on the cross-harbour ferry journey. A Commission of Inquiry headed by the Chief Justice was appointed to examine the cause of the riots. A person who featured in the Inquiry was Elsie Elliott, an Urban Councillor who had a reputation for lobbying on behalf of her constituents and helping the underdog. She had been a prolific writer of letters to the police, many of which complained of police corruption, who saw her as a thorn in their side. In the course of the Inquiry, police corruption became an issue. As the hearings continued, this issue attracted more and more attention and the Inquiry's proceedings were widely reported in the press.[40] Both Mrs Elliott and the Commissioner of Police gave evidence at the Inquiry. When the Commissioner of Police was asked if there was more corruption in the police force than in other government departments he replied:

> I would say that there is corruption in the police force, but that there is corruption in other government departments and… indeed in commercial life and, in fact, pretty well every walk of life here in Hong Kong.

1.64 He did little to restore confidence in the police force when he asserted that police officers needed to accept bribes in order to pay off their informers.

(c) The 1967 disturbances

1.65 But the impact of the Inquiry on the issue of police corruption was arrested by civil disturbances that took place in Hong Kong for a period of approximately six months after May 1967 as a flow-on from the Cultural Revolution in China. In containing and quelling this unrest the police proved reliable and courageous. Indeed one of the officers who particularly distinguished himself was Peter Godber – a man who only a few years later would achieve notoriety for his corrupt conduct. But for the moment, the public's attention was distracted from police corruption by the more pressing issue of security.

5. 1968–1970: Review of the Existing Law

1.66 With the passage of time a general feeling developed that the Prevention of Corruption Ordinance was inadequate in dealing with what was perceived as a worsening problem in corruption. In 1968, the Anti-Corruption Branch took the initiative to make a study of the law and to draw attention to legislation from other jurisdictions which contained more comprehensive provisions for investigating corruption. The Commissioner of Police lobbied the Government and it responded in 1968 by sending the Attorney General on a fact-finding tour to Ceylon and a Crown Counsel (Mr F T M Jones) and the Chief Superintendent in charge of the Anti-Corruption Branch of the police force (Mr J C Law), on a similar mission to Singapore. The anti-corruption laws of both these countries were examined and reports compiled by the government officers and tendered to the Governor.

40 In his book *Hard Graft in Hong Kong: Scandal, Corruption, the ICAC* (Hong Kong: Oxford University Press, 1985), H J Lethbridge has succinctly described, at page 65, the impact of the Inquiry as follows:

> Inadvertently, the Commission had opened Pandora's Box; unwittingly it had publicised the problem of corruption, a problem which now emerged from the shadows.

1.67 On 2 May 1968, a working party was set up to consider these reports. Its terms of reference were:

> To consider amendments to the Prevention of Corruption Ordinance, based on the situation in Ceylon and Singapore as reported upon by the Attorney General, Mr Law and Mr Jones.

1.68 In July 1969, the Working Party issued its report recommending against amending the Prevention of Corruption Ordinance and instead proposing completely new legislation drawing upon provisions contained in the anti-corruption legislation of Singapore, Ceylon and Malaysia. Part of their report was in fact a draft bill and this draft bill was referred to the Advisory Committee on Corruption. This Committee endorsed the draft bill with some suggested amendments and it was this amended draft bill that was published.

1.69 Between 1969 and the end of 1970, there was widespread consultation, both in Hong Kong and in England, on the proposed new law and the Working Party's original bill went through a number of revisions, mainly to provide safeguards against the abuse of some of its provisions. This final version was then submitted to the Secretary of State for his comments 'in view of its importance and of the nature of some of its clauses'.[41]

6. 1970: The Prevention of Bribery Bill

1.70 After the public consultation period was over and the comments of the Secretary of State obtained, the Prevention of Bribery Bill was gazetted on 16 October 1970 and had its first and second readings in the Hong Kong Legislative Council on 21 October and the second reading debate resumed on the 18 November 1970 with the Bill being passed on 10 December 1970. In moving the second reading of the Bill the Attorney General said:[42]

> Sir, it is impossible to assess with any accuracy the extent to which society in Hong Kong is affected by corruption … But … corruption does exist here to an extent which not only justifies, but demands, that the utmost efforts be made to eradicate it from our public and business affairs …
>
> Those whose task it is to prevent, investigate, or prosecute cases of corruption have long considered that the present law is inadequate in that it confers insufficient powers of investigation and makes the proof of offences too difficult and technical …
>
> This has been described in the press as a tough bill and I think that this is a fair description of it. It introduces novel offences and wide powers of investigation which may cause inconvenience and annoyance to members of the public. I hope that they will regard this as a reasonable price to pay for arming those who enforce the law with adequate powers to do so.

1.71 In stark contrast to the rudimentary nature of the Prevention of Corruption Ordinance, the Prevention of Bribery Bill contained 36 sections and a schedule. It was divided into five parts. Part II contained eight corruption offence-creating sections; Part III contained four sections granting special powers of investigation; and Part IV

41 Second reading speech of the Attorney General, Hong Kong Hansard 21 October 1970, page 133.

42 Hong Kong Hansard 21 October 1970.

freedom of expression. This right could only be restricted by law if the restrictions were necessary:

(1) for respect of the rights or reputations of others; or

(2) for the protection of public order.

1.160 In dealing with the challenge the Court of Appeal asked the question of whether the restrictions contained in section 30(1) of the POBO were 'necessary' in terms of either (1) or (2) above. The Court went on to say that it would approach this question 'broadly' and would not try and provide a judicial interpretation of the word 'necessary'. It found itself 'wholly persuaded by the Solicitor-General's argument that section 30(1), in its full amplitude, is necessary both for the respect of the rights and reputations of others and for the protection of public order'.[98] As in the section 10 challenge, the Court took the opportunity to emphasise the serious threat that corruption poses to the social order, and of the need for special laws to combat it, saying:[99]

> … corruption is a particularly insidious evil in society… Society itself suffers, as the fabric of law and order gets eaten away.

1.161 Because the Courts have been so supportive of the fight against corruption, the Bill of Rights has not proven to be the foe of Hong Kong's anti-corruption legislation that was once feared.

1.162 A recent illustration of such support is the Court of Final Appeal's decision in *A v Commissioner of the Independent Commission Against Corruption*,[100] when section 14(1) of the POBO, the power to require information, was challenged as violating, inter alia, Articles 10 and 11 of the Hong Kong Bill of Rights, by indirectly depriving the respondent of the privilege against self-incrimination. This constitutional challenge failed as the Court recognised that it was rational to equip the ICAC with special investigatory powers for the legitimate purpose of suppressing corruption, which posed a serious danger to society.

12. The Dismissal of the ICAC's Deputy Director of Operations

1.163 On 10 November 1993, Mr Alex Tsui Ka-kit, Deputy Director of Operations of the ICAC was summarily dismissed by the Commissioner, acting under his section 8(2) ICACO power.[101] Section 8(2) provided, very simply that:

> The Commissioner may, if he is satisfied that it is in the interests of the Commission, terminate the appointment of an officer without assigning any reason therefor.

1.164 The reason given by the Commissioner for exercising the power was that he had lost confidence in Mr Tsui. This of an officer who was then regarded as heir apparent to the position of Head of Operations.

98 *R v Ming Pao Newspaper Ltd* (1995) 5 HKPLR 13 at 21B–C.
99 (1995) 5 HKPLR 13, 19C–D.
100 (2012) 15 HKCFAR 362, [2013] 1 HKC 334.
101 The circumstances surrounding the dismissal are discussed in more detail in Chapter 2.

1.165 The dismissal of Mr Tsui was a tumultuous event for the ICAC. It occurred at a time when the localisation of the civil service was an active political issue and it produced wide ranging counter accusations by Mr Tsui from racist administration in the ICAC, to misuse of ICAC powers for political purposes. The words of the Governor, spoken back in October 1973 at the time of the ICAC's inception, that:

> To combat corruption, good laws and good organisation are essential, but I put my trust principally in the services of sound men.

would, sadly, now echo back through the years to haunt the ICAC as it celebrated its 20th anniversary.

1.166 A Legislative Council inquiry was set up to investigate the circumstances behind the Commissioner's use of the section 8(2) power to sack Mr Tsui. On 26 January 1994, the Chief Secretary announced that there would be a review committee established under the chairmanship of a prominent member of the community, to conduct a full and wide-ranging review of the powers of the ICAC and of its present system of accountability to the community. She said in her address to the Legislative Council:[102]

> When the Independent Commission Against Corruption (ICAC) was established 20 years ago, Hong Kong was very different from what it is today.
>
> We must, as the motion suggests, take into account the social conditions that exist in 1994. Hong Kong has changed greatly since 1974. … The ICAC is not immune from this change. The community needs to be convinced that its extensive powers are still justified, and that they are not open to abuse. …
>
> As the ICAC enters its third decade, it is timely that the community should review and reaffirm its mandate.

1.167 Members of this committee were appointed in February 1994 with an obligation to report to the Governor by 31 December 1994. Its terms of reference were:

(1) to review the powers of the ICAC under the ICACO, POBO and CIPO[103] and to advise the Governor whether they remain appropriate, necessary and sufficient; and

(2) to review the accountability of the ICAC in the exercise of its powers, including the role played by the existing five ICAC Advisory Committees, and to advise the Governor whether the present systems of accountability are adequate or should be modified.

1.168 The Committee sought, and was granted, approval to extend its terms of reference to enable it to bring within its review, a consideration of sections 10(2), 20, 21, 24, 25 and 26 of the POBO. At the Government's request the Committee also examined the proposal that the ICAC take over the responsibility, previously discharged by the Special Branch of the Hong Kong Police Force, of carrying out integrity checks on candidates being considered for appointment to senior positions in the civil service.

102 Hong Kong Hansard 26 January 1994.
103 Corrupt and Illegal Practices Ordinance (Cap 288).

an after-care service and returning to its clients to monitor the progress being made in the project on which the CPD was consulted and providing any supplementary guidance by way of fine tuning of its original advice.

