

立法會
Legislative Council

LC Paper No. CB(2)2268/00-01

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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, 26 June 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 Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon Mr Ambrose LAU Hon-chuen, JP

Members Absent : Hon Albert HO Chun-yan
Hon Mrs Miriam LAU Kin-ye, JP

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

Public Officers Attending : Item V

Mr Stephen WONG
Deputy Solicitor General

Mr Llewellyn MUI
Senior Government Counsel
Department of Justice

Mr Peter KAM
Government Counsel
Department of Justice

Mr LIU Wen-da
Trainee
Department of Justice

Item VI

Ms Miranda CHIU
Deputy Director of Administration

Mrs Fanny YU
Deputy Director of Legal Aid

Mr James CHAN
Assistant Director of Administration

Item VII

Mr Clement MAK
Acting Secretary for Constitutional Affairs

Mr Isaac CHOW
Deputy Secretary for Constitutional Affairs

Ms Mable CHAN
Principal Assistant Secretary for Constitutional Affairs

Mr Benedict LAI
Deputy Law Officer (Civil Law) (Advisory)

Ms Miranda CHIU
Deputy Director of Administration

Mr NG Hon-wah
Principal Assistant Secretary for Home Affairs

By Invitation : Item IV

Mrs Margaret Hill
Secretary, Steering Committee on The Review of Legal
Education and Training in Hong Kong

Mr Paul TSANG
Government Counsel
Department of Justice

Item V

Hong Kong Bar Association

Mr Edward LASKEY

Item VI

Legal Aid Services Council

Mr LEE Jark-pui, OBE, JP
Chairman

Mr Ruy BARRETTO
Member

Mr John MULLICK
Member
(also representative of the Hong Kong Bar Association)

Mr Stephen YAU, JP
Member

Mrs Angela CHEUNG
Secretary

Clerk in Attendance : Mrs Justina LAM
Assistant Secretary General 2

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

I. Draft report of the Panel on Administration of Justice and Legal Services to the Legislative Council
(LC Paper No. CB(2)1907/00-01(01))

Members endorsed the draft report (LC Paper No. CB(2)1907/00-01(01)). Members also authorised the Clerk, in consultation with the Chairman, to make necessary changes to the report in the light of the deliberations at this meeting. Members noted that the report would be presented to the Legislative Council (LegCo) at its meeting on 4 July 2001.

II. Information papers issued since the last meeting
(LC Paper Nos. CB(2)1684/00-01(01) and 1765/00-01(01))

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

III. Items for discussion at future meetings
(LC Paper Nos. CB(2)1907/00-01(02) and (03))

Meeting on 18 September 2001

3. Members agreed that the next meeting would be held on 18 September 2001 to discuss the following items -

- (a) Paragraphs 27 and 43 of the Concluding Observations of the United Nations Committee on Economic, Social and Cultural Rights on report submitted by the Hong Kong Special Administrative Region (HKSAR); and
- (b) Operation of the District Court and the High Court.

(Post-meeting note - At the suggestion of the Chairman, another item on "Solicitors (Professional Indemnity) (Amendment) Rules 2001" is subsequently added to the agenda of the meeting on 18 September 2001.)

Incorporation of solicitors' practices

4. The Chairman instructed the Clerk to write to the Law Society of Hong Kong to enquire whether the Law Society would be ready to brief the Panel on the up-to-date position on the above subject at a meeting in October or November 2001.

IV. Matters arising

Working Group on Review of Process of Appointment of Judges

5. The Chairman informed members that the Working Group had met on 9 June 2001 and agreed that the Secretariat should prepare a consultation paper for the consideration of the Panel and consultation with the relevant parties. The consultation paper should address the following two major concerns -

- (a) the lack of transparency and accountability in the present system of appointment of judges; and
- (b) the lack of information and procedure as a basis for LegCo to perform a meaningful role in the endorsement of judicial appointments under Article 73(7) of the Basic Law.

6. The Chairman informed members that the Secretariat was still awaiting the Administration to provide the relevant information sought by the Working Group in order to finalise the drafting of the consultation paper.

