

**Legislative Council Subcommittee on
Subsidiary Legislation to Implement the Obligations
under the United Nations Convention Against Corruption**

Purpose

At the meeting on 13 July 2007, the Subcommittee requested the Administration to provide a response to the following issues¹ in relation to the Organized and Serious Crimes Ordinance (Amendment of Schedule 2) Order 2007 (“OSCO Order”) -

- (a) explain the differences, including the scope of application and burden of proof, between a restitution order under section 12 of the Prevention of Bribery Ordinance (“POBO”) and a confiscation order under Schedule 2 to the Organized and Serious Crimes Ordinance (“OSCO”);
- (b) advise whether there were difficulties in the enforcement of an order issued under section 12 of the POBO; and
- (c) advise if the Administration was aware of any countries where proceeds from corruption could only be recovered by way of a civil order.

2. We have consulted the Department of Justice (“DoJ”) and the Independent Commission Against Corruption (“ICAC”) and the Administration’s response is set out in the following paragraphs.

(A) Differences between a Restitution Order and a Confiscation Order

(a) Restitution Order

3. Section 12 of the POBO provides that the court shall order a person who is guilty of a bribery offence under Part II of the POBO² (“convicted person”) to pay to such “person or public body” the amount of any advantage received by him or any part thereof (“restitution order”). In this context, such “person or public body” means the “principal³” of the convicted person, who/which may or may not be the Government. The maximum amount that

¹ The Subcommittee also requested the Administration to explain the effect, if any, of the OSCO Order on existing agreements on mutual legal assistance in criminal matters (“MLA”) and surrender of fugitive offenders (“SFO”), including whether a jurisdiction with which Hong Kong had not concluded an MLA agreement could seek MLA under the OSCO Order. The Administration’s response to this issue is set out in the LC Paper No. CB(2)2635/06-07(01).

² Including offences concerning the offer, solicitation and acceptance of advantages.

³ See pages 4 and 5 of the judgement on *Caltex Oil Hong Kong Ltd v Deputy District Judge Christie* MP 1542/94 as quoted on page 383 of “Bribery and Corruption Law in Hong Kong” by Ian McWalters, LexisNexis Butterworths (2003).

can be recovered by means of a restitution order is the value of the advantage received by the convicted person. As a restitution order is conviction based, it can only be made if the court has already satisfied itself beyond reasonable doubt that the person against whom the order is being made accepted an advantage of a certain amount or value. There is however no criminal sanction in respect of any non-compliance with a restitution order which is civil in nature.

(b) Confiscation Order

4. Similar to a restitution order, there must be a conviction for a specified offence, such as offences on “*offering*” bribes under sections 4(1), 5(1), 6(1) and 9(2) of the POBO, before a confiscation order can be made by the court under section 8 of the OSCO. Like section 12 of the POBO, the prosecution will bear the burden of proof for the confiscation order to the same standard of proof beyond reasonable doubt. However, there are some major differences between a confiscation order and a restitution order –

- (a) **Maximum amount:** The maximum amount that can be recovered by means of a confiscation order is the “value of a convicted person’s proceeds of the relevant offence” as defined under section 2(6)⁴ of the OSCO. For a bribery offence, such value can include the interest or profits generated from the advantage received by the convicted person. As a result, the amount confiscated under a confiscation order could be greater than that under a restitution order, which is limited to the value of the advantage received. This is especially likely if the convicted person has made use of the bribe monies for some time in cases where the corruption is only detected much later after its occurrence;
- (b) **Beneficiary:** The Government, irrespective of whether it is the principal of a convicted person or not, is the beneficiary of a confiscation order;
- (c) **Non-compliance:** Once a confiscation order is made, the convicted person must comply with it within the period stipulated by the court under section 13(1)(a)(i) and section 13(1A) of the OSCO, usually not more than six months. Failing that, the convicted person will need to serve a prison sentence ordered by the court under section 13(1)(a)(ii)⁵ of the OSCO. However, service of this prison sentence does not avoid compliance with the confiscation order. A continuing refusal to comply will result in receivers being appointed to realize the convicted

⁴ The “value of a person’s proceeds of an offence” is the aggregate of the values of the following -
(a) any payments or others rewards received by him at any time (whether before or after 2 December 1994) in connection with the commission of that offence;
(b) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and
(c) any pecuniary advantage obtained in connection with the commission of that offence.

