

立法會
Legislative Council

Ref : CB2/BC/12/06

LC Paper No. CB(2)1577/07-08
(These minutes have been seen by
the Administration)

**Bills Committee on
Prevention of Bribery (Amendment) Bill 2007**

**Minutes of the 6th meeting
held on Wednesday, 19 March 2008, at 8:30 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon Jasper TSANG Yok-sing, GBS, JP (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Dr Hon LUI Ming-wah, SBS, JP
Hon Margaret NG
Hon Howard YOUNG, SBS, JP
Dr Hon YEUNG Sum, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
Hon Mrs Anson CHAN, GMB, JP
- Member attending** : Hon TAM Heung-man
- Members absent** : Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon CHEUNG Man-kwong
Dr Hon Philip WONG Yu-hong, GBS
Hon Timothy FOK Tsun-ting, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon LI Kwok-ying, MH, JP
Hon Daniel LAM Wai-keung, SBS, JP
Hon Albert Jinghan CHENG, JP
Hon KWONG Chi-kin

**Public Officers : Item I
attending**

Miss Jennifer MAK
Director of Administration
Administration Wing, Chief Secretary for Administration's Office

Miss Shirley YUNG
Deputy Director of Administration
Administration Wing, Chief Secretary for Administration's Office

Mr Ian McWalters
Deputy Director of Public Prosecutions
Department of Justice

Mr Llewellyn MUI
Senior Government Counsel
Department of Justice

Ms Monica LAW
Senior Assistant Law Draftsman
Department of Justice

Clerk in attendance : Miss Mary SO
Chief Council Secretary (2) 5

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

Ms Amy YU
Senior Council Secretary (2) 3

Ms Sandy HAU
Legislative Assistant (2) 5

Action

I. Confirmation of minutes of meeting
(*LC Paper No. CB(2)1376/07-08*)

Mr Martin LEE said that the first sentence of paragraph 12 of the minutes of the meeting held on 29 February 2008 should be amended by replacing the phrase "was not employed by the HKSAR Government" with "was not concerned with any particular government department".

Action

2. There being no other amendments, the minutes of the meeting held on 29 February 2008 were confirmed.

II. Meeting with the Administration

(LC Paper Nos. CB(2)1215/07-08(02), CB(2)1237/07-08(01) and CB(2)1378/07-08(01))

3. The Bills Committee deliberated (index of proceedings attached at **Annex**).

Investigation of bribery complaints against the Chief Executive by the Independent Commission Against Corruption

4. Mr Martin LEE, Ms Emily LAU, Dr YEUNG Sum and Mrs Anson CHAN shared the concern raised by the Law Society of Hong Kong in its submission (LC Paper No. CB(2)1378/07-08(01)) that it was inappropriate to require the Independent Commission Against Corruption (ICAC) to investigate any alleged offence of bribery of the Chief Executive (CE), given that ICAC was accountable to CE under Article 57 of the Basic Law (BL). 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 investigation into corruption complaints against CE.

5. The Administration responded as follows -

- (a) ICAC was the appropriate authority and possessed the powers and expertise to perform the investigation of corruption complaints against CE. Under the ICAC Ordinance (Cap. 204), the Commissioner, ICAC (C, 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;
- (b) the Operations Review Committee (ORC) of ICAC was responsible for receiving from ICAC information about all corruption complaints and the manner in which C, ICAC was dealing with them. ORC was tasked to ensure that all corruption complaints, including those against CE, should be handled properly. Regardless of whether ICAC's investigation would point towards substantiating an allegation or otherwise, a full report would have to be submitted to the satisfaction of ORC. When the investigation was completed, a report would be made to the Department of Justice for legal advice and consideration of prosecution. If the Secretary for Justice (SJ)

Action

decided against prosecution, ICAC would report the proposal to end an investigation or close a case to ORC for advice;

- (c) the "non-disclosure" requirement in section 30 of the Prevention of Bribery Ordinance (Cap. 201) (POBO) prevented 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. A person holding the office of CE who directed C, ICAC to brief him on any investigation findings involving himself would likely be using his office as CE for an improper purpose. This could constitute misconduct in public office. Although BL 57 specified that ICAC should be accountable to CE, this specification should be read in context. It would certainly be unlawful for CE to abuse BL 57 in order to conduct himself in a way which constituted the common law offence of misconduct in public office, perverting the course of public justice, or the lesser offence of obstructing or resisting ICAC officers in executing their duties under section 13A of ICAC Ordinance;
- (d) there was no cause for concern that ICAC would refrain from conducting an investigation into a corruption complaint against CE and refer the matter to SJ if there was reason to suspect that CE might have committed an offence under POBO, as CE was not afforded immunity from criminal prosecution while in office under BL; and
- (e) an independent mechanism was provided under BL 73(9) enabling the Legislative Council (LegCo), after passing a motion, to give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee to look into any charges of serious breach of law or dereliction of duty by CE.

6. Mr Martin LEE said that the Administration's explanation still failed to allay the concern that ICAC had not been influenced by the fact that CE was their boss when deciding whether or not to investigate a borderline case alleging corruption practices by CE.

7. The Administration responded that CE was not in any strict term the boss of ICAC. Although ICAC was accountable to CE under BL 57, ICAC was given independence free from any interference from CE. Being an independent law enforcement body with considerable investigation powers, it was necessary to make ICAC accountable to someone and that person was most appropriately CE.

8. Ms Margaret NG pointed out that under section 5(2) of ICAC Ordinance, "The Commissioner shall not be subject to the direction and control of any person other than CE".

Action

9. Senior Assistant Legal Adviser 2 (SALA2) also advised that under section 12(c) of ICAC Ordinance, "The Commissioner had the duty, on behalf of CE, to investigate any conduct of a prescribed officer which, in the opinion of the Commissioner is connected with or conducive to corrupt practices and report thereon to CE".

