

## Chapter 4 ASSESSMENT AND RECOMMENDATIONS

### Overview

4.1 This Chapter sets out the assessment and recommendations of the IRC on the regulatory framework and procedures for the prevention and handling of potential conflicts of interests applicable to the Chief Executive (CE), Officials under the Political Appointment System (politically appointed officials or PAOs), and Members of the Executive Council (ExCo Members).

### General Considerations

4.2 A clean public service is a core value of our society. The public offices covered in this review are our highest public offices and their holders are our political leaders. Indeed, the CE is the head of the HKSAR. The community has highest expectations that these public officials would observe the highest standards of conduct. Mere compliance with the law is plainly insufficient. They must conduct themselves in a manner which will maintain and strengthen public confidence in the integrity of the Government and avoid conduct which runs the risk of undermining public trust.

4.3 The public has reaffirmed such a view strongly during the public consultation and through the media. It is of crucial importance that the public should have full confidence in the system for maintaining integrity and probity in our Government. It is fundamental to the integrity of public administration that the decision-making process must be fair and impartial and be perceived to be so. It is only with a good system that we can uphold the dignity and honour of these highest public offices.

4.4 Public officials are members of the community. As such, it is inevitable that they have interests, both financial and otherwise. It is of fundamental importance that there is in place a sound system for the prevention and handling of potential conflicts of interests concerning public officials which commands public confidence. Such a system is vital for ensuring fairness and impartiality in the conduct of government business.

4.5 In reviewing the present system, the IRC considers that it is appropriate to be guided by the following considerations –

- (a) Leaders should lead by example. The system applicable to the highest public officials should be at least as stringent as that applicable to those they lead.
- (b) The system must command public confidence.
- (c) The system must have an appropriate degree of transparency.
- (d) The system must take into account legitimate privacy concerns of individuals.
- (e) The system must not be unduly burdensome for the efficient conduct of government business.

4.6 In reviewing the present system, the IRC has studied the system applicable in the Civil Service for the prevention and handling of potential conflicts of interests, including

the regulatory framework and procedures for the declaration and handling of interests and investments and those for the acceptance of advantages and entertainment (summarized at *Appendix B*). The IRC considers that the civil service system is a good system. It has stood the test of time and commands public confidence. Indeed, having been improved from time to time over the years in the light of experience, the civil service system has been widely regarded as setting the gold standard. Accordingly, the IRC has taken full account of the civil service system in the present review.

4.7 Having regard to the above considerations, the assessment and recommendations of the IRC on the regulatory regime for the prevention and handling of conflicts of interests concerning PAOs, the CE and ExCo Members respectively are set out in the ensuing sections.

## **Politically Appointed Officials (PAOs)**

### *Declaration and Handling of Conflict of Interests*

4.8 PAOs are subject to the Code for Officials under the Political Appointment System (the PAO Code)<sup>50</sup> which contains provisions for the prevention of conflict of interest<sup>51</sup>. Specifically, they are required to report to the CE any private interest that might influence, or appear to influence, their judgement in the performance of their duties. They are also required to make regular declaration of a wide range of investments and interests, parts of which are open for public inspection. These requirements are as comprehensive and extensive as those in the civil service declaration system.

4.9 In these provisions, the reference to “interest” or “interests” include not only the official’s pecuniary interests but also his non-pecuniary interests. Non-pecuniary interests may include matters such as family ties, friendships, membership of organizations and associations<sup>52</sup>. Where a conflict of interest may have arisen, the CE will determine whether there is any conflict and if so, the appropriate course of actions.

4.10 These arrangements are similar to those in the Civil Service, where interests declared by a civil servant are examined by his supervisor to determine whether there is any conflict, taking into account the duties of the civil servant concerned, his relationship with the persons concerned, and/or whether the relationship could lead to embarrassment or loss of impartiality in the discharge of his duties. If a conflict of interest may have arisen, the civil servant may be relieved of his involvement in the matter concerned and the matter may be assigned to another civil servant.

4.11 The IRC considers that the present system of declaration and handling of interests and investments concerning PAOs set out in the PAO Code, which is consistent with that applicable to the Civil Service, is largely satisfactory. When PAOs may have potential conflict of interest, the consideration and handling of such question should not be laxer than

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<sup>50</sup> Relevant excerpts of the PAO Code are at *Appendix A*.

<sup>51</sup> Certain provisions are also elaborated in the “Memorandum on Terms and Conditions for the Employment of PAOs” which, together with the appointment letters of PAOs, constitutes their employment contracts.

<sup>52</sup> For instance, see paragraph 3 of Civil Service Bureau (CSB) Circular No. 2/2004 on “Conflict of Interests” dated 31 January 2004 elaborating on scope of “private interests”.

the approach for civil servants.

4.12 **Recommendation 1:** The IRC **recommends** that, in deciding on conflict of interest questions concerning PAOs, the CE should adopt an approach which should be at least as stringent as that applicable in the Civil Service.

### Transparency

4.13 To inspire public confidence in the operation of the present system for handling potential conflict of interests concerning PAOs, the IRC considers that an appropriate degree of transparency in the system is necessary. This includes publishing the guidelines relating to consideration of potential cases of conflict of interests concerning PAOs, that is, publishing them publicly. Where this Report refers to “publish” or “publication”, it means public publication.

4.14 In addition, to demonstrate to the public that the system is functioning, the IRC considers that the Administration should, in announcing any decision, make it known to the public where any PAO has withdrawn from the decision-making process due to conflict of interest. The IRC notes that this has been done in a recent occasion when the Secretary for Justice withdrew himself from handling a case involving the arrest of a former Principal Official to avoid any possible perception of bias or improper influence<sup>53</sup>.

4.15 **Recommendation 2:** The IRC **recommends** that the CE should formulate, adopt and publish the guidelines applicable to his consideration and handling of conflict of interest questions concerning PAOs.

4.16 **Recommendation 3:** The IRC **recommends** that, where any PAO has withdrawn from the decision-making process in relation to any matter due to conflict of interest, this fact should be stated as and when the decision concerning that matter is publicly announced by the Administration, identifying the PAO in question and the nature of the interest involved.

### Sanctions

4.17 A civil servant who fails to declare a conflict of interest is liable to civil service disciplinary proceedings. He is subject to sanctions, including warning, reprimand, compulsory retirement or dismissal if found guilty. If breach of the law is suspected, e.g. the common law offence of misconduct in public office, the civil servant may also be subject to investigation and prosecution and on conviction, criminal sanctions. However, in respect of PAOs, the handling process and the applicable sanctions in case of alleged breach of the PAO Code including its provisions on the prevention of conflict of interest are not expressly spelt out at present.

<sup>53</sup> See press release issued by the Government on “Statement by the Department of Justice” dated 29 March 2012 (<http://www.info.gov.hk/gia/general/201203/29/P201203290472.htm>).

4.18 **Recommendation 4:** The IRC **recommends** that the PAO Code should be amended to make clear that in the event of any allegation of breach of the PAO Code relating to conflicts of interests by PAOs, the CE after due process would decide on whether breach is established and if so, on the applicable sanctions, including warning, public reprimand, suspension or dismissal; or in the case of Principal Officials, recommendation to the Central People’s Government for their suspension or dismissal. The relevant contracts of employment involving PAOs should enable such sanctions to be imposed.

### *Acceptance of Advantages*

4.19 PAOs are currently subject to the same regulatory regime as civil servants on the solicitation and acceptance of advantages, including the Prevention of Bribery Ordinance (Cap.201) (the POBO). Under section 3 of the POBO, it is a criminal offence for PAOs to solicit or accept any advantage without the CE’s permission. “Advantages” under the POBO include gifts, loans, passages, any other service or favour, but exclude entertainment which covers lunches, dinners and the like and any accompanying performance.

4.20 “Prescribed officers” which include both PAOs and civil servants are given general permission by the CE by virtue of the Acceptance of Advantages (Chief Executive’s Permission) Notice (the AAN) to solicit or accept certain types of advantages under specified circumstances (e.g. accept a gift of value not more than \$3,000 from a close personal friend, or not more than \$500 from any other person, on special occasions such as wedding or birthday; or accept a gift of value not more than \$1,500 from a close personal friend, or not more than \$250 from any other person, on any other occasion). PAOs, like civil servants, must seek special permission from the CE to solicit or accept advantages not covered by the general permission in the AAN. So, this is essentially the same system as that applicable in the Civil Service<sup>54</sup>.

4.21 The civil service system for regulating the solicitation and acceptance of advantages is well-established, sound and commands public confidence. It is imperative that the regulatory regime applicable to PAOs for the acceptance of advantages should be at least as stringent as that applicable to the Civil Service. The IRC considers that the present system regulating the acceptance of advantages by PAOs, provided for in section 3 of the POBO and the AAN, being the same system as that applicable to the Civil Service, is largely satisfactory.

### Guidelines for special permission

4.22 The guidelines for considering applications from PAOs for special permission are not expressly spelt out at present. By comparison, the Civil Service has set out a number of factors in internal circulars for considering applications from civil servants for special permission to solicit or accept advantages. It is essential that the guidelines to be adopted by the CE in considering applications by PAOs for special permission should not be laxer than those applicable in the Civil Service. They should be published for transparency.

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<sup>54</sup> Except that PAOs are given blanket permission for personal retention of gifts and invitations received in official capacity which differs slightly from similar blanket permission given in the Civil Service (see paragraph 3.34).

