

## **LEGISLATIVE COUNCIL BRIEF**

### **PREVENTION OF BRIBERY (AMENDMENT) BILL 2007**

#### **INTRODUCTION**

At the meeting of the Executive Council on 27 June 2007, the Council ADVISED and the Acting Chief Executive ORDERED that the Prevention of Bribery (Amendment) Bill 2007, at Annex, should be introduced into the Legislative Council (“LegCo”) to apply certain provisions of the Prevention of Bribery Ordinance (Cap. 201) (“POBO”) to the Chief Executive (“CE”).

Annex

#### **JUSTIFICATIONS**

2. The POBO contains provisions for prohibiting in certain circumstances the offer, solicitation or acceptance of advantages by any person. Some provisions target persons employed in the public sector and some in the private sector. In respect of the public sector, the POBO creates a broad class of employee known as “public servants” and a much narrower subset known as “prescribed officers”. “Public servants” include, amongst others, prescribed officers and employees of a public body. “Prescribed officers” include, amongst others, principal officials, judicial officers and civil servants. Sections 4 and 5 of the POBO create specific offences in respect of “public servants”, while section 10 creates an offence in respect of “prescribed officers”, as detailed below –

- (a) Section 4 – this section makes it an offence for any public servant, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, to solicit or accept any advantage as an inducement to or reward for or otherwise on account of his acting in his capacity as a public servant;
- (b) Section 5 – this section makes it an offence for any public servant, without lawful authority or reasonable excuse, to solicit or accept any advantage as an inducement to or reward for or otherwise on account of giving assistance in regard to public sector contracts; and
- (c) Section 10 – this section makes it an offence for any “prescribed officer” or former “prescribed officer” to maintain a standard of

living or control property disproportionate to his emoluments which he cannot satisfactorily explain.

3. At present, the CE is prohibited from offering or accepting bribes under the common law offence of bribery. Furthermore, under Article 47 of the Basic Law (“BL”), he must be a person of integrity, and shall declare his or her assets to the Chief Justice of the Court of Final Appeal (“CJ”). An impeachment mechanism is provided under BL 73(9) to handle charges of serious breach of law or dereliction of duty by the CE. Notwithstanding the existing anti-corruption regime, the CE has agreed to take the extra step of extending the application of certain POBO provisions to himself within the framework of the BL, in order to demonstrate Government’s commitment to a clean government.

4. In considering the extent to which the POBO provisions could be extended to apply to the CE, we have taken into account the unique constitutional status of the CE under the BL. The CE is appointed by the Central People’s Government (“CPG”) and is both the head of the Hong Kong Special Administrative Region (“HKSAR”) and the HKSAR Government. He is accountable to the CPG and the HKSAR in accordance with the provisions of the BL.

## **PROPOSAL**

### **Application of sections 4 and 5 of POBO to the CE**

5. We **propose** to introduce legislative amendments to create offences similar to those in sections 4 and 5 of the POBO and apply them to the CE (**Clauses 2 and 3**). The application of these sections to the CE would impose restrictions on the CE in respect of any bribery acts of solicitation and acceptance of advantages. Any person who offers bribes to the CE would also commit an offence.

6. Under the amended section 4, the CE commits an offence if he, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his acting in his capacity as the CE.

7. Under the amended section 5, the CE commits an offence if he, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his giving assistance in regard to public sector contracts.

## **Application of section 10 of POBO to the CE**

8. We also **propose** to amend section 10 of POBO so that it applies to the CE. If there is sufficient evidence to prove that any CE or former CE maintains a standard of living above that which is commensurate with his present or past official emoluments; or that he is in control of pecuniary resources or property disproportionate to his present or past emoluments, and he is unable to give a satisfactory explanation to the court, the CE or former CE will be guilty of an offence and be liable to legal sanction, as in the case for “prescribed officers” (**Clause 4**).

9. Pursuant to BL 47(2), the CE, on assuming office, shall declare his or her assets to the CJ. The CE is the only person in the HKSAR who is required by the BL to make a formal declaration of his assets. This declaration requirement under the BL will provide useful information in determining whether the CE or the former CE is maintaining a standard of living or controlling property disproportionate to his emoluments. We therefore **propose** to specify in the Bill that should any CE or former CE be accused of having committed an offence under section 10, the court shall take into account the assets declared by the CE or former CE when he assumes office.

