

BUTTERWORTHS HONG KONG

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**Commercial Crimes Law**  
HANDBOOK

Fourth Edition



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# Commercial Crimes Law Handbook

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## ORGANIZED AND SERIOUS CRIMES ORDINANCE

(CAP 455)

Introduction

Organized crime has long been a great concern of the community of Hong Kong. Organized crime encompasses a whole spectrum of criminal activities from trafficking in dangerous drugs, robbery, fraud, blackmail, loansharking, vice to extortion. As observed by the then Secretary for Security Mr Alistair Peter Grey, OBE, AE, JP, when he moved the second reading of the Organized and Serious Crimes Bill on 15 July 1992:

[organized crime] represents a particularly serious threat to law and stability in our society because:

- (a) it survives on fear and intimidation, and on the threat of violence;
- (b) it imposes a rigid discipline on its members, which often serves to insulate the organisers from direct participation in the criminal act and hence from the risk of prosecution;
- (c) it generates enormous profits which are in many cases laundered into legitimate businesses, with the legitimate and the criminal activities then bolstering and supporting each other; and
- (d) it affects the lives of ordinary people, particularly those who can least afford to resist the extortionate demands – the hawker, the PLB driver, those living in squatter areas.

Our objective in tackling organized crime must therefore be twofold: to enable the police to obtain evidence against those who organised, co-ordinate or carry out such crimes; and to enable adequate sanctions, including financial penalties, to be imposed on those involved in organized crime.

(Hansard (15 July 1992), at p 4217.

History

The Organized and Serious Crimes Bill was introduced in July 1992 to address the wide public concern about the extent of organized and serious crimes in Hong Kong. The Bill sought to improve the Administration's ability to investigate and prosecute these crimes by four distinct methods, namely:

- (1) additional investigation powers: cls 3, 4, 5 and 7;
- (2) confiscation measures: cls 8–24;

- (3) wider provision against money laundering;
- (4) enhancement of sentencing in respect of specified offences.

An ad hoc group had been set up to study the Bill in a number of aspects. The objective of the ad hoc group was to strike a right balance between the need to combat organized crime and the need to ensure that any powers so given would be necessary.

The Bill, having been first introduced on 15 July 1994, was read on the same day, during which period, several amendments were debated. The debate resumed on 12 October 1994. Eventually, on that day, the Bill was read and passed.

Sections 2, 25-27, 30, 32-35 and Sch 1 and Sch 2 of the Organized and Serious Crimes Ordinance (Cap 455) (the 'Ordinance') started to apply on 1 December 1994 whereas the rest of this Ordinance came into force on 1 January 1995. The significant amendments to this Ordinance are as follows:

- (1) the first major amendments occurred in 1995 and related to the interpretation (s 2), requirement to furnish information (s 3), order to make material available (s 4), order to produce information obtained under s 3, 4 or 5 (s 6), order to assess the proceeds of crime (s 9), statements of value (s 10), amount to be recovered (s 11), definition of principal terms used (s 12), order for enforcing confiscation order (s 13), cases in which charging orders may be made (s 14), restraint orders (s 15), orders in respect of land, securities, etc (s 16), variation of orders (s 17), application of proceeds of realisation and other orders (s 18), variation of powers by High Court or receiver (s 19), variation of orders (s 20), bankruptcy of defendant etc (s 21), winding up of companies (s 22), dealing with property (s 23), orders to represent proceeds of indictable offence (s 25), order for disclosure (s 26), sentencing in respect of specified offences (s 29). Section 11A and Sch 5 were added to the Organized and Serious Crimes (Amendment) Ordinance (1995);
- (2) as from 1 January 2003, there were yet further amendments to the Organized and Serious Crimes Ordinance (Cap 455) relating to the interpretation (s 2), confiscation orders (s 8), order to make confiscation order (s 10), application of provisions (s 11), cases in which charging orders may be made (s 13), cases in which restraint orders may be made (s 14), restraint orders (s 15), orders in respect of land, securities, etc (s 16) and Sch 1 and Sch 2 of the Organized and Serious Crimes (Amendment) Ordinance (2002);
- (3) as from 2011, Pt IVA on remittance agents and related provisions (s 24A-24E) has been repealed.

