

立法會
Legislative Council

LC Paper No. CB(2)1978/00-01

(These minutes have been
seen by the Administration)

Ref : CB2/PL/CA

**Legislative Council
Panel on Constitutional Affairs**

**Minutes of meeting
held on Monday, 7 May 2001 at 8:30 am
in the Chamber of the Legislative Council Building**

Members Present : Hon Andrew WONG Wang-fat, JP (Chairman)
Hon Emily LAU Wai-hing, JP (Deputy Chairman)
Hon James TIEN Pei-chun, JP
Hon Margaret NG
Hon CHEUNG Man-kwong
Hon HUI Cheung-ching
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon YEUNG Yiu-chung
Hon SZETO Wah
Hon Audrey EU Yuet-mee, SC, JP

Public Officers Attending : Item VI

Ms K Y CHANG
Deputy Director of Administration

Ms Maggie WONG
Assistant Director of Administration

Mr M J Bishop
Assistant Director (Investigation Branch/4)
Operations Department, ICAC

Mr I C McWalters
Senior Assistant Director of Public Prosecutions
Department of Justice

Mr Peter WONG
Senior Assistant Solicitor General
Department of Justice

Mr Paul TSANG
Government Counsel (Basic Law Unit)
Department of Justice

Item VII

Mr LEE Wing-wai
Assistant Director (Subvention)
Social Welfare Department

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

Staff in Attendance : Mr Jimmy MA
Legal Adviser

Ms Eva LIU
Head, Research and Library Services Division

Miss Yvonne YU
Senior Assistant Secretary (2)7

Action
Column

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)1158/00-01)

The minutes of the meeting on 19 February 2001 were confirmed.

II. Paper issued since the last meeting

2. Members noted the following papers which had been issued since the last meeting -

- (a) LC Paper No. CB(2)1236/00-01(01) - (03) - Supplementary Information from Dr Anthony CHEUNG Bing-leung on "System of accountability for principal officials" and
- (b) LC Paper No. CB(2)1290/00-01(01) - The Director of Administration's reply on the HKSAR Precedence Table.

3. On item (a), the Chairman opined that the Civil Service Code and the Ministerial Code of the United Kingdom were very useful to the Panel's further deliberation on the system of accountability for principal officials in the Hong Kong Special Administrative Region (HKSAR).

4. On item (b), the Chairman said that the issue of the HKSAR Precedence Table was discussed by the Panel on 15 January 2001. Despite the Administration's explanations, the Panel was not convinced that the changes made to the Precedence Table were justified and had requested the Administration to convey members' views to the Chief Executive (CE). The Administration had duly reflected members' views to the CE. The Chairman suggested and members agreed that a report should be made to the House Committee. A draft report to the House Committee would be prepared for members' consideration at the next meeting on 21 May 2001.

III. Matters arising

(LC Paper Nos. CB(2)1441/00-01(01)&(02))

Employment arrangements for principal officials

5. The Chairman referred members to the Administration's reply (LC Paper No. CB(2)1441/00-01(02)). On the Administration's response that it was not appropriate to disclose the specific terms and conditions of service for former or current government employees as those details were personal data and were a matter between the Government and the employees, the Chairman asked for Legal Adviser (LA)'s view.

6. LA said that the term "personal data" referred to by the Administration was a general term and did not point to any legal restriction under the Personal Data (Privacy) Ordinance. The Administration had not indicated that it could not disclose the details because of the provisions under the Ordinance. In his view, it was legitimate for members to request for such information which was related to the management of the Civil Service and the use of public money in the employment of principal officials.

7. Mr HUI Cheung-ching asked LA whether the Administration could disclose details of the employment contract of Mr Antony LEUNG if Mr LEUNG had no objection to such disclosure. As the employment of principal officials involved public funding, he asked whether the public had a right to ensure that the public money spent was reasonable and cost-effective.

8. In response to Mr HUI's first question, LA said that according to the Administration, the contract was a matter between the Government and the officer. As regards Mr HUI's second question, LA advised that under Article 64 of the Basic Law (BL), the HKSAR Government was accountable to LegCo

and had to obtain approval from LegCo for public expenditure.

9. Mr CHEUNG Man-kwong said that the Administration was evading from the crux of the matter. Members were aware that integrity checking was a civil service appointment procedure and not a requirement under Article 48(5) of BL. It was considered inappropriate for integrity checking to be conducted after the appointment by the Central People's Government (CPG). As regards the specific terms and conditions of employment contracts, he was of the view that they should not be regarded as personal data. Such information, when made available, could facilitate members to ascertain whether the terms of appointment and conditions of service of principal officials were in accordance with the prevailing civil service provisions.

