

立法會
Legislative Council

LC Paper No. CB(2)113/01-02
(These minutes have been
seen by the Administration)

Ref : CB2/BC/13/00

**Legislative Council
Bills Committee on Chief Executive Election Bill**

**Minutes of the fourteenth meeting
held on Tuesday, 19 June 2001 at 8:30 am
in the Chamber of the Legislative Council Building**

- Members Present** : Hon IP Kwok-him, JP (Chairman)
Hon James TIEN Pei-chun, JP
Ir Dr Hon Raymond HO Chung-tai, JP
Hon Eric LI Ka-cheung, JP
Hon Martin LEE Chu-ming, SC, JP
Hon NG Leung-sing
Prof Hon NG Ching-fai
Hon CHEUNG Man-kwong
Hon Jasper TSANG Yok-sing, JP
Dr Hon YEUNG Sum
Hon Emily LAU Wai-hing, JP
Hon SZETO Wah
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, JP
Hon LEUNG Fu-wah, MH, JP
Dr Hon Philip WONG Yu-hong
Dr Hon LO Wing-lok
Hon Audrey EU Yuet-mee, SC, JP
- Members Absent** : Hon Andrew WONG Wang-fat, JP (Deputy Chairman)
Hon David CHU Yu-lin
Hon Cyd HO Sau-lan
Hon Margaret NG
Hon HUI Cheung-ching
Hon CHAN Yuen-han
Hon Howard YOUNG, JP
Hon Ambrose LAU Hon-chuen, JP
Hon CHOY So-yuk

Hon Timothy FOK Tsun-ting, SBS, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon Michael MAK Kwok-fung
Hon LAU Ping-cheung

Public Officers : Mr Michael M Y SUEN, GBS, JP
Attending Secretary for Constitutional Affairs

Mr Robin IP
Deputy Secretary for Constitutional Affairs

Ms Doris HO
Principal Assistant Secretary for Constitutional Affairs

Mr Bassanio SO
Principal Assistant Secretary for Constitutional Affairs

Mr James O'NEIL
Deputy Solicitor General (Constitutional)

Mr Gilbert MO
Deputy Law Draftsman
(Bilingual Drafting & Administration)

Ms Phyllis KO
Senior Assistant Law Draftsman

Mr Lawrence PENG
Senior Government Counsel

Clerk in : Mrs Percy MA
Attendance Chief Assistant Secretary (2)3

Staff in : Mr Jimmy MA
Attendance Legal Adviser

Mr Stephen LAM
Assistant Legal Adviser 4

Mr Raymond LAM
Senior Assistant Secretary (2)5

I. Clause-by-clause examination of the Bill

Members continued with the clause-by-clause examination of the Bill, commencing from clause 63.

Legislative Council (LegCo) Ordinance Clause 63

2. In response to Ms Audrey EU's question on the proposed amendments to section 3(2)(c) of LegCo Ordinance (clause 63(b)(ii)), Deputy Secretary for Constitutional Affairs (DSCA) said that as provisions relating to the Election Committee (EC) were now proposed to be provided for in the Bill, similar provisions in the LegCo Ordinance were no longer required and proposed to be deleted. Legal Adviser (LA) informed members that the relevant new provisions could be found in Part 1 of the Schedule to the Bill.

Clauses 64 to 75

3. Members did not raise any queries.

Electronic Transactions (Exclusion) Order Clauses 76 and 77

4. Members did not raise any queries.

Elections (Corrupt and Illegal Conduct) Ordinance Clauses 78 to 82

5. Members did not raise any queries.

Schedule - Election Committee Part 1 (Preliminary)

6. Members did not raise any queries.

Part 2 (Membership of Election Committee)

7. The Chairman said that he was not a member of EC when it was formed in July 2000. He asked whether he was eligible to vote in the next CE election as he was now an ex-officio EC member.

8. DSCA replied in the positive and explained that the membership of EC was updated after the LegCo general election on 10 September 2000 and the LegCo Hong Kong Island by-election on 10 December 2000.

