

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

**Minutes of the fifth meeting
held on Tuesday, 1 November 2005 at 16:30 pm
in Conference Room A 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 Howard YOUNG, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Daniel LAM Wai-keung, BBS, JP
Hon MA Lik, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon WONG Ting-kwong, BBS
Hon TONG Ka-wah, SC
- Member attending** : Hon LI Kwok-ying, MH
- Members absent** : Hon Albert HO Chun-yan
Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
Hon Bernard CHAN, JP
Hon LEUNG Kwok-hung
- Public Officers attending** : Ms CHANG King-yiu
Director of Administration

Mrs Susan MAK
Deputy Director of Administration

Mr Ryan WONG Sai-chiu
Director of Investigation (Government Sector)
Independent Commission Against Corruption

Mr Peter WONG Hing-hong
Senior Assistant Solicitor General
Department of Justice

Mr Llewellyn MUI Kei-fat
Senior Government Counsel
Department of Justice

Attendance by invitation : The Hong Kong Bar Association

Mr Andrew Bruce, SC
Vice Chairman of the Hong Kong Bar Association

Clerk in attendance : Mrs Percy MA
Chief Council Secretary (2)3

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

Mr CHAU Pak-kwan
Research Officer 5

Mrs Eleanor CHOW
Senior Council Secretary (2)4

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I. Election of Chairman and Deputy Chairman

Dr YEUNG Sum, Chairman of the Subcommittee in office, informed members that two members had withdrawn from and five members had joined the Subcommittee in the current session. Members agreed that re-election of the Chairman of the Subcommittee was not necessary.

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II. Meeting with the Hong Kong Bar Association and Administration
(LC Paper No. CB(2)195/05-06(01) – Submission from the Law Society of Hong Kong on "Application of certain provisions of the Prevention of Bribery Ordinance to the Chief Executive"

LC Paper No. CB(2)195/05-06(02) – Administration's paper on "Proposal to apply certain provisions of the Prevention of Bribery Ordinance (Cap. 201) to the Chief Executive"

LC Paper No. CB(2)248/05-06(01) – Administration's response to the Law Society of Hong Kong's submission on "Application of certain provisions of the Prevention of Bribery Ordinance to the Chief Executive"

LC Paper No. CB(2)248/05-06(02) – Submission from the Hong Kong Bar Association on "Application of certain provisions of the Prevention of Bribery Ordinance to the Chief Executive"

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

LC Paper No. LS115/04-05 – Discussion paper on "Application of the Prevention of Bribery Ordinance to the Chief Executive" prepared by the Legal Service Division

LC Paper No. CB(2)2629/04-05(01) – Preliminary findings on Research Report on "Prevention of Corruption and Impeachment of Head of Government in Selected Places")

2. Mr Andrew BRUCE presented the views of the Hong Kong Bar Association on the application of certain provisions of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE) as set out in its submission.

(Post-meeting note : The Administration's response to the submission of the Bar Association was issued to members vide LC Paper No. CB(2)691/05-06(02) on 13 December 2005.)

3. Director of Administration (D of Adm) briefed members on the Administration's legislative proposal to be introduced into the Legislative Council (LegCo) in the current session. The main provisions of the legislative proposal were –

- (a) to introduce legislative amendments to apply sections 4, 5 and 10 of POBO to CE;

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- (b) to introduce a new provision to bind any person who offered any advantage to CE in line with section 8(1) of POBO;
- (c) to amend section 10 to specify that if CE was accused of possessing unexplained property, the Court shall take account of CE's assets declared to the Chief Justice (CJ) pursuant to Article 47(2) of the Basic Law (BL 47(2)) in determining whether CE had given a satisfactory explanation under section 10(1); and
- (d) to add a new section to enable the Secretary for Justice (SJ) to refer to the Legislative Council (LegCo) a report of CE suspected to have committed the POBO offences for possible follow-up under BL 73(9).

4. Members welcomed the Administration's proposal to introduce legislative amendments to apply certain provisions of POBO to CE. Their views on the Administration's proposal and the Bar Association's submission are summarized below.

