

立法會
Legislative Council

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(These minutes have been seen
by the Administration and
cleared by the Chairman)

Ref: CB1/BC/18/98/2

Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Wednesday, 23 February 2000, at 8:30 am
in Conference Room A of the Legislative Council Building

- Members present** : Hon SIN Chung-kai (Chairman)
Hon HO Sai-chu, SBS, JP
Hon Eric LI Ka-cheung, JP
Hon Fred LI Wah-ming, JP
Hon Howard YOUNG, JP
Dr Hon Philip WONG Yu-hong
Hon YEUNG Yiu-chung
Hon Mrs Miriam LAU Kin-ye, JP
- Non-Bills Committee** : Hon Ronald ARCULLI
Members attending Hon Margaret NG
- Members absent** : Hon David CHU Yu-lin
Hon MA Fung-kwok
Hon CHOY So-yuk
- Public officers** : Ms Eva CHENG, JP
attending Deputy Secretary for Information Technology and
Broadcasting
- Mr M H AU
Senior Assistant Director of Telecommunications

Ms Gracie FOO
Principal Assistant Secretary for Information
Technology and Broadcasting

Miss Priscilla TO
Assistant Secretary for Information Technology and
Broadcasting

Mr Geoffrey FOX
Senior Assistant Law Draftsman

Clerk in attendance : Miss Polly YEUNG
Chief Assistant Secretary (1)3

Staff in attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Ms Anita SIT
Senior Assistant Secretary (1)8

I Matters arising from previous meetings

The Chairman informed members that a further submission (CB(1)1039/99-00(01)) from Cable & Wireless HKT Limited (CWHKT) had been issued to members on 22 February 2000. In the submission, CWHKT highlighted its concern about the absence of a statutory appeal mechanism and that it was discriminatory to single out licensees for the application of the provisions on competition safeguards in the Bill. As requested by the Chairman, the Deputy Secretary for Information Technology and Broadcasting (DS/ITB) said that the Administration would examine CWHKT's submission and provide its response in due course.

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2. Mrs Miriam LAU referred to a letter from BOT tunnel operators dated 22 February 2000. (The letter was copied and tabled at the meeting and issued to members vide paper CB(1) 1056/99-00 dated 24 February 2000.) She said that BOT tunnel operators were concerned whether there were relevant provisions in the Bill to deal with the other aspects of access, apart from fees, by mobile network operators to shielded public places for installation of radiocommunications equipment. These aspects included safety, maintenance, insurance, performance, time of access etc. DS/ITB agreed to provide a response to the letter in due course.

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(Post-meeting note: The Administration has provided its response to the aforesaid submissions vide papers CB(1) 1122/99-00(01) and (02) issued on 7 March 2000.)

II Papers issued since last meeting

3. Members noted that in view of members' concerns about personal data privacy raised at the meeting on 17 February 2000, the legal adviser to the Bills Committee had written to the Administration to seek clarification on the implementation of proposed section 7I of the Bill, with particular regard to whether there would be conflicting obligations under the Personal Data (Privacy) Ordinance (PDPO) and the Bill. The letter (CB(1)1039/99-00(02)) had been issued to members for information.

4. DS/ITB said that the Administration was considering the points raised in the letter and would consult the Privacy Commissioner for Personal Data on the proposed provisions regarding the Telecommunications Authority (TA)'s request for and disclosure of information. If necessary, the Administration would propose Committee Stage Amendments (CSAs) to state explicitly in the Bill that TA was required to abide by the data protection principles under PDPO. She stressed that it was not the Administration's policy intention that TA's power to obtain or disclose information should prevail over the requirements stipulated in PDPO.

(Post-meeting note: The Administration has responded to the legal adviser's letter vide paper CB(1) 1147/99-00(01) issued on 9 March 2000.)

III Meeting with the Administration

Clause-by-clause examination of the Bill

Clause 4 - Proposed section 7N

Non-discrimination

5. Mr Howard YOUNG enquired about the rationale for restricting the application of proposed section 7N(1) to licensees in a dominant position, instead of all licensees. In reply, the Senior Assistant Director, Office of the Telecommunications Authority (SAD/OFTA) explained that TA was mainly concerned with discriminatory practices that has the purpose or effect of preventing or substantially restricting competition in a telecommunications market. As the discriminatory practice described in proposed section 7N(1), if adopted by licensees who were not in a dominant position, would unlikely

have the effect of preventing or substantially restricting competition, these non-dominant licensees would not therefore be covered under proposed section 7N(1).

