

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

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

Purpose

This paper sets out the Administration's response to the issues raised by the Bills Committee at the meetings on 29 February and 19 March 2008 concerning –

- (a) whether there is a need to make it clearer in the Prevention of Bribery (Amendment) Bill 2007 (Bill) what the word “matter” in the phrase “may refer the matter” in the proposed section 31AA would cover (*see paragraph 3 below*);
 - (b) whether the Independent Commission Against Corruption (ICAC) is the appropriate authority to conduct investigation into a bribery offence suspected to have been committed by the Chief Executive (CE) under the Prevention of Bribery Ordinance (POBO) (Cap. 201) in the light of sections 5(2) and 12(c) of the ICAC Ordinance (ICACO) (Cap. 204), section 17(2)(a)(iii) of the Official Secrets Ordinance (OSO) (Cap. 521), section 30 of the POBO, Article 57 of the Basic Law (BL) and overseas experience (*see paragraphs 4 to 15 below*);
 - (c) whether the CE's duties should be assumed by the Chief Secretary for Administration (CS), Financial Secretary (FS) or Secretary for Justice (SJ) in this order of precedence temporarily if the CE is suspected to have committed a bribery offence under the POBO (*see paragraph 16 below*); and
 - (d) how the ICAC is, at present, held accountable to the CE under BL 57 (*see paragraph 17 below*).
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) Scope of “matter” in the proposed section 31AA

3. 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 Commissioner, ICAC (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 Legislative Council (LegCo) for it to consider whether to take any action under BL 73(9). We consider that the word “matter” in the phrase “may refer the matter” in the proposed section 31AA should be wide enough to cover material, information and

evidence concerning a bribery offence suspected to have been committed by the CE under the POBO. Although the word “matter” is not specifically defined in the Bill, the context in which it appears and the purpose of the proposed section 31AA should render it a meaning wider than the mere fact that the allegation has been made against the CE.

(B) Appropriate authority to investigate a bribery offence involving the CE

(a) ICAC’s mandatory duty to investigate

4. Section 12(b)(ii) of the ICACO imposes a mandatory duty on the C,ICAC to investigate any alleged or suspected offence under the POBO. He thus has and should fulfill this statutory responsibility to investigate a bribery offence suspected to have been committed by any person, including the CE. The C,ICAC is obliged to discharge his duty to investigate under section 12(b)(ii), even if the offence is suspected to have been committed by the CE.

(b) Safeguards against disclosure of information

(i) Post commencement of investigation

5. Section 30 of the POBO provides that a person, while knowing or suspecting that an investigation in respect of an offence alleged or suspected to have been committed under Part II of the POBO 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,

unless and until the person under investigation has been arrested or any of the other conditions in section 30(2) has been satisfied. This prohibition applies equally to the C,ICAC as well as any other person. If the C,ICAC disclosed to the CE that the CE was subject to an investigation being conducted by the ICAC or any details about the investigation without lawful authority or reasonable excuse, the C,ICAC would commit an offence under section 30.

(ii) Pre-investigation

6. Section 17 of the OSO provides that a person who is or has been a public servant commits an offence if he, without lawful authority, discloses information, document or other article which impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders and that is or has been in his possession by virtue of his position as such. By virtue of section 21(1) of the OSO, disclosure by a public servant is made with lawful authority if, and only if, it is made in accordance with his official duty. If the C,ICAC disclosed to the CE the presence

of, or any details about a corruption complaint against the CE, the C,ICAC would commit an offence under section 17 because such information would fall within the scope of “impeding the prevention or detection of offences or the apprehension or prosecution of suspected offenders” under section 17 and the disclosure could not be considered as having been made in accordance with the C,ICAC’s official duty (*see paragraph 8 below for more details*).

(c) BL 57 and sections 5(2) and 12(c) of the ICACO

7. BL 57 provides that the ICAC shall function independently and be accountable to the CE. This requirement is also transcribed in section 5(2) of the ICACO which provides that the C,ICAC shall not be subject to the direction or control of any person other than the CE. These provisions underpin the independence of the ICAC and that the C,ICAC is accountable to the office of the CE, not to the post holder per se.

8. There is a view that BL 57 and/or section 5(2) might have the effect of empowering the CE to direct the C,ICAC to disclose the presence of, or even details about a corruption complaint/investigation against himself, the CE. This view is untenable. Firstly, if BL 57 had such an empowering effect, it would be arguable that BL 57 empowered the CE to interfere with the investigation by ICAC of a corruption complaint against the CE. This would apparently go against an important principle that the BL does not provide the CE with general immunity from criminal investigation or prosecution. Secondly, if a person holding the office of the CE did give such an instruction to the C,ICAC, that person’s conduct may amount to an abuse of the powers of the office of the CE and, if so, this would constitute the common law offence of misconduct of public office. Depending upon the circumstances, it may also constitute the offence of 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 ICACO. Thirdly, if the C,ICAC did comply with the unlawful instruction, he may commit an offence under section 30 of the POBO and/or section 17 of the OSO. Where an unlawful disclosure has been made, it is most unlikely that the C,ICAC could establish the defence of “lawful authority or reasonable excuse (under section 30 of the POBO)” or “lawful authority (under section 17 of the OSO)” as he must have known that the CE’s instruction to him was unlawful in the first place. The same would also apply if the C,ICAC made the disclosure of his own volition.

