

立法會
Legislative Council

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by the Administration)

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Legislative Council
Bills Committee on Elections (Corrupt and Illegal Conduct) Bill

Minutes of the 15th meeting
held on Monday, 4 October 1999 at 2:30 pm
in Conference Room A of the Legislative Council Building

Members Present : Hon Ronald ARCULLI, JP (Chairman)
Hon Cyd HO Sau-lan
Hon LEE Wing-tat
Hon CHAN Yuen-han
Hon Gary CHENG Kai-nam, JP
Hon Andrew WONG Wang-fat, JP
Dr Hon TANG Siu-tong, JP
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP
Hon CHOY So-yuk

Members Absent : Hon NG Leung-sing
Hon Mrs Selina CHOW, JP
Hon Emily LAU Wai-hing, JP

Public Officers Attending : Mr Robin IP
Deputy Secretary for Constitutional Affairs

Mr Bassanio SO
Principal Assistant Secretary for Constitutional Affairs

Mr James O'NEIL
Deputy Solicitor General (Constitutional)

Ms Phyllis KO
Deputy Principal Government Counsel (Elections)

Mr Michael LAM
Government Counsel

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

Staff in Attendance : Mr Arthur CHEUNG
Assistant Legal Adviser 5

Mr Paul WOO
Senior Assistant Secretary (2)3

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I. Meeting with the Administration

Clause-by-clause examination of the Bill

Clause 27

Assistant Legal Adviser enquired whether it was the policy intention to provide a "reasonable excuse" defence for the offence under clause 27 and if not, whether clause 27(8) was necessary.

2. The Administration agreed to reconsider the drafting of clause 27 and provide a written response to the various issues raised on this clause, including those discussed at the last meeting on 23 September 1999.

Clause 28

3. In response to the Chairman, Deputy Secretary for Constitutional Affairs (DS/CA) said that clause 28 which made provisions for the granting of an injunction by the Court would operate on the existing rules and procedures governing a civil action. The clause expanded upon the existing section 16(3) of the Corrupt and Illegal Practices Ordinance (CIPO) to cover the illegal conduct of publishing false statements and false claim of support.

4. Ms CHOY So-yuk opined that the Administration should review the mechanism for handling complaints relating to an election. She suggested that complaints of a trivial nature or involving minor irregularities due to inadvertence could be dealt with under a simplified procedure without the need for a party to engage legal representation in court proceedings in order to save time and expense.

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5. In response, the Administration replied that under the existing system, most complaints were first channeled to the Electoral Affairs Commission (EAC) which performed the role of a monitoring body in election matters. EAC had the authority to issue a warning or censure to a contravening party upon completion of an investigation. It could also refer a complaint to the Independent Commission Against Corruption (ICAC) or the Police for investigation and follow-up action. Clause 28 which provided an additional remedy in the form of a court injunction was intended to specifically deal with illegal conduct at an election in contravention of clauses 25, 26 or 27. DS/CA further advised that clauses 31 and 39 provided for the authority of the Court to grant relief to candidates who would otherwise have engaged in certain illegal conduct, subject to the conditions specified in those two clauses.

6. In reply to a question from Dr TANG Siu-tong, DS/CA said that an application for an injunction under clause 28 should be made by the party who considered that his interests had been prejudiced by the conduct in question. Thus, EAC was not the appropriate party to apply for an injunction under the clause.

Clauses 29 and 30

7. In response to the Chairman's enquiry concerning the purpose of clause 29(1) and (2), Deputy Solicitor General (Constitutional) (DSG(C)) advised that the former reflected the general rule that a candidate was personally liable for corrupt or illegal conduct engaged in by others with the candidate's knowledge and consent. The latter provided a defence which exonerated a candidate from the liability for the corrupt or illegal conduct by an agent if the candidate could satisfy the Court that he did not consent to the act and that he was not aware of the act or he had taken all reasonable steps to prevent the agent from engaging in the conduct. Clause 29 reflected the relevant provisions in the existing sections 9, 24 and 25 of CIPO. He added that "an agent" did not necessarily mean the authorized election agent of a candidate.

8. The Chairman said that it was difficult to understand how the deeming provisions in clause 29(2) operated in parallel with clause 29(1). He queried whether clause 29(2) was necessary. He further pointed out that the references to "could not be reasonably expected to be aware" and "ought to have been aware" in clause 29(2)(b)(i) and 29(2)(b)(ii) respectively were ambiguous in meaning, which were new concepts not found in the existing CIPO provisions.

