

立法會
Legislative Council

LC Paper No. CB(2)438/01-02
(These minutes have been
seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of special meeting
held on Thursday, 26 April 2001 at 2:30 pm
in Conference Room A of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Mrs Miriam LAU Kin-ye, JP
Hon Mr Ambrose LAU Hon-chuen, JP

Members Attending : Hon CHAN Kwok-keung
Hon LI Fung-ying, JP
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP

Public Officers Attending : Item I

Ms Alice TAI, JP
The Ombudsman

Mr MOK Yun-chuen
Chief Executive Officer
Office of The Ombudsman

Ms CHANG King-yiu
Deputy Director of Administration

Ms Maggie WONG
Assistant Director of Administration

Mrs LIU WONG Po-yuk
Acting Chief Property Manager
Government Property Agency

Items II - IV

Mr Michael SCOTT
Senior Assistant Solicitor General

Miss Agnes CHEUNG
Senior Government Counsel
Legal Policy Division, Department of Justice

Miss Doris LO
Government Counsel
Legal Policy Division, Department of Justice

By Invitation : Item II

Hong Kong Bar Association

Mr M K WONG

Law Society of Hong Kong

Mr Michael JACKSON
Mr Christopher KNIGHT

Item III

Hong Kong Bar Association

Mr Edward CHAN, SC

Item IV

Mr Michael BUNTING, SC

Hong Kong Bar Association

Mr M C CHIU
Mr Michael YIN

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

Staff in Attendance : Ms Bernice WONG
Assistant Legal Adviser 1

Mr Paul WOO
Senior Assistant Secretary (2)3

Action
Column

I. Delinking of the Office of the Ombudsman from the Administration
(LC Paper No. CB(2)1345/00-01(01))

At the invitation of the Chairman, the Ombudsman briefed members on LC Paper No. CB(2)1345/00-01(01). The paper explained -

- (a) the proposed amendments to The Ombudsman Ordinance (Cap. 397) (the Ordinance) to formalise the delinking of the Office of The Ombudsman (the Office) from the Administration since 1 April 2001, and to further regularise and facilitate the independent operation of The Ombudsman; and
 - (b) the proposed plan of the Office to acquire its permanent office premises.
2. Mr Martin LEE and Mr Albert HO said that the Democratic Party supported the delinking as a step forward to enhance the independent status of the Office. Mrs Miriam LAU also supported the delinking.
 3. Mr Albert HO enquired about how mediation and investigation would be conducted by the Office.
 4. The Ombudsman said that it had been the practice of the Office to dispose of some minor and straight-forward complaints by way of mediation, which was considered a cost-effective means of dispute resolution. Mediation was conducted subject to the agreement of both the complainant and the organisation concerned. The Office also conducted preliminary inquiry to determine whether or not a formal investigation into a complaint should be undertaken. She said that the proposed amendments to the Ordinance sought to provide the legal basis for such practices which were not specifically laid down in the law.

5. In reply to the Chairman and Mrs Miriam LAU concerning the proposal to purchase permanent accommodation for the Office, the Ombudsman explained that it would be more cost-effective in the long term for the Office to be accommodated in its own premises. Owned premises provided security of tenure and protection from rent increase upon lease renewal. Moreover, it would also facilitate an independent image of the Office. She advised that under the legislative amendments, the Ombudsman, as a legal entity, would be empowered to acquire, hold or dispose of property. Nevertheless, the Ombudsman could not sell or lease any part of the property to any other person without the prior written approval of the Administration. The detailed requirement would be set out in the form of a Memorandum of Administrative Arrangement. She added that in her knowledge, similar arrangements existed for the Consumer Council.

6. Deputy Director of Administration (DD/A) said that the new legislative provision would specify that any proposal of the Ombudsman to invest resources not immediately required to be expended was subject to the approval of the Director of Administration, who should in turn consult the Secretary for the Treasury. The Administration would ensure that such proposals were in line with the proper discharge of the statutory duties and functions of the Office.

