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Report of the Bills Committee on Prevention of Bribery (Amendment) Bill 2007

Purpose

This paper reports on the deliberations of the Bills Committee on Prevention of Bribery (Amendment) Bill 2007 (the Bill).

Background

2. At present, the Chief Executive (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 assets to the Chief Justice of the Court of Final Appeal (CJ) when he assumes office. An impeachment mechanism is provided under BL 73(9) to handle charges of serious breach of law or dereliction of duty by CE.

3. Notwithstanding the existing anti-corruption regime, CE has agreed to extend the application of certain provisions of the Prevention of Bribery Ordinance (Cap. 201) (POBO) to himself within the framework of BL to demonstrate Government's commitment to a clean government.

The Bill

4. The Bill seeks to extend the application of sections 4, 5 and 10 of POBO to CE as follows -

- (a) clause 2 creates an offence identical to section 4(2) of POBO that will apply to CE so that he will be subject to the POBO offence of bribery. Any person who offers bribes to CE will also commit an offence;

- (b) clause 3 creates an offence identical to section 5(2) of POBO that will apply to 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 CE in respect of public sector contracts will also commit an offence; and
- (c) clause 4 amends section 10 of POBO so that CE or a 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 CE or a former CE is accused of having committed a section 10 offence, the court shall take into account assets that CE or the former CE declared to CJ.

5. The Bill also seeks to add a new section 31AA to POBO under clause 5 to provide that when, upon investigation by the Independent Commission Against Corruption (ICAC), there is reason to suspect that CE may have committed an offence under POBO, the Commissioner, ICAC (C, ICAC) may refer the matter to the Secretary for Justice (SJ). Where, as a result of such a referral, SJ has reason to suspect that CE may have committed an offence under POBO, he may refer the matter to the Legislative Council (LegCo) for it to consider whether to take any action under BL 73(9). BL 73(9) provides that -

“If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council 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 and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision.”

The Bills Committee

6. At the House Committee meeting on 5 October 2007, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

7. Under the chairmanship of Hon Jasper TSANG Yok-sing, the Bills Committee has held nine meetings with the Administration and received views from the Hong Kong Bar Association and the Law Society of Hong Kong on the Bill.

Deliberations of the Bills Committee

Referral of a corruption complaint against CE

8. Under section 30(1) of POBO, 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 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.

9. In addition, section 30(2) provides that the restriction on disclosure of information in section 30(1) does not apply to the following -

- (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 a certain order, notice, etc. by the court in respect of the subject person, such as a notice requiring him to surrender to C, ICAC his travel documents.

10. 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.

11. In view of the restriction under section 30(1) of POBO, the Administration has proposed to add a new section 31AA to POBO to ensure that SJ will not be prevented from referring corruption complaints against CE and the findings of ICAC's investigation to LegCo for it to consider whether to take any action under BL 73(9). New section 31AA reads as follows -

- "(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."

12. The Administration has pointed out that the proposed new section 31AA does not have the effect of excluding any person from making a complaint to LegCo. Subject to the restriction under section 30(1) of POBO, any person may refer information involving a corruption complaint against CE to LegCo for it to consider whether to take any action under BL 73(9). There is also no prohibition against a person who makes a corruption complaint to ICAC to also make an identical complaint to LegCo before, after or at the same time when the complaint is made to ICAC, so long as he does not reveal that this matter is subject to the ICAC's investigation. Enabling SJ to refer a corruption complaint against CE to LegCo will not compromise the right of LegCo to consider invoking the investigation and impeachment procedures under BL 73(9).

13. Hon CHEUNG Man-kwong and Hon Martin LEE are of the view that in order to safeguard the independence of LegCo in carrying out its constitutional duty under BL 73(9), C, ICAC should refer a corruption complaint against CE to LegCo or alternatively, SJ should be required to make a report to LegCo on the reason(s) for not referring a corruption complaint against CE received from C, ICAC to LegCo.

