

**Bills Committee on
Prevention of Bribery (Amendment) Bill 2007**

**Follow-up actions arising from the discussion
at the meetings on 15 November and 4 December 2007**

Purpose

This paper aims to respond to the following issues raised by the Bills Committee on Prevention of Bribery (Amendment) Bill 2007 at the meetings on 15 November and 4 December 2007 -

- (a) whether the Government would, in the light of feedback from Members, introduce a provision along the lines of section 8(1) of the Prevention of Bribery Ordinance (POBO) to create a criminal liability on a person who has offered an advantage to the Chief Executive (CE); and
- (b) whether the Government would consider applying section 3 of POBO to the CE by setting up an independent body to grant general or special permission for the CE to accept advantages.

2. We have consulted the Department of Justice and the Independent Commission Against Corruption, and the Administration's response is set out in the subsequent paragraphs.

(A) Section 8(1) of the POBO

3. Under section 8(1) of the POBO, any person who offers an advantage to a prescribed officer¹ while having dealings of any kind with the Government through any department, office or establishment in which the prescribed officer is employed, commits an offence unless he can establish the defence of lawful authority or reasonable excuse. As mentioned in the case of *Sin Kam-wah v HKSAR [2005] 2 HKLRD 375*, the term "dealings of any kind" carries a broad meaning². For example, if a person, while having a contract with the Transport Department, offers a gift to a prescribed officer of the Transport Department, he

¹ "Prescribed officers" include, amongst others, principal officials, judicial officers and civil servants.

² Paragraphs 58 – 60 of the judgment read –

"The expression "dealings of any kind" is of the widest import.... It should not be read as requiring that there should be an actual dealing on foot when the offer is made but rather that a course or pattern of regular dealings will be enough. It would make no sense at all to read the sub-section as having no application to the case where a bribe is offered in the certain knowledge that dealings are about to take place between the offeror and the Government.

There is nothing in the provision to support the suggestion that it must be shown that the person to whom the bribe is offered is in a position to influence the outcome of the dealing."

will commit an offence under section 8(1) unless the offer is made with lawful authority or reasonable excuse.

4. Section 8(1) is a stringent corruption prevention measure. It creates an offence that does not require the prosecution to prove that the advantage was offered to the prescribed officer for any purpose related to his duties or for a corrupt purpose. Its severity is mitigated to an extent by limiting its application to only those occasions where the offer is made to a prescribed officer employed in the department, office or establishment through which the offeror is having his dealings with the Government and by providing the defence of lawful authority or reasonable excuse³.

5. We have considered the propriety of providing for an offence provision similar to section 8(1) to bind persons offering advantages to the CE by adapting “having dealings of any kind with the Government through any department, office or establishment” to “having dealings of any kind with the Government”. Given that the CE is the head of the HKSAR Government (HKSARG), the new offence provision could have the effect of subjecting any person having dealings of any kind with any government department to an offence whenever he offers an advantage to the CE. The scope of the new offence would be much wider than the scope of the offence created by the existing section 8(1), which covers only the department in which the prescribed officer is employed. The onus is on the offeror to establish that he has lawful authority or reasonable excuse to so offer. This could be too onerous on well-meaning citizens offering souvenirs to the CE out of courtesy or respect. The inherent design of section 8(1) makes it unsuitable for application to the offering of gifts to the CE.

6. If a gift were offered to the CE for a corrupt purpose, this should fall within the scope of proposed section 4(2A) of the POBO, which provides that if a person, whether in Hong Kong or elsewhere, offers an advantage to the CE without lawful authority or reasonable excuse, as an inducement to or reward for or otherwise on account of his acting in his capacity as the CE, he will commit an offence. Members may wish to note that in the context of proposed section 4(2A), the term “act” should be broadly construed as encompassing more than just a quid pro quo situation but also generalized and non-specific transactions – “the keeping sweet situation in its most tenuous and insidious form”⁴. In other words, many offers of advantages to the CE in circumstances where there is a conflict of interest should be caught under the proposed section 4(2A). In addition, a person offering a bribe to the CE would also be caught by the common law offence of bribery. Having regard to its implications and that there are sufficient measures, such as proposed section 4(2A), to tackle the

³ For example, if the offeror and the prescribed officer had an existing close personal friendship and the offeror genuinely gave a birthday or wedding gift to the prescribed officer, that would be a reasonable excuse.

⁴ See page 256 of “Bribery and Corruption Law in Hong Kong” by Ian McWalters, LexisNexis Butterworths (2003) and *Attorney General v Chung Fat-ming* quoted therein.

corrupt offering of gifts to the CE, we do not consider it necessary to include in the Prevention of Bribery (Amendment) Bill 2007 (the Bill) an offence similar to that found in section 8(1).

(B) Section 3 of the POBO

7. Section 3 of the POBO provides that a prescribed officer will commit an offence if he solicits or accepts an advantage without the general or special permission of the CE. Similar to section 8(1), section 3 targets “corrupt practices” by creating an offence that does not require proof of corruption, impropriety or lapse of integrity of any kind by the prescribed officer. This very stringent corruption prevention provision is made palatable by the CE, as principal, giving his permission to prescribed officers to accept many types of advantages.

8. There are serious practical constraints involved in applying section 3 to the acceptance and solicitation of advantages for the CE. Section 3 only applies to persons over whom the CE has authority. Under section 3, prescribed officers seek the CE’s permission for the solicitation or acceptance of advantages. However, the CE cannot grant permission to himself. This poses structural difficulties in fitting the CE within the framework of the offence provisions of section 3. In addition, section 3 is premised upon the existence of a principal-agent relationship. The CE is not an agent of the HKSARG and has no equivalent principal within the HKSARG. We have considered the propriety of creating an independent body to monitor or approve requests from the CE to accept or solicit advantages. We do not consider this appropriate because the CE is the head of the HKSAR and the HKSARG, and there could be no principal-agent relationship between the CE and any independent body set up for this purpose.

9. As explained above, section 3 cannot be adapted to apply to the CE. We have examined the need for creating a new offence provision to deal with the acceptance of advantages by the CE for a non-corrupt purpose. The Bill already provides comprehensive controls and sanctions against the commission of bribery or corruption offences by the CE. The application of sections 4, 5 and 10 of the POBO to the CE would impose restrictions on him in respect of any bribery acts of solicitation and acceptance of advantages and possession of unexplained property. The proposed Bill represents a significant augmentation of legal sanctions against any possible corrupt practice of the CE through the application of various provisions of POBO. In addition to the proposed statutory anti-corruption measures, the CE is also bound by the common law offence of bribery and those who offer any bribe to the CE would be caught by the offence. Furthermore, Article 47 of the Basic Law stipulates that the CE must be a person of integrity, dedicated to his or her own duties. It also requires the CE, on assuming office, to declare his or her assets to the Chief

Justice. The CE is subject to very tight public scrutiny and his acts will be closely monitored by the media and the public. These provide effective and powerful measures to safeguard the integrity of the CE and prevent any possible abuse in view of the CE's unique constitutional position. As such, we do not consider that there is a need to create a new offence provision to handle the acceptance of advantages by the CE for a non-corrupt purpose.

**Administration Wing, Chief Secretary for Administration's Office
Department of Justice
January 2008**