

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

**Follow-up actions arising from the discussion
at the meeting on 29 October 2007**

Purpose

At the meeting on 29 October 2007, the Bills Committee on Prevention of Bribery (Amendment) Bill 2007 (the Bill) requested the Administration to provide a response to the following issues -

- (a) comparison of the Administration's proposal to extend the coverage of the Prevention of Bribery Ordinance (Cap. 201) (POBO) to the Chief Executive (CE) previously submitted to the Subcommittee on Application of Certain Provisions of the Prevention of Bribery Ordinance to the Chief Executive of the Panel on Constitutional Affairs (Subcommittee) and that made under the Bill;
 - (b) Commissioner, Independent Commission Against Corruption (C,ICAC), should refer a corruption complaint against the CE to the Legislative Council (LegCo) if he had reason to suspect that the CE might have committed an offence under the POBO, instead of referring the complaint to the Secretary for Justice (SJ), in order to enable the LegCo to take any action provided under Article 73(9) of the Basic Law (BL). Alternatively, the SJ should be required to make a report to the LegCo on the reason(s) for not referring a corruption complaint against the CE received from the C,ICAC to the LegCo. Details of the report should include essential facts of the complaint, such as findings of the Independent Commission Against Corruption (ICAC)'s investigation;
 - (c) need to provide in POBO immunity to the LegCo Members for inadvertently disclosing information contained in the SJ's referrals made under new section 31AA outside the proceedings of the LegCo and its committees; and
 - (d) the extent to which the Central People's Government (CPG) had been involved in the formulation of the Bill, if any.
2. We have consulted the Department of Justice (DoJ) and the ICAC and the Administration's response is set out in the following paragraphs.

(A) Comparison between the proposals presented to the Subcommittee and those in the Bill

3. On 1 November 2005, we consulted the Subcommittee on the proposal to apply certain provisions of the POBO to the CE, which had been drawn up taking into account the unique constitutional status of the CE, the requirement for the CE to declare assets, and the mechanism to handle serious breach of law by the CE under BL 73(9). Specifically, we proposed –

- (a) to apply sections 4, 5 and 10 of the POBO to the CE. This would impose restrictions on the CE in respect of solicitation and acceptance of advantages and possession of unexplained property;
- (b) to introduce a new provision to bind any person who offers any advantage to the CE in line with section 8(1) of the POBO;
- (c) to amend section 10 of the POBO to specify that if the CE is accused of possessing unexplained property, the court shall take account of the CE's assets declared to the Chief Justice (CJ) pursuant to BL 47(2) in determining whether the CE has given a satisfactory explanation under section 10(1); and
- (d) to add a new section to enable the SJ to refer to the LegCo a report of the CE suspected to have committed the POBO offences for possible follow-up under BL 73(9).

4. All these proposals save for the one concerning section 8(1) of the POBO have been reflected in the Bill. Details are set out below -

- (a) Clause 2 creates an offence identical to section 4(2) of the POBO that will apply to the CE so that he will be subject to the POBO offence of bribery. Any person who offers bribes to the CE will also commit an offence;
- (b) Clause 3 creates an offence identical to section 5(2) of the POBO that will apply to the CE so that he will be subject to the POBO offence of bribery in respect of public sector contracts. Any person who offers bribes to the CE in respect of public sector contracts will also commit an offence;
- (c) Clause 4 amends section 10 of the POBO so that the CE or the former CE will be subject to the offence of maintaining a standard of living or controlling property disproportionate to his emoluments. It also provides that where the CE or the former CE is accused of having committed a section 10 offence, the court shall take into account assets that the CE or the former CE declared to the CJ; and

- (d) Clause 5 adds a new section 31AA to the POBO to enable the C,ICAC to refer corruption-related complaints against the CE to the SJ. It also enables the SJ to refer such complaints to the LegCo for it to consider whether to take any action under BL 73(9).

5. At present, section 8(1) of the POBO makes it an offence for any person, who, without lawful authority or reasonable excuse, 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. We have examined the feasibility of creating an offence similar to that created by section 8(1) to stipulate that any person who, without lawful authority or reasonable excuse, while “having dealings of any kind with the Government”, offers any advantage to the CE, shall be guilty of an offence.

6. In the case of *Sin Kam-wah v HKSAR* [2005] 2 HKLRD 375, the Court of Final Appeal said (at paragraphs 58 – 60) -

“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.”.

7. Given the broad meaning of the term “dealings of any kind”, the new offence could have the effect of subjecting all persons having dealings of any kind with any government department to an offence whenever they offer an advantage to the CE; and the onus is on them to establish whether they have “lawful authority or reasonable excuse” to so offer. 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. This could be too onerous on well-meaning citizens offering souvenirs to the CE out of courtesy or respect, and would cause disturbance to members of the public. 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. Having carefully examined the implications, we decided not to include in the Bill an offence similar to that found in section 8(1).