Review of Legal Education and Training in Hong Kong (LC Paper Nos. CB(2)1794/00-01(01) and 1809/00-01(01))

7. The Chairman said that she and a few members of the Panel had exchanged views with the two overseas consultants engaged to conduct the Review at an informal meeting on 6 June 2001. At that meeting, members had taken the opportunity to convey to the consultants their views that the study should comprehensively review the current legal education system in Hong Kong in order to identify the inadequacies of the system, and propose measures to address the problems having regard to the needs of the community. Specifically, the consultants were asked to explain the justifications for the outline of a provisional model they had earlier presented to the Steering Committee on Review of Legal Education and Training in Hong Kong (the Steering Committee) which included, inter alia, a new four-year Bachelor of Laws programme (LLB) and a practical legal training course of about 15 weeks focusing on vocational skills to replace the Postgraduate Certificate in Laws course (PCLL).

8. The Chairman said that the consultants were also informed of the concerns expressed by the relevant parties at previous meetings of the Panel, such as the need to raise the language standard of university law graduates, and the financial implications associated with a reformed legal education and training system.

9. Ms Audrey EU opined that the "Consultation Paper on Legal Education and Training in Hong Kong : Preliminary Review" released by the consultants

in September last year appeared to be only a compilation of the submissions gathered in an earlier consultation exercise, and did not contain concrete proposals of how to put in place an improved system which could produce world class lawyers locally.

10. Ms Emily LAU said that for the Review to be worth the time and money spent, the Final Report produced by the consultants should make substantial proposals and recommendations on how to introduce desirable changes to the existing system.

11. In response, Mrs Margaret HILL said that the consultants, having taken into account the views collected in the public consultation process, had put forward some provisional suggestions for the Steering Committee to consider. The Panel had been briefed on a summary of the preliminary outline of the Final Report at the meeting on 24 April 2001. She informed members that the consultants had recently submitted a draft report to the Steering Committee. To ensure that the exercise had so far covered all the elements that should be dealt with, the consultants had visited Hong Kong in early June 2001 to hold discussions with the Steering Committee on the draft report, as well as to listen to further views from the interested parties and organisations, including members of the LegCo Panel on Administration of Justice and Legal Services. The consultants had indicated that as a result of the discussions, they might propose to revise some of their recommendations in the draft report.

12. Mrs Margaret HILL further said that the Final Report on the Review was still in the process of development, in view of the comments contributed by interested parties and stake-holder organisations in the legal community. She anticipated that the Final Report could be published and publicly released around late July or early August 2001. Members of the Steering Committee had agreed not to discuss the contents of the Final Report until it was published. They also agreed that after the Final Report was published, there should be at least three months for the Steering Committee to consider the recommendations at length, and to decide how to proceed with the Second Stage of the Review. This would give all parties concerned sufficient time to consider the Report and make their views known.

13. In response to the Chairman, Mrs Margaret HILL said that it would be more appropriate for the Steering Committee to consult the Panel again on the subject around October 2001, when the Committee would be able to present to the Panel its informed views on how to take forward the Second Stage of the Review.

14. At the suggestion of the Chairman, members agreed that representatives of the Steering Committee should be invited to attend the regular meeting of the Panel in October 2001 to discuss the subject.

V. Competence and compellability of spouses in criminal proceedings
(LC Paper Nos. CB(2)1889/00-01(01) and (02); Report on Competence and Compellability of Spouses in Criminal Proceedings published by the Law Reform Commission (LRC) in 1988 (attached at LC Paper No. CB(2)1889/00-01))

15. Deputy Solicitor General (DSG) briefed members on the Administration's paper (LC Paper No. CB(2)1889/00-01(01)). DSG said that the thrust of the LRC's recommendations was that a spouse would be both competent and compellable in all cases to testify for the other spouse, but compellable to testify against the other spouse only in cases involving offences that threatened their family. He drew members' attention to paragraphs 12 to 14 of the Administration's paper, which set out the Administration's position on whether there should be a general rule relating to spouse as compellable witness. A summary of the present law and the recommendations of the LRC were set out in the Annex to the paper.

16. DSG also informed members that the Administration had introduced a Bill in 1990, the Criminal Procedure (Amendment) Bill 1990, to amend the Criminal Procedure Ordinance (Cap. 221) to implement the recommendations made in the LRC Report, but the Bill was defeated. It was the intention of the Administration to reintroduce the Bill to implement the relevant recommendations.

17. The Chairman sought the views of the Hong Kong Bar Association on the matter.

18. Mr Edward LASKEY said that the Bar Association supported the proposals of the LRC, which represented a change of its stance 10 years ago when the matter was considered by the Bar Association. He explained that the present position of the Bar Association was that the proposals of the LRC were sensible, given the change of time and people's attitudes in relation to, for instance, the sanctity of marriage and family values. Nonetheless, the Bar Association felt that in implementing the legislative changes, there should be certainty as to the offences to which the new rules would apply. For instance, it would be desirable to clearly define in the law the offences which were deemed to "threaten" the family, or alternatively to provide a schedule setting out such specific offences.

