

Standards Committee AGENDA

DATE: Tuesday 26 April 2011

TIME: 7.30 pm

VENUE: Committee Room 5,
Harrow Civic Centre

MEMBERSHIP (Quorum 2 Councillors and 1 Independent Person)

Chairman: Dr J Kirkland

Councillors:

Mano Dharmarajah	(Vacancy)
Brian Gate	Joyce Nickolay
Nizam Ismail	

Independent Persons: Mr James Coyle
Dr John Kirkland (CH)
Mr Derek Lawrence

Reserve Members:

- | | |
|----------------|-------------------|
| 1. Mitzi Green | 1. Paul Osborn |
| 2. David Perry | 2. Richard Romain |
| 3. Nana Asante | 3. John Nickolay |

Contact: Vishal Seegoolam, Senior Democratic Services Officer
Tel: 020 8424 1883 E-mail: vishal.seegoolam@harrow.gov.uk

AGENDA - PART I

1. ATTENDANCE BY RESERVE MEMBERS

To note the attendance at this meeting of any duly appointed Reserve Members.

Reserve Members may attend meetings:-

- (i) to take the place of an ordinary Member for whom they are a reserve;
- (ii) where the ordinary Member will be absent for the whole of the meeting; and
- (iii) the meeting notes at the start of the meeting at the item 'Reserves' that the Reserve Member is or will be attending as a reserve;
- (iv) if a Reserve Member whose intention to attend has been noted arrives after the commencement of the meeting, then that Reserve Member can only act as a Member from the start of the next item of business on the agenda after his/her arrival.

2. DECLARATIONS OF INTEREST

To receive declarations of personal or prejudicial interests, arising from business to be transacted at this meeting, from:

- (a) all Members of the Committee, Sub Committee, Panel or Forum;
- (b) all other Members present in any part of the room or chamber.

3. MINUTES (Pages 1 - 8)

That the minutes of the meeting held on 14 December 2010 be taken as read and signed as a correct record.

4. PUBLIC QUESTIONS

To receive questions (if any) from local residents/organisations under the provisions of Committee Procedure Rule 17 (Part 4B of the Constitution).

5. PETITIONS

To receive petitions (if any) submitted by members of the public/Councillors under the provisions of Committee Procedure Rule 15 (Part 4B of the Constitution).

6. DEPUTATIONS

To receive deputations (if any) under the provisions of Committee Procedure Rule 16 (Part 4B) of the Constitution.

7. FUTURE OF STANDARDS REGIME AT LONDON BOROUGH OF THE HARROW (Pages 9 - 24)

Report of the Director of Legal of Governance Services.

8. STANDARDS DECISIONS (Pages 25 - 62)

Report of the Director of Legal and Governance Services.

9. BRIBERY ACT 2010 (Pages 63 - 124)

Report of the Director of Legal and Governance Services.

AGENDA - PART II - NIL

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STANDARDS COMMITTEE

MINUTES

14 DECEMBER 2010

Chairman:	* Dr J Kirkland	
Councillors:	* Nana Asante (3) * John Cowan * Brian Gate	* Nizam Ismail * Joyce Nickolay † M Rizvi
Independent Persons:	* Mr D Lawrence	† Mr A Mantri † Mr A MantriM Rizvi

- * Denotes Member present
- (3) Denotes category of Reserve Member
- † Denotes apologies received

23. Attendance by Reserve Members

RESOLVED: To note the attendance at this meeting of the following duly appointed Reserve Member:-

<u>Ordinary Member</u>	<u>Reserve Member</u>
Councillor Mano Dharmarajah	Councillor Nana Asante

24. Declarations of Interest

There were none.

25. Minutes

RESOLVED: That the minutes of the meeting held on 20 September 2010 be taken as read and signed as a correct record.

26. Public Questions, Petitions and Deputations

RESOLVED: To note that no public questions were put, or petitions or deputations received at this meeting.

RESOLVED ITEMS

27. Information Report - Presentation by New Independent Members

Mr Derek Lawrence provided the Committee with a short presentation on his background and experience. Mr Lawrence had a strong background in the aviation industry and was passionate about standards in business and public life.

The Committee thanked Mr Lawrence for his presentation and requested that Mr Anand Mantri and Mr Mohammed Rizvi provide a short statement detailing their background and experience to be circulated to all Members of the Committee.

RESOLVED: That the presentation be noted.

28. Attendance at Other Meetings of the Council by Independent Members

The Chairman reported that the Committee's Independent Members had attended a range of meetings throughout the authority. The report detailed their observations and suggested outcomes

The Chairman reported that generally they were very impressed with the high levels of standards and conduct demonstrated at the meetings they observed. There were only 3 main suggestions, which they considered to be relevant.

The Chairman reported that the first suggestion from the Independent Members referred to reminders being provided to ensure that late reports were attempted to be sent to all Members within a timely manner. Their second suggestion involved encouraging Members to ask detailed and technical questions prior to a meeting, to ensure that full and comprehensive responses was provided by officers at the meeting. Their third suggestion involved providing members of the public more information on how to ask questions and present petitions at Council meetings.

Members of the Committee raised a number of issues which included:

- it would be helpful to have guidance for members of the public on how to ask questions and present petitions at meetings. Members of the public only usually attended meetings if there was an item of interest to them. It was important for residents to be informed of ways that they could lobby the Council, particularly as difficult decisions would have to be made in light of the current economic climate. The role of chairmen and Members was also particularly important to ensure flexibility in public participation at meetings;

- there were concerns about what constituted detailed and technical questions as this was a subjective test. The public perception also had to be taken into account. If questions were asked prior to meetings, it could appear that there were not sufficient relevant questions being asked at meetings. Time-pressures also meant that this would not always be possible.

The Chairman summarised the comments made by Members as follows:

- Recommendation 1 could be agreed if it was re-worded to recognise that there were often occasions when information had to be provided late and a lot of work was performed to ensure that it was reported as soon as possible;
- Recommendation 2 could be referred to the Member Development Panel, as this was a potential training issue;
- There was general agreement on Recommendation 3 with the addition that the leaflet explains generally what the public can do at the meeting and for the future.

The Committee also agreed that, given the proposed changes to the Standards regime, it would not currently be wise at this stage to repeat the project.

RESOLVED: That

- (1) the following suggestions be referred to the Monitoring Officer for actioning:
 - in relation to late reports presented to Member level meetings recognition should be given to Members who have not had the opportunity to previously see and absorb the information;
 - that guidance be provided at all Member-level meetings providing information for members of the public on how to participate at meetings and what can be done for the future.
- (2) the suggestion of Members being encouraged to give notice of detailed technical questions prior to meetings, to ensure full and comprehensive answers at the meeting, be referred to the Member Development Panel as it potentially involved a training issue.

29. Information Report - Review of Follow-Up Actions

The Committee received a report which set out an update on follow-up actions requested by it since June 2008. The Chairman referred to a previously requested action that an article appears in the next edition of Harrow People to raise the profile of the Committee. The Chairman queried whether this would be wise given that proposed changes to the Standards regime would possibly alter the structure and role of the Committee. As an alternative, a

future article could be used to promote how members of the public could participate at meetings.

Members discussed the idea and raised several views which included:

- the article was still a good idea to ensure that residents what the Standards Committee was and what it was doing;
- it would be better to wait until the proposals to alter the Standards regime had been concluded;
- an article could be published once the new proposals had been concluded.

The Chairman reported that the majority view of the Committee was that a proposed article should wait until any new proposals for the future of the Committee had been developed. This was to be noted as an action point for the future.

RESOLVED: That the report be noted.

30. Partnerships Protocol

The Committee considered a report which enclosed 3 toolkits prepared by Standards for England, which could assist in strengthening partnership arrangements between local authorities and their partners. An officer explained that this report had previously been presented to the Committee at its last meeting. The Committee had requested more concise versions to be provided at this meeting.

The officer reported that:

- the first toolkit enclosed addressed adopting a pre-partnership commitment to ethical standards. This toolkit posed relevant ethical standards questions which could be asked prior to entering into a partnership;
- the second toolkit enclosed could be used to ask relevant ethical standards questions as part of scrutinising existing partnership arrangements;
- the last toolkit enclosed was an overarching behaviour protocol for the duration of a partnership. This had been prepared by Standards for England in conjunction with Manchester City Council;
- potential benefits to these documents had been highlighted by Standards for England. These included allowing for an ethical self assessment between the local authority and prospective partners to be conducted. It could also allow the local authority and its partners to decide how ethical issues would be monitored and reviewed;

- the purpose of the report was to seek an initial endorsement on whether any of the toolkits could potentially be useful. If so, further consultation would need to take place with other bodies prior to any decision being requested by the Council. The scope of this consultation would need to be determined but any suggestions would be welcomed.

During the discussion on this item, Members raised a number of different issues which included:

- the toolkits could play an important role in demonstrating transparency and accountability by the Council. There was value to be obtained if the documents were adopted;
- there were some concerns if the toolkits were to be applicable to suppliers to the Council. This could impose an unnecessary burden on suppliers and have an effect on the expedient supply of items. This was therefore unnecessary as there were other burdens in commercial contracts;
- the toolkits represented a starting point in attempting to encourage high ethical standards with partners. It could also contribute towards the Council promoting the interests of residents;
- the 3rd toolkit was the most attractive, as it set out implied standards of values, behaviour and operation. Some Members felt that whilst this was the most attractive, it did not negate the benefits of the other toolkits;
- in the current national climate, where partnerships were being encouraged, all of the toolkits could be useful and would force potential partners to think through relevant ethical standards processes.

The Chairman summed up that there were different views on the documents. However the majority view was that they were useful and all 3 should be taken further. However this had to be considered in light of potential detriments to routine commercial arrangements.

Officers confirmed that further consideration would be required on who would need to be consulted prior to requesting any formal decision on the documents. It was envisaged that this would certainly include senior officers and the Leaders of each political group. A Member suggested the procurement department should also be consulted with.

RESOLVED: That all toolkits, reported to the Committee, be initially endorsed for further consultation.

31. Standards Decisions

The Committee received a report detailing two cases which had been considered by Standards for England and the First Tier Tribunal in relation to complaints made against Members.

The first case related to an allegation that Members had misused their position to secure an advantage for a planning applicant and bring the authority and office of Councillor into disrepute. The ethical standards officer found that the Members had not breached the code of conduct.

The second case related to where a Member had been persistently disruptive and disrespectful to the Mayor during a Council meeting. The Member had been found to be in breach of the code of conduct and was censured. Members briefly discussed the facts of each case.

RESOLVED: That the report be noted.

32. Information Report - Work Programme

The Committee received a report which set out the updated work programme for the Standards Committee for the Municipal Year 2010/11.

RESOLVED: That the report be noted.

33. Chairman's Report

The Chairman explained that agenda items 13 (Chairman's Report) and 14 (Appendix to the Chairman's Report) would be discussed together. The Chairman advised that he had initially wanted to speak about the future of the Standards Committee. This had been followed by the publication of a letter from Bob Neill MP to the Chair of Standards for England and the subsequent publication of the Localism Bill.

An officer explained the main highlights of the proposed Bill. These included that:

- there would be a general duty to promote high standards of conduct;
- councils could adopt a voluntary code of conduct. This could involve adopting the current Code of Conduct or amending it;
- if an allegation was made against a Member who had not followed the Code of Conduct, the Council could consider if it wished to investigate and how;
- there could be criminal sanctions for failing to disclose interests. Only the Director of Public Prosecutions would be able to prosecute under this provision.

The officer confirmed that Bill was still in the discussion stage. It was anticipated that the Bill would not receive Royal Assent until the later part of 2011. During the discussion on this item, Members raised a number of issues which included:

- the possibility of enacting by-laws to allow the Council to impose legal sanctions for breach of any Code of Conduct should be investigated;
- there was a view that Independent Members should be retained by any future Standards Committee to ensure objectivity and impartiality;
- the Council could set its own standards and if there were any misdemeanours, there could be a public rebuke which would cause embarrassment for the Member concerned;
- it was important for residents to feel confident that any complaint they made against a Member, was dealt with comprehensively;
- there was a desire not to be influenced by other authorities who may not wish to adopt a voluntary code of conduct or Standards Committee in the future.

A Member of the Committee proposed that the initial views of it, on how future proposals should be reflected, were as follows:

- there was a desire to continue with a voluntary Standards Committee;
- there was a desire to have a voluntary code of conduct for Members;
- there was a desire to have an Independent Chairman and experienced Independent Members;
- there was a desire that there should be two separate processes to deal with complaints made by a Member/s against another Member/s and complaints made by a member of the public against a Member/s.

The Committee agreed with the summarised views and that these be taken to each of the political group meetings for further comments. Following the outcomes from this, a report would then be presented to the Committee at its next meeting to see what further actions would be required by it, if any, to play a role in proposing future arrangements. Members requested a briefing note to be prepared by officers for their group meetings.

RESOLVED: That

- (1) a briefing note be prepared by officers for Members to discuss with their groups;
- (2) the Committee consider at its meeting, on 22 March 2011, any actions it should take in relation to its future arrangements.

34. Appendix to the Chairman's Report

The Chairman reported that this item had been considered as part of agenda item 13 (Chairman's Report).

RESOLVED: That the appendix be noted.

(Note: The meeting, having commenced at 7.30 pm, closed at 9.44 pm).

(Signed) DR J KIRKLAND
Chairman

REPORT FOR: STANDARDS COMMITTEE

Date of Meeting: 26 April 2011

Subject: The future of a Standards regime at London Borough of Harrow

Responsible Officer: Hugh Peart, Director of Legal and Governance Services

Exempt: No

Enclosures: Appendix 1 - Discussion paper
Appendix 2 - Guidance note issued by Local Government Improvement and Development and the Association of Council Secretaries and Solicitors

Section 1 – Summary and Recommendations

The Report addresses the options for maintaining high ethical standards in local government.

Recommendation:

That the Committee:-

Agree to set up a member and officer working party to consider and produce recommendations about the type and content of a future standards regime. Such working party to report back to the Standards Committee.

Section 2 – Report

1. At the Standards Committee on the 14 December 2010 Members received as part of the Chairman's Report an up date of the main highlights to be included in the proposed Localism Bill together with suggestions relating to what could take the place of the current standards regime once the regime is abolished in 2012.
2. Members at that meeting raised a number of issues which they felt needed to be addressed. These issues were:-
 - there was a view that Independent Members should be retained by any future Standards Committee to ensure objectivity and impartiality;
 - the Council could set its own standards and if there were any misdemeanours, there could be a public rebuke which would cause embarrassment for the Member concerned;
 - it was important for residents to feel confident that any complaint made against a Member, was dealt with comprehensively:
 - there was a desire not to be influenced by other authorities who may not wish to adopt a voluntary code of conduct or Standards Committee in the future.
3. Members resolved at that meeting that officers should prepare for Members a discussion paper which would be circulated to all the Groups for their views and comments on what they saw as the future of standards at Harrow. The discussion paper was circulated on 24 December 2010 and is attached at Appendix 1. The views and comments received will be reported verbally at the meeting.
4. In the intervening time since the last Standards Committee a helpful Guidance Note has been produced by Local Government Improvement and Development in conjunction with the Association of Council Secretaries and Solicitors entitled "Maintaining High Ethical Standards in Local Government" which gives a summary of changes that the proposed bill makes to the standards regime but it also goes on to outline the provisions that will remain in existence including criminal and civil law provisions following abolition of the current regime. This Guidance note is attached at Appendix 2 to the Report.
5. Many Local Authorities have local elections in May and are leaving their decisions as to the way forward for standards until after those elections. This should not impact on the decisions of this Committee and the Council

as it is clear that it will be for individual authorities to decide what best fits their Council and Communities.

6. The Association of Council's Secretaries and Solicitors are currently looking into drawing up a voluntary Code which Councils could opt to adopt. No further information is available as to the likely timescale of when a draft may be available for consideration.

7. The current views of some other London Boroughs are as follows:

Southwark

They are keen to keep a code in place and are looking into whether it would be possible to create a system of sanctions through the members allowance scheme

Camden

They are looking at keeping a simple code.

Waltham Forest

They prefer to keep the code in its current format other than essential changes so as to reduce confusion. They also may retain independent members and a committee. They have not decided in what capacity independent members will set

Brent

They wish to have a Code in place and if one could be agreed for London they would be supportive of this.

Hackney

They are likely to retain a local code and standards regime but will be considering all the options fully. They will be looking at what others are doing.

Richmond

They have taken the same view as Hackney.

Sutton

They are interested in a voluntary code but feel there needs to be sanctions in place and a way of monitoring conduct. They are considering undertaking a risk assessment to guide future arrangements.

8. The questions therefore that remain outstanding and that the Committee might wish to address are as follows:-

- Do the Council wish to adopt a voluntary Code of Conduct for Members to sign up to?

- Does the Council wish to retain a Standards Committee?
- Should Independent Members be retained and utilised by the chosen governing body? Consideration also needs to be given to the legal power to retain independent members and what roles they will be able to take on the committee.

Risk Management Implications

9. Failing to stay informed about developments in the standards framework may impact on the ability of the Standards Committee to perform its role to a high standard and plan for the future.

Relevant Objectives of the Standards Committee

10. This report contributes towards the objective of “Internal Control” to ensure strong ethical governance is in place.

Corporate Priorities

11. This Report is relevant to the corporate priority to united and individual communities: a council that listens and leads.

Financial Implications

12. There are no financial implications associated with this report.

Section 3 - Statutory Officer Clearance

Name: Steve Tingle	<input checked="" type="checkbox"/>	on behalf of the* Chief Financial Officer
Date: 12 April 2011		
Name: Matthew Adams	<input checked="" type="checkbox"/>	on behalf of the* Monitoring Officer
Date: 12 April 2011		

Section 4 - Contact Details and Background Papers

Contact:

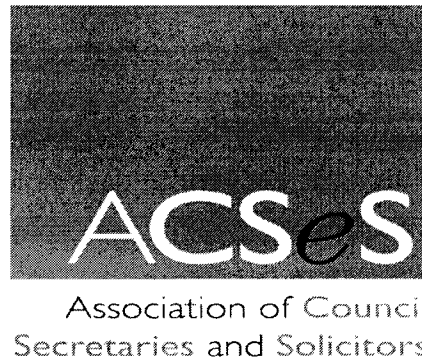
Jessica Farmer, Head of Legal Services – Legal Services, 0208 420 9889
Vishal Seegoolam, Acting Senior Professional – Democratic Services, 020 8424 1883

Background Papers: None

If appropriate, does the report include the following considerations?

1.	Consultation	NO
2.	Corporate Priorities	YES

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MAINTAINING HIGH ETHICAL STANDARDS IN LOCAL GOVERNMENT

The Localism Bill published on 13th December contains proposals to abolish the Standards for England regime. Whilst subject to Parliament approving the necessary legislation, the changes can be summarised as Standards for England (formally the Standards Board for England) ceasing to operate, councils no longer being required to have a local standards committee, the national code of conduct for elected members being dispensed with and council's being allowed to adopt voluntary codes of conduct.

Following the abolition of the standards regime, councils will no longer have a single body of law to refer to for dealing with elected member conduct but will, instead, be able to call upon a range of remedies, including existing criminal and civil law provisions and those provisions contained in the Localism Bill. This paper seeks to summarise the proposals contained within the Bill and outline those provisions available to authorities to call upon. The paper covers the following:

- Summary of changes proposed in the Bill
- The position of the Nolan Principles
- Registering interests
- Fiduciary duty of councillors
- Criminal and civil law including discrimination and electoral offences
- Local Government Ombudsman
- Audit Commission powers
- The common law position of bias, predisposition and predetermination

The Local Government Group acknowledges the valuable contributions of the senior members of the Association of Council Secretaries and Solicitors (ACSeS) in helping to produce this paper.

