

立法會
Legislative Council

LC Paper No. CB(2)487/99-00
(These minutes have been
seen by the Administration)

Ref : CB2/PL/CA

**Legislative Council
Panel on Constitutional Affairs**

**Minutes of meeting
held on Monday, 25 October 1999 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 LEE Wing-tat
Hon CHEUNG Man-kwong
Hon Ambrose CHEUNG Wing-sum, JP
Hon Gary CHENG Kai-nam
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon SZETO Wah

Members Absent : Hon Margaret NG
Hon Ronald ARCULLI, JP
Hon Ambrose LAU Hon-chuen, JP

Member attending : Hon James TO Kun-sun

Public Officers Attending : *Item III*

Mrs Carrie YAU
Director of Administration

Mr Jacky LUM
Assistant Director of Administration

Mr Jacky CHAN
Deputy Secretary General
University Grants Committee

Dr Lawrence LAI
Deputy Director, Hospital Authority

Mrs June SHERRY
Assistant Director (Subventions)
Social Welfare Department

Item IV

Mrs Carrie YAU
Director of Administration

Mrs Apollonia LIU
Assistant Director of Administration

Mr M J BISHOP
Assistant Director (Investigation Branch/4)
Operations Department, ICAC

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

Mr James O'NEIL
Deputy Solicitor General (Constitutional)
Department of Justice

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

Clerk in Attendance : Mrs Justina LAM
Assistant Secretary General (2)

Staff in Attendance : Mr Jimmy MA
Legal Adviser

Mrs Eleanor CHOW
Senior Assistant Secretary (2)7

I. Confirmation of minutes of meetings
(LC Paper Nos. CB(2) 136 and 147/99-00)

The minutes of the meetings on 25 June 1999 and 7 October 1999 were confirmed.

II. Information papers issued since the last meeting
(LC Paper Nos. CB(2) 115/99(01) and 177/99-00(01))

2. Members noted that paper 115/99(01) was the speaking note of the Secretary for Constitutional Affairs for the briefing on the Chief Executive's Policy Address 1999 which was tabled at the last meeting. The Chairman informed members that paper 177/99(01) set out the contingency plans for Y2K-induced incidents in the Constitutional Affairs Bureau (CAB) and the Registration and Electoral Office. Members did not raise queries on the two papers.

III. Existing practices of employees of tertiary institutions funded by the University Grants Committee (UGC) and public-funded bodies taking up public offices
(LC Paper No. CB(2) 168/99-00(02))

3. Director of Administration (D of Adm) said that she assumed a co-ordinating role in respect of this agenda item which involved different departments and bureaux. Referring members to the paper, D of Adm explained that while the Administration believed that employers should be encouraged to adopt a positive attitude towards their staff taking up public offices, the Administration also recognized that flexibility should be provided to the relevant organizations to decide on the detailed arrangements that could best suit their needs. She invited representatives of the Hospital Authority (HA), UGC and Social Welfare Department (SWD) to brief members on their existing practices.

4. Deputy Director of HA (DD/HA) said that guidelines on arrangement concerning staff engaging in public offices were set out in the Human Resources Policy Manual of HA. In drawing up the guidelines, reference had been made to the policies of the Civil Service Bureau.

5. Assistant Director (Subventions) of SWD (AD/SWD) said that there were over 100 subvented organizations under SWD. Many of them required their staff to inform or to seek approval from the management before taking up public service. The Hong Kong Council of Social Service (HKCSS), which was the main coordinating body of the non-government organizations (NGO)

in the welfare sector, had a set of administrative guidelines for the reference of its member agencies, including subvented organizations, in respect of NGO employees taking up public offices. SWD monitored the performance of subvented organizations to ensure that their services would not be affected by their staff taking up public services. AD/SWD added that it was the policy of SWD to encourage staff to take up public offices. However, the actual number of employees of subvented NGOs taking up public service was relatively small.

6. Deputy Secretary General of UGC (DSG/UGC) said that all the eight tertiary education institutions funded by UGC had established and promulgated to staff clear procedures and guidelines governing their employees' engagements in outside practices, and such procedures differed slightly among the institutions. DSG/UGC explained that in general, an employee had to seek the permission of the head of his department to engage in outside practices, including taking up public offices. Referring members to paragraph 3 of the paper which set out the existing arrangement, DSG/UGC pointed out that adjustment of salaries and benefits of the employees concerned, if any, mainly depended on the time spent on the outside practice.

