

Criminalisation of Bribery in Nepal

**Prevention of Corruption Act, 2059 (2002 A.D)
(Unofficial Translation Provided by the
Nepal Commission for the Investigation of Abuse
of Authority)**

3.(1) Whoever, being, or expecting to become, a public servant accepts or agrees to accept graft amounting as follows for himself or for any other person in consideration of his performing or having performed or of forbearing to perform or having forborne to perform any act pertaining to his office or the related act or in consideration of favoring or disfavoring or causing or not causing a loss or of having favored or disfavored or having caused or not caused a loss to any person while carrying out his official functions, shall be liable to a punishment of imprisonment as follows and of a fine as per the amount involved depending on the degree of the offense.

[...]

(3) Whoever gives a graft to a public servant or any other person in order to do or forbear to do any function pursuant to sub-Section (1) or (2), shall be liable to a punishment pursuant to sub-Section (1) depending on the degree of the offense committed.

INTRODUCTION

As of September 2009, Nepal has signed but has not yet ratified the UNCAC. It has been a member of the APG since 2002. Nepal's legal system is based on the English common law but with some Hindu legal concepts. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE BRIBERY OFFENCES

In Nepal, active and passive domestic bribery is covered mainly by Sections 3(1) and (3) of the Prevention of Corruption Act, 2059 (2002 A.D.) (PCA). This report will focus primarily on these provisions. The PCA contains additional offences that address specific types of official misconduct that could also cover bribery, *e.g.* acceptance of goods or services for free or below

market value (Section 4), taking gifts (Section 5) or commissions (Section 6), and obtaining illegal benefits (Section 7). This report will also address these offences where appropriate.

International standards generally require coverage of three modes of committing active bribery, namely offering, giving, and promising a bribe. Section 3(3) PCA covers only the giving of a bribe explicitly. There is no case law to clarify whether the provision also covers promising and offering a bribe. The offence of attempting to bribe arguably covers offering to bribe, though the maximum punishment for this offence is punishable only by half of that for giving a bribe. There is also no case law on bribes that are made but not received, or bribes that are rejected by an official.

As for passive domestic bribery, international standards generally demand coverage of solicitation or acceptance of a bribe. Section 3(1) PCA speaks of a person who “accepts or agrees to accept” a bribe. Similar language is found under the offences of accepting goods or services below market value (Section 4 PCA) and accepting gifts (Section 5 PCA). There is thus no explicit mention of soliciting a bribe, though the situation is arguably covered by an attempt to accept a bribe. However, as with attempting to give a bribe, that maximum punishment for attempting to accept a bribe is only half of that for the completed offence.

The PCA general bribery offences do not appear to address bribes given, solicited, etc. through an intermediary. Sections 3(1) and 3(3) do not contain express language to this effect. The treatment of third party beneficiaries (i.e. someone other than the official) is clearer. Section 3(1) explicitly covers a public servant who accepts a bribe “for himself or for any other person”, while Section 3(3) covers the giving of a bribe “to a public servant or any other person”.

The PCA’s definition of a public official is fairly broad. It covers, among others, persons appointed, nominated or elected under an oath to His Majesty, His Majesty’s government or to public institutions. Public institutions include local bodies; government-owned or controlled enterprises; and commissions, organisations, corporate etc. established by the government. The definition also encompasses anyone holding office of public responsibility with or without remuneration. However, there is no express mention of legislative officials. Judicial officials are also not mentioned, although the offences do cover the bribery of “persons appointed as an arbitrator or any other person appointed in the same position pursuant to the prevailing laws to resolve or adjudicate any dispute” (Section 2(b)(2)).

International standards also require broad coverage of the act or omission performed by an official in return for a bribe. Nepal's active and passive bribery offences broadly cover any act "pertaining to [the official's] office". They also specifically cover bribes to induce officials, while performing their official functions, to show favour or disfavour, or to cause or prevent a loss, for the briber or another person. In sum, the language in these provisions should cover acts or omissions in relation to the performance of official duties. The term "to show favour or disfavour" should also cover bribery to influence discretionary making, *e.g.* the award of a public procurement contract.

