

立法會 *Legislative Council*

LC Paper No CB(2)1091/04-05(01)

Ref. : CB2/PL/CA

Meeting of Panel on Constitutional Affairs on 21 March 2005

Background brief prepared by the Legislative Council Secretariat

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

Purpose

This paper highlights the past discussions of Members of the Legislative Council (LegCo) on the issue of the application of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE).

Background

2. At the Council meeting on 13 January 1999, Hon Emily LAU raised a written question on whether CE was subject to the provisions of POBO. A copy of the question and reply is in **Annex A to Appendix I**.

3. The Panel on Constitutional Affairs (the Panel) first followed up the matter at its meeting on 9 February 1999. The Administration advised members that CE had indicated that he was happy to be bound by POBO. The Administration would review the application of certain provisions of POBO to CE, i.e. those provisions applicable to “government officers” or “public officers”, taking into account the constitutional position of CE as provided in the Basic Law.

4. The Panel had expressed disappointment about the little progress achieved at a number of meetings. Despite the Panel’s repeated requests, the Administration had not been able to provide a concrete legislative timetable. The Panel made reports to the House Committee regarding the time taken by the Administration to introduce a legislative proposal to apply certain provisions of POBO to CE on 15 June 2001 and 25 January 2002 respectively. The Panel urged that the Administration should introduce the legislative proposal within the 2001-02 legislative session so that the control framework would come into effect before the second term CE assumed office in July 2002. On both occasions, the Chairman of the House Committee raised the matter with the Chief Secretary for Administration (CS).

5. On the second occasion, CS advised that the legislative proposal would be introduced into LegCo in the 2002-03 session. However, the relevant legislative proposal was not included in the Government's Legislative Programme for the 2002-03, 2003-04 and 2004-05 sessions.

6. The major issues discussed by the Panel are set out in paragraphs 7 to 26.

Major issues discussed by the Panel

The constitutional position of CE

7. The Administration has reviewed the constitutional position of CE under the Basic Law. Its observation is that –

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

8. The position of CE in the context of POBO is that CE is not an agent of the HKSAR Government within the meaning of "agent" in section 2(1) of POBO, and CE is not a "government officer" or a "public servant" as defined under POBO. Given that the relationship between the HKSAR Government and CE does not constitute a principal-agent relationship, it would be difficult to fit the HKSAR Government and CE into the structure of POBO.

9. The Administration considers that CE is therefore not subject to the following provisions of POBO that are only applicable to "government officers" or "public servants" –

- (a) section 3 – this section prohibits a government officer from soliciting or accepting any advantage without the general or special permission of CE;
- (b) section 4(2) and (3) – it is an offence under this section 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;

- (c) section 5(2) – this provision deals with the solicitation and acceptance of an advantage by a public servant in regard to contracts;
- (d) section 10 – this section concerns possession of unexplained property by a government officer or a former government officer;
- (e) section 12 – (other than sections 12(1)(a)(ii) and (iii) and 12(1)(b)(ii)) – this section sets out the penalty for offences;
- (f) section 12AA – a court may make order for confiscation of assets under this section; and
- (g) section 16 – this section requires that a public servant to provide assistance to any investigation officer of the Independent Commission Against Corruption (ICAC) if being so requested.

10. CE, however, like all other citizens of Hong Kong, is subject to various other provisions of 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). For example, section 4(1) makes it an offence for any person to offer any advantage to a public servant, without lawful authority or reasonable excuse, as an inducement to or reward for or otherwise on account of his acting in certain manner in his capacity as a public servant. Section 8 makes it an offence for any person who has dealings with a public body, without lawful authority or reasonable excuse, to bribe any public servant employed by that public body.

11. A copy of the Administration's papers (LC Paper No. CB(2)1249/98-99(02) and LC Paper No. CB(2)168/99-00(03)) are in **Appendices I and II** respectively.

Existing arrangements on acceptance and disposal of gifts and handling of sponsorships by CE

12. The Administration has advised that the offences of solicitation and acceptance of advantages under POBO are generally premised upon the principal-agent relationship. While CE is the authority to approve the receipt of advantages by members of the civil service, there is no appropriate authority under POBO to grant approval to CE for the receipt of advantages himself.

