

立法會
Legislative Council

LC Paper No. CB(2)2607/99-00
(These minutes have been
seen by the Administration and
cleared with the Chairman)

Ref : CB2/BC/27/98

**Bills Committee on
Statute Law (Miscellaneous Provisions) Bill 1999**

**Minutes of 2nd Meeting
held on Monday, 20 March 2000 at 10:45 am
in Conference Room B of the Legislative Council Building**

Members Present : Hon Albert HO Chun-yan (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon Margaret NG
Hon Andrew WONG Wang-fat, JP
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP

Public Officers Attending : Mr Stephen K Y WONG
Deputy Solicitor-General (Advisory)

Miss Agnes CHEUNG
Senior Assistant Solicitor General (Acting)

Ms Anastasia KWONG
Senior Government Counsel

Clerk in Attendance : Miss Flora TAI
Chief Assistant Secretary (2) 6

Staff in Attendance : Mr Arthur CHEUNG
Assistant Legal Adviser 5

Mrs Eleanor CHOW
Senior Assistant Secretary (2) 7

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2) 1060/99-00)

The minutes of the meeting held on 18 January 2000 were confirmed.

II. Matters arising from the last meeting

2. A number of questions on various parts of the Bill were raised by Members at the meeting on 18 January 2000 for the Administration to respond. The gist of discussion on the Administration's response is summarised in the following paragraphs.

Short title of the Bill

(LC Paper No. CB(2) 1028/99-00(01))

3. Members did not raise any queries on the paper.

Discharge of encumbered property

(LC Paper Nos. CB(2) 1028/99-00(02), 1188/99-00, 1297/99-00(01) and 1313/99-00(01))

4. In view of the policy implications of the proposed amendments, members had suggested at the last meeting that the Hong Kong Conveyancing and Property Law Association Limited (the Association) be consulted. Deputy Solicitor General (Advisory) (DSG(A)) informed the Bills Committee that the Association had been consulted and it expressed support for the proposed amendments. The Association had further proposed that the relief be extended to situations where no sale or exchange was involved, where the property owner only wished to remortgage or charge the subject property to secure fresh finance (the Association's further proposal). The Law Society of Hong Kong (the Law Society) had also indicated support for the Association's further proposal. Members generally considered the Association's further proposal acceptable and agreed that the Administration should move Committee Stage amendments (CSAs) to such effect.

5. Members noted that the Law Society had expressed concern about the situations involving old mortgages in the New Territories. It had pointed out that under section 14 of the Limitations Ordinance (Cap. 347), a landowner's right of redemption would extinguish after the mortgagee had been in possession of the mortgaged land for a period of 12 years or more and that the mortgagee would become the owner of the land. To ensure that the proposed amendments would not prejudice the entitlement of a mortgagee, the Law Society proposed to add a saving provision for the right of a mortgagee over New Territories land under section 14 of the Limitations Ordinance. The Law

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Society also proposed to allow the costs of application to be deducted from the amount to be paid into court.

6. Acting Senior Assistant Solicitor General (Ag SASG) informed members that while the Administration was prepared to adopt the Law Society's proposal in relation to the provision for costs of the application, it was of the view that the proposed saving provision was unnecessary and outside the scope of clauses 6 and 7 of the Bill for the reasons set out in paragraph 9(a) - (d) of the Paper No. CB(2)1313/99-00(03).

7. Members were generally in support of the Administration's views and agreed that the Administration should move CSAs to allow the costs of the application to be deducted from the amount to be paid into the court.

Part IV of the Bill regarding repeated publication of sections referred to in warning notices and conspiracy committed before commencement of Crimes (Amendment) Ordinance 1996
(LC Paper No. CB(2) 1093/99-00)

8. Members did not raise queries on the examples of the notices published in newspapers in relation to Part IV of the Bill.

Conspiracy committed before commencement of Crimes (Amendment) Ordinance 1996 (clause 14)

9. DSG(A) informed members that before 2 August 1996, crimes of conspiracy were a creature of the common law. Common law conspiracies (with the exception of conspiracies to defraud) were abolished on 2 August 1996 and replaced by statutory conspiracies. Section 159E of the Crimes Ordinance (Cap. 200) was ambiguous as to whether acts of conspiracy committed before the commencement of the section on 2 August 1996 for which proceedings had not been started could be prosecuted. Clause 14 of the Bill proposed that saving provisions be added to section 159E(7) of the Crimes Ordinance to remove the ambiguity and ensure that such acts remained an offence and subject to prosecution.

