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Report of the Subcommittee on Application of Certain Provisions of the Prevention of Bribery Ordinance to the Chief Executive

PURPOSE

This paper reports on the deliberations of the Subcommittee on Application of Certain Provisions of the Prevention of Bribery Ordinance to the Chief Executive.

BACKGROUND

2. At the Council meeting on 13 January 1999, a written question was raised by Hon Emily LAU on whether the Chief Executive (CE) was subject to the provisions of the Prevention of Bribery Ordinance (POBO) (Cap. 201). The Panel on Constitutional Affairs (the Panel) has followed up the matter since then.

3. The Administration advised the Panel in February 1999 that CE had indicated that he was happy to be bound by POBO, and it would review the application of certain provisions of POBO to CE. After considering the technical and constitutional issues involved in applying certain provisions of POBO to CE, the Administration had come to the following views -

(a) CE's unique constitutional status

Under the Basic Law, CE is appointed by the Central People's Government (CPG) (Articles 15 and 45 of the Basic Law (BL 15 and 45)). The Basic Law does not confer any power on the Hong Kong Special Administrative Region Government (HKSARG) in the appointment or removal of CE to/from his office. Under BL 60(1), CE is the head of the HKSARG, and under BL 43(2), he is accountable to the CPG and the HKSAR in accordance with the provisions of the Basic Law. Any proposal to extend the general standard of bribery prevention applicable to "prescribed officers" under POBO for application to CE must take into account CE's unique constitutional position in the HKSAR.

(b) To reconcile CE's unique constitutional status with an appropriate regulatory framework

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

(c) 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 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 POBO.

4. The Administration had also explained that CE was the authority to approve the receipt of advantage by members of the civil service, and there was no appropriate authority according to the provisions of POBO to grant approval to CE for the receipt of advantages himself. The present arrangement was that CE could not accept gifts for personal retention unless he had paid for them at market price. CE would declare all gifts received by him, irrespective of their value, in a register which was available for public inspection. The declaration system complied with the spirit of the rules applicable to civil servants concerning acceptance of gifts.

5. The Administration reported the progress of the review to the Panel in 1999, 2000, 2001 and 2002 respectively. Despite the Panel's repeated requests, the Administration had yet to consider whether and, if so, how the relevant POBO provisions should apply to CE and would not provide a concrete legislative timetable. For details of the past discussions of and follow-up actions taken by the Panel on the matter, members are invited to refer to the background brief prepared by the Legislative Council (LegCo) Secretariat for the Panel meeting on 21 March 2005, which is available on the LegCo website (LC Paper No. CB(2)1091/04-05(01)).

THE SUBCOMMITTEE

6. Members considered the lack of progress of the Administration's review over a six-year period totally unacceptable. The Panel resolved at its meeting on 30 May

2005 to form a subcommittee to closely follow up the matter. The terms of reference of the Subcommittee, as endorsed by the Panel, are "to monitor and examine the issue of devising an appropriate statutory framework of bribery prevention applicable to the Chief Executive, including in particular the Government's review of the Prevention of Bribery Ordinance."

7. Under the chairmanship of Dr Hon YEUNG Sum, the Subcommittee has held six meetings, including four meetings with the Administration. A membership list of the Subcommittee is in **Appendix I**.

8. In the course of its deliberation, the Subcommittee has considered the views of the legal adviser to the Subcommittee, the Hong Kong Bar Association and the Law Society of Hong Kong. It has also considered the Research Report on Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea prepared by the Research and Library Services Division of the LegCo Secretariat (RP01/05-06). An Executive Summary of the Research Report is in **Appendix II** for members' reference.

DELIBERATIONS OF THE SUBCOMMITTEE

Request of the Subcommittee

9. As the Administration has reiterated its views in paragraphs 3 to 4 above to the Subcommittee, members have requested the legal adviser to provide a paper on the relevant issues for consideration of the Subcommittee. The views of the legal adviser are summarised as follows –

(a) on whether the legislative provisions for exclusive application to CE should be given effect through amendments to POBO or other legislative vehicles, the legal adviser considers that the long title of POBO does not seek to restrict POBO to bribery prevention in any particular area of activities. As the existing provisions of POBO are mainly focused on bribery prevention in the public sector in so far that they are targeted at "prescribed officers" as receivers of bribes, employees (and certain persons in other specified capacity) of a list of named public bodies as receivers of bribes and the persons bribing them, the inclusion of bribery prevention provisions aimed at CE in POBO would not only seem to be a viable option but may also be a logical choice;

