

**SUBMISSION OF THE HONG KONG BAR ASSOCIATION**

**RE: PREVENTION OF BRIBERY (AMENDMENT) BILL 2007  
Bills Committee Meeting on 15 April 2008**

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1. The Hong Kong Bar Association (“HKBA”) has considered the Legislative Council Brief dated 5 July 2007 (“LegCo Brief”) on the Prevention of Bribery (Amendment) Bill 2007 (“Bill”).
2. The HKBA has concerns over clause 5 of the Bill and invites the Administration to reconsider its position thereon.
3. By clause 5 of the Bill, the Administration proposes that a provision be added to the Prevention of Bribery Ordinance (Cap. 201) (“POBO”) to the effect that: (1) when, upon investigation by the Independent Commission Against Corruption (“ICAC”), there is a reason to suspect that the Chief Executive (“CE”) may have committed an offence under the POBO, the Commissioner of ICAC may refer the matter to the Secretary for Justice (“SJ”); (2) where, as a result of such 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 Legislative Council for it to consider whether to take any action under Article 73(9) of the Basic Law. (See paragraphs 10 and 11 of the LegCo Brief and clause 5 of the Bill.)
4. The HKBA had previously expressed its views on the application of the POBO to the CE in a paper dated 31 October 2005 (LegCo Paper CB(2)248/05-06 (02)) (“Bar’s Paper”). Amongst others, the HKBA suggested that an office of independent counsel (“Office of Independent Counsel”) should be established. The relevant part of the Bar’s Paper reads as follows:

“..... The Bar sees merit in the establishment of an office of independent counsel .... Whilst this may not be modelled on the approach seen in the United States for investigating alleged violations of federal law of the President of the United States and other senior officials, some inspiration may be taken from this. The Bar suggests that, bearing in mind Art 73(9)

of the Basic Law of the HKSAR regarding impeachment of the Chief Executive of the HKSAR, a person such as the Chief Justice of the Court of Final Appeal can appropriately be vested with the power of appointing such and independent counsel from qualified individuals including senior counsel. (The person does not have to be the CJ, it could be a committee of judges - as in the US. This is a matter that can be considered.) ..... Provisions may be made for the report of the independent counsel be presented to the Secretary for Justice for decision on prosecution and if no decision is made within a specified period, the report will be presented to the Legislative Council in confidence; and if the Secretary for Justice decides against a prosecution, the Legislative Council may resolve to require the presentment of the report. The Legislative Council may then after considering the report resolve whether the course prescribed under Art 73(9) of the Basic Law of the HKSAR ought to be taken.”

5. The above recommendation was previously made by the HKBA when it considered whether it is appropriate to require the ICAC to investigate complaints of bribery or misconduct in public office against an incumbent Chief Executive of the HKSAR. The Bar notes that the Administration maintains the view that the ICAC is the appropriate body to conduct such investigation. As stated in paragraph 8 of the Bar’s Paper, the HKBA takes a different view.
6. More importantly, even if the Administration maintains the view that the investigation may be conducted by the ICAC, the Bar remains of the view that the establishment of an Office of Independent Counsel is desirable as it can perform the following important role in an independent manner:
  - (1) supervise the investigation conducted by the ICAC;
  - (2) report on the result of the investigation and make such appropriate recommendations (including whether or not to prosecute) as it may see fit.
7. Clause 5 to the Bill only deals with the disclosure issue in that it seeks to empower the SJ to make disclosure to the Legislative Council without contravening section 30 of the POBO. (See paragraph 11 of the LegCo Brief.) It does not address the issue of independence or perceived independence.

8. Under Article 57 of the Basic Law of the HKSAR, the ICAC is accountable to the CE. Further, although Article 63 of the Basic Law of the HKSAR stipulates that the Department of Justice shall control criminal prosecutions free from any interference, the general public does very much perceive the SJ to be part of the Administration. This public perception is understandable since one of the SJ's roles after all is the chief legal adviser of the Administration headed by the CE. In the circumstances, although the decision to prosecute or otherwise should remain with the SJ, the establishment of the Office of Independent Counsel will help to ensure public confidence in the entire process.

Hong Kong Bar Association  
14 April 2008