14. The Administration has advised that the duties of ICAC are set out in section 12 of ICAC Ordinance (Cap. 204). These include, among others, the duty to investigate any alleged or suspected offences under POBO, receive and consider complaints alleging corrupt practices and investigate those complaints that C, ICAC considers practicable. However, the power to prosecute after completion of investigations is vested with SJ by virtue of BL 63. This division of function is emphasised by the requirement in section 31 of POBO, i.e. no prosecution for an offence under Part II of POBO shall be instituted except with the consent of SJ. As the prosecuting authority of the Hong Kong Special Administrative Region (HKSAR), SJ receives information on all criminal investigations of serious offences that could lead to prosecution. Where the information relates to alleged POBO offences involving CE, SJ may decide to take prosecution action on the strength of the information. Alternatively, SJ may refer the case to LegCo for it to consider whether to take any action under BL 73(9) if SJ has reason to suspect that CE may have committed a serious breach of POBO (this being made possible with the removal of the legal prohibition to do so by the proposed new section 31AA). Which course SJ should take is an important discretion which SJ has to exercise with great care on a case by case basis, and for which SJ is accountable.

15. The Administration assures there is no question of any corruption complaint involving CE being covered up. First, with all ICAC investigations, any decision by ICAC to close the file and any decision by the Department of Justice not to prosecute will be reported fully and discussed at the Operations Review Committee (ORC) of ICAC. If the investigation involves CE, the question of whether SJ should refer the case to LegCo for it to consider whether to take any action under BL 73(9) will arise in the ORC discussion should ICAC decide to close the file or SJ decide against prosecution. The ORC comprises distinguished non-officials and is tasked to ensure all corruption complaints, including any complaint against CE, will be handled properly. Second, there is no prohibition against a complainant to ICAC also making an identical complaint to LegCo provided he does not reveal ICAC's investigation. This 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 ICAC to seek legal advice from SJ in handling any corruption complaint. It will be wholly inappropriate for ICAC to bypass SJ to report all investigations of POBO offences involving CE to LegCo. This will inevitably interfere with SJ's constitutional function to control criminal prosecutions free from any interference under BL 63, alter the statutory duty of ICAC, and remove an important safeguard against vexing CE with referrals which could not have crossed the requisite threshold.

16. Hon CHEUNG Man-kwong has suggested that LegCo should at least be informed by SJ that CE is the subject person of a corruption complaint which SJ has decided not to prosecute or refer to LegCo for it to consider whether to take any action under BL 73(9). The Administration's view is that requiring SJ to do so would be contradictory to his decision not to refer the case to LegCo which has been fully reported to and discussed at ORC. Moreover, it will be inappropriate for SJ to disclose the identity of the subject person of a closed corruption complaint, as to do so would undermine the subject person's reputation.

17. Hon Margaret NG considers the referral mechanism unnecessary and undesirable, as criminal proceedings should not be mingled with political proceedings. It is for SJ to decide whether and, if so, when to institute criminal proceedings against CE on the basis of the evidence available, and for LegCo to decide whether and, if so, when to invoke BL 73(9) in appropriate circumstances. Ms NG also does not see how SJ could be prevented from providing information about corruption complaints against CE and the ICAC's findings to LegCo upon request, as to do so is within the meaning of lawful authority or reasonable excuse under section 30(1) of POBO. Ms NG has indicated that she will move an amendment to delete the proposed new section 31AA.

18. Some members have queried whether "Legislative Council" referred to in the proposed new section 31AA(2) would impede LegCo Members in invoking the impeachment proceedings under BL 73(9), as the initiation of a motion to charge CE with serious breach of law or dereliction of duty requires one-fourth of

all LegCo Members. The Administration has advised that by virtue of BL 67 "Legislative Council" should mean "Legislative Council Members". However, in response to members' views, the Administration will move an amendment to replace "Legislative Council" with "Legislative Council Members" in the proposed new section 31AA(2) so as to make it clear that the matter is referred by SJ to LegCo Members for them to consider whether to take any action under BL 73(9).

Provision of further information after making referral

19. Members have asked whether SJ would, after referring the case to LegCo, provide LegCo with further information on the case upon completion of ICAC's investigation.

20. The Administration has advised that while the proposed new section 31AA is not intended as, and does not operate, as a mechanism for regulating how SJ should deal with the information he receives from ICAC, the phrase "may refer the matter" in new section 31AA(1) should be wide enough to enable SJ to provide LegCo with further information on a case which has been referred by him to LegCo should he decide to do so. The Administration has further advised that the word "matter" in the phrase "may refer the matter" in new section 31AA(1) should be wide enough to cover material, information and evidence concerning a bribery offence under POBO suspected to have been committed by CE. Although the word "matter" is not specifically defined in the Bill, the context in which it appears and the purpose of new section 31AA should render it a meaning wider than the mere fact that the allegation has been made against CE.

