

立法會
Legislative Council

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(These minutes have been seen by
the Administration)

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

Minutes of the 14th meeting
held on Thursday, 23 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 Mrs Selina CHOW, JP
Hon CHAN Yuen-han
Hon Gary CHENG Kai-nam, JP
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP
Hon CHOY So-yuk

Members Absent : Hon Andrew WONG Wang-fat, JP
Hon Emily LAU Wai-hing, 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

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 21

The Chairman asked how clause 21 would impact on a situation where a person, having lodged an election petition with the court, came to terms with the respondent on matters relating to disposal of costs arising from the petition, and decided to withdraw the election petition on the basis of the agreement. He asked whether such an agreement between the two parties would involve the offering and soliciting of an advantage as an inducement to withdraw an election petition under clause 21 of the Bill.

2. In response, Deputy Solicitor General (Constitutional) (DSG(C)) advised that provisions similar to clause 21 could be found in the electoral legislation of other jurisdictions, the purpose of which was to regulate the situation of a person being bribed to withdraw an election petition, or soliciting a bribe to withdraw an election petition. Unlike a normal commercial civil action involving a claim for recompense, an election petition dealt with challenges against the outcome of an election which was a matter of public concern. As laid down in the Legislative Council Ordinance and the District Councils Ordinance, a petitioner could withdraw an election petition only with the leave of the court. Regarding costs arising as a result of the action of lodging an election petition, the court could make an order on such matters at the termination of the proceedings.

3. The Chairman noted that the words "advantage" and "reward" were used in different contexts in clause 21, i.e. the former was used under subclauses (1) and (2) while the latter was used under subclause (3). Subclause (5) contained references to "advantage or reward", denoting that the two were not the same thing. Moreover,

"advantage" was a defined term in the Bill whereas "reward" was not.

4. DSG(C) said that the use of the term "reward" in the Bill followed that in the Prevention of Bribery Ordinance. He pointed out that in some other provisions in the Bill, e.g. clauses 7 and 11, "reward" was intended to be synonymous with "advantage", and hence the reference to "advantage as a reward" was used in those clauses. At members' request, the Administration undertook to review the drafting of the provisions in the Bill in which the terms were used, in order to achieve consistency in meaning.

Adm

Clause 23

5. In response to members, DSG(C) explained that clause 23(5) dealt with election expense agent for a single candidate, as opposed to clause 23(6) in relation to election expense agent for a group of candidates on a list. In the latter case, the written authorization of each of the candidates on the list was required for a person to act as their election expense agent. The situation of a person acting as an election expense agent for only one candidate of a group of candidates did not arise as election expenses were incurred for the group as a whole under the list system in elections for geographical constituency in a LegCo election.

6. Ms Cyd HO reiterated her concern that in spite of the Administration's proposal to replace the "effect test" with the "purpose test" for the purpose of determining whether a publication was an election advertisement, commentaries about an election or candidates made by independent individuals or third-party organizations taking on a keen interest in politics and public affairs could easily be caught as infringing clause 23(1). Such comments, which often contained praises or criticisms of certain candidates or political parties whose members stood as candidates, could be treated as deliberate acts to promote or prejudice the election of a candidate or group of candidates. Therefore, they would be governed by the provisions on election advertisements and election expenses. The Chairman and Ms Cyd HO suggested that the Administration should consider the desirability of introducing a defence of "public interest" or "with reasonable excuse" for the illegal conduct in clause 23(1).

7. In response, the Administration said that the underlying thrust in the construction of the Bill in general, and clause 23 in particular, was to reflect the existing provisions in the Corrupt and Illegal Practices Ordinance (CIPO). To introduce a defence clause in clause 23 would amount to a significant policy change regarding the system of regulating election expenses. To provide a level playing field for all candidates, it was essential that all expenses incurred for promoting or prejudicing the election of a candidate or candidates be accounted for. Whether or not a particular publication was an election advertisement having such an intention was a matter for the court to decide in case of dispute.

8. DSG(C) added that under section 26 of CIPO, the court had the power to except acts or omissions by a candidate, an election expense agent or other persons which would otherwise constitute illegal practices under the Ordinance. Clause 31 of the Bill had the same effect. It provided that a person could apply to the court for an order to relieve the person from penalties if he engaged in an illegal conduct due to inadvertence or some other reasonable cause and not due to bad faith.

Adm

9. The Chairman was concerned that clause 23(1) as drafted had such a wide breadth that instead of encouraging active public participation in election matters, it could impose an undesirable stifling effect on freedom of expression. The Administration was requested to give further thought to the proposal in paragraph 6 above.