Adm

7. DD/A undertook to provide supplementary information on the cost-effectiveness in the long run of purchasing permanent office accommodation for the Office.

(Post-meeting note - The supplementary information was circulated vide LC Paper No. CB(2)1500/00-01(01))

8. Members noted that the Administration planned to introduce The Ombudsman (Amendment) Bill 2001 within the current legislative session to underpin the delinking exercise. Separate approval of the Public Works Subcommittee and the Finance Committee would be sought on the Ombudsman's proposal to acquire permanent office accommodation.

(Post-meeting note - The Ombudsman (Amendment) Bill 2001 was introduced into the Legislative Council on 30 May 2001. The proposal for the Office of the Ombudsman to acquire its permanent office premises was submitted to the Finance Committee on 6 July 2001.)

II. Proposed amendments to section 118 of the Crimes Ordinance (Cap. 200) - Marital rape and related sexual offences
(LC Paper Nos. CB(2)1249/00-01(01), 1342/00-01(01) to (06) and 1392/00-01(01))

9. Senior Assistant Solicitor General (SASG) informed members that subsequent to the discussion of the subject at the meeting on 16 January 2001, the Administration had worked out a number of proposed legislative amendments to the Crimes Ordinance to clarify the law regarding the offence of marital rape (second draft of the amendments dated 3 April 2001 circulated under LC Paper No. CB(2)1249/00-01(01) refers). The major amendments were -

- (a) to define "unlawful sexual intercourse" in the proposed new section 117(1B) of the Ordinance to include non-consensual marital intercourse; and
- (b) to remove the word "unlawful" in section 118(3)(a) and, for the avoidance of doubt, clarify that "sexual intercourse" in that section included sexual intercourse between a husband and his wife.

10. SASG further said that the draft issued on 3 April 2001 was a consultation draft on which the views of the legal professional bodies had been sought. He said that the Administration had received some of the latest responses to the proposed amendments only very recently. The Administration would further revise the amendments having regard to the views expressed.

11. Mr M K WONG informed members that the Bar Association's views on the second draft of the proposed amendments were set out in a letter dated 14 April 2001 to the Administration (LC Paper No. CB(2)1342/00-01(01)). The Bar Association was then in favour of the proposed amendments. He added that the Bar Association would give further thoughts to the amendments in view of the latest round of submissions on the proposed amendments, such as those made by the Law Society, and would comment further on a revised draft to be prepared by the Administration.

12. Mr Michael JACKSON said that the Law Society had considered the proposed amendments and submitted its views to the Administration in a letter dated 25 April 2001 (LC Paper No. CB(2)1392/00-01(01)). The gist of the Law Society's submission was as follows -

- (a) the Law Society supported the proposed deletion of "unlawful" in section 118 of the Crimes Ordinance to clarify that marital rape was a crime in Hong Kong;

- (b) the Society considered that section 119 (procurement by threats) and section 120 (procurement by false pretence) should be amended to ensure that wives would be equally protected in the circumstances covered in those two sections;
- (c) the Society did not support a non-exhaustive definition of "unlawful" to be included in section 117 in the manner as proposed. In its view, this was unnecessary in the absence of any general review of the law relating to related sexual offences, and would make the legislation more complex and confusing than was necessary; and
- (d) the Society doubted the necessity to introduce an avoidance of doubt provision to expressly state that "sexual intercourse" included sexual intercourse between a husband and his wife, believing that this was not good drafting practice.

13. Mr Michael JACKSON also said that the Law Society would like to make further comments if revised draft amendments were proposed by the Administration.

