

政府總部  
香港下亞厘畢道



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6 December 2005

Clerk to Subcommittee  
Subcommittee on Application of  
Certain Provisions of POBO to the CE  
Legislative Council Building  
No.8, Jackson Road  
Central  
(Attn: Mrs Eleanor Chow)

Dear Mrs Chow,

**Subcommittee on Application of  
Certain Provisions of POBO to the CE**

**Views of the Hong Kong Bar Association**

We refer to the submission by the Hong Kong Bar Association ("Bar Association") in respect of the application of certain provisions of the Prevention of Bribery Ordinance ("POBO") (Cap. 201) to the Chief Executive ("CE"). As agreed at the meeting of the Subcommittee on 1 November, we set out below the Administration's comments.

**Applicability of the POBO to the CE**

The Bar Association's suggestion to apply to the CE the standards of bribery prevention applicable to "prescribed officer" under POBO is overtaken by events. As explained in our paper to the Subcommittee for the meeting on 1 November, the Administration proposes that the CE should be subject to control in respect of the solicitation and acceptance of advantages and possession of unexplained property similar to the arrangements for "prescribed officer" under the POBO. Hence, the proposal to apply sections 4, 5 and 10 of the POBO to the CE. You may wish to see the details of our proposal in the paper, a copy is attached please.

## Investigation into the CE

As regards the investigation of complaints of bribery by the Independent Commission Against Corruption (ICAC) against the CE, we consider that the ICAC would be the appropriate authority and possesses the powers and expertise to perform the investigation duties. Under the ICAC Ordinance (Cap.204), the Commissioner, ICAC has the duty to receive and consider complaints alleging corrupt practices and investigate the complaints as he considers practicable. He therefore has and should fulfill the statutory responsibility to investigate corruption complaints, including those against the CE. When handling or investigating any corruption allegations received, the Commission must observe the statutory requirements set out in the law, including provisions under the ICACO and the POBO.

Section 30 of the POBO prevents the disclosure of the identity of any person being investigated or details of the investigation unless and until the person under investigation has been arrested or any of the other conditions in section 30 has been satisfied. Any person, who fails to comply with this requirement without lawful authority or reasonable excuse, shall be guilty of an offence. Therefore, if a person holding the office of the CE were suspected to have committed a POBO offence and, believing himself to be under the ICAC's investigation, directed the Commissioner, ICAC to brief him on any investigation findings involving himself, he would likely be using his office as the CE for an improper purpose. This could constitute misconduct in public office. Although the Basic Law (BL) Article 57 specifies that the ICAC shall be accountable to the CE, this specification should be read in context. It would certainly be unlawful for the CE to misuse BL 57 in order to conduct himself in a way which constitutes the common law offence of misconduct in public office, perverting the course of public justice or the lesser offence under section 13A of the ICACO of obstructing or resisting ICAC officers in executing their duties.

The Operations Review Committee (ORC) of the ICAC is responsible for receiving from ICAC information about all corruption complaints and the manner in which the Commission is dealing with them. The ORC is tasked to ensure that all corruption complaints, including those against the CE, should be handled properly. No matter whether the ICAC's investigation will point towards substantiating an allegation or otherwise, a full report will have to be submitted by the ICAC to the satisfaction of the ORC.

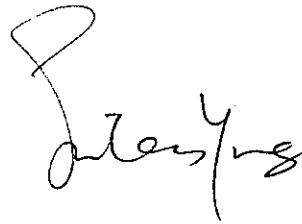
Moreover, if the Legislative Council passes a motion under BL Article 73(9) and gives a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee, the committee will carry out investigation of the CE under the impeachment procedure. The establishment of an office of independent counsel is therefore

unnecessary and could duplicate the role of the independent investigation committee formed for the purpose of BL Article 73(9).

**Application of section 3 to the CE**

As regards the Bar Association's proposal to also apply section 3 of the POBO to the CE, we are now considering the matter and will explain our views to the Subcommittee on "Application of certain provisions of the POBO to the CE" in due course.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Shirley Yung". The signature is written in black ink and is positioned above the printed name and title.

( Miss Shirley YUNG )  
for Director of Administration