13. Under the existing arrangements, CE will declare publicly all the gifts presented to him irrespective of their value. 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 would be disposed of through the Treasury. As regards items which CE would like to retain, valuations will be obtained from the Treasury and CE would purchase them. The proceeds would be donated to charitable organizations. As regards sponsorship, CE declares in an open register financial sponsorships he receives or overseas sponsored visits he makes, similar to other members of the Executive Council.

Progress of the review on POBO

14. Given the constitutional position of CE (paragraphs 7 to 10 above), the Panel had discussed the following proposals in relation to the application of POBO to CE –

- (a) members' proposal that CE should be deemed to be a "government officer" or "public servant" for the purpose of POBO;
- (b) members' proposal that the common law offence of bribery should be codified; and
- (c) the Administration's proposal to create separate legislative provisions to set out the bribery prevention provisions for application to CE.

Proposal of deeming CE as a "government officer" or "public servant"

15. Having regard to the Administration's advice that the offence provisions under POBO were generally premised upon the common law principal-agent relationship and the position of CE in the context of POBO, members had requested the Administration to consider the possibility of deeming CE to be a "government officer" or "public servant" for the purpose of POBO so that the relevant provisions of the Ordinance that were applicable to "government officers" or "public servants" would apply to CE.

16. Having obtained legal advice, the Administration informed the Panel in May 2000 that this option was not viable. The Administration explained that given the constitutional position of CE and the absence of an appropriate authority in HKSAR to grant approval to CE for the receipt of advantages himself, CE would not be able to avail himself to the defence of "lawful authority or reasonable excuse".

17. However, the Administration advised that it was already a common law offence for a "public officer" to accept a bribe and for anyone to bribe a "public officer". Legal advice was that CE could 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 was therefore of the view 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". A copy of the Administration's paper (LC Paper No. CB(2)1929/99-00(04)) is in **Appendix III**.

18. The Legal Adviser to LegCo raised concern as to whether the special investigation powers of ICAC under POBO could be exercised in respect of the common law offence of bribery. The Administration advised that the special powers of ICAC under sections 13, 14 and 17 of POBO did not apply to the

common law offence of bribery. Nevertheless, the Commissioner of ICAC had the power to investigate any allegation or suspicion of offence of bribery of a public officer under the common law. ICAC was therefore empowered to conduct investigation on CE if he was subject to allegation of common law offence of bribery for public officers. The Legal Adviser to LegCo pointed out that some of the special investigation powers of ICAC were not available under the common law, e.g. power to investigate bank accounts.

19. Some members considered that the common law offence of bribery was unclear and not couched in statutory terms. They requested the Administration to pursue the codification of the common law offence of bribery, so that CE would be subject to the same regulatory and legal framework applicable to “government officers” or “public servants” under POBO.

Proposal of codification of the common law offence of bribery

20. One year later, the Administration reverted to the Panel at the meeting on 7 May 2001 regarding its view on the proposal of codification of the common law offence of bribery. The Administration was of the view that the proposal might bring about more problems than it intended to resolve. A major hurdle was that bribery at common law was difficult to define because it evolved over time, and opinions differed as to whether it was to be regarded as a general offence or whether the common law was comprised of a number of specific or different offences of bribery. The Administration cited a number of precedents and court judgments to demonstrate the complexities involved in an attempt to codify the common law offence of bribery. In addition, it pointed out that most common law jurisdictions had resorted to specific provisions to tackle corruption and bribery offences. A copy of the Administration's paper (LC Paper No. CB(2)1448/00-01(02)) is in **Appendix IV**.

21. The Administration proposed to leave the common law offence of bribery as it was so that CE would continue to be liable to prosecution under the common law offence of bribery. The Administration also considered that it was more appropriate, outside the common law, to create separate legislative provisions to set out the bribery provisions for application to CE, making reference to the existing framework of control as applicable to government officers under POBO. The Administration advised the Panel that it would research into this possible option with a view to, in consultation with legal advice, establishing its full legal and constitutional implications. The Administration would report progress to the Panel once it had worked out the details.