2.74 Importantly, the CPD has received recognition from the private sector. In 1985, it set up the Advisory Services Group to offer free of charge, and on a confidential basis, advice to any private sector business on how to prevent corruption. At first there was some hesitation by the private sector in associating quite so closely with the ICAC but by 1990 the Advisory Services Group was providing assistance to over a hundred businesses a year. It also drew up a series of "Best Practice Packages" that provided suggestions on how to minimise the opportunities and risks of corruption in certain corruption prone areas, such as tendering and purchasing.

2.75 But the CPD does not work in isolation. As part of the Commission's three pronged attack on corruption it follows up on the work of the Operations Department. If corruption has occurred then it is only natural to ask why it occurred and whether there were any circumstances that allowed or encouraged its commission. If so then the issue has to be addressed of what can be done about these circumstances to prevent a recurrence of the corruption and the obvious body to answer these questions is the CPD. Likewise it and the Operations Department work together with the Community Relations Department in the preventive training work that it does.

2.76 The CPD is currently headed by a Director and supported by two Assistant Directors. The Department is currently organised into six assignment groups and a management group providing administrative support to the Department. Five assignment groups are concerned with corruption prevention for government departments and public bodies, specialising in functional areas, such as procurement. One of the assignment groups, the Advisory Services Group, is dedicated to handling requests for corruption prevention advice from private organisations. The work of the officers in these groups is not, however, limited to making recommendations. They follow up on the implementation of their recommendation and assess the effectiveness of them as preventive corruption measures. The Special Project Group, as its name implies, is tasked with providing corruption prevention advice to Government in respect of major development projects.

(d) The Community Relations Department

2.77 The purpose of the Community Relations Department (CRD) was to "educate the public against the evils of corruption and enlist and foster public support in combating corruption".[55] It strives to carry out these duties by extolling the values of good citizenship and promoting the concept of working for the community. When this is combined with publicity on the work of the ICAC and the intolerance of corruption message, the groundwork is laid for a partnership between the ICAC and the community it exists to serve. By this means the ICAC has been able to develop genuine support from the public and this is reflected in the way that the high number of anonymous corruption reports gradually declined in the course of the first few years of its operation.

55 ICACO, section 12(g) and (h).

2.78 The CRD utilises all forms of mass media to publicise its anti-corruption message and each year conducts research to monitor community attitudes to corruption and to the work of the Commission and publicizes the results in its Annual Survey. In its work it relies heavily on branch offices in order to reach down to the grass roots level of the Hong Kong community.

2.79 The first Commissioner saw the importance of personal contact between the ICAC and members of the public and community organisations. He regarded direct liaison as vital to the success of the ICAC's role of enlisting public support for its efforts in eradicating corruption. In his 1976 annual report he recognised that the CRD was the key to the future. He said:[56]

> Important though detection, punishment and prevention are, in the long run the battle against corruption has to be won by the community itself. The Community Relations Department is the medium through which the public and the Commission may meet to pursue their common goal of eradicating corruption in our society.

2.80 In the early days of the ICAC, the CRD promoted the anti-corruption cause through the media and direct personal contact. With the opening of more and more local offices the CRD was better able to work within the community. It played a vital role in the process of gaining the public's trust and maintaining its confidence in the Commission. It also used the medium of television to explain and promote the work of the Operations Department through dramatisation of some of its investigations.

2.81 In its involvement with young people, it has tried to inculcate moral values of intolerance of corruption and to develop high standards of personal integrity. This is particularly important to the future success of the ICAC's anti-corruption efforts and the key to the CRD achieving its goal of bringing about a quiet revolution in people's attitudes. This was appreciated by the Commissioner in his 1983 Annual Report when, after noting that corruption stems from greed and that Hong Kong was a highly materialistic society, he said:[57]

> The long-term solution to Hong Kong's corruption is a radical change in social attitudes and values, especially among the young. Therefore, in the years to come, the Community Relations Department will need to sustain its efforts and devise new ways to this end.

2.82 The CRD also works closely with the business community, through the various chambers of commerce and trade associations in trying to enhance the standards of business ethics. It helps in formulating codes of conduct and in conducting training sessions to ensure that employees understand, and know how to apply, these codes. But given the size of the business community this task was too much for the CRD. In order that these programmes would continue, the Hong Kong Ethics Development Centre was set up under the auspices of the ICAC in May 1995. It is committed to the promotion of business ethics and the services that it provides include consultancy on the formulation of codes of conduct, ethics training courses, and a resource library and through its web site it makes available reference materials on business ethics.

2.83 The work of the CRD is also assisted by an oversight committee called the Citizens Advisory Committee on Community Relations (CACCR). The terms of reference of this Committee are:

56 Annual Report on the Activities of the ICAC for 1976, page 7 at paragraph 1.25.
57 Annual Report on the Activities of the ICAC for 1983, page 28.

Lun[80] said that the general tenor of that provision suggested that the principal mischief at which it was directed was the spontaneous tendering of misleading information and that "its use to put pressure on suspected persons when invited to interview the police (sic), to make statements incriminating themselves was not contemplated".[81]

3.93 There are only two appellate decisions on sentencing for section 13B offences. The first is *HKSAR v Cheung Sing Hoi*,[82] a decision of a single judge of the High Court. In this case Deputy Judge Toh said at page 3 of her judgment:

> This offence is serious and I would say there should be no doubt in people's mind that when false allegations are made, either to the police or to the ICAC, that deterrent sentences, normally sentences of imprisonment, would be justified.

3.94 The second decision is by the Court of Appeal. It is *HKSAR v Fong Jik Jin Louis*[83] where the complaint, in respect of a sentence of six months imprisonment, was that the judge had exaggerated the seriousness of the offence by equating it with an attempt to pervert the course of justice. At page 11, paragraph 41 of its judgment the Court of Appeal responded as follows:

> The judge was entitled to equate the circumstances revealed by the evidence as similar to those inherent in an offence of perverting the course of justice. An immediate custodial sentence was appropriate and a deterrent component was justified to underline the repugnance with which the courts view offences which affect adversely the course of public justice.

3.95 It has also been held in respect of the offence of wasteful employment of police time contained in section 91(2) of the Criminal Procedure Ordinance (Cap 221) that custodial sentences of some form are in principle appropriate and deserved.[84]

3.96 Conduct which exposes individuals to arrest (for example making a false accusation against someone) is too grave to be dealt with by a summary offence such as this. Rather a charge of perverting the course of justice should be laid.[85]

3.97 Finally, it is an offence for any person to falsely pretend to be an officer of the ICAC or to have any of the powers of an officer under the ICACO or the POBO or under any authorisation or warrant under either of those ordinances; or to be able to procure an officer to do or refrain from doing anything in connection with his duties. This offence is a summary one carrying a maximum penalty of a fine of $20,000 and imprisonment for one year.[86] Notwithstanding section 26 of the Magistrates Ordinance, a complaint may be made or an information laid in respect of these last two offences within one year from the time when the matter of such complaint or information respectively arose.[87]

3.98 The POBO contains two offence provisions similar to those contained in section 13B of the ICACO. They are in section 29 of the POBO and can only occur

80 [1961] HKLR 268.
81 Ibid at 280.
82 HCMA 1334/2001, 8 March 2002, unreported.
83 [2003] HKCU 359 (CACC 624/2002, 19 March 2003, unreported).
84 *R v Too Hung Fong* [1991] 1 HKLR 365.
85 *R v Rowell* (1977) 65 Cr App R 174.
86 ICACO, section 13C.
87 ICACO, section 13E. As this provision only applies to the section 13B and 13C offences, the time bar for the section 13A offence must be six months only, in accordance with section 26 of the Magistrates Ordinance (Cap 227).

when an authorization has issued under section 13 of this ordinance. Section 13 is a power used by ICAC officers in the covert stage of an investigation to obtain information of a financial accounting nature.[88] Both offences in section 29 can only be committed during the course of an investigation into, or in any proceedings relating to, an offence alleged or suspected to have been committed under the POBO. In such circumstances it is an offence for any person to knowingly make or cause to be made a false report of the commission of a POBO offence to any investigating officer specified in an authorization given under section 13.[89] It is also an offence for any person to knowingly mislead any investigating officer specified in an authorization given under section 13 of the POBO.[90]

3.99 Both of these offences are summary offences punishable upon conviction by a fine of $20,000 and imprisonment for one year.

(b) Section 30, Prevention of Bribery Ordinance: Offence to disclose identity, etc of persons being investigated

3.100 Section 30 criminalises the disclosure of details of an ICAC investigation. It creates two offences, one relating to disclosure to the subject of the investigation, and the other relating to disclosure to the public or any other person.[91]

3.101 In respect of the former, it is an offence for any person who, knowing or suspecting that an investigation in respect of an offence alleged or suspected to have been committed under Part II of the POBO is taking place, without lawful authority or reasonable excuse, discloses to the person who is the subject of the investigation the fact that he is the subject of an investigation or discloses to him any details of the investigation.[92] In respect of the latter it is an offence if the disclosure is made to the public, a section of the public or to any particular person of the identity of the person the subject of the investigation or the fact that that person is so subject or any details of the investigation.[93] The penalty for these offences of criminal disclosure is a fine of $20,000 and imprisonment for one year.

3.102 But any disclosure of the kind mentioned in these provisions is not an offence where, in connection with the investigation the details of which have been disclosed:

(1) a warrant has been issued for the arrest of the person who is the subject of the investigation;
(2) this person has been arrested whether with or without warrant;
(3) this person who is the subject of the investigation has been required to furnish a statutory declaration or a statement in writing by a notice served on him under section 14(1)(a) or (b) of the POBO;

88 Section 13 is described in detail and its provisions discussed in Chapter 12.
89 POBO, section 29(a).
90 POBO, section 29(b).
91 In a POBO section 30 prosecution, proof of the fact that a person was the subject of an investigation can be proven by assertions made by the issuer of authorisations under section 13 of the POBO should that authorisation be exhibited in the trial. See *R v Lau Wai Shing* HCMA 448/1988, unreported.
92 POBO, section 30(1)(a).
93 POBO, section 30(1)(b).

