

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 sixth meeting
held on Monday, 19 December 2005 at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Dr Hon YEUNG Sum (Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Dr Hon LUI Ming-wah, SBS, JP
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
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 Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS
Hon TONG Ka-wah, SC
- Members absent** : Hon Daniel LAM Wai-keung, BBS, JP
Hon MA Lik, GBS, JP
Hon Alan LEONG Kah-kit, SC
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

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

Staff in attendance : Mr Watson CHAN
Head, Research and Library Services Division

Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mr CHAU Pak-kwan
Research Officer 5

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Action

I. Research Report on “Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea”

(RP01/05-06 – Research Report prepared by the Research and Library Services Division)

With the aid of a power-point presentation, Head of Research and Library Services Division briefed members on the Research Report by summarising the various attributes of the legal regulation for corruption control and impeachment of the head of state/government in the United Kingdom (UK), the United States (US) and Korea and Hong Kong.

2. Ms Emily LAU asked about the interface between impeachment and prosecution in the three places studied. The Chairman added that the issue was a major concern of members in considering the Administration’s proposal at the last meeting.

Action

3. Research Officer 5 (RO5) said that the three places had no statutory provisions requiring prosecution agencies to advise the respective legislatures of any credible information that might constitute grounds for an impeachment. The only exception was the arrangement in US prior to 1999. After President Nixon fired the Watergate special prosecutor, there were suggestions that there ought to be a mechanism to investigate executive misconduct that was independent of the President and the Attorney General. As a result, the Ethics in Government Act was enacted in 1978, which authorised the Attorney General to make an arrangement to appoint a special prosecutor (renamed as “independent counsel” in 1983) to perform all investigatory and prosecutorial functions of the Department of Justice if he believed that any federal criminal law had been violated by the President or other senior public officials. Under the relevant provisions, an independent counsel must “advise the House of Representatives of any substantial and credible information that may constitute grounds for an impeachment”. As President Clinton’s impeachment was triggered by evidence presented to the House by an independent counsel appointed pursuant to the independent counsel provisions of the federal laws, and the independent counsel statute had generated considerable criticism, neither House of Congress passed the renewed legislation after it expired in 1999.

(Post-meeting note : Paragraphs 3.1.7-3.1.8 and 3.2.7-3.2.8 of the Research Report are relevant).

4. In further response to Ms LAU, RO5 said that under both the UK and US systems, the impeachment proceedings would be conducted in the lower house of the respective legislature, and the trial would take place in the upper house. The system in Korea was however different. The Constitutional Court of Korea, a judicial body, had jurisdiction over impeachment proceedings. In the event that the National Assembly passed an impeachment motion, the motion would be submitted to the Constitutional Court of Korea for a determination.

5. Ms Emily LAU commented that given that the position of the Chief Executive (CE) could not be equated to that of a head of a state/government, it might be more appropriate to make reference to positions such as mayors of certain states of US, instead of head of state/government of a country, in similar research projects in future.

6. Mr Howard YOUNG said that the prosecution and impeachment procedures regarding corruption charges against head of state/government in overseas jurisdictions could only be used as a reference. Hong Kong should explore a system that was suitable to its own circumstances. Mr TONG Ka-wah said that the three places studied had a democratic system for electing the head of state/government. In the case of Hong Kong where CE was not directly elected, it was important to ensure that the system of political sanction would complement that of criminal sanction so as to provide proper check and balance.

Action

II. Meeting with the Administration

(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)691/05-06(01) – Administration's paper on "Proposal to apply certain provisions of the Prevention of Bribery Ordinance to the Chief Executive"

LC Paper No. CB(2)691/05-06(02) – Administration's response to the submission from the Hong Kong Bar Association)

Proposed provisions for handling bribery offences by CE

7. Director of Administration (D of Adm) said that having considered the views expressed by members at the last meeting, the Administration remained of the view that there was a need for expressly providing 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 offences under the Prevention of Bribery Ordinance (POBO) for possible follow-up by LegCo under Article 73(9) of the Basic Law (BL 73(9)) (the “referral provision”).

8. Senior Assistant Solicitor General (SASG) briefed members on the interface between impeachment and prosecution in respect of the Heads of States in US, UK, South Korea and Singapore, a summary of which was in Annex B to the Administration’s paper (LC Paper No. CB(2)691/05-06(01)). SASG said that the overseas examples helped illustrate that it was not unreasonable for the impeachment proceedings to be conducted prior to criminal proceedings.

