

立法會
Legislative Council

LC Paper No. CB(2)657/00-01
(These minutes have been
seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 28 November 2000 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 Mrs Miriam LAU Kin-yee, JP
Hon Mr Ambrose LAU Hon-chuen, JP
Hon Emily LAU Wai-hing, JP

Member Absent : Hon James TO Kun-sun

Public Officers Attending : Item VI

Mr Wilfred TSUI
Judiciary Administrator

Miss Emma LAU
Deputy Judiciary Administrator

Mr Andrew WONG
Director of