General principle

7. Ms Emily LAU said that as a matter of principle, there should be standardized guidelines for public-funded bodies to follow to ensure transparency and fairness. She expressed concern that providing flexibility to these organizations to decide on their own arrangements might lead to abuse by employers. For instance, the same employer might apply different treatment to employees taking up the same type of public office.

8. D of Adm clarified that although the Administration considered that flexibility should be given to the relevant organizations, it did not imply that there was no mechanism to regulate the existing practices. The Administration believed that employees and employers concerned were in the best position to work out the most practical arrangements between them. To have a set of standardized guidelines across the board would be difficult to implement and unlikely to be feasible, given the different nature of the organizations, the job of the employees concerned, and the public offices in question. D of Adm noted Ms LAU's concern, and said that consideration would be given to standardizing the guidelines for organizations of similar nature.

9. The Chairman said that the nature of the job of the employees rather than the nature of the organizations should be the main consideration in standardizing a set of guidelines. Mr SZETO Wah opined that there could be several sets of guidelines. However, employees holding similar jobs and positions in organizations of similar nature and taking up the same type of public office should be accorded equal treatment. Moreover, the guidelines

should be promulgated so that employees concerned would know the exact arrangements.

10. Mr Ambrose CHEUNG expressed concern about the mechanism to deal with complaints arising from arrangements concerning engagement in public offices. D of Adm replied that the management of the individual organizations should be able to set up an appeal mechanism. DSG/UGC said that employees of tertiary education institutions could lodge complaints with the governing body of the individual universities. The Chairman expressed concern that this might adversely affect the career prospect of the complainant. Mr Ambrose CHEUNG said that an independent body should be set up for handling complaints.

Adm

11. D of Adm agreed that any guidelines must be fair and acceptable to the employees concerned. The Administration would take account of members' views, and an inter-departmental working group might need to be set up to follow up the matter, subject to the views of relevant bureaux. The Chairman said that the relevant bureaux should also be invited to attend future meetings for discussion of the item.

Practices in the education sector

12. The Chairman and Dr YEUNG Sum declared interest as employees of the Chinese University of Hong Kong (CUHK) and the University of Hong Kong (HKU) respectively. The Chairman said that the salary he received from CUHK was reduced by one-third as a result of his taking up the office of a LegCo Member. Dr YEUNG said that in his case, HKU charged a levy of 40% on his remuneration as a LegCo Member.

Adm

13. The Chairman advised that before the concept of remunerated public service was introduced by some tertiary education institutions such as the Hong Kong University of Science and Technology some five years ago, employees of tertiary education institutions were allowed to keep both the salary of their full time job and the remuneration from public service. He requested the Administration to provide information on the existing practices in primary and secondary schools in respect of staff taking up public offices. He added that the Administration should rationalize the different practices in the education sector.

14. Mr CHEUNG Man-kwong informed members that teachers of primary and secondary schools taking up public offices would have their salaries deducted based on the time spent on the public service. In his case, he did not receive any salary from his school. He opined that the standard to be drawn up for the education sector should be based on the time devoted by a teacher to his school. He also enquired about the existing arrangement adopted for vice

chancellors of tertiary education institutions taking up public office. Mr CHEUNG expressed concern over the conflicting roles of a vice chancellor, who being a member of the governing body, would be involved in the approval process of his own application to take up public office.

15. Mr Howard YOUNG expressed concern that an employee's provident fund would be affected if his salary was completely or partially deducted. He held the view that an employee should not be penalized because of his engagement in public office. The Chairman echoed Mr YOUNG's view and pointed out that his arrangement with CUHK was less favourable than that of Dr YEUNG Sum's, given that Dr YEUNG's contribution to the provident fund was unaffected. Mr CHEUNG Man-kwong said that the Administration should consider whether the employer's contribution to the provident fund should cease even though the employee had ceased his contribution because he did not receive any salary as a result of his taking up public office. Members urged the Administration to work out a standardized system which was reasonable and acceptable to the community.

16. In response to members' questions, D of Adm said that the existing practices in the education sector had been developed over the years. She further said that UGC would gather information on the existing practices of the eight institutions with a view to identifying the differences. As regards standardizing the guidelines for the education sector, the Administration noted members' views concerning adjustment of salaries and benefits but had to study the matter in detail before reverting to the Panel.

