

立法會

Legislative Council

LC Paper No. LS13/12-13

Paper for the House Committee meeting on 7 December 2012

Issues concerning the Legislative Council's power to summon witnesses

At the meeting of the House Committee on 30 November 2012, Members requested Legal Adviser to draw the Committee's attention to issues that may facilitate their discussion on the two proposals¹ which authorize the invocation of the powers stipulated in the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) (LCPPO). As such, the Chief Executive (CE) may be required to attend before the Development Panel (Panel) or a select committee to give evidence or to produce any paper, book, record or document in the possession or under the control of CE.

The Two Proposals

2. The first proposal is for the Panel to be authorized to exercise the powers conferred by LCPPO to inquire into the handling of unauthorized building works in House No. 4 and No. 5 at 4 Peel Rise by the Development Bureau, the Buildings Department and other Government departments concerned.

3. The second proposal is to appoint a select committee to inquire into unauthorized building works in the premises of CE on the Peak and to authorize the committee to exercise LCPPO powers.

4. It is noted that an important part of both proposals is to authorize the invocation of the LCPPO powers. In essence, these powers include the power to order any person to attend before the Panel or select committee to give evidence or to produce any paper etc. in the possession or under the control of that person. Needless to say, whether

¹ The two proposed motions attached respectively to the letters of Hon Alan LEONG dated 28 November 2012 (LegCo Paper No. CB(2)288/12-13(01)), and of Hon LEE Cheuk-yan dated 29 November 2012 (LegCo Paper No. CB(2)288/12-13(02)).

a particular person will be summoned under that power to attend to give evidence and/or to produce any paper etc. will have to be determined by the Panel or select committee concerned in the course of its inquiry, taking into account many factors, e.g. the focus of the inquiry, the availability of potential witnesses, the value of the potential evidence, the proper use of public funds and the efficient conduct of the inquiry.

Issues for attention of House Committee

5. Against what is set out in paragraphs 2 to 4 above as background, the rest of this paper is divided into three parts to set out the issues for attention of House Committee:

- (a) the legal framework which provides the Legislative Council (LegCo) and its committees with the power to summon witnesses;
- (b) an account of how the issue of whether CE is subject to the power to summon was considered in 2004; and
- (c) constitutional, legal and other related considerations.

Legal framework on LegCo's power to summon witnesses

6. Under Article 73(10) of the Basic Law (BL 73(10)), LegCo is empowered to summon, as required when exercising the powers and functions under BL 73, persons concerned to testify or give evidence. It was held in the case of *Cheng Kar Shun v Li Fung Ying and others*² that this power extends to committees of LegCo, and that section 9 of LCPPO does not contravene BL, to the extent that a committee, if specially authorized by LegCo, may exercise the power to summon.

7. Under LCPPO, LegCo or a standing committee³ or any other committee specially authorized by the Council by a resolution⁴ may by summons⁵ order any person to attend before the Council or before such committee and to give evidence or to produce any records in the possession or under the control of such person. The President of LegCo may direct the Clerk to LegCo to issue a warrant, to be executed by a police officer, to apprehend that person if that person does not attend

² [2011] 2 HKLRD 555.

³ Section 9(1) of LCPPO.

⁴ Section 9(2) of LCPPO.

⁵ Section 10 of LCPPO.

the meeting at the date and time stated in the summons.⁶ A person lawfully ordered to attend a meeting is entitled to the same right or privilege as before a court of law.⁷ However, the person cannot refuse to answer any relevant question on the ground of privilege against incrimination.⁸ Nevertheless, no statement or admission made by a person in answering a question put to him in any proceedings conducted pursuant to the answering to a summons or in complying with any order made in any such proceedings, is or can be admissible in evidence against that person in proceedings for any offence.⁹ The only exception to this protection is where the person is prosecuted for the offence under section 32¹⁰ or 36¹¹ of the Crimes Ordinance (Cap. 200).¹²

8. Any person who disobeys a lawful order made by LegCo under LCCPO commits an offence and is liable to a fine of \$10,000 and to imprisonment for 12 months, and in the case of a continuing offence, to a further fine of \$2,000 for each day on which the offence continues.¹³ However, the consent of the Secretary for Justice is required for the institution of prosecution under LCPPO.¹⁴

How the issue of whether the Chief Executive is subject to LegCo's power to summon was considered in 2004

9. In 2004, the Select Committee to inquire into the handling of the Severe Acute Respiratory Syndrome outbreak by the Government and the Hospital Authority (the Select Committee) had to consider the question of whether CE could be summoned to give evidence before the Select Committee. The then Director of the Chief Executive's Office (the Director) expressed the view that it was constitutionally inappropriate for CE, as Head of the Hong Kong Special Administrative Region (HKSAR), to submit himself to the procedure by which the Select Committee conducted its inquiry. The Director based his views on two BL principles: that HKSAR is to be executive-led and that there should be regulation and coordination between the executive authorities and the legislature of the HKSAR.

