

LS/B/30/01-02
2869 9457
2877 5029

Mr C S Wai
Prin AS (W)3
Environment, Transport and Works Bureau
11 Murray Building
Garden Road
Hong Kong

By Fax (2536 9299) and By Post

4 November 2002

Dear Mr Wai

Land (Miscellaneous Provisions) (Amendment) Bill 2002

Further to the discussions of the Bills Committee with the Administration at its last meeting on 24 October 2002, I wonder if you could provide more information on the following:-

Record of Criminal Convictions

1. The question of whether convictions of minor offences should bar the issue of Certificate of No Criminal Conviction ("CNCC") had attracted considerable attention in the 1980s and 1990s. The issue was discussed between Members and the Administration on several occasions at the meetings of then OMELCO Panel on Security and LegCo Panel on Security.

2. For your easy reference, the following papers on this subject are herewith enclosed:-

- (a) Duty Roster Member's Report on a representation concerning the issuance of Certificate of No Criminal Conviction to OMELCO In-house Meeting held on 3 April 1992;
- (b) Record of meeting of OMELCO Panel on Security held on 30 April 1992 (extracts); and
- (c) Record of meeting of LegCo Panel on Security held on 9 February 1993 (extracts).

3. It seems that, from the information then available, the Police maintained records of criminal convictions. It was the Police who determined which crimes or offences

should be included in the List of Recordable Offences which formed the basis for considering whether or not to issue a CNCC. The List of Recordable Offences was reviewed by the Police annually. Please advise whether this is still the current practice.

4. According to the explanation given by the then Secretary for Security at the meeting on 30 April 1992, CNCCs were normally required by Hong Kong citizens for the purpose of emigration to foreign countries and governments of these countries had requested for inclusion of all convictions in the CNCC. The Administration considered it appropriate, as a matter of policy, to tell the truth about a person's convictions, whether or not "spent" under the Rehabilitation of Offenders Ordinance (Cap. 297), if so required by the foreign government. Please confirm whether this is still the view of the Administration. Please also advise whether this policy applies to the criminal sanctions imposed by the Land (Miscellaneous Provisions) (Amendment) Bill 2002.

Section 10Q

5. Section 10Q(1) makes provisions for the duties of the permittee and the nominated permittee of a principal excavation permit or principal emergency excavation permit in respect of safety precautions and support. Please clarify whether such duties are to be discharged by the permittee and the nominated permittee jointly or severally or jointly and severally.

6. Section 10Q(2) provides that "[a] permittee *and* nominated permittee who *contravenes* subsection (1) shall each be guilty of an offence ...". Please explain the operation of this subsection. Do you think that the drafting can be improved so as to more accurately reflect the Administration's intention of the provision?

Please let me have a reply as soon as possible, preferably before 12 November 2002.

Thank you.

Yours sincerely

Kitty Cheng
Assistant Legal Adviser

Encl

c.c. LA
CAS(1)2

OMELCO In-house Meeting
to be held on 3 April 1992

Duty Roster Member's Report on
a representation concerning the
Issuance of Certificate of No Criminal Conviction

Purpose

This paper :-

- (a) reports to Members a representation received by a Duty Roster Member concerning the issuance of Certificate of No Criminal Conviction (CNCC); and
- (b) seeks Members' agreement to refer the policy aspect of the representation to the OMELCO Standing Panel on Security for further consideration.

The Representation

2. On 30 January 1992, Duty Roster Member Hon Martin LEE received a representation from a Mr HUNG who was aggrieved that, although his previous conviction of Criminal Damage was regarded as 'spent' under the Rehabilitation of Offenders Ordinance, Cap. 297, the Commissioner (CP) had refused to issue a CNCC to him. According to him, his application for emigration to New Zealand was subsequently rejected. He states that as his past offence was very minor in nature, it is too harsh a punishment to deny him a CNCC, thus depriving his of an opportunity to emigrate.

