

立法會
Legislative Council

LC Paper No. CB(2)2523/99-00
(These minutes have been seen
by the Administration and
cleared with the Chairman)

Ref : CB2/PL/CA

**Legislative Council
Panel on Constitutional Affairs**

**Minutes of meeting
held on Monday, 15 May 2000 at 2:30 pm
in Conference Room A of the Legislative Council Building**

Members Present : Hon Andrew WONG Wang-fat, JP (Chairman)
Hon Emily LAU Wai-hing, JP (Deputy Chairman)
Hon CHEUNG Man-kwong
Hon Gary CHENG Kai-nam, JP
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon SZETO Wah

Member Absent : Hon LEE Wing-tat
Hon Margaret NG
Hon Ronald ARCULLI, JP
Hon Ambrose LAU Hon-chuen, JP

Public Officers Attending : Item V
Mr P C LEUNG
Deputy Director of Administration
Mr Robin IP
Deputy Secretary for Constitutional Affairs
Mrs Apollonia LIU
Assistant Director of Administration

Mr M J BISHOP
Assistant Director (Investigation Branch/4)
Operations Department,
Independent Commission Against Corruption

Mr I C MCWALTERS
Senior Assistant Director of Public Prosecutions,
Department of Justice

Mr Peter WONG
Senior Assistant Solicitor General, Department of Justice

Mr Paul TSANG
Government Counsel (Basic Law Unit),
Department of Justice

Item VI

Mr Clement C H MAK
Secretary for Constitutional Affairs (Acting)

Mr Robin IP
Deputy Secretary for Constitutional Affairs

Ms Mable CHAN
Principal Assistant Secretary for Constitutional Affairs

Mr Philip TANG
Assistant Secretary for Constitutional Affairs

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2)1961/99-00 - Minutes of meeting on 1 April 2000)

The above minutes were confirmed.

II. Endorsement of draft report of the Panel on Constitutional Affairs to Legislative Council
(LC Paper No. CB(2)1929/99-00(01))

2. Members endorsed the draft report which would be presented to the Council on 21 June 2000. The meeting authorized the Clerk, in consultation with the Chairman, to revise the report to incorporate the major issues discussed at this meeting.

III. Information paper issued since the last meeting

3. Members noted the following papers which had been issued since the last meeting -

- (a) LC Paper No. CB(2)1806/99-00(01) - A letter from the Administration providing a profile of voters in the 1999 District Councils election by sex and age; and
- (b) LC Paper No. CB(2)1807/99-00(01) and (02) - Copy of a letter to the Secretary for Health and Welfare and a reply from the Administration on "Issue of employees of public-funded bodies taking up remunerated offices".

4. On LC Paper No. CB(2)1806/99-00(01) above, members agreed to ask the Administration to provide a further breakdown of the voters by geographical constituencies, or, if this was not possible, by the 18 districts.

(Post-meeting note - The Administration subsequently provided a breakdown by 18 districts. The information has been circulated vide LC Paper No. CB(2)2170/99-00(01))

5. On LC Paper No. CB(2)1807/99-00(02), Ms Emily LAU expressed concern about the statement made in the paper that individual subvented welfare organizations should be allowed the autonomy and the flexibility of determining the course of action in dealing with the matter of employees taking up public offices, and that this was in line with the spirit of the Lump Sum Grant subvention mode being introduced to the subvented welfare sector. She queried whether such practice complied with the principle of prudent use of public money which the Panel had repeatedly stressed in previous discussions of the matter. She pointed

out that the Hospital Authority as well as UGC-funded institutions had already promulgated guidelines specifying some general guiding principles on adjustment in salary and benefits of employees if their normal duties were affected as a result of their taking up remunerated public offices.

6. The meeting agreed that the Chairman should write to the Secretary for Health and Welfare on behalf of the Panel to reiterate members' view that the guidelines being drafted for reference of subvented welfare organizations should include provisions on adjustment of salary/benefits of employees taking up remunerated public offices. The guidelines, once promulgated, should be applicable to all subvented organizations in the welfare sector. The Administration would also be requested to provide the proposed guidelines, which were expected to be ready by the latter half of the year, for the information of the Panel and whatever action it deemed necessary to take in the next legislative session.

