

立法會
Legislative Council

LC Paper No. CB(2) 2600/99-00
(These minutes have been seen by
the Administration and cleared
with the Chairman)

Ref : CB2/BC/12/99

Bills Committee on Broadcasting Bill

Minutes of Meeting
held on Tuesday, 9 May 2000 at 8:30 am
in Conference Room A of the Legislative Council Building

Members Present : Hon Mrs Selina CHOW LIANG Shuk-ye, JP (Chairman)
Hon David CHU Yu-lin
Hon Cyd HO Sau-lan
Hon MA Fung-kwok
Hon SIN Chung-kai
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Hon Andrew CHENG Kar-foo

Members Absent : Hon Ronald ARCULLI, JP
Hon YEUNG Yiu-chung
Hon FUNG Chi-kin

Public Officers Attending : Mr Eddy CHAN
Acting Deputy Secretary for Information Technology
and Broadcasting (1)

Mr Eddie MAK
Principal Assistant Secretary for Information Technology
and Broadcasting (A)

Ms Ava CHIU
Assistant Commissioner for Television and Entertainment
Licensing (Broadcasting)

Mr Geoffrey A FOX
Senior Assistant Law Draftsman, Department of Justice

Clerk in Attendance : Mrs Constance LI
Chief Assistant Secretary (2) 2

Staff in Attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Miss Betty MA
Senior Assistant Secretary (2) 1

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I. Matters arising

Members noted that the International Federation of Phonographic Industry (Hong Kong) Group had provided a third submission [Paper No. CB(2)1917/99-00(02)] requesting re-consideration of clauses 13 and 14 of the Broadcasting Bill (the Bill). As the Administration would provide a consolidated response on the competition provisions in the Bill, members agreed to defer discussion of the issue pending the Administration's paper.

**II. Clause-by-clause examination
(from clause 23 to clause 43 and Schedules 1, 2 and 3)**

2. The Bills Committee continued clause-by-clause examination of the Bill starting from clause 23.

Clause 23 - Directions of Broadcasting Authority and Telecommunications Authority

3. Acting Deputy Secretary for Information Technology and Broadcasting (DS(ITB)(Ag)) said that clause 23 sought to empower the Broadcasting Authority (BA) and the Telecommunications Authority (TA) to give directions to the licensee that were considered necessary in order for the licensee to comply with the provisions in the Bill, the licence conditions and the codes of practice.

4. In response to Mr Andrew CHENG, DS(ITB)(Ag) advised that "prescribed Ordinance" in clause 23 referred to the Bill, the Broadcasting Authority Ordinance and the Telecommunication Ordinance. He further said that

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directions relating to programme content would be given by BA under clause 23(1), while those for technical standards would be given by TA under clause 23(2).

5. In response to Miss Emily LAU, Principal Assistant Secretary for Information Technology and Broadcasting (PAS(ITB)) said that the Chinese version of "局長" in clause 23(2) referred to the Telecommunications Authority (電訊管理局局長) as defined in clause 2 of the Bill. To avoid confusion with the Secretary for Information Technology and Broadcasting, Miss Emily LAU suggested that the Chinese term of "局長" should be given in full in clause 23(2). DS(ITB)(Ag) agreed.

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6. Miss Emily LAU asked whether a licensee could make representations on a direction given by BA. DS(ITB)(Ag) replied that a licensee aggrieved by BA's decision could make representations to the Chief Executive in Council (CE in C) directly. The licensee could also seek judicial review of a decision of the BA. Senior Assistant Law Draftsman (SALD) added that if a licensee made representations to BA in relation to any proposed variation of licence conditions, BA was obliged under clause 10(6) to fairly reflect the representations to CE in C.

7. Miss Emily LAU considered that the directions given by BA on public interest considerations should be made known to the public. DS(ITB)(Ag) responded that BA would explain its decisions at press conferences held after its regular meetings. SALD added that as these directions were mainly concerned with the licensee's non-compliance with certain licence conditions or legislative requirements, it would be up to the licensee to disclose these directions.

