

立法會
Legislative Council

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**Subcommittee on Subsidiary Legislation Relating to
Transfer of Management of the Castle Peak Bay Immigration Centre**

**Minutes of the second meeting
held on Monday, 15 March 2010, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon LAU Kong-wah, JP
Hon Emily LAU Wai-hing, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP

Member absent : Hon Cyd HO Sau-lan

Public Officers attending : Agenda item I

Mr Alan LO Ying-ki
Principal Assistant Secretary for Security, Security
Bureau

Mr Corrado CHOW
Assistant Director (Enforcement and Torture Claim
Assessment), Immigration Department

Mr S W NG
Assistant Principal Immigration Officer
(Castle Peak Bay Immigration Centre),
Immigration Department

Ms Elaine NG
Government Counsel

Clerk in attendance : Miss Odelia LEUNG
Chief Council Secretary (2)6

Staff in attendance : Mr Timothy TSO
Assistant Legal Adviser 2

Ms Judy TING
Senior Council Secretary (2)7 (Acting)

Miss Jenny LEE
Legislative Assistant (2)6 (Acting)

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I. Meeting with the Administration

[LC Paper Nos. CB(2)1083/09-10(01) and (02)]

The Subcommittee deliberated (index of proceedings attached at **Annex**).

Deliberations

2. Members noted the withdrawal of Dr Margaret NG from the Subcommittee and the Administration's response to their concerns raised at the last meeting.

3. Ms Emily LAU welcomed the non-inclusion of certain powers provided in the Prison Rules (Cap. 234 sub. leg. A) ("the Prison Rules") in the Immigration (Treatment of Detainees) (Amendment) Order 2010 ("the Amendment Order"), such as body cavity searches. Mrs Regina IP held different views and was concerned about the adverse impact of the absence of such powers as drug-taking detainees might not be easily detected. She queried whether the powers to examine urine and conduct body cavity searches of detainees in the Castle Peak Bay Immigration Centre ("CIC") were not necessary as claimed by the Administration.

4. Principal Assistant Secretary for Security ("PAS(SB)") stressed that new legislation should be made on a need basis. As CIC detainees were not convicted or sentenced prisoners but immigration detainees pending investigation or removal, the Administration did not see the need for adding the powers and restrictions in the Prison Rules that were considered not necessary for Immigration Department ("ImmD")'s effective management of CIC. He further said that body cavity searches had not been conducted at CIC and no case of drug problem had been found at CIC for the past five years. Measures had been put in place to prevent the inflow of drug to CIC, and detainees'

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behaviour could be also indicative of the existence or otherwise of a drug problem.

5. Assistant Director Enforcement and Torture Claim Assessment, Immigration Department ("AD(EA)") supplemented that the long-term detainees at CIC were mainly released prisoners of the Vietnamese ethnicity pending repatriation to their mother country. Under the existing mechanism, the authorities in Vietnam had to come to Hong Kong to verify the identity of such detainees before effecting the repatriation by batches. Persons of torture claim were normally released on recognizance should it be expected that the handling of such claims would take a long period. There were no cases of drug problem at CIC in the past five years. Apart from closely monitoring the inflow of articles to detention centres, ImmD had established ways to deal with detainees found to have a drug problem such as by providing medical services and separate confinement.

6. Members requested the Administration to consider the feasibility of transferring CIC detainees who were found to have a drug problem or CIC long-term detainees to the detention centres managed by the Correctional Services Department ("CSD") which were governed by the Prison Rules. Members considered that such an arrangement might address the issue of not including certain provisions in the Prison Rules relating to the treatment of detainees in the Amendment Order.

7. As regards safeguards against non-compliance, PAS(SB) stressed that a breach of the Operation Manual by ImmD staff could be a disciplinary offence, the same as a breach of the Prison Rules by CSD staff. Government Counsel ("GC") supplemented that according to the advice of the Civil Division of the Department of Justice, in terms of protection to a detainee, there would unlikely be material differences in remedies available whether the detention was governed by the Operation Manual or the Prison Rules. For example, any persons who felt aggrieved by the non-compliance with the Prison Rules or the Operation Manual could seek judicial review or lodge a complaint. Whether there could be a cause of action for a breach of statutory duty would depend on the legislative intent of the relevant law. The case law in the United Kingdom showed that the Prison Rules of the United Kingdom were not intended to confer on the prisoners the right to lodge a private suit for breach of the provisions therein. She further said that the Prison Rules (Cap. 234 sub. leg. A) did not provide for criminal liability for breach of the provisions therein. Part V of the Prison Rules contained the disciplinary provisions applicable to prison staff. It would have to be shown that the Prison Rules and the Immigration (Treatment of Detainees) Order (Cap.115 sub. leg. E) ("the Order") had the legislative intent of conferring a private right of action for the institution of proceedings for a breach of statutory duty. As such, as far as the legal protection for detainees was concerned, there would unlikely be material differences in specifying their treatment in statutory provisions and the

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Operation Manual.

