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Legislative Council

LC Paper No. CB(2)1764/00-01(01)

Ref. : CB2/PL/CA

Panel on Constitutional Affairs

Background Paper prepared by Legislative Council Secretariat

**Application of certain provisions of
Prevention of Bribery Ordinance to the Chief Executive**

Purpose

This paper summarises the main points of members' discussions concerning the issue of application of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE).

1998-99 legislative session

2. As a follow up to a written question raised by Hon Emily LAU at the Council meeting on 13 January 1999 on whether CE was subject to the provisions of POBO, the Panel requested the Administration to provide a detailed paper for discussion by the Panel on 9 February 1999. A copy of the Administration's paper (LC Paper No. CB(2)1249/98-99(02)) is at **Appendix I**. The Administration agreed to review POBO taking into account members' views.

1999-2000 legislative session

Panel meetings on 25 October 1999 and 15 November 1999

3. The Administration reported the progress of the review to the Panel at its meetings on 25 October 1999 and 15 November 1999. The Administration was of the view that it would be difficult to fit the HKSAR Government and CE into the structure of POBO, given the relationship between the HKSAR Government and CE did not constitute a principal-agent relationship. A copy of the Administration's paper (LC Paper No. CB(2)168/99-00(03)) is at **Appendix II**.

4. Members requested the Administration to consider adopting a narrow definition for CE in the relevant legislation along the line that "for the purpose of this Ordinance, CE is regarded as a public servant".

Panel meeting on 15 May 2000

5. The Administration advised that it had considered the possibility of deeming CE to be a government officer or public servant for the purpose of POBO so that the relevant sections of the Ordinance that were applicable to "government officers" or "public servants" would apply to him. However, this option was considered not viable on the basis of legal advice.

6. The Administration explained to the Panel that -

- (a) Legal advice was that CE might fall within the meaning of "public officer" under the common law and would be liable to prosecution if he accepted a bribe even without amendment to POBO; and
- (b) In view of the foregoing, the creation of a new offence in the POBO applicable to CE would suffice. The new offence would be in line with the spirit of the existing section 10 of POBO concerning the possession of unexplained property which was currently applicable to "government officers". The Administration would introduce the necessary legislative amendments as soon as possible.

A copy of the Administration's paper (LC Paper No. CB(2)1929/99-00(04)) is at **Appendix III**.

7. Members considered that the common law offence of bribery was unclear and not couched in statutory terms. They requested the Administration to consider codifying the offence by way of enactment, so that CE would be subject to the same regulatory and legal framework applicable to government officers or public servants under POBO. The Administration agreed to consider and revert to the Panel.

2000-2001 legislative session

Panel meeting on 20 November 2000

8. The Administration advised the Panel at its meeting on 20 November 2000 that it would need about six months to study the scope and application of the common law offence of bribery.

Panel meeting on 7 May 2001

9. The Administration informed the Panel at its meeting on 7 May 2001 that it came to a view that the proposal for codification of the common law offence of bribery might bring about more problems than it intended to resolve. The Administration considered it more appropriate to set out in separate legislative

provisions the bribery offences for application to CE. The proposal would need to address CE's unique constitutional position and the fact that he was not a "government officer" or "public servant" as defined in POBO.

10. As regards the Administration's earlier proposal to introduce legislative amendments to extend section 10 of POBO to CE, the Administration would deal with this proposal in the same legislative package. A copy of the Administration's paper (LC Paper No. CB(2)1448/00-01(02)) is at **Appendix IV**.

11. The Administration also advised the Panel that there had been nine prosecutions for offences in contravention of section 10(1)(b) of POBO in which assets concerned were acquired before the enactment of POBO in 1971. However, no prosecution had ever been taken against government officers for the common law offence of bribery.

12. Members were of the strong view that the Administration should introduce the legislative proposal as soon as possible so that the legal framework would apply to the CE election in March 2002. The Administration noted members' request.

Meeting of the Bills Committee on the Chief Executive Election Bill on 31 May 2001

13. At the meeting of the Bills Committee on Chief Executive Election Bill on 31 May 2001, members raised a number of concerns relating to application of anti-bribery legislation to the CE election, in particular, the urgent need for extending the applicability of POBO to CE before the CE election. A list of the concerns raised is at **Appendix V**.

14. The Bills Committee suggested that the matter be followed up by the Panel at its next meeting on 12 June 2001.

Latest development

15. On the instruction of the Panel Chairman, the Administration has been requested to provide a written response to the concerns raised by the Bills Committee at the coming meeting on 12 June 2001.