(Post-meeting note - The Chairman's letter to the Administration has been circulated vide LC Paper No. CB(2)2035/99-00(01))

IV. Items for discussion at the next meeting on 19 June 2000

(LC Paper No. CB(2)1929/99-00(02) - List of issues to be considered)

(LC Paper No. CB(2)1929/99-00(03) - Administration's paper on "Counting arrangements for the 2000 Legislative Council elections")

7. Members agreed that the following items should be discussed at the next meeting on 19 June 2000 -

(a) The term "important bill" in Article 50 of the Basic Law

This item was originally scheduled for this meeting but subsequently deferred to the meeting in June as proposed by the Administration.

(b) Counting arrangements for the 2000 Legislative Council (LegCo) elections

The Administration's paper (LC Paper No. CB(2)1929/99-00(03)) set out the present thinking of the Electoral Affairs Commission on the broad counting arrangements and a range of initiatives that it intended to adopt to speed up the counting process. Members agreed that the Administration should be asked to brief the Panel on the paper and the results of a mock counting session which would be

carried out by the Registration and Electoral Office in early June 2000.

V. Review on the application of certain provisions of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE) and related issues

(LC Paper No. CB(2)1929/99-00(04) - Paper prepared by the Administration)

8. Deputy Director of Administration briefed members on the Administration's paper which explained the latest thinking of the Administration concerning the application of certain provisions of the POBO to the CE. The gist of the paper was as follows -

- (a) Legal advice had confirmed that the CE was not subject to those provisions of the POBO that were only applicable to "Government officers" or "public servants" because of the unique constitutional position of the CE under the Basic Law (BL). The CE had indicated that he should be bound by the POBO and had instructed that the necessary arrangements be worked out to bring that into force;
- (b) It was an offence at common law for a "public officer" to accept bribe and for anyone to bribe a "public officer". Legal advice was that CE might fall within the meaning of "public officer" under the common law and CE would be liable to prosecution if he accepted a bribe even without any amendment to the POBO;
- (c) In the light of the foregoing, the Administration was of the view that the creation of a new provision in the POBO which would be applicable to the CE would suffice. The new provision would be in line with the spirit of the existing section 10 of the POBO concerning the possession of unexplained property which was currently applicable to "Government officers". The penalties for the offences under section 10 of the POBO as provided for in section 12 and 12AA would apply to the proposed new provision. Such a proposed new provision was consistent with the common law principle governing the offence of bribing a public officer; and
- (d) The Administration intended to introduce the relevant legislative amendments to POBO in the next legislative session.

9. Ms Emily LAU opined that the POBO should bind the CE and that a legislative amendment to put this into effect should be implemented as soon as possible. Responding to the points elaborated by the Administration, she queried whether the proposed amendment to the POBO had the effect of rendering all the existing provisions of the POBO, so far as they applied to Government officers, also applicable to the CE. She said that in view of the special constitutional status of the CE and the requirement in BL 57 that the Commissioner of Independent Commission Against Corruption (C/ICAC) was accountable to the CE, sufficient legislative safeguard should be provided against the possibility of the CE abusing his powers by interfering with the independent investigation of the ICAC, including investigation which might concern the CE himself.

10. Assistant Director, Operations Department of ICAC said that section 5 of the Independent Commission Against Corruption Ordinance (ICACO) provided that the C/ICAC might be appointed by the Governor (the CE after the reunification) and should not be subject to the direction or control of any person other than the latter. The ICACO did not specify in what manner the CE might or might not direct the actions of the C/ICAC. He opined that in law, there was nothing to prevent the C/ICAC from investigating the CE in accordance with powers given to him under the ICACO.