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9. Apart from the proposal of the Bill to provide a mechanism for updating the membership of EC and the Administration's proposed Committee Stage amendment (CSA) to the effect that an ex-officio EC member would be deemed to have resigned from his elected or nominated membership in the event of overlapping membership, Ms Audrey EU asked whether any other changes were proposed to the constitution of EC provided under the LegCo Ordinance.

10. DSCA explained that apart from those mentioned by Ms Audrey EU and some minor technical amendments as set out in the CSAs proposed by the Administration (LC Paper No. CB(2) 1854/00-01(02)), the constitution of EC as proposed under the Bill was basically the same as that under the LegCo Ordinance.

11. In response to Dr Philip WONG's question about the number of vote that an EC member who possessed two categories of ex-officio membership was entitled to cast, SCA said that the EC member concerned could only cast one vote.

Part 3 (Religious subsector)

12. Ms Emily LAU asked whether the method for the drawing of lots in the nomination of members by the religious subsector would be maintained. DSCA responded that there would not be any changes in this respect.

Part 4 (Subsector Election) to Part 6 (Miscellaneous)

13. Members did not raise any queries.

II. The Administration's responses to points raised at previous meetings

(LC Paper Nos. CB(2) 1774/00-01(01), 1786/00-01(01), 1796/00-01(01), 1854/00-01(01) and 1876/00-01(01))

Commencement date of the Bill

(LC Paper No. CB(2)1796/00-01(01))

14. Ms Audrey EU asked about the arrangements for filling a LegCo vacancy as a result of the resignation of a LegCo Member returned by EC after the Bill was passed and came into operation.

15. Secretary for Constitutional Affairs (SCA) and DSCA responded that once the Bill was passed and came into effect, a new mechanism for updating the membership of EC would be brought into operation at the same time. A new set of subsidiary legislation for the EC subsector by-election and

supplementary nomination would have to be introduced. If any vacancy in the LegCo seats returned by EC arose in July 2001 and -

- (a) if the Bill was to come into operation in July 2001, the LegCo by-election would have to be held in February or March 2002 because the subsidiary legislation to provide for the EC subsector by-election and supplementary nomination would be introduced in the next legislative session and come into operation by the end of 2001; and
- (b) if the Bill was to come into operation in September 2001, the LegCo by-election could be held shortly after the vacancy arose because there was no need to arrange for a subsector by-election or supplementary nomination under existing arrangements as provided for in Schedule 2 to the LegCo Ordinance.

16. Ms Emily LAU and Dr YEUNG Sum questioned how a LegCo by-election could be conducted in the absence of a mechanism to update the EC membership. Ms LAU said that if the Bill was passed by LegCo, it should be brought into operation in accordance with the Administration's time-table as set out in LC Paper No. CB(2) 1796/00-01(02). She considered that deliberately deferring the commencement of an enacted legislation was inconsistent with the rule of law.

17. LA explained that under the LegCo Ordinance, there was no mechanism to fill vacancies among the EC membership. However, a mechanism was in place for the by-election of a LegCo Member returned from EC.

18. SCA reiterated that following the enactment and commencement of the Bill, any LegCo by-election could only be held after the EC subsector by-election was completed in January 2002. The earliest possible polling date for any LegCo by-election would be in February or March 2002. This was undesirable as leaving a LegCo seat vacant for a long period was not conducive to the effective operation of LegCo.

19. Ms Emily LAU considered it inappropriate to defer the date of commencement of the Bill on the ground that a LegCo seat should not be left vacant for a long period. She said that the Bill should come into operation as soon as possible after its passage by LegCo, and any LegCo by-election should be held in accordance with the arrangements provided for in the Bill.

20. SCA stressed that the LegCo Ordinance had already provided for the by-election of a LegCo Member returned from EC, although a mechanism for updating the EC membership was absent. While the new mechanism was an improvement over the existing one, it did not mean that any LegCo by-election conducted under the existing arrangements was illegal or had no legal basis.