9. The Administration was requested to reconsider the drafting of clause 29 in the light of policy considerations and having regard to the real-life practicalities involved in electioneering activities.

10. Members expressed concern about the difficulty for a candidate to satisfy the onus of proof of having taken "all reasonable steps" to prevent an agent from engaging in corrupt or illegal conduct under clauses 29 and 30, where it was determined that the candidate was or ought to have been aware of the conduct. Members enquired whether the standard of proof could be relaxed.

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11. Members also noted that the conditions stipulated in clause 30(1)(a) - (d) had to be satisfied collectively before the Court hearing an election petition could declare a candidate to be elected despite corrupt or illegal conduct by an agent. Members asked the Administration to reconsider, as a matter of policy, whether an elected candidate ought to be disqualified only because he failed to satisfy the Court that he had taken all reasonable steps to avoid the commission of the corrupt or illegal conduct by an agent, despite the offence was of a trivial nature.

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Clause 31

12. DSG(C) advised that for the purpose of a hearing of an application under clause 31(1), as a matter of practice the court required all relevant documents relating to the application to be provided to EAC, the relevant returning officer as well as the other candidates concerned.

13. The Chairman asked whether it was acceptable, from a policy point of view, to introduce a simplified mechanism whereby the Court could exercise a final discretion to allow an applicant to submit a paper application for the purpose of an order under clause 31(2). DSG(C) responded that as clause 31 dealt with a legal measure to relieve persons from the consequences of certain illegal conduct at an election, which were matters of public concern, any application procedures adopted had to be fair and open and acceptable to the public at large. Ultimately, a balance had to be struck between minimizing inconvenience and achieving a high degree of transparency.

14. Ms CHOY So-yuk enquired whether illegal conduct of a trivial nature, such as inadvertent omission in reporting or under-reporting of election expenses of a minimal amount which did not involve the offence of exceeding the maximum amount of election expenses of a candidate, could be dealt with by way of an EAC warning rather than an application for a court order under clause 31.

15. In response, DS/CA said that the proper role of EAC was to ensure that elections were conducted in full compliance with the electoral law. It was not for EAC to decide on the seriousness of a corrupt or illegal conduct at an election, which was a matter for the Court after thorough investigation of the offence by law enforcement agencies such as the ICAC or the Police. He added that past experience had shown that members of the public took an interest in election matters, including the disclosure of information on election donations and election expenses concerning individual candidates. Such matters had also been widely reported by the media. The keen interest of the community at large clearly justified the need for a high degree of transparency in those matters.

16. On the operation of clause 31, members requested the Administration to clarify the following -

- (a) whether it was still open to a person to apply to the Court for an order under clause 31(2) to relieve him from the consequences of certain illegal conduct

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after prosecution had been brought against the person for the conduct;

- (b) in the case of a person who had made an application under clause 31(1) and was subsequently prosecuted for the illegal conduct, whether the Court could still hear the application and make an order under clause 31(2); and
- (c) whether the costs incurred by a candidate in making an application for a Court order under this clause would be counted as election expenses of the candidate.

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17. The Chairman enquired whether the relevant criminal proceedings against a person would be stayed once an application under clause 31 or 39 was made. The Administration agreed to review the relevant clauses to address this point.

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Clause 34

18. The Administration advised that the printing details requirements specified in clause 34(1) in relation to election advertisements also applied in the case of a printed performance report if they were published by an incumbent candidate for the purpose of promoting his candidature. By virtue of clause 34(8), a performance report published by an incumbent member during an election period was deemed an election advertisement.

19 In reply to Mr Andrew WONG, DSG(C) said that the distribution of a previously published performance report by an incumbent candidate during the election period would be subjected to the requirements governing election advertisements and election expenses. He advised that "publish" was a defined term in clause 2 which included "continue to publish".

Clauses 35 and 2

20. In response to Assistant Legal Adviser, the Administration clarified that the Bill applied to an election to elect members of the Election Committee. The Administration undertook to review the definition of "appropriate authority" and "returning officer" in clause 2 as well as the drafting of clause 35(a) to include the reference to "the Election Committee" to make clear that the relevant provisions were also applicable to candidates in the subsector elections of the Election Committee.

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Clauses 36 and 39

21. Mr Andrew WONG said that a candidate might not be able to comply with clause 36(2)(b)(i) for reason such as loss of the invoice or receipt for an election expense. He pointed out that the relief available under clause 39 was not capable of dealing with this type of situation.

