

立法會
Legislative Council

LC Paper No. CB(2)857/99-00

Ref : CB2/BC/17/98

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

Minutes of the 11th meeting
held on Wednesday, 8 September 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 NG Leung-sing
Hon Gary CHENG Kai-nam, JP
Hon Andrew WONG Wang-fat, JP
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP
Dr Hon TANG Siu-tong, JP

Members Absent : Hon Mrs Selina CHOW, JP
Hon CHAN Yuen-han
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk

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

Mr Phyllis KO
Acting 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. Confirmation of minutes of meetings

(LC Paper No. CB(2)2693/98-99 - minutes of meeting on 23 February 1999)
(LC Paper No. CB(2)2734/98-99 - minutes of meeting on 3 March 1999)
(LC Paper No. CB(2)2694/98-99 - minutes of meeting on 22 March 1999)
(LC Paper No. CB(2)2697/98-99 - minutes of meeting on 29 March 1999)
(LC Paper No. CB(2)2707/98-99 - minutes of meeting on 15 April 1999)

The five sets of minutes were confirmed.

II. Meeting with the Administration

Administration's response to the concerns raised at the meeting on 5 July 1999
(LC Paper No. CB(2)2729/98-99(01))

Definition of "election advertisement"

2. Deputy Secretary for Constitutional Affairs (DS/CA) advised that, as explained in the Administration's paper, the proposal to amend the definition of "election advertisement" in the Bill by introducing a "purpose test" in place of the "effect test" could strike a balance between fair elections and freedom of expression. Under the proposed new definition, if the views expressed in a publication were not for the purpose of promoting or prejudicing the election of a candidate or group of candidates, the publication would not be treated as an election advertisement. He added that clause 34 of the Bill only sought to impose requirements concerning printing details and lodgment of copies in relation to election advertisements, rather than to impose restrictions on the contents of election advertisements.

"Valuable consideration" in the definition of "advantage" and corrupt conduct under clause 11

3. DS/CA said that, as explained at the last meeting, it was not desirable to prescribe an arbitrary limit for the purpose of determining whether a gift or payment in kind should fall within the meaning of "valuable consideration" in paragraph (a) of the definition of "advantage". For the offence of corrupt conduct under clause 11 to occur, the element of "inducement" to vote or not to vote, by the offering of an advantage, had to be proved. Concerning the query raised at the last meeting as to whether giving out balloons to children during the election period would be caught by clause 11(1)(c), the Administration was of the view that it was most unlikely that the court would consider that a balloon of a nominal value would amount to an inducement. Yet, each case had to be judged on its particular circumstances.

4. DS/CA further advised that the term "valuable consideration" was not used in the existing Corrupt and Illegal Practices Ordinance (CIPO). Following enactment of the Bill, the Electoral Affairs Commission (EAC) would reflect the relevant provisions in its Guidelines for the 2000 Legislative Council election.

Meaning of "a group of candidates" in the definition of "candidate"

5. The Administration advised that the term "a group of candidates" was a defined term to cover specifically the list system for geographical constituencies in a LegCo election, and to make clear the status of the persons whose names appeared on such a list.

Submissions from media groups on "election advertisement"

(LC Paper Nos. CB(2)2729/98-99(02) and (03) - Submission from the Newspaper Society of Hong Kong and the Administration's response; LC Paper Nos. CB(2)2749/98-99(01) and CB(2)2761/98-99(01) - Submission from the Hong Kong Journalists Association and the Administration's response)

6. Pursuant to the Bills Committee's previous discussions on the definition of "election advertisement", the Secretariat had written to six media groups to seek their views, of which two (i.e. the Newspaper Society of Hong Kong and the Hong Kong Journalists Association) had responded. In essence, their concerns were as follows -

The Newspaper Society of Hong Kong

- (a) It would be difficult for a newspaper publisher to ascertain whether an election advertisement had the effect of promoting or prejudicing the election of a candidate or candidates as well as to comply with the lodgment requirement under clause 34(4);

- (b) Hence, the Society considered that only neutral advertisements should be allowed in newspapers;

Hong Kong Journalists Association

- (c) Apart from raising the same issue of lodgment requirement, the Association pointed out that it was not clear from the definition of "election advertisement" that election advertisement excluded media editorial materials discussing an election and candidates at the election; and
- (d) Whether or not there were justifiable grounds for not extending the exemption under clause 34(2) regarding printing details to an election advertisement that was printed in a foreign newspaper circulating in Hong Kong.

