

立法會
Legislative Council

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LC Paper No. CB(2)478/07-08
(These minutes have been seen by
the Administration)

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

**Minutes of the second meeting
held on Thursday, 15 November 2007, 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
Hon Margaret NG
Hon CHEUNG Man-kwong
Dr Hon Philip WONG Yu-hong, GBS
Hon Howard YOUNG, SBS, JP
Dr Hon YEUNG Sum, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, SBS, 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 Albert Jinghan CHENG, JP
Hon KWONG Chi-kin
- Members absent** : Dr Hon LUI Ming-wah, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon LI Kwok-ying, MH, JP
Hon Daniel LAM Wai-keung, SBS, JP

Public Officers : Item II
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 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)333/07-08*)

The minutes of the meeting held on 29 October 2007 were confirmed.

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II. Meeting with the Administration

(LC Paper No. CB(2)331/07-08(01))

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

Introducing a new provision to bind any person who offers any advantage to the Chief Executive in line with section 8(1) of the Prevention of Bribery Ordinance

3. Ms Margaret NG expressed concern that the Prevention of Bribery (Amendment) Bill 2007 (the Bill) did not introduce a new provision to bind any person who offered any advantage to the Chief Executive (CE) in line with section 8(1) of the Prevention of Bribery Ordinance (Cap. 201) (POBO), and urged that this be done to ensure a clean government. At present, section 8(1) of POBO made it an offence for any person, who, without lawful authority or reasonable excuse, offered an advantage to a prescribed officer while "having dealings of any kind with the Government through any department, office or establishment of the Government" in which the prescribed officer was employed.

4. The Administration explained that -

- (a) in view of the broad meaning of the term "dealings of any kind" given in the Court of Final Appeal judgment in the case of *Sin Kam-wah v HKSAR [2005]2 HKLRD 375*, and having regard to the fact that CE was head of the Hong Kong Special Administrative Region (HKSAR) and its Government, to introduce a new provision binding any person who offered any advantage to CE in line with section 8(1) of POBO could have the effect of subjecting all persons having dealings of any kind with any government department to an offence whenever they offered an advantage to CE, and the onus was on them to establish that they had "lawful authority or reasonable excuse" to so offer. For example, a person offering a small gift to CE during a district visit would commit an offence if he applied for renewal of driving licence. This could be too onerous on well-meaning citizens offering souvenirs to CE out of courtesy or respect, and would cause disturbance to members of the public; and
- (b) there was no cause for concern that CE would not be subject to anti-corruption regulation as other prescribed officers. Apart from applying sections 4, 5 and 10 of POBO to CE as proposed by the Bill, which would impose restrictions on CE in respect of solicitation and acceptance of advantages and possession of unexplained property, CE was already bound by the common law offence of bribery. The person who offered advantage to CE would also commit an offence.

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5. Ms Margaret NG, Mr Martin LEE and Mr Ronny TONG disagreed with the Administration's explanation. They were of the view that it should be equally an offence for members of the public offering advantages to CE as to prescribed officers. They failed to see the logic why members of the public should be allowed to offer any advantage to CE, no matter how small, when they could not do so in relation to any prescribed officer. Ms NG further said that should the Administration have difficulties in precluding any souvenir or gift of the kind to CE which could not be described as a bribe in the drafting of the new provision to include in POBO an offence similar to that found in section 8(1), consideration should be given to formulating a set of guidelines on offering "legitimate" souvenir or gift to CE for the public to follow.

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6. The Chairman requested the Administration to re-consider introducing a new provision to bind any person who offered any advantage to CE in line with section 8(1) of POBO, taking into account members' views. The Administration agreed to revert in writing.

Referral of a corruption complaint against CE

7. Mr CHEUNG Man-kwong said that in order to enable the Legislative Council (LegCo) to independently carry out its constitutional duty under Article 73(9) of the Basic Law (BL), the Commissioner, Independent Commission Against Corruption (C, ICAC) should refer a corruption complaint against CE to LegCo if he had reason to suspect that CE might have committed an offence under POBO, instead of relying on the Secretary for Justice (SJ) to refer the complaint to LegCo as proposed by the Bill. Alternatively, SJ should be required to make a report to LegCo on the reason(s) for not referring a corruption complaint against CE received from C, ICAC to LegCo.

