

When in Rome

The implications of the Bribery Act
for Higher Education Institutions

Talking Points

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Introduction – is bribery a risk for UK HEIs?

Bribery has traditionally not been considered a high management risk for Higher Education Institutions (HEIs).

Recent developments however mean a rethink is needed. First the level of international activity by UK HEIs, whether in the area of overseas student recruitment or campuses, has never been higher, exposing an HEI to new risks.

Secondly as a result of recent changes to UK law, the range of bribery related offences and the severity of the penalties have both increased dramatically.

This Talking Points outlines some of the new risks facing HEIs and the ways in which these may be addressed.

Key Anti-Bribery issues for HEIs to address

1 ***Conduct a comprehensive bribery risk assessment – have all bribery risks been identified and their likelihood and impact evaluated?***

The anti-bribery movement – changing attitudes

A short history

Until the Bribery Act 2010, the UK's anti-bribery legislation consisted largely of three Acts passed in the reigns of Queen Victoria, Edward VII and George V. Not surprisingly, these Acts did not address issues which might arise, for example, when several multi-nationals are bidding for a large scale construction project overseas. This failure to address modern business practices, combined with the general requirement in these Acts to show the breach of an agent-principal relationship, contributed to there being few convictions.

However, in recent years there has been a growing realisation that bribery, far from being a victimless crime, takes money from many individuals, frequently the poorest in society. “When in Rome do as the Romans do” was becoming an unacceptable mantra for winning business overseas. But in spite of this shift in attitudes, there was no significant new anti-bribery legislation passed in the UK until the current Bribery Act 2010.

Although the Bribery Act could therefore be accused of having had an overly long gestation period, it could not be said to be ‘soft’. Under the new Act, institutions can face unlimited fines if they are found guilty of bribing a foreign public official or if they

fail to prevent somebody – such as an agent or a party in a joint venture – committing bribery on their behalf. As universities increasingly diversify their income base with overseas expansion, they must be aware of the new risks.

Crime and punishment

The Bribery Act 2010 received Royal Assent on 8 April 2010, coming into force on 1 July 2011. The Act itself is not complicated. In just 13 pages it outlines four corporate offences, three of which also apply to individuals, as shown in the table below.

These offences – whether for commercial organisations or for individuals – apply regardless of where in the world the bribes are offered or received, and can apply regardless of whether the bribery is direct or indirect, for example via a connected party such as an agent or joint venture partner.

An HEI that is found to have committed any bribery offence could face unlimited fines and may come under additional scrutiny from HEFCE. Individuals could face a ten year prison sentence and, again, an unlimited fine. This includes senior officers of entities held liable through their consent to or connivance with the HEI committing any of the first three offences below.

When the likely reputational damage from a Bribery Act conviction is also taken into account, it is clear that the consequences of corrupt behaviour are now extremely severe.

	Offence 1	Offence 2	Offence 3	Offence 4
	Paying or offering a bribe	Receiving or requesting a bribe	Bribing a foreign public official	Failing to prevent bribery
Commercial organisations	✓	✓	✓	✓
Individuals	✓	✓	✓	N/A

The Bribery Act and HEIs – the impact and challenges

HEIs, as seats of educational excellence, might be tempted to think that the Bribery Act is of little relevance to them. It is certainly true that few instances of fraud, including bribery, are reported: in a sector with a turnover of over £20 billion, the total reported annually to HEFCE (as is required for all instances greater than £25,000) is on average less than £1m. Our experience in other sectors is that the true underlying amount is likely to be much greater.

The UK has now implemented some of the strictest rules around bribery and corruption in the world, meaning that what might be considered normal business practices elsewhere could constitute a breach of UK legislation. Whilst the final guidance from the Ministry of Justice¹ recognises that a common sense and proportionate approach needs to be taken, the Serious Fraud Office (SFO) has made it clear that when it comes to genuine bribery, it will act decisively:

“We shall be using all of the tools at our disposal in identifying and prosecuting cases”². Anti-bribery has become a priority, with the SFO’s reach extending globally.

