

For Information
on 25 October 1999

Legislative Council Panel on Constitutional Affairs

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

Purpose

This paper seeks to inform Members of the progress of the review on the application of certain provisions of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE).

Background

2. The Administration has undertaken at the meeting of the LegCo Panel on Constitutional Affairs held on 9 February 1999 to review the application of those provisions of the POBO that are applicable to “government officers” or “public servants” to the CE, taking into account Members’ views and the constitutional position of the CE as provided for in the Basic Law.

Progress of the Review

3. The CE has indicated earlier that he is happy with the suggestion that the POBO be applied to him. We would need to consider how that could be given effect, given the construction of the POBO and CE’s special constitutional position.

The Construction of the POBO

4. Currently, the offences of solicitation and acceptance of advantages under the POBO are, generally speaking, premised upon the common law principal-agent relationship. In general, a person will be guilty of an offence if he or she :

- (a) as an agent of a principal, solicits or accepts an advantage without the approval of the principal, as an inducement to or reward for or otherwise on account for his or her acting in a certain manner in relation to his principal's affairs or business; or
- (b) as a public servant, solicits or accepts without lawful authority or reasonable excuse, as an inducement to or reward for or otherwise on account for his or her acting in a certain manner in his or her capacity as a public servant.

The Constitutional Position of the CE

5. The Administration has reviewed the constitutional position of the CE under the Basic Law. In particular, we attempted to analyse the relationship between the CE and the Government of the Hong Kong Special Administrative Region (SARG). Our observation is that :

- (a) Under the Basic Law (BL), the CE is appointed by the Central People's Government (CPG) (BL Articles 15 and 45). The Basic Law does not confer any power on SARG in the appointment or removal of the CE to/from his office.
- (b) CE is the head of the Government of the Hong Kong Special Administrative Region (SARG) (BL Article 60(1)) and is accountable to the Central People's Government (CPG) and the Hong Kong Special Administrative Region (HKSAR) in accordance with the provisions of the Basic Law (BL Article 43(2)).

6. Against this background, the position of the CE in the context of the POBO is that :

- (a) the CE is not an agent of the SARG within the meaning of "agent" in section 2(1) of the POBO; and
- (b) the CE is not a government officer nor a public servant under the POBO.

Therefore, the CE is not subject to those provisions of the POBO that are only applicable to "government officer" or "public servant" under the POBO (i.e. sections 3, 4(2), 4(3), 5(2), 10, 12 (other than sections 12(1)(a)(ii) and (iii) and

12(1)(b)(ii)), 12AA and 16 of the Ordinance). The CE like all other citizens of Hong Kong is subject to various other provisions of the POBO (i.e. sections 4(1), 5(1), 6, 7, 8, 9, 11, 12(1) (a)(ii) and (iii) and 12(1)(b)(ii), 12A, 13, 13C, 14, 14C, 17, 17A, 17C, 29, 30, 33 and 33A of the Ordinance).

The Constitutional Position of the CE vis-à-vis the Construction of the POBO

7. Given the special constitutional position of the CE, it is quite difficult to fit the SARG and the CE (whose relationship does not constitute a principal/agent relationship) into the structure of the POBO. Moreover, even if we could overcome the difficulty of fitting the SARG and the CE into the structure of the POBO, we still need to resolve one practical difficulty : that the CE is currently the authority to approve the receipt of advantage by members of the civil service, and there is, at present, no appropriate authority according to the provisions of the POBO to grant approval to the CE for the receipt of advantages himself.

Current Administrative Arrangements

8. But notwithstanding the above, Members may wish to note that at present, to ensure transparency and accountability in relation to the acceptance and disposal of gifts to the CE, the CE's Office has already established a system to handle such gifts namely, the CE will declare publicly all the gifts presented to him irrespective of value. This arrangement makes reference to, and comply with the spirit of, the rules applicable to civil servants concerning acceptance of gifts. Generally speaking, gifts with protocol value or decorative items will be for display or use in the office or other Government properties. Gifts with commercial value will be disposed of through the Treasury and the proceeds will be donated to charitable organisations. As regards items which the CE would like to retain, valuations will be obtained from the Treasury and the CE would purchase them. The proceeds will again be donated to charities. As regards sponsorship, the CE declares, in an open register, financial sponsorships he receives or overseas sponsored visits he makes like other members of the Executive Council. The above arrangements are desirable and effective in ensuring transparency and accountability in relation to the acceptance and disposal of gifts and the handling of sponsorships.

The Review

9. The Administration will continue with the review on the application of the POBO to the CE and will revert to the LegCo Panel on Constitutional Affairs later.

Response to other issues raised by the LegCo Constitutional Affairs Panel at its meeting on 9 February 1999

10. Apart from the application of the POBO to the CE, Members had also raised a number of related issues at the meeting of the Constitutional Affairs Panel on 9 February 1999. The Administration's response to those points is as follows :

- (a) Should the CE, by the fact that CE was being mentioned in Article 104 of Section 6 (on the subject of Public Servants) of Chapter IV (on Political Structure) of the BL, be a public servant under the BL

BL Article 104 itself makes no reference to "public servant", and it is clear that not all those persons referred to in that Article are necessarily "public servants". For instance, judges cannot be "public servants", for otherwise they would have to be responsible to the SARG under BL Article 99(2). Besides, although section 6 of Chapter IV of the Basic Law (of which BL Article 104 forms part) is entitled "Public Servants", none of the BL Articles therein, except BL Article 104, refers to the CE. In fact, for some of these Articles, if the expression "public servants" therein were construed to include the CE, anomalies would arise. Such Articles include BL Article 100 (which provides for continuation of employment of public servants serving before the setting-up of the HKSAR), BL Article 101 (which provides for employment of foreign nationals to serve as public servants at all levels save for the excepted posts which do not include the office of CE), and BL Article 103 (which provides for the appointment and promotion of public servants on the basis of their qualifications, experience and ability).

- (b) Whether there are any other Ordinances in the Laws of Hong Kong which provide for similar exemptions of the CE from the application of certain provisions of those Ordinances

Similar exemptions of the CE will only occur in such other Ordinances which apply only to “government officer” or “public servant” with meaning as defined in the POBO. Subject to the foregoing, all Ordinances apply to the CE; he is subject to the laws of Hong Kong.

- (c) Should the CE commit an offence under the POBO, whether the procedure regarding the impeachment of the CE under BL Article 73(9) should be invoked before or after the trial

While it is very difficult to comment in vacuum on a hypothetical question, it appears that the intention behind BL Article 73(9) is to leave the ultimate decision as to whether the “serious breach of law or dereliction of duty” concerned should result in the institution of the impeachment procedure under BL Article 79(6) (without awaiting the conclusion of the related trial or any appellant procedures) to the good sense of the LegCo Members.

- (d) Whether the Special Adviser to the CE (Mr Paul Yip) is a government officer or a public servant under the POBO

Mr Yip was appointed by the CE as his Special Adviser to tender the CE his advice. There is no contract between Mr Yip and the SARG, and Mr Yip is not being remunerated for that appointment. On this basis, the view of our legal adviser is that Mr Yip is not a government officer nor a public servant for the purposes of the POBO. Nevertheless, Mr Yip is subject to the relevant provisions of the Ordinance like all other citizens of Hong Kong.