Organized and Serious Crimes Ordinance ('OSCO') is divided into the following parts:

- Part I: Preliminary;
- Part II: Powers of Investigation;
- Part III: Confiscation of Proceeds of Crime;
- Part IV: Enforcement, etc of Confiscation Orders;
- Part V: Miscellaneous.

Part I principally includes the interpretation section: s 2. This section is primarily in the Organized and Serious Crimes Ordinance (Cap 455) as the terms used may not, in everyday language, carry precisely the same meaning as they do in the Ordinance. Important words defined in the section are: confiscation order, organized crime, Sch 1 offence, and specified offence.

Parts II and III provide for additional investigation powers enshrined by statute. Part II provides for powers of investigation. It may require a person, or persons of a particular description, to furnish information or produce material relevant to the investigation of an organized crime. The main feature of a s 3 order is that no person subjected to such an order may claim the right to remain silent, right against self-incrimination, or obligation of secrecy. Sections 4 and 5, providing for production orders and search warrants, are an expansion of existing provisions in other Ordinances, eg. the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405). Section 6 concerns disclosure of information obtained under ss 3, 4 or 5 whereas section 7 makes it an offence for a person to prejudice investigation. Note however that enforcement agencies are not bound to utilize the powers of investigation conferred in the Organized and Serious Crimes Ordinance (Cap 455) in any investigation of a matter that fell within the definition of 'organized crime' or 'specified offence': *Philip KH Wong & Kennedy YH Wong & Co (a firm) v Commissioner of the Independent Commission Against Corruption* [2008] 2 HKC 208 [2008] 3 HKLRD 565 (CA).

Part III: Confiscation of proceeds of crime  
The confiscation provisions in ss 8-12 of the Organized and Serious Crimes Ordinance (Cap 455) are modelled on the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405). This Ordinance enlarges the regime so that it can be invoked upon conviction of a specified offence and when the person has benefitted from the proceeds of a person's specified offence or, where the specified offence is an organized crime, proceeds of his or her organized crime will be liable to confiscation. Section 9 is about assessing the proceeds of crime. Section 10 provides for statements etc relevant to making confiscation order whereas s 11 provides for amount to be recovered under confiscation order. Section 11A covers interest

## PREVENTION OF BRIBERY ORDINANCE

### (CAP 201)

#### Introduction

Prevention of Bribery Ordinance (Cap 201) (the 'Ordinance') forbids civil servants (including the Chief Executive), public bodies, and private sector employees and their agents from soliciting or accepting advantages as inducements or rewards for acts done within their professional capacity without lawful authority or reasonable excuse. Its genesis dating back as far as 1898 when bribery was outlawed by the Misdemeanours Punishment Ordinance 1898 (1 of 1898), it explicitly prohibited accepting advantages for giving assistance in relation to contracts, tenders for contracts, and auctions. It also prohibited the possession of stolen property and conspiracy to commit a bribery offence.

The Commissioner of the Independent Commission Against Corruption (ICAC) who is endowed with the function of investigating suspected bribery offences by the Ordinance, although leave to carry out certain aspects of investigation should be obtained from the Court of First Instance by way of an ex parte application. The ICAC can search and examine a suspect's documents and bank accounts, request details of a suspect's assets, incomes and expenditure, retain travel documents so as to prevent him from evading investigation, or seek a restraining order in relation to a suspect's property to prevent its dispersal, while maintaining the confidentiality of its investigations and protecting the identities of informers. Together with the Independent Commission Against Corruption Ordinance (Cap 204) and the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554), the Prevention of Bribery Ordinance (Cap 201) forms part of a substantial legislative framework which empowers the ICAC in its fight against corruption in Hong Kong.