## **Interface with the impeachment mechanism under BL 73(9)**

10. We **propose** that a new provision be added to the POBO to provide that when, upon investigation by the Independent Commission Against Corruption (“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 Secretary for Justice (“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) (**Clause 5**).

11. This new provision is essential for the proper handling of a corruption complaint against the CE. 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. The proposed provision ensures 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). This proposed provision 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 will not be prevented from referring corruption complaints against the CE to the LegCo. Also, the referral by the SJ is not meant to compel the LegCo to invoke the impeachment procedures, and hence, does not compromise the right of the LegCo to consider invoking BL 73(9).

## **THE BILL**

12. The key provisions of the Bill are explained 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.
  - (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).

## **LEGISLATIVE TIMETABLE**

13. The legislative timetable will be –

Publication in the Gazette

6 July 2007

First Reading and commencement of the Second Reading debate	11 July 2007
Resumption of the Second Reading debate, committee stage and Third Reading	to be notified

## **IMPLICATIONS OF THE PROPOSAL**

14. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no economic, financial, civil service, productivity, sustainability or environmental implications. The proposal extends the coverage of the POBO to the CE but other than that, it does not affect the current binding effect of the POBO.

## **PUBLIC CONSULTATION**

15. We have consulted the LegCo Panel on Constitutional Affairs and its Subcommittee on Application of Certain Provisions of the POBO to the CE. The Subcommittee presented a report to the Panel in February 2006.

## **PUBLICITY**

16. A press release will be issued and a spokesman would be available to handle media and public enquiries.

## **ENQUIRIES**

17. Enquiries relating to this Legislative Council Brief may be directed to Miss Shirley Yung, Assistant Director of Administration at telephone number 2810 3503.

**Administration Wing**  
**Chief Secretary for Administration's Office**  
5 July 2007

A BILL

To

Amend the Prevention of Bribery Ordinance –

- (a) to apply to the Chief Executive the provisions of sections 4 and 5 of that Ordinance that are now applicable to prescribed officers;
- (b) to apply to the Chief Executive section 10 of that Ordinance;
- (c) to enable the Commissioner of the Independent Commission Against Corruption and the Secretary for Justice to refer a matter involving an offence under that Ordinance suspected to have been committed by the Chief Executive to the Secretary for Justice and to the Legislative Council respectively; and
- (d) to provide for matters connected with these purposes, and to make related amendments to the Organized and Serious Crimes Ordinance.

Enacted by the Legislative Council.

**1. Short title**

This Ordinance may be cited as the Prevention of Bribery (Amendment) Ordinance 2007.

**Prevention of Bribery Ordinance**

**2. Bribery**

Section 4 of the Prevention of Bribery Ordinance (Cap. 201) is amended by adding –

“(2A) Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to the Chief Executive as an inducement to or reward for or otherwise on account of the Chief Executive’s –

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as the Chief Executive;
- (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by the Chief Executive in his capacity as the Chief Executive or by any public servant in his capacity as a public servant; or
- (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

shall be guilty of an offence.

(2B) If the Chief Executive, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his –

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as the Chief Executive;
- (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by the Chief Executive in his capacity as the Chief Executive

or by any public servant in his capacity as a public servant; or

- (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

he shall be guilty of an offence.”.

### **3. Bribery for giving assistance, etc. in regard to contracts**

Section 5 is amended by adding –

“(3) Any person who, without lawful authority or reasonable excuse, offers any advantage to the Chief Executive as an inducement to or reward for or otherwise on account of the Chief Executive’s giving assistance or using influence in, or having given assistance or used influence in –

- (a) the promotion, execution or procuring of –
  - (i) any contract with a public body for the performance of any work, the providing of any service, the doing of any thing or the supplying of any article, material or substance; or
  - (ii) any subcontract to perform any work, provide any service, do any thing or supply any article, material or substance required to be performed, provided, done or supplied under any contract with a public body; or
- (b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in



any such contract or subcontract as is referred to in paragraph (a), shall be guilty of an offence.

