

立法會

Legislative Council

LC Paper No. CB(2)1189/ 01-02

(These minutes have been
seen by the Administration)

Ref : CB2/PL/CA

**Legislative Council
Panel on Constitutional Affairs**

**Minutes of meeting
held on Monday, 21 January 2002 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, GBS, JP
Hon CHEUNG Man-kwong
Hon HUI Cheung-ching, JP
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon YEUNG Yiu-chung, BBS
Hon SZETO Wah
Hon IP Kwok-him, JP

Member Attending: Hon Cyd HO Sau-lan

Member Absent : Hon Margaret NG

Public Officers Attending : Items III & IV

Mr Michael M Y SUEN, GBS, JP
Secretary for Constitutional Affairs

Mr Clement MAK
Deputy Secretary for Constitutional Affairs

Mrs Philomena LEUNG
Principal Assistant Secretary for Constitutional Affairs

Mr Robert ALLCOCK
Solicitor General
Department of Justice

Mr James O'NEIL
Deputy Solicitor General
Department of Justice

Item V

Ms K Y CHANG
Deputy Director of Administration

Ms Maggie WONG
Assistant Director of Administration

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

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

Item III

Mr Watson CHAN
Head, Research and Library Services Division

Mr CHEUNG Wai-lam
Research Officer 2

Ms Elyssa WONG
Research Officer 4

Action
Column

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)922/01-02)

The minutes of the meeting held on 17 December 2001 were confirmed.

II. Items for discussion at next meetings

(LC Paper Nos. CB(2)921/01-02(01) and 821/01-02(01))

Items for meeting on 18 February 2002

2. Members agreed that the following items should be discussed at the next meeting on 18 February 2002 -

- (a) Restrictions on activities of former heads of government and former senior members of government; and
- (b) Issues relating to employees of subvented organizations taking up public offices.

3. Members agreed that the Panel should invite academics to submit views on item (a) above. Copies of the Research Report on "Restrictions on Activities of Former Heads of Government and Former Senior Members of Government" provided by the Research and Library Services Division (RLSD) would be provided to the academics to facilitate their consideration of the subject.

Items for meeting on 18 March 2002

4. Members agreed that the following two items could be discussed at the meeting on 18 March 2002 -

- (a) Restrictions on activities of former heads of government and senior members of government; and
- (b) Hong Kong 2001 Population Census - Basic Tables for Constituency Areas.

III. Research projects undertaken by Research and Library Services Division

Research Report on "Restrictions on Activities of Former Heads of Government and Former Senior Members of Government"

(RP02/01-02 circulated under LC Paper No. CB(2)887/01-02)

5. At the invitation of the Chairman, Head, Research and Library Services Division (H/RL) briefed members on the above Report which set out the arrangements relating to post-office restrictions on activities of former heads of government and former senior members of government, including ministers, political appointees and senior civil servants in overseas countries. Five overseas countries and places were chosen for the research exercise, i.e. France,

the United Kingdom (UK), the United States (US), California of the United States (California) and Ontario of Canada (Ontario). The gist of the research findings was as follows -

Post-office restrictions for heads of government

- (a) In France and the US, there was no written rule governing post-office activities undertaken by former heads of government. Convention, media comments and public reactions etc appeared to have the effect of deterring unethical behaviour of the persons;
- (b) The UK Ministerial Code required former heads of government on leaving office to seek advice from the Advisory Committee on Business Appointments on any appointments they wished to take up within two years of leaving office;
- (c) In California and Ontario, post-office restrictions were underpinned by statute;

Post-office restrictions for senior members of government

- (d) In France, there was no legislation governing activities undertaken by former ministers of government. There was a decree governing activities of former members of ministerial cabinets within five years after leaving office;
- (e) In the UK, post-office restrictions applicable to former heads of government also applied to former ministers. Ministers generally followed the rules laid down in the Ministerial Code;
- (f) In the US, California and Ontario, there was legislation governing post-office restrictions for former senior members of government;
- (g) In most of the countries and places under study, there were written rules governing activities undertaken by former senior civil servants;

Mechanism relating to post-office restrictions

- (h) In France, the government was required to consult the Ethics Commission about the suitability of employment intended to be undertaken by members of ministerial cabinets and senior civil servants within five years of leaving government. The final decision, however, rested with the government;

- (i) In the UK, former heads and ministers of government, by convention, sought advice from the Advisory Committee on Business Appointments about appointments they intended to take up within two years of leaving office. However, the Advisory Committee would not take any action against any person if he did not follow its advice. Senior civil servants in the UK were required to obtain government approval before taking up any employment within two years of leaving government;
- (j) In the US, Ontario and California, there was no requirement for members of government to seek approval for their post-office job plans. However, there were offence provisions specified in the legislation governing post-office restrictions.

