



# The Attorney General Falkland Islands

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# The Attorney General's Guidance on Preventing Bribery and Corruption

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# 1. Introduction

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1. Part 20 of the Crime Ordinance 2014 sets out an offence of bribery, under section 496, which can be committed by commercial organisations 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.
2. Section 498 of the Ordinance requires the Governor 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.
3. The Ordinance 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 490 and 491 respectively. It also sets out two further offences which specifically address commercial bribery.
4. Section 495 of the Ordinance creates a third offence relating to bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business, and section 496 deals with corporate liability for failing to prevent bribery on behalf of a commercial organisation.
5. This guidance explains the policy behind section 496 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 496. The guidance is designed to be of general application and is formulated around six guiding principles. 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.
6. 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.
7. 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.

8. As the principles make clear commercial organisations should consider a risk-aware 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. It is important that policies and procedures are regularly reviewed and that staff are trained and aware of the rules.
9. A risk-aware approach will, however, serve to focus the effort where it is needed and will have most impact. A risk-aware approach recognises that the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions.
10. 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.

## 2. Corporate Liability (section 496)

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11. The objective of section 496 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, the section 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. The commercial organisation's willingness to co-operate with an investigation into an allegation of bribery 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.
13. In order to be liable under section 496 a commercial organisation must have failed to prevent conduct that would amount to the commission of a relevant bribery offence. Where the prosecution cannot prove beyond reasonable doubt that a relevant bribery offence has been committed the section 496 offence will not be triggered.
14. The section 496 offence is in addition to, and does not displace, liability which might arise under other sections of the Ordinance where the commercial organisation itself commits an offence.

### 3. Jurisdiction (section 501)

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15. Section 501 of the Ordinance provides that the courts will have jurisdiction over sections 490, 491 or 495 offences committed in the Falkland Islands, but they will also have jurisdiction over offences committed outside the Falkland Islands where the person committing them has a close connection with the Falkland Islands by virtue of being an individual who was ordinarily resident in the Falkland Islands; or by being a corporate body incorporated by or under the law of or carrying on business in the Falkland Islands.
  
16. However, an individual and a commercial organisation can be liable for the specific bribery offences who is neither a Falkland Islands resident nor a body incorporated or formed in the Falkland Islands. It must also be remembered that the common law principle “identification principle” is retained which means that an offence committed by a body corporate is also committed by an individual where that person is the directing mind or will of the organisation such as key directors, shadow directors, controlling shareholders or chief executives.

## 4. Bribing another Person (section 490)

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17. Section 490 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:
  - (a) **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.
  - (b) **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'**, in summary, 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 Falkland Islands would expect in relation to the performance of that function or activity. Where the performance of the function or activity is not subject to Falkland Islands law (for example, it takes place in a jurisdiction outside of the Falkland Islands) than 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 490 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 Falkland Islands thought.
21. So, for example, an invitation to foreign clients to attend a dinner at the Waterfront Kitchen Cafe 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 490 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.

## 5. Bribing a Foreign Official (section 495)

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22. Section 495 sets out the 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.
23. 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.
24. Sections 490 and 495 may capture the same conduct but will do so in different ways. The policy that founds the offence at section 495 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 490 applies, but, unlike section 490, section 495 does not require proof of it or an intention to induce it.
25. 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 490 would amount to a very significant deficiency in the ability of the legislation to address this particular mischief.
26. 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 496, the Government offers the following further explanation of issues arising from the formulation of section 495.



27. For the purposes of section 495 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.
28. 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.
29. 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 495. 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.
30. In addition it is recognised that different jurisdictions have different cultures and different cultural expectations. For example in China the giving of 'Lucky Money' in red envelopes is an ancient tradition and businesses operating in this market will no doubt wish to respect this tradition. The giving of money in this way is unlikely to attract investigation and prosecution unless the amounts involved are unusual or the circumstances suspect.

## 6. Hospitality and Business Expenditure

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31. 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 Ordinance to criminalise such behaviour.
32. The Government does not intend for the Ordinance 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.
33. In order to amount to a bribe under section 495 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.
34. 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 495 will be committed.
35. 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.
36. 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.

37. 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. Levels of expenditure will not, therefore, be the only consideration in determining whether a section 495 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.
38. Some further examples might be helpful. The provision by a Falkland Islands 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.
39. Flights and accommodation to allow foreign public officials to meet with senior executives of a Falkland Islands 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 the opera are facts that are, in themselves, unlikely to raise the necessary inferences.
40. 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 495. 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.
41. It may be that, as a result of the introduction of the section 496 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.

## 7. Failure to Prevent Bribery (section 496)

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42. 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.
43. Only a 'relevant commercial organisation' can commit an offence under section 496 of the Ordinance. A 'relevant commercial organisation' is defined as a body or partnership incorporated or formed in the Falkland Islands 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 Falkland Islands 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 Falkland Islands 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.
44. As regards bodies incorporated, or partnerships formed, in the Falkland Islands, 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.
45. As regards bodies incorporated, or partnerships formed, outside the Falkland Islands, whether such bodies can properly be regarded as carrying on a business or part of a business 'in any part of the Falkland Islands' will again be answered by applying a common sense approach. Where there is a particular dispute as to whether a business presence in the Falkland Islands satisfies the test in the Ordinance, the final arbiter, in any particular case, will be the courts as set out above.
46. However, the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the Falkland Islands would not be caught.

