

立法會
Legislative Council

LC Paper No. CB(2)538/00-01
(These minutes have been seen
by the Administration)

Ref : CB2/PL/CA

**Legislative Council
Panel on Constitutional Affairs**

**Minutes of meeting
held on Monday, 20 November 2000 at 2:30 pm
in Conference Room A 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 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

Member Absent : Hon Margaret NG

Public Officers Attending : Mr P C LEUNG
Deputy Director of Administration

Mrs Apollonia LIU
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

Ms Adeline WAN
Senior Assistant Solicitor General (Acting),
Department of Justice

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

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

Staff in Attendance : Mr Jimmy MA
Legal Adviser

Mrs Eleanor CHOW
Senior Assistant Secretary (2)7

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2) 239/00-01)

The minutes of the meeting on 14 October 2000 were confirmed.

II. Paper issued since the last meeting
(LC Paper No. CB(2) 206/00-01(01))

2. Members noted the Administration's reply on the number of appeals filed with the Court of Appeal which were right of abode related. The Chairman advised that the Establishment Subcommittee had endorsed the proposal to create a supernumerary post of Justice of Appeal of the Court of Appeal of the High Court in relation to the appointment of Chairman of the Electoral Affairs Commission.

III. Application of certain provisions of the Prevention of Bribery Ordinance (Cap. 201) (POBO) to the Chief Executive (CE)
(LC Paper Nos. CB(2) 2523/99-00 and 288/00-01(01))

3. Deputy Director of Administration (DD of Adm) expressed his apology for not being able to provide a paper for discussion by the Panel at the meeting. He said that the issue of codification of the common law offence concerning the bribery of, and the acceptance of bribes by, public officers was complex and

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could have far reaching implications. The Administration would need about three to six months to study the scope and application of the common law offence of bribery. A copy of DD of Adm's speaking note tabled at the meeting was issued to members vide LC Paper No. CB(2) 288/00-01(01).

4. The Chairman said that since the study on codification of the common law offence of bribery would take some time, it would be desirable for the Administration to introduce first the legislative amendments to extend the existing section 10 of POBO concerning the possession of unexplained property to include CE. Legal Adviser (LA) advised that as Article 15 of the International Covenant on Civil and Political Rights provided that a person should not be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence when it was committed, the proposed legislative amendments should be introduced as early as possible. Members agreed.

Adm

5. DD of Adm responded that having regard to the Panel's request made on 20 June 2000 that the Administration should advise members of its view on the codification on the common law offence of bribery prior to the introduction of the legislative amendments relating to section 10 of POBO, he was not in a position to advise at this stage when the proposed legislation could be introduced into LegCo. In view of members' view expressed at this meeting, DD of Adm undertook to introduce the legislative amendments as soon as practicable.

6. Mr CHEUNG Man-kwong was disappointed that little progress had been made since the issue was last discussed in May 2000. DD of Adm reiterated that it was the Administration's view that CE already fell within the meaning of "public officer" under the common law and would be liable to prosecution if he accepted a bribe even without any amendment to POBO.

Adm

7. Ms Emily LAU said that the Administration had yet to provide information on previous prosecutions taken against Government officers for possession of unexplained property acquired before section 10 of POBO came into force, as requested by members at the Panel meeting on 15 May 2000 (paragraph 18 of the minutes of the meeting refers). DD of Adm agreed to follow up the matter. Ms LAU requested the Administration to also provide information on previous prosecutions taken against Government officers under the common law offence of bribery.

8. Referring to paragraph 21 of the minutes of the meeting on 15 May 2000, Ms Emily LAU raised the question as to whether LegCo should conduct a research study on other relevant areas such as matters relating to securing of evidence and burden of proof for prosecution under the common law and the

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wider offence of misconduct of public officers, etc. , in order to facilitate members to better understand the matter. The Chairman said that the Research and Library Services Division would have difficulty in conducting a research unless it was given clear instructions on the scope and objective of the study.

Adm

9. LA explained that the concern he raised in paragraph 21 of the minutes was that in order to prosecute the common law offence of bribery, the law enforcement agency might not have the statutory powers given to the ICAC to carry out the investigation and existing statutory evidentiary provisions might not apply. DD of Adm said that the Administration would address the point raised by LA in its study.