Immunity for disclosure of information

21. The Administration has advised that the proposed new section 31AA provides that SJ may refer a matter involving a bribery offence suspected to have been committed by CE to LegCo for it to consider whether to take any action under BL 73(9). Enabling SJ to refer such a matter to LegCo so that it can act upon it for this specific purpose may suggest that LegCo Members should be entitled to further disclose it pursuant to this purpose. This may allow of an argument that disclosure of information contained in SJ's referral by LegCo Members for the purpose of taking any action under BL 73(9) could be made possible under the defence of "reasonable excuse" provided under section 30 of POBO. However, it is much less arguable that LegCo Members would have a defence of "lawful authority" for such disclosure under section 30 of POBO, as the defence of "lawful authority" requires that the law authorises the disclosure and neither BL 73(9) nor the Bill explicitly provides that. Whether a particular disclosure can be covered by the defence of "reasonable excuse" or "lawful authority" will and can only be decided before the court, after taking into consideration the relevant circumstances of the case.

22. Some members consider that immunity for disclosure of information contained in SJ's referral for LegCo Members should be expressly provided in the Bill, as in the case of the proposed new section 31AA which enables SJ to refer to LegCo a corruption complaint against CE and ICAC's findings, the disclosure of which is currently prohibited under 30(1) of POBO.

23. To address members' general concern about immunity for disclosure of information contained in SJ's referral by LegCo Members as well as by staff members of LegCo Secretariat, the Administration will add a new section 31AB to the Bill. The new section aims to -

- (a) allow disclosure of information contained in SJ's referral by a LegCo Member to the Secretary General, LegCo (SG) for the purpose of enabling LegCo Members to take or consider 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 LegCo Secretariat provided that (i) SG is satisfied that the disclosure is reasonably necessary for the purpose of enabling LegCo Members to take or consider whether to take any action under BL 73(9); and (ii) LegCo President has given prior approval to the disclosure;
- (c) provide that when giving approval under item (b) above, LegCo President must be satisfied that the disclosure is reasonably necessary for the purpose of enabling LegCo Members to take or consider whether to take any action under BL 73(9); and
- (d) allow disclosure of information contained in SJ's referral by any party once the impeachment proceedings under BL 73(9) have been initiated, i.e. one-fourth of all LegCo Members have initiated a motion to charge CE with serious breach of law or dereliction of duty.

24. As the operation of the new section 31AB involves LegCo President, SG and staff members of LegCo Secretariat, the Bills Committee has asked the Administration to seek their views on the new provision. In his reply, SG has raised no objection to the proposal for substituting "Legislative Council" by "Members of the Legislative Council" and suggested that a provision should be added to this section to provide clearly that the point of time when the motion to charge CE with serious breach of law or dereliction of duty is considered to have been initiated should be that as provided in LegCo Rules of Procedures (RoP).

25. In response, the Administration explains that BL 73(9) provides that one-fourth of all LegCo Members can initiate a motion jointly to charge the CE with serious breach of law or dereliction of duty. This provision does not specify

when the motion is considered to have been initiated. BL 75(2) provides that the rules of procedure of LegCo shall be made by the Council on its own, provided that they do not contravene BL. Consequently, the Administration considers that LegCo is empowered by BL 75(2) to make its own rules of procedure, including those in relation to the impeachment proceedings under BL 73(9), such as when a motion is considered to have been initiated. Hence, while the Administration agrees with the view that the point of time when the motion to charge CE with serious breach of law or dereliction of duty is considered to have been jointly initiated should be that as provided in LegCo RoP, given that LegCo business by nature is to be processed according to RoP, the Administration does not consider there to be a need to make express reference to RoP in the proposed new section 31AB. In response to SG's request, the Administration agrees to explain the policy intent for the new section 31AB(4) and its operation in relation to RoP (i.e. the point of time when an initiating motion is considered to have been initiated jointly by one-fourth of all LegCo Members under BL 73(9) should be that as provided in RoP) at the resumption of Second Reading debate on the Bill or Committee Stage.

26. Hon Margaret NG has voiced strong objection to the proposed new section 31AB, as how LegCo should handle the information contained in SJ's referral is a matter wholly for LegCo to decide according to its RoP. Ms NG has asked the Administration to confirm with SJ on the appropriateness of the executive authorities interfering with the operation of the legislature under new section 31AB.