Bills Committee on Chief Executive Election Bill

Meeting on 31 May 2001

Application of certain provisions of the Prevention of Bribery Ordinance (POBO) (Cap. 201) to Chief Executive

Members' concerns about application of POBO to CE are summarized as follows-

- (1) A member of the BC has said that a situation could arise where a member or certain members of the EC might approach the CE seeking re-election and ask him to exercise his influence on certain matters, such as on a Bill under scrutiny by LegCo, which involves no direct personal interests or benefits of the EC member(s) concerned, in exchange for voting for the incumbent CE at the election. The EC member(s) might also be under the influence of a third party in making such an approach to the CE. The BC member is of the view that such act of solicitation, or other similar acts of the kind, might not be caught under the existing POBO or ECICO, and that it should be made specifically a criminal offence in the law to catch the acts of all parties concerned;
- (b) As certain provisions of POBO do not apply to CE and the incumbent CE may seek re-election in 2002, the legislative proposals to amend POBO to extend the Ordinance's applicability to CE should be introduced into LegCo early so that the new framework can apply to the CE election in March 2002;
- (c) There is an urgent need to amend POBO to eliminate the difference between the standards applicable to civil servants under the specific provisions of POBO and that applicable to CE under the other general provisions and the common law, the former standards being stricter than the latter; and
- (d) The ECICO only governs corrupt and illegal conduct at an election but not acts such as that of a serving CE who has yet to announce his intention to seek re-election. There might be a need to deal with that in the context of the POBO.

For discussion on
9 February 1999

Legislative Council Panel on Constitutional Affairs
Application of Certain Provisions of the
Prevention of Bribery Ordinance to the Chief Executive

Purpose

This paper is an elaboration of the reply given by the Administration to a written question raised by the Hon. Emily Lau at the LegCo meeting on 13 January 1999 concerning the application of certain provisions of Prevention of Bribery Ordinance (Cap. 201) (the Ordinance) to the Chief Executive (CE).

Background

2. The Hon. Emily Lau raised a written question for reply at the LegCo meeting held on 13 January 1999 on whether the CE is subject to the provisions of the Ordinance; and if not, whether the Executive Authorities have examined if the CE should be brought under the ambit of the Ordinance. A copy of the question and reply is at Annex A.

3. Subsequent to the reply, Ms Lau requested the Administration to elaborate on its reply by providing a detailed paper for discussion at the Constitutional Affairs Panel Meeting to be held on 9 February 1999.

Application of the Ordinance to the CE

4. As set out in our reply to Ms Lau, the CE is neither a "government officer" nor a "public servant" under the Ordinance and is, therefore, not subject to those sections of the Ordinance that only apply to "government officers" or "public servants". Those provisions in question are sections 3, 4(2), 4(3), 5(2), 10, 12, 12AA and 16 of the Ordinance. An extract of those sections of the Ordinance is at Annex B for Members' reference.

5. Of the remaining provisions of the Ordinance, those which relate to criminal offences and to which the CE is subject in common with all other citizens of Hong Kong are sections 4(1), 5(1), 6, 7, 8, 9, 11, 12(1), 12A, 13, 13C, 14, 14C, 17, 17A, 17C, 29, 30, 33 and 33A; an extract of those sections is at Annex C.

6. As pointed out in the Administration's reply to Ms Lau's LegCo question, the CE is subject to the relevant provisions of the Ordinance like all other citizens of Hong Kong. There is therefore no question that the CE being "above the law".

7. Members may also wish to note that as stated in the Administration's earlier reply, Article 47 of the Basic Law provides that "The Chief Executive of the Hong Kong Special Administrative Region must be a person of integrity, dedicated to his or her duties." Furthermore, Article 73(9) of the Basic Law provides for a mechanism under which LegCo may pass a motion of impeachment and report it to the Central People's Government for decision if the CE is charged with serious breach of law or dereliction of duty and the CE refuses to resign, and if the charge is substantiated by an independent investigation committee chaired by the Chief Justice of the Court of Final Appeal.

8. While the Administration do not see any immediate need to amend the Ordinance, we appreciate Members' concern regarding the application of certain provisions to the CE. We are therefore prepared to review the Ordinance taking into account Members' views.

9. The Administration will work out the scope of the review in due course. Given that corruption-related matters fall within the purview of the LegCo Security Panel, the Administration will keep the Security Panel informed of the progress of the review.

Administration Wing
Chief Secretary for Administration's Office
February 1999

LegCo Question 20 (Written Reply)

Asked by: The Hon Emily LAU Wai-hing

Date of Sitting: 13.1.99
Replied by: CS

Question:

It is learnt that the Prevention of Bribery Ordinance (Cap 201) was not applicable to the then Governor of Hong Kong before Hong Kong's reunification with China. In this connection, will the Executive Authorities inform this Council whether the Chief Executive ("CE") is now subject to the provisions of the Ordinance; if not, whether they have studied if the CE should be brought under the ambit of the Ordinance; if the conclusion of the study is that the CE should not fall within the ambit of the Ordinance, of the justifications for that?

Reply:

Madam President,

Both the then Governor of Hong Kong before Hong Kong's reunification with China and the Chief Executive (CE) are subject to the relevant provisions of the Prevention of Bribery Ordinance (the Ordinance) like all other citizens of Hong Kong. The Chief Executive is not a Government employee nor is he employed by a public body. He is not a "government officer" or a "public servant" as defined under the Ordinance. Accordingly he is not subject to those sections of the Ordinance that only apply to "government officers" or "public servants".