10. Addressing members' concerns, Assistant Director (Investigation Branch/4) of the Operations Department of ICAC said that, in theory, if the ICAC were to investigate a public officer for the common law offence of bribery of a public officer, in circumstances where the alleged or suspected corrupt conduct did not also infringe the POBO, it would not be possible for investigators to invoke their special powers of investigation provided under the POBO and ICAC Ordinance. In practice, however, it was almost certain that any allegation or suspicion of the common law offence of bribery of a public officer would also give rise to suspicion of offences under the POBO. In the circumstances, the ICAC would be able to invoke its special powers of investigation.

11. The Chairman said that if codification would result in abolition of the common law offence, the Administration should ensure that the scope of the statutory offence of bribery applicable to CE was wide enough to avoid creating any loopholes.

12. Senior Assistant Director of Public Prosecutions of the Department of Justice explained that codification normally referred to creating a statutory offence to replace the existing common law offence. However, it was possible to create a separate offence which supplemented the common law offence rather than replacing it. He pointed out that a new offence of fraud was created under the Theft Ordinance last year, in addition to the existing common law offence of conspiracy to defraud. In creating a new offence in the situation where a common law offence was already in existence, it was necessary to decide whether the new offence was to supplement or to substitute the common law offence. If the latter was the case, it was important that the new offence was as broad as or perhaps even broader than the existing common law offence so as to ensure that loopholes would not be created when the common law offence was substituted.

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Adm 13. DD of Adm said that the issue was complicated and delicate. It was necessary to conduct a careful and thorough study on the codification of the bribery offence before the Administration could revert to the Panel with its stance on the matter. He undertook to report progress to the Panel at the meeting in March 2001.

Internal discussion

IV. Development of the HKSAR's political system - System of accountability for principal officials (LC Paper Nos. CB(2) 270/00-01(04) - (06) and 280/00-01)

14. The Chairman invited members to give views on how the Panel should proceed with the study of the proposed system of accountability for principal officials.

15. Dr YEUNG Sum said that the Administration would take one year to complete its study on the system of accountability for principal officials. The Panel should come up with its recommendations before the Administration finalized its proposal. To proceed with the study, he suggested that the Panel should conduct public hearings to receive views from academics and experts in political science. The consultation process would enable the public to understand more about the subject through media reports and the Panel to identify areas of concerns that were relevant to its study.

16. Dr YEUNG Sum suggested that for the study to be comprehensive, the system of accountability for principal officials should be discussed together with the election of the CE by universal suffrage. The Chairman said that although the two issues were related, the scope of the study might be too broad if it would also cover the election of the CE. Since the accountability system was proposed by the Administration in response to the former Panel's recommendation, he suggested that for the purpose of the present consultation exercise, the Panel should focus its study on this particular subject first. Members did not raise any objection.

17. To facilitate the work of the Panel and in response to Dr YEUNG Sum's earlier suggestion, Ms Emily LAU proposed and members agreed that the public consultation should cover inter alia the following issues -

- (a) the arrangements for out-going principal officials;
- (b) the terms of appointment of principal officials/ministers under the new system, i.e. pensionable, contract or other terms, remuneration package, etc,

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- (c) the system of appointment and removal of principal officials/ministers under the new system;
- (d) the administrative and legislative means for implementation of the new system; and
- (e) the system of accountability for principal officials under the leadership of a directly elected CE vis-à-vis that under a CE elected by the Election Committee.

18. The Chairman informed members that the Director of the Hong Kong Transition Project, one of the organizers of the workshop on "Thinking about 2007", had advised that he was in the process of compiling the information presented to the workshop with a view to producing a green paper which would include a summary of the discussions held and recommendations made. He had agreed to let the Panel have the relevant papers together with a copy of the green paper for reference.

V. Overseas duty visit

19. The Chairman said that the LegCo Commission had invited Panels to submit bids for funds for members to conduct overseas duty visits. It might be worthwhile for the Panel to visit countries in western Europe to study the system of accountability of the executive. He invited members to give their preliminary views on his proposal. He hoped that the delegation could comprise members of different political parties and groups.

