

立法會
Legislative Council

LC Paper No. CB(2)2565/99-00
(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, 19 June 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 Margaret NG Hon CHEUNG Man-kwong Hon Gary CHENG Kai-nam Hon Howard YOUNG, JP Dr Hon YEUNG Sum Hon SZETO Wah
Members Absent	: Hon LEE Wing-tat Hon Ronald ARCULLI, JP Hon Jasper TSANG Yok-sing, JP Hon Ambrose LAU Hon-chuen, JP
Public Officers Attending	: <i>Item IV</i> Mr Robin IP Deputy Secretary for Constitutional Affairs (2) Mr Bassanio SO Principal Assistant Secretary for Constitutional Affairs (5) Mr Jacky LUM Assistant Director of Administration (3)

Item V

Mr Robin IP
Deputy Secretary for Constitutional Affairs (2)

Ms Doris HO
Principal Assistant Secretary for Constitutional Affairs (4)

Mr LI Wing
Chief Electoral Officer

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

Staff in Attendance : Mr Jimmy MA
Legal Adviser

Mrs Eleanor CHOW
Senior Assistant Secretary (2)7

Action Column

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)2339/99-00)

The minutes of the meeting held on 8 May 2000 were confirmed.

II. Information papers issued since the last meeting
(LC Paper Nos. CB(2)2035/99-00(01), 2170/99-00(01) and 2370/99-00(01))

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

- (a) LC Paper No. CB(2)2035/99-00(01) - A copy of the Panel Chairman's letter to the Secretary for Health and Welfare on "Issue of employees of public-funded bodies taking up public offices";
- (b) LC Paper No. CB(2)2170/99-00(01) - The Administration's reply on "Sex and age profile of electors in the 1999 District Councils election"; and

- (c) LC Paper No. CB(2)2370/99-00(01) - The Administration's reply on "Application of certain provisions of the Prevention of Bribery Ordinance (POBO) to the Chief Executive".

On item (c), the Chairman said that the Administration had advised that it would start to prepare the necessary legislative amendments to extend the existing section 10 of the POBO concerning the possession of unexplained property to include the Chief Executive (CE). As regards members' suggestion to codify the common law offence bribery, the Administration had responded that it would need more time to consider the issue.

3. Legal Adviser (LA) said that the Administration had advised that the case of Whitaker in 1914 provided a definition for "public officer". In the Panel meeting in May, he had referred to a more recent case in 1996 (R v Bowden (1996) IWLR 98) which the Administration was requested to look into. The Administration had now advised that the 1996 case was considered irrelevant to the discussion on the common law offence of bribery. He would like to point out that while the case was irrelevant in terms of the offence committed, it was relevant as far as the discussion on the definition of "public officer" was concerned. This was because despite the definition of "public officer" provided in the Whitaker's case, the Court of Appeal in England had been requested in the 1996 case to rule on whether an accused was a public officer. On the question of the application of the offence of bribery to the Chief Executive, members might wish to consider whether it was appropriate to rely on the definition provided in the 1914 case or whether the common law offence should be codified.

4. After discussion, the Chairman suggested and members agreed that the Administration should be requested to advise the Panel of its view on the question of codification of the common law offence of bribery prior to the introduction of the necessary legislative amendments to the POBO in the next legislative session, as the two issues were inter-related.

(Post-meeting note : The Panel's request was conveyed to the Administration on 20 June 2000.)

III. List of issues to be considered

(LC Paper No. CB(2)2354/99-00(01))

5. The Chairman suggested and members agreed that the list of issues should be passed to the new Panel for consideration in the next session.

IV. The question of "important bill" under Article 50 of the Basic Law
(LC Paper No. CB(2)2383/99-00(01))

6. At the invitation of the Chairman, Deputy Secretary for Constitutional Affairs (DSCA) introduced the paper. DSCA said that the purpose of the paper was to highlight the issues that needed to be considered in relation to the question of "important bill" in BL 50. Given the constitutional implication of BL 50, the Administration needed more time to study the matter before forming a mature view. He invited members' views on the subject.

7. In response to Dr YEUNG Sum's question on the practice in France, DSCA explained that in France, bills were not classified as "important" or otherwise. Under the French constitution, the French Government could require that the texts of a bill be voted on in its entirety, rather than clause by clause at the end of the debate. The French Government could further make the passage of the bill an issue of confidence. The bill would be treated as having been passed unless the opposition could successfully initiate a motion of censure within 24 hours and secure the support of an absolute majority of the membership of the French National Assembly. Under the French system, there were no restrictions on how these powers were exercised.

8. Referring to paragraph 9 of the paper, Ms Emily LAU queried the rationale for stating that the "impact of Government operations brought about by a premature dissolution of the legislature" could be one of the factors in determining whether a bill was "important". DSCA explained that the paragraph sought to point out that the premature dissolution of the Council under BL 50 would have an impact on Government operations. This was a practical issue which the Government must address when BL 50 was invoked. The Chairman added that there was a mechanism for the calling of emergency meetings during dissolution of the Council.

