

立法會
Legislative Council

LC Paper No. CB(2)2424/99-00

(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 24th meeting
held on Thursday, 6 January 2000 at 8:30 am
in Conference Room A of the Legislative Council Building

Members Present : Hon Ronald ARCULLI, JP (Chairman)
Hon NG Leung-sing
Hon Mrs Selina CHOW LIANG Shuk-yee, JP
Hon CHAN Yuen-han
Hon Jasper TSANG Yok-sing, JP
Hon Emily LAU Wai-hing, JP

Members Absent : Hon Cyd HO Sau-lan
Hon LEE Wing-tat
Hon Gary CHENG Kai-nam, JP
Hon Andrew WONG Wang-fat, JP
Hon Ambrose LAU Hon-chuen, 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. Revised draft Committee Stage amendments (CSAs) proposed by the Administration
(LC Paper No. CB(2)391/99-00(01))

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

Clause 34

2. In response to Ms Emily LAU, Deputy Secretary for Constitutional Affairs (DS/CA) said that the new clause 34(4A) was proposed as a result of the discussion of the Bills Committee of the concern raised by the press and the printing media industry about the requirement to provide copies of election advertisement to returning officers. The new clause now made it clear that for an election advertisement published in a registered local newspaper, the duty to comply with subsection (4) was on the person who sought to place the advertisement in the newspaper.

3. Ms Emily LAU said that it was not uncommon practice for political parties or organizations to place advertisements in newspapers during an election period urging the public to support the parties or organizations concerned. In her opinion, such advertisements clearly had the purpose, and the effect, of promoting the election of those members of the party or organization who stood as candidates at the election, although the advertisements might not have specifically mentioned the names nor contained any pictorial representation of the candidates. She suggested that for the avoidance of doubt, some provisions might be included in the new legislation to make it clear that such advertisements should be treated as election advertisements.

4. The Chairman opined that an advertisement which called upon electors to support the members of a specific organization standing as candidates at an election should be regarded as an election advertisement. Yet, whether support for a political party or a political organization amounted to support for its members standing as candidates at an election might be subject to arguments.

5. The Chairman referred members to the reply given by the Administration (in LC Paper No. CB(2)2836/98-99(01)) to a similar question discussed at a previous meeting. The reply stated that, under the proposed new definition of election advertisement (EA), *"if a political party publishes an advertisement for the purpose of promoting or prejudicing the election of a candidate or candidates, it will be counted as an EA. In deciding whether an advertisement is an EA, and thus the expenses thereon will be counted as election expenses, the court will look at all the relevant circumstances. These may include contents of the advertisement and the manner of and conditions affecting its publication."*

6. DS/CA said that under the proposed revised definition of EA, in which the original "effect test" was replaced with a "purpose test", whether or not a publication was an EA depended on whether it was published for the purpose of promoting or prejudicing the election of a candidate or candidates at an election. It would be a matter for the court to decide if a particular advertisement had that purpose, and hence should be counted as an EA.

7. Mrs Selina CHOW said that some publications calling for public support might be simply part of a whole package of on-going activities conducted by a political party to promote the party itself, which had nothing to do with an election. She opined that it would not be desirable to spell out rigidly in the new Ordinance that such publications were election advertisements. She said that given the diversity of forms in which advertisements could take, whether a particular advertisement was an EA should be determined on the facts and circumstances of the case.

8. The Chairman added that the law could only set out the general principles to reflect the legislative intent. It was not possible nor desirable for an Ordinance to specify situations which would or would not fall within the meaning of a certain statutory definition.

9. Assistant Legal Adviser (ALA) expressed the same views. He considered that the "purpose test" specified in the new definition of EA was a parameter sufficient for the court to rely upon in judging whether a publication in a given case was an EA.