8. In response to Mr SIN Chung-kai, DS(ITB)(Ag) said that sometimes BA would also direct a licensee to take action regarding certain regulatory requirements, for example, the broadcast time of API or education programmes.

9. Mr SIN Chung-kai considered that basically all licensing and programming requirement had been set out in legislation and in the Codes of Practices. He therefore did not see the need for BA to give directions under clause 23(1). Taking API as an example, DS(ITB)(Ag) explained that it was technically infeasible to stipulate in the Code of Practice the detailed requirements on the broadcast time of APIs because different government departments would have different requirements.

10. The Chairman said that members generally considered that BA's directions should be made known to the public unless there were specific reasons for not doing so. She therefore requested the Administration to give further consideration to members' views. To facilitate members' understanding of the types of directions issued by BA, the Chairman also advised the Administration

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Admin to provide some examples. DS(ITB)(Ag) agreed.

Clause 24 - Investigation of licensee's business

11. DS(ITB)(Ag) said that clause 24 provided the legal basis for BA to investigate a licensee's business for the proper performance of its functions, in particular the enforcement of the competition provisions. He said that the provisions were modelled on the Television Ordinance.

12. Miss Emily LAU said that as the functions of BA were given in several ordinances, she asked what specific functions of BA were referred to in clause 24(1). PAS(ITB) advised that the clause referred to those functions and powers of BA set out in section 9 of the Broadcasting Authority Ordinance and in section 14 of Schedule 9 to the Bill.

13. Miss Emily LAU said that as clause 24(1) also referred to "any other Ordinance", it would be clearer if the functions and powers of BA could be specified in the clause. DS(ITB)(Ag) clarified that "any other Ordinance" referred to the Telecommunication Ordinance, Part IIIA of which was related to sound broadcasting licences. SALD added that a comprehensive description of the functions and powers of BA was given in section 9 of the Broadcasting Authority Ordinance.

Admin 14. The Chairman considered that for clarity purpose, Administration should specify the scope of BA's functions which were relevant to clause 24(1). SALD agreed that clause 24(1) could be improved so that BA's functions would only referred to those empowered under section 9 of the Broadcasting Authority Ordinance. Members agreed to the suggestion.

15. At the request of Miss Emily LAU, DS(ITB)(Ag) explained the investigation procedures under clauses 24(1) to (8).

16. Mr SIN Chung-kai said that clause 24 conferred wide investigation power on BA. He considered that the power for BA to demand routine information from a licensee should be differentiated from that required for investigations. DS(ITB)(Ag) advised that the requirement for annual returns from licensees was given in clause 38.

17. The Chairman suggested that the Administration might consider specifying the range of functions which would require invoking the powers of investigations under clause 24.

Admin 18. SALD suggested that the reference to "the proper performance of its functions under this Ordinance" should be qualified to "ensure licensee's compliance with the requirements set out in the Bill". Members agreed to the

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proposal.

19. Mr Andrew CHENG noted that BA could apply to the magistrate for a warrant under clause 24(3) to enter premises, if permission for entry had been refused or was likely to be refused. In his view, the licensees concerned would likely refuse the entry of BA to examine and remove information for investigation. He therefore suggested that BA should apply for a warrant for entry in all cases. SALD responded that if a licensee was willing to cooperate, BA would not need to apply to the magistrate under clause 24(3) for entry into the premises. He added that clause 24(1) already empowered an authorized officer to remove record or documentation required for examination.

20. Miss Emily LAU asked whether the issue of a warrant under clause 24(3) should be made by a court of a higher level than the magistrate. She also enquired whether a licensee could make representations on the issue of warrant for entry into its premises.

21. SALD clarified that the warrant was issued by the magistrate ex parte, and the magistrate would have to be satisfied with the evidence put forward before issuing a warrant. DS(ITB)(Ag) said that any person who objected to the issue of a warrant for search and seizure of information under clause 24 could apply to the Court for an injunction. Assistant Legal Adviser 3 (ALA3) also elaborated on the procedures for the issue of warrant by a magistrate.

