



# **The Legal 500 Country Comparative Guides**

## **Hong Kong**

# **BRIBERY & CORRUPTION**

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This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in Hong Kong.

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# HONG KONG BRIBERY & CORRUPTION



## 1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

The primary piece of legislation governing bribery and corruption in Hong Kong is the Prevention of Bribery Ordinance (Chapter 201) (POBO), which targets both supply and demand side bribery in the private and public sectors.

In addition, the *Independent Commission Against Corruption Ordinance* (Chapter 204) (ICACO) establishes the Independent Commission Against Corruption (ICAC), Hong Kong's anti-corruption agency, and sets out its responsibilities and powers.

Both are supplemented by subsidiary legislation with regard to certain provisions.

## 2. Which authorities have jurisdiction to investigate and prosecute bribery and corruption in your jurisdiction?

The ICAC investigates, and the Department of Justice prosecutes, bribery in Hong Kong.

## 3. How is 'bribery' or 'corruption' (or any equivalent) defined?

In general, offering, soliciting or accepting a bribe (referred to as an 'advantage' under the POBO) as an inducement to, reward for, or otherwise on account of someone (not) doing an act or showing (dis)favour constitutes an offence, subject to certain defences and exceptions.

Under the POBO, an offence is committed when the offer is made, the solicitation takes place, or the acceptance is given. It is not necessary to show that the advantage was actually provided to the recipient. Bribery through intermediaries or third parties, as well as conspiracy to commit a POBO offence, is also prohibited.

The term 'advantage' encompasses all kinds of benefits, however trivial (such as money, gifts, services, office or employment, contracts, release of liability, and protection from penalty), but not 'entertainment'. 'Entertainment' as defined under the POBO means the provision of food or drink for consumption on the occasion when it is provided, and of any other entertainment connected with or provided at the same time as such provision of food or drink.

A direct or specific benefit in return for a bribe (ie, a 'quid pro quo') is not required under Hong Kong's bribery laws. Bribery may comprise advantages offered to build a store of goodwill to provide the basis for future corrupt demands. This is sometimes referred to as the 'sweetening doctrine'.

## 4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Is a distinction made between a public official and a foreign public official? Are there different definitions for bribery of a public official and bribery of a private person?

### Public sector bribery offences

There are a number of public sector bribery offences under the POBO. Engaging in the following acts without lawful authority or reasonable excuse constitutes an offence:

- Offering an advantage to a public servant (or, as a public servant, soliciting or accepting an advantage) as an inducement to, reward for, or otherwise on account of the public servant (not) performing or influencing the performance of any act in his/her capacity as a public servant, or influencing any business transaction between any person and a public body (similar offences exist in relation to the Chief Executive of Hong Kong) (section 4,

POBO);

- Offering an advantage to a public servant (or, as a public servant, soliciting or accepting an advantage) as an inducement to, reward for, or otherwise on account of the public servant giving assistance in connection with a contract with a public body (similar offences exist in relation to the Chief Executive of Hong Kong) (section 5, POBO);
- Offering an advantage to any person (or soliciting or accepting an advantage) as an inducement to, reward for, or otherwise on account of the withdrawal of a tender (or refraining from the making of a tender) for a contract with a public body, or refraining from bidding at an auction conducted by or on behalf of a public body (sections 6 and 7, POBO); and
- Offering an advantage to a public servant while having dealings with the relevant public body, or to a prescribed officer (a type of public servant) while having dealings with the relevant government department (section 8, POBO).

Unlike the above offences, some offences are not cured by lawful authority and/or reasonable excuse. These concern public sector offenders only:

- Section 3 of the POBO prohibits the solicitation or acceptance of any advantage by a prescribed officer without the general or special permission of the Chief Executive of Hong Kong; and
- Under section 10 of the POBO, it is an offence for a prescribed officer or the Chief Executive to maintain a standard of living above that which is commensurate with his/her present or past official emoluments, or to be in control of pecuniary resources or property disproportionate to his/her present or past official emoluments, without a satisfactory explanation.

