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**Report of the Subcommittee on
Subsidiary Legislation to Implement the Obligations under
the United Nations Convention Against Corruption**

Purpose

This paper reports on the deliberations of the Subcommittee on Subsidiary Legislation to Implement the Obligations under the United Nations Convention Against Corruption in relation to the Organized and Serious Crimes Ordinance (Amendment of Schedule 2) Order 2007 (the OSCO Order) and the Mutual Legal Assistance in Criminal Matters (Corruption) Order (the MLA Order).

Background

2. The Central People's Government of the People's Republic of China has ratified the United Nations Convention Against Corruption (the Convention) which came into force for the People's Republic of China, including Hong Kong, on 12 February 2006. The Convention introduces a comprehensive set of standards, measures and rules that States Parties can apply, in order to strengthen the legal and regulatory regimes to fight corruption. The Convention calls for preventive measures and the criminalisation of various forms of corruption in both the public and private sectors. It also introduces the fundamental principle and framework for stronger cooperation between states to prevent corruption.

3. To implement the obligations under the Convention in Hong Kong, legislative amendments and provisions are required in relation to the confiscation of proceeds of crimes, extradition and mutual legal assistance in criminal matters (MLA).

The subsidiary legislation

The Fugitive Offenders (Corruption) Order (L.N. 100 of 2007)

4. The Fugitive Offenders (Corruption) Order (the FO Order) is made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503) (FOO) for the purpose of implementing the extradition requirements under Article 44 of the Convention. The objective of the FO Order is, in relation to the extradition provisions of the Convention, to apply as between Hong Kong and the places outside Hong Kong to which the Convention relates the procedures for the surrender of fugitive offenders set out in FOO. The procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the terms of the Convention as recited in the Schedule to the FO Order.

5. The FO Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

The Organized and Serious Crimes Ordinance (Amendment of Schedule 2) Order 2007

6. Made by the Chief Executive in Council under section 31 of the Organized and Serious Crimes Ordinance (Cap. 455) (OSCO), the OSCO Order amends Schedule 2 to OSCO by adding to that Schedule the offences under sections 4(2), 5(2), 6(2) and 9(1) of the Prevention of Bribery Ordinance (Cap. 201) (POBO) in order to better fulfil the requirements under Article 31 of the Convention. Under the amendments, the proceeds or property derived from those offences may be subject to a restraint order, charging order or confiscation order made under OSCO.

7. There is no express commencement provision in the OSCO Order. According to section 20(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the OSCO Order shall come into operation on the day when it is published in the Gazette.

The Mutual Legal Assistance in Criminal Matters (Corruption) Order

8. Made by the Chief Executive in Council under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO), the MLA Order seeks to fulfil the requirements under Articles 46 and 57 of the Convention. The MLA Order directs that, in relation to the MLA provisions of the Convention, MLAO shall, subject to the modifications specified in Schedule 2 to the Order, apply as between Hong Kong and the places outside Hong Kong to which the Convention relates. The Convention is recited in Schedule 1 to the MLA Order.

9. The MLA Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

The Subcommittee

10. At the House Committee meeting on 1 June 2007, Members formed a subcommittee to study the FO Order. Members agreed at the House Committee meeting on 8 June 2007 that the subcommittee should also study the OSCO Order and the MLA Order. The membership list of the Subcommittee is in the **Appendix**.

11. Chaired by Hon Margaret NG, the Subcommittee reported its deliberations on the FO Order at the House Committee meeting on 5 October 2007 (LC Paper No. CB(2)2764/06-07 refers). By the Fugitive Offenders (Corruption) Order (Commencement) Notice, the Secretary for Security has appointed 21 December 2007 as the day on which the FO Order will come into operation. The Subcommittee held a meeting with the Administration on 6 November 2007 to further discuss the OSCO Order and the MLA Order.

Deliberations of the Subcommittee

The Organized and Serious Crimes Ordinance (Amendment of Schedule 2) Order 2007

12. The Subcommittee has enquired whether the proposed addition of the offences on soliciting or accepting bribes under sections 4(2), 5(2), 6(2) and 9(1) of POBO to Schedule 2 to OSCO is necessary for achieving the confiscation requirements under the Convention, the differences between a restitution order made under section 12 of POBO and a confiscation order under section 8 of OSCO, and whether there have been difficulties in the enforcement of orders issued under section 12 of POBO.