22. Some members considered that it was merely a law drafting exercise to extend the applicability of the relevant provisions of POBO to CE. It was inappropriate and unwise to have two separate sets of prevention of bribery legislation applicable to government/public officers and CE respectively.

23. Members asked whether the new legislation to extend the application of POBO to CE would have retrospective effect. The Administration advised that the general principle concerning retrospectivity of criminal offence was contained in Article 15 of the International Covenant on Civil and Political Rights. Whether a conduct would be caught by the offence provisions depends on whether the person was in control of the pecuniary resources or property which was disproportionate to his present or past official emoluments at the time when the new legislation was in force. Some members considered that the Administration's advice had further demonstrated the need for the new legislation to be in place at an early opportunity to minimize the chance of a person taking advantage of the time lag to dispose of any pecuniary resources or property prior to the passage of the new legislation.

Proposal of creating separate legislative provisions to set out the bribery prevention provisions for application to CE

24. In January 2002, the Administration advised the Panel of its views after examining the provisions under POBO currently applicable to government officers or public servants (sections 4(2) and (3), and 5(2)), and two more stringent provisions which applied exclusively to government officers (sections 3 and 10). The Administration would consider how best the issues identified could be resolved and given effect. The Administration would also consider whether the legislative provisions for exclusive application to CE should be given effect through amendments to POBO or other legislative vehicles. If these were taken in the form of an amendment bill to POBO, the opportunity might be taken to effect other amendments to the Ordinance. A copy of the Administration's paper (LC Paper No. CB(2)921/01-02(05)) is in **Appendix V**.

25. Regarding the Administration's intention to take the opportunity to effect other amendments to POBO, members expressed concern that the approach might result in a further delay of introducing the relevant amendments.

26. In June 2004, members expressed disappointment at the lack of progress of the review on POBO and agreed that the Panel Chairman should write to the Director Administration (D of Adm) in this respect. D of Adm subsequently replied in writing in early July 2004 that the Administration would consult the Panel after it had worked out the detailed proposal. A copy of D of Adm's reply dated 5 July 2004 (LC Paper No. CB(2)3027/03-04(01)) is in **Appendix VI**.

27. In response to the Panel's concern about the progress of the review, the Administration advised in writing in November 2004 that it would revert to the Panel once it was in a position to do so.

28. A chronology of the meetings of the Council, House Committee and Panel is in **Appendix VII**.

Relevant papers/documents

29. A list of relevant papers with their hyperlinks at the LegCo website is in **Appendix VIII**.

Council Business Division 2
Legislative Council Secretariat
15 March 2005

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-

- (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-~~

- ~~(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: 17 Heading: **Further powers of search** Version Date: 01/07/1997

Remarks:

Amendments retroactively made - see 25 of 1998 s. 2

(1) Any investigating officer may, for the purposes of an investigation into, or proceedings relating to, an offence suspected to have been committed under this Ordinance, make an ex parte application to a court for the issue of a warrant under subsection (1A). (Replaced 48 of 1996 s. 10)

(1A) Where on an application under subsection (1) the court is satisfied that there is reasonable cause to believe that in any premises or place there is anything which is or contains evidence of an offence under this Ordinance, the court may by warrant directed to an investigating officer named in the warrant, empower such officer and any other investigating officer, to enter such premises or place, by force if necessary, and search the same. (Added 48 of 1996 s. 10)

(1B) Notwithstanding subsections (1) and (1A), where the Commissioner is satisfied that there is reasonable cause to believe-

(a) that in any premises or place there may be anything which is or contains evidence of an offence under this Ordinance; and

(b) that the making of an ex parte application under subsection (1) would seriously impede an investigation into, or proceedings relating to, an offence suspected to have been committed under this Ordinance, the Commissioner may by warrant directed to an investigating officer named in the warrant, empower such officer and any other investigating officer to enter such premises or place, by force if necessary, and search the same. (Added 48 of 1996 s. 10)

(2) Without prejudice to any other law relating to entry and search, the chambers of counsel or the office of a solicitor are not subject to entry and search under this section or any warrant issued under this section except in the course of investigating an offence under this Ordinance alleged or suspected to have been committed by that counsel or that solicitor, as the case may be, or by his clerk or any servant employed by him in such chambers or office.