‘Public servants’ are defined under the POBO to include:

- ‘Prescribed officers’ (any person holding an office of emolument under the government and certain others including principal officials of the government appointed under the Basic Law, certain persons appointed by the Hong Kong Monetary Authority, the Chairman of the Public Service Commission, ICAC staff, and judicial officers); and
- Employees and certain members and individuals of public bodies (‘public bodies’

are broadly defined and include, among others, the government and its executive, legislative and district councils, and more than 140 entities listed under Schedules 1 and 2 of the POBO, some of which are private companies that perform public functions). Employees of government-owned entities are not considered “public servants” unless such entities are listed in Schedules 1 and 2 of the POBO or otherwise fall within the definition of “public body” under the POBO.

#### Private sector bribery offences

These are found in section 9 of the POBO and address the bribery of “agents”. In the business context, the principal is regarded as the employer, and the agent, the employee. Section 9 is intended to prohibit conduct that may undermine the integrity of the principal-agent relationship, in particular the receipt by an agent of advantages from third parties without the principal’s knowledge, and secret attempts by third parties to corrupt or influence an agent.

‘Agent’ is defined broadly in the POBO to include ‘... any person employed by or acting for another’. Since ‘agent’ also includes a public servant, section 9 also applies to the principal-agent relationship between the government and a public servant.

Offences include, without lawful authority or reasonable excuse, offering an advantage to an agent (or, as an agent, soliciting or accepting an advantage), as an inducement to, reward for, or otherwise on account of the agent (not) performing an act, or (dis)favouring any person, in relation to his/her principal’s affairs or business.

### **5. What are the civil consequences of bribery and corruption offences in your jurisdiction?**

Victims of bribery may make civil claims for damages against the parties involved in the bribery for financial loss.

Regulated persons may be subject to civil or disciplinary action by their regulatory or professional bodies as a result of involvement in bribery.

### **6. What are the criminal consequences of bribery and corruption offences in your jurisdiction?**

The maximum levels of punishment for the bribery

offences under the POBO are:

- Section 10 offence (maintaining a disproportionate standard of living or being in control of disproportionate pecuniary resources or property without a satisfactory explanation): a fine of HKD 1 million and imprisonment for 10 years;
- Section 5 offence (offering, soliciting or accepting an advantage to assist/influence a contract with a public body) and section 6 offence (offering, soliciting or accepting an advantage in relation to the withdrawal of a tender for a public body): a fine of HKD 500,000 and imprisonment for ten years;
- Section 3 offence (soliciting or accepting an advantage without the Chief Executive's general or special permission): a fine of HKD 100,000 and imprisonment for one year;
- Other bribery offences: a fine of HKD 500,000 and imprisonment for seven years.

The Hong Kong courts have advocated the need for deterrent sentences, which means that immediate custodial sentences can be expected in most cases.

A court can also order a convicted person to pay a person, public body or the government the amount or value of any advantage received by the convicted person (or part thereof).

In respect of the offence of a prescribed officer being in control of disproportionate pecuniary resources or property without a satisfactory explanation (under section 10(1)(b) of the POBO), a court may order the convicted person to pay the government a sum not exceeding the value of the unexplained resources or property. Where a person is convicted on indictment of this offence, the court may order the confiscation of any pecuniary resources or property not exceeding the value of the unexplained resources or property.

In addition, if it is in the public interest to do so, the court may order that a person convicted of the above offences be prohibited from taking or continuing employment (whether paid or unpaid) for up to seven years. The POBO also provides that a person will, by reason of such conviction, be disqualified for a period of five years from being elected or appointed as a member of the Legislative Council, Executive Council and certain other public bodies.

## **7. Does the law place any restrictions on hospitality, travel and entertainment**

## **expenses? Are there specific regulations restricting such expenses for foreign public officials? Are there specific monetary limits?**

As mentioned under Question 3 above, the term 'advantage' under the POBO does not include 'entertainment' (ie, the provision of food or drink for consumption on the occasion when it is provided, and of any other entertainment connected with or provided at the same time as such provision of food or drink).