Essential provisions of the Ordinance are as follows:

- 1) 'Bribery'—when a person, without lawful authority or reasonable excuse, offers any advantage to a public servant, including the Chief Executive, as an inducement or reward for his performing or abstaining from performing any act, or for assisting, favouring, delaying or hindering any person in the transaction of business with a public body. The offence is also committed if a public servant solicits or accepts any advantage on the grounds stated above: s 4.
- 2) there are specific bribery offences in relation to the promotion, execution and procurement of contracts or subcontracts with a public body. There are also specific offences in relation to the withdrawal of tenders for contracts, and with regards to persons bidding at auctions conducted by or on behalf of a public body: ss 5, 6 and 7;

- (3) corrupt transactions with agents are also prohibited by the Prevention of Bribery Ordinance (Cap 201): s 9;
- (4) 'Possession of unexplained property'—if a person, who is or is in control of property or pecuniary resources or present emoluments, and he cannot give a satisfactory explanation to the court as to how he came to control such property or how his standard of living is maintained, then he is guilty of an offence: s 10;
- (5) 'Confiscation orders'—where a person is convicted of an offence under the Ordinance and is found to be in control of pecuniary resources or property which he cannot explain, then the resources or property may become subject to a confiscation order on application to the Court of Justice within 28 days of the conviction: s 12AA;
- (6) 'Powers of investigation'—the Commissioner may require an investigating officer to inspect accounts, books, documents, articles relating to the suspect, and to require from the suspect an explanation relating to the suspect which may be required for the investigation, and to take copies or photographs of such documents, articles or information: s 12A;
- (7) 'Power to obtain information'—the Commissioner may require any person to furnish a statutory declaration to the investigating officer as to any property belonging to him, all expenditure incurred by him or his family by way of living expenses, all liabilities incurred by him or any monies sent outside Hong Kong by him within a specified period of time. He may also request information from a person who is a public body or the manager of any bank: s 14;
- (8) 'Restraining orders'—the Commissioner may apply to the court for a restraining order in relation to the property of a suspect. The court must not deal with the property save as in accordance with the order of the court: s 14C;
- (9) the Ordinance does not require information etc. to be disclosed: s 15;
- (10) a magistrate may, on the application of the Commissioner, order that a bribery suspect's travel documents be surrendered to the Commissioner: s 17A;
- (11) the burden of proving lawful authority and reasonable excuse is on the accused: s 24;
- (12) it is an offence under the Prevention of Bribery Ordinance to disclose the identity of persons subject to investigation or the addresses of informers to the Commissioner are also prohibited: s 30A;
- (13) the consent of the Secretary for Justice is required in respect of offences under Pt II of the Ordinance: s 31.

## CHAPTER 201

### PREVENTION OF BRIBERY ORDINANCE

#### ARRANGEMENT OF SECTIONS

##### PART I PRELIMINARY

- Short title
- Interpretation

##### PART II OFFENCES

- Soliciting or accepting an advantage
- Bribery
- Bribery for giving assistance, etc. in regard to contracts
- Bribery for procuring withdrawal of tenders
- Bribery in relation to auctions
- Bribery of public servants by persons having dealings with public bodies
- Corrupt transactions with agents
- Possession of unexplained property
- Giver and acceptor of bribe to be guilty notwithstanding that purpose not carried out, etc.
- Penalty for offences
- Confiscation of assets
- Appeal against confiscation order
- Costs in proceedings on confiscation order
- Conspiracy

##### PART III POWERS OF INVESTIGATION

- Special powers of investigation
- Order to make material available and to render assistance
- Disclosure of information obtained under section 13A
- Restriction on publication of information disclosed under section 13B
- Power to obtain information
- (Repealed)
- (Repealed)
- Restraining orders
- Variation and revocation of restraining orders
- Application for directions
- Legal advisers and privileged information
- Power to obtain assistance

- 17. Further powers of search
- 17A. Surrender of travel document
- 17B. Return of travel documents
- 17BA. Permission to leave Hong Kong
- 17C. Further provisions relating to security
- 18. (Repealed)