8. Assistant Legal Adviser 2 ("ALA2") advised that from the legal point of view, there should be differences in liability and remedies for non-compliance with the statutory provisions and the Operation Manual. He acknowledged that there could be cases where the liability and remedies for non-compliance with the statutory provisions and the Operation Manual would make no difference. However, there could also be cases where the legal effect for non-compliance with the statutory provisions and the Operation Manual would be different.

9. Referring to the Administration's paper [LC Paper No. CB(2)1083/09-10(02)] which stated that "*no statutory rules are made in respect of the treatment of detainees in the short-term detention places used by any law enforcement agencies*", ALA2 pointed out that the Immigration Service (Treatment of Detained Persons) Order (Cap. 331 sub. leg. C) ("the Treatment of Detained Persons Order") applied to the detention facilities at the 1st and 2nd floors of No. 1 Ma Tau Kok Road, Kowloon as specified in its Schedule. Treatment arrangements such as communication with legal advisers, food and drink, toilet facilities and exercise etc. were provided in that Order.

10. Members were gravely concerned about the misleading information provided by the Administration in its paper. Members pointed out that if certain statutory provisions had been made on the treatment of detainees in Ma Tau Kok Detention Centre ("MTKDC"), which was designed to detain persons for less than 48 hours, it was unacceptable not to have those provisions for CIC, which could be used for longer-term detention. Members considered that the relevant provisions in the Treatment of Detained Persons Order should at least be similarly incorporated in the Order.

11. PAS(SB) apologized for the unclear information contained in the Administration's paper. He clarified that the sentence meant to refer to detention facilities managed by the Police and the Customs and Excise Department. He explained that MTKDC was previously used for longer-term detention, say a week or so, and statutory rules on the treatment of detainees were hence provided. Certain provisions in the Treatment of Detained Persons Order had already been included in the existing Order. Other arrangements such as the provision of food and drink for detainees, would be set out in the Operation Manual. He undertook to consider members' views and provide a written response.

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Follow-up

12. Members requested the Administration to -
- (a) clarify whether there were any statutory rules made in respect of the treatment of detainees in the short-term detention places used by any law enforcement agencies;
 - (b) provide further information on the privacy and sanitary conditions and facilities at CIC, such as the availability of toilet flushing, hand washing facilities and clean blankets and the frequency of cleansing blankets, etc;
 - (c) provide in writing the legal advice given by the GC at the meeting concerning the differences in liability and remedies for non-compliance with the Prison Rules and the Operation Manual;
 - (d) consider the feasibility of transferring CIC detainees who were found to have a drug problem or CIC long-term detainees to the detention centres managed by CSD; and
 - (e) advise whether any amendments would be proposed to the Amendment Order.