Article 47 of the Basic Law provides that "The Chief Executive of

the Hong Kong Special Administrative Region must be a person of integrity, dedicated to his or her duties." Furthermore, Article 73(9) of the Basic Law provides for a mechanism under which the Legislative Council may pass a motion of impeachment and report it to the Central People's Government for decision if the CE is charged with serious breach of law or dereliction of duty and he refuses to resign, and if the charge is substantiated by an independent investigation committee chaired by the Chief Justice of the Court of Final Appeal.

The Administration has no plan to change the current position.

Letterhead "BLIS ON (NTERNET) Section of Enactment."

Chapter:	201	Title:	PREVENTION OF BRIBERY ORDINANCE	Gazette Number:	
Section:	3	Heading:	Soliciting or accepting an advantage	Version Date:	30/06/1997

PART II

OFFENCES

Any Crown servant who, without the general or special permission of the Governor, solicits or accepts any advantage shall be guilty of an offence.

BLIS ON

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Section of Enactment

Chapter: 201 Title: PREVENTION OF BRIBERY ORDINANCE Gazette Number:
Section: 4 Heading: **Bribery** Version Date: 30/06/1997

~~(1) Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's- (Amended 28 of 1980 s. 3)~~

~~(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;~~

~~(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or~~

~~(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,~~

~~shall be guilty of an offence.~~

~~(2) Any public servant who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his- (Amended 28 of 1980 s. 3)~~

~~(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;~~

~~(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by himself or by any other public servant in his or that other public servant's capacity as a public servant; or~~

~~(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,~~

~~shall be guilty of an offence.~~

~~(3) If a public servant other than a Crown servant solicits or accepts an advantage with the permission of the public body of which he is an employee being permission which complies with subsection (4), neither he nor the person who offered the advantage shall be guilty of an offence under this section. (Added 28 of 1980 s. 3)~~

~~(4) For the purposes of subsection (3) permission shall be in writing and~~

~~(a) be given before the advantage is offered, solicited or accepted; or~~

~~(b) in any case where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance.~~

~~and for such permission to be effective for the purposes of subsection (3), the public body shall, before giving such permission, have regard to the circumstances in which it is sought. (Added 28 of 1980 s. 3)~~

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Section of Enactment

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Chapter:	201	Title:	PREVENTION OF BRIBERY ORDINANCE	Gazette Number:	
Section:	5	Heading:	Bribery for giving assistance, etc. in regard to contracts	Version Date:	30/06/1997

~~(1) Any person who, without lawful authority or reasonable excuse, offers an advantage to a public servant as an inducement to or reward for or otherwise on account of such public servant's giving assistance or using influence in, or having given assistance or used influence in-~~

~~(a) the promotion, execution, or procuring of-~~

~~(i) any contract with a public body for the performance of any work, the providing of any service, the doing of any thing or the supplying of any article, material or substance, or~~

~~(ii) any subcontract to perform any work, provide any service, do any thing or supply any article, material or substance required to be performed, provided, done or supplied under any contract with a public body;~~

~~or
(b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract or subcontract as aforesaid,~~

~~shall be guilty of an offence.~~

(2) Any public servant who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his giving assistance or using influence in, or having given assistance or used influence in-

(a) the promotion, execution or procuring of, or

(b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in, any such contract or subcontract as is referred to in subsection (1) shall be guilty of an offence.

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Section of Enactment

Chapter: 201 Title: PREVENTION OF BRIBERY ORDINANCE Gazette Number:
Section: 4 Heading: Bribery Version Date: 30/06/1997

(1) Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's- (Amended 28 of 1980 s. 3)

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
- (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or
- (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body, shall be guilty of an offence.

~~(2) Any public servant who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his- (Amended 28 of 1980 s. 3)~~

- ~~(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;~~
- ~~(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by himself or by any other public servant in his or that other public servant's capacity as a public servant; or~~
- ~~(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body, shall be guilty of an offence.~~

~~(3) If a public servant other than a Crown servant solicits or accepts an advantage with the permission of the public body of which he is an employee being permission which complies with subsection (4), neither he nor the person who offered the advantage shall be guilty of an offence under this section. (Added 28 of 1980 s. 3)~~

~~(4) For the purposes of subsection (3) permission shall be in writing and-~~

- ~~(a) be given before the advantage is offered, solicited or accepted; or~~
 - ~~(b) in any case where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance,~~
- ~~and for such permission to be effective for the purposes of subsection (3), the public body shall, before giving such permission, have regard to the circumstances in which it is sought. (Added 28 of 1980 s. 3)~~

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Section of Enactment

▼
Chapter: 201 Title: PREVENTION OF BRIBERY ORDINANCE Gazette Number:
Section: 5 Heading: **Bribery for giving assistance, etc. in regard to contracts** Version Date: 30/06/1997

(1) Any person who, without lawful authority or reasonable excuse, offers an advantage to a public servant as an inducement to or reward for or otherwise on account of such public servant's giving assistance or using influence in, or having given assistance or used influence in-

(a) the promotion, execution, or procuring of-

(i) any contract with a public body for the performance of any work, the providing of any service, the doing of any thing or the supplying of any article, material or substance, or

(ii) any subcontract to perform any work, provide any service, do any thing or supply any article, material or substance required to be performed, provided, done or supplied under any contract with a public body; or

(b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract or subcontract as aforesaid, shall be guilty of an offence.