11. Senior Assistant Director of Public Prosecutions (SADPP) said that it was a common law offence for any person to pervert the course of justice by attempting to improperly interfere with the investigation of a law enforcement agency. This was premised on the basic legal principle that no one could properly instruct or authorize another to do an illegal act. The CE would be acting unlawfully if he sought to direct the C/ICAC to do something that was contrary to the proper carrying out of the duties laid down in section 12 of the ICACO, and hence the C/ICAC would be entitled to disregard any such direction. He said that section 5 of the ICACO should be viewed in the perspective of preserving the independence of the ICAC rather than the CE having an overriding control of the C/ICAC over the direction and administration of the ICAC.

12. In response to Ms Emily LAU, SADPP said that it was difficult to give an answer of general application as to under what circumstances the C/ICAC should seek advice from the CE as it would be a matter to be decided on a case-by-case basis.

13. The Legal Adviser (LA) drew members' attention to the relevant provisions in the BL. These included, among others -

- (a) the ICAC should function independently and be accountable to the CE (BL 57);
- (b) the Department of Justice should control criminal prosecutions, free from any interference (BL 63);
- (c) the CE, on assuming office, should declare his or her assets to the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region (HKSAR), and the declaration should be put on record (BL 47);
- (d) the CE should be responsible for the implementation of all laws, including the BL, which applied in the HKSAR (BL 48(2)); and
- (e) Hong Kong residents and other persons in Hong Kong should have the obligation to abide by the laws in force in the HKSAR (BL 42).

14. Mr CHEUNG Man-kwong asked whether the amendment to the POBO as proposed by the Administration, which extended the applicability of section 10 of POBO to the CE, would have retrospective effect so that it could cover the scenario of the CE possessing unexplained property acquired after the CE had assumed office and before the legislative amendment came into force. In his view, the proposed new provision should be capable of catching that kind of situation.

15. LA said that the offence provisions in section 10 of POBO dealt with the act of a Government officer possessing unexplained property acquired while the officer concerned was in office.

16. Senior Assistant Solicitor General advised that the general principle concerning retrospectivity of criminal offence was contained in Article 15 of the International Covenant on Civil and Political Rights, which stated that -

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed..."

Echoing the LA's view, he said that the crucial element of the offence in question was whether CE was in control of the pecuniary resources or property which was disproportionate to his present or past official emoluments at the time when the

proposed legislation became effective. If the answer was affirmative, the offence would apply.

17. SADPP said that section 10 of the POBO created two separate offences, i.e. maintaining a standard of living or control of pecuniary resources or property which was disproportionate to the accused person's present or past official emoluments. In order to prove the offence, it was necessary to make reference to the period of time in which the accused person was a Government officer or public servant to determine whether a disproportionate state of affairs existed. He added that any income, asset or property possessed by a person before he became a Government officer was relevant. In the case of the CE, his assets had to be declared and recorded at the time when he assumed office as required by BL 47.

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18. The Chairman requested the Administration to provide information on previous prosecutions taken against Government officers for possession of unexplained property acquired before section 10 of the POBO came into force.

19. Ms Emily LAU pointed out that the proposed offence provision would apply to the CE only insofar as matters relating to standard of living or control of property. On the question of bribery, she said that as the common law offence of bribery was unclear and not couched in statutory terms, consideration should be given to codifying the offence by way of enactment, so that CE should be subject to the same regulatory and legal framework applicable to Government officers or public servants under the POBO. Her view were shared by Mr SZETO Wah.

20. In response to the Chairman, LA said that while he was not in a position to judge whether the statute law or the common law approach could better deal with the issue in question, he could see the merits in the argument that codification of certain common law principles by express provisions would achieve the purpose of certainty. He added that, as the Administration had pointed out, whether the conduct of a person would be caught by the offence provisions depended on whether the person was in possession of the unexplained property at the time when the legislation was in force. This demonstrated a need to have the new legislation put in place at an early opportunity to minimize the chance of a person taking advantage of the time lag to dispose of the property prior to the passage of the new legislation.

