

**President's ruling on
Committee Stage amendments to
Prevention of Bribery (Amendment) Bill 2007
proposed by Dr Hon YEUNG Sum, JP and Hon Margaret NG**

Dr Hon YEUNG Sum and Hon Margaret NG have given notice to move Committee Stage amendments (CSAs) to the Prevention of Bribery (Amendment) Bill 2007 (the Bill), if the motion for the Second Reading of the Bill is agreed to at the meeting of the Legislative Council (LegCo) of 25 June 2008. Before making a ruling on the admissibility of these CSAs, I have invited the Chief Secretary for Administration (CS) to offer his comments on the CSAs, and the Members concerned to offer their responses. I have also sought the advice of Counsel to the Legislature.

Proposed Committee Stage amendments

Dr Hon YEUNG Sum's proposed CSA

2. Dr YEUNG's proposed CSA seek to substitute, by way amendment, the proposed new section 31AA in clause 5 of the Bill by a new provision to impose a duty on the Commissioner of the Independent Commission Against Corruption (C,ICAC) to make a referral to the Secretary for Justice (SJ) and a duty on SJ to make an onward referral to LegCo after an independent investigation committee (IIC), which he is required to appoint to investigate the matters of the referral, has reported to him its findings.

Hon Margaret NG's proposed CSA

3. Ms NG's proposed CSA to add new clause 3A to the Bill seeks to extend the criminal sanction, as provided in the existing section 8 of the Prevention of Bribery Ordinance (POBO), whereby a person having dealings with the Government or a public body is prohibited from offering an advantage to its employee who is a prescribed officer or a public servant, to cover the offering of any advantage to the Chief Executive (CE) by a person having such dealings.

Relevant rules in Rules of Procedure

4. The relevant rules in the Rules of Procedure (RoP) relating to amendments to bills which CS has referred to in his comments are Rule 57(4)(a) and Rule 57(6). Details of these rules are set out as follows.

5. Rule 57(4)(a) provides that an amendment relating to a bill must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates.

6. Rule 57(6) provides that:

"An amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by -

- (a) the Chief Executive; or
- (b) a designated public officer; or
- (c) a Member, if the Chief Executive consents in writing to the proposal."

The Administration's views and responses from Members

7. For easier reading, CS's comments on the CSAs proposed by the Members, and the respective responses of the Members concerned are summarized in the **Appendix**.

Advice of Counsel to the Legislature

8. Counsel of the Legislature has given his opinion which is summarized in the following paragraphs.

Dr Hon YEUNG Sum's proposed CSA

9. Counsel points out that it is obvious that Dr YEUNG's proposed CSA has no relevance to items (a) and (b) of the long title in so far as they represent the scope of the Bill. In the new section 31AA proposed in clause 5 of the Bill, before SJ exercises his power to make a referral to LegCo, he must have reason to suspect that CE may have committed the offence. In comparison, Dr YEUNG's proposed CSA seeks to replace this precondition for SJ's exercising the referral power by the proposed requirements of an investigation by the IIC and the report of findings to SJ by the IIC as necessary procedures which SJ is obliged to follow. Counsel considers that such a proposal should be considered as a proposal that relates to the details of the referral mechanism proposed in clause 5 of the Bill. Moreover, the proposed change of the C,ICAC's power to make a referral to SJ and SJ's power to make a referral to LegCo a duty to do so does not make the proposed CSA one that exceeds the scope of the Bill as represented by item (c) of the long title.

10. Since CS's submission as regards item (d) of the long title (detailed in the Appendix) is based on his view that the proposed CSA cannot fall within the scope of items (a), (b) and (c) of the long title, Counsel considers that it is not necessary to deal with it.

11. Counsel also points out that the proposed CSA requires an IIC to be formed and chaired by a retired judge. There is no requirement that a serving judge is to be appointed to the IIC. CS has not made any relevant estimate of necessary expenditure on remuneration. CS also fails to set out the need and the estimate for provision to be made for expenses other than purported remuneration apart from a mere assertion. In the circumstances, Counsel is of the view that there is lack of any ground for a ruling to be made that there is charging effect.

Ms Margaret NG's proposed CSA

12. Counsel considers that it is not in dispute that the scope of the Bill includes application of the specified sections, i.e. sections 4, 5 and 10, of the POBO to CE. What is in issue is whether the application of section 8 to CE is connected to the application of those other sections in such a way that could bring it within the scope of the Bill as represented in item (d) of the long title.

13. Hon Margaret NG considers that it is so connected because the objective of the Bill is really to apply the POBO to CE by appropriate adaptation. Counsel points out that there is no mention of such an objective in the long title of the Bill. To ascertain whether this is indeed an objective of the Bill, the provisions of the Bill, the LegCo Brief and the Explanatory Memorandum to the Bill have been studied but there is no mention of that objective. On the contrary, they refer to the Bill as specifically to apply the existing sections 4, 5 and 10 of the POBO to CE. The singular absence of any amendment to section 8 is significant because had the objective of the Bill been to make appropriate and technical adaptation to apply the POBO to CE, the Bill should have included amendments to section 8.