SUMMARY OF CHANGES PROPOSED IN THE BILL

The proposals outlined in the Bill are as follows:

- The Relevant Authorities (General Principles) Order 2001, which sets out the principles which govern the conduct of members and co-opted members of relevant authorities in England and police authorities in Wales, will be revoked
- The Local Authorities (Model Code of Conduct) Order 2007 (S.I 2007/1159) which prescribes the model code of conduct to apply to members of relevant authorities will be revoked
- The requirement for local authorities to have standards committees will be abolished
- Standards for England will be abolished. Established by the Local Government Act 2000 and the regulator for local authority standards committees, the Standards Board requires primary legislation to abolish it and its legislative functions. None of the Standards Boards functions will be transferred to other bodies.
- The First-tier Tribunal (Local Government Standards in England), the independent judicial tribunal established as a disciplinary body to hear and determine references and appeals concerning the conduct of local authority councillors, will lose its jurisdiction over the conduct of local authority members
- Elected members will be required to continue to register and declare personal interests and will not be allowed to use their position improperly for personal gain. The government intends that wilful failure to comply with these requirements will constitute a criminal offence.
- The requirement for local authorities to adopt a model code of conduct and for local authority members to abide by that code will be abolished. However, local authorities will be free to adopt their own, voluntary code of conduct should they so wish.
- The requirement for councils to maintain a standards committee will be abolished. However, local authorities will be free, should they choose, to establish voluntary standards committees to consider complaints about the conduct of elected and co-opted members. Such committees will, according to councils' local constitutions, be able to censure but will not be able to suspend or disqualify members from council membership.

It is anticipated that the Bill will receive Royal Assent in late 2011. The present conduct regime (a model code governing local authority members' conduct and enforced through local authority standards committees, regulated in turn by the Standards for England), will continue to function in a normal manner, considering, investigating and determining allegations of misconduct, until a fixed date ("the appointed day"), probably two months after the Bill receives Royal Assent.

This means that until the appointed day, an allegation of misconduct can be made but that after the appointed day no further allegations of misconduct can be made under the Standards for England regime. It also means that at the appointed day, allegations will be in the process of investigation and, further, that appeals against sanctions will be pending. Transitional measures are to be put in place to address this and the way in which they will operate is detailed in the following paragraphs:

- Any cases in the system at the appointed day will make their way through a transitional regime. This would meet the expectation of those who had made allegations that these would be properly dealt with. It also provides an elected member who has had an allegation made against them with the opportunity to clear their name.
- The government proposes that any investigations being undertaken by Standards for England transfer, on the appointed day, to the local authority that referred the investigation. It will be for that local authority to arrange for the conclusion of the investigation. The local authority's standards committee will remain established until the last complaint it is considering, referred either internally or from Standards for England, has been dealt with.
- Any cases with which the First-tier Tribunal (Local Government Standards in England) is dealing on the appointed day will be concluded by that tribunal. It will not receive any appeals against standards committee rulings after that date. The right of appeal will not exist for those cases standards committees deal with as they work their way through the transitional system. The government considers that the risk of protracted proceedings justifies this approach. The sanctions available to standards committees are significantly less severe than the sanctions available to the First-tier Tribunal (Local Government Standards in England).
- The government proposes that the suspension sanction is removed from standards committees for the transitional period. Hence the most a standards committee could do, for instance, is to issue a councillor with a censure or a request that they undergo training.

THE NOLAN PRINCIPLES

The **Committee on Standards in Public Life** is an advisory non-departmental public body established in 1994. The Committee's landmark First Report published in 1995 established *The Seven Principles of Public Life* often described as the Nolan Principles.

The Seven Principles of Public Life are:-

- **Selflessness** – Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family or their friends.
- **Integrity** – Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

- **Objectivity** – In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- **Accountability** – Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- **Openness** – Holders of public office should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- **Honesty** – Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
- **Leadership** - Holders of public office should promote and support these principles by leadership and example.

Whilst it is anticipated that the statutory principles will be repealed, they have the potential to continue to be utilised more informally by people looking to develop their understanding of the standards expected of those in public office.

FIDUCIARY DUTY OF COUNCILLORS

A councillor is treated as a trustee of council assets, with a fiduciary duty to apply those assets in the public interest. Where a councillor abuses that trust, for example by disposing of those assets for personal gain, he/she can be held liable for the resulting loss - as with the House of Lords landmark ruling against Dame Shirley Porter in her capacity as Leader of Westminster City Council.

REGISTERING INTERESTS

The Local Government Act 2000 requires each councillor to make a declaration of his or her interests and to ensure that any addition or amendment to that declaration is made within 28 days of any change occurring in relation to his or her interests. The Bill intends to strengthen this by making it a criminal offence for a councillor to fail to register a relevant interest or withdraw for a personal interest, although the scope of this offence awaits Regulations.

CIVIL LAW

As councillors do not enjoy legal privilege they are subject to the same laws of **libel and slander** as the rest of the population. However, a council cannot itself be libelled so this remedy would only be available for the individual claiming they have been libelled or defamed rather than the authority itself.

Misfeasance in public office is a cause of action in the civil courts. It is an action against the holder of a public office, alleging in essence that the office-holder has misused or abused his power. There are two types of misfeasance in public office. One, known as 'targeted malice', occurs when a public office holder intentionally abuses his or her position with the motive of inflicting damage upon the claimant. The second is termed 'untargeted malice' and is committed by a public office holder who acts knowing that he/she has no power to undertake the act complained of.

EQUALITIES AND DISCRIMINATION LAW

Other civil law remedies would be available to individuals, but not councils, in the area of **equalities and discrimination law** for unlawful discrimination.

Discrimination law governs the right of individuals not be treated less favourably than others on grounds that include sex, race, religion, sexual orientation, age and disability. It also deals with the duty of public bodies to promote equality although the coalition government have announced that they are to repeal the social-economic duty on council's enacted in the Equalities Act 2010.

Councillors may, of course, be specifically named as a party to proceedings by claimants in discrimination proceedings.

CRIMINAL LAW

A councillor sentenced to a term of imprisonment of not less than 3 months is disqualified from office by virtue of **Section 80 of the Local Government Act 1972**.

A councillor using their position to support or influence a planning application for a project or venture that they have a financial interest in or otherwise using their position for self financial gain would be committing an offence under the **Fraud Act 2006**. Conviction under this Act carries a maximum penalty of 10 years imprisonment or an unlimited fine or both

The **Bribery Act 2010** provides a legal framework to combat bribery in the public (or private) sectors. It replaces the fragmented and complex offences at common law and those previously contained in the Prevention of Corruption Acts 1889-1916

The new Act creates two general offences covering the offering, promising or giving of an advantage, and requesting, agreeing to receive or accepting of an advantage in a public office. Again, the maximum penalty for individuals is 10 years' imprisonment or a fine, or both

The Crown Prosecution Service, rather than councils, would decide whether there was sufficient evidence to prosecute for criminal offences.

ELECTORAL OFFENCES

The relevant legislation relating to electoral offences can be found in the:

- The Representation of the People Act 1983 (the Act)
- The Representation of the People Act 1985
- The Political Parties, Elections and Referendums Act 2000
- The Electoral Administration Act 2006 ("EAA")

There are a number of electoral offences specified in the Representation of the People Act 1983 and 1985, with the key ones being:

Undue influence: Where an individual, directly or indirectly, makes use of or threatens to make use of force, violence or restraint; or inflicts or threatens to inflict injury, damage or harm in order to induce or compel any voter to vote or refrain from voting. This offence has been modified by the Electoral Administration Act to extend the effect of it to include intention and not just where an act has taken place. A

person may be guilty of undue influence if they impede or prevent, or intend to impede or prevent, the free exercise of the franchise of an elector.

Bribery: Where any individual, directly or indirectly, gives any money to any voter, in order to induce any voter to vote or not to vote for a particular candidate, or to vote or refrain from voting.

Treating: Where either before, during or after an election, any person, directly or indirectly, gives or provides (or pays wholly or in part the expense of giving or providing) any food, drink, entertainment or provision in order to influence corruptly any voter to vote or refrain from voting.

Personation: Where any individual votes as someone else (whether that other person is living or dead or is a fictitious person), either by post or in person at a polling station as an elector or proxy. Further, the individual voting can be deemed guilty of personation if they vote on behalf of a person they have reasonable grounds for supposing is dead or fictitious, or where they have reasonable grounds for supposing the proxy appointment is no longer in force.

Postal and proxy voting: Where an individual applies for a postal or proxy vote as some other person, otherwise makes a false statement in connection with an application for a postal or proxy vote, requests an Electoral Registration Officer or a Returning Officer to send a postal vote or associated communication to an address which has not been agreed by the person entitled to vote, or causes a postal or proxy voting communication not to be delivered to the intended recipient.

False information in nomination papers: Where a person gives false information in a nomination paper or in their consent to nomination, they are guilty of a corrupt practice.

False information in relation to registration: Where an individual, for any purpose in connection with the registration of electors, provides false information to the Electoral Registration Officer in connection with the registration of electors, that person is guilty of offence.

The Electoral Administration Act 2006 created two new offences which are:

Supplying false information to the Electoral Registration Officer, and

Making fraudulent application for a postal vote

The majority of electoral offences carry a maximum penalty of 1 or 2 years imprisonment or an unlimited fine.

AUDIT COMMISSION FOR LOCAL AUTHORITIES

Whilst powers of surcharge were abolished under the **Local Government Act 2000** an auditor appointed by the Audit Commission under the **Audit Commission Act 1998** will continue to play their role in investigating financial impropriety in local government and can recover financial losses from individuals councillors on the basis that he or she is responsible for the authority incurring unlawful expenditure. It is yet to be seen whether this power will be transferred to another body given the government's announced abolition of the Audit Commission.

LOCAL GOVERNMENT OMBUDSMAN

The Local Government Ombudsman was set up to investigate maladministration causing injustice. The law does not define maladministration but the Local Government Ombudsman currently defines its' mandate as follows:

"We can consider complaints about things that have gone wrong in the way a service has been given or the way a decision has been made, if this has caused problems for you"

Individual or collective actions or failings of councillors may amount to maladministration.

The government has announced that it intends to give the Local Government Ombudsman, the established body for investigating public complaints over the way they have been treated by their council, greater influence. For the first time local authorities will be legally compelled to implement the Ombudsman's findings.

BIAS, PREDISPOSITION AND PREDETERMINATION

This is a complex area of common law (i.e. judge-made law) that has implications for councillors individually and councils. It is wrong, therefore, to associate such matters exclusively as having been caused by Standards for England or as a direct result of the introduction of the standards regime under the Local Government Act 2000.

The long established legal position is that a councillor may not be party to decisions in relation to which he/she either is actually biased (in the sense that he/she has a closed mind and has pre-determined the outcome of the matter to be decided irrespective of the merits of any representations or arguments which may be put to him/her) or gives an appearance of being biased, as judged by a reasonable observer.

A finding of bias and/or predetermination can make a decision unlawful with costs and reputational implications for councils and the First-tier Tribunal (Local Government Standards, England (formerly the Adjudication Panel for England) has held that such a finding could be a breach of Paragraph 5 of the current code of conduct which could lead to the disqualification of a councillor.

The Localism Bill aims to clarify the rules on pre-determination and bias: the Bill provides that an indication by a councillor that he takes a particular view on a matter is not to be taken as evidence of a closed mind. The intention is that the normal activities of a councillor, such as campaigning, talking with constituents, expressing views on local matters and seeking to gain support for those views, should not lead to an unjust accusation of having a closed mind on an issue that can lead to a legal challenge. The government claims that that this will give councillors the assurance that they can campaign, discuss and vote on issues with confidence and so encourage more people to stand in local elections. In practice, the Court of Appeal has already asserted that such activities will not preclude participation in decision-making, unless the councillor is so committed that they are not even prepared to listen to the evidence, but courts may fret that, where a councillor says that he has a closed mind on a matter, the court cannot take this assertion into evidence;

The government previously announced that a power of electoral recall of councillors is also being proposed to allow for the removal of councillors mid term for cases of 'serious misconduct'; although this has also not been included in the Localism Bill.

MISCELLANEOUS

It will remain open to councils to agree local arrangements whereby councillors could be censured for breaching local codes of conduct and other local protocols; including other activity regarded as inappropriate and to remove councillors from committees, outside bodies and other appointments, when appropriate. Whilst there will be a need for local authorities to reflect constitutional changes as a result of abolition of the current standards regime, other local protocols covering, for example, member/officer relations and guidelines regarding use of council resources, will continue to have effect and be subject to any local sanctions adopted by individual councils, though there will be no statutory sanctions against an offending member and therefore no powers to suspend or disqualify councillors.

FURTHER CONTACT

Chris Bowron, Local Government Group e-mail – chris.bowron@local.gov.uk

Internal Memo

Legal & Governance Services Department

To: All Members of Standards Committee
Independent Members:
Cllr Bill Stephenson, Leader of the Council
Cllr Susan Hall, Leader of the Opposition

Your Ref:

From: Jessica Farmer

Our Ref: sup JFARMER

FAO:

Date: 24th December 2010

ADVICE NOTE TO COUNCILLORS REGARDING THE LOCALISM BILL 2010

The Localism Bill has now been introduced into Parliament. The reforms cover four broad areas strengthening local democracy, community empowerment, reform of the planning system and social housing reform.

As far as Standard Committee matters are concerned the Bill gives local authorities new flexibilities. This includes the revocation of the members Code of Conduct, the abolition of Standards Boards for England and the requirement for local authorities to have a Standards Committee. Instead it will be a criminal offence for Councillors to fail to register or withdraw for a personal interest (the scope of this awaits regulations).

Local authorities may still adopt a non-statutory code and will have a duty to consider allegations of breaches of the code. Breaches of the code can still be investigated and there is still a general duty to promote and maintain high standards of conduct. However there are no statutory sanctions against a member who offends the Code of Conduct unless it is in relation to an interest. So as the Bill is currently drafted there will no longer be a power to suspend or disqualify councillors who bully, are rude, disclose confidential information or bring their authorities and local government generally into disrepute provided that they do not commit a criminal offence. A member will remain in office until the electorate have a chance to remove them at the next election. Proposals for electoral recall to allow the removal of councillors mid-term on evidence of serious mis-conduct have not been included in the Bill.

At the last meeting of the Standards Committee, the Committee asked if I would draft a note and circulate it to Members of the Standards Committee, group leaders and independent members outlining what was in the Localism Bill in relation to Standards. Members could then discuss the matter in their party groups with a view to decisions being made at Council. The decisions to be made are: whether the authority wishes to adopt a Code of Conduct, what any such Code of Conduct may contain and what if any system of procedure the Council may wish to see with regard to breaches of such a code.



The issues, including the possibility of setting up a working group, can be discussed at Standards Committee in March with a view to officers preparing reports for Council in due course.

REPORT FOR: STANDARDS COMMITTEE

Date of Meeting:	26 April 2011
Subject:	Standards Decisions
Responsible Officer:	Hugh Peart, Director of Legal and Governance Services
Exempt:	No
Enclosures:	Appendix 1: First Tier Tribunal Decision – Middlesborough Council (Member: Councillor McTigue Appendix 2: First Tier Tribunal Decision - Berwick- Upon-Tweed Borough Council (Member: Councillor Douglas) Appendix 3: Standards for England Guidance on blogging

Section 1 – Summary and Recommendations

Attached to this Report are details of some recent local government standards cases that have been considered by the First Tier Tribunal.

Recommendation:

- 1. That the Committee notes the attached standards decisions**
- 2. That the Committee considers whether to develop a Protocol on Blogging.**

Section 2 – Report

1. While the majority of investigations into complaints that members of local authorities have breached their authority's Code of Conduct are conducted locally, the most serious cases are referred to Standards for England. Where a Standards for England investigation reveals evidence of a serious breach of the Code, the case is referred to the First Tier Tribunal (Local Government Standards in England), part of the General Regulatory Chamber, for a decision. The First Tier Tribunal is also the body that hears appeals against Standards Committee decisions.
2. Standards for England publishes summaries of the cases it investigates on its website. The decisions of the First Tier Tribunal are also publicly available. There is therefore an expanding body of local government standards case decisions available, which can assist authorities and their Standards Committees in interpreting the Code, and help Standards Committees to decide the cases they hear.
3. Attached to this Report at Appendix 1 and 2 are details of two cases which have been considered by the First Tier Tribunal.
4. The first case is a decision of the First Tier Tribunal relating to a complaint of failure to treat others with respect, bringing the office of the member and the authority into disrepute and not using resources in accordance with the authority's reasonable requirements. The interesting issues in this case revolve around whether the Member was acting in their official capacity at the time of the alleged breaches and whether Article 10 of the European Convention on Human Rights impacted on the case.
5. The second is a decision of the First Tier Tribunal relating to a complaint of failure to treat others with respect and bringing the authority into disrepute. Again the issue of official capacity was discussed.
6. Members are requested to note the attached decisions.
7. Additionally, at the Hearing Sub-Committee on 9 February 2011 the Sub-Committee made a recommendation that "the Member Development Panel should consider arranging training for all members on blogging." This has been passed on to the panel and is likely to be on 25th May 2011. They also recommended that "the Standards Committee should consider developing a member protocol on blogging." Members are requested to give a view on whether they wish a Protocol on blogging be developed.
8. Standards for England have produce guidance on the issue of blogging and both the quick guide and detailed guide are attached at appendix 3 for member's information.

Risk Management Implications

Failing to stay informed about developments in .the standards framework may impact on the ability of the Standards Committee to perform its role to a high standard.

Relevant Objectives of the Standards Committee

This report contributes towards the objective of 'Internal Control', as being aware of standards cases that are reported nationally will help the Committee to ensure that it deals with ethical governance issues in accordance with the law and in line with best practice.

Corporate Priorities

This Report is relevant to the corporate priority of united and involved communities: a council that listens and leads.

Financial Implications

There are no financial implications associated with this report.

Section 3 - Statutory Officer Clearance

Name: Steve Tingle	<input type="checkbox"/>	on behalf of the* Chief Financial Officer
Date:		
Name: Matthew Adams	<input type="checkbox"/>	on behalf of the* Monitoring Officer
Date:		

Section 4 - Contact Details and Background Papers

Contact:

Jessica Farmer, Head of Legal Services – Legal Services, 0208 420 9889
Vishal Seegoolam, Acting Senior Professional – Democratic Services, 020 8424 1883

Background Papers: None

If appropriate, does the report include the following considerations?

1.	Consultation	NO
2.	Corporate Priorities	YES

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Appeals Tribunal Decision

Case Ref:	APE 0421
Appeals Tribunal Date:	29 April 2009
Relevant Standards Committee:	Middlesbrough Council
Date of Standards Committee decision:	22 January 2009
Name of member concerned: <i>(Appellant)</i>	Councillor McTigue
Monitoring Officer:	Mr Richard Long
Independent Investigator:	Mrs Katharine Metcalfe
<u>Appeals Tribunal Members</u>	
Chairwoman:	Mrs Beverley Primhak
Member:	Mr Richard Enderby
Member:	Mr Chris Perrett

1. The Appeals Tribunal has considered an appeal from the Appellant about the above decision.
2. The Appeals Tribunal has considered written and oral submissions from Councillor McTigue and Mr Richard Long and has heard evidence from Mr Anthony Warren.