6. In reply to the Chairman's enquiry about the need to qualify "restricting competition" by the word "substantially" in proposed section 7N(4), SAD/OFTA explained that the term "substantially restricting competition" was used in existing licences and was commonly adopted in the competition legislation of overseas countries. As far as competition was concerned, TA and overseas authorities only intended to regulate those practices that had significant adverse effect on market competition.

7. Mr Ronald ARCULLI concurred that it was necessary to restrict the application of proposed section 7N(1) and (2) to those practices that had a significant adverse effect on competition. Otherwise, TA and licensees would find the provisions too broad to be duly enforced or complied with. He however queried whether proposed section 7N(1) and (4) were sufficiently clear for licensees in a dominant position to duly comply with. In reply, DS/ITB advised that the principle embedded in proposed section 7N(1) was very clear in that licensees in a dominant position should not discriminate his customers on charges or on the conditions of supply of services. Proposed section 7N(3) further set out the scope of discriminatory practices that might be prohibited under proposed section 7N(1) and (2). SAD/OFTA supplemented that in each case of alleged discrimination, TA would examine whether the act of the licensee concerned had the purpose or effect of preventing or substantially restricting competition having regard to the then prevailing market circumstances. TA would be required to give written reasons for his decision in this regard according to proposed section 6A.

8. Regarding the term "a telecommunications market" in proposed section 7N, SAD/OFTA explained that TA would assess whether a licensee was in a dominant position in respect of a particular sector of the telecommunications market rather than "the telecommunications market" as a whole in broad terms. Members noted that the interpretation of the term "telecommunications market" in the Bill had been provided in proposed section 2.

9. Members noted that according to the interpretation in proposed section 2, the term "dominant position" in the Bill meant dominant position construed in accordance with the provisions of section 7L and the words "dominance" and "dominant" should also be construed accordingly. Mr Ronald ARCULLI pointed out that proposed section 7L did not provide an objective definition of "dominant position". Instead, proposed section 7L(2) empowered TA to determine whether a licensee was in a dominant position. Although proposed section 7L(3) set out some relevant factors that TA should take into account in the determination, the list of factors was not meant to be exhaustive. Hence, the final decision as to whether a licensee was in a dominant position still rest

with TA. Members were concerned that without an objective definition of "dominant position" in the Bill, licensees might be confused as to whether certain statutory obligations or prohibitions applicable to dominant licensees would also be applicable to them.

10. In response, SAD/OFTA said that it was provided in existing telecommunications licences that if TA formed an opinion that a licensee was not in a dominant position, he would issue a waiver to the licensee to the effect that the licensee would not be required to abide by those licence conditions which were applicable to a licensee in a dominant position. Hence, licensees should have a clear understanding as to whether they were regarded by TA as being in a dominant position. In reply to the Chairman, SAD/OFTA advised that at present, there was not a consolidated list of dominant operators in respect of different telecommunications markets as defined under proposed section 2. However, waivers that had been issued by the TA to licensees not in a dominant position were public information which could be viewed on the website of OFTA.

11. Dr Philip WONG asked whether cross-shareholding would be taken into account in determining whether a licensee was in a dominant position in a telecommunications market. DS/ITB said that the assessment would be made in the context of a particular telecommunications market, rather than two or more markets taken together. The fact that a company operating telecommunications facilities or services in a few markets was not necessarily a material consideration. However, if a licensee had control over two or more other licensed telecommunications companies which operated in the same telecommunications market, TA would take this into account in determining whether the licensee was in a dominant position. In this case, a critical consideration was the extent of control of the licensee over the other licensed companies.