II. Any other business

Date of next meeting

13. Members agreed to hold the third meeting on Tuesday, 30 March 2010, at 10:45 am.

14. The meeting ended at 5:37 pm.

Council Business Division 2
Legislative Council Secretariat
8 April 2010

**Proceedings of the second meeting of the
Subcommittee on Subsidiary Legislation Relating to
Transfer of Management of the Castle Peak Bay Immigration Centre
on Monday, 15 March 2010, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker(s)	Subject(s)	Action required
000000 - 000644	Chairman	Chairman informing members of Dr Margaret NG's withdrawal from the Subcommittee on the ground that her schedule could not tie in the meeting dates of the Subcommittee.	
000645 - 001531	Admin	Briefing by PAS(SB) on the Administration's response to members' concerns raised at the last meeting.	
001532 - 003113	Mrs Regina IP Admin Chairman	<p>Mrs IP's concern about the non-inclusion of certain powers in the Amendment Order such as examination of urine and body cavity searches, and the impact of the absence of such powers on the effective management of CIC, in particular about drug control.</p> <p>AD(EA)'s elaboration on the repatriation arrangements concerning released prisoners of Vietnamese ethnicity which accounted for their long-term detention at CIC. His explanation on arrangements for handling persons of torture claims who were normally released on recognisance. His remark on the low risk of drug abuse by CIC detainees.</p> <p>Mrs IP's enquiry on measures to deal with possible cases of drug problem at CIC.</p> <p>Chairman's proposal for transferring CIC detainees who were found to have a drug problem or long-term detainees to the detention centres managed by CSD. His opinion that such an arrangement might address the issue of not including certain provisions in respect of treatment of detainees in the Amendment Order.</p> <p>AD(EA)'s emphasis on non-discovery of drug problem at CIC in the past five years. His advice that the Chairman's proposal had legal and administrative implications.</p> <p>PAS(SB)'s advice that body cavity searches had never been conducted at CIC in the past five years and such searches were</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>controversial. His elaboration on other measures to prevent drug problem at CIC including checking of inflow of articles and observance of detainees' behaviour. His reiteration of the different nature of immigration detainees at CIC and convicted prisoners.</p> <p>AD(EA)'s elaboration on the established mechanism for distributing articles including food to detainees and ways to deal with detainees found to have a drug problem such as by providing medical services and separate confinement.</p>	
003114 - 005312	Ms Emily LAU Admin Chairman ALA2	<p>Ms LAU's expression of appreciation of ImmD for not seeking unnecessary powers for conducting body cavity searches. Her request for further information on differences between non-compliance with the Prison Rules and the Operation Manual.</p> <p>Chairman's view that the liability for breaching statutory provisions and the Operation Manual should be different. His remark that breach of statutory provisions would result in criminal liability.</p> <p>PAS(SB)'s advice that a breach of the Prison Rules could be subject to disciplinary proceedings, the same as a breach of the Operation Manual.</p> <p>GC's provision of legal advice of the Civil Division of the Department of Justice on legal protection of detainees by way of specifying their treatment in statutory provisions and the Operation Manual.</p> <p>ALA2's advice on the different legal implications of breaching the Prison Rules and the Operation Manual.</p> <p>Ms LAU and Chairman's enquiry on the reasons for not including the provisions relating to the treatment of detainees at CIC under the Prison Rules in the Amendment Order.</p> <p>PAS(SB)'s emphasis that new legislation was made on a need basis. His reiteration that breaching the Prison Rules by CSD staff would be subject to disciplinary proceedings.</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>GC's advice that the Prison Rules did not provide for criminal liability for breach of provisions therein and institution of proceedings for breach of statutory duty. Part V of the Prison Rules contained the disciplinary provisions applicable to prison staff. As far as breach of statutory duty was concerned, the mere fact that certain treatment was provided for in statutory provisions instead of in the Operation Manual would not give rise to a cause of action, as it would have to be shown that there was legislative intent to confer such a right of action.</p> <p>ALA2's advice that Treatment of Detained Persons Order applied to the detention facilities at the 1st and the 2nd floors of No. 1 Ma Tau Kok Road, Kowloon as specified in its Schedule and arrangements such as communication with legal adviser, food and drink, and toilet facilities and exercise etc. were provided therein.</p> <p>Chairman's grave concern about the misleading information provided by the Administration in its paper. His request for written clarification from the Administration. His view that the provisions of the Treatment of Detained Persons Order should at least be similarly incorporated in the Order, not to mention that more treatment arrangements should be provided in the Order as it applied to CIC designed for long-term detention.</p> <p>PAS(SB)'s explanation that MTKDC was previously used for longer-term detention.</p>	Admin
005313 - 005747	Mrs Regina IP Chairman Admin	<p>Mrs IP's echo on the need to align the provisions concerning the treatment of detainees at MTKDC with those in the Order applicable to CIC detainees.</p> <p>PAS(SB)'s explanation that some provisions in the Treatment of Detained Persons Order had already been included in the existing Order and some arrangements would be provided in the Operation Manual. His agreement to consider members' view and provide a written response.</p>	Admin
005748 - 010403	Ms Emily LAU Admin Chairman	Ms LAU' enquiry on the legislative timetable, and further information on the sanitary conditions and facilities at CIC, such as the frequency of cleansing blankets.	

Time Marker	Speaker(s)	Subject(s)	Action required
		Her reference to a case handled by the Complaints Division of the Legislative Council Secretariat about the hygiene and privacy of detention rooms in police stations. Confirmation on the date of next meeting at 10:45 am, Tuesday, 30 March 2010.	

Council Business Division 2
Legislative Council Secretariat
8 April 2010