Adm

17. In response to the Chairman's question, Legal Adviser (LA) said that funding for the tertiary education institutions was not directly approved by LegCo, as the policy was to ensure autonomy of the institutions. He added that according to his understanding, the institutions were not wholly public-funded. DSG/UGC explained that the institutions were provided with a one-line vote. They had full autonomy to decide on the amount spent on administrative, teaching, research and other areas. However, the terms and conditions of employees of the institutions were comparable to those of civil servants in accordance with the subvention principle.

Practices in the welfare sector

18. Mr Howard YOUNG asked about the practices in respect of employees in the welfare sector engaging in public offices. AD/SWD replied that the welfare sector had basic principles governing the arrangements between the NGOs and their employees who were engaged in public services. However, whether a social worker's salary would be deducted as a result of his taking up public offices was a matter for the management of the individual subvented organizations to decide. She added that very rarely had this happened.

Adm 19. Mr Howard YOUNG suggested that the welfare sector should make reference to the guidelines promulgated by HA and the tertiary education institutions funded by UGC in drawing up a set of standardized guidelines for subvented organizations. AD/SWD undertook to consider Mr YOUNG's suggestion.

Adm 20. Members enquired about the arrangement adopted for Miss Rosanna WONG Yick-ming, the General Secretary of a subvented NGO, who took up a number of public offices. Members also requested the Administration to provide details of the administrative guidelines promulgated by HKCSS and the existing practices adopted by subvented organizations in regulating employees currently taking up public offices. The Administration undertook to provide the information, subject to no breach of the Personal Data (Privacy) Ordinance.

IV. Progress of review on the application of certain provisions of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE)

(LC Paper Nos. CB(2) 1249/98-99(02) and 168/99-00(03))

Application of the POBO to CE

21. D of Adm said that the paper sought to inform members of the progress of the review on the application of certain provisions of the POBO to CE. Since the paper was issued, there had been media reports that the Administration had no intention of applying the POBO to CE. She clarified that this was not the case. On the contrary, CE had indicated that he was more than happy to be bound by the POBO. In fact, CE like all other residents in Hong Kong was bound by the POBO, except those provisions of the POBO which were only applicable to government officers and public servants.

22. D of Adm further said that in response to the views expressed by members at the Panel meeting on 9 February 1999, the Administration had consulted the Department of Justice and reviewed the application of those provisions of the POBO that were applicable to "government officers" or "public servants" to CE. Currently, the offences of solicitation and acceptance of advantages under the POBO were generally premised upon the common law principal-agent relationship. Given that the relationship between the Hong Kong Special Administrative Region Government (HKSARG) and CE did not constitute a principal-agent relationship, the Administration came to the view that it was difficult to fit the HKSARG and CE into the structure of the POBO. Details of the Administration's explanation were set out in paragraphs 4 to 6 of LC Paper No. 168/99-00(03).

23. Mrs Emily LAU asked whether the problem of fitting CE into the structure of the POBO was technical or constitutional. D of Adm clarified that the problem was mainly a technical one, and the Administration was in the course of exploring means to apply those provisions of the POBO to CE having regard to relevant provisions of the Basic Law. It might be necessary to draft a separate section in the POBO to that effect. The Administration would also consider whether there should be a separate legislation or other more effective means to achieve the same result. Deputy Solicitor General of the Department of Justice (DSG/DJ) added that amendments to the POBO, if any, had to be consistent with the provisions of the Basic Law and take into account the constitutional position of CE.

24. Mr CHENG Kai-nam asked about the sections of the POBO which were applicable to government officers and public servants but not to CE. Assistant Director of Administration (AD of Adm) explained that those provisions in question were -

- (a) section 3 - soliciting and accepting an advantage by government officers;
- (b) sections 4(2) & (3), and 5(2) - soliciting and accepting bribes by public servants;
- (c) section 10 - possession of unexplained property;
- (d) section 12 - penalty for offences;
- (e) section 12AA - confiscation of assets; and
- (f) section 16 - requirement that public servants should provide assistance to ICAC investigating officers.

25. AD of Adm said that extracts of these sections were provided in Annex B to the Administration's paper prepared for the Panel meeting on 9 February 1999 (LC Paper No. CB(2) 1249/98-99(02)). Those provisions which related to criminal offences that were not specific to government officers or public servants and to which CE was subject in common with all other citizens of Hong Kong were detailed in Annex C to the paper.

26. Mr James TO asked whether it was the view of CE or HKSARG that certain provisions of the POBO should be extended to cover CE. D of Adm replied that it was the view of both parties. In fact, CE had urged that a legislative proposal be drawn up as soon as practicable. She assured members that the Administration was actively pursuing the matter.

