

For Discussion
on 19 December 2005

**Legislative Council Subcommittee on Application of
Certain Provisions of the Prevention of Bribery
Ordinance to the Chief Executive**

**Proposal to Apply Certain Provisions of
the Prevention of Bribery Ordinance to the Chief Executive**

Purpose

This paper elaborates on the need to expressly provide that the Secretary for Justice (SJ) may refer bribery-related complaints against the Chief Executive (CE) to the Legislative Council (LegCo) for consideration of invoking impeachment proceedings under Article 73(9) of the Basic Law (BL), without compromising the Department of Justice's (DOJ) constitutional function to control criminal prosecutions free from any interference as provided for under BL Article 63.

Background

2. At the Subcommittee meeting on 1 November 2005, the Administration affirmed the CE's commitment to subject the post-holder to similar POBO control standards as prescribed officers^{Note}. The Administration also presented to Members the detailed proposal to apply sections 4, 5 and 10 of POBO to the CE. Inherent in the application

^{Note} "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.

formula is the necessary provision to expressly provide that the SJ may refer to the LegCo a report that the CE is suspected to have committed the POBO offences, with a view to facilitating LegCo's consideration of invoking the unique investigation and impeachment mechanism for dealing with serious breach of law or dereliction of duty by the CE under BL 73(9) ("the proposed express provision").

3. In response to some Members' comments on the legislative proposal, the Administration undertook to set out in detail the underlying considerations of the proposed express provision with reference to some overseas experiences.

The Proposed Express Provision on BL 73(9)

4. The proposed express provision is essential for the proper handling of a corruption complaint against the CE. Members would note that when there is a corruption complaint against the CE, he will be subject to criminal investigation by the Independent Commission Against Corruption (ICAC), which will make a report to the DoJ for legal advice and consideration of prosecution. Any proposal to end an investigation or close a case will be reported to the Operations Review Committee (ORC). At the same time, because of the unique constitutional role of the CE, he will also be subject to the LegCo's investigation and impeachment procedures as stipulated in BL 73(9). The following paragraphs explain how the proposed express provision would ensure the effective working and smooth interface of this dual mechanism.

Section 30 of POBO

5. Without the proposed express provision, the SJ will arguably be prevented from referring the complaint to the LegCo by section 30 of POBO and the Personal Data (Privacy) Ordinance (PDPO) (Cap. 486). In the absence of any knowledge or information about the complaint against the CE, the LegCo would be inhibited from performing its constitutional function under the BL.

6. Section 30 of POBO provides that a person who, knowing or

suspecting that an investigation in respect of a POBO offence alleged or suspected to have been committed under Part II of the POBO is taking place, without lawful authority or reasonable excuse, discloses the subject or details of the investigation commits an offence. The SJ is bound by the “non-disclosure” requirement unless it can successfully be argued that one of the exceptions in section 30 of the POBO will apply or the legislation vests SJ with the power of referral to the LegCo. It is clearly desirable to put the legal position beyond doubt by the proposed express provision so that the LegCo may obtain the essential facts of a complaint against the CE and LegCo Members may consider invoking the investigation and impeachment procedures under BL 73(9).

7. Furthermore, Data Protection Principle 3 in Schedule 1 to PDPO stipulates that a data user (e.g. ICAC or SJ) shall not use personal data for a purpose other than for which it was collected at the time of its collection (i.e. investigation and prosecution) in the absence of the data subject’s (e.g. the CE’s) prescribed consent. In the present case, it would not be appropriate for the SJ to seek the CE’s consent for referring to the LegCo a complaint against the CE himself. With the proposed express provision, one of the purposes for the collection of data by ICAC will be for the SJ to consider referring the complaint and essential investigation findings to the LegCo. In this way, it can be ensured that the SJ’s referral to the LegCo will not contravene the restrictions imposed by PDPO.

BL 73(9)

8. BL 73(9) specifically provides for the mechanism for handling serious breach of law or dereliction of duty by the CE –

“If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal 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."