Key Anti-Bribery issues for HEIs to address

2 Gain board commitment
– *is the governing body ‘walking the talk’?*

HEIs we have spoken to are currently deriving much comfort from the fact that they only employ ethical people who would never dream of accepting or soliciting a ‘backhander’. While this is in most cases probably true, the Act is far more wide ranging than this. For example in relation to the main Offences 1 and 2 (bribing and being bribed):

- **The bribe can take the form of ‘a financial or other advantage’**
– it does not have to be cash
- **Offering or requesting is enough**
– it does not have to be paid
- **The bribe does not have to go to the person being influenced** – in the US, even donations to charity (intending to influence the trustee of that charity) have been held to be bribes
- **The bribe does not have to be substantial**
– there is no materiality threshold in the Act

- It is no defence to say that the payment was customary in an overseas situation – the Act specifically says that UK standards must be applied

At least in the cases above there must be an intention on behalf of the bribe payer that the recipient behaves improperly. Under Offence 3 however, bribing a foreign public official, the rules are even tougher:

- **There is no requirement for the intention of improper behaviour** – merely seeking to influence the official in an attempt to ‘obtain or retain business, or an advantage in the conduct of business’ is sufficient for an offence to occur
- **The definition of ‘foreign public official’ includes not just members of foreign governments** – also covered are state education sector employees such as teachers, all police and customs officials and providers of permits and visas

Key Anti-Bribery issues for HEIs to address

3 Assess existing anti-bribery programmes
– *what changes are needed?*

¹ Published 30 March 2011: <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>

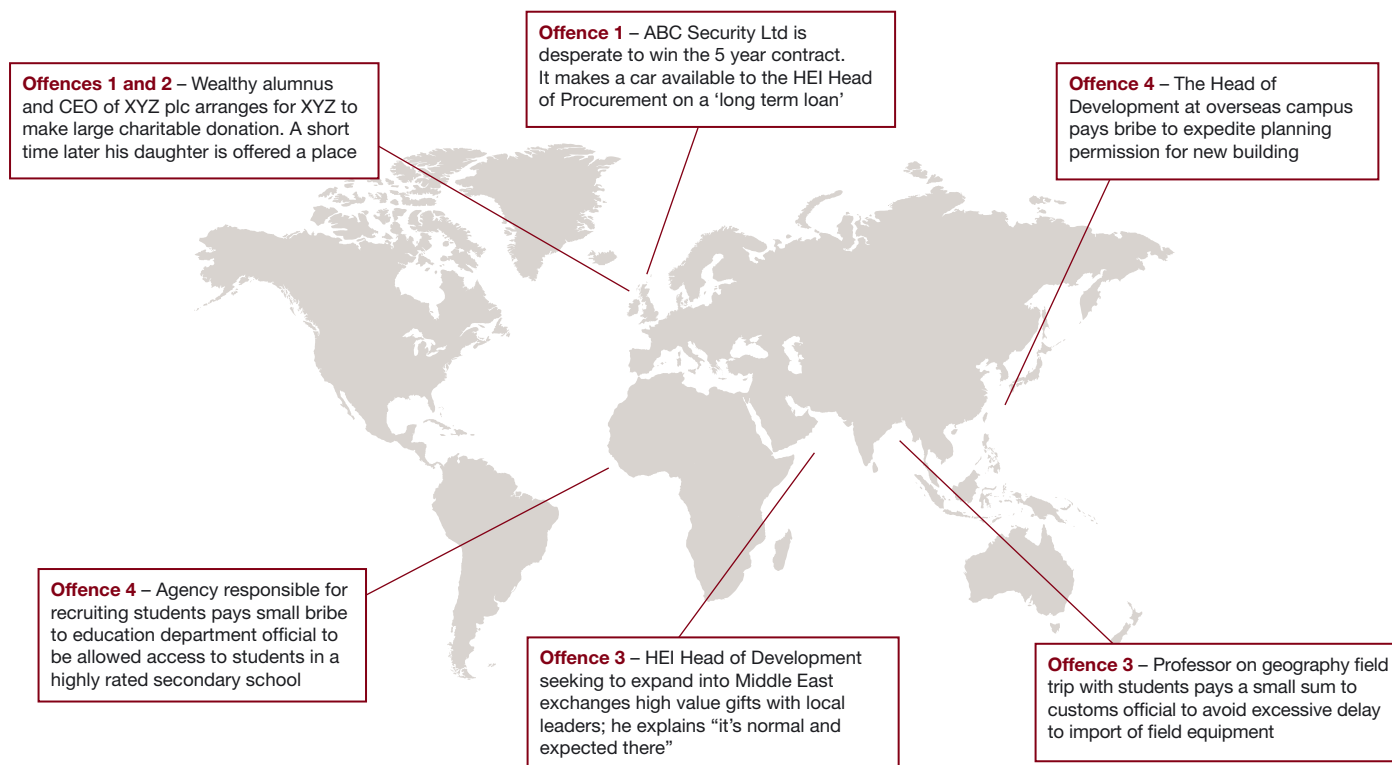
² <http://www.sfo.gov.uk/bribery--corruption/the-sfo's-response.aspx>

In case this is not onerous enough, Offence 4, failing to prevent bribery, makes UK HEIs potentially liable if an 'associated person' who 'performs services on your behalf' pays a bribe for the benefit of the HEI. This could extend to overseas agents, campuses and joint venture partners, and other service providers, such as those who assist with the immigration of overseas students.