8. The Administration responded as follows -

- (a) enabling SJ to refer a corruption complaint case against CE received from C, ICAC would not compromise the right of LegCo to consider invoking the investigation and impeachment procedures against CE under BL 73(9), as LegCo could always invoke BL 73(9) as it saw fit without a referral by SJ;
- (b) reasons for empowering SJ to refer a corruption complaint case against CE received from C, ICAC were twofold. First, 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 essential knowledge or information about the complaint, LegCo would not be in a position to perform its constitutional duty under BL 73(9). Second, in view of the important constitutional function of investigation and impeachment entrusted to LegCo under

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BL 73(9), it was incumbent upon SJ to only refer those cases in which he had reason to suspect that CE might have committed an offence under POBO to LegCo;

- (c) the proposed "referral provision", i.e. new section 31AA, did not mean that SJ must refer a corruption complaint case against CE to LegCo. Rather, it was an empowering provision to ensure that SJ would not be prevented from referring a corruption complaint case against CE and the findings of ICAC's investigation to LegCo by section 30 of POBO. 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 subjects or details of the investigation committed an offence;
- (d) whether to prosecute CE for an offence under POBO and to refer a corruption complaint case against CE to LegCo for possible follow-up under BL 73(9) were two separate decisions to be made by SJ. SJ might refer a corruption complaint case against CE to LegCo for possible follow-up under BL 73(9), regardless of whether he would initiate criminal proceedings against CE for an offence under POBO in accordance with the established prosecution policy;
- (e) there was no cause for concern of any cover up of any corruption complaint against CE by the Administration. Regardless of whether the ICAC's investigation would point towards substantiating an allegation or otherwise, C, ICAC would submit a full report to the satisfaction of the Operations Review Committee (ORC) formed by ICAC. Where SJ decided against prosecution upon examination of the ICAC's investigation report, ICAC would report the proposal to end an investigation or close a case to ORC. ORC, which comprised Executive Council Members, LegCo Members as well as other distinguished personalities, was tasked to ensure that all corruption complaints should be handled properly. ORC was responsible for receiving from ICAC information about all corruption complaints and the manner in which C, ICAC was dealing with them; and
- (f) notwithstanding (e), there was every reason to follow the existing practice for ICAC to seek legal advice from SJ in handling any corruption complaint. ICAC, being the investigative authority, and being made accountable to CE by BL, should not be tasked to decide whether or not to prosecute or make a referral to LegCo where there was reason to suspect that CE might have committed an offence

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under POBO. SJ, with his independence and impartiality, had already been entrusted with the responsibility to decide whether or not to institute prosecution in a particular case. There was no ground to doubt that he was not capable of doing so in the case of making a referral to LegCo. It should also be noted that new section 31AA would not compromise SJ's constitutional function to control criminal prosecutions free from any interference under BL 63.

9. Mr Martin LEE queried whether the reasons given in paragraph 8(f) above were justified, as the independent investigation committee which could be formed by the Chief Justice of the Court of Final Appeal under BL 73(9) was not a court per se and that BL 73(9) was silent on the role of SJ in that regard.

10. Mr CHEUNG Man-kwong remained of the view that in order not to impede LegCo in carrying out its constitutional duty under BL 73(9), LegCo should be provided with essential facts pertaining to a corruption complaint against CE from C, ICAC at an appropriate time if C, ICAC considered that the case, although lacking sufficient evidence to initiate prosecution action against CE for an offence under POBO, might qualify for an impeachment by LegCo, instead of relying on SJ to make a referral to LegCo as he saw fit. Mr CHEUNG pointed out that although LegCo could invoke BL 73(9) without a referral by SJ, it was not possible for LegCo to invoke BL 73(9) in the absence of essential information about a corruption complaint against CE as LegCo did not have the expertise or the resources to carry out its own investigation on a corruption complaint against CE.

11. The Administration responded as follows -

- (a) it was not appropriate for C, ICAC to refer a case to LegCo for possible follow-up under BL 73(9), as the duties of ICAC were to investigate any alleged or suspected offences under POBO, amongst others. Moreover, C, ICAC did not have the necessary knowledge or expertise to determine which case might qualify for an impeachment by LegCo. On the contrary, SJ, being the chief legal adviser of HKSAR Government, was an expert on BL and the established prosecution policy; and
- (b) allowing SJ to refer a corruption complaint against CE to LegCo under new section 31AA should not be construed as impeding the constitutional function of LegCo to invoke the investigation and impeachment procedures under BL 73(9), as new section 31AA was merely an empowering provision to ensure that SJ would not be prevented from referring corruption complaints against CE and the findings of ICAC's investigation to LegCo by section 30 of POBO,

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so that LegCo Members might consider invoking the mechanism of investigation under BL 73(9). It should not be ruled out that LegCo could obtain information about an allegation that CE might have committed an offence under POBO from other sources.