The Administration responded to the above issues as follows -

- (a) To uphold the principle of open election, candidates at an election should be given the flexibility to utilize different publicity channels. It was not appropriate to limit newspaper election advertisements to neutral advertisements as suggested by the Newspaper Society of Hong Kong;
- (b) The Administration had already proposed to amend the definition of "election advertisement" with the inclusion of a "purpose test". With this amendment, the 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;
- (c) Foreign newspapers circulating in Hong Kong did not need to be registered and they were not subject to the provisions of the Registration of Local Newspapers Ordinance. Hence, it would be difficult for the public and the candidates at election to ascertain the relevant printing details. Therefore, the Administration considered it undesirable to extend the exemption in clause 34(2) to election advertisements placed in foreign newspapers circulating in Hong Kong; and
- (d) Regarding the concern about the lodgment requirement, one possible solution would be to make it clear in the Bill that for a paid election advertisement placed in a local newspaper, the liability for lodgment rested with the person placing the election advertisement, rather than with the newspaper publishers. The Administration welcomed the Bills Committee's views on this proposal.

7. In response to Mr LEE Wing-tat's enquiry, the Administration said that the proposed amendment to the Bill to revise the deadline for lodging two copies of an election advertisement with the Returning Officer to "within 7 days after publication" was consistent with section 19(2) of CIPO. The requirement would also apply to election advertisements published in newspapers and would be adopted in the District Councils election to be held in November 1999. In the circumstances where it was not possible to provide copies such as where the election advertisement was in the form of a large solid banner, two photographs showing the true object would serve the purpose.

8. To address the concern about election advertisements published in foreign newspapers, members requested the Administration to provide information on the statutory requirements in other jurisdictions governing election advertisements placed in local newspapers as opposed to foreign newspapers circulating in those jurisdictions; and to advise on how non-compliance was dealt with in those jurisdictions.

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"Purpose test" for election advertisement

9. Ms Cyd HO considered that the adoption of a "purpose test" to define election advertisement would still not address the concern about limitation on freedom of expression. She said that independent individuals or "watch-dog" organizations expressing views on candidates at an election or commenting on the performance of incumbent candidates were likely to be bound by the definition because such views and comments could be easily caught as having the intention to promote or prejudice the election of a candidate or group of candidates. She held the view as expressed in previous discussion that it might be desirable to introduce a defence of "reasonable excuse" in this context.

10. Mr Andrew WONG pointed out that in UK, an advertisement published by a political party during an election period which promoted the political party in general without mentioning specific candidates would not be regarded as an election advertisement, and hence the expenses incurred therefrom would not be counted towards election expenses of the party's members standing as candidates at the election. However, in reality, such advertisement could have an effect on the election of candidates.

11. In response, the Administration said that the court was required to look into all the circumstances of a case, such as the content of the advertisement and the timing of its publication etc, to determine whether it was published for the purpose of promoting or prejudicing the election of a candidate or a group of candidates.

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12. The meeting requested the Administration to advise in writing on whether an advertisement which promoted a political party generally would be treated as an election advertisement, and to provide a comparison between the provisions in the Bill and the relevant UK legislation.

Election advertisement on the electronic media

13. Referring to the opening captions of a television daily news programme which contained shots of a particular LegCo Member, Mr CHENG Kai-nam asked whether repeated exposures in the electronic media for public viewing of a person who happened to be standing as a candidate at an election would fall within the definition of election advertisement. The Chairman enquired about how election advertisements other than printed advertisements were covered in the Bill.