10. In response to the Chairman's question on the judgment of the Court of Appeal on *HKSAR v CHAN Pun-chung and Another* M.A. 364/1999, DSG(A) advised that the Court of Appeal held that section 159E(7)(b) of the Crimes Ordinance should not be construed as providing for the only situation in which proceedings for a conspiracy at common law could be commenced after 2 August 1996. It would not have prevented the appellants in the case from being charged after 2 August 1996 with conspiracy under the common law. He said that the proposal to add saving amendments had taken into account the views of the legal profession and was made before the Court of Appeal's judgment on the case.

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11. Assistant Legal Adviser (ALA) advised that section 23(c) and (d) of the Interpretation and General Clauses Ordinance (Cap. 1) might have already provided for the continuous effect of any right, privilege, obligations or liability acquired, accrued or incurred under any ordinance so repealed, and of any penalty, forfeiture or punishment incurred in respect of any offence committed against any ordinance so repealed.

12. Miss Margaret NG said that saving amendments would only be necessary if certain law was unclear. Having regard to the Court of Appeal's judgment and section 23(c) and (d) of the Interpretation and General Clauses Ordinance, she considered that clause 14 was not necessary. The Chairman and Mr Martin LEE echoed her view. They expressed concern that unless the same saving provisions were added to all other relevant ordinances, such amendments might create confusion. In this connection, Mr Andrew WONG said that if the Administration decided to delete clause 14 in the light of members' views, it should clearly explain the reasons during the Second Reading debate on the Bill. DSG(A) undertook to reconsider the proposal, having regard to members' views.

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Subsidiary legislation deemed laid before the Council
(LC Paper No. CB(2) 1028/99-00(06))

13. DSG(A) said that the Administration noted that some 20 items of subsidiary legislation were inadvertently not laid before the Legislative Council (LegCo), contrary to section 34 of the Interpretation and General Clauses Ordinance. Having regard to the uncertain legal effect of the failure to table subsidiary legislation at LegCo, the Administration proposed that, for the avoidance of doubt, provisions be enacted to deem those items of subsidiary legislation as having been duly laid.

14. Mr Martin LEE asked whether the proposal was put forward as a result of a court case. Ag SASG replied in the negative. She advised that the items of subsidiary legislation that had not been tabled at LegCo were regarded to have legal effect, unless the court had ruled otherwise.

15. Miss Margaret NG reminded members that a Subcommittee was earlier formed under the House Committee to study issues relating to the tabling of subsidiary legislation in LegCo. The Legal Service Division of LegCo was of the view that section 34(1) of the Interpretation and General Clauses Ordinance was directory and not mandatory, and that subsidiary legislation had legal effect upon its publication in the Gazette. It considered that the tabling requirement should not affect the legal effect of subsidiary legislation. However, the Administration was of the view that the tabling requirement in section 34(1) of the Interpretation and General Clauses Ordinance was mandatory and formed an essential part of the legislative process. It provided

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for the amendment of subsidiary legislation by resolution after the gazettal of the same. The Administration took the view that the position should be clarified by way of enacting deeming provisions. Miss NG said that she shared the views of the Legal Service Division of LegCo but also noted the merit of the Administration's proposal. She did not object to the Administration's proposal. Mr Martin LEE expressed a similar view.

16. In response to Mr Andrew WONG, Miss Margaret NG said that an agreement had been reached between LegCo and the Administration in relation to an improved mechanism for laying subsidiary legislation before the Council, namely, by way of the printing of a note on the contents page of Legal Supplement No. 2 of the Gazette to specify the subsidiary legislation to be laid on the table of LegCo.