The decision appealed against

3. The Appellant had appealed against the Standards Committee's finding that she had failed to comply with paragraphs 3(1), 5 and 6(b)(i) of the Council's Code of Conduct.
4. The complaint against the Appellant arose from an earlier complaint by the Complainant, Ms Sharon Bawden, in relation to waste collection services at her home. That complaint was heard at a meeting of the Council's Complaints and Appeals Committee on 18 June 2008, at which both the Complainant and the Appellant were present. Subsequently the Complainant submitted a complaint in relation to the Appellant's conduct at that meeting and in the days following that meeting in respect of a series of postings by the Appellant on the forum of the Middlesbrough Evening Gazette. It is the allegations in the subsequent complaint that have led to these proceedings.
5. The Council's Standards Committee Hearings Subcommittee considered the matter on 22 January 2009. They concluded:

- 5.1. that the Appellant had failed to treat the Complainant with respect in relation to the posts on the Evening Gazette forum contrary to paragraph 3 of the Code of Conduct.
 - 5.2. that the Appellant's actions were likely to have diminished public confidence in, and harmed the reputation of, the member: consequently she had brought her office into disrepute contrary to paragraph 5 of the Code of Conduct.
 - 5.3. that the Appellant failed to use the Council's resources in accordance with its reasonable requirements; however they considered that this was merely a technical breach contrary to paragraph 6(b)(i) of the Code of Conduct.
 - 5.4. They also concluded that, in respect of the complaints relating to the Appellant's conduct at the Complaints and Appeals Committee meeting, the Appellant was not acting in an official capacity, and thus was not subject to the Code of Conduct at that meeting. In relation to allegations of bullying, intimidation and breach of confidentiality there was no case to answer. These matters are not the subject of these appeal proceedings.
6. The Appellant has also appealed against the action which the Standards Committee decided to take in the light of their decision that she had failed to follow the provisions of the Code of Conduct. That action was to suspend Councillor McTigue for two months.

Preliminary Issues

7. In her application to appeal the Appellant expressed some criticism of the way the decision of the Standards Committee was notified to her. However, even if valid, those criticisms would not affect the issue of whether the conduct which gave rise to the investigation was a breach of the Code of Conduct nor be relevant to the question of sanction. The matter was therefore not considered by the Appeals Tribunal.
8. The Appellant indicated in her appeal papers, both in her initial appeal documents and a supplementary bundle that she considered the Standards Committee process had been flawed. However, again this was not an issue that affected whether there had been a breach of the Code of Conduct and any real or apparent bias would be overreached by the appeal being heard before the Appeals Tribunal. The Chair explained that the Appeals Tribunal would be reaching its own decision on the merits and would not be considering the detail of the proceedings before the Standards Committee.

Findings of Fact

9. Councillor McTigue has been an elected Middlesbrough Borough Councillor since May 2003. She was re-elected in 2007 and currently sits on the Licensing Committee, the Community Safety and Leisure Scrutiny Panel and the Corporate Parenting Board.
10. Paragraph 3 (1) of the Code provides:

“You must treat others with respect.”
11. Paragraph 5 of the Code provides:

“You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.”

12. Paragraph 6(b)(i) of the Code provides:

“You must, when using or authorising the use by others of the resources of your authority— (i) act in accordance with your authority’s reasonable requirements;”
13. The hearing on 18 June 2008 arose from a complaint that the Complainant had raised about the standard of the wheelie bin collection from her home (the wheelie bin complaint). The complaint had been long-standing and the hearing was part of a process of trying to bring the wheelie bin complaint to resolution.
14. It was alleged by the Complainant that Councillor McTigue’s behaviour at the Complaints and Appeals Committee meeting was inappropriate. Councillor McTigue denies this.
15. On 19 June 2008 the Complainant sent an email to Councillor McTigue at her Middlesbrough Council email address expressing her views on Councillor McTigue’s actions at the Complaints hearing and including the phrase, “*Think on at the next meeting and behave like the Councillor you should be, rather than the “low life” you were yesterday. Don’t bother to reply*”. Councillor McTigue replied on 20 June 2008 acknowledging receipt of that email. She said she would not be entering into further discussions and that she had arranged for any further emails from the complainant to go directly to her junk folder, for deletion before they were opened.
16. On 20 June 2008 the first of a series of forum postings making reference to the Council’s hearing of the wheelie bin complaint was posted on forums.gazettelive.co.uk. This was an on-line forum hosted by The Evening Gazette. There followed a series of postings by different contributors on the issue until 7 July 2008. In all there were nearly 130 postings on the topic within the eighteen day period.
17. Councillor McTigue initiated the topic on the forum using the pseudonym “Indie”. She has been a contributor to the ‘gazettelive’ forum in the past under the same pseudonym.
18. The forum postings by Indie (35 of the 127) can be grouped into 3 types:
 - 18.1. General postings – not directed to any particular individual.
 - 18.2. Those directed to the complainant (after she entered the forum under the pseudonym cynic2008).
 - 18.3. Those directed to other individual forum participants (as replies to their entries). The other users are identified only by their usernames and generally no further details are known about them. Mr Warren in evidence identified himself as “Tosha”.
19. In the forum exchanges between Councillor McTigue (as Indie) and the Complainant (as cynic2008) each was aware of the other’s true identity.
20. The first posting on the topic of the wheelie bin complaint was posted by Councillor McTigue under the pseudonym “Indie” and was headed: “*The Marton woman and her wheelie bin!*”. It then went on to say: “*I attended the hearing and this woman stated that having her wheelie bin place on her drive had almost brought on a nervous breakdown and had almost brought her to her knees*”.
21. There followed a series of postings by various people, with differing views on the subject of the wheelie bin complaint, councillors, rubbish collection etc. There are

several blogs by people who were clearly concerned about the way that the public site had been used by Councillor McTigue in relation to the wheelie bin complaint.

22. Mr Warren in evidence said that he was a regular blogger and had not connected "Indie" with being a councillor. However he accepted that he became aware at one point in the series of postings that she was in fact a councillor.
23. It is clear from the postings that it was well-known that "Indie" was Councillor McTigue's pseudonym. On 25 June 2008, in the 11th posting of the forum series relating to the wheelie bin complaint, Ms Bawden posting as cynic2008 stated: *"Hey "INDIE" you obviously have not made it clear that you are actually Councillor Joan McTigue"*. The Appellant responded on the same day: *"Everyone on this site knows who I am"*.
24. The Appellant referred to the Council, other councillors and specifically her role as councillor in various ways in her postings on the forum.
25. Councillor McTigue's postings continued well after it had been made clear to her by the Complainant and other bloggers that her postings were inappropriate.

Findings as to whether the Appellant failed to follow the Code

26. The first matter to be determined is whether the Appellant was acting in her official capacity when she was engaged in the series of posts on the Evening Gazette forum. If she was not, then she would not have been in breach of the Code of Conduct in respect of these matters.
27. If it is concluded that she was acting in her official capacity, it then has to be determined whether by her actions she
 - 27.1. failed to treat Ms Bawden with respect and/or
 - 27.2. could reasonably be regarded as bringing her office into disrepute and/or
 - 27.3. when using the Council computer failed to act in accordance with the Council's reasonable requirements.

Official capacity

28. The Appellant argued that she was not acting in her official capacity as all her comments on the forum were made in her private time and all using the pseudonym of "Indie".
29. The Appeals Tribunal accepted that even if it became clear from the forum that an individual who was posting on the forum was a councillor, the Code of Conduct would not automatically be engaged. The question was whether in the postings on the forum the councillor was deemed to be, or gave the impression that he or she was, "acting in the role of councillor". This was fact-sensitive and would very much depend on the content of the postings.
30. It was noted that Councillor McTigue had used a pseudonym, and that she states in at least one of the postings that she is on the forum as a resident who just happens to be a councillor. However, taking the contents of the postings on the Evening Gazette forum as a whole the Appeals Tribunal concluded that the Appellant did give the impression that she was acting in the role of councillor and thus representing the council. Postings by "Indie" (Councillor McTigue) that resulted in this conclusion include:

- 30.1. 25/6/08: *"I was sitting next to Cllr McPartland (who gave me a sweet!) and other Labour cllrs & I assure you, if my behaviour was even in the least not acceptable I would have been reported to the S Board before my feet touched the ground".*
- 30.2. 25.6.08: *"cynic – you claimed that the council agreed with your complaint – who agreed – name them please so that I can verify it ..."*
- 30.3. 26/6/08: *"BillygangI have suggested that since the council is targeted by the Government on recycling, that we pay people as an incentive – I don't make the decisions though – those above me do & they are appointed by the Labour Group. If you are not happy about your litter situation etc – complain to the right people why don't you – you cannot blame me. Which cllrs do you know who are childish – let's have some real evidence and examples here please – I for one agree but I would be interested in your experience of this. ..."*
- 30.4. 26/6/08: *"I am a councillor as most people know I have no political banner ..."*
- 30.5. 26/6/08: *"As you can appreciate I am limited as to how I can describe what happened – if you see what I mean.*
- 30.6. 27/6/08: *"... do you know who your ward councillors are by any chance? Get to know them and then you can judge them."*
- 30.7. 27/6/08: *"Mon – the residents in my ward are not just a number – I assure you of that. When one of them comes to me with a problem, the first thing I ask them is, how long it's been going on. If they reply – months or ages, I chide them for not contacting me sooner. ..."*
- 30.8. 28/6/08: *"Every single person who uses this site could take their questions/complaints/questions and ask them in person at a full council meeting which is held every 6 weeks where they will be answered – providing the question is accepted by the Head of Legal Services. If they prefer to use this site instead – there is a chance I can answer them or perhaps the other cllrs on here who are anon.What's the difference between this and a public meeting where anything is discussed and aired, apart from the fact that you would see cllrs".*
- 30.9. 28/6/08: *"..before I put anything up here for discussion I have the sense to check first with the legal dept in the Town Hall".*
- 30.10. 29/6/08: *"...my phone is in perfect working order so anyone here can contact me day or night and I have no objections whatsoever to people calling at my home which they do on a daily basis – it helps to live on the ward in some respects.We do our cllr work when it needs doing – there are no set hours – I thought everyone knew that."*
- 30.11. 29/6/08: *"..during this hearing/tribunal/appeal whatever you wish to call it I asked the cllr sitting next to me Cllr McPartland what he thought the costs would be and he rolled his eyes heavenwards. Would you like me to find out the approx cost for you & how many man hours have been spent on this?"*
- 30.12. 29/6/08: *" ...as a councillor I cannot deal with them in the same manner. ..."*

31. This conclusion is further supported by the impression that was clearly received by other posts on the blog.

Failure to treat with respect

32. Failure to treat others with respect will occur when unfair, unreasonable or demeaning behaviour is directed by one person against another. The circumstances in which the behaviour occurred is relevant to assessing whether the behaviour is disrespectful. The circumstances include the place where the behaviour occurred, who observed the behaviour, the character and relationship of the people involved and the behaviour of anyone who prompted the alleged disrespect.
33. The Appeals Tribunal accepted that the Appellant had felt wrongly accused by the complainant of bad behaviour at the Council's Appeals Committee and that she had received a strongly-worded email from the complainant which she had taken exception to. However this did not provide a justification for what she did, which was, instead of dealing with the matter privately, to choose to take the issue to a very public blog-site, run by the local newspaper. It was inappropriate for someone with a valid and accepted complaint, which had been taken seriously by the Council, to be subjected to public ridicule and demeaning statements on a public website by a member of that council. The tone of the Appellant's postings was derogatory and disparaging to Ms Bawden, including references to her as *"the wheelie bin woman"*. In addition, the Appellant's postings triggered off abusive responses directed at Ms Bawden from other people, such as: *"Do you think there might be a 'Compo case' in the offing???"*, to which the Appellant replied that he must be a mind-reader. In fact the Claimant was claiming out-of-pocket expenses.
34. The Appeals Tribunal concluded that the Appellant had not treated the complainant with respect in breach of paragraph 3(1) of the Code of Conduct.

Disrepute

35. The Oxford English dictionary defines disrepute as "lack of good reputation or respectability". A member will have failed to comply with the Code if his or her conduct could "reasonably be regarded" by an objective observer as bringing the member's office or authority into disrepute. Anything which diminishes the member's office or their authority, or which harms or could harm the reputation of an authority, will bring that office or authority into disrepute.
36. The Appeals Tribunal considered that the way that the Respondent had behaved was not that expected of a councillor and would diminish the office of councillor. It considered therefore that the Appellant had brought the office of councillor into disrepute in breach of paragraph 5 of the Code of Conduct.

Misuse of Council Property

37. The Appeals Tribunal felt that by implication using a Council computer for such purposes would constitute a breach of paragraph 6(b)(1) of the Code of Conduct. However, this was a technical breach and in itself not significant.

Human Rights

38. In considering whether Councillor McTigue breached the Code of Conduct the Appeals Tribunal has had regard to Article 10 of the European Convention on Human Rights which provides:

“(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ..the protection of the reputation or rights of others,..”.

39. In the recent case of *Mullaney v The Adjudication Panel for England [2009] EWHC 72* (Admin) Charles J considered how the code fitted with Article 10. He stated at paragraph 101: *“I agree with Collins J in Livingstone at paragraph 34 and Wilkie J in Sanders (accepting the stance there of the Councillor) that in principle the Code satisfies Article 10(2). Also as so indicated I agree that it is important that the restraints should not extend beyond what is necessary to maintain proper standards in public life and that political expression attracts a higher level of protection.”*
40. This is a case where proper standards in public life have not been maintained. It is not a case where there is a need to protect political expression. The disrespect shown was not to a councillor or other politician but to a member of the public in a public arena. The Appellant continued with the postings even after there were clear objections to the series of postings from other bloggers on the grounds that they were inappropriate. Most importantly there was nothing to stop the Appellant from raising the issue of wheelie bins on the forum in a proper manner to elicit views without, as she did, vilifying the complainant personally.
41. The Appeals Tribunal considered therefore that Article 10 did not assist the Appellant in this case.

Sanction

42. The Standards Committee in considering a sanction took into account the mitigating circumstances of the Complainant’s behaviour towards the Appellant and the Appellant’s previous history of breaches of the Code of Conduct. It then resolved to suspend the Appellant for a period of two months, with immediate effect.
43. The Appeals Tribunal made it clear to the Appellant what the possible sanctions were and received submissions and evidence from both parties. Mr Long submitted documents relating to previous breaches of the Code of Conduct by Councillor McTigue, namely:
 - 43.1. A finding of the Adjudication Panel for England (APE 329) in 2006 that the Appellant had breached the Code by not declaring a personal interest at two meetings. No penalty was imposed, although the Tribunal stated that *“the Respondent should be left in no doubt that the Tribunal deprecated her behaviour”*.
 - 43.2. A finding by Middlesbrough Council Standards Committee on 22 May 2006 that she had not treated Council officers with respect. Councillor McTigue was required to write a letter of apology.
 - 43.3. A finding of Middlesbrough Council Standards Committee on 18 September 2007 that she had not treated a person with respect. The sanction was one month’s suspension.

Councillor McTigue had not appealed against any of these findings, although she indicated that this was because she had no faith in the appeal system.

44. Mr Long submitted that in his view the two month suspension imposed by the Standards Committee was in fact too lenient in the circumstances. Councillor McTigue made submissions as to why the previous breaches were not as serious as might have been considered; including providing a letter from a witness in one of the cases to the effect that he had been coerced to give evidence.
45. The Appeals Tribunal took all these matters into account. From the evidence before it the Appeals Tribunal was satisfied that Councillor McTigue is a committed and zealous councillor. However it was felt that this was a case where there was a fairly serious breach of the Code of Conduct, based as it was on an unwarranted personal attack against a member of the public in a series of postings on a public website. In that respect they felt that the circumstances were clearly different from the *Livingstone* case which had been referred to by the Appellant.
46. It was clear that Councillor McTigue had a significant history of involvement in proceedings for breaching the Code of Conduct. The Appeals Tribunal considered that it might be expected that she would have learnt from this and adjusted her behaviour accordingly. However this had not happened and the Appeals Tribunal considered that the two month suspension imposed by the Standards Committee was appropriate.
47. The Appeals Tribunal was not convinced that the Appellant fully appreciates the requirements of the Code of Conduct. It appears that, although training on the Code has been offered by the Council, the Appellant has not participated in it for some time. The Appeals Tribunal therefore decided to impose an additional sanction of the requirement for training on the Code of Conduct within three months of the date of the hearing, with a recommendation that this be one-to-one training if possible, to ensure that the Appellant fully understands the Code and so that any misconceptions she currently has are addressed.
48. The Appeals Tribunal has upheld the finding of the Standards Committee.
49. The decision of the Appeals Tribunal was unanimous.
50. The Standards Committee is required to impose the penalties specified at paragraph 44 and 45 above.
51. A copy of this determination is being given to the Appellant, the Standards Board, the Standards Committee, and any person who made the allegation that gave rise to the investigation.
52. This determination will be published in a newspaper circulating in the area of the relevant local authority and also published on the Adjudication Panel's website at www.adjudicationpanel.tribunals.gov.uk

Beverley Primhak
Chairwoman of the Appeals Tribunal
10 May 2009

Appeals Tribunal Decision

Case Ref:	APE 0414
Date of Appeals Tribunal:	10 February 2009
Relevant Standards Committee:	Berwick-Upon-Tweed Borough Council
Date of Standards Committee Decision:	26 November 2008
Name of member concerned: <i>(Appellant)</i>	Councillor Douglas
Monitoring Officer:	Mr Henry
Independent Investigator:	Mr Newton
<u>Appeals Tribunal Members</u>	
Chairman:	Mr Simon Bird
Member:	Mr Richard Enderby
Member:	Mr Alex Rocke

1. The Appeals Tribunal has considered an appeal from the Appellant about the above decision.
2. The Appeals Tribunal has considered written and oral submissions from Mr Liam Henry and Councillor Douglas and has heard evidence from Mr Ben Guy and Councillor Douglas.

The decision appealed against

3. The Appellant had appealed against the Standards Committee's finding that he had failed to follow paragraphs 3(1) and 5 of the Council's Code of Conduct.
4. The Appellant had been reported in a local newspaper under a headline "Planning Chief attacks own department." The report quoted him as saying that the relevant council department was not performing as it should. He was also quoted as saying that there was a problem in Berwick about the Council being officer-led and that people who came into jobs in the Council lacked local knowledge and a commitment on the future of Berwick.
5. The Hearings Sub-committee of the Council's Standards Committee found that the Appellant had made the comments attributed to him in the press article and rejected his claim to have been misquoted. The Hearings Sub-committee found that the Code of Conduct did apply to the Appellant during his conversation with the journalist.

6. The Hearings Sub-committee found that the Appellant had failed to treat the staff of the Development Services department with respect contrary to paragraph 3(1) of the Council's Code of Conduct. The reason given was that the comments has been made in a very public forum, rather than through the appropriate channels within the authority, which had given the staff concerned no opportunity for redress.
7. The Hearings Sub-committee also found that the Appellant has conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute contrary to paragraph 5 of the Code of Conduct. The reason given was that in their view, the comments were likely to result in a reduction in public confidence not just in the Development Services staff and the planning function but also in the local authority generally. They noted that the Appellant had shown no remorse in respect of his comments at any time despite the obvious concern and distress which these had caused the Development Control Services staff at the Council.
8. The Appellant has appealed against the action, which the Standards Committee decided to take in the light of their decision that he had failed to follow the provisions of the Code of Conduct. That action was to suspend Councillor Douglas for six months.
9. The Appellant's grounds for seeking permission to appeal alleged that he had been unfairly treated by the Standards Committee in that the matter was heard in his absence, the material put before the Standards Committee was selective with material omissions and there was an absence of impartiality. Given (a) that the Appeals Tribunal is itself independent and impartial and will reach its own independent conclusions on both the facts and whether those facts support a finding of the Council's Code of Conduct and (b) the Appellant has a full opportunity to present all relevant evidence to the Appeals Tribunal, there is no need for it to reach any determination on these contested matters.
10. Because Councillor Douglas disputed the accuracy of the content of the press article which lay at the heart of the alleged breaches of the Code, the Appeals Tribunal considered it necessary to hear evidence as to what was said from the author of that article, Mr Ben Guy and from Councillor Douglas.

Findings of Fact

11. The followings are its findings of fact based on that evidence and the other undisputed evidence before it:

- 11.1. Councillor Douglas was elected to office on Berwick-upon-Tweed Borough Council on 3 May 2007 for a term of four years and gave a written undertaking to observe the Code of Conduct on 8 May 2007. As at 22 May 2008, he was a member of the Council's Planning Committee but not it's Chair.

