

For Information
On 15 May 2000

Legislative Council Panel on Constitutional Affairs

**Application of Certain Provisions of the
Prevention of Bribery Ordinance (Cap. 201) to the Chief Executive**

Purpose

This paper aims at advising Members of the Legislative Council (LegCo) Panel on Constitutional Affairs on the latest thinking of the Administration regarding the application of certain provisions of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE).

Application of the POBO to the CE

2. As the Administration has advised the Panel earlier, legal advice has confirmed that the CE is currently not subject to those provisions of the POBO that are only applicable to “Government officers” or “public servants” under the POBO. The CE has indicated that he should be bound by the POBO, and he has instructed the Administration to work out how that could be done having regard to the constitutional position of the CE under the Basic Law.

3. In working out the solution, the Administration has carefully considered the possibility of deeming the CE to be a Government officer or public servant for the purpose of the POBO so that the relevant sections of the Ordinance that are applicable to “Government officers” or “public servants” would apply to him. However, having the benefit of legal advice, the Administration confirms that this option is not quite viable :-

- (a) The offence provisions of the POBO concerning solicitation and acceptance of advantages are drafted in such a way that is either predicated on the absence of the requisite permission or allows a defence of “lawful authority or reasonable excuse”. Given the special constitutional position of the CE and, thus, a lack of an appropriate authority in the HKSAR to grant approval to the CE for the receipt of advantages himself, the CE would not be able to avail himself, like other defendants, of the defence.

- (b) One possibility of making such an option viable would be to ban the acceptance of gifts and sponsorship by the CE altogether. However, this is not a practical solution because there is a practical need for the CE to accept gifts and certain sponsorships for protocol reasons, e.g. sponsorship from foreign governments for visits to their countries, and such an arrangement is also in line with international practice.

4. Further, it is already a common law offence for a “public officer” to accept a bribe and for anyone to bribe a “public officer”. In this context, a “public officer” means “one who discharges any duty in which the public is interested and more particularly if he receives payment from public money” (see Whitaker (1914) 10 Cr App R 245 at p. 252). According to section 101 I (1) of the Criminal Procedure Ordinance, Cap. 221, the maximum penalty for this common law offence is 7 years imprisonment and a fine of an unlimited amount. Legal advice is that the CE may fall within this meaning of “public officer” under the common law and would be liable to prosecution if he accepts a bribe even without any amendment to the POBO. In the light of the foregoing, we propose that the creation of a new provision in the POBO applicable to the CE will suffice : the new provision will be in line with the spirit of the existing section 10 of the POBO concerning the possession of unexplained property which is currently applicable to “Government officers”, and yet will take into account the unique constitutional position of the CE. The penalties for offences under section 10 of the POBO as provided for in section 12 and the provision on the confiscation of assets relating to section 10 offences as set out in section 12AA will apply to the new provision to be applicable to the CE. (Relevant extracts of the POBO are attached at the Annex.)

The Way Forward

5. The Administration will work on the necessary drafting instructions for the amendment of the POBO. We hope to introduce the legislation in the next legislative session.

Administration Wing
Chief Secretary for Administration’s Office
May 2000

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Section of Enactment

Chapter: 201 Title: PREVENTION OF BRIBERY Gazette Number:
ORDINANCE
Section: 10 Heading: **Possession of unexplained
property** Version Date: 30/06/1997

- (1) Any person who, being or having been a Crown servant-
- (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or
 - (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,

shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

- (2) Where a court is satisfied in proceedings for an offence under subsection (1)(b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused. (Added 9 of 1974 s. 3. Amended 48 of 1996 s. 3)

(3)-(4) (Repealed 56 of 1973 s. 2)

- (5) In this section, "official emoluments" (公職薪俸) includes a pension or gratuity payable under the Pensions Ordinance (Cap 89), the Pension Benefits Ordinance (Cap 99) or the Pension Benefits (Judicial Officers) Ordinance (Cap 401). (Amended 36 of 1987 s. 44; 85 of 1988 s. 51)