III. Clause by clause examination of the Bill

(LC Paper Nos. CB(2) 881, CB(2)1096/99-00 and CB(2)1423/99-00)

Clauses 3 to 5 - Provisions relating to further sentence while a detention order, supervision order or recall order is in force

17. DSG(A) explained that there were presently no statutory provisions governing what happened to an existing detention order, supervision order or recall order when a detainee in a Detention Centre, or a Drug Addiction Treatment Centre, or a Training Centre, was further sentenced to one or other of the centres for a separate offence. It was therefore proposed to amend section 7(1) of the Detention Centres Ordinance (Cap. 239), section 6A of the Drug Addiction Treatment Centres Ordinance (Cap. 244), and section 5A of the Training Centres Ordinance (Cap. 280) to the effect that the Board of Review might decide the appropriate treatment in such circumstances.

18. The Chairman asked how parallel orders made against a person would be executed. Ag SASG responded that it was a matter for the Board of Review to decide. She explained that clause 4 proposed that an order should lapse, might be waived or suspended "as may be decided by the Board of Review" established under regulation 6 of the Drug Addiction Treatment Centres Regulations (Cap. 244 sub. leg.). The fact that a person was further sentenced to one or other of the centres for a separate offence meant that he was already recalled. Depending on the circumstances, the Board of Review would decide whether the other order should lapse or be suspended until he was released from the centre concerned.

19. In response to Mr Martin LEE, Senior Government Counsel (SGC) said that it was the usual drafting practice to use the phrase "as may be decided" as opposed to "if so decided", although these two phrases had the same meaning.

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20. ALA further asked about the reasons for the difference in choice of words between proposed section 5A(3)(a)(ii) of Treatment Centres Ordinance and proposed section 6A(2)(c) of Drug Addiction Treatment Centres Ordinance. The former used the words "may be waived or suspended" and the latter used the words "shall lapse". Ag SASG undertook to respond in writing.

Adm

21. ALA drew members' attention to the fact that that while the Commissioner of Correctional Services (the Commissioner) was expressly empowered to vary or cancel a supervision order at any time under section 5(2) of the Drug Addiction Treatment Centres Ordinance, the proposed section 5A(3)(ii) of the Training Centres Ordinance provided for the Board of Review to waive or suspend such a supervision order. These empowering provisions might conflict with the power of the Commissioner under the Drug Addiction Treatment Centres Ordinance and the Training Centres Ordinance, and would be inconsistent with the functions of the Boards of Reviews which were only tasked under the respective Regulations to make recommendations to the Commissioner. Ag SASG agreed to provide a written response to ALA's query. At Mr Martin LEE's request, DSG(A) undertook to explain why such power should be conferred to the Board of Review.

Adm

Adm

22. In response to ALA, SGC confirmed that there was basically no difference between the meaning of the phrase "shall cease to have effect" in section 61(1)(b) of the Drug Addiction Treatment Centres Ordinance and the phrase "shall lapse" in proposed section 6A(2)(b) of the Drug Addiction Treatment Centres Ordinance.

23. Miss Margaret NG remarked that clause-by-clause examination of the Bill might be conducted more effectively if the Administration was informed of the queries on drafting before the meeting. ALA said that the Legal Service Division would seek clarification from the Administration depending on circumstances either before the meeting or during the clause-by-clause examination and was always mindful of the need that the effectiveness of the scrutiny proceedings should not be affected. The Chairman suggested that members might wish to raise the matter for discussion at a House Committee meeting.

Clauses 6 and 7 - Discharge of encumbered property
(LC Paper No. CB(2) 1423/99-00(01))

24. The Chairman asked why new section 12A(1) of the Conveyancing and Property Ordinance proposed that land subject to encumbrance was sold or exchanged by "the court". Ag SASG explained that the proposed amendment sought to provide the court with a discretion to declare that a property was free of any encumbrance in the event that the mortgagee or the mortgage documents could not be found and therefore be freed for subsequent sale or exchange.

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25. Ag SASG informed members that the words "on sales or exchanges" in the heading of clause 7 were proposed to be deleted because the relief would be extended to cases of untraceable mortgage to situations where no sale or exchange was involved. Ag SASG further explained that the CSA to substitute proposed section 12A(2) of the Conveyancing and Property Ordinance was in response to the suggestion of the Law Society to allow the costs of the application to be deducted from the amount to be paid into court.