27. In response, the Administration explains that as mentioned in paragraph 23 above, new section 31AB, if enacted, would provide exemption for the purpose of section 30 of POBO to Members and SG in respect of disclosure of information contained in SJ's referral. It also allows, for the purpose of section 30, disclosure of information contained in SJ's referral by any party once the impeachment proceedings under BL 73(9) have been initiated, i.e. one-fourth of all LegCo Members have initiated a motion jointly to charge CE with serious breach of law or dereliction of duty. The new section 31AB therefore only deals with section 30 restriction. Such being the case, the Administration's legal advice is that the new section 31AB can hardly constitute an intervention into any LegCo proceedings whether in relation to the impeachment procedure under BL 73(9) or otherwise.

28. While recognising the need to explicitly provide in the Bill that LegCo Members may disclose information contained in SJ's referral to staff members of LegCo Secretariat if such disclosure is necessary for the purpose of taking action under BL 73(9), Hon Emily LAU is dissatisfied that the new section 31AB does not include a provision to allow LegCo Members to disclose information contained in SJ's referral to the political groups they are affiliated with. The Administration has explained that as the power to take action under BL 73(9) is given to LegCo only, information subject to the restriction of section 30(1) of

POBO contained in SJ's referral would only be disclosed to LegCo Members.

29. Members have asked the Administration to consider also providing LegCo Members and staff members of LegCo Secretariat with immunity for inadvertently disclosing information contained in SJ's referrals made under new section 31AA. The Administration does not consider it necessary to do so as an offence under section 30(1) of POBO is one of mens rea requiring proof of knowledge or recklessness. 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 POBO whilst knowing or suspecting that an investigation in respect of an offence alleged or suspected to have been committed under Part II of 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(1).

Investigation of bribery complaints against CE by ICAC

30. Hon Martin LEE, Hon Emily LAU, Dr Hon YEUNG Sum, Hon Mrs Anson CHAN, Hon Margaret NG and Hon Ronny TONG share the concern about the possible public perception that ICAC may not conduct its investigation of corruption complaints against CE independently and impartially, given that BL 57 stipulates that ICAC shall be accountable to CE. This requirement is also transcribed in section 5(2) of ICAC Ordinance which provides that C, ICAC shall not be subject to the direction and control of any person other than CE. Section 12(c) of the ICAC Ordinance also provides that C, ICAC has the duty, on behalf of CE, to investigate any conduct of a prescribed officer which, in the opinion of C, ICAC is connected with or conducive to corrupt practices and report thereon to CE.

31. The Administration has pointed out that both BL 57 and section 5(2) of ICAC Ordinance actually underpin the independence of ICAC and that C, ICAC is accountable to the office of CE and not to the post holder per se. These provisions do not have the effect of empowering an incumbent CE to interfere with the investigation by ICAC on a corruption complaint against him. If that were not the case, this would go against an important principle that BL does not provide CE with general immunity from criminal investigation or prosecution. Thus, if a person holding the office of CE instructs C, ICAC to disclose to him the details of a corruption complaint/investigation against him, C, ICAC is not obliged to comply with this instruction as it would not be one which can be lawfully given by a CE. The Administration has also pointed out that since CE is not a prescribed officer as defined under section 2 of ICAC Ordinance, C, ICAC's duty to report to CE under section 12(c) of the same does not include any corrupt practice or bribery offence suspected to have been committed by CE.

32. The Administration has further advised that apart from the special regime for the investigation and impeachment of CE in respect of complaint about his serious breach of law or dereliction of duty provided under BL 73(9), there are

robust structural safeguards through the ORC and legislative safeguards to ensure the independence and integrity of the ICAC's investigation. Details of the legislative safeguards are as follows -

- (a) under section 12(b)(ii) of ICAC Ordinance, C, ICAC is obliged to investigate corruption offences suspected to have been committed by any person including CE. If C, ICAC deliberately curtailed or interfered in an investigation of a corruption complaint against CE in order to dishonestly benefit CE, then he would commit the offence of misconduct in public office;
- (b) ICAC is prohibited by law to disclose to CE the presence of, or details about a corruption complaint/investigation against CE. If C, ICAC disclosed to CE that CE was subject to an investigation being conducted by ICAC or any details about the investigation without lawful authority or reasonable excuse, C, ICAC would commit an offence under section 30(1) of POBO. In addition, section 17 of the Official Secrets Ordinance (Cap. 521) (OSO) prohibits disclosure of information which impedes the prevention or detection of offences or apprehension or prosecution of suspected offenders. If C, ICAC chose to act to the contrary either upon CE's instruction or of his own volition, he would commit an offence under section 30(1) of POBO and/or section 17 of OSO; and
- (c) although ICAC is accountable to CE under BL 57, it would clearly be unlawful for 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.

