

立法會
Legislative Council

LC Paper No. CB(2)2590/04-05
(These minutes have been seen
by the Administration)

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**Subcommittee on Application of Certain Provisions of the
Prevention of Bribery Ordinance to the Chief Executive**

**Minutes of the second meeting
held on Monday, 11 July 2005 at 10:45 am
in the Chamber of the Legislative Council Building**

- Members present** : Dr Hon YEUNG Sum (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Dr Hon LUI Ming-wah, SBS, JP
Hon Margaret NG
Hon CHEUNG Man-kwong
Hon Bernard CHAN, JP
Hon Howard YOUNG, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Daniel LAM Wai-keung, BBS, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon TONG Ka-wah, SC
- Members absent** : Hon Albert HO Chun-yan
Hon LI Kwok-ying, MH
Hon MA Lik, GBS, JP
- Public Officers attending** : Ms CHANG King-yiu
Director of Administration
- Mrs Susan MAK
Deputy Director of Administration (1)
- Clerk in attendance** : Mrs Percy MA
Chief Council Secretary (2)3

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mrs Eleanor CHOW
Senior Council Secretary (2)4

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I. Meeting with the Administration

(LC Paper No. CB(2)1091/04-05(01) – Background Brief prepared by the Legislative Council Secretariat)

(LC Paper No. CB(2)1091/04-05(02) – Paper provided by the Administration)

(Appendix V to LC Paper No. CB(2)2111/04-05(01) – Letter dated 24 June 2005 from the Administration)

(LC Paper No. CB(2)2206/04-05(01) – Letter dated 5 July 2005 from the Administration)

Progress of work

Director of Administration (D of Adm) said that the Administration would study during the summer whether and how the provisions of the Prevention of Bribery Ordinance (POBO) that were applicable to “prescribed officer” or “public servant” should apply to the Chief Executive (CE), taking account of the CE’s constitutional role under the Basic Law and the construction of POBO. The Administration would endeavour to conclude the study in October 2005 and brief members on its final decision after the Policy Address, i.e. at the end of October 2005.

2. Ms Emily LAU said that she had lost patience with the Administration, given that there was no progress on the review of the application of POBO to CE after a lapse of more than six years. She pointed out that the absence of a statutory framework of bribery prevention applicable to CE gave a wrong message to the international community that CE was not bound by law. Ms LAU pointed out that notwithstanding his unique constitutional status, CE was not above the law. There was no express provision in the Basic Law exempting CE from being subjected to bribery prevention legislation. Ms LAU enquired about the difficulties encountered by the Administration in conducting the review.

3. Ms Emily LAU also said that she could not accept that the Administration would only announce the decision on the issue after the Policy Address. She said that given the importance of the issue, it should be included in the new CE’s

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Policy Address. Briefings by the Administration to the Panel on Constitutional Affairs or this Subcommittee should then follow. Some members supported her view.

4. Mr Jeffrey LAM said that given the complex nature of the issue, the Administration should be given time to conclude its study before reverting to members. He had reservation about the proposal to request CE to cover the issue in the Policy Address.

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5. D of Adm said that she would relay Ms LAU's view that the issue should be covered in the coming Policy Address to CE. However, it was CE's prerogative to decide on the content of the Policy Address.

6. The Chairman said that the technical issues arising from the unique constitutional status of CE had been known for years and asked whether they could be resolved. Ms Margaret NG said that the technical issues identified were not insurmountable, as long as the Administration had made a decision on the policy.

7. D of Adm explained that according to legal advice, CE was not an agent of the Hong Kong Special Administration Regions (HKSAR) Government within the meaning of section 2(1) of POBO. It was difficult to fit CE within the structure of POBO. Over the years, the Administration had conducted various studies and considered various options on how to introduce a regulatory framework of bribery prevention for application to CE. For example, the Administration would need to address the issue of the absence of an appropriate principal under POBO to grant approval to CE for receipt of advantages. This would be a relevant issue if the intention remained to apply the standard or arrangement for acceptance of advantages by prescribed officers to CE within the framework of POBO. The Administration required more time for internal deliberation before reaching a final decision on the matter.

8. D of Adm further assured members that CE was not above the law. CE was already bound by the common law offence of bribery applicable to public officers. It remained the Administration's policy target to introduce a regulatory framework of bribery prevention for application to CE.