21. Mr TSANG Yok-sing said that the Bill had introduced a new mechanism which could not be implemented until February or March 2002. Thus, it was a choice of conducting a LegCo by-election under the arrangements provided either in the LegCo Ordinance or in the Bill after it came into operation. There was legal basis for both options.

The only candidate shall be returned (clause 22)
(LC Paper No. CB(2)1876/00-01(01))

22. SCA said that having regard to members' views on clause 22, the Administration proposed that in the event that any candidate died or was disqualified after the close of nominations but before the declaration of result, the CE election should be terminated and nomination be re-opened. A new poll should be held on the first Sunday 42 days later.

23. Members expressed support for the Administration's proposal. Ms Emily LAU pointed out that the new poll would be no different from a new poll held under clause 11(2) as a result of the CE-elect not being able to assume the office. As the poll under clause 11(2) was held on the first Sunday 120 days after the vacancy arose, she considered that the same lead time should apply to any new poll held as a result of termination of election proceedings.

24. SCA said that a lead time of 42 days was proposed because in situations where the CE election failed due to the death or disqualification of a candidate, it would not be necessary to update the EC membership. He said that there was room for a review of the 42-day lead time when a suitable opportunity arose in the future.

25. SCA added that it was not possible to set out all situations in legislation. Under the new proposal, the new poll would be held on the first Sunday 42 days after the election failed. The proposed 42-day period, which had taken into account the time required for nomination (14 days), canvassing (21 days) and arrangements for the new election (7 days), should be sufficient.

26. Ms Audrey EU referred to the Administration's proposal in respect of clause 11(2) (item 2 of LC Paper No. CB(2)1782/00-01(01) refers), and asked whether holding a new election on the first Sunday 120 days upon the expiry of the six-month period when the office of the CE first became vacant was consistent with the requirement in BL 53 which provided that a new CE must be selected within six months in the event of a vacancy.

27. SCA responded that the Administration's proposed arrangement was consistent with BL. It was a situation where a candidate had been elected as CE but could not assume office. As it was inappropriate to wait indefinitely for the CE-elect to assume office, it was proposed that if the CE-elect could not

assume office upon the expiry of term of the serving CE or upon the expiry of the six-month period when the office of the CE first became vacant, the office of the CE would become vacant and a new election would be held on the first Sunday 120 days later.

28. LA said that the issue was mainly concerned with the interpretation of the word "selected" in BL 53. According to the interpretation of the Administration, the CE was not yet selected in the case of clause 22 because the election failed, whereas under the situation in clause 11(2), the CE had been selected although he could not assume office.

29. Mr CHEUNG Man-kwong expressed reservation about the Administration's interpretation of BL 53. He said that if an election failed due to the death or disqualification of a candidate and a second poll again failed for the same reason, it would not be possible for a third poll to be completed within the six-month period. Hence, the election would be in contravention of BL 53. He pointed out that it was possible for a candidate standing for the CE election to act in a deliberate way to result in the termination of election proceedings e.g. he could be disqualified from being elected by declaring that he had a right of abode in a foreign country or that he was bankrupt, after the nomination closed. The same tactic could be employed more than once in a CE election with the consequences that a new CE could not be selected within the six-month period under BL 53. With the Administration's interpretation of BL 53, problems would arise, especially if CE was returned by direct election which would attract a lot of candidates. He requested the Administration to reconsider whether BL 53 should be interpreted to the effect that the six-month period should apply to all CE elections, including the situation where it was necessary to conduct a new poll because the CE election failed.

30. SCA responded that in the unlikely situation quoted by Mr CHEUNG Man-kwong, it would be necessary to rely on the good judgement of EC members, as a nomination of a candidate had to be made by not less than 100 EC members. He said that if CE was to be elected by universal suffrage at some stage in the future, the relevant electoral laws would be suitably amended to cater for the situation at that time.