- 11.2. The paragraphs of the Code relevant to the determination of this appeal provide as follows:

- 11.2.1. Paragraph 2 (which provides in so far as is relevant):

“(1) Subject to sub-paragraphs (2) to (5), you must comply with this code of conduct whenever you:-

conduct the business of your authority (which, in this Code, includes the business of the office to which you are elected or appointed); or

act, claim to act or give the impression you are acting as a representative of your authority,

and references to your official capacity shall be construed accordingly.

Subject to sub-paragraphs (3) and (4), this Code does not have effect in relation to your conduct other than where it is in your official capacity.

In addition to having effect in relation to conduct in your official capacity, paragraphs 3(2)(c), 5 and 6(a) also have effect, at any other time, where that conduct constitutes a criminal offence for which you have been convicted....

11.2.2. Paragraph 3(1):

"You must treat others with respect."

11.2.3. Paragraph 5:

"You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute."

12. The Appellant owns land at 11 Mill Strand, Tweedmouth and this land was the subject of a number of applications for planning permission for its development which were made to the Council by Mr Simon Eltringham. Mr Eltringham is the Appellant's grandson. One such application was an application for full planning permission for the erection of 5 dwellings (ref.08/B/0079) which was registered by the Council's Development Services Unit on 6 February 2008. This application was not determined within the prescribed 8 week period and an appeal against the Council's failure to determine the application was made to the Secretary of State on 9 May 2008. Part of the reason for the Council not determining the application within the prescribed period, was that a statutory consultation response had been returned by the consultee to an email address provided by the Council which was in fact the wrong one.
13. In April 2005, the Council was designated as a "Standards Authority" for Development Control performance. A further inspection on behalf of the Department for Communities and Local Government in 2006 acknowledged that improvements had been made since April 2005 but expressed concerns that the Council was still not meeting the government's performance targets, particularly those relating to the determination of planning applications. In May 2007, the Council received a further report on the Council's planning service prepared by Joan Lees Consulting Ltd. This recognised that the Standards Authority designation would extend into 2007/2008 and identified the key themes which emerged from earlier reports as:

"1. Recruitment and retention of staff is a significant challenge and is having a major impact on performance.

2. The small size of the authority presents a challenge in terms of maintaining performance.

3. *There is a major deficiency in terms of procedures and the documentation of procedures. This "systems failure" is impacting on performance and is exposing the Council to risk.*

4. *ICT systems need significant development in order to properly support internal processes and to meet the e-planning requirements.*

5. *There are cultural issues which need to be addressed."*

14. The Joan Rees report adds:

"This review corroborates these previous findings...Performance is good in relation to appeals, delegation levels and ombudsman case and there are some examples of good practice. However, performance is poor in relation to BVPI 111 (satisfaction with planning services) and very poor in relation to the BVPI 109 series (processing times). In the case of the BVPI 109 series, Berwick is in the bottom 2% on all three PIs."

15. Improvement in the processing of planning applications began to be seen in April 2008.

16. On or about 19 May 2008, Mr Ben Guy a journalist employed by the Newcastle Journal received an anonymous tip off to the effect that a planning application submitted to the Council in the name of the Appellant's grandson represented a conflict of interest for the Appellant. Following initial researches, he telephoned the Appellant, who had returned home from work about an hour and half previously. This was an unarranged, speculative telephone call and there had been no previous contact between Mr Guy and the Appellant. It was the equivalent of "door stepping". Although the Appellant contends that the telephone call was made to him in his private capacity, having regard to the substance of the interview (which is not seriously challenged by the Appellant), the Appeals Tribunal prefers the evidence of Mr Guy that the call was made to the Appellant in both his private capacity and as a member of the Council.

17. The telephone call lasted about 20 minutes. The first part of it was concerned with whether there was any basis for the allegation of a conflict of interest. There is no dispute that this part of the conversation was conducted off the record. Mr Guy quickly established by his questions that there was no conflict of interest.

18. As a result, he informed the Appellant that the angle of his story had changed and the interview became focussed, although not exclusively, on the Council's Planning Department. The Appellant's responses to the questions were noted in shorthand by Mr Guy as they were given. Mr Guy produced his shorthand notes of the interview in evidence. The Appellant confirmed in his evidence that it was more likely than not that he had said the statements recorded in the transcript. In so far as there is any discrepancy between the transcript and the subsequently published article, the Appeals Tribunal prefers transcript, it being more likely to be accurate given its contemporary status.

19. There is a dispute between Mr Guy and the Appellant as to whether this second stage of the interview was on or off the record. Mr Guy impressed the Tribunal as an accurate and truthful witness and having regard to his standard approach to conducting interviews, it is satisfied on the balance of probabilities that he did invite the Appellant to confirm that this second stage of the interview was on the record. This is consistent with the absence of any reference in the contemporaneous note to

the interview being off the record. However, the Appeals Tribunal is also satisfied that the Appellant was being truthful in relation to his understanding of the status of the interview. Notwithstanding what Mr Guy had said to him, the Appeals Tribunal is satisfied that the Appellant remained genuinely uncertain as the status of the interview. Those parts of it which related to his private capacity he regarded as on the record as addressing the anonymous complaint. Those parts which related to his public capacity as a member of the Council he regarded as being off the record.

20. There is no full note of the interview and the partial transcript of Mr Guy's notes excludes some sentences which are completely illegible. The partial transcript reads:

"There's no conflict of interest.

The situation in Berwick is that although I am chair I am not a portfolio holder. I have no control over the department. I would like to have control over the department because it would then toe the line and get results."

"The fact is that the council haven't given a decision within the prescribed time and therefore they are not applying the rules.

"At the moment on the planning committee this is something that consistently happens at Berwick.

"That department isn't performing as well as it should be. You can make all of the excuses under the sun about short staff."

"I have no sympathy whatsoever. I asked for a meeting with the regeneration officer.

"The planning committee do not run the department. We are the figureheads that make decisions.

"From my point of view I have got a property. We have people who are trying to manipulate the planning system from the outside.

"There is always an attitude of them and us in local government. The problem we have in Berwick is that we have been officer led for so long.

"I am a Berwicker born and bred and I want Berwick to survive and prosper. There are people who come into jobs and don't have local knowledge. They lack commitment on the future of Berwick."

"I will play it my way"

"The property has been in the family since 1962. If you have got something 46 years at the end of the day it is a ?? family operation??"

"I am always going to look to the future. I am 61. There is nothing wrong with it.

Unreadable sentence.

"We are exercising our right to appeal and the situation is that we should have had a decision on the first of April and that hasn't happened because of the way the organisation I set up.

"The reality is that I want the department to improve"

21. The telephone interview formed the basis for an article which appeared in the Newcastle Journal on 22 May 2008 under the heading "Planning chief attacks own department". In the article, the following statements appear as quotations of the Appellant's words:

"The fact is that the Council hasn't given a decision within the prescribed time and therefore they are not applying the rules. As a member of the planning committee this is something I consistently see happening at Berwick.

You can make all the excuses under the sun about short staff, but the simple fact is that the department isn't performing as it should be. I have no sympathy whatsoever. We are exercising our right to reapply.

We should have had a decision on April 1 and that hasn't happened because of the way the organisation is set up. I want this department to improve"

"The problem we have in Berwick is that as a council we have been officer led for so long. I am a Berwicker, born and bred, and I want Berwick to survive and prosper.

There are people who came into jobs who don't have the local knowledge, and they lack the commitment on the future of Berwick. I will play it my way.

22. The Appellant made no reference during the interview to any individual officer of the Council; it focussed exclusively on the Appellant's views as to the performance the planning services department as a whole.
23. The Appellant was elected Chair of the Planning Committee on 3 June 2008.

Findings as to whether the Appellant failed to follow the Code

24. Three matters fall for determination on the basis of the facts as found:

24.1. Whether when talking to Mr Guy on the telephone, the Appellant was acting in his official capacity for the purposes of the Code i.e. conducting the business of the Council or acting, claiming to act or giving the impression that he was acting as a representative of the Council;

24.2. If so, whether what he said:

24.2.1. failed to treat others with respect and/or

24.2.2. was such as could reasonably be regarded as bringing his office or the Council into disrepute.

Official capacity

25. The Code in defining the scope of its operation uses ordinary descriptive English words. Their application is inevitably fact sensitive and so whether or not a person is so acting inevitably calls for informed judgment by reference to the facts of a given case.
26. The Appellant's interview includes the following references:

"I am chair I am not a portfolio holder"

"I have no control over the department"

"We are the figureheads that make the decisions"

*"The problem we have in Berwick is that we have been officer led for so long"
"I want the department to improve"*

27. In the Appeals Tribunal's view, the content of the interview coupled with the statements made by the Appellant to the investigating officer in his interview during the investigation are such that the Appellant did give the impression that he was wearing his Councillor hat and acting as a representative of his authority. The Code therefore applied to his conduct in giving the interview notwithstanding that he regarded it as off the record.

Failure to treat with respect and disrepute

28. Failure to treat others with respect will occur when unfair, unreasonable or demeaning behaviour is directed by one person against another. The circumstances in which the behaviour occurred is relevant in assessing whether the behaviour is disrespectful. The circumstances include the place where the behaviour occurred, who observed the behaviour, the character and relationship of the people involved and the behaviour of anyone who prompted the alleged disrespect.
29. The Oxford English dictionary defines disrepute as "lack of good reputation or respectability". A member will have failed to comply with the Code if his or her conduct could "reasonably be regarded" by an objective observer as bringing the member's office or authority into disrepute. Anything which diminishes the member's office or their authority, or which harms or could harm the reputation of an authority, will bring that office or authority into disrepute.
30. In considering whether Councillor Douglas breached paragraphs 3(1) and 5 of the Code, the Appeals Tribunal has had regard to Article 10 of the European Convention on Human Rights which provides:
- "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....
 - (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of...the protection of the reputation or rights of others, ..."
31. Section 1 of the Human Rights Act 1998 identifies the rights under the European Convention of Human Rights which have effect for the purposes of that Act. They include Articles 6 and 10 of the ECHR. Section 3(1) of the 1998 Act provides that so far as it is possible to do so.....subordinate legislation must be read and given effect in a way which is compatible with the convention rights.
32. Section 6 of the 1998 Act provides as follows:
- "(1) It is unlawful for a public authority to act in a way which is incompatible with a convention right.

- (2) Disapplies the section in certain very limited circumstances concerning primary legislation. This does not apply to the present case as the matters raised by the appellant concern subordinate legislation.

Sub-section (3) provides:

“In this section public authority includes –

- (a) a court or tribunal

Section 7 provides:

- (1) A person who claims that a public authority has acted in a way which is made unlawful by section 6(1) may –

- (b) rely on the convention right or rights concerned in any legal proceedings...”

33. In *Sanders v Steven Kingston* [2005] EWHC 1145 (Admin) Wilkie J had to consider the relationship between Article 10 and paragraphs 2(b) and 4 of the then Code of Conduct. These provisions equate to paragraphs 3(1) and 5 of the Council’s Code with which this appeal is concerned. In paragraph 69 of his judgment, Wilkie J reviewed a number of authorities. He noted [at para.69] that in *Lingens v Austria* the following was said:

“ In this connection the court has to recall that freedom of expression...constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self fulfilment. Subject to paragraph 2, it is applicable not only to “information or ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no democratic society...More generally freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the convention...In such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues. ”

34. From *R v Central Independent Television plc (1994) Fam 192* Wilkie J set out the following passage from the speech of Lord Justice Hoffman:

“Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which “right thinking people” regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute....It cannot be too strongly emphasised that outside the established exceptions, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.”

35. From the case of *Reynolds v Times Newspapers Ltd (2001) 2 AC 127* he set out the following passage from the speech of Lord Nichols of Birkenhead:

“My starting point is freedom of expression. The high importance of freedom to impart and receive information and ideas has been stated so often and so eloquently that this point calls for no elaboration in this case. At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country. This freedom enables those who elect representatives to parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions....To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.”

36. Wilkie J then proceeded to consider whether, on the facts of the Sanders case, a finding of breach and/or imposition of a sanction would violate Article 10. He held that, in principle, Article 10 was engaged, that the finding of breach of itself and the imposition of a sanction was prima facie a breach of Article 10 but that the restriction of the right to freedom of expression was, on the facts, one which was justified by reason of the requirements of Article 10(2). He said this at paragraphs 84 and 85 of his judgment:

“..... the adoption by Parliament of the statement of principles and establishment of a code of conduct arose from the publication by Lord Nolan of the third report of the Committee of Standards in Public Life in July 1997 (CM 3701-1). This report called for a new start based on an ethical framework the effect of which would be a radical change in the ethical framework within which local government operated. It was stated that it was important that local authorities themselves should adopt their own codes of conduct but had to be with a degree of consistency across local authorities and an assurance that certain minimum standards would be attained by any individual code. The government in response introduced into Part III of the Local Government Bill clauses relating to the conduct of local government members and employees. The purpose of the legislation was to encourage and impose certain minimum standards of behaviour in respect of local government. No challenge is made by Councillor Sanders to the scheme. It is, therefore, implicit that he accepts that the system whereby members are obliged to undertake that they will comply with the code of conduct and will be subject to the jurisdiction of the Case Tribunal in the event that they are not satisfied, in principle, the three conditions for a lawful interference with free speech in a democratic society. I have concluded that the words and writing of the appellant amounted to no more than expressions of personal anger and personal abuse and did not constitute political expression which attracts the higher level of protection. In those circumstances, in my judgment the finding by the Case Tribunal that the appellant had breached the code of conduct and its notification of that finding to his local authority constitute an interference with freedom of expression but one which was lawful pursuant to Article 10(2).

I recognise that, were this machinery to be used against a member of a local authority who did give expression to political opinions of an offensive nature or expressed political opinions in an offensive way, then there might be circumstances in which the Case Tribunal could not find a breach of the code of conduct without involving itself in an unlawful infringement of the rights protected by Article 10. However, as a matter of fact, this is not such a case.”

37. The Appeals Tribunal also notes the words of Collins J in *Livingstone v The Adjudication Panel for England* [2006]EWHC 2533 (Admin) [at para.39]:

"The burden is on [the Adjudication Panel for England] to justify interference with freedom of speech. However offensive and undeserving of protection the appellant's outburst may have appeared to some, it is important that any individual knows that he can say what he likes, provided it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2) to render him liable to sanctions".

38. The right to freedom of expression is a crucially important right in a democratic society and it is clear that it may only be interfered with where there are convincing and compelling reasons within Article 10(2) justifying that interference. A key issue for the Appeals Tribunal's determination is thus whether a finding of a breach of the Code on the facts as found, would represent no greater an impairment to the Appellant's right to freedom of expression than is necessary to accomplish the legislative objective of the Code.
39. This requires a factual investigation of the nature of the words used in order to determine whether they constitute expression relating to matters within the legitimate concern of the member as a Councillor (political or quasi political comment which benefit from a high level of protection), or whether they are no more than expressions of personal anger and personal abuse. In the latter case, the high degree of protection required by the authorities is not engaged.
40. It is important that the restraints should not extend beyond what is necessary to maintain proper standards in public life and that political expression is afforded a higher level of protection. In the Appeals Tribunal's view, it is important that members should be able to express in robust terms, concerns that they may have about any aspect of the running of the Council and this can include expressing disagreement with officers and can include criticism of the way in which a department or an officer handles particular matters.
41. The concept of "treating others with respect" is one that allows the essential balance required by Article 10(2) to be performed, as does the phrase "bringing his office into disrepute" used in paragraph 5 of the Code.
42. In the Appeals Tribunal's view, the threshold for a failure to treat another with respect and a failure to comply with paragraph 5 of the Code in the case of expressions of view, has to be set at a level that allows for the passion and fervour that often accompanies political debate or debates relating to the efficient running of a Council and which allows for appropriate and robust criticism of the performance of a Council function. This is entirely consistent with the objective of maintaining proper standards in public life.
43. In seeking to support the Standards Committee's finding of a breach of paragraph 3(1) of the Code, Mr Henry relied upon three of the Appellant's quoted comments as failing to treat others with respect (given their public airing and the absence of a right of reply) namely:
- (b) *"You can make all the excuses under the sun about short staff but the simple fact is that the department isn't performing as it should be"*
 - (c) *"The problem we have in Berwick is that as a Council we have been officer led for so long...."*

(d) "There are people who come into jobs who don't have the local knowledge and they lack the commitment on the future of Berwick"

44. The Appeals Tribunal does not consider that any of the statements made to Mr Guy by the Appellant failed to treat any other person with respect within the scope of the Code.
45. Having regard to the evidence before the Appeals Tribunal in the form of various reports on the Council's performance in the processing of planning applications¹, it was a fair comment, having regard to the requirement for timely determination planning applications, that the Development Services Department was not performing as it should be. The Appeals Tribunal notes the conclusion of the Investigating Officer that what he termed the Appellant's "*frustration*" on this issue was "*entirely justified*".
46. The comment was not unfair, unreasonable or demeaning. It was not on any assessment disrespectful. It was not expressed in intemperate or offensive terms. Whilst Council officers might have wished for such criticism to be made directly and privately to them, with an opportunity to respond, this was criticism directed at the functioning of a department of the Council within the context of an interview in which the Appellant's view on what he would do to improve the situation was being elicited. There was no personal criticism raising issues of competence or integrity levelled at any individual and the Appeals Tribunal is satisfied from all that it has heard and read, that none was intended. This was generalised comment of a political nature.
47. The Appellant was perfectly entitled to raise such an issue in a public forum without notice, irrespective of whether there might have been a more palatable alternative approach viewed from the perspective of staff of the criticised department. The comment addressed concerns he held and reflected concern expressed by others to him Appellant as a Councillor. Those who elected him would expect him to voice concerns of this kind on their behalf.
48. As to the reference to the Council being "officer led", as the Appeals Tribunal heard, the Appellant's genuinely held view was that the history of the Council and in particular, an historic urban/rural division between elected members, had led to an executive weakness which officers had, of necessity, to respond to. In his view, this led to the Council being perceived to be officer led. That might be an unpalatable view to some which they might regard as offensive. It might have little or no justification. However, it was the Appellant's genuinely held view on the balance of power within the Council and his expression of it was a political statement. It was not derogatory of any individual nor on its face, capable of being seen as an attack on the integrity of any individual or body of officers. It was not expressed in a way which was unreasonable, unfair or demeaning to any identifiable individual or body of officers. It did not as a matter of fact fail to treat any person with respect.
49. The comment "*There are people who come into jobs who don't have the local knowledge, and they lack the commitment on the future of Berwick,*" has to be looked at in context. The Joan Rees Consulting Report had identified that the recruitment and retention of staff was a significant challenge to the Council with poor performance compounded by high staff turnover. Better recruitment and retention of staff was identified as essential if performance was to improve. The Appellant's view, as expressed in interview and evidence was that the proper approach was to recruit locally because "*...there are people who lived in Berwick who can do the jobs and that*

¹ The ODPM commissioned report of 21 June 2006 and the Council's own commissioned Joan Rees Consulting Ltd Report May 2007

the people that do the jobs, to be committed, should work and reside in the same area”.

