

立法會

Legislative Council

LC Paper No. CB(2)2208/00-01

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by the Administration)

Ref : CB2/PL/CA

Legislative Council Panel on Constitutional Affairs

Minutes of meeting held on Monday, 21 May 2001 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 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

Members Absent : Hon James TIEN Pei-chun, JP

Public Officers Attending : Item III

Mr Robin IP
Deputy Secretary for Constitutional Affairs

Mr Chris SUN
Assistant Secretary for Constitutional Affairs

Item IV

Mr Joseph W P WONG, JP
Secretary for the Civil Service

Mr Thomas CHAN
Principal Assistant Secretary for the Civil Service
(Appointments) (Special Duties)2

Mr Clement MAK
Acting Secretary for Constitutional Affairs

Mrs Philomena LEUNG
Principal Assistant Secretary for Constitutional Affairs

Item V and VI

Mr Joseph W P WONG, JP
Secretary for the Civil Service

Ms Anissa WONG, JP
Deputy Secretary for the Civil Service (1)

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

Staff in Attendance : Mr Jimmy MA
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

Miss Yvonne YU
Senior Assistant Secretary (2)7

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I. Confirmation of minutes of meetings
(LC Paper Nos. CB(2)1544/00-01 and CB(2)1542/00-01)

The minutes of the meetings on 3 March 2001 and 19 March 2001 were confirmed.

II. Items for discussion at the next meeting on 12 June 2001
(LC Paper No. CB(2)1573/00-01(01))

2. Members agreed that the following items be discussed at the next meeting on 12 June 2001 -

- (a) Electoral Affairs Commission's Report on the 2000 LegCo By-election held on 10 December 2000;

- (b) Mechanism for amending the Basic Law; and
- (c) Development of the HKSAR's political system.

III. The question of "important bill" under Article 50 of the Basic Law
(RLSD Research Report on "Parliamentary Handling of Non-Ordinary Bills", LC Paper Nos. CB(2)1573/00-01(02) - (03) and CB(2)1601/00-01(01))

3. The Chairman recapped the background of the agenda item. He said that arising from previous discussions on the interpretation of the word "budget" under Articles 50 and 51 of the Basic Law (BL), the Panel raised concern about the meaning of "important bill" in BL 50. BL 50 stipulated that if the Chief Executive (CE) of the Hong Kong Special Administrative Region (HKSAR) refused to sign a bill passed the second time by the Legislative Council (LegCo), or the LegCo refused to pass a budget or any other important bill introduced by the government, and if consensus still could not be reached after consultations, CE might dissolve the LegCo. The Panel had subsequently requested the Research and Library Services Division (RLSD) of the LegCo Secretariat to prepare a research report on "Parliamentary Handling of Non-Ordinary Bills" which was submitted to the Panel on 7 May 2001. The agenda item was last discussed with the Administration at the meetings on 19 December 1999 and 19 June 2000.

4. Deputy Secretary for Constitutional Affairs (DSCA) referred members to the Administration's paper (LC Paper No. CB(2)1601/00-01(01)). He said that in drawing up the proposed arrangements to implement BL 50 in relation to an important bill, the Administration would take into account members' views, the general scheme of things in the BL and the actual situation in Hong Kong, and make reference to the French and British systems where appropriate. Given that BL 50 aimed at providing a special measure to resolve a grave constitutional impasse between the executive and the legislature and had far-reaching implications, the Administration would need more time to study the matter before reverting to the Panel.

5. Ms Emily LAU raised two points. First, she asked the Administration to advise on the legislative intent of BL 50. Secondly, she asked whether the Administration could confirm that BL 50 would not be invoked until the procedural arrangements for implementing the provision were put in place. On the second point, the Chairman added that members were particularly concerned that CE might declare a bill as "important" only after LegCo had refused to pass the bill or proposed amendments to the bill. He urged the Administration to give an undertaking to the effect that BL 50 would not be invoked before any mechanism for its implementation had been agreed

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between the Administration and LegCo. DSCA said that he would need to consult other departments before he could give a reply to the points raised.

6. Paragraph 10 of the Administration paper stated that "Questions such as whether important bill should be defined and when should CE declare a bill as "important" for the purpose of BL 50 will have to be addressed." Mr CHEUNG Man-kwong and Mr SZETO Wah pointed out that the paragraph gave an impression that CE had the sole discretion to decide whether a bill was "important". They expressed worry that BL 50 could be used by CE as a powerful weapon to dissolve LegCo.

