

立法會
Legislative Council

LC Paper No. CB(2)2423/99-00

(These minutes have been
seen by the Administration)

Ref : CB2/BC/17/98

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

Minutes of the 23rd meeting
held on Wednesday, 5 January 2000 at 8:30 am
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 NG Leung-sing
Hon Mrs Selina CHOW, JP
Hon Gary CHENG Kai-nam, JP
Hon Jasper TSANG Yok-sing, JP

Members Absent : Hon CHAN Yuen-han
Hon Andrew WONG Wang-fat, JP
Hon Ambrose LAU Hon-chuen, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Dr Hon TANG Siu-tong, 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

Action Column

I. Administration's responses to concerns raised at the meetings on 7 and 10 December 1999
(LC Papers Nos. CB(2)756/99-00(01), (02) and (03))

Proposed new definition of "election donation"

Deputy Secretary for Constitutional Affairs (DS/CA) said that having regard to members' views expressed at previous meetings, the Administration was prepared to propose Committee Stage amendments (CSAs) to amend paragraphs (b) and (c) of the definition of "election donation" to clarify that apart from money donations, election donations also consisted of -

- (a) any goods given to or in respect of a candidate or candidates for the purpose of promoting the election of the candidate or candidates or of prejudicing the election of another candidate or candidates; and
- (b) any service provided to or in respect of a candidate or candidates for the purpose of promoting the election of the candidate or candidates or of prejudicing the election of another candidate or candidates, but did not include voluntary service.

He added that as a result of the above amendments, consequential amendments would also be made to clauses 18, 19(2) and 19(3) to achieve consistency.

2. The Chairman said that the construction of clause 18 as it presently stood appeared to require that a candidate could only use election donations for the purpose of meeting election expenses. He pointed out that by definition, election expenses already covered "the value of election donations consisting of goods and services" used for promoting or prejudicing the election of a candidate or candidates. In view of this, he asked the Administration to consider, in consultation with Assistant Legal Adviser (ALA), whether the proposed new definition of "election donation" as well as the amendments to clauses 18, 19(2) and (3) mentioned above could be simplified, i.e. whether the reference to election donation to consist of good or services was in fact

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Adm necessary.

Proposed definition of "voluntary service"

3. DS/CA advised that as proposed by members, the Administration would amend the original phrase of "at the person's own free time" to "at the person's own time".

4. DS/CA further advised that not all free voluntary services provided to a candidate or candidates would be excluded from the amended definition of "advantage". Under the revised definition of "advantage" and "voluntary service", only voluntary service provided for the purpose of promoting or prejudicing the election of a candidate or candidates would not be considered as an advantage.

5. The Chairman asked whether a person providing a free service to an elector which was seemingly unrelated to the election would be caught as offering an advantage under clause 11.

6. DS/CA replied that the test would ultimately depend on the intention of the person providing the service. If the service was provided as an inducement for the elector to vote or not to vote for a particular candidate or candidates at an election, the offence in clause 11 of bribing electors would apply.

Clause 7(1)

7. In response to the queries raised at the meeting on 7 December 1999, DS/CA explained the rationale for treating an act of inducing someone to stand as a candidate at an election as a corrupt conduct under clause 7(1). He said that the existing section 8A(1) of the Corrupt and Illegal Practices Ordinance was added in 1984 as suggested by an interdepartmental Working Group after reviewing the arrangements for the 1982 District Board elections and 1983 Urban Council elections. The Working Group considered that as there were provisions aimed at preventing any person from bribing or intimidating any elector to vote or not to vote for a particular candidate only, additional provisions should also be made to prevent any person from bribing or intimidating any other person to stand as a candidate or to withdraw his candidature.

8. DS/CA said that the objective of clause 7(1) was to maintain clean and honest elections, i.e. to prevent persons or organizations from offering an advantage to candidates at an election so that, once elected, they would protect or promote the interests of these persons or organizations.

9. Mr LEE Wing-tat said that the argument in paragraph 8 above to justify the necessity of clause 7(1) was misleading. He pointed out that it was a duty upon any elected candidate to represent and protect the interests of those who had elected him. This was particularly obvious for Legislative Council Members returned through the functional constituencies.

10. DS/CA responded that like the other clauses in Part 2 of the Bill, clause 7 sought to define what corrupt conduct at election was. A crucial element of the offence was the existence of a corrupt motive to bribe by the offering of an advantage. He said that this mental element of a corrupt intent was built-in in the construction of clause 7 and the other offence clauses in Part 2.

11. The Chairman doubted that clause 7 and the other clauses in Part 2 adequately reflected the legislative intent. He said that as the drafting now stood, it did not appear that a conviction of the offences required a mens rea, i.e. a guilty intent to commit the offence, to be proved. In addition, the definition of "advantage" had a wide meaning covering a wide range of activities including, for example, the offering of an employment by a political organization to a person with a view to encouraging and assisting him to seek elected office. The Chairman was concerned that the offence provisions in Part 2 in effect could easily create absolute offences, i.e. the offence of corrupt conduct at election would be complete merely by a bona fide act alone without having to prove a corrupt motive.