5.27 The occasions when the three conditions[27] will be satisfied will be rare and exceptional. Firstly, the requirement that there be ambiguity or obscurity refers to the statutory provision read without the benefit of any external aid. The ambiguity or obscurity must be apparent on the face of the legislation under consideration. It cannot be manufactured by reference to the external aid. In *Hong Kong Clays and Kaolin Co Ltd v Director of Lands*,[28] Nazareth VP said at page 536B:[29]

> The ambiguity sought to be relied upon must emerge from the provision that is said to be ambiguous or the instrument of which it forms part. Extraneous material cannot be relied upon to create ambiguity which is then to be relied upon to justify reference or inclusion of that material; the ambiguity must be shown to exist before the excluded material can be resorted to, a fortiori if it is to be used to clear up that very ambiguity.

5.28 Even if the ambiguity/obscurity pre-condition is satisfied, to be of assistance as an external aid the parliamentary statement relied upon must be clear and unequivocal. Otherwise it is of no real use.[30] In considering whether such a statement is clear and unequivocal, regard must be had to the circumstances in which it was made. Thus, extempore answers given in the course of vigorous debate in the legislature or in committee cannot be expected to be as comprehensive and precise as more formal statements.[31] Indeed, if the court was drawn into "comparing one statement with another, appraising the meaning and effect of what was said and considering what was left unsaid and why" it might come "uncomfortably close to questioning the proceedings in Parliament".[32] The clarity and unequivocal nature of the parliamentary statement should be such as "would almost certainly settle the matter immediately one way or the other".[33]

5.29 Even if the pre-conditions are satisfied and the parliamentary statement qualifies as an external aid, that statement does not necessarily exclusively determine how the statutory provision should be construed. The statement is no more than part of the legislative background of the provision under consideration and it will simply be one of the factors that the court takes into account in construing the disputed provision. This point was emphasised by Lord Nicholls in *ex parte Spath Holme Ltd* when he said at page 39G–H:[34]

27 Ie the legislation is unclear; there exists statements by the promoter of the bill; and the statements relied upon are clear.

28 [1999] 1 HKLRD 527.

29 In *R v Environment Secretary, ex parte Spath Holme Ltd* [2001] 2 WLR 15 at 38E–H, Lord Nicholls expressed the view that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, "the courts are not confined to looking solely at the language in question in its context within the statute". However, this was a view he cautiously advanced warning also that "the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity".

30 *R v Environment Secretary, ex parte Spath Holme Ltd* [2001] 2 WLR 15 at 39D per Lord Nicholls of Birkenhead.

31 Ibid at 40C.

32 Ibid at 32C, per Lord Bingham of Cornhill.

33 Per Lord Reid in *R v Warner* [1969] 2 AC 256 at 279E, quoted by Lord Bingham of Cornhill in *R v Environment Secretary, ex parte Spath Holme Ltd* [2001] 2 AC 349, [2001] 1 All ER 195, [2001] 2 WLR 15 at page 32C.

34 This statement by Lord Nicholls was quoted with apparent approval by Li CJ in *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568, [2009] 6 HKC 22.

> Government statements, however they are made and however explicit they may be, cannot control the meaning of an Act of Parliament. As with other extraneous material, it is for the court, when determining what was the intention of Parliament in using the words in question, to decide how much importance, or weight, if any, should be attached to a Government statement. The weight will depend on all the circumstances.

5.30 If the courts of Hong Kong are guided by the authors of the leading English work on statutory interpretation, *Bennion on Statutory Interpretation*,[35] they will apply the rule in *Pepper v Hart* only rarely and with considerable caution.[36] The rule appears to introduce as much uncertainty as it removes and greatly increases the duties of counsel, to search through parliamentary material. The authors of *Bennion* take pains to demonstrate that the relaxation of the exclusionary rule was unnecessary in that instant case.[37]

3. The Interpretation and General Clauses Ordinance

5.31 Although the POBO and the ICACO contain their definition sections, they are not exhaustive and there are many words in these two ordinances for which no definition is provided, but for which a definition can be found in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) (IGCO). Examples are Chief Executive, Hong Kong, person, property, the Government, the Executive Council and the Legislative Council. By section 2(1) of the IGCO these definitions apply to every other Hong Kong ordinance unless a contrary intention is apparent, either from the IGCO or from the context of the ordinance or instrument to which application of the IGCO definition is being considered.

5.32 The construction of section 2(1) came under scrutiny by Keith J in *Mutual Luck Investment Ltd v Attorney General*.[38] In that case, he noticed that section 2(1) employed the words "where the contrary intention appears" whereas most similar provisions in other interpretation ordinances were drafted in terms of "unless the context otherwise requires". This latter phrase, he said, meant that the definition of a particular word or phrase will be adopted unless it is displaced by express words or necessary implication. But the former phrase, which is employed by the IGCO, had the effect of lowering the threshold for the displacement of the section 3 definitions. He concluded that these definitions would apply to the same word or phrase in another ordinance unless there was something in the context, or in the manifest object of that other ordinance or in the nature of its subject matter to displace the IGCO definition.

5.33 Although he rejected the submission that the dissimilar language resulted in no more than a distinction without a difference Keith J did suspect that there would be very few cases in which this variation in language would actually produce different results. He said this because he recognised that the indicators that it was intended

35 F A Bennion and O Jones, *Bennion on Statutory Interpretation* (6th Edn, 2013, London: LexisNexis).

36 See ibid, pages 566 to 588, 'Section 127 Use of Hansard'.

37 See ibid, page 578 and the analysis on pages 578 to 582, under the side heading 'Comment Part Eight: Facts and Law in *Pepper v Hart*'.

38 [1997] HKLRD 1097.

6.73 It is always necessary therefore to revert back to the legislation in which the phrase is contained in order to construe it. The preamble to the POBO describes its purpose as:

> To make further and better provision for the prevention of bribery and for purposes necessary thereto or connected therewith.

6.74 When discussing the defence of lawful authority or reasonable excuse in *Ngan Lun Yan v R*[86] Huggins J said at pages 372–373:[87]

> The manifest intention of the Legislature was to proscribe the offering, demanding, giving and receiving of what may generically be termed secret commissions. An employee ought to be paid by his employer and not, save with his employer's consent, by persons dealing with the employer.

6.75 The starting point for construing the phrase must therefore surely be a recognition that it is an integral part of anti-corruption legislation whose social purpose is the eradication and punishment of corrupt conduct. The question then becomes what justification (ie lawful authority or reasonable excuse) can there be for offering an agent a bribe or for an agent soliciting or accepting one? The author uses the word "bribe" deliberately as a reminder that in respect of the Part II offences the defence only arises for consideration if the prosecution has established the elements of the corruption offence beyond reasonable doubt. In respect of most of the Part II offences to which the defence attaches this means in effect that the prosecution has proven beyond reasonable doubt the offer, solicitation or acceptance of a bribe.[88]

(b) Procedural operation of the defence

6.76 Section 24 of the POBO places the burden of proving the defence on the accused. The standard of proof is the balance of probabilities.[89] As a reverse burden provision the defence is in effect a negative averment and section 24 operates in the same way as section 94A of the Criminal Procedure Ordinance (Cap 221). That was certainly the view of the Attorney General at the time that the Prevention of Bribery Bill was being debated. He said:[90]

> This provision, though the matter is not free from doubt, probably reproduces the present position at common law, the general principle being that if the subject matter of an allegation is peculiarly within the knowledge of an accused, it is for him to rebut it. A similar provision is already to be found in the Criminal Procedure Ordinance.

6.77 Such a view was taken by Roberts CJ in *Attorney General v Chan Fuk Hing*[91] on a similar defence provision in section 33(1) of the Public Order Ordinance (Cap 245).[92]

86 [1975] HKLR 369.

87 See also *HKSAR v Feng Chun Han* HCMA 1049/2001, 16 April 2002, unreported where Deputy Judge Wong said of section 9 that "the most essential element of the offence is lack of consent or approval from the employer" and that the consent of the employer was "the gravaman of the offence".

88 The exception to this statement are the offences in section 8 of the POBO which do not contain the element of "inducement to, reward for or otherwise on account of".

89 *HKSAR v Chung Chun Keung* [2000] 3 HKC 496.

90 Hong Kong Hansard 21 October 1970, page 141.

91 [1979] HKLR 495.

92 See also *Attorney General v On Hing Man* HCMA 61/1989, 17 March 1989, unreported.

In that case he held that the lawful authority or reasonable excuse defence that was created by this provision was a negative averment that was covered by section 94A of the Criminal Procedure Ordinance.

6.78 But the constitutional legality of reverse burden provisions must now be considered against the backdrop of human rights law that has developed in this area. In respect of the POBO this was done by the Court of Final Appeal in *HKSAR v Ng Po On*[93] where it was called upon to determine whether the words "reasonable excuse" in section 14(4) of the POBO created a reverse burden offence. That is, one which requires an accused to prove "an ultimate fact which is necessary to the determination of his guilt or innocence".[94] At page 109E, para 48 Ribeiro PJ, in giving the judgment of the Court said:[95]

> Where a person prosecuted under s. 14 seeks to contend that he has a reasonable excuse for failing to comply with the notice served on him, the combined effect of s. 14(4) and s. 24 is to impose on him the persuasive burden of establishing the existence of such reasonable excuse on the balance of probabilities. The wording of s. 24 – 'the burden of proving a defence … reasonable excuse shall lie upon the accused' – leaves no room for doubt that a persuasive burden is expressly imposed.

