

For information
on 21 January 2002

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

Background

At the Legislative Council (LegCo) Panel on Constitutional Affairs meeting on 7 May 2001, Members noted that the Chief Executive (CE) is bound by the common law offence of bribery and those provisions of the Prevention of Bribery Ordinance (Cap. 201) (POBO) that apply to members of the public. Members also noted that the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) (ECICO) provides comprehensive safeguards to prevent corruption and other illegal activities in the CE election to be held in March 2002. An incumbent CE seeking re-election is subject to the provisions of the ECICO.

2. Members agreed not to pursue the codification of the common law offence of bribery but requested the Administration to extend the general standard of bribery prevention applicable to government officers¹ under the POBO for application to the CE. Members also expressed support to retain the common law offence of bribery notwithstanding the proposed express bribery prevention provisions applicable to the CE.

Application of Bribery Prevention Provisions to the CE

3. In consultation with the Department of Justice, we have examined the control framework of bribery prevention that is applicable to government officers under the POBO. It includes all those provisions applicable to public servants² and two more stringent provisions which apply exclusively to government officers only. In considering a possible arrangement for applying the bribery prevention provisions to the CE, we need to ensure that the arrangement takes into account the CE's unique constitutional position and is consistent with the provisions of the Basic Law. Also, we have to bear in mind the need to reconcile the CE's current status under the POBO, i.e. the appointee is neither a government officer nor a public servant as defined in the Ordinance.

¹ For the purpose of this paper, government officer is used to denote "Crown servant". In the Adaptation of Laws Bill 2001, the Administration has proposed to adapt "Crown servant" to "prescribed officer".

² "Public servant" is defined to mean, inter alia, any Crown servant and also any employee of a public body.

4. Having examined the two offence provisions of the POBO that only apply to government officers (extract at Annex A), we have come to the following view -

(a) Section 3 of the POBO

This section prohibits a government officer from soliciting or accepting any advantage without the general or special permission of the CE. Owing to the CE's unique constitutional position and the fact that the CE does not serve as the agent of anyone in the Hong Kong Special Administrative Region, any proposition for the CE to follow the government officer's model to seek the 'principal's consent' for his acceptance of advantages becomes impractical.

In practice, administrative arrangement is in place to ensure transparency and accountability in relation to the acceptance and disposal of gifts presented to the CE. The current arrangement is that the CE will not accept gifts for personal retention unless the incumbent has paid for them at market value.

(b) Section 10 of the POBO

This section makes it an offence for the possession of unexplained property by a government officer or a former government officer. In line with the spirit of section 10, a new provision needs to be created to address the unique attributes of the office of the CE. For example, the CE is not a career civil servant. Further, the Basic Law provides that the CE must be a person of integrity who shall declare his assets to the Chief Justice of the Court of Final Appeal on assuming office; the term of office of the CE shall be five years who may serve for not more than two consecutive terms. The new offence should ensure that full regard be given to these unique attributes in establishing the CE's or an ex-CE's standard of living, and the pecuniary resources/property under his control against his official emoluments. In this regard, in assessing the property possessed by and official emoluments of the CE or an ex-CE, reference should be made to the assets of the CE as declared to the Chief Justice of the Court of Final Appeal on assuming office pursuant to Article 47(2) of the Basic Law.

5. Apart from the two more stringent provisions that apply exclusively to government officers, we need to examine the need and the extent to which other offence provisions currently applicable to public servants and

government officers under the POBO should also be made applicable to the CE. The provisions (extract at Annex B) include –

(a) Section 4(2) and (3) of the POBO

It is an offence for any public servant, without lawful authority or reasonable excuse, to solicit or accept any advantage as an inducement to or reward for or otherwise on account of his acting in certain manner in his capacity as a public servant. In view of the unique constitutional position of the CE under the Basic Law, we have to give detailed examination over possible application of this provision and any necessary modification.

(b) Section 5(2) of the POBO

This provision proscribes the solicitation and acceptance of an advantage by a public servant, without lawful authority or reasonable excuse, as an inducement to or reward for or otherwise on account of his giving assistance or using influence in matters in regard to contracts. Similar to paragraph 5(a) above, we are looking into whether and how this specific provision should also bind the CE.

6. In addition, we should give consideration to the possible need for and scope of application to the CE of other provisions of the POBO in relation to government officers and public servants. For example, the provision which proscribes the offering of bribes by any person to a government officer or public servant or that requires a public servant to provide assistance to any investigating officer of the Independent Commission Against Corruption if being so requested.

7. We are considering how best the issues identified above may be resolved and given effect. Subject to the final form of the legislative provisions, we would consider whether the legislative provisions for exclusive application to the CE should be given effect through amendments to the POBO which is premised upon the principal-agent relationship or other legislative vehicles. If these were taken in the form of an amendment Bill to the POBO, we may take the opportunity to effect other amendments to the Ordinance.

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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.

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Section of Enactment

Chapter:	201	Title:	PREVENTION OF BRIBERY ORDINANCE	Gazette Number:
Section:	10	Heading:	Possession of unexplained property	Version Date: 30/06/1997

(1) Any person who, being or having been a Crown servant-

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,

shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

(2) Where a court is satisfied in proceedings for an offence under subsection (1)(b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused. (Added 9 of 1974 s. 3. Amended 48 of 1996 s. 3)

(3)-(4) (Repealed 56 of 1973 s. 2)

(5) In this section, "official emoluments" (公職薪俸) includes a pension or gratuity payable under the Pensions Ordinance (Cap 89), the Pension Benefits Ordinance (Cap 99) or the Pension Benefits (Judicial Officers) Ordinance (Cap 401). (Amended 36 of 1987 s. 44; 85 of 1988 s. 51)

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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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