

## EXECUTIVE SUMMARY

### Introduction

Hong Kong takes great pride in its international reputation as a clean society free of corruption. This reputation is hard-earned and, in order to maintain it, eternal vigilance by all, both the Government and citizens, is required. A clean public service is a core value of our community. The public has the highest expectations that holders of high public offices would observe the highest standards of conduct. Our citizens fundamentally value a culture of probity in government.

2. Arising from public controversies concerning certain actions by the Chief Executive (CE), the Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests (“the IRC”) has been set up to review the present regulatory system for the prevention and handling of potential conflicts of interests concerning the CE, Members of the Executive Council (ExCo Members) and politically appointed officials (PAOs). This Report sets out the IRC’s review and recommendations.

3. The IRC has reviewed the present system for the prevention and handling of potential conflicts of interests, including the arrangements for declaration of interests and investments, acceptance of advantage and entertainment<sup>1</sup>, and post-office outside work (*Chapter 3*). In its review, the IRC has taken full account of the present system applicable to the Civil Service, which represents a good system and is widely regarded as setting the gold standard (*Appendix B*). The IRC has also taken note of the practices in various overseas jurisdictions and local public bodies/institutions (*Appendices C-D*).

4. The IRC is guided by the following considerations in its review –

- (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.

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<sup>1</sup> The Prevention of Bribery Ordinance (Cap.201) (the POBO) defines the terms “advantage (利益)” and “entertainment (款待)”, but does not contain the term “hospitality”. The Code for Officials under the Political Appointment System (the PAO Code) contains the terms “advantage (利益)”, “entertainment (款待)” and “hospitality (款待)”, with the latter two terms being the same in Chinese. “Hospitality” may be an “advantage” and/or “entertainment” within the POBO, depending on its nature and circumstances. See also paragraphs 3.44-3.45. For the sake of clarity, this Report refers to “advantage (利益)” and “entertainment (款待)” as used under the POBO, and refers to “hospitality”, without attempting a definitive legal definition of it, as “招待” in Chinese although the PAO Code uses “款待”.

5. Based on its review, the IRC has identified inadequacies in the present system, and put forward 36 recommendations to improve them (*Chapter 4*) which are summarized below. In formulating its recommendations, the IRC has taken into account views received during its public consultation exercise through written public submissions and at a public forum (*Appendix E*).

## The Legal Framework

6. The present system for the prevention and handling of conflict of interests is underpinned by a legal framework. The common law offences of misconduct in public office and bribery, which criminalize corrupt activities and abuse of authority, including those arising in conflict of interest situations, apply to the CE, PAOs and ExCo Members in the same way as civil servants. The Prevention of Bribery Ordinance (Cap.201) (the POBO) contains provisions relating to bribery that apply to all persons (including the CE, PAOs, ExCo Members and civil servants). It also contains various provisions which apply differently to different categories of holders of public offices –

- (a) **Section 3** criminalizes the solicitation and acceptance of an advantage without the CE's permission by a category of "prescribed officers" including PAOs and civil servants. It does not apply to the CE or ExCo Members. "Advantage" is defined under POBO to include gifts, loans, passages<sup>2</sup>, any other service or favour, but exclude "entertainment" which is defined as the provision of food or drink, that is, lunches, dinners and the like and any accompanying performance.
- (b) **Sections 4 and 5** criminalize bribery concerning the CE and a broader category of "public servants" which cover all prescribed officers including PAOs and civil servants, and also ExCo Members, LegCo Members, District Council Members, and members and staff of public bodies.
- (c) **Section 8** criminalizes the offer of an advantage by anyone, without lawful authority or reasonable excuse, while having dealings with a government department, to a prescribed officer (including any PAO or civil servant) employed in that department. It also criminalizes an offer of an advantage by anyone to a public servant in similar circumstances. It does not apply to the CE.
- (d) **Section 10** criminalizes possession of unexplained property by the CE and prescribed officers (including PAOs and civil servants). It does not apply to ExCo Members.

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<sup>2</sup> The term "passage" is not defined or referred in the POBO, but the Acceptance of Advantages (Chief Executive's Permission) Notice (AAN) refers to "passage (旅費)" and "air, sea or overland passage (機票費、船費或車費)" as one of the types of advantages for which general permission is given for prescribed officers to solicit or accept under specified circumstances. A passage includes an air, sea or overland passage not only in the form of a ticket on a commercial airline, cruise or coach but also travel on a private jet or yacht as a service. For the sake of clarity, this Report refers to "passage" as "旅程" in Chinese although the AAN uses "旅費".

