

For information
on 7 May 2001

Legislative Council Panel on Constitutional Affairs

Application of Prevention of Bribery Provisions to the Chief Executive

Purpose

At the meeting of the Legislative Council (LegCo) Panel on Constitutional Affairs on 20 November 2000, Members asked the Administration to study the issue of the codification of the common law offence of bribery for the purpose of application to the Chief Executive (CE). This paper sets out the Administration's findings.

Codification of the Common Law Offence of Bribery

2. Notwithstanding that the CE is not subject to those provisions of the Prevention of Bribery Ordinance (Cap. 201) (POBO) that are only applicable to "government officer" or "public servants", Members noted that the CE would be subject to the common law offence of bribery. Nevertheless, Members asked the Administration to consider codifying the common law offence to remove any uncertainty in the enforcement of law in connection with the CE. Members also expressed the concern about the inability of the ICAC to exercise its special investigation powers provided under the POBO in dealing with a possible offence of bribery by the CE.

3. We have conducted research on this subject and come to a view that the proposal for codification of the common law offence of bribery may bring more problems than it intends to resolve. A major hurdle is that bribery at common law is difficult to define: it evolves over time, and opinions differ as to whether it is to be regarded as a general offence (i.e. applying to a range of different offices or functions) or whether the common law is comprised of a number of specific or different offences of bribery (as distinguished by the office or function to which a particular offence applies)¹.

4. The most frequently quoted definition of the common law offence as provided in *Russell on Crime*² is that "Bribery is the receiving or offering of any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known

¹ English Law Commission Consultation Paper No. 145, "Legislating the Criminal Code: Corruption – A Consultation Paper", para. 2.2.

² *Russell on Crime* (12th ed 1964), p 381.

rules of honesty and integrity”. According to David Lanham³, four aspects of the law of bribery needed to be examined in dealing with the common law offence. These include : the position of the person bribed; the nature of the reward (e.g. the distinction between a bribe and a treat); the mens rea of bribery (i.e. the mental element in bribery) and the problem of mutuality (i.e. whether the innocent intent on the part of one party may provide a defence to the other even if the latter has a guilty intent).

5. Take the question of mens rea as an example, Russell’s definition of bribery includes the phrases “in order to influence his behaviour” and “to incline him to act contrary to the known rules of honesty and integrity,”⁴. But it is recognized that such formulae might not capture the full flavour of the mental element. In *William v R*⁵, the court took a rather narrow view that the corruption at common law implied an intention to procure a breach of duty on the part of the official bribed. But in *R v Gurney*⁶, there was no suggestion that the attempt to bribe must be to induce the Justice of the Peace (JP), who was being bribed, to come to the wrong decision. There seemed no requirement that the gift to the JP is intended to cause a breach of duty or that taking the gift into consideration is itself a breach of duty.

6. As a further point of illustration, the courts have taken different views on the question of whether a defendant would be guilty of accepting a bribe when the giver has no corrupt motive. According to David Lanham, a number of South African cases have held that the defendant was not guilty if he knew that the giver of a bribe had no corrupt intention. However, a different view was taken by a Jamaican Court of Appeal in *Stewart v R*⁷ that both a receiver and an offeror could be guilty of an offence within the definition of bribery and that there was no substance in the contention that the defendant was not guilty because it had not been shown that the offeror paid the money in bad faith.

7. The preceding cases and court judgements seek to demonstrate the complexities involved in an attempt to codify the common law offence of bribery. Despite the definition provided in *Russell on Crime*, it is clear that there is still room for legal argument and interpretation over its full scope and practical applications. Any attempt to codify the offence will not be straightforward. Furthermore, it may result in unwarranted modifications

³ D Lanham, “Bribery and Corruption” in P Smith (ed), *Criminal Law: Essays in Honour of J C Smith* (London: Butterworths, 1987), 92-113.

⁴ D Lanham, “Bribery and Corruption” in P Smith (ed), *Criminal Law: Essays in Honour of J C Smith* (London: Butterworths, 1987), p.95.

⁵ (1979) 23 ALR 369.

⁶ (1867) 10 Cox CC 550.

⁷ (1960) 2 WIR 450.

being made to the common law principles. In the light of the uncertainty and complexity as to how the offence is to be codified or circumscribed in express legal terms, we would also risk imposing undesirable limitations on or creating loopholes in effective law enforcement by statutory agencies.

8. To add to the difficulties in attempting to codify the common law offence of bribery, it should be noted that most common law jurisdictions have resorted to specific provisions to tackle corruption and bribery offences. For example, jurisdictions in some Australian states, Canada and South Africa all have express statutory provisions to cover corruption and bribery offences. In Hong Kong, the POBO has been enacted since 1971 and has been working well in the past 30 years. Even in the United Kingdom, corruption related legislation has been in existence since the late 19th century. As a result, there are no modern English authorities on the common law offence of bribery that we may make reference to.

9. Based on the findings as explained above, our considered view is that codification of the common law offence of bribery will not be easy or straightforward. Rather, we propose to leave the common law offence of bribery as it is, such that the CE, who will be caught as a public officer within the meaning of the common law, will continue to be liable to prosecution under the common law offence of bribery. We would, however, seek to address the need for applying express provisions on prevention of bribery to the CE as set out in the ensuing paragraphs.

Application of Prevention of Bribery Provisions to the CE

10. The CE has indicated that he is willing to be subject to the general standards of bribery prevention as under the POBO. Given the problems and complications associated with the codification of the common law offence of bribery, we consider it more appropriate to, outside the common law, set out in separate legislative provisions the bribery offences for application to the CE. The proposal will need to address the CE's unique constitutional position and the fact that he is not a "government officer" or "public servant" as defined in the POBO.

11. In formulating the proposal, we have taken into account the fact that the offences of solicitation and acceptance of advantages under the POBO are generally premised upon the principal-agent relationship. The offence provisions, and indeed the POBO generally, were not intended to cater for the office of the CE.

12. We are looking into the feasibility and implications of creating separate legislative provisions to set out the bribery offences for exclusive

application to the CE, making reference to similar standards and definition of bribery prevention as currently applicable to government officers under existing law. We are researching into this possible arrangement with a view to, in consultation with legal advice, establishing its full legal and constitutional implications. We shall report progress and consult Members once we have been able to work out the details with the Department of Justice.

Administration Wing
Chief Secretary for Administration's Office
May 2001