9. D of Adm said that the Basic Law did not stipulate which proceedings should take place first. The experience in overseas jurisdictions illustrated that it was common for the impeachment proceedings against and even removal of office of the Head of State to precede any criminal trial. In the case of Hong Kong, the Administration was of the view that it was more appropriate for impeachment proceedings to be conducted prior to criminal trials. Nevertheless, SJ had the discretion to take into account any imminent or pending impeachment proceedings in deciding on the timing for prosecution. However, the Administration would not make any stipulation in this regard in the legislative amendments and would leave the need and timing for prosecution to the discretion of SJ. D of Adm stressed that it was for LegCo to decide on its own the need and timing for invoking the impeachment proceedings.

10. Ms Margaret NG expressed concern about the “referral provision” and the Administration’s view that the impeachment proceedings should precede criminal proceedings. She said that SJ, being a politically appointed principal official, might choose to take a course of action that would better serve the interests of CE

Action

who appointed him, e.g. by making a referral to LegCo so that CE would be subject to the impeachment proceedings first. When this happened, a practical consideration was whether CE would still be prosecuted and would have a fair trial after he had been subject to the impeachment proceedings which were open and highly politicised in nature. Ms NG further said that under the mechanism provided under BL 73(9), if SJ decided not to prosecute CE and if CE refused to resign, the impeachment procedures could be triggered by LegCo. It was unnecessary for SJ to make a referral to LegCo to facilitate its consideration of invoking the investigation and impeachment mechanism under BL 73(9). The need and timing for LegCo to invoke any impeachment proceedings should better be left to the discretion of LegCo.

11. D of Adm and SASG 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 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 proposed “referral provision” merely served to facilitate lawful disclosure of essential information relating to any bribery-related complaints against CE to allow LegCo to consider whether or not to invoke the investigation and impeachment procedures under BL 73(9). The “non-disclosure” requirement was unique in that it was only stipulated in POBO, and not other ordinances involving criminal offences.

12. Director of Investigation (Government Sector) of Independent Commission Against Corruption (ICAC) supplemented that given the difficulties in investigating bribery-related complaints, and in order to protect the integrity of the investigation process, there was a need to prohibit persons who had knowledge about details of the investigation from disclosing the information. Section 30 of POBO applied to all investigations conducted by ICAC.

13. Ms Margaret NG expressed concern whether the material which constituted evidence in a criminal investigation should be provided to LegCo, and maintained the view that the “referral provision” was unnecessary. She said that if LegCo would like to have access to essential information about the complaint against CE, it could invoke BL 73(9) so that a report of the investigation committee chaired by CJ would be made available to LegCo, and she trusted that the investigation committee would have the means to obtain the relevant information in the course of its investigation. In addition, LegCo could also exercise its power to order the production of the relevant documents. She pointed out that there had been occasions in the past that the select committees established by LegCo were supplied with information relating to the investigations of ICAC.

Action

14. Ms NG further said that if section 30 of POBO was the problem that the Administration tried to tackle, consideration should be given to amending the section to allow disclosure of essential facts of a complaint against CE to LegCo under certain circumstances, instead of introducing the “referral provision”. Quoting the ICAC investigations involving Mr Antony LEUNG, the former Financial Secretary and Mr Michael WONG, a retired judge, Ms NG considered that if such an amendment was introduced, it should also cover bribery-related complaints against persons such as principal officials.

15. SASG pointed out that there could be a situation where LegCo was not aware of an on-going investigation of a bribery-related complaint against CE. In the absence of knowledge or information about the complaint, LegCo would be inhibited from performing its constitutional duty under BL 73(9). In the circumstance, it was necessary for SJ to take the initiative to make a referral to LegCo. SJ would arguably commit an offence if he passed essential information to LegCo in the absence of the “referral provision”.

16. D of Adm explained that the main purpose of the “referral provision” was to vest SJ with the power to make a referral to facilitate LegCo to consider whether the impeachment mechanism under BL 73(9) should be invoked. As this special mechanism was only applicable to CE, any exception made to the “non-disclosure” requirement in section 30 of POBO should not apply to other persons.

17. Ms Margaret NG said that the purpose of BL 73(9) was to cater for the situation where CE was involved in a public scandal and refused to resign. In her view, if there was “prima facie” case of CE committing a POBO offence, SJ should initiate prosecution and it was inappropriate for him to make a referral to LegCo. In the situation where SJ decided not to prosecute CE because of lack of evidence, there was no need for SJ to make a referral to LegCo.