The BL provision clearly indicates that an independent investigation committee chaired by the Chief Justice of the Court of Final Appeal (CJ) may be set up by the LegCo to carry out an investigation into charges of a "serious breach of law or dereliction of duty" on the part of the CE. In BL 73(9), the wording used is "[charges of] serious breach of law or dereliction of duty", rather than "convicted and sentenced to imprisonment" as in BL 79(6). The wording suggests that the intent is not to compel the LegCo to invoke the impeachment procedures only after the completion of the criminal proceedings. To the contrary, BL 73(9) allows the investigation and impeachment mechanism against the CE to take place before any criminal trial.

9. The relationship between the Head of the HKSAR Government, viz. the CE and the LegCo is embodied in the special impeachment mechanism under BL 73(9). This constitutional principle of regulation has already been explained in the Explanations on "The Basic Law of the HKSAR(Draft)" and its Related Documents (by Ji Pengfei at the Third Session of the Seventh National People's Congress on 28 March 1990) –

"The executive authorities and the legislature should regulate each other as well as co-ordinate their activities. To maintain Hong Kong's stability and administrative efficiency, the CE must have real power which, at the same time, should be subject to some restrictions.He is to lead the Government of the Region If the CE is found to have committed a serious breach of law or dereliction of duty and if he or she still refuses to resign, the LegCo may pass a motion of impeachment through the specified procedures and refer it to the CPG for decision. The provisions mentioned above embody the relationship of regulation

and co-ordination between the executive authorities and the legislature.”

10. Against the above background, BL 73(9) not only lays down a special regime for the investigation and impeachment of the CE in respect of a complaint about his serious breach of law or dereliction of duty, but also entrusts to the LegCo the important constitutional function of investigation and impeachment. Safeguards have been built in BL73(9) to avoid the risk of politicization that would undermine the integrity of the impeachment process (see **Annex A**). In other words, the LegCo *does* have a constitutional role to perform in case of serious breach of law or dereliction of duty by the CE. It would thus be constitutionally appropriate to facilitate the LegCo to obtain essential information pertaining to any bribery-related complaints against the CE through a referral by the SJ.

Impeachment vs Prosecution

11. We have carefully considered the question as to whether any prosecution should be carried out in parallel with or even prior to the impeachment proceedings under BL 73(9). As explained above, by using the wording “charges” rather than “convicted and sentenced”, BL 73(9) does not envisage impeachment to take place only after criminal proceedings. Furthermore, the impeachment arrangement under BL 73(9) contemplates that an independent investigation committee chaired by the CJ will be set up by the LegCo to conduct investigation of any alleged “serious breach of law or dereliction of duty” on the part of the CE. If a prosecution were brought in parallel with the impeachment process, the proceedings to be conducted by the investigation committee chaired by the CJ under BL 73(9) would overlap with the criminal proceedings in respect of the same conduct in question. This is clearly undesirable. Rather, it would be reasonable for the SJ to take into account any imminent or pending impeachment proceedings in deciding on the time to launch criminal proceedings, if necessary.

Experience in Overseas Countries

12. We have also examined the interface arrangement between

impeachment and prosecution in respect of Heads of States in a number of overseas countries. The findings reveal that impeachment proceedings are generally to be conducted prior to criminal trials. According to the opinions of the United States Department of Justice, the President of the United States is afforded immunity from criminal prosecution until such time as he leaves office or the Congress has impeached and removed the President from his office. In reality, there has not been any incident of sitting Presidents being indicted or prosecuted and the United States Department of Justice's view remains unchallenged. In Singapore, the President enjoys a constitutional immunity from any court proceedings during his term of office. In the Republic of Korea, the Constitution provides that "the President shall not be charged with a criminal offence during the tenure of office except for insurrection or treason". Seen in this light, it is a common arrangement in overseas countries that it would be necessary to first remove the Head of State from his office before any criminal proceedings could be instituted against him. A table summarizing the impeachment and prosecution mechanism covering Heads of States in the four overseas countries is at **Annex B**.

