

For information
on 21 March 2005

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 briefs Members on the Administration's present position regarding the review of application of certain provisions of the Prevention of Bribery Ordinance (Cap.201) (POBO) to the Chief Executive (CE).

Background

2. At the meeting of LegCo Panel on Constitutional Affairs held on 9 February 1999, the Administration undertook to review the applications of certain provisions of the POBO to the CE. The Administration subsequently provided the Panel with information papers on the progress of exercise in 1999, 2000, 2001 and 2002 respectively. In response to the request made by the Panel on 21 February 2005, we set out below the Administration's present position in respect of the review.

Present Position

3. The Administration has carefully considered the technical and constitutional issues involved in applying certain provisions of the POBO to the CE and come to the following views :

(a) The CE's unique constitutional status

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

extend the general standard of bribery prevention applicable to “prescribed officers”^{*} under the POBO for application to the CE must take into account the CE’s unique constitutional position in the HKSAR.

- (b) To reconcile the CE’s unique constitutional status with an appropriate regulatory framework is a complicated matter requiring in-depth examination

Under the POBO, the offences of solicitation, acceptance and offer of advantages are generally premised upon the existence of a principal-agent relationship. Even civil servants are agents. They are employees of the HKSARG which, for the purposes of the POBO, is their principal. However, according to legal advice, the CE is not an agent of the HKSARG within the meaning of Section 2(1) of the POBO. The special constitutional position of the CE poses difficulties in fitting him within the structure of the existing offence provisions in the POBO. The Administration will further consider whether any legislative provisions for exclusive application to the CE should be given effect through amendment to the POBO or other legislative vehicles.

- (c) The CE is already bound by the common law offence of bribery of public officer

It is already a common law offence for a “public officer” to accept a bribe and for anyone to bribe a “public officer”. Legal advice is that the CE may fall within the 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. 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.

4. Notwithstanding that the review on application of the POBO to CE is still underway, there are various measures in place to ensure that the CE is seen to be a person of the highest integrity and conduct. Under

* In the previous papers submitted to the Panel on the discussion of this matter, “government officer” was used to denote “Crown Servant” as defined in the POBO. By virtue of the Law Amendment and Reform (Miscellaneous Provisions) Ordinance (Ord. No. 14 of 2003), the definition of “Crown Servant” has been replaced by that of “prescribed officer.”

Article 47 of the Basic Law, the CE must be a person of integrity and dedicated to his duties. He shall declare his assets to the Chief Justice of the Court of Final Appeal on assuming office, and this declaration shall be put on record. The Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) provides comprehensive safeguards to prevent corruption and other illegal activities in the election of a CE. The HKSARG has also put in place administrative measures to ensure the transparency and accountability in relation to the acceptance and disposal of gifts presented to the CE. The CE cannot accept such gifts for personal retention unless he has paid for them at market price.

Way Forward

5. The Administration will further examine the issue of how to strengthen the bribery prevention measures applicable to the CE. Meanwhile, the CE will continue to observe the Basic Law and other relevant legislation and administrative measures.

Administration Wing
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