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Subject Submission of views on conflict-of-interest issues

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The Honourable Li Kwok-nang, GBM, JP
Chairman
Independent Review Committee for the Prevention
and Handling of Potential Conflicts of Interests,

Dear Mr Li,

I write, in my private capacity, to submit my views on issues regarding the prevention and handling of conflicts of interests concerning the Chief Executive. My submissions, in the form of two short think-piece articles, are attached for the Committee's reference, please.

Yours sincerely,

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Think-piece 2 - Public Scrutiny.docx Think-piece 1 - Ethical Conduct.docx

Think-piece on Conflict of Interest (Paper 1)

Why the Chief Executive has to observe the highest standard of ethical conduct?

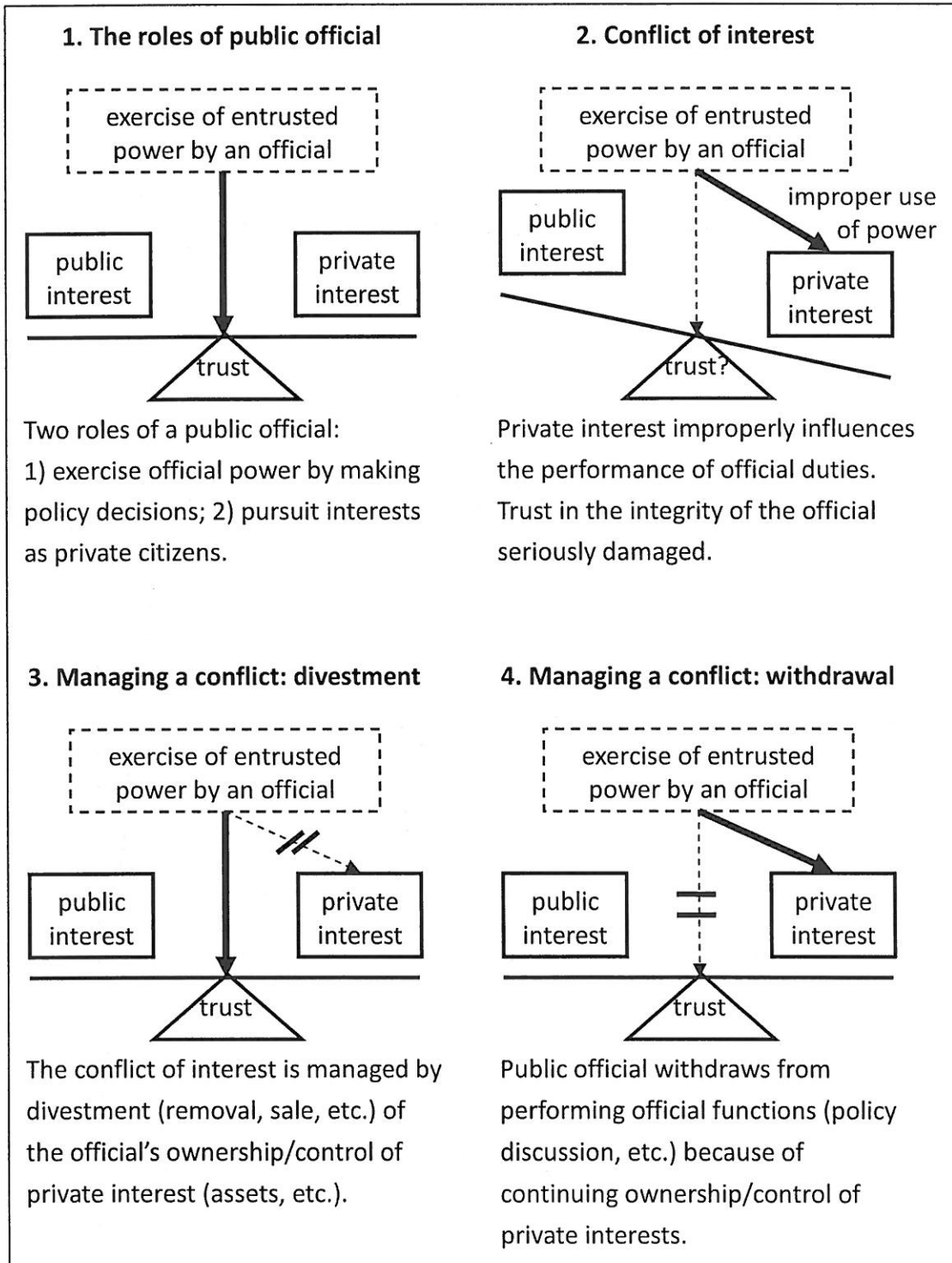
Dr. Elvis W.K. Luk

1. Recent scandals have drawn public criticisms to the importance of avoiding conflicts of interest which can become an issue when, for example, the Chief Executive accepts passages on board private jet and yacht without declarations, or becomes too closely aligned to business tycoons whom have multiple connections with the policies the official handles.
2. These criticisms are not ungrounded: receiving hospitalities may not be unlawful, but it gives rise to an unethical psychological situation where the public official feels 'obligated' to return the favour in the future by slanting his/her policy decisions.

The nature of conflict of interest

3. As the OCED defines, a conflict of interest involves 'a conflict between the public duty and the private interest of a public official, in which the official's private-capacity interest could improperly influence the performance of their official duties and responsibility.'
4. However, the very fact is that conflict of interest is a situation, not behaviour. As the Chief Executive has legitimate interests which arise out of his/her capacity as private citizen, conflict of interest exists even if there are no improper acts as a result of it. In other words, conflict of interest cannot simply be avoided or prohibited; it can be defined, identified, and managed (see diagrams below).
5. It is difficult, if not impossible, for the Chief Executive to withdraw from performing official functions because of continuing ownership/control of private interests (e.g. the Chief Executive cannot abstain himself/herself from the issuing of the Policy Address). For this reason, it is imperative for the Chief Executive to observe the highest standard of ethical conduct, and to place public

interest ahead of their private interests.



