

立法會
Legislative Council

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seen by the Administration)

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Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 17 October 2000 at 5:15 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 Martin LEE Chu-ming, SC, JP
Hon Mrs Miriam LAU Kin-yee, JP
Hon Mr Ambrose LAU Hon-chuen, JP
Hon Emily LAU Wai-hing, JP

Members Absent : Hon Albert HO Chun-yan
Hon James TO Kun-sun

Public Officers Attending : Item II

Mr Ian WINGFIELD, GBS, JP
Law Officer (Civil Law)

Mr Peter CHEUNG, JP
Director of Administration and Development (Acting)

Mr Charles BARR
Deputy Law Officer (Civil Law) (Commercial)

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

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Ms Eva LIU
Head, Research and Library Services Division

Mr Paul WOO
Senior Assistant Secretary (2)3

Action
Column

I. Information papers issued since last meeting

(LC Paper No. CB(2)30/00-01(01) - Administration's letter dated 28 September 2000 on award for bereavement under the Fatal Accidents Ordinance;

LC Paper No. CB(2)41/00-01(01) - Administration's letter of 3 October 2000 on common law offence of conspiracy to defraud;

LC Paper No. CB(2)45/00-01 - Consultation Paper on Legal Education and Training in Hong Kong : Preliminary Review;

LC Paper No. CB(2)58/00-01(01) - Administration's letter dated 29 September 2000 on the seven sets of rules relating to admission of notaries public)

Members noted that the above papers had been issued.

II. Creation of two permanent posts of Deputy Principal Government Counsel (DL2) in the Commercial Unit of the Civil Division of the Department of Justice

(LC Paper No. CB(2)62/00-01(01) - Paper provided by the Administration)

2. Law Officer (Civil Law) (LO(CL)) briefed members on the Administration's paper which set out the justifications for the proposed creation of two permanent posts of Deputy Principal Government Counsel (DPGC) in the Commercial Unit of the Civil Division of the Department of Justice (D of J), namely -

(a) a permanent post of DPGC in the Commercial Law Team with effect from a current date to strengthen the directorate support in complicated commercial law matters; and

(b) a permanent post of DPGC in the Insider Dealing Tribunal (IDT) Team with effect from 12 December 2000 to provide continued directorate support to the Financial Services Bureau in relation to insider dealing cases.

He advised that the work relating to commercial law matters and insider dealing inquiries had been increasing rapidly both in terms of volume and complexity, with the growth in the Government's commercial activities, its regulation of utilities, licences and certain commercial activities, and in Hong Kong's securities market leading to the need for insider dealing inquiries. Following a recent review of the work of the Commercial Unit, the Administration came to the view that there was a need for the dedicated attention of a directorate officer at DPGC level on a permanent basis to strengthen the supervision of the Commercial Law Team, which advised the Government on the more complicated commercial law matters, and another to lead the IDT Team to cope with the workload in insider dealing cases. Regarding the latter post, the Administration proposed to create one DPGC post on a permanent basis on 12 December 2000 upon the lapse of the existing supernumerary DPGC post in the IDT Team.

Creation of a DPGC post in the Commercial Law Team

3. Members enquired about the qualities required of the holder of the above DPGC post.

4. Deputy Law Officer (Civil Law) (Commercial) (DLO(CL)(C)) said that there were various facets to the nature and complexity of the duties involved. He explained that as the Commercial Law Team was responsible for providing legal advice to the Government on all aspects of commercial law in connection with Government's own commercial activities and regulatory functions, the Administration was looking for a candidate who was well familiar with work in such fields as telecommunications and broadcasting, securities and futures, negotiating, drafting and interpretation of commercial contracts, privatization and corporatization and other aspects of public sector reforms, as well as the exercise of statutory regulatory powers and the process of new regulatory functions. He pointed out that at present, the existing DPGC in the Commercial Law Team had to oversee the work of 10 Government Counsel, to be increased to 11, in the wide range of such complicated matters, which had proved to be an impossible task. Strengthening of supervisory directorate support for the Team therefore became necessary.

5. Ms Emily LAU asked to what extent the ability to use bilingual language, especially Chinese, was an important factor for appointment to the post. In reply, LO(CL) advised that being proficient in Chinese was always an advantage as far as civil service appointments were concerned. However, this was not a pre-requisite for the DPGC post in question because commercial work in the business sector was generally undertaken in English. The Administration would need to consider the relative merits of all the applicants. He said that language would become a decisive factor only in respect of two most suitable candidates being equally qualified in all other respects.

6. Ms Emily LAU enquired about whether the proposed post would be filled by internal promotion or opened up to outside competition as well.