7. Miss Margaret NG said that it was important for the Administration and LegCo to reach consensus on a mechanism for implementing BL 50 as soon as possible. However, it was not necessarily the case that the Administration could not invoke BL 50 in the absence of such a mechanism. In the circumstances, she asked LA to provide legal advice on two points. First, she would like to know whether the Administration could invoke BL 50 in the absence of an agreed mechanism for implementing the provision. Secondly, in the event that the CE had declared a bill as an "important bill" before an agreed mechanism was in place, whether his decision was justiciable in court.

8. LA said that as BL was a constitutional document, it only stated general principles. BL 50 could be invoked if a number of factors had taken place, e.g. when LegCo refused to pass an "important bill". The definition of an "important bill" was the subject matter now under discussion by the Panel. In his view, any agreement made between the Administration and LegCo on the question of "important bill" was not a legally enforceable arrangement. There would not be any legal sanction if the agreement was broken. In places where universal suffrage was implemented, the ultimate sanction against breaching such an agreement would be through the result of a general election, when a person might be voted out of office.

9. Mr CHEUNG Man-kwong said that it would be very dangerous if it was for CE alone to decide whether a bill was "important" for the purpose of BL 50, as the defeat of which might result in the dissolution of LegCo. Mr CHEUNG Man-kwong and Ms Emily LAU considered that there should be objective criteria and clear procedures for defining an "important bill". They stressed that BL 50 should not be invoked before LegCo and the Administration had agreed on a mechanism for implementing the provision in relation to an important bill.

10. The Chairman said that as indicated in the minutes of the meetings on 19 December 1999 and 19 June 2000 when the item was discussed by the Panel (LC Paper Nos. CB(2)1573/00-01(02) - (03)), the Administration had adopted a preliminary view that CE should have "unfettered flexibility" to decide whether a bill was "important" or not. He requested the

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Administration to take into consideration members' views and re-consider the matter in a more open-minded manner. DSCA agreed.

IV. System of accountability for principal officials

(LC Paper Nos. CB(2)1583/00-01(01) and CB(2)1601/00-01(02))

11. Secretary for the Civil Service (SCS) briefed members on the observations made during the duty visit to the New Zealand Government in Wellington, the Commonwealth Government of Australia in Canberra and the New South Wales State Government of Australia in Sydney (LC Paper No. CB(2)1583/00-01(01)). Acting Secretary for Constitutional Affairs (SCA) briefed members on the principles and scope of the review of the system of accountability of principal officials (LC Paper No. CB(2)1601/00-01(02)). He said that in conducting the review, the Administration would adhere to two important principles, i.e. any changes must be consistent with the Basic Law and the present civil service system must remain basically unchanged. As the review was still underway, he was unable to provide more details at this stage.

Political neutrality of principal officials

12. Referring to the Administration's advice about the need to maintain the neutrality of the civil service system, Mr CHEUNG Man-kwong raised two questions -

- (a) whether existing principal officials appointed from within the civil service were politically neutral, or whether this had never been the case as recently disclosed by the Secretary for Security (Mrs Regina IP); and
- (b) whether Mr Antony LEUNG, the Financial Secretary (FS) and Ms Elsie LEUNG, the Secretary for Justice (S for J) who were appointed to the rank from outside the civil service were politically neutral. Prior to their appointment as secretaries, the former often spoke on education policies, while the latter was a member of a political party.

13. SCA said that both FS and the S for J were civil servants, not political appointees. In conducting the review of the system of accountability of principal officials, the Administration would consider how best to put together a set of appropriate arrangements to address the current problems of principal officials having to shoulder political responsibilities which in other government systems were shouldered by political appointees. It also needed to consider the system of appointment of principal officials holding the positions of Secretaries of Departments and Directors of Bureaux, their working relationship with civil servants, and whether there needed to be any adjustment

to the structure and operation of the Government.

14. Mr CHEUNG said that SCA had not responded to his questions. In his view, the present system was unsatisfactory in that the two categories of principal officials mentioned in paragraph 12 above were considered by the Administration as politically neutral.

15. SCS explained that under the existing system, principal officials were civil servants and played an important role in policy formulation. They would put forward policy proposals to the CE in Council for approval. Any policy proposals approved by the CE in Council intact or with modifications would become Government policies. The principal officials were then required to explain and promote the approved policies. They could be considered to have a certain political stance if viewed in this perspective. SCS agreed that the system was unsatisfactory and needed to be reviewed. Referring to the Administration's duty visit, he pointed out that a common feature of all three governments visited was that the public service was an apolitical entity and separated from the political layer. He added that in the review being conducted, the Administration would consider ways to enhance the accountability of principal officials as well as to ensure that the present civil service system would remain politically neutral.

