

For discussion
on 1 November 2005

Panel on Constitutional Affairs
Subcommittee on Application of Certain Provisions of the Prevention of
Bribery Ordinance to the CE

Proposal to Apply Certain Provisions of
the Prevention of Bribery Ordinance (Cap. 201) to the CE

Purpose

This paper explains to Members the Administration's proposal to apply sections 4, 5 and 10 of the Prevention of Bribery Ordinance (POBO) (Cap. 201) to the Chief Executive (CE).

Review

2. At the Subcommittee meetings on 11 and 22 July 2005, the Administration reaffirmed its endeavour to conclude the review of whether and how the provisions applicable to "prescribed officer" under the POBO should apply to the CE. We undertook to brief Members on the matter upon the commencement of the new Legislative Council (LegCo) session.

3. The Administration has completed the review and is ready to put forward its proposal to the Subcommittee. The review focused on examining the legislative approach to extend to the CE those sections of the POBO applicable to "prescribed officer", taking into account the constitutional and legal issues involved and the views previously expressed by Members. After careful study, the Administration decides to apply to the CE sections 4, 5 and 10 of the POBO as applicable to "prescribed officer". We propose to amend the POBO in this legislative session through introducing the Prevention of Bribery (Amendment) Bill into the LegCo.

Proposed Sections Applicable to “Prescribed Officer”

4. Three POBO provisions, viz. sections 4, 5 and 10 impose specific requirements on “prescribed officer”. Details of these provisions are as follows –

- (a) Section 4 – it is an offence for any public servant^{Note 1}, 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 as a public servant;
- (b) Section 5 – it is an offence for any public servant, without lawful authority or reasonable excuse, to solicit or accept any advantage in regard to contracts; and
- (c) Section 10 – it is an offence for any prescribed officer or former prescribed officer to possess any unexplained property.

5. The Administration proposes to introduce legislative amendments to the POBO to apply sections 4, 5 and 10 to the CE. The implementation of the proposal would impose restrictions on the CE in respect of solicitation and acceptance of advantages and possession of unexplained property. The standards are as stringent as those applicable to “prescribed officer”.

6. In pursuing the legislative amendments, we should also take into account the unique constitutional status of the CE, the requirement to declare assets and the mechanism to handle serious breach of law by the CE under the Basic Law (BL).

Note 1 “prescribed officer” (訂明人員) means-

- (a) any person holding an office of emolument, whether permanent or temporary, under the Government; and
- (b) the following persons (to the extent that they are not persons included in paragraph (a))-
 - (i) any principal official of the Government appointed in accordance with the Basic Law;
 - (ii) the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap 66) and any person appointed under section 5A(3) of that Ordinance;
 - (iii) Chairman of the Public Service Commission;
 - (iv) any member of the staff of the Independent Commission Against Corruption;
 - (v) any judicial officer holding a judicial office specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap 92) and any judicial officer appointed by the Chief Justice, and any member of the staff of the Judiciary;

and under the Prevention of Bribery Ordinance (Cap 201), “public servant” means any “prescribed officer” and any employee of a public body.

Certain offence provisions under the POBO contain the general defence of “lawful authority or reasonable excuse”, and some includes the defence of “principal’s consent”. As the Administration pointed out at previous Constitutional Affairs Panel and its Subcommittee meetings, the CE is not an “agent” of the HKSAR Government as defined under section 2 of the POBO. It is thus difficult to fit the CE directly within the regulatory framework under this type of provisions of the POBO. In this regard, the sections proposed to apply to the CE, viz. sections 4 (the part applicable to prescribed officer), 5 and 10, all do not incorporate “principal’s consent” as a reason of defence. The non-existence of an appropriate “principal” to grant permission for the CE to accept advantages would not put him in an unfavourable position. Sections 4 and 5 cover the general bribery related offences within the legal remit of the POBO. The question of “principal’s consent” is not relevant to the offence of “possession of unexplained property” under section 10, which provides a stringent regulatory requirement applicable exclusively to “prescribed officer”. The application of sections 4, 5 and 10 of the POBO to the CE would therefore impose restrictions on him in respect of bribery acts of solicitation and acceptance of advantage and possession of unexplained property.

7. As a matter of fact, insofar as the principal-agent relation is concerned, the provision that cannot apply to the CE is mainly section 3 of the POBO. This section specifies that any “prescribed officer” who, without the general or special permission of the CE, solicits or accepts any advantage, shall be guilty of an offence. Although section 3 cannot apply directly to the CE himself, the Administration has put in place administrative measures to provide effective control of the acceptance of gifts by the CE. In accordance with the established system, the CE cannot accept gifts for personal retention unless he has paid for them at market price. Moreover, the gift register of the CE is available for public inspection. These administrative measures have effectively ensured the transparency and accountability in the acceptance and disposal of gifts presented to the CE.

8. In examining the application to the CE of section 10 concerning the possession of unexplained property by “prescribed officer”, we should take into consideration the requirement for the CE to declare his assets to the Chief Justice of the Court of Final Appeal (CJ) on assuming office pursuant to BL 47(2). The CE is the only person in the HKSAR who is required to make formal declaration of assets under the BL. This declaration requirement under the BL should be regarded as a useful reference for determining whether the CE is in possession of

unexplained property. We therefore propose to specify in the amendment bill that, should the CE be accused of having committed an offence under section 10, the Court should take into account the CE's declaration of assets made to the CJ under the BL.

9. At present, section 8(1) of the POBO provides that a person who, without lawful authority or reasonable excuse, while having dealings of any kind with the Government through any department, office or establishment of the Government, offers any advantage to a "prescribed officer" employed in that department, office or establishment of the Government, will be guilty of an offence. We suggest drafting a similar provision to bind those persons who offer advantages to the CE.

Proposed Provisions for Handling Bribery Offences by the CE

10. In accordance with BL 73(9), if a motion initiated jointly by one-fourth of all the members of the LegCo charges the CE with serious breach of law or dereliction of duty and if he refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the CJ to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision.

11. The Administration proposes that upon receipt of complaints against the CE committing any proposed POBO offences applicable to the CE, the Secretary for Justice (SJ) may refer those with "prima facie" case and the findings of the ICAC's preliminary investigation to the LegCo. LegCo Members would accordingly consider invoking the mechanism of investigation to be conducted by the independent investigation committee chaired by the CJ and passing a motion of impeachment under BL 73(9). Should the LegCo decides to proceed with the procedures under BL 73(9), the SJ may exercise discretion and allow the LegCo to complete the investigation and impeachment proceedings, before he may exercise his power of criminal prosecution or require the ICAC to conduct further investigation.

Way Forward

12. The Administration welcomes the views of the Subcommittee on the legislative proposal. We will proceed to prepare the legislative amendments to apply sections 4, 5 and 10 of the POBO to the CE. We will also introduce a new provision to bind any person who offers any advantage to the CE in line with section 8(1) of the POBO. As for the amendment of section 10, the Administration will specify that if the CE is accused of possessing unexplained property, the Court shall take account of the CE's assets declared to the CJ pursuant to BL 47(2) in determining whether the CE has given a satisfactory explanation under section 10(1). A new section will also be added to enable the SJ to refer to the LegCo a report of the CE suspected to have committed the POBO offences for possible follow-up by the LegCo under BL 73(9). We will endeavour to complete the drafting of the bill and introduce it into the LegCo in this session.

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