

立法會
Legislative Council

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(These minutes have been
seen by the Administration)

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Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of the meeting
held on Tuesday, 20 March 2001 at 4:30 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 James TO Kun-sun
Hon Mrs Miriam LAU Kin-yee, JP
Hon Mr Ambrose LAU Hon-chuen, JP
Hon Emily LAU Wai-hing, JP

Member Attending : Hon Audrey EU Yuet-mee, SC, JP

Public Officers Attending : Items IV and V

Mr Tony YEN, SBS, JP
Law Draftsman

Mr Gilbert MO
Deputy Law Draftsman

By Invitation : Items IV and V

Hong Kong Bar Association

Mr Alan LEONG, SC
Chairman

Item IV

Law Society of Hong Kong

Ms Jacqueline CHIU

The City University of Hong Kong

Dr ZHAO Yu-hong
Lecturer of School of Law

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

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr LEE Yu-sung
Senior Assistant Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

Action
Column

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)1086/00-01)

The minutes of the meeting on 16 January 2001 were confirmed.

II. Information papers issued since last meeting
(LC Paper Nos. CB(2)969/00-01(01); 982/00-01(01) & (02); and
1030/00-01(01))

2. Members noted that the above papers had been issued.

III. Items for discussion at the next and future meetings
(LC Paper No. CB(2)1085/00-01(01))

3. Members agreed that the following items should be discussed at the next regular meeting to be held on 24 April 2001 -

- (a) Progress report on review of legal education and training in Hong Kong;
- (b) Research report on "The Process of Appointment of Judges in Some Foreign Countries"; and
- (c) Proposed retention of a supernumerary post of Assistant Principal Legal Aid Counsel post for the implementation of the Information Systems Strategy in the Legal Aid Department.

Binding effect of ordinances on the Government and "State" organs

4. Ms Emily LAU suggested that the Panel should follow up with the Administration at a future meeting on the progress of review of the binding effect of ordinances on "State" organs and their personnel in the Hong Kong Special Administrative Region (HKSAR).

5. The Chairman noted that the subject had been discussed by the Panel at some previous meetings. Arising from the discussion, the Administration had undertaken to conduct a review on the 17 Ordinances that expressly bound the "Government" but were silent on the binding effect on the "State" organs in the HKSAR. According to the Administration, of the 17 Ordinances, the Personal Data (Privacy) Ordinance was the only Ordinance a review of which had yet to be completed. The Administration had also explained that a comprehensive review of all the rest of the Ordinances to see whether they bound the "State" by necessary implication would be a difficult task because it would involve a section-by-section review of all the Ordinances. The Chairman considered that before further pursuing the matter at a future meeting, the Secretariat should request the Administration to explain its latest stance on whether, and if so, how, the Administration would take forward a review of the remaining Ordinances.

Clerk

IV. Drafting policy on bilingual legislation

(LS Paper No. LS74/00-01; LC Paper Nos. CB(2)1085/00-01; 1127/00-01(01) and 1136/00-01(01))

6. Senior Assistant Legal Adviser (SALA) took members through the paper prepared by the Legal Services Division (LS Paper No. LS74/00-01). He said that in the course of scrutinizing the Securities and Futures Bill (the Bill), the Bills Committee had noted that there were differences in the drafting and style between the English and Chinese texts of the Bill. Members of the Bills Committee were concerned that this would lead to different interpretation of the two texts of the Bill. In view of the potential far-reaching implications for the scrutiny of bills by the Legislative Council, it was decided that the Panel

on Administration of Justice and Legal Services should discuss the policy aspects of the Government's bilingual law drafting practice.

7. SALA also drew members' attention to the examples highlighted in the paper from certain clauses of the Bill in which there were different approaches in drafting between the two texts. In the main, common scenarios on different drafting approaches could be categorized as follows -

- (a) the Chinese text contained less details than the English text;
- (b) structural difference between the English and Chinese text; and
- (c) the reader of the Chinese text had to refer to another part of the Bill for details.

8. At the invitation of the Chairman, Law Draftsman (LD) addressed the Panel on the policy on bilingual law drafting (copy of LD's speech attached at Appendix refers). LD also referred members to the information paper prepared by the Administration on the subject which was circulated before the meeting (LC Paper No. CB(2)1085/00-01(02)).

9. The Chairman then invited representatives of the Hong Kong Bar Association and the Law Society of Hong Kong as well as Dr ZHAO Yu-hung to give their views.