However, it appears that these offences do not cover all uses of a public official's position or office, including acts or omissions outside the official's competence. For instance, the offences do not cover an executive of a company who bribes a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official award a contract to that company.¹

The nature of a bribe is defined in Section 2 PCA, which states that a "graft" includes "cash, goods or any type of gain or benefit and the term also includes bribe". On its face, this definition arguably covers non-monetary bribes. But according to Nepalese authorities, there are no provisions which expressly cover bribes of a non-monetary nature, though officials have been punished under administrative codes of conduct for taking such benefits. Nepalese authorities also state that whether an act is bribery does not depend on the perceptions of local customs towards the giving of an advantage. It does depend on, however, other factors such as the value of the advantage, its results, the tolerance of bribery by local authorities, the necessity of giving advantages, and whether the briber is the best qualified bidder. International standards such as the OECD Convention prohibit the consideration of such factors.

It should be noted that the active and passive bribery offences in the PCA go beyond what is required in most international anti-corruption instruments in some respects. For instance, both offences cover bribery of persons "expecting to become" public servants, as well as giving advantages as a reward for acts or omissions already performed by an official.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

It is not an offence in Nepal to bribe officials of foreign countries or public international organisations in the conduct of international business. The definition of officials in the PCA refer only to Nepalese officials.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Section 23 of the PCA provides that “In case any firm, company or corporate body commits any act that is deemed to be an offence under this chapter, the partners at the time of commission of the act in case of a firm and the person acting as the principal official in case of a company or a corporate body shall be deemed to have committed offence.” “Principal official” includes the chairman, board members, general managers, managing directors, or other officials working in the same capacity.

However, Section 23 does not appear to impose liability against a legal person for bribery. The provision imposes liability against a legal person’s partners or principal officers, not the legal person itself. Furthermore, it is unclear how a firm, company or corporate body can *commit* an act deemed to be an offence. The PCA does not provide any guidance on how to attribute the acts or omissions of a natural person to a legal person. Also unclear is whether liability arises when the principal official of one company bribes for the benefit of another company within the same conglomerate.

JURISDICTION TO PROSECUTE BRIBERY

Section 1(2) PCA provides that the PCA “shall be extended throughout the Kingdom of Nepal and applicable to all Nepalese citizens, public servants residing anywhere outside the Kingdom of Nepal and to the non-Nepalese citizens residing in foreign countries having committed any act that may be deemed to be corruption under this Act.”

Nepalese authorities clarified that Section 1(2) PCA only provides a limited jurisdictional basis for prosecuting bribery. There is clearly jurisdiction to prosecute bribery offences that occur wholly on Nepalese soil, since the PCA is extended throughout Nepal. What is not clear is whether there is also jurisdiction to prosecute offences that take place only partly in Nepal, *e.g.* when some elements of the offence occur abroad.

Other jurisdictional bases are also somewhat unclear. The wording of Section 1(2) PCA (that the PCA is “applicable to all Nepalese citizens”) arguably provides jurisdiction to prosecute Nepalese nationals for bribery offences committed anywhere, including outside of Nepal.² Jurisdiction may also be available to prosecute Nepalese officials who commit passive bribery while outside of Nepal (since the PCA is applicable to “public servants residing anywhere outside the Kingdom of Nepal”). There may also be jurisdiction to prosecute non-Nepalese nationals residing in foreign countries who bribe Nepalese officials (passive personality jurisdiction).

SANCTIONS FOR BRIBERY

The general active and passive bribery offences in Section 3 PCA are punishable by different ranges of sentences “as per the amount involved depending on the degree of the offence”.

Amount Involved	Imprisonment	Amount Involved	Imprisonment
Under NPR 25 000 (approx. under EUR 235)	3 months or less	NPR 1 to 2.5 million (approx. EUR 9 400 to 23 500)	30-48 months
NPR 25 000 to 50 000 (approx. EUR 235 to 470)	3-4 months	NPR 2.5 to 5 million (approx. EUR 23 500 to 47 000)	4-6 years
NPR 50 000 to 100 000 (approx. EUR 470 to 940)	4-6 months	NPR 5 to 10 million (approx. 47 000 to 94 000)	6-8 years
NPR 100 000 to 500 000 (approx. EUR 940 to 4 700)	6-18 months	Over NPR 10 million (approx. over EUR 94 000)	8-10 years
NPR 500 000 to 1 million (approx. EUR 4 700 to 9 400)	18-30 months		

It is not entirely clear to what “amounts involved” refers, *e.g.* to the amount of a bribe, or the value of a contract obtained through bribery. It is also unclear what the range of sentence would be if a monetary value cannot be assigned to a bribe. A court may also impose a fine in addition to imprisonment, but there is no indication what the range of fine may be or how it may be determined.