Background

3. Mr HUNG claims that in early 1983, he had a row with a staff member of the MTRC over the replacement of a defective stored-value ticket and inadvertently damaged a glass panel at the MTR station office. He was charged, convicted and fined \$300. He has no other criminal conviction. This is confirmed by the Police.

Certificate of No Criminal Conviction (CNCC)

4. The Police maintain records of criminal convictions. CNCC are documents which are issued at the request of applicants who are required to produce them to foreign government for visa/immigration purposes. The Police consider that they are obliged to disclose 'recordable' offences to the foreign governments seeking CNCC even though the offences concerned may be regarded as 'spent' under the Rehabilitation of Offenders Ordinance.

5. Currently, the Police themselves determine what crimes or offences should be contained in the List of Recordable Offences which forms the basis for considering whether to issue a CNCC or not. The list is reviewed annually and at present contains some 127 offences, including "Criminal Damage". In deciding what to be included in the list, the Police apply the following criteria :-

- (i) gravity of the offence;
- (ii) the attitude in law to the offence with regard to the penalty that can be imposed;
- (iii) the requirement of the courts for knowledge of previous convictions when considering sentence; and
- (iv) the prevalence of the offence and the community's attitude towards it.

6. The CP's authority is apparently built on a ruling by the Court of Appeal in the case Regina Vs LI Hok-ming (No. CA 176/1978) in which the Appeal Court Judge stated that :-

" The Courts cannot dictate to the Commissioner of Police what records he shall keep, but they can properly direct that a determination which is not a conviction shall not be referred to as conviction in the Courts of this Colony. Outside the Courts, the Commissioner may keep such records as he thinks fit and use them for such purposes as he may be advised."

Rehabilitation of Offenders Ordinance Cap. 297

7. The Rehabilitation of Offenders Ordinance was enacted on 30 July 1986. The Ordinance is modelled after the UK Rehabilitation of Offenders Act. Broadly speaking, the Ordinance seeks to rehabilitate offenders who have not been reconvicted for 3 years (hence avoiding single minor offence destroying efforts at rehabilitation) and prohibits unauthorized disclosure of a rehabilitated offender's previous conviction, unless there is some specific need for disclosure. The result will be that once a conviction has become spent, evidence of the conviction will not, generally, be admissible in Court; the offender will not need to disclose it in answer to any question, and it will not be lawful ground for prejudice in relation to employment.

8. In moving the Second Reading of the Bill on 2 July 1986, the Attorney General stated, in relation to keeping a criminal records by the Police, that :-

" I should stress that the provision of this Bill will not, indeed cannot, affect the requirements of disclosure imposed by foreign laws on Hong Kong citizens wishing to emigrate. Requirements to make full disclosure of all convictions are imposed by the country of the intended destination, not by Hong Kong. A prospective emigrant will, if asked, have to reveal his conviction whether or not it is considered spent in Hong Kong, if a foreign law requires him to give an answer. Hong Kong legislation cannot change immigration procedures adopted by foreign states. It is to be hoped, however, that consistent with the spirit of this Bill, overseas authorities will ordinarily overlook a minor conviction where it has occurred some time previously. "

9. In May 1986, an unsuccessful applicant for CNCC sought an order of certiorari in the Supreme Court of Hong Kong to quash a decision by the Commissioner of Police to refuse to supply a CNCC for the purpose of his application for a resident visa in Portugal. The decision of the High Court Judge confirmed that the CP is obliged and has the authority to disclose a person's 'spent' conviction to a foreign government if requested to do so.

Public Views on the Rehabilitation of Offenders Ordinance
in relation to Certificate of No Criminal Convictions

10. In May 1988, a joint working party of the Bar Association and the Law Society published a paper proposing reform of the Rehabilitation of Offenders Ordinance (ROO). The paper suggested, among other things, that since the clear spirit and intent of the ROO was to assist the rehabilitation of an offender and not to have a finding of guilt characterised as a conviction, the whole object of the ROO was defeated if the authorities (Police) nevertheless revealed the spent conviction to a foreign government. The paper noted that in the UK the practice was not to reveal 'spent' convictions in the certificates they issued.