21. LA further remarked that it would facilitate members of the Panel to come to a more well-informed decision on the matter if the issue could be examined in a broader perspective apart from the considerations set out in paragraph 4 of the Administration's paper. This might involve a fuller research into other relevant areas such as matters relating to securing of evidence and burden of proof for

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prosecution under the common law and the wider offence of misconduct of public officers etc.

22. Referring to paragraph 4 of the Administration's paper where the case of Whitaker (1914) was quoted to illustrate the common law offence of bribery, LA pointed out that there was a more recent case in England in 1996 which might also be of relevance in considering the elements of the common law offence insofar as whether CE could be regarded as a public officer. The Chairman requested LA to provide the details of the case for members' reference.

23. In concluding, the Chairman requested the Administration to reconsider its position having regard to the views expressed at the meeting. Members agreed that the subject could be discussed again at the next meeting in June if the Administration could revert with a written response by then.

(Post-meeting note - The Administration's response to members' views on codification of the common law offence of bribery and concerning the case of R v Bowden (1996) referred to by LA at the meeting has been circulated vide LC Paper No. CB(2)2370/99-00(01). In its reply, the Administration has advised that it needs more time to consider whether the common law offence should be codified. In the meantime, the Administration will start to prepare the necessary legislative amendment to extend the existing section 10 of POBO to include the CE. The Administration aims to introduce the proposed legislation as soon as possible.)

Elections (Corrupt and Illegal Conduct) Ordinance (ECICO)

24. In reply to the Chairman's question concerning corrupt and illegal practices at elections, Deputy Secretary for Constitutional Affairs (DS/CA) said that the ECICO had been enacted. The provisions in the new Ordinance would apply, inter alia, to an election to elect the CE. He added that it was intended that proposed new electoral legislation to provide for matters relating to the election of the CE would be introduced to the LegCo in mid 2001.

25. Dr YEUNG Sum said that there was concern in the community that "small circle" type of elections, such as the election to return the CE by the 800-member Election Committee, was prone to corrupt or illegal practices. He urged the Administration to introduce the relevant electoral legislation as soon as possible.

26. DS/CA responded that the ECICO specifically dealt with corrupt and illegal conduct at elections which fell within the purview of the Ordinance. It provided

for criminal sanction for offences set forth therein to ensure clean and honest elections.

VI. Mechanism for amending the Basic Law

(LC Papers Nos. CB(2)1951/98-99(05); 2306/98-99(06) and 2558/98-99(04)
- Administration's papers issued in May, June and July 1999)

27. The Chairman recapped for members' information the previous discussions on the subject of mechanism for amending the BL. He said that the Panel had held a series of meetings to deliberate the issue in the 1998-99 legislative session, including two meetings in March 1999 to receive public views on the matter. In May 1999, the Administration advised that it had identified a number of issues for further study and would need to consult all relevant parties in devising an appropriate mechanism to give effect to BL 159. Its rough estimate of the time required for those steps in the consultation process not involving the Central authorities was about 15-22 months (including drafting and enactment of local legislation to implement the finalized proposal). The Panel followed up the matter at a meeting in January 2000. The Administration had no progress to report at that stage.

28. The Chairman invited the Administration to report on the latest position.

29. Acting Secretary for Constitutional Affairs (SCA(Ag)) said that according to BL 48(2), the CE was responsible for the implementation of the Basic Law including BL 159 which concerned matters relating to the amendment of the Basic Law. However, BL 159 did not provide for the mechanism for proposing amendments to the Basic Law. The Administration fully endorsed the view that it was necessary to put in place a proper mechanism so as to implement BL 159 and recognised that it was the Administration's duty to do so. The Administration had been working in that direction. Over the past year, the Administration had been working closely with the Constitutional Affairs Panel and making steady progress. In particular, the Administration had completed a preliminary analysis on the major issues identified during previous discussions with the legal profession, the academics as well as other relevant organizations and individuals, and set out the procedures required for setting up a mechanism for amending the Basic Law. Given the importance and complexity of the matter, it had to be thoroughly discussed and handled with prudence. Since many issues involving arrangements for the three parties under BL 159 (that is, the CE, the LegCo and the local NPC deputies) were inter-related, it was necessary to consult all the relevant parties so that their views could be taken into account in working out an appropriate mechanism for the purpose of BL 159. At the present stage, the Administration