(b) the legal adviser has pointed out that CE is at present subject to the common law offence of accepting bribe as a public officer, and offences of bribing a public officer under both the common law and POBO. In respect of these offences, no distinction is drawn between CE and any other public officer or any ordinary citizen and no concern over CE's unique constitutional status has been expressed by the Administration. It is not readily clear how CE's unique constitutional position should

affect the general standard of bribery prevention applicable to "prescribed officers" under POBO; and

(c) on the Administration's view that there is a lack of authority to approve CE's receipt of advantage, the legal adviser has suggested that consideration may be given to devise a more comprehensive declaration/registration system that is consistent with the spirit on which the grant of approval for the receipt of advantage is based, and to accord the system legislative status so that compliance with it may constitute lawful authority for acceptance of advantage. This may be a way to obviate the need for an approval mechanism.

10. The Subcommittee notes from the Research Report prepared by the LegCo Secretariat that although all the heads of state/government of the United Kingdom (UK), the United States (US) and Korea have a unique constitutional status, they are subject to legal regulation for corruption control similar to other public officials. Notwithstanding CE's unique constitutional status, he is not above the law and there is no express provision in the Basic Law exempting CE from being subjected to bribery prevention legislation. The Subcommittee considers that an appropriate statutory framework of bribery prevention should be devised by the Administration for application to CE without further delay. Some members have suggested that CE should announce a decision on the matter in his Policy Address to be delivered in October 2005.

11. At its meeting on 11 July 2005, the Subcommittee passed the motion moved by Hon TONG Ka-wah urging the Government to immediately put forward feasible proposals regarding the application of legislative provisions on bribery prevention to CE, so as to expeditiously legislate for the regulation of the conduct of CE.

The Administration's proposal

12. In his Policy Address delivered on 12 October 2005, CE indicated that he accepted the need for his office to be subject to anti-corruption regulation. To this end, the Government would introduce legislation into LegCo as soon as possible to put in place the necessary legal regulatory procedures within the framework of the Basic Law.

13. In early November 2005, the Administration consulted the Subcommittee on the proposal to apply certain provisions of POBO to CE. According to the Administration, in pursing the legislative amendments, it will take into account the unique constitutional status of CE, the requirement for CE to declare assets, and the mechanism to handle serious breach of law by CE under BL 73(9). The legislative proposal seeks –

(a) to apply sections 4, 5 and 10 of POBO to CE. This would impose restrictions on CE in respect of solicitation and acceptance of advantages and possession of unexplained property;

(b) to introduce a new provision to bind any person who offers any advantage to CE in line with section 8(1) of POBO;

(c) to amend section 10 to specify that if CE is accused of possessing unexplained property, the Court shall take account of CE's assets declared to CJ pursuant to BL 47(2) in determining whether CE has given a satisfactory explanation under section 10(1); and

(d) to add a new section to enable the Secretary for Justice (SJ) to refer to LegCo a report of CE suspected to have committed the POBO offences for possible follow-up under BL 73(9).

14. Under the Administration's proposal and insofar as the principal-agent relation is concerned, the provision that cannot apply to 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 CE himself, administrative measures are put in place to provide effective control of the acceptance of gifts by the CE. In accordance with the established system, CE cannot accept gifts for personal retention unless he has paid for them at market price. Moreover, the gift register of 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 CE.

15. While members of the Subcommittee welcome the Administration's proposal to introduce legislative amendments to subject CE to the control of POBO, they have raised concerns on certain aspects of the legislative proposal and related issues. Detailed deliberations of the Subcommittee are summarised in paragraphs 16 to 57 below.

Application of section 3 of POBO to CE

16. While members support the application of sections 4, 5 and 10 of POBO to CE, they have reservation about the Administration's view that section 3 of POBO could not apply to CE (paragraph 14 above refers).

