

立法會
Legislative Council

LC Paper No. CB(2)530/99-00

(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 10th meeting
held on Monday, 5 July 1999 at 2:30 pm
in the Chamber of the Legislative Council Building

Members Present : Hon Ronald ARCULLI, JP (Chairman)
Hon LEE Wing-tat
Hon NG Leung-sing
Hon CHAN Yuen-han
Hon Gary CHENG Kai-nam
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk

Members Absent : Hon Cyd HO Sau-lan
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon Andrew WONG Wang-fat, JP
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

Ms Phyllis KO
Acting Deputy Solicitor General

Ms Dorothy CHENG
Senior Government Counsel

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

Voluntary service

(LC Paper No. CB(2)1947/98-99(01) - Draft paper prepared by the Secretariat on Voluntary Service; LC Paper No. CB(2)1805/98-99(01))

Mr CHENG Kai-nam and Mr TSANG Yok-sing opined that the proposal of the Administration to limit the scope of voluntary service to be counted as election donation by introducing a time element in relation to the provision of the service would not address the concerns expressed by members. They pointed out that it was not uncommon that people in various occupations were working irregular hours. To many of them, it would be extremely difficult to determine the "normal" working time for the purpose of earning income or profit.

2. Deputy Secretary for Constitutional Affairs (DS/CA) explained that the Administration's proposal was modelled on the Electoral Affairs Commission's (EAC) guidelines in respect of the 1998 LegCo election which specified that voluntary service rendered by a person to a candidates or group of candidates would be counted as election donation if such service was the work "normally undertaken by the individual and during such time for the purpose of earning income or profit." He said that the law could not be so specific as to set out all conceivable circumstances to determine whether certain services should fall within the meaning of election donation. Ultimately, it would be a matter for the court to decide, having regard to the circumstances of the case.

3. The Chairman and Ms CHOY So-yuk said that the law should be as clear and certain as possible to avoid grey areas which might lead to unnecessary disputes and litigations. They said that services rendered free of charge, provided that they were offered voluntarily and free from any undue influence or pressure from somebody, should not be treated as election donation.

4. Ms Emily LAU reiterated her concern that an across-the-board removal of the restriction on voluntary service might create a loophole for exploitation so that the

purpose of imposing an upper limit of election expenses was defeated. She said that under the Administration's proposal, the inclusion of the two elements of "occupation" and "working hours" operating together should have in effect excluded a wide range of voluntary services from the definition of election donation. She added that the treatment of voluntary service in relation to election donation was, after all, not a new arrangement in elections, and no serious problems had been experienced in the past.

5. DS/CA said that the purpose of treating certain voluntary services as election donation was to provide a level playing field for all candidates. If all kinds of voluntary services were excluded, some candidates might gain an unfair advantage over others if they could obtain voluntary services more easily from people in various occupations.

6. The Chairman opined that the treatment of voluntary service as proposed unfairly discriminated against those candidates who, by virtue of their experience and exposure in certain fields, had friends and associates who were willing to offer help and assistance in the election. Ms CHOY So-yuk pointed out that in an extreme scenario, a candidate seeking election in a functional constituency and consulting the professional people in the relevant fields for their advice on how to promote the interests of the electors might be caught as receiving election donation. Furthermore, if the value of such service was to be counted towards election expenses, the limit of election expenses could easily be exceeded. Mr TSANG Yok-sing added that movie stars or art performers participating in electioneering activities might also be caught as rendering service within the meaning of election donation.

7. The Chairman enquired about the practice adopted in other countries (Annex to LC Paper No. CB(2)1805/98-99(01)). Principal Assistant Secretary for Constitutional Affairs (PAS/CA) advised that in Australia, Canada, Germany, Japan, Singapore and UK, voluntary services were not counted towards election expenses, but there were certain restrictions on voluntary services in US.

8. As there was no consensus view of the Bills Committee on the subject, the Chairman suggested that further discussion be deferred to another meeting.

Discussion on the Administration's responses to the concerns raised at the meetings on 15, 20 and 28 April 1999 and 5 May 1999
(LC Papers Nos. CB(2)1947/98-99(02); 2053/98-99(01) and 2053/98-99(02))

Employees of public-funded organizations taking up remunerated or non-remunerated public office

9. DS/CA advised that at present, the measures adopted by public-funded organizations, such as UGC-funded institutions and subvented organizations in the welfare sector, were not standardized, owing to the different nature of services

provided by those organizations as well as their organizational resource considerations. He said that members' suggestion of a uniform arrangement regarding staff taking up public service had been conveyed to the policy bureaux and departments for consideration.

10. Members agreed that the matter should be referred to the relevant LegCo Panels for follow-up.

(*Post-meeting note* : The subject was discussed by the Panel on Constitutional Affairs at its meetings on 25 October 1999 and 20 December 1999.)

Election advertisement

11. DS/CA advised that in view of members' comments, the Administration was prepared to amend clause 34(3) to change the requirement to lodge a statutory declaration from "before the advertisement is published" to "not later than 7 days after the advertisement is published" so as to be consistent with section 19(1A) of the Corrupt and Illegal Practices Ordinance (CIPO). Members agreed to the proposed amendment.

Media commentaries

12. DS/CA advised that having considered members' concern that the definition of election advertisement (EA) in clause 2 might be too wide, the Administration proposed to amend the definition by substituting the "effect" test for EA with a "purpose" test. This amendment could reflect more clearly the policy to cover only those materials which were published for the purpose of promoting or prejudicing the election of a candidate or candidates at an election. He said that the "purpose" test would also apply to media commentaries. However, media carrying out their normal and ongoing activities of reporting and commenting on public affairs in a fair and objective manner would not be caught by the definition. The proposed revised definition sought to maintain a balance between freedom of expression and level playing field in elections.