10. Mr Alan LEONG said that the Bar Association supported the law drafting policy set out in paragraph 6 of the Administration's paper, i.e. the policy was to draft legislation that -

- (a) could accurately reflect the policy intent; and
- (b) subject to (a), was easy to comprehend and understand.

He added that a primary concern of bilingual law drafting was to ensure that both the English and Chinese texts carried the same legal effect. In order to achieve this aim, the two texts of legislation should, as far as possible, match in terms of style and presentation. Referring to some of the examples given in the Legal Services Division's paper (namely clauses 105(1) and 237 of the Securities and Futures Bill and clause 16(4)(e) of Karaoke Establishments Bill) where the Chinese text appeared to contain less details than the English text, Mr LEONG opined that the English text could in fact be drafted in a similar fashion without any depletion in meaning of the English text. He said that this would address the concern that the textual differences between the two texts reflected a discrepancy in terms of substantive legal meaning.

11. Ms Jacqueline CHIU said that the Law Society supported any effort which would make the statute law easier to understand. However, the Society would be concerned if the drafting approach for the English and Chinese text respectively varied to such an extent as to give rise to different legal interpretation. In relation to the Securities and Futures Bill, she said that the Society had set out in its written submission (LC Paper No. CB(2)1127/00-01(01)) the parts of the Bill where the apparent discrepancies between the two texts could result in uncertainty in legal meaning.

12. Dr ZHAO Yu-hong tabled her written submission for the reference of the meeting (the paper was subsequently circulated to members vide LC Paper No. CB(2)1136/00-01(01)). She then briefed the meeting on the gist of her submission. In her view -

- (a) the goal of bilingual law drafting was to reflect the policy intent accurately, and that there should be equal authenticity between the two texts in terms of legal effect;
- (b) the traditional approach of strict literal translation of the source text might not be the best way to achieve the purpose of communicating the effects of legislation, given the fundamental linguistic differences between the Chinese and English languages. Hence, the adoption of syntactic sentence restructuring, deletion and addition in accordance with the grammatical rules of the Chinese language to enhance clarity and comprehensibility without affecting the intended legal effects should be allowed. For instance, in relation to clause 151(1) of the Securities and Futures Bill, despite the discrepancies in the format or layout between the Chinese and English texts, the present proposed drafting was acceptable; and
- (c) In Hong Kong, at present, the practice of bilingual drafting in most cases was that the Chinese text was produced based on the English text. Ultimately, the Chinese text should be drafted based on policy instructions instead of being translated from the English text. This process of "parallel drafting" in which different language text drafters worked side by side according to policy instructions could achieve the objective of equal authenticity of the two language texts under one single legal instrument.

13. The Chairman thanked the deputations for their views and said that the written submissions from the Law Society and Dr ZHAO Yu-hong should be provided to the Bills Committee on the Securities and Futures Bill and Banking (Amendment) Bill 2000 for its consideration.

14. In response to the Chairman, LD said that law draftsmen in the Department of Justice worked on the two texts based on drafting instructions from policy bureaux which were usually given in English. In most cases, the English text was drafted first and formed the basis upon which the Chinese text was prepared. However, the Chinese text was not a translation of the English one. The drafting policy for the two texts was the same and there should not be any discrepancies in meaning between the two texts. In terms of legal status and effect, both texts were equal and should be treated as such.

15. Mr Martin LEE said that the problem with bilingual legislative drafting as identified in the Securities and Futures Bill might be caused by the difficulties experienced by law drafters to produce an equivalent Chinese text to suit the English text. He opined that in some cases, the English text could in fact be adjusted and improved in style and presentation based on the Chinese text.

16. Mr Albert HO said that while he supported the importance of the two basic elements of drafting policy specified in the Administration's paper, he agreed with Mr Alan LEONG that the policy should also require that the two texts of statute law should match each other as far as possible so as to ensure the same accuracy in legal meaning. He added that it would be desirable for the two texts of a bill to be drafted by the same team of law draftsmen working closely with each other.