Proposed provisions for handling bribery offences by CE

5. D of Adm advised that the Administration had proposed that upon receipt of complaints against CE committing any proposed POBO offences applicable to CE, SJ might refer those with "prima facie" case and the findings of Independent Commission Against Corruption (ICAC)'s preliminary investigation to LegCo, with a view to facilitating LegCo's consideration of invoking the impeachment proceedings under BL 73(9). Should LegCo decide to proceed with the procedures under BL 73(9), SJ might exercise discretion and allow LegCo to complete the investigation and impeachment proceedings, before he might exercise his power of criminal prosecution or require ICAC to conduct further investigation. In the legislative proposal to be introduced, a new section was proposed to enable SJ to refer to LegCo a report of CE suspected to have committed the POBO offences for possible follow-up by LegCo under BL 73(9) (the "referral provision").

6. Some members, including Mr CHEUNG Man-kwong, Ms Margaret NG, Ms Emily LAU and Mr TONG Ka-wah, held the view that as all residents were equal before the law, the criminal proceedings applicable to CE in respect of a corruption offence should be the same as those instituted against any person who was charged with an offence under POBO. They expressed particular concern about the "referral provision" proposed by the Administration. These members stressed that LegCo would decide on its own whether the impeachment proceedings under BL 73(9) should be invoked. As provided in BL 73(9), LegCo, after passing a motion for investigation, would entrust CJ to form an independent investigation committee which would report its findings to LegCo. The report would facilitate LegCo's consideration of whether to proceed with

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the impeachment process. They considered that the “referral provision” unnecessary and undesirable.

7. These members were also of the view that SJ should make an independent decision on whether and when to institute prosecution if warranted, regardless of the progress of the impeachment proceedings under BL 73(9), if any.

8. D of Adm pointed out that LegCo had a constitutional role under the Basic Law to perform in case of serious breach of law or dereliction of duty by CE. It would thus be constitutionally appropriate to facilitate LegCo to obtain essential information pertaining to any bribery-related complaints against CE through a referral by SJ. She explained that under section 30 of POBO, a person who, knowing or suspecting that an investigation in respect of a POBO offence alleged or suspected to have been committed under Part II of POBO was taking place, without lawful authority or reasonable excuse, disclosed the subject or details of the investigation committed an offence. SJ was arguably bound by the “non-disclosure” requirement unless the proposed “referral provision” was made to empower him to refer bribery-related complaints against CE to LegCo. The “referral provision” would allow LegCo to obtain the essential information in considering whether or not to invoke the investigation and impeachment procedures under BL 73(9).

9. Regarding the interface between impeachment and prosecution, D of Adm said that it might be reasonable for LegCo to complete the investigation and impeachment proceedings before SJ exercised his power of criminal prosecution. Nevertheless, SJ had the discretion to institute criminal proceedings at any time he considered appropriate. D of Adm stressed that SJ’s constitutional function to control criminal prosecutions free from any interference, as stipulated under BL 63, would not be compromised.

10. Ms Emily LAU said that it was inappropriate for SJ to make a referral to LegCo when there was evidence to substantiate criminal prosecution against CE. She pointed out that given the political nature of LegCo, a motion to investigate CE under BL 73(9) could be negated, hence making it impossible for any investigation to take place, not to mention the passage of a motion on impeachment. She held the view that SJ should only refer a bribery-related complaint against CE to LegCo if he decided against prosecution.

11. Mr TONG Ka-wah said that he had no doubt that SJ would act in an impartial manner in deciding whether or not to institute criminal proceedings against CE. The mechanism under BL 73(9) could make it possible for a CE to be subject to the political process of impeachment, even if he could not be prosecuted for a corruption offence under the criminal proceedings, e.g. due to technical reasons.

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12. D of Adm assured members that should there be sufficient evidence to substantiate charges against CE on allegations of corruption, SJ would exercise his constitutional function and consider proceeding with criminal proceedings, irrespective of whether the impeachment proceedings were invoked or the outcome of the impeachment proceedings. The referral by SJ of the “prima facie” case and the findings of ICAC’s preliminary investigation to LegCo was not meant to compel LegCo to invoke the impeachment procedures, but aimed at providing to LegCo essential information pertaining to any bribery-related complaints against CE so that LegCo would not be inhibited from performing its constitutional duty under BL 73(9). It was for LegCo to consider whether to proceed with the impeachment process after receipt of the referral.

13. Some members were not convinced of the Administration’s explanations. They disagreed that there was a need for the “referral provision”. They stressed that criminal proceedings should not be mingled with political proceedings and vice versa. It was for SJ to decide whether and when to institute criminal proceedings against CE on the basis of the evidence available, and for LegCo to decide whether and when to invoke BL 73(9) if CE was charged with serious breach of law or dereliction of duty. The two proceedings should be separate and not connected. The Chairman requested the Administration to reconsider the need for the “referral provision” having regard to the views expressed by members, and revert to the Subcommittee on its position at the next meeting.

