

立法會 *Legislative Council*

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Background Brief for Bills Committee on Adaptation of Laws Bill 2001

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

Purpose

At the meeting of the Bills Committee on 17 September 2002, members asked whether paragraph (a) of the proposed definition of "prescribed officer" included the Chief Executive (CE). The Administration replied in the negative and explained that in order to address the unique constitutional position of CE and the fact that CE was not a "government officer" or a "public servant" as defined in the Prevention of Bribery Ordinance (Cap. 201) (POBO), the Administration was in the course of drafting legislative amendments with a view to applying certain provisions of POBO to CE. The Administration had discussed the matter with the Panel on Constitutional Affairs at a number of meetings. The Chairman requested the Clerk to prepare a background brief on previous discussions of the Panel on application of POBO to CE.

Major developments

2. The issue was first raised at the meeting of the Legislative Council (LegCo) on 13 January 1999. The major developments are summarised below -
 - (a) 9 February 1999 - The issue was first discussed by the Panel. The Administration advised that CE was happy to be bound by POBO. The Administration would review POBO taking into account members' view.
 - (b) 7 May 2001 - The Administration advised the Panel that separate legislative provisions would be created to set out the bribery offences for application to CE, making reference to the existing framework of control as applicable to government officers under POBO.
 - (c) 26 June 2001 and 28 January 2002 - The Panel expressed concern about the progress of the review. On behalf of the Panel, the Chairman of the House Committee raised the matter with the Chief Secretary for Administration on two occasions.

- (d) 1 February 2002 - The Chairman of the House Committee reported to the House Committee that the Chief Secretary for Administration had advised that the legislative proposal would be introduced in the next session.

Highlights of deliberations of the Panel

3. The main points of discussions by the Panel concerning the application of POBO to CE since the 1998-1999 legislative session are summarised in paragraphs 4 - 13 below.

1998-1999 legislative session

4. 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 first discussed the issue on 9 February 1999. The Administration advised that CE had indicated that he was happy to be bound by POBO. The Administration would review POBO taking into account members' views.

1999-2000 legislative session

5. The issue was discussed at three meetings of the Panel held in October, November 1999 and May 2000. The Administration explained that it had to consider how application of certain provisions of POBO to CE could be given effect, given the construction of POBO and CE's special constitutional position. The Administration was of the view that it would be difficult to fit the Hong Kong Special Administrative Region (HKSAR) Government and CE into the structure of POBO, given that the relationship between the HKSAR Government and CE did not constitute a principal-agent relationship. A paper setting out the Administration's views is in the **Appendix**.

6. In response to the suggestion of members, the Administration 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. The Administration explained to the Panel that 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. The Administration therefore considered that the creation of a new offence in 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".

7. However, 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 and public servants under POBO.

2000-2001 legislative session

8. 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. However, separate legislative provisions would be created to set out the bribery offences for application to CE, making reference to the existing framework of control as applicable to government officers under POBO, including section 10 of the Ordinance. The proposal would address CE's unique constitutional position and the fact that he was not a "government officer" or "public servant" as defined in POBO.

9. In June 2001, members expressed concern about the progress of the review. They were of the strong view that the Administration should introduce the legislative proposal as soon as possible so that the regulatory and legal framework could apply to the CE election to be held in March 2002. The Administration assured members that the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) had provided comprehensive safeguards to prevent corruption and other illegal activities in elections. An incumbent CE seeking re-election was subject to the provisions of the Ordinance.

10. At the request of the Panel, the Chairman of the House Committee raised the matter with the Chief Secretary for Administration on 26 June 2001. The Director of Administration subsequently responded in writing advising that the Administration would proceed with the exercise with priority and further consult the Panel once a proposal regarding separate legislative provisions applicable to CE had been worked out.

2001-2002 legislative session

11. At its meeting on 21 January 2002, the Panel was informed that the Administration was still in the process of considering how the issues identified could be resolved and given effect. As regards the legislative timetable, the Administration agreed to introduce the legislative proposal, through amendments to POBO or other legislative vehicles, into LegCo in the next legislative session.

12. Majority of the members of the Panel were dissatisfied with the situation. They pointed out that the issue had dragged on for more than three years since it was first raised by the Panel. They were adamant that the legislative proposal should be introduced into LegCo as soon as possible so that it would come into effect before the second term CE assumed office.

13. At the request of the Panel, the Chairman of the House Committee raised the matter with the Chief Secretary for Administration on 28 January 2002. The Chief Secretary for Administration had responded that it was important to examine carefully whether applying the regulatory and legal framework for government officers and public servants to CE would have any adverse impact on the administration of Hong Kong and the world market as a whole, and that the systems in other jurisdictions should also be studied as reference. The legislative proposal would be introduced in the next session.

Government's Legislative Programme for 2002-2003

14. An indicative list of bills which the Administration intends to introduce into LegCo in 2002-2003 has been circulated to Members vide LC Paper No. CB(2)38/02-03 on 9 October 2002. The legislative proposal to apply the bribery prevention provisions to CE is not included in the list.

Council Business Division 2
Legislative Council Secretariat
1 November 2002

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.