6. Dr YEUNG Sum asked whether the Administration would consider introducing post-office restrictions on the activities of the Chief Executive (CE) as well as restrictions (during and after leaving office) on the principal officials who would be politically appointed under the proposed new accountability system. Secretary for Constitutional Affairs (SCA) replied that the Administration was currently undertaking a study on the relevant issues. It would take public views into consideration and report to the Panel when it had come up with certain recommendations.

7. Ms Emily LAU said that she was in favour of implementing a statutory mechanism for regulating post-office activities of former CEs and former senior members of government to avoid conflict of interest. She suggested that in addition to providing a fact-finding research, the RLSD might also conduct a comparative analysis to assess the effectiveness of the different systems adopted in the countries and places covered in the research and the problems encountered, so as to assist the Panel in a more in-depth consideration of the issues.

8. Research Officer 4 (RO4) said that according to the reply from the UK Consulate General, the existing practices in the UK worked satisfactorily. Ministers generally complied with the rules laid down in the Ministerial Code. Former ministers, by convention, sought advice from the Advisory Committee on Business Appointment on any appointments they wished to take up within two years of leaving office. When a former minister took up a post which the Advisory Committee had considered, the Advisory Committee's advice would be published in its annual report for public scrutiny. RLSD also got favourable feedback regarding the monitoring system in Ontario.

9. RO4 added that an assessment of the relative effectiveness of the systems operating in the overseas countries might need to be based on information such as statistics on prosecutions or sanctions against non-

compliance of the post-office restrictions. However, such data were scarce and difficult to obtain.

10. The Chairman expressed the view that a comparative study on the effectiveness of the systems as suggested by Ms Emily LAU would involve more complicated research efforts. He added that even if RLSD could come up with any concluded views or recommendations, they would not likely to be agreed to by all members of the Panel.

11. In response to Mr CHEUNG Man-kwong, RO4 said that post-office restrictions for former heads of government in the places under study mainly took the form of restrictions on standing for elections to the head of government, future employment, making contracts with the government or seeking to influence government decisions for compensation etc. The practices adopted varied among the places covered in the study and they were set out in Table 2 and paragraphs 5.2 to 5.13 of the Report.

12. Mr CHEUNG Man-kwong noted that as opposed to the situation in the UK, there were no written rules nor legislation in the US and France limiting the activities of former heads of government. Deterrence was only in the form of public expectation, media comments and threat of hostile public reactions etc.

13. RO4 said that according to the replies from the Consulate General of France and the US Office of Government Ethics, the use of convention for regulating activities of former heads of government were considered effective.

14. The Chairman opined that the reason for adopting different practices could possibly be attributed to the fundamental differences between the two major systems, i.e. presidential versus parliamentary system of government.

15. In response to Ms Cyd HO, RO4 said that in the five countries and places studied there were no statutory post-office restrictions on former senior members of government accepting appointments to offices with substantive political power.

16. In reply to Mr HUI Cheung-ching's questions on post-office benefits, SCA said that the Administration had not considered providing the principal officials appointed under the new accountability system with retirement benefits such as pensions. The arrangements with respect to CE would be considered in due course.

17. The Chairman said that issues relating to remuneration and terms of employment of principal officials could be further considered in the context of the system of accountability for principal officials.

Action
Column

RLSD

18. After further discussion, members requested H/RL to provide the following additional information for the Panel's consideration -

- (a) the relevant statutory provisions on post-office restrictions in the US and Ontario;
- (b) terms of office of the various regulatory or advisory authorities in the overseas countries and places and other relevant information such as whether members of those bodies were appointed on full-time or part-time basis;
- (c) whether or not there were post-office restrictions in the countries and places studied on former heads of government and senior members of government taking up paid public offices which might be perceived as involving conflict of interest in relation to their duties when in office;
- (d) a comparison table setting out post-office restrictions on and benefits for former heads of government, former ministers/political appointees/elected officials and former senior civil servants in the countries and places; and
- (e) post-office restrictions, if any, on activities of officials in the People's Republic of China equivalent to the rank of CE.

