

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

**Follow-up actions arising from the discussion
at previous Bills Committee meetings**

Purpose

This paper summarises the Administration's previous response to the issues raised by the Bills Committee on Prevention of Bribery (Amendment) Bill 2007 concerning –

- (a) sections 8(1) and 3 of the Prevention of Bribery Ordinance (POBO) (*see paragraphs 3 – 9 below*) ; and
- (b) referral mechanism under the proposed section 31AA of the Prevention of Bribery (Amendment) Bill 2007 (the Bill) (*see paragraphs 12 – 21*) .

It also sets out the Administration's response to some other issues raised by the Bills Committee at the meetings on 15 November 2007, 4 December 2007 and 8 January 2008 concerning –

- (c) whether the existing arrangements regarding the acceptance of gifts by the Chief Executive (CE) should be formalized (*see paragraphs 10 – 11*);
- (d) whether the Secretary for Justice (SJ) would, after referring the case to the Legislative Council (LegCo), provide the LegCo with further information on the case upon completion of the Independent Commission Against Corruption (ICAC)'s investigation (*see paragraph 22*);
- (e) whether there was any legal provision similar to section 30 of the POBO prohibiting the SJ from referring a case that the CE might have committed a serious crime, other than that under the POBO, to the LegCo; if so, whether consideration had been given to any legislative amendment to enable the SJ to do so (*see paragraph 23*); and
- (f) whether there was a need to provide in the POBO immunity to the LegCo Members for disclosing information contained in the SJ's referrals made under the proposed section 31AA for the purpose of taking action under Basic Law (BL) 73(9) (*see paragraph 24*).

2. We have consulted the Department of Justice (DoJ) and the ICAC, and the Administration's response is set out in the subsequent paragraphs.

(A) Section 8(1) of the POBO

3. Section 8(1) of the POBO provides that if a person 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, the offeror will commit an offence unless he can establish the defence of lawful authority or reasonable excuse. The term "dealings of any kind" carries a broad meaning². For example, if a person, while having a contract with a government department, offers a gift to a prescribed officer of the department, he 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 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. For example, a person offering a small gift to the CE during a district visit would commit an offence if he applied for renewal of driving licence. The scope of the new offence would be much wider than the

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

² See paragraphs 58 – 60 of the judgment for the case of *Sin Kam-wah v HKSAR* [2005] 2 HKLRD 375, which 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."

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.

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) in the Bill, 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. The term “act” in the proposed section 4(2A) 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. Many offers of advantages to the CE in circumstances where there is a conflict of interest should be caught under 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 the implications and that there are sufficient measures to tackle the corrupt offering of gifts to the CE, we do not consider it necessary to include in 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. Prescribed officers may seek the CE’s permission for the solicitation or acceptance of advantages under section 3. However, the CE cannot grant permission to himself. This poses structural difficulties in fitting the CE within the framework of the offence in 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

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.

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. Given that 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. 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, BL 47 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.

(C) Existing Arrangements

10. The CE's Office (CEO) has since 1997 established a Register of gifts presented to the CE in his official capacity. The Register is available for public inspection, hitherto upon request and since July 2007, through CE's website. The Register records all gifts of an estimated value exceeding HK\$400 received by the CE or his spouse in the CE's official capacity. The Register includes two lists, one covering items for government disposal and another one items for the CE's personal retention. Should the CE wish to retain any gift on the Register, CEO would invite the Government Logistics Department to arrange valuation in a professional manner and the CE may purchase the gift at the valued price. The Register is updated on a monthly basis.

11. The existing practice of recording and making available for public inspection gifts presented to the CE in his official capacity has been established for over 10 years. Exposing the Register to public scrutiny is an effective measure to safeguard the transparency and accountability of the existing practice. The arrangements have worked well. We do not see a need to establish a new body to track the arrangements.

