

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

**Follow-up actions arising from the discussion
at the Bills Committee meeting on 15 April 2008**

Purpose

This paper sets out the Administration's :

- (a) proposed committee stage amendments (CSAs) (*see paragraphs 2 and 3 below*); and
- (b) response to possible public perception that the Independent Commission Against Corruption (ICAC) may not conduct its investigation into a corruption complaint against the Chief Executive (CE) independently and impartially (*see paragraphs 4 to 10 below*).

(A) CSAs proposed by the Administration

2. To address Members' concern about immunity for them for disclosure of information in the referral of the Secretary for Justice (SJ) in the course of discharging their constitutional function under Article 73(9) of the Basic Law (BL), the Administration would like to propose the CSAs at **Annex A**. These CSAs :

- (a) allow disclosure of information in the SJ's referral by the Legislative Council (LegCo) Members to Secretary General, LegCo (SG) for the purpose of taking or considering whether to take any action under BL 73(9);
- (b) allow disclosure of information obtained under item (a) above by SG to staff members of the LegCo Secretariat provided that (i) SG is satisfied that the disclosure is reasonably necessary for the purpose of enabling the LegCo to take or consider whether to take any action under BL 73(9); and (ii) the LegCo President has given prior approval to the disclosure; and
- (c) provide that when giving approval under item (b) above, the LegCo President must be satisfied that the disclosure is reasonably necessary for the purpose of enabling the LegCo to take or consider whether to take any action under BL 73(9).

3. In addition, the Administration proposes to cover in the CSAs some amendments consequential to the enactment of the Organized and Serious Crimes Ordinance (Amendment of Schedule 2) Order 2007 (the Order) in December 2007. The Order sought to add those offences on “soliciting or accepting” bribes under existing sections 4(2), 5(2), 6(2) and 9(1) of the Prevention of Bribery Ordinance (POBO) to Schedule 2 to the Organized and Serious Crimes Ordinance (OSCO) with a view to better achieving the confiscation requirements of the United Nations Convention Against Corruption (UNCAC)¹. Consequential to the enactment of the Order, it becomes necessary to add the offences on soliciting or accepting bribes by the CE under new sections 4(2B) and 5(4) in the Prevention of Bribery (Amendment) Bill 2007 to Schedule 2 to the OSCO. By so doing, the HKSARG can apply to the court for orders under the OSCO for the freezing, seizure and confiscation of proceeds or property derived from these types of corruption offences.

(B) Response to possible public perception

4. We have looked into the proposals² raised by deputations/Members at previous Bills Committee meetings (Proposals), which are all mooted upon the perception that the ICAC may not conduct its investigation of the CE independently and impartially. 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. Some Members of the LegCo Subcommittee on Application of Certain Provisions of the POBO to the CE 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 to the ICAC, notwithstanding that it is accountable to the CE under BL 57, handling or investigating any corruption allegations against the CE as the ICAC is accountable to the office of the CE, and not to the post holder per se. Seen in this light, it looks more likely than not that members of the public should countenance that the ICAC can and will conduct its investigation of alleged offences by the CE independently and impartially, just like its investigation of alleged offences by any other member of the public.

¹ Pursuant to Article 31 of the UNCAC, States Parties are required, to the greatest possible extent under their domestic legal systems, to adopt measures for the identification, tracing, freezing, seizure and the eventual confiscation of proceeds derived from bribery.

² They are namely :

- (a) establishing an independent office/counsel to conduct investigation or supervise investigation (including making a recommendation to SJ as to whether or not to prosecute) into corruption complaints against the CE;
- (b) arranging the CE’s duties to be temporarily assumed by the Chief Secretary for Administration etc when the CE becomes the subject of a corruption complaint;
- (c) providing that the ICAC should not report to the CE when the CE becomes the subject of a corruption complaint; and
- (d) requiring the Commissioner, ICAC to refer all corruption complaints against the CE to the SJ, regardless of whether the ICAC’s investigation reveals a prima facie case.

5. While the public have general confidence in the work of the ICAC, some Members opine that there may be an issue of possible public perception that the ICAC may not conduct its investigation of alleged offences by the CE independently and impartially because of BL 57³. In this respect, we wish to reiterate that **BL 57 actually underpins the independence of the ICAC and that the Commissioner, ICAC (C,ICAC) is accountable to the office of the CE, not to the post holder per se.** BL 57 does not have the effect of empowering an incumbent CE to interfere with the investigation by the ICAC of a corruption complaint against him. Thus, if a person holding the office of the CE instructs the C,ICAC to disclose to him the details of a corruption complaint/investigation against him, the C,ICAC is not be obliged to comply with this instruction as it would not be one which can be lawfully given by a CE.