13. The Administration has explained that pursuant to Article 31 of the Convention, States Parties are required, to the greatest extent possible under their domestic legal systems, to adopt measures for the identification, tracing, freezing, seizure and the eventual confiscation of proceeds derived from bribery. Under Hong Kong's legal framework, provisions for the freezing, seizure and confiscation of proceeds of crimes are provided for under OSCO. The Hong Kong Special Administrative Region (HKSAR) Government can apply to the court to exercise the above powers to deal with proceeds derived from offences listed in Schedule 2 to OSCO. However, only offences on offering bribes as defined under sections 4(1), 5(1), 6(1) and 9(2) of POBO are included in Schedule 2 to OSCO, but not offences on soliciting or accepting bribes as defined under sections 4(2), 5(2), 6(2) and 9(1) of POBO.

14. The Administration has further explained that under section 12 of POBO, a person who is guilty of a bribery offence shall be ordered to return to such person or public body, i.e. the principal of the convicted person, the amount or value of advantage received by him. However, a restitution order under this section is a civil order and is enforceable by the principal of the convicted person, not necessarily by the HKSAR Government. Therefore, section 12 of POBO does not provide the same tool for the

confiscation of proceeds as that provided for under the OSCO framework. The proposed legislative amendments will allow Hong Kong to better achieve the confiscation requirements under Article 31 of the Convention. Instead of using the civil order provided under section 12 of POBO, the HKSAR Government can apply to the court for restraint orders, charging orders and confiscation orders under OSCO for the freezing, seizure and confiscation of proceeds or property derived from soliciting or accepting bribes.

15. On the major differences between a confiscation order and a restitution order, the Administration's explanations are as follows -

- (a) the maximum amount that can be recovered by means of a confiscation order is the value of a convicted person's proceeds of the relevant offence as defined under section 2(6) of OSCO. For a bribery offence, such value can include the interest or profits generated from the advantage received by the convicted person. As a result, the amount confiscated under a confiscation order could be greater than that under a restitution order, which is limited to the value of the advantage received. This is especially likely if the convicted person has made use of the bribe monies for some time in cases where the corruption is only detected much later after its occurrence;
- (b) the HKSAR Government, irrespective of whether or not it is the principal of a convicted person, is the beneficiary of a confiscation order;
- (c) once a confiscation order is made, the convicted person must comply with it within the period stipulated by the court under section 13(1)(a)(i) and section 13(1A) of OSCO, usually not more than six months. Failing that, the convicted person will need to serve a prison sentence ordered by the court under section 13(1)(a)(ii) of the OSCO. However, service of this prison sentence does not avoid compliance with the confiscation order. A continuing refusal to comply will result in receivers being appointed to realize the convicted person's property in order to satisfy the confiscation order. Late compliance will also have the consequence that interest will accrue to the value of the confiscation order; and
- (d) as the OSCO confiscation regime is conviction based, a confiscation order can only be made against a person who has been found guilty of a specified offence. A determination of guilt in respect of every criminal offence is made by application of the standard of proof of beyond reasonable doubt. However, the court applies the lesser standard of proof on the balance of probabilities when determining the amount to be recovered under a confiscation order. Furthermore, if the convicted person wishes to claim that he is unable to pay the amount of the confiscation order because the amount exceeds the value of the realizable property, then the burden shifts

to him to establish this and the standard of proof for him is also the balance of probabilities.

16. The Administration has also advised that the cost of enforcing a restitution order will have to be borne by the principal who is not necessarily the Government. Consequently, in those cases where the Government is not the principal, whether or not the order is enforced will depend upon the whim of the principal, who, according to the experience of the Department of Justice and the Independent Commission Against Corruption (ICAC), is not likely to bother enforcing it unless he is confident that his efforts will fairly quickly and inexpensively produce a favourable outcome. In the past three years, there were 75 private sector corruption prosecution cases where a restitution order was made. ICAC's records reveal that non-compliance with the order was found in 17 cases.

17. The Administration has explained that while a person convicted of a bribery offence can be ordered to return the amount of advantage received by him by a restitution order, this order is enforceable by the principal of the convicted person, which may not necessarily be the Government, thereby creating potential enforcement difficulties. Furthermore, when compared with a confiscation order, the maximum amount that can be recovered is relatively lower while the standard of proof is relatively higher. As a result, a restitution order cannot serve as the same tool as a confiscation order. To better achieve the confiscation requirements under Article 31 of the Convention, the Administration considers that there is a need to add the offences of soliciting or accepting bribes under sections 4(2), 5(2), 6(2) and 9(1) of POBO to Schedule 2 to OSCO.