4.23 **Recommendation 5:** The IRC **recommends** that the CE should formulate, adopt and publish guidelines for considering applications by PAOs for special permission to solicit or accept advantages, which should be at least as stringent as those applicable in the Civil Service<sup>55</sup>.

#### Guidance in PAO Code

4.24 Chapter 5 of the PAO Code on “*Prevention of Conflict of Interest*” currently includes a section on “*Acceptance of advantages*” (paragraphs 5.8-5.10) which contains provisions that remind PAOs of the statutory provisions and provide guidance in relation to the acceptance of advantages, gifts, hospitality, free service, other benefits, and entertainment. Whether any hospitality, free service and benefit amounts to an advantage or to entertainment depends on its nature and circumstances. For example, hospitality consisting of hotel accommodation or passage would be advantages, whilst hospitality consisting of a meal and accompanying performance would be entertainment.

4.25 There is a need to distinguish clearly between provisions in the PAO Code applicable to advantages and those applicable to entertainment. The former are subject to the POBO and administrative guidance, whilst the latter is not subject to the POBO and is subject to administrative guidance only.

4.26 Further, the provision in the PAO Code reminding PAOs of the relevant statutory provisions (part of current paragraph 5.8) and the need to seek permission from the CE for the acceptance of advantages should be separated from the provisions on administrative guidance.

4.27 **Recommendation 6:** The IRC **recommends** that the section in the PAO Code concerning the acceptance of advantages should be re-formulated to have a separate and specific provision reminding PAOs of –

- (a) the POBO and the Independent Commission Against Corruption Ordinance (Cap.204), including in particular section 3 of the POBO which provides that solicitation or acceptance of advantages without permission is a criminal offence;
- (b) section 2(2) of POBO which provides that an official solicits or accepts an advantage if he or any other person on the his behalf, directly or indirectly, solicits or accepts any advantages, whether for himself or any other person; and
- (c) the requirement to seek special permission from the CE to solicit or accept advantages in circumstances other than those for which general permission has been given by the AAN.

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<sup>55</sup> Guidelines for considering special permission for the acceptance of advantages by civil servants are set out in CSB Circular No. 3/2007 on “Acceptance of advantages offered to an officer in his private capacity” dated 16 February 2007 and No. 4/2007 on “Advantages/entertainment offered to an officer in his official capacity and gifts and donations to a department for the benefit of staff” dated 16 February 2007.

4.28 As stated above, there is a need to separate out advantages from entertainment in different provisions in setting out guidance in the PAO Code. Paragraph 5.9 of the Code mixes together the acceptance of gift, hospitality and free service. The guidelines set out therein echo those in the Civil Service: whether the acceptance of advantages by PAOs might or might reasonably appear to compromise their judgement or place them under an improper obligation, or would lead to a conflict of interest with their official duties, place them in a position of obligation, lead to embarrassment in the discharge of their functions, or bring them or the public service into disrepute. Such guidelines can be expanded and presented in a clearer way in the PAO Code.

4.29 **Recommendation 7:** The IRC **recommends** that the section in the PAO Code concerning the acceptance of advantages should be re-formulated to have a separate and specific provision giving guidance for PAOs on the acceptance of advantages. This provision should only deal with advantages and should not be confused with matters which may amount to entertainment.

4.30 The provision should be amended to make clear that in deciding whether to accept any advantage, apart from observing the relevant legal provisions, the PAO shall consider whether, having regard to matters such as the frequent or excessive nature of the advantage, the relationship between the official and the offeror, and the character or reputation of the offeror, acceptance of the advantage by the PAO is likely –

- (a) to lead to a conflict of interest with the PAO’s official duties;
- (b) to place the PAO in a position of obligation to the offeror or under any improper obligation;
- (c) to compromise the judgement of the PAO or to lead to a reasonable perception of such compromise;
- (d) to lead to embarrassment of the PAO or the Government; or
- (e) to bring the PAO or the Government into disrepute bearing in mind public perception.

*(Underlined parts indicate additions to existing guidelines.)*

4.31 The provision should make clear that, when in doubt, the PAO shall seek guidance from the CE on the acceptance of any advantage, irrespective of whether special permission is required. The CE should in giving guidance adopt an approach which is at least as stringent as that in the Civil Service.

#### Advantages received in official capacity

4.32 In the Civil Service, advantages such as gifts received in official capacity by civil servants or their spouses belong to the Government, unless permission has been given for the civil servant concerned to accept or retain personally. While this is also the practice in respect of PAOs, such arrangement is not specified in the PAO Code at present.

4.33 **Recommendation 8:** The IRC **recommends** that the section in the PAO Code concerning the acceptance of advantages should be re-formulated to include a provision which makes clear that any advantage received by a PAO or his spouse from any organization, person or government (other than the HKSAR Government) which in any way relates to his office as PAO, i.e. in his official capacity, belongs to the Government, unless permission is given for the PAO to accept or retain the advantage personally.

4.34 PAOs have been given blanket permission to accept and retain personally gifts offered to them in their official capacity, of up to \$400 in value, or up to \$1,000 in value if the gift is inscribed with the PAO's name or received by him as the guest of honour or an officiating guest. This covers modest gifts offered to PAOs in the course of various events or visits as normal gestures of courtesy or appreciation. Such permission is entirely appropriate and is consistent with similar blanket permission given in the Civil Service in the relevant Civil Service Bureau Circular or departmental instructions<sup>56</sup>. However, such blanket permission for PAOs has not been published. We consider that any blanket permission given for PAOs to accept advantages should be published for transparency.

4.35 **Recommendation 9:** The IRC **recommends** that any blanket permission given by the CE for PAOs to accept advantages, received in official capacity or otherwise, should be published to enhance transparency.

#### PAO Register of Advantages

4.36 To ensure transparency in the operation of the system regulating acceptance of advantages by PAOs, the current arrangements under the PAO Code (paragraph 5.14) whereby a PAO is required to maintain a register of gift, advantage, payment, sponsorship or material benefit received by him or his spouse in official capacity should be revised with the register renamed the PAO Register of Advantages and expanded to cover –

- (a) all advantages (gifts, passages, hotel accommodation, sponsored visits, etc.) received by the PAO or his spouse in official capacity above a certain monetary limit, say \$400, which belong to or are undertaken for the Government and will be dealt with or disposed of by the Government, unless permission is given by the CE for the PAO to accept or retain the advantages personally;
- (b) the advantages in (a) that are accepted or retained personally by the PAO in accordance with the (general or special) permission given by the CE; and
- (c) all advantages received by the PAO in private capacity and accepted in accordance with the special permission given by the CE, i.e. beyond the circumstances for which general permission is given.

<sup>56</sup> CSB Circular No. 4/2007 on “Advantages/entertainment offered to an officer in his official capacity and gifts and donations to a department for the benefit of staff” dated 16 February 2007 gives blanket permission for the acceptance of gifts in official capacity to Permanent Secretaries and provides that Permanent Secretaries and Heads of Department may consider giving similar blanket permission for officers under them. A number of them have done so.

For the advantages in (b) and (c), their estimated values should be stated in the Register. The IRC recognizes that in some cases, the value (if any) of an item may be unknown, e.g. a painting or some handicraft painted or made by a citizen which appears to be worth over \$400. In these instances, it would be acceptable for the Register to state that the item's value is unknown.

4.37 Such expansion of the Register would enhance the current transparency arrangements on the acceptance of advantages by PAOs. The Register would not include advantages received in official capacity, of an estimated value at or below \$400 and those received in private capacity which are covered by general permission in the AAN. This would reduce administrative work for compiling the Register. The proposed monetary limit of \$400 is in line with the general permission given for personal retention of official gifts by PAOs.

4.38 **Recommendation 10**: The IRC **recommends** that the PAO Register of Gifts etc. should be renamed the PAO Register of Advantages and should cover –

- (a) All advantages (gifts, passages and other advantages) of an estimated value of over \$400 received by a PAO or his spouse in official capacity, indicating –
  - (i) that they are not accepted or retained personally by the PAO and thus belong to and would be dealt with or disposed of by the Government; or
  - (ii) that they are accepted or retained personally by the PAO in accordance with any general or special permission given by the CE, indicating their estimated values.
- (b) All advantages received by a PAO in his private capacity and accepted in accordance with any special permission given by the CE (or under his delegated authority), indicating their estimated values.

### ***Acceptance of Entertainment***

4.39 Entertainment i.e. lunches, dinners and the like and any accompanying performance are not advantages under the POBO, but the acceptance of entertainment by PAOs is subject to guidance under the PAO Code. This is the case in the Civil Service where guidance is laid down in internal circulars. In particular, a PAO should not accept entertainment which may, for instance, lead to embarrassment of him in the discharge of his functions or bring him or the public service into disrepute.

4.40 We recognize that an important part of the PAOs' duties is to meet with people from various walks of life in the community, particularly those involved in the area of the particular portfolio of the PAO concerned, and that lunches, dinners and other similar social gatherings are a normal way of meeting people. Imposing control mechanisms for the acceptance of entertainment with detailed rules and procedures would be impracticable and unduly burdensome.



4.41 For example, it would be totally inappropriate to subject the acceptance of lunches, dinners and the like to an approval mechanism. A PAO could not reasonably be expected to obtain information of the cost of a meal from his host beforehand. To ensure propriety, suitable guidelines must be provided and PAOs must exercise vigilance in making good judgement with commonsense. Such an arrangement on the acceptance of entertainment is the same as that in the Civil Service and has worked satisfactorily. Where a PAO has fallen short of the expected standards, he may be subject to sanctions by the CE (see Recommendation 4) and also to public scrutiny and censure.