33. The Law Society of Hong Kong has proposed establishing an independent ad hoc committee chaired by a retired judge and staffed by officers of ICAC to investigate corruption complaints against CE. The Hong Kong Bar Association has proposed the establishment of an office of independent counsel to conduct the investigation or supervise the investigation conducted by ICAC and report on the investigation result and make recommendations including whether or not to prosecute. Hon Ronny TONG has also proposed the following -

- (a) arranging CE's duties to be temporarily assumed by the specified principal officials in accordance with BL 53 when CE becomes the subject of a corruption complaint;
- (b) requiring C, ICAC to refer all corruption complaints against CE to SJ, regardless of whether the ICAC's investigation reveals a prima facie case; and

- (c) providing that ICAC should not report to CE when CE becomes the subject of a corruption complaint.

34. The Administration considers the above proposals will give rise to the following issues -

- (a) the establishment of another body to conduct the investigation could duplicate or compromise the role of the investigation committee to be chaired by CJ under BL 73(9);
- (b) it is wholly inappropriate to empower an office of independent counsel to make recommendations on whether or not to prosecute. This may undermine SJ's constitutional role as the prosecuting agency, which must be free from any interference as guaranteed under BL 63;
- (c) ICAC has a mandatory duty under the ICAC Ordinance to investigate any alleged or suspected offence under POBO. Establishment of another investigation authority might affect ICAC's discharge of its statutory duties;
- (d) BL 53 already allows for a temporary arrangement to cater for a 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 CE, and whether there would be a genuine short-term loss of the ability to discharge duties under such circumstances;
- (e) CE has a unique constitutional status under the BL. He is the head of the HKSAR (BL 43) and the HKSAR Government (HKSARG) (BL 48). Disallowing 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
- (f) BL has already provided for 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.

35. Dr Hon YEUNG Sum remains of the view that the issue of possible public perception that ICAC may not conduct its investigation of a corruption complaint

against CE independently and impartially needs to be addressed. Dr YEUNG has indicated his intention to move an amendment to set up an independent ad hoc committee chaired by a retired judge and staffed by officers seconded from ICAC to conduct the investigation of a corruption complaint against CE, should the Administration refuse to move an amendment to that effect.

Application of Section 3 of POBO to CE

36. Section 3 of POBO provides that any prescribed officer, who without the general or special permission of CE, solicits or accepts any advantage shall be guilty of an offence. Prescribed officers include, among others, principal officials, judicial officers and civil servants. Section 3 is a stringent corruption prevention measure. It creates an offence that does not require the prosecution to prove that the advantage was offered to the prescribed officer for any purpose related to his duties or for a corrupt purpose.

37. Hon Emily LAU is of the view that the spirit governing the solicitation and acceptance of advantages by prescribed officers under section 3 of POBO should also apply to CE. Ms LAU has urged the Administration to consider the suggestion of the Hong Kong Bar Association, previously made to the Subcommittee on Application of Certain Provisions of POBO to CE formed under LegCo Panel on Constitutional Affairs, to introduce a special section or sub-section applicable to CE in POBO, and to set up an independent body to grant general or special permission for CE to accept advantages.

38. The Administration has advised that there are serious practical constraints involved in applying section 3 of POBO to the acceptance and solicitation of advantages for CE. Section 3 only applies to persons over whom CE has authority. Under section 3, prescribed officers seek CE's permission for the solicitation or acceptance of advantages. However, CE cannot grant permission to himself. This poses structural difficulties in fitting CE within the framework of the offence provisions of section 3. In addition, section 3 is premised upon the existence of a principal-agent relationship. CE is not an agent of HKSARG and has no equivalent principal within HKSARG.