17. The Administration has explained that certain offence provisions under POBO contain the general defence of "lawful authority or reasonable excuse", whilst some specifically include the defence of "principal's consent". As CE is not an "agent" of the HKSAR Government as defined under section 2 of POBO, it is difficult to fit CE directly within the regulatory framework under these latter provisions of POBO. In this regard, all the sections proposed to apply to CE, i.e. sections 4, 5 and 10, do not incorporate "principal's consent" as a defence. The application of these sections would therefore only impose restrictions on him in respect of acts of solicitation and acceptance of advantage and possession of unexplained property.

18. Section 3 of POBO prohibits any "prescribed officer" from soliciting or accepting any advantage without the general or special permission of CE. Given the special constitutional position of CE and the lack of an appropriate authority to grant permission for CE to accept any advantage, CE would not be able to avail himself of the defence of "principal's consent".

19. Some members consider that the problem raised by the Administration could be resolved by tasking a special committee to grant permission for CE to receive advantages. In this connection, they have referred the Administration to the suggestion of the Hong Kong Bar Association that the issue could be addressed by having a special section or sub-section applicable only to CE in POBO, and an independent body to grant general or special permission for CE to accept advantages.

20. The Administration agrees with members that the spirit governing the solicitation and acceptance of advantages by prescribed officers should apply to CE. It is, however, technically not feasible to directly apply section 3 of POBO to CE because he could not grant permission to himself to accept an advantage. Nevertheless, the Administration has undertaken to consider whether and, if so, how section 3 could be made applicable to CE.

Proposed new section to allow SJ to make a referral to LegCo

The "referral provision"

21. A major concern of the Subcommittee is the need for and implications of the proposal to introduce a new section to enable SJ to refer to LegCo a report of CE suspected to have committed a POBO offence for possible follow-up by LegCo under BL 73(9) (the "referral provision"). BL 73(9) provides that –

> "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."

22. The Administration has explained that the "referral provision" is essential for the proper handling of a corruption complaint against CE. When there is a corruption complaint against CE, he will be subject to criminal investigation by the Independent Commission Against Corruption (ICAC), which will make a report to the Department of Justice 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 CE, he will also be subject to LegCo's investigation and impeachment procedures under BL 73(9).

23. The Administration has proposed that upon receipt of such complaints from ICAC, SJ may refer those with "prima facie" case and the findings of ICAC's preliminary investigation to LegCo. Members could accordingly consider invoking the mechanism of investigation to be conducted by the independent investigation committee chaired by CJ and passing a motion of impeachment under BL 73(9). Should LegCo decide to proceed with the procedures under BL 73(9), SJ may exercise discretion and allow LegCo to complete the investigation and impeachment proceedings, before he may exercise his power of criminal prosecution or require ICAC to conduct further investigation.

24. Members note that in all of the three places covered in the Research Report prepared by the LegCo Secretariat, there are no legal provisions requiring prosecution agencies to advise the respective legislature of any credible information that may constitute grounds for an impeachment.

25. Some members consider that the "referral provision" is unnecessary and undesirable. They have stressed that criminal proceedings should not be mingled with political proceedings. It is for SJ to decide whether and, if so, when to institute criminal proceedings against CE on the basis of the evidence available, and for LegCo to decide whether and, if so, when to invoke BL 73(9) in appropriate circumstances. SJ should make an independent decision on prosecution, regardless of whether there are, or the progress of, impeachment proceedings under BL 73(9).

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

27. The Administration has supplemented that the Data Protection Principle 3 in Schedule 1 to the Personal Data (Privacy) Ordinance (PDPO) (Cap. 486) stipulates that a data user (e.g. ICAC or SJ) shall not use personal data for a purpose other than that for which they were to be used at the time of their collection (i.e. investigation and prosecution) in the absence of the data subject's (e.g. CE's) prescribed consent. In the present case, it would not be appropriate for SJ to seek CE's consent for referring to LegCo a complaint against CE himself. With the proposed "referral provision", one of the purposes for the collection of data by ICAC will be for SJ to consider referring the complaint and essential investigation findings to LegCo. In this way, it can be ensured that SJ's referral to LegCo will not contravene the restrictions imposed by PDPO.