10. Ms Emily LAU agreed that integrity checking was not a requirement under BL. She said that the response given by the Administration at the Panel meeting on 19 March 2001 gave the impression that the integrity checking of Mr Antony LEUNG was conducted after appointment by CPG. Although she accepted that the details of integrity checking might contain confidential information, she was not convinced that the timing of the integrity checking and the date of signing of the contract etc were by their nature secret.

11. Dr YEUNG Sum said that the Chief Executive (CE) intended to implement a system of accountability for principal officials, and more and more principal officials were appointed from outside the Civil Service. If the Administration had intentionally or unintentionally chosen not to follow the proper procedure of conducting integrity checking before appointment by CPG, this might result in concentration of power of CE as he could nominate any like-minded persons as principal officials.

12. Ms Audrey EU held the view that principal officials were employed by the Government on behalf of the public. The reasons advanced by the Administration for non disclosure were unacceptable.

Response of the Secretary for the Civil Service to questions raised by members at the meeting on 19 March 2001

13. Ms Emily LAU said that she was dissatisfied that the Secretary for the Civil Service (SCS) had refused to answer members' questions at the Panel meeting on 19 March 2001. She had earlier proposed to raise the matter at the House Committee meeting on 23 March 2001. The Chairman of the House Committee suggested that the matter be brought back to the Panel for a decision. She sought members' view on her proposal. Mr CHEUNG Man-kwong agreed that a report on the Panel's dissatisfaction should be made to the House Committee. A few members preferred to listen to SCS's further explanations at the next meeting before deciding on the next step. The Chairman concluded that the Panel would consider whether any follow-up

action was required after a further discussion with SCS at the next meeting.

14. Ms Emily LAU requested the Secretariat to provide a verbatim transcript of the discussion of the item at the meeting on 19 March 2001 to facilitate member's consideration at the next meeting. Mr CHEUNG Man-
kwong said that SCS should be requested to give a response to members' comments made at this meeting.

IV. Items for discussion at the next meeting on 21 May 2001
(LC Paper No. CB(2)1411/00-01(03))

15. Members agreed that the following items be discussed at the next meeting on 21 May 2001 -

- (a) The question of "important bill" under Article 50 of the Basic Law;
- (b) Employment arrangements for principal officials ; and
- (c) System of accountability for principal officials.

Meeting in June

16. The Chairman said that the regular meeting on 18 June 2001 had to be rescheduled as the Panel delegation would visit Europe from 13 to 24 June 2001. Members agreed that the meeting in June would be held on Tuesday, 12 June 2001 at 10:45 am.

V. Research Report on "Parliamentary Handling of Non-Ordinary Bills" by Research and Library Services Division
(Research Report issued vide LC Paper No. CB(2)1437/00-01)

17. At the invitation of the Chairman, Head, Research and Library Services Division (H/RLSD) briefed members on the research report. Ms Emily LAU said that the research study showed that both the United Kingdom and France did not have a category of bills the defeat of which might result in a change of Government or the dissolution of Parliament. It would appear that the Panel could not make any reference to the experience of these two countries in considering the question of "important bill" under Article 50 of the Basic Law (BL 50).

18. The Chairman said that BL 50 was probably modelled on the French system, although the arrangement under BL was the dissolution of LegCo but not the tabling of censure motion as in the case of France. He also noted that,

under the French system, the Prime Minister could invoke Article 49(3) of the French Constitution at any time. Such provision provided that the Prime Minister might make the passing of a bill an issue of the Government's responsibility before the National Assembly. As such, the system in France could enhance the accountability of the French Government as the consequence of the passage of a motion of censure was the resignation of the Government, leaving the National Assembly intact. This could provide insight to members in considering the system of accountability of principal officials in the HKSAR.

19. H/RLSD briefed members on paragraphs 6.15 to 6.19 of the report. She said that Article 49(3) of the French Constitution had pros and cons from the Government's perspective. Although this article enabled the legislative process to be expedited and assured the passage of legislation within a short period of time, it denied Parliament its deliberative function.

