

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

**Follow-up actions arising from the discussion
at the meeting on 15 November 2007**

Purpose

At the meeting on 15 November 2007, the Bills Committee on Prevention of Bribery (Amendment) Bill 2007 requested the Administration to provide a response to the following issues -

- (a) detailing measures taken and/or would be taken to allay Members' concerns about the referral mechanism;
- (b) clarifying whether there was any legal provision similar to section 30 of the Prevention of Bribery Ordinance (POBO) prohibiting the Secretary for Justice (SJ) from referring a case that the Chief Executive (CE) might have committed a serious crime, other than that under the POBO, to the Legislative Council (LegCo); if so, whether consideration had been given to any legislative amendment to enable the SJ to do so; and
- (c) re-considering introducing a new provision to bind any person who offered any advantage to the CE in line with section 8(1) of the POBO, taking into account Members' views.

2. We have consulted the Department of Justice (DoJ) and the Independent Commission Against Corruption (ICAC) and the Administration's response to paragraph 1(a) above is set out in the subsequent paragraphs. The response to paragraphs 1(b) and (c) above will be submitted to the Bills Committee for discussion later on.

3. Section 30(1) 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 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.

4. 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 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.

5. The prohibition on disclosure under section 30(1) only exists when the investigation is still in a covert stage in order to protect the integrity of the investigation and the reputation of the subject person, as the investigation is embarked based on mere suspicion. It is no longer 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.

6. 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 Basic Law (BL) 73(9). We have therefore proposed 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; 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).

7. The new 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. It should also be noted that this section 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 involving 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).

8. 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. Allegation against the CE is a serious matter and the BL 73(9) procedure should not be invoked lightly. The purpose of the new section 31AA is to empower 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.

9. As the prosecuting authority of the Hong Kong Special Administrative Region, 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 new 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.

10. This system provides sufficient safeguards and there is no question of any corruption complaint involving the CE being covered up. First, 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). 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. The ORC comprises distinguished non-officials and is tasked to ensure that all corruption complaints, including any against the CE, will be handled properly. Second, as stated before, there is no prohibition against a complainant to the ICAC also making an identical complaint to the LegCo provided he does not reveal the ICAC's investigation.

11. 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), alter the statutory role and duty of the ICAC, and remove an important safeguard against vexing the CE with referrals which could not have crossed the requisite threshold.

12. Some Bills Committee Members have also expressed concern that the LegCo does not have the expertise or the resources to carry out its own investigation on a corruption complaint against the CE. It should be noted that under BL 73(9), the LegCo may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation of any alleged serious breach of law or dereliction of duty on the part of the CE and reporting its findings to the LegCo. If the committee considers the evidence sufficient to substantiate such charges, the LegCo may pass an impeachment motion and report it to the Central People's Government for decision.

**Administration Wing, Chief Secretary for Administration's Office
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