

**THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA  
ADMINISTRATION COMMITTEE – 29 SEPTEMBER 2011**

**REPORT BY THE DIRECTOR OF LEGAL SERVICES**

**THE BRIBERY ACT 2010**

Describes the requirements of the Bribery Act 2010 and proposes changes to the Constitution to enable compliance with the Act.

**FOR DECISION AND INFORMATION**

**1. INTRODUCTION**

- 1.1 The Committee is requested to recommend to Full Council changes to the Constitution to reflect requirements of the Bribery Act 2010 (the Act) and to note changes to the Council's standard contract documentation procurement policy and a new bribery policy.

**2. BACKGROUND**

- 2.1 The Act repeals the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Acts of 1905 and 1916 and makes consequential changes to a number of other Acts.
- 2.2 There are four key offences under the new Act:
- bribery of another person (section 1)
  - accepting a bribe (section 2)
  - bribing a foreign official (section 6)
  - failing to prevent bribery (section 7)
- 2.3 Section 1 makes it an offence to offer, promise or give a bribe. Section 2 makes it an offence to request, agree to receive, or accept a bribe. Section 6 of the Act creates a separate offence of bribing a foreign public official with the intention of obtaining or retaining business or an advantage in the conduct of business.
- 2.4 Section 7 introduces a new corporate offence of failing to prevent an "associated person" bribing another with the intention to obtain or retain an advantage or business for the organisation with which he is associated. This applies to both public and private organisations.

- 2.5 An associated person is a person who performs services for, or on behalf, of the organisation. This includes, but is not limited to, employees, agents and subsidiaries and in the case of a local authority would include members.
- 2.6 It is a defence to section 7 for an organisation to show that it had in place "adequate procedures" designed to prevent its employees and others from committing bribery. Whether an organisation had adequate procedures in place 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 authority to prove that it had adequate procedures in place to prevent bribery.
- 2.7 The Council already has an anti-bribery strategy in place with procedures for reporting suspicious activity. All employees are made aware of their responsibilities, there are clear lines of reporting and staff are asked to be vigilant and to report any suspicion of bribery. This is backed up with training and assurances that instances of alleged bribery will be investigated.
- 2.8 Government guidance on the Act (Department of Justice "The Bribery Act 2010", see background papers) states that:

*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... 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.*

*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.*

### **3. NEED**

- 3.1 It is recommended that changes are made to the Council's Contract Regulations, the Officer's Code of Conduct and the Council's precedent contract documentation in order to bring reflect the new Act.
- 3.1 It is not considered that the Council's guidance and rules on hospitality and gifts needs to be amended.
- 3.2 It is not considered that the Member's Code of Conduct requires amendment. The Code already includes the following principles:

- Members should serve only public interest and should never improperly confer an advantage or disadvantage on any person (Part 5A I.1).
- Members should not place themselves in situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour (Part 5A I.2).
- Members should uphold the law and, on all occasions, act in accordance with the trust that the public is entitled to place in them (Part 5A I.8).
- Must not use or attempt to use your position as a member improperly to confer on or secure for yourself or any other person, an advantage or disadvantage; (Part 5A II.6.(a)).

#### **4. OFFICERS' CODE OF CONDUCT**

- 4.1 It is proposed that the Officers' Code of Conduct in Part Five of the Constitution is amended to reflect the language of the new Act.
- 4.2 In paragraph 2.6 on whistle blowing only the minor additions in bold are suggested:

*2.06 Any concern that is raised, and which involves the possibility of fraud, **bribery, or corruption in relation to any person associated with the Council**, or poor value-for-money taking place or the Financial Procedure Rules being breached, must be referred without delay to the Head of Internal Audit. If a concern is raised with relates to any of these issues, the relevant manager or any Human Resources Manager must refer it without delay with the Head of Internal Audit*

- 4.3 In paragraph 11 on corruption the following revised text is proposed:

