

Autumn returns and with it a further set of considerations. Many charities have taken the position that the new Bribery Act has little by way of implication for them; we consider how accurate that view is. Governance continues to be at the forefront of Regulators' minds as an investigation into governance arrangements leads to a prosecution for embezzlement.



## Bribery Act 2010

The Bribery Act 2010 came into force on 1 July 2011 following completion of a comprehensive post-election review and the publication of statutory guidance by the Ministry of Justice (MOJ). The Scottish Government has confirmed that the MOJ guidance applies in Scotland and that separate guidance will not be issued.

Many charities have taken the view that the legislation applies only to enterprises trading for profit and or operating in international markets; these charities' interpretation of the phrase "commercial organisations" used in the Act is at odds with the MOJ view.

The statutory guidance is quite clear that, any incorporated body which engages in "business", regardless of the purpose for which profit is made, are caught by the provisions of the Act. Charities are explicitly referred to in the Statutory Guidance as being within the scope of the Act.

Business has no legal definition. It is implicit in the guidance that entering into any form of contract constitutes trading, be that for the receipt of goods and services, the supply of goods and services, employment, etc. constitutes conducting business.

One may argue that charities do not generate profit.

Whilst literally true, charity surpluses, a profit by any other name, are not subject to tax only by virtue of the exemptions granted under s505 of the Income and Corporation Taxes Act 1988. The statutory guidance considers charity surpluses to be profit, as already noted - regardless of the purpose for which that profit is made.

Some organisations have argued that the Act is relevant only for those charities with overseas operations. Whilst overseas operations do represent an area of risk for certain charities, offences under the Act are not restricted to that; three of the four offences under the act relate to domestic arrangements.

Four offences were created by the Act, these are:

- Offering or giving a bribe;
- Requesting or receiving a bribe;
- Bribery of a foreign official; and
- Failure by an organisation to prevent bribery.

Failure to prevent bribery will result in a criminal conviction for those responsible for the governance of the organisation, i.e. Trustees, resulting in up to ten years imprisonment and unlimited fines. There is only one defence under the Act – Proportionate Procedures.

What does this mean for charities? Everything and nothing. Well governed charities will already be taking account of the spirit of the Act in their governance framework; however, even they may not have addressed the specific requirements of the Act.

For a corporate defence of Proportionate Procedures to be effective, the Ministry of Justice has set-out, in the guidance, the steps that organisations must have taken as a part of their on-going governance process. The defence is only available if you can demonstrate that you had taken proper steps; that is the burden of proof lies, not on the prosecution, but on the defence. To rely on the defence the procedures must have been in place prior to any act of bribery having occurred.

There is no concept of materiality in the Act; theoretically bribery on any scale can lead to prosecution. Most likely, only acts of bribery material to the or-

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We would be delighted to meet with you to discuss how we may help. A summary of our competencies is overleaf.

ganisation or of public interest are likely to be subject to prosecution and sanction. What is really interesting is that the first test case under the Act did not involve a corporate giant bribing to win a multi-million pound contract in the international markets; a clerk in a magistrate's court was successfully prosecuted for requesting and or accepting a £500 payment to "fix" a motoring offence. This is exactly the kind of low level offence the MOJ have previously explained to us they wished to stamp out. The clerk was sentenced to six years imprisonment. We await with interest what action will be taken against the clerk's employer.

*The first step you need to take is to consider your organisation's risk of exposure to bribery. These can arise in unexpected places...*

What steps do you need to take? The guidance indicates that there are six principles that must be embedded in your processes:

- Proportionate procedures;
- Commitment at the top;
- Risk assessment;
- Due diligence;
- Communication and training; and
- Monitoring and review.

Too many organisations simply jump in and put in place a generic "bribery" policy without regard to the bribery risks faced by the organisation or the other principles they need to consider. Clearly, you need to undertake a risk assessment before you can determine the extent of policies and procedures considered proportionate.

Risk can arise in unexpected places and requires careful appraisal by Trustees and Management. Another factor which is frequently overlooked is that these principles apply, not only to determining Proportionate Procedures but, to their implementation too.

Section 8 of the Act is the sting in the tail which extends the scope of s7 to those individuals or organisations who act on your behalf; e.g. a third-party fund-raiser, a main contractor etc.. What does this mean? Those representing the organisation must observe your Proportionate Procedures, come within your risk assessment, be trained if appropriate, be monitored within the context of your Proportionate Procedures and be subject to appropriate due diligence.

You may have put in place a "bribery" policy. Is this enough? Can you demonstrate the deliberations you went through to have open to you the defence of Proportionate Procedures? Have you an audit trail that supports the establishment and implementation of Proportionate Procedures? What follow-up or monitoring processes do you have in place? We would be happy to offer you a one-hour consultation free of charge to discuss these questions with you.

## Next issue

In the next issue we shall be exploring whistle-blowing and Board effectiveness. Tom Mitchell shall also be reflecting on his experience as a charity trustee and some of the challenges he has faced.

## Governance

- Advisory
- Reviews
- Training
- Board effectiveness
- Strategic planning

## Risk

- Advisory
- Policies and procedures
- Training
- Risk audit
- Bribery Act

## Fraud risk

**Trustee found guilty of embezzlement of £800 following a three-year investigation by the Office of the Scottish Charity Regulator.** What can you do to ensure that headline, which relates to a recent genuine case, is not repeated in your charity?

Fraud risk forms one component of any organisation's risk management procedures. There are a small number of areas which require a regular in-depth risk assessment in addition to general risk appraisal. These include, but are not limited to: fraud, bribery, health and safety, and equality. In many respects charities are more vulnerable due to the trust and public service ethos that rightly exists within them.



Charity Trustees are responsible for the prevention and detection of fraud in their charity, even where they delegate operations to a management team.

There are no reliable estimates of fraud in Scottish charities. However, in England & Wales<sup>1</sup>, fraud in charities is around 3% of all fraud and is believed to account for losses amounting to circa 2.5% of charity income. Another survey<sup>2</sup> reported that 18% of charities (England) had experienced fraud in the previous 2 years.

Whilst the levels of fraud appear low, 2.5% represents £2,500 to a charity with a £100,000 income, vital revenue in these straightened times.

There are simple steps that can be taken to minimise the risk of fraud. These include:

- Undertake a regular fraud risk assessment. Understand where losses could occur;
- Develop, implement and monitor an anti-fraud and whistle-blowing policies;
- Establish a fraud response plan; and
- Take steps to ensure that the internal control environment is robust through testing and improvement.

Often simple steps can prove to be the strongest measures: regular financial information, good skills mix of Trustees, lock up cheque books, do not sign blank cheques, proper purchasing procedures.

Please give us a call and take advantage of a free one hour consultation considering your fraud risk.

<sup>1</sup> Source: Charity Commission

<sup>2</sup> Source: PKF & Charity Finance Directors Group 2008

## Finance

- Advisory
- Director services
- Secretariat services
- Management accounting
- Independent examination