13. The Administration does not cite the above overseas examples to give any prerogative or immunity to the CE. Rather, the examples above point out that it is reasonable to have special procedures dealing with the Head of State or Head of Government in case of the Head's serious breach of law, and that the interface between the special procedures and normal criminal proceedings is a real issue that should not be considered lightly. In the case of Hong Kong, these special procedures involve the investigation and impeachment mechanism as provided under BL 73(9). The overseas examples help illustrate that it is not unreasonable for impeachment proceedings to be conducted prior to criminal trials.

Way Forward

14. The proposed express provision enabling the SJ's referral to the LegCo a complaint about bribery-related offence by the CE is necessary and essential. Notwithstanding the common overseas arrangement to require the impeachment proceedings against and even

removal of office of the Head of State to precede any criminal trial, the Administration does not propose to make any stipulation in this regard and would leave the need and timing for prosecution to the discretion of the SJ. We shall proceed with the preparation of the necessary legislative amendments such that the CE would be subject to the control of POBO as soon as possible.

Administration Wing

12 December 2005

Impeachment Mechanism under BL 73(9)

The Administration has closely examined the special scheme of impeachment under BL 73(9) and noted that safeguards have been built in the scheme to ensure the integrity and impartiality of the impeachment process and avoid unnecessary politicization of the matter –

- (a) BL 73(9) provides that the impeachment mechanism may only be triggered if the CE does not resign on a charge of serious breach of law or dereliction of duty to avoid unnecessary politicization.
- (b) To protect the integrity of the investigation process, BL 73(9) provides that the investigation is to be conducted by “an independent investigation committee” formed and chaired by the CJ, the most senior member of the independent judiciary of the HKSAR.
- (c) The committee chaired by CJ will be responsible for deciding whether the evidence is sufficient to substantiate such charges of misconduct and if so, the LegCo will decide whether to impeach the CE and report it to the CPG for a decision.

Impeachment and Prosecution of Heads of States in Overseas Countries

	United States	United Kingdom	South Korea	Singapore
Constitutional basis for impeachment	<ul style="list-style-type: none"> The US Constitution provides for the impeachment of a President. 	<ul style="list-style-type: none"> The basis for impeachment is established by constitutional convention. 	<ul style="list-style-type: none"> The Korean Constitution provides for the impeachment of a President. 	<ul style="list-style-type: none"> The Constitution provides for the removal procedure of the President, which is similar to the impeachment mechanism under Article 73(9) of our Basic Law.
Are corruption-related offences impeachable?	<ul style="list-style-type: none"> Yes 	<ul style="list-style-type: none"> The scope of impeachable deeds is unclear. 	<ul style="list-style-type: none"> Yes 	<ul style="list-style-type: none"> Yes
Criminal Liability of Head of State / Government	<ul style="list-style-type: none"> The US Department of Justice holds that the President is afforded immunity from criminal prosecution until such time as he leaves his office or the Congress has impeached and removed the President from his office. In reality, no sitting President has ever 	<ul style="list-style-type: none"> There are authorities that the ruling monarch, being the Head of State, is exempt from the jurisdiction of the criminal courts. However, the Prime Minister, being the Head of Government, is not immune from criminal liabilities. 	<ul style="list-style-type: none"> The Constitution provides that the President shall not be charged with a criminal offence during his tenure of office save for specific circumstances. 	<ul style="list-style-type: none"> The President of the Singapore enjoys a constitutional immunity from any court proceedings for anything done or omitted to be done by him in both his private and official capacity during the term of his office.

	<p>been prosecuted for criminal charges and hence the US Department of Justice's view remains unchallenged.</p>			
<p>Investigation and Prosecution of the Head of State / Government</p>	<ul style="list-style-type: none"> No sitting US President has ever been prosecuted. However, once removed from office, the US President is subject to the normal workings of the criminal justice system. 	<ul style="list-style-type: none"> Not known 	<ul style="list-style-type: none"> It would be necessary to remove the President from his office before any criminal proceedings could be instituted against him save for specific circumstances. 	<ul style="list-style-type: none"> It would be necessary to remove the President from his office before any criminal proceedings could be instituted against him.