

Application of Certain Provisions of the Prevention of Bribery Ordinance to the

Chief Executive of the HKSAR

VIEWS OF THE HONG KONG BAR ASSOCIATION

1. The Hong Kong Bar Association (“the Bar”) was asked by the Sub-committee on Application of Certain Provisions of the Prevention of Bribery Ordinance to the Chief Executive, Panel on Constitutional Affairs, Legislative Council to provide its views on the following issues of concern:

(a) Whether the standards of bribery prevention applicable to “prescribed officers” under the Prevention of Bribery Ordinance (“POBO”) should apply to the Chief Executive of the HKSAR, and if so, whether the legislative provisions for application to the Chief Executive of the HKSAR should be given effect through amendments to the POBO or separate legislative provisions;

(b) How to reconcile the Chief Executive of the HKSAR’s unique constitutional status with an appropriate regulatory framework; and

(c) If the Chief Executive of the HKSAR is subject to bribery prevention

legislation, whether it is appropriate for the ICAC to investigate the Chief Executive of the HKSAR for an alleged offence of bribery since the ICAC is accountable to the Chief Executive of the HKSAR under Art 57 of the Basic Law of the HKSAR, and if not, what are the alternatives.

2. The Bar considers it convenient to tackle (b) first.
3. On (b), the Bar considers that the Chief Executive of the HKSAR does not have any relevant “unique constitutional status”. The Chief Executive of the HKSAR is not immune from the law. The fact that he is appointed by the Central People’s Government does not alter this. The Basic Law has an impact as to how he is appointed or removed from office but not as to his susceptibility to the process of the law - whether that be the civil or the criminal law. If the Administration perceives a difficulty in the application of the present POBO provisions to the Chief Executive of the HKSAR due to the understanding that the Chief Executive of the HKSAR is not an agent of the HKSAR Government, the same may be said of the principal officials referred to in Art 48(5) of the Basic Law of the HKSAR, since they, like the Chief Executive of the HKSAR, are appointed by the Central People’s Government. The Basic Law of the HKSAR confers no power on the HKSAR Government in relation to the appointment or removal of the Chief Executive of the HKSAR and principal

officials. The Chief Executive of the HKSAR may nominate a person for appointment or recommend a removal but it is the Central People's Government that decides on the appointment or removal.

4. Principal officials come within paragraph (b)(i) of the definition of "prescribed officer" in s 2 of the POBO. There is no reason in principle why the Chief Executive of the HKSAR could not be so treated - even if it is necessary to deem or declare him to be such.
5. The Bar considers therefore that having taken into account the position of the Chief Executive of the HKSAR under the Basic Law, there is no reason why the standards of bribery prevention applicable to "prescribed officers" under the POBO should not apply to the Chief Executive of the HKSAR. The Chief Executive of the HKSAR does not enjoy, whether pursuant to any provision of the Basic Law of the HKSAR or by necessary implications of the provisions of the same, an immunity from criminal prosecution while in office or for acts done while in office. The question of whether the matter should be addressed in the POBO or some other legislation is a matter of drafting and thus a technicality.
6. The Bar adds in this connection that the Chief Executive of the HKSAR is

subject to the common law offences of bribery *and* misconduct in public office. Two comments are apposite in this regard. First, the applicability of these laws underlines the proposition that the Chief Executive has no relevant special status. Second, the Bar sees no valid or meaningful argument that the Chief Executive should be subject to a less rigorous standard of conduct in relation to corruption offences than his subordinates.

7. Any issue arising out of the implications of section 3 of the POBO *i.e.* criminalizing the conduct of a prescribed officer who, without the general or special permission of the Governor, solicits or accepts any advantage, may be addressed by having a special section or sub-section applicable only to the Chief Executive of the HKSAR and the general or special permission of another body (such as the Legislative Council) might be substituted in relation conduct on the part of the Chief Executive of the HKSAR.
8. On (c), the Bar considers that it is not appropriate to require the ICAC to investigate complaints of bribery or misconduct in public office against an incumbent Chief Executive of the HKSAR. The Bar sees merit in the establishment of an office of independent counsel for this purpose. While this may not be modelled on the approach seen in the United States for investigating alleged violations of federal law of the President of the United

States and other senior officials, some inspiration may be taken from this. The Bar suggests that, bearing in mind Art 73(9) of the Basic Law of the HKSAR regarding impeachment of the Chief Executive of the HKSAR, a person such as the Chief Justice of the Court of Final Appeal can appropriately be vested with the power of appointing such an independent counsel from qualified individuals including senior counsel. (The person does not have to be the CJ, it could be a committee of judges - as in the US. That is a matter that can be considered.) The Bar envisages that the independent counsel once appointed would have the same investigatory powers as exist under the POBO as if he were the Commissioner of the ICAC. The independent counsel should be provided with a secured line of provision in the Government Budget and, amongst other things, may require civil servants or ICAC investigators to be seconded to serve in his office. Provisions may be made for the report of the independent counsel be presented to the Secretary for Justice for decision on prosecution and if no decision is made within a specified period, the report will be presented to the Legislative Council in confidence; and if the Secretary for Justice decides against a prosecution, the Legislative Council may resolve to require the presentment of the report. The Legislative Council may then after considering the report resolve whether the course prescribed under Art 73(9) of the Basic Law of the HKSAR ought to be taken.

Dated 31st October 2005.

Hong Kong Bar Association