(D) Referral Mechanism

12. Under section 30(1) of the POBO, a person, while knowing or suspecting that an investigation in respect of an offence alleged or suspected to have been committed under Part II is taking place, shall not, without lawful authority or reasonable excuse, disclose to -

- (a) the person who is the subject of the investigation (subject person) the fact that he is so subject or any details of such investigation; or
- (b) the public or any other person the identity of the subject person or the fact that the subject person is so subject or any details of such investigation.

13. In addition, section 30(2) provides that the restriction on disclosure of information in section 30(1) does not apply to the following types of disclosure -

- (a) disclosure after the subject person has been arrested, after a warrant has been issued for the arrest or after the residence of the subject person has been searched under a warrant issued by the court; or
- (b) disclosure after the issue of a certain order, notice, etc. by the court in respect of the subject person, such as a notice requiring him to surrender to the Commissioner, Independent Commission Against Corruption (C,ICAC) his travel documents.

14. The purpose and effect of the prohibition on disclosure under section 30(1) is to protect the integrity of the investigation when it is in its covert stage and also to protect the reputation of the subject person, as the investigation is embarked on mere suspicion which may be later found to be unsubstantiated. It ceases to be an offence for any person to disclose the identity of the subject person and any details of the investigation after one of the situations set out in section 30(2) has taken place. It is also not an offence if the disclosure is made with lawful authority or reasonable excuse. There is no prohibition against a person who makes a corruption complaint to the ICAC to also make an identical complaint to the LegCo before, after or at the same time when the complaint is made to the ICAC, so long as he does not reveal that this matter is subject to the ICAC's investigation.

15. In view of the restriction under section 30, when information is received by the SJ on an investigation in respect of a bribery offence involving the CE as the suspect, the SJ cannot refer the matter to the LegCo for it to consider whether to take action under BL 73(9). We have therefore proposed to add the new section 31AA to provide that when, upon investigation by the ICAC, there is reason to suspect that the CE may have committed an offence under the

POBO, the C,ICAC may refer the matter to the SJ; and where, as a result of such a referral, the SJ has reason to suspect that the CE may have committed an offence under the POBO, he may refer the matter to the LegCo for it to consider whether to take any action under BL 73(9).

16. Members may wish to note that the proposed section 31AA does not have the effect of excluding any person from making a complaint to the LegCo. Subject to the restriction under section 30, any person may refer information that is the substance of a corruption complaint against the CE to the LegCo for it to consider whether to take any action under BL 73(9). Enabling the SJ to refer a corruption complaint against the CE received from C,ICAC will not compromise the right of the LegCo to consider invoking the investigation and impeachment procedures under BL 73(9).

17. BL 73(9) lays down a special procedure for the impeachment of the CE in respect of a complaint about his serious breach of law or dereliction of duty. Making an allegation against the CE is a serious matter and the BL 73(9) procedure should not be invoked lightly. The proposed section 31AA is an empowering provision, the purpose of which is to enable the SJ to refer a corruption complaint against the CE to the LegCo so that the LegCo Members may obtain the essential facts for considering whether to invoke the BL 73(9) procedure.

18. As the prosecuting authority of the HKSAR, the SJ receives information of all criminal investigations of serious offences that could lead to prosecution. Where the information relates to alleged POBO offences involving the CE, the SJ may decide to take prosecution action on the strength of the information. Alternatively, the SJ may refer the case to the LegCo for it to consider whether to take any action under BL 73(9) if the SJ has reason to suspect that the CE may have committed a serious breach of the POBO (this being made possible with the removal of the legal prohibition so to do by the proposed section 31AA). Which course the SJ should take is an important discretion which the SJ has to exercise with great care on a case by case basis, and for which the SJ is accountable. Of course, the same information may not justify either prosecution or referral to the LegCo at all.