11.01 ~~Employees must be aware that~~ It is a serious criminal offence **for any person to request, accept or receive a bribe as a reward for improperly performing a function which they are required to carry out in good faith, impartially or from a position of trust. It is also an offence to bribe another person to induce or reward them to perform such a function improperly. A bribe is an inducement or reward offered, promised or provided to gain personal, commercial, regulatory or contractual advantage. The prevention of bribery and corruption is of utmost importance to the Council and will be prosecuted to the full extent of the law.** ~~for them corruptly to receive or give any gift, loan, fee, reward or advantage for doing, or not~~

~~doing, anything or showing favour, or disfavour, to any person in their official capacity. Any money, gift, or consideration received by an employee in public service from a person or organisation holding or seeking to obtain a contract will be deemed by the courts to have been received corruptly unless the employee proves to the contrary.~~

11.02 The Council's disciplinary code cites corrupt practices, **which includes bribery**, as an example of gross misconduct. Employees may be dismissed for even a single act of gross misconduct.

4.4 It is recommended that the disciplinary code is reviewed to ensure it reflects the new Act fully.

## **5. CONTRACT REGULATIONS**

5.1 It is proposed that Contract Regulation 2.05 in Part Four of the Constitution is amended to add the words in bold:

*(a) The Council regards any corrupt practices as completely incompatible with its public service role. All staff must comply with the rules within the 'Code of Conduct for Employees' dealing with the declaration of personal interests **and the prevention of bribery.***

*(b) If an allegation is made it is for the employee to demonstrate that any rewards have not been corruptly obtained. The Council may cancel any contract, which it finds has been corruptly let, and may seek to recover losses arising from that cancellation from the contractor.*

~~*(c) Every person who lets, manages or supervises a contract shall act in accordance with the highest standards of propriety and proper practice and ensure that adequate records are kept.*~~

*(c) Every person associated with the Council, including employees, consultants, agents and contractors performing functions on behalf of the Council, is required to ensure that no inducement or reward is offered, promised or provided to gain personal, commercial, regulatory or contractual advantage in the performance of those functions.*

*(d) Every person who lets, manages or supervises a contract shall act in accordance with the highest standards of propriety and proper practice and ensure that proportionate measures are taken in respect of persons connected with the contract to mitigate identified bribery risks. Such measures shall include keeping adequate records, monitoring and reviewing contracts, facilitating the reporting, investigation and prosecution of criminal offences.*

## **6. CONTRACT DOCUMENTATION**

6.1 The Director of Legal Services will review and amend all relevant standard Council contracts, grant agreements, service level agreements and guidance to ensure their compatibility with the new Act. Procurement guidelines on the Intranet will be amended accordingly by the Head of Strategic Procurement.

## **7. OPTIONS**

7.1 The Council has no option other than to comply with the Bribery Act. In the adoption and enforcement of anti-bribery measures the Council already maintains systems to detect and prevent bribery and a new draft bribery policy was presented to the Audit Committee for comment on 21 September 2011 and can be found at Appendix A.

## **8. Financial Implications**

8.1 As identified in this report.

## **9. Legal Implications**

9.1 As identified in this report.

## **10. HR Implications**

10.1 None.

## **11. RECOMMENDATION(S)**

11.1 It is recommended that the Administration Committee ask Full Council to make the changes to the Constitution set out in paragraphs 4 and 5 above to reflect the introduction of the Bribery Act 2010.

**MICHAEL COGHER  
DIRECTOR OF LEGAL SERVICES**

**Background papers:** Department of Justice "The Bribery Act 2010 Guidance": <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>

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### **ANTI-BRIBERY POLICY**

#### **Policy Statement - Anti Bribery**

Bribery is an inducement or reward offered, promised or provided to gain personal, commercial, regulatory or contractual advantage.

Bribery is a criminal offence. The Royal Borough of Kensington and Chelsea does not, and will not, pay bribes or offer improper inducements to anyone for any purpose, nor does the Council or will the Council, accept bribes or improper inducements.