(3) Any person who obstructs or resists the Commissioner or any investigating officer in the exercise of the powers of entry and search under this section 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. 9; 28 of 1980 s. 12; 48 of 1996 s. 10)

(4) In this section "court" (法庭) means a magistrate and the Court of First Instance. (Added 48 of 1996 s. 10. Amended 25 of 1998 s. 2)

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:

Section: 30 Heading: **Offence to disclose identity, etc. of persons being investigated** Version Date: 30/06/1997

(1) Any person who knowing or suspecting that an investigation in respect of an offence alleged or suspected to have been committed under Part II is taking place, without lawful authority or reasonable excuse, discloses to-

(a) the person who is the subject of the investigation (the "subject person") the fact that he is so subject or any details of such investigation; or

(b) the public, a section of the public or any particular person the identity of the subject person or the fact that the subject person is so subject or any details of such investigation, shall be guilty of an offence and shall be liable on conviction to a fine of \$20000 and to imprisonment for 1 year. (Replaced 48 of 1996 s. 15)

(1A) (Repealed 48 of 1996 s. 16)

(2) Subsection (1) shall not apply as regards disclosure of any of the descriptions mentioned in that subsection where, in connection with such investigation-

(a) a warrant has been issued for the arrest of the subject person;

(b) the subject person has been arrested whether with or without warrant;

(c) the subject person has been required to furnish a statutory declaration or a statement in writing by a notice served on him under section 14(1)(a) or (b);

(d) a restraining order has been served on any person under section 14C(3);

(e) the residence of the subject person has been searched under a warrant issued under section 17; or

(f) the subject person has been required to surrender to the Commissioner any travel document in his possession by a notice served on him under section 17A. (Replaced 48 of 1996 s. 16)

(3) Without affecting the generality of the expression "reasonable excuse" in subsection (1) a person has a reasonable excuse as regards disclosure of any of the descriptions mentioned in that subsection if, but only to the extent that, the disclosure reveals-

(a) any unlawful activity, abuse of power, serious neglect of duty, or other serious misconduct by the Commissioner, the Deputy Commissioner or any officer of the Commission; or

(b) a serious threat to public order or to the security of Hong Kong or to the health or safety of the public. (Replaced 48 of 1996 s. 16)

(Amended 9 of 1974 s. 13)

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.

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

Annex

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)

BLIS ON
INTERNET

Section of Enactment

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. 9)

(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. 9)

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)

BLIS ON
INTERNET

Section of Enactment

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

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

Annex

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:	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. 9)

(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. 9)

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)

**BLIS ON
INTERNET**

Section of Enactment

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

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 officers⁸ 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 servants⁹ 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.

⁸ 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".

⁹ "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.

Administration Wing
Chief Secretary for Administration's Office
January 2002

政府總部
香港下亞厘畢道



GOVERNMENT SECRETARIAT
LOWER ALBERT ROAD
HONG KONG

來函編號 Our Ref: CSO/ADM CR 1/1806/99(03)
來信編號 Your Ref: CB2/PL/CA

Tel: 2810 3503
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5 July 2004

Clerk to Panel
Panel on Constitutional Affairs
Legislative Council
Legislative Council Building
8 Jackson Road
Central, Hong Kong
(Attn: Mrs Percy MA)

Dear Mrs Ma,

Panel on Constitutional Affairs

Follow up to meeting on 21 June 2004

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

Thank you for your letter of 23 June 2004.

The Administration understands the concern of the LegCo Panel on Constitutional Affairs about the progress of the above issue. It remains our objective to devise a legislative proposal for applying certain prevention of bribery provisions to the Chief Executive (CE). When devising such a legislative proposal, we would take into account the legal and constitutional issues involved, including the unique constitutional position of the CE under the Basic Law.

We are still working on the detailed proposal and will consult the LegCo Panel once we are ready. As Members are aware, the CE is subject to the control of the common law offence of bribery in the interim.