19. Ms Emily LAU said that she particularly shared the views expressed by the Guardianship Board in response to the Administration's consultation exercise. The Board supported the proposed reform in respect of compellability, provided that compellability as witness for the prosecution was extended to cover crimes against mentally incapacitated adults living in the family, and not only limited to crimes against spouses, cohabitees and children.

20. Ms Emily LAU pointed out that, as stated in paragraph 10 of the Administration's paper, four organisations had raised objection to compelling spousal testimony for different reasons. She said that the Administration should take into account all the different views put forward when preparing the Bill for the scrutiny of LegCo.

21. DSG said that the intended Bill would endeavour to address the concerns about spouse as compellable witness. The Bill would not open the floodgates of compelling a spouse to give evidence in any situation, as compellability would be subject to restrictions, i.e. spouses should not be compellable to testify against each other, except in a limited category of cases affecting the family, such as cases involving physical or sexual violence against family members. The exceptional situations were explained in paragraph 12 of the Administration's paper.

22. DSG added that the Administration had yet to work on the contents of the Bill. He advised that the Administration intended to introduce the Bill into LegCo in the latter half of 2002.

23. Mr TSANG Yok-sing pointed out that the present position was that at common law, a person was not competent to give evidence for or against his or her spouse except in very limited circumstances. He asked whether by enacting legislation to provide for competence alone, of a spouse to testify against the other accused spouse, would solve most of the problems envisaged by the Administration.

24. DSG explained that the issue of competence was much less controversial than compellability. It was thought that the spouse who was torn between loyalty to his or her accused spouse on the one hand, and loyalty to an endangered party on the other, would suffer less conflict of loyalty if the law compelled his or her testimony. The present proposal to compel spousal testimony only in limited circumstances was to strike a balance between the interest of society in upholding the institution of marriage and the public interest of prosecuting and convicting offenders.

25. Legal Adviser pointed out that in the course of scrutinising the Criminal Procedure (Amendment) Bill 1990, the Administration agreed to introduce an amendment to the Bill to allow a spouse or a cohabitee of an accused to seek exemption from testifying for the prosecution. Under the proposed amendment provision, the court would be empowered to grant exemption as it saw fit. He suggested that the Administration should also take such a provision into consideration when preparing the Bill.

26. In concluding the discussion, the Chairman requested the Administration to provide the following information/documents for the consideration of the Panel in due course -

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- (a) a copy of the Criminal Procedure (Amendment) Bill 1990;
- (b) copies of written submissions received by the Administration during the public consultation exercise;
- (c) a list of the crimes which in the opinion of the Administration justified compelling spousal testimony; and
- (d) an information note on experience in overseas common law jurisdictions and the development of similar legislation in those countries.

Adm

27. The Chairman suggested that the Administration should also provide the above information/documents to the legal professional bodies for their further comments on the subject. She requested the Administration to provide a written report on the outcome of consultation for the Panel's consideration in due course.

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VI. Operation of the Legal Aid Services Council

(LC Paper Nos. CB(2)1549/00-01(01), 1907/00-01(04) to (06))

28. At the invitation of the Chairman, Mr LEE Jark-pui briefed members on the discussion paper (LC Paper No. CB(2)1549/00-01(01)) prepared by the Legal Aid Services Council (LASC). Mr LEE said that the paper explained the objectives and justifications for certain amendments to the Legal Aid Services Council Ordinance, the Legal Aid Ordinance and the Personal Data (Privacy) Ordinance. The proposed amendments were put forward by LASC in October 2000, pursuant to a consultancy review of the Council's role and operation in overseeing the administration of legal aid services. Mr LEE added that broadly speaking, the legislative proposals as set out in Appendix I of the LASC paper could be categorised into -

- (a) amendments to enhance the powers of LASC; and
- (b) amendments to address the operational difficulties encountered by LASC.

29. Mr LEE Jark-pui informed Members that the Administration had only very recently responded to the proposals. A meeting was held by LASC on 20 June 2001 to consider the Administration's response. However, because of the absence of a quorum for the meeting, the related discussion proceeded only on an informal basis. He said that another meeting of LASC to discuss the matter again would be held in July 2001.