11. In May 1989, the Fight Crime Committee produced a public consultation paper entitled "Review of the Rehabilitation Scheme Under the Rehabilitation of Offenders Ordinance". In early 1991, the OMELCO Standing Panel on Security considered possible changes to the Rehabilitation Scheme and related issues. The Panel recommended, inter alia, that persons with "spent" convictions should be issued with clean CNCC, on the grounds that the spirit of the

Rehabilitation Scheme would be defeated if such convictions were shown on the CNCC. The recommendation was forwarded to the Administration.

Current Position

12. It is understood that following the public consultation, the Fight Crime Committee finalized its recommendations and submitted them to the Administration. The Security Branch has prepared the drafting instructions for the preparation of an amendment Bill. However, it is not yet clear when an amendment Bill may be introduced into the Legislative Council. It is unlikely that this can be done within the current LegCo Session.

Advice Sought

13. Members are invited to consider whether the policy aspect of the representation should be referred to the OMELCO Standing Panel on Security for further consideration, as suggested by the Duty Roster Member.

Complaints Division
OMELCO Secretariat

P1046

Ref : MP/17

Record of Meeting of OMELCO Panel on Security
held on 30 April 1992 at 10:45 a.m.
in Conference Room B of the Legislative Council Building

Present :

Hon Mrs Rita FAN, OBE, JP (Convener)
Hon Mrs Elsie TU, CBE (Deputy Convener)
Hon Mrs Selina CHOW, OBE, JP
Hon HUI Yin-fat, OBE, JP
Hon PANG Chun-hoi, MBE
Hon Ronald Arculli, JP
Hon Martin Barrow, OBE, JP
Hon Mrs Peggy LAM, MBE, JP
Hon Mrs Miriam LAU, JP
Hon Moses CHENG Mo-chi
Hon CHEUNG Man-kwong
Hon CHIM Pui-chung
Rev Hon FUNG Chi-wood
Hon Simon IP Sik-on, JP
Hon Emily LAU Wai-hing
Prof Hon Felice LIEH MAK, OBE, JP
Hon James TO Kun-sun
Hon Howard YOUNG
Hon Zachary WONG Wai-yin

Absent with apologies

Hon Edward HO, OBE, JP
Hon Martin LEE, QC, JP
Hon LAU Wah-sum, OBE, JP
Dr Hon LEONG Che-hung
Hon Marvin CHEUNG Kin-tung
Dr Hon Conrad LAM Kui-shing
Hon Gilbert LEUNG Kam-ho
Hon Stephen NG Ming-yum
Dr Hon Philip WONG

By invitation

Security Branch

Mr A P Asprey, Secretary for Security
Mr Isaac CHOW, Principal Assistant Secretary (3)
Mrs Marion Lai, Principal Assistant Secretary (7)

Immigration Department

Mr John YEUNG, Director of Immigration (Acting)

Royal Hong Kong Police Force

Mr D T Emmet, Regional Commander (New Territories)
Mr Mike Prew, CSO Crime/Support
Mr T K CHAN, CSO Crime/OCTG

In attendance

ASG2, OPS, CAST5, SAST10, AS5, AS6

I. Confirmation of record of meeting held on 9 April 1992
(OMELCO Paper No. 1026/91-92)

The record of the last meeting was confirmed.

II. Matters arising from record of the meeting held on 9 April 1992

(a) Attendance at regular meeting of District Fight Crime Committees (DFCC) (para.2)

2. Members endorsed the programme of Members' attendance at DFCC meetings which was tabled.

(b) Visit to Marine Police (Para.4)

3. Members agreed that the visit should take place in the morning of 11 June 1992. They would depart the Legislative Council Building at 10:00 a.m.