(a) Independent Investigation Committee chaired by the Chief Justice

6. BL 73(9) already provides 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 an investigation of the CE under the impeachment procedure.

(b) Independent investigation by the ICAC

7. As explained before, there are robust safeguards, both legislative and structural, to ensure the independence and integrity of the ICAC's investigation (see **Annex B** for details). There is no case to allege that the ICAC will not and cannot conduct its investigation independently and impartially if the target of complaint is the CE.

(c) Possible issues arising from the Proposals

8. We note that the Law Society has proposed establishing an independent ad hoc committee chaired by a retired judge and staffed by officers of the ICAC to investigate corruption complaints against the CE. The Bar Association has proposed the establishment of an Office of Independent Counsel to conduct the investigation or to supervise the investigation conducted by the ICAC and report on the investigation result and make recommendations including whether or not to prosecute. A member has also proposed -

- arranging the CE's duties to be temporarily assumed by the Chief Secretary for Administration etc when the CE becomes the subject

³ BL 57 provides that the ICAC shall function independently and be accountable to the CE. This requirement is also reflected in section 5(2) of the ICAC Ordinance which provides that the C,ICAC shall not be subject to the direction or control of any person other than the CE.

of a corruption complaint;

- requiring the C,ICAC to refer all corruption complaints against the CE to the SJ, regardless of whether the ICAC's investigation reveals a prima facie case; and
- providing that the ICAC should not report to the CE when the CE becomes the subject of a corruption complaint.

9. We consider that such Proposals would give rise to the following issues :

- The establishment of another body to conduct the investigation could **duplicate or compromise the role of the investigation committee to be chaired by the Chief Justice** under BL 73(9);
- It is wholly inappropriate to empower an Office of Independent Counsel to make recommendations on whether or not to prosecute. This may undermine **the SJ's constitutional role as the prosecuting agency**, which must be free from any interference as guaranteed under BL 63;
- ICAC has a mandatory duty under the ICAC Ordinance to investigate any alleged or suspected offence under the POBO. Establishment of another **investigation** authority might affect the discharge of the statutory duty by the ICAC (see **Annex B** for details);
- BL 53 already allows for a temporary arrangement to cater to the temporary loss of CE's ability to discharge his duties. It is doubtful whether it is the intention of BL 53 or BL as a whole to disallow a person holding the office of the CE to discharge CE's duties whenever there is a corruption complaint against the CE, and whether there would be a genuine short term loss of the ability to discharge duties under such circumstances;
- The CE has a unique constitutional status under the BL. He is the head of the HKSAR (BL 43) and HKSARG (BL 48). Disallowing the CE to discharge his duties merely upon receipt of a corruption complaint against him is inconsistent with the spirit of the "presumption of innocence" principle and is thus wholly inappropriate; and

- The BL has already provided for the SJ's constitutional role as the prosecuting agency (BL 63) as well as the mechanism for the temporary assumption of CE's duties by Chief Secretary for Administration etc (BL 53). Besides, BL 73(9) already provides for the mechanism for handling serious breach of law or dereliction of duty by the CE. It is wholly inappropriate to process any legislative proposals which essentially deal with the same matters in the BL, in the context of an ordinary amendment bill.

(d) ICAC is the most appropriate authority to investigate

10. Given the ICAC's expertise and proven track record, proper interpretation of BL 57, presence of robust safeguards to ensure the independence and integrity of investigation, we remain strongly of the view that the ICAC is the most appropriate authority to investigate a corruption offence suspected to have been committed by the CE. Such investigation should be subject to the prevailing mechanism, just as in the case of a corruption complaint against any other member of the public (see **Annex B** for details).