22. Miss Emily LAU expressed concern about the procedure for the search and removal of journalistic materials. DS(ITB)(Ag) advised that it was governed by Part XII of the Interpretation and General Clauses Ordinance which stated that an express provision in the law was required for the issue of a warrant conferring a power to enter the premises for the purpose of searching or seizing journalistic materials. As the Bill did not make express provision for the search and seizure of journalistic materials, clause 24 was not applicable to journalistic materials. ALA3 added that application for a production order in respect of journalistic materials should be made to the court inter partes. For the avoidance of doubt, SALD proposed to add a provision to clause 24 stating that journalistic materials were subject to the provisions of Part XII of the Interpretation and General Clauses Ordinance. Members agreed.

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23. Mr Andrew CHENG sought clarification on the meaning of "such reasonable conditions" in clause 24(6). DS(ITB)(Ag) explained that an authorized person of the licensee could apply to BA for the use of those information removed by BA subject to reasonable conditions imposed by BA for the protection of such information.

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24. Responding to Mr SIN Chung-kai, SALD advised that the meaning of "associate" in clause 24(9) was defined in clause 2 and Part 1 of Schedule 1 to the Bill.

Clause 25 - Broadcasting Authority may obtain information

25. DS(ITB)(Ag) said that clause 25 sought to empower a magistrate to issue an order requiring a person who was not a licensee to give certain information or documents to BA, where the magistrate was satisfied that such information or documents were relevant to a contravention of the Bill.

26. Miss Emily LAU asked whether the person could make representations on an order made under clause 25 and whether the order should be issued by a higher level of court.

27. SALD responded that an order for providing information and documents was normally issued by the magistrate ex parte, and a person objecting to the order could apply to the court for an injunction. If the order was to be issued by a higher level of court, the Judiciary Administrator would have to be consulted on the policy implications and the additional workload on the District Court judges.

28. Mr SIN Chung-kai said he saw no objection to the magistrate issuing the orders under clause 25, since journalistic materials were subject to separate procedures under the Interpretation and General Clauses Ordinance.

29. The Administration noted Mr Andrew CHENG's opinion that any penalty proposed for offences under clause 25 should be in line with that proposed in clause 24.

Clause 26 - Confidential matter to be safeguarded

30. DS(ITB)(Ag) said that clause 26 provided that information and documents furnished to BA by a person would be treated as confidential unless requested by that person.

31. Mr SIN Chung-kai asked about the penalty for breaching the confidentiality under clause 26. SALD said that BA was not liable to criminal proceedings as other statutory bodies but a person could still institute civil proceedings for damages.

32. Miss Emily LAU noted that under clause 26(2), the information provided to BA might be disclosed in connection with legal proceedings. She then sought clarification on the "public interest" considerations for disclosing the information. DS(ITB)(Ag) advised that BA would examine the circumstances of

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each case in making a decision. One example for the "public interest" considerations was the enforcement of competition provisions. He said that the procedures in clause 26(2) were modelled on the existing provisions in the Television Ordinance and the Telecommunication Ordinance.

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33. The Chairman drew members' attention to clause 26(3) which allowed a person to make representations on a proposed disclosure of information. In this connection, Miss Emily LAU said that the drafting of clause 26(3) gave the impression that the two considerations stipulated in clauses 26(3)(a) and (b) were the only factors for considering the representations on disclosure of information. In response, SALD agreed to improve the drafting of clause 26(3).

34. Responding to the Chairman, SALD said that the reference to "a person" in clause 26(4) referred to any person(s) who would be affected by the Bill.

The Chairman ordered a break of 15-minutes. The meeting resumed at 10:45 am.

Clause 27 - Licensee to pay financial penalty

35. DS(ITB)(Ag) said that clause 27 empowered BA to impose a financial penalty on a licensee for contravening a licence condition, a requirement under the Bill or a provision of the codes of practice. He said that the clause was modelled on the Television Ordinance, except that the maximum financial penalty would be increased to \$1 million. He added that the Administration was considering members' proposal to peg the financial penalty to the revenue or economic gains of the programme in question.