14. In response to the Chairman, Assistant Legal Adviser made the following observations as regards the proposed amendments -

- (a) Unless the Administration had completed a review of every section in Part XII of the Crimes Ordinance containing the reference to "unlawful sexual intercourse" or "unlawful sexual act", it would not be advisable to prescribe a definition of "unlawful sexual intercourse" for the entire Part XII. For instance, sections 123 and 125 of the Ordinance respectively provided for offences of unlawful sexual intercourse with girls under 13 and unlawful intercourse with a mentally incapacitated person. It was not clear, for instance, whether unlawful intercourse in the contexts of these two sections meant outside the bounds of marriage, hence consensual marital intercourse could be a defence, or whether the two categories of persons in question were considered incompetent to give consent on account of age or mental incapacity;
- (b) The consequential effect on section 149 and the Schedule to the Ordinance should be considered;
- (c) Paragraphs (a) and (b) under the proposed new section 117(1B) could be merged into one; and

- (d) In the marked-up copy of the proposed amendments (LC Paper No. CB(2)1342/00-01(06)), the English reference in section 146 to "she consents to the act" should be amended to "the child consents to the act".

15. The Chairman said that it appeared that there was a general consensus that section 118 of the Crimes Ordinance should be amended to clarify that marital rape was a crime. However, the picture was not so clear as to whether other related sexual offences sections in Part XII of the Ordinance containing the reference to "unlawful" should also be reviewed, and amended, if necessary. She suggested that the Administration might wish to conduct further consultation to see whether a wider exercise to review all the related sexual offences should be pursued.

16. The Chairman added that when the issue of marital rape was initially brought up for discussion, the primary concern of the Panel was that it should be made clear in the law that marital rape was a crime. It was expected that some relatively simple amendments to the Crimes Ordinance would suffice to achieve that purpose. The Panel did not anticipate a concurrent overall review of related sexual offences.

17. SASG responded that a "wholesale" review of sexual offences would take a long time to be completed. He said that as far as the present exercise was concerned, it was the intention of the Administration to introduce legislative amendments to the Crimes Ordinance to deal with the issue of marital rape and the relevant consequential amendments, without expanding the scope to cover related sexual offences. He said that the final legislative proposals would be introduced into the Legislative Council in the current legislative session.

III. Court's power under section 12 of the Conveyancing and Property Ordinance (Cap. 219)

(LC Paper Nos. CB(2)1249/00-01(02) and 1342/00-01(07))

18. Members noted that the item was last discussed at the meeting on 20 February 2001. At the meeting, the Panel considered the Administration's proposal to amend the Conveyancing and Property Ordinance (CPO) to enable the court to order return of a purchaser's deposit. The Administration was of the view that -

- (a) a provision equivalent to section 49(2) of the UK Law of Property Act 1925 be introduced by way of amendment to section 12 of CPO; and

- (b) such amendments included an express prohibition against contracting out of the provision.

19. Members also noted that the Administration had further submitted a paper (LC Paper No. CB(2)1249/00-01(02)) which was in response to the comments made by the Bar Association, the Law Society and Ms Audrey EU. Both the Bar Association and Ms Audrey EU considered that the courts of Hong Kong should not be conferred with the discretionary power. The Law Society supported the Administration's proposal in principle.

20. In response to the Chairman, Mr Edward CHAN said that the latest comments of the Bar Association on the subject were set out in its submission made to the Panel in February 2001 (LC Paper No. CB(2)908/00-01(01) previously circulated). He summarized the Bar Association's views as follows -

- (a) Parties should enjoy freedom of contract and the courts should not intervene. It was important to have certainty of contract. For a long time in Hong Kong, people had been used to the concept that if a party to a contract did not perform the contract, the party would be liable to a loss such as forfeiture of deposit. There appeared to be no sufficient reasons to justify sale of property to be an exception. The need for certainty of contract was particularly important in Hong Kong, where the completion period for a property transaction was relatively short, as compared with other places such as the UK;
- (b) The provision of a blanket discretionary power of the court to order repayment of deposit on any ground, and the absence of statutory guidelines on how the discretion should be exercised, would encourage purchasers to bring unnecessary litigation. This concern had been expressed by seasoned practitioners with vast experience in conveyancing matters;
- (c) A discretionary power of the courts in the UK might be justified by the difficult question of title to property. However, the same situation did not exist in Hong Kong.