28. Some members have expressed concern whether SJ, a politically appointed principal official, may choose to take a course of action that would better serve the interests of the person who appoints him, e.g. by making a referral to LegCo so that the impeachment proceedings would take place before the criminal proceedings. This would then give rise to a practical consideration of whether CE, if prosecuted, could have a fair trial after he has been subject to the impeachment proceedings which are held in open session and highly politicized in nature. These members have pointed out that if SJ decides not to prosecute CE and if CE refuses to resign, the impeachment procedures could be triggered by LegCo. It is unnecessary for SJ to make a referral to LegCo to facilitate its consideration of invoking the investigation and impeachment mechanism under BL 73(9). The need and timing for LegCo to invoke any impeachment proceedings should better be left to the discretion of LegCo. They have also pointed out that as illustrated by the Research Report prepared by the LegCo Secretariat, the respective legislature of UK, US and Korea has responsibility over its own impeachment procedure.

29. Another concern of some members is the risk of politicisation of the impeachment process. These members have pointed out that given the composition and political nature of LegCo, a motion to investigate CE under BL 73(9) could easily be negatived, hence making it impossible for any investigation to proceed, not to mention the passage of a motion of impeachment. It is undesirable if a referral is made by SJ to LegCo in the hope that the motion of investigation or impeachment would be defeated because of the composition of LegCo, and CE would not be subject to further criminal proceedings.

30. The Administration has assured members that if there is sufficient evidence to substantiate complaints against CE over any POBO offence, SJ will consider proceeding with criminal proceedings, irrespective of whether the impeachment proceedings are invoked or the outcome of the proceedings. The referral by SJ is not meant to compel LegCo to invoke the impeachment procedures, but aims at providing to LegCo essential information pertaining to any bribery-related complaints against CE, so that LegCo would not be inhibited from performing its constitutional duty under BL 73(9). It is for LegCo to consider whether to proceed with the impeachment process after receipt of the referral.

31. The Administration has also assured members that there is no ground to doubt the independence and impartiality of SJ in deciding whether to institute prosecution in a particular case. Any prosecution decision will be made having regard to the established prosecution policy. The proposed "referral provision" will not compromise SJ's constitutional function to control criminal prosecutions free from any interference under BL 63.

32. Some members disagree that LegCo has to rely on SJ's referral in order to obtain essential information pertaining to any bribery-related complaints against CE. Under BL 73(9), LegCo, after passing a motion for investigation, will entrust CJ to form and chair an independent investigation committee. The findings and report of the investigation committee will provide information to facilitate LegCo's consideration

of whether to proceed with the impeachment process. In addition, LegCo could exercise its power to order the production of relevant documents by the Administration, if considered necessary.

33. The Administration has pointed out that there could be a situation where LegCo is not aware of an on-going investigation of a bribery-related complaint against CE. In the absence of knowledge or information about the complaint, LegCo would not be in position to perform its constitutional duty under BL 73(9). In the circumstance, it is necessary for SJ to take the initiative to make a referral to LegCo. SJ would arguably commit an offence under section 30 if he passes essential information to LegCo in the absence of the "referral provision".

34. The Administration has reiterated its position that the proposed "referral provision" is necessary and essential. BL 73(9) not only lays down a special regime for the investigation and impeachment of CE in respect of a complaint about his serious breach of law or dereliction of duty, but also entrusts LegCo with the important constitutional function of investigation and impeachment. It would be constitutionally appropriate to facilitate LegCo to obtain essential information pertaining to any bribery-related complaints against CE through a referral by SJ.

35. Some members have no strong view on the proposed "referral provision". Given that LegCo has the constitutional role to perform the check and balance function in case CE refuses to resign on a charge of serious breach of law or dereliction of duty, they consider that the proposed "referral provision" would facilitate the work of LegCo in this respect. In addition, it is ultimately for LegCo to decide whether to accept the referral or invoke the impeachment proceedings after receipt of the referral.

36. Some members have suggested that in addition to SJ making a referral to LegCo on his initiative, SJ should also provide information to LegCo at the latter's request. To facilitate LegCo to perform its constitutional role under BL 73(9), SJ should be empowered to make a referral to LegCo if CE is charged of dereliction of duty, and serious breach of any other laws in addition to POBO.

37. A member is of the view that if section 30 of POBO is the problem that the Administration tries to tackle, consideration should be given to amending the section to allow disclosure of essential facts of a complaint against CE to LegCo under certain circumstances, instead of introducing the "referral provision". The Administration has agreed to consider how to give effect to the "referral provision" in the amendment bill i.e. whether a new section should be added in POBO as originally contemplated by the Administration, or whether section 30 of POBO should be amended to provide an exception as proposed by some members.