9. Ms Margaret NG said that the purpose of this meeting was to let the Administration know the expectation of the Subcommittee at the October meeting. Commenting on the various technical and constitutional issues set out in paragraph 3 of the Administration's paper (LC Paper No. CB(2)1091/04-05(02)), Ms NG said that CE could be added to the definition of "prescribed officers" under POBO so that the general standards of bribery prevention applicable to "prescribed officers" could be extended to CE. As regards the concern about the principal-agent relationship, Ms NG pointed out that this was only relevant to certain provisions of POBO. With CE defined as a

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prescribed officer, Ms NG considered that POBO could set out special provisions to deal with the acceptance of advantages etc. by CE. Ms Ng added that once the Administration had decided on a policy, it was a matter of legislative drafting to reflect the policy. She requested D of Adm to advise at this meeting whether it was the policy of the Administration to introduce legislation to put into place a regulatory framework of bribery prevention for application to CE, and the paper to be provided for the Subcommittee in October would explain the legislative approach to be adopted.

10. D of Adm said that over the years, the Administration Wing together with Department of Justice had considered various options to subject CE to a regulatory framework of bribery prevention. However, she could not confirm at this stage on behalf of the Government whether legislative measures would be introduced to deal with the issue, and if legislative approach was adopted, whether it should be given effect through amendments to POBO or other legislative vehicles. In further response to members, D of Adm explained that the Government would consider details of various proposals including legislative proposals, their pros and cons, their feasibility and implications, before a final decision was made.

11. In further response to Ms NG, D of Adm said that the Administration's paper to be provided to the Subcommittee after the Policy Address in October 2005 would indicate whether and how legislative measures would be adopted to address the issue and the timetable for implementation.

Private Member's Bill (PMB)

12. Ms Emily LAU sought legal advice on the possibility of introducing a PMB to put in place a framework of bribery prevention applicable to CE.

13. Senior Assistant Legal Adviser 2 explained that Article 74 of the Basic Law (BL 74) provided that Members could introduce bills that did not relate to public expenditure or political structure or the operation of the Government. The written consent of CE was required before bills relating to Government policies were introduced. In his view, the proposed PMB might not relate to the political structure or the operation of the Government. Whether or not it involved public expenditure would depend on the content of the PMB. The PMB, however, might relate to Government policies for which the written consent of CE would be required before its introduction.

Concerns of and motion proposed by Mr TONG Ka-wah

14. Mr TONG Ka-wah expressed the following concerns –

- (a) BL 47(2) required CE to declare his asset to the Chief Justice of the Court of Final Appeal on assuming office, and this declaration

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shall be put on record. Although the new CE had assumed office for more than two weeks, he had yet to fulfill this constitutional duty by declaring his asset to the Chief Justice. Mr TONG asked whether a mechanism should be put in place to deal with the situation of CE failing to comply with the relevant provisions of the Basic Law;

- (b) under BL 57, the Independent Commission Against Corruption (ICAC) should function independently and be accountable to CE. Mr TONG asked members to consider the appropriateness for ICAC to be empowered under statute to investigate any alleged offence of bribery of CE since it was accountable to CE; and
- (c) BL 64 provided that the Government of HKSAR must abide by the law and be accountable to the Legislative Council (LegCo). If CE committed serious breach of law or dereliction of duty and if he refused to resign, he could be impeached under BL 73(9). Mr TONG pointed out that at present, there were no provisions in local legislation to implement BL 73(9).

15. Mr TONG said that in his view, separate bribery prevention legislation should be introduced to regulate the conduct of CE. In this connection, he moved the following motion –

“本會促請政府立刻就防止賄賂法律條文對行政長官的適用問題提出可行方案，以便盡快立法規管行政長官操守行爲。”

(Translation)

“That this Subcommittee urges the Government to immediately put forward feasible proposals regarding the application of legal provisions on bribery prevention to the Chief Executive, so as to expeditiously legislate for the regulation of the conduct of the Chief Executive.”

16. Mr CHEUNG Man-kwong said that he was particularly concerned about investigation by ICAC into CE’s involvement in an alleged case of bribery as ICAC was accountable to CE under BL 57. He held the view that in considering the procedure for investigation and prosecution of CE for an alleged case of bribery, reference could be made to the impeachment procedure under BL 73(9). He pointed out that under BL 73(9), an independent investigation committee could be formed and chaired by the Chief Justice of the Court of Final Appeal to carry out the necessary investigation, and it was for LegCo to pass a motion for investigation and a motion of impeachment. In his view, bribery prevention legislation applicable to CE was a must and would provide the legal basis for invoking the procedure under BL 73(9). Mr CHEUNG added that given the special constitutional status of CE, he should be subject to more stringent

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statutory control than that applicable to public servants.