As will by now be evident, the Bribery Act is designed to prevent not just 'cash for contracts' bribes, but bribery in its widest sense. The map below indicates a range of UK and overseas activities which, depending on the circumstances, could lead to breaches of the Act by the UK individuals or HEI involved.

Key Anti-Bribery issues for HEIs to address

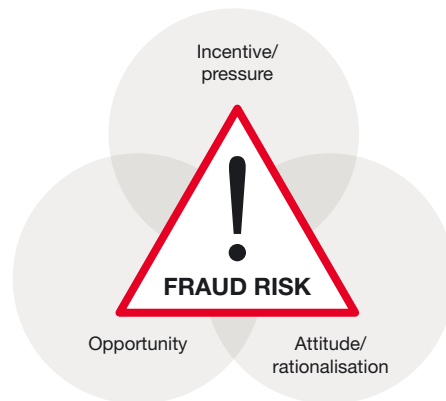
4 *Develop an anti-bribery implementation plan – in the event of an incident, how robust will it look to a regulator?*



5 **Establish governance structures**
– which individual has overall responsibility for the anti-bribery programme?
What oversight arrangements are in place?

Why should an HEI be concerned?

Fraud practitioners often point to three factors which are generally present when fraudulent behaviour, including bribery, occurs. First, perpetrators need an incentive or pressure to engage in misconduct. Secondly, there needs to be an opportunity to commit a fraudulent act, and thirdly, perpetrators are often able to rationalise or justify their actions. These may conveniently be illustrated in the Fraud Triangle below.



The current pressure on the public purse is huge. Cuts to public services are widespread, with the higher education sector being hit particularly hard. In these circumstances, the likelihood of each of these three factors occurring may be increased. By way of examples:

- In times of reduced spending, pay freezes and redundancies, employees and third parties whose financial stability is threatened may have more incentive or pressure to engage in unethical behaviour, for example soliciting or offering a bribe. Even when no bribery is suspected, it is important to undertake appropriate due diligence in relation to donations. Political parties, City Academies and, recently, HEIs have all experienced unwelcome publicity and other negative consequences as a result of failing to investigate adequately the provenance and motivation behind large donations

6 **Establish and embed the anti-bribery framework in the business of the HEI**
– is the code of conduct comprehensive and has adequate training been provided?

- Staff cuts can lead to a lack of segregation of duties or a slimmed down internal audit department, both providing increased opportunity for fraud and other forms of corrupt behaviour
- At a time when the gap between high and low earners appears to be increasing, employees and third parties may find it easier to rationalise fraud or corruption as a means of getting just desserts. Headlines about bankers' bonuses, MPs' expenses and local authority chief executives earning more than the prime minister, can all contribute to such a rationalisation, however unfounded

A recent survey by PwC³ revealed that 71% of public sector employees believe there is a greater risk of fraudulent behaviour in the current economic climate. Bribery is perhaps more likely to increase than other types of fraud for two reasons: first, suppliers and others who typically pay bribes are more desperate than ever to win contracts. Financial pressures may lead to otherwise ethical contractors using methods they would previously have eschewed. Secondly, those in procurement and others to whom bribes are traditionally offered may be more ready to rationalise the receipt of a bribe as in some way acceptable, for example in lieu of a missing pay rise.

Key Anti-Bribery issues for HEIs to address

8 *Review disciplinary and other HR procedures – what vetting is there of new employees etc?*

Key Anti-Bribery issues for HEIs to address

7 *Provide appropriate whistleblower facilities – is there a working hotline facility?*

³ http://fraudacademy.pwc.co.uk/publications/gps_global_economic_crime_survey_2009

The consequences

A breach of the Act can have a range of knock-on consequences over and above the possible jail sentences and unlimited fines mentioned before. Three potential consequences are:

- HEFCE requirements contained in the Financial Memorandum⁴, state that funds must be spent only on the provision of education and the undertaking of research, or on facilities and activities which are required for these purposes. An instance of corruption would be likely to lead to serious consideration by HEFCE of whether other funds had been spent appropriately