27. Referring to the Administration's early comment that the HKSAR and CE did not constitute a principal-agent relationship, the Chairman said that a person would be guilty of an offence under the POBO under two conditions as set out in paragraph 4(a) and 4(b) of the paper. Paragraph (a) referred to a person who was an agent of a principal and paragraph (b) referred to a person who was a public servant. He considered that CE could be regarded as a public servant for the purposes of POBO.

28. Acting Senior Government Counsel (Basic Law Unit) of the Department of Justice (SGC/DJ) responded that in the light of common law, in considering whether a person was a public servant, regard should be paid to inter alia, the body responsible for appointing and removing the person to/from office. However, the Basic Law did not confer any power on the HKSARG in the appointment or removal of CE to/from his office. Under the existing arrangement, CE was appointed by the Central People's Government (CPG). In addition, there was concern as discussed in the paper on whether there was an appropriate authority according to the provisions of the POBO to grant approval to CE for the receipt of advantages himself.

29. The Chairman held the view that the common law concept of public servant should have no bearing on the issue under discussion. He also pointed out that the principal officials of HKSARG, although appointed by the CPG, were still accountable to the HKSARG.

30. LA said that he was not aware of the common law concept of public servant which was referred to by SGC/DJ. However, the term "public servant" was defined in the Interpretation and General Clauses Ordinance (Cap. 1). He considered that the Chairman's suggestion in paragraph 27 was viable and that problems, if any, were technical and could be resolved by adopting a narrow definition for CE in the relevant legislation along the line that "for the purpose of this ordinance, CE is regarded as a public servant". Regarding the concern about the appropriate authority to grant approval for receipt of advantage to CE who was currently the authority under the POBO to give such approval to public servants, LA proposed two options. Either a specific body could be designated as the authority to grant such approval to CE, or a stricter requirement could be imposed on CE having regard to his special status, i.e. CE should be banned from receiving any advantages.

31. In response, D of Adm said that as the review on POBO was not completed, the Administration had yet to decide on the way forward. At this stage, the Administration was studying whether the scope of the existing provisions of the POBO could be expanded to cover CE. In addition, consideration would be given to giving legal effect to the current administrative arrangements in relation to the acceptance and disposal of gifts

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Adm to CE. In response to the Chairman, D of Adm undertook to consider the suggestion to regard CE as a public servant for the purposes of POBO.

Adm 32. Dr YEUNG Sum requested the Administration and LA to set out for members' consideration various options for implementing the proposal to apply certain provisions of POBO to CE.
LA

Legislation on CE elections

33. Mr CHENG Kai-nam expressed concern over the absence of legislation to regulate the second term CE election, given that CE would neither be subject to the provisions in the POBO which were applicable to government officers and public servants, nor the Corrupt and Illegal Practices Ordinance (CIPO) which prohibited various corrupt and illegal activities in relation to elections.

34. Ms Emily LAU asked whether the Basic Law precluded the HKSAR from making laws to prohibit corrupt activities at CE elections. If it did not, she urged that the relevant legislation be enacted as soon as possible and preferably before the dissolution of the current LegCo. Mr James TO agreed that there was urgent need for enactment of the legislation as any new legislation would not have retrospective effect on corrupt and illegal activities already committed.

35. Mr CHEUNG Man-kwong pointed out that although Article 47 of the Basic Law provided that CE must be a person of integrity, dedicated to his or her duties to the HKSAR, and that the LegCo could move a motion under Article 73(9) to impeach him if he had acted otherwise, he was still not subject to certain provisions of POBO or CIPO. He said that "small circle" type of elections such as the return of CE by the 800-member Selection Committee were prone to corrupt and illegal practices. He was concerned that CE could influence the voting preference of members of the Election Committee by offering key appointments to them. Currently there were no laws to prevent CE from abusing his power and position to manipulate the second term CE election. Given his paramount position and power, the mechanism for regulating the conduct of CE should be more stringent than that for candidates of other elections. He urged that the relevant legislative proposals be introduced expeditiously to plug the loopholes.

36. In response to members, DSG/DJ advised that laws could be made to regulate corrupt and illegal activities at CE election. D of Adm said that a concrete proposal would soon be drawn up in respect of application of certain provisions of POBO to CE. As regards the legislation on CE elections, she was not in a position to advise on the timetable without seeking the advice of the Department of Justice and the CAB.

