

立法會
Legislative Council

Ref : CB2/BC/12/06

LC Paper No. CB(2)1781/07-08
(These minutes have been seen by
the Administration)

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

**Minutes of the 7th meeting
held on Tuesday, 15 April 2008, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Members present : Hon Jasper TSANG Yok-sing, GBS, JP (Chairman)
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP
Hon Martin LEE Chu-ming, SC, JP
Dr Hon LUI Ming-wah, SBS, JP
Hon Margaret NG
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 LI Kwok-ying, MH, JP
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
Hon Mrs Anson CHAN, GMB, JP

Members absent : Hon CHEUNG Man-kwong
Dr Hon Philip WONG Yu-hong, GBS
Dr Hon YEUNG Sum, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Daniel LAM Wai-keung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, 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 : Miss Mary SO
attendance Chief Council Secretary (2) 5

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

Ms Elyssa WONG
Deputy Head (Research & Library Services)

Mr Thomas WONG
Research Officer 4

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)1577/07-08)

The minutes of the meeting held on 19 March 2008 were confirmed.

II. Meeting with the Administration

(LC Paper Nos. IN11/07-08, CB(2)1602/07-08(01),
CB(2)1605/07-08(01) and LS73/07-08)

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

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

3. Mr Ronny TONG said that to address the perception in the public that an Independent Commission Against Corruption (ICAC) investigator might not be acting totally independent in interviewing the Chief Executive (CE) over a corruption complaint against CE given that ICAC was accountable to CE under Article 57 of the Basic Law (BL), consideration should be given to the following -

- (a) CE should cease to be the person to whom ICAC should report when he became the subject of a corruption complaint; or
- (b) CE should have his duties temporarily assumed by the specified principal officials under BL 53 when he became the subject of a corruption complaint; or
- (c) ICAC should refer any corruption complaint against CE to the Secretary for Justice (SJ), regardless of whether the ICAC's investigation did not point towards a prima facie case.

4. Senior Assistant Legal Adviser 2 advised that applicability of BL 53 to the situation where CE became the subject of a corruption complaint to facilitate his taking leave to enable investigation to be carried out into the complaint was questionable, as the temporary assumption of duties by the specified principal officials under BL 53 was predicated on the inability of CE to discharge his duties for a short period. Apart from the issue of whether there would be a genuine short term loss of the ability to discharge duties, the stand-in arrangement might only be too temporary to allow sufficient time for the investigation to be completed.

5. To address the applicability issue of BL 53 mentioned in paragraph 4 above, Mr Ronny TONG said that a new provision could be added to the Bill to require ICAC to report to other public officials when CE became the subject of a corruption complaint.

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6. Mr Martin LEE asked about the arrangement if Commissioner, ICAC (C, ICAC) was the subject of a corruption complaint.

7. The Administration responded that if C, ICAC was the subject of a corruption complaint, the matter would be referred to SJ to decide whether or not an investigation should be conducted after examining the surrounding circumstances of the complaint, and if so, whether ICAC or the Police should conduct the investigation to instill public confidence in the investigation.

8. Mr Martin LEE asked why the Administration refused to apply the same approach in handling corruption complaints against CE.

9. The Administration responded that it did not see the need for the Law Society's proposal for the reasons given in paragraphs 4 to 15 of the Administration's paper (LC Paper No. CB(2) 1602/07-08(01)). Notwithstanding that it was a policy issue whether ICAC should investigate a bribery offence involving CE, the Administration pointed out that specialist investigation required specialists to do the job and ICAC was the most appropriate authority, as it had the expertise and was given special powers to investigate any alleged or suspected offence under the Prevention of Bribery Ordinance (POBO) (Cap. 201).

10. Mr Martin LEE said that setting up an independent ad hoc committee chaired by a retired judge and staffed by officers seconded from ICAC to conduct the investigation, as proposed by the Law Society of Hong Kong, could address public perception that ICAC might not conduct the investigation against CE in a fair and independent manner on the one hand and the need for expertise in conducting the investigation on the other.

11. The Administration responded that BL 73(9) had already provided that the Legislative Council (LegCo) could pass a motion and give a mandate to the Chief Justice (CJ) of the Court of Final Appeal to form and chair an independent investigation committee to carry out investigation of CE under the impeachment procedure. The establishment of any additional investigation authorities was therefore unnecessary and could duplicate and even compromise the role of the independent investigation committee formed for the purpose of BL 73(9).

12. Ms Margaret NG was of the view that no measures would be effective in ensuring that ICAC would conduct the investigation against CE in a fair and independent manner, as the separation of the official post and the occupier of the post had become increasingly blurred in Hong Kong. Ms NG further said that she strongly opposed the "referral mechanism" to enable SJ to refer to LegCo a report of CE suspected to have committed a POBO crime for possible follow-up by LegCo under BL 73(9). Ms NG pointed out that criminal proceedings should not be mingled with political proceedings. It was for SJ to decide whether, and if so, when to institute criminal proceedings against CE on the basis of the evidence

Action

available, and for LegCo to decide whether, and if so, when to invoke BL 73(9) in appropriate circumstances.