~~(2) Any public servant who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his giving assistance or using influence in, or having given assistance or used influence in-~~

~~(a) the promotion, execution or procuring of, or~~

~~(b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in, any such contract or subcontract as is referred to in subsection (1) shall be guilty of an offence.~~

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Section of Enactment

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Chapter: 201 Title: PREVENTION OF BRIBERY ORDINANCE Gazette Number: 25 of 1998 s. 2
Section: 12 Heading: **Penalty for offences** Version Date: 01/07/1997

Remarks:

Amendments retroactively made - see 25 of 1998 s. 2

(1) Any person guilty of an offence under this Part, other than an offence under section 3, shall be liable-
(a) on conviction on indictment-

- (i) for an offence under section 10, to a fine of \$1000000 and to imprisonment for 10 years;
- (ii) for an offence under section 5 or 6, to a fine of \$500000 and to imprisonment for 10 years; and
- (iii) for any other offence under this Part, to a fine of \$500000 and to imprisonment for 7 years; and
(Replaced 50 of 1987 s. 3)

(b) on summary conviction-

- (i) for an offence under section 10, to a fine of \$500000 and to imprisonment for 3 years; and
- (ii) for any other offence under this Part, to a fine of \$100000 and to imprisonment for 3 years, (Replaced 50 of 1987 s. 3)

and shall be ordered to pay to such person or public body and in such manner as the court directs, the amount or value of any advantage received by him, or such part thereof as the court may specify.

(Amended 28 of 1980 s. 5)

~~(2) Any person guilty of an offence under section 3 shall be liable on conviction to a fine of \$100000 and to imprisonment for 1 year, and shall be ordered to pay to the Crown in such manner as the court directs the amount or value of the advantage received by him or such part thereof as the court may specify.
(Amended 9 of 1974 s. 4; 28 of 1980 s. 5)~~

(3) In addition to any penalty imposed under subsection (1), the court may order a person convicted of an offence under section 10(1)(b) to pay to the Crown-

(a) a sum not exceeding the amount of the pecuniary resources; or

(b) a sum not exceeding the value of the property,

the acquisition of which by him was not explained to the satisfaction of the court. (Added 9 of 1974 s. 4)

(4) An order under subsection (3) may be enforced in the same manner as a judgment of the High Court in its civil jurisdiction. (Added 9 of 1974 s. 4. Amended 25 of 1998 s. 2)

~~(5) An order may be made under subsection (3) in respect of an offence under section 10(1)(b) where the facts that gave rise to that offence arose before 15 February 1974. (Added 61 of 1980 s. 2)~~

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(3) Any person who, having been lawfully required under this section to disclose any information or to produce any accounts, books, documents or other article to an investigating officer authorized under subsection (1), shall, notwithstanding the provisions of other Ordinance or rule of law to the contrary save only the provisions of section 4 of the Inland Revenue Ordinance (Cap 112), comply with such requirement, and any such person who fails or neglects, without reasonable excuse, so to do, and any person who obstructs any such investigating officer in the execution of the authorization given under subsection (1), shall be guilty of an offence and shall be liable on conviction to a fine of \$20000 and to imprisonment for 1 year. (Amended 9 of 1974 s. 5; 48 of 1996 s. 4; 25 of 1998 s. 2)

(4) Any person who falsely represents that an appropriate authorization has been given under subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of \$20000 and to imprisonment for 1 year.

substantial and unreasonable prohibition or restriction upon the reporting of those proceedings or the reporting of that prosecution and that, notwithstanding the matters referred to in subsection (6)(a), (b) and (c) and the views of the person in favour of whom the order was made, if any, it is in the public interest to remove the prohibition or to relax the restriction, the court or the judge shall direct that the order shall not apply to such information in respect of which that order was made as is specified in the direction.

(8) Any person who publishes or broadcasts information being the subject of an order under subsection (5), including an order in respect of which a direction is made under subsection (7), in contravention of that order commits an offence and is liable on conviction to a fine of \$10000 and to imprisonment for 6 months.