18. Ms Emily LAU said that she had no strong view for SJ to make a referral to LegCo, as it was for LegCo to decide whether or not to accept the referral or invoke the impeachment proceedings after receipt of the referral. However, she shared Ms Margaret NG’s concerns about the nature of the post of SJ, and the implications of conducting impeachment proceedings ahead of criminal proceedings. She said that notwithstanding the Administration’s advice that it would not make any stipulation in this regard in the legislative amendments, she was concerned about the Administration’s position. Ms LAU further said that it would be an undesirable situation if a referral was made by SJ to LegCo in the hope that the motion of impeachment against CE would be defeated because of the composition of LegCo, and CE would not be subject to further criminal proceedings.

19. Ms LAU also held the view that the two proceedings could be conducted in parallel. In response to Ms LAU’s enquiry, RO(5) said that in US, different

Action

investigations of the President could be conducted concurrently by the House of Congress and the prosecution authority.

20. SASG explained that in US, the Department of Justice had primary jurisdiction for investigation and prosecution of corruption charges against federal officials. While a number of investigations could be conducted on the President concurrently, the Department of Justice held that the President was afforded immunity from criminal prosecution until such time as he left office or the Congress had impeached and removed him from office. In reality, no incumbent President had ever been prosecuted for criminal charges. SASG said that the Administration had also studied the arrangements in France, Germany and Italy. The heads of state/government in these three countries were in general given criminal immunity under their Constitutions. Impeachment proceedings would therefore take place before criminal proceedings, although the sequence of the two proceedings was not stipulated in law.

21. Mr Martin LEE pointed out that in some of the overseas countries cited, impeachment proceedings took place first because the head of state/government was entitled to criminal immunity under the Constitution. However, the Basic Law did not provide criminal immunity to CE. Under the Administration's proposal, SJ alone was given the discretion to decide whether to make a referral to LegCo, and the need and timing for prosecution after making the referral. In other words, SJ had the flexibility to decide whether criminal proceedings should take place prior to or after completion of the impeachment proceedings. Mr LEE said that in view of some members' concerns that SJ was a politically appointee and LegCo was not directly elected, the Subcommittee should consider carefully whether the law should stipulate clearly the sequence of the two proceedings, instead of leaving the discretion to SJ.

22. D of Adm said that CE, like any other Hong Kong residents, was not given criminal immunity. Given that the Basic Law had no express provisions on the sequence for conducting the two proceedings, it was inappropriate to introduce such a provision in local law.

23. SASG said that there was no ground to doubt the independence and impartiality of SJ in deciding whether to institute prosecution in a particular case. Any prosecution decision would be made having regard to the established prosecution policy. The proposed "referral provision" would not compromise SJ's constitutional function to control criminal prosecutions free from any interference under BL 63.

24. D of Adm reiterated that under the proposed "referral provision", SJ might make the referral if CE was subject to criminal investigation and suspected of committing a serious offence under POBO. If a referral to LegCo was considered unnecessary by SJ for whatever reasons, prosecution would be considered. If SJ decided against prosecution, ICAC would report the proposal to end an

Action

investigation or close a case to the Operations Review Committee for advice.

25. Mr TONG Ka-wah said that he had no doubt that SJ would adhere to legal principles when deciding whether to institute prosecution against CE. Given that LegCo had the constitutional role to perform the check and balance function in case CE did not resign on a charge of serious breach of law or dereliction of duty, he considered that the proposed “referral provision” would facilitate the work of LegCo in this respect.

26. Mr TONG further said that he agreed with the Administration that a stipulation should not be made in the law to the effect that the impeachment proceedings should precede criminal proceedings. In his view, it would be a more acceptable arrangement for criminal proceedings to precede impeachment proceedings, as the latter would be held in open session and was highly politicised in nature. In addition, it might be more appropriate for the evidence relating to an offence to be heard by the court first. Having said that, Mr TONG also pointed out that it was not uncommon for concurrent investigation proceedings on the same incident to be conducted in courts and LegCo.

Adm

27. Mr Martin LEE suggested that in addition to SJ making a referral to LegCo on his initiative, SJ should also provide information to LegCo at the latter’s request. Mr TONG Ka-wah shared Mr LEE’s view. To facilitate LegCo to perform its constitutional role under BL 73(9), he suggested that SJ should be empowered to make a referral to LegCo if CE was charged of serious breach of any other laws or dereliction of duty, in addition to a breach of certain provisions of POBO.