Impeachment and criminal proceedings

14. Ms Emily LAU asked Mr Andrew BRUCE whether the Bar Association considered that the criminal proceedings should take place before the impeachment proceedings, in the event that CE was charged with serious breach of law.

15. Mr Andrew BRUCE said that the political process of impeachment initiated by LegCo could lead to the removal of CE from office, while the criminal proceedings initiated by SJ could lead to CE losing his liberty. In the view of the Bar Association, the two proceedings were largely separate. While the two proceedings could be carried out in parallel, this might be unfair to the CE who had to undergo both proceedings at the same time. By convention, rather than by constitutional requirement, the criminal process would take place before the political process. There was, however, nothing to stop the two processes from taking place at the same time. It was for LegCo to take forward the matter in the manner it considered most appropriate.

16. Ms Margaret NG said that the impeachment mechanism under BL 73(9) could be invoked if LegCo “charges CE with serious breach of law”. She pointed out that because of the use of the wording, there was no basis for impeachment of CE unless he was convicted.

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17. D of Adm explained that the use of the wording “charges CE with serious breach of law” instead of “convicted of serious breach of law” implied that the impeachment process could be invoked when CE was suspected of having seriously breached the law. Senior Assistant Solicitor General (SASG) said that the expression “charges CE with serious breach of law” should be read in context. In his view, the intent of BL 73(9) was not to require LegCo to invoke the impeachment procedures only after the completion of the criminal proceedings. On the contrary, the provision allowed the investigation and impeachment mechanism against CE to take place before any criminal trials.

18. D of Adm said that strictly speaking the impeachment and criminal proceedings could take place in parallel. Similarly, a bribery-related complaint against CE could be investigated by ICAC and the independent investigation committee established under BL 73(9) at the same time. SASG supplemented that the Administration had conducted a study on overseas practices and the preliminary finding was that in some countries, impeachment proceedings could be conducted before criminal proceedings. D of Adm said that the Administration would conduct a more in-depth study on overseas practices and revert to members on its findings at the next meeting.

Investigation of bribery complaints against CE by ICAC

19. Ms Emily LAU requested Mr Andrew BRUCE to elaborate on the Bar Association’s view on whether it was appropriate for ICAC to investigate CE for an alleged offence of bribery (paragraph 8 of the Bar Association’s submission).

20. Mr Andrew BRUCE explained that the Bar Association considered it inappropriate to require ICAC to investigate complaints of bribery or misconduct in public office against an incumbent CE given that ICAC was accountable to CE under BL 57. The Bar Association proposed that CJ of the Court of Final Appeal or a committee of judges could appoint an independent counsel to carry out the investigation. The independent counsel might require the assistance of civil servants or ICAC investigators and would have the same investigatory powers provided to the Commissioner of ICAC under POBO. The report of the independent counsel could be presented to SJ for a decision on prosecution. If SJ did not make any decision within a specified period, the report would be presented to the LegCo in confidence; and if SJ decided against a prosecution, LegCo could resolve to require the presentation of the report. LegCo might after considering the report resolve whether to proceed to the impeachment mechanism under BL 73(9).

21. Mr Howard YOUNG expressed concern whether the Bar Association’s proposal had the effect of LegCo overturning the decision of SJ, and dovetailed with the relevant provisions of the Basic Law.

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22. Mr Andrew BRUCE explained that the proposal of appointing an independent counsel sought to complement the impeachment arrangement under BL 73(9). The intention was for a proper evaluator to analyse the evidence from the standpoint of whether there was sufficient evidence to justify a criminal prosecution. The report of the independent counsel would be placed before SJ who had the responsibility to decide whether to institute criminal proceedings against CE, or before LegCo for it to decide whether to proceed with the impeachment process.

23. Ms Margaret NG said that she had a number of concerns about the Bar Association's proposal, e.g. whether it was appropriate -

- (a) to appoint an independent counsel to carry out the investigation as he was not an expert in investigation of bribery-related complaints;
- (b) to involve CJ or judges in the investigation process as the case might eventually go to the Court if SJ decided to prosecute; and
- (c) to require the independent counsel to present the report to LegCo after SJ had decided against prosecution.