VI. Application of certain provisions of the Prevention of Bribery Ordinance (POBO) (Cap. 201) to the Chief Executive (CE)
(LC Paper Nos. CB(2)1448/00-01(01) & (02))

20. Deputy Director of Administration (DD of Adm) briefed members on the Administration's paper (LC Paper No. CB(2)1448/00-01(02)). She said that the cases and court judgments referred to in the Administration's paper demonstrated the complexities involved in an attempt to codify the common law offence of bribery. Given the problems and complications associated with the codification exercise, the Administration considered it more appropriate to, outside the common law, set out in separate legislative provisions the bribery offences for application to CE. The Administration had yet to decide whether the legislative proposal would be introduced by way of an amendment to POBO or as a separate piece of legislation. Meantime, the CE would continue to be subject to the common law offence of bribery.

21. LA drew members' attention to a paper provided by the Administration in February 1999 (LC Paper No. CB(2)1249/98-99(02)). In that paper, the Administration advised that as CE was neither a "government officer" nor a "public servant" under POBO, he was therefore not subject to those sections of POBO that only applied to "government officers" or "public servants". Of the remaining provisions of POBO, some were related to criminal offences and to which CE was subject in common with all other citizens of Hong Kong. As such, CE was subject to the relevant provisions of POBO like all other citizens in Hong Kong.

22. Ms Emily LAU expressed concern that CE was only subject to certain provisions of POBO and that no public officer had ever been prosecuted for the common law offence of bribery.

23. The Chairman said that POBO could be amended to make it applicable to CE. To address the problem arising from the principal-agent relationship, he proposed the Administration to consider deeming CE to be a government officer or public officer for the purpose of POBO. DD of Adm said that the Administration had explained to the Panel in May 2000 that this option was considered not quite viable on the basis of legal advice.

24. The Chairman said that the Administration had previously agreed to introduce legislative amendments to extend the applicability of section 10 of POBO concerning the possession of unexplained property to CE. He asked when the legislative proposal would be introduced into LegCo. DD of Adm said that as the Administration would create separate legislative provisions to set out the bribery offences for application to CE, making reference to the existing framework of control as applicable to government officers under POBO, including section 10 of the Ordinance.

Special powers of investigation of ICAC under POBO

25. In response to Hon Emily LAU's question, DD of Adm responded that CE fell within the meaning of "public officer" under the common law. If CE had committed an offence of bribery, the Independent Commission Against Corruption (ICAC) would have the statutory power to carry out the investigation under the common law.

26. Assistant Director (Investigation Branch/4) of the Operations Department of ICAC (AD/ICAC) confirmed that ICAC could investigate allegations of common law corruption against all public officers including the CE, although no government officer had ever been prosecuted for the common law offence of bribery as they would have been caught by the provisions of the POBO.

27. LA asked whether the special investigation powers of the ICAC under POBO could be exercised in respect of the common law offence of bribery. AD/ICAC said that the special powers of investigation under sections 13, 14 and 17 of the POBO did not apply to common law offence of bribery. Nevertheless, the Commissioner of ICAC had the power to investigate any allegation or suspicion of offence of bribery of a public officer under the common law. ICAC was therefore empowered to conduct investigation on CE if he was subject to allegation of common law offence of bribery for public officer.

28. In response to Hon Emily LAU, LA supplemented that some of the special investigation powers of the ICAC were not available under the common law, e.g. power to investigate bank accounts.

Principal-agent relationship under POBO

29. In response to Mr James TIEN's question, DD of Adm said that the offences of solicitation and acceptance of advantages under POBO were generally premised upon the principal-agent relationship. The offence provisions were not intended to cater for the office of CE. While CE was the authority to approve the receipt of advantages by members of the civil service, there was no appropriate authority under the POBO to grant approval to CE for the receipt of advantages himself. In formulating separate legislative provisions to set out the bribery offences for exclusive application to CE, the Administration would need to address CE's unique constitutional position and the fact that he was not a "government officer" or "public servant" as defined in POBO.

30. Mr James TIEN asked which authority would be the "principal" if CE was the "agent" under the principal-agent relationship. DD of Adm said that it was generally agreed that CE should be subject to at least the same standard of bribery prevention as currently applicable to government officers under the POBO or even a higher standard. Under the existing administrative arrangements on acceptance and disposal of gifts presented to CE, gifts with commercial value would be disposed of through the Treasury. For those gifts which CE would like to retain, he would purchase them. The proceeds would be donated to charitable organizations. DD of Adm added that CE had accepted the arrangements whereby he would not seek approval for 'free' acceptance of gifts.

31. Mr James TIEN said that the absence of a principal-agent relationship in the bribery legislation for application to CE would appear to be a major policy change. Referring to the example quoted by the Administration on acceptance of gifts, he said that "advantage" under POBO could cover intangible things other than gifts. DD of Adm said that pending the finalisation of the legislative proposal, the Administration had not come to a view as to whether the legislative provisions should be incorporated into POBO or otherwise.