Top positions need particular attention

6. In the Western world, it has been well established that senior public officials are expected to act in a manner that will bear the closest

public scrutiny; they are also expected to act at all times so that their integrity serves an example to other public officials and the public. When a conflict arises, senior public officials should accept responsibility for identifying and resolving it in favour of the public interest.

7. In New Zealand, ministers must conduct themselves at all times in the knowledge that their role is a public one. They are also held to standards that place their public interest ahead of their private interests. In Germany, ministers are forbidden by law to restrict their non-ministerial activities.

Good practice = guideline + adviser + independent watchdog

8. In UK, while it is a personal responsibility of the ministers to decide on any actions to manage a conflict-of-interest situation, ministers are obligated to observe the ministerial code of conduct and if necessary, to seek advice from the Cabinet Office Propriety and Ethics Team, which is tasked to ensure the highest standards of propriety and integrity. The Prime Minister also appointed an independent adviser to provide independent checks and to advise ministers on the handling of their private interests.
9. Outside the government, an independent advisory body is also available to monitor and make recommendations on all issues relating to the ethical standards of officials' public life.

Conclusion

10. Ensuring that the integrity of official decision-making is not compromised by senior public official's private interests is a growing public concern. While it is not feasible to identify all possible forms of conflict of interest in advance and simply prohibit them, it is possible to put in place robust measures for ensuring that conflicts of interest which arise are rapidly identified and resolved appropriately.

March 16, 2012

Think-piece on Conflict of Interest (Paper 2)

Why the Chief Executive has to be open to the closest public scrutiny and explanation?

Dr. Elvis W.K. Luk

1. In a traditional Chinese board game Dou Shou Qi (鬥獸棋, or literally 'Game of Fighting Animals'), the two players each have eight pieces representing different animals, each with a different rank. Higher ranking pieces can capture all pieces of identical or weaker ranking. However, there is one exception: the Elephant (highest rank) cannot capture the Rat (lowest rank) while the Rat can capture the Elephant. Metaphorically, this applies to the Chief Executive (Elephant) who oversees the conduct of his/her subordinate officers, while at the same time his/her conduct, representations and decisions are open to public scrutiny and explanation (Rat). Idiomatically, everything has its vanquisher (一物治一物).

Most senior positions need closest public scrutiny

2. As head of the Government, the Chief Executive is entrusted with considerable privilege and wide discretionary power, the public expects that he/she observes the highest standard of ethical conduct (see Think-piece #1). At present, however, rules governing the conduct of the Chief Executive are vague or virtually non-existent: the Chief Executive is subject to neither the Civil Service Code, which bans gifts worth more than \$500, nor the more lenient code for political appointees.
3. In recognition that public office is a public trust, the public expects the Chief Executive to have some personal sacrifice in terms of the time and energy that must be devoted to official duties and some loss of privacy. In other words, the Chief Executive is expected to perform their official duties and functions and arrange their private affairs in a manner that bears the closest public scrutiny.
4. Along this line, the conduct of the Chief Executive is subject to the monitoring of the people of Hong Kong. But the question is: can we do that?

Illicit activity is a calculation

5. As recent scandals show, being unethical does not necessarily mean unlawful in the absence of well-defined rules and specifications. Unscrupulousness may be indicative of illicit activities (e.g. concealing a conflict-of-interest situation, misusing office for unofficial ends, etc.) if the official has monopoly power over a policy decision, has the discretion to decide whether someone gets what and how much, and there is no accountability whereby others can see what that official is deciding (see formula below).

$$I = M + D - A$$

where I = illicit activities; M = official's unique position to deploy power; D = official's discretionary power; and A = accountability.

Elephant has to be overseen by the Rat

6. Solutions, therefore, begin with systems. Since the Chief Executive has the highest monopoly and discretion power, there is reason to raise the accountability and transparency so as to minimise the occurrence of conflict-of-interest situations inducible to illicit activities. To strengthen accountability, codes setting out the principles expected to govern the behaviour of the Chief Executive are to be written, whereas the Chief Executive's discretionary powers are to be clarified and circumscribed to reduce arbitrary discretion.
7. A second approach is to bring in an independent adviser to provide independent checks and sources of advice to the Chief Executive on the handling of his/her private interests, and to investigate allegations that the Chief Executive may have breached the code of conduct. To raise transparency, the adviser should, for the purpose of public inspection, regularly publish lists covering the interests of and hospitality received by the Chief Executive, and reports on the overall operation of the Chief Executive's interest arrangements.
8. Since the public expects that the obligations on the Chief Executive to disclose relevant interests are wider than those falling on the political appointees and civil servants, the Chief Executive should adopt a stringent standard for himself/herself: the declaration and registration of interests should be inclusive, not exclusive. If in doubt,

an interest should be included.

Everything has its vanquisher

9. In the absence of rules governing the conduct of the Chief Executive, and an authority to enforce these rules, one could only rely on the Chief Executive to abide by his/her own 'ethical standard'. Illicit activities are therefore unpreventable.
10. When we think of prevention of illicit activities, we should think of a stringent standard and a mechanism that we can gain public confidence and safeguard the reputations and dignity of the senior public officials.

March 16, 2012