19. This system provides sufficient safeguards and there is no question of any corruption complaint involving the CE being covered up. First, as with all ICAC investigations, any decision by the ICAC to close the file and any decision by the DoJ not to prosecute will be reported fully and discussed at the Operations Review Committee (ORC). The ORC comprises distinguished non-officials and is tasked to ensure that all corruption complaints, including any against the CE, will be handled properly. There is no need to require the SJ to make a report to the LegCo on the reason(s) for not making a referral. If the investigation involves the CE, the question of whether the SJ should refer the case to the LegCo for any action under BL 73(9) will arise in the ORC

discussion should the ICAC decide to close the file or the SJ decide against prosecution. Second, as explained before, there is no prohibition against a complainant to the ICAC also making an identical complaint to the LegCo provided that he does not reveal the ICAC's investigation.

20. We consider that it will be wholly inappropriate for the ICAC to bypass the SJ to report all investigations of POBO offences involving the CE to the LegCo. This will inevitably interfere with the SJ's constitutional role as the prosecuting agency (which must be free from any interference as guaranteed under BL 63) and alter the statutory role and duty of the ICAC.

21. Hence, we remain of the view that when there is a corruption complaint against the CE, he should be subject to investigation by the ICAC which will make a report to the SJ for legal advice and consideration of prosecution. When, upon investigation by the ICAC, there is reason to suspect that the CE may have committed an offence under the POBO, the C,ICAC may refer the matter to the SJ. Where, as a result of such a referral, the SJ has reason to suspect that the CE may have committed an offence under the POBO, he may refer the case to the LegCo for it to consider whether to take any action under BL 73(9). Any proposal to end an investigation or close a case should continue to be reported to the ORC.

(E) Provision of Further Information after Making Referral

22. As explained before, in view of the prohibition under section 30 of the POBO, the proposed section 31AA is added to provide that when, upon investigation by the ICAC, there is reason to suspect that the CE may have committed an offence under the POBO, the C,ICAC may refer the matter to the SJ; and where, as a result of such a referral, the SJ has reason to suspect that the CE may have committed an offence under the POBO, he may refer the matter to the LegCo for it to consider whether to take any action under BL 73(9). While the proposed section 31AA is not intended as, and does not operate as, a mechanism for regulating how the SJ should deal with the information he receives, the phrase "may refer the matter" in this provision should be wide enough to enable the SJ to provide the LegCo with further information on a case which has been referred by him to the LegCo before should he decide to do so.

(F) Section 30 of the POBO

23. We have not been able to locate any provision in other ordinances which is identical with section 30 of the POBO, i.e. imposing a general restriction against disclosure of the identity of the subject or other details of an investigation of an alleged offence, unless there is lawful authority or reasonable excuse. We are however aware that there are certain provisions which impose

a duty to maintain secrecy (secrecy provision) in respect of information obtained when carrying out the provisions of, or exercise functions under the relevant ordinance⁵ (**Annex**). Nearly all these secrecy provisions⁶ contain either express or implied⁷ exceptions to the duty to maintain secrecy, such as disclosure with a view to the institution of or for the purpose of criminal proceedings or investigation under the relevant ordinance or any other ordinance. As such, if there were any serious breach of the relevant statutory requirements by the CE, the secrecy provisions would not appear to have the effect of prohibiting the SJ from receiving relevant information that could lead to prosecution and SJ may, on the strength of such information, decide to take prosecution action or refer the case to the LegCo for it to consider whether to take any action under BL 73(9). Some of the secrecy provisions restrict further disclosure, without the consent of the relevant authority, of information disclosed under the express exceptions to the secrecy provision, or authorize the relevant authority to attach a condition to disclosure under the secrecy provision that there should be no further disclosure without the consent of the relevant authority. However, in view of the nature of the relevant ordinances⁸, such secrecy provisions do not appear to be of relevance to the office of the CE.