<u>Immunity for Members under section 30 of POBO</u>

38. While the Subcommittee notes that LegCo has established practice to handle confidential information supplied by the Administration, and Members are covered

by the protection and immunity provided under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) during proceedings of the Council and its committees, it has expressed concern about the possible consequences faced by Members for inadvertent disclosure of the information contained in SJ's referral outside the proceedings of the Council and its committees.

39. The Administration has advised that the information referred by SJ to LegCo is confidential in nature and is not meant for the public. It is a matter for LegCo to consider how such information should be used and handled. However, it is not the intention of the Administration to impose criminal liability on Members for inadvertent disclosure of the information.

40. Members have pointed out that even if SJ discloses details of the investigation in respect of an alleged POBO offence against CE to LegCo, it is unlikely for him to commit an offence under section 30 of POBO as he may have a reasonable excuse to do so. However, the Administration has decided to amend the law to provide a clear legal basis for SJ to do so. If there is to be referral, it is also necessary for the Administration to consider exempting Members from similar liability provided that the leak of information is not wilful. The Administration has also agreed to consider the issue of confidentiality and disclosure raised by members in proposing legislative amendments relating to section 30 of POBO.

Impeachment and criminal proceedings

41. Arising from the discussion on the proposed "referral provision", members have considered the question of whether any criminal proceedings should be carried out in parallel with or even prior to the impeachment proceedings under BL 73(9).

42. The Administration has briefed members on the interface between impeachment and prosecution in respect of the Heads of States in UK, US, South Korea and Singapore. The experience in overseas jurisdictions illustrates that it is common for impeachment proceedings against and even removal of office of the Head of State to precede any criminal trial. In the case of Hong Kong, the Administration is of the view that it is more appropriate for impeachment proceedings to be conducted prior to any criminal trial. However, the Administration does not propose to make any stipulation in this regard in the amendment bill and would leave the need and timing for prosecution to the discretion of SJ.

43. Some members hold the view that the two proceedings could be conducted in parallel. It is noted that in the case of US, there are no legal provisions providing express immunity for the President, and different investigations of the President could be conducted concurrently by the House of Congress and the prosecution authority.

44. The Administration has explained that in US, the Department of Justice has primary jurisdiction for investigation and prosecution of corruption charges against federal officials. While a number of investigations could be conducted on the President concurrently, the US Department of Justice is of the opinion that the

President is afforded immunity from criminal prosecution until such time as he leaves office or the Congress has impeached and removed him from office. In reality, there has not been any incident of sitting Presidents being indicted or prosecuted and the Department of Justice's view remains unchallenged.

45. The Administration has also explained that if a prosecution is brought in parallel with the impeachment process, the proceedings to be conducted by the investigation committee chaired by 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 SJ to take into account any imminent or pending impeachment proceedings in deciding on the time to launch criminal proceedings, if necessary.

46. The Hong Kong Bar Association is of the view that the two proceedings are largely separate. While the two proceedings could be conducted in parallel, this may be unfair to the CE who has to undergo both proceedings at the same time. By convention, rather than by constitutional requirement, the criminal process should precede the political process.

47. Some members consider that it would be a more acceptable arrangement for criminal proceedings to precede impeachment proceedings, as the latter are conducted in open session and highly politicised in nature. In addition, it might be more appropriate for the evidence relating to a suspected offence to be heard by the court first.

48. A member has pointed out that in some of the countries where impeachment proceedings are conducted prior to criminal trials, the head of state/government are entitled to criminal immunity under their constitutions. However, the Basic Law does not provide criminal immunity to CE. Under the proposed "referral provision", SJ alone has the absolute discretion to decide whether criminal proceedings should take place prior to or after completion of the impeachment proceedings. The member considers that the law should stipulate clearly the sequence of the two proceedings, instead of leaving the discretion entirely to SJ.

49. The Administration does not consider it appropriate to introduce such a provision in local law, given that the Basic Law has no express provisions on the sequence for conducting the two proceedings.

50. Some members have expressed concern about the respective role of CJ in the impeachment proceedings and criminal proceedings. They have pointed out that on the one hand, CJ, being the most senior member of the Judiciary, is entrusted with the responsibility to form and chair an independent investigation committee when BL 73(9) was invoked. On the other hand, CJ and other judges appointed by him to assist in the investigation may need to preside over or conduct the trial when criminal proceedings are subsequently instituted against CE.