9. Ms Emily LAU questioned the basis for the Administration's view in paragraph 10 that BL 50 could be construed as giving the CE "unfettered flexibility" to decide whether a bill was important or not. The Chairman asked whether the view was supported by legal advice. Some members considered that the Administration's interpretation of the provision was unfounded.

10. DSCA responded that given that there was no definition for the term "important bill" in the Basic Law and BL 50 stated that "if consensus cannot be reached after consultations, the CE may dissolve the LegCo", it was the preliminary view of the Administration that the CE was given "unfettered flexibility" to decide whether a bill was "important" or not. As pointed out in paragraph 5 of the paper, the Basic Law contained many provisions recognizing

the important constitutional status of the legislature. The fundamental purpose of BL 50 was to provide a special measure to resolve a grave constitutional impasse between the executive and legislature. The impasse must be grave enough to justify dissolving the legislature mid-term. Moreover, there were procedural safeguards against arbitrary use of the power.

11. LA said that despite the fact that the view of the Administration was only preliminary, it would affect the focus of future discussion. The Administration should provide more justifications in support of the view that the CE should be given "unfettered flexibility". He pointed out that such an interpretation might imply that the CE's power was not subject to judicial review.

12. LA further said that given that BL 50 was a general provision, it was necessary for a set of criteria to be agreed upon in order to facilitate the implementation of the provision and not to undermine the checks and balances between the executive and the legislature. He agreed with the Administration that BL 50 was not intended as a provision to facilitate the CE to dissolve LegCo. Rather, it served to protect the operation of legislature from unnecessary and unreasonable interference.

13. Dr YEUNG Sum said that whether a bill was important could be determined by the executive; or the legislature; or the executive and legislature upon reaching a consensus. He asked which scenario the Administration was inclined to support. DSCA responded that the Administration had yet to form a view on the matter.

14. In response to Dr YEUNG Sum, LA said that in case of judicial review, the court would consider how the CE had exercised his power under BL 50. Under common law, CE's power should not be inconsistent with or exceed the scope of the empowering provision. He opined that it was preferable for the executive and the legislature to work out a mechanism to ensure that BL 50 would be implemented fairly.

15. Ms Emily LAU disagreed that the power to decide whether a bill was "important" should be conferred on the CE alone. Given that the Basic Law provided a checks and balances system between the executive and the legislature, there should be a set of objective criteria for determining "important" bills. The Chairman pointed out that a bill could become an "important" bill after certain clauses had been amended. If a bill was only declared as "important" after rejection by LegCo, it could lead to constitutional crisis. Ms Emily LAU suggested that the Administration should advise LegCo whether a bill was "important" upon its introduction.

16. On Ms LAU's last point, Miss Margaret NG said that such an arrangement was impracticable, as it would imply bills other than the specified bills were not important. Some Members might also perceive labelling bills as "important" to be a threat imposed by the executive on the legislature. In case of a dispute between the executive and the legislature on whether a bill was "important", she said that either the court could refuse to give a judgment or the court would say that it was for the CE to decide whether a bill was important. She personally considered that it would be very difficult to come up with a set of objective criteria for determining whether a bill was "important" or not. She said that the Administration's view that the CE had "unfettered flexibility" to determine whether a bill was "important" or not was not unreasonable.

17. The Chairman said that he had no strong view if the CE was given "unfettered flexibility" in determining whether a bill was "important". However, since "unfettered flexibility" was subjective, it should only be exercised subject to certain procedural restrictions. Alternatively, objective criteria should be prescribed for determining whether a bill was "important". In any event, the nature of the bill should be made known to the public well in advance. Referring to the French experience where the passage of a bill could become an issue of confidence, the Chairman said that Hong Kong could consider devising a similar procedure whereby the responsible Government official e.g. the Chief Secretary for Administration or the policy secretary in charge of an "important" bill had to resign if a motion of censure was passed. In this respect, he suggested and members agreed that the Research and Library Services Division should be asked to conduct a research on the subject, making reference to overseas practices, during the summer recess. In response to the Chairman, DSCA undertook to conduct a more in depth study on the background of the French system.

Adm

(*Post-meeting note* : The Panel's request was conveyed to the Research and Library Services Division on 30 June 2000.)

18. Miss Margaret NG said that the matter might fall within the jurisdiction of the court in the event that BL 50 was not implemented in a fair and reasonable manner. She agreed with LA's earlier comment that the court might adjudicate on whether the procedure involved and the power so exercised were in compliance with BL 50. She also agreed with the Chairman that the Administration should in consultation with the legislature work out a procedure for determining the nature of a bill. She believed that a procedure could be developed by convention.

19. DSCA said that the Administration would give due consideration to the views expressed by members. He reiterated that the Administration needed more time for the study of the underlying principles in determining the nature of a bill. When a more mature view on the principles was developed, the Administration

Adm could address other interdependent issues such as procedure and timing. He undertook to keep members informed of any further progress on the matter.