7. LO(CL) replied that under normal civil service recruitment practice, the Administration would consider the possibility of internal promotion as a first step. He said that in recent years, there had been a significant increase in the range and complexity of the legal work undertaken by the Commercial Law Team. The increase arose partly as a result of new technology and partly from a number of new initiatives of the Government. To cope with the workload, D of J had provided specialized training in the various fields concerned to officers in the Department. From the management's point of view, it was a worthwhile objective to retain competent staff who had been groomed in those technical areas and who wished to stay with the Department to expand their expertise. He added that with the increasing changes in new technology which affected both the public and private sectors, experienced lawyers capable to deal with complex commercial law matters were in short supply, and also extremely well paid. Therefore, the Administration expected that there would be a difficulty to recruit and retain people from outside the civil service with the requisite level of experience and expertise, even at a salary level pitched at DL2.

8. The Chairman opined that in view of the highly specialized nature of the job, it might be desirable for the Administration to go for outside recruitment to bring in people with the rare and valuable expertise, hence increasing the depths of the legal and professional expertise available in D of J. Echoing the Chairman's view, Mr Martin LEE said that he saw no reason why the Administration should be obligated to first consider the possibility of filling the post by internal promotion. Ms Emily LAU preferred to open up the recruitment so that candidates from both within and outside the civil service could compete for the post.

9. LO(CL) said that where a civil service vacancy arose, the general preference was to fill the vacancy internally by a qualified serving candidate, for the benefit of staff morale and career development. This, however, did not prevent the Administration from opening up any recruitment to outside applicants in circumstances where it was considered desirable to do so. He said that as far as the proposed DPGC post in the Commercial Law Team was concerned, the Administration was still in the process of considering whether there was a serving officer who was suitable in terms of the overall level of experience and ability for appointment.

10. Members generally agreed that there was a need to create the proposed DPGC post, and suggested that the Administration should consider the option of filling the post by open recruitment. Mr Martin LEE opined that the Administration might also advertise to invite applications from overseas candidates if it foresaw a difficulty to recruit locally.

11. Mr Ambrose LAU opined that the Administration should first exhaust the possibility of filling the post by internal promotion before resorting to open recruitment.

12. LO(CL) noted members' views. He said that he was prepared to seek the approval of the Public Service Commission (PSC) and the Civil Service Bureau (CSB) to open up the post for both inside and outside applications. He added that normally PSC and CSB would have to be satisfied that there was no candidate within the civil service suitable to fill a vacancy before they would give approval for conducting outside recruitment.

Creation of a DPGC post in the Insider Dealing Tribunal (IDT) Team

13. The Chairman asked whether insider dealing had become a permanent type of market fraud in Hong Kong and therefore justified the creation of the proposed DPGC post in the IDT Team.

14. LO(CL) replied that three years after the existing supernumerary post of DPGC in the IDT Team was created in December 1997, the hope that insider dealing would cease to be a problem had not been borne out by reality. The fact that insider dealing activities were continuous, though not necessarily increasing sharply, justified the proposal to make the existing DPGC post permanent.

15. Ms Emily LAU noted that, as stated in paragraph 10 of the Administration's paper, the Administration expected that the Securities and Futures Commission (SFC) would continue to refer more cases to the Insider Dealing Tribunal (the Tribunal) for inquiry in the future. She asked to what extent the Government was successful in tackling this insidious type of market misconduct.

16. LO(CL) said that the results of the Government's efforts to deter insider dealing should be viewed in the proportion of cases brought before the Tribunal in which insider dealing was found to have taken place and the persons culpable were identified. He pointed out that for cases successfully punished, the Tribunal had imposed average fines of up to 1.5 times the value of the profits gained or the losses avoided.

17. DLO(CL)(C) supplemented that since its establishment in 1994, the Tribunal had completed five insider dealing inquiries. Since the creation of the IDT Team in December 1997, the Tribunal had completed another seven insider dealing inquiries. The IDT Team was also dealing with a further five referrals from the SFC, some of which were likely to be substantial inquiries. With the backlog of referrals, D of J expected that it would take more than two years to complete the present cases even with two divisions of the Tribunal sitting simultaneously. He said that the establishment of the proposed DPGC

post was necessary to enable the IDT Team to be strong in the fight against malpractice in the securities market.

18. Members enquired about what long-term measures would be taken by the Government to effectively deter insider dealing activities.

19. LO(CL) responded that this was precisely an important issue to be dealt with in the proposed Securities and Futures Bill which would soon be introduced into the Legislative Council (LegCo) for scrutiny. The Government regarded the Bill as a major step forward in reforming the regulatory framework for the securities and futures market. It proposed, among other things, the establishment of a Market Misconduct Tribunal to replace the IDT and to deal with insider dealing as well as market manipulation and other market misconduct. LO(CL) added that if the Bill was passed, the staffing complement of the IDT Team would be further reviewed.