Hospitality, travel and entertainment falling outside the above 'entertainment' exception may constitute an 'advantage' under the POBO.

The POBO does not provide for de minimis exceptions. However, the value of the benefit will be one factor when deciding whether the benefit constitutes an unlawful advantage. In determining the legality of a benefit, the following factors will be taken into account:

- The purpose of the benefit;
- The value and frequency of the benefit (lavish or extravagant benefits are red flags);
- Whether the benefit is equally offered to others or just the recipient in question;
- The recipient's position and role; and
- The relationship between the offeror and the recipient – in particular, if there are official dealings between them.

Bribery in relation to foreign public officials is not expressly addressed in the POBO but has been held to be included within the broad definition of "agent" under the POBO section 9 offence.

## **8. Are political contributions regulated? If so, please provide details.**

The Elections (Corrupt and Illegal Conduct) Ordinance (Chapter 554) (ECICO) aims to ensure that public elections are conducted fairly, openly and honestly and are free from corrupt and illegal conduct. Among other things, it requires candidates to properly account for the expenditure of money at elections and the soliciting and receipt of election donations.

An election donation includes any money, goods or service given or provided to (or in respect of) a candidate for the purpose of promoting the election of the candidate or prejudicing the election of other candidates. An election donation is not an 'advantage' under the POBO or the ECICO as long as particulars of the donation are provided in an election return that has

been lodged with the appropriate authority in accordance with the ECICO.

Under the ECICO, each candidate is required to lodge with the appropriate authority an election return setting out his/her election expenses and all election donations received within the specified time period. If the value of the election donation is more than HKD 1,000, the candidate must issue a receipt to the donor with the required particulars. The ECICO also includes provisions as to how a candidate must handle certain election donations.

A candidate or other person is considered to have engaged in corrupt conduct at an election (and committed an offence under the ECICO) if he or she uses election donations for a purpose other than meeting (or contributing towards meeting) the candidate's election expenses, or a purpose other than promoting the election of the candidate or prejudicing the election of another candidate.

The ECICO also criminalises various bribery-related conduct associated with public elections, such as bribing of candidates or prospective candidates, bribing of electors, and withdrawing an election petition or election appeal for a bribe.

### **9. Are facilitation payments regulated? If not, what is the general approach to such payments?**

The bribery offences in the POBO cover the making of facilitation payments. They expressly prohibit offering, accepting or soliciting an advantage to 'expedite' the performance of a public function.

### **10. Are there any defences available to the bribery and corruption offences in your jurisdiction?**

As mentioned under Question 4 above, with the exception of the section 3 and section 10 offences, the public and private sector bribery offences generally allow for an affirmative defence where the accused is acting with 'lawful authority or reasonable excuse'. These are not defined in the POBO and the burden is on the accused to prove them on the balance of probabilities.

Lawful authority generally concerns the disclosure of and permission to receive the advantage in question. In respect of the section 4 and section 9 offences, the POBO specifically provides that if a public servant other than a prescribed officer or an agent solicits or accepts

an advantage with the permission of the relevant public body or principal, neither he/she nor the person who offered the advantage will be guilty of an offence. The permission must be in writing (in the case of a section 4 offence) and be given before the advantage is offered, solicited or accepted (or if not, must be applied for and given as soon as reasonably possible after such offer or acceptance).

Reasonable excuse has been narrowly construed by the courts and is of very limited application in practice.

The POBO specifically states that it is not a defence to show that an advantage is customary in any profession, trade, vocation or calling.

### **11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?**

There is no law in Hong Kong that specifically provides that compliance programmes are a defence or mitigating factor for bribery offences. It will depend on the specific circumstances of the case whether the compliance programme in question can eliminate or reduce liability. In practice, however, corporate entities are rarely prosecuted in Hong Kong. See Question 12 below.