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

7. The regime for the prevention and handling of conflict of interest applicable to PAOs is essentially the same as that applicable in the Civil Service. PAOs are subject to the POBO in the same way as civil servants. PAOs are governed by the Code for Officials under the Political Appointment System (the PAO Code)<sup>3</sup> which provides guidance on the acceptance of advantages and entertainment, which is similar to the guidance in the Civil Service. On declaration of conflict of interest, PAOs are required under the PAO Code to report any potential conflict of interests to the CE, and to make regular declaration of a wide range of investments and interests. These provisions mirror closely those applicable in the Civil Service.

8. The IRC considers that the present systems applicable to PAOs regulating declaration of interests and investments and acceptance of advantages and entertainment, which are essentially the same as that applicable in the Civil Service, are largely satisfactory. The IRC has made a number of recommendations to improve upon the systems applicable to PAOs in the following aspects –

- (a) In deciding on matters concerning PAOs relating to conflict of interests or acceptance of advantages or entertainment, the CE should adopt an approach which should be at least as stringent as that applicable in the Civil Service.
- (b) Transparency of the systems should be enhanced by publishing to the public the applicable guidelines for dealing with conflict of interest questions and for giving special permission to solicit or accept advantages, the process for dealing with alleged breaches of the PAO Code, and the applicable sanctions in case of breach. Transparency should also be enhanced by making public instances of PAOs withdrawing due to conflict of interest, and expanding the PAO Register of Advantages to include advantages accepted with special permission together with their estimated values.
- (c) The provisions in the PAO Code providing guidance on the acceptance of advantages and entertainment should be improved to distinguish between advantages and entertainment, and to strengthen the guidelines for PAOs in considering the propriety of accepting any advantage or entertainment.

### **(Recommendations 1-12)**

9. On post-office outside work, PAOs are subject to a control regime different from that applicable in the Civil Service. Considering that the Political Appointment System has been in place for a decade and expanded in the interim, and that the control regime in the Civil Service has been reviewed and revised recently, the IRC recommends that the Administration should review the control regime for PAOs. The review should take into account the differences in the nature of employment of PAOs and civil servants which may appear to justify some differences in the arrangements, and consider the possibilities of

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<sup>3</sup> Relevant excerpts of the PAO Code are at *Appendix A*.

providing for different control periods for PAOs of different ranks and lengths of service and making the control restriction on PAOs legally binding. (**Recommendations 13-15**)

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

10. The strict regime under section 3 of the POBO is a stringent corruption prevention measure and is underpinned by criminal sanctions. Section 8 is also part of that regime. A fundamental defect in the present system regulating the solicitation or acceptance of advantages is that the strict regime under sections 3 and 8 of the POBO is applicable to PAOs and civil servants, but not the CE. The CE decides on the solicitation or acceptance of advantages for himself and is not subject to any check and balance. The IRC considers that this is totally inappropriate. The CE should not be above the law which applies to PAOs and civil servants.

11. The IRC fully recognizes the unique constitutional status of the office of the CE. He is the head of the HKSAR and the Government and he is accountable to the Central People's Government and the HKSAR. But the IRC sees no justification for exempting the CE from the statutory regime to which PAOs and civil servants are subject. All public officials are servants of the people. Indeed the CE should be regarded as "the Chief Servant" of the people. The public expect our public officials, particularly the CE, to observe the highest standards of conduct. Indeed the high constitutional status of the CE makes it all the more important that he sets a good example for all, especially PAOs and the Civil Service which he leads.

12. The IRC considers that, as a matter of principle, 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. The IRC does not accept the reasons put forward by the Administration for not applying sections 3 and 8 to the CE when amending the POBO in 2008. It recommends that the statutory regime on the solicitation and acceptance of advantages governing PAOs and civil servants should be applied to the office of the CE as follows –

- (a) 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, which should consist of three members appointed jointly by the Chief Justice and the President of LegCo.
- (b) The process of appointment of the Independent Committee and the process of that Committee giving permission under the statutory regime should be apolitical and any risk of politicization should be avoided.
- (c) The members of the Independent Committee should be permanent residents of the HKSAR and persons of high standing in the community. All prescribed officers (including serving PAOs, civil servants and judges) and also serving Members of ExCo, LegCo and District Councils should not be eligible for appointment.

- (d) The Independent Committee would have the responsibility of giving general permission to the CE to accept advantages in defined circumstances and giving special permission in particular cases. It should publish a Notice setting out the scope of general permission and 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.
- (e) Legislation should also 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, unless the acceptance of the advantage by the CE is covered by general permission.
- (f) To address the problem of modest gifts offered to the CE (or his spouse) on various events or visits as normal gestures of goodwill by members of the public, the Independent Committee should consider giving general permission to the CE to accept gifts up to \$400 from any person offered to him (or his spouse) in his official capacity.
- (g) To enhance transparency, the CE Register of Gifts should be renamed Register of Advantages and expanded to include all advantages received by the CE in his private capacity and accepted with the special permission of the Independent Committee, including their estimated values.