18. Hon James TO has expressed concern about the impact of the OSCO Order on the interest of the principal (who is not the Government) of the convicted person as the Government can apply for a confiscation order under section 8 of OSCO.

19. The Administration has advised that it is the Government's policy for victims in criminal cases to pursue claims. While the Government will stand aside, it will apply to the court for an order to preserve the assets. The prosecution will, at about the end of the trial where there is a possibility of a conviction, approach the principal in whose favour a restitution order may be made. If the principal does not wish to enforce the restitution order, the Administration will ensure that provisions are in place to prevent persons convicted of corruption offences from benefiting from the proceeds of crime. Application for confiscation of assets will then be made.

20. The Administration has confirmed that the offences on soliciting or accepting bribes under sections 4(2), 5(2), 6(2) and 9(1) of POBO are the only corruption offences which need to be added to Schedule 2 of OSCO for better achieving the confiscation requirements under the Convention. At the request of the Subcommittee, the Administration will state this point when moving the motion on the OSCO Order.

21. The Subcommittee has enquired about the effect of the OSCO Order on existing agreements on MLA and surrender of fugitive offenders, and whether a jurisdiction with which Hong Kong has not concluded a MLA agreement could seek MLA under the proposed amendments to Schedule 2 to OSCO.

22. The Administration has explained that the OSCO Order seeks to add the offences of soliciting or accepting bribes under sections 4(2), 5(2), 6(2) and 9(1) of POBO to Schedule 2 to OSCO, so as to enable the HKSAR Government to apply to the court to confiscate the proceeds of such offences as required under Article 31 of the Convention. It does not affect the operation of any existing bilateral MLA or surrender of fugitive offenders agreements between Hong Kong and other jurisdictions. Both Hong Kong and such other jurisdictions will continue to be obliged to provide assistance to each other in accordance with the provisions of the agreements. The OSCO Order also does not have the effect of enabling any State Party to the Convention to seek MLA from Hong Kong.

The Mutual Legal Assistance in Criminal Matters (Corruption) Order

23. The Subcommittee has enquired how the MLA Order gives effect to the MLA provisions under the Convention and the effect of including the Convention in the Order.

24. The Administration has explained that Articles 46 and 57 of the Convention requires States Parties to afford one another the widest measure of MLA in relation to the offences under the Convention, and to enable a State Party's competent authorities to return confiscated property when acting on the request made by another State Party. Specifically, Article 46(27) provides that a person who consents to give evidence in a proceeding in a territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any restriction of his or personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested State Party. Such safe conduct shall cease when the person having had, for a period of 15 consecutive days or for any period agreed upon by the States Parties from the date on which he has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his own free will. The MLA Order, which sets out the Convention in a schedule, provides that in relation to the MLA provisions of the Convention, MLAO shall apply as between Hong Kong and States Parties to the Convention, subject to the modifications specified in Schedule 2 giving effect to Article 46(27) of the Convention. It does not have the effect of implementing the non-MLA related provisions of the Convention.

25. The Administration has advised that under section 4(2) of MLAO, an order should not be made unless the arrangement for MLA are substantially in conformity with the provisions of MLAO. The arrangements for MLA under the Convention do so

conform. Article 46(17) of the Convention provides that a MLA request shall be executed in accordance with the domestic law of the requested State Party. Similar modifications in respect of the safe conduct period have been effected for all bilateral MLA agreements with other jurisdictions.

Conclusion

26. The Subcommittee is in support of the OSCO Order and the MLA Order. The Administration will give fresh notices for moving the motions to seek the Council's approval of the two Orders.

Advice Sought

27. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
15 November 2007

**Subcommittee on Subsidiary Legislation to Implement the Obligations under
the United Nations Convention Against Corruption**

Membership list

Chairman

Hon Margaret NG

Members

Hon James TO Kun-sun
Hon Howard YOUNG, SBS, JP
Hon LAU Kong-wah, JP

(Total : 4 Members)

Clerk

Mrs Sharon TONG LEE Yin-ping

Legal Adviser

Mr Timothy TSO

Date

12 June 2007