(Added 48 of 1996 s. 5)

by him or on his behalf during such period as may be specified in the notice; (Amended 50 of 1987 s. 14)

(c) any other person to furnish to the investigating officer specified in such notice a statutory declaration or, as the Commissioner sees fit, a statement in writing enumerating the property, being property in such categories or classes of property, movable or immovable, as may be specified in such notice, belonging to or possessed by him and further stating, in respect of each such property, the date upon which and the person from whom it was acquired, if the Commissioner believes that such information may assist the investigation or proceedings; (Amended 50 of 1987 s. 6)

(d) any other person whom the Commissioner believes to be acquainted with any facts relevant to such investigation or proceedings to furnish to the investigating officer specified in such notice all information in his possession or to which he may reasonably have access (not being information readily available to the public) respecting such matters as are specified in the notice or, as the Commissioner sees fit, to appear before the investigating officer specified in such notice or such other person specified in the notice and to answer orally on oath or affirmation any questions relevant thereto; and, on demand by the investigating officer specified in such notice or such other person, to produce or deliver or otherwise furnish to him the original or a copy of any document in his possession or under his control or to which he may reasonably have access (not being a document readily available to the public) which, in the opinion of the investigating officer specified in such notice or such other person, may be relevant to such investigation or proceedings; for the purposes of this paragraph the investigating officer specified in such notice or such other person shall have authority to administer any oath or take any affirmation; (Amended 28 of 1980 s. 7)

(e) the person in charge of any public body or any department, office or establishment of any public body to produce or furnish to the investigating officer specified in such notice any document or a copy, certified by the person in charge, of any document which is in his possession or under his control or to which he may reasonably have access (not being a document readily available to the public); (Amended 28 of 1980 s. 7)

(f) the manager of any bank to give to the investigating officer specified in such notice copies of the accounts of such person or of his spouse, parents or children at the bank as shall be named in the notice.

(2) Without prejudice to the generality thereof, the powers conferred by subsection (1)(d) include the power to require information from, and to require the attendance for the purpose of answering questions of-

(a) any person, or any employee of any person, who has acted for or is acting for any party to any particular land or property transaction; and

(b) any person, or any employee of any person, who was concerned in the passing of any consideration, brokerage, commission or fee, or in the clearing or collection of any cheque or other instrument of exchange, respecting any particular land or property transaction, as to any of the following matters, that is to say-

(i) the full names (including aliases) and addresses of any of the persons referred to in paragraphs (a) and (b) and any other information in his possession which may be helpful in identifying or locating any such person;

(ii) any consideration, brokerage, commission or fee paid or received in respect of or in connection with any such land or property transaction; and

(iii) the terms and conditions of any such land or property transaction.

(3) A notice under subsection (1) shall be served on the person to whom it is addressed either personally or by registered post addressed to his last known place of business or residence.

(4) Every person on whom a notice under subsection (1) is served shall, notwithstanding the provisions of other Ordinance or rule of law to the contrary save only the provisions of section 4 of the Inland Revenue Ordinance (Cap 112), comply with the terms of that notice within such time as may be specified therein or within such further time as the Commissioner may, in his discretion, authorize, and any person on whom such a notice has been served, who, without reasonable excuse, neglects or fails so to comply shall be guilty of an offence and shall be liable on conviction to a fine of \$20000 and to imprisonment for 1 year. (Amended 25 of 1998 s. 2)

(5) A person who wilfully makes any false statement in answer to a notice under subsection (1) shall be guilty of an offence and shall be liable to a fine of \$20000 and to imprisonment for 1 year. (Added 9 of 1974 s. 6)

(Amended 9 of 1974 s. 6)

operation for periods of 3 months at a time. (Replaced 48 of 1996 s. 7)

(5) Where-

(a) a restraining order is made with respect to a third party or a suspected person against whom a prosecution for an offence under this Ordinance has been instituted; or

(b) a restraining order is in force with respect to a third party or a suspected person against whom a prosecution for such an offence is instituted, the restraining order shall, except in the case of a prosecution against a third party, continue in force until the proceedings on such prosecution have been finally determined and, if an order is made against that person under section 12(3) or 12AA, until that order has been set aside, complied with or enforced, as the case may be. (Amended 50 of 1987 s. 8; 48 of 1996 s. 7)

(5A) Nothing in subsection (4) or (5) shall prevent the court from making a further restraining order in respect of the same property on application ex parte by or on behalf of the Commissioner. (Added 50 of 1987 s. 8)

(6) A suspected person or third party on whom a copy of a restraining order has been served in accordance with subsection (3) or (3B) of this section or section 14D(5) shall be guilty of an offence and shall be liable on conviction to a fine of \$50000 or to the value of the property disposed of or otherwise dealt with, whichever is greater, and to imprisonment for 1 year if, during the continuance in force of the order, he knowingly disposes of or otherwise deals with any property specified in the restraining order otherwise than in accordance with directions of the court. (Amended 48 of 1996 s. 7)

(7) In this section and in sections 14D and 14E, "court" means the Court of First Instance. (Added 48 of 1996 s. 7. Amended 25 of 1998 s. 2)

(Added 9 of 1974 s. 7)

* Please see the saving provisions contained in s. 18 of 48 of 1996, which section is reproduced immediately after the Schedule.

Letterhead "BLIS ON (NTERNET) Section of Enactment."

Chapter: 201 Title: PREVENTION OF BRIBERY ORDINANCE Gazette Number: 25 of 1998 s. 2

Section: 17C Heading: **Further provisions relating to security, appearance, etc.** Version Date: 01/07/1997

Remarks:

Amendments retroactively made - see 25 of 1998 s. 2

(1) Where a person granted an application under section 17B fails to comply with the requirement of any condition imposed under that section- (Amended 48 of 1996 s. 13)

(a) he may be arrested and dealt with in the same manner that a person who fails to comply with a notice under section 17A(1) may be arrested and dealt with under section 17A(4) and (5); and

(b) any deposit made or recognizance entered into under section 17B may be forfeited by a magistrate on application by the Commissioner or under section 65 (which relates to the enforcement of recognizances) of the Magistrates Ordinance (Cap 227).