17. In response to the above views, the Administration said that under the worldwide trend of using plain language in law drafting, legislation drafted in recent years was relatively clearer and more comprehensible than that drafted in early years. With the accumulation of experience in original drafting of legislation in Chinese, law draftsmen had gradually abandoned the rigid word-for-word translation approach. They readily spent more time and efforts in assimilating the intent of the policy embodied in the drafting instructions and the English text, and then produce it in Chinese. Also, Chinese and English were two languages with different characteristics. As experience showed that the comprehensibility of Chinese legal sentences dropped with the growth in their length, law draftsmen endeavoured to keep the Chinese legal provisions short and concise, subject to the paramount concern that the attempt would not result in discrepancy in meaning between the two texts or failure to reflect the policy intent. While discrepancies in meaning between the two texts of new legislation could still be identified occasionally, they were the result of drafting errors rather than pursuit for conciseness of Chinese texts.

18. The Administration further advised that in view of the differing sentence structure and presentation of the Chinese and English languages, law draftsmen might not find it necessary to insist on reconciliation of certain differences between the two texts of legislation, when the discrepancies were in form, not in substance. As a result, the manner of presentation in the Chinese and

English texts might be different in a small number of provisions. Furthermore, the two texts might be handled by different drafters. Their differing personal approach in the style of drafting could lead to difference in presentation between the two texts, even though the meanings of the two texts were the same.

19. Mr TSANG Yok-sing said that under the stated drafting policy, both the two texts of legislation should be easy to comprehend and understand. He did not agree with the view that more complicated sentence structure could be accepted for the English text. He referred members to the examples set out in the Annex of the Administration's paper showing certain Chinese provisions in the Securities and Futures Bill which were dissimilar to their English equivalents. He said that in his view, the English provisions could be simplified along the same line and using similar terminology as the Chinese texts, without affecting the legal meaning of the English provisions.

20. Ms Audrey EU concurred with the view of Mr Alan LEONG that the two texts of legislation should as far as possible look alike in order to minimize the chance of the textual differences giving rise to different legal interpretation. She said that statute law drafting was different from the writing of a legal opinion where the latter could allow different personal styles of presentation.

21. The Chairman also expressed the view that personal style of presentation should not feature in the drafting of legislation, particularly in common law jurisdictions where the principle of law making was that legislative enactment should be couched in detailed express provisions for the sake of clarity and precision. In her view, to eliminate ambiguity and uncertainty in legal meaning, apparent discrepancies between the Chinese and English texts should best be avoided. As far as the Securities and Futures Bill was concerned, the Chairman said that some of the differences between the two texts could result in differences in substance rather than in form. She said that such provisions would be dealt with in detail by the Bills Committee.

22. Mrs Miriam LAU said that new legislation in both Chinese and English should be made in plain and comprehensible language. Where different law drafters worked separately on the Chinese and English texts, they should strive to avoid inconsistencies between the two to minimize the chance of unnecessary litigation arising from different interpretation of the legal meaning.

23. Ms Emily LAU enquired whether there were precedent cases where court rulings were sought on issues arising from alleged differences in meaning between the two texts of legislative provisions. LD responded that he recalled two fairly recent cases of such nature. In both cases, the court held that, having regard to the policy intent, there were no actual difference in legal meaning between the Chinese and English provisions.

24. In reply to the Chairman, Legal Adviser said that section 10B of Interpretation and General Clauses Ordinance (Cap. 1) stipulated that both the Chinese and English texts of an Ordinance were equally authentic, and that the provisions of an Ordinance were presumed to have the same meaning in each authentic text. Section 19 of the same Ordinance also specified that "an Ordinance should be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit." He said that the court was bound to observe this "purposive" approach of statutory interpretation.

25. The Chairman requested the Legal Services Division to provide relevant court judgments on cases concerning differences in meaning between the Chinese and English texts of legislation for members' reference.

(Post-meeting note : Four court cases were subsequently circulated for members' reference vide LC Paper No. CB(2)1260/00-01.)

26. Referring to the drafting policy stated in paragraph 6 of the Administration's paper, the Chairman sought the Administration's view on whether it would agree that another element should be added to the policy to the effect that both the Chinese and English texts should also match language-wise as far as possible. In response, LD said that he had no objection to such view. This element should be subject to the two referred to in paragraph 10 above. He added that the Department of Justice would review its internal criteria having regard to the views expressed at the meeting.

27. In closing, the Chairman advised that the deliberations of the Panel on the subject should be brought to the attention of the Bills Committee on the Securities and Futures Bill and Banking (Amendment) Bill 2000.

(Post-meeting note : The deliberations of the Panel were conveyed to the Bills Committee on 28 March 2001.)