4.42 Taking into account the civil service guidelines on the acceptance of entertainment and the above recommended re-formulation of the guidelines relating to the acceptance of advantages by PAOs, the provision in the PAO Code on the acceptance of entertainment (paragraph 5.10) could be strengthened to provide guidance for PAOs in considering the propriety of accepting entertainment. It should also make clear that, when in doubt, PAOs should seek guidance from the CE who should adopt an approach which is at least as stringent as that in the Civil Service on the acceptance of any entertainment.

4.43 **Recommendation 11:** The IRC **recommends** that the section in the PAO Code concerning the acceptance of entertainment should be re-formulated to have a separate and specific provision under the heading “Acceptance of entertainment” providing guidance for PAOs on the acceptance of entertainment.

4.44 The provision should be amended to make clear that in deciding on the acceptance of entertainment (that is, lunches, dinners and the like and any accompanying performance), the PAO shall consider whether, having regard to matters such as the lavish or excessive nature of the entertainment, the relationship between the official and his host, and the character or reputation of his host or known attendees, attendance by the PAO is likely –

- (a) to lead to a conflict of interest with the PAO’s official duties;
- (b) to place the PAO in a position of obligation to the host or under any improper obligation;
- (c) to compromise the judgement of the PAO or to lead to a reasonable perception of such compromise;
- (d) to lead to embarrassment of the PAO or the Government; or
- (e) to bring the PAO or the Government into disrepute bearing in mind public perception.

*(Underlined parts indicate additions to existing guidelines.)*

4.45 The provision should also make clear that, when in doubt, the PAO shall seek guidance from the CE on the acceptance of any entertainment. The CE should in giving guidance adopt an approach which is at least as stringent as that in the Civil Service.

## *Spouse and Children*

4.46 We note that circumstances may arise where the acceptance of advantages or entertainment by the spouse and/or children of a PAO may put the PAO in a difficult, unsatisfactory or undesirable situation, although such acceptance may be outside the purview of the law including the POBO. PAOs should exercise their best endeavour to avoid any such circumstances.

4.47 **Recommendation 12:** The IRC **recommends** that the section in the PAO Code concerning the acceptance of advantages and entertainment should include an additional provision reminding that a PAO should exercise his best endeavours to ensure that his spouse and/or children do not accept any advantage or entertainment where it is likely to lead to the PAO being placed in a position referred to in the guidelines set out above for the acceptance of advantages and entertainment. (Recommendations 7 and 11)

## *Post-Office Outside Work*

4.48 Under the PAO Code, PAOs are subject to restrictions within a control period of one year on taking up outside work after leaving their office. During the one year, they are prohibited from representing anyone in dealings with the Government or engaging in lobbying activities on matters relating to the Government. They are also required to seek advice from the Advisory Committee on Post-office Employment for Former Chief Executives and Politically Appointed Officials (“the Advisory Committee”)<sup>57</sup> before commencing any employment, becoming a director or partner, or starting any business or profession. The Advisory Committee has drawn up and published the principles and criteria to be adopted for the purpose of advising former PAOs on their post-office employment or appointment<sup>58</sup>.

4.49 The IRC considers that a review of the control regime for post-office outside work on PAOs is timely because –

- (a) the control regime has been in place since the introduction of the Political Appointment System in 2002 and considerable experience has been accumulated in its operation;
- (b) the Political Appointment System has been expanded in 2008 from its original scope of Principal Officials and Director of the Chief Executive’s Office (D/CEO) to the newly created positions of Under Secretary and Political Assistant; and
- (c) the control regime in the Civil Service has been reviewed and improved following the Report by the Committee on Review of Post-service Outside Work for Directorate Civil Servants published in July 2009<sup>59</sup>.

<sup>57</sup> The membership and terms of reference of the Advisory Committee can be found on the website of the CE’s Office (<http://www.ceo.gov.hk/poo/eng/index.htm>).

<sup>58</sup> See “Guidance Note on Post-office Employment for Politically Appointed Officials” published by the Advisory Committee in April 2008 ([http://www.ceo.gov.hk/poo/eng/images/guid\\_note.pdf](http://www.ceo.gov.hk/poo/eng/images/guid_note.pdf)).

<sup>59</sup> See the Report on Review of Post-Service Outside Work for Directorate Civil Servants by the Committee on Review

We note that, although the matter was outside its terms of reference, the Committee mentioned in sub-paragraph (c) above also recommended the Administration to carry out a separate review of such arrangements for PAOs.

4.50 **Recommendation 13:** The IRC **recommends** that the Administration should conduct a review of the control regime for post-office outside work of PAOs, seeking such advice as it considers appropriate from the Advisory Committee on Post-office Employment for Former Chief Executives and Politically Appointed Officials.

4.51 While generally, PAOs should be subject to standards at least as rigorous as the civil servants they lead, in the area of post-service outside work, we recognize that there are material differences between the nature of the employment of PAOs and that in the Civil Service. Civil servants have a career in the Civil Service and would have served for a long period before reaching directorate level and say at least 20 years before reaching the most senior rank of Permanent Secretary. They enjoy a considerable measure of security in their employment. PAOs on the other hand are drawn from both the public and private sectors. They are appointed for a term that cannot exceed the five-year term of the CE who appoints them and their term may be terminated before then for a variety of reasons.

4.52 These differences would appear to justify some differences on the control arrangements for the two classes of persons respectively. The review of the control regime for post-office outside work on PAOs should have regard to the differences in the nature of their employment. It is important that the PAO system is able to continue to attract talent, whether from the public or the private sector, to serve as PAOs.

4.53 **Recommendation 14:** The IRC **recommends** that the differences in the nature of employment of PAOs and civil servants should be recognized and taken into account in considering whether and if so, how the control arrangements for PAOs should be revised in the Administration's review.

4.54 We recognize that in the Civil Service, different control periods are set for different levels of civil servants with different lengths of service. Under the expanded Political Appointment System, it may be argued that, as regards the extent of control of post-office outside work, a Principal Official who is the principal decision maker should be treated differently from a Political Assistant whose task is to provide assistance to the Principal Official, and that a Principal Official who has served two terms totalling 10 years should be subject to more stringent control than a Principal Official who has served a term of five years or less.

4.55 At present, the advice of the Advisory Committee to a former PAO on his proposed employment or appointment is not legally binding. We recognize that, in cases where the PAO decides to take up the employment or appointment, the advice is published and the case is thus subject to public scrutiny and censure. However, it may be argued that,

as is the case with the Civil Service, the control restriction on post-service outside work should be made legally binding on the PAO concerned, either by providing contractually that: (i) the advice of the Advisory Committee would be binding; or (ii) such advice should be given to the Administration and the Administration's decision, after obtaining the Advisory Committee's advice, would be binding.

4.56 **Recommendation 15:** The IRC **recommends** that, in the review of the control regime for post-office outside work of PAOs, the following possibilities may be considered:

- (a) whether to provide for different control periods for PAOs of different ranks with different lengths of service; and
- (b) whether to make the control restriction on the advice of the Advisory Committee legally binding.

## **The Chief Executive (the CE)**

### ***Prevention of Bribery Ordinance (POBO)***

4.57 The POBO is a key component of the present regulatory regime for the prevention of conflicts of interests in the public sector. It provides for specific offences of bribery such as sections 4 and 5, which are applicable to a broad class of "public servants" (including civil servants, PAOs, ExCo Members, LegCo Members, District Council Members and appointees to or employees of various public bodies). It also contains section 10 on the possession of unexplained property which applies to a narrower class of "prescribed officers" (including PAOs and civil servants).

4.58 Section 3 is an important provision in the regime. It is a stringent corruption prevention measure. It criminalizes the solicitation and acceptance of advantages by "prescribed officers" (which include PAOs and civil servants) without the CE's permission. Section 8 of the POBO makes it an offence for any person, without lawful authority or reasonable excuse, to offer advantages to "public servants" (including "prescribed officers") while having dealings with the government department or the public body in which the public servant is employed.

4.59 The office of the CE is subject to the common law offence of misconduct in public office and bribery in the same way as PAOs, ExCo Members and civil servants, as well as certain provisions in the POBO relating to bribery (such as sections 6, 7 and 9) which apply to any person. Following the amendment of the POBO in 2008, a number of its provisions applicable to public servants and prescribed officers, namely sections 4 and 5 on bribery and section 10 on the possession of unexplained property, also apply to the office of the CE by specific reference.