21. Ms Audrey EU explained her major reservations about the proposal to provide the court with the discretionary power as follows -

- (a) While the loss suffered by the unfortunate purchaser in the case of Wu Wing Kuen was genuine, that appeared to be just one of a few isolated cases. The occasions on which a purchaser might need to rely on the proposed discretion of the court would be few. In fact, most litigation arising from frustration of contract happened not

because of proof of title but because of fluctuations in the property market and prices;

- (b) With the passage of the Land Titles Bill, the problems associated with proof of title to property could be solved;
- (c) The proposed discretion was undesirable from the public interest point of view. As pointed out by Lord Hoffmann, Judge of Court of Final Appeal, in the case of Union Eagle :

"...The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be 'unconscionable' is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case."; and

- (d) On payment of a deposit, the property was tied up by a lien on title and the vendor could not sell the property to another purchaser even at a higher price. Unmeritorious litigation subsequently brought by the purchaser, the process of which could be lengthy, would be unfair to the vendor.

22. Referring to Ms Audrey EU's point on property being tied up by litigation, Mr Edward CHAN expressed the view that introducing a summary procedure for property transaction-related cases might help address the problem.

23. Ms Audrey EU also referred to the Law Society's submission, where it was stated that the Law Society supported the Administration's proposal subject to the proposed discretionary power being narrowly drafted. The Law Society suggested that the amendment should be along the line of section 55 of the New South Wales Conveyancing Act 1919. Ms Audrey EU pointed out, however, that section 55(2A) of the New South Wales Act, which was similar to section 49(2) of the UK Act, was couched in rather wide terms. She said that it might be useful to seek the Law Society's clarification in this regard.

24. SASG said that the Administration had tried to address the question of whether or not the legislation should specify categories of circumstances under which the court should exercise the proposed discretion, but found that it would be impossible to do so because of the infinite range of circumstances where it would be unjust to forfeit a purchaser's deposit. The Administration remained of the view that the UK provision could be adopted as a model for CPO.

25. SASG confirmed that section 55(2A) of the New South Wales Act was the same as section 49(2) of the UK Act.

26. Mr Martin LEE said that there could be differences and similarities between the situation in Hong Kong and that in UK and Australia. The fact that similar legislation existed in UK and Australia indicated that such legislation might serve useful purposes. Referring to Lord Hoffmann's view cited by Ms Audrey EU, Mr LEE said that the concern expressed by Lord Hoffmann could hold equally true in other cases where there was the element of uncertainty and where the court had the discretion to grant relief having regard to the circumstances. In his view, there were merits in providing such flexibility to the court to enable the court to act in a way which, based on its judgment, could best achieve justice.

27. Mr Martin LEE further said that the fact that transactions of properties in Hong Kong took place within short completion periods might in fact support the argument for providing the court with the discretionary power to ensure that justice was done to the parties.

28. Mrs Miriam LAU said that to protect the sanctity of contract, the exercise of the discretion to order repayment of a purchaser's deposit should be restricted so that it would not apply to situations where there was a clear breach of the contract by the purchaser.

29. Mr Ambrose LAU said that on balance, he did not think that there was an immediate need to introduce the proposed amendment. He said that cases similar to the unfortunate case of Wu Wing Kuen were rare. He supported the view that unnecessary litigation would rise with the provision of the proposed discretionary power to the court.

30. Mr Albert HO said that he had come across quite a number of disputed cases resulting from uncertainty of title to property, on which lawyers themselves experienced great difficulties in adequately advising their clients. He said that he was primarily concerned about the need to make the law clearer to help all parties involved in a transaction. On the question of the court's discretion to grant relief against forfeiture of deposit in circumstances where it considered just to do so, he said that such power was not unique as there were similar discretionary powers provided for under some other legislation. Mr HO said that there were valid arguments both for and against the Administration's proposal, and he had yet to come to a decided view on the matter.