36. Ms Cyd HO said that consideration should be given to a differential financial penalty system for breaches of programme content requirements and breaches of the competition provisions. Mr MA Fung-kwok considered that the issue could be followed up when the Administration had completed its deliberations on members' proposal about pegging the financial penalty to the revenue of a programme.

37. Miss Emily LAU asked whether public hearings would be held to consider representations made by a licensee under clause 27(4).

38. DS(ITB)(Ag) responded that the Broadcasting Authority Ordinance stipulated that all information submitted by licensees related to the complaint cases under the consideration of the Complaints Committee of BA should be kept confidential. However, the Complaints Committee would inform the licensee concerned of its recommendation(s) to the BA beforehand. The licensee could therefore make representations to BA before a decision was taken by BA.

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39. The Chairman said that members were concerned whether the consideration of representations should be held in public, and if so, whether the requirement for public hearings should be specified in the legislation. DS(ITB)(Ag) said that there would be operational difficulties to conduct public hearings given that it was a statutory requirement for BA to treat the information supplied by the licensees as confidential materials. He said that there was already sufficient transparency in the operation of BA.

40. Ms Emily LAU considered that the technical problem regarding confidentiality could be resolved by amending the relevant provisions in the Broadcasting Authority Ordinance if the Administration agreed to conduct public hearings. Mr MA Fung-kwok was of the view that if a licensee objected to a public hearing, BA should respect the licensee's view and hold closed meetings on the representations. Otherwise, the licensee might simply decide not to make representations in order to avoid disclosure of sensitive information. The Chairman said that BA would take into account all relevant factors including the licensee's views before deciding whether public hearings on representations should be held.

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41. The Chairman concluded that while members appreciated the need for confidentiality, they considered that public hearings should be held to enhance the transparency of the representation process. She therefore requested the Administration to consider the suggestion.

42. Responding to members' concerns, SALD said that "performance bond" was defined in clause 2 of the Bill. DS(ITB)(Ag) explained that clause 27(5) aimed to prevent double punishment in that no financial penalty would be imposed if a performance bond had already been called in respect of a contravention. Usually, the amount of performance bond forfeited would be greater than a financial penalty. He added that the performance bond was to secure compliance by licensees with the licence conditions and it was not related to anti-competitive behaviour. If the licensee could not fulfill its licence obligations such as service coverage or development plan, the performance bond tied to the obligations concerned would be called.

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43. At the request of the Chairman, DS(ITB)(Ag) agreed to provide further information and examples on forfeiture of performance bonds and the amounts called.

44. Mr Andrew CHENG reiterated his concern that a non-licensee was liable to imprisonment for failing to comply with the requirement to give information to BA whereas a licensee was only liable to financial penalty for the same offence. He stressed that the same penalty should be imposed on licensee and non-licensee for breaches under clauses 24 and 25.

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45. SALD explained that a contravention of clause 25 was a criminal offence, therefore a non-licensee would be subject to criminal sanctions. However, a contravention of the relevant provisions by a licensee would be subject to financial penalty and sanctions which could lead to suspension or revocation of licence.

46. Mr Andrew CHENG remained of the view that there should not be different penalties for the same offence.

47. ALA3 pointed out that the Administration had proposed an amendment to the Telecommunication (Amendment) Bill 1999 imposing a criminal sanction on the licensee for non-compliance with the requirement to provide the required information to the regulatory authority. The Chairman requested the Administration to consider whether the same amendment should be made to the Bill.

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Clause 28 - Recovery of financial penalty

48. Mr Andrew CHENG inquired the difference between a certificate made by BA under clause 28(3) and a notice made under clause 28(4). In reply, SALD said that a certificate would be prima facie evidence in court for recovery of a civil debt, while a notice was only to inform the licensee of the payment.

49. The Chairman asked whether a certificate would still be served if the licensee did not make any appeal. SALD explained that on receipt of a notice of financial penalty by BA, the licensee would have 30 days to settle the payment. If he failed to pay and did not appeal, a certificate would be issued. If the licensee still did not pay, he would be liable to sanctions under clause 30(2)(a)(ii), i.e. suspension of licence.