### ***The Administration's Position on Application of POBO Sections 3 and 8 to the CE***

4.60 It was the considered position of the Administration at the time the POBO was amended in 2008 that sections 3 and 8 should not apply to the office of the CE, and this was accepted by LegCo after debate. The Administration put forward the following main

- (a) **Unique constitutional status of the CE:** The CE is appointed by the Central People’s Government, is the head of HKSAR, and is accountable to the Central People’s Government and HKSAR in accordance with the Basic Law. Any proposal to extend the POBO provisions to CE must take into account his status.
- (b) **To reconcile CE’s unique constitutional status with an appropriate regulatory framework:** The Administration considered that under the POBO, the offences of solicitation, acceptance and offer of advantages are generally premised upon the existence of a principal-agent relationship. Civil servants are agents of the HKSARG. The Administration considered that the CE “is not an agent of HKSARG” within the meaning of the POBO. The Administration believed that the CE’s special constitutional position posed difficulties in fitting him within the structure of the existing offence provisions in the POBO.
- (c) **The CE already subject to statutory regulation and public scrutiny:** Under Article 47 of the Basic Law (BL47), the CE must be a person of integrity, dedicated to his or her own duties, and that he shall, on assuming office, declare his or her assets to the Chief Justice of the Court of Final Appeal (CJ). The CE is also subject to the common law offence of misconduct in public office and bribery. Sections 4 and 5 of the POBO as amended would also apply to the CE and would already cover the situations where a person offers a bribe to the CE or where the CE accepts a bribe. The Administration considered that section 4 of the POBO applicable to the CE would be construed widely such that offers of advantages to the CE in cases where there was a conflict of interest would be caught. Last but not least, the CE would also be subject to public scrutiny and his acts would be closely monitored by the media and public. The Administration considered that, given these, there was no need to subject the office of the CE to additional statutory control under sections 3 and 8 of the POBO.
- (d) **Difficulties in applying section 3 to the CE:** The CE is the authority to approve acceptance of advantages under the regime in section 3 of the POBO. The Administration considered that there would be no appropriate authority to give approval to the CE for the solicitation or acceptance of advantages. The Administration considered the proposal of creating an independent body to monitor or approve requests from the CE to solicit or accept advantages under

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<sup>60</sup> See the following documents relating to the Administration’s position during the deliberations on the application of certain provisions of the POBO to the CE –

- (1) the Administration’s paper for LegCo Panel on Constitutional Affairs on “Application of Certain Provisions of the Prevention of Bribery Ordinance (Cap. 201) to the Chief Executive” on 21 March 2005;
- (2) the Administration’s paper for LegCo Panel on Constitutional Affairs on “Proposal to Apply Certain Provisions of the Prevention of Bribery Ordinance to the CE” on 1 November 2005;
- (3) “Report of the LegCo Subcommittee on Application of Certain Provisions of the Prevention of Bribery Ordinance to the Chief Executive” to the LegCo Panel on Constitutional Affairs on 20 February 2006;
- (4) the Administration’s papers for the Bills Committee on Prevention of Bribery (Amendment) Bill 2007 -
  - (a) “Follow-up actions arising from the discussion at the meeting on 29 October 2007”;
  - (b) “Follow-up actions arising from the discussion at the meetings on 15 November and 4 December 2007”;
  - (c) “Follow-up actions arising from the discussion at previous Bills Committee meetings” dated February 2008;
- (5) “Report of the Bills Committee on Prevention of Bribery (Amendment) Bill 2007” dated 19 June 2008; and
- (6) Resumption of Second Reading debate on the Prevention of Bribery (Amendment) Bill 2007 on 25 June 2008.

section 3 inappropriate because there could not be a principal-agent relationship between the CE and any independent body set up for this purpose.

- (e) **Difficulties in applying section 8 to the CE:** The Administration cited the judgment of the Court of Final Appeal (CFA) in *Sin Kam-wah v HKSAR*<sup>61</sup> that “dealings of any kind” under section 8(1) of the POBO should be construed widely. Since the CE is the head of the Government, a person having dealings of any kind with any government department (e.g. applying for a restaurant or food license) would be liable for an offence under section 8(1) if he offered an advantage to the CE. The offence would have a much wider scope for the CE compared to civil servants in general and would inadvertently catch well-meaning citizens offering small tokens and souvenirs to the CE out of courtesy or respect.

### ***The IRC’s Views on Application of POBO Sections 3 and 8 to the CE***

4.61 The IRC fully recognizes the unique constitutional status of the office of the CE, in that he is the head of the HKSAR and the Government and he is accountable to the Central People’s Government and the HKSAR. The CE leads PAOs and the Civil Service. He is ultimately responsible for deciding on various matters concerning PAOs including matters relating to their standards of conduct and conflicts of interests. The management and administration of the Civil Service is also based upon his authority. Likewise, the CE is the ultimate authority on various matters concerning the Civil Service, including appointment, disciplinary proceedings and punishment. Some may view any regulation of the CE as compromising his high constitutional status.

4.62 But all public officials, including the CE, PAOs and civil servants, are servants of the people of Hong Kong. Indeed, the CE having regard to his high constitutional status should be regarded as “the Chief Servant” of the people. The public expect and have a right to expect that our public officials, particularly the CE, observe the highest standards of conduct. This is clear from the views expressed by the public in the media during the recent controversies and in the course of our public consultation. Indeed, the high constitutional status of the CE makes it all the more important that he sets a good example for all. It is reasonable for the public to expect the CE to observe rules at least as rigorous as those applied to PAOs and the Civil Service.

4.63 The IRC considers that, as a matter of principle, in order to command public confidence, the CE should observe rules that are at least as stringent as those applicable to PAOs and the Civil Service which he leads. Indeed, this is essential for upholding the dignity and honour of the office of the CE, and maintaining public trust in the integrity and probity of the system.

4.64 A fundamental defect in the present system regarding the solicitation or acceptance of advantages is that whilst PAOs and civil servants are subject to the strict regime under section 3 of the POBO which is underpinned by criminal sanctions, the CE is not. The CE decides on the solicitation or acceptance of advantages for himself and is not subject to any check and balance. The IRC believes that by reason of this defect, the present system is totally inappropriate. The CE should not be above the law which applies

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<sup>61</sup> 8 HKCFAR 192.

to PAOs and civil servants.

4.65 Some may hold the view that under the present system, one should be able to rely on the self-restraint of the CE and on media scrutiny and public censure. The IRC does not accept this view. There is no justification for exempting the CE from the strict regime relating to the solicitation or acceptance of advantages which is applicable to PAOs and the Civil Service, which he leads.

4.66 Further, in relation to the operation of the present system, it is totally inappropriate for the CE to have no record of the internal rule (and instances of its application) which he has adopted concerning his travelling on a friend's private jet or yacht during his private vacation (see paragraph 3.65(b)). The IRC is duty-bound to observe that the absence of documentation on such a matter is not consistent with the proper conduct of public administration.

4.67 Section 8 of the POBO makes it an offence for any person, without lawful authority or reasonable excuse, to offer advantages to any prescribed officer (including any PAO or civil servant) whilst having dealings with the government department or the public body in which the officer is employed. (It also criminalizes the offer of an advantage to a public servant in similar circumstances.) Section 8 focusing on the offeror is part of the regime for PAOs and civil servants. For reasons similar to those discussed above relating to section 3, the IRC considers that it should apply to the office of the CE.

4.68 Having regard to the above considerations, the IRC considers that the same statutory regulation in the solicitation and acceptance of advantages as that applicable to all PAOs and civil servants should apply to the office of the CE. The system under sections 3 and 8 of the POBO should similarly apply to the office of the CE. Including the office of the CE under statutory regulation would remove the defect in the current system and would apply to the office of the CE the same stringent regime as that applicable to PAOs and the Civil Service. The IRC recognizes that, in doing so, it is necessary to address various issues, including those identified by the Administration as stated above concerning the difficulties of applying sections 3 and 8 to the office of the CE.

### ***Proposals to Apply POBO Section 3 to the CE***

4.69 To apply the POBO section 3 to the office of the CE, it is necessary to put in place a mechanism for determining and giving permission for the CE to solicit or accept any advantage. The IRC recognizes that any proposal for the mechanism should take into account the unique constitutional status of the office of the CE. We propose to establish a statutory Independent Committee specifically for this purpose.

4.70 **Recommendation 16:** The IRC **recommends** that legislation should be enacted to render it a criminal offence for the CE to solicit or accept any advantage without the general or special permission of a statutory Independent Committee. This would in effect apply to the office of the CE the regime of section 3 of the POBO applicable to PAOs and civil servants. The penalties should be the same as those for an offence under section 3 of the POBO, i.e. a maximum of one year's imprisonment and a fine of \$100,000.

## The proposed Independent Committee

4.71 The sole function of the Independent Committee is to consider and decide on permission (both general and special) for the CE to solicit and accept advantages. It should be a committee of three members appointed jointly by the Chief Justice of the Court of Final Appeal (CJ) and the President of the Legislative Council (President of LegCo). The statute should prescribe that the persons to be appointed should be permanent residents and should be persons of high standing in the community. It is important that the persons appointed command public confidence. The statutes should provide that the appointment is for a renewable fixed term of, say not more than three years.

4.72 The appointment authority should ensure that the persons to be appointed do not have any conflict of interest and will be perceived to be impartial and unbiased. For this purpose, as part of the appointment process, the CJ and the President of LegCo may make appropriate inquiries of the persons being considered for appointment and if considered necessary, the CE, of facts concerning any family tie and any past or present association, relationship or dealings between them and the CE. In deciding whether to appoint them, the CJ and the President of LegCo would have to bear in mind whether they will be perceived by the public to be impartial and unbiased having regard to such facts.

4.73 It must be emphasized that the process of appointment of the Independent Committee and the process of that Committee considering and giving permission under the section 3 regime should be apolitical. Any risk of their politicization should be avoided. It would be the President of LegCo who, by virtue of his office and in his own right, would alone be responsible for making the appointment jointly with the CJ. LegCo as a body would not be involved. The CJ's independence as Head of the independent Judiciary cannot be questioned. The fact that the CE is the approving authority for him under the section 3 regime does not render his participation in the appointment process inappropriate.

4.74 The offices of the CJ and President of LegCo, as the heads of the judicial and legislative branches, are at the highest levels of the HKSAR. An appointment authority composed of the holders of these two high offices gives due recognition to the high constitutional status of the office of the CE. It is preferable to have an Independent Committee of three members rather than one person as there would be the benefit of collective wisdom, especially when the three persons may be drawn from different backgrounds.