12. Referring to the discussion at the last meeting on 10 December 1999, the Chairman further pointed out that a similar reference could be drawn from section 107 of the UK Representation of the People Act 1983 (the UK Act) on corrupt withdrawal from candidature, which stated that -

"Any person who corruptly induces or procures any other person to withdraw from being a candidate at an election, in consideration of any payment or promise of payment, and any person withdrawing in pursuance of the inducement or procurement, shall be guilty of an illegal payment."

He said that the use of the words "corruptly induces" in section 107 of the UK Act clearly indicated that a corrupt intention had to be proved.

13. Members agreed that the drafting of the clause 7 and the other offence clauses in Part 2 of the Bill should be reviewed to prevent innocent acts from being caught. The Administration was requested to consider the Chairman's suggestion to add the reference to "corruptly induces" along the line of section 107 of the UK Act, or to introduce a defence of "with reasonable excuse".

Adm

Clause 19

14. DS/CA advised that the Administration was of the view that it was appropriate to use "more than \$1,000" as the amount of election donation requiring a receipt to be issued to the donor, even though the election donation was given collectively to a group of candidates at an election. To avoid confusion, the Administration would move a CSA to clarify this point.

15. DS/CA further advised that whether a series of payments made by a donor would be treated as a single election donation for the purpose of clause 19 would depend on the circumstances of the case. For example, where the donor made clear from the start his intention to donate a specific sum in excess of \$1,000 by way of installments over a short period of time, the amount of the individual payments would be subject to aggregation for the purpose of clause 19. A number of factors would be relevant such as the amount of individual payments, the method of payment, the total amount given, the frequency of payments, and the relationship between the donor and the candidate etc. It should also be borne in mind that in enforcing clause 19(3), it would be for the prosecution to prove beyond reasonable doubt that the payments were part of a single donation and that the candidate was aware of that fact.

Clause 21

16. Deputy Solicitor General (Constitutional) responded to the Chairman's query raised at the meeting on 10 December 1999 as to whether the corrupt conduct to withdraw an election petition for a bribe under clause 21 would cover the situation where both parties to an election petition reached an agreement on how the costs should be disposed of between themselves as a pre-condition for the petitioner to withdraw the petition. He explained that the Administration's stance was that unlike in a commercial dispute where it was perfectly legitimate for the litigants to reach an out-of-court settlement as the dispute issues related wholly to private rights and interests, in an election petition the petitioner was actually challenging the result of an election which was of public concern. Therefore, it was inappropriate to allow any form of advantage, be it an offer of out-of-court settlement or a blatant bribe, to be offered to induce a petitioner to withdraw his election petition.

17. The Chairman opined that where the parties concerned genuinely wanted to "bury the issue" and came to a settlement by way of an agreement on costs, and provided that the Court granted leave for the withdrawal of the election petition, the offence in clause 21 should not apply. He said that a settlement of this kind could save a lot of time and costs on the part of both the petitioner and the respondent.

18. DS/CA reiterated that as the disputes involved in an election petition were matters of public concern, it was not appropriate to specify in the law circumstances under which private settlement between the parties should or should not be allowed. He further pointed out that existing electoral law contained provisions on payment of costs arising from an election petition. For example, section 68(7) of the Legislative Council Ordinance specified that the petitioner was liable to pay the costs of the respondent on withdrawal of the petition or where the petitioner ceased to prosecute the petition. He said that when the hearing of an election petition had already started, a withdrawal on the basis on a private agreement on payment of costs between the parties concerned could give rise to public suspicion.

19. Mr LEE Wing-tat said that it would be difficult to remove public suspicion that

an out-of-court settlement relating to the disposal of costs might involve a corrupt element of offering and accepting advantage. Mrs Selina CHOW opined that the law should be drafted in such a way as to minimize the possibility of corrupt or illegal conduct. She was not in favour of permitting any out-of-court settlement in relation to an election petition. She added that so far as costs were concerned, the Court had authority to make an appropriate order at termination of the proceedings.

II. Revised draft CSAs proposed by the Administration
(LC Paper No. CB(2)391/99-00(01))

20. Members continued to scrutinize the draft CSAs proposed by the Administration.

Offence of not using best endeavours in election campaigning

21. ALA pointed out that the proposed new offence of not using the best endeavours in an election was introduced only in respect of clause 7 on corrupt conduct to bribe candidates or prospective candidates but not in respect of clause 8. In view of ALA's observation, members requested the Administration to consider the necessity to introduce in clause 8 an offence element of using or threatening to use force or duress against a candidate to induce the candidate not to use his best endeavours in election campaigning.

Adm

Clauses 27 to 31

22. Members studied and agreed to the draft CSAs to clauses 27 to 31 as proposed in the Administration's paper.

III. Date of next meeting

23. The next meeting was scheduled for 6 January 2000 at 8:30 am.

24. The meeting ended at 10:30 am.

(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)850/99-00(01) dated 13 January 2000.)