10. The Chairman expressed concern that section 30 of POBO might not prohibit C, ICAC from disclosing to CE that CE was the subject of a corruption complaint and to which an investigation had not yet conducted. SALA2 advised that section 17 of the Official Secrets Ordinance (Cap. 521) (OSO) provided that a person who was or had been a public servant or government contractor committed an offence if he, without lawful authority, disclosed any information, document or other article to which section 17 applied and that was or had been in his possession by virtue of his position as such. Section 17(2)(a)(iii) of OSO further provided that "This section applies to any information, document or other article the disclosure of which impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders".

Admin

11. In the light of the above, the Administration was requested to provide a response in writing to the following issues -

- (a) to consider the appropriateness of requiring ICAC to investigate any alleged offence of bribery of CE, having regard to the special position of CE under BL 57 and the ICAC Ordinance, particularly its sections 5(2) and 12(c), and to the "non-disclosure" requirement in section 30 of POBO and section 17 of OSO;
- (b) information on the conduct of investigation in respect of corruption complaints against heads of state in overseas jurisdictions which the Administration had previously studied in drafting the Bill; and
- (c) how ICAC was held accountable to CE under BL 57, including the types of information provided to CE, at what stage and when.

LegCo
Secretariat

12. The Research and Library Services Division of LegCo Secretariat was also requested to provide information on whether, and if so, which overseas jurisdiction(s) had a criminal investigation agency which was accountable to a head of state and how such overseas jurisdiction(s) addressed conflict of interest in the event that the head of state was the subject of a corruption complaint.

Admin /
SALA2

13. Mr Ronny TONG said that as ICAC was accountable to the office of CE and not the post holder, consideration could be given to having CE's duties temporarily assumed by a principal official in the order stipulated in BL 53 should CE become the subject of a corruption complaint under investigation by ICAC. The Administration and SALA2 were asked to provide their respective response to Mr TONG's suggestion in writing.

Action

III. Date of next meeting

14. Members agreed to hold the next meeting on 8 April 2008 at 4:30 pm.

(Post-meeting note: At the request of the Administration and with the concurrence of the Chairman, the next meeting was re-scheduled to 15 April 2008 at 4:30 pm.)

15. There being no other business, the meeting ended at 10:15 am.

Council Business Division 2
Legislative Council Secretariat
11 April 2008

**Proceedings of the sixth meeting of the
Bills Committee on Prevention of Bribery (Amendment) Bill 2007
on Wednesday, 19 March 2008, at 8:30 am
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000657	Chairman	Opening remarks	
000658 - 000844	Mr Martin LEE Chairman	Minutes of meeting on 29 February 2008	
000845 - 001756	Chairman Admin	Administration's response to the submission from the Law Society of Hong Kong [LC Paper No. CB(2)1378/07-08(01)]	
001757 - 002846	Mr Martin LEE Admin SALA2	Mr Martin LEE shared the Law Society of Hong Kong's view that the Independent Commission Against Corruption (ICAC) was not an appropriate authority to investigate any corruption allegation against the Chief Executive (CE), given that ICAC was accountable to CE under Article 57 of the Basic Law (BL)	
002847 - 004034	Ms Emily LAU Clerk Admin	Ms Emily LAU echoed Mr Martin LEE's concern	
004035 - 004642	Chairman Ms Margaret NG Admin Ms Emily LAU	The Administration was requested to provide a response in writing to the following issues - (a) to consider the appropriateness of requiring ICAC to investigate any alleged offence of bribery of CE, having regard to the special position of CE under BL 57 and the ICAC Ordinance, particularly its sections 5(2) and 12(c), and to the "non-disclosure" requirement in section 30 of POBO and section 17 of Official Secrets Ordinance (Cap. 521) (OSO); and (b) information on the conduct of investigation in respect of corruption complaints against heads of state in overseas jurisdictions which the Administration had previously studied in drafting the Bill	✓ (Admin to provide a written response)
004643 - 005550	Dr YEUNG Sum Mrs Anson CHAN Admin Chairman Mr Martin LEE	Dr YEUNG Sum and Mrs Anson CHAN shared the concern that there would be conflict of interest for ICAC to investigate any alleged offence of bribery of CE	
005551 - 010550	Mr Ronny TONG SALA2 Admin	The Administration and SALA2 were requested to provide their respective response to Mr Ronny TONG's suggestion as to whether consideration could be given to having CE's duties temporarily assumed by a principal official in the order stipulated in BL 53 should CE become the subject of a corruption complaint under investigation by ICAC	✓ (Admin and SALA2 to provide a written response respectively)

Time marker	Speaker	Subject	Action required
010551 - 012145	Ms Emily LAU Chairman Admin Dr YEUNG Sum Chairman	The Administration was requested to provide a written response on how ICAC was held accountable to CE under BL 57, including the types of information provided to CE, at what stage and when The Research and Library Services Division of LegCo Secretariat was also requested to provide information on whether, and if so, which overseas jurisdiction(s) had a criminal investigation agency which was accountable to a head of state and how such overseas jurisdiction(s) addressed conflict of interest in the event that the head of state was the subject of a corruption complaint	✓ (Admin to provide a written response) ✓ (Clerk to follow up)
012146 - 013849	Chairman Admin SALA2 Ms Emily LAU	SALA2's letter dated 10 January 2008 concerning sections 17 and 18 of OSO [LC Paper No. CB(2) 1215/07-08(02)] and the Administration's response [LC Paper No. CB(2)1237/07-08(01)]	
013850 - 014224	Chairman Ms Emily LAU Dr YEUNG Sum	Date of next meeting	

Council Business Division 2
Legislative Council Secretariat
 11 April 2008