

LCQ4: Bringing Chief Executive within ambit of sections 3 and 8 of Prevention of Bribery Ordinance

Following is a question by the Hon Dennis Kwok and a reply by the Chief Secretary for Administration, Mr Matthew Cheung Kin-chung, in the Legislative Council today (January 23):

Question:

The Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests submitted its report to the Government in May 2012, recommending the enactment of legislation to provide that the Chief Executive (CE) must obtain permission from a statutory independent committee prior to the acceptance of advantages, so as to make the system under section 3 of the Prevention of Bribery Ordinance (POBO) applicable to CE. In addition, the incumbent CE has undertaken in her election manifesto that she would "resolve as soon as possible those constitutional and legal issues aiming at amending the Prevention of Bribery Ordinance to extend the scope of sections 3 and 8 to cover the Chief Executive". In his reply to a question raised by a Member of this Council on July 5, 2017, the Chief Secretary for Administration (CS) indicated that "upon completion of the study on such constitutional and legal issues, the Government will initiate the legislative procedure as early as possible". CS also stated that, in respect of a relevant private bill proposed by me, the Government would "examine whether the bill involves public expenditure, the political system, government operation, and so on". Regarding the efforts to amend POBO, will the Government inform this Council:

(1) whether it will propose legislative amendments in accordance with the proposal made by the Review Committee; if not, of the reasons for that, and the alternative proposals under consideration;

(2) whether it will complete the legislative amendment exercise within the current term of the Government; if so, of the legislative timetable; if not, the reasons for that; and

(3) whether it will undertake that it will, for the period from the present to the time of submission of the proposed legislative amendments to this Council, report on a half-yearly basis the progress of the legislative amendment exercise to this Council or any of its committees; if not, of the reasons for that?

Reply:

President,

Since the Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests (the IRC) submitted its report in May 2012, the Government has been actively following up on the IRC's recommendations, with a view to enhancing the robustness of the system concerned to effectively prevent and properly deal with potential conflicts of interests involving public officials.

The IRC recommended in its report that amendments be made to sections 3 and 8 of the Prevention of Bribery Ordinance (Cap 201) (POBO) to extend their application to the Chief Executive (CE). As the head of the Hong Kong Special Administrative Region (HKSAR) and the HKSAR Government, CE must be a person of integrity and dedicated to his/her duties according to Article 47 of the Basic Law. CE agrees that there should be a good system to maintain and strengthen public confidence in the integrity of the Government. At present, CE observes the provisions in the Code for Officials under the Political Appointment System and the declaration system applicable to Members of the Executive Council (ExCo) in declaring her financial and other interests. The open part of her declaration has been uploaded to the websites of CE's Office and ExCo for public inspection. The information related to gifts presented to and sponsorships received by CE has also been uploaded to the website of CE's office.

According to section 3 of POBO, any "prescribed officer" (including politically appointed official and civil servant) who, without CE's permission, solicits or accepts any advantage shall be guilty of a criminal offence. Also, section 8 of POBO stipulates that any person who, without lawful authority or reasonable excuse, while having dealings with any government department or public body, offers advantages to any "public servant" (including "prescribed officer") employed in that department or by that public body, shall be guilty of an offence.

Amending these two sections for application to CE has implications on the provisions about the political structure of HKSAR and CE's constitutional status in HKSAR as prescribed in the Basic Law. The relevant constitutional and legal requirements as well as operational issues must be studied in a holistic manner.

Under Articles 15 and 45 of the Basic Law, CE shall be selected by election held in HKSAR and be appointed by the Central People's Government. Article 43 of the Basic Law stipulates that CE shall be the head of HKSAR, and shall be accountable to the Central People's Government and HKSAR in accordance with the provisions of the Basic Law. Pursuant to Article 60 of the Basic Law, CE shall also be the head of the Government of HKSAR. Hence CE is both the head of HKSAR and the head of the HKSAR Government. As indicated by the IRC in its report, any regime that gives permission to CE for soliciting or accepting advantages shall take into account the unique constitutional status of the office of CE under the Basic Law. The IRC recommended that a specialised independent committee, with members jointly appointed by the Chief Justice and the President of the Legislative Council, should be set up to give general or special permission to CE for soliciting and accepting advantages. This, however, may not be consistent with CE's

unique constitutional status.

Furthermore, given that CE is the head of the HKSAR Government, amending section 8 to make it applicable to CE could have the effect of making it an offence potentially for any persons having dealings of any kind with any government department to offer an advantage to CE. In this connection, the IRC recommended that the reach of the statutory provisions would not include any person offering an advantage to CE where such acceptance of the advantage by CE is covered by a given general permission. But again, if such general permission is to be granted by a specialised independent committee established according to the IRC's recommendation, the above-mentioned constitutional and legal implications remain.

In fact, the existing POBO already contains certain provisions which effectively regulate the alleged corrupt acts of CE. Apart from such universally-applicable provisions as sections 6, 7 and 9 of POBO, sections 4, 5 and 10 are also applicable to CE for regulating respectively any bribery acts of soliciting and accepting advantages and possession of unexplained properties. Under these provisions, any person who offers any bribe to CE shall be guilty of an offence as well. Meanwhile, CE is subject to the regulation of bribery offences under the common law, and the offence of "misconduct in public office" under the common law also applies to CE.

The Government is now studying carefully the relevant issues on amending POBO to extend the application of sections 3 and 8 to CE in accordance with the constitutional framework set out in the Basic Law and the existing legal requirements. On completion of the study, the Government will report its findings to the Legislative Council (LegCo) as early as possible. Since the study is still in progress, the Government does not have a specific date for submitting the report or introducing the amendment bill on POBO to LegCo at this stage.

Thank you, President.