

Hong Kong's Anti-Bribery laws under Scrutiny as former Chief Executive is charged

The prosecution of former Chief Executive Donald Tsang Yam-kuen on two charges of misconduct in public office has highlighted what has been described as a "fundamental defect" in Hong Kong's main anti-corruption legislation, the Prevention of Bribery Ordinance (POBO).

The charges related to the failure to file conflict of interest declarations to the Executive Council concerning a lease on a penthouse flat in Shenzhen and alleged dealings with an interior designer. The maximum penalty for each charge is seven years' imprisonment. The charges come less than a year after Hong Kong property tycoon Thomas Kwok and Rafael Hui, the former Chief Secretary for Administration (and Tsang's deputy from 2005-2007), were imprisoned for bribery. Their appeal against their convictions and sentences (7½ years for Hui and 5 years for Kwok) began today (Monday 2 November) and is expected to last a week.

Mr. Tsang was *not* prosecuted, however, for taking several trips on private jets and luxury yachts with business tycoons, which he later said he paid for but received at a significant discount. In explaining the apparent omission, the Hong Kong Department of Justice (**DOJ**) said there had been both a lack of evidence and no apparent breach of relevant laws.

An Omission in the POBO

The POBO's rules against the giving and receiving of gifts do not apply to the Chief Executive.

Section 3 of the POBO prohibits the solicitation and acceptance of an advantage by a prescribed officer without the permission of the Chief Executive, however the Chief Executive himself is not covered. Under section 8, anyone who offers an advantage to a prescribed officer is guilty of an offence, but again the Chief Executive is exempt.

"Advantage" is defined as gifts, loans, fees, rewards or commissions and any other service or favor. Sea, air, and overland journeys are included in the definition of advantages that can be authorized by the Chief Executive. The definition of *"Advantage"* excludes *"Entertainment"* defined as *"the provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment connected with, or provided at the same time as, such provisions."*

Sections 4 and 5 do cover the Chief Executive. Section 4 makes it illegal for the Chief Executive, without lawful authority or reasonable excuse, to solicit or accept an advantage as an inducement or reward for his performing or abstaining from performing any act in his capacity as Chief Executive, whilst section 5 states that it is unlawful for anyone to offer an advantage to the Chief Executive, without lawful authority or reasonable excuse, as an inducement or reward for the Chief Executive giving assistance with the procuring of contracts with public bodies.

The evidentiary challenge for prosecutors is clear – to establish a POBO violation, the prosecutor must that prove that the payments or advantages were given or accepted for a purpose connected with the recipient's official duties.

A Call for Change

An attempt to amend the law in 2008 was met with strong opposition from the then-Chief Secretary Henry Tang Ying-yen. In 2012, a committee recommended that the Chief Executive be brought within the scope of the Ordinance. The report said it was wrong for the Chief Executive to be "above the law" and that the committee saw "no justification for exempting the chief executive from the statutory regime to which politically appointed officials and civil servants are subject. Indeed, the high constitutional status of the chief executive makes it all the more important that he sets a good example for all, especially politically appointed officials and the civil service which he leads."

The present Chief Executive, Leung Chun-ying has refused to say whether his administration would seek to close the loophole. A statement by the office of the Chief Secretary for Administration said since "the recommendations on the revisions to the Prevention of Bribery Ordinance have constitutional, legal and operational implications and may have an impact on the existing (Ordinance), the government needs to handle them prudently and study them in an in-depth and holistic manner."

Contrast with UK

The situation in Hong Kong is in marked contrast to that in other comparable jurisdictions. The latest edition of the United Kingdom's [Ministerial Code](#) states that "ministers should not accept any gift or hospitality which might, or might reasonably appear to, compromise their judgement or place them under an improper obligation." As part of the "seven principles of public life," the "integrity" principle says that "holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties." As for travel, the Code says that "offers of free travel should not normally be accepted. The only exception to this is in the case of an offer of transport from an overseas government provided no undue obligation is created." A [similar code](#) exists in Singapore, which stresses that a minister "must scrupulously avoid any actual or apparent conflict of interest between his office and his private financial interests."

Increase in Serious Fraud

The number of serious fraud cases involving money laundering in Hong Kong has soared, with nine cases being reported in the first half of this year alone, involving HKD456 million (approximately USD59 million), compared with HKD245 million (approximately USD32 million) in the whole of 2014. Police have explained the rise by an increase in the number of non-locals coming into Hong Kong to open bank accounts with fake documents.

This and the controversy over the POBO exemption threatens to tarnish Hong Kong's reputation as a city that has cleaned itself up in recent years partly through the vigorous attention of the ICAC in pursuing wrongdoers at all levels of public life. According to [Transparency International's Corruption Perceptions Index 2014](#), Hong Kong is one of the least corrupt countries in the world, ahead of the United States, France, and Italy. Hong Kong's lawmakers and judiciary will be keen to ensure that it retains and consolidates its position in this respect as further legislative amendments are considered.

Contacts



Wendy Wysong

Partner

T: +852 2826 3460 (Hong Kong)

+1 202 290 7634 (Washington)

E: wendy.wysong@cliffordchance.com



Kabir Singh

Partner

T: +65 6410 2273

E: kabir.singh@cliffordchance.com



Diana Chang

Partner

T: +61 28922 8003

E: diana.chang@cliffordchance.com



Jenni Hill

Partner

T: +61 8 9262 5582

E: jenni.hill@cliffordchance.com



Michelle Mizutani

Counsel

T: +81 3 5561 6646

E: michelle.mizutani@cliffordchance.com



Richard Sharpe

Senior Associate

T: +852 2826 2427

E: richard.sharpe@cliffordchance.com



Lei Shi

Senior Associate

T: +852 2826 3547

E: lei.shi@cliffordchance.com



Montse Ferrer

Registered Foreign Lawyer

T: +852 2826 3562

E: montse.ferrer@cliffordchance.com

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Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong

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