**(Recommendations 16-22)**

13. With the above recommendations, a statutory regime on the solicitation and acceptance of advantages would be applied to the CE, which would essentially be the same as that applicable to PAOs and the Civil Service. Under such a regime, 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.

14. The IRC recommends that the CE in Council<sup>4</sup> should decide as a matter of policy that the CE has the duty to observe the PAO Code applicable to PAOs and the ExCo system of declaration of interests applicable to ExCo Members. The IRC considers that it should not be a matter of voluntary choice by the incumbent holder of the office of the CE. In applying the provisions in the PAO Code, the CE should adopt standards at least as stringent as those he would adopt in deciding on such matters for PAOs and ExCo Members. In particular, when deciding on conflict of interest questions concerning himself in relation to any matter, he should follow the same guidelines he adopts for PAOs and may seek the advice of ExCo if and as he considers appropriate. **(Recommendations 23-27)**

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<sup>4</sup> Defined in the Interpretation and General Clauses Ordinance (Cap.1) to mean the Chief Executive acting after consultation with the Executive Council.

15. On entertainment (that is, lunches, dinners and the like including any accompanying performance), the CE, PAOs and the Civil Service are all subject to similar administrative guidance. The IRC considers that it would be impracticable to impose control mechanisms for the acceptance of entertainment, for example, an approval mechanism with detailed rules and procedures. The CE, as the head of the HKSAR, has a duty to conduct himself with total propriety so as to command public confidence and respect. He should set a good example for PAOs and civil servants. In accepting entertainment, as with PAOs and civil servants, to ensure propriety, the CE would have to exercise vigilance in making good judgement with common sense applying suitable guidelines.

16. The CE would have the duty to observe the PAO Code as recommended. The recommended provision in the PAO Code would make clear that in accepting entertainment, the CE 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 CE 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 CE or the Government into disrepute, bearing in mind public perception. It is of particular importance that the CE should exercise great vigilance in deciding on the acceptance of entertainment and adopt a cautious approach that should be at least as stringent as that which is expected of PAOs and in the Civil Service. The IRC considers it appropriate for the CE to follow the maxim: “if in doubt, don’t”. **(Recommendation 28)**

17. On post-office outside work, the office of the CE is subject to a control regime which is much 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. During the first year, he is prohibited from undertaking any employment, becoming a director or partner in any business. During the second and third years, he must seek the advice of the Advisory Committee on Post-office Employment for Former Chief Executives and Politically Appointed Officials before taking up any employment or engaging in any business or professional activities in or outside Hong Kong and is in any event prohibited from a wide range of activities. The IRC considers that the present regime for former CE is largely satisfactory. If the post-office outside work restriction for PAOs is made legally binding following the recommended review of the regime for PAOs, the IRC recommends that a similar change should be considered for a former CE. **(Recommendation 29)**

### **Members of the Executive Council (ExCo Members)**

18. ExCo Members, both Official and Non-Official, are subject to the ExCo system of declaration of interests, under which they are required to make regular declaration of a specified range of interests and investments, and also ad hoc declaration of specific interest in any matters in respect of individual items to be submitted before ExCo for discussion. The declaration system is in substance similar to those applicable to PAOs and in the Civil

Service. The declaration requirements are reviewed and revised from time to time in the light of experience.

19. The IRC considers that the current ExCo declaration system is on the whole satisfactory, and recommends that its transparency should be enhanced by publishing a document setting out the system for dealing with conflict of interest in ExCo, and annual statistics on the number of occasions where one or more ExCo Members withdrew from its decision-making process due to conflict of interest. **(Recommendations 30-31)**

20. ExCo has a large membership, including many Non-Official Members. The IRC recognizes that 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. Its Non-Official Members are drawn from many different fields in the community. They continue to be involved in the community in various capacities and are usually fully engaged in various fields. The fact that they come from different fields can be regarded as the strength of the Non-Official membership of ExCo. They serve part-time and are not full-time officials. The IRC considers that it is inappropriate to subject them to the same regulatory regime for the acceptance of advantages and entertainment as applicable to full-time officials like the CE, PAOs and civil servants.

### **General Transparency**

21. The IRC recommends that, for consistency, all documents at present or recommended to be made available for public inspection or published should be made accessible to the public through the relevant websites. **(Recommendations 32-34)**

### **Review**

22. 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 they meet the expectations of the public in rapidly changing times. **(Recommendation 35)**

23. The IRC recommends that the general permission given for the solicitation and acceptance of advantages under the POBO for PAOs and civil servants, and those to be given by the proposed Independent Committee for the CE), including the permissible circumstances and the associated monetary limits, should be reviewed from time to time having regard not only to inflation but also evolving social conventions. **(Recommendation 36)**