20. Members raised no objection to the proposed DPGC post in the IDT Team to be created on a permanent basis. However, members requested the Administration to provide a summary of the cases handled by the IDT Team, including information on the results of the inquiries conducted by the Tribunal. LO(CL) agreed to include such information in the paper to be submitted to the Establishment Subcommittee of the Finance Committee in mid-November.

Adm

III. Internal discussion on progress of outstanding items and proposed new items

(LC Paper No. CB(2)62/00-01(02) - List of issues to be considered)

Appointment of judges

21. The Clerk briefed members on the background to this item. She said that the legal and administrative matters relating to the appointment of Court of Final Appeal (CFA) judges were discussed by the Panel at three special meetings in June 2000. Arising from the discussions, members proposed that the Panel should follow up on a number of issues, namely, whether the Chief Executive had the discretionary power not to appoint persons recommended by the Judicial Officers Recommendation Commission (JORC) as judges; review of the operation of JORC relating to judicial appointments and its interface with LegCo; and how LegCo should exercise its power under Article 73(7) of the Basic Law. The Clerk added that pursuant to the decision of the Panel made at the meetings in June, the Research and Library Services Division (RLSD) was requested to conduct a study on the process of appointment of judges in the United States (US) and the United Kingdom (UK).

22. Ms Emily LAU enquired about the timing for the Administration to seek LegCo's endorsement of the appointment of the Chief Judge of the High

Court, an appointment consequential to the appointment of Mr Justice Patrick CHAN as a judge of the CFA. The Clerk said that according to the advice of the Judiciary, it was likely that JORC would be submitting its recommendation to the Chief Executive in the next month or so.

23. On the progress of the research report, Head of RLSD (H(RL)) said that the drafting of the report on US would be ready before the end of October, whereas the one on UK would be available by mid-November.

24. Mr Martin LEE said that the US Constitution provided that the US President should nominate and, with the advice and consent of the Senate, appoint judges, whereas the UK had no written Constitution in this respect. However, it was unlikely for Hong Kong to follow the system adopted by the US. Mr LEE suggested that, to better assist members in the consideration of the subject, the research study should include at least one more common law jurisdiction in which the appointment of judges was governed by statute, e.g. Canada.

25. After discussion, members agreed that the Panel should consider the research reports on US and UK at the meeting to be held in November. Meanwhile, RLSD should start studying the system in one more jurisdiction for consideration of the Panel at a later stage. The Chairman asked H(RL) to provide the draft reports to Legal Adviser (LA) for his comments as soon as the reports were available.

H(RL)/LA

Consideration of public interest in decision to prosecute
(LC Paper No. CB(2)62/00-01(03) - proposed scope of research study)

26. The Clerk informed members that to follow up on Ms Emily LAU's suggestion made at the meeting on 10 October 2000 to conduct a research study on the above subject, the scope of the study proposed for the Panel's consideration was as follows -

"To study how and to what extent is "public interest" a matter for consideration when prosecuting authorities decide whether or not to prosecute in some common law jurisdictions."

27. H(RL) was of the preliminary view that the scope as proposed was quite wide. In addition, the study would involve research and analysis into the different legal and judicial systems as well as prosecution policy and practices of overseas common law jurisdictions. In view of the expertise required, RLSD might not be able to complete the study within the normal timeframe as allowed for other research projects.

28. Ms Emily LAU said that her request for a research study arose from the concerns expressed by some, such as the Hong Kong Journalists Association,

about whether and how public interest would be a factor to be taken into account by the prosecuting authorities in deciding whether or not to initiate prosecution against certain criminal offences. She cited unlawful disclosure of information as one example.

29. The Chairman said that in common law jurisdictions, a general principle governing criminal prosecution was the requirement to consider the public interest in a decision to prosecute. Yet, there was no hard and fast rule as to how the principle was to apply in any case since public interest involved a balanced consideration of a wide range of factors which varied from case to case. Furthermore, under the common law system, prosecuting authorities would not normally disclose or explain why they decided to prosecute or otherwise in a given case. She expressed reservation about asking RLSD to take on a research project with the proposed scope.

30. In response to the Chairman, LA said that there were insufficient case-law precedents to throw light on the subject. He pointed out that the courts rarely interfered in, or gave advisory opinion on, the prosecuting authorities' decisions to prosecute. Although there were case laws concerning the power of the court to terminate proceedings under special circumstances, such cases might not be directly relevant to the discussion of how public interest would affect a prosecution decision.

31. LA further pointed out that the issue of public interest defence in criminal law was previously discussed by the Panel at a meeting on 20 April 1999 at which D of J had presented its view on the matter.

LA

32. After some further discussion, members agreed that before the Panel decided whether a research study should be conducted on the subject, LA should assist by obtaining some factual information on the prosecution policy and guidelines adopted in some overseas jurisdictions for members' consideration.