Draft research outline on "Process of Appointment of Senior Members of Government in Selected Countries"

(LC Paper No. CB(2)921/01-02(02))

19. The Chairman said that the Administration had previously advised that it would be for the CE in the second term to decide whether and if so, when the proposed system of accountability for principal officials would be implemented. Details of the accountability system would be worked out by the Administration in the next few months. To facilitate the Panel's consideration, the RLSD had been requested to undertake a research project to study the process of appointment of senior members of government (i.e. political appointees such as ministers and heads of departments) in the US, the UK, France and Singapore.

20. Members endorsed the proposed research outline prepared by RLSD (circulated vide LC Paper No. CB(2)921/01-02(02)).

21. Ms Emily LAU and Dr YEUNG Sum opined that the research project by RLSD should be completed as soon as possible before the Administration finalized the details of the accountability system.

22. As it was anticipated that the part of the research project on France would likely take a longer time to complete, members agreed that the RLSD should first deal with the parts concerning the US, the UK and Singapore. H/RL was requested to present the report for the consideration of the Panel at the meeting on 18 March 2002.

IV. System of accountability for principal officials

(LC Paper Nos. CB(2)194/01-02(01); 387/01-02(01) to (03); 421/01-02(01) to (05); 441/01-02(01) & (02); 675/01-02(03); 693/01-02(01); and 921/01-02(03))

23. Members noted that the Administration had prepared a paper for the consideration of the Panel (circulated vide LC Paper No. CB(2)921/01-02(03)) in response to the issues raised in connection with the post of Secretary for Justice (SJ) at the last meeting on 17 December 2001.

24. The Solicitor General (SG) introduced the paper. In summary, the Administration advised that it had reconsidered its position having regard to members' views expressed at the last meeting as well as the Bar Association's submission on the subject. The Administration remained of the view that the proposal to include SJ in the proposed accountability system was appropriate. The Administration did not propose to adopt a system similar to that in Australia or New Zealand in respect of the office of SJ. In its opinion, the proposed arrangements under the new accountability system would not alter the position in law or in practice in relation to the requirement for SJ to act independently, particularly in making prosecution decisions free from interference.

25. SG added that the Administration had also considered the question of whether either the Administration's proposal, or the Bar Association's proposal, would contravene Article 63 of the Basic Law (BL). He said that the Administration was of the view that its proposal was in compliance with BL 63. As regards the Bar Association's proposal to have the legal roles of SJ (which the Administration interpreted as roles in relation to prosecution decisions and other quasi-judicial functions) transferred and discharged by another Law Officer so that SJ was only responsible for legal policies, the Administration's view was that it was permissible for SJ to delegate the powers to a Law Officer whilst retaining ultimate control and responsibility. However, a complete transfer of those powers and responsibilities would amount to an abdication of SJ's duties as head of the Department of Justice and was likely to be inconsistent with BL 63. It would also work against the move towards greater accountability. He added that at present, in practice, some of the functions of SJ were delegated to Law Officers, including roles in relation to prosecution decisions which were delegated to the Director of Public Prosecutions (DPP). But SJ remained ultimately responsible for those decisions.

26. Ms Emily LAU said that she had no misgivings about CE choosing people who held the same visions as his for policy goals and were prepared to lend support to CE in pursuing those policies. However, from the point of view of achieving true accountability, there must be a system which could ensure that the principal officials would be held ultimately accountable to the public, rather than to the CE alone. In this regard, she said that she was in favour of adopting a system similar to that in the United States where the legislature had a part to play in appointing and removing senior government officials.

27. SCA said that it was clearly stipulated in the BL that the authority to recommend for the appointment and removal of principal officials vested entirely in the Chief Executive. However, this did not mean that the principal officials, in carrying out their duties, could afford to ignore public opinion. He said that the objective of the proposed accountability system was precisely to bring the impact of public expectations to bear effectively on the conduct of principal officials.