Yours sincerely,

(Sidney CHAN)
for Director of Administration

c.c. SCA

**Chronology of meetings of the Council, House Committee and
Panel on Constitutional Affairs (the Panel)**

1998-99 legislative session

Council meeting on 12 January 1999

Hon Emily LAU raised a written question on whether the Chief Executive (CE) was subject to the provisions of Prevention of Bribery Ordinance (POBO). The Administration responded that CE was not subject to those sections of POBO that only applied to “government officers” or “public servants”. However, CE was subject to the relevant provisions of POBO like all other citizens in Hong Kong.

Meeting of Panel on 9 February 1999

2. Subsequent to the reply to her written question, Hon Emily LAU requested the Administration to elaborate on its reply by providing a paper for discussion at the Panel meeting on 9 February 1999. The Administration agreed to review POBO and work out the scope of the review in due course.

1999-2000 legislative session

Meetings of Panel on 25 October 1999 and 15 November 1999

3. The Administration reported the progress of the review to the Panel at these two meetings. The Administration was of the view that it would be difficult to fit the Government of the Hong Kong Special Administrative Region (HKSAR) and CE into the structure of POBO, given the relationship between the HKSAR Government and CE did not constitute a principal-agent relationship.

Meeting of Panel on 15 May 2000

4. The Administration proposed that the creation of a new provision in line with the spirit of section 10 of POBO for application to CE would suffice. The Administration hoped to introduce the legislative proposal in the next legislative session. In response to members’ request, the Administration also agreed to consider whether the common law offence of bribery should be codified.

2000-01 legislative session

Meeting of Panel on 20 November 2000

5. The Administration advised the Panel that it would need about six months to

study the issue of codification of the common law offence of bribery for the purpose of application to CE.

Meeting of Panel on 7 May 2001

6. The Administration 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 was looking into the feasibility and implications of creating separate legislative provisions to set out the bribery offences for exclusive application to CE.

Meeting of Panel on 12 June 2001

7. The Panel requested the Administration to expedite the legislative process so that the legal framework would apply to the CE election to be held in March 2002. As the Administration was not in a position to confirm the specific legislative timetable, the Panel agreed to raise the matter to the House Committee.

Meeting of House Committee on 15 June 2001

8. Members agreed that the Administration should be requested to provide a written response to explain why it had taken a long time to introduce the legislative proposal to apply certain provisions of POBO to CE. The Director of Administration (D of Adm) subsequently replied in writing that the Administration would proceed with the exercise with priority and would consult the Panel in due course.

2001-02 legislative session

Meeting of Panel on 21 January 2002

Meetings of House Committee on 25 January and 1 February 2002

9. At the Panel meeting on 21 January 2002, the Administration informed members that it would require more time to decide how the problems identified could be resolved, and the final form of legislative provisions.

10. The Panel made a report to the House Committee on 25 January 2002, and urged that the Administration should introduce the legislative proposal into LegCo within the current legislative session so that it would come into effect before the second term CE assumed office in July 2002.

11. The Chairman of the House Committee conveyed the request of the Panel to the Chief Secretary for Administration (CS). CS responded that the legislative proposal would be introduced in the 2002-03 session.

2003-04 legislative session

12. The Constitutional Affairs Bureau advised the Panel on several occasions that the Administration Wing of the CS's Office aimed to revert to the Panel once it was in a position to do so.

Meeting of Panel on 21 June 2004

13. Some members expressed disappointment at the lack of progress of the matter and agreed that the Panel Chairman should write to D of Adm enquiring about the progress.

2004-05 legislative session

14. The Administration advised in writing in November 2004 that it would revert to the Panel once it was in a position to do so.

Meeting of Panel on 21 February 2005

15. The Panel expressed concern about the lack of progress of the matter and requested the CS to report progress and the way forward at its next meeting on 21 March 2005.