14. In view of the specific reference to sections 4, 5 and 10 of the POBO as the only provisions that the Bill is seeking to apply to CE and having examined the provisions of the POBO, the Bill and the LegCo Brief, Counsel advises that the proposed CSA is not connected with the purposes of the Bill and should fall outside the scope of the Bill.

My opinion

Dr Hon YEUNG Sum's proposed CSA

15. CS submits that Dr YEUNG's proposed CSA is not relevant to the subject matter of the Bill or the subject matter of clause 5 of the Bill and thus should not be admissible under Rule 57(4)(a).

16. My opinion is set out as follows. Clause 5 of the Bill seeks to amend the POBO to give effect to the purpose of the Bill as stated in item (c) of the long title, i.e. "to enable the Commissioner of the Independent Commission Against Corruption and the Secretary for Justice to refer a matter involving an offence under the Ordinance suspected to have been committed by the Chief Executive to the Secretary for Justice and to the Legislative Council respectively". Dr YEUNG's CSA seeks to change the clause from an empowering provision to one which imposes such a duty on C, ICAC and SJ to do so. I accept Counsel's advice that this amendment does not make Dr YEUNG's proposed CSA one that exceeds the scope of the Bill, as represented by item (c) of the long title.

17. Also, Dr YEUNG's CSA seeks to replace the precondition for SJ's exercising the power to refer the matter to LegCo, i.e. he has reason to suspect that CE may have committed an offence under the POBO, by the requirements that SJ shall appoint a retired judge to form and chair an IIC, and that the IIC shall be responsible for carrying out the investigation and report its findings to SJ. As Dr YEUNG's amendment relates to the details of the referral mechanism proposed in clause 5 of the Bill, I therefore consider that Dr YEUNG's proposed CSA does not exceed the scope of the Bill.

18. As regards whether Dr YEUNG's proposed CSA has a charging effect, CS has not provided any estimate of expenditure arising from the implementation of the CSA. CS merely submits that the Administration finds it "difficult to work out an accurate estimate for the expenditure involved for setting up and running the IIC", but he considers it safe to assume that the expenditure involved will not be too negligible to be ignored.

19. I consider that there is insufficient ground for me to rely on such a statement by the Administration to form the opinion that Dr YEUNG's proposed CSA has a charging effect.

Hon Margaret NG's proposed CSA

20. The new clause 3A proposed by Ms NG seeks to extend the scope of section 8 of the POBO to cover the offering of advantage to CE by persons having dealings with public bodies or the Government. CS submits that the main objects of the Bill are those set out in its long title, which are achieved by means of specific provisions in the Bill, and that the new clause 3A proposed by Ms NG cannot fall within the scope of the long title.

21. Ms NG considers that the objective of the Bill is to extend the application of the POBO to CE by appropriate adaptation. The policy is simply to put CE in the same position as a "prescribed officer" so far as possible, and in that sense is technical in nature.

22. I note from items (a) to (d) of the long title of the Bill that none of it mentions such an objective. There is also no information contained in the provisions of the Bill, the LegCo Brief and the Explanatory Memorandum to the Bill based upon which I could find that the objective of the Bill is as alleged by Ms NG. I am therefore of the opinion that Ms NG's CSA falls outside the scope of the Bill.

Ruling

23. Having considered CS's comments, Members' responses and the advice of Counsel to the Legislature, my ruling is as follows:

- (a) Dr Hon YEUNG Sum may move his CSA to clause 5 of the Bill; and
- (b) Hon Margaret NG's proposed CSA to add clause 3A to the Bill is not relevant to the subject matter of the Bill. It is not admissible under Rule 57(4)(a) of RoP.

(Mrs Rita FAN)
President
Legislative Council

24 June 2008

Prevention of Bribery (Amendment) Bill 2007

Summary of Members' proposed Committee Stage amendments (CSAs), Chief Secretary for Administration (CS)'s comments and Members' responses

CSAs	CS's comments	Members' responses
<i>(a) Dr Hon YEUNG Sum</i>		
<p><u>Clause 5</u> To delete the proposed section 31AA and substitute with a new one</p>	<p>The explanatory memorandum of, and the LegCo Brief, for the Bill clearly specify that the main objects of the Bill are those set out in the long title, which are achieved by means of specific provisions in the Bill. As such, any amendment which does not fall within the scope of the long title should not be admissible under RoP 57(4).</p> <p>In view of the wording of the long title, it is clear that the referral of a suspected POBO offence to the IIC and its investigation by the IIC cannot fall within the scope of items (a), (b) and (c) of the long title. As regards item (d) of the long title, the scope of "connected with these purposes" cannot be construed so far as to cover the referral to the IIC or the investigation because:</p> <p>(a) the proposed CSA would, by implication, require C,ICAC not to exercise its existing investigative power as far as the suspected offence is concerned and thus would go beyond the subject matter of the Bill; and</p>	<p>The CSA does not violate the long title. If the proposed CSA is passed by LegCo, C,ICAC and SJ can still, as stated in item (d) of the long title, refer a matter involving an offence under the POBO suspected to have been committed by CE to SJ and LegCo respectively. The proposed CSA is relevant to the subject matter of the Bill.</p> <p>The proposed CSA is to let SJ appoint a retired judge to form and chair an IIC. Thus, the example quoted by the Administration is totally irrelevant. Moreover, the Administration cannot work out an accurate estimate for the expenditure of the proposed CSA. If no accurate figure is provided, the proposed CSA does not have any real charging effect.</p>