12. Mrs Miriam LAU recalled that the Administration had stated at the previous meeting that a licensee adopting a predatory pricing strategy would not be in breach of proposed section 7L unless the licensee was in a dominant position. She enquired whether and how a licensee would be notified when, in the opinion of TA, the licensee became a dominant operator. In reply, SAD/OFTA advised that if TA considered that a licensee might have become a dominant position in a telecommunications market, he would consult the market and invite views from the licensee concerned before making a decision on the matter. He also advised that upon enactment of the Bill, TA would issue guidelines concerning the test of dominance in consultation with the licensees in the relevant telecommunications markets. Besides, it had been an on-going practice that if a licensee had been regarded by TA as a dominant operator but wanted to have the status revoked, the licensee would need to apply to TA. TA would make a decision on the matter upon consultation with the relevant market.

13. In reply to Mr Ronald ARCULLI's enquiry about the policy objective of proposed sections 7K to 7N, DS/ITB advised that proposed sections 7K to 7N were adapted from the existing licence conditions on competition safeguards. The intention was to codify these licence conditions into legislation so as to consolidate the powers for the promotion of fair competition in the telecommunications industry.

Clause 4 - Proposed section 7O

Transitional provisions applicable to the repealed section 7

14. Mr Ronald ARCULLI sought clarification on the transitional arrangements for existing licensees. The Senior Assistant Law Draftsman (SALD) advised that proposed section 7O was not an exceptional transitional provision amongst existing licensing regimes. When a new regime was introduced, existing licences of the old regime should normally be repealed. The arrangement under proposed section 7O was to enable the transition of existing licences to the new regime. Upon enactment of the Bill, existing licences would be deemed as licences granted under the new regime. The licensees would be subject to the conditions in the existing licences and the provisions of the Telecommunications Ordinance, as amended by the Bill, for the remainder of the validity period of the existing licences. The proposed transitional provisions sought to establish a new regime with old and new licensees placed on equal footing.

15. Pointing out that existing licensees would be subject to the additional powers conferred on TA by the Bill for the remainder period of existing licences, Mr Ronald ARCULLI queried whether the proposed transitional provisions had the effect of changing the existing contractual relationship between TA and licensees by legislation, and whether bringing the existing licences under the new regulatory regime involved a change of goalposts and thus was unfair to the licensees concerned.

16. In response, SALD said that a licence was not equivalent to a contract. DS/ITB added that the proposed amendments in the Bill sought to bring about an improved regulatory regime for the telecommunications market and many of the provisions were already included in the licence conditions. Hence, the Bill did not seek to drastically change the regulatory regime.

17. Mr Ronald ARCULLI requested the Administration to provide a detailed table to compare the existing licensing conditions with the proposed provisions in the Bill for different types of licences. DS/ITB said that as there were numerous types of telecommunications licences, there were practical difficulties in providing a comprehensive comparison as suggested by Mr ARCULLI for each type of licence. The Chairman suggested and DS/ITB agreed that the Administration would try to set out the major changes to the

existing licence conditions for the major categories of licences upon enactment of the Bill.

(Post-meeting note: The paper provided by the Administration in response to Mr ARCULLI's request was issued to members vide paper CB(1) 1098/99-00(01) on 1 March 2000.)

Clause 5 - Proposed section 8

Prohibition of establishment and maintenance of means of telecommunications, etc., except under licence

18. On the requirement under proposed section 8 that any person offering a telecommunications service or operating a telecommunications facility must be licensed, the Chairman expressed concern that this might restrain the development of innovative telecommunications facilities or services.

19. In response, DS/ITB advised that to protect consumers' interest, proposed section 8 would extend the licensing framework to also cover telecommunications service providers who did not operate any telecommunications facility and it was intended that the provision of such telecommunications services, e.g. telephone card services, would be covered under a class licence. She further advised that the proposed class licence system was intended to cover the supply of certain telecommunications services and to operate certain telecommunications facilities such as telephone equipment which were currently exempted from the licensing provisions by way of Exemption Orders. Under the class licence system, persons supplying a service or operating a facility that fell within the specified scope of services/facilities of a class licence would be deemed to be a licence holder and would be required to comply with the relevant licence conditions in the course of supplying the service or operating the facility. There would be no need for the persons concerned to apply for an individual licence.

20. On the rationale of bringing telecommunications service providers who did not possess or operate any telecommunications facility into the licensing framework, SAD/OFTA explained that because of the lack of regulation on these operators in the past, TA had no proper means to obtain information on these operators. Nor did TA have the power to regulate the activities of these operators even when such activities were found detrimental to consumers' interest. Referring to past complaints about telephone cards, SAD/OFTA pointed out that as telephone cards fell outside the purview of the telecommunications licensing system, TA was unable to investigate into these complaints. He also clarified that it would be the suppliers rather than the retailers of telephone cards who would be covered by a class licence. For certain class licences, TA might require persons intending to operate the relevant facilities or services to register their contact details with him. The registration procedure would be very simple and could be done electronically.

