

THE  
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AND  
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DESCRIPTION  
OF  
THE  
COUNTY OF  
SURREY

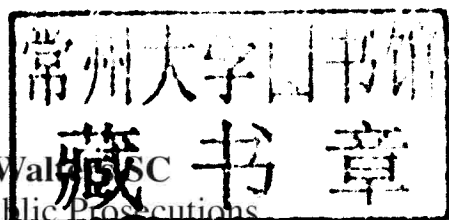
BY  
J. H. P. J. J. J.

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# **Bribery and Corruption Law in Hong Kong**

**2<sup>nd</sup> Edition**



**Ian McWalsh SC**

Director of Public Prosecutions

Hong Kong SAR Department of Justice

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**Bribery and Corruption Law  
in Hong Kong**

**2<sup>nd</sup> Edition**

## FOREWORD TO THE FIRST EDITION

Ian McWalters has written a fine book which is destined to become the leading work on the law of bribery and corruption in Hong Kong. It is no mere dry legal tome. Practitioners and others will of course find in it a comprehensive, detailed and perceptive discussion of the relevant statutory provisions and case-law. But the book delves deeper, presenting a picture of the social and juristic context in which this corpus of law has developed and presently operates. Thus, Mr McWalters provides, as his starting-point, a useful historical account of key events which led to a progression of reforms aimed at suppressing corruption. It is salutary to note how history has repeated itself a number of times – shocking revelations of high-level and widespread corruption, followed by legislative changes to introduce better-adapted legal rules and to promote more effective law enforcement. One is left in no doubt as to the Hydra-like qualities of corruption, requiring unrelenting efforts at its elimination. The difficulty of detecting and proving corrupt conduct are plain. So is the need to ensure the integrity of the institutions charged with investigation and prosecution. The main body of this book examines in detail the measures – sometimes extraordinary – adopted by the legal system in the fight against corruption.

There is extensive analysis of the various elements of the novel offences created by the Prevention of Bribery Ordinance, as well as of certain special rules of evidence and procedure, which have, in many cases, been closely debated in the reported cases. There is also a valuable survey of the constitution, jurisdiction, powers of investigation, search, seizure, arrest and detention of the Independent Commission Against Corruption. The chapter on sentencing is also noteworthy, assembling statements of sentencing policy made by the courts, identifying specific principles developed, surveying levels and types of sentence imposed and providing case-studies for different corruption offences. The book also contains a review of common law corruption offences and includes discussion of the recent decisions of the Court of Final Appeal in *Shum Kwok-she v HKSAR* [2002] 3 HKC 117; (2002) 5 HKCFAR 381, concerning the offence of misconduct in a public office. The results of such legal and institutional developments, coupled with rigorous enforcement and initiatives aimed at education and corruption prevention, are acknowledged in the community and internationally to represent a significant success for Hong Kong. There can be no doubt that we live in an incomparably less corrupt, fairer and more transparent society than existed 30 years ago, when the infamous Peter Godber, Chief Superintendent of Police, furtively slipped out of Hong Kong to become a fugitive from justice.

However, developments in this area cannot merely involve one-sidedly increasing the armoury of the prosecution. As Mr McWalters shows, there has always been, and must always be, earnest recognition of the danger that the extraordinary powers needed to fight the insidious crime may be abused and result in oppression. The ICAC Review Committee set up to conduct a general review in 1994 stressed the importance of a balance between effective measures

and the prevention of misuse of the ICAC's special powers. Internal measures, involving the establishment of oversight committees with outsiders as chairmen and members have imported greater transparency and accountability. When the Bill of Rights Ordinance was enacted, a review of the then existing statutory provisions was undertaken with a view to ensuring compliance with the Bills of Rights. The process must continue. Scrutiny of the way corruption offences are defined, investigated, prosecuted and tried, measured against the Basic Law's guarantees of our individual freedoms, is an essential safeguard. An approach seeking to strike a balance between the vital public interest in suppressing corruption and the fundamental rights and freedoms of the individual must be adopted to secure the public confidence and support needed for a constant and sustainable campaign against corruption. Mr McWalters is to be congratulated for his book which makes a valuable contribution to that campaign.

Mr Justice Ribeiro  
Permanent Judge  
Hong Kong Court of Final Appeal  
31 October 2003

## **PREFACE TO THE FIRST EDITION**

In the years that I have been working in the criminal law in Hong Kong I have been surprised that so little has been written on corruption law. Its neglect by criminal law writers may perhaps be explained by the fact that throughout much of the common law world, prosecutions for corruption have, in the past, been fairly infrequent with little opportunity to develop a substantial body of case law, especially by the appellate courts.