Clause 25

10. DSG(C) advised that clause 25 reflected section 15 of CIPO. The purpose of this clause was to catch illegal conduct engaged by a person by publishing a false statement that another person was or was not a candidate.

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11. The Chairman requested the Administration to provide information on any precedent cases of complaints or prosecutions brought against the offence under this clause.

Clause 26

12. In reply to Mr CHENG Kai-nam, DSG(C) advised that clause 26 dealt with false or misleading statements of a factual nature. He said that some statements of facts might be false or misleading but not necessarily material to the effect of promoting or prejudicing the election of a candidate. For example, a statement saying that a candidate was aged 31 when in fact he was 30 would not be a materially false or misleading statement for the purpose of clause 26. However, a false allegation that a candidate was a qualified lawyer when he was not, or vice versa, would be caught by the provisions in the clause. The element of material prejudice or promotion had to be proved by the prosecution.

Clause 27

13. Referring to the illegal conduct under clause 27, the Chairman pointed out that clause 27(1) and (2) made no reference to the element of prior consent in relation to the publication of election advertisements implying support given by individuals or organizations to a candidate or candidates. Therefore, the present construction of the two subclauses could give rise to the interpretation that proceedings for the offence under this clause would automatically follow even where the candidate or candidates had the genuine support of the persons or organizations. He suggested that a reference to prior consent should be added in clauses 27(1) and (2) in order to qualify

clearly the ingredients of the offence. Referring to clause 27(3), the Chairman also considered that the requirement for the defendant to prove the existence of prior consent as a defence should be reviewed. In his opinion, it was only necessary for the defendant to prove that he had reasonable grounds to believe that consent for the publication of the election advertisement had been given by the persons or organizations concerned.

14. Ms CHOY So-yuk and Ms CHAN Yuen-han said that it was not uncommon for candidates to publish election materials such as notices, addresses or posters containing photographs of the candidates together with other people in social functions. Some of those people in the photographs might just happen to be around on the occasion and were not known to the candidates. Therefore, it would be impracticable for the candidates to obtain their prior written consent as required under clause 27(3) before the materials were published. They opined that the requirement would impose an undesirable restrictive effect on lively campaigning in elections.

15. The Administration explained that the object of clause 27 was to catch the conduct of a person publishing election advertisements which included false claim of support. It was also necessary to protect the interests of the affected organizations or persons who might become the "victims" of such election advertisements in that they were falsely represented as supporting the candidate or candidates concerned. The Administration added that a feature of the past elections was that some election advertisements took the form of or contained pictorial representations of candidates shaking hands with celebrities or office-bearers of certain organizations, or a listing of the names of the candidates' subscribers etc which had the effect of playing on the minds of the electors that the candidates had the support of those individuals or organizations. This had led to a number of complaints in the past. The Administration advised that a person publishing an election advertisement that contained the name, logo, or pictorial representation associated with a person or an organization in such a way as to imply or be likely to cause electors to believe that a candidate had the support of the person or organization should be bound by the provisions in clause 27. To obtain a conviction of the offence under this clause, the prosecution had to prove beyond reasonable doubt the element of false claim of support.

16. In response to Ms CHAN Yuen-han, the Administration said that clause 27 was intended to reflect section 17 of CIPO and it was drafted in modernized and less complicated language. Assistant Legal Adviser opined that he did not see any difference between clause 27 and section 17 of CIPO prosecution's point of view.

17. In response to the Chairman's enquiry about clause 27(5), the Administration advised that the effect of the clause was that a person who deliberately published an election advertisement with a false claim of support would not be relieved of the penalty by way of a disclaimer printed on the advertisement saying that the inclusion of a name or logo or pictorial representation in the advertisement did not imply support

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of the person or organization.

18. The meeting requested the Administration to review the drafting of clauses 27(1) to (4) having regard to the concerns raised by members. The Administration was also requested to provide information on previous cases of complaints or prosecutions relating to the offence (including samples of the election advertisements or pictorial representations giving rise to the complaints or prosecutions) for members' consideration.

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19. In response to Assistant Legal Adviser on the phrase "support in relation to a person or an organization " in clause 27(9), the Administration undertook to review the drafting of the English version which appeared to carry a different meaning from the Chinese version.

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(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)27/99-00(04) dated 6 October 1999.)

II. Dates of next meetings

20. The next two meetings were scheduled as follows :

- 4 October 1999 from 2:30 to 6:30 pm; and
- 5 October 1999 from 8:30 to 10:30am.

21. The meeting ended at 4:30 pm.

Legislative Council Secretariat
27 January 2000