6.79 Having concluded that section 24 imposed a reverse burden in respect of proving lawful authority or reasonable excuse whenever that phrase (or, as in the case of section 14(4), only part of it) appeared in a POBO offence provision, the Court of Final Appeal had to consider whether such a derogation from the presumption of innocence is justified. The principles applicable to such a determination were set out by Ribeiro PJ at 102H–103B, para 28. He said:

> … the constitutional protection accorded to the presumption of innocence is not absolute and that derogation from it may be justified if such derogation has a rational connection with the pursuit of a legitimate aim and if it is no more than necessary for the achievement of that aim. Where the legislature has chosen to impose a reverse onus on the defendant, the court gives weight to that legislative decision, taking into account the nature of the problem addressed in the statute and in particular, whether it involves adoption of a policy which the legislature is better placed than the court to assess, as discussed in *Lam Kwong Wai*. The Court must of course ultimately exercise its constitutional responsibility by determining the issue, after giving appropriate respect to the legislative judgment.

6.80 Leaving aside the giving of proper regard to the Legislature's decision, the court will apply the two tests mentioned at the beginning of this quote, namely the rationality test and the proportionality test. In satisfying these tests and justifying the derogation, the burden is on the state and for it to succeed its reasons must be compelling.

93 (2008) 11 HKCFAR 91, [2008] 3 HKC 1.

94 *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at paragraph 27.

95 Had section 24 not existed or not been so clearly drafted it would have been necessary for the court to construe the legislative provision by applying relevant common law and statutory principles with a view to ascertaining whether the impugned provision imposes a persuasive burden of proof on the accused. See the discussion of the relevant principles by Ribeiro PJ at pages 103G–107H of *Ng Po On*. For examples of where the offences were held not to impose a persuasive burden see *HKSAR v Lam Yuk Fai* (2006) 9 HKCFAR 281 and *Securities and Futures Commission v Yu Ka Tak* [2008] 2 HKLRD 626.

The Leonard J test, applied by the judge, looks at "capacity" from the angle of the offeror: would the offer have been made if the person in question were not the kind of public servant he in fact was.

(c) The act must be discernible as a public act

8.44 This section discusses element (d) of Leonard J's formulation of the elements of a section 4 offence as set out in the headnote to *Attorney General v Chung Fat Ming*.[53] It emphasises the need to distinguish between acts performed by a public servant in his private capacity and those performed by him in his public capacity. In order to address this issue Leonard J devised, in effect, a proviso to his capacity test. This proviso stems from the qualification expressed by him in *Kong Kam Piu v R*[54] when he said at page 130:

> ... provided of course that the embarrassment sought to be avoided by the gift could not equally easily have been caused by the police officer had he not been a police officer.

8.45 The most famous example of where the application of this proviso was considered was the decision by the Privy Council in *Attorney General v Ip Chiu*.[55] At page 17 of the report, Lord Edmund-Davies referred to the evidence that the accused police officers were paid bribes so that they would not plant drugs on the offeror or beat him up and said of these acts that "they could have been perpetrated equally well by a stranger as by a member of the police force". The proviso seems to be no more than another way of expressing the point that there must be a link between the act to be corruptly performed and the public servant's capacity ie that the act flows from the duties, powers, capability, position or character of the public servant's office. In determining whether an act is in a public servant's capacity it operates in a negative way by identifying what acts will not be within his capacity.

8.46 This view of the role of the proviso was propounded by McMahon DJ in *HKSAR v Li Hiu Ling*.[56] In this case a prostitute offered free sexual services to policemen who had come to her flat in response to a complaint that she was operating a one woman brothel. It was argued that even if this was what the appellant was doing it was no offence and so the police officers would have had no greater power than anyone else to in any way prejudice the rights or interests of the appellant. Whilst recognising that the Leonard test was an "elegant and incisive pathway to the heart of otherwise perhaps troubling questions of whether an offer or solicitation was made on account of a civil servant doing an act in his capacity as a civil servant"[57] McMahon DJ said that the proviso to it was nevertheless:[58]

> ... no more than an illustration of circumstances where the test itself would provide an answer to the effect that the offer or solicitation could not be said to be in the civil servant's capacity. In other words, the proviso or second limb does not add to or change the terms or effect of the test which preceded it in Leonard J's judgement. It merely illustrates a general instance where the offer or solicitation would not relate to the civil servant's capacity.

53 [1978] HKLR 480.
54 [1973] HKLR 120.
55 [1980] HKLR 11.
56 [2001] 3 HKLRD 728.
57 Ibid at 731F, paragraph 12.
58 Ibid at 731H, paragraph 14.

8.47 The court saw capacity not as part of the actus reus but rather as part of the mens rea, a view which it said was supported by the provisions of section 11(2) which prevent an offeror from arguing in his defence that the agent to whom he offered a bribe to do a particular act, in fact had no power, right or opportunity to do that act. By applying this provision with the Leonard test the court said that "it would be sufficient for the prosecution to have established that the offer was made because the appellant believed or suspected in terms of section 11(2) that the officers had the ability as police officers to take steps leading to her eviction and that by making the offer she hoped to have them abstain from taking those steps."

8.48 This view is consistent with the Court of Appeal's comments in *R v Leung Kam Ho Gilbert*[59] that the test is a subjective one looking to the belief or perception held by the offeror of the agent's capacity, not to the reality of that capacity. This was a view which itself was adverted to by McMullin J in *Attorney General v Chung Fat Ming*,[60] when at page 488 of the report he commented on the Leonard test and said of the phrase "the kind of public servant" that is used in it:

> ... it seems to me this test is clear and workable only if one interprets "the kind of public servant" as meaning not merely that the official in question holds a certain office but also that he is, *or is thought to be*, in a position by virtue of that office to favour or disfavour the interest of the particular solicitee and that this is something which is apparent to both parties.
>
> [*Italics are the author's*]

8.49 The words "or is thought to be" are particularly appropriate in respect of an offering situation. These qualifying words of McMullin J were adopted with approval by Keith J in *R v Ng Man Ho*[61] but have not otherwise been commented on by the courts. Although they seem to follow on from comments that Leonard J himself made in *Kong Kam Piu v R*[62] where he said at page 130:

> ... the present ordinance aims at the mischief of a police officer obtaining a gift from a member of the public whether or not he be entitled *virtute officii* to do the act forborne provided of course that the embarrassment sought to be avoided by the gift could not equally easily have been caused by the police officer had he not been a police officer.

8.50 Leonard J's own words, "whether or not he be entitled *virtute officii* to do the act forborne", also suggest that the proviso he then went on to express was not directed at the actual powers, rights or duties etc of the public servant.

8.51 Another example of the application of the proviso is *Attorney General v Lam Sau Ki*.[63] In this case it was alleged that the respondent public servant gained access to certain advance information from the Building and Lands Department after his transfer from that department to the Housing Department and accepted advantages for supplying that information to certain persons. There was evidence adduced at trial that this advance information was not confidential and was kept to promote academic research. It would have been given to any member of the public who had an interest in it or a good enough cause for obtaining it. The evidence was that the information

59 [1995] 1 HKCLR 90.
60 [1978] HKLR 480.
61 [1993] 1 HKC 632.
62 [1973] HKLR 120.
63 [1992] 1 HKCLR 279, [1992] HKC 92.

10.104 The income component of the standard of living is, in terms of his civil service salary only those official emoluments which have actually been paid during the charge period, regardless of the period in respect of which they have been paid. Sums earned in, or payable in respect of, the charge period but not paid until later should be excluded although they may be brought in by way of explanation if credit has been obtained during the charge period on the strength of an expectation that the emoluments would be paid.

10.105 The Full Court's guidelines in *Hunt* can be summarised as follows:

In assessing the "standard of living maintained" you should take into account during the charge period, the value, cost or liability of the accused to pay for:

(1) goods and services acquired during the charge period;
(2) running costs, expenses of repairs or maintenance and outgoings, incurred during the charge period, connected with property acquired before the charge period;
(3) the value of gifts made;
(4) money spent by the accused on another's standard of living;
(5) his ability to obtain credit during the charge period required consideration of the nature of the expectation upon which the application for credit is based;
(6) prepayment of periodic outgoings within the charge period;
(7) goods and the value of services obtained on credit – these items should be brought into the quantification at the date when the goods or services are obtained and not at the date when payment is made;
(8) emoluments received but excluding those not actually paid during the charge period;
(9) the amount of hire charges paid during the charge period;
(10) bills remaining unpaid for goods supplied and services rendered during the charge period;
(11) school fees of dependent children, irrespective whether such were paid for by a former wife – pre-payment of school fees for the charge period are not to be excluded but a discount may be made;
(12) only that salary tax actually paid during the charge period;
(13) the increase in the accused's bank balance between the beginning and end of the charge period;
(14) deposits in banks and investments held but excluding notional interest thereon;
(15) payments made by third parties for and on behalf of the accused for goods and services maintaining the accused's standard of living – however, such payments might be included as part of the explanation of the standard of living maintained where the court is satisfied that payment was made with untainted money;
(16) credit should be given for money received from the sale of assets or goods acquired before the charge period provided they are shown to have come from an untainted source and that it is shown the monies were utilised in maintaining the accused's standard of living.

12. Section 10(1)(b): Controlling Disproportionate Pecuniary Resources or Property

(a) Actus reus and mens rea of the offence

10.106 The actus reus of this offence is the controlling of pecuniary resources or property.[107] No mens rea is required to be proven in respect of knowledge of the property. This is apparent from *Sturgeon v R*[108] where the appellant, a Superintendent of the Royal Hong Kong Police Force, argued that the prosecution had to prove that he had knowledge of the property alleged to be under his control, and contended that he did not in fact have such knowledge. The Court of Appeal rejected this argument, holding that prima facie evidence of mens rea was unnecessary as the intention of the Legislature was to put the onus of giving an explanation on the accused as soon as actual control of property disproportionate to his present or past official emoluments was established. The Court said that absence of knowledge would be a matter of explanation and it was something which an innocent person should have no difficulty in proving on a balance of probabilities.