That of course is not so in Hong Kong. Ever since the establishment of the Independent Commission Against Corruption, prosecutions for corruption offences have been a prominent feature of court lists at all levels of trial court. Inevitably, this had led to the creation of a large body of case law by our own appellate courts and, pre-reunification with the People's Republic of China, by the Privy Council. However, not all the cases were reported and whether a particular authority was drawn to the attention of a trial or appeal court depended upon the personal knowledge of the tribunal and of the counsel appearing before it. This has sometimes meant that not all relevant authorities have been placed before a particular court with the consequence that some decisions are difficult to reconcile with others.

Hopefully, at the very least, this book will serve the useful purpose of making practitioners and judicial officers aware of the case law, of the principles established by it and of those issues it has raised but that as yet might remain unresolved. If it succeeds in doing that then I am confident that my colleagues at the criminal bar, with their fertile legal imagination and keen pursuit of justice for their clients, will keep me gainfully employed in anti-corruption work for many more years and produce sufficient new law to warrant a second edition of this work.

Writing this book has been a daunting and exhausting project but also one which has given me much professional satisfaction. Through it I have come to learn much more about the field of law in which I have been practising for so many years, and especially to better appreciate, within an historical context, the importance to Hong Kong of having an effective regime of anti-corruption laws. Of course it goes without saying that at the centre of Hong Kong's remarkable success in combating corruption is the ICAC – an organisation born out of a crisis and denied the advantage of a gradual, settled growth. Despite the difficulties it encountered in its early years, it developed into a model of its kind and has become the object of study throughout the world with its famous three-pronged approach to anti-corruption work being emulated by a number of governments. To the many persons who, over the years, have staffed this organisation I owe a debt of gratitude for the enriching experiences that I have enjoyed through working with them. They and their investigations have brought challenge, excitement and, great professional satisfaction to what might otherwise have been a much less interesting legal career.

To my colleagues in the Attorney General's Chambers and its successor the Department of Justice, I also owe much. Lawyers always need to speak to other lawyers in order to obtain the benefit of their experience, erudition and wisdom. My colleagues, both local and foreign, have always been a source of support, guidance and reassurance and, when the occasion needed it, of caution and restraint. To single out individuals is not to downplay the assistance of others and so I hope that none will be offended that I express my great appreciation to my friend and colleague Kevin Zervos, SC. Kevin came to Hong Kong with an established anti-corruption pedigree having worked for the New South Wales ICAC. He adapted to the different laws of Hong Kong and of our ICAC's greater emphasis on operational work with enthusiasm and brought enormous energy to his prosecutions. Over the last ten years, he has been involved at the trial and appellate level in many of Hong Kong's most prominent corruption cases. For me, he has been a staunch ally and inspiring colleague.

I am grateful to the ICAC to reproduce their organisation chart which appears in the Appendix. This chart is taken from the ICAC's 2002 Annual Report.

Finally, and most important of all, I must thank my wife and family who have shown great patience and understanding throughout the long period it has taken me to complete this book and whose support during this time has made the task of writing it endurable. I am especially appreciative for the artistic contribution of my son Andrew who took time off from a busy final year at university to design the cover for this book.

The law that is referred to in this work is as at September 2003. This book strives not only to state the law but also to explain, analyse and critically discuss it. Any shortcomings, errors or omissions in the course of so doing are entirely my own responsibility and of course the views expressed in it are my own and do not necessarily reflect those of the Department of Justice.

Ian McWalters SC  
*Department of Justice, HKSAR*

## PREFACE TO THE SECOND EDITION

In writing the second edition of this book what stood out very clearly is the significant impact that human rights law is having on the development of the criminal law. It is equally clear that Hong Kong's law on bribery and corruption is, quite properly, not immune from its influence. From the construction of statutory offences which contain potentially reverse onus provisions to the rights of persons affected by the exercise of special powers of investigation, the influence of the developing body of human rights jurisprudence could be felt. This has not only produced more material for this second edition, it has made the practice of the criminal law more challenging and more exciting. Criminal practitioners can no longer ignore principles of human rights law if they are to effectively serve their client's interests.

But also fascinating to watch in the years since the first edition was published, is the way the offence of misconduct in public office has developed. As more and more countries acceded to the United Nations Convention Against Corruption so the awareness of countries of the need for such an offence increased. As governments continue to extend their reach into the daily lives of their citizens and entrust their public officers with greater powers in order to implement their policies, so the opportunities for abuse of these powers has increased. Being a common law offence, misconduct in public office enjoys the advantage of having the capacity for organic development through the courts in order to meet the changing needs of our time. How this will play out in a way that will ensure the offence retains its relevance and utility remains to be seen.

I foolishly thought at the time I finished the first edition of this book that there would be no need for a second edition for many years to come. However the rapid changes in the law and the pleadings of my publisher quickly proved me wrong. New decisions of our courts are handed down daily and as the law of bribery and corruption takes on a more international complexion interesting case law emerges from other jurisdictions. Where overseas cases are thought helpful I have included reference to them. The law is stated as at 1st November 2009.

Ian McWalters SC

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