28. Concerning the development of conventions relating to the accountability of principal officials, SCA said that the BL had no such provision. No one could say how things might develop in future, and the Administration could not rule out such a possibility. Conventions might emerge out of a whole series of actual precedent cases. The Administration would have to see what might happen in the goodness of time.

29. Regarding the issue of including SJ in the accountability system, Ms Emily LAU said that the concern was that by making SJ a political appointee, it would give rise to a public perception that the independent and impartial roles of the Department of Justice might not be adequately safeguarded. She pointed out that the handling of the Sally Aw case by the Administration had cast a huge shadow over the minds of the public as to whether the SJ's decision of not prosecuting in the case was a fair and independent decision not influenced by favouritism or cronyism or other considerations. To make the office of SJ a political appointment would further undermine people's confidence in the rule of law in Hong Kong as the public would feel worried that similar controversies would occur again in the future.

30. SG said that it was fairly common for there to be controversies with regard to prosecution decisions due to the inherently complicated nature of prosecution matters. The Department of Justice had set out clearly in a publication for public information the principles which would be adhered to by the Department in taking prosecution decisions, how such decisions were taken independently, and what proper procedures had to be followed etc. If in some cases there were misconceptions that prosecution decisions had not been made independently, the Administration would do its best to correct the

misconceptions. He added that the pertinent issue was how ultimate accountability for prosecution decisions should be achieved. In view of the fact that prosecution decisions and other quasi-judicial functions of the Department of Justice had great implications for the public interests, the Administration considered that it would be more appropriate to place ultimate responsibility on SJ under the new accountability system than on a permanent civil servant.

31. Ms Emily LAU said that she did not think that the public concerns about the impartiality of SJ's decision arising from the Sally Aw case were purely misconceptions. She said that she would not support a system which in the eyes of the public might give rise to injustice. She opined that the Administration should seriously reconsider the desirability of adopting a system similar to that in Australia or New Zealand.

32. Mr CHEUNG Man-kwong referred to paragraph 10 of the Administration's paper which stated that "...Prosecution decisions would continue to be made by the Department of Justice, not the Executive Council. Since the Executive Council would not make such decisions, there would be no question of collective responsibility for those decisions...". He asked firstly whether, in the Sally Aw case, the Executive Council (ExCo) had held any discussions on SJ's decision or expressed any opinion on how the Administration should react to public concerns resulting from the decision. Secondly, he asked whether, under the principle of collective responsibility, ExCo Members would discuss controversial matters which gave rise to huge public outcry, such as an incident resulting in a no-confidence motion debate in the Legislative Council (LegCo).

33. SCA responded that he did not know whether discussions had taken place in ExCo on the Sally Aw case because he was not involved and discussions of ExCo meetings were strictly held in confidence. However, it was clear that the principle explained in paragraph 10 of the Administration's paper should apply to all cases.

34. SG reiterated that in terms of the constitutional position, prosecution decisions remained with the Department of Justice, free from interference and regardless of whether a case had given rise to controversies. The possibility of an ExCo decision in those matters did not arise and hence the question of collective responsibility of ExCo did not arise.

35. Mr IP Kwok-him said that the Sally Aw case had been debated at length in LegCo. He considered that it would not be appropriate to make any inference from the case in discussing the proposed accountability system.

36. Mr CHEUNG Man-kwong said that he merely raised some questions for the Administration to clarify which by no means contained any assertions or

inferences that the ExCo had actually interfered in the Sally Aw case. Dr YEUNG Sum said that LegCo Members were duty bound to ask questions which they considered were relevant in the discussion of an issue. He opined that it was not inappropriate for members to make reference to the Sally Aw case because it was a good precedent case demonstrating that the public had grave concern about whether the independence of the Department of Justice in prosecution matters might be compromised by factors other than a fair and objective consideration of the issues in question. Ms Emily LAU expressed similar views.

37. The Chairman said that he was in support of the proposal of having the role of SJ in prosecution matters delegated to the DPP. He added that he had in fact made a proposal at the time when the BL was being drafted for an independent post of DPP to take charge of prosecution matters. He further said that he was concerned about the Administration's view set out in paragraph 12 of the paper that the transfer of powers and responsibilities in respect of prosecution matters from SJ was likely to be inconsistent with BL 63, which implied that the development of some form of convention in the course of time to give effect to such transfer of powers would be forbidden.