13. Mrs Anson CHAN noted the Hong Kong Bar Association's proposal that CJ of the Court of Final Appeal or a committee of judges could appoint an independent counsel to carry out the investigation concerning a corruption complaint against CE. The independent counsel might require the assistance of civil servants or ICAC investigators and would have the same investigatory powers provided to C, 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 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). Mrs CHAN urged the Administration to consider the Bar Association's proposal, unless there were impediments from a legal and/or principles standpoint.

14. The Administration reiterated that ICAC was the appropriate authority to investigate a bribery offence involving CE for the reasons given in paragraphs 4 to 15 of LC Paper No. CB(2) 1602/07-08(01). The Administration further said that the Bar Association's proposal, if implemented, would be in breach of BL 63 which provided that the Department of Justice of the Hong Kong Special Administrative Region should control criminal prosecutions free from any interference. The Administration added that during the deliberations of the Subcommittee on Application of Certain Provisions of POBO to CE formed by the Panel on Constitutional Affairs in 2005, some Members had raised concern as to whether it was appropriate to (a) appoint an independent counsel to carry out the investigation as he was not an expert in investigation of bribery-related complains; (b) involve CJ or judges in the investigation process as the case might eventually go to the Court if SJ decided to prosecute; and (c) require the independent counsel to present the report to LegCo after SJ had decided against prosecution.

Admin

15. Ms Emily LAU urged the Administration to come up with ways to address the public perception concern expressed by members and the two legal professional bodies about requiring ICAC to investigate a bribery offence involving CE. Ms LAU suggested to suspend the scrutiny work of the Bills Committee should the Administration fail to come up with a satisfactory response to the concern raised at the next meeting.

III. Date of next meeting

16. The clerk to fix the date of next meeting after consulting members and the Administration.

Action

17. There being no other business, the meeting ended at 5:55 pm.

Council Business Division 2
Legislative Council Secretariat
2 May 2008

**Proceedings of the seventh meeting of the
Bills Committee on Prevention of Bribery (Amendment) Bill 2007
on Tuesday, 15 April 2008, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000358	Chairman	Confirmation of minutes of meeting on 19 March 2008	
000359 - 001024	DH(RL)	Introduction of the Information Note on "Independence of anti-corruption agencies in investigating corruption complaints against the head of state or head of government in selected places" (IN11/07-08)	
001025 - 002625	Mr Ronny TONG Admin Chairman SALA2	Appropriateness of requiring the Independent Commission Against Corruption (ICAC) to investigate corruption complaints against the Chief Executive (CE) Applicability issue of Article 53 of the Basic Law (BL) New provision could be added to the Bill to require ICAC to report to other public officials when CE became the subject of a corruption complaint	
002626 - 003412	Ms Emily LAU DH(RL) Admin Chairman	Appointment of a Special Counsel by the Attorney General in the United States to conduct an investigation of a person or matter when determining that the investigation would present a conflict of interest for the Department of Justice and would be in the public interest	
003413 - 004719	Mr Martin LEE Admin Chairman	Arrangement if Commissioner, ICAC (C, ICAC) was the subject of a corruption complaint	
004720 - 005713	Ms Margaret NG Admin	Expressed reservation about the effectiveness of the proposed measures to safeguard the independence of the investigation into corruption complaint against CE	
005714 - 010254	Mrs Anson CHAN Admin	The Administration was requested to consider the Hong Kong Bar Association's proposal to maintain the independence of investigation into corruption complaint involving CE, unless there were impediments from a legal and/or principles standpoint	
010255 - 010900	Mr Ronny TONG Admin	The Administration was requested to consider the following - (a) CE should cease to be the person to whom ICAC should report when he became the subject of a corruption complaint; or (b) CE should have his duties temporarily assumed by the specified principal officials under BL 53 when he became the subject of a corruption complaint; or (c) ICAC should refer any corruption complaint against CE to the Secretary for Justice (SJ),	

Time marker	Speaker	Subject	Action required
		regardless of whether the ICAC's investigation did not point towards a prima facie case	
010901 - 011538	Ms Margaret NG Ms Emily LAU Chairman	Appropriateness of requiring ICAC to investigate an corruption complaint against CE	
011539 - 011619	Chairman Admin	Briefing on the Administration's response to the issues raised by members at the meetings on 29 February and 19 March 2008 (LC Paper No. CB(2)1602/07-08(01))	
011620 - 011729	Ms Emily LAU Mrs Anson CHAN Chairman	Suspension of the scrutiny work of the Bills Committee, should the Administration fail to come up with a satisfactory response to the concern raised by members about the appropriateness of requiring ICAC to investigate an corruption complaint against CE at the next meeting	✓ (Admin to provide a written response)
011730 - 011857	Chairman	Date of next meeting	

Council Business Division 2
Legislative Council Secretariat
2 May 2008