39. The Administration has considered the propriety of creating an independent body to monitor or approve requests from CE to accept or solicit advantages, and does not consider this appropriate because CE is the head of HKSAR and HKSARG and there could be no principal-agent relationship between CE and any independent body set up for this purpose. Consideration has also been given to the proposal of creating a new offence provision to deal with the acceptance of advantages by CE for a non-corrupt purpose. The conclusion is that there is not a need to do so. The Bill already provides comprehensive controls and sanctions against the commission of bribery or corruption offences by the CE. The application of sections 4, 5 and 10 of POBO to CE would impose restrictions on him in respect of any bribery acts of solicitation and acceptance of advantages and

possession of unexplained property. In addition to the proposed statutory anti-corruption measures, CE is also bound by the common law offence of bribery and those who offer any bribe to CE would be caught by the offence. Furthermore, BL 47 stipulates that CE must be a person of integrity, dedicated to his or her own duties. It also requires CE, on assuming office, to declare his or her assets to CJ. CE is also subject to very tight public scrutiny and his acts will be closely monitored by the media and the public.

Application of section 8(1) of POBO to CE

40. Section 8(1) of the POBO provides that if a person offers an advantage to a prescribed officer while having dealings of any kind with the Government through any department, office or establishment of the Government in which the prescribed officer is employed, the offeror will commit an offence unless he can establish the defence of lawful authority or reasonable excuse. Similar to section 3 of POBO, section 8(1) is a stringent corruption prevention measure. It creates an offence that does not require the prosecution to prove that the advantage was offered to the prescribed officer for any purpose related to his duties or for a corrupt purpose. Its severity is mitigated to an extent by limiting its application to only those occasions where the offer is made to a prescribed officer employed in the government department through which the offeror is having his dealings with the Government and by providing the defence of lawful authority or reasonable excuse.

41. The Administration has advised that in view of the broad meaning of the term "dealings of any kind" given in the Court of Final Appeal judgment in *Sin Kam-wah v HKSAR [2005]2 HKLRD 375*, and having regard to the fact that CE is head of HKSARG, to introduce a new provision binding any person who offers any advantage to CE in line with section 8(1) of POBO could have the effect of subjecting any person having dealings of any kind with any government department to an offence whenever he offers an advantage to CE. 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 government department in which the prescribed officer is employed. The onus is on the offeror to establish that he has "lawful authority or reasonable excuse" to so offer. For example, a person offering a small gift to 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 CE out of courtesy or respect. The inherent design of section 8(1) makes it unsuitable for application to the offering of gifts to CE.

42. The Administration has also pointed out that if a gift were offered to CE for a corrupt purpose, this should fall within the scope of proposed section 4(2A) in the Bill, which provides that if a person, whether in Hong Kong or elsewhere, offers an advantage to CE without lawful authority or reasonable excuse, as an inducement to or reward for or otherwise on account of his acting in his capacity

as CE, he will commit an offence. The term "act" in the proposed section 4(2A) should be broadly construed as encompassing more than just a quid pro quo situation but also generalised and non-specific transactions. Many offers of advantages to CE in circumstances where there is a conflict of interest should be caught under the proposed section 4(2A). In addition, a person offering a bribe to CE would also be caught by the common law offence of bribery.

43. Hon Margaret NG, Hon Martin LEE, Hon Ronny TONG, Hon CHEUNG Man-kwong and Hon Mrs Anson CHAN are of the view that it should be equally an offence for members of the public offering advantages to CE as to prescribed officers. To exclude people offering advantages to CE in the Bill is double standard, and would send a wrong message to the public that it is legal for CE to accept gifts from the public whereas this is not the case for public servants.

44. Hon Margaret NG considers the Administration's explanation unconvincing. Ms NG has indicated that she will move an amendment to extend the coverage of section 8(1) of POBO to CE.

Register of gifts received by CE

45. The Administration has advised that CE's Office (CEO) has since 1997 established a Register of gifts presented to CE in his official capacity. The Register is available for public inspection, hitherto upon request and since July 2007, through CE's website. The Register records all gifts of an estimated value exceeding HK\$400 received by CE in the CE's official capacity. The Register includes two lists, one covering items for government disposal and another one items for CE's personal retention. Should CE wish to retain any gift on the Register, CEO would invite the Government Logistics Department to arrange valuation in a professional manner and CE may purchase the gift at the valued price. The Register is updated on a monthly basis.