50. As an expression of view as to the Council’s recruitment policies and the need for staff to have a local residence to demonstrate commitment, this may have been regarded by others as misguided, naïve and unsupported by evidence. However, it is the Appellant’s view and, given the substance of it, he was entitled to express it. This was an off the cuff, general comment of a political or quasi political nature made in the context of a single, ad hoc telephone interview, discussing the Council’s performance as planning authority generally. It was not of a personal nature, there is no evidence of any “*history*” between the Appellant and planning officers from which a personal attack could be implied, nor any evidence that the Appellant was engaged in a course of conduct intended to undermine any individual officer or, indeed the small department as a whole.
51. Looked at in the context of all of the circumstances, this comment could not reasonably have been taken to be a criticism of any existing individual officers in any department of the Council nor did it fail to treat any person with respect. It does not meet the threshold for a breach of paragraph 3(1) of the Code and, in the Appeal Tribunal’s view, it would be a disproportionate restriction on the Appellant’s right to freedom of expression to find such a breach.
52. Finally on the allegation of a failure to treat others with respect, it is implicit in the Standards Committee decision, that, had the Appellant said what he did not to Mr Guy but to the Council’s Head of Development Services, there would have been no breach of the Code. It must follow that in their view, there was nothing disrespectful in the words used; rather it was the public utterance of them and the claimed absence of any opportunity to respond. The Appeals Tribunal does not accept this reasoning. If there is nothing disrespectful in the nature of the words used, or the tone or manner in which they are expressed and their substance is not of such a nature that (because of personal or other sensitivity) it is dealt with by convention in private, it matters not whether they are publicly or privately expressed or whether those who may regard themselves as within the class being commented upon have a right of response.
53. Turning to the issue of disrepute, the comments about the Council being “officer led” and in relation to the absence of commitment to the future of Berwick of those without local knowledge, formed the focus of Mr Henry’s submissions on behalf of the Standards Committee. He relied on Ahmed and others v UK 29 ECHR 1 in which the Court emphasised that the local government system of the UK has long resided on a bond of trust between elected members and a permanent core of local government officers who both advise them on policy and assume responsibility for the implementation of policies adopted. That relationship of trust stems from the right of council members to expect that they will be assisted in their functions by officers who are politically neutral and whose loyalty is to the council as a whole.
54. In the Appeals Tribunal’s view, expressing these views does not meet the threshold set by the words of paragraph 5. Neither looked at objectively would have any material bearing on public confidence in either the office of councillor or the authority itself. Both are comments of a very general political or quasi political kind which respect for the freedom of expression of (possibly) unpalatable views in the political context must allow for. Their content properly understood, the manner and forum in which they were expressed and the absence of any personal criticism are such that they could not reasonably be regarded as affecting the essential trust between officers and Councillor Douglas and his ability to perform his functions. In the Appeals

Tribunal's view it would not be proportionate for the Code to operate to prevent the expression of such genuinely held views even though they may be contentious.

55. For these reasons, the Appeals Tribunal has determined that the Appellant did not fail to follow the provisions of the Code.
56. The Appeals Tribunal has rejected the finding of the Standards Committee.
57. The decision of the Standards Committee ceases immediately to have effect.
58. A copy of this determination is being given to the Appellant, the Standards Board, the Standards Committee and any person who made the allegation that gave rise to the investigation.
59. This determination will be published in a newspaper circulating in the area of the relevant local authority and also published on the Adjudication Panel's website at www.adjudicationpanel.co.uk.

Simon Bird

Chairman of the Appeals Tribunal

17 February 2009

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Blogging

Introduction

Blogging is increasingly becoming an important and legitimate part of the operation of a democratic society. It is an efficient, cost-effective and enjoyable way to get in touch with constituents and discuss important issues with the community you represent.

This guide is aimed at members who are new to blogging and social networking as well as experienced bloggers and networkers. It may also be helpful for standards committee members and monitoring officers. It explains the positive role of blogging. It provides information on how the Code of Conduct (the Code) may apply to blogging and social networking and gives some examples of tribunal cases that have dealt with the issues.

What is a blog?

A blog is a frequently updated individual website discussing subjects ranging from the personal to the political. It may focus on one narrow subject or a whole range of subjects.

What is social networking?

Social networking is an online method of sharing information, photos and views with contacts and associates. Examples of social networking sites are Facebook, Twitter and MySpace.

How do members use blogging and social networking?

There are a number of different ways you can use social networking or blogging.

Social networking or blogging can be:

- sponsored by your authority e.g. a leader or members blog
- carried out as an individual
- carried out anonymously

It is important to note that when blogging the Code may apply. This will depend on the factors explored below.

Using council provided media

If you use online media to promote your work as a member or through council websites you will be regarded as conducting the business of the authority. Communicating in this way is most likely to engage the Code.

As an individual

The content of private, non-political blogs are less likely to engage the Code. It will again depend upon the particular facts whether or not the Code applies.

It is the content of a blog and the circumstances surrounding its creation that will determine whether or not its content falls under the Code. A disclaimer in a private blog which says that any comments are not made in an official capacity will not necessarily prevent breaches of the code being found. See Mullaney and Dorrian cases below.

Anonymous blogging

Anonymous satirical websites raise other issues. The first point to consider is whether it can be proved that you uploaded the site content. Although this may be generally suspected, the First Tier Tribunal (Local Government Standards in England) would expect an Ethical Standards Officer to be able to prove (on a balance of probabilities) that the content has been uploaded by a member. A standards committee would also expect similar proof from an investigating officer. If proof is established it is then necessary to show that you acted, claimed to act or gave the impression that you were acting as a member when you posted the offending comments.

How does the Code of Conduct apply to blogging?

When considering the application of the Code to blogging and social networking, it is essential to consider whether the Code will apply to your blog and which paragraphs you should be aware of in order to ensure ethical blogging.

For the Code to apply to your blog paragraph 2 of the Code needs to be satisfied. Paragraph 2 makes it clear that the Code only applies when you are acting in your official capacity. Official capacity is defined as conducting the business of the authority or acting, claiming to act or giving the impression that you are acting as a councillor. For further information on official capacity please see our quick guide to official capacity.

The decision as to whether you are acting in your official capacity will depend on the particular facts of each case and the circumstances surrounding your blog. There are a number of factors that will be taken into account when assessing this. These include:

- **How well known or high profile you are as a member.** The more high profile you are, the more likely it is that you will be seen as acting in your official capacity when you blog or use a social networking site.
- **The privacy settings on your blog or social networking site.** If you have a private, personal blog, ensure that you have appropriate privacy settings so that you decide who can read your posts. If you have

a political blog this may well be open to all readers. If constituents are able to see your posts, they may assume that you are acting in your official capacity as their representative.

- **The profile on your blog or social networking site.** You should set out clearly in your profile if this is a political or personal blog. Identifying this will enable readers to better understand if you are seeking to act in your official capacity or not. Nevertheless it may be possible in a personal blog to give the impression that you are acting as a member even though you have stated otherwise. Also, you cannot discuss council business on a personal blog and/or make gratuitously offensive remarks about others who are linked to the council and then claim to be doing so in a private capacity.

When blogging you should bear in mind the following paragraphs of the Code will apply to your online behaviour just as they would to any other form of communication.

- **Paragraph 3(1) - Treating others with respect:** The aim of the Code is not to stifle political opinions and arguments. As such, political comments and comments about ideas are less likely to be seen as disrespectful and result in a breach of the Code. However, personal jibes or remarks aimed at an individual may well be seen as disrespectful and could lead to a breach of the Code and possible sanctions.
- **Paragraph 3(2) (d) – Disclosing confidential information:** Before releasing any information on your blog or networking site, check if it is confidential and if you have the right to release it.
- **Paragraph 5 – Disrepute:** Because of your role, your actions and behaviour are subject to greater scrutiny than that of ordinary members of the public. You should be aware that your actions might have an impact on your office or authority. Dishonest or deceitful behaviour in your role as a member may bring your office or the authority into disrepute.
- **Paragraph 6 (b) (i), 6(b) (ii) and 6(c) – Use of resources:** You must not use local authority resources “improperly to confer on or secure for yourself or any other person, an advantage or disadvantage.” Also you must ensure that these resources are not used improperly “for political purposes” - including party political purposes. See the Johnson case below.

You should also consider other online activities where the Code may apply:

- **Forum posts.** If you go on to a forum and identify yourself as a member then it is likely that the Code will apply when you post entries. If you put content on the site which you could only have obtained as a member it is possible to argue that you have given the impression that you were acting as a member even if you did not identify yourself as such when you made the posting.
- **Comments made by others.** It is also important to regularly check your own blog or networking site to ensure there are no defamatory or obscene comments posted by others. If this does happen you should remove the posts as soon as you become aware of them. You should also take steps to discourage users from posting such comments in the future.
- **“Friends” on social networking sites.** You should be aware that anyone you include as a friend on social networking sites could be regarded as a “person with whom you have a close association” within the meaning of paragraph 8 of the code – personal interests. Simply including someone on a site as a friend does not establish a close association but it is one factor that would be taken into account in deciding whether such an association exists.

Human rights considerations

In considering whether your use of social networking media have breached the Code, Article 10 of the European Convention on Human Rights (the right to freedom of expression) must also be taken into account. The First Tier Tribunal and court cases have made a number of decisions about this issue.

You are less likely to breach the Code where you are making genuine political statements. This means that you are less likely to breach the Code if your comments are about another member’s political position or are a genuine expression of political differences with someone. The courts have established that this is because of the fundamental importance of freedom of political expression in a democratic society. However, any political expression should avoid being just an expression of personal anger or abuse towards someone since insults and abuse do not normally qualify for the protection of Article 10. If you make rude comments about a member of the public or an officer of an authority it is more likely that you will be found to have breached the Code.

Examples of cases

Examples which illustrate how the First Tier Tribunal and standards committees have viewed cases involving social networking can be found in(1):

Councillor Mullaney APE 0400 and High Court judgment

Birmingham City Council

In this decision factors relevant to the conclusion that conduct was within “official capacity” included the following

- The subject member trespassed onto an individual’s property and shot a video that he subsequently posted on You Tube. The aim of the video was to galvanise the planning department into taking action concerning the building.
- The YouTube video concerned identified the subject member at the outset.
- The subject member identified himself several times as a member.
- The video was subsequently published on the subject member’s website - the homepage of which identified him as a member.
- References were made in the video to the jurisdiction of the subject member’s council.
- The subject member failed to remove or edit the video when requested.
- The tribunal decision on breach was upheld by the High Court and the case was sent back to the Appeals Tribunal to consider if the sanction they applied was appropriate.
- The sanction applied was a one month suspension.

[Click here for a link to the case.](#)

Councillor McTigue APE 0421
Middlesbrough Council

The Appeals Tribunal accepted that

- Even if it became clear from the forum (an on-line forum hosted by the local newspaper) that an individual who was posting on the forum was a member, the Code would not automatically be engaged.
- The question was whether in the postings on the forum the member was deemed to be, or gave the impression that he or she was “acting in the role of member”.
- This was fact-sensitive and would very much depend on the content of the postings.
- The subject member had used a pseudonym and stated that she was on the forum as a resident who just happened to be a member. Taking the contents of the postings as a whole the member did give the impression that she was acting in the role of member and representing the council. In a series of posts the subject member discussed council business, outlined what had happened at council meetings and referred to herself as a councillor.
- Sanction applied was a two month suspension.

[Click here for a link to the case](#)

Mayor Johnson
Greater London Authority Standards Committee Decision

- The Mayor of London linked in his tweet to the front page of the Sun, which on that day had announced its decision to endorse the Conservative party.
- The standards committee found that he had breached paragraph 6(b) (ii) of the authority’s Code because he tweeted using his mayoral twitter feed (thus using GLA resources) and was considered to be seeking to affect party political support.
- Sanction applied was for the monitoring officer to speak to the Mayor about his responsibilities under the code.

[Click here for a link to the case.](#)

Councillor Sharratt APE 0458
South Ribble Borough Council

- The member was a journalist who published a small journal.
- The member neither claimed nor gave the impression of acting as a representative of the council. The magazine was ‘published for fun’, and a member of the public would be in no doubt, the panel said, that the journal was not a matter that was the business of the council.
- The Standards Committee accepted the argument that Cllr Sharratt used the magazine to conduct public discourse on the council and party issues, and that his activities on the council, the magazine and the party were seamlessly connected. However, the First-tier Tribunal disagreed. It said the decision in Livingstone (Livingstone v APE (2006) EWHC 2533) referring to ‘activities which are apparently within the performance of a member’s functions’ should be narrowly construed.
- The appeals tribunal rejected the finding of the standards committee and concluded there had been no

breach of the Code.

- No breach.

[Click here for a link to the case.](#)

Councillor Barnbrook APE 470/471

London Borough of Barking and Dagenham

- The member appealed the decision of the standards committee of the London Borough of Barking and Dagenham.
- The member published a video on a website concerning statements about knife crime that were inaccurate.
- The key question considered by the tribunal was whether the member was acting in his official capacity when making the video.
- There was no evidence to support the position that the member was conducting the 'business of the Council' and the parties did not put forward any arguments to this effect
- The Tribunal was drawn to the conclusion that the making of the video was not proximate enough to the role of member so as to bring him into the ambit of acting in his capacity as a member. The Tribunal considered the following factors in reaching its conclusion:
 - The member was making a video on behalf of the BNP with its primary purpose being party political;
 - He was not identified as a member for the London Borough of Barking & Dagenham;
 - He was not taking forward an issue relevant primarily to the London Borough of Barking & Dagenham;
 - He was not taking forward an issue on behalf of an individual constituent; and,
 - The video dealt with a range of issues and the Appellant did not concentrate upon issues within the London Borough of Barking & Dagenham.
- No breach.

[Click here for a link to the case.](#)

Other issues to consider

There are also considerations apart from the Code that should be taken into account when using online media. The following is a brief guide to some of the legal pitfalls(2) in establishing personal blogs. Almost all of these can be avoided if your online content is objective, balanced, informative and accurate.

In the main, you have the same legal duties online as anyone else, but failures to comply with the law may have more serious consequences.

Libel

If you publish an untrue statement about a person which is damaging to their reputation they may take a libel action against you. This will also apply if you allow someone else to publish something libellous on your website if you know about it and do not take prompt action to remove it. A successful libel claim will result in an award of damages against you.

Bias and Predetermination

If you are involved in determining planning or licensing applications, you should avoid publishing anything on your blog that might suggest you have already made up your mind about a matter you may be involved in determining. Otherwise, the decision runs the risk of being invalidated.

Copyright

Placing images or text on your site from a copyrighted source (e.g. extracts from publications, photos etc) without permission is likely to breach copyright. Avoid publishing anything you are unsure about or seek permission in advance. Breach of copyright may result in an award of damages against you.

Data protection

Avoid publishing the personal data of individuals unless you have their express written permission.

Obscene material

It goes without saying that you should avoid publishing anything in your blog that people would consider obscene. Publication of obscene material is a criminal offence.

Conclusion

Blogging and social networking are excellent ways to engage a wider audience. In order to blog successfully, you should ensure that you comply with the Code and any other legal requirements.

It is also important to note that, the ethical use of online social media is not limited to what is covered in the Code. You should also consider the Ten General Principles of Public Life. While you may not be investigated or censured for using online media in certain ways, your conduct might still be viewed as less than exemplary and attract adverse publicity for your office and authority.

Helpful links:

You can find further guidance and information on blogging and social networking as a member from the sources below:

- Blogging quick guide
- Official capacity quick guide
- www.civicsurf.org.uk a resource for blogging members
- www.socialbysocial.com a primer for harnessing social media for social good
- IDeA's Connected Members: A guide to using social media

(1) These cases were heard during the period where the Adjudication Panel for England was in operation. The functions of the Adjudication Panel for England have now been transferred to the First-Tier Tribunal (Local Government Standards in England) and the Adjudication Panel for England has been abolished.

(2) This section is based on material produced by and with the permission of Victoria McNeill, Head of Legal at Norfolk County Council.

Guidance

In this section:

- The Code of Conduct
 - Code Guidance
 - Guide for members
 - Online guides
 - Guidance FAQ
 - Code legislation
- The local standards framework

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Blogging Quick Guide

Blogging and social networking are effective methods for councillors to interact with constituents and support local democracy. Used effectively, they can engage those who would not normally have access to local councillors and politics.

Standards for England support the use of such media and encourage councillors to get online. You should think about what you say and how you say it, in just the same way as you would when making statements in person or in writing,

You will also need to think about whether you are seen to be, or give the impression that you are acting in your official capacity as a councillor. To make sure you comply with the Code of Conduct (the Code) and to ensure your use of online media is well received we suggest the following general hints.

Do

- set appropriate privacy settings for your blog or networking site – especially if you have a private, non-political blog
- keep an eye out for defamatory or obscene posts from others on your blog or page and remove them as soon as possible to avoid the perception that you condone such views

- be aware that the higher your profile as a councillor, the more likely it is you will be seen as acting in your official capacity when you blog or network
- ensure you use council facilities appropriately; if you use a council provided blog site or social networking area, any posts you make will be viewed as made in your official capacity
- be aware that by publishing information that you could not have accessed without your position as a councillor you will be seen as acting in your official capacity
- make political points, but be careful about being too specific or personal if referring to individuals. An attack on individuals may be seen as disrespectful, whereas general comments about another party or genuine political expression is less likely to be viewed as disrespectful.

Don't

- blog in haste.
- post comments that you would not be prepared to make in writing or face to face
- use council facilities for personal or political blogs.

When the Code may apply

Bear in mind the Code when you blog or use social networking sites. You should pay particular attention to the following paragraphs of the Code:

- Disrespect
- Bullying
- Disclosure of confidential information
- Disrepute
- Misuse of authority resources

However, it is difficult to give definitive advice on the application of the Code as each blog and social networking page is different. The content of a blog or other social networking tool and the circumstances surrounding its creation will determine whether or not it might be covered by the Code.

Ethical use of online social media is not limited to what is covered in the Code. We encourage members to respect the **Ten General Principles of Public Life**. While your conduct may not be a breach of the Code it may still be viewed as less than exemplary and attract adverse publicity for your office and authority.

Find out more

- Please read our **Code of Conduct: Guidance for members 2007**
- Call our enquiries line on 0845 078 8181
- Email us at enquiries@standardsforengland.gov.uk

Published on 25th February 2010.

Guidance

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REPORT FOR: STANDARDS COMMITTEE

Date of Meeting:	26 April 2011
Subject:	Bribery Act 2010
Responsible Officer:	Hugh Peart, Director of Legal and Governance Services
Exempt:	No
Enclosures:	Appendix 1- Guidance note issued by the Ministry of Justice about procedures commercial organisations can put in place to prevent bribing. Appendix 2 – Guidance note also issued by Ministry of Justice entitled The Bribery Act 2010: ‘Quick start guide’.

Section 1 – Summary and Recommendations

The report outlines the main provisions of the Bribery Act 2010 and the steps that officers have identified as necessary to prepare for its implementation.

Recommendation:

That members note this report.

Section 2 – Report

1. On 30 March, the Ministry of Justice announced that the Bribery Act 2010 will come into force on 1 July 2011. On the same day the Ministry also published guidance related to the Act. The Act will replace, update and extend the existing law against corruption which dates back to 1889.
2. The Act creates four new offences:

Offences of bribing another person (Section 1)

It will be an offence to offer, promise or give a financial or other advantage with the intention of inducing that person to perform improperly a 'relevant function or activity' or to reward that person for doing so.

It will also be an offence to offer, promise or give a financial or other advantage where the person doing so 'know or believes' that the acceptance of the advantage would itself constitute the improper performance or a 'relevant function or activity'.

In both cases it does not matter whether the advantage is offered, promised or given directly or through a third party.

In the local authority context, if the 'relevant function or activity' is of a public nature requiring the person performing it to either act (a) in good faith, (b) impartially or (c) in a position of trust, then it will be 'improperly performed' if there is a breach of a 'relevant expectation'. This 'expectation' is itself an objective test of what a reasonable person in the UK would expect in relation to the function or activity.

Offences relating to being bribed (Section 2)

This offence is relevant to a number of prescribed cases but in essence it will be an offence to agree to request, receive or accept a financial or other advantage with the intention that a 'relevant function or activity' should be performed improperly and it does not matter whether the advantage is received directly or through a third party.

This will be of particular relevance to the Council.

Bribery of a foreign official (Section 6)

This offence is applicable in situations where the intention of influencing a public official is in his/her foreign capacity.

It is unlikely this offence will be relevant to the Council.

Failure of commercial organisation to prevent bribery (Section 7)

The Act creates a new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf. For the purposes of the Act a relevant commercial organisation means a body corporate or partnership which carries on a business or part of a business. Business is defined as a trade or profession. It is a defence if the organisation has adequate procedures in place to prevent bribery (Section 9).

In general, a public body would not be a commercial organisation for the purposes of the Act, however the Council may have subsidiaries which would come under the scope of the Act or it may carry out activities which are akin to running a private business. In any event it would be prudent for the Council to review its policies and procedures in light of the Act to ensure that they would be adequate in relation to those offences that could affect the Council, and to minimise risk.