31. Deputy Solicitor General (Constitutional) (DSG(C)) said that BL 53 referred to the selection procedure set out in BL 45, which further referred to the selection method prescribed in Annex I to BL. The electoral law encompassed by the Bill gave effect to the election method referred to in Annex I to BL. If there were future problems in its application to universal suffrage, they would be taken into account in the electoral law enacted at that time. When interpreting BL, a purposive approach should be adopted. It would not be productive to attempt discussing every hypothetical constitutional problem that might arise.

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32. Mr CHEUNG Man-kwong reiterated that a new poll held as a result of the death or disqualification of a candidate should be no different from a new poll held as a result of the CE-elect not being able to assume office. Thus, both polls should be given the same period to complete.

33. SCA disagreed and pointed out that the two situations were different. In the former case, the election process had yet to be completed.

34. Mr SZETO Wah said that it would appear that the "vacancy" referred to in the second paragraph of BL 53 arose as a result of the situation in the first paragraph of BL 53 i.e. CE was unable to discharge his duties for a short period. If the "vacancy" arose as a result of the expiry of term of office of CE, the second paragraph of BL 53 should directly follow BL 46.

35. LA said that the first paragraph of BL 53 dealt with a temporary situation, whereas the second paragraph of BL 53 dealt with a "vacancy" in the office of CE. DSG(C) concurred with the view of LA and added that a vacancy could arise under various situations, such as the expiry of term of office of the CE referred to in BL 46 or the situations referred to in BL 52 and BL 79.

III. Draft CSAs proposed by the Administration and Members

Draft CSAs proposed by the Administration (LC Paper No. CB(2) 1854/00-01(02))

36. Members noted the draft CSAs proposed by the Administration.

37. Ms Emily LAU informed members that she would not move any CSAs to the Bill, as she was opposed to the Bill.

Vacancy in office (clause 4)

38. Referring to the Administration's draft CSAs to clause 4, Ms Emily LAU asked why the term "revoke" in the clause was revised to "remove". She said that the new clause 4(c)(v) was not proposed by the Hong Kong Bar Association (the Bar). She asked about the reasons for incorporating new clause 4(c)(v) and the meaning of "any other circumstances".

39. SCA responded that the reasons for incorporating clause 4(c)(v) had been explained by the Administration at previous meetings. He said that the Administration's views were shared by LA and the Law Society of Hong Kong (the Law Society).

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40. Deputy Law Draftsman (Bilingual Drafting and Administration) explained that "revoke" was replaced by "remove" in response to the view expressed by Miss Margaret NG at a previous meeting that interpretation problems might arise if the term "revoke" was used. He added that the term "removed from office" could be found in many parts of BL.

41. Ms Emily LAU asked the Administration to advise the articles of BL, apart from BL 52 and BL 73(9), which were relevant to the removal of CE from office. SCA responded that many BL articles were relevant, including the article that required CE to be a person of integrity.

42. Ms Audrey EU said that the rationale for the enactment of a provision in law should be very clear. The enactment of a provision should not merely be based on the views of the Bar, the Law Society, LA or the majority views in the society. It should be based on whether there were full justifications. She said that the Administration should set out "any other circumstances" in detail and in very clear terms.

43. DSG(C) responded that the Administration had previously submitted papers which explained the source of power of the Central People's Government (CPG) to remove CE. He said that LA had also concluded in his written opinion on the matter (LC Paper No. LS102/00-01) that "According to the basic principles of 'one country, two systems' and 'high degree of autonomy' of the HKSAR, and on the premise that the CPG should only exercise its power not to appoint sparingly and rationally, it appears that the CPG would have the implied power to revoke the appointment of the CE in limited circumstances which include circumstances specified in BL 52 and BL 73(9), and circumstances which do not fall within the ambit of BL 52 and BL 73(9) but where revocation is necessary for purposes which do not contravene the BL, including the purpose of maintaining 'Hong Kong's stability and administrative efficiency'." DSG(C) added that in the absence of a catch-all provision as proposed in new clause 4(c)(v), there would be no basis to declare a vacancy arising in circumstances which were not set out. The declaration of a vacancy was the necessary trigger for the holding of an election of a new CE.

