

Q&A IN RELATION TO BRIBERY OFFENCES IN HONG KONG

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1. Legal Framework

What is the legal framework governing bribery in Hong Kong?

- The Prevention of Bribery Ordinance (Cap. 201) (POBO), enacted in 1971, is the primary anti-bribery legislation in Hong Kong and is enforced by the Independent Commission Against Corruption (ICAC). It contains provisions prohibiting bribery in both the public and private sectors.
- There also exists a common law offence of misconduct in public office that applies where a public official deliberately engages in misconduct in relation to his/her public office without any reasonable excuse. The misconduct has to be serious for charges to be laid. This is less commonly used given the extensive statutory provisions under the POBO.

2. What Constitutes a Bribe?

What constitutes a bribe?

- The offence under the POBO is triggered in cases of offering, soliciting or accepting an advantage by a government official/public servant (public sector) or an agent/employee (private sector).
- Advantage has a wide meaning under the POBO. It includes gifts, loans, services, contracts, employment, the exercise or forbearance from the exercise of certain rights, favors and discharges of liability in whole or in part. There is no minimum threshold.
- An advantage becomes a bribe when there is an illegitimate purpose linked to the offer, solicitation or acceptance, without lawful authority or reasonable excuse, of the advantage provided.¹

What are the principal offences under this legal framework?

Public sector offences under the POBO are committed where:

- any prescribed officer, without the general or special permission of the Chief Executive, solicits or accepts any advantage (section 3). This offence does not require an illegitimate purpose linked to the solicitation or acceptance;
- any person offers to a public servant, or any public servant solicits or accepts, an advantage as an inducement or reward for performing, abstaining from, delaying, expediting etc. that or another public servant's act (section 4);
- any person offers to a public servant, or any public servant solicits or accepts, an advantage as an inducement or reward for assistance in relation to any contract or subcontract involving a public body (section 5);
- any person offers, solicits or accepts an advantage to/from another person as an inducement or reward for withdrawal of a tender or refraining from making a tender for any contract with a public body (section 6);
- any person offers, solicits or accepts any advantage as an inducement or reward for refraining from bidding at any auction conducted by or on behalf of a public body (section 7);
- any person who, while having dealings of any kind with the government or other public body, offers any advantage to any prescribed officer or public servant (section 8); or
- any prescribed officer maintains a standard of living or has assets not commensurate with their official emoluments (section 10).

The private sector offence is committed where:

- any agent solicits or accepts, or any person offers to an agent, an advantage in connection with the agent's performance or abstaining from performance of any act in relation to his/her principal's affairs or business (section 9).

3. Jurisdictional Reach

What is the jurisdictional reach of the legal framework?

- Only the offences provided for in section 4 of the POBO can have extraterritorial effect. Section 4 contains extraterritorial language that makes it an offence to offer a bribe to a public servant, whether in Hong Kong or elsewhere. Note that public servant is defined so as to only include Hong Kong public servants.
- The section 9 offence, which concerns private sector bribery, is not extraterritorial in and of itself, but can cover bribery of foreign officials. The foreign official is the agent and the foreign government is the principal for the purposes of the legislation. The offer, solicitation or acceptance of the advantage must be made within Hong Kong for the section to be engaged.² The same applies in case of a private sector bribery offence not involving any foreign official.
- Factors that the court considers relevant when determining whether POBO will apply include the place of the contemplated unlawful act (or unlawful means) agreed upon, where the bribery was to take place,³ where the making of the offer takes place; where the proposed terms were communicated to the agent,⁴ or where "a substantial measure of the activities constituting a crime" have taken place within Hong Kong.⁵

4. Who may be liable?

Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

- Under the POBO, the following may be liable for bribery:
 - public servants;
 - the Chief Executive;
 - agents, meaning a public servant and any person employed by or acting for another; and
 - any person, which includes any individual, public body or anybody of persons corporate or unincorporated. Companies may therefore be liable for bribery under POBO. However, while it is technically possible to target companies, normally individuals are targeted in practice.
- As in England, a company could be held liable under the identification principle if a "directing mind and will," typically a senior person in the company (such as a director), commits a bribery offence under the POBO.

Can a parent company be liable for its subsidiary's involvement in bribery?

- No. A company can only be liable under the POBO if the person committing the offence can be shown to be its directing mind and will.

² *HKSAR v Krieger* [2014] 3 HKLRD 404

³ *HKSAR v Krieger* [2014] 3 HKLRD 404

⁴ *HKSAR v Krieger* [2014] 3 HKLRD 404

⁵ *HKSAR v Chan Shing Kong* [2010] HKEC 1179

5. High Risk Areas

Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

- Yes. Such payments would fall within the definition of advantage, which includes any gift, loan, fee, reward or commission. Section 4 of the POBO specifically prohibits any advantage offered to a public servant as an inducement or reward for expediting an act.