The Act means that if the bribery offence is committed with the consent/connivance of a senior officer of the local authority, then that person is also personally guilty of an offence. This will potentially catch all those working at manager level and upwards. Penalties under the Act include fines and/or imprisonment for up to ten years (for the more serious offences).

Guidance

3. On 30 March, the Ministry of Justice published the final version of guidance about anti-bribery procedures in respect of the offence under Section 7.
4. The guidance explains the policy behind Section 7 and sets out six principles that are intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery. The guidance also offers case study examples that help illuminate the application of the Act.
5. Separately, the Ministry of Justice has also published a 'Quick start guide' to the Act.

Risk Management Implications

6. Officers have agreed the appropriate departmental leads take responsibility for reviewing and amending relevant documents they own (for example, Employees Code of Conduct, Gifts and Hospitality Protocol, Corporate Anti-Fraud Policy, Whistleblowing Policy, Financial regulations and contract procedure rules). If changes are required then the necessary steps will be taken.
7. Updated procedures/policies will need to be publicised, and training conducted across the Council which will need to include Members. Relevant objectives of the Standards Committee. This report contributes towards the objective of “internal control” to ensure strong ethical governance.

Corporate Priorities

8. These changes support the corporate priorities of - United and involved communities: a Council that listens and leads.

Financial Implications

9. There are no financial implications associated with this report.

Section 3 - Statutory Officer Clearance

Name: Steve Tingle	<input checked="" type="checkbox"/>	on behalf of the* Chief Financial Officer
Date: 11 April 2011		
Name: Matthew Adams	<input checked="" type="checkbox"/>	on behalf of the* Monitoring Officer
Date: 12 April 2011		

Section 4 - Contact Details and Background Papers

Contact:

Jessica Farmer, Head of Legal Services – Legal Services, 0208 420 9889
Vishal Seegoolam, Acting Senior Professional – Democratic Services, 020 8424 1883

Background Papers: None

If appropriate, does the report include the following considerations?

1.	Consultation	NO
2.	Corporate Priorities	YES

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THE BRIBERY ACT 2010

Guidance

about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)

THE BRIBERY ACT 2010

Guidance

about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)

Foreword

Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.

Tackling this scourge is a priority for anyone who cares about the future of business, the developing world or international trade. That is why the entry into force of the Bribery Act on 1 July 2011 is an important step forward for both the UK and UK plc. In line with the Act's statutory requirements, I am publishing this guidance to help organisations understand the legislation and deal with the risks of bribery. My aim is that it offers clarity on how the law will operate.

Readers of this document will be aware that the Act creates offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation's behalf. These are certainly tough rules. But readers should understand too that they are directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms.

I have listened carefully to business representatives to ensure the Act is implemented in a workable way – especially for small firms that have limited resources. And, as I hope this guidance shows, combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality. It also offers case study examples that help illuminate the application of the Act. Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix. Separately, we are publishing non-statutory 'quick start' guidance. I encourage small businesses to turn to this for a concise introduction to how they can meet the requirements of the law.

Ultimately, the Bribery Act matters for Britain because our existing legislation is out of date. In updating our rules, I say to our international partners that the UK wants to play a leading

role in stamping out corruption and supporting trade-led international development. But I would argue too that the Act is directly beneficial for business. That's because it creates clarity and a level playing field, helping to align trading nations around decent standards. It also establishes a statutory defence: organisations which have adequate procedures in place to prevent bribery are in a stronger position if isolated incidents have occurred in spite of their efforts.

Some have asked whether business can afford this legislation – especially at a time of economic recovery. But the choice is a false one. We don't have to decide between tackling corruption and supporting growth. Addressing bribery is good for business because it creates the conditions for free markets to flourish.

Everyone agrees bribery is wrong and that rules need reform. In implementing this Act, we are striking a blow for the rule of law and

growth of trade. I commend this guidance to you as a helping hand in doing business competitively and fairly.

A handwritten signature in black ink, appearing to read 'K. Clarke', with a stylized flourish at the end.

Kenneth Clarke
Secretary of State for Justice
March 2011

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Introduction

- 1 The Bribery Act 2010 received Royal Assent on 8 April 2010. A full copy of the Act and its Explanatory Notes can be accessed at: www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1

The Act creates a new offence under section 7 which can be committed by commercial organisations¹ which fail to prevent persons associated with them from committing bribery on their behalf. It is a full defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. Section 9 of the Act requires the Secretary of State to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing. This document sets out that guidance.
- 2 The Act extends to England & Wales, Scotland and Northern Ireland. This guidance is for use in all parts of the United Kingdom. In accordance with section 9(3) of the Act, the Scottish Ministers have been consulted regarding the content of this guidance. The Northern Ireland Assembly has also been consulted.
- 3 This guidance explains the policy behind section 7 and is intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery as mentioned in section 7(1).
- 4 The guidance is designed to be of general application and is formulated around six guiding principles, each followed by commentary and examples. The guidance is not prescriptive and is not a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case. The onus will remain on the organisation, in any case where it seeks to rely on the defence, to prove that it had adequate procedures in place to prevent bribery. However, departures from the suggested procedures contained within the guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures.
- 5 If your organisation is small or medium sized the application of the principles is likely to suggest procedures that are different from those that may be right for a large multinational organisation. The guidance suggests certain procedures, but they may not all be applicable to your circumstances. Sometimes, you may have alternatives in place that are also adequate.

¹ See paragraph 35 below on the definition of the phrase 'commercial organisation'.

- 6 As the principles make clear commercial organisations should adopt a risk-based approach to managing bribery risks. Procedures should be proportionate to the risks faced by an organisation. No policies or procedures are capable of detecting and preventing all bribery. A risk-based approach will, however, serve to focus the effort where it is needed and will have most impact. A risk-based approach recognises that the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions.
- 7 The language used in this guidance reflects its non-prescriptive nature. The six principles are intended to be of general application and are therefore expressed in neutral but affirmative language. The commentary following each of the principles is expressed more broadly.
- 8 All terms used in this guidance have the same meaning as in the Bribery Act 2010. Any examples of particular types of conduct are provided for illustrative purposes only and do not constitute exhaustive lists of relevant conduct.

Government policy and Section 7 of the Bribery Act

- 9 Bribery undermines democracy and the rule of law and poses very serious threats to sustained economic progress in developing and emerging economies and to the proper operation of free markets more generally. The Bribery Act 2010 is intended to respond to these threats and to the extremely broad range of ways that bribery can be committed. It does this by providing robust offences, enhanced sentencing powers for the courts (raising the maximum sentence for bribery committed by an individual from 7 to 10 years imprisonment) and wide jurisdictional powers (see paragraphs 15 and 16 on page 9).
- 10 The Act contains two general offences covering the offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery) at sections 1 and 2 respectively. It also sets out two further offences which specifically address commercial bribery. Section 6 of the Act creates an offence relating to bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business², and section 7 creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organisation. More detail about the sections 1, 6 and 7 offences is provided under the separate headings below.
- 11 The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.
- 12 The application of bribery prevention procedures by commercial organisations is of significant interest to those investigating bribery and is relevant if an organisation wishes to report an incident of bribery to the prosecution authorities – for example to the Serious Fraud Office (SFO) which operates a policy in England and Wales and Northern Ireland of co-operation with commercial organisations that self-refer incidents of bribery (see ‘Approach of the SFO to dealing with overseas corruption’ on the SFO website). The commercial organisation’s willingness to co-operate with an investigation under the Bribery Act and to make a full disclosure will also be taken into account in any decision as to whether it is appropriate to commence criminal proceedings.

² Conduct amounting to bribery of a foreign public official could also be charged under section 1 of the Act. It will be for prosecutors to select the most appropriate charge.

- 13 In order to be liable under section 7 a commercial organisation must have failed to prevent conduct that would amount to the commission of an offence under sections 1 or 6, but it is irrelevant whether a person has been convicted of such an offence. Where the prosecution cannot prove beyond reasonable doubt that a sections 1 or 6 offence has been committed the section 7 offence will not be triggered.
- 14 The section 7 offence is in addition to, and does not displace, liability which might arise under sections 1 or 6 of the Act where the commercial organisation itself commits an offence by virtue of the common law ‘identification’ principle.³

Jurisdiction

- 15 Section 12 of the Act provides that the courts will have jurisdiction over the sections 1, 2⁴ or 6 offences committed in the UK, but they will also have jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.
- 16 However, as regards section 7, the requirement of a close connection with the UK does not apply. Section 7(3) makes clear that a commercial organisation can be liable for conduct amounting to a section 1 or 6 offence on the part of a person who is neither a UK national or resident in the UK, nor a body incorporated or formed in the UK. In addition, section 12(5) provides that it does not matter whether the acts or omissions which form part of the section 7 offence take part in the UK or elsewhere. So, provided the organisation is incorporated or formed in the UK, or that the organisation carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed) then UK courts will have jurisdiction (see more on this at paragraphs 34 to 36).

³ See section 5 and Schedule 1 to the Interpretation Act 1978 which provides that the word ‘person’ where used in an Act includes bodies corporate and unincorporate. Note also the common law ‘identification principle’ as defined by cases such as *Tesco Supermarkets v Nattrass* [1972] AC 153 which provides that corporate liability arises only where the offence is committed by a natural person who is the directing mind or will of the organisation.

⁴ Although this particular offence is not relevant for the purposes of section 7.

Section 1: Offences of bribing another person

- 17 Section 1 makes it an offence for a person ('P') to offer, promise or give a financial or other advantage to another person in one of two cases:
- **Case 1** applies where P intends the advantage to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance.
 - **Case 2** applies where P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.
- 18 'Improper performance' is defined at sections 3, 4 and 5. In summary, this means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. The offence applies to bribery relating to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons. Therefore, bribery in both the public and private sectors is covered.
- 19 For the purposes of deciding whether a function or activity has been performed improperly the test of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of that function or activity. Where the performance of the function or activity is not subject to UK law (for example, it takes place in a country outside UK jurisdiction) then any local custom or practice must be disregarded – unless permitted or required by the written law applicable to that particular country. Written law means any written constitution, provision made by or under legislation applicable to the country concerned or any judicial decision evidenced in published written sources.
- 20 By way of illustration, in order to proceed with a case under section 1 based on an allegation that hospitality was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in the UK thought. So, for example, an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.

Section 6: Bribery of a foreign public official

- 21** Section 6 creates a standalone offence of bribery of a foreign public official. The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.
- 22** A ‘foreign public official’ includes officials, whether elected or appointed, who hold a legislative, administrative or judicial position of any kind of a country or territory outside the UK. It also includes any person who performs public functions in any branch of the national, local or municipal government of such a country or territory or who exercises a public function for any public agency or public enterprise of such a country or territory, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises. Foreign public officials can also be an official or agent of a public international organisation, such as the UN or the World Bank.
- 23** Sections 1 and 6 may capture the same conduct but will do so in different ways. The policy that founds the offence at section 6 is the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official’s request, assent or acquiescence. Such activity is very likely to involve conduct which amounts to ‘improper performance’ of a relevant function or activity to which section 1 applies, but, unlike section 1, section 6 does not require proof of it or an intention to induce it. This is because the exact nature of the functions of persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve. To require the prosecution to rely entirely on section 1 would amount to a very significant deficiency in the ability of the legislation to address this particular mischief. That said, it is not the Government’s intention to criminalise behaviour where no such mischief occurs, but merely to formulate the offence to take account of the evidential difficulties referred to above. In view of its wide scope, and its role in the new form of corporate liability at section 7, the Government offers the following further explanation of issues arising from the formulation of section 6.
- Local law**
- 24** For the purposes of section 6 prosecutors will be required to show not only that an ‘advantage’ was offered, promised or given to the official or to another person at the official’s request, assent or acquiescence, but that the advantage was

one that the official was not permitted or required to be influenced by as determined by the written law applicable to the foreign official.

- 25 In seeking tenders for publicly funded contracts Governments often permit or require those tendering for the contract to offer, in addition to the principal tender, some kind of additional investment in the local economy or benefit to the local community. Such arrangements could in certain circumstances amount to a financial or other ‘advantage’ to a public official or to another person at the official’s request, assent or acquiescence. Where, however, relevant ‘written law’ permits or requires the official to be influenced by such arrangements they will fall outside the scope of the offence. So, for example, where local planning law permits community investment or requires a foreign public official to minimise the cost of public procurement administration through cost sharing with contractors, a prospective contractor’s offer of free training is very unlikely to engage section 6. In circumstances where the additional investment would amount to an advantage to a foreign public official and the local law is silent as to whether the official is permitted or required to be influenced by it, prosecutors will consider the public interest in prosecuting. This will provide an appropriate backstop in circumstances where the evidence suggests that the offer of additional investment is a legitimate part of a tender exercise.

Hospitality, promotional, and other business expenditure

- 26 Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.
- 27 In order to amount to a bribe under section 6 there must be an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage. In this regard, it may be in some circumstances that hospitality or promotional expenditure in the form of travel and accommodation costs does not even amount to ‘a financial or other advantage’ to the relevant official because it is a cost that would otherwise be borne by the relevant foreign Government rather than the official him or herself.

- 28 Where the prosecution is able to establish a financial or other advantage has been offered, promised or given, it must then show that there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage. Where the prosecution cannot prove this to the requisite standard then no offence under section 6 will be committed. There may be direct evidence to support the existence of this connection and such evidence may indeed relate to relatively modest expenditure. In many cases, however, the question as to whether such a connection can be established will depend on the totality of the evidence which takes into account all of the surrounding circumstances. It would include matters such as the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business. In this circumstantial context, the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return.
- 29 The standards or norms applying in a particular sector may also be relevant here. However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant.
- 30 Levels of expenditure will not, therefore, be the only consideration in determining whether a section 6 offence has been committed. But in the absence of any further evidence demonstrating the required connection, it is unlikely, for example, that incidental provision of a routine business courtesy will raise the inference that it was intended to have a direct impact on decision making, particularly where such hospitality is commensurate with the reasonable and proportionate norms for the particular industry; e.g. the provision of airport to hotel transfer services to facilitate an on-site visit, or dining and tickets to an event.

- 31 Some further examples might be helpful. The provision by a UK mining company of reasonable travel and accommodation to allow foreign public officials to visit their distant mining operations so that those officials may be satisfied of the high standard and safety of the company's installations and operating systems are circumstances that fall outside the intended scope of the offence. Flights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York as a matter of genuine mutual convenience, and some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match are facts that are, in themselves, unlikely to raise the necessary inferences. However, if the choice of New York as the most convenient venue was in doubt because the organisation's senior executives could easily have seen the official with all the relevant documentation when they had visited the relevant country the previous week then the necessary inference might be raised. Similarly, supplementing information provided to a foreign public official on a commercial organisation's background, track record and expertise in providing private health care with an offer of ordinary travel and lodgings to enable a visit to a hospital run by the commercial organisation is unlikely to engage section 6. On the other hand, the provision by that same commercial organisation of a five-star holiday for the foreign public official which is unrelated to a demonstration of the organisation's services is, all things being equal, far more likely to raise the necessary inference.
- 32 It may be that, as a result of the introduction of the section 7 offence, commercial organisations will review their policies on hospitality and promotional or other similar business expenditure as part of the selection and implementation of bribery prevention procedures, so as to ensure that they are seen to be acting both competitively and fairly. It is, however, for individual organisations, or business representative bodies, to establish and disseminate appropriate standards for hospitality and promotional or other similar expenditure.

Section 7: Failure of commercial organisations to prevent bribery

- 33** A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. As set out above, the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities.
- 35** As regards bodies incorporated, or partnerships formed, in the UK, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.

Commercial organisation

- 34** Only a 'relevant commercial organisation' can commit an offence under section 7 of the Bribery Act. A 'relevant commercial organisation' is defined at section 7(5) as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. The key concept here is that of an organisation which 'carries on a business'. The courts will be the final arbiter as to whether an organisation 'carries on a business' in the UK taking into account the particular facts in individual cases. However, the following paragraphs set out the Government's intention as regards the application of the phrase.
- 36** As regards bodies incorporated, or partnerships formed, outside the United Kingdom, whether such bodies can properly be regarded as carrying on a business or part of a business 'in any part of the United Kingdom' will again be answered by applying a common sense approach. Where there is a particular dispute as to whether a business presence in the United Kingdom satisfies the test in the Act, the final arbiter, in any particular case, will be the courts as set out above. However, the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught. The Government would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the

London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a 'relevant commercial organisation' for the purposes of section 7. Likewise, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.

Associated person

37 A commercial organisation is liable under section 7 if a person 'associated' with it bribes another person intending to obtain or retain business or a business advantage for the organisation. A person associated with a commercial organisation is defined at section 8 as a person who 'performs services' for or on behalf of the organisation. This person can be an individual or an incorporated or unincorporated body. Section 8 provides that the capacity in which a person performs services for or on behalf of the organisation does not matter, so employees (who are presumed to be performing services for their employer), agents and subsidiaries are included. Section 8(4), however, makes it clear that the question as to whether a person is performing services for an organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The concept of a person who 'performs services for or on behalf of' the organisation

is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf.

38 This broad scope means that contractors could be 'associated' persons to the extent that they are performing services for or on behalf of a commercial organisation. Also, where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an 'associated' person.

39 Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of sub-contractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Indeed, the organisation may only know the identity of its contractual counterparty. It is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain. The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of a supply chain is by employing the types of anti-bribery procedures referred to elsewhere in this guidance (e.g. risk-based due diligence and the use of anti-bribery terms and conditions) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain.

- 40 As for joint ventures, these come in many different forms, sometimes operating through a separate legal entity, but at other times through contractual arrangements. In the case of a joint venture operating through a separate legal entity, a bribe paid by the joint venture entity may lead to liability for a member of the joint venture if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member. However, the existence of a joint venture entity will not of itself mean that it is 'associated' with any of its members. A bribe paid on behalf of the joint venture entity by one of its employees or agents will therefore not trigger liability for members of the joint venture simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture.
- 41 The situation will be different where the joint venture is conducted through a contractual arrangement. The degree of control that a participant has over that arrangement is likely to be one of the 'relevant circumstances' that would be taken into account in deciding whether a person who paid a bribe in the conduct of the joint venture business was 'performing services for or on behalf of' a participant in that arrangement. It may be, for example, that an employee of such a participant who has paid a bribe in order to benefit his employer is not to be regarded as a person 'associated' with all the other participants in the joint venture. Ordinarily, the employee of a participant will be presumed to be a person performing services for and on behalf of his employer. Likewise, an agent engaged by a participant in a contractual joint venture is likely to be regarded as a person associated with that participant in the absence of evidence that the agent is acting on behalf of the contractual joint venture as a whole.
- 42 Even if it can properly be said that an agent, a subsidiary, or another person acting for a member of a joint venture, was performing services for the organisation, an offence will be committed only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation. The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe. By the same token, liability

for a parent company could arise where a subsidiary is the 'person' which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa.

- 43 The question of adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person and the degree of risk that requires mitigation. The scope of the definition at section 8 needs to be appreciated within this context. This point is developed in more detail under the six principles set out on pages 20 to 31.

Facilitation payments

- 44 Small bribes paid to facilitate routine Government action – otherwise called 'facilitation payments' – could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offence and therefore potential liability under section 7.
- 45 As was the case under the old law, the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development⁵ recognises the corrosive effect of facilitation payments and asks adhering countries to discourage

companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.

- 46 The Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play and the guidance below offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.
- 47 Issues relating to the prosecution of facilitation payments in England and Wales are referred to in the guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.⁶

⁵ Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

⁶ Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.

Duress

48 It is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defence of duress is very likely to be available in such circumstances.

51 Factors that weigh for and against the public interest in prosecuting in England and Wales are referred to in the joint guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions referred to at paragraph 47.