17. Mr TAM Yiu-chung said that at present, there were various bribery prevention measures applicable to CE. On how to further strengthen these measures, he urged the Administration to put forward a feasible proposal as soon as practicable. He added that he would reserve his position on whether the measures introduced should be statutory or otherwise. As regards Mr TONG's motion, he considered it impracticable to expect the Administration to come up with a proposal immediately. The Administration's undertaking to revert to the Subcommittee on a final decision in October 2005 was acceptable.

18. Mr Howard YOUNG said that the Members of the Liberal Party (LP) were in support of a regulatory framework of bribery prevention applicable to CE. The Administration's proposal to revert to the Subcommittee in October 2005 was acceptable. Members of LP, however, did not support the motion proposed by Mr TONG Ka-wah.

19. Ms Emily LAU said that the Administration should adopt legislative approach to subject CE to the same POBO provisions applicable to "prescribed officer". The Administration should also consider whether ICAC should be the appropriate investigation authority. She added that irrespective of the preference of the new CE, he should be subject to bribery prevention provisions. The new CE should be requested to clarify whether he agreed to be bound by bribery prevention provisions. Her view was concurred by Ms Margaret NG.

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20. D of Adm assured members that CE would declare his asset to the Chief Justice shortly, and undertook to reflect members' concern to CE. She further said that the legal advice obtained by the Administration was that ICAC was empowered to investigate any allegation or suspicion of offence of bribery of CE under the common law. As regards members' concern about BL 57 concerning the accountability of ICAC to CE, D of Adm agreed to seek further legal advice to clarify the matter.

21. Mr TONG Ka-wah said that although the new CE was appointed to serve only the remaining two years of the term of office, he should take decisive action to devise a framework of bribery prevention to regulate the conduct of CE by legislative measures. Mr TONG further said that the concerns raised by him earlier at the meeting could be addressed. For example, setting up an independent body to investigate into alleged cases of bribery involving CE could avoid putting ICAC in a difficult position.

22. The Chairman put the motion proposed by Mr TONG Ka-wah to vote. Five members voted for, and two members voted against, the motion. The Chairman declared that the motion was carried.

Proposed research study

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23. Ms Margaret NG and Mr CHEUNG Man-kwong suggested that the Research and Library Services Division of the Secretariat (RLSD) be requested to conduct a research on the regulatory framework of bribery prevention and legal procedure for impeachment of head of government in other common law jurisdictions during the summer recess. Mr CHEUNG said that the research should cover the line of command, if any, between the head of the government and the authority responsible for investigating any alleged offence of bribery of the former. Members agreed.

Proposal of Mr Martin LEE on the date of next meeting

24. Mr Martin LEE said that it was inconceivable and unacceptable that the Administration was still uncertain whether the control framework of bribery prevention applicable to CE should be statutory or otherwise after reviewing the issue for more than six years. He proposed that the Administration should be requested to revert to the Subcommittee on its position within one week, and a meeting of the Subcommittee should be held for such purpose in the following week.

25. Members who were in support of the Mr LEE's proposal said that CE or the Chief Secretary for Administration should be invited to attend the meeting and to give a clear policy indication as to whether CE should be subject to the standards of bribery prevention applicable to government servants under POBO, and whether the Administration would adopt legislative means to that effect. Members also suggested that the outline of the proposed research study should be prepared by RLSD for members' consideration and endorsement at the same meeting.

26. Mr TAM Yiu-chung said that it was impractical to expect the Administration to come up with any new developments within one week. He considered that a meeting with the Administration in October 2005 was acceptable. Mr Howard YOUNG said that he would support holding a meeting in the following week for the purpose of discussing the proposed research outline only.

27. D of Adm reiterated that if a meeting was held in the following week and if she were asked to attend the meeting, she did not have any new information to provide to the Subcommittee.

28. The Chairman put Mr Martin LEE's proposal for holding a meeting in the following week to vote. Four members voted for, and two members voted against, the proposal. The Chairman instructed the Clerk to propose a date for the meeting after consulting members of the Subcommittee.

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(Post-meeting note : The meeting of the Subcommittee was scheduled on 21 July 2005 at 8:30 am. An invitation letter was sent to CE on 12 July 2005 and issued to members vide LC Paper No. CB(2)2345/04-05(01) on 20 July 2005.)

29. The meeting ended at 12:20 pm.

Council Business Division 2
Legislative Council Secretariat
27 September 2005