**PART IV  
EVIDENCE**

- 19. Custom not to be a defence
- 20. Admissibility of accused's declarations
- 21. Evidence of pecuniary resources or property
- 21A. Certificate as to official emoluments, etc.
- 22. Person giving or receiving bribe not to be accomplice
- 23. Power to secure evidence of parties to offence
- 24. Burden of proof
- 25-26. (Repealed)

**PART V  
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- 27. Frivolous, false or groundless complaints to Secretary for Justice
- 28. Costs on acquittal
- 29. Offence of making a false report of the commission of an offence, etc.
- 30. Offence to disclose identity, etc. of persons
- 30A. Protection of informers
- 31. Consent of Secretary for Justice required for prosecution of offences under Part II
- 31AA. Referral of matter involving offence suspected to have been committed by Chief Executive
- 31AB. Disclosure of information received under section 31AA to Members of Legislative Council etc.
- 31A. Time limit for prosecution of offences
- 32. Alternative convictions, and amending particulars
- 33. Effect of conviction of an offence under this Ordinance
- 33A. Power of court to prohibit employment of persons
- 34. Extension of certain provisions in relation to repealed Ordinance
- 35. Amendment of Schedules
- Sch -
- Sch 1 Public Bodies
- Sch 2 Public Bodies Specified for Purposes of this Ordinance
- Servant

**Long Title**  
to make further and better provision for the prevention of bribery for purposes necessary thereto or connected therewith.

[14 May 1971] L.N. 58 of 1971

## PART IV

## EVIDENCE

(Format changes)

**19. Custom not to be a defence**

In any proceedings for an offence under this Ordinance, it shall not be a defence to show that any such advantage as is mentioned in section 9 of the Ordinance is customary in any profession, trade, vocation or business.

**[19.01] Advantage**

See note [2.01] above.

**[19.02] Customary in any profession, trade, vocation or business**

See note [9.04] above.

By s 19, the mere fact that a practice is customary within a trade or profession is not a defence under s 9 above: *HKSAR v Chu Ang* (趙鶯) [2020] 4 HKCFAR 194, [2020] HKCFA 18, at [42]. However, it may be that such a practice has been validated by more than one judicial authority: *Hobbs v The London Life Assurance Ltd & Anor* [2012] 3 HKC 187, [2012] 1 HKCFAR 187.

**20. Admissibility of accused's declarations and statements**

In any proceedings against a person for an offence under this Ordinance—

- (a) if such person tenders himself as a witness, any statutory declaration or statement furnished by him in compliance with the terms of a notice under section 14 shall be regarded as a statement made by him relative to the proceedings and sections 13 and 14 of the Evidence Ordinance (Cap. 8) shall apply to that witness;

- (b) the fact of the person's failure to comply with the terms of a notice under section 14 may be adduced in evidence in the proceedings, but shall not be made the subject of comment by the prosecution.

(Replaced 48/01)

**[21.01] Enactment history**

This section was replaced pursuant to s 14 of the Prevention of Bribery Ordinance (Miscellaneous Provisions) Ordinance 1996 (48 of 1996).

**Evidence of pecuniary resources or property**

In any proceedings against a person for an offence under Part II (other than section 10), the fact that the accused was, at or about the date of or at any time since the date of the alleged offence, or is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he had, at or about the date of or at any time since the date of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken by the court—

- (a) as corroborating the testimony of any witness giving evidence in such proceedings that the accused accepted or solicited any advantage; and
- (b) as showing that such advantage was accepted or solicited as an inducement or reward.

For the purposes of subsection (1) a person accused of an offence under Part II (other than section 10) shall be presumed to be or to have been in possession of pecuniary resources or property, or to have obtained an accretion thereto, where such resources or property are or were held, or such accretion was obtained, by any other person whom, having regard to his relationship to the accused or to any other circumstances, there is reason to believe is or was holding such resources or property or obtained such accretion in trust for or otherwise on behalf of the accused or as a gift from the accused.