Immunity for Members under section 30 of POBO

28. Senior Assistant Legal Adviser 2 (SALA 2) asked whether the referral made by SJ was confidential in nature, and whether the Administration would impose any conditions to restrict the use of such information. SALA 2 said that LegCo had established practices to handle confidential information supplied by the Administration, and Members were covered by the protection and immunity provided under the Legislative Council (Powers and Privileges) Ordinance during proceedings of the Council and its committees. However, he expressed concern about the possible consequences faced by Members for inadvertent disclosure of information outside the proceedings of the Council and its committees.

29. D of Adm said that the information referred by SJ to LegCo was confidential in nature and was not meant for the public. It was a matter for LegCo to consider whether and how such information should be used and handled. She assured members that it was not the intention of the Administration to impose criminal liability on Members who made an inadvertent disclosure of the information.

Action
Adm

30. Mr Martin LEE said that even if SJ disclosed details of the investigation in respect of an alleged POBO offence against CE to LegCo, it was unlikely for him to commit an offence under section 30 of POBO as he may have reasonable excuse to do so. However, the Administration chose to amend the law to provide a clear legal basis for SJ to do so. He requested the Administration to consider exempting Members from similar liability provided that the disclosure was not wilful.

Adm

31. D of Adm said that having regard to members' views expressed at the meeting, the Administration would consider how to give effect to the "referral provision" in the amendment bill i.e. whether a new section should be added in POBO as originally contemplated by the Administration, or whether section 30 of POBO should be amended to provide an exception as proposed by some members. As this was a technical drafting point, she would consult the Law Draftsman on the best approach to be adopted. Members could further consider this when the detailed legislative provisions were available in the form of an amendment bill. SASG added that in considering amendments relating to section 30 of POBO, the Administration would take account of the views expressed by members and address the issue of confidentiality and disclosure raised by SALA 2.

Role of judges in impeachment and criminal proceedings

32. Ms Emily LAU and Mr Howard YOUNG expressed concern about the roles of CJ in the impeachment proceedings and criminal proceedings respectively. They pointed out that on one hand, CJ, the most senior member of the Judiciary, was entrusted to form and chair an independent investigation committee when BL 73(9) was invoked. On the other hand, CJ and other judges appointed by him to assist in the investigation might need to preside over or conduct the trial when criminal proceedings were subsequently instituted against CE.

33. D of Adm said that as read from BL 73(9), it was for CJ, the chairman of the investigation committee, to decide how to form the committee and proceed with its work. She envisaged that CJ should have no difficulty in addressing members' concerns about the possible conflict of interest of CJ or other judges, in the event that prosecution was subsequently instituted against the same offence which had been investigated by the committee. SASG added that in the event that the court case eventually went to the Court of Final Appeal, arrangement could be made for CJ not to hear the case.

34. Ms Emily LAU asked whether the investigation committee would produce a report with recommendations. SASG said that the investigation committee would be responsible for deciding whether the evidence was sufficient to substantiate the charges of serious breach of law and if so, LegCo would decide whether to impeach CE and report it to the Central People's Government for a decision.

Action

35. Ms Emily LAU said that in order to facilitate implementation of BL 73(9), issues such as the operation and composition of the investigation committee, the handling of the report of the investigation committee by LegCo, the role of CJ and judges in any subsequent criminal proceedings against CE should be discussed by Members in due course.

36. D of Adm advised that the implementation of BL 73(9), which concerned the impeachment against CE for charges of serious breach of law or dereliction of duty, was much wider in scope than the ambit of this Subcommittee which was tasked to study the application of POBO to CE. Members might wish to discuss the matter in another forum.

Application of section 3 of POBO to CE

Adm 37. D of Adm said that the Administration agreed with members that the spirit governing the solicitation and acceptance of advantages by prescribed officers under POBO should also apply to CE. It was, however, technically not feasible to directly apply section 3 of POBO to CE because he could not grant permission to himself to accept an advantage. She said that the Administration would consider whether and how section 3 could be made applicable CE.

Way forward

Adm 38. The Chairman requested the Administration to take account of members' views and suggestions in drafting the amendment bill.

39. In response to Mr TONG Ka-wah, D of Adm said that the Administration intended to introduce the bill into LegCo by May 2006. Members agreed that a bills committee might be formed to study the bill after its introduction into LegCo. As the Subcommittee had concluded its study, it would make a report to the Panel on Constitutional Affairs.

40. The meeting ended at 10:30 am.