12. The Chairman and Mr CHEUNG Man-kwong queried how LegCo could obtain information about an allegation that CE might have committed an offence under POBO from sources other than from a referral by SJ provided under new section 31AA, having regard to the prohibition of disclosure of the identity of the subject and facts of the investigation under section 30 of POBO.

13. The Administration advised that prohibition on disclosure of the identity of the subject and facts of the investigation under section 30 of POBO only existed when the investigation was still in a covert stage in order to protect the integrity of the investigation and the reputation of the person who was the subject of the investigation, as the investigation was embarked based on mere suspicion. In other words, it was no longer an offence for any person to disclose the identity of the subject and any details of the investigation after one of the situations set out in section 30(2) of POBO had taken place. The Administration further advised that there was no prohibition against a person who made a corruption complaint to ICAC to also make an identical complaint to LegCo, so long as at the time that person made the complaint to LegCo he did not reveal that he had requested ICAC to embark on an investigation of the complaint.

14. While agreeing that C, ICAC should not disclose to LegCo the identity of the subject and facts of the investigation when the investigation was still in an early stage, Mr CHEUNG Man-kwong asked the Administration when it considered was the most appropriate time to provide the necessary information to LegCo for it to consider to take any action under BL 73(9) on the one hand and not impeding the constitutional function of LegCo in doing so on the other. Mr CHEUNG further said that although it was not an offence for any person to disclose the identity of the subject and details of the investigation after one of the situations set out in section 30(2) of POBO had taken place, LegCo could still have no knowledge of the existence of a corruption complaint against CE if SJ did not refer the case to LegCo.

15. The Administration assured members that there was no question that a corruption complaint against CE would be covered up by SJ for the reasons already given in paragraph 8(e) above. Moreover, in considering SJ's decision not to prosecute, ORC could provide views on whether SJ should refer the case to LegCo. Mr CHEUNG Man-kwong said that it would address members' concern about SJ withholding a case from LegCo if it was made mandatory for SJ to refer all corruption complaint cases against CE which he decided not to prosecute to LegCo.

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Admin

16. At the request of the Chairman, the Administration undertook to provide a paper detailing measures taken and/or would be taken to allay members' concerns about the referral mechanism.

17. Ms Margaret NG considered that the "referral provision" was unnecessary. If SJ had reason to suspect that CE had committed an offence under POBO, he should initiate criminal proceedings against CE if there was sufficient evidence and in the public interest to do so, instead of referring the case to LegCo. Ms NG further said that it was at variance with the existing principle for SJ not to proceed on a case without sufficient evidence.

18. Mr Martin LEE said that it was unclear whether the independent investigation committee formed by the Chief Justice of the Court of Final Appeal under BL 73(9) could obtain details of a corruption complaint against CE under investigation by ICAC. According to section 30 of POBO, C, ICAC was prohibited from disclosing details of a case under investigation by ICAC to outsiders. Mr LEE requested the Administration to address this point. The Administration responded that the matter on how the independent investigation committee should operate was outside the ambit of the Bill, and should best be addressed by LegCo's Committee on Rules of Procedure.

Referral of other crime- related cases to LegCo

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19. Senior Assistant Legal Adviser 2 sought clarification from the Administration on whether there was any legal provision similar to section 30 of POBO prohibiting SJ from referring a case that CE might have committed a serious crime, other than that under POBO, to LegCo; if so, whether consideration had been given to any legislative amendment to enable SJ to do so. The Administration agreed to provide a response in writing.