32. Miss Margaret NG said that CE like any other citizens in Hong Kong were subject to the Laws of Hong Kong. It was merely a law drafting exercise to extend the applicability of the relevant provisions of POBO to CE. In her view, it was unacceptable to have two separate sets of prevention of bribery legislation applicable to government officers and the CE respectively. The Chairman said that it was inappropriate and unwise to enact a separate piece of prevention of bribery legislation for CE only.

Legislative timetable

33. Mr CHEUNG Man-kwong expressed concern about the time taken by the Administration in studying the matter and asked the Administration to

advise on the specific legislative timetable. Ms Emily LAU expressed disappointment that little progress had been made since the issue was first raised in 1999 and urged the Administration to expedite the legislative process. Mr SZETO Wah said that the legislative process must be completed by 24 March 2002 when the election of the second term CE was held. In the circumstances, the Administration should introduce the legislative proposal into LegCo at the beginning of the next legislative session in October 2001. Dr YEUNG Sum concurred with the view of Mr SZETO. Mr James TIEN was in support for the Administration to introduce the relevant legislation into LegCo as soon as possible.

34. DD of Adm said that as the Administration had to bid a legislative slot for introducing the legislative proposal into LegCo in the next legislative session, she was not in a position to confirm the specific timetable. In line with the existing practice, the Administration would also need to consult the Panel on the legislative proposal before introduction of a bill into LegCo. In these circumstances the Administration could not commit to passage of the bill in LegCo before March 2002. In response to members' repeated requests for early enactment of the bill, DD of Adm said that the Administration had noted members' views, and would endeavour to introduce the legislative proposal as soon as possible.

VII. Issues of employees of subvented welfare organizations taking up public offices

(LC Paper No. CB(2)1441/00-01(04))

35. Assistant Director (Subvention) of Social Welfare Department (AD/SW) briefed members on the Administration's paper. Ms Emily LAU said that the salary and benefits of the employees of the subvented non-governmental organizations (NGOs) should be deducted upon taking up remunerated public offices as a person could not perform equally well in different posts at the same time. She queried why the Administration proposed to set out the broad principles of the guidelines for reference of NGOs only, but not for their compliance. She pointed out that the tertiary institutions, albeit administratively autonomous bodies, had to comply with the guidelines. The Administration should make reference to the practices adopted by the Hospital Authority and the tertiary institutions in requiring the NGOs to comply with the guidelines.

36. In response to Ms LAU's question, AD/SW explained that no preferential treatment was given to any particular person or organization by the Administration. The guidelines for NGOs were expected to strike a pragmatic balance between encouraging and enabling staff to honour their civil duties on the one hand and proper use of subvention money as public funds on the other. Each NGO should be allowed the autonomy and flexibility to determine how

its financial and manpower resources should be deployed.

37. Quoting the case of Ms Rosanna WONG Yick-ming who had been the Executive Director of the Hong Kong Federation of Youth Groups, the Chairman of the Housing Authority and a member of the Executive Council at the same time, the Chairman asked what the Administration proposed to deal with such cases. AD/SW responded that in formulating the SWD guidelines, the Administration would include provisions on adjustment of salary/benefits for employees of NGOs taking up remunerated public offices.

38. Mr James TIEN agreed with Ms Emily LAU's view. In the light of his experience as the Chairman of the Yan Chai Hospital, he opposed to giving full autonomy to the NGOs to determine how their financial and manpower resources should be deployed and the actual course of action to take if their employees took up remunerated public offices. In his view, SWD guidelines should make reference to the guidelines issued by the Hospital Authority. Mr HUI Cheung-ching agreed with the view of Ms Emily LAU and Mr James TIEN. He said that it was only fair and reasonable to deduct the salary and benefits of the employees of subvented welfare organizations taking up remunerated public offices.

39. The Chairman said that there were different standards for employees of public-funded bodies taking up remunerated public offices. Compared to the Hospital Authority and the tertiary institutions, the subvented welfare organizations were subject to a lower standard of restriction. He requested the Administration to reconsider the matter having regard to members' views. He also requested the Administration to provide the draft guidelines for members' consideration. Ms Emily LAU stressed that the SWD guidelines should be issued for compliance, instead of reference of NGOs. AD/SW said that the Administration would consider members' views and revert to the Panel in due course.

Adm

40. The meeting closed at 10:45 am.

Legislative Council Secretariat
5 July 2001