37. Mr James TO said that the Administration's reply indicated that it had not attached much importance to the issue. Since it was now more than two years after the reunification, there was no excuse to further delay the matter. He pointed out that the necessary legislation to facilitate the election of the first term LegCo was introduced by the Administration under a very tight timetable. In the circumstances, the Administration should have the ability to deal with the present problem expeditiously. Dr YEUNG Sum echoed the view that stalling on the matter would project a negative image on the HKSARG as it would give an impression that CE was above the law.

Adm 38. The Chairman doubted whether legislation to regulate the election of the second term CE would be ready in time in the event that the office of CE suddenly became vacant. He asked the Administration to consider applying the CIPO or its replacement legislation to the election of CE. Mr James TO pointed out that the CIPO did not cover non-pecuniary advantages such as offering of honorific titles in return for votes.

Adm 39. In response to members, D of Adm replied that the Administration noted the urgency of introducing legislation in respect of the arrangements for and regulation of the election of CE. She undertook to relay members' views to the CAB. In response to the Chairman, D of Adm said that while proposals to cover CE in the POBO and the CIPO could be considered concurrently, she believed that the former proposal would be put forward for members' consideration ahead of the latter, hopefully within the current LegCo term.

Constitutional position of CE

40. Referring to paragraphs 5 and 6 of the paper, Mr Ambrose CHEUNG asked whether the constitutional duties of CE could be defined in a general term so as to facilitate the making and application of legislation to CE.

41. SGC/DJ responded that it was necessary to study all the provisions of the Basic Law relating to CE in order to fully understand his constitutional status. He opined that it was difficult to come up with a general term to describe the position of CE. DSG/DJ elaborated that paragraphs 5 and 6 of the paper were written from the angle of how CE could be fitted into the structure of POBO, following a review of the position of CE under the Basic Law. The crux of the problem was that the principal-agent relationship could not be easily applied to CE because he had a number of different relationships. The only way to describe CE was that he was the CE under the Basic Law performing all the functions, duties and requirements that the Basic Law imposed upon him.

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Adm 42. In further response to Mr Ambrose CHEUNG, D of Adm said that she would not rule out the possibility that, apart from POBO, there were other provisions in existing laws that were not applicable to CE because of his constitutional status. However, the number of such cases would be few and in some cases, it did not make sense to apply such provisions to CE. She undertook to consider conducting a review in this respect.

43. Mr James TO asked whether paragraph 5 of the paper implied that CE would enjoy the same exemption granted to officials of the State organs stationed in the HKSAR, namely the Commissioner's Office of the Ministry of Foreign Affairs, the Hong Kong Garrison, and the Xinhau News Agency, because of his constitutional status. D of Adm replied in the negative : CE would abide by the law as other Hong Kong citizens.

Special Adviser to CE

44. Ms Emily LAU referred to the Administration's reply that Mr Paul YIP Kwok-wah, Special Adviser to CE, was not regarded as a government officer or a public servant because he was not being remunerated for that appointment. She said that the arrangement was far from satisfactory. Since Mr YIP's position was influential, he should be subject to stringent regulation. She urged the Administration to refrain from creating special positions that could not be bound by relevant laws.

45. D of Adm replied that Mr YIP, as an ordinary citizen of Hong Kong, was still bound by the POBO, except the provisions that were applicable to government officers and public servants.

Adm 46. Mr CHEUNG Man-kwong responded that Mr YIP was not an ordinary citizen as he had more opportunities to give advice to CE than anyone else. In the circumstances, Mr YIP or any other persons holding similar appointments should also be subject to the provisions of the relevant legislation governing government officers and public servants. The Administration was requested to review the matter and revert to the Panel at the next meeting.

V. Items for discussion at the next meeting (LC Paper No. CB(2) 168/98-99(01))

47. As the meeting ran short of time, members agreed that the item on "Designation of officials to attend LegCo meetings" originally scheduled for this meeting be deferred to the next meeting to be held on 15 November 1999. Members also agreed that the following items would be discussed at the next meeting -

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- (a) Existing practices of employees of tertiary institutions funded by the UGC and public-funded bodies taking up public offices;
- (b) Review on the application of certain provisions of the POBO to the CE and related issues;
- (c) Articles 50 and 51 of the Basic Law; and
- (d) Mechanism for amending the Basic Law (if the Administration was ready to report progress).

48. The meeting ended at 4:36 pm.

Legislative Council Secretariat

3 December 1999