51. The Administration has advised that under BL 73(9), it is for CJ, as the chairman of the investigation committee, to decide how to form the committee and proceed with its work. The Judiciary should be able to address members' concern about the possible conflict of interest of CJ or other judges, in the event that prosecution is subsequently instituted against the same offence which has been investigated by the committee. Some members share the view of the Administration.

Investigation of bribery complaints against CE by ICAC

52. The Subcommittee has discussed whether it is appropriate for ICAC to be empowered under statute to investigate any alleged offence of bribery of CE, given that ICAC is accountable to CE under BL 57.

53. The Subcommittee has noted the views of the two legal professional bodies that it is inappropriate to require ICAC to investigate complaints of bribery or misconduct in public office against an incumbent CE given that ICAC is accountable to CE under BL 57. The Hong Kong Bar Association has proposed that CJ or a committee of judges could appoint an independent counsel, with the assistance of civil servants or ICAC investigators, to carry out the investigation. The Law Society of Hong Kong has proposed that an independent ad hoc committee chaired by a retired judge and staffed by officers seconded from ICAC be set up to conduct the investigation.

54. The Administration considers that ICAC is the appropriate authority and possesses the powers and expertise to perform the investigation of bribery complaints against CE. Under the ICAC Ordinance, the Commissioner of 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 CE. When handling or investigating any corruption allegations received, the Commissioner must observe the statutory requirements set out in the law.

55. The Administration has advised that ORC of ICAC is responsible for receiving from ICAC information about all corruption complaints and the manner in which the Commissioner is dealing with them. ORC is tasked to ensure that all corruption complaints, including those against CE and ICAC staff, should be handled properly. Regardless of whether ICAC's investigation would point towards substantiating an allegation or otherwise, a full report would have to be submitted to the satisfaction of ORC. When the investigation is completed, a report will be made to the Department of Justice for legal advice and consideration of prosecution. If SJ decides against prosecution, ICAC will report the proposal to end an investigation or close a case to ORC for advice.

56. The Administration has further explained that the "non-disclosure" requirement in section 30 of 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 have been satisfied. A person holding the office of CE who directs the Commissioner to

brief him on any investigation findings involving himself would likely be using his office as CE for an improper purpose. This could constitute misconduct in public office. Although BL 57 specifies that ICAC shall be accountable to CE, this specification should be read in context. It would be unlawful for 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 of obstructing or resisting ICAC officers in executing their duties under section 13A of the ICAC Ordinance.

57. Some members have indicated that they have confidence in the work of ICAC, given its experience and expertise in performing investigative duties. They also have no objection for ICAC, which is accountable to CE under BL 57, to handle or investigate any corruption allegations against an incumbent CE, as ICAC is accountable to the office of CE, and not the post holder per se.

Implementation of BL 73(9)

58. Some members consider that the procedure for implementation of 73(9) should be discussed by LegCo. Issues such as the operation and composition of the independent investigation committee, the handling of the report of the independent investigation committee by LegCo, the role of CJ and judges in any subsequent criminal proceedings against CE may need to be considered.

59. The Administration has advised that the implementation of BL 73(9), which concerns the impeachment against CE for charges of serious breach of law or dereliction of duty, is much wider in scope than the ambit of this Subcommittee which is tasked to study the application of POBO to CE. It is more appropriate for Members to discuss the matter in a separate forum.

60. The Subcommittee has requested the Committee on Rules of Procedure to accord priority to its study on the procedure to implement BL 73(9), which is an item on its list of issues for discussion.

RECOMMENDATION

61. The Subcommittee recommends that the Administration should proceed with the preparation of the necessary legislative amendments as soon as possible, taking into account members' views and concerns. The Administration has advised that the Prevention of Bribery (Amendment) Bill 2006 has been included in the Legislative Programme 2005-06 and will be introduced into LegCo by May 2006.

62. As the Subcommittee has completed its work entrusted by the Panel, members recommend that the Subcommittee be dissolved after making a report to the Panel.