30. In response to the Chairman, Deputy Director of Administration (DD/A) introduced the Administration's paper (LC Paper No. CB(2)1907/00-01(05)), which set out the Administration's response to the various legislative amendment proposals put forward by LASC and the Administration's views on the way forward to address the issues identified by LASC. The gist of the Administration's views was -

- (a) certain proposals could be implemented under the existing legislative framework and did not necessitate amendment to the LASC Ordinance. These included appointment of committees, networking with legal aid bodies in other jurisdictions, producing and distributing publicity materials, obtaining information relevant for the consideration of issues regarding delivery of legal aid services, and doing things incidental to the carrying out of the LASC's functions;
- (b) certain proposals would be taken forward at the earliest opportunity or revisited as necessary. These included powers to appoint LASC's own staff, enter into contract or take on lease, power for the Chief Executive to permit submission of LASC's annual report at a later date, and changing the quorum for LASC meetings; and
- (c) the issue of LASC acting as trustee went beyond the role envisaged for the Council.

31. Mr Martin LEE sought the Administration's views on LASC's proposal to change the quorum requirement for LASC meetings. DD/A responded that the problem was a practical one. The Administration considered that LASC could continue the arrangement of using committees, working parties or groups to discuss specific issues and then report their deliberations to LASC for decisions; hence, it might not be necessary for the full Council to meet as frequently as at present. Nevertheless, the Administration was prepared to reconsider the need for changing the quorum requirement as and when necessary, taking into account the impact on the composition of a Council meeting.

32. Mr LEE Jark-pui said that LASC normally met 10 times a year. Experience had shown that the Council had encountered difficulties on a number of occasions in obtaining a quorum for the meeting.

33. Ms Emily LAU and Mr Martin LEE considered that the Administration should render every possible assistance to LASC to enhance its independent role and facilitate its operation in monitoring the provision of legal aid services. Ms Emily LAU opined that LASC should have the authority to appoint its own staff and take on lease of accommodation as it considered necessary, and that the Government should provide the requisite resources and support to LASC.

34. Mr LEE Jark-pui informed members that in August 2000 LASC reviewed the existing arrangement of its secretariat being serviced by civil servants. LASC had decided that the subject would be considered again after the Administration had decided on the Council's proposals on amending the relevant ordinances, as the volume of work of LASC in future would depend on the extent to which the Administration would accept the Council's proposals.

35. The Chairman pointed out that prior to the setting up of LASC in 1996, there was widespread support among LegCo Members for the establishment of an independent legal aid authority. One of the major functions entrusted to LASC was to advise the Administration on legal aid policy, in particular on the feasibility and desirability of establishing an independent legal aid authority. LASC's recommendation to set up such an independent authority, however, had not been accepted by the Administration. The Chairman said that with the passage of time, it was opportune for LASC to comprehensively review its operation in order to fulfil its designated roles effectively.

36. Mr Ruy BARRETTO said that LASC's position as regards measures to enhance its roles and functions was set out in the paper submitted to the Panel, and put forward to the Administration for consideration. As regards the question of staff appointment, he opined that ultimately, LASC should be able to employ its own staff, which would facilitate the Council in discharging its complex roles as both an advisory and monitoring body.

37. The Chairman suggested that the matter could be followed up by the Panel at a meeting in November 2001, depending on the progress of discussion between LASC and the Administration regarding LASC's proposals.

VII. Applicability of Ordinances to the offices set up by the Central People's Government in the HKSAR

(LC Paper Nos. CB(2)1744/00-01, 1907/00-01(07) to (10))

Legislative amendments in respect of the 15 Ordinances

38. The Chairman asked the Administration exactly when it consulted the Central People's Government (CPG) on the applicability of the 15 Ordinances which expressly applied to the Government but were silent as to their applicability to the offices set up by the CPG in the HKSAR (CPG offices).

39. In reply, Acting Secretary for Constitutional Affairs (SCA(Ag)) said that the Administration first consulted the CPG in 1998. In the course of discussion with the CPG, the CPG expressed no differing views to the proposal to extend the applicability of the 15 Ordinances to cover the CPG offices. The Administration then informed the Panel in October 1998 that the relevant

Policy Bureaux and government departments would follow up on the necessary legislative work.