Prosecutorial discretion

49 Whether to prosecute an offence under the Act is a matter for the prosecuting authorities. In deciding whether to proceed, prosecutors must first decide if there is a sufficiency of evidence, and, if so, whether a prosecution is in the public interest. If the evidential test has been met, prosecutors will consider the general public interest in ensuring that bribery is effectively dealt with. The more serious the offence, the more likely it is that a prosecution will be required in the public interest.

50 In cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute. The operation of prosecutorial discretion provides a degree of flexibility which is helpful to ensure the just and fair operation of the Act.

The six principles

The Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles. These are set out below. Commentary and guidance on what procedures the application of the principles may produce accompanies each principle.

These principles are not prescriptive. They are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in. Small organisations will, for example, face different challenges to those faced by large multi-national enterprises. Accordingly, the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.

As set out in more detail below, bribery prevention procedures should be proportionate to risk. Although commercial organisations with entirely domestic operations may require bribery prevention procedures, we believe that as a general proposition they will face lower risks of bribery on their behalf by associated persons than the risks that operate in foreign markets. In any event procedures put in place to mitigate domestic bribery risks are likely to be similar if not the same as those designed to mitigate those associated with foreign markets.

A series of case studies based on hypothetical scenarios is provided at Appendix A. These are designed to illustrate the application of the principles for small, medium and large organisations.

Principle 1

Proportionate procedures

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Commentary

- 1.1 The term 'procedures' is used in this guidance to embrace both bribery prevention policies and the procedures which implement them. Policies articulate a commercial organisation's anti-bribery stance, show how it will be maintained and help to create an anti-bribery culture. They are therefore a necessary measure in the prevention of bribery, but they will not achieve that objective unless they are properly implemented. Further guidance on implementation is provided through principles 2 to 6.
- 1.2 Adequate bribery prevention procedures ought to be proportionate to the bribery risks that the organisation faces. An initial assessment of risk across the organisation is therefore a necessary first step. To a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor. Some small organisations can face quite significant risks, and will need more extensive procedures than their counterparts facing limited risks. However, small organisations are unlikely to need procedures that are as extensive as those of a large multi-national organisation. For example, a very small business may be able to rely heavily on periodic oral briefings to communicate its policies while a large one may need to rely on extensive written communication.
- 1.3 The level of risk that organisations face will also vary with the type and nature of the persons associated with it. For example, a commercial organisation that properly assesses that there is no risk of bribery on the part of one of its associated persons will accordingly require nothing in the way of procedures to prevent bribery in the context of that relationship. By the same token the bribery risks associated with reliance on a third party agent representing a commercial organisation in negotiations with foreign public officials may be assessed as significant and accordingly require much more in the way of procedures to mitigate those risks. Organisations are likely to need to select procedures to cover a broad range of risks but any consideration by a court in an individual case of the adequacy of procedures is likely necessarily to focus on those procedures designed to prevent bribery on the part of the associated person committing the offence in question.
- 1.4 Bribery prevention procedures may be stand alone or form part of wider guidance, for example on recruitment or on managing a tender process in public procurement. Whatever the chosen model, the procedures should seek to ensure there is a practical and realistic means of achieving the organisation's stated anti-bribery policy objectives across all of the organisation's functions.

- 1.5 The Government recognises that applying these procedures retrospectively to existing associated persons is more difficult, but this should be done over time, adopting a risk-based approach and with due allowance for what is practicable and the level of control over existing arrangements.

Procedures

- 1.6 Commercial organisations' bribery prevention policies are likely to include certain common elements. As an indicative and not exhaustive list, an organisation may wish to cover in its policies:

- its commitment to bribery prevention (see Principle 2)
- its general approach to mitigation of specific bribery risks, such as those arising from the conduct of intermediaries and agents, or those associated with hospitality and promotional expenditure, facilitation payments or political and charitable donations or contributions; (see Principle 3 on risk assessment)
- an overview of its strategy to implement its bribery prevention policies.

- 1.7 The procedures put in place to implement an organisation's bribery prevention policies should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons. The following is an indicative and not exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced:

- The involvement of the organisation's top-level management (see Principle 2).
- Risk assessment procedures (see Principle 3).
- Due diligence of existing or prospective associated persons (see Principle 4).
- The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments.
- Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration.
- Governance of business relationships with all other associated persons including pre and post contractual agreements.
- Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure.
- Transparency of transactions and disclosure of information.
- Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.
- Enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti-bribery rules.
- The reporting of bribery including 'speak up' or 'whistle blowing' procedures.
- The detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation.
- The communication of the organisation's policies and procedures, and training in their application (see Principle 5).
- The monitoring, review and evaluation of bribery prevention procedures (see Principle 6).

Principle 2

Top-level commitment

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Commentary

2.1 Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable. The purpose of this principle is to encourage the involvement of top-level management in the determination of bribery prevention procedures. It is also to encourage top-level involvement in any key decision making relating to bribery risk where that is appropriate for the organisation's management structure.

Procedures

2.2 Whatever the size, structure or market of a commercial organisation, top-level management commitment to bribery prevention is likely to include (1) communication of the organisation's anti-bribery stance, and (2) an appropriate degree of involvement in developing bribery prevention procedures.

Internal and external communication of the commitment to zero tolerance to bribery

2.3 This could take a variety of forms. A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might

be tailored to different audiences. The statement would probably need to be drawn to people's attention on a periodic basis and could be generally available, for example on an organisation's intranet and/or internet site. Effective formal statements that demonstrate top level commitment are likely to include:

- a commitment to carry out business fairly, honestly and openly
- a commitment to zero tolerance towards bribery
- the consequences of breaching the policy for employees and managers
- for other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a 'best practice' objective)
- articulation of the business benefits of rejecting bribery (reputational, customer and business partner confidence)
- reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing)
- key individuals and departments involved in the development and implementation of the organisation's bribery prevention procedures
- reference to the organisation's involvement in any collective action against bribery in, for example, the same business sector.

Top-level involvement in bribery prevention

2.4 Effective leadership in bribery prevention will take a variety of forms appropriate for and proportionate to the organisation's size, management structure and circumstances. In smaller organisations a proportionate response may require top-level managers to be personally involved in initiating, developing and implementing bribery prevention procedures and bribery critical decision making. In a large multi-national organisation the board should be responsible for setting bribery prevention policies, tasking management to design, operate and monitor bribery prevention procedures, and keeping these policies and procedures under regular review. But whatever the appropriate model, top-level engagement is likely to reflect the following elements:

- Selection and training of senior managers to lead anti-bribery work where appropriate.
- Leadership on key measures such as a code of conduct.
- Endorsement of all bribery prevention related publications.
- Leadership in awareness raising and encouraging transparent dialogue throughout the organisation so as to seek to ensure effective dissemination of anti-bribery policies and procedures to employees, subsidiaries, and associated persons, etc.
- Engagement with relevant associated persons and external bodies, such as sectoral organisations and the media, to help articulate the organisation's policies.
- Specific involvement in high profile and critical decision making where appropriate.
- Assurance of risk assessment.
- General oversight of breaches of procedures and the provision of feedback to the board or equivalent, where appropriate, on levels of compliance.

Principle 3

Risk Assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Commentary

- 3.1 For many commercial organisations this principle will manifest itself as part of a more general risk assessment carried out in relation to business objectives. For others, its application may produce a more specific stand alone bribery risk assessment. The purpose of this principle is to promote the adoption of risk assessment procedures that are proportionate to the organisation's size and structure and to the nature, scale and location of its activities. But whatever approach is adopted the fuller the understanding of the bribery risks an organisation faces the more effective its efforts to prevent bribery are likely to be.
- 3.2 Some aspects of risk assessment involve procedures that fall within the generally accepted meaning of the term 'due diligence'. The role of due diligence as a risk mitigation tool is separately dealt with under Principle 4.

Procedures

- 3.3 Risk assessment procedures that enable the commercial organisation accurately to identify and prioritise the risks it faces will, whatever its size, activities, customers or markets, usually reflect a few basic characteristics. These are:
- Oversight of the risk assessment by top level management.
 - Appropriate resourcing – this should reflect the scale of the organisation's business and the need to identify and prioritise all relevant risks.
 - Identification of the internal and external information sources that will enable risk to be assessed and reviewed.
 - Due diligence enquiries (see Principle 4).
 - Accurate and appropriate documentation of the risk assessment and its conclusions.
- 3.4 As a commercial organisation's business evolves, so will the bribery risks it faces and hence so should its risk assessment. For example, the risk assessment that applies to a commercial organisation's domestic operations might not apply when it enters a new market in a part of the world in which it has not done business before (see Principle 6 for more on this).

Commonly encountered risks

3.5 Commonly encountered external risks can be categorised into five broad groups – country, sectoral, transaction, business opportunity and business partnership:

- **Country risk:** this is evidenced by perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation and a failure of the foreign government, media, local business community and civil society effectively to promote transparent procurement and investment policies.
- **Sectoral risk:** some sectors are higher risk than others. Higher risk sectors include the extractive industries and the large scale infrastructure sector.
- **Transaction risk:** certain types of transaction give rise to higher risks, for example, charitable or political contributions, licences and permits, and transactions relating to public procurement.
- **Business opportunity risk:** such risks might arise in high value projects or with projects involving many contractors or intermediaries; or with projects which are not apparently undertaken at market prices, or which do not have a clear legitimate objective.
- **Business partnership risk:** certain relationships may involve higher risk, for example, the use of intermediaries in transactions with foreign public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.

3.6 An assessment of external bribery risks is intended to help decide how those risks can be mitigated by procedures governing the relevant operations or business relationships; but a bribery risk assessment should also examine the extent to which internal structures or procedures may themselves add to the level of risk. Commonly encountered internal factors may include:

- deficiencies in employee training, skills and knowledge
- bonus culture that rewards excessive risk taking
- lack of clarity in the organisation's policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
- lack of clear financial controls
- lack of a clear anti-bribery message from the top-level management.

Principle 4

Due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Commentary

4.1 Due diligence is firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework. Due diligence procedures are both a form of bribery risk assessment (see Principle 3) and a means of mitigating a risk. By way of illustration, a commercial organisation may identify risks that as a general proposition attach to doing business in reliance upon local third party intermediaries. Due diligence of specific prospective third party intermediaries could significantly mitigate these risks. The significance of the role of due diligence in bribery risk mitigation justifies its inclusion here as a Principle in its own right.

4.2 The purpose of this Principle is to encourage commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.

Procedures

4.3 As this guidance emphasises throughout, due diligence procedures should be proportionate to the identified risk. They can also be undertaken internally

or by external consultants. A person 'associated' with a commercial organisation as set out at section 8 of the Bribery Act includes any person performing services for a commercial organisation. As explained at paragraphs 37 to 43 in the section 'Government Policy and section 7', the scope of this definition is broad and can embrace a wide range of business relationships. But the appropriate level of due diligence to prevent bribery will vary enormously depending on the risks arising from the particular relationship. So, for example, the appropriate level of due diligence required by a commercial organisation when contracting for the performance of information technology services may be low, to reflect low risks of bribery on its behalf. In contrast, an organisation that is selecting an intermediary to assist in establishing a business in foreign markets will typically require a much higher level of due diligence to mitigate the risks of bribery on its behalf.

4.4 Organisations will need to take considerable care in entering into certain business relationships, due to the particular circumstances in which the relationships come into existence. An example is where local law or convention dictates the use of local agents in circumstances where it may be difficult for a commercial organisation to extricate itself from a business relationship once established. The importance of thorough due diligence and risk mitigation prior to any commitment are paramount in such circumstances. Another relationship

that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another.

4.5 'Due diligence' for the purposes of Principle 4 should be conducted using a risk-based approach (as referred to on page 27). For example, in lower risk situations, commercial organisations may decide that there is no need to conduct much in the way of due diligence. In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations, or general research on proposed associated persons. Appraisal and continued monitoring of recruited or engaged 'associated' persons may also be required, proportionate to the identified risks. Generally, more information is likely to be required from prospective and existing associated persons that are incorporated (e.g. companies) than from individuals. This is because on a basic level more individuals are likely to be involved in the performance of services by a company and the exact nature of the roles of such individuals or other connected bodies may not be immediately obvious. Accordingly, due diligence may involve direct requests for details on the background, expertise and business experience, of relevant individuals. This information can then be verified through research and the following up of references, etc.

4.6 A commercial organisation's employees are presumed to be persons 'associated' with the organisation for the purposes of the Bribery Act. The organisation may wish, therefore, to incorporate in its recruitment and human resources procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees which is proportionate to the risk associated with the post in question. Due diligence is unlikely to be needed in relation to lower risk posts.

Principle 5

Communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Commentary

5.1 Communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation's procedures and to the organisation's commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge and skills needed to employ the organisation's procedures and deal with any bribery related problems or issues that may arise.

Procedures

Communication

5.2 The content, language and tone of communications for internal consumption may vary from that for external use in response to the different relationship the audience has with the commercial organisation. The nature of communication will vary enormously between commercial organisations in accordance with the different bribery risks faced, the size of the organisation and the scale and nature of its activities.

5.3 Internal communications should convey the 'tone from the top' but are also likely to focus on the implementation of the organisation's policies and procedures and the implications for employees. Such communication includes policies on particular areas such as decision making, financial control, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations and penalties for breach of rules and the articulation of management roles at different levels. Another important aspect of internal communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice. These so called 'speak up' procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.

5.4 External communication of bribery prevention policies through a statement or codes of conduct, for example, can reassure existing and prospective associated persons and can act as a deterrent to those intending to bribe on a commercial organisation's behalf. Such communications can include information on bribery prevention procedures and controls, sanctions, results of internal

surveys, rules governing recruitment, procurement and tendering. A commercial organisation may consider it proportionate and appropriate to communicate its anti-bribery policies and commitment to them to a wider audience, such as other organisations in its sector and to sectoral organisations that would fall outside the scope of the range of its associated persons, or to the general public.

Training

5.5 Like all procedures training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk. Training may take the form of education and awareness raising about the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed.

5.6 General training could be mandatory for new employees or for agents (on a weighted risk basis) as part of an induction process, but it should also be tailored to the specific risks associated with specific posts. Consideration should also be given to tailoring training to the special needs of those involved in any 'speak up' procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. Effective training is continuous, and regularly monitored and evaluated.

5.7 It may be appropriate to require associated persons to undergo training. This will be particularly relevant for high risk associated persons. In any event, organisations may wish to encourage associated persons to adopt bribery prevention training.

5.8 Nowadays there are many different training formats available in addition to the traditional classroom or seminar formats, such as e-learning and other web-based tools. But whatever the format, the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them.

Principle 6

Monitoring and review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Commentary

6.1 The bribery risks that a commercial organisation faces may change over time, as may the nature and scale of its activities, so the procedures required to mitigate those risks are also likely to change. Commercial organisations will therefore wish to consider how to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary. In addition to regular monitoring, an organisation might want to review its processes in response to other stimuli, for example governmental changes in countries in which they operate, an incident of bribery or negative press reports.

Procedures

6.2 There is a wide range of internal and external review mechanisms which commercial organisations could consider using. Systems set up to deter, detect and investigate bribery, and monitor the ethical quality of transactions, such as internal financial control mechanisms, will help provide insight into the effectiveness of procedures designed to prevent bribery. Staff surveys, questionnaires and feedback from training can also provide an important source of information on effectiveness and a means by which employees and other associated persons can inform continuing improvement of anti-bribery policies.

6.3 Organisations could also consider formal periodic reviews and reports for top-level management. Organisations could also draw on information on other organisations' practices, for example relevant trade bodies or regulators might highlight examples of good or bad practice in their publications.

6.4 In addition, organisations might wish to consider seeking some form of external verification or assurance of the effectiveness of anti-bribery procedures. Some organisations may be able to apply for certified compliance with one of the independently-verified anti-bribery standards maintained by industrial sector associations or multilateral bodies. However, such certification may not necessarily mean that a commercial organisation's bribery prevention procedures are 'adequate' for all purposes where an offence under section 7 of the Bribery Act could be charged.

Appendix A

Bribery Act 2010 case studies

Introduction

These case studies (which do not form part of the guidance issued under section 9 of the Act) look at how the application of the six principles might relate to a number of hypothetical scenarios commercial organisations may encounter. The Government believes that this illustrative context can assist commercial organisations in deciding what procedures to prevent persons associated with them from bribing on their behalf might be most suitable to their needs.

These case studies are illustrative. They are intended to complement the guidance. They do not replace or supersede any of the principles. The considerations set out below merely show in some circumstances how the principles can be applied, and should not be seen as standard setting, establishing any presumption, reflecting a minimum baseline of action or being appropriate for all organisations whatever their size. Accordingly, the considerations set out below are not:

- comprehensive of all considerations in all circumstances
- conclusive of adequate procedures
- conclusive of inadequate procedures if not all of the considerations are considered and/or applied.

All but one of these case studies focus on bribery risks associated with foreign markets. This is because bribery risks associated with foreign markets are generally higher than those associated with domestic markets. Accordingly case studies focussing on foreign markets are better suited as vehicles for the illustration of bribery prevention procedures.

Case study 1 – Principle 1

Facilitation payments

A medium sized company ('A') has acquired a new customer in a foreign country ('B') where it operates through its agent company ('C'). Its bribery risk assessment has identified facilitation payments as a significant problem in securing reliable importation into B and transport to its new customer's manufacturing locations. These sometimes take the form of 'inspection fees' required before B's import inspectors will issue a certificate of inspection and thereby facilitate the clearance of goods.

A could consider any or a combination of the following:

- Communication of its policy of non-payment of facilitation payments to C and its staff.
- Seeking advice on the law of B relating to certificates of inspection and fees for these to differentiate between properly payable fees and disguised requests for facilitation payments.
- Building realistic timescales into the planning of the project so that shipping, importation and delivery schedules allow where feasible for resisting and testing demands for facilitation payments.
- Requesting that C train its staff about resisting demands for facilitation payments and the relevant local law and provisions of the Bribery Act 2010.
- Proposing or including as part of any contractual arrangement certain procedures for C and its staff, which may include one or more of the following, if appropriate:
 - questioning of legitimacy of demands
 - requesting receipts and identification details of the official making the demand
- requests to consult with superior officials
- trying to avoid paying 'inspection fees' (if not properly due) in cash and directly to an official
- informing those demanding payments that compliance with the demand may mean that A (and possibly C) will commit an offence under UK law
- informing those demanding payments that it will be necessary for C to inform the UK embassy of the demand.
- Maintaining close liaison with C so as to keep abreast of any local developments that may provide solutions and encouraging C to develop its own strategies based on local knowledge.
- Use of any UK diplomatic channels or participation in locally active non-governmental organisations, so as to apply pressure on the authorities of B to take action to stop demands for facilitation payments.

Case study 2 – Principle 1

Proportionate Procedures

A small to medium sized installation company is operating entirely within the United Kingdom domestic market. It relies to varying degrees on independent consultants to facilitate business opportunities and to assist in the preparation of both pre-qualification submissions and formal tenders in seeking new business. Such consultants work on an arms-length-fee-plus-expenses basis. They are engaged by sales staff and selected because of their extensive network of business contacts and the specialist information they have. The reason for engaging them is to enhance the company's prospects of being included in tender and pre-qualification lists and of being selected as main or sub-contractors. The reliance on consultants and, in particular, difficulties in monitoring expenditure which sometimes involves cash transactions has been identified by the company as a source of medium to high risk of bribery being undertaken on the company's behalf.

In seeking to mitigate these risks the company could consider any or a combination of the following:

- Communication of a policy statement committing it to transparency and zero tolerance of bribery in pursuit of its business objectives. The statement could be communicated to the company's employees, known consultants and external contacts, such as sectoral bodies and local chambers of commerce.
- Firming up its due diligence before engaging consultants. This could include making enquiries through business contacts, local chambers of commerce, business associations, or internet searches and following up any business references and financial statements.
- Considering firming up the terms of the consultants' contracts so that they reflect a commitment to zero tolerance of bribery, set clear criteria for provision of bona fide hospitality on the company's behalf and define in detail the basis of remuneration, including expenses.
- Consider making consultants' contracts subject to periodic review and renewal.
- Drawing up key points guidance on preventing bribery for its sales staff and all other staff involved in bidding for business and when engaging consultants
- Periodically emphasising these policies and procedures at meetings – for example, this might form a standing item on meeting agendas every few months.
- Providing a confidential means for staff and external business contacts to air any suspicions of the use of bribery on the company's behalf.