In addition to imprisonment and fines, a court shall confiscate property “earned” through corruption (Section 47 PCA).³ This provision likely allows the confiscation of bribes and the direct proceeds of bribery. Whether indirect proceeds (*i.e.* the proceeds of proceeds) are also covered is not known. There are no provisions to allow a court to impose a fine equivalent in value to property that is subject to confiscation. It is thus unclear whether any additional sanctions are available when confiscation is not possible, *e.g.* when the property that is subject to confiscation has been spent or converted.

The PCA does not expressly provide for administrative sanctions, *e.g.* blacklisting or debarment from participating in government procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

Chapter 3 PCA provides basic investigative powers to law enforcement agencies in bribery cases. These include the power to order a government body or official to produce relevant documents and to respond to inquiries. Investigators may also search and seize any relevant evidence (Sections 28 and 30 PCA).

The Commission for the Investigation of Abuse of Authority (CIAA) has additional investigative powers under its constituting statute. The CIAA may order any office or individual to produce relevant documents or materials (Section 19(1)) and to answer questions (Section 19(2)). Public officials who are ordered to produce evidence cannot claim immunity from disclosure (Section 19(9)). This would supposedly override any secrecy rules, such as those for tax records. There are no comparable provisions to expressly override bank secrecy. However, the CIAA may freeze a transaction or account at a bank or financial institution (Section 23a). Information was not available on how often these techniques are used or whether there are obstacles to their usage, such as delays in obtaining evidence.

Some covert investigative techniques are available under the CIAA Rules 2002. Although there are no provisions dealing with surreptitious surveillance generally, Section 30 of the Rules allows the CIAA to arrange the delivery of a bribe to an official. Section 41 allows investigators to use “scientific and communication equipment and devices as may be necessary according to the order of the CIAA.” This includes the use of wiretapping, video recording, and listening and bugging devices, according to Nepalese authorities. Whether these methods have in fact been used in bribery investigations is not known.

Extradition but not mutual legal assistance (MLA) is available in bribery cases. The Extradition Act allows Nepal to seek extradition of a person who has committed a criminal offence, including bribery (subject to other restrictions in an applicable treaty or foreign legislation). The availability of MLA is unclear. As of 2007, Nepal did not have MLA legislation. It thus could not provide MLA, while its ability to seek MLA was unclear.

There are also procedures to encourage persons who participated in an offence to co-operate with the authorities. An offender who assists in an investigation may receive a reduced sentence or even complete immunity from

prosecution. Proceedings may be re-instituted against the offender if he/she later becomes uncooperative, or if his/her evidence is not corroborated by other proofs (Sections 55 PCA and 19(15) CIAA Act).

ENFORCEMENT OF BRIBERY OFFENCES

The CIAA has jurisdiction over criminal bribery investigations. Prosecutions are conducted by a “government prosecutor or an attorney appointed by the Commission in coordination with the Office of the Attorney General” (CIAA Act 1991, Sections 14 and 35).

Only statistics for the total number of cases handled by the CIAA are available; there are no statistics that pertain specifically to bribery.

	2003/4	2004/5	2005/6	2006/7	2007/8
Investigations	3 118	3 709	3 353	2 976	2 135
Prosecutions	98	113	114	115	70
Convictions	N/A	97	89	140	95
Suspended/Deferred Proceedings	N/A	N/A	N/A	N/A	N/A
Acquittals	N/A	9	20	31	32

RECOMMENDATIONS FOR A WAY FORWARD

Nepal’s scheme for criminalising bribery is relatively modern and meets many aspects of international standards on the criminalisation of bribery. To strengthen this scheme, Nepal could consider addressing the following issues.