(b) Valuation of controlled property

10.107 The first question that has to be answered is what property did the accused have under his control at the charge date. To answer this question requires a quantification of the property and emoluments in terms of dollars and cents. In *Chung Cheong v R*,[109] the issue of how to value the controlled property came up for consideration. No evidence was given at the appellant's trial for an offence under section 10(1)(b), as to the value, at the charge date, of his equitable interest in a flat and as to the value of certain shares held by him. The prosecution relied on entries made by the appellant in notebooks where he had set out what money he had invested in the flat and what he had paid for the shares. The Court of Appeal held that such valuations were sufficient to constitute prima facie evidence of the value of his interest in the flat and of his ownership and market value of the shares as at the charge date.[110]

10.108 In *Ho Pui Yiu v R*,[111] the Court of Appeal was hearing an appeal against a decision of a District Court judge who had ruled that on a trial of a section 10(1)(b) offence, the prosecution was not required to adduce evidence of the value of the controlled properties as at the charge date as opposed to their values as at the dates of purchase. The date of disproportion under section 10(1)(b) was alleged by the prosecutor to be the charge date. Evidence of official emoluments from the date of first employment to the charge date was led by the prosecution and there was evidence

107 Per Huggins JA in *Lai Man Yau v Attorney General* [1978] HKLR 7.
108 [1975] HKLR 677.
109 CACC 1364/1977, 6 February 1980, unreported.
110 The differing views amongst District Court judges as to whether the value of property should be the value at acquisition or the value at charge are discussed by Hooper DJ in *R v Chung Cheong* DCCC 137/1977, 22 December 1977, unreported at pages 7–10 of the Reasons for Verdict.
111 [1979] HKLR 69.

responsible officer in charge of that site, must accept a higher degree of culpability".[293] He said of such a person, "a sentence of 15 months for corruption offences by a Crown servant in a position of some responsibility cannot be said to be manifestly excessive".[294] He said that for the artisans a sentence of 12 months' imprisonment would have been appropriate.

11.202 The Court of Appeal in *R v Siu Hon Sum*[295] was dealing with a 63 year old appellant in poor health who had been convicted of six counts of offering advantages to a corrupt clerk of works who was supervising the construction work being performed by his company on a public housing estate. The offences were dated having taken place between 1970 and 1973. Indeed, one of the charges on which the appellant was convicted was laid under the Prevention of Corruption Ordinance, the predecessor of the POBO. The amount of each bribe was $10,000 but it seems to have been accepted that the charges laid were only sample charges and the total value of the bribes paid was $200,000. The trial judge ordered the appellant to pay a fine of $350,000 and serve a total period of two years and nine months' imprisonment. This sentence was upheld on appeal.

11.203 *HKSAR v Chan Kau Tai*[296] concerned an appeal against sentence by the Chief Building Services Engineer of the Housing Department who had been convicted on a retrial of nine counts of accepting an advantage contrary to section 4 of the POBO. The corruption involved seven offerors and took place over approximately an eight months period during which the applicant accepted $1.5 million in advantages of which $1.1 million was paid to him in cash. Most of the offerors were private sector contractors working on Housing Authority construction projects. He was sentenced by the trial judge to six years imprisonment, a totality which the judge reached by ordering that portions of some of the sentences be served consecutively to the others. The Court of Appeal said that since most of the offences involved different offerors from different companies for different purposes, they should not be treated as a single transaction or a single course of conduct. It said that there was no error of principle by the trial judge in ordering partially consecutive sentences in order to obtain an appropriate totality. As to the totality the court said that although the value of the bribe or bribes received is also a matter of significance, the dominant consideration is the impact of the corruption, particularly on the public interest. Characterizing the applicant's conduct as a "blatant case of public corruption"[297] and describing him as "behaving in the classic mould of one who was prepared to do almost anything it was in his power to achieve provided the price he was paid for doing it was sufficient"[298] the Court of Appeal said that "the sentence the applicant received might well have been heavier than the one the judge imposed".

293 Ibid at page 4.
294 Ibid at page 4.
295 [1989] 1 HKLR 327.
296 [2008] 4 HKLRD 404, [2008] 3 HKC 78.
297 Ibid at 88B–C.
298 Ibid at 88B–C.

(ii) Bribery to assist in processing development applications

11.204 In *R v Liew Kwok Shan William*,[299] the accused was a Chief Engineer in the Transport Department who was convicted after trial of soliciting $400,000 and accepting $100,000 for assisting a company in its application to develop a car park. Starting points of five years' and three years' imprisonment, respectively, were held to be proper with the court saying that offences of this kind called for sentences which contained an element of deterrence. The trial judge reduced the sentences by six months and ordered that they run concurrently. The final sentence of four and a half years' imprisonment was held by the Court of Appeal to be neither wrong in principle nor manifestly excessive.

11.205 The accused in *R v Chan Kwok Hing*[300] was the operator of an amusement game centre who pleaded guilty to offering a bribe of $40,000 to the executive officers of the Television and Licensing Authority (TELA) to obtain permission to extend his premises. He was sentenced to nine months' imprisonment from a starting point of 12 months' imprisonment. He appealed against sentence and prayed in aid on his appeal the fact that he was a single parent responsible for three children and financial hardship would be caused to his business if he was incarcerated. He had also suffered a long delay, through no fault of the prosecution, in awaiting trial. The Court of Appeal in dismissing the appeal against sentence, described the offence as a very serious one and characterised the sentence of nine months' imprisonment as a lenient one that was "plainly neither wrong in principle nor manifestly excessive".[301]

(iii) Bribery of driving examiners and driving instructors

11.206 In *Lee Kong Chung v R*,[302] Chief Justice Roberts discussed the respective culpabilities of driving examiners and driving instructors. He made a distinction between the two, asserting that the culpability of the former was generally more serious than that of the latter. He said that "where a driving examiner, who is a public servant, is convicted of soliciting or accepting bribes in relation to the passing of driving tests, an immediate custodial sentence should normally be imposed" and that only where there were unusual extenuating circumstances present should the sentence be suspended. When he came to dealing with the position of driving instructors he noted that there was a wide disparity between the sentences that the courts had imposed. This may have influenced him in making what is, it is suggested, a somewhat artificial distinction. He said at pages 2–3 of his judgment:

> Generally speaking the culpability of driving instructors is somewhat less than that of driving examiners. Although they are taking part in an arrangement which may lead to grave consequences, in that they are seeking to arrange, by the payment of money, for the passing of driving tests by persons who may not be fit to pass them. It must be obvious to anyone that the presence of unqualified drivers on the roads only lead to serious accidents.
>
> Against this background, I cannot say that a magistrate is wrong in imposing an immediate custodial sentence on a driving instructor. Though I suggest that a magistrate

299 CACC 405/1995, 11 October 1995, unreported.
300 [1994] 3 HKC 115.
301 Ibid at 121G–H.
302 CACC 393/1980, 11 June 1980, unreported.

12.28 The use of such compulsive powers in the investigation of criminal conduct is not a breach of article 11(2)(g) of the Bill of Rights which says that "in the determination of any criminal charge against him, everyone shall be entitled to … not to be compelled to testify against himself or to confess guilt. The reason for this is because this article only applies to persons who face a criminal charge and the immunity provided by the article in respect of such persons is only a testimonial immunity.[36]

12.29 Even though the prosecution may not make direct use of statements obtained from a suspect through the POBO Part III powers, it is not prevented by the common law from making derivative use of the information so acquired.[37] The mere fact that derivative use is made of information obtained under compulsion does not mean that an accused will not receive a fair trial. Nor does it undermine the presumption of innocence. In *HKSAR v Lee Ming Tee*[38] at 176F–J the Court of Final Appeal said a statutory abrogation of the privilege against self-incrimination which inferentially permitted the derivative use of compulsorily obtained self-incriminating materials could be justified if it was not a disproportionate response to a genuine social evil. It will not be disproportionate if it strikes a fair balance between the general interest of the community in realizing the legislative aim and the protection of the fundamental rights of the individual.[39] The Court of Final Appeal said at page 179E of its judgment:

> In the constitutional, legislative and common law context of the HKSAR … the impact of directly or derivatively using compulsorily obtained evidence on the fairness of a trial and on the presumption of innocence must be assessed, not in absolute terms, but by balancing the competing public interests, and not by focusing on one aspect, such as the absence of any derivative use immunity, in isolation, but by taking the trial process as a whole.

12.30 However the Court was also careful to emphasize that its comments were only directed to the use at trial of evidence that was acquired derivatively from statements made by an accused under compulsion. For it is only such evidence that rubs up against the right against self-incrimination.[40] Evidence which exists independently of the will of the accused does not impact on the privilege. Moreover Ribeiro PJ was of the view that "there is much to be said for the general proposition that there is no inherent unfairness in establishing a person's guilt by the use of reliable objective

Tee & Anor (2001) 4 HKCFAR 133 at 175G and *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170, [2008] 3 HKLRD 372 at para 83.

36 *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133.

37 *Lam Chi Ming v R* [1991] 2 AC 212 followed by the Court of Final Appeal in *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133.

38 (2001) 4 HKCFAR 133.