V. Recent developments in the review of legislation
(LC Paper No. CB(2)889/00-01(01))

28. The Chairman said that at the policy briefing by the Secretary for Justice on 16 October 2000, members noted the Administration's policy initiative to review the existing legislation with a view to redrafting outdated and unclear provisions in plain and modern language. Subsequently, the Administration had been requested to advise on how the review should be taken forward and which legislation would be given priority for review.

29. LD then briefed members on the Administration's paper which described the formulation of a policy for the modernization of legislation and recent developments. The major points were summarized as follows -

- (a) Justice required the law to be made readily understandable and available. The Administration was aware of the need to draft simple, direct and clear laws and to make these laws more accessible to the public. Also, the call from the society was that some outdated and old-style provisions in the statute book needed to be improved and modernized;
- (b) Concerning the review to identify "old" Ordinances for redraft, the Administration had targeted eight Ordinances for a pilot scheme under the review programme (the eight Ordinances were set out in Annex of the paper). Draftsmen would be assigned to redraft these Ordinances; and
- (c) The Administration was taking a cautious approach to this meaningful but mammoth exercise which was only at the very beginning stage. At present, in the course of drafting new amendment legislation, opportunities were taken where possible to remove minor errors and omissions and to update some of the obviously dated terms and expressions. The review was therefore already an on-going pursuit.

30. The Chairman sought Mr Alan LEONG's views on the issue. Mr LEONG responded as follows -

- (a) There existed only a fine dividing line between amendment of laws and modernization of laws and hence a cautious approach should be taken. The Bar Association felt that if any "old" Ordinances were to be refined in modern language, the normal law enactment procedures involving the careful scrutiny by the legislature should be adopted;
- (b) There might be useful case laws established in the courts over a long period of time concerning the application of certain statutory provisions. Any change to the express legal terms might affect the usage of such precedent case laws; and
- (c) The review programme envisaged by the Administration entailed tremendous resource implications, which might affect other legislative programmes of a more pressing nature. Hence, priorities should be set in proceeding with the review.

31. On point (b) above, Mr Martin LEE suggested that the Administration should make reference to the experience of other common law jurisdictions in modernizing "old" statutes, particularly in respect of legislation similar to the eight Ordinances which the Administration had identified for the pilot exercise.

32. LD advised that statutory terms and provisions whose meaning had previously been interpreted by the court were unlikely to be the target for revision. He said that the Administration was well aware of the difficulties and resource limitations associated with the review and it would proceed with the exercise carefully by consulting all parties concerned.

33. In response to the Chairman's enquiry about the timing for completion of the revision programme, LD said that the Administration did not see the need for a fixed schedule at this beginning stage since the exercise was a gradual and continuous one.

34. Mrs Miriam LAU said that users of legislation wished that outdated provisions should be improved so that they could be more easily understood. In her view, being a policy initiative, the revision work should be undertaken, although priorities should be determined in the course of the review.

35. Mr Albert HO echoed Mrs Miriam LAU's views. He added that the Administration should set a realistic target having regard to the experience of other common law jurisdictions.

36. Mrs Miriam LAU enquired about the position in UK of legislation equivalent to the eight Ordinances identified for the pilot review. LD replied that most of the legislation still existed in UK, of which the Evidence Act and Defamation Act had been revised.

37. The Chairman said that she did not support a large-scale, time and resource consuming revision exercise purely for the purpose of modernizing the language used in the legislation without any change to the original policy and legislative intent. She considered that provisions which were no longer applicable nowadays should be the prime targets for review, and such provisions should be dealt with through the normal legislative amendment procedures.

38. LD noted the concern expressed by members. He said that even the simplest revision task very often required a policy decision on the areas to be revised. Furthermore, most revision projects would involve a review of a group of Ordinances to ascertain whether there were any spent or inoperable provisions to be repealed or revised and whether there were any policy developments that needed to be taken account of before revision. He advised that the Department of Justice would start discussion with the relevant policy

bureaux to gradually work out a revision programme. The Administration would revert to the Panel in due course on any progress made.

VI. Any other business

39. The Chairman informed members that the Legal Aid Services Council had invited Panel members to a lunch-cum-visit to the Council Office. The Secretariat would work out the logistics with the Council Office and notify members of the arrangements in due course.

40. The meeting ended at 6:30 pm.

Legislative Council Secretariat
11 May 2001