### **12. Who may be held liable for bribery? Only individuals, or also corporate entities?**

The definition of 'person' in Hong Kong legislation includes both individuals and corporate entities. As such, corporate entities can technically be found liable for committing bribery offences. In practice, however, almost all prosecutions target individuals, whereas corporate entities are more likely to be subject to regulatory action or investigatory steps (such as search and seizure notices). This is because the offence of bribery requires human actors, and it is difficult to establish corporate liability for bribery which, based on common law principles, requires actions by senior management that represent the company's 'directing mind and will'.

There is no separate corporate bribery offence which provides for corporate criminal liability in the case of bribery by employees or other associated persons.

### **13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your**



## jurisdiction?

In relation to the public sector, the Civil Service Code states that civil servants should not:

- solicit or accept, directly or indirectly, any advantage or gift which would (or might reasonably be seen to) compromise their integrity or judgment or influence the discharge or non-discharge of their duties and responsibilities; or
- place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

In addition to the Acceptance of Advantages (Chief Executive's Permission) Notice 2010 which relates specifically to the POBO section 3 offence applicable to prescribed officers, the Hong Kong Civil Service Bureau has published a number of civil service regulations and circulars relating to conduct and integrity of civil servants, including to those regarding acceptance of advantages offered to an officer in his/her private capacity and official capacity, acceptance of entertainment, gifts and donations to a department, sponsored visits, and retirement gifts.

The Code for Officials under the Political Appointment System, which applies to politically appointed officials, contains guidance relating to similar issues, including acceptance of advantages and entertainment, register of advantages, and sponsored visits.

In addition, the ICAC provides a variety of online resources, reference materials, as well as training programmes for both the public and private sectors.

## 14. Does the law in your jurisdiction provide protection to whistle-blowers? Do the authorities in your jurisdiction offer any incentives or rewards to whistle-blowers?

There is no general whistle-blowing legislation in Hong Kong. However, there are provisions in various legislation that offer some protection to whistle-blowers or informers. For example:

- Under the Employment Ordinance, an employer is prohibited from terminating (or threatening to terminate) the employment of an employee, and from discriminating against an employee in any way, as a result of the

employee giving evidence in proceedings for the enforcement of the Ordinance or relating to a work accident, or giving information to a public officer in any inquiry made by the officer for such purposes. Public officers also have confidentiality obligations in relation to the name and identify of a person who has made a complaint alleging a contravention of the Ordinance.

- Under various anti-discrimination legislation, it is unlawful for a person (discriminator) to discriminate against another person (victim) as a result of the victim bringing proceedings against the discriminator under the legislation, giving evidence or information in connection with proceedings brought against the discriminator under the legislation, or alleging that the discriminator or any other person has committed an act which contravenes the legislation.
- Under the POBO, the name and address of an informer in respect of an offence under the Ordinance are required to be kept confidential and should not be admitted in evidence in any civil and criminal proceedings.

## 15. How common are government authority investigations into allegations of bribery? How effective are they in leading to prosecutions of individuals and corporates?

The ICAC is a persistent and highly effective anti-corruption agency. In 2021, it initiated 1,692 new cases (excluding cases under the ECICO) for investigation, and completed the investigation of 1,741 cases (including cases that were brought forward from 2020). 190 persons were prosecuted, 154 prosecutions were completed, with 109 persons convicted and 29 persons receiving cautions for minor breaches. In 2022, 204 persons were prosecuted, 111 prosecutions were completed, with 89 persons convicted and 16 persons receiving cautions for minor breaches. As indicated under Question 12, corporate entities are rarely prosecuted.

## 16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19 pandemic had any ongoing impact and, if so, what?

The ICAC has continued its zero-tolerance approach to

tackling bribery and corruption, and will investigate cases even where the amount of the bribe is relatively small.

It has continued to work closely with other local regulators, most recently entering into memoranda of understanding with the Securities and Futures Commission (SFC) in 2019 and the Financial Reporting Council (now known as the Accounting and Financial Reporting Council) in 2021 to enhance collaboration and enforcement capabilities. The memoranda provide for matters such as referral of cases, joint investigations, exchange and use of information, investigative assistance, and capacity building and training.