20. The Chairman expressed concern that the Administration's paper had not addressed the question of whether a budget or an important bill which had been passed with amendments proposed by LegCo would be regarded as LegCo refusing to pass the budget or the bill under BL 50, as it was not passed in its original form. LA informed members that the Committee on Rules of Procedure had discussed the issue. The Committee noted that under the three readings procedure, the officer in charge of a bill had the right to withdraw the bill at the beginning of each reading. If the bill had been read the second time, it implied that the legislature had endorsed the merits and principles of the bill which could proceed to the committee stage and its third reading. The Committee considered that a decision of the Council to negative the second reading or third reading motion on an Appropriation Bill should be taken as the refusal of the Council to pass a budget. The Chairman said that the same understanding should apply to an "important" bill.

21. Mr CHEUNG Man-Kwong said that under the Basic Law, there were three scenarios which could lead to the dissolution of the Council: (a) LegCo refused to pass a budget; (b) LegCo refused to pass an important bill; and (c) CE refused to sign an ordinary bill passed the second time by LegCo. He expressed particular concern about CE's power under scenario (c). The Chairman said that the point raised by Mr CHEUNG, though important, was outside the scope of the Panel's discussion.

V. Counting arrangements for the 2000 LegCo elections (LC Paper No. CB(2)2354/99-00(02))

22. At the invitation of the Chairman and referring to the paper, Chief Electoral Officer of the Registration and Election Office (CEO) explained the broad counting arrangements, and the initiatives to be adopted in order to speed up the counting process, for the 2000 LegCo general election and the Election Committee (EC) subsector elections.

23. In response to questions raised by Mr Howard YOUNG and Ms Emily LAU, CEO said that there would be about 530 polling stations for the elections of geographical constituency (GC) as well as the functional constituency (FC). Same as the practice adopted for the LegCo election in 1998, GC and FC ballot papers were in different colours so that any ballot papers misplaced could be easily identified. CEO also took note of Ms LAU's comment that adequate chairs, food

and drinks should be provided to candidates and their agents at the counting stations.

24. Ms Emily LAU considered that the time for completing the count for the 2000 general election, which was estimated to be reduced by some six hours as compared to the 1998 election, was not a significant improvement. In the circumstances, she preferred the centralized counting arrangement adopted in 1998 which created a better atmosphere for the election. She asked the Administration whether it was due to the difficulty to hire a venue for centralized counting that the option to have regional counting stations was adopted. She also asked about the new measures to be introduced to speed up the count.

25. CEO responded that the proposed counting arrangement was adopted in the bid to speed up the counting process. With each of the five GC counting stations responsible for its own count, there would be better division of labour. The delivery time of ballot boxes from polling stations to respective counting stations would also be improved, as the routes of transportation of ballot boxes would be more direct and more efficient. There were also measures to improve the handling of questionable ballot papers. As the time spent on determination of the validity of questionable papers was considerably long in the 1998 LegCo election, questionable ballot papers found in the 2000 LegCo election would be determined in batches as soon as they were brought in for the Returning Officer's attention. This arrangement would be more efficient than determining all questionable papers at the end. With the use of the chop, the risk of inconsistency in determination would be reduced to a minimum. The number of questionable papers was also expected to be significantly reduced.

26. Principal Assistant Secretary for Constitutional Affairs (PAS/CA) added that the fact that all ballot papers from about 500 polling stations were required to be delivered to the central counting station at about the same time in the 1998 LegCo election had created a bottleneck. With the use of five regional counting stations for the GCs and the new arrangement to open all ballot boxes as soon as they arrived at the counting stations, counting would be speeded up.

27. Mr CHENG Kai-nam said that he had indicated at a previous meeting that he also preferred centralized counting to regional counting. However, given that the present proposal for counting arrangement was a compromise reached, he saw no point in bringing up the subject for further discussion. He asked why the proposed regional counting stations for the New Territories East (NTE) and New Territories West (NTW) GCs were located outside their respective boundaries.

28. CEO explained that all the venues originally identified in the NTE and NTW GCs were considered to be too small. In the circumstance, more spacious

venues to be located outside the respective boundaries had to be used. The venues presently proposed (each about 2 500 m²) could accommodate more counting staff and provide more space for candidates, their agents, the public and the media to observe the count. He added that the location of these two regional counting stations were such that staff of polling stations could deliver the GC ballot boxes to these two stations on the way to the central counting station.

29. Mr CHEUNG Man-kwong suggested that the Administration should consider using the EC subsector elections to be conducted on 9 July 2000 as a testing ground to ascertain the effectiveness of counting at individual polling stations, in view of the small number of electors involved. CEO responded that the counting arrangement for the EC subsector elections was governed by the relevant regulation and could not be changed. In addition, the counting arrangement was complicated as it had to take into account the number of seats allocated to each subsector. The Chairman said that he did not support Mr CHEUNG's proposal. He pointed out that given the small number of voters for EC subsector elections, such an arrangement could easily reveal their identity.

30. There being no other business, the meeting ended at 4:12 pm.

Legislative Council Secretariat

28 August 2000