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Section of Enactment

Chapter: 201 Title: PREVENTION OF BRIBERY Gazette Number: 25 of 1998 s. 2
ORDINANCE

Section: 12 Heading: **Penalty for offences** Version Date: 01/07/1997

Remarks:

Amendments retroactively made - see 25 of 1998 s. 2

(1) Any person guilty of an offence under this Part, other than an offence under section 3, shall be liable-

(a) on conviction on indictment-

(i) for an offence under section 10, to a fine of \$1000000 and to imprisonment for 10 years;

(b) on summary conviction-

(i) for an offence under section 10, to a fine of \$500000 and to imprisonment for 3 years; and

and shall be ordered to pay to such person or public body and in such manner as the court directs, the amount or value of any advantage received by him, or such part thereof as the court may specify. (Amended 28 of 1980 s. 5)

(2) Any person guilty of an offence under section 3 shall be liable on conviction to a fine of \$100000 and to imprisonment for 1 year, and shall be ordered to pay to the Crown in such manner as the court directs the amount or value of the advantage received by him or such part thereof as the court may specify. (Amended 9 of 1974 s. 4; 28 of 1980 s. 5)

(3) In addition to any penalty imposed under subsection (1), the court may order a person convicted of an offence under section 10(1)(b) to pay to the Crown-

(a) a sum not exceeding the amount of the pecuniary resources; or

(b) a sum not exceeding the value of the property,

the acquisition of which by him was not explained to the satisfaction of the court. (Added 9 of 1974 s. 4)

(4) An order under subsection (3) may be enforced in the same manner as a judgment of the High Court in its civil jurisdiction. (Added 9 of 1974 s. 4. Amended 25 of 1998 s. 2)

(5) An order may be made under subsection (3) in respect of an offence under section 10(1)(b) where the facts that gave rise to that offence arose before 15 February 1974. (Added 61 of 1980 s. 2)

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Section of Enactment

Chapter: 201 Title: PREVENTION OF BRIBERY Gazette Number:
ORDINANCE

Section: 12AA Heading: **Confiscation of assets** Version Date: 30/06/1997

- (1) Subject to this section, where a person is convicted on indictment of an offence under section 10(1)
- (b) the court may, in addition to any penalty imposed under section 12(1), order the confiscation of any pecuniary resources or property-
- (a) found at the trial to be in his control as provided in section 10; and
- (b) of an amount or value not exceeding the amount or value of pecuniary resources or property the acquisition of which by him was not explained to the satisfaction of the court.
- (2) Any application for an order under subsection (1) shall be made by the Attorney General within 28 days after the date of the conviction.
- (3) An order under subsection (1) shall not be made in respect of pecuniary resources or property held by a person other than the person convicted unless that other person has been given reasonable notice that such an order may be made and has had an opportunity to show cause why it should not be made.
- (4) An order under subsection (1) shall not be made in respect of pecuniary resources or property held by a person other than the person convicted if that other person satisfies the court in any proceedings to show cause under subsection (3) that he had-
- (a) acted in good faith as regards the circumstances in which the pecuniary resources or property came to be held by him; and
- (b) so acted in relation to the pecuniary resources or property that an order in the circumstances would be unjust.
- (5) Nothing in subsection (4) shall be construed as limiting the court's discretion to decline to make an order under subsection (1) on grounds other than those specified in subsection (4).
- (6) An order under subsection (1)-
- (a) may be made subject to such conditions as the court thinks fit in all the circumstances of the case; and
- (b) may be made in respect of an offence under section 10(1)(b) where the facts that gave rise to that offence occurred before the date of commencement of the Prevention of Bribery (Amendment) Ordinance 1987 (50 of 1987).
- (7) A court may make orders under both subsection (1) and section 12(3) in respect of the same offence but shall not make orders under both provisions in respect of the same pecuniary resources or property.
- (8) An order under subsection (1) may make provision for taking possession of pecuniary resources or property to which the order applies and for the disposal of such resources or property by or on behalf of the Crown.