26. ALA queried whether the wording of the CSA "upon the redemption of the encumbrance" to clause 7 of the Bill was appropriate. He pointed out that if an encumbrance was redeemed, it was no longer necessary for the court to declare a property to be free from an encumbrance.

Adm

27. Miss Margaret NG said that if "upon the redemption of the encumbrance" referred to "payment into court of a sum of money sufficient to redeem the encumbrance" as provided in proposed section 12A(1), proposed section 12A(2) should repeat the phrase in subsection (1) to ensure clarity. SGC undertook to consider Miss NG's suggestion.

28. ALA said that unlike section 50 of the English Law of Property Act, the CSAs to clause 7 might not have addressed the situation whereby an encumbrancer or any person entitled to the money or fund in court was found. SGC responded that proposed section 12A(3) of the Conveyancing and Property Ordinance in the Bill provided that the court could give directions on the matter.

Adm

29. ALA was concerned that clause 7 might not have addressed the question of the legal status of the property upon the payment to the encumbrancer. He said that the Administration might wish to consider whether it was necessary to state in law that upon the payment to the encumbrancer, the encumbered property was discharged. Ag SASG undertook to consider ALA's suggestion.

30. As regards the CSA which proposed to add to section 12 of the Conveyancing and Property Ordinance that "(4) In this section, 'court' means the Court of First Instance unless the party to the application submit to the jurisdiction of the District Court", Mr Martin LEE asked and Ag SASG confirmed that the word "submit" should read "submits". ALA pointed out that given that new subsection (4) allowed a party a choice to submit an application to the District Court, the term "court" could include the District Court.

31. SGC responded that the drafting of new section 12A(4) was consistent with section 12 of the Conveyancing and Property Ordinance which provided that applications to the court by a vendor or purchaser should be made to the Court of First Instance unless the parties submitted to the jurisdiction of the

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District Court. In response to Miss Margaret NG, SGC confirmed that the term "court" was not defined in the interpretation section of the Conveyancing and Property Ordinance.

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32. Miss Margaret NG queried whether it was necessary to provide a definition as proposed in the CSA when the District Court already had jurisdiction to hear and determine any action which would otherwise be within the jurisdiction of that Court. She suggested that for drafting purpose, proposed section 12A(3) and (4) should make cross-reference to the District Court (Amendment) Bill 1999 which was currently under study by a Bills Committee. Ag SASG undertook to reconsider the drafting of the two subsections.

Clause 8 - Abrogation of the "Year and a day rule"

33. ALA informed members that the drafting of the phrase "which caused the death" in new section 33C(2) of the Offences against the Person Ordinance (Cap.212) might not be appropriate, given that the act or omission which occurred more than a year and a day ago might not have caused the death. Even though there was a *prima facie* case that the act or omission did cause the death, from the legal point of view, the causation was not proven. He said that one of the possibilities was to reword the phrase such as "which purports to cause the death".

34. DSG(A) and Ag SASG explained that proposed section 33C(2) was a saving provision which provided for the continued application of the rule referred to in subsection (1) to a case where the act or omission which caused the death occurred before the commencement of the Statute Law (Miscellaneous Provisions) Ordinance 1999. Since the act or omission in question must be proved to have caused the death before the presumption in subsection (1) arose, the wording used in subsection (2) was considered appropriate. If the omission had not caused the death, there would be no need for any party to rely on the presumption. SGC supplemented that the drafting of the two subsections was based on the relevant English law. When subsections (1) and (2) were read together, the legislative intent was very clear.

Adm

35. Mr Ambrose LAU pointed out that the phrase "which caused the death" in subsection (2) was a positive approach while the phrase "presumed not to have caused a person's death" in subsection (1) was a negative approach. He felt uncomfortable about the drafting and requested the Administration to provide more background information on the drafting of the relevant English law from which the two subsections was based. DSG(A) responded that given the limited time available, the Administration would have difficulty in ascertaining such information. However, it would reconsider the drafting of proposed section 33C(2).

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Clause 15 - Registration of father of illegitimate child

36. SGC said that the Affiliation Proceedings Ordinance (Cap.183) had been repealed by the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance 1996. Since section 12 of the Births and Deaths Registration Ordinance (Cap.174) still referred to the repealed Ordinance, amendment was required.