CSAs	CS's comments	Members' responses
	<p>(b) as drafted, the CSA imposes a duty on the IIC to investigate, but without conferring any powers of investigation upon it.</p> <p>The subject matter of clause 5 of the Bill (which adds the proposed section 31AA) is about referral (of a suspected POBO offence). It is doubtful whether the investigation of a suspected POBO offence can be considered as related to the referral. Furthermore, while item (c) of the long title includes referral by SJ to LegCo, the establishment of a new body, the IIC, and the requirement that SJ refers a suspected offence to it for investigation, are outside the scope of item (c) and not connected with it.</p> <p>The proposed CSA is not relevant to the subject matter of the Bill or the subject matter of clause 5 of the Bill and thus should not be admissible under RoP 57(4).</p> <p>It would be difficult to work out an accurate estimate for the expenditure involved for setting up and running the IIC. However, it is safe to assume that the expenditure involved will not be too negligible to be ignored. For example, the annual salary of a Judge of the Court of First Instance of the High Court is \$2.28 million, while that of a Justice of Appeal of the Court of Appeal of the High Court is \$2.39 million. Provision would also need to be made for other operating expenses, such as electricity charges,</p>	

CSAs	CS's comments	Members' responses
	<p>air-conditioning and other sundry expenses. The CSA should have charging effect and hence require the consent in writing of CE by virtue of RoP 57(6).</p>	
<i>(b) Hon Margaret NG</i>		
<p><u>New clause 3A</u> To amend section 8 of POBO</p>	<p>The explanatory memorandum of, and the LegCo Brief, for the Bill clearly specify that the main objects of the Bill are those set out in the long title, which are achieved by means of specific provisions in the Bill. As such, any amendment which does not fall within the scope of the long title should not be admissible under RoP 57(4).</p> <p>Existing 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. Existing section 8(2) is similar to section 8(1) but deals with the offering of advantages by persons having dealings with public bodies (other than Government). As such, it is clear that new clause 3A cannot fall within the scope of items (a), (b) and (c) of the long title.</p> <p>As regards item (d) of the long title, there might be an argument that new clause 3A could be</p>	<p>Section 8 of POBO is not "completely different" from sections 4 and 5 of POBO. On the contrary, sections 4, 5, 8 and 10 are integral parts of a single scheme which creates a series of offences on the offering and solicitation bribes to or by a "prescribed officer", either to secure the doing of an act by the prescribed officer or the awarding of a contract.</p> <p>The objective of the Bill is to apply the POBO to CE by appropriate adaptation. The policy is simply to put CE in the same position as a "prescribed officer" so far as possible, and in that sense is technical in nature. No logical distinction can be drawn between sections 4, 5 and 10 on the one hand, and section 8 on the other.</p> <p>The purported distinction of between "corrupt purpose" and "non-corrupt purpose" is untenable. As the name of the POBO implies, all offences created under it deal with actual or potential corruption offering or accepting advantages. The scheme is one of offences of descending evidential requirement. The proposed CSA merely bridges the obvious gap and is plainly within the scope of the Bill.</p>

CSAs	CS's comments	Members' responses
	<p>considered as "connected with the purposes" specified in item (a) of the long title, which applies sections 4 and 5 of the POBO to CE. Such an argument is not tenable as the nature of section 8 of the POBO is completely different from sections 4 and 5 of the POBO:</p> <p>(a) section 8 creates offences that do not require the prosecution to prove that the advantage was offered to the prescribed officer/public servant for a corrupt purpose (i.e. as an inducement to or reward for or otherwise on account of the prescribed officer/public servant doing an act in his capacity as a prescribed officer/public servant) while sections 4 and 5 target the offering/acceptance/solicitation of advantages for a corrupt purpose;</p> <p>(b) section 8 only deals with the offering of advantages while sections 4 and 5 cover both the offering and acceptance/solicitation of advantages; and</p> <p>(c) unlike sections 4 and 5, section 8 creates separate offences for prescribed officers and public servants (other than prescribed officers).</p> <p>As nothing in the Bill deals with matters concerning the offering of advantages for a non-corrupt purpose, the scope of item (d) of the</p>	

CSAs	CS's comments	Members' responses
	long title cannot be wide enough to cover new clause 3A.	

Abbreviations

CE	Chief Executive
C,ICAC	Commissioner, Independent Commission Against Corruption
IIC	Independent investigation committee
LegCo	Legislative Council
POBO	Prevention of Bribery Ordinance
RoP	Rules of Procedure
SJ	Secretary for Justice