21. Noting from SAD/OFTA that the services or facilities covered by a class licence would be broadly defined, the Chairman expressed concern that telecommunications operators, in particular those who were prepared to launch new services/facilities in the market, might find the class licence system confusing. He asked whether it would be more appropriate to prescribe the services/facilities that were subject to a class licence in the form of subsidiary legislation to avoid confusion. He also enquired whether activities such as IDD service retailing and auctioning of telephone cards on the Internet would be regulated.

22. Mr Ronald ARCULLI enquired how TA would ensure that persons who intended to operate the facilities/services which were the subject of a class licence would be well informed of the need to register with TA and of the licence conditions. He also enquired whether E-commerce and services offered through the Internet would come under the class licence system.

23. In response, DS/ITB and SAD/OFTA stressed that apart from including existing exempted services in the regulatory regime, the proposed new licensing framework also sought to simplify and streamline the licensing procedure for operators of some telecommunications facilities or services. They advised that the class licence system and the procedure for creating a class licence were prescribed in proposed section 7B. As TA would conduct public consultation on any proposed class licence, TA would duly consider and address any concerns about the licensing system or licence conditions raised in the consultation process. The current plan was for TA to carry out consultation on proposed class licences before the proposed amendments to section 8 commenced operation.

24. In this connection, DS/ITB said that as undertaken at a previous meeting, the Administration would advise the Bills Committee on the proposed amendments which would commence operation at a later date after enactment of the Bill, as well as the relevant transitional arrangements. The current intention was for the proposed amendments to section 8 to commence operation at a later date.

Clause 6 - Proposed section 10

Control of use of radiocommunications apparatus on vessel in Hong Kong waters

25. Members did not raise any query on proposed section 10.

Clause 7 - Proposed section 14

Power to place and maintain telecommunications lines, etc., on land, etc.

26. Members agreed to skip proposed section 14 pending further

deliberation on the legal and constitutional issues arising from the Bill.

Clause 8 - Proposed section 16

Removal, etc., of line, post or installation where necessary by reason of use of land, etc.

27. Members noted that clause 8 only sought to add the words "seabed" and "radiocommunications installation" in the existing section 16(1). Mrs Miriam LAU enquired whether TA or the licensee concerned was entitled to refuse to comply with a written notice served under proposed section 16 requiring the removal or alteration of telecommunication facilities.

28. SALD said that reading proposed sections 16(1) and (2) in conjunction, his view was that if a person's lawful use of the land or seabed required the removal or alteration of the telecommunications facilities already laid in/on the land or seabed, the person might serve a notice requiring TA or the licensee concerned to remove or alter the facilities, and TA or the licensee concerned was entitled to recover the cost incurred for the removal or alteration from the person serving the notice. He further said that although it was not explicitly stated that TA or the licensee must comply with the notice, compliance on the part of TA or the licensee was implied. He however concurred that proposed section 16(1) could be improved by adding a provision to the effect that TA or the licensee concerned should comply with the requirement if it was reasonable in all circumstances of the case.

29. SAD/OFTA said that a licensee maintaining telecommunications facilities in/on any land or seabed by virtue of section 14 actually did not possess any property right to the land or seabed, as the licensee had only been authorized by TA to place the telecommunications facilities in/on the land or seabed. Thus, in his view, if there was another user, who was not necessarily the owner of the land or seabed but who wanted to use the land or seabed for lawful purposes, and if the telecommunications facilities of TA or a licensee was obstructing such use of the land or seabed, it would be reasonable on the part of TA or the licensee to comply with the notice, while recovering the costs incurred from the person making the request. He further said that so far, existing section 16 had not been invoked but TA or the licensee would be expected to comply with a notice served under the section if it was lawful and reasonable.