44. Ms Audrey EU asked about the BL provisions that were encompassed in new clause 4(c)(v).

45. DSG(C) responded that a number of BL provisions had been referred to as being relevant to the power of the CPG to remove a CE from office. These provisions included BL 2, 12, 15, 43, 45, 47, 52 and 73(9). In situations where a CE had committed a serious breach of law outside Hong Kong or committed a moral wrong which brought an outcry from the community, the question could arise whether the CE should be removed from office by the CPG for being unsuitable to be the head of HKSAR and represent it under BL 43 or not being a person of integrity under BL 47. There were a number of

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circumstances not covered by BL 52 and BL 73(9).

46. Mr CHEUNG Man-kwong said that many BL provisions mentioned by DSG(C), such as BL 2, were not related to CPG's power to remove CE from office. If the BL articles quoted by DSG(C) could be interpreted as relevant to CPG's power to remove CE from office, all provisions in BL could be interpreted to such effect.

47. DSG(C) responded that the Administration had previously submitted papers to the Bills Committee explaining that CPG's power to remove CE from office flowed from BL. It had specifically referred to BL 15 and BL 45 which provided that CE should be appointed by CPG. The papers had explained the Administration's position in detail.

48. Mr CHEUNG Man-kwong said that in previous discussions of the Bills Committee, the BL provisions relevant to the power of CPG to remove CE were confined to BL 52 and BL 73(9). In view of DSG(C)'s advice in paragraph 45 above, he requested the Administration to provide a paper explaining the BL articles and legal basis under which CPG could remove CE from office. If the Administration could not provide adequate explanations, it should withdraw its earlier advice. Mr SZETO Wah held the same view. Ms Audrey EU added that the Administration should also explain the circumstances under which CPG could remove CE from office.

49. SCA said that clause 4 was not concerned with the circumstances under which CPG could remove CE from office. It only set out the situations under which the office of CE would become vacant. It did not confer additional powers on CPG to remove CE from office. Nevertheless, the Administration would submit a paper on the issue for discussion at the next meeting.

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50. Dr YEUNG Sum commented that the situation in Hong Kong increasingly resembled that in the Mainland. He expressed concern that SCA had put more emphasis on whether an issue was politically right than whether it was rational.

(Post-meeting note : The paper submitted by the Administration in response to the issues raised by members was circulated vide LC Paper No. CB(2)1933/00-01 on 23 June 2001.)

Draft CSAs to be proposed by Mr Martin LEE
(LC Paper No. CB(2) 1863/00-01(01))

51. Mr CHEUNG Man-kwong informed members that the draft CSAs to be proposed by Mr Martin LEE were being drafted and should be ready before 30 June 2001. The CSAs would mainly cover -

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- (a) circumstances under which a vacancy in CE's office would arise;
- (b) the election of CE by universal suffrage; and
- (c) the deletion of the requirement that the winning candidate had to declare not being a member of any political party.

52. The Chairman said that as the resumption of Second Reading debate on the Bill would take place at the Council meeting to be held on 11 July 2001, the Administration would give notice of resumption of debate on 23 June 2001. As the Bills Committee would hold another meeting on 26 June 2001 and report its deliberations to the House Committee on 29 June 2001, he sought members' views on the arrangement. Mr CHEUNG Man-kwong and Dr YEUNG Sum indicated that they had no objection to the resumption of Second Reading debate on the Bill. The Chairman reminded members that the deadline for giving notice to move CSAs was 30 June 2001.

IV. Date of next meeting

53. The Chairman reminded members that the next meeting would be held on 26 June 2001 from 8:30 am to 12:45 pm.

54. The meeting ended at 10:50 am.

Legislative Council Secretariat
19 October 2001