(2) Without prejudice to section 65 of the Magistrates Ordinance (Cap 227), where a magistrate declares or orders the forfeiture of a recognizance under this section, such declaration or order may, on the application of the Commissioner, be registered in the Court of First Instance, and thereupon the provisions of sections 110, 111, 112, 113 and 114 (which relate to the enforcement of recognizances) of the Criminal Procedure Ordinance (Cap 221) shall apply to and in relation to that recognizance. (Amended 25 of 1998 s. 2)

(3) (Repealed 44 of 1992 s. 4)

(Added 50 of 1987 s. 10)

Letterhead "BLIS ON (NTERNET) Section of Enactment."

Chapter: 201 Title: PREVENTION OF BRIBERY ORDINANCE Gazette Number:

Section: **29** Heading: **Offence of making a false report of the commission of offence, etc.** Version Date: 30/06/1997

Any person who, during the course of an investigation into, or in any proceedings relating to, an offence alleged or suspected to have been committed under this Ordinance, knowingly-

- (a) makes or causes to be made a false report of the commission of an offence under this Ordinance to any investigating officer specified in an authorization given under section 13; or
- (b) misleads any investigating officer specified in an authorization given under section 13,

shall be guilty of an offence and shall be liable on summary conviction to a fine of \$20000 and to imprisonment for 1 year.

(Amended 9 of 1974 s. 12)

Letterhead "BLIS ON (NTERNET) Section of Enactment."

Chapter: 201	Title: PREVENTION OF BRIBERY ORDINANCE	Gazette Number:	134 of 1997 s. 85
Section: 33	Heading: Effect of conviction of an offence under this Ordinance	Version Date:	03/10/1997

Any person convicted of an offence under Part II of this Ordinance shall, by reason of such conviction, be disqualified for a period of 5 years from the date of such conviction from-

- (a) being elected as a Member of the Legislative Council; or
- (b) being or being elected or appointed as a member of the Executive Council, the Urban Council, the Regional Council and any other public body, other than a public body specified in the Schedule.

(Replaced 134 of 1997 s. 85)

For Information
on 25 October 1999

Legislative Council Panel on Constitutional Affairs

Progress of the Review on the Application of Certain Provisions of the Prevention of Bribery Ordinance (Cap. 201) to the Chief Executive

Purpose

This paper seeks to inform Members of the progress of the review on the application of certain provisions of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE).

Background

2. The Administration has undertaken at the meeting of the LegCo Panel on Constitutional Affairs held on 9 February 1999 to review the application of those provisions of the POBO that are applicable to “government officers” or “public servants” to the CE, taking into account Members’ views and the constitutional position of the CE as provided for in the Basic Law.

Progress of the Review

3. The CE has indicated earlier that he is happy with the suggestion that the POBO be applied to him. We would need to consider how that could be given effect, given the construction of the POBO and CE’s special constitutional position.

The Construction of the POBO

4. Currently, the offences of solicitation and acceptance of advantages under the POBO are, generally speaking, premised upon the common law principal-agent relationship. In general, a person will be guilty of an offence if he or she :

- (a) as an agent of a principal, solicits or accepts an advantage without the approval of the principal, as an inducement to or reward for or otherwise on account for his or her acting in a certain manner in relation to his principal's affairs or business; or
- (b) as a public servant, solicits or accepts without lawful authority or reasonable excuse, as an inducement to or reward for or otherwise on account for his or her acting in a certain manner in his or her capacity as a public servant.

The Constitutional Position of the CE

5. The Administration has reviewed the constitutional position of the CE under the Basic Law. In particular, we attempted to analyse the relationship between the CE and the Government of the Hong Kong Special Administrative Region (SARG). Our observation is that :

- (a) Under the Basic Law (BL), the CE is appointed by the Central People's Government (CPG) (BL Articles 15 and 45). The Basic Law does not confer any power on SARG in the appointment or removal of the CE to/from his office.
- (b) CE is the head of the Government of the Hong Kong Special Administrative Region (SARG) (BL Article 60(1)) and is accountable to the Central People's Government (CPG) and the Hong Kong Special Administrative Region (HKSAR) in accordance with the provisions of the Basic Law (BL Article 43(2)).

6. Against this background, the position of the CE in the context of the POBO is that :

- (a) the CE is not an agent of the SARG within the meaning of "agent" in section 2(1) of the POBO; and
- (b) the CE is not a government officer nor a public servant under the POBO.