31. Mr Martin LEE considered that the Administration would need to further justify its proposal in view of the different views expressed on the relevant issues.

32. The Chairman said that she had reservations about the need to implement the legislative change as proposed by the Administration. She said that in the end it was a matter for the Administration to decide whether to introduce the proposal, having regard to the diversity of views expressed. The Panel would further consider the matter if necessary.

IV. Proposed amendments to the Small Claims Tribunal Ordinance, the Labour Tribunal Ordinance and the Minor Employment Claims Adjudication Board Ordinance
(LC Paper Nos. CB(2)1344/00-01(01) and (02))

33. Members noted that the Administration had submitted an information paper (LC Paper No. CB(2)1344/00-01(01)) on proposed amendments to the Small Claims Tribunal Ordinance (Cap. 338) (SCTO) to limit costs of appeal and transfer of cases from the Small Claims Tribunal (SCT).

34. As pointed out in the paper, under section 28(1) of SCTO, any party who was aggrieved by a decision of SCT might apply to the Court of First Instance (CFI) for leave to appeal on any ground involving a question of law or on the ground that the claim was outside the jurisdiction of SCT. On appeal, CFI might make such order as to costs and expenses as it considered appropriate. Furthermore, under section 7 of SCTO, SCT might transfer proceedings to the Minor Employment Claims Appeal Board, the Labour Tribunal, the Lands Tribunal, the District Court or CFI, and the practice and procedure of the transferee court were to apply. According to the Administration, it was suggested by a barrister, Mr Michael BUNTING, SC, that if a party could litigate in SCT without the risk of bearing the opponent's legal costs, the party should not lose the same protection in proceedings on appeal. Mr BUNTING suggested that the law should be amended accordingly to provide for that protection.

35. Arising from Mr BUNTING's suggestions, the Administration conducted a consultation on the issues in question, and subsequently came to the view that SCTO should be amended as suggested by Mr BUNTING. The Administration's recommendations were set out in paragraph 34 of its paper. The major legislative proposals were as follows -

- (a) sections 29(2)(b) and 29B of SCTO should be amended so that each party should bear his own legal costs on appeal;
- (b) section 7 of SCTO should be amended to make it clear that the costs regime of SCTO applied in respect of proceedings transferred under the section;

- (c) section 24(1) of SCTO should be amended to make it clear that "any reasonable expenses necessarily incurred" did not include a lawyer's advisory or drafting fees; and
- (d) the Labour Tribunal Ordinance and the Minor Employment Claims Adjudication Board Ordinance should be amended to limit costs in the same way in order to achieve coherence and consistency in the general legal policy.

36. Mr Michael BUNTING said that his suggestions arose from the case of So Sai Ming, in which a poor claimant who had succeeded on the merits in SCT had to pay \$122,610 in taxed costs on appeal by the defendant. The defendant's ground for appeal was that the adjudicator had made procedural errors in the conduct of the hearing. Mr BUNTING said that in small claims cases, there were policy reasons against subjecting the losing party to a liability to pay his opponent's costs on appeal. Also, since the clear policy was to provide for SCT's determination of small claims without the incidence of legal costs, it was anomalous and absurd that on appeal the parties were at risk as to such costs. He considered that the proposed legislative amendments were consistent with the policy aim of making justice equally available to everyone through the small claims tribunal system.

37. Ms LI Fung-ying and Mr CHAN Kwok-keung supported the legislative proposals. They pointed out that in many labour dispute cases, as legal representation was allowed on appeal from the Labour Tribunal, the risk of the employees having to pay for their opponents' disproportionate legal costs, which far exceeded the amount of the claims, had deterred the employees from pursuing meritorious claims.