Elements of the Active and Passive Domestic Bribery Offences

Nepal’s general bribery offences in the PCA already contain some aspects found in international standards, *e.g.* coverage of pecuniary and non-pecuniary bribes, and several modes of active and passive bribery. In some respects, the offences even go beyond what is required in international standards. To improve the bribery offences, Nepal could consider addressing the following areas:

- (a) Express inclusion of additional modes of committing bribery PCA, such as promising, offering and soliciting a bribe;

- (b) Incomplete offences, such as when a bribe is offered but not received by an official, or when an official rejects a bribe;
- (c) Express coverage of bribery through intermediaries;
- (d) Express definition of a public official that covers legislative and judicial officials;
- (e) Bribery in order that an official uses his/her position outside his/her authorised competence;
- (f) Definition of a “gratification” to include non-monetary benefits; and
- (g) Ensuring that the giving of an advantage is a crime regardless of the value of the advantage, its results, the tolerance of bribery by local authorities, the necessity of giving advantages, and whether the briber is the best qualified bidder.

Bribery of Foreign Public Officials

To bring its criminal into line with international standards, Nepal should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Whether Section 23 PCA imposes liability against a legal person (as opposed to the legal person’s officers and partners) for bribery is unclear. Nepal may wish to expressly address this matter through new and clearer legislation. A new scheme of liability should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

A scheme of liability should also address the following:

- (a) Legal persons responsible for active bribery are given effective, proportionate and dissuasive criminal and/or non-criminal sanctions, including monetary sanctions and confiscation; and
- (b) Liability does not depend on the conviction of a natural person for the crime.

Jurisdiction for Prosecuting Bribery

Despite the wording of Section 1(2) PCA, Nepalese authorities have confirmed that the provision only provides for jurisdiction to prosecute its bribery committed in Nepal. To ensure an adequate jurisdictional basis for prosecuting bribery, Nepal could consider addressing or clarifying the following issues:

- (a) Jurisdiction to prosecute active and passive bribery that is committed partly in Nepal; and
- (b) Jurisdiction to prosecute Nepalese nationals for active and passive bribery committed outside Nepal.

Sanctions for Bribery

Bribery offences under the Penal Code are punishable by imprisonment of up to ten years, which is in line with international standards. To ensure sanctions for bribery are effective, proportionate and dissuasive, Nepal could address or clarify the following issues:

- (a) Whether “the amount involved” in a bribery case relates to the value of a bribe or the value of fruits of bribery (*e.g.* contract awarded);
- (b) The range of fines available for bribery offences;
- (c) Confiscation of property obtained indirectly from a bribery offence;
- (d) The availability of fines equivalent in value to property that is subject to confiscation; and
- (e) The availability of blacklisting and debarment from public procurement as sanctions for bribery under the Penal Code.

Tools for Investigating Bribery

Nepal has a fairly broad range of tools for investigating bribery cases, ranging from production orders and search warrants to wiretapping and controlled deliveries. The express legislative provision overriding secrecy of government information (e.g. tax records) is commendable. Statistics on the total number of cases handled by CIAA were available, though data specific to bribery cases were not. Addressing the following matters in the context of bribery investigations could improve Nepal's enforcement capabilities:

- (a) Overriding bank secrecy when obtaining evidence from banks and financial institutions;
- (b) Maintain statistics on the use of various investigative techniques; and
- (c) The ability to seek MLA for all bribery offences.

Enforcement of Bribery Offences

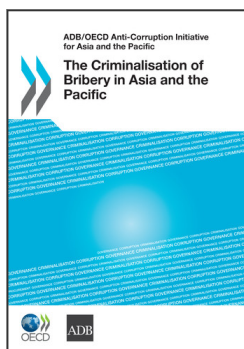
In order to properly assess whether its bribery offences are adequately and effectively enforced in practice, Nepal should maintain statistics on investigations, prosecutions, convictions of bribery for both natural and legal persons, as well as the number and nature of sanctions imposed in bribery cases, including confiscation.

RELEVANT LAWS AND DOCUMENTATION

The Prevention of Corruption Act, 2059 (2002 A.D.) and other relevant legislation are available from the Commission for the Investigation of Abuse of Authority: www.ciaa.gov.np

NOTES

- ¹ See OECD Convention, Commentary
- ² However, the Nepalese authorities have indicated in their response to a questionnaire that nationality jurisdiction is not available.
- ³ Section 29b of the CIAA Act 1991 contains a similar provision and may also be applicable.



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