Clause 29 - Licensee to include correction or apology in television programme service

50. DS(ITB)(Ag) advised that clause 29 was a new provision requiring a licensee to include a correction or apology in its licensed service as directed by BA for a contravention of the licence conditions, provisions in the Bill or the codes of practice. The requirement was in line with the practice in other jurisdictions. He said that the Administration was considering members' proposal about specifying the time within which an apology should be made by the licensee.

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51. Miss Emily LAU suggested and DS(ITB)(Ag) agreed to consider allowing the licensee to make representations in public under clause 29.

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Clause 30 - Suspension of licence

52. DS(ITB)(Ag) said that clause 30 provided that BA might suspend a licence for a period not exceeding 30 days for a contravention of a licence condition, a provision in the Bill or the Code of Practice as set out in clause 30(2). The clause was modelled on existing provisions in the Television Ordinance.

53. In response to Miss Emily LAU's concern that the grounds for the suspension of licence in clause 30 were too broad, DS(ITB)(Ag) said that it was practically not possible to list out all possible scenarios under which BA might consider suspension of licence. He further said that BA would consider the severity and frequency of contravention in making a decision, and that the licensee could make representations on or seek judicial review of the decision. He added that suspension of licence was a severe penalty and BA had not invoked such power before.

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54. To address Miss Emily LAU's concern, the Chairman asked whether the Administration could specify the circumstances or the nature of contravention which would lead to suspension of licence under clause 30. DS(ITB)(Ag) agreed to consider the suggestion.

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55. Mr Andrew CHENG commented that it might be too harsh to consider a suspension of licence for a negligent act of an licensee under clause 30(2)(b)(ii). DS(ITB)(Ag) agreed to consider.

Clause 31 - Revocation of licence

56. DS(ITB)(Ag) explained the grounds for revocation of licence under clause 31(4). SALD also drew members' attention to clause 31(6) in relation to a licensee who went into liquidation.

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57. The Chairman said that the Administration should also consider specifying the circumstances under which a suspension of licence would be considered. Mr Andrew CHENG agreed with the Chairman that there should be greater clarity on the nature of contravention which would lead to suspension or revocation of licence.

58. In response to Miss Emily LAU's enquiry on clause 31(4)(b), SALD explained that when a licensee went into liquidation, the company would no longer exist and was no longer in need of a licence.

59. Ms Cyd HO asked whether a licensee would be given an opportunity to continue its business if it could reach an agreement with its creditors on the financial arrangement under clause 31(4)(b)(ii). SALD said that usually this would be the last step taken by a licensee to avoid bankruptcy and it would be up

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to CE in C or BA to decide whether the arrangement was satisfactory. The licensee could lodge an appeal if aggrieved by the decision.

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60. At the suggestion of Miss Emily LAU, SALD agreed to improve the drafting of clause 31(4) concerning the authority to revoke a licence.

Clause 32 - Inquiry by Broadcasting Authority

61. DS(ITB)(Ag) said that clause 32 sought to require BA to inform a licensee of an inquiry in consideration of revocation of licence. The licensee could make representations to BA within 28 days.

62. Responding to Miss Emily LAU, DS(ITB)(Ag) explained that the holding of public hearings was part of the inquiry conducted by BA for the consideration of revocation of licence under clause 32. The procedure for holding public hearings in this connection was set out in clause 31(2) and (3).

63. The Chairman asked whether an inquiry would be held for circumstances listed in clause 31(4)(a) and (b). She considered it necessary to afford a chance for a licensee to make representations whenever revocation of licence was considered. Miss Emily LAU echoed the same concern.

64. SALD pointed out that the circumstances described in clause 31(4)(a) and (b), such as failure to pay a licence fee, were a matter of fact which was not in dispute. He said that public hearings were normally held for more severe offences. DS(ITB)(Ag) added that the licensee concerned would be allowed to make representations in all circumstances under clause 31.

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65. As revocation of licence was a very severe penalty, the Chairman considered that the Administration should enhance the transparency of the process by requiring public hearings to be held also for circumstances under clause 31(4)(a) and (b). DS(ITB)(Ag) agreed to consider.