47. A commercial organisation is liable under section 496 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 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. 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. 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 496 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.
48. 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.
49. 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.
50. 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.
51. 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.

52. 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.
53. 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.
54. 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.
55. 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.
56. 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.
57. 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.

## 8. Facilitation Payments

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58. Small bribes paid to facilitate routine Government action – otherwise called ‘facilitation payments’ – could trigger either the section 495 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 490 offence and therefore potential liability under section 496.
59. As was the case under the old law, the Ordinance does not provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development 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.
60. 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. Each case is different but these are important factors that will be taken into consideration when deciding whether it is in the public interest to bring a prosecution.
61. There is also a need for collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play and this guidance offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.
62. International treaty obligations extend to the Falkland Islands and the Government of the Falkland Islands takes those obligations seriously and is proud to play its part in the global objective to eradicate bribery.

## 9. Duress

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63. It is recognised that there are circumstances in which individuals are genuinely 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.



## 10. Prosecutorial Discretion

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64. Whether to prosecute an offence under the Ordinance 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.
  
65. In cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Ordinance 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 Ordinance.

# 11. Preventing Bribery – Six Principles

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66. 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.
67. 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.
68. 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.

## **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.**

69. 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.
70. 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.
71. 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 in addition to briefings and management training and diligence.
72. 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.
73. 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.

74. Bribery prevention procedures may 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.
75. 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.
76. 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:
  - (a) its commitment to bribery prevention (see Principle 2)
  - (b) 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)
  - (c) an overview of its strategy to implement its bribery prevention policies.
77. 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:
  - (a) The involvement of the organisation's top-level management (see Principle 2).
  - (b) Risk assessment procedures (see Principle 3).
  - (c) Due diligence of existing or prospective associated persons (see Principle 4).
  - (d) The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments.
  - (e) Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration.
  - (f) Governance of business relationships with all other associated persons including pre and post contractual agreements.

- (g) Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure.
- (h) Transparency of transactions and disclosure of information.
- (i) Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.
- (j) Enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti-bribery rules.
- (k) The reporting of bribery including 'speak up' or 'whistle blowing' procedures.
- (l) 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.
- (m) The communication of the organisation's policies and procedures, and training in their application (see Principle 5).
- (n) The monitoring, review and evaluation of bribery prevention procedures (see Principle 6).

## Principle 2 - Leadership

**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.**

78. 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.
79. 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.
80. Internal and external communication of the commitment to zero tolerance to bribery. 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) a commitment to carry out business fairly, honestly and openly
  - (b) a commitment to zero tolerance towards bribery
  - (c) the consequences of breaching the policy for employees and managers
  - (d) 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)
  - (e) articulation of the business benefits of rejecting bribery (reputational, customer and business partner confidence)
  - (f) 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)

- (g) key individuals and departments involved in the development and implementation of the organisation's bribery prevention procedures
- (h) reference to the organisation's involvement in any collective action against bribery in, for example, the same business sector.

81. 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:

- (a) Selection and training of senior managers to lead anti-bribery work where appropriate.
- (b) Leadership on key measures such as a code of conduct.
- (c) Endorsement of all bribery prevention related publications.
- (d) 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.
- (e) Engagement with relevant associated persons and external bodies, such as sectoral organisations and the media, to help articulate the organisation's policies.
- (f) Specific involvement in high profile and critical decision making where appropriate.
- (g) Assurance of risk assessment.
- (h) 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.**

82. 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.
83. 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.
84. 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:
- (a) Oversight of the risk assessment by top level management.
  - (b) Appropriate resourcing – this should reflect the scale of the organisation's business and the need to identify and prioritise all relevant risks.
  - (c) Identification of the internal and external information sources that will enable risk to be assessed and reviewed.
  - (d) Due diligence enquiries(see Principle 4).
  - (e) Accurate and appropriate documentation of the risk assessment and its conclusions.
85. 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 external risks can be categorised into five broad groups – country, sectoral, transaction, business opportunity and business partnership:



- (a) **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.
  - (b) **Sectoral risk:** some sectors are higher risk than others. Higher risk sectors include the extractive industries and the large scale infrastructure sector.
  - (c) **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.
  - (d) **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.
  - (e) **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.
86. 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:
- (a) deficiencies in employee training, skills and knowledge
  - (b) bonus culture that rewards excessive risk taking
  - (c) lack of clarity in the organisation's policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
  - (d) lack of clear financial controls
  - (e) 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.**

87. 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.
88. 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.
89. 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 includes any person performing services for a commercial organisation. 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.
90. 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.
91. 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.
92. 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.

93. 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.
94. 'Due diligence' for the purposes of Principle 4 should be conducted using a risk-aware approach in proportion to the anticipated risk. 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.
95. 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.
96. A commercial organisation's employees are presumed to be persons 'associated' with the organisation for the purposes of the Ordinance. 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 and 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.**

97. 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.
98. 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.
99. 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.
100. 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.
101. These so called whistle blowing 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.
102. 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.

103. 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.
104. 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.
105. 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.
106. Consideration should also be given to tailoring training to the special needs of those involved in any whistle blowing 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.
107. 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.
108. Nowadays there are many different training formats available. 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.**

109. 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.
110. 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.
111. 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.
112. 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 496 of the Ordinance could be charged.

# Document Control

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