39 Ibid at 176F–J. The same reasoning prevailed in *A v Commissioner of the ICAC* (2012) 12 HKCFAR 601.

40 In *Kennedy v Cheng & Anor* (2009) 12 HKCFAR 601, the Court of Final Appeal, in allowing the appeal of the liquidator, accepted his counsel's submission that after conducting a private examination under section 221 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), the liquidator could provide transcripts thereof to the police where he suspected wrongdoing without seeking the leave of the court. However, as the same evidence was obtained by compulsion, the transcript would not be admissible as direct evidence should a prosecution arise therefrom. See the judgment of Bokhary PJ, with which the other judges agreed, at paragraph 39. It should also be noted that there was no constitutional challenge to the section 221 powers in this case: see paragraph 33.

evidence obtained from an independent source even if the acquisition of that evidence was facilitated by clues contained in the excluded admissions".[41]

12.31 Nor do these kinds of compulsory powers offend the right of privacy contained in Article 14 of the Bill of Rights. This is because the interference with the right that flows from the exercise of these powers is neither arbitrary nor unlawful. In respect of similar powers granted to the Securities and Futures Commission to enable it to properly investigate market misconduct the Court of Appeal in *R v Securities and Futures Commission, ex parte Lee Kwok Hung*[42] said that the interests of the individual had to be balanced against the interests of society and concluded that the interests of society must prevail. At page 61 of the report Litton JA said:

> Such "privacy" as the appellant, and persons in a similar position, might have cannot stand against society's requirements of a proper investigation under section 33(4).[43]

12.32 While the last two decades have seen the development of a mature jurisprudence dealing with the accommodation of the powers of compulsion that aid the investigation as well as human rights law, major challenges are surfacing that highlight the problems that the courts of Hong Kong face in exercising compulsive powers to secure a fair trial process. Increasingly, the integration of Hong Kong's economy with that of the Mainland brings complex criminal trials before the courts, where material witnesses reside and exhibits are located beyond the usual powers to secure attendance or production. Absent ready cooperation, assistance may be sought by the cumbersome system of letters of request issued by the courts under section 77E of the Evidence Ordinance (Cap 8), which is not uncommonly demonstrated to be uncertain or ineffective.[44] Operations where the law enforcement agencies of Hong Kong and the Mainland act in close coordination are not rare and they are also apt to expose the shortcomings of the current system. Obvious difficulties would accompany a close integration of the neighbouring legal systems, but the time must be ripe for determining how much better the courts and the Secretary for Justice can act for all parties to facilitate cooperation between law enforcement agencies and better secure evidence in the Mainland for transmission to Hong Kong.[45]

41 *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 at 177F–G.

42 [1993] 2 HKLR 51.

43 Reaffirmed by the Court of Appeal in *Koon Wing Yee v Securities and Futures Commission* [2009] HKCU 661 (CACV 367/2008, 7 May 2009, unreported).

44 See *HKSAR v Hon Ming Kong* (2014) 17 HKCFAR 727, where the Court of Final Appeal dismissed leave to appeal an application at the centrepiece of which was a point of law arguing that Article 95 of the Basic Law imposed a mutual legal obligation upon the HKSAR and the Mainland to put in place a scheme for mutual legal assistance in criminal matters. The source of the applicants' complaints was the failure of the trial judge to stay legal proceedings where the attendance of witnesses the applicants claimed were vital to their defence could not be secured despite letters of request being employed. The Court of Appeal had determined that a fair trial could nonetheless still be secured. Interestingly, the Court of Final Appeal left open for a suitable appeal the formulation of a duty on the prosecution to assist the defence in securing evidence from witnesses in the Mainland it required to put forward its case: see paragraph 10 of the judgment.

45 See *Keen Lloyd Holdings Limited & Ors v Commissioner of Customs and Excise & Anor* [2014] HKCU 2956 (HCAL 82/2013, 23 December 2014, unreported). The Customs and Excise Department wrongfully provided their Mainland counterparts with copies of exhibits seized upon the execution of Hong Kong warrants, absent legal authority to do so, relying on administrative arrangements to share intelligence. See paras 159–180 and the conclusions at paras 181 and 182.

8. Powers in Respect of Prescribed Officers, Public Servants and Public Bodies

12.144 These powers are contained in the POBO and the ICACO and relate to both the investigatory and corruption prevention duties of the ICAC. But they are confined in their application to the public sector and have no relevance to the private sector. In the performance of the ICAC's investigatory role, they provide it with a right of entry upon government premises without the need for a search warrant, a right of access to documents and records of a government department and a right to compel prescribed officers to answer questions. For public bodies, the Commissioner is given a limited power only, confined to accessing the records of the public body solely for the purpose of discharging his corruption prevention duties. Consequently, if he wished to enter the premises of a public body in order to search it as part of a corruption investigation then he would have to rely upon his search warrant powers.

(a) Section 16 POBO: Power to obtain assistance from public servants[262]

12.145 An investigating officer conducting an investigation into an offence alleged or suspected to have been committed under the POBO may apply to any public servant for assistance in the exercise of his powers or the discharge of his duties under the POBO. Any public servant who, when requested to render assistance, without reasonable excuse neglects of fails to do so is guilty of an offence and liable on conviction to a fine of $20,000 and imprisonment for one year.

12.146 Section 16 of the POBO supplements the powers in section 13 of the ICACO that are set out below, but would appear to be only available to enforce powers or duties exercised or discharged under the POBO. For example, powers being exercised under Part III of the POBO. Duties are discharged in the course of exercising these powers but the primary duties of investigating officers are set out in section 12 of the ICACO. The qualifying words "under this Ordinance would suggest that the section 16 offence could not be used in respect of public servants failing to assist an investigating officer when he is exercising a power contained in section 13 of the ICACO.

12.147 For the ordinary person, providing assistance to a law enforcement agency in the investigation of crime is a civic duty but not a legal one. By making the failure to render assistance to the ICAC a criminal offence, section 16 transforms the civic duty, at least for public servants, into a legally enforceable obligation. Such a sanction is necessary if the duty is to be given any real meaning, for it is imposed upon the broad group of people that make up the class of "public servant". Whilst prescribed officers might be subject to disciplinary action under civil service regulations for failing to assist the ICAC, there would be no punitive sanction for the large number of people outside of the civil service who are caught by the public servant definition. This is yet another example of the POBO taking a broad view of the public sector and distinguishing between it and the private sector in the severity of its provisions.

262 The definition of 'public servant' is a broad one and includes prescribed officers.

(b) Section 13(1)(b) ICACO: Power to enter government premises and require prescribed officers to provide information

12.148 Section 13(1)(b) of the ICACO empowers the Commissioner of the ICAC, for the purpose of the performance of his functions under the ICACO, to enter any government premises and require any prescribed officer[263] to answer questions concerning the duties of any prescribed officer or public servant[264] and require the production of any standing orders, directions, office manuals or instructions relating to those duties. This section and section 13(2)(a) would appear to complement each other by enabling the ICAC: to firstly, enter government premises; to secondly, require prescribed officers to answer questions, even about the duties of public servants; and to thirdly, access all records relating to the work of any prescribed officer. In relation to the last right, it is confined to records either on government premises (section 13(1)(b)) or records in the possession of or under the control of a prescribed officer (section 13(2)(a)).

(c) Section 13(2)(a) ICACO: Power to access records of a government department

12.149 Section 13(2)(a) of the ICACO empowers the Commissioner of the ICAC or any officer[265] authorised in writing by the Commissioner, as regards the performance of any of the Commissioner's functions under the ICACO, to access all records, books and other documents[266] relating to the work of any government department in the possession or under the control of any prescribed officer. As regards any such records, books and other documents the Commissioner and his authorised officers are empowered to photograph or make copies of them.[267]

(d) Section 13(2)(b) ICACO: Powers to carry out corruption prevention duties

12.150 Section 13(2)(b) of the ICACO empowers the Commissioner of the ICAC or any officer[268] authorised in writing by him, in so far as is necessary for the performance of any of the Commissioner's functions under section 12(d)[269] or

263 By section 2 of the ICACO 'prescribed officer' is given the same definition that is employed in the POBO. This definition is discussed in Chapter 5.

264 By section 2 of the ICACO 'public servant' has the meaning assigned to it in section 2 of the POBO and this definition is discussed in Chapter 5.

265 By section 2 of the ICACO 'officer' means an officer of the ICAC appointed under section 8 of the ICACO.

266 By section 13(3) of the ICACO 'documents' has the meaning assigned to 'document' in section 2(1) of the POBO. For the meaning of 'document' see footnote 124 of this chapter.

267 ICACO, section 13(2)(c).

268 For the meaning of 'officer' see footnote 265 of this chapter.

269 Section 12(d) of the ICACO imposes upon the Commissioner of the ICAC the duty to "examine the practices and procedures of government departments and public bodies, in order to facilitate the discovery of corrupt practices and to secure the revision of methods of

construction. Any doubt which may arise should be resolved in favour of the citizens. See *Rossminster*, Lord Wilberfore at 998A, Lord Diplock at 1008D, Lord Salmon at 1017E and *Williams*, Lord Hoffman at 363B;

(4) the court in discharging this constitutional duty must balance two competing aspects of the public interest, namely, the interest in the detection of crimes and bringing criminals to justice on the one hand and the interest in the protection of the citizens' rights and privacy on the other. See *Rossminster*, per Lord Diplock 1007G, Lord Salmon at 1015B and *Williams*, per Lord Hoffman at 361A.

12.251 In *Ch'ng Poh v Commissioner of the ICAC*,[436] the Court of Appeal at page 466G–H repeated a comment earlier made by Bokhary JA in *Neil Pryde v Bryan Chau*[437] at page 130 that "the law on search warrants must … be as free from subtlety as possible. It should of course lean in favour of the individual but not to the point of becoming unrealistic".