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22. The Administration was requested to consider the need for amending clause 39 to enable a candidate to apply for a court order under that clause for loss of the documents required under clause 36(2)(b). The grounds for granting a court order should be the same for correcting errors in an election return as set out in clause 39(4).

Clause 38

23. Mr Andrew WONG said that a meeting of the Legislative Council or the body to which a candidate was elected might be held before the deadline for lodging an election return under clause 36. He asked whether an elected candidate participating in the affairs of the Council or body as a member under such circumstances would be regarded as committing the offence under clause 38(1).

24. The Administration explained that it was in order for an elected candidate to participate in the affairs of the Council or body so long as the 30-day period for lodging an election return specified in clause 36 had not expired. The Administration agreed to -

- (a) review and amend, if necessary, the phrase "without having lodged an election return as required by section 36" in clause 38(1) to remove any ambiguity; and
- (b) review clause 38(2) regarding the liability of a person who had applied for a court order under clause 39.

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Clause 39

25. Assistant Legal Adviser said that once a candidate failed to lodge an election return as required by clause 36 within the permitted period, the candidate would be caught as having committed the offence under clause 37. Therefore, it was doubtful whether the candidate could make an application under clause 39(1) to extend the deadline after the permitted period.

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26. Members requested the Administration to reconsider the present drafting to see whether it could achieve the purported objective.

27. The Chairman noted that clause 39(2) and (4) set out the grounds for which the Court must be satisfied before granting an order. He was concerned that the phrase "some other reasonable cause" used in these two clauses appeared to imply that this other cause must be of similar nature to those grounds specifically set out in the clauses, and hence had the effect of excluding other justifiable causes for seeking the relief under clause 39.

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Adm 28. The Administration was requested to review and improve the drafting of clause 39(2) and (4) in conjunction with clause 31(2)(a) in relation to the reference to "some other reasonable cause".

Clause 41

29. Ms Cyd HO enquired whether "reasonable diligence to prevent" in clause 41(1)(b) included making a report to the law enforcement agencies by an officer of the corporation about a corrupt or illegal conduct under clause 41.

30. DSG(C) explained that clause 41 aimed at a person acting in his official capacity as an officer of a corporation, as opposed to the status as an ordinary citizen. If the corrupt or illegal conduct by a corporation was committed with the knowledge of a person as an officer of the corporation, the person was required by virtue of clause 41 to prove that he had taken reasonable steps, within the scope of his official authority in the corporation, to prevent the conduct from being engaged in, so as to relieve himself of the liability under this clause. Clause 41 did not require the person to act directly, it might be sufficient for him to give directions or orders to others as required to ensure that the corrupt or illegal conduct would not be committed by the corporation.

Clause 42

Adm 31. The Chairman opined that in terms of the level of penalty, there appeared to be a difference between conviction of an attempt to commit an offence and conviction of having committed a substantive offence. He asked the Administration to explain the policy intent of clause 42 to equate attempts to complete offences.

Clause 43

32. DSG(C) advised that clause 43 reflected the existing scope and objective of section 28 of CIPO in modernized and simplified wordings. Assistant Legal Adviser agreed that clause 43 as presently drafted had the same effect as that of section 28 of CIPO.

Clause 44

33. DS/CA informed the meeting that a regulation under clause 44 would be enacted under the negative vetting procedure of the Legislative Council.

Clause 46

34. DS/CA advised that most of the consequential amendments to other Ordinances specified in the Schedule were technical amendments, such as repealing "Corrupt and Illegal Practices Ordinance" and substituting "Elections (Corrupt and Illegal Conduct) Ordinance"; replacing the reference to "corrupt or illegal practice" with "corrupt or

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illegal conduct" etc. Two exceptions were items 6(i) and 7(ii) of the Schedule concerning the addition of a subsection in section 67 of the Legislative Council Ordinance and section 55 of the District Councils Ordinance respectively. This subsection provided that the Court was required to submit a report to the Director of Public Prosecutions giving details of the corrupt or illegal conduct engaged in by a specified person if such conduct was revealed during the trial of an election petition.

(Post-meeting note: The Administration's response to the concerns raised at the meeting has been circulated to members vide LC Paper No. CB(2)84/99-00(01) dated 13 October 1999.)

II. Date of next meeting

35. The next meeting was scheduled for 5 October 1999 at 8:30 am.
36. The meeting ended at 6:30 pm.

Legislative Council Secretariat
28 January 2000