

[2.08] Offers, Solicits or Accepts

The offence is completed once an offer was made regardless of whether the corrupt agreement was ever carried out by the offeree. The crucial element for consideration is the intent of the offerer when he made the offer. Whether or not that purpose has been later attained may be used as corroborative evidence of the offerer's corrupt intent; but it is unnecessary for the prosecution to establish the intended objective had in fact been attained (*HKSAR v So Kam Tim* [1997] 4 HKC 1).

For the offence of accepting an advantage, it is unnecessary to prove the causal link between the acceptance of the payment and the alleged favour. In showing the state of mind of the acceptor, it is sufficient to show that he had made the demands and accepted the advantage (*HKSAR v Tham Chee Seng* [1998] 3 HKC 654).

PART II**OFFENCES****3. Soliciting or accepting an advantage**

Any prescribed officer who, without the general or special permission of the Chief Executive, solicits or accepts any advantage shall be guilty of an offence.

(Amended 1 of 2003 s 3; 14 of 2003 s 14)

Note:

The Acceptance of Advantages (Chief Executive's Permission) Notice 2010 was issued by the Chief Executive and published as GN 1967 in the Government of the HKSAR Gazette (No 14 Vol 14) on 9 April 2010 for the purpose of this section.

[3.01] Chief Executive

See note [2.06] above.

[3.02] Advantage

See note [2.01] above.

4. Bribery

- (1) Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any

advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's—

(Amended 28 of 1980 s 3)

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
 - (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or
 - (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,
- shall be guilty of an offence.

- (2) Any public servant who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his—

(Amended 28 of 1980 s 3)

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
 - (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by himself or by any other public servant in his or that other public servant's capacity as a public servant; or
 - (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,
- shall be guilty of an offence.

- (2A) Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to the Chief Executive as an inducement to or reward for or otherwise on account of the Chief Executive's—

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as the Chief Executive;
- (b) expediting, delaying, hindering or preventing, or

having expedited, delayed, hindered or prevented, the performance of an act, whether by the Chief Executive in his capacity as the Chief Executive or by any public servant in his capacity as a public servant; or

- (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

shall be guilty of an offence.

(Added 22 of 2008 s 2)

- (2B) If the Chief Executive, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his—

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as the Chief Executive;
- (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by the Chief Executive in his capacity as the Chief Executive or by any public servant in his capacity as a public servant; or
- (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

he shall be guilty of an offence.

(Added 22 of 2008 s 2)

- (3) If a public servant other than a prescribed officer solicits or accepts an advantage with the permission of the public body of which he is an employee being permission which complies with subsection (4), neither he nor the person who offered the advantage shall be guilty of an offence under this section.

(Added 28 of 1980 s 3; Amended 14 of 2003 s 15)

- (4) For the purposes of subsection (3) permission shall be in writing and—

- (a) be given before the advantage is offered, solicited or accepted; or
- (b) in any case where an advantage has been offered or accepted without prior permission, be applied for and

given as soon as reasonably possible after such offer or acceptance,
and for such permission to be effective for the purposes of subsection (3), the public body shall, before giving such permission, have regard to the circumstances in which it is sought.

(Added 28 of 1980 s 3)

[4.01] Hong Kong

‘Hong Kong’ is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) means the Hong Kong Special Administrative Region.

[4.02] Lawful Authority or Reasonable Excuse

In any proceedings against a person for an offence under the Prevention of Bribery Ordinance, that person bears the burden of proving a defence of lawful authority or reasonable excuse. The standard of proof is on the balance of probabilities (*HKSAR v Chung Chun-keung* [2000] 3 HKC 496 (CFI)).

Lawful authority, in the context of the Prevention of Bribery Ordinance, is one that is sourced in a positive rule of law that expressly or impliedly empowers, countenances, or authorises the defendant to conduct himself in a way that would otherwise be an offence (*HKSAR v Yan Pak Cheung* [2009] 1 HKC 339; see also *Crafter v Kelly* [1941] SASR 237; *Taikato v R* (1996) 90 A Crim R 323, (1996) 139 ALR 386).

An excuse is a reasonable belief that one has the right to do what one seeks to do (*R v Li Wing-tat* [1991] 1 HKLR 731, [1991] HKCU 403, applying *Cambridgeshire and Isle of Ely County Council v Rust* [1972] 2 QB 426, [1972] 3 All ER 232 (DC, Eng)). That an accused has difficulties in complying with the law does not constitute a reasonable excuse, although it may mitigate sentence. Nor is it a reasonable excuse for an accused to say that he had done his best to comply with the law (*R v Tsang Chu Lun* [1994] 1 HKC 769).

Once the defence of lawful authority or reasonable excuse is advanced it is for the prosecution to disprove it.

It is a question of fact as to whether a defendant has a reasonable excuse but a matter of law whether certain facts put forward are capable of amounting to a reasonable excuse.

An honest, but mistaken, belief of facts which, if true, would have constituted lawful authority, is capable of being a reasonable excuse, but a belief based on facts which, if true, could not have amounted to lawful authority, is not capable of founding a defence of reasonable excuse (*R v Jones* [1995] QB 235 at 241, [1995] 3 All ER 139 at 143 (CA, Eng)). The only justification for a person to offer a payment to someone else’s employee is the express or implied consent of that employee’s employer (*Ngan Lun-yan v R* [1975] HKLR 369, [1975] HKCU