In the past year, the ICAC worked with the SFC on large scale joint operations to investigate a syndicate suspected of operating ramp-and-dump schemes through a complex cross-shareholding network of Hong Kong-listed companies, involving illicit gains of HKD 191 million. The joint operation in November 2022 involved more than 70 ICAC officers and 120 SFC officers, in which a total of 50 premises were searched (including over 20 jointly searched by the ICAC and the SFC). Eight suspects were arrested, including the suspected ringleader of the syndicate. Five more individuals were arrested in March 2023 in a follow-up joint operation. The syndicate is suspected to have offered bribes to the responsible officers and staff members of brokers for providing assistance in share placing to facilitate the ramp-and-dump schemes. Other suspected offences include market misconduct and perverting the course of public justice.

Although the pandemic may have affected the progress of investigations from time to time due to social distancing measures and widespread infection, the ICAC's operations have now largely returned to normal, as can be seen by its recent joint operation with the SFC.

**17. Is there a process of judicial review for challenging government authority action and decisions? If so, please describe key features of this process and remedy.**

Public bodies, including government departments and enforcement agencies (such as the ICAC) are amenable to judicial review. Their actions may be challenged on grounds such as illegality, irrationality, procedural impropriety, and failure to take into account legitimate expectations. A judicial review application in Hong Kong is heard by the Court of First Instance.

**18. Are there any planned or potential developments or reforms of bribery and anti-corruption laws in your jurisdiction?**

At the time of writing, no amendments have been proposed to the POBO, the ICACO or the ECICO.

**19. To which international anti-corruption conventions is your country party?**

Hong Kong is a party (via China) to the United Nations Convention against Corruption 2003 and the United Nations Convention against Transnational Organised Crime 2000. Hong Kong is also a member of various international and regional anti-corruption bodies, such as the Asia Development Bank and the Organisation for Economic Co-operation and Development Anti-Corruption Initiative for Asia and the Pacific.

**20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection. Does it cover internal investigations carried out by in-house counsel?**

The concept of legal professional privilege exists under Hong Kong law, and applies to external lawyers as well as in-house lawyers (as long as the in-house lawyer is acting in his/her capacity as a lawyer and not any other executive role he/she may have within the organisation).

Communications between an in-house lawyer and non-lawyer employees will be privileged if they are confidential and for the dominant purpose of either:

- seeking or giving legal advice (legal advice privilege); or
- advising on or obtaining evidence in relation to actual or contemplated litigation (litigation privilege).

Any investigations team within an organisation must therefore be set up carefully to ensure that a qualified lawyer controls and directs or otherwise oversees the process of investigation, so that the work products from the investigation are generated for one of the dominant purposes above.

Subject to limited exceptions, the POBO preserves the right to legal professional privilege in respect of information to be disclosed to the ICAC.

## 21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

The Hong Kong government places high importance on tackling bribery and corruption. The ICAC has adopted a zero-tolerance approach to tackling bribery and corruption, and will investigate cases even where the amount of the bribe is relatively small. In a 2022 survey conducted by the ICAC, 98.9% of the respondents indicated that they had not personally come across corruption in the previous 12 months.

Hong Kong was placed 12th in the 2022 Corruption Perceptions Index, which ranked 180 countries and territories globally by their perceived levels of public sector corruption. It has ranked within the top 16 in the past five years.

The ICAC is an active player in the international anti-corruption community, participating in the work of international and regional bodies, such as the International Association of Anti-Corruption Authorities (IAACA), the Asia-Pacific Economic Cooperation – Anti-Corruption and Transparency Experts' Working Group, the Asia Development Bank and the Organisation for Economic Co-operation and Development Anti-Corruption Initiative for Asia and the Pacific, and the Economic Crime Agencies Network.

Mr Simon Peh, Special Adviser and former Commissioner of the ICAC, was elected as President of the IAACA in January 2022, while he was the Commissioner of the ICAC. He had been actively involved in the work of the IAACA in the previous decade, including in his role as convenor of the IAACA training committee since 2017 where he implemented various training initiatives for the organisation.