To use a third party as a conduit to channel bribes to others is a criminal offence. The Council does not, and will not, engage indirectly in or otherwise encourage bribery.

The Council is committed to the prevention, deterrence and detection of bribery and has a zero-tolerance towards bribery. The Council aims to maintain anti-bribery compliance as ongoing "business as usual", rather than as a one-off exercise.

#### **Objective of this policy**

This policy provides a coherent and consistent approach as part of the Council's overall Anti-Fraud and Corruption framework:

[HYPERLINK TO ANTI FRAUD AND CORRUPTION POLICY](#) to enable the Council's employees to understand and implement arrangements enabling compliance. In conjunction with related policies it will also enable employees to identify and effectively report a potential breach.

The Council requires that all personnel:

- act honestly and with integrity at all times and to safeguard the Council's resources for which they are responsible
- comply with the spirit, as well as the letter, of the laws and regulations within which the Council operates, in respect of the lawful and responsible conduct of activities

#### **Scope of this policy**

This policy applies to all of the Council's activities. For partners, joint ventures and suppliers, the Council will seek to promote the adoption of policies consistent with the principles set out in this policy.

Within the Council, the responsibility to control the risk of bribery occurring resides at all levels. This policy covers all personnel, whether permanently employed, temporary agency staff, contractors, non-executives, agents, all elected Members, volunteers and consultants. The Chief Executive and Town Clerk, Executive Directors of Finance, Information System and Property, the Head of Internal Audit and the Monitoring Officer will lead on overseeing the control.

#### **The Council's commitment to action**

The Royal Borough of Kensington and Chelsea commits to:

- Setting out a clear anti-bribery policy and keeping it up to date;
- Making all employees and Members aware of their responsibilities to adhere strictly to this policy at all times;

- Providing guidance to all employees and Members as part of the ethics and governance agenda so that they can recognise and avoid the use of bribery by themselves and others;
- Encouraging employees to be vigilant and to report any suspicion of bribery;
- Rigorously investigating instances of alleged bribery and assisting police and other appropriate authorities in any resultant prosecution;
- Taking firm and vigorous action against any individual(s) involved in bribery
- Include appropriate clauses in contracts to prevent bribery.

### **Offences under the Bribery Act 2010**

There are four key offences under the Act:

- bribery of another person (section 1)
- accepting a bribe (section 2)
- bribing a foreign official (section 6)
- failing to prevent bribery (section 7)

Failure by a commercial organisation to prevent bribery is a corporate offence. For the purposes of the Bribery Act 2010, the Royal Borough of Kensington and Chelsea is a "*commercial organisation*".

### **Penalties**

An individual guilty of an offence under sections 1, 2 or 6 is liable:

- On conviction in a magistrates court, to imprisonment for a maximum term of 12 months, or to a fine not exceeding £5,000, or to both
- On conviction in a crown court, to imprisonment for a maximum term of ten years, or to an unlimited fine, or both

Organisations are liable for these fines and if guilty of an offence under section 7 are liable to an unlimited fine.

### **Defence**

An organisation will have a defense to this corporate offence if it can show that it had in place adequate procedures designed to prevent bribery by or of persons associated with the organisation. This is one of the purposes of the Council's Anti-Bribery Policy.

### **What are "adequate procedures"?**

Whether the procedures are adequate will ultimately be a matter for the courts to decide on a case-by-case basis. Adequate procedures need to be applied proportionately, based on the level of risk of bribery in the Council. It is for the Council to determine proportionate procedures in the recommended areas of six principles. The Royal Borough of Kensington and Chelsea is committed to proportional implementation of these principles.

### ***Proportionate procedures***

The Council'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 Council's activities. They are also clear, practical, accessible, effectively implemented and enforced.

### ***Top level commitment***

The Chief Executive and Town Clerk, Executive Directors, the Head of Internal Audit and the Monitoring Officer are committed to preventing bribery by persons associated with the Council. A culture exists within the Council in which bribery is never acceptable.