10. Mrs Selina CHOW and Mr TSANG Yok-sing said that in past elections, candidates had been very careful in reporting election expenses to guard against accusations by opponents of failure to comply with the legal requirements. Mr TSANG pointed out that advertisements published by the Democratic Alliance for the Betterment of Hong Kong to promote the party had been reported by its members standing as candidates in their election returns.

11. Ms Emily LAU said that the Administration should ask the Electoral Affairs Commission to review and improve its electoral guidelines as appropriate to minimize any uncertainties relating to the interpretation of the meaning of EA. She further suggested that the Secretary for Constitutional Affairs should explain fully the

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Adm legislative intent in his speech in moving the Second Reading debate on the Bill.

Clause 36

12. Mr TSANG Yok-sing asked whether the proceeds from selling raffle tickets or other articles to the public by a political party for the purpose of fund-raising for an election would be regarded as election donation.

13. The Chairman opined that judging from the ordinary meaning of "donation", the proceeds from the sale of any item for which there was a chance for the buyers to win a prize or get something in return should not be treated as election donation. He said that a donor normally would not expect to get something in return for his donation.

14. Deputy Solicitor General (Constitutional) (DSG(C)) advised that according to the definition of election donation, a donation would be caught if it was given to a particular candidate or candidates for the purpose of promoting or prejudicing the election of the candidate or candidates. Donation given to an organization would not be covered by the definition. Hence, whether the proceeds from any fund-raising activities would be regarded as election donation depended on the intended use of the money collected, i.e. whether the money was to benefit an organization or for promoting the election of a candidate or candidates. The Administration agreed to give an explanation in writing.

Adm

Clause 38

15. The Chairman enquired about the need for adding "act in office or" before "participate in affairs of body" in the heading of clause 38.

16. Deputy Principal Government Counsel explained that this was a technical amendment to reflect the difference between the election of the Chief Executive (CE) and the other elections to which the Bill applied. As opposed to candidates returned in elections to participate in the affairs of the bodies to which they were elected, the CE was elected to act in an office, i.e. the office of the CE of the Hong Kong Special Administrative Region.

New clauses 47 and 48

17. In response to the Chairman, the Administration advised that the proposed new clause 47 was a standard transitional clause to provide that any subsidiary legislation made under an Ordinance before its repeal and in force at the commencement of the new Ordinance was to continue in force and have the like effect for all purposes as if made under the replacement Ordinance. The practical effect of clause 47 was to enable subsidiary legislation made under the Corrupt and Illegal Practices Ordinance (CIPO), such as the election expenses orders, to remain in force upon the enactment of the Bill to cater for the eventuality of a by-election, until the relevant new subsidiary

legislation could be made under the new Elections (Corrupt and Illegal Conduct) Ordinance.

18. The Administration added that the proposed clause 47 mirrored section 36 of the Interpretation and General Clauses Ordinance (Cap. 1). One advantage of adding the clause was to enable people to understand the status of certain subsidiary legislation subsequent to the repeal of CIPO without having to refer to an external source.

19. On proposed clause 48, the Administration advised that it followed the principle in section 23 of Cap. 1, which provided that the repeal of an Ordinance by another Ordinance would not affect any right, privilege, obligation or liability etc. incurred under the repealed Ordinance, as if the repealing Ordinance had not been passed.

20. The Chairman noted that the opening phrase of proposed clause 48 read "*Without derogating from section 23 of the Interpretation and General Clauses Ordinance (Cap.1)*". On comparing proposed clauses 47 and 48, he pointed out that while the former was a replacement for section 36 of Cap.1, the latter merely incorporated part of section 23 of Cap.1. He requested the Administration to reconsider the drafting of the two new clauses in consultation with ALA to achieve consistency.