**[21.01] Satisfactorily account**

The fact to be proved in order to trigger the use of this provision is not that the accused has failed to give a satisfactory explanation to the investigating authority rather than that he has failed to give it to the court. If an accused does give an explanation to the investigating authority for his possession of disproportionate property, then, whether or not the investigating authority is satisfied by the explanation, it will be for the court in the end to decide whether or not the explanation is satisfactory. In the case of an accused who has not been called upon, at trial, to give an explanation, this may have the effect of depriving him of the right to silence. But once the evidence has established the relevant disproportion

no injustice is involved in calling for an explanation at the trial stage.  
*Butterworths Hong Kong Commercial Law*  
*& Ors* [1985] 2 HKC 159 (CA).

## [21.02] Advantage

See note [2.01] above.

### 21A. Certificate as to official emoluments, etc.

(1) In any proceedings against a person for an offence under s. 12 of the Prevention of Bribery Ordinance, a certificate purporting— (Amended 14 of 2003 s. 18)

(a) to certify—

(i) the rate of, and the total amount of, such emoluments and the allowances or other payments, paid to any prescribed officer in relation to the discharge of his duties as a prescribed officer; (Amended 14 of 2003 s. 18)

(ii) that any person was or was not seen at any specified time or during any specified period as a prescribed officer or ceased to be a prescribed officer at or before that time; or (Amended 14 of 2003 s. 18)

(iii) that a prescribed officer held or exercised any specified office at any specified time or during any specified period; (Amended 14 of 2003 s. 18)

(b) to be signed by the Chief Secretary for Administration,

shall be admitted in such proceedings by any court without further proof.

(2) On the production of a certificate under subsection (1) to a court before which it is produced shall, until the contrary is proved, presume—

(a) that the facts stated therein are true; and

(b) that the certificate was signed by the Chief Secretary for Administration.

(3) In this section, *official emoluments* (公職薪俸) means any pension or gratuity payable under the Pension Benefits Ordinance (Cap. 89), the Pension Benefits (Judicial Officers) Ordinance (Cap. 85) or the Pension Benefits (Judicial Officers) Ordinance (Amended 36 of 1987 s. 44; 85 of 1988 s. 51).

(Added 69 of 1978 s. 2. Amended L.N. 10 of 1980 s. 1.)

### 21A.01 Chief Secretary for Administration

'Chief Secretary for Administration' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as meaning the Chief Secretary of Administration of the Hong Kong Special Administrative Region.

### 22. Person giving or receiving bribe not to be regarded as an accomplice

Notwithstanding any Ordinance, rule of law or practice to the contrary, no witness shall, in any proceedings for an offence under Part II, be regarded as an accomplice by reason only of any payment or delivery by him or on his behalf of any advantage to the person accused or, as the case may be, by reason only of any payment or delivery of any advantage by or on behalf of the person accused to the person giving or receiving the advantage. (Amended 25 of 1998 s. 2)

### 22.01 Not to be regarded as an accomplice

This provision was introduced to avoid an unwilling donor or donee, when called as a witness, being deemed to be an accomplice: *Li Tit-Chuen v The Queen* [1977] HKLR 71, [1977] HKCU 4 (CFI). In *The Queen v Chan Man-Nung, Ho Yee-San and Mo Chiu-Keung* [1986] HKCU 5 (unreported, CACC 344/1985, 27 January 1986) (CA), the Court of Appeal, whilst agreeing with the comments of Trainor J in *Li Tit-Chuen v The Queen* (above), said that another possible view of the Prevention of Bribery Ordinance (Cap 201), s 22 is that anyone who participates in the offence of bribery is, by reason of that participation, part of the crime willing or not and that s 22 was inserted to avoid the necessity for the normal accomplice direction to be given in respect of him.

### 22.02 Only

The effect of the word 'only' is that where a person initiated a corrupt transaction and did some act over and above agreeing to pay or receive money, he is to be treated as an accomplice and his evidence so regarded. However, if a person is asked to pay a bribe, agrees to do so and in fact does so, the fact that that person has done more than make the payment (that is, he has before that agreed to make the payment), even if willing to do so, does not mean that that person must be treated as an accomplice: *R v Chan Hoi-Lung* [1988] HKC 162, [1988] 2 HKLR 18 (CA). Nevertheless, the provision does not relieve the court of the duty of examining the evidence of those who give bribes with particular care: *Kong Kam-Piu and Anor v The Queen* [1973] HKLR 120, [1973] HKCU 11 (CA). However, a subsequent statutory amendment to the Criminal Procedure Ordinance (Cap 221) (the Criminal Procedure Ordinance, s 60) abolishing the need for warnings about convicting on the uncorroborated evidence of accomplices has

effectively rendered this provision redundant.