### ***Risk Assessment***

The Council 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. It includes financial risks but also other risks such as reputational damage.

### ***Due diligence***

The Council 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.

### ***Communication***

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

### ***Monitoring and review***

The Council monitors and reviews procedures designed to prevent bribery by persons associated with it and undertakes improvements where necessary.

## **Bribery is not tolerated**

It is unacceptable to:

- give, promise to give, or offer a payment, gift or hospitality with the expectation or hope that a business advantage will be received, or to reward a business advantage already given
- give, promise to give, or offer a payment, gift or hospitality to a government official, agent or representative to "facilitate" or expedite a routine procedure
- accept payment from a third party that you know or suspect is offered with the expectation that it will obtain a business advantage for them
- accept a gift or hospitality from a third party if you know or suspect that it is offered or provided with an expectation that a business advantage will be provided by us in return
- retaliate against or threaten a person who has refused to commit a bribery offence or who has raised concerns under this policy
- engage in activity in breach of this policy.

## **Facilitation payments**

Facilitation payments are not tolerated and are illegal. Facilitation payments are unofficial payments made to public officials in order to secure or expedite actions.

### **Gifts and hospitality**

This policy must be considered with the Employee and Members Code of Conduct in relation to Gifts and Hospitality.

HYPERLINKS TO BOTH POLICIES.

This makes it clear that the general principles in deciding whether to accept gifts or hospitality are:

1. The presumption is that you should not accept any gift or hospitality in connection with the performance of your duties as an officer of the authority.
2. Never accept a gift or hospitality as an inducement or reward for anything you do in your job.
3. You should only accept a gift or hospitality if there is a commensurate benefit to the authority.
4. Never accept a gift or hospitality if acceptance might be open to misinterpretation.
5. Never solicit a gift or hospitality.

The authority has agreed that you may accept gifts and hospitality in certain circumstances. Details of the consent regimes are given in the policy. The acceptance of a gift or hospitality is governed by the Council's Staff and Members Code of Conduct.

### **Public contracts and failure to prevent bribery**

Under the Public Contracts Regulations, a company is automatically and perpetually debarred from competing for public contracts where it is convicted of a corruption offence. Organisations that are convicted of failing to prevent bribery are not automatically barred from participating in tenders for public contracts. The Council has the discretion to exclude organisations convicted of this offence.

### **Staff responsibilities**

The prevention, detection and reporting of bribery and other forms of corruption are the responsibility of all those working for the Council or under its control. All staff are required to avoid activity that breaches this policy.

You must:

- ensure that you read, understand and comply with this policy
- raise concerns as soon as possible if you believe or suspect that a conflict with this policy has occurred, or may occur in the future.

As well as the possibility of civil and criminal prosecution, staff that breach this policy will face disciplinary action, which could result in dismissal for gross misconduct.

### **Raising a concern**

The Council is committed to ensuring that everyone has a safe, reliable, and confidential way of reporting any suspicious activity. The Council

wants each and every member of staff to know how they can raise concerns.

Everyone has a responsibility to help detect, prevent and report instances of bribery. If you have a concern regarding a suspected instance of bribery or corruption, please speak up – your information and assistance will help. The sooner you act, the sooner it can be resolved.

Please refer to the Reporting Concerns at Work (Whistleblowing) policy for the appropriate channel to raise your concern.

**HYPERLINK**

In the event that an incident of bribery, corruption, or wrongdoing is reported, the Council will act as soon as possible to evaluate the situation. The Council has clearly defined procedures for investigating fraud, misconduct and non-compliance issues and these will be followed in any investigation of this kind.

If you have any questions about these procedures, please contact:

**Moyra Mc Garvey, Head of Internal Audit on:**

**0207 361 2389 or e-mail [moyra.mcgarvey@rbkc.gov.uk](mailto:moyra.mcgarvey@rbkc.gov.uk)**