(4) If the Chief Executive, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his giving assistance or using influence in, or having given assistance or used influence in –

(a) the promotion, execution or procuring of; or

(b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in,

any such contract or subcontract as is referred to in subsection (3)(a), he shall be guilty of an offence.”.

#### **4. Possession of unexplained property**

(1) Section 10(1) is amended by adding “the Chief Executive or” after “having been”.

(2) Section 10 is amended by adding –

“(1A) If the accused in any proceedings for an offence under subsection (1) is or has been the Chief Executive, the court, in determining whether the accused has given a satisfactory explanation as provided in that subsection, shall take into account assets that he declared to the Chief Justice pursuant to Paragraph 2, Article 47 of the Basic Law.

(1B) The Chief Justice shall disclose to a court information about assets declared to him pursuant to Paragraph 2, Article 47 of the Basic Law if the disclosure is required by an order made by the court for the purposes of subsection (1A).”.

#### **5. Section added**

The following is added immediately after section 31 –

**“31AA. Referral of matter involving offence suspected to have been committed by Chief Executive**

(1) Notwithstanding section 30, where the Commissioner has reason to suspect that the Chief Executive may have committed an offence under this Ordinance, the Commissioner may refer the matter to the Secretary for Justice for him to consider whether to exercise his power under subsection (2).

(2) Notwithstanding section 30, where as a result of a referral made under subsection (1), the Secretary for Justice has reason to suspect that the Chief Executive may have committed an offence under this Ordinance, he may refer the matter to the Legislative Council for it to consider whether to take any action under Article 73(9) of the Basic Law.”.

**Organized and Serious Crimes Ordinance**

**6. Other specified offences**

(1) Schedule 2 to the Organized and Serious Crimes Ordinance (Cap. 455) is amended, in paragraph 9, by adding “and (2A)” after “section 4(1)”.

(2) Schedule 2 is amended, in paragraph 9, by adding “or the Chief Executive” after “public servant”.

(3) Schedule 2 is amended, in paragraph 9, by adding “and (3)” after “section 5(1)”.

**Explanatory Memorandum**

The main object of this Bill is to amend the Prevention of Bribery Ordinance (Cap. 201) (“the Ordinance”) to make provision relating to the solicitation and acceptance of advantages by the Chief Executive by extending sections 4, 5 and 10 of the Ordinance to the Chief Executive.

2. Section 4(2) of the Ordinance makes it an offence for a prescribed officer to solicit or accept any advantage as a reward for his performing any act in his

capacity as a prescribed officer. It is also an offence under section 4(1) of the Ordinance for a person to offer such an advantage to a prescribed officer. Clause 2 adds to section 4 of the Ordinance similar provisions that apply in relation to the Chief Executive and a person who offers such an advantage to the Chief Executive.

3. Section 5(2) of the Ordinance makes it an offence for a prescribed officer to solicit or accept any advantage as a reward for his giving assistance in the execution of a contract. It is also an offence under section 5(1) of the Ordinance for a person to offer such an advantage to a prescribed officer. Clause 3 adds to section 5 of the Ordinance similar provisions that apply in relation to the Chief Executive and a person who offers such an advantage to the Chief Executive.

4. Under section 10 of the Ordinance, a prescribed officer who maintains a standard of living above that which is commensurate with his present or past official emoluments is, unless he gives a satisfactory explanation to the court, guilty of an offence. Clause 4 amends section 10 of the Ordinance so that it is applicable to the Chief Executive. It further provides that the court, in determining whether the Chief Executive has given a satisfactory explanation, shall take into account the Chief Executive's assets declared to the Chief Justice pursuant to the Basic Law, and that the Chief Justice shall disclose information about those assets if there is a court order requiring such disclosure.

5. Clause 5 adds section 31AA to the Ordinance. It enables the Commissioner of the Independent Commission Against Corruption to refer a matter involving an offence suspected to have been committed by the Chief Executive to the Secretary for Justice for him to consider whether to refer the matter to the Legislative Council. It also enables the Secretary for Justice to refer such a matter to the Legislative Council for it to consider whether to take any action under Article 73(9) of the Basic Law.

6. Clause 6 makes related amendments to Schedule 2 to the Organized and Serious Crimes Ordinance (Cap. 455).