Council Business Division 2
Legislative Council Secretariat
16 February 2006

Appendix I

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

Membership list

Chairman	Dr Hon YEUNG Sum
Members	Hon Albert HO Chun-yan Hon Martin LEE Chu-ming, SC, JP Dr Hon LUI Ming-wah, SBS, JP Hon Margaret NG Hon Mrs Selina CHOW LIANG Shuk-yee, GBS, JP (2005-06 session only) Hon CHEUNG Man-kwong Hon Bernard CHAN, JP Hon Howard YOUNG, SBS, JP Hon Emily LAU Wai-hing, JP Hon TAM Yiu-chung, GBS, JP Hon Audrey EU Yuet-mee, SC, JP (2005-06 session only) Hon LI Kwok-ying, MH (2004-05 session only) Hon Daniel LAM Wai-keung, BBS, JP Hon Jeffrey LAM Kin-fung, SBS, JP (2004-05 session only) Hon MA Lik, GBS, JP Hon Alan LEONG Kah-kit, SC (2005-06 session only) Hon LEUNG Kwok-hung (2005-06 session only) Hon WONG Ting-kwong, BBS (2005-06 session only) Hon TONG Ka-wah, SC
Clerk	Mrs Percy MA
Legal Adviser	Mr Arthur CHEUNG

Appendix II

Executive Summary of Research Report on Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea

1. This research studies the legal regulation for corruption control and impeachment of the head of state/government in the United Kingdom (UK), the United States (US) and the Republic of Korea (Korea).

2. Although all the heads of state/government of the three places studied hold unique constitutional status, they are subject to legal regulation for corruption control similar to other public officials. In the Hong Kong Special Administrative Region (HKSAR), there are only a handful of legal provisions in relation to corruption prevention of the Chief Executive (CE).

3. Since 1999, the Legislative Council of the HKSAR has expressed concern over the application of certain provisions of the Prevention of Bribery Ordinance (PBO) to CE. In October 2005, the Government announced that it was ready to put forward a proposal to apply certain provisions of PBO to CE.

4. In the UK, corruption charges are investigated by the police and prosecuted by the Crown Prosecution Service. There are no provisions for special counsel, grand juries or special commissions.

5. In the US, the Department of Justice has primary jurisdiction for investigation and prosecution of corruption charges against federal officials. In Korea, the criminal investigation and prosecution procedure for corruption charges against high-ranking public officials follows the general criminal procedure.

6. Both the US and Korea have a special mechanism to investigate executive misconduct. In the US, the Attorney General has the power to appoint an outside special counsel to conduct investigation when the prosecution by the Department of Justice would pose a conflict of interest. The National Assembly of Korea may pass a bill to appoint an independent counsel to investigate a corruption case.

7. In both the US and the UK, there are no legal provisions providing express immunity for the President or the Prime Minister. Under the Korean Constitution, the President is entitled to criminal immunity during his tenure of office except for insurrection or treason. In the HKSAR, the Basic Law does not provide any immunity for CE. In all of the three places studied, there are no legal provisions requiring prosecution agencies to advise the respective legislature of any credible information that may constitute grounds for an impeachment.

8. The tradition of impeachment has its origins in the laws of England. The impeachment process in the three places studied is similarly governed by their constitutions, parliamentary procedures and relevant statutes regulating the institutions concerned.

9. Under both the UK and the US systems, it is for the impeachment to be made in the lower house of the respective legislature and for the trial to be held in the upper house. In Korea, after the National Assembly has passed an impeachment motion, the motion is submitted to the Constitutional Court of Korea for a determination.

10. In the three places studied, the respective legislature has its own discretion with regard to the impeachment procedure. Conviction under the old English impeachment system could result in punishment by imprisonment, fine or even death. In the US and Korea, conviction may only lead to the removal of office of the accused. The US Senate may impose an additional punishment to prohibit the accused from holding an office of public trust again. Any person who is removed by impeachment in Korea is prohibited to be a public official for the next five years.

11. In all of the three places studied, the particular kind of misconduct falling within the boundary of impeachable offence is a contentious issue. Historically, the English impeachment was used for "high crimes and misdemeanors" beyond the reach of law, or where no other authority in the state could prosecute. The US President may be impeached in cases involving treason, bribery, and "high crimes and misdemeanors". In Korea, the President may be impeached if he has violated the Constitution or other laws in the performance of official duties.