40. SCA(Ag) further said that the Arbitration Ordinance was one of the 15 Ordinances which would be amended to apply to the CPG offices. The Administration introduced into LegCo in 1999 the proposed amendments to the Arbitration Ordinance which included a provision to extend the application of the Ordinance to cover any persons and organs, including the HKSAR Government and the CPG offices, as and when it entered into or became in any way involved in an arbitration agreement that was subject to the HKSAR laws. However, the Bills Committee considered that the drafting of the proposed provision might not be sufficiently clear to reflect the policy intention. The Administration undertook to continue to work on an appropriate application formula. The Administration considered that when an appropriate application provision had been worked out and endorsed by LegCo, it could be adopted or used as a reference for other Ordinances. SCA(Ag) added that since the Administration was still working on the appropriate application provision for the Arbitration Ordinance, the drafting instructions in respect of the 14 remaining Ordinances had yet to be issued.

41. DD/A advised members that the CPG was last consulted on the application provision for the Arbitration Ordinance in May and September 2000.

42. SCA(Ag) further said that the Administration was fully aware of Members' concern about the progress of amending the 15 Ordinances to apply to the CPG offices. He added that Members' concern had also been conveyed by the Chairman and Deputy Chairman of the House Committee to the Chief Secretary for Administration(CS), and that CS had given clear instruction that the relevant Policy Bureaux and departments should try their best to expedite action and speed up the legislative work as a matter of priority.

43. Referring to Article 22(3) of the Basic Law which stated that "all offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region", Ms Emily LAU said that the failure of the HKSAR Government to introduce legislative amendments to extend the application of the relevant Ordinances to the CPG offices had conveyed to people in Hong Kong and the international community the message that the CPG offices and their personnel were above the law.

44. Mr James TO said that if the delay in introducing the legislative changes was caused by the CPG's failure to make known its views on the application provision, then it was the CPG which was impeding the implementation of "one country, two systems" in Hong Kong. However, if the delay was due to

the failure of the HKSAR Government to provide the necessary advice and information to the CPG to facilitate its consideration, then it was the HKSAR Government which was not fulfilling its duties.

45. SCA(Ag) responded that the rule of law in Hong Kong applied to all, including the CPG offices. The principle was enshrined in Articles 14 and 22 of the Basic Law. He said that the fact that a particular organisation or person was not subject to a particular ordinance did not mean that the organisation or person was above the law. It merely reflected a policy decision that it was neither necessary nor appropriate to apply that ordinance to the organisation or person. He explained that the 15 Ordinances in question did not apply to the CPG offices in Hong Kong since 1 July 1997 because, when those Ordinances were enacted before the reunification, policy decisions had been taken not to apply them to the Crown in right of the United Kingdom Government. He reiterated that it was now agreed that as a matter of policy, these 15 Ordinances should apply to the CPG offices and that the Administration would speed up the legislative work to extend the application of the 15 Ordinances to the CPG offices.

Adaptations of references to "Her Majesty's Forces" and other military references

46. Ms Emily LAU enquired about the time-table for completing the adaptations.

47. Deputy Law Officer (Civil Law) (Advisory) (DLO(CL)(A)) said that the Administration was now working on the adaptations involving the Garrison. They covered about 90 Ordinances and subsidiary legislation and there were over 200 references to "Her Majesty's Forces" and other military references. In accordance with Article 10 of the Garrison Law, the Garrison was being consulted on the legislative proposals. He said that the consultation process was approaching the final stage. The proposed adaptations would be introduced into LegCo after completion of consultation with the Garrison.

Adaptations of 53 Ordinances which contain express references to the "Crown"

48. Referring to the Clerk's letter of 23 June 2001 conveying Hon Emily LAU's enquiry relating to the 53 ordinances which were expressed to bind or apply to the "Crown", DLO(CL)(A) said that 18 of the 53 Ordinances in question had been wholly or partly adapted so far. References to the "Crown" in four of these Ordinances had been replaced by references to the "State" which included the CPG offices in Hong Kong. The other 14 Ordinances had the word "Crown" replaced by the word "Government". The remaining 35 Ordinances had yet to be amended. He said that the Ordinances would be construed in accordance with the Hong Kong Reunification Ordinance, the relevant provisions of which had been incorporated into the Interpretation and

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General Clauses Ordinance.

Adm

49. At the request of the Chairman, the Administration agreed to provide a written response for members' information.

(Post-meeting note - The Administration's written response was circulated to members vide LC Paper No. CB(2)2082/00-01(01))

50. Members agreed that the item on "Applicability of Ordinances to the offices set up by the Central People's Government in the HKSAR" should be placed on the agenda of the Panel's regular meeting in October 2001 for follow up discussion.

51. There being no other business, the meeting ended at 7:10 pm.

Legislative Council Secretariat

14 September 2001