III. Date of next meeting

20. Members agreed to hold the next meeting on 4 December 2007 at 4:30 pm.

21. There being no other business, the meeting ended at 6:21 pm.

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

Time marker	Speaker	Subject	Action required
000000 - 000134	Chairman	Confirmation of minutes of meeting on 29 October 2007	
000135 - 000800	Chairman Administration	Administration's response to issues raised at the meeting on 29 October 2007 (LC Paper No. CB(2)331/07-08(01) - (A) Comparison between the proposals presented to the Subcommittee on Application of Certain Provisions of the Prevention of Bribery Ordinance to the Chief Executive of the Panel on Constitutional Affairs and those made under the Bill	
000801- 001925	Ms Margaret NG Administration Chairman	Ms Margaret NG expressed concern that the Bill did not introduce a new provision to bind any person who offered any advantage to the Chief Executive (CE) in line with section 8(1) of the Prevention of Bribery Ordinance (Cap. 201) (POBO), and urged that this be done to ensure a clean government	
001926 - 002400	Mr Martin LEE Administration Chairman	Mr Martin LEE's view that CE should not be treated differently from other public servants and prescribed officers so far as the applicability of section 8(1) of POBO was concerned	
002401 - 003122	Mr Ronny TONG Chairman Administration	Mr Ronny TONG shared Ms Margaret NG's view that a new provision to bind any person who offered any advantage to CE in line with section 8(1) of POBO should be included in the Bill	
003123 - 003829	Mr Martin LEE Administration Ms Margaret NG Chairman	The Administration was requested to re-consider introducing a new provision to bind any person who offered any advantage to CE in line with section 8(1) of POBO, taking into account members' views. The Administration agreed to revert in writing	✓ (Admin to provide written responses)
003830 - 004235	Administration	Administration's response to issues raised at the meeting on 29 October 2007 (LC Paper No. CB(2)331/07-08(01) - (B) Referral of a corruption complaint against the CE	
004236 - 005752	Mr CHEUNG Man-kwong Administration Chairman	Mr CHEUNG Man-kwong's view that it was not appropriate to empower the Secretary for Justice (SJ) to decide whether to refer to the Legislative Council (LegCo) a case where CE was suspected to have committed a corruption offence for possible follow-up by LegCo (the referral provision) under the impeachment mechanism provided under Article 73(9) of the Basic Law (BL 73(9))	

Time marker	Speaker	Subject	Action required
005753 - 010152	Ms Margaret NG Mr Howard YOUNG	Miss Margaret NG considered that the "referral provision" was unnecessary as it would politicize the impeachment process	
010153 - 010719	Chairman Mr CHEUNG Man-kwong	Mr CHEUNG Man-kwong's view that it was important to ensure that LegCo had access to essential information on a case where CE was suspected to have committed a corruption offence for possible follow-up under the impeachment mechanism	
010720 - 011341	Mr Martin LEE Chairman Administration Mr Howard YOUNG	Whether an independent investigation committee chaired by the Chief Justice of the Court of Appeal set up under BL73(9) could obtain details of a corruption complaint against CE under investigation by ICAC	
011342 - 012721	Mr Martin LEE Administration Chairman	Discussion on whether SJ should be empowered to make a decision on whether to refer a corruption related complaint against CE to LegCo in relation to LegCo's constitutional function provided under BL73(9)	
012722 - 013830	Chairman Administration Mr Martin LEE Mr CHEUNG Man-kwong	Members' enquiry on how LegCo could obtain information pertaining to a corruption-related complaint against CE if the Commissioner, Independent Commission Against Corruption (C, ICAC) or SJ did not provide such information to LegCo, having regard to the prohibition on disclosure under section 30 of POBO Administration's response that the prohibition on disclosure under section 30(1) of POBO existed only when the investigation was at an early, covert stage, and such prohibition no longer applied when any of the situations specified under section 30(2) of POBO had taken place	
013831 - 014053	Mr CHEUNG Man-kwong Administration	The role of the Operations Review Committee (ORC) in reviewing the handling of all corruption complaints by the C, ICAC	
014054 - 014253	Chairman	The Administration was requested to provide a response detailing measures taken and/or would be taken to allay members' concerns about the referral mechanism	✓ (Admin to provide written responses)
014254 - 014434	Dr YEUNG Sum	Considered it incumbent upon the Administration to provide LegCo with essential information on a corruption-related complaint against CE to enable LegCo to perform its constitutional role of monitoring the executive authorities	
014435 - 014959	SALA2 Administration Chairman Mr CHEUNG Man-kwong	The Administration was requested to advise in writing whether there was any legal provision similar to section 30 of POBO prohibiting SJ from referring a case that CE might have committed a serious crime, other than that under POBO, to LegCo, if so, whether consideration had been given to any legislative amendment to enable SJ to do so	✓ (Admin to provide written responses)

Time marker	Speaker	Subject	Action required
015000 - 015101	Chairman	Date of next meeting	

Council Business Division 2
Legislative Council Secretariat
3 December 2007