was continuing the discussion with the Central People's Government (CPG) regarding the issues identified, particularly those relating to the NPCSC, the State Council, the local NPC deputies and the Basic Law Committee. It was necessary to allow ample time for the Central authorities to examine and give their views on those issues. SCA(Ag) said that the Administration would report progress to the Panel in due course.

30. Mr CHEUNG Man-kwong expressed great disappointment at the present static situation. He said that this issue had been brought up for discussion by the Panel more than a year ago and yet the present state of affairs was such that no progress whatsoever had been made. He stressed that the Administration in dealing the matter must not only pay "lip-service" but use its best endeavours to achieve some concrete result. He further remarked that he saw a great different degree of urgency with which the Administration handled the matter of seeking an interpretation of certain provisions of the BL from the NPCSC last year, as opposed to how it currently dealt with working out a mechanism for amending the BL. He queried whether Article 159 was operable or rather it was merely a myth.

31. Dr YEUNG Sum asked whether the Administration could provide at this stage an estimate of the time required to complete the whole process of devising a mechanism for amending the BL.

32. SCA(Ag) responded that BL 159 provided that the power to propose bills for amendment to the Basic Law should be vested in the NPCSC, the State Council and the HKSAR. He emphasized that there was no question of the Administration dragging its feet or stalling the matter. The Administration had, so far as possible, provided a rough estimate of the time required for some of the essential steps in the process of devising an amendment mechanism. The timetable had been submitted and explained to the Panel at the meeting on 21 June 1999. From the point of view of the Administration, it was impossible to set a timetable for the completion of the whole process because many of the issues concerned arrangements that involved not only the HKSAR but the CPG as well. Interpretation of the Basic Law and amending the Basic Law were two entirely different matters and should be dealt with separately.

33. Commenting on the lack of progress of the matter, Ms Emily LAU asked whether the Administration had encountered difficulties in seeking the views of the Hong Kong NPC deputies.

34. SCA(Ag) said that according to the procedures set out in the tentative timetable worked out by the Administration, it was intended that the Administration would consult the CPG on issues which involved the NPCSC, the

State Council, the local NPC deputies and the Basic Law Committee. The General Office of the NPCSC promulgated in late 1998 a set of guidelines to local NPC deputies on, inter alia, how they should discharge their duties in Hong Kong. The Administration would need to know whether the NPCSC would issue detailed guidelines on how the local NPC deputies should discharge their duties under BL 159.

35. Mr SZETO Wah enquired about the channels for consulting the CPG and how many times the Administration had consulted the CPG.

36. SCA(Ag) replied that consultation with the CPG took place through meetings between the Constitutional Affairs Bureau and the Hong Kong and Macau Affairs Office. He said that the issue of mechanism for amending the BL had been a standing item for discussion at those meetings since May 1999. Since that time, a total of four meetings had been held. In response to the Chairman's enquiry, SCA(Ag) replied that he would not rule out the possibility of discussing with the NPCSC on this matter where necessary.

37. The Chairman asked whether the Administration had come up with a preliminary framework for the amendment mechanism as the basis for discussion with the CPG.

38. SCA(Ag) said that while the Administration had studied the matter and had some initial views on individual issues, it would not be appropriate for the Administration to formulate a mechanism unilaterally before consulting all relevant parties. The Administration had discussed the matter with this Panel, and had listened to the views of the legal profession, the academics and other relevant parties. The Administration was now seeking the views of the CPG on the matter. After consulting all relevant parties, the Administration would formulate preliminary proposals for members' consideration. He assured members that the Panel would be kept informed of new developments.

39. There being no other business, the meeting ended at 4:40 pm.