The ICAC has also been providing tailored capacity building programmes to anti-corruption agencies in different countries on fighting and preventing corruption. Since 2017, it has discussed training collaboration with anti-corruption agencies from 68 countries in Asia, Europe and Africa.

## 22. Generally how serious are organisations in your country about preventing bribery and corruption?

The ICAC takes bribery and corruption seriously and has adopted a three-pronged approach in tackling

corruption, namely, law enforcement, systemic prevention and community education. These three areas are handled by the following departments respectively:

- The Operations Department receives, considers and investigates alleged corruption offences.
- The Corruption Prevention Department examines the practices and procedures of government departments and public bodies to reduce corruption opportunities, provides advice on the formulation of new initiatives, policies and procedures, and conducts system-specific seminars and workshops to promote best practices in the public sector. It also offers corruption prevention advice and capacity building training to private organisations, as well as publishes sector-specific guides and self-learning tools.
- The Community Relations Department educates the public about aspects of corruption via various media platforms.

All of the above work to help foster an ethical culture in Hong Kong and encourage and incentivise organisations and businesses to take bribery and corruption seriously.

## 23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction? How have they sought to tackle these challenges?

As a result of the suspension of a number of bilateral agreements between Hong Kong and other jurisdictions relating to mutual legal assistance and surrender of fugitive offenders, the ICAC faces increased difficulties in the investigation of bribery and corruption cases that involve cross-border elements. Agreements with a number of jurisdictions have been suspended in recent years, such as those with Australia, Canada, Finland, France, Germany, Ireland, the Netherlands, New Zealand, the UK and the US. These agreements provided for mutual assistance between the parties in matters such as taking of evidence, executing requests for search and seizure, producing documents, restraining and confiscating proceeds of crime, transferring persons to give assistance, effecting service of legal process, and surrendering of fugitive offenders.

The increase in the types of data and the locations in which they are stored (eg, instant messaging apps such as self-destructing messaging apps) make it more difficult to find and secure evidence.



Rapid technological developments, such as those involving digital assets, add to the complexity of crimes and difficulties in evidence gathering.

In addition, the lack of specific corporate bribery offences under Hong Kong law means that corporate entities can rarely be prosecuted (see Question 12 above).

#### 24. What are the biggest challenges businesses face when investigating bribery and corruption issues?

The greatest challenges are around finding and securing evidence. With increased use of instant messaging apps (eg, WhatsApp and WeChat) and the use of personal devices, evidence is often beyond the reach of the employing entity. Further, strict data protection laws may restrict the ability to collect and move data out of jurisdictions where investigations cover different jurisdictions. Restrictions are particularly strict in relation to data held in Mainland China, which means that the ability to collect and review data is often restricted and will often have to be conducted onshore.

#### 25. What do you consider will be the most significant bribery and corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?

Businesses may continue to face higher instances of bribery in light of the economic downturn in the aftermath of the Covid-19 pandemic that has given rise

to increased opportunities and incentives for bribery.

Managing data in compliance with increasingly strict and complex data protection laws will continue to be a challenge.

#### 26. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?

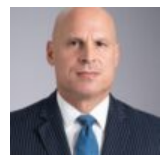
As discussed under Question 12 above, although corporate entities can technically be found liable under Hong Kong law for committing bribery offences, it is in practice difficult to establish corporate liability in the absence of specific corporate offences, such as those in the UK and Malaysia. The introduction of a corporate liability offence would make it easier to hold companies accountable for bribery committed by employees or agents on their behalf.

There is also room for enhancing the protection of whistle-blowers. As discussed under Question 14 above, there are only a few provisions in some legislation offering protection in limited circumstances. For example, under the Employment Ordinance, the protection is only triggered where a public officer has made an inquiry or proceedings are on foot for the enforcement of the Ordinance or a work accident. The introduction of a more comprehensive regime which provides for a broader range of circumstances under which whistle-blower protection is triggered (including the reporting of bribery and other misconduct within an organisation) may increase the willingness of whistle-blowers to come forward.

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