Therefore, the CE is not subject to those provisions of the POBO that are only applicable to "government officer" or "public servant" under the POBO (i.e. sections 3, 4(2), 4(3), 5(2), 10, 12 (other than sections 12(1)(a)(ii) and (iii) and

12(1)(b)(ii)), 12AA and 16 of the Ordinance). The CE like all other citizens of Hong Kong is subject to various other provisions of the POBO (i.e. sections 4(1), 5(1), 6, 7, 8, 9, 11, 12(1) (a)(ii) and (iii) and 12(1)(b)(ii), 12A, 13, 13C, 14, 14C, 17, 17A, 17C, 29, 30, 33 and 33A of the Ordinance).

The Constitutional Position of the CE vis-à-vis the Construction of the POBO

7. Given the special constitutional position of the CE, it is quite difficult to fit the SARG and the CE (whose relationship does not constitute a principal/agent relationship) into the structure of the POBO. Moreover, even if we could overcome the difficulty of fitting the SARG and the CE into the structure of the POBO, we still need to resolve one practical difficulty : that the CE is currently the authority to approve the receipt of advantage by members of the civil service, and there is, at present, no appropriate authority according to the provisions of the POBO to grant approval to the CE for the receipt of advantages himself.

Current Administrative Arrangements

8. But notwithstanding the above, Members may wish to note that at present, to ensure transparency and accountability in relation to the acceptance and disposal of gifts to the CE, the CE's Office has already established a system to handle such gifts namely, the CE will declare publicly all the gifts presented to him irrespective of value. This arrangement makes reference to, and comply with the spirit of, the rules applicable to civil servants concerning acceptance of gifts. Generally speaking, gifts with protocol value or decorative items will be for display or use in the office or other Government properties. Gifts with commercial value will be disposed of through the Treasury and the proceeds will be donated to charitable organisations. As regards items which the CE would like to retain, valuations will be obtained from the Treasury and the CE would purchase them. The proceeds will again be donated to charities. As regards sponsorship, the CE declares, in an open register, financial sponsorships he receives or overseas sponsored visits he makes like other members of the Executive Council. The above arrangements are desirable and effective in ensuring transparency and accountability in relation to the acceptance and disposal of gifts and the handling of sponsorships.

The Review

9. The Administration will continue with the review on the application of the POBO to the CE and will revert to the LegCo Panel on Constitutional Affairs later.

Response to other issues raised by the LegCo Constitutional Affairs Panel at its meeting on 9 February 1999

10. Apart from the application of the POBO to the CE, Members had also raised a number of related issues at the meeting of the Constitutional Affairs Panel on 9 February 1999. The Administration's response to those points is as follows :

- (a) Should the CE, by the fact that CE was being mentioned in Article 104 of Section 6 (on the subject of Public Servants) of Chapter IV (on Political Structure) of the BL, be a public servant under the BL

BL Article 104 itself makes no reference to "public servant", and it is clear that not all those persons referred to in that Article are necessarily "public servants". For instance, judges cannot be "public servants", for otherwise they would have to be responsible to the SARG under BL Article 99(2). Besides, although section 6 of Chapter IV of the Basic Law (of which BL Article 104 forms part) is entitled "Public Servants", none of the BL Articles therein, except BL Article 104, refers to the CE. In fact, for some of these Articles, if the expression "public servants" therein were construed to include the CE, anomalies would arise. Such Articles include BL Article 100 (which provides for continuation of employment of public servants serving before the setting-up of the HKSAR), BL Article 101 (which provides for employment of foreign nationals to serve as public servants at all levels save for the excepted posts which do not include the office of CE), and BL Article 103 (which provides for the appointment and promotion of public servants on the basis of their qualifications, experience and ability).

- (b) Whether there are any other Ordinances in the Laws of Hong Kong which provide for similar exemptions of the CE from the application of certain provisions of those Ordinances

Similar exemptions of the CE will only occur in such other Ordinances which apply only to “government officer” or “public servant” with meaning as defined in the POBO. Subject to the foregoing, all Ordinances apply to the CE; he is subject to the laws of Hong Kong.

- (c) Should the CE commit an offence under the POBO, whether the procedure regarding the impeachment of the CE under BL Article 73(9) should be invoked before or after the trial

While it is very difficult to comment in vacuum on a hypothetical question, it appears that the intention behind BL Article 73(9) is to leave the ultimate decision as to whether the “serious breach of law or dereliction of duty” concerned should result in the institution of the impeachment procedure under BL Article 79(6) (without awaiting the conclusion of the related trial or any appellant procedures) to the good sense of the LegCo Members.

- (d) Whether the Special Adviser to the CE (Mr Paul Yip) is a government officer or a public servant under the POBO

Mr Yip was appointed by the CE as his Special Adviser to tender the CE his advice. There is no contract between Mr Yip and the SARG, and Mr Yip is not being remunerated for that appointment. On this basis, the view of our legal adviser is that Mr Yip is not a government officer nor a public servant for the purposes of the POBO. Nevertheless, Mr Yip is subject to the relevant provisions of the Ordinance like all other citizens of Hong Kong.

For Information
On 15 May 2000

Legislative Council Panel on Constitutional Affairs

Application of Certain Provisions of the Prevention of Bribery Ordinance (Cap. 201) to the Chief Executive

Purpose

This paper aims at advising Members of the Legislative Council (LegCo) Panel on Constitutional Affairs on the latest thinking of the Administration regarding the application of certain provisions of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE).