4.75 All "prescribed officers" (including serving PAOs, civil servants and judges) would be ineligible for appointment since under the section 3 regime, the CE is the ultimate approval authority for them. Serving ExCo Members should also be ineligible since they are appointed by the CE. Serving Members of LegCo and District Councils should also be excluded. As pointed out earlier, the risk of politicizing the process of considering and giving permission for the acceptance of advantages should be avoided.

4.76 **Recommendation 17:** The IRC **recommends** that the legislation in establishing the Independent Committee should provide for the followings:

- (a) The Independent Committee should consist of three members, including a Chairman, appointed jointly by the Chief Justice and the President of LegCo.



- (b) The Chairman and the other two members of the Independent Committee should be permanent residents of the HKSAR and should be persons of high standing in the community. Serving ExCo Members, LegCo Members, District Council Members, PAOs, civil servants, judges and other prescribed officers should be ineligible for appointment. They should be appointed for a renewable fixed term of, say not more than three years. Decisions of the Independent Committee should be made by majority.
- (c) The Independent Committee's statutory terms of reference should be –
  - (i) to give general permission to the CE to solicit or accept advantages in certain defined circumstances; and
  - (ii) to give special permission to the CE to solicit or accept advantages in particular cases upon application by the CE.
- (d) The Independent Committee should be served by a secretariat which is independent of the CE's Office. It may be an existing independent secretariat serving various independent bodies.

#### General permission and guidelines for special permission

4.77 The Independent Committee should be transparent in the general permission it gives to the CE and the guidelines it adopts for considering special permission upon application by the CE. In particular, similar to the AAN for civil servants and PAOs, the Independent Committee should publish a notice setting out the general permission for the solicitation or acceptance of advantages by the CE. Further, the Independent Committee should also publish the guidelines for giving special permission that should generally be at least as stringent as those applicable to PAOs and in the Civil Service. Like the AAN, the notice of general permission as well as the guidelines for considering special permission for the CE would not be subsidiary legislation.

4.78 **Recommendation 18:** The IRC **recommends** that the Independent Committee should publish a Notice setting out the scope of general permission and the procedure for the application for special permission.

4.79 **Recommendation 19:** The IRC **recommends** that the Independent Committee should adopt and publish guidelines for giving special permission, which generally should be at least as stringent as those applicable to PAOs and in the Civil Service.

#### Problems of “dealings with the Government”

4.80 In considering the scope of general permission, the Independent Committee should address the problems that have been raised in connection with “dealings with the Government” in applying section 3 of the POBO to the office of the CE. Under the present AAN, the general permission for prescribed officers (including PAOs and civil servants) to accept gifts and passages from close personal friends or other persons would be

disapplied if the person offering the advantage has dealings with the government department or organization in which the prescribed officers work. It would appear that routine dealings are not covered<sup>62</sup>.

4.81 If the Independent Committee considers that its general permission should also be disapplied in the case of the CE when the offeror has dealings with the Government, it should then have to address the practical problem that the general permission would exclude modest gifts or souvenirs offered to the CE by a member of the public at various events or visits as normal gestures of courtesy or goodwill, since that member of the public is likely to have dealings of some kind with the Government. For example, the owner of a bakery seeing the CE on a visit to a district may offer him a pack of egg tarts to bring home when the owner might have dealings with the Government such as applying to renew his food license. It should be noted that such problems already exist to a certain extent for PAOs at higher levels who have responsibilities over a wide range of government bureaux and departments, e.g. the Chief Secretary for Administration.

4.82 To address this problem, the Independent Committee may consider giving general permission for the CE to accept and retain personally any gift up to \$400 in value offered to him (or his spouse) by any person which in any way relates to his office as the CE (i.e. in his official capacity), even if that person has dealings with the Government. This is the same as the blanket permission for PAOs to personally retain gifts received in official capacity<sup>63</sup>, and is broadly consistent with similar blanket permission for Permanent Secretaries<sup>64</sup>. Likewise, the Independent Committee may also consider giving the same general permission for the CE as the present blanket permissions for PAOs to accept: (i) gifts received in official capacity above \$400 but at or below say \$1,000 if the gift is inscribed with the CE's name or if he received it as the guest of honour or an officiating guest; and (ii) invitations to functions or performance for the CE and his spouse at value of not more than \$2,000 per head. The Independent Committee may also consider giving general permission for the CE to accept advantages offered to him (or his spouse) for personal use or retention as a matter of protocol by government authorities including on the Mainland.

4.83 **Recommendation 20:** The IRC **recommends** that the Independent Committee should consider –

- (a) giving general permission to the CE to accept the following advantages offered to him (or his spouse) in his official capacity:
  - (i) gifts up to \$400 from any person;

<sup>62</sup> It should be noted that paragraph 16 of CSB Circular No. 3/2007 stated that “official dealings” in this context are not considered to include routine contact with a government department in making use of the regular services provided by the Government, e.g. the postal, medical, fire and ambulance services, etc., or in making regular payment of tax, rent, rates, etc., and that sections 5(2)(a) and 6(2)(a) of the AAN are not designed to catch such cases.

<sup>63</sup> PAOs are given blanket permission to retain gifts received in official capacity up to \$400 in value, or up to \$1,000 in value if the gift is personally inscribed with the PAO's name or received by the PAO as the guest of honour or an officiating guest.

<sup>64</sup> Permanent Secretaries are given blanket permission to retain personally gifts received in official capacity up to 0.1% of their substantive salary (which amounts to about \$200) or up to \$400 in value if the gift is personally inscribed with the civil servant's name or received by the civil servant as the guest of honour or an officiating guest.

- (ii) gifts above \$400 up to \$1,000 from any person if the gift is inscribed with the CE's name or is received by the CE (or his spouse) as the guest of honour or an officiating guest; and
  - (iii) invitations to functions or performances for the CE and his spouse at value up to \$2,000 per head.
- (b) giving general permission to the CE to accept advantages offered to him (or his spouse) for personal use or retention as a matter of protocol by government authorities including on the Mainland.

### The CE Register of Advantages

4.84 To ensure transparency in the operation of the proposed statutory regime for the CE on the solicitation or acceptance of advantages, the current arrangements whereby the CE's Office maintains a register of gifts presented to the CE and/or his spouse in official capacity should be renamed the CE Register of Advantages and expanded to cover –

- (a) all advantages (gifts, passages, hotel accommodation, sponsored visits, etc.) received by the CE or his spouse in his official capacity above a certain monetary limit, say \$400, which belong to or are undertaken for the Government and will be dealt with or disposed of by the Government, unless permission is given by the Independent Committee for the CE to accept or retain the advantages personally;
- (b) the advantages in (a) that are accepted or retained personally by the CE in accordance with the (general or special) permission given by the Independent Committee; and
- (c) all advantages received by the CE in private capacity and accepted in accordance with the special permission given by the Independent Committee, i.e. beyond the circumstances for which general permission is given.

For advantages in (b) and (c), their estimated values should be stated in the Register. For similar reasons as for the PAO Register, where this cannot be done (e.g. a painting or handicraft by a citizen), it can be stated in the Register that the item's value is unknown.

4.85 **Recommendation 21**: The IRC **recommends** that the CE Register of Gifts should be renamed the CE Register of Advantages and should cover –

- (a) All advantages (gifts, passages, and other advantages) of an estimated value of over \$400 received by the CE or his spouse in official capacity, indicating –
  - (i) that they are not accepted or retained personally by the CE and thus belong to and would be dealt with or disposed of by the Government; or
  - (ii) that they are accepted or retained personally by the CE in accordance with any general or special permission given by the Independent Committee, indicating their estimated values.

- (b) All advantages received by the CE in his private capacity and accepted with the special permission of the Independent Committee, indicating their estimated values.

#### PAO Code and advantages

4.86 It is recommended that the CE should have the duty of following the PAO Code. Even where the solicitation or acceptance by the CE is within the parameters of the law, for example covered by general permission, the CE should in accordance with the Code to be revised as recommended, applying standards which are at least as stringent as those he would apply for PAOs, consider whether, having regard to matters such as the frequent and excessive nature of the advantage, the relationship between the CE and the offeror and the latter's character or reputation, acceptance of the advantage by the CE is likely –

- (a) to lead to a conflict of interest with the CE's official duties;
- (b) to place the CE in a position of obligation to the offeror or under any improper obligation;
- (c) to compromise the judgement of the CE or to lead to a reasonable perception of such compromise;
- (d) to lead to embarrassment of the CE or the Government; or
- (e) to bring the CE or the Government into disrepute bearing in mind public perception.

#### ***Proposals to Apply POBO Section 8 to the CE***

4.87 If the solicitation and acceptance of advantages by the CE is put under statutory regulation as recommended, similar to PAOs and civil servants, it would be necessary to put the offer of advantages to the CE by any person while having dealings with the Government under statutory control as well. This would mean the extension of section 8 of the POBO to cover the office of the CE in addition to "public servants" and "prescribed officers".

4.88 As regards the practical problems which would arise in relation to "any dealings with the Government", these have been discussed above. It should be made clear that the reach of the statutory provisions would not include any person offering an advantage to the CE where such acceptance of the advantage by the CE is covered by general permission given.

4.89 **Recommendation 22:** The IRC **recommends** that legislation should be enacted to make it a criminal offence for any person to offer any advantage to the CE, without lawful authority or reasonable excuse, where the person has any dealings with the Government. Such legislation would broadly be along the lines of the present section 8 of the POBO, and should make clear that offers of advantages by persons having "any dealings with the Government" would not be caught where the acceptance of advantages by the CE is covered by general permission.