### [22.03] Advantage

See note [2.01] above.

## 23. Power to secure evidence of parties to offence

In or for the purpose of any proceedings for an offence under Part II, the court may, at the request in writing of the Secretary for Justice or other person accused or suspected of such offence under Part II that, if he gives full and true evidence in any such proceedings with a view to committal for trial under section 85 of the Ordinance (Cap. 227), in the trial before the High Court as to which he is lawfully examined, he will not be held to have committed any offence disclosed by his evidence; and upon such evidence in any such proceedings no prosecution shall be brought on unless the court before which he gives evidence certifies to the Secretary for Justice in writing that he has wilfully withheld evidence or given false evidence.

(Amended L.N. 362 of 1997)

### [23.01] Court

See note [12.01] above.

### [23.02] Secretary for Justice

See note [12AA.01] above.

### [23.03] High Court

See note [12.05] above.

## 24. Burden of proof

In any proceedings against a person for an offence under the Ordinance, the burden of proving a defence of lawful excuse or reasonable excuse shall lie upon the accused.

### [24.01] Lawful Authority or Reasonable Excuse

See note [4.02] above.

There is conflicting case law on whether this section imposes of a defendant an evidential or a persuasive burden—which type of burden may well depend on the nature of the offence in respect of which the defendant is seeking to rely on this provision.

In *HKSAR v Ng Po On & Anor* [2008] 3 HKC 1, (2008) 11 HKCFAR 91, [2008] 3 HKLRD 176 (CFA), the appellant had been convicted of an offence of failing to comply with a s 14 notice. He had sought to rely on the defence in s 24. The Court of Final Appeal was concerned with the constitutionality of the s 14 offence, and held in applying the proportionality test, that the offence was consistent with the presumption of innocence provided the defence was read down to an evidential burden: per Ribeiro PJ, at [77].

However, in *HKSAR v Chan Tat Chung Danny* (陳達忠) [2010] 2 HKC 268 (CFI), the court held that the offence was one of attempting to commit the s 9 offence of offering an advantage to an agent, Beeson J held that the burden imposed on the appellant in respect of the s 24 defence was a persuasive burden.

Although the Court of Appeal in *香港特別行政區 v 陳志雲 (Chan Chi Wan Stephen) 及 叢培崑 (Tseng Pei Kun)* [2016] 3 HKLRD 186, [2015] HKCU 2483 (CFI), where the offence was again a s 9 offence, cited with approval *HKSAR v Ng Po On & Anor* [2008] 3 HKC 1, (2008) 11 HKCFAR 91, [2008] 4 HKLRD 186 (CFA), and the case was remitted to the District Court for determination, where the trial judge duly followed *HKSAR v Chan Tat Chung Danny* (陳達忠) (above), the court held that the burden was ultimately determined in the Court of Final Appeal (*S-J v Chan Chi Wan Stephen* (陳志雲) [2017] 2 HKC 410, (2017) 20 HKCFAR 98 (CFA)) but the issue of the nature of the burden imposed on a defendant relying in the s 24 defence, was not raised in that court.

In *香港特別行政區 v 陳志翔及另三人* [2016] 1 HKLRD 1448, [2015] HKCU 2483 (CFI), Barnes J dealing with an appeal in a s 9 case, followed *HKSAR v Ng Po On & Anor* (above) in holding that the burden imposed on the appellant was an evidential one and all that the appellant was required to do was to 'provide sufficient credible evidence to engender a reasonable doubt as to the prosecution case' [75]–[77].

-26. (Repealed 48 of 1996 s. 17)