Does the legal framework restrict political and charitable contributions?

- A political or charitable contribution could be considered a bribe if it was offered to a public servant or agent as an inducement to act improperly, or as a reward for having acted improperly.
- Note, however, that the definition of advantage in the POBO specifically excludes election donations, provided the particulars of the donation are included in an election return. The offences in the POBO therefore do not apply to election donations defined as any money, goods or services given to or in respect of a candidate at an election.
- However, the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) contains offences for bribing candidates or prospective candidates. Under section 7, a person engages in corrupt conduct at an election if the person corruptly offers an advantage as an inducement or reward for standing, not standing, withdrawing a nomination etc.

Does the legal framework place restrictions on corporate hospitality?

- The provision of entertainment is specifically exempted from the definition of advantage for the purposes of the POBO offences. Entertainment means the provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment with, or provided at the same time as, such provisions.
- Although accepting entertainment is permitted under the POBO, guidance from the government's Civil Service Bureau states that civil servants should not accept lavish, or unreasonably generous or frequent entertainment, or any entertainment that is likely to give rise to any potential or real conflict of interest. Similar guidelines apply to politically appointed officials.

6. Legal Defences

Are there any defenses for bribery offences?

- Aside from the offences in sections 3 and 10, all the bribery offences under POBO listed above are subject to the defense that the public servant or agent was acting with "lawful authority or reasonable excuse."
- The POBO does not define lawful authority or reasonable excuse, and the onus is on the defendant to prove the defense. The standard of proof is on the balance of probabilities. Lawful authority is authority that expressly or impliedly authorizes the defendant to conduct themselves in a way that would otherwise be an offence. This could, for example, take the form of permission from the public body that employs the public servant (POBO section 4(3)), or, in the case of private bribery, permission from an agent's principal (POBO section 9(4)). An excuse is the reasonable belief that one has the right to do what one seeks to do. For example, an honest, but mistaken, belief of facts which, if true, would have constituted lawful authority, is capable of being a reasonable excuse (Annotated Ordinances of Hong Kong, 4.02).
- The only defense to the section 3 offence is if the prescribed officer had permission from the Chief Executive to accept the advantage.
- In relation to the section 10 offence, the accused must provide a satisfactory explanation to the court as to how they were able to maintain such a standard of living or how such pecuniary resources or property came under their control.

- It shall be no defense for a person accused of offering an advantage that the recipient of the bribe had no power, right or opportunity to do the act for which the bribe was offered. Similarly, it is not open to a person accused of accepting a bribe to escape liability on the basis that they did not have the power, right, opportunity or intention to do the act for which they accepted the bribe, nor that they did not in fact do the act (POBO section 11).

7. Regulatory and Enforcement Bodies

What are the key regulatory or enforcement bodies with regard to bribery?

- The ICAC is the primary agent for investigating and prosecuting bribery in Hong Kong, with assistance from other bodies.
- Under the Independent Commission Against Corruption Ordinance (Cap. 204), the ICAC may without warrant arrest a person if it reasonably suspects that person is guilty of an offence under the POBO. The ICAC may search any person, premises or places and seize or detain anything which it has reason to believe to be or to contain evidence of any of the offences under the POBO. In addition, the ICAC may require the production of documents if there is reasonable cause to believe that an offence under the POBO may have been committed by any person and that there are documents likely to be relevant.

8. Legal Consequences

What are the legal consequences of being found guilty of bribery offences?

- For an offence committed under section 3, the guilty person may be liable to a fine of HKD100,000 and imprisonment for one year.
- For an offence committed under section 10, the guilty person may be liable for a fine of HKD1 million and imprisonment for ten years.
- The maximum penalty for bribery of a public servant with regards to contracts and for bribery relating to withdrawal of a tender (under sections 5 and 6 respectively) is ten years' imprisonment and a fine of HKD500,000 (POBO section 12(1)).
- For the bribery offences under sections 4, 7 and 8, the POBO provides for a maximum penalty of seven years' imprisonment and a fine of HKD500,000 (POBO section 12(1)).
- In addition, except from in relation to the section 3 offence, the guilty party will be ordered to pay the amount or value of any advantage received, as determined by the court.
- Anyone convicted of a bribery offence under the POBO may be prohibited for a period of up to seven years from taking up or continuing employment as either a professional, a self-employed businessperson, or a manager of a corporation or public body (POBO section 33A).

9. Deferred Prosecution Agreements

Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

- No. Neither DPAs nor pre-trial diversions are available in Hong Kong.

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