(b) Search warrant powers of the ICAC

12.252 The ICAC is granted two specific powers to which it may have access for the purpose of conducting its investigations. The two powers are contained in section 17 of the POBO and section 10B of the ICACO. The section 17 POBO warrant may be issued by a magistrate or High Court judge whilst the section 10B ICACO warrant may only be issued by a magistrate. The section 17 POBO warrant is confined to use in the investigation of POBO offences whilst the section 10B ICACO warrant may be used in the investigation of any offence referred to in section 10 of the ICACO. Search warrant provisions are contained in many ordinances in Hong Kong and some are in ordinances that are enacted to deal with specific forms of criminal conduct. One such example is the Organized and Serious Crimes Ordinance (Cap 455) (OSCO). But even if the ICAC is investigating a particular crime that is specifically regulated by another ordinance, such as OSCO, it is not required to only use the search warrant powers contained in that ordinance.[438] As a general rule where, in the course of an investigation, a search warrant maybe obtained pursuant to the provisions of a number of separate ordinances, it is open to the investigating authority to choose whichever provision most conveniently suits it purpose, provided only that the conditions precedent prescribed by that ordinance for such an application are met.[439]

(i) Section 17 POBO: Search warrant power for POBO offences

12.253 Any investigating officer[440] may, for the purposes of an investigation into, or proceedings relating to, an offence suspected to have been committed under the POBO, make an ex parte application to a magistrate or to the Court of First Instance[441] for the issue of a search warrant.[442] The application for the warrant may only be

436 [1996] 2 HKLR 460.
437 [1995] 2 HKLR 125.
438 [2008] 3 HKLRD 565, [2008] 2 HKC 479.
439 Ibid at 583, para 52.
440 'Investigating officer' is defined in section 2(1) of the POBO. For the definition see footnote 275 of this chapter.
441 The word used in the section is 'court' but by section 17(4) 'court' is defined to mean a magistrate and the Court of First Instance.
442 POBO, section 17(1).

granted where the judicial officer is satisfied that there is reasonable cause to believe that in any premises or place there is anything which is or contains evidence of an offence under the POBO. If so satisfied, the judicial officer may, by warrant directed to an investigating officer named in the warrant, empower that officer and any other investigating officer to enter, by force if necessary, the premises or place identified in the warrant and search them.[443]

12.254 However, in special circumstances, the Commissioner of the ICAC[444] may himself issue a search warrant rather than apply for one to a magistrate or to the Court of First Instance. But the Commissioner may only exercise this power if he is satisfied that there is reasonable cause to believe that in any premises or place there may be anything which is or contains evidence of an offence under the POBO and that the making of an ex parte application to a judicial officer would seriously impede an investigation into, or proceedings relating to, that offence. Like the warrant issued by a judicial officer, the warrant issued by the Commissioner is directed to a named investigating officer and empowers that officer and any other investigating officer to enter the premises or place identified in the warrant, by force if necessary, and search them.[445]

12.255 Warrants may not be issued under this section to search the chambers of counsel or the office of a solicitor except in the course of investigating an offence under the POBO where that offence is alleged or suspected to have been committed by the counsel or solicitor, or by his clerk or any servant employed by him in his chambers or office.[446]

12.256 It is an offence for any person to obstruct or resist the Commissioner or any investigating officer in the exercise of the powers of entry and search under this section. The punishment upon conviction is a fine of $20,000 and to imprisonment for one year.[447]

12.257 In *Apple Daily Ltd v Commissioner of the ICAC (No 2)*,[448] Keith J at page 652C–H explained the operation of section 17(1A) as follows:

> Three comments should be made about section 17(1A):
>
> (i) What triggers the court's power to issue the warrant is the court being satisfied that there is reasonable cause to believe that there is in the premises to be named in the warrant anything which is or contains evidence of an offence under the POBO. …
>
> (ii) Section 17(1A) does not in express terms limit what officers armed with such a warrant may search for. It empowers the officers to enter the premises "and search the same". However, I do not think that the absence of any words of limitation means that the officers can search for whatever they want. Since the warrant can only be issued if the court is satisfied that there is reasonable cause to believe that there is in the premises "anything which is or contains evidence of an offence under [the POBO]", I would construe the power to search the premises which

443 POBO, section 17(1A).
444 'Commissioner' is defined by section 2(1) of the POBO. For the definition see footnote 274 of this chapter.
445 POBO, section 17(1B).
446 POBO, section 17(2).
447 POBO, section 17(3).
448 [2000] 1 HKLRD 647.

it was clear from the wording of section 3 that it was not necessary to prove who made the offer of the advantage to the Crown servant. It followed therefore that the particular relating to the identity of the offeror was not a material averment. The same view was taken by Deputy Judge Line in *HKSAR v Lau Chi Hang*.[80]

13.51 This reasoning should be equally applicable to the other POBO offences that criminalise the soliciting and acceptance of advantages.

(vi) Particularising the beneficiary of a bribe

13.52 In *R v Leung Yuen*,[81] Huggins J, when dealing with a charge under section 3(1) of the Prevention of Corruption Ordinance (POCO), held that in a soliciting charge it is not necessary to particularise whether the person making the solicitation is doing so for his own benefit or whether he is doing so for the benefit of another. In this predecessor to the POBO, the words 'for himself, or for any other person' appeared in the offence provision, whereas in the POBO they appear in the section 2(2) definition of solicits. Huggins J said that the essence of this charge was that the accused solicited and 'whether he solicited for himself or some other person matters not'.[82] He was of the view that the words 'for himself or any other person' did not add anything to the meaning of the offence but merely removed any doubt there might have been 'that it was no defence to show that the soliciting was done on behalf of another and not for the benefit of the defendant'.[83]

13.53 Similarly, in *R v Chow Hei*,[84] a charge laid under section 3(2) of the POCO was not considered defective for failing to allege for whose benefit the reward was being offered.[85]

(vii) Inducement to, reward for etc

13.54 In *Chan Wing Yuen v R*,[86] McMullin J was dealing with two charges under section 4(2) of the POBO. He saw no impropriety in pleading in the charge all three elements of inducement to, reward for and otherwise on account of. He was quite definite that no issue of duplicity or multiplicity of the charge arose. He argued that in corrupt transactions, the purpose for the bribe may be generally apparent, without being entirely explicit; and that in any particular case, the evidence available to the prosecution may not be sufficiently specific to indicate whether the advantage has been solicited, accepted or offered as an 'inducement' to do a particular act or as a 'reward' for having done it. He was of the view that in such a case, the charge could be pleaded as soliciting, accepting or offering the advantage 'on account of' some prospect of favour not particularised but discernible among a variety of possible acts within the public capacity of the accused. But he saw little point in confining the prosecution to pleading only one of the three elements of this phrase when there

80 HCMA 744/2002, 9 January 2003, unreported.
81 [1963] 2 HKLR 154
82 Ibid at 159.
83 Ibid at 160.
84 [1960] HKLR 37.
85 This, at least, was the interpretation of the effect of the Full Court's judgment by Huggins J in *R v Leung Yuen* [1963] 2 HKLR 154.
86 [1977] HKLR 186.

could be no prejudice to the accused in pleading all three, for the consequence of limiting the prosecution to naming only one of the elements is that if the evidence is not consistent with that particularised element then it will be necessary to amend the charge. This, he said, 'could be avoided without injustice to the accused by naming of all the alternatives in the first instance'.[87] In *Ip Chiu v R*,[88] the Court of Appeal endorsed the comments of McMullin J in *Chan Wing Yuen*.[89] Similar comments were also made by the Court of Appeal in *Fung Ying Kwong v R*.[90]

13.55 A similar position exists in England and also in Scotland.[91] In *R v Richards*,[92] the Court of Appeal was dealing with convictions contrary to section 1 of the Prevention of Corruption Act 1906. This provision is similar to section 9 of the POBO. In this case, the offence had been pleaded in terms of the accused corruptly accepting a sum of money 'as an inducement or reward for doing an act' etc. It was submitted that this constituted two offences as paying money as an inducement was 'a distinct and different offence to paying money as a reward'. In rejecting this submission, Lord Justice Hobhouse said:

> We consider that this objection to the indictment is without merit. The offence is the corrupt acceptance of the money. It is that act which constitutes the offence and the reference to 'inducement or reward' is simply a description of the criminality of the act and the character of the corrupt element. …
>
> The offence is the giving or the receiving of the payment and the reference to 'inducement or reward' is merely a reference to the illegal or improper character of the payment. The offence is a single act and the particulars are directed to showing what is the criminal aspect of the commission of the relevant act.

13.56 Carrying this argument to its ultimate conclusion, the Hong Kong Supreme Court held that a charge of conspiracy to bribe which did not particularise the corrupt purpose of the bribe did disclose an offence known to the law. The court said that to allege bribery was to implicitly allege the giving of money for a corrupt purpose, and that the failure to particularise the corrupt purpose may justify a request for particulars but could not be a ground for quashing the charge.[93] However, whether any more specific and detailed particulars can be given will ultimately depend on the evidence and the basis on which the prosecution is presenting its case. It may be that the prosecution can do no more than to say that an advantage was offered or accepted in order that the agent show favour in some way towards the offeror in his capacity as a public servant or in relation to his principal's affairs or business.[94]

87 Ibid at 192.
88 CACC 99/1977, 19 May 1977, unreported. See p 3 of the judgment where the Court of Appeal said "we have seen the judgment of McMullin J in *Chan Wing Yuen v R* Cr App 192/77 and we respectfully agree with the observations he there made on this point."
89 The Court of Appeal in *Ip Chiu v R* CACC 99/1977, 19 May 1977, unreported also endorsed McMullin J's observation that the element of 'otherwise on account of' was wide enough to incorporate the other two elements of 'inducement to' and 'reward for'.
90 [1984] HKLR 293.
91 See *Copeland v Johnston* 1967 SLT (Sh Ct) 28.
92 Court of Appeal, No 94/0534/W5, 6 October 1994, unreported.
93 *R v Tsang Yau Choo* CACC 911/1974, 27 March 1975, unreported.
94 See the discussion of 'as an inducement to or reward for or otherwise on account of' in Chapter 6. For an overseas example of where pleading no more than that the advantage was offered as an 'inducement to show favour' was held acceptable, see the Scottish case of *King v Williams* 2004 SLT 955.

14.9 And so society is entitled to expect that its public servants exercise the powers and discretions they are given – whether those powers and discretions be great or small – with integrity and fidelity, or, in a single word, 'incorruptly'. In order to enforce this expectation, it is only natural and proper that the law demand of public officers adherence to a high ethical code and that it be able to punish them for lapses from it, whether such lapses be through bribery or other forms of abuse of office, when they deliberately depart from this ethical code in order to serve their own purposes. This was recognised by Lord Mansfield in the 18th century when he said:[15]

> The functions of the Executive system in all its parts, ministerial and judicial, cannot possibly be exercised as purely, and effectively, if the temptation to sacrifice duty to gain be not vigorously excluded by means of penal laws.