(c) Visit to the Hong Kong Island Regional Commander and Control Centre and the Computer Assisted Fingerprint Identification System (para.3)

4. Members endorsed the draft programme prepared by the Police which was tabled.

III. Strengthening Hong Kong as an International City
(OMELCO Paper No. 1027/92-92)

5. After some discussion, Members suggested to explore the following areas to strengthen Hong Kong's international foundation:

- (a) to strengthen Hong Kong's participation in and its link with the International Criminal Police Organization, commonly known as Interpol. The Administration should be invited to brief the Panel on the work of the Hong Kong Interpol Bureau and its working relationship/arrangement with the Interpol offices in other countries;

The Administration agreed to consider Members' requests and let Members have a paper setting out the Administration's considered views in due course.

(Mr Isaac CHOW and Mr John YEUNG left the meeting at this point.)

VI. Issuance of Certificates of No Criminal Conviction (CNCC)
(OMELCO Paper No. 622/91-92)

15. Mrs FAN welcomed Mrs Marion Lai and Mr Mike Prew to the meeting and asked about the current position of legislative amendments to the Rehabilitation of Offenders Ordinance (ROO). Mr Asprey said that the legislative amendments to the ROO would not be introduced into the Legislative Council this current session because the amendment bill could not get a slot in the 1991/92 Legislative Programme. He confirmed that the legislative amendments would not affect the current practice of issuance of CNCC which was an administrative arrangement. He then explained that CNCCs were normally required by Hong Kong citizens for the purpose of emigration to foreign countries. Governments of these countries had requested for inclusion of all convictions in the CNCC. The Administration considered it appropriate, as a matter of policy, to tell the truth about a person's convictions, whether 'spent' or not; if so required by the foreign government. He assured Members that all foreign consulates were aware of the Rehabilitation Scheme and they generally took a lenient attitude towards applicants with 'spent' and minor convictions.

16. Members were not convinced of the explanations. They pointed out that according to a paper published by a joint working party of the Bar Association and the Law Society, the UK Government did not reveal 'spent' convictions in the certificates they issued. It was therefore unfair for the foreign governments to require the Hong Kong Government to disclose all the 'recordable' convictions of the applicant. They considered it more important to follow the spirit of the Rehabilitation Scheme than to comply with the requirement of foreign governments. The current practice of including all 'recordable' convictions in the CNCCs was contrary to the spirit of the Rehabilitation Scheme and should be discontinued. At Members' request, Mr Asprey agreed to find out more about the practice in UK and to set out in a paper the Administration's position on the matter in the light of the findings.

(Mr Prew left the meeting at this point.)

VII. Law enforcement standards in the NT and the urban areas

17. Mrs Elsie TU chaired the meeting on behalf of Mrs FAN who had left the meeting due to another commitment. She welcomed Mr Emmet and invited him to brief Members on the law enforcement standards in the NT.

Ref : MP/17

LegCo Panel on Security

Record of Meeting held on
Tuesday, 9 February 1993 at 10:45 a.m.
in LegCo Chamber of the Legislative Council

- Present : Hon Mrs Elsie TU, CBE (Convener)
Hon Simon IP Sik-on, JP (Deputy Convener)
Hon Allen LEE, CBE, JP
Hon Mrs Selina CHOW, OBE, JP
Hon HUI Yin-fat, OBE, JP
Hon Martin LEE, QC, JP
Hon PANG Chun-hoi, MBE
Hon Edward HO, OBE, JP
Hon Martin Barrow, OBE, JP
Hon Mrs Peggy LAM, OBE, JP
Hon Mrs Miriam LAU, OBE, JP
Hon LAU Wah-sum, OBE, JP
Hon CHIM Pui-chung
Rev Hon FUNG Chi-wood
Hon Emily LAU Wai-hing
Hon LEE Wing-tat
Hon Gilbert LEUNG Kam-ho
Hon Eric LI Ka-cheung, JP
Dr Hon Philip WONG
Hon Howard YOUNG, JP
Hon Zachary WONG Wai-yin
Hon Christine LOH Kung-wai
- Absent with : Hon James TO Kun-sun (away from Hong Kong)
apologies
- Hon Ronald Arculli, JP)
Hon Moses CHENG Mo-chi) (other commitments)
Dr Hon Conrad LAM Kui-shing)
- Hon CHEUNG Man-kwong (indisposed)