9. Section 12(c) of the ICACO provides that the C,ICAC has the duty to investigate any conduct of a prescribed officer which is connected with or conducive to corrupt practices and to report thereon to the CE. Since the CE is **not** a prescribed officer as defined under section 2 of POBO, the C,ICAC’s duty to report to the CE under section 12(c) does not include any corrupt practice or bribery offence suspected to have been committed by the CE.

(d) Independent Investigation Committee under BL 73(9)

10. BL 73(9) has already provided for 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. If the LegCo passes a motion under BL 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 any additional investigation authorities is therefore unnecessary and could duplicate and even compromise the role of the independent investigation committee formed for the purpose of BL 73(9).

(e) Overseas experience

11. As reported to the LegCo Subcommittee on Application of Certain Provisions of the POBO to the CE (Subcommittee) in late 2005, we had examined the interface arrangements between impeachment and prosecution in respect of Heads of States in the United Kingdom, the United States, South Korea and Singapore. In gist, the research 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 a sitting President 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 jurisdictions that it would be necessary to remove the Head of State from his office before any criminal proceedings could be instituted against him (*see the table at Annex for details*).

12. While it is not the Administration's intention to cite these examples for the purpose of proposing prerogative or immunity to the CE, we wish to point out that it is inappropriate to compare the investigation arrangements in overseas jurisdictions without first ascertaining the interface between impeachment and prosecution in respect of the Heads of States / Governments. Nor can such an overseas comparison be considered meaningful without looking into the details of the relevant safeguards, such as those in section 30 of the POBO and section 17 of the OSO.

(f) Conclusion

13. In the light of the above, the Administration remains of the view that the ICAC should be the appropriate authority to investigate a bribery offence suspected to have been committed by the CE, as in the case of any other person. The ICAC possesses the requisite powers and expertise to carry out the investigation of suspected bribery offences. Under the ICACO, the C,ICAC has a mandatory duty to investigate a bribery offence suspected to have been committed by the CE. Since its

establishment in 1974, the ICAC's investigation has all along been conducted independently, fairly and in confidence and that it has been seen by the public as such. Indeed, some Subcommittee Members have indicated that they have confidence in the work of the ICAC, given its experience and expertise in performing investigative duties. They also have no objection for the ICAC, though being accountable to the CE under BL 57, to handle or investigate any corruption allegations against the CE as the ICAC is accountable to the office of the CE, and not the post holder per se.

14. Although BL 57 specifies that the ICAC shall be accountable to the CE, this specification should be read in context and would unlikely have the effect of empowering the CE to interfere with the investigation by the ICAC of a corruption complaint against the CE. It would 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 of 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 ICACO. There are already sufficient safeguards, such as section 30 of the POBO and section 17 of the OSO, against any possible unlawful disclosure to the CE of the presence or even details about a corruption complaint/investigation against the CE. As explained above, BL 57, sections 5(2) and 12(c) of the ICACO will not and cannot legalise such unlawful disclosure.

15. As with all ICAC investigation, any decision by the ICAC to close the file and any decision by the DoJ not to prosecute in relation to a corruption complaint against the CE 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 question of any corruption complaint involving the CE not being properly acted on.

(C) Discharge of the CE's duties

16. BL 53 provides that if the CE is not able to discharge his duties for a short period, such duties shall temporarily be assumed by the CS, FS and SJ in this order of precedence. There has been a suggestion that following the design of this article, the CE's duties should be assumed by the CS temporarily whenever there is a corruption complaint against the CE. We do not consider this suggestion worth pursuing. Firstly, as explained above, when there is a corruption complaint against the CE, it is unlawful for the C,ICAC to disclose to the CE the presence of, or any details about the complaint and the ICAC's investigation. As such, there is no means whereby the suggested mechanism can be triggered unless the C,ICAC is allowed to disclose to the CE information about the complaint or investigation. Secondly, it is doubtful whether it is the intention of BL 53 to disallow a person holding the office of the CE to discharge CE's duties whenever there is a corruption complaint against the CE. Thirdly, BL 73(9) already provides for the mechanism for handling serious breach of law or dereliction of duty by the CE.

(D) ICAC's accountability mechanism

17. In accordance with BL 57 and section 5 of the ICACO, the C,ICAC is accountable to the CE. The C,ICAC reports to the CE as and when necessary on issues pertaining to the performance of his statutory duties. However, any matters relating to complaints concerning the CE will not be mentioned.

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Impeachment and Prosecution of Heads of States in Overseas Jurisdictions

	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 been prosecuted for 	<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 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.

	United States	United Kingdom	South Korea	Singapore
	criminal charges and the US Department of Justice's view remains unchallenged.			
Investigation and Prosecution of the Head of State / Government	<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.