## ***Response to the Administration's Position on Application of POBO Sections 3 and 8 to the CE***

4.90 The IRC has fully considered the matters put forward by the Administration at the time of the amendment of the POBO in 2008 in support of its position that sections 3 and 8 should not be made applicable to the CE. Many of these matters have been discussed above.

4.91 As has been stated, the IRC fully recognizes the unique constitutional status of the CE as head of the HKSAR and the Government who is accountable to the Central People's Government and the HKSAR. But in the IRC's view, the CE's status does not justify exempting him from a system applicable to the PAOs and civil servants led by him. His status is taken into account in having an appointment authority for the Independent Committee at the highest levels in the HKSAR. The recommended regime with an Independent Committee would not compromise the status of the office of the CE. On the contrary, by applying to him what is essentially the same regime as that for the PAOs and civil servants led by him, the standing and the honour and dignity of that office would be enhanced. The CE as head of the HKSAR and the Government is and remains accountable to the Central People's Government and the HKSAR, including for his observance of the laws in Hong Kong, including the recommended statutory regime.

4.92 The proposed Independent Committee is an appropriate authority and this overcomes any difficulty in applying the section 3 regime. The absence of a principal-agent relationship between it and the CE is not an obstacle to the establishment of the proposed mechanism. The fact that the CE is subject to other provisions of the POBO and the common law and to public scrutiny is beside the point. In the IRC's view, the system needs to be improved to meet high public expectations. The difficulties arising from "dealings with the Government" could be addressed as proposed above and should not be an obstacle either.

4.93 We would like to highlight that, with the application of the section 3 regime to the CE and with the proposed mechanism of the Independent Committee, the CE would be subject to a statutory regime which at present applies to PAOs and civil servants. This replaces the current arrangement under which the CE exercises complete discretion on his own relating to advantages without any check and balance. It would serve to reassure the public that the same stringent standards as those applicable to PAOs and in the Civil Service would be observed by the CE. The IRC considers this essential in restoring and maintaining public confidence in the integrity and probity of the Government.

### ***Summary on Advantages and the CE***

4.94 To sum up, with the above recommendations, a regime on the solicitation and acceptance of advantages, which would essentially be the same as that applicable to PAOs, would be applied to the office of the CE. That regime is in turn as stringent as that applicable in the Civil Service. Assuming the recommendations are implemented –

- (a) It would be a criminal offence for the CE to accept any advantage (including any gift, hotel accommodation, any purchase or rental of premises at an undervalue, any passage, whether on a commercial airline, private jet or private yacht) without the general or special permission of the Independent Committee.

- (b) It would be a criminal offence for any person, while having dealings with the Government, to offer any advantage to the CE unless the CE has the general permission of the Independent Committee.
- (c) Even where the solicitation or acceptance of the advantage is within the parameters of the law, the CE has the duty to observe the PAO Code on this matter. Applying the same stringent standards as he would apply for PAOs, he would have to consider a number of matters, including whether such acceptance would bring the CE or the Government into disrepute, bearing in mind public perception.
- (d) The Register of Advantages kept by the CE and open for public inspection would list out various items, including advantages received by him and his spouse in official capacity which are retained personally by the CE in accordance with general or special permission, and advantages accepted by the CE in private capacity with special permission.

### ***Observance of PAO Code by the CE***

4.95 As stated above, it is important that the CE should abide by standards at least as stringent as those applicable to the PAOs he leads. PAOs are subject to the PAO Code which contains a number of provisions relating to the prevention and handling of conflict of interests, including regular declaration of investments and interests, ad hoc declaration of private interests in specific matters being handled, guidance on the acceptance of advantages and entertainment, and restrictions on post-office outside work. The current CE has chosen to observe voluntarily the PAO Code insofar as they are applicable. The IRC considers that abiding by the PAO Code should not be a matter of voluntary choice by the incumbent holder of the office of the CE. It would give the public greater reassurance and confidence if observance of the PAO Code by the holder of the office of the CE is made a matter of government policy.

4.96 **Recommendation 23:** The IRC **recommends** that the CE in Council<sup>65</sup> should decide as a matter of policy that the CE has the duty to observe the PAO Code, including Chapter 5 relating to conflicts of interest.

4.97 However, various provisions in the PAO Code envisage or require approval or guidance from a higher authority i.e. the CE. For instance, PAOs must report to the CE any private interest that might influence or appear to influence their judgement in the performance of their duties and the CE may require the PAO concerned to take necessary action. Another instance is that PAOs are required to seek the CE's permission to accept any sponsored visit. In such situations, we recognize that the CE in observing the PAO Code has to handle and make decisions for himself. In doing so, the IRC considers that the CE should adopt an approach which should be no less rigorous than that he would apply in deciding similar matters for PAOs. (It should be noted that where solicitation or acceptance of advantages is concerned, with the recommended application of the section 3

<sup>65</sup> Defined in the Interpretation and General Clauses Ordinance (Cap.1) to mean the Chief Executive acting after consultation with the Executive Council.

regime of the POBO, the CE must have the permission of the Independent Committee.)

4.98 In particular, when dealing with conflict of interest questions concerning himself, we consider that the CE should follow the same guidelines as those he would formulate and publish for handling conflict of interest questions concerning PAOs (see Recommendation 2). As an additional measure to assist the CE, he may seek the advice of ExCo on matters of conflict of interests concerning himself, if and as he considers appropriate.

4.99 **Recommendation 24:** The IRC **recommends** that –

- (a) in observing the PAO Code, where the CE has to handle and make decisions for himself, he should adopt standards which are at least as stringent as those he would apply in deciding similar matters for PAOs; and
- (b) in particular, in deciding on conflict of interest questions concerning himself, the CE should adopt an approach which is at least as stringent as that applied by him on such questions concerning PAOs, following his published guidelines for handling of conflict of interest questions concerning PAOs, and that he may seek the advice of ExCo, if and as he considers appropriate.

4.100 We have recommended above (Recommendation 3) that the Administration should, as and when announcing a decision on any matter, make public where any PAO has withdrawn from the decision-making process in relation to that matter due to conflict of interest. We consider that the same should be applied to the CE in the interest of transparency.

4.101 **Recommendation 25:** The IRC **recommends** that, where the CE has withdrawn from the decision-making process in relation to any matter due to conflict of interest, this fact should be stated as and when the decision concerning the matter is publicly announced by the Administration, identifying the nature of the interests involved and stating who handled the matter with the CE's withdrawal.

### ***Declaration of Interests and Investments***

4.102 On the basis that the CE has the duty to observe the PAO Code as recommended above, it would follow that the CE would have to observe the provisions in the PAO Code concerning declaration of interests and investments, including both the regular declaration of investments and interests, and the ad hoc declaration of any private interest that might influence, or appear to influence, the CE's judgement in the performance of his duties.

4.103 **Recommendation 26:** The IRC **recommends** that, in accordance with his duty to observe the PAO Code, the CE should lodge the regular declaration of investments and interests, and also declare any private interest that might influence or appear to influence his judgement in the performance of his duties, as required by the PAO Code, to be deposited with the Permanent Secretary of the CE's Office.

4.104 At present, the CE observes the requirement for regular declaration of interests as applicable to ExCo Members, which has been included in the terms and conditions of his appointment. Such requirement is as extensive as the requirement for PAOs. Further, the CE has chosen to observe voluntarily the requirement for ad hoc declaration of interests on specific matters before ExCo. For similar reasons as in the case of the PAO Code, we consider that abiding by the declaration requirement applicable to ExCo Members should not be a matter of voluntary choice by the incumbent CE. It would give greater reassurance and confidence to the public if compliance by the holder of the office of the CE of the ExCo declaration system as a whole is made a matter of government policy.

4.105 **Recommendation 27**: The IRC **recommends** that the CE in Council should decide as a matter of policy that the CE as the President of ExCo should observe the declaration system applicable to ExCo Members, including both the regular declaration of interests (including registrable interests subject to public inspection and financial interests to be kept confidential, and notification of any change to declared interests) and ad hoc declaration of interest in specific matters put before ExCo.

4.106 We recognize that the requirements for regular declaration of investments and interests under the PAO Code and the ExCo system are essentially the same in substance, and that having to lodge both sets of declarations is likely to involve duplicative efforts. This is already the situation for Principal Officials who have to lodge regular declarations under both systems. However, the IRC recognizes that the two sets of declarations are made for different purposes, and there may thus be a need for keeping the two systems separate.

4.107 To reduce administrative work, the IRC suggests that consideration should be given to harmonize or combine the declaration forms for PAOs and ExCo Members under both declaration systems, so that those who are required to make declarations under both systems (i.e. the CE and Principal Officials) would only need to complete one set of forms or one form plus a supplementary form instead of two sets of forms.

### ***Acceptance of Entertainment by the CE***

4.108 On matters of acceptance of entertainment (that is, lunches, dinners and the like and any accompanying performance), as with civil servants, PAOs are subject to administrative guidelines. The PAO Code at present gives guidance on entertainment in the following terms. PAOs should not accept entertainment if it is likely, for example, by reason of its excessive nature or the relationship between the host and the PAO or the host's character, to lead to embarrassment of the PAO in the discharge of his functions or to bring the PAO or the public service into disrepute. These are broadly similar to the guidelines in the Civil Service. As the CE has voluntarily chosen to observe the PAO Code, he should at present follow the guidance in the Code. Under the Code, PAOs can seek guidance from the CE. In the case of the CE, he has to make a judgement for himself.