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Department of Justice
May 2008

PREVENTION OF BRIBERY (AMENDMENT) BILL 2007

COMMITTEE STAGE

Amendments to be moved by the Chief Secretary for Administration

Clause

Amendment Proposed

- 5 In the English text –
- (a) in the heading, by deleting “**Section**” and substituting “**Sections**”;
 - (b) by deleting “is added” and substituting “are added”.
- 5 By adding immediately after the proposed section 31AA –
- “31AB. Disclosure of information received under section 31AA by Members of Legislative Council etc.**
- (1) Notwithstanding section 30, a Member of the Legislative Council may disclose any information received under section 31AA to the Secretary General for the purpose of enabling the Legislative Council to take, or to consider whether to take, any action under Article 73(9) of the Basic

Law.

(2) Notwithstanding section 30, the Secretary General may, with the prior approval of the President of the Legislative Council, disclose any information received under subsection (1) to any member of the staff employed in the Legislative Council Secretariat if the Secretary General is satisfied that the disclosure is reasonably necessary for the purpose of enabling the Legislative Council to take, or to consider whether to take, any action under Article 73(9) of the Basic Law.

(3) The President of the Legislative Council shall not approve a disclosure under subsection (2) unless the President is satisfied that the disclosure is reasonably necessary for the purpose of enabling the Legislative Council to take, or to consider whether to take, any action under Article 73(9) of the Basic Law.

(4) In this section, “Secretary General” (秘書長) has the meaning assigned to it in section 2 of The Legislative Council Commission Ordinance (Cap. 443).”.

(1) Schedule 2 to the Organized and Serious Crimes Ordinance (Cap. 455) is amended, in paragraph 9, by repealing –

“section 5(1) bribery for giving assistance, etc. in regard to contracts”

and substituting –

“section 4(2A) bribery of Chief Executive

section 4(2B) soliciting or accepting bribes in the capacity of Chief Executive

section 5(1) bribery of public servant for giving assistance, etc. in regard to contracts”.

(2) Schedule 2 is amended, in paragraph 9, by adding –

“section 5(3) bribery of Chief Executive for giving assistance, etc. in regard to contracts

section 5(4) soliciting or accepting bribes in the capacity

of Chief Executive
for giving assistance,
etc. in regard to
contracts”

after –

“section 5(2) soliciting or accepting
bribes in the capacity
of a public servant for
giving assistance, etc.
in regard to
contracts”.”.

Safeguards to ensure independence of investigation

(A) Legislative Safeguards

ICAC obliged by law to investigate

- The C,ICAC has a mandatory duty under section 12(b)(ii) of the ICACO to investigate any alleged or suspected offence under the POBO. He is **obliged to investigate corruption offences suspected to have been committed by any person including the CE**. If C,ICAC deliberately curtailed or interfered in an investigation of the CE in order to dishonestly benefit him, then he would commit the offence of misconduct in public office.

ICAC prohibited by law to make disclosure

- The **ICAC is prohibited by law to disclose** to the CE the presence of, or details about a corruption complaint/investigation against the CE. 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 30¹ of the POBO**. In addition, **section 17² of the Official Secrets Ordinance (OSO)**

¹ **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.

² **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.

prohibits disclosure of information which impedes the prevention or detection of offences or apprehension or prosecution of suspected offenders. If the C,ICAC chose to act to the contrary either upon the CE's instruction or of his own volition, he would commit an offence under section 30 of the POBO and/or section 17 of the OSO as 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 was unlawful in the first place.

CE prohibited by law to interfere with investigation

- The CE is prohibited by law to interfere with the investigation by ICAC of a corruption complaint against him. 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 in public office**. Depending upon the circumstances, it may also constitute the **offence of perverting the course of public justice** or the offence of **obstructing ICAC officers in executing their duties** under section 13A of the ICACO. If the C,ICAC did comply with the unlawful instruction, he might commit an offence under section 30 of the POBO and/or section 17 of the OSO.
- Although the ICAC shall be accountable to the CE under BL 57, it would clearly be **unlawful for the CE to misuse BL 57 to interfere with the investigation** and to conduct himself in a way which constitutes the common law offence of misconduct in public office, perverting the course of public justice, etc.

(B) Structural safeguards

- As with all ICAC investigation, any decision by the ICAC to close the file and any decision by the Department of Justice (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. The establishment of a body to "supervise" the ICAC's

investigation is therefore unnecessary and could duplicate or compromise the role of the ORC. Indeed, when a person makes a corruption complaint to the ICAC against the CE, he is free to lodge an identical complaint with 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. This "parallel" arrangement would effectively deter any cover-up or abuse of powers in the investigation process as such misconduct is doomed to come to light sooner rather than later.