Clause 33 - Appeal to Chief Executive in Council

66. DS(ITB)(Ag) advised that clauses 33 provided that a licensee might appeal to CE in C against a decision of BA.

67. Mr Andrew CHENG reiterated his concern that an independent appeal board comprising non-BA members should be established to hear objections other than those relating to suspension or revocation of licence. He did not consider that CE in C was the appropriate avenue to deal with objections to BA's decision.

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68. DS(ITB)(Ag) responded that the Complaints Committee of BA presently dealt with complaints related to programme content and other relatively minor issues. Under the current arrangement, a licensee was given ample opportunity to make representations when the Complaints Committee was considering a complaint case and before the Committee put forward its recommendations to BA. If the licensee was aggrieved by the decision of BA, he could appeal to CE in C.

69. Mr Andrew CHENG did not accept that the appeal mechanism should operate within BA and he suggested introducing an additional tier for reviewing the decisions of BA.

70. Mr SIN Chung-kai commented that consideration could be given to establishing an appeals mechanism on competition matters similar to the proposed Telecommunications Appeal Board under the Telecommunication (Amendment) Bill 1999. He said that the Telecommunications Appeals Board would comprise a judge and a panel to deal with competition disputes. In his view, CE in C was a political body which should not deal with technical issues such as competition disputes.

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71. The Chairman was of the view that BA should be responsible for dealing with disputes and breaches of codes of practice. At the request of the Chairman, DS(ITB)(Ag) agreed to consider the proposal of establishing an appeals mechanism to deal with competition disputes.

Clause 34 - Determination of appeal

72. DS(ITB)(Ag) said that clause 34 provided that CE in C might receive advice and information from BA or any person in determining an appeal under clause 33.

73. Responding to the Chairman, SALD said that "representations" under clause 34(1)(b) referred to written representations.

Clause 35 - Court may prohibit certain television programmes, etc

74. DS(ITB)(Ag) said that clause 35 sought to prohibit a licensee from including in its licensed service a television programme which was likely to incite hatred in Hong Kong against any group of persons by reference to colour, race, sex, religion, nationality or ethnic or national origin, result in a general breakdown of law and order, and gravely damage public health or morals. The Chief Secretary for Administration (Chief Secretary) could apply for a prohibition order to be issued by the Court of First Instance under clause 35(4).

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75. The Chairman reminded the meeting that one deputation had suggested that the scope of clause 35(1)(a) should be confined to incitement which would likely result in violence. The Administration had provided its response vide Paper No. CB(2)1774/99-00(01) that the policy intent was to prohibit all forms of incitement of hatred against specified groups irrespective of whether violence was the likely result.

76. Miss Emily LAU expressed concern that the application for an interim order was made ex parte and on affidavit. She considered that the party subject to the order should be given the opportunity to contest before the Court granted an interim order. SALD responded that an interim order was applied ex parte as a matter of urgency. Given the pressure of time, there was insufficient time to go through procedures such as serving papers on the other side. He added that the party concerned could apply for an injunction to the order.

77. ALA3 explained the procedures for the grant of an interim order by the court. She said that the Court would have to be satisfied with the reasons put forward in an application that it was a case of urgency. In issuing the interim order, the Court could also impose conditions such as giving the affected party the right to apply for an order of discharge.

78. The Chairman drew members' attention to the fact that the application for an interim order ex parte and on affidavit under clause 35(3) was only an option enabling the Chief Secretary to apply for an order from the Court in a case of urgency. In all other cases, the application would have to be made by motion or summons. She said that it would be for the members to decide whether the Chief Secretary should be given such option in a case of urgency. She also requested the Administration to consider improving the drafting of clause 35(3) to the effect that the Court must be satisfied that it was a matter of urgency before issuing an interim order to prohibit any television programmes.

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Next meeting

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79. The Chairman requested the Administration to provide the draft Committee Stage amendments and its response to outstanding issues raised at previous meetings for discussion at the next meeting scheduled for 25 May 2000.

80. There being no other business, the meeting ended at 1:10 pm.

Legislative Council Secretariat

5 October 2000