4.109 So, the position is that the CE, PAOs and the Civil Service are all subject to similar administrative guidance. As explained earlier in relation to PAOs, it would be impracticable to impose control mechanisms for entertainment with detailed rules and procedures. For example, it would be totally inappropriate to subject the acceptance of



lunches, dinners and the like to an approval mechanism. An official could not reasonably be expected to obtain information of the cost of a dinner from his host. For the CE, as with PAOs and civil servants, to ensure propriety, vigilance would have to be exercised in making good judgement with commonsense applying suitable guidelines.

4.110 We have already recommended that the PAO Code should be re-formulated in relation to guidance on entertainment (Recommendation 11). The recommended provision would make clear that in accepting entertainment (that is, lunches, dinners and the like), the PAO must consider whether having regard to matters such as its lavish or excessive nature, the relationship with his host, and the character or reputation of his host or known attendees, attendance by the PAO is likely to lead to a conflict of interest, to place him in a position of obligation or under any improper obligation, to compromise his judgement or to lead to a reasonable perception of such compromise, to lead to embarrassment or to bring the PAO or the Government into disrepute, bearing in mind public perception. As recommended above (Recommendation 23), the CE would have to follow the PAO Code, not as a matter of choice but of duty, including the foregoing re-formulated guidance on entertainment.

4.111 It is of particular importance that the CE should exercise great vigilance over the acceptance of entertainment. He is the head of the HKSAR. As the head of our community, he has a duty to conduct himself with total propriety so as to command public confidence and respect. It is the CE who should set a good example for PAOs and civil servants. It is the CE who should be setting the gold standard.

4.112 The CE must of course as part of his work communicate with persons from all walks of life. He must gain an understanding of the conditions and circumstances in all sectors as well as the challenges and problems faced by people in all sectors. But this does not have to be done at lavish dinners. The cost of the meal can have no bearing on the ability to have good and meaningful exchanges.

4.113 There is a further dimension to the acceptance of entertainment by the CE. The CE is the leader of all in our community, both the rich and the poor, and both the powerful and the weak. If the CE gives undue attention to one sector, for example business tycoons by accepting their invitations to lavish dinners most frequently, this may give rise to the perception that the Government is partial to their views. Such a perception would be unfortunate. In the context of the recommended revised guidelines, it is likely to lead to embarrassment of the CE or the Government.

4.114 Where a PAO in applying the guidance in the Code has exercised poor judgement in accepting inappropriate entertainment, he may be criticised by the CE. Especially where there are repeated instances, the CE may impose sanctions, ranging from warning to dismissal. In the case of the CE, leaving aside the impeachment process provided for in the Basic Law, the sanction is that of media scrutiny and public censure. The recent controversies have demonstrated that this is an effective and salutary sanction. The court of public opinion, reflecting the views of right thinking citizens, sets exacting standards and is a tough master.

4.115 **Recommendation 28:** Bearing in mind the matters discussed above, the IRC **recommends** that the CE should exercise great vigilance and adopt a cautious approach in deciding on the acceptance of entertainment in accordance with the guidance laid down in

the PAO Code to be revised as recommended. That approach should be at least as stringent as that which is expected of PAOs and in the Civil Service. It is appropriate for the CE to follow the maxim: “if in doubt, don’t”.

### *Post-Office Outside Work*

4.116 Following recommendations by the Independent Commission on Remuneration Package and Post-office Arrangements for the Chief Executive of the HKSAR in June 2005<sup>66</sup>, the office of the CE is subject to a control regime on post-office outside work which is much more extensive than that for former PAOs. The control restrictions together with the basic principles to be followed are set out in an Undertaking signed by the CE in the form of a Memorandum of Agreement under seal.

4.117 A former CE is subject to the prohibition against the improper use of any information which came to his knowledge during his term of office and which has not yet become known to the public, which is essentially the same as that applicable to PAOs. The control regime for post-office outside work for the CE is more extensive than that for former PAOs and no less stringent than that applicable to Permanent Secretaries as the most senior civil servants. He is subject to a control period of three years compared to a control period of one year for PAOs –

- (a) During the first year, he is prohibited from undertaking any employment, becoming a director or a partner in any business or starting any business or profession.
- (b) During the second and third years –
  - (i) he must seek the advice of the Advisory Committee on Post-office Employment for Former Chief Executives and Politically Appointed Officials (“the Advisory Committee”) before taking up any employment or engaging in any business or professional activities in or outside Hong Kong.
  - (ii) he is, in any event, prohibited from a wide range of activities (see paragraph 3.71(b) for details), including –
    - entering into employment with or becoming a director of any company with land or property development being part of its business or which was awarded with any franchise or license approved by ExCo during his time in office;
    - representing any person in connection with any matter against or with the Government;
    - engaging in any lobbying activities on matters relating to the Government;

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<sup>66</sup> See “Report of the Independent Commission on Remuneration Package and Post-office Arrangements for the Chief Executive of the HKSAR” published in June 2005.

- entering into employment with or becoming a director of a company which is involved in litigation against the Government; and
- being involved personally in the bidding for any government land, property, project, contract, license or franchise.

4.118 However, during the three year control period, a former CE may, without seeking advice from the Advisory Committee, accept appointments made by the Central Authorities or the HKSAR Government, appointments to a charitable, academic, or other non-profit-making organizations, or non-commercial regional or international organizations. He should inform the Government of any such appointment.

4.119 The IRC considers that the present control arrangements for former CEs to be largely satisfactory. First, he is subject to a control period which is longer than that for PAOs by two years. Secondly, during the first year, he is totally prohibited from taking up any employment or engaging in any business or professional activities. Thirdly, during the second and third years, apart from the obligation to seek advice from the Advisory Committee, he is in any event barred from an extensive range of activities.

4.120 We have recommended above (Recommendation 15) that consideration should be given to making the advice of the Advisory Committee on restriction on a former PAO legally binding. If this is to be done in respect of PAOs, then the same should be considered for the CE, so as to maintain a regime for the CE at least as stringent as that applicable to PAOs.

4.121 **Recommendation 29:** The IRC **recommends** that if, following review of the post-office outside work regime for PAOs, the advice of the Advisory Committee is made legally binding on a former PAO, the Administration should then consider a similar change for a former CE.

## Members of the Executive Council (ExCo Members)

### *ExCo System of Declaration of Interests*

4.122 ExCo Members, both Official and Non-Official, are subject to the ExCo system of declaration of interests. The system is set out in an internal guidance note which has not been published<sup>67</sup>. All current Official ExCo Members are also Principal Officials under the Political Appointment System and are thus also subject to the PAO Code including the requirements for declaration of interests and investments therein, in addition to the ExCo declaration requirements.

4.123 Under the ExCo declaration system, ExCo Members are required to make regular declaration of a specified range of interests and investments. Part of the declaration is open subject to public inspection. This covers general information of Members'

<sup>67</sup> A restricted "Guidance Note for Members of the Executive Council on Declaration of Interest" issued by the Executive Council Secretariat in July 2010.

remunerated directorships and employment, land and property, shareholding of a nominal value greater than 1% of the issued capital, and membership of boards, committees or other organizations. The other part of the declaration is kept confidential, covering in greater detail the financial interests of Members, including shareholding irrespective of amount and futures and options contracts. They are also required to notify any change to such interests declared and any currency transaction involving the Hong Kong Dollar amounting to more than \$200,000.

4.124 In addition, ExCo Members are required to make ad hoc declaration of specific interests in any matters in respect of individual items to be submitted before ExCo for discussion. The responsibility to make such declarations rests with the Members concerned. A system is also in place to check any potential conflict of interests on the basis of declared interests and any other known information (see paragraph 3.83). As a general rule, Members who have a direct and significant interest should withdraw from the discussion and the ExCo memorandum would be withheld from them. All interests declared, irrespective of whether they require the withdrawal of the Members concerned, would be noted on the records of ExCo meetings which are kept confidential.

4.125 The CE observes the ExCo requirement for regular declaration of interests and has also chosen to observe voluntarily the requirement for ad hoc declaration of interests on specific matters before ExCo. We have recommended above that the CE in Council should decide as a matter of policy that the CE as the President of ExCo should observe the ExCo declaration system as a whole (Recommendation 27).

4.126 The declaration requirements under the ExCo system are in substance similar to those applicable to PAOs and in the Civil Service, except for some minor differences in scope (e.g. ExCo Members' regular declaration is confined to remunerated directorship, while the regular declaration by PAOs and civil servants covers all directorships, both remunerated and non-remunerated). The ExCo declaration requirements are more extensive than those applied to LegCo Members. They are reviewed and revised from time to time in the light of experience. Where there is any allegation of breach of the requirements by any ExCo Member, the CE takes action to investigate and handle the matter<sup>68</sup>.

4.127 The IRC considers that the current system for declaration of interests by ExCo Members, being similar in substance to that applicable to PAOs and the Civil Service, is on the whole satisfactory. Adjustments and fine-tuning may be necessary from time to time. The IRC also notes that general statistics about the operation of the ExCo declaration system has been made public in response to questions raised<sup>69</sup>.

### Transparency

4.128 However, recognizing that ExCo deliberations and proceedings must be kept confidential, the IRC sees a need to enhance the transparency of the ExCo declaration system and its operation. This will give the public greater confidence. The IRC

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<sup>68</sup> For instance, see the statement by the CE's Office on the incident of alleged breach of declaration requirements by Hon LAU Wong-fat on 30 September 2010 (<http://www.info.gov.hk/gia/general/201009/30/P201009300363.htm>).