Adm 37. Miss Margaret NG requested and Ag SASG agreed to provide reasons for the repeal of the Affiliation and Proceedings Ordinance.

Clause 16 - Reference to former or retired judge

38. SGC said that the Adaptation of Laws (Courts and Tribunals) Ordinance, 25 of 1998, excluded person who were formerly judges of the High Court (i.e. who had retired before 1 July 1997) from serving on the Post-Release Supervision Board and the Long-term Prison Sentence Review Board. Given that this was not the policy intent, it was proposed that suitable amendments be made to the Interpretation and General Clauses Ordinance to reflect more accurately the policy intent.

Adm 39. Mr Ambrose LAU had reservations on the approach which sought to resolve a specific problem by introducing a general amendment to the Interpretation and General Clauses Ordinance. At his request, Ag SASG undertook to provide information on the pieces of legislation that would be affected by such an amendment.

Adm 40. The Chairman and Miss Margaret NG asked whether it was more appropriate to amend the respective pieces of legislation rather than the Interpretation and General Clauses Ordinance if the number of ordinances with references to former judges of the pre-1 July 1997 courts was few. Miss Margaret NG was of the view that amendment to the Interpretation and General Clauses Ordinance was more appropriate if it was the policy principle that persons who were qualified to perform specific duties, or be eligible to do so, on the strength of their having been judges of courts in Hong Kong before 1 July 1997, should continue to be so qualified or so eligible. Ag SASG undertook to respond to members' views in writing.

Clauses 17 - 24 - Director of Audit's power to delegate and duty to audit to certain accounts

41. Referring to the 12 items of accounts and funds set out in proposed Schedule 1 of the Audit Ordinance (Cap.122), Ag SASG said that the Chief Justice had requested the Director of Audit (DA) to audit the court related accounts pursuant to the relevant legislation listed in the fourth column of the Schedule. However, the Audit Ordinance in fact did not confer such power to

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the DA. The proposed amendments sought to make provisions for the application of the DA's statutory powers to the moneys listed in Schedule 1, and to empower the DA to delegate his duties or powers to certain public officers.

42. In response to the Chairman, DSG(A) clarified that the 12 items set out in proposed Schedule 1 were suitors' fund and not public moneys. Ag SASG added that proposed section 18(1) of the Audit Ordinance provided that the Financial Secretary could amend Schedule 1 by notice published in the Gazette.

43. As regards Schedule 2 which set out the public officers to whom the DA might delegate the powers to certify certain accounts, DSG(A) advised members that by virtue of proposed section 10(3) of the Audit Ordinance, only staff in the rank and office not below that of a Principal Auditor would be considered for delegation. Ag SASG added that proposed section 18(2) provided that the DA might, by notice published in the Gazette, amend Schedule 2.

44. The Chairman and Miss Margaret NG expressed concern that the powers of the Financial Secretary and the DA to amend proposed Schedules 1 and 2 respectively might be unchecked. ALA advised that any amendments to the two Schedules of the Audit Ordinance were subject to negative vetting by the LegCo pursuant to section 34 of Interpretation and General Clauses Ordinance. DSG(A) confirmed that there was procedural safeguard to restrict the powers of the Financial Secretary and the DA in this respect. He undertook to respond to members' concerns in writing.

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Clause 48 - Carrying and production of proof of identity

45. SGC said that the Chinese rendition of "registration officer" in section 17C(4)(a) of the Immigration Ordinance (Cap. 115) should read "登記主任" and not "人事登記主任", in order to be consistent with the definition of the term in section 2 of the Immigration Ordinance. She further said that it was necessary to amend the term with effect from 12 May 1995, the date on which the Chinese text of the Immigration Ordinance was authenticated.

46. Miss Margaret NG said that she had reservations about introducing amendments with retrospective effect. However, given that this was an obvious drafting error, she did not object to the amendment.

IV. Date of next meeting

47. Members agreed that the next meeting would be held on 11 April 2000 at 8:30 am.

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48. The meeting ended at 12:40 pm.

Legislative Council Secretariat
18 July 2000