38. Mr Albert HO also supported the Administration's proposals. He said that since the Tribunal and the appellate court were two components of the one system, it was illogical to eliminate the risk of bearing costs in the Tribunal, but not in the appellate court. He further said that some companies being the party losing in the Labour Tribunal decided to appeal since they wished to get an authoritative ruling on a matter of law of importance. In many of such cases, the appeal had the effect of driving the other party, i.e. the employees, into abandoning their claims because of the inability to pay the high legal costs, including that of the appellant, if they lost in the appeal.

39. The Chairman noted that the Bar Association and the Judiciary Administrator did not support the proposal to cap costs on appeal and on transfer of cases from SCT. She sought the Bar Association's comment.

40. Mr Michael YIN said that the matter was not one of wealthy litigants using the threat of disproportionate costs on appeal to crush their opponents, regardless of the merits of the case. He said that the appellate court would

take into account whether the claimant/defendant had a bona fide claim/defence as well as the merits of the appeal. In the end, leave to appeal would only be granted on the basis of identified points of law or jurisdiction. The appellate procedure would not be invoked lightly. He added that there were on average only about 30 to 40 small claims appeals per year. There might be no need to change the existing law.

41. The Chairman said that in the case of an appeal being brought about by errors made by a Tribunal, it would be unfair that the respondent should be liable to pay for the mistake of the adjudicator. She sought the Administration's views on whether the problem of disproportionate costs could be addressed by way of judicial review, where the matters for appeal involved a question of law or procedural irregularity, so that the burden of costs on appeal would fall on the Tribunal if the Tribunal was found at fault. The Chairman suggested that the Administration might also consider whether the right of appeal should be abolished altogether as in Quebec where appeals from judgments of the Small Claims Division were not permitted.

42. SASG said that the Administration would further consider the above comments.

43. Mr Michael BUNTING said that in an ideal state, lawyers should be allowed to argue cases and in the case of mistakes made by lawyers or the Tribunal, both parties to litigation should be relieved of the consequences of costs if none of them contributed in any way to the mistakes. However, that was not the way the legal system operated. Hence, the matter essentially involved how a fair balance between the interests of the parties concerned and other relevant considerations could be struck. He added that in his view, abolishing the right of appeal would not be a just solution because there were instances in which a party would wish to appeal even though the party was well aware that he could not possibly recover the costs. Typical examples were banks, insurance and credit card companies etc wishing to seek a court interpretation to clarify certain uncertainties about a particular provision in a document or standard contract which were in use. He further said that one should not assume that a litigant who wanted to appeal necessarily needed to seek the assistance of a lawyer. A litigant might be content to argue his case in person even though the other side was legally represented. Traditionally, judges had always assisted litigants pursuing their case in person.

44. The Chairman said that the proposal to limit costs on appeal did not necessarily work to the advantage of the less well-off litigants. She said that if the law was to be amended so that each party should bear his own legal costs on appeal, an aggrieved party such as the ordinary workers would be deterred from pursuing an appeal because even if they succeeded on appeal, they would not be able to recover their own legal costs. Mrs Miriam LAU shared similar views.

Action
Column

45. The Chairman noted that section 24(1) of SCTO provided that SCT might award to a party costs and expenses including any reasonable expenses necessarily incurred. Under this section, SCT might possibly award costs in respect of an advisory or drafting fee charged by a barrister or solicitor, although the award was unlikely to be very large. It was the present view of the Administration that "reasonable expenses necessarily incurred" should not include a lawyer's advisory or drafting fee, and the Administration proposed to amend section 24 accordingly. The Chairman opined that if the fees were reasonable and proportional and were incurred solely for the preparation of the case in question, such expenses should be allowed.

Adm

46. In concluding the discussion, the Chairman called upon the Administration to take into careful consideration the views expressed in preparing the proposed legislative amendments.

47. There being no other business, the meeting ended at 5:00 pm.

(Post-meeting note - The legislative proposals in agenda items II to III above were included in the Statute Law (Miscellaneous Provisions) Bill 2001 introduced into the Legislative Council on 4 July 2001.)

Legislative Council Secretariat
20 November 2001