30. Mr Ronald ARCULLI pointed out that as the expression "necessary to remove...." had been used in the existing and proposed section 16(1), TA or a licensee could refuse the notice served under the section on the grounds that the person serving the notice had not demonstrated "necessity". Mrs Miriam LAU considered that both the existing and the proposed section 16(1) were unclear as to whether TA or the licensee had the right to object to the notice served under the section. She suggested that the Administration should take the opportunity of the Bill to clarify the provision.

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31. At the Chairman's request, the Administration agreed to consider whether CSA was necessary to clarify the obligation of TA or the licensee concerned to comply with a written notice served upon it under proposed section 16.

(Post-meeting note: The Administration has proposed CSAs to proposed section 16 vide paper CB(1) 1138/99-00 issued on 8 March 2000.)

Clauses 9 to 12 - Proposed sections 17 to 19A

32. Members did not raise any query on clauses 9 to 12.

Clause 13 - Proposed section 19B

Right of access to public telecommunications services

33. Mrs Miriam LAU pointed out that it was common for deeds of mutual covenant to provide that residents or occupiers were not allowed to install their own antennae or receptors. She considered such restriction reasonable in consideration of public safety and the need to maintain the façade of a building visually pleasant. However, it appeared that under proposed section 19B, a resident or occupier of a building would have the right to install a antenna/receptor of his own choice despite such act being prohibited in the relevant deed of mutual covenant.

34. In response, SAD/OFTA said that as residents or occupiers of a building could have access to public telecommunications services through the installation of a common antenna or receptor, he did not consider that prohibiting residents or occupiers from installing their own antennae or receptors would have the effect of restricting the right of residents or occupiers to have access to the public telecommunications services of their choice. Hence, proposed section 19B should not apply in such a situation.

35. Mrs Miriam LAU considered that proposed section 19B would apply if the building concerned had not installed a common antenna or receptor or the common antenna or receptor installed at the building did not enable the occupiers or residents concerned to have access to all public telecommunications services they desired. Mr Ronald ARCULLI said that while he did not object to the policy intent of proposed section 19B, he shared the view of Mrs LAU that proposed section 19B would have the effect of rendering a term in a deed of mutual covenant void if the term prohibited residents or occupiers from installing their own antennae or receptors for good reasons.

36. Taking note of members' concern, DS/ITB said that the Administration would clarify whether under this subsection, a resident or occupier would have

Admin the right to install antennae or receptors of his choice despite such act being prohibited in the relevant deed of mutual covenant.

(Post-meeting note: The Administration has proposed CSAs to proposed section 19B(1) vide paper CB(1)1138/99-00 dated 8 March 2000.)

Clause 14

Part heading amended

37. Members did not raise any query on clause 14.

Clause 15 - Proposed section 32A

Use of unauthorized frequencies

38. On the proposed imposition of criminal sanction for the use of unauthorized frequencies, SAD/OFTA explained that the provision was mainly targeted at possible interference caused by the use of unauthorized frequencies and such interference might have serious consequences such as jeopardizing aviation safety, commercial operations and public services etc. Hence, there was a need to impose criminal sanction. Currently, there was no provision to sanction a licensee using unauthorized frequencies, though there was a provision prohibiting the use of radio transmitter without a licence.

39. SAD/OFTA also advised that a properly designed radio transmitter should not transmit radio waves in the process of changing from one frequency to another frequency. As interference was caused by the operation of radio transmitters only, proposed section 32A did not seek to cover the use of radio receivers. The use of radio receivers was however regulated under a relevant licence.

Clause 15 - Proposed section 32B

Unauthorized dealing in radio transmitters

40. Mr Ronald ARCULLI enquired about the applicability of proposed section 32B to the export of radio transmitters and the sale of radio transmitters to tourists in Hong Kong. In reply, SAD/OFTA advised that a licensee authorized to deal in radio transmitters could export certain classes of radio transmitters as specified in the relevant licence conditions. As regards the sale of radio transmitters to tourists, a waiver had been issued to exempt tourists from the need to obtain a licence for possessing a radio transmitter within a certain duration while staying in Hong Kong.