⁶ Section 12 of LCPPO.

⁷ Section 14 of LCPPO.

⁸ Section 16(1) of LCPPO.

⁹ Section 16(2) of LCPPO.

¹⁰ Section 32 of the Crimes Ordinance relates to false statements on oath made otherwise than in a judicial proceeding.

¹¹ Section 36 of the Crimes Ordinance relates to false statutory declarations and other false statements without oath.

¹² Section 16(3) of LCPPO.

¹³ Section 17 of LCPPO.

¹⁴ Section 26 of LCPPO.

10. The Select Committee considered that it had the power to summon any person including CE to give evidence before it. However, as it would take time to study the Director's views, the Select Committee agreed with the Administration on alternative arrangements to obtain information from the then CE including a private meeting with him.¹⁵ Whether CE is compellable by way of a summons issued under LCPPO is therefore left open and is unresolved.

Constitutional, legal and other related considerations

11. Under BL 43, CE is the head of HKSAR. He is accountable to the Central People's Government and HKSAR. Pursuant to BL 60, CE is also head of the HKSAR Government.

12. Under BL 48(2), CE is responsible for the implementation of BL and other laws which apply in HKSAR. He is given the power by BL 48(11) to decide, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before LegCo and its committees. On the other hand, LegCo is empowered under BL 73(10) to summon persons concerned to testify, as required when exercising its powers and functions, including for example its function under BL 73(9) in relation to a motion of impeachment of CE.

13. Under BL 64, the HKSAR Government (of which CE is the head) is accountable to LegCo through various means, which include answering questions raised by Members of LegCo. Rule 22 of LegCo Rules of Procedure (RoP) provides a mechanism for Members of LegCo to address questions to the Government, and under BL 62(6) and Rule 9 of RoP, the Government may designate public officers to speak on behalf of the Government. Under Rule 8 of RoP, CE may at his discretion attend meetings of LegCo and its committees for certain purposes stipulated in that rule.

14. It should be fair to conclude from the above account of the key BL provisions on LegCo's powers and functions and CE's constitutional position that CE bears the constitutional responsibility to find the proper means through which LegCo could properly perform its powers and functions under BL. Rule 8 of RoP is an example of such

¹⁵ Paragraphs 1.38 to 1.39 and 15.52 of the Report of the Select Committee issued in July 2004. The soft copy of the report is available at the website of LegCo (accessed on 3 December 2012) at http://www.legco.gov.hk/yr03-04/english/sc/sc_sars/reports/sars_rpt.htm.

means through which CE could exercise his discretion consistent with his constitutional role to attend meetings of LegCo or its committees for various purposes in connection with the powers and functions of LegCo.

15. Where the circumstances are such that LegCo found it necessary to summon CE, it should be highlighted that the issue of whether such a power is available against CE has not been resolved. There is also no easy answer to the question under the existing legal framework. The Select Committee in 2004 proceeded with its work by way of agreeing to have a private meeting with CE which resulted in not having the need to tackle the issue. Information collected from the meeting was duly considered by the Select Committee in the course of its deliberation and was recorded in the Select Committee's report.

16. It will be for the committee concerned, whether the Panel or the select committee appointed specifically to study the matter, to decide whether to confront the Government's stance held in 2004 that it would be constitutionally inappropriate for CE to submit himself to the procedure by which the Select Committee conducts its inquiry. In doing so, it would be necessary for the committee to consider what action ought to be taken in the event that CE simply decides not to comply with the summons which orders him to attend a committee to give evidence. According to section 12 (1) of LCPPO the President may, if satisfied that a summons has been duly served on a person or that such person has wilfully avoided service, direct the Clerk to LegCo to issue a warrant which is to be executed by a police officer to bring that person before the Council or the committee which made the order for his or her appearance. Section 26 of LCPPO provides that no prosecution for an offence under LCPPO, which includes the offence of contempt for disobeying an lawful order of the Council or a committee, shall be instituted except with the consent of the Secretary of Justice. How far these provisions are also applicable to CE is yet to be determined.

17. Members may also wish to note that only provisions in LCPPO which relate to attendance of the person summoned at a meeting of the committee are discussed in this paper. There was precedent of a witness who appeared before a committee after being summoned but refused to answer any questions put to him. For the present purpose, it may not be necessary to envisage this becoming an issue.

Conclusion

18. Members may wish to note the above issues in their discussion on the two proposals to be considered by the House Committee.

Prepared by

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