38. Dr YEUNG Sum enquired whether the Administration would revisit its position on the matter. SG replied that if in the course of discussing the detailed proposals relating to the accountability system new issues were raised in relation to the office of SJ, the Administration would be happy to consider the matters further.

39. Ms Emily LAU suggested that the Administration should consider moving a motion debate in LegCo on the proposed accountability system before the system was actually finalized for implementation. SCA said that he would convey the suggestion for the Administration's consideration.

Adm

V. Application of certain provisions of the Prevention of Bribery Ordinance (Cap. 201) to the Chief Executive
(LC Paper Nos. CB(2)921/01-02(04) and (05))

40. Deputy Director of Administration (DDA) briefed members on the Administration's position on the proposal to extend the general standard of bribery prevention applicable to government officers under the Prevention of Bribery Ordinance (POBO) for application to the CE. She advised that the Administration had examined the control framework of bribery prevention under POBO, which included all those provisions applicable to public servants and government officers and the two more stringent provisions that applied exclusively to government officers (sections 3 and 10 of the POBO). In addition, the operation of the offence provisions currently applicable to public servants (sections 4(2) and 4(3) and section 5(2) of the POBO) in relation to

their applicability to the CE had to be examined in detail. The views of the Administration were set out in the Administration's paper (LC Paper No. CB(2)921/01-02(05)).

41. DDA further advised that in considering a possible arrangement for applying the bribery prevention provisions to CE, it was necessary to take into account the CE's unique constitutional position and the provisions under the BL. It was also necessary to reconcile the CE's status under the POBO, i.e. the CE was neither a government officer nor a public servant as defined in POBO. The Administration was considering how best the problems identified might be resolved. Subject to the final form of the legislative provisions, it would consider whether the legislative provisions for exclusive application to CE should be given effect through amendments to the POBO or other legislative vehicles.

42. Mr Howard YOUNG noted that according to the Administration, administrative arrangement was in place to ensure transparency and accountability in relation to the acceptance and disposal of gifts presented to the CE. The current arrangement was that CE would not accept gifts for personal retention unless the incumbent had paid for them at market value. He suggested that the Administration might consider codifying such arrangement in enactment. DDA responded that the Administration would consider the proposal.

Adm

43. Mr CHEUNG Man-kwong said that CE had expressed himself clearly in 1999 that he was happy to be bound by the bribery prevention provisions of POBO. Mr CHEUNG said that it was a very undesirable situation that several years had passed and the relevant legislative amendments had yet to be drafted and introduced into LegCo for consideration. He further pointed out that as advised by the Administration in its paper, if the decision was taken to implement the arrangement for application to the CE in the form of an amendment Bill to the POBO, the Administration might take the opportunity to effect other amendments to the Ordinance. He cautioned that such approach might result in a further delay of introducing the relevant amendments. He considered that the Administration should first introduce those legislative provisions which would apply exclusively to CE as soon as possible so that the control framework could come into operation when the second term CE assumed office.

44. DDA responded that in view of the complexities involved in the exercise as explained in the Administration's paper, the Administration would need more time to decide the best way forward to give effect to the new arrangement. She said that the Administration had no intention to defer the exercise. Subject to a final decision on whether the provisions should be implemented through amending the POBO or other legislative means and the completion of law drafting, the Administration would introduce the legislative

provisions.

45. In response to members, DDA said that it was expected that the Administration would be able to introduce the legislative proposal in the next legislative session.

46. The majority of members were dissatisfied with the proposed legislative timetable. They stressed that the Administration should expedite the matter with a view to introducing the legislative proposal within the current legislative session so that it could come into effect when the second term CE assumed office. Members agreed that the Panel should make a report to the House Committee and to seek its support for the matter to be raised with the Chief Secretary for Administration.

Panel

VI. Any other business

Meeting on 18 February 2002

47. The Chairman informed members that he would not be able to attend the next meeting on 18 February 2002. It was agreed that Ms Emily LAU, Deputy Chairman, should chair the meeting in his absence.

48. There being no other business, the meeting ended at 4:40 pm.

Council Business Division 2
Legislative Council Secretariat
26 February 2002