14.10 And so three centuries later common law legal systems continue to find the need for a penal law in this area of life and have turned to the offence of misconduct in public office in order to fulfil that need.[16]

3. The Common Law Offence of Misconduct in Public Office

14.11 The offence of misconduct in public office appears to have been rarely used in modern times with only a few judgments from courts scattered across the common law world being found on it in the law reports. But in the early 1990s, the Independent Commission Against Corruption (ICAC) in Hong Kong started to detect cases where civil servants abused their position and powers for the benefit of themselves or others but their conduct did not involve the solicitation or acceptance of advantages. Despite the range of offences contained in the Prevention of Bribery Ordinance (Cap 201) (POBO), there was no statutory crime that targeted this form of misbehaviour and so attention inevitably turned to the common law offence in the hope that it might complement the existing bribery laws by filling a gap left by an Ordinance that otherwise exhaustively dealt with all possible permutations of bribery by and of public officials.

14.12 However, the infrequency with which the offence had been used in the 20th century meant that there was little modern law on it with the consequence that there was some uncertainty as to what its elements were and what the prosecution had to prove. Nevertheless, there was no doubt that the offence continued to exist. Though seldom prosecuted, there were some 20th century decisions which recognised it, albeit none that provided a definitive explanation of its elements. Prior to recent high appellate authority, it had made only occasional appearances in the law reports, such as in *Question of Law Reserved (No 2 of 1996)*,[17] a decision of the South Australia

15 *R v Vaughan* 4 Burr 2494.

16 See 'Revival of the common law offence of misconduct in public office', by David Lusty (2014) 38 Crim LJ 337. This article reviews the historical development of the common law offence from the 14th century to the present, throughout the common law world, but with emphasis on England and Wales, Australia and Hong Kong.

17 (1996) 88 A Crim R 417.

Court of Criminal Appeal; as well as *R v Bowden*,[18] *R v Llewellyn-Jones*[19] and *R v Dytham*,[20] all decisions of the English Court of Appeal. But a point which was repeatedly made by the courts was that the offence was difficult to define. In the report of Mr Llewellyn-Jones' trial, Widgery J (as he then was) said that it was:[21]

> ... not easy to lay down with precision the exact limits of the kind of misconduct or misbehaviour.

14.13 In *Question of Law Reserved (No 2 of 1996)* it was stated that:

> ... the offence is not easily capable of exhaustive definition.[22]

and

> ... there is some uncertainty as to the precise content of the offence and even its correct title.[23]

14.14 As to what might constitute the offence, the little guidance that existed came from comments made by Lord Widgery CJ in *Dytham* who was dealing with a case of misconduct in public office in the form of a breach of duty by a police officer who had failed to intervene in a violent assault which resulted in the victim's death. He said at page 727C of the report:

> The neglect must be wilful and not merely inadvertent; and it must be culpable in the sense that it is without reasonable excuse or justification.

and at pages 727H–728A he further explained:

> This involves an element of culpability which is not restricted to corruption or dishonesty but which must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.

14.15 This then was the state of the law in relation to this offence in the 1990s – obscure as to its elements and uncertain as to its scope. Lord Widgery's comments, as Sir Anthony Mason NPJ noted in *Shum Kwok Sher v HKSAR*[24] at 407C, are not the language of legal definition but they were the only modern judicial dicta on the offence.[25]

(a) The judgment of the Court of Final Appeal in Shum Kwok Sher v HKSAR[26]

14.16 The opportunity for Hong Kong to address the scope and elements of the offence arose in the Court of Final Appeal case of *Shum Kwok Sher v HKSAR*. In

18 [1995] 4 All ER 505, [1996] 1 WLR 98.

19 [1968] 1 QB 429.

20 [1979] 1 QB 722.

21 *R v Llewellyn-Jones and Lougher* (1966) 51 Cr App R 4 at 6.

22 Per Doyle CJ in *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 420.

23 Ibid at 438.

24 (2002) 5 HKCFAR 381.

25 The earliest reported case in Hong Kong on the offence of misconduct in public office is a trial ruling of Judge Downey in the District Court case of *R v Lau Alexander* [1982] HKDCLR 53. In an endeavour to identify the elements of the offence, Judge Downey found himself grappling with the words of Lord Widgery in *R v Dytham* [1979] 1 QB 722 which, as an attempt at definition, he found vague and unhelpful.

26 (2002) 5 HKCFAR 381.

14.155 Probably the single most significant instance of corruption detected and prosecuted in Hong Kong was the case brought against Rafael Hui for misconduct in public office. He was the Chief Secretary in Hong Kong, the second most powerful post in government, and he was paid large sums of money as a 'general sweetener', so he would look favourably upon the affairs of a large local property company and its subsidiaries. The terms of imprisonment imposed upon Rafael Hui and those who paid him off corresponded to the highest end of sentences imposed in Hong Kong for public or private corruption offences under POBO. It is difficult to argue that it should have been otherwise. Hong Kong suffered an enormous blow to its reputation and prestige. Upon sentencing the defendants on 23 December 2014, Macrae JA stated that he had been referred to the statutory guidelines used in the United Kingdom by the Sentencing Council in relation to fraud, bribery and money laundering. While the guidelines were helpful in identifying serious factors of culpability and harm, he pointed out that the laws of England and Wales were different: maximum sentences were different and Hong Kong had developed its own approach to sentencing jurisprudence. Rafael Hui received a sentence of seven and a half years in total, for a number of offences of misconduct and conspiracy to commit misconduct in public office. The notional sentence, applying the totality principle was eight years and three months, with nine months deducted for Hui's personal mitigation. The starting point for each of the two most serious charges concerning misconduct in public office (counts five and seven) was six years imprisonment.

14.156 That there does not have to be a loss caused to the public body in order for the conduct to be serious was a point also made by the Superior Court of Pennsylvania in *Commonwealth v Steinberg*[174] when it said at page 386, footnote 9:

> The offence of misbehaviour in office is complete when a discretionary act is performed with an improper or corrupt motive. … The Commonwealth does not need to prove that a loss in fact resulted to the city because loss is not an element of the offence. It is only necessary to show that an officer subordinated the interests of the public he was appointed to serve to some other interest for improper purpose. Bad faith is the essence of the offence.

14.157 It would appear, therefore, that the absence of loss should not be seen as a feature that mitigates the seriousness of the offence; rather the presence of an adverse consequence should be seen as an aggravating feature.[175] Financial loss is, of course, just one of the adverse consequences that might accrue to either the public sector principal of the corrupt public official or innocent third parties having dealings with it. The most adverse consequence, and one that will almost always be present, is that the conduct of the corrupt official will bring his public office into disrepute. The extent to which it will be present and of its impact upon the public's confidence in the public body employing the corrupt public official will vary according to the nature of the misconduct and the nature of the public official's duties. When police officers are involved and the misconduct involves citizens with whom they are having official dealings, the courts are likely to take a particularly serious view. In *HKSAR v Chow Koon Shing*,[176] Beeson J was dealing with an appeal against sentence

174 (1976) 362A 2d 370.

175 This was the approach taken by the English Court of Appeal in *R v O'Leary* [2007] 2 Cr App R (S) 51 at 319, para 8.

176 [2007] 3 HKLRD 10.

by a police officer who, whilst on duty at Tsuen Wan Magistracy, had used a phone equipped with a camera to take a photograph under the skirt of a lady whom he was assisting to reclaim bail money. Describing the position of the victim, Beeson J said at page 16H, para 25:

> A member of the public who seeks the assistance of a police officer, is entitled to expect professional help and protection, and should be able to rely on the integrity of that officer. Those legitimate expectations were denied to the victim.

14.158 Turning to the consequences of the police officer's misconduct, she said at page 17B, para 27:

> The effects of his misbehaviour are two-fold. First, there is an abuse of trust *vis-a vis* the victim. Secondly his behaviour brings the police force into disrepute and, to the extent that the offence was carried out in the magistracy building, could affect also the public perception of the judicial system.

14.159 Because the offence was misconduct in public office and because these features were present, Beeson J was quite emphatic that sentences imposed in respect of similar conduct on persons committing the conduct as private individuals in their private life were irrelevant to the position of the appellant.[177] At page 17D–E, para 28 she said:

> An offence of misconduct in public office demands a different perspective and a sentencing range which ensures that perpetrators of such offences are punished in a manner that the public understands and expects. Such sentences should serve as a warning to others who are tempted to misconduct themselves in a similar fashion.

14.160 Where police officers use their positions to access and to provide confidential police information either for personal gain or to assist criminals, the courts take a very serious view of the misconduct. In these situations, the breach of trust is particularly gross and the interests of justice may also be prejudiced. When this happens, sentences of several years imprisonment may be called for.[178] In *Attorney General's Reference (No 1 of 2007)*,[179] Lord Chief Justice Philips endorsed previous comments of the Court of Appeal on the seriousness of police officers retrieving sensitive information from the police national computer system and using it for improper purposes.[180] He said that such conduct required an immediate sentence of imprisonment and the sentence should include a deterrent element so that 'it must be quite clear to police officers that if they commit this offence they risk dire consequences'.[181]

177 At page 16G, para 24 Beeson J said: 'The cases referred to by Mr Khosa have no real significance in light of the different charges therein laid. This was a case of "misconduct in public office" and thus more complex sentencing factors fell to be considered.'

178 See, for example, *R v Gellion* [2006] 2 Cr App R (S) 69 and *R v O'Leary* [2007] 2 Cr App R (S) 51.

179 [2007] 2 Cr App R (S) 87.

180 One such previous comment of the Court of Appeal was in the case of *R v Kassim* [2006] 1 Cr App R (S) 4 where the court had observed: 'It seems to us that, especially nowadays, the preservation of the integrity of information regarding members of the public held on databases like those maintained by the police is of fundamental importance to the well-being of society. Any abuse of that integrity by officials including the police is a gross breach of trust which, unless the wrongdoing is really minimal … will be necessarily met by a severe punishment, even in the face of substantial personal mitigation.'

181 *Attorney General's Reference (No 1 of 2007)* [2007] 2 Cr App R (S) 87 at 552, para 26.