By invitation:Security Branch

Mrs Marion LAI
Principal Assistant Secretary (Security)7

Dr Simon Vickers
Principal Assistant Secretary (Security)3

Mr Brian Bresnihan
Refugees Co-ordinator

Royal Hong Kong Police Force

Mr Mike Prew, CPM
Chief Staff Officer (Crime Support)

Immigration Department

Mr P T CHOY
Assistant Director (Control & Investigation)

Mr K S CHEUNG
Assistant Director (Special Duties)

Australian Consulate

Mr A E F Metcalfe
Regional Migration Director

Commission for Canada

Mr G K Campbell
Senior Immigration Counsellor

New Zealand Consulate

Mr R Patterson
Chief Migration Officer

The U S Consulate

Mr R H Williams
Consul (Consular)

In attendance: CAST2, SAST2, SAPS1

INTERNAL DISCUSSION

- I. Confirmation of record of meeting held on 12 January 1993
(LegCo Paper No. 1592/92-93)

The record was confirmed.

- II. Matters arising from record of meeting held on
12 January 1993
(LegCo Paper No. 1592/92-93)

- (a) Visit to the Royal Hong Kong Police Force, Station
Information Communal System (para 3)

2. Mr Simon IP, Mrs Selina CHOW, Ms Emily LAU and Mr James TO joined the second visit on 14 January 1993 to see the operation of the Station Information Communal System (SICS). Mr IP pointed out that SICS could be developed to produce bilingual charge sheets. However the Government maintained that bilingual charge sheets would not be introduced until the Laws of Hong Kong had been translated. This would take a long time. He said that the Police had working translation of many offences and were already using them in

their daily work. The Government should therefore provide official translation of these offences so that bilingual charge sheets could be introduced without delay. Members supported the view and agreed to discuss this at a future meeting. Meanwhile, Mr IP would seek the views of the Hong Kong Bar Association on the subject.

(b) Use of explosives in film shooting (para 4)

3. Members noted that the draft ExCo paper on proposals to relax the ban on fireworks was being circulated within the Administration for submission to ExCo before end February 1993.

(c) Dependants of Hong Kong residents residing in China (para 29)

4. Members were informed that a special meeting had been arranged to discuss the subject at 10:45 a.m. on 30 March 1993.

(d) Identity card and related service (para 32)

5. Members were informed that a letter requesting for provision of more resources for the identity card and related service had been sent to the Secretary for Security.

III. Agenda for the next meeting
(LegCo Paper No. 1593/92-93)

6. Members agreed that the next meeting should be held on 9 March 1993 to discuss the following subjects:

- (a) independent investigation of complaints against Police officers; and
- (b) attendance of Police representatives at LegCo case conferences of complaint cases.

7. As for the meeting in April, Members agreed that it should be held on 20 April 1993.

MEETING WITH THE ADMINISTRATION

IV. Issuance of Certificate of No Criminal Conviction (CNCC)
(OMELCO Paper No. 1200/91-92 and LegCo Paper No. 1594/92-93)

8. Mrs TU welcomed Mrs LAI, Messrs Prew, Metcalfe, Campbell, Patterson and Williams to the meeting.

9. Mrs LAI recapitulated the previous discussion of the subject at the Panel meeting of April 1992 and briefed Members on the definition of spent conviction and the current practice of issuing CNCC. She explained that under the Rehabilitation of Offenders Ordinance (ROO), where a person, on a first conviction, was not sentenced to death, a prison term or a fine exceeding \$5,000, the conviction should be treated as "spent" and be disregarded for most purposes after three years so long

as there were no further convictions. CNCC, which was normally required by overseas consulates for assessing immigration applications, was issued by the Police upon application. Applicants with spent conviction would not be issued with CNCC. Instead, they would be given a refusal letter with information that the conviction revealed was regarded as spent in Hong Kong. Members considered this practice of revealing spent conviction contrary to the spirit of the ROO and suggested that CNCC be issued to applicants with spent conviction as well. They also asked the Administration to find out the practice in the United Kingdom (UK).