Key Anti-Bribery issues for HEIs to address

9 ***Manage third party compliance risks – who are your ‘associated persons’?***

- Nearly all universities have charitable status and therefore have to abide by the Charity Commission’s rules. Trustees of charities have significant legal responsibilities over the use of the charity’s funds. It seems likely that following a case of corruption the Charity Commission could raise questions about the Trustees’ stewardship of those funds. In addition, HEFCE acts as the Principal Regulator on behalf of the Charity Commission in respect of all HEIs that are Exempt Charities. All serious incidents, such as bribery and corruption, would need to be reported to HEFCE
- There has been a significant shift in attitudes to bribery such that any instance or even allegation of corruption now has the potential to be extremely damaging in terms of reputation. Competition for government funding and for students is likely to intensify and any publicity connected with an alleged instance of corruption will be at best highly undesirable. It could also threaten an HEI’s place on the UK Border Agency’s Register of Sponsors, making it more difficult to sponsor migrant students or employ migrant workers

The biggest challenge facing HEIs is that the new law is coming into force at a time when resources are extremely constrained. Departments which would normally play a role in an implementation process (finance, internal audit, legal, HR/training etc) face being cut rather than expanded. Money for outside assistance is also thin on the ground. Of particular concern is Offence 4, preventing associated persons from paying bribes on the HEI’s behalf.

Key Anti-Bribery issues for HEIs to address

10 ***Ensure adequacy of monitoring and reporting procedures – how do you know the code and policies are being followed?***

⁴ http://www.hefce.ac.uk/pubs/hefce/2010/10_19/

How can HEIs prepare for the Act?

Adequate Procedures defence for Offence 4, failing to prevent bribery

It is this offence which is proving to be the biggest worry for UK corporate organisations as well as potentially for HEIs. While entities tend to accept as reasonable the requirement to keep ones own house in order, potential liability resulting from the misbehaviour of those from whom one receives services and other associated persons is, for many, hard to accept. Indeed, this was a primary focus of the early 2011 lobbying which led to the Act's introduction being postponed.

However the legislator did make some allowance for this problem, in the form of the so called adequate procedures defence, namely that it is a defence to Offence 4 above (failing to prevent bribery), if it can be shown that 'adequate procedures' were in place at the time of the alleged offence. These procedures form useful guidelines for an overall anti-bribery framework.

How long have I got and what should I do?

Since a comprehensive anti-bribery programme can take considerable time to implement, an HEI that has not yet addressed any gaps in its programme may have difficulty meeting the introduction deadline.

The final guidance, published on 30 March 2011, focuses on six key areas:

- Proportionate procedures
- Top-level commitment
- Risk assessment
- Due diligence
- Communication (including training)
- Monitoring and review

The steps to follow and the likely work involved will naturally vary depending on the HEI's existing policies and procedures and on the nature of its operations, for example on the way in which overseas students are recruited and on whether or not there are overseas campuses.

The bribery risk assessment

Throughout this Talking Points, we have included the ten issues we regard as most important for an HEI to comply with the Act. Of these, the bribery risk assessment is, in our view, the essential first step to take, and a pre-requisite for those that follow.

The assessment should look in detail at all areas of the HEI's operations, with a view to identifying every possible way in which the HEI or its staff could breach the Bribery Act, and the controls designed to prevent and detect such events.

Clearly, without having assessed what risks exist, it is difficult to manage them properly. Having undertaken a formal exercise of this kind, an HEI is in a much better position to decide what measures, if any, need to be taken to deal with the residual risk. While HEIs sometimes claim to have completed this process informally, an undocumented risk assessment will be of little value if or when an incident occurs and an HEI is required to evidence the way in which risks were managed. Apart from the evidential benefits, HEIs will also derive much comfort from knowing that the risk assessment process was robust.

Conclusions

Bribery has changed in the past 20 years from being, to many people globally, an unexceptional business practice, to one which in the UK can lead to ten years in prison and an unlimited fine. Given this dramatic shift, it is vital that HEIs give the Bribery Act due consideration and then take appropriate action.

HEIs do not have a reputation as centres of corruption, and it would be absurd to suggest that the risks facing HEIs are as great as those facing, say, a global pharmaceutical, energy or construction company. Nevertheless, an opposite view, that the Act is of little relevance to the sector, would be equally misplaced.

The increasing scope of HEIs' overseas activities (be they student recruitment, joint ventures or campuses) exemplifies the case.

In view of these changes, it would be wise for an HEI to conduct a bribery risk assessment and to determine the adequacy of its existing procedures and, based on that, identify what further steps, if any, are needed. HEIs have had approximately a year to prepare. For those who are not yet confident of their Bribery Act response, the time to act is now.

About PwC

PwC has been helping government and public sector organisations locally, regionally, nationally and internationally for many years. We work with organisations across such sectors as diverse as health, education, transport, home affairs, criminal justice, local government, housing, social welfare, defence and international development. Our Government and Public Sector practice comprises some 1,300 people who provide a range of consulting, assurance, tax and other advisory services. We bring specialist expertise from both our private and public sector practices to advise the Higher Education sector.

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