24. Mr CHEUNG Man-kwong said that both the Hong Kong Bar Association and the Law Society of Hong Kong considered it inappropriate for ICAC to investigate bribery-related complaints against CE as ICAC was accountable to CE under BL 57. The Law Society had proposed that an independent ad hoc committee chaired by a retired judge and staffed by officers seconded from ICAC be set up to conduct the investigation. Mr CHEUNG said that he was inclined to support the Law Society's proposal.

25. The Chairman asked whether ICAC envisaged any difficulties in investigating CE, who was the head of the Government, in the event that a bribery-related complaint against CE was received.

26. D of Adm said that the Administration considered that ICAC was the appropriate authority and possessed the powers and expertise to perform the investigation of bribery complaints against CE. Under the ICAC Ordinance, the Commissioner of ICAC had the duty to receive and consider complaints alleging corrupt practices and investigate the complaints as he considered practicable, he therefore had and should fulfill the statutory responsibility to investigate corruption complaints, including those against CE. When handling or investigating any corruption allegations received, the Commissioner must observe the statutory requirements set out in the law.

27. D of Adm further said that the Operations Review Committee (ORC) of ICAC was responsible for receiving from ICAC information about all corruption complaints and how the Commissioner was dealing with them. ORC was tasked

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to ensure that all corruption complaints, including those against CE and ICAC staff, should be handled properly. Whether or not ICAC's investigation would point towards substantiating an allegation, a full report would have to be submitted to the satisfaction of ORC before ICAC might conclude a case.

28. Director of Investigation (Government Sector), ICAC supplemented that ICAC was set up 31 years ago and its investigations had been conducted independently, fairly and in confidence. The "non-disclosure" requirement in section 30 of POBO prevented any person from the disclosure of the identity of any person being investigated or details of the investigation unless and until the person under investigation had been arrested or any of the other conditions in section 30 had been satisfied. Although BL 57 stipulated that ICAC shall be accountable to CE, if a person holding the office of CE directed the Commissioner to brief him on any investigation findings involving himself, he would likely be using his office as CE for an improper purpose, and could commit an offence.

29. Director of Investigation (Government Sector), ICAC further said that when ICAC was conducting an internal investigation on its staff, both ORC and the Department of Justice (DoJ) would be informed. ORC would meet every six weeks and at the meeting, the Principal Investigator would report progress of the investigation and answer questions from ORC. When the investigation was completed, a report would be made to DoJ for legal advice for consideration of prosecution or otherwise. Any proposal to end an investigation or close a case would be reported to ORC.

30. Mr TONG Ka-wah said that he had confidence in the work of ICAC given its experience and expertise in conducting investigation on bribery-related complaints. In his view, ICAC was accountable to the office of CE, and not the post holder.

Application of section 3 of POBO to CE

31. Mr Martin LEE said that he had reservation about the Administration's view that section 3 of POBO could not apply to CE.

32. D of Adm explained that section 3 of POBO prohibited any "prescribed officer" from soliciting or accepting any advantage without the general or special permission of CE. Given the special constitutional position of CE and the lack of an appropriate authority to grant permission for CE to accept any advantage, CE would not be able to avail himself to the defence of "principal's consent". The present arrangement was that CE could not accept gifts for personal retention unless he had paid for them at market price. CE would declare all gifts received by him, irrespective of their value, in a register which was available for public inspection.

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33. Mr Martin LEE held the view that the criteria for CE to grant “general permission” for any “prescribed officer” to accept advantages should equally be applicable to CE. He suggested that CE could automatically accept advantages which fell under the category of “general permission” without the need for him to get permission per se. However, CE should not be allowed to accept advantages which required “special permission”.

34. Ms Margaret NG said that the problem mentioned by the Administration could be resolved by tasking a special committee to grant permission for CE to receive advantages. In this connection, Mr Martin LEE referred the Administration to the suggestion of the Bar Association that the issue could be addressed by having a special section or sub-section applicable only to CE in POBO, and an independent body to grant general or special permission for CE to accept advantages. D of Adm said that the Administration would consider the matter and give a response at the next meeting.

III. Any other business

35. Members agreed that the next meeting would be held in six to eight weeks’ time so as to allow sufficient time for the Administration to reconsider its proposal.

(Post-meeting note : The next meeting was held on 19 December 2005 at 8:30 am.)

36. The meeting ended at 6:25 pm.

Council Business Division 2
Legislative Council Secretariat
26 January 2006