



THE CRIMINAL BAR ASSOCIATION

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CBA response to Consultation on Guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010).

Introduction

The Criminal Bar Association (“CBA”) represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

Many of our members are experienced in representing those prosecuting or accused of corruption under the existing legislation; equally many of our members have given or give advice on the sufficiency of corporate procedures designed to comply with industry or sector good practice guidance to clients.

Executive Summary

The consultation: Section 9 of the Bribery Act requires the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribery. The objective of the Government in providing guidance is said to be to support businesses in determining the sort of preventative measures they can put in place. In setting out the fundamental principles the Government has already indicated that it is not intended that the guidance be prescriptive or limiting but of general application to all commercial organisations of whatever size and in whatever business sector. This inevitably means that the guidance given is stated in extremely broad terms, and open to interpretation.

Given that the guidance is expressed in terms of “an organisation may wish to...” it is difficult to know whether other suggestions are considered too specific to include. E.g. “education of the workforce in preventing bribery” may be included within “top level commitment”, but it may not. With those general observations, we respond to the individually posed questions.

Response

Question 1: Are there principles other than those set out in the draft guidance that are relevant and important to the formulation of bribery prevention in commercial organisations? If so what are they and why do you think they are important?

No. In our view the principles stated cover every stage and aspect of bribery prevention.

Question 2: Are there any procedures other than those set out in the draft guidance that are relevant and important to a wide range of commercial organisations? If so what are they and why do you think they are important?

None

Question 3: Are there any ways in which the format of the draft guidance could be improved in order to be of more assistance to commercial organisations in determining how to apply the guidance to their particular circumstances?

Under principle 1 it is suggested that attention be drawn to “the stage of the transaction” risk. It is clear that there are certain stages of a transaction, where bribery risks are greater than others (e.g. in procurement there are differing levels of risk at different stages of the process). Highlighting this may assist in identifying areas of higher risk to organisations which can then concentrate on them in their anti-bribery strategy.

Question 4: Are there any principles or procedures that are particularly relevant and important to small and medium sized enterprises that are not covered by the draft guidance and which should be? If so what are they and why do you think they are they important?

None.

Question 5: In what ways, if any, could the principles in the draft guidance be improved in order to provide more assistance to small and medium sized enterprises in preventing bribery on their behalf?

The guidance is designed to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery from occurring within them. It is designed to be of general application. This generality is in many ways very effective, being flexible and having a broad applicability, but it does seem to us that the lack of specific guidance may well leave smaller businesses feeling vulnerable. Given financial and budgetary constraints they may feel they need to prioritise one or several aspects of their anti bribery activity over others but would be uncertain as to the most advantageous and effective use of limited resources - both in terms of preventing bribery and protecting themselves. More detailed guidance and information for smaller businesses would therefore be welcomed, including lists of contacts and/or advice points within government bodies, specifically to assist smaller enterprises. Without this, smaller organisations accused of bribery might legitimately argue that the guidance was in reality more closely directed at those medium to large organisations with the ability to deploy greater resources to the issue.

Any other matters: we are concerned that there is no assistance on the interpretation of the word “adequate”. What level of threshold is there? It is insufficiently clear for those in business life to rely either on prosecutorial discretion or on the verdict of a jury for an evaluation of what is or is not adequate in any given circumstances. Although we understand that the Government is not seeking to give prescriptive advice, it is obviously right that an organisation ought to have some guidance on this aspect of potential offending.

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