

**立法會**  
**Legislative Council**

LC Paper No. LS58/11-12

**Note for the Subcommittee on Prevention of Bribery Ordinance  
(Amendment of Schedules 1 and 2) Order 2012**

**A Body Corporate as Public Servant under  
the Prevention of Bribery Ordinance (Cap. 201)**

**Background**

During the meeting of the Subcommittee on Prevention of Bribery Ordinance (Amendment of Schedules 1 and 2) Order 2012 on 25 April 2012, the issue was raised as to whether a public servant is restricted to a natural person for the purpose of the Prevention of Bribery Ordinance (POBO). The Administration issued a paper on 30 April 2012 (File ref: CB(1) 1742/11-10(01)) to provide its view.

**The Administration's view**

2. In the above paper, the Administration has stated that "there has not been any case in Hong Kong in which a company was prosecuted as a public servant under POBO, and there is uncertainty as to how a company could be prosecuted as a public servant under POBO." No details have been provided.

**Body corporate as public servant under POBO**

3. Section 2 of POBO defines "public servant" to mean, essentially, any –
- (a) prescribed officer;
  - (b) employee of a public body (including a body specified in Schedule 1);
  - (c) member of a public body if the public body is not specified in Schedule 2 and is not a club, association or educational institution;
  - (d) office holder (other than an honorary one) of a public body specified in Schedule 2; and
  - (e) member of any council, board, committee or other body of a public body which is vested with any responsibility for the conduct or management of the affairs of the public body specified Schedule 2.
4. "Prescribed officer" referred to in paragraph 3(a) above is defined in POBO. The persons that are specified in the definition do not include any legal person.

"Employee" referred to in paragraph 3(b) is not defined in POBO. In the absence of a definition, the meaning of the term must be understood in its ordinary usage, which should exclude a legal person.

5. As the expressions "member" and "office holder" referred to in paragraphs 3(c) to (e) are similarly not defined in POBO, their ordinary usage should prevail, which does not preclude a body corporate.

6. As explained above, it appears that a body corporate could be a public servant for the purpose of POBO. However, if it can be established that a body corporate has committed an offence under section 4(2) or 5(2)<sup>1</sup> of POBO, section 101E of Criminal Procedure Ordinance (Cap. 221) provides that where an offence is committed by a company and it is proved that the offence was committed with the consent or connivance of a director or other officer concerned in the management of the company, or any person purporting to act as such director or officer, the director or other officer shall be guilty of the like offence.

7. Hence, it will be for the prosecution to consider and decide, depending on the facts of the case and with reference to the purpose<sup>2</sup> of POBO and section 101E, whether to prosecute the body corporate alone, or any director or officer of the body corporate who has consented to or connived at the act in question, or both the company and such a director or officer, bearing in mind that only a natural person may be imprisoned and imprisonment often has greater deterrence.

### **Possible offences that can be committed by a member of HKIRC**

8. Further, the Administration has also stated in its paper that "if an HKIRC member accepts advantages for election of directors to the Board, he/she could have committed offences under POBO or common law, such as conspiracy to defraud, or other statutory offences, such as fraud under section 16A of the Theft Ordinance (Cap. 210)". There is however no elaboration, particularly with regard to the specific common law and statutory offences given as examples.

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<sup>1</sup> The POBO offences that only a "public servant" as defined may commit are those provided for in sections 4(2) and 5(2). In gist, section 4(2) concerns taking bribe by a public servant in relation to the performance (or non-performance) of an act and section 5(2) concerns assistance given by a public servant in regard to contracts in relation to the bribe that he solicits or accepts.

<sup>2</sup> The long title of POBO states its purpose to be "to make further and better provisions for the prevention of bribery and for purposes necessary thereto or connected therewith".