(G) Immunity for disclosure of information

24. The proposed section 31AA provides that the SJ may refer the matter to the LegCo for it to consider whether to take any action under BL 73(9). Hence, the LegCo Members may use the information contained in the SJ's referral in the course of discharging the constitutional function under BL 73(9). As regards the question as to whether the LegCo Members can also disclose the information to other parties for the purpose of taking action under BL 73(9), our legal advice is that such disclosure may arguably be covered by the defence of reasonable excuse under section 30 of the POBO. In view of Members' concern, we are considering whether there is a need to explicitly provide in the Bill that LegCo Members may disclose the information contained in the SJ's referral to relevant parties if such disclosure is reasonably necessary for the purpose of taking action under BL 73(9), with due regard to the policy intent for

⁵ For example, section 4 of the Inland Revenue Ordinance (Cap. 112) (IRO) provides that every person appointed under or employed in carrying out the provisions of the IRO is required to take an oath of secrecy and, except in the performance of his duties under the IRO, preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that may come to his knowledge in the performance of duties under the IRO.

⁶ Except the Human Reproductive Technology Ordinance which, however, does not appear to be of relevance to the office of the CE.

⁷ For example, while there is no express provision under the IRO authorizing the Commissioner of Inland Revenue to pass information to the SJ for advice and for intended institution of prosecution of alleged offences, the Court of Appeal in the case of *Neil Pryde Ltd v Chau Bryan, Magistrate [1995] 2 HKC 812* held that the Commissioner could do so since it was in the performance of his duties to collect and secure the collection of tax revenue and to request the then Attorney General to prosecute particular cases of exemption or reduction of tax obtained by deception including unsuccessful attempts.

⁸ Namely, Insurance Companies Ordinance (Cap. 41), Banking Ordinance (Cap. 155), Hong Kong Science and Technology Parks Corporation Ordinance (Cap. 565), Securities and Futures Ordinance (Cap. 571), Deposit Protection Scheme Ordinance (Cap. 581) and Financial Reporting Council Ordinance (Cap. 588).

section 30, i.e. to protect the integrity of the investigation when the investigation is still in a covert stage and the reputation of the subject person.

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

Statutory Provisions on Secrecy

1. Section 53A of *Insurance Companies Ordinance* (Cap. 41)
2. Sections 32H & 42G of *Professional Accountants Ordinance* (Cap. 50)
3. Section 15 of *Gas Safety Ordinance* (Cap. 51)
4. Section 4 of *Inland Revenue Ordinance* (Cap. 112)
5. Section 120 of *Banking Ordinance* (Cap. 155)
6. Section 5 of *Money Lenders Ordinance* (Cap. 163)
7. Section 15 of *Hong Kong Examinations and Assessment Authority Ordinance* (Cap. 261)
8. Section 4 of *Business Registration Ordinance* (Cap. 310)
9. Section 4K of *Motor Vehicles (First Registration Tax) Ordinance* (Cap. 330)
10. Section 15 of *The Ombudsman Ordinance* (Cap. 397)
11. Section 28 of *Noise Control Ordinance* (Cap. 400)
12. Section 77 of *Occupational Retirement Schemes Ordinance* (Cap. 426)
13. Section 46 of *Personal Data (Privacy) Ordinance* (Cap. 486)
14. Section 28 of *Environmental Impact Assessment Ordinance* (Cap. 499)
15. Section 21 of *Fire Safety (Commercial Premises) Ordinance* (Cap. 502)
16. Section 154 of *Chinese Medicine Ordinance* (Cap. 549)
17. Section 46 of *Electronic Transactions Ordinance* (Cap. 553)
18. Section 34 of *Human Reproductive Technology Ordinance* (Cap. 561)
19. Section 31 of *Hong Kong Science and Technology Parks Corporation Ordinance* (Cap. 565)
20. Section 378 of *Securities and Futures Ordinance* (Cap. 571)
21. Section 22 of *Fire Safety (Buildings) Ordinance* (Cap. 572)
22. Section 46 of *Deposit Protection Scheme Ordinance* (Cap. 581)
23. Section 50 of *Clearing and Settlement Systems Ordinance* (Cap. 584)
24. Section 51 of *Financial Reporting Council Ordinance* (Cap. 588)
25. Section 31 of *Hong Kong Export Credit Insurance Corporation Ordinance* (Cap. 1115)