Application of the POBO to the CE

2. As the Administration has advised the Panel earlier, legal advice has confirmed that the CE is currently not subject to those provisions of the POBO that are only applicable to “Government officers” or “public servants” under the POBO. The CE has indicated that he should be bound by the POBO, and he has instructed the Administration to work out how that could be done having regard to the constitutional position of the CE under the Basic Law.

3. In working out the solution, the Administration has carefully considered the possibility of deeming the CE to be a Government officer or public servant for the purpose of the POBO so that the relevant sections of the Ordinance that are applicable to “Government officers” or “public servants” would apply to him. However, having the benefit of legal advice, the Administration confirms that this option is not quite viable :-

- (a) The offence provisions of the POBO concerning solicitation and acceptance of advantages are drafted in such a way that is either predicated on the absence of the requisite permission or allows a defence of “lawful authority or reasonable excuse”. Given the special constitutional position of the CE and, thus, a lack of an appropriate authority in the HKSAR to grant approval to the CE for the receipt of advantages himself, the CE would not be able to avail himself, like other defendants, of the defence.

- (b) One possibility of making such an option viable would be to ban the acceptance of gifts and sponsorship by the CE altogether. However, this is not a practical solution because there is a practical need for the CE to accept gifts and certain sponsorships for protocol reasons, e.g. sponsorship from foreign governments for visits to their countries, and such an arrangement is also in line with international practice.

4. Further, it is already a common law offence for a “public officer” to accept a bribe and for anyone to bribe a “public officer”. In this context, a “public officer” means “one who discharges any duty in which the public is interested and more particularly if he receives payment from public money” (see Whitaker (1914) 10 Cr App R 245 at p. 252). According to section 101 I (1) of the Criminal Procedure Ordinance, Cap. 221, the maximum penalty for this common law offence is 7 years imprisonment and a fine of an unlimited amount. Legal advice is that the CE may fall within this meaning of “public officer” under the common law and would be liable to prosecution if he accepts a bribe even without any amendment to the POBO. In the light of the foregoing, we propose that the creation of a new provision in the POBO applicable to the CE will suffice : the new provision will be in line with the spirit of the existing section 10 of the POBO concerning the possession of unexplained property which is currently applicable to “Government officers”, and yet will take into account the unique constitutional position of the CE. The penalties for offences under section 10 of the POBO as provided for in section 12 and the provision on the confiscation of assets relating to section 10 offences as set out in section 12AA will apply to the new provision to be applicable to the CE. (Relevant extracts of the POBO are attached at the Annex.)

The Way Forward

5. The Administration will work on the necessary drafting instructions for the amendment of the POBO. We hope to introduce the legislation in the next legislative session.

Administration Wing
Chief Secretary for Administration’s Office
May 2000

BLIS ON
INTERNET

Section of Enactment

Chapter: 201 Title: PREVENTION OF BRIBERY Gazette Number:
ORDINANCE

Section: 12AA Heading: **Confiscation of assets** Version Date: 30/06/1997

- (1) Subject to this section, where a person is convicted on indictment of an offence under section 10(1)
- (b) the court may, in addition to any penalty imposed under section 12(1), order the confiscation of any pecuniary resources or property-
- (a) found at the trial to be in his control as provided in section 10; and
- (b) of an amount or value not exceeding the amount or value of pecuniary resources or property the acquisition of which by him was not explained to the satisfaction of the court.
- (2) Any application for an order under subsection (1) shall be made by the Attorney General within 28 days after the date of the conviction.
- (3) An order under subsection (1) shall not be made in respect of pecuniary resources or property held by a person other than the person convicted unless that other person has been given reasonable notice that such an order may be made and has had an opportunity to show cause why it should not be made.
- (4) An order under subsection (1) shall not be made in respect of pecuniary resources or property held by a person other than the person convicted if that other person satisfies the court in any proceedings to show cause under subsection (3) that he had-
- (a) acted in good faith as regards the circumstances in which the pecuniary resources or property came to be held by him; and
- (b) so acted in relation to the pecuniary resources or property that an order in the circumstances would be unjust.
- (5) Nothing in subsection (4) shall be construed as limiting the court's discretion to decline to make an order under subsection (1) on grounds other than those specified in subsection (4).
- (6) An order under subsection (1)-
- (a) may be made subject to such conditions as the court thinks fit in all the circumstances of the case; and
- (b) may be made in respect of an offence under section 10(1)(b) where the facts that gave rise to that offence occurred before the date of commencement of the Prevention of Bribery (Amendment) Ordinance 1987 (50 of 1987).
- (7) A court may make orders under both subsection (1) and section 12(3) in respect of the same offence but shall not make orders under both provisions in respect of the same pecuniary resources or property.
- (8) An order under subsection (1) may make provision for taking possession of pecuniary resources or property to which the order applies and for the disposal of such resources or property by or on behalf of the Crown.

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