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Schedule

21. Members studied and agreed to the draft CSAs to the Schedule.

II. Administration's response to the points raised at the meeting on 5 January 2000

22. DS/CA gave a verbal response to the points raised at the meeting held on 5 January 2000.

Clause 7(1)

23. DS/CA said that the Administration was prepared to introduce a new CSA to add the word "corruptly" after "A person engages in corrupt conduct at an election if the person" in clause 7(1). The inclusion of this element of corrupt intention would address members' concern that the present drafting of the offence provisions in clause 7 could catch innocent acts committed without a guilty intent. The Administration considered it unnecessary to make similar amendment to the other clauses in Part 2 of the Bill because the element of a corrupt motive was already built-in in those other offence clauses.

24. Members accepted the Administration's proposal.

Clause 8

25. DS/CA said that the Administration was of the view that it was not necessary to introduce a new offence of not using the best endeavours in election campaigning in clause 8 as it was unlikely that such an offence element would come into play in the context of using force or duress to affect a person's candidature.

26. Mr TSANG Yok-sing said that the term "duress" was defined as including causing financial loss. He pointed out that an employer, by making a representation to an employee standing as a candidate at an election that the latter's prospect of promotion might be adversely affected if he succeeded in the election, could cause the employee to refrain from doing his best in the electioneering activities. He said that this might constitute a situation of using duress to induce a candidate not to use best endeavours in election.

27. In response, DSG(C) said that as explained in past discussion of clause 7, the element of "not using one's best endeavours" was difficult to prove. The difficulty in pinpointing this offence element became all the more apparent in the context of use or threatening to use force or duress in clause 8 because of all the grey areas one could envisage. He advised that the Administration's concern was that by adding such an offence element in clause 8, it would result in a new offence which was practically impossible to prove, hence making the offence provision not enforceable. Moreover, this would place doubts in the minds of candidates and others, and cause uncertainties which would be available for exploitation by opponents of candidates making accusations against them of committing the offence.

28. The Chairman opined that the situation in the example given by Mr TSANG Yok-sing could be dealt with under clause 8(1)(c) of the Bill. Mr TSANG Yok-sing accepted the Administration's explanation.

Clauses 2, 18 and 19

29. DS/CA informed members that as agreed at the last meeting on 5 January 2000, the Administration would follow up with ALA to consider whether the reference to "goods or services" in the new definition of "election donation" as well as in clauses 18 and 19(2) and (3) as proposed in the revised CSAs was necessary. The Administration would revert to members as soon as possible.

Adm

III. Way forward

30. Members agreed that the written response from the Administration on the points raised at this meeting and the last on 5 January 2000, as well as a full set of the Administration's revised CSAs, should be circulated for members' scrutiny as soon as

they were available. Subject to members' endorsement of the amended CSAs, the Bills Committee would make a report to the House Committee on 21 January 2000 and seek the latter's support for the Second Reading debate on the Bill be resumed on 16 February 2000.

IV. Any other business

31. Ms Emily LAU expressed the view that to reflect the efforts made by Members of the Council participating in the work of Bills Committees, consideration should be given for Members to move certain CSAs which had been agreed between them and the Administration as a result of the deliberations of the Bills Committees concerned.

32. The Chairman pointed out that under certain circumstances the moving of CSAs by Members might be subject to the restrictions specified in Article 74 of the Basic Law.

33. DS/CA said that the above comments would be considered in general by the Administration. He said that as far as this Bill was concerned, the Secretary for Constitutional Affairs would explain, when moving the Second Reading debate, how the CSAs were arrived at and agreed as a result of detailed discussion of the Bills Committee.

V. Cancellation of meeting

34. Pending receipt of the Administration's written response to the outstanding issues and the updated CSAs mentioned in paragraph 30 above, members agreed that the meeting originally scheduled for 10 January 2000 was no longer necessary and should be cancelled.

35. The meeting ended at 10:40 am.

(Post-meeting note : The Administration's written response to the concerns raised at the meetings on 5 and 6 January 2000 together with a full set of the Administration's revised CSAs were circulated to members vide LC Papers Nos. CB(2)850/99-00(01) to (04). A report of the Bills Committee was made to the House Committee on 21 January 2000 and the Second Reading debate on the Bill was resumed on 16 February 2000.)