<sup>69</sup> For instance, see the reply by the Secretary for Constitutional and Mainland Affairs to Hon Emily LAU Wai-hing in LegCo on 22 February 2012 (<http://www.info.gov.hk/gia/general/201202/22/P201202220370.htm>).

considers that, without compromising the confidentiality of ExCo deliberations, the CE in Council should publish a document setting out the ExCo declaration system, the approach for handling conflict of interest, the procedures for handling alleged breaches, and the available sanctions such as warning, public reprimand or removal. The IRC also considers that the Administration should make the publication of general statistics on the operation of the ExCo declaration system a standing feature.

4.129 **Recommendation 30**: The IRC **recommends** that the CE in Council should publish a document setting out the system it has adopted for dealing with conflict of interest. This would include the declaration system, the procedure for ascertaining whether possible conflicts of interest may have arisen and the approach and guidelines for their consideration and resolution. It should also include the procedure for the investigation of alleged breaches of the declaration requirements and the available sanctions such as warning, public reprimand or removal.

4.130 **Recommendation 31**: The IRC **recommends** that the CE in Council should publish annual statistics of the number of occasions on which one or more Members withdrew from its decision-making process due to conflict of interest.

### *Acceptance of Advantages and Entertainment*

4.131 Non-Official ExCo Members are not subject to section 3 of the POBO. They are subject to the bribery provisions of the POBO as “public servants” which also include LegCo Members, District Council Members and members and staff of public bodies. They are not subject to any administrative control or guidance on the acceptance of advantages and entertainment, except that under the ExCo declaration system, ExCo Members are required to declare the acceptance by them or their spouses any financial sponsorship, sponsored overseas visit, or gift worth \$2,000 or more in relation to their ExCo membership. Such declarations are subject to public inspection.

4.132 Under the Basic Law, ExCo is an organ for assisting the CE in policy-making (BL54). Its Members are appointed from among Principal Officials, LegCo Members and public figures (BL55). The first category forms the Official Members. The latter two categories are the Non-Official Members. The CE has a duty to consult ExCo before making important policy decisions, introducing bills to LegCo, making subordinate legislation or dissolving LegCo. If the CE does not accept a majority opinion of ExCo, the CE has to put the specific reasons on record (BL56). ExCo Members must take an oath swearing to uphold the Basic Law, bear allegiance to the HKSAR and serve the HKSAR “conscientiously, dutifully, in full accordance with the law, honestly and with integrity”. They must also take an oath of secrecy.

4.133 ExCo has a large membership. At present, apart from the CE as the President, ExCo has a total of 28 Members (15 Official and 13 Non-Official). ExCo acts as a collective body in advising the CE in ExCo. An individual ExCo Member does not act on his own in relation to ExCo business and is not vested with any executive power or responsibility. The Non-Official Members are drawn from many different fields in the community. Unlike full-time public officials, they serve only part-time as ExCo Members.

They continue to be involved in the community in various capacities and are usually fully engaged in various fields. With their different backgrounds, experience and expertise, they advise the CE on the matters brought before ExCo. The fact that they come from different fields enables them to bring varied perspectives to the matters before ExCo. This can be regarded as the strength of the Non-Official membership of ExCo.

4.134 Having regard to the foregoing matters, the IRC considers that it would not be appropriate to subject them to the same or a similar regulatory regime for the acceptance of advantages and entertainment as that applicable to full-time officials like the CE, PAOs and civil servants.

## **Debts and Liabilities**

4.135 During our public consultation, a suggestion has been raised to introduce an additional requirement for the CE, PAOs and ExCo Members to declare in their regular declaration of investments and interests any personal debt or liability and any payment, release, discharge or liquidation thereof (“debts and liabilities etc.”).

4.136 Since any loan is an advantage, its solicitation or acceptance by a PAO, as with any civil servant, is subject to the section 3 regime of the POBO. General<sup>70</sup> or special permission by the CE is necessary. For the CE, with the recommended application of the section 3 regime to him, the permission of the proposed Independent Committee would be necessary. As pointed out above, Non-Official ExCo Members are not subject to the section 3 regime.

4.137 Under the present system, as is the case in the Civil Service, the CE, PAOs, and ExCo Members are always under a duty to avoid any conflict of interest. In relation to a specific matter arising for consideration before a particular official, the nature and extent of his debts and liabilities etc. and the identity of the creditor may be such as to give rise to a potential conflict of interest. In such a situation, as with any situation involving potential conflict of interest, the official concerned would have to disclose his debts and liabilities etc. so that a decision can be made on the appropriate course of actions to handle the conflict. In the case of PAOs and ExCo Members, the disclosure would be made to and the decision would ultimately be made by the CE. In the case of the CE himself, he would have to decide the matter for himself, seeking the advice of ExCo as appropriate as discussed above.

4.138 With the present system requiring ad hoc declarations of debts and liabilities etc. by the CE, PAOs and ExCo Members in relation to specific matters being considered and bearing in mind privacy concerns, the IRC does not consider it necessary to include the additional requirement to declare debts and liabilities etc. in their regular declarations of investments and interests. The IRC has noted that this is the position in the Civil Service

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<sup>70</sup> The AAN gives general permission for prescribed officers to solicit and accept loans from a company or an individual in certain circumstances. In relation to the former, the circumstances include that it has to be made in the normal course of business provided that it is equally available on equal terms to other persons and the company has no official dealings with the prescribed officer. In relation to the latter, the amounts of the loans depend on the relationship between the prescribed officer and the lender (\$3,000 from a close personal friend and \$1,500 from any other person) and the loans must be repaid within 30 days, provided that the lender has no official dealings with the department or organization in which the prescribed officer works.

where there is no general requirement to declare loans and liabilities etc. in regular declarations of investments<sup>71</sup>. And this appears to have worked satisfactorily.

4.139 It should be noted that the debts and liabilities etc. of a PAO or a civil servant may be examined as part of his financial situation in the integrity checking process. Integrity checking is conducted as part of the appointment process to senior positions or positions with access to sensitive information, for the purposes of ensuring that the potential appointees are of good conduct and high integrity as required of those positions and ascertaining whether they may be vulnerable to possible corrupt activities or other forms of pressure. The system of integrity checking is outside the review ambit of the IRC.

## General Transparency

4.140 In addition to various measures recommended above relating to transparency, the IRC considers that, for consistency, the documents which are at present or are recommended to be made available for public inspection or published should all be made accessible to the public through the relevant websites. Some of them which are at present open to public inspection can already be so accessed.

4.141 **Recommendation 32:** The IRC **recommends** that the documents relating to the regulatory regime for prevention and handling of conflict of interests concerning the CE, PAOs and ExCo Members<sup>72</sup> should be made accessible on the relevant websites, in so far as they are not at present.

4.142 **Recommendation 33:** The IRC **recommends** that the CE's, PAOs' and ExCo Members' open declarations of investments and interests subject to public inspection should be made accessible on the relevant websites, in so far as they are not at present.

4.143 **Recommendation 34:** The IRC **recommends** that the CE Register of Advantages<sup>73</sup>, the PAOs' Registers of Advantages<sup>74</sup>, and ExCo Members' declarations of gifts and sponsorships should be made accessible on the relevant websites, in so far as they are not at present.

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<sup>71</sup> However, individual departments may impose arrangements for declarations of such due to operational needs, e.g. the Hong Kong Police Force.

<sup>72</sup> These include but are not limited to the following: the PAO Code, the guidelines adopted by the CE for considering conflict of interest questions concerning PAOs (Recommendation 3), the general permission given by the CE for PAOs to solicit or accept advantages (Recommendation 9), the guidelines adopted by the CE for considering and giving special permission for PAOs (Recommendation 5), the general permission given by the Independent Committee for the CE to solicit or accept advantages and the procedure for the application for special permission (Recommendation 18), the guidelines adopted by the Independent Committee for considering and giving special permission for the CE (Recommendation 19), and the note describing the ExCo system for prevention and handling of conflict of interest (Recommendation 30).

<sup>73</sup> See Recommendation 21.

<sup>74</sup> See Recommendation 10.

## Review

4.144 In a rapidly changing world, public expectations of the standards of conduct of public officials may change over time. The system for the prevention and handling of potential conflict of interests must be adapted from time to time to keep up with public expectations in order to maintain public confidence. The IRC thus considers it necessary for the system to be subject to regular review. This should not preclude review during the interim as and when the need arises.

4.145 Further, the general permission for the acceptance of advantages for the purpose of section 3 of the POBO, as set out in the AAN for civil servants and PAOs, and the general permission to be given by the proposed Independent Committee for the CE, represents what is regarded as generally acceptable without the need for special permission. The IRC also sees a need for the general permission, especially the permissible circumstances and the associated monetary limits (which were last revised in 2007), to be subject to review from time to time to ensure that they remain relevant and appropriate.

4.146 **Recommendation 35**: The IRC **recommends** that the system for the prevention and handling of potential conflicts of interests concerning the CE, ExCo Members and PAOs should be subject to review at least once every five years in the light of experience to ensure that it meets the expectations of the public in rapidly changing times.

4.147 **Recommendation 36**: The IRC **recommends** that consideration should be given to reviewing the general permission given for the solicitation and acceptance of advantages under the POBO, including the permissible circumstances and the associated monetary limits, from time to time, having regard not only to inflation but also evolving social conventions, bearing in mind that the AAN is applicable to the entire Civil Service.