16. Dr YEUNG Sum said that although the Administration was considering to enhance the accountability of principal officials by offering political contracts to them, the situation was still unsatisfactory because the principal officials were only accountable to the CE, but not the public. Dr YEUNG considered that the best way to enhance the accountability of principal officials was to return both the CE and LegCo by universal suffrage as soon as possible. If principal officials were offered political contracts, constitutional conventions should be established such that when a motion of no-confidence was passed by LegCo on a political appointee, his contract must be terminated.

17. Mr SZETO Wah said that the Administration should refrain from saying that principal officials were "politically neutral" which had been publicly refuted by the Secretary for Security. In addition, the concept of political neutrality of civil servants arose from the need for them to remain apolitical in a political system where a single party commanded a majority in the Parliament or a coalition government by different political parties was formed. This was not the situation in Hong Kong. On the accountability system for principal officials, Mr SZETO said that some policies were not formulated by principal officials, but announced by CE in the Policy Address. It would be unfair to hold the bureau secretary concerned to be politically accountable for the outcome of the policies in the circumstances. An obvious example was the policy of producing a minimum of 85,000 housing units per year. He was of the view that unless the head of the government was held politically accountable, there would not be any real accountability system.

18. Ms Emily LAU said that she had never believed that bureau secretaries were apolitical. She opined that Administrative Officers (AOs) responsible for formulating policies should not be regarded as politically neutral. SCS said that there were over 500 AOs in the civil service. They were appointed or promoted on the basis of their ability, not political affiliation. In further response to Ms LAU, SCS said that certain officers at senior level including AOs were prohibited from participating in any form of electioneering activities for public elections so as to ensure that they would remain impartial.

19. The Chairman said that in considering the proposed accountability system for principal officials, some members were of the view that there should be two levels in a constitutional system, the political layer and the career civil servants. The political layer would be responsible for formulating policies and be held politically accountable. While the civil servants were apolitical, they would provide impartial support to the political layer in the formulation of policy proposals and options. Ideally, the political layer should be composed of persons who were directly elected. Alternatively, the political layer could be appointed by CE but had the majority support of LegCo.

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20. The Administration thanked members for their views which would be taken into consideration in the review of the system of accountability for principal officials.

Duty visit to Australia and New Zealand

21. Dr YEUNG Sum said that the Administration's paper on the duty visit fell short of referring to the political system of the two countries which was important in considering the proposed accountability system for principal officials. Ms Emily LAU said that the Administration had not presented the full picture of the political system of these places. For example, the fact that the ministers in both Australia and New Zealand were Members of the Parliament returned by direct election was not mentioned.

22. SCS explained that the paper set out some observations arising out of the duty visit to Australia and New Zealand. It was not the intention of the Administration to adopt any of these political systems as a blueprint for the HKSAR. As head of the Civil Service Bureau, he was more interested in the civil service management and progress of public sector reforms of these governments. However, the delegation also took the opportunity to be briefed on the working relationship between public servants and political appointees.

23. Mr HUI Cheung-ching and Ms Emily LAU asked whether the public sector reforms in Australia and New Zealand such as decentralization of staff management responsibilities, removal of permanent employment and security of tenure, and adoption of a flexible retirement benefits system to replace the

pension schemes were generally accepted by public servants and the community.

24. SCS replied in the positive. He said that all these governments had started their public service reforms in 1980s. It was interesting to note that such reforms also had the support of trade unions which believed that staff would have better advancement opportunities when individual departments were given high degree of autonomy and flexibility in employing and managing their own staff.

25. The Chairman asked whether staff were required to join the trade unions under the closed shop agreement. SCS said that he did not have the information in hand as the delegation had not met any trade unions during the visit. In further response to the Chairman, he advised that many senior civil service vacancies in Australia and New Zealand were open for recruitment. The majority of senior public servants there were now employed on open-ended contracts.

V. Employment arrangement for principal officials

VI. Responses of the Secretary for Civil Service to questions raised by members on "Employment arrangements for principal officials" at the meeting on 19 March 2001 - to be raised by Hon Emily LAU Wai-hing
(LC Papers No. CB(2)1079/00-01(04), CB(2)1441/00-01(02) and CB(2)1573/00-01(04) -(05))

26. The Chairman said that items V and VI should be discussed together. He said that SCS had briefed the Panel on the employment arrangements for principal officials at the meeting on 19 March 2001. As SCS refused to reply to some of the questions raised by members at the meeting, Ms Emily LAU was dissatisfied with his attitude. At the last Panel meeting on 7 May 2001, she suggested that the matter should be raised at the House Committee. The Panel agreed to defer a decision to this meeting.

27. SCS said that the appointment and removal of principal officials was governed by Article 48(5) of the Basic Law. At present, principal officials were employed as civil servants. In accordance with the prevailing civil service arrangements, incumbents of all principal official posts were subject to integrity checking. In response to members' views expressed at the Panel meeting on 7 May 2001, he would provide further information on two aspects at this meeting : integrity checking system and employment contracts of principal officials.