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

(B) Referral of a corruption complaint against the CE

8. Under section 30 of the POBO, a person who, knowing or suspecting that an investigation in respect of a POBO offence alleged or suspected to have been committed under Part II of the POBO was taking place, without lawful authority or reasonable excuse, discloses the subject or details of the investigation commits an offence.

9. In view of this prohibition, we consider it necessary to add a new provision (i.e. 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. 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). It should be noted that this new section 31AA is an **empowering provision**, which does not mean that the SJ must refer the case to the LegCo. Rather, it serves to ensure that the SJ would not be prevented from referring corruption complaints against the CE and the findings of ICAC's investigation to the LegCo by section 30 of the POBO. It also enables the LegCo to obtain the essential facts of a complaint against the CE so that Members may consider invoking the mechanism of investigation under BL 73(9).

10. At the Bills Committee meeting on 29 October 2007, some Members suggested that the C,ICAC should refer a corruption complaint against the CE to the LegCo if he had reason to suspect that CE might have committed an offence under POBO or alternatively, the SJ should be required to make a report to the LegCo on the reason(s) for not referring a corruption complaint against the CE received from the C,ICAC to the LegCo.

11. The duties of the ICAC are set out in section 12 of the ICAC Ordinance. These include, among others, the duty to investigate any alleged or suspected offences under the POBO, receive and consider complaints alleging corrupt practices and investigate those complaints that the C,ICAC considers practicable. However, the power to prosecute after completion of investigations is vested with the SJ by virtue of BL 63. This division of function is emphasised by the requirement in section 31 of the POBO, i.e. no prosecution for an offence under Part II of POBO shall be instituted except with the consent of the SJ.

12. Members will appreciate that the ICAC has to be given extensive investigative powers in order to discharge its mandate to keep corruption in check. Such powers however have to be subject to an equally elaborate system of checks and balance to prevent any possible abuse and to instill public confidence. The Operations Review Committee (ORC) of the ICAC, which

comprises Executive Council Members, LegCo Members as well as other distinguished personalities, is tasked to ensure that all corruption complaints should be handled properly. The ORC is responsible for receiving from the ICAC information about all corruption complaints and the manner in which the C,ICAC is dealing with them. Regardless of whether the ICAC's investigation would point towards substantiating an allegation or otherwise, the C,ICAC will submit a full report to the satisfaction of the ORC. Where the SJ decides against prosecution upon examination of the ICAC's investigation report, the ICAC will report the proposal to end an investigation or close a case to the ORC.

13. The existing system of checks and balance has been operating smoothly and effectively over the years and has earned the trust of members of the public. There is every reason to follow the existing practice for the ICAC to seek legal advice from the SJ in handling any corruption complaint. The ICAC, being the investigative authority, and being made accountable to the CE by the BL, should not be tasked to decide whether or not to prosecute or make a referral to the LegCo where there is reason to suspect that the CE may have committed an offence under the POBO. The SJ, with his independence and impartiality, has already been entrusted with the responsibility to decide whether or not to institute prosecution in a particular case. There is no ground to doubt that he is not capable of doing so in the case of making a referral to the LegCo. It should also be noted that the new section 31AA will not compromise the SJ's constitutional function to control criminal prosecutions free from any interference under BL 63. The SJ retains his full discretion and power to prosecute. Any prosecution decision will be made in accordance with the established prosecution policy. There will, therefore, be no reason to question the independence and impartiality of the SJ in making the decision to prosecute or to refer the case to the LegCo.

14. 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. There is no need to require the SJ to make a report to the LegCo on the reason(s) for not making a referral.

(C) Immunity for inadvertent disclosure of information

15. The new 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 would be under “lawful authority” to use the information contained in the SJ’s referral in the course of discharging the constitutional function under BL 73(9).

16. As an offence under section 30 of the POBO is one of mens rea requiring proof of knowledge or recklessness², there is a need for the prosecution to prove that the defendant intentionally did acts which constitute disclosure of the information referred to in section 30(1)(a) or (b) of the POBO whilst knowing or suspecting that an investigation in respect of an offence alleged or suspected to have been committed under Part II of the POBO was taking place at the time of disclosure. A disclosure otherwise than with this mens rea could thus not fall within the scope of section 30. As a result, we do not consider it necessary to add an express provision in the Bill to provide Members with immunity for inadvertently disclosing information contained in the SJ’s referrals made under new section 31AA.

(D) Involvement of the CPG

17. BL 47 provides that the CE must be a person of integrity, dedicated to his duties. The CPG thus does not have any objection to the Administration’s proposal to apply anti-corruption regulation to the office of the CE. The legislative proposals in the Bill have been formulated by the Administration taking into account the unique constitutional status of the CE, the requirement for the CE to declare assets, and the mechanism to handle serious breach of law by the CE under BL 73(9).

**Administration Wing, Chief Secretary for Administration’s Office
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² See Ian McWalters, “Bribery and Corruption Law in Hong Kong”, LexisNexis Butterworths (2003), at p129.