13. The Administration added that the existing CIPO provided no definition of EA but merely set out requirements (in section 19) as to addresses, bills, notices and posters etc. having reference to an election. The present proposal better clarified the policy intent. Furthermore, it was consistent with the definitions of election expenses and election donation which also included a purpose test.

14. In response to Mr LEE Wing-tat, Assistant Legal Adviser said that it was relatively difficult to prove an "intention" as it involved a subjective element which was not easy to establish. He agreed that the scope of the definition of EA under a purpose test was more restrictive than that under an effect test.

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15. Mr TSANG Yok-sing opined that the Administration's proposal to amend the definition of EA by including a purpose test still failed to address members' concern. He reiterated that in the 1998 LegCo election, some newspaper editorials had openly appealed to the public to vote for candidates belonging to a particular political party. Therefore, there was evidently the intention to promote the election of particular candidates in such publications. He pointed out that paragraph 5 of Appendix to Chapter 8 of the EAC's Proposed Guidelines on Election-related Activities in respect of the 1999 District Councils Election stated that "any newspaper is at full liberty to express its support for or disapproval of a candidate". By virtue of this EAC guideline, press commentaries might be exempt from the definition of EA. However, in the above-mentioned situation, when the same articles were published in other publications such as periodicals issued by trade unions or Kai Fong associations, they would be caught by the definition of EA because of the purpose test. Mr TSANG said that if such was the policy intention, the Administration would have to justify that by reasons other than the purpose test argument. He suggested that the Administration might consider excluding newspaper commentaries altogether from the definition of EA by express provisions in the legislation.

16. Mr LEE Wing-tat said that it was understood that no local newspapers were owned or controlled by political parties and that no local newspapers had any political inclinations. Both Mr LEE Wing-tat and Ms Emily LAU were in support of a liberal approach to exclude media commentaries from the definition of EA.

17. In response to Mr LEE Wing-tat, PAS/CA advised that under the revised definition of EA, a media commentary published for the purpose of promoting the election of a candidate or candidates would be caught by the definition. A person who incurred costs in publishing such material without the consent or authorization of the candidate or candidates concerned committed the offence of incurring unauthorized election expenses.

18. The Chairman held the view that the proposed definition of EA as it applied in the context of media commentaries contradicted with the EAC guideline. He requested the Administration to explain in more detail the need for introducing a definition of EA and whether this had been prompted by complaints in past elections.

19. Ms Emily LAU suggested and members agreed that the Bills Committee should consult the relevant media organizations on the definition of EA .

Village representatives (VR) elections

20. DS/CA informed members that the Administration had agreed in principle that the scope of the Bill should also cover VR elections. Owing to the fact that previous VR elections were conducted in accordance with the Model Rules promulgated by the

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Heung Yee Kuk which did not have a legal basis, it would be necessary to introduce new legislation for the purpose of future VR elections. This would be the subject of a Bill to be introduced into the LegCo in due course.

21. In response to members, DS/CA advised that as the Working Group headed by the Home Affairs Bureau had yet to complete its review of VR elections and because of the time required for law drafting, it was unlikely that the Bill to provide for matters relating to VR elections could be introduced into the LegCo before the passage of the Elections (Corrupt and Illegal Conduct) Bill being scrutinized by members. He explained that this should create no problems as consequential amendments could be introduced to the Elections (Corrupt and Illegal Conduct) Ordinance after its enactment to extend its applicability to VR elections before the next round of VR elections took place.

Clause-by-clause examination of the Bill

"Valuable consideration" in the definition of "advantage"- Clause 2

22. In reply to a question raised by Ms Emily LAU, DS/CA advised that the Administration considered that it was not appropriate to prescribe in the law an arbitrary value amount below which a gift or payment in kind would be excluded from the definition of "advantage". The meaning of "advantage" should be judged not in isolation but in the overall context of the provisions in which the term was used. For example, for a corrupt conduct of offering or acceptance of an advantage under clause 11 to occur, it had to be shown that something was offered to a person as an inducement to vote, or as a reward for having voted, at an election for a particular candidate or candidates.

23. DS/CA added that the term "valuable consideration" was used in the definition of "money" in section 27 of CIPO.

24. Mr LEE Wing-tat said that the ambiguity should be removed as far as possible. He pointed out that under the provisions in clause 11(1)(c), conduct such as handing out souvenirs like balloons to children during electioneering activities might be caught as offering an advantage to another person as "an inducement to get, or try to get, a third person to vote at the election".

25. At members' request, the Administration undertook to revert to the Bills Committee on whether the EAC had provided any guidelines or examples to clarify the meaning of "advantage" and "valuable consideration".

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Definition of "candidate"

26. Referring to the definition of "candidate" in clause 2, the Chairman questioned

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whether the reference to "a group of candidates" was necessary as such persons should have been covered under paragraph (a) of the definition.

27. DS/CA replied that the term "a group of candidates" was included to cover specifically the list system in elections for geographical constituencies in a LegCo election. Certain requirements in the Bill, such as those relating to election expenses, applied to the whole group of candidates on the same list.

Adm 28. DS/CA agreed to provide a written response to clarify the point raised by the Chairman.

(Post-meeting note - The Administration's reply to the above concerns raised by members has been circulated to members vide LC Paper No. CB(2)2729/98-99(01) dated 3 September 1999.)

II. Date of next meeting

29. The next two meetings were scheduled as follows :

- 6 September 1999 at 2:30 pm
- 8 September 1999 at 2:30 pm

(Post-meeting note - The meeting scheduled for 6 September 1999 at 2:30 pm has subsequently been cancelled.)

30. The meeting ended at 4:30 pm.

Legislative Council Secretariat
25 November 1999