46. In response to members' request to raise public awareness of the existence of the register of gifts presented to CE, the Administration plans to issue a press release explaining to members of the public the new measures to tackle bribery acts involving CE as well as the register upon the passage of the Bill.

Disclosure of assets under BL 47(2)

47. The Administration has advised that under BL 47(2), CE shall declare his or her assets to CJ on assuming office. The term "assets" is not specifically defined under BL. Hence, the types of assets to be disclosed should follow the ordinary meaning of "assets". However, the Administration is not in a position to advise the types of assets disclosed in the declaration which is required to be made to CJ only. Other than that under BL47(2), there is no legal requirement on the disclosure of CE's assets. The Administration has also advised that while there is no legal requirement for CE to disclose his assets in his capacity as the President

of the Executive Council (ExCo), he, nonetheless, furnishes a return on his registrable interests, such as remunerated directorships, land and property, in his capacity as ExCo President, like other ExCo Members. A register is available for public inspection through ExCo's website.

Others

48. Members note that the Administration will move 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 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. Consequential to the enactment of the Order, it becomes necessary to add the offences on soliciting or accepting bribes by CE under new sections 4(2B) and 5(4) in the Bill to Schedule 2 to OSCO. By so doing, HKSARG can apply to the court for orders under OSCO for the freezing, seizure and confiscation of proceeds or property derived from these types of corruption offences.

Committee Stage amendments

49. The Committee Stage amendments to be moved by the Administration and agreed by the Bills Committee are in **Appendix II**.

Resumption of Second Reading debate

50. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 25 June 2008.

Advice sought

51. Members are invited to note the deliberations of the Bills Committee.

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

Chairman	Hon Jasper TSANG Yok-sing, GBS, JP
Members	Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP Hon Martin LEE Chu-ming, SC, JP Dr Hon LUI Ming-wah, SBS, JP Hon Margaret NG Hon CHEUNG Man-kwong Dr Hon Philip WONG Yu-hong, GBS Hon Howard YOUNG, SBS, JP Dr Hon YEUNG Sum, JP Hon Emily LAU Wai-hing, JP Hon Timothy FOK Tsun-ting, GBS, JP Hon TAM Yiu-chung, GBS, JP Hon Abraham SHEK Lai-him, SBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon LI Kwok-ying, MH, JP Hon Daniel LAM Wai-keung, SBS, JP Hon Andrew LEUNG Kwan-yuen, SBS, JP Hon WONG Ting-kwong, BBS Hon Ronny TONG Ka-wah, SC (since 14 November 2007) Hon Albert Jinghan CHENG, JP Hon KWONG Chi-kin Hon Mrs Anson CHAN, GBM, JP (since 14 December 2007)
	(Total : 22 Members)
Clerk	Miss Mary SO
Legal Adviser	Mr Arthur CHEUNG
Date	14 December 2007

PREVENTION OF BRIBERY (AMENDMENT) BILL 2007

COMMITTEE STAGEAmendments to be moved by the Chief Secretary for Administration

<u>Clause</u>	<u>Amendment Proposed</u>
5	<p>In the English text –</p> <p>(a) in the heading, by deleting “Section” and substituting “Sections”;</p> <p>(b) by deleting “is added” and substituting “are added”.</p>
5	<p>In the proposed section 31AA(2), by deleting “Legislative Council for it” and substituting “Members of the Legislative Council for them”.</p>
5	<p>By adding immediately after the proposed section 31AA –</p> <p style="text-align: center;">“31AB. Disclosure of information received under section 31AA by Members of Legislative Council etc.</p> <p>(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 Members of the Legislative Council to take, or to consider whether to take, any action under Article 73(9) of the Basic Law.</p> <p>(2) Notwithstanding section 30, the Secretary General may, with the prior approval of the President of</p>

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 Members of 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 Members of the Legislative Council to take, or to consider whether to take, any action under Article 73(9) of the Basic Law.

(4) Where in relation to a matter referred to the Members of the Legislative Council under section 31AA(2), a motion has been initiated jointly by one-fourth of all the Members of the Legislative Council under Article 73(9) of the Basic Law charging the Chief Executive with serious breach of law or dereliction of duty, section 30(1) shall not apply as regards the disclosure by any person of any information relating to the matter provided by the Secretary for Justice to the Members of the Legislative Council under section 31AA(2).

(5) 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).”.

6

By deleting the clause and substituting –

“6. Other specified offences

(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”.”.