10. Mrs LAI went on to say that enquiries with the Scotland Yard on their practice had revealed that they did not issue CNCC or similar documents because the police records were confidential and were for use by the police in connection with their official duties. The Administration had discussed Members' suggestion with the consulates of major emigration destination countries. The consulates considered the current practice of revealing spent convictions useful in their assessment of the immigration applications because the spent conviction, though minor in nature, would provide useful information on the applicants' background. All consulates consulted required immigration applicants to declare their previous convictions, whether spent or not, in application forms. They anticipated that longer processing time for all applicants would be required if CNCCs were issued also to persons with spent convictions. As vast majority of emigrants did not have any conviction, Members' suggestion would in fact be detrimental to these people. Mrs LAI said that to her knowledge, persons with spent convictions would not be automatically denied immigration visas. Indeed, a large proportion of persons with such convictions had been successful in their applications for emigration. Experience of some countries was that they had refused more applicants on the grounds of not honestly declaring their convictions than declaring the spent convictions. Having considered the consulates' views and in the interest of the vast majority of emigrants who did not have any convictions, the Administration concluded that the present practice of issuing CNCC and disclosing spent convictions to the consulates for emigration purpose should continue. It was also not considered necessary to draw direct parallel with the UK since every place had its unique circumstances.

11. In response to Members' enquiries, the consular representatives explained that they drew a distinction between the rehabilitation programme of their home countries and the immigration activity. As the receiving end of immigrants, they had to carefully scrutinize the applicants in order to decide their qualification for immigration. All applicants irrespective of their country of residence were therefore required to disclose in their applications all their past criminal convictions, regardless of the nature and sentence. Such information would help them understand the applicants' conduct and character and to decide whether further enquiries

would be required. The present system of the Hong Kong Government to provide consulates with criminal records of the applicants had helped them a lot in their processing, without which more stringent interview requirement would have to be enforced, thus complicating and lengthening the whole procedure. This happened to those countries which did not operate a system similar to that of Hong Kong. They assured Members that the arrangement was intended to facilitate processing and not to block immigrants with minor convictions. Mr Metcalfe and Mr Patterson advised that to their knowledge no applicants for immigration to Australia and New Zealand had been rejected solely on grounds of their spent convictions. Mr Campbell said that the overall refusal rate on criminal conviction was very low in Canada, less than 5%. Mr Williams said that the number of people unqualified for immigration to the States because of criminal records was low. He would try to see if exact figures could be made available for Members' information.

12. In reply to Mrs TU, Mr Patterson said that applicants denied residence in New Zealand would be informed of the reasons of the refusal and the appeal channel through which they could appeal against the decision of the New Zealand Immigration Service.

13. One Member held the view that the ROO and CNCC were different subjects. The ROO was intended to help rehabilitate Hong Kong citizens with minor offences while CNCC was for emigration purpose. He felt that conviction records should not be supplied automatically to the consulates. Instead, the consulates should approach the Police for information whenever required.

14. Mrs LAI agreed that the ROO and CNCC were two separate issues. They were linked up mainly because of the disclosure of spent conviction. The ROO was at present under review. It was hoped that legislative amendments could soon be introduced into the Legislative Council. Mr Prew said that when the ROO was drafted, both the Legal Department and the major consulates were consulted. Having regard to the legal advice and the views of the consulates, the present system of disclosing spent convictions to consulates was adopted.

15. In reply to a Member's enquiry on whether CNCC would be issued to applicants for the purpose of seeking jobs, Mrs LAI said that the Police practice was to restrict the issue of CNCC to applicants for emigration purpose. Mr Prew added that the practice was historical rather than legal. Mr Simon IP suggested to discuss the legal provision on the issue of CNCC at a future meeting.

(Mrs LAI, Messrs Prew, Metcalfe, Campbell, Patterson and Williams left the meeting.)