Clause 15 - Proposed section 32C

Unauthorized modification of radio transmitters

41. Members did not raise any query on proposed section 32C.

*Clause 16 - Proposed section 32D
Standards*

42. The Chairman asked whether the Administration would consider setting up a committee or designating an existing committee to advise TA on the technical standards and specifications for the purposes of proposed section 32D(1). In response, DS/ITB said that as these standards and specifications would have wide implications on the operation of the telecommunications industry, the Administration considered it necessary for TA to conduct industry-wide consultation before prescribing these standards and specifications, and hence the requirement under proposed section 32D(2). TA however might also consult relevant advisory committees on these standards and specifications as appropriate. DS/ITB also confirmed that the industry had not expressed objection to this proposed section during the consultation on the legislative proposals in the Bill.

*Clause 16 - Proposed section 32E
Certification requirements*

43. Members did not raise any query on proposed section 32E.

*Clause 16 - Proposed section 32F
Power of Authority in relation to numbering plan*

44. In reply to Mr Ronald ARCULLI, SAD/OFTA advised that at the initiative of telecommunications operators, TA had in the past tendered some special numbers with the proceeds paid to the Community Chest. He also advised that the proceeds that could be raised through the disposal of special numbers were estimated to be in the order of a few millions to tens of millions.

45. DS/ITB recalled that when the subject was discussed at a previous meeting, some members had suggested that the proceeds derived from the allocation and sale etc. of special numbers should be placed with the Lotteries Fund while some members supported the arrangements under proposed section 32F(5)(b), which included a proposal that the proceeds be paid into a fund established by TA for promoting education or research and development connected with telecommunications. She reiterated that the Administration would be prepared to consider other viable alternatives subject to any consensus view of the Bills Committee.

46. Mrs Miriam LAU reiterated her concern expressed earlier on that the new arrangements under proposed sections 32F(5)(b) might set a precedent deviating from the existing practice whereby a Government agency usually could not raise revenue to fund its own activities or activities for the benefit of a particular sector/industry. If proposed section 32F(5)(b) was enacted as

currently drafted, other industries such as the transport industry would have good grounds to seek the establishment of a fund to hold proceeds arising from the sale of special vehicle numbers for the benefit of the transport industry. Mr Ronald ARCULLI shared the concern of Mrs LAU and queried the rationale for the proposed new arrangements.

47. Mr Howard YOUNG opined that proceeds arising from the allocation or sale of public resources such as vehicle numbers, telephone numbers and street numbers should be disposed of in a way that would benefit the general public rather than a particular sector or industry.

48. The Chairman said that being the representative of the information technology sector in the Legislative Council, he was in support of the disposal of the proceeds towards the development of the telecommunications sector as provided for under proposed section 32F(5)(b).

49. The Principal Assistant Secretary for Information Technology and Broadcasting referred to the paper "The Administration's response on the new section 32F relating to the management of a numbering plan" (CB(1)167/99-00(02) issued on 21 October 1999) and recapitulated that according to the Office of the Telecommunications Authority Trading Fund Resolution passed in May 1995, proceeds generated from the disposal of special numbers must be channeled to the OFTA Trading Fund, not the General Revenue Account. There was hence no question of the hypothecation of revenue pursuant to the proposed section 32F which would empower TA to pay the proceeds to a charitable institution or to apply the proceeds towards promoting education, research and development connected with telecommunications, and to set up a fund under TA for the purpose. She informed members that the proposed arrangements had received general support during the consultation on the legislative proposals in the Bill.

50. In reply to Mrs Miriam LAU's enquiry on how the administrative and other costs incurred in relation to the allocation or sale etc. of a number under proposed section 32F(6) were determined, the Administration advised that the costs would include staffing costs based on man hours and overhead costs based on a percentage of the staffing costs.

51. In this connection, Miss Margaret NG said that the Bar Association had advised its members not to charge legal fees on the basis of the man hours spent on a case. She suggested that the Administration should take this into account in reviewing the basis for charging Government fees and charges.

IV Any other business

52. Members agreed that the next six meetings of the Bills Committee would be held as follows -

<u>Date</u>	<u>Time</u>
1 March 2000	8:30 am
7 March 2000	8:30 am
10 March 2000	8:30 am
15 March 2000	10:45 am
5 April 2000	8:30 am
5 April 2000	10:45 am

53. Members also agreed that the Bills Committee would examine the constitutional and legal issues arising from the Bill at the two meetings to be held on 5 April 2000.

54. The meeting ended at 10:40 am.

Legislative Council Secretariat
August 2000