⁵ For example, if the outstanding amount exceeds \$10 million, the maximum term of imprisonment for non-compliance is 10 years.

person's property in order to satisfy the confiscation order. Late compliance will also have the consequence that interest will accrue to the value of the confiscation order; and

- (d) ***The burden and standard of proof:*** As the OSCO confiscation regime is conviction based, a confiscation order can only be made against a person who has been found guilty of a specified offence. A determination of guilt in respect of every criminal offence is made by application of the standard of proof of beyond reasonable doubt. However, the court applies the lesser standard of proof on the "balance of probabilities"⁶ when determining the amount to be recovered under a confiscation order. Furthermore, if the convicted person wishes to claim that he is unable to pay the amount of the confiscation order because the amount exceeds the value of the realizable property, then the burden shifts to him to establish this and the standard of proof for him is also the "balance of probabilities".

(B) Enforcement Difficulties

5. As mentioned in paragraph 3 above, a restitution order is made in favour of the principal of a convicted person who has received the advantage. The order is a civil one which is enforceable by the principal through the civil court process. The cost of enforcing the order will have to be borne by the principal which is not necessarily the Government. Consequently, in those cases where the Government is not the principal, whether the order is enforced or not will depend upon the whim of the principal (i.e. the beneficiary of the order), who, according to DoJ and ICAC's experience, is not likely to bother enforcing it unless he is confident that his efforts will fairly quickly and inexpensively produce a favourable outcome. In the event that a recalcitrant corrupt agent tries to obstruct the principal's efforts, it will be more unlikely that the principal will be persuaded that enforcing the order will be worth his while.

6. In the past three years, there were 75 private sector corruption prosecution cases where a restitution order was made. ICAC records⁷ reveal that non-compliance with the order was found in nearly one-fourth of these cases (i.e. 17 cases in total). The reasons for non-compliance are summarized as follows -

- (a) defendants claiming to be bankrupt (four cases);
- (b) appeal pending (three cases);

⁶ Section 8(8B) of the OSCO.

⁷ ICAC records do not contain information on the order compliance in one of the 75 corruption prosecution cases.

- (c) restitution not pursued by principals (five cases);
- (d) defendants not located by principals (four cases); and
- (e) amount of restitution disputed (one case).

7. Pursuant to Article 31 of the United Nations Convention Against Corruption (“UNCAC”), Hong Kong is required, to the greatest possible extent under its domestic legal systems, to adopt measures for the identification, tracing, freezing, seizure and the eventual confiscation of proceeds derived from bribery. While a person convicted of a bribery offence can be ordered to return the amount of advantage received by him by a restitution order, this order is enforceable by the principal of the convicted person, which may not necessarily be the Government, thereby creating potential enforcement difficulties. Furthermore, when compared with a confiscation order, the maximum amount that can be recovered is relatively lower while the standard of proof is relatively higher. As a result, a restitution order cannot serve as the same tool as a confiscation order. To better achieve the confiscation requirements under Article 31 of the UNCAC, we consider that there is a need to add the offences on soliciting or accepting bribes under sections 4(2), 5(2), 6(2) and 9(1) of POBO to Schedule 2 to the OSCO which already contain those offences on offering bribes under sections 4(1), 5(1), 6(1) and 9(2) of the POBO.

(C) Recovery of Proceeds

8. The Administration is not aware of any country where proceeds from corruption could only be recovered by way of a civil order analogous to a restitution order made under section 12 of the POBO.

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