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

Relevant Papers/Documents

Date of Constitutional Affairs Panel
meeting

9 February 1999 and

25 October 1999

25 October 1999

15 November 1999

15 May 2000

15 May 2000

20 November 2000

7 May 2001

7 May 2001

12 June 2001

12 June 2001

Papers

LC Paper No. CB(2)1249/98-99(02)

[<http://www.legco.gov.hk/yr99-00/english/panels/ca/papers/p1249e02.pdf>]

LC Paper No. CB(2)168/99-00(03)

[<http://www.legco.gov.hk/yr99-00/english/panels/ca/papers/ca25105b.pdf>]

LC Paper No. CB(2)377/99-00(03)

[<http://www.legco.gov.hk/yr99-00/english/panels/ca/papers/b377e03.pdf>]

LC Paper No. CB(2)1929/99-00(04)

[<http://www.legco.gov.hk/yr99-00/english/panels/ca/papers/b1929e04.pdf>]

LC Paper No. CB(2)2370/99-00(01)

[<http://www.legco.gov.hk/yr99-00/english/panels/ca/papers/b2370e01.pdf>]

LC Paper No. CB(2)288/00-01(01)

[<http://www.legco.gov.hk/yr00-01/english/panels/ca/papers/b288e01.pdf>]

LC Paper No. CB(2)1448/00-01(01)

[<http://www.legco.gov.hk/yr00-01/english/panels/ca/papers/b1448e01.pdf>]

LC Paper No. CB(2)1448/00-01(02)

[<http://www.legco.gov.hk/yr00-01/english/panels/ca/papers/b1448e02.pdf>]

LC Paper No. CB(2)1764/00-01(01) [Background paper]

[<http://www.legco.gov.hk/yr00-01/english/panels/ca/papers/b1764e01.pdf>]

LC Paper No. CB(2)1764/00-01(02)

[<http://www.legco.gov.hk/yr00-01/english/panels/ca/papers/b1764e02.pdf>]

<u>Committees</u>	<u>Date of meeting</u>	<u>Minutes of meeting</u>
Constitutional Affairs Panel	9 February 1999	LC Paper No. CB(2)1522/98-99 [http://www.legco.gov.hk/yr98-99/english/panels/ca/minutes/ca090299.htm]
Constitutional Affairs Panel	25 October 1999	LC Paper No. CB(2)487/99-00 [http://www.legco.gov.hk/yr99-00/english/panels/ca/minutes/ca251099.pdf]
Constitutional Affairs Panel	15 November 1999	LC Paper No. CB(2)626/99-00 [http://www.legco.gov.hk/yr99-00/english/panels/ca/minutes/ca151199.pdf]
Constitutional Affairs Panel	15 May 2000	LC Paper No. CB(2)2523/99-00 [http://www.legco.gov.hk/yr99-00/english/panels/ca/minutes/ca150500.pdf]
Constitutional Affairs Panel	20 November 2000	LC Paper No. CB(2)538/00-01 [http://www.legco.gov.hk/yr00-01/english/panels/ca/minutes/ca201100.pdf]
Constitutional Affairs Panel	7 May 2001	LC Paper No. CB(2)1978/00-01 [http://www.legco.gov.hk/yr00-01/english/panels/ca/minutes/ca070501.pdf]
Constitutional Affairs Panel	12 June 2001	LC Paper No. CB(2)2209/00-01 [http://www.legco.gov.hk/yr00-01/english/panels/ca/minutes/ca120601.pdf]
House Committee	15 June 2001	LC Paper No. CB(2)1873/00-01 [http://www.legco.gov.hk/yr00-01/english/hc/minutes/hc150601.pdf]
Constitutional Affairs Panel	21 January 2002	LC Paper No. CB(2)1189/01-02 [http://www.legco.gov.hk/yr01-02/english/panels/ca/minutes/ca020121.pdf]
House Committee	25 January 2002	LC Paper No. CB(2)1014/01-02 [http://www.legco.gov.hk/yr01-02/english/hc/minutes/hc020125.pdf]

<u>Committees</u>	<u>Date of meeting</u>	<u>Minutes of meeting</u>
House Committee	1 February 2002	LC Paper No. CB(2)1058/01-02 [http://www.legco.gov.hk/yr01-02/english/hc/minutes/hc020201.pdf]
Constitutional Affairs Panel	21 June 2004	LC Paper No. CB(2)3310/03-04 [http://www.legco.gov.hk/yr03-04/english/panels/ca/minutes/ca040621.pdf]