Legal aid for proceedings in respect of defamation

33. The Chairman informed members that with the consent of Mr Martin LEE, the proposer of the above item, the Administration had been requested to explain the justifications for the existing policy to exclude proceedings relating to defamation cases from the scope of the Legal Aid Ordinance. She said that Mr LEE had also raised the matter at the meeting on 10 October 2000 when the Administration briefed the Panel on the Chief Executive's 2000 Policy Address.

34. Mr Martin LEE said that the Law Reports contained defamation cases where proceedings were taken against individuals for making libellous remarks, or writing articles of such nature, on the media. He suggested that an extract of these cases in the past five years might be circulated for members' reference.

35. Mrs Miriam LAU expressed the view that proceedings in respect of defamation could cover a wide range of cases. To single out a particular category of cases for study might not serve the purpose of reviewing a general policy.

36. Members agreed that the Panel should first discuss the subject in the light of the Administration's written response to the Panel's enquiry.

The Administration of the Judiciary

(LC Paper No. CB(2)62/00-01(04) - Progress Report on Research Study on "Measurement of Efficiency of the Administration of the Judiciary" prepared by RLSD)

37. The Clerk said that in the last LegCo session, the Public Accounts Committee (PAC), in considering the Director of Audit's Report No. 34, expressed concern about utilization of judicial time and requested RLSD to do a research study on three aspects in overseas jurisdictions. They were, namely, established standards for the average court sitting hours for different levels of courts, the arrangements for listing court cases, and monitoring of judicial time. PAC also suggested that, if the research report was completed after the expiry of the last LegCo term, the report should be forwarded to the Panel for consideration and follow-up.

38. H(RL) then briefed members on the progress of the research study. She said that RLSD had sent enquiries to six common law jurisdictions, i.e. UK, US, Canada, Australia, New Zealand, and Singapore. The Division had also made reference to a considerable amount of documents and articles with a view to collecting relevant material for the study. The preliminary findings indicated that utilization of judicial time or court sitting hours did not seem to be a standard measurement of the efficiency of the administration of the judiciary in the above common law jurisdictions, nor was monitoring of judicial time a popular practice. In view of the scarcity of information on those aspects in which PAC was interested, H(RL) sought the Panel's views on how the research study should be taken forward.

39. Mr Martin LEE opined that setting standards for court sitting hours and utilization of courtrooms could not serve the purpose of measuring the performance of the Judiciary as they did not truly reflect the time and effort that judges spent in their judicial duties. To illustrate his point, he said that very often, judges might decide to permit litigants to negotiate an out-of-court settlement, in the interest of the parties to the proceedings and saving the court's time and resources. He considered that information such as the court waiting time would be a more objective indicator of the efficiency of the administration of the Judiciary.

40. Mr Ambrose LAU and Mrs Miriam LAU expressed similar views. Mr Ambrose LAU said that setting standards for court sitting hours could be seen as intruding upon the independence of the operation of the Judiciary.

41. Ms Emily LAU said that the PAC's proposal was made in response to the Director of Audit's Report and against the historical background that the Judiciary and the Administration had all along adopted these indicators to measure the efficiency of the administration of the Judiciary.

42. The Chairman queried whether a research study as suggested by PAC would help assess the performance of the local Judiciary, pointing out that the demand for legal and judicial services as well as the system of delivery of such services in other jurisdictions differed vastly from that in Hong Kong. She added that the absence in overseas jurisdictions of the type of information sought by PAC also made it difficult for RLSD to make further headway in its study.

43. At the suggestion of the Chairman, members agreed that it was not necessary for RLSD to proceed further with the research study commissioned by PAC. Upon receipt of a report from RLSD, PAC would be advised of the Panel's view. Members also agreed that the issue of measurement of efficiency of the Administration of the Judiciary would be discussed by the Panel at a future meeting. The Panel together with the Judiciary could examine the viability of introducing quantitative performance measures for the Judiciary. The Judiciary Administrator would be requested to come up with some proposals in that regard.

H(RL)

IV. Date of next meeting and items for discussion

44. Members agreed that the next meeting should be held on 28 November 2000 at 4:30 pm to discuss -

- (a) Research study on process of appointment of judges in the United States and the United Kingdom - briefing by Head of Research and Library Services Division; and
- (b) Consultation Paper on Legal Education and Training in Hong Kong: Preliminary Review.

(Post-meeting note : At the request of the Administration and with the agreement of the Chairman, the item on Supplementary provision for Subhead 243 "Hire of legal services and related professional fees" has been included in the agenda of the meeting.)

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45. The meeting ended at 7:00 pm.

Legislative Council Secretariat

15 December 2000