28. SCS explained that the Administration was unwilling to disclose the timing for conducting the integrity checking of any civil servants including

principal officials because the information and procedures involved were by their nature secret. Under the existing practice, the Administration would destroy all the relevant information after the integrity checking was completed. Nevertheless, he had taken the unusual step to confirm at the Panel meeting on 19 March 2001 that Mr Antony LEUNG's integrity checking and medical examination had been completed.

29. SCS further explained that he had advised members in his letter dated 27 April 2001 that Mr LEUNG had signed an employment contract which provided for the prevailing civil service terms of conditions applicable to the rank of D9 of the Directorate Pay Scale. He had also provided a copy of the Memorandum on Conditions of Service which was applicable to Mr LEUNG for the Panel meeting on 19 March 2001. SCS added that the Administration was willing to answer questions relating to employment matters and conditions of service as applicable to civil servants in general. However, it would not disclose the specific terms and conditions of service for any particular government employees as those details were personal data and were a matter between the Government and employees. As such, the Administration could not disclose the exact details of the employment contract with Mr LEUNG including the date of signing the contract. In his view, the date was not important as long as the contract was signed upon satisfactory completion of all recruitment formalities including integrity checking and medical examination.

30. SCS further advised members that as the Administration was reviewing the system of accountability for principal officials, he welcomed views from members on the matter including the integrity checking system.

31. Mr CHEUNG Man-kwong said that the Administration was still evading from the crux of the matter. The Panel was concerned about whether Mr LEUNG's case had departed from established Government's policy for integrity checking to be completed prior to appointment. The Panel was also concerned about whether the Administration would review the procedure to ensure that no similar incidents would occur in future, if Mr LEUNG's case had not been handled properly. In view of the Administration's position on the matter, how Mr LEUNG's case was handled would never be known. However, it was his guess that Mr LEUNG's integrity checking was completed after appointment by the Central People's Government (CPG). Mr CHEUNG considered that it would be much better if the Administration could admit that a mistake had been made due to its lack of experience in handling the appointment of principal officials on agreement terms and undertake to adhere to the Government's policy in future. He pointed out that as Mr LEUNG had passed the integrity checking, it was the appointment procedure, rather than the appointment per se was at fault.

32. The Chairman reiterated that members were concerned about the system of appointment of principal officials on civil service agreement terms, not the

appointment of individual principal officials. The Chairman said that the Administration should consider how to interface the procedures involved in the appointment of principal officials, i.e. their nomination and appointment by CE and CPG respectively under Article 48(5) of the Basic Law, and their employment by the HKSAR. Ms Emily LAU stressed that the Administration must follow the Government's policy in conducting integrity checking for employment purposes.

33. Mr Howard YOUNG reckoned that in the case of Mr LEUNG, the announcement of the appointment might be required to be made the soonest for political or other reasons. However, he pointed out that it would put the CE and the CPG in a difficult position if a principal official, who had been appointed by the CPG, was later found to be unsuitable for appointment to the post because he had failed to pass the integrity checking or medical examination. He was of the view that it was desirable to announce an appointment after completion of all the necessary employment procedures.

34. Ms Emily LAU referred members to the verbatim transcript of the discussion on the item at the Panel meeting on 19 March 2001 (LC Paper No.1573/00-01(05)). She said that from the verbatim transcript, it could be seen that the attitude of SCS was very unacceptable. As one of the functions of the LegCo was to monitor the Government, public officials had the responsibility to answer questions raised by members. Any public official who was unable to provide an answer at the meeting could furnish a written reply after the meeting. However, it was unacceptable for a public official to refuse to answer members' questions outright. This would be detrimental to the relationship between the legislature and the executive. The Administration must take a serious view on the matter.

35. SCS thanked Ms LAU's for her view. He said that as recently pledged by the Chief Secretary for Administration, all civil servants would try their best to enhance their communication with LegCo Members. He explained that when he advised members that he would not answer certain questions at the previous meeting, he was meant to say that he had nothing to add or that he could not disclose the information. He hoped members would appreciate that he had provided further information to the Panel and had personally attended two Panel meetings for discussion of the item. Ms Emily LAU said that SCS, as head of the civil service, should set a good example for civil servants to follow.

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VII. Any other business

Draft report of Panel on HKSAR Precedence Table
(LC Paper No. CB(2)1573/00-01(06))

36. The draft report of Panel on HKSAR Precedence Table to the House Committee was endorsed.

37. The meeting closed at 4:45 pm.

Legislative Council Secretariat
24 August 2001