20. Dr YEUNG Sum, Ms Emily LAU and Mr CHEUNG Man-kwong considered that such a visit would be beneficial to the Panel's study.

21. Mr Howard YOUNG had reservations about the proposed visit. He pointed out that Macao was the only city the HKSAR Government could make reference to as it was also operated under the "One country two systems". He doubted whether any visit to European countries which operated under a different system of government would be useful and whether there was an urgency for the visit to take place within the current financial year.

22. Mr YEUNG Yiu-chung said that it might be better to invite academics to brief the Panel on the system of accountability of the executive in overseas countries before the Panel decided on the next course of action. Mr HUI Cheung-ching said that academics could be invited to submit written views to the Panel instead. He also pointed out that the proposed visit needed not be undertaken before March 2001.

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23. Mr SZETO Wah said that it was not possible for members to "see" how the system of executive accountability worked during an overseas visit. The Chairman explained that discussions with legislators of foreign countries during the visit could enhance members' understanding in this respect. Alternatively, members of overseas legislatures could be invited through their respective consulates in Hong Kong to brief the Panel on their respective systems. While he agreed that the Panel could bid for funds in March 2001 for the visit to be conducted in the next financial year, he hoped that members could make a decision on the proposal now.

Clerk

24. Ms Emily LAU suggested that a proposal on the objective and scope of the study visit, countries to be visited, timing, etc. should be prepared for members' consideration. The Chairman said that a paper on how the Panel should proceed with its study of the system of accountability for principal officials, including the details of the public consultation and the proposed overseas study visit would be prepared for members' consideration at the next meeting.

VI. Items for discussion at the next meeting on 18 December 2000
(LC Paper Nos. CB(2) 270/00-01(01) - (03), 288/00-01(02) and (03))

25. Members agreed that the following items be discussed at the next meeting on 18 December 2000 -

- (a) System of accountability for principal officials;
- (b) Enhancing the role and functions of the District Councils;
- (c) Legislation on CE election; and
- (d) Negative procedure for vetting of subsidiary legislation.

26. On item (c), the Chairman said that in response to the request of the Panel, the Chairman of the House Committee had met with the Acting Chief Secretary for Administration on 6 November 2000 urging the Administration to give more concrete information on the bill on CE election. The Administration promised to provide information in two to three weeks' time.

27. On the Chairman's invitation to brief members on the background to item (d), LA explained that under the existing negative vetting procedure, subsidiary legislation must be laid on the table of the Council at the next meeting after it was gazetted. It was legally in order for subsidiary legislation to take effect upon gazettal. Any Member who found such subsidiary

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legislation unsatisfactory might move a motion to amend it. A motion for amendment had to be moved at the Council meeting held not later than 28 days after the Council meeting at which the subsidiary legislation was laid. However, should Members decide to extend the scrutiny period by means of a resolution, the 28-day scrutiny period could be extended by one Council meeting.

28. LA further explained that prior to 1993, the 28-day scrutiny period might be extended by another 21 days by means of a resolution. The procedure was then considered too rigid. This was because in the case that the extended period fell within a LegCo recess, Members would have no choice but to complete the scrutiny work within the normal 28-day period. The procedure had subsequently been amended to its present form in which the scrutiny period was extended by a Council meeting instead of a period of 21 days. He advised that a long scrutiny period was undesirable as it could make the continued validity of subsidiary legislation uncertain, while a short scrutiny period might leave insufficient time for Members to examine subsidiary legislation in some circumstances.

LA

29. The Chairman said that a possibility to resolve the problem was to extend the scrutiny period by one Council meeting or 21 days, whichever was the longer, so as to provide more flexibility to LegCo in handling complicated and lengthy subsidiary legislation. The Chairman suggested that LA should prepare an information paper on the historical aspect of the negative vetting procedure. Ms Emily LAU said that LA might also include in the paper options to improve the existing procedure for members' consideration.

30. The meeting ended at 3:45 pm.

Legislative Council Secretariat
8 January 2001