

For discussion
on 18 December 2006

Legislative Council Panel on Constitutional Affairs
Application of Certain Provisions of the
Prevention of Bribery Ordinance to the Chief Executive

Purpose

This paper sets out the Administration's response to some issues raised by Members at the meeting of the Legislative Council ("LegCo") Panel on Constitutional Affairs ("CA Panel") on 20 November 2006 concerning the application of certain provisions of Prevention of Bribery Ordinance (Cap. 201) ("POBO") to the Chief Executive ("CE").

Commitment to apply certain provisions of POBO to the CE

2. The CE has clearly indicated in his Policy Address in October 2005 that he accepted the need for his office to be subject to anti-corruption regulation. The Administration will honour this undertaking and introduce legislation into the LegCo to put in place the necessary legal regulatory procedures within the framework of the Basic Law.

The Administration's proposal

3. In November 2005, the Administration put forward a legislative proposal to the Subcommittee on Application of Certain Provisions of the POBO to the CE ("the Subcommittee") formed under the CA Panel. The proposal seeks to apply certain POBO provisions to the CE so that the CE would be subject to a range of similar provisions as those regulating prescribed officers. The main provisions of the legislative proposal were –

- a) to introduce legislative amendments to apply s. 4, 5 and 10 of POBO to the CE¹;

¹ The existing provisions are set out below –

Section 4 – it is an offence for any public servant, without lawful authority or reasonable excuse, to solicit or accept any advantage as an inducement to or reward for or otherwise on account of his acting in certain manner as a public servant;

Section 5 – it is an offence for any public servant, without lawful authority or reasonable excuse, to

- b) to introduce a new provision, in line with s.8(1) of POBO², to bind any person who offered any advantage to the CE;
- c) to amend s.10 to specify that if the CE was accused of possessing unexplained property, the Court shall take account of the CE's assets declared to the Chief Justice pursuant to BL47(2) in determining whether the CE has given a satisfactory explanation under s.10(1); and
- d) to add a new section to provide that the Secretary for Justice may refer to the LegCo a report of the CE suspected to have committed the POBO offences for possible follow-up under BL73(9)³.

4. At the Subcommittee meeting on 19 December 2005, the Administration further explained and elaborated on the legislative proposal. The Subcommittee presented its Report at the CA Panel meeting on 20 February 2006. It was recommended that the Administration should proceed with the preparation of the necessary legislative amendments, taking into account Members' views and concerns.

solicit or accept any advantage in regard to contracts; and
Section 10 – it is an offence for any prescribed officer or former prescribed officer to possess any unexplained property.

Under the POBO, “prescribed officer” (訂明人員) means –

- (a) any person holding an office of emolument, whether permanent or temporary, under the Government; and
- (b) the following persons (to the extent that they are not persons included in paragraph (a))-
 - (i) any principal official of the Government appointed in accordance with the Basic Law;
 - (ii) the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap. 66) and any person appointed under section 5A(3) of that Ordinance;
 - (iii) Chairman of the Public Service Commission;
 - (iv) any member of the staff of the Independent Commission Against Corruption;
 - (v) any judicial officer holding a judicial office specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap. 92) and any judicial officer appointed by the Chief Justice, and any member of the Commission Ordinance (Cap. 92) and any judicial officer appointed by the Chief Justice, and any member of the staff of the Judiciary;

and, “public servant” (公職人員) means any “prescribed officer” and any employee of a public body.

² At present, section 8(1) of the POBO provides that a person who, without lawful authority or reasonable excuse, while having dealings of any kind with the Government through any department, office or establishment of the Government, offers any advantage to a “prescribed officer” employed in that department, office or establishment of the government, will be guilty of an offence.

³ In accordance with BL 73(9), if a motion initiated jointly by one-fourth of all the members of the LegCo charges the CE with serious breach of law or dereliction of duty and if he refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision.

5. Since then, the Administration has been preparing the necessary legislative amendments on the basis of the proposal presented to the Subcommittee.

Progress

6. In considering how certain provisions under the POBO should apply to the CE, the Administration has taken into account the existing regulatory measures for prescribed officers (including principal officials and civil servants) as well as public servants including LegCo Members, etc. The Administration also needs to consider how certain provisions should be adapted to reflect the unique constitutional status of CE as head of the HKSARG who is accountable to the CPG and the HKSAR in accordance with the provisions of the Basic Law.

7. The policy and technical issues arising from the preparation of the draft legislation are more complicated than we previously envisaged. By way of illustration, section 8 of POBO provides that *“any person who, without lawful authority or reasonable excuse, while having dealings of any kind with the Government through any department, office or establishment of the Government, offers any advantage to any prescribed officer employed in that department, office or establishment of the Government, shall be guilty of an offence.”* As the CE is the head of HKSAR and its Government, if we were to directly apply section 8 to cases of offering of advantages to the CE, it could subject all persons having dealings of any kind with any government department (e.g. persons applying for driving licences or other permits, and someone filing a tax return) to a strict offence whenever they offer an advantage to the CE. If so, the scope would be much wider than the existing section 8 which covers only the department in which the prescribed officer is employed. This would also be unduly harsh as some well-intentioned individuals may genuinely want to offer souvenirs or mementos to the CE during his official visits. Therefore, in considering the exact wording of the provisions in the amendment bill, we have to examine the implications carefully to avoid the provisions being too loose or too draconian.

The CE is bound by other laws

8. The Administration is committed to combating corruption and maintaining a clean society in Hong Kong. The CE is already subject to other anti-corruption measures under existing laws –

- (a) under Article 47 of the Basic Law, the CE must be a person of integrity, dedicated to his or her duties. Further, the CE, on assuming office, shall declare his or her assets to the Chief Justice;
- (b) the CE is bound by other provisions under the POBO (save for those which are applicable to “prescribed officers” or “public servants” only) as applied to all individuals in Hong Kong;
- (c) the CE is bound by the common law offence of bribery, and those who offer any bribe to the CE would also be caught by the offence; and
- (d) Article 73(9) of the Basic Law provides for a mechanism under which the LegCo may pass a motion of impeachment and report it to the Central People’s Government for decision if the CE is charged with serious breach of law or dereliction of duty and refuses to resign.

9. In addition, the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) (“ECICO”) provides comprehensive safeguards to prevent any corrupt and illegal conducts relating to elections, including the CE elections. According to section 2 of ECICO, the definition of “candidate” includes a person who stands nominated as a candidate at an election and a person who, at any time before the close of nominations for an election, has publicly declared an intention to stand as a candidate at the election. Any candidate who runs for an election (including an incumbent CE running for re-election) is bound by the relevant provisions under the ECICO.

Legislative timetable

10. The Administration is proceeding with the requisite drafting of the Prevention of Bribery (Amendment) Bill (“the Bill”) having regard to all pertinent issues. We are working earnestly for a proposal that is practicable and effective and will revert to the LegCo when the remaining policy and technical issues arising from the preparation of the draft legislation are resolved. We have already included the Bill in the 2006-07 Legislative Programme and are working towards introducing the Bill into LegCo during the first half of this legislative session.

Administration Wing
Chief Secretary for Administration’s Office
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