Case study 3 – Principles 1 and 6

Joint venture

A medium sized company ('D') is interested in significant foreign mineral deposits. D proposes to enter into a joint venture with a local mining company ('E'). It is proposed that D and E would have an equal holding in the joint venture company ('DE'). D identifies the necessary interaction between DE and local public officials as a source of significant risks of bribery.

- Binding commitments by D and E to comply with all applicable bribery laws in relation to the operation of DE, with a breach by either D or E being a breach of the agreement between them. Where such a breach is a material breach this could lead to termination or other similarly significant consequences.

D could consider negotiating for the inclusion of any or a combination of the following bribery prevention procedures into the agreement setting up DE:

- Parity of representation on the board of DE.
- That DE put in place measures designed to ensure compliance with all applicable bribery and corruption laws. These measures might cover such issues as:
 - gifts and hospitality
 - agreed decision making rules
 - procurement
 - engagement of third parties, including due diligence requirements
 - conduct of relations with public officials
 - training for staff in high risk positions
 - record keeping and accounting.
- The establishment of an audit committee with at least one representative of each of D and E that has the power to view accounts and certain expenditure and prepare regular reports.

Case study 4 – Principles 1 and 5

Hospitality and Promotional expenditure

A firm of engineers ('F') maintains a programme of annual events providing entertainment, quality dining and attendance at various sporting occasions, as an expression of appreciation of its long association with its business partners. Private bodies and individuals are happy to meet their own travel and accommodation costs associated with attending these events. The costs of the travel and accommodation of any foreign public officials attending are, however, met by F.

F could consider any or a combination of the following:

- Conducting a bribery risk assessment relating to its dealings with business partners and foreign public officials and in particular the provision of hospitality and promotional expenditure.
- Publication of a policy statement committing it to transparent, proportionate, reasonable and bona fide hospitality and promotional expenditure.
- The issue of internal guidance on procedures that apply to the provision of hospitality and/or promotional expenditure providing:
 - that any procedures are designed to seek to ensure transparency and conformity with any relevant laws and codes applying to F
 - that any procedures are designed to seek to ensure transparency and conformity with the relevant laws and codes applying to foreign public officials
 - that any hospitality should reflect a desire to cement good relations and show appreciation, and that promotional expenditure should seek to improve the image of F as a commercial organisation, to better present its products or services, or establish cordial relations
- that the recipient should not be given the impression that they are under an obligation to confer any business advantage or that the recipient's independence will be affected
- criteria to be applied when deciding the appropriate levels of hospitality for both private and public business partners, clients, suppliers and foreign public officials and the type of hospitality that is appropriate in different sets of circumstances
- that provision of hospitality for public officials be cleared with the relevant public body so that it is clear who and what the hospitality is for
- for expenditure over certain limits, approval by an appropriately senior level of management may be a relevant consideration
- accounting (book-keeping, orders, invoices, delivery notes, etc).
- Regular monitoring, review and evaluation of internal procedures and compliance with them.
- Appropriate training and supervision provided to staff.

Case study 5 – Principle 3

Assessing risks

A small specialist manufacturer is seeking to expand its business in one of several emerging markets, all of which offer comparable opportunities. It has no specialist risk assessment expertise and is unsure how to go about assessing the risks of entering a new market.

The small manufacturer could consider any or a combination of the following:

- Incorporating an assessment of bribery risk into research to identify the optimum market for expansion.
- Seeking advice from UK diplomatic services and government organisations such as UK Trade and Investment.
- Consulting general country assessments undertaken by local chambers of commerce, relevant non-governmental organisations and sectoral organisations.
- Seeking advice from industry representatives.
- Following up any general or specialist advice with further independent research.

Case study 6 – Principle 4

Due diligence of agents

A medium to large sized manufacturer of specialist equipment ('G') has an opportunity to enter an emerging market in a foreign country ('H') by way of a government contract to supply equipment to the state. Local convention requires any foreign commercial organisations to operate through a local agent. G is concerned to appoint a reputable agent and ensure that the risk of bribery being used to develop its business in the market is minimised.

G could consider any or a combination of the following:

- Compiling a suitable questionnaire for potential agents requiring for example, details of ownership if not an individual; CVs and references for those involved in performing the proposed service; details of any directorships held, existing partnerships and third party relationships and any relevant judicial or regulatory findings.
- Having a clear statement of the precise nature of the services offered, costs, commissions, fees and the preferred means of remuneration.
- Undertaking research, including internet searches, of the prospective agents and, if a corporate body, of every person identified as having a degree of control over its affairs.
- Making enquiries with the relevant authorities in H to verify the information received in response to the questionnaire.
- Following up references and clarifying any matters arising from the questionnaire or any other information received with the agents, arranging face to face meetings where appropriate.
- Requesting sight or evidence of any potential agent's own anti-bribery policies and, where a corporate body, reporting procedures and records.
- Being alert to key commercial questions such as:
 - Is the agent really required?
 - Does the agent have the required expertise?
 - Are they interacting with or closely connected to public officials?
 - Is what you are proposing to pay reasonable and commercial?
- Renewing due diligence enquiries on a periodic basis if an agent is appointed.

Case study 7 – Principle 5

Communicating and training

A small UK manufacturer of specialist equipment ('J') has engaged an individual as a local agent and adviser ('K') to assist with winning a contract and developing its business in a foreign country where the risk of bribery is assessed as high.

J could consider any or a combination of the following:

- Making employees of J engaged in bidding for business fully aware of J's anti-bribery statement, code of conduct and, where appropriate, that details of its anti-bribery policies are included in its tender.
- Including suitable contractual terms on bribery prevention measures in the agreement between J and K, for example: requiring K not to offer or pay bribes; giving J the ability to audit K's activities and expenditure; requiring K to report any requests for bribes by officials to J; and, in the event of suspicion arising as to K's activities, giving J the right to terminate the arrangement.
- Making employees of J fully aware of policies and procedures applying to relevant issues such as hospitality and facilitation payments, including all financial control mechanisms, sanctions for any breaches of the rules and instructions on how to report any suspicious conduct.
- Supplementing the information, where appropriate, with specially prepared training to J's staff involved with the foreign country.

Case study 8 – Principle 1, 4 and 6

Community benefits and charitable donations

A company ('L') exports a range of seed products to growers around the globe. Its representative travels to a foreign country ('M') to discuss with a local farming co-operative the possible supply of a new strain of wheat that is resistant to a disease which recently swept the region. In the meeting, the head of the co-operative tells L's representative about the problems which the relative unavailability of antiretroviral drugs cause locally in the face of a high HIV infection rate.

In a subsequent meeting with an official of M to discuss the approval of L's new wheat strain for import, the official suggests that L could pay for the necessary antiretroviral drugs and that this will be a very positive factor in the Government's consideration of the licence to import the new seed strain. In a further meeting, the same official states that L should donate money to a certain charity suggested by the official which, the official assures, will then take the necessary steps to purchase and distribute the drugs. L identifies this as raising potential bribery risks.

L could consider any or a combination of the following:

- Making reasonable efforts to conduct due diligence, including consultation with staff members and any business partners it has in country M in order to satisfy itself that the suggested arrangement is legitimate and in conformity with any relevant laws and codes applying to the foreign public official responsible for approving the product. It could do this by obtaining information on:
 - M's local law on community benefits as part of Government procurement and, if no particular local law, the official status and legitimacy of the suggested arrangement
 - the particular charity in question including its legal status, its reputation in M, and whether it has conducted similar projects, and
 - any connections the charity might have with the foreign official in question, if possible.
- Adopting an internal communication plan designed to ensure that any relationships with charitable organisations are conducted in a transparent and open manner and do not raise any expectation of the award of a contract or licence.
- Adopting company-wide policies and procedures about the selection of charitable projects or initiatives which are informed by appropriate risk assessments.
- Training and support for staff in implementing the relevant policies and procedures of communication which allow issues to be reported and compliance to be monitored.
- If charitable donations made in country M are routinely channelled through government officials or to others at the official's request, a red flag should be raised and L may seek to monitor the way its contributions are ultimately applied, or investigate alternative methods of donation such as official 'off-set' or 'community gain' arrangements with the government of M.
- Evaluation of its policies relating to charitable donations as part of its next periodic review of its anti-bribery procedures.

Case study 9 – Principle 4

Due diligence of agents

A small UK company ('N') relies on agents in country ('P') from which it imports local high quality perishable produce and to which it exports finished goods. The bribery risks it faces arise entirely as a result of its reliance on agents and their relationship with local businessmen and officials. N is offered a new business opportunity in P through a new agent ('Q'). An agreement with Q needs to be concluded quickly.

N could consider any or a combination of the following:

- Conducting due diligence and background checks on Q that are proportionate to the risk before engaging Q; which could include:
 - making enquiries through N's business contacts, local chambers of commerce or business associations, or internet searches
 - seeking business references and a financial statement from Q and reviewing Q's CV to ensure Q has suitable experience.
- Considering how best to structure the relationship with Q, including how Q should be remunerated for its services and how to seek to ensure Q's compliance with relevant laws and codes applying to foreign public officials.
- Making the contract with Q renewable annually or periodically.
- Travelling to P periodically to review the agency situation.

Case study 10 – Principle 2

Top level commitment

A small to medium sized component manufacturer is seeking contracts in markets abroad where there is a risk of bribery. As part of its preparation, a senior manager has devoted some time to participation in the development of a sector wide anti-bribery initiative.

The top level management of the manufacturer could consider any or a combination of the following:

- The making of a clear statement disseminated to its staff and key business partners of its commitment to carry out business fairly, honestly and openly, referencing its key bribery prevention procedures and its involvement in the sectoral initiative.
- Establishing a code of conduct that includes suitable anti-bribery provisions and making it accessible to staff and third parties on its website.
- Considering an internal launch of a code of conduct, with a message of commitment to it from senior management.
- Senior management emphasising among the workforce and other associated persons the importance of understanding and applying the code of conduct and the consequences of breaching the policy or contractual provisions relating to bribery prevention for employees and managers and external associated persons.
- Identifying someone of a suitable level of seniority to be a point-person for queries and issues relating to bribery risks.

Case study 11

Proportionate procedures

A small export company operates through agents in a number of different foreign countries. Having identified bribery risks associated with its reliance on agents it is considering developing proportionate and risk based bribery prevention procedures.

The company could consider any or a combination of the following:

- Using trade fairs and trade publications to communicate periodically its anti-bribery message and, where appropriate, some detail of its policies and procedures.
- Oral or written communication of its bribery prevention intentions to all of its agents.
- Adopting measures designed to address bribery on its behalf by associated persons, such as:
 - requesting relevant information and conducting background searches on the internet against information received
 - making sure references are in order and followed up
 - including anti-bribery commitments in any contract renewal
 - using existing internal arrangements such as periodic staff meetings to raise awareness of 'red flags' as regards agents' conduct, for example evasive answers to straightforward requests for information, overly elaborate payment arrangements involving further third parties, ad hoc or unusual requests for expense reimbursement not properly covered by accounting procedures.
- Making use of any external sources of information (UKTI, sectoral organisations) on bribery risks in particular markets and using the data to inform relationships with particular agents.
- Making sure staff have a confidential means to raise any concerns about bribery.

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Ministry of
JUSTICE

THE BRIBERY ACT 2010

Quick start guide

The Bribery Act 2010 modernises the law on bribery. It comes into force on 1 July 2011. This document offers a quick guide to the things you need to know to prepare your business for implementation.

The Government has also produced detailed guidance about the Act and the procedures that organisations can put in place to prevent bribery, as well as a set of illustrative case studies which you may find of further assistance (available here: www.justice.gov.uk/guidance/bribery.htm).

Key points

- This Act deals only with bribery – not other forms of white collar crime
- Your organisation may be liable for failing to prevent a person from bribing on your behalf but only if that person performs services for you in business. It is very unlikely therefore that you will be liable for the actions of someone who simply supplies goods to you
- There is a full defence if you can show you had adequate procedures in place to prevent bribery. But you do not need to put bribery prevention procedures in place if there is no risk of bribery on your behalf
- Hospitality is not prohibited by the Act
- Facilitation payments are bribes under the Act just as they are under the old law

What is covered by the Act?

The Act is concerned with bribery. Very generally, this is defined as giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so. So this could cover seeking to influence a decision-maker by giving some kind of extra benefit to that decision maker rather than by what can legitimately be offered as part of a tender process.

The Act is not concerned with fraud, theft, books and record offences, Companies Act offences, money laundering offences or competition law. Further detail about what is covered by the Act can be found in 'The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)' – www.justice.gov.uk/guidance/bribery.htm

When could my organisation be liable?

Your organisation could be liable if a very senior person in the organisation (for example, a managing director) commits a bribery offence. This person's activities would then be attributed to the organisation.

Your organisation could also be liable where someone who performs services for it – like an employee or agent – pays a bribe specifically to get business, keep business, or gain a business advantage for your organisation. But you will have a full defence for this particular offence, and can avoid prosecution, if you can show you had adequate procedures in place to prevent bribery (see page 4, 'What do I need to do to rely on the defence?' for further information about this defence).

It is important to note that no one can be prosecuted in England and Wales unless one of the two most senior prosecutors (the Director of Public Prosecutions or the Director of the Serious Fraud Office) is personally satisfied that a conviction is more likely than not, and that prosecution is in the public interest.

What do I need to do to rely on the defence?

You will not commit the offence of failing to prevent bribery if you can show that your organisation had 'adequate procedures' in place to prevent bribery. What counts as adequate will depend on the bribery risks you face ('How do I assess risk?', see page 5) and the nature, size and complexity of your business. So, a small or medium sized business which faces minimal bribery risks will require relatively minimal procedures to mitigate those risks. The following six principles will help you decide what, if anything, you need to do differently:

- 1 Proportionality:** The action you take should be proportionate to the risks you face and to the size of your business. So you might need to do more to prevent bribery if your organisation is large, or if you are operating in an overseas market where bribery is known to be commonplace, compared to what you might do if your organisation is small, or is operating in markets where bribery is not prevalent.
- 2 Top Level Commitment:** Those at the top of an organisation are in the best position to ensure their organisation conducts business without bribery. If you are running a business, you will want to show that you have been active in making sure that your staff (including any middle management) and the key people who do business with you and for you understand that you do not tolerate bribery. You may also want to get personally involved in taking the necessary proportionate action to address any bribery risks.
- 3 Risk Assessment:** Think about the bribery risks you might face. For example, you might want to do some research into the markets you operate in and the people you deal with, especially if you are entering into new business arrangements and new markets overseas ('How do I assess risk', see page 5).
- 4 Due Diligence:** Knowing exactly who you are dealing with can help to protect your organisation from taking on people who might be less than trustworthy. You may therefore want to ask a few questions and do a few checks before engaging others to represent you in business dealings.
- 5 Communication:** Communicating your policies and procedures to staff and to others who will perform services for you enhances awareness and helps to deter bribery by making clear the basis on which your organisation does business. You may, therefore, want to think about whether additional training or awareness raising would be appropriate or proportionate to the size and type of your business.
- 6 Monitoring and Review:** The risks you face and the effectiveness of your procedures may change over time. You may want, therefore, to keep an eye on the anti-bribery steps you have taken so that they keep pace with any changes in the bribery risks you face when, for example, you enter new markets.

How do I assess risk?

Many organisations will face little or no risk of bribery, especially if their business is undertaken primarily in the UK. If you operate overseas, the risks may be higher. Factors such as the particular country you want to do business in, the sector which you are dealing in, the value and duration of your project, the kind of business you want to do and the people you engage to do your business will all be relevant.

There are simple practical steps you can take to assess and mitigate risks. These are mostly obvious, and are similar to (or even the same as) those you probably take anyway (for example, to make sure you can trust the people you work with). For example, you might use simple internet searches to find out about the levels of corruption or bribery in the particular country you propose to do business in. You could consult UK diplomatic posts or UK Trade and Investment for advice. You could also consult business representative bodies here and in the relevant country for up to date local knowledge. We set out some contacts below including a Government-sponsored Business Anti-Corruption Portal aimed at small and medium sized businesses involved in overseas trade.

Do I need complex procedures in place even if there is no risk?

No. If there is very little risk of bribery being committed on behalf of your organisation then you may not feel the need for any procedures to prevent bribery. If, having assessed the position, there is a risk of bribery then, if you want to rely on the defence, the procedures you adopt should be proportionate to that risk.

There is no need for extensive written documentation or policies. You may already have proportionate procedures through existing controls over company expenditure, accounting and commercial or agent contracts for example. In larger organisations it will be important to ensure that management in charge of the day to day business is fully aware and committed to the objective of preventing bribery. In micro-businesses it may be enough for simple oral reminders to key staff about the organisation's anti-bribery policies.

In addition, although parties to a contract are of course free to agree whatever terms are appropriate, the Act does not require you to comply with the anti-bribery procedures of your business partners in order to be able to rely on the defence.

Do I need to do due diligence on all my suppliers?

You only have to think about doing due diligence on persons who will actually perform services for you, or on your behalf. Someone who simply supplies goods to you is unlikely to do that. It is very unlikely, therefore, that you will need to consider doing due diligence on persons further down a supply chain.

Where you decide to undertake due diligence, how much you need to do will depend on your risk assessment. If you assess the risk as low then all you may need to do is satisfy yourself that people performing services for you (for example, an agent) are genuine and someone you can trust to do your business without bribing. You could do this by making enquiries with business contacts, local chambers of commerce or business associations or via the internet for example.

Where you think the risks are higher, then you may need to do more. You might ask your agent for a CV, financial statements or accounts, and other references. You might then follow those up to ensure they are genuine. The aim is to satisfy yourself that the person that is to represent your organisation can be trusted not to use bribery on your behalf, but this does not necessarily require sophisticated and costly techniques. Personal contact, allowing you to assess the person for yourself, can be very helpful.

Do I need to employ consultants or lawyers to provide advice on the risks I face, the procedures I adopt, or the level of due diligence I should undertake?

No. There is no duty to engage lawyers or consultants in helping you assess what risks you face, what procedures you might adopt or what sort of due diligence you undertake - especially where you consider the risks to be low or non-existent. The Act does not require external verification of any bribery prevention measures you have put in place.

Can I provide hospitality, promotional or other business expenditure under the Act?

Yes. The Government does not intend that genuine hospitality or similar business expenditure that is reasonable and proportionate be caught by the Act, so you can continue to provide bona fide hospitality, promotional or other business expenditure.

In any case where it was thought the hospitality was really a cover for bribing someone, the authorities would look at such things as the level of hospitality offered, the way in which it was provided and the level of influence the person receiving it had on the business decision in question. But, as a general proposition, hospitality or promotional expenditure which is proportionate and reasonable given the sort of business you do is very unlikely to engage the Act. So you can continue to provide tickets to sporting events, take clients to dinner, offer gifts to clients as a reflection of your good relations, or pay for reasonable travel expenses in order to demonstrate your goods or services to clients if that is reasonable and proportionate for your business.

What about facilitation payments?

Facilitation payments, which are payments to induce officials to perform routine functions they are otherwise obligated to perform, are bribes. There was no exemption for such payments under the previous law nor is there under the Bribery Act.

As was the case under the old law, prosecutors will carefully consider all the facts and surrounding circumstances of cases which come to their attention to assess whether a payment amounts to a bribe and, if so, whether a prosecution is in the public interest.

You can continue to pay for legally required administrative fees or fast-track services. These are not facilitation payments.

Further information

www.justice.gov.uk

www.bis.gov.uk

www.businesslink.gov.uk

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