14. The Administration replied that the proposed definition of election advertisement was meant to cover pointed advertisements and those distributed by electronic transmission. The requirements imposed under clause 34 of the Bill were carried over from the CIPO and they applied only in relation to printed election advertisements. However, according to the Electoral Procedure Regulation for the District Councils made by the EAC, the requirement relating to lodgment of copies would apply to all kinds of election advertisements. Furthermore, the EAC, through its Guidelines promulgated for the 1998 LegCo election and the 1999 District Councils election, had appealed to the media to adhere to the fair and equal treatment principle in covering all the candidates who appeared in their programmes, and set out sanctions which would be taken in the event of non-compliance.

15. The Administration further advised that under existing legislation, political advertising was prohibited in the electronic media (i.e. radio and television).

16. Mr CHENG Kai-nam pointed out that the proposed definition of "election advertisement" provided no dividing line as to time in determining whether something was an election advertisement. Therefore, an advertisement which was produced well before an election could still be caught by the definition. On the other hand, in the example of the television news programme which he cited earlier, neither the EAC Guidelines nor the relevant broadcasting legislation or codes of practice could apply because the programme was apparently not related to an election. Nor could it be said to be in the nature of political advertising. He enquired about how these grey areas could be resolved.

17. The Administration was requested to respond to the above queries and provide information on existing guidelines and statutory requirements governing broadcasting on electronic media.

Adm

Continue with clause-by-clause examination of the Bill

Clause 6

18. In response to the Chairman, Deputy Solicitor General (DSG) explained that clause 6(3) mirrored the existing section 4(2) of CIPO, which made it mandatory for the court to order a person who had been convicted of having engaged in corrupt conduct, such as having accepted an advantage, to pay to the court the whole amount received in connection with the conduct or such part of the amount as the court specified.

Clause 7

19. DSG advised that clause 7 largely reflected section 8A(1) of CIPO on bribery in relation to standing as a candidate, but it sought to set out the offence more clearly and in a more specific manner by specifying the different activities which could constitute corrupt conduct under this clause. He further pointed out that so far as CIPO was concerned, section 8A had to be read by reference to section 5 in that the bribery activities caught under section 5 in relation to voting, by virtue of section 8A(2), were imported into section 8A in relation to standing as a candidate. Clause 7 now sought to cover all the activities relating to offering and accepting an advantage in one single section to facilitate better and easier understanding.

20. The Chairman asked whether clause 7(1)(b)(i) could cover the situation where a candidate, without any prior arrangement or implicit understanding whatsoever with anybody, received an amount from another person after the election as a form of financial support in recognition of his having stood as a candidate. He said that with the opening words of clause 7(1) stating that "A person engaged in corrupt conduct at an election if ...", such conduct might not be caught as it could be argued that the conduct was not engaged at an election because the actual payment was received after the election had been concluded.

21. DSG responded that it was the policy intention to cover situations where a bribe was given after the election. This accounted for the need for clause 7(1)(b) to remove any loophole. He said that the same intention was implicit in section 5 and section 8A of CIPO. He opined that in the example given by the Chairman, the conduct of offering and accepting the amount could be covered under clause 7.

22. The Chairman considered that under the present drafting, clause 7(1) might not be able to cover corrupt conduct engaged after an election was over. The Administration was requested to review the drafting of clause 7 as well as that of other offence provisions containing the phrase "at an election", and to consider the proposals to replace "at an election" with "in relation to an election" or "before, during or after the election period".

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(Post-meeting note : The Administration's reply to the concerns raised at the meeting has been circulated to members vide LC Paper No. CB(2)2836/98-99(01) dated 20 September 1999.)

III. Date of next meeting

23. The next three meetings were scheduled as follows :

- 21 September 1999 at 4:30 pm
- 22 September 1999 at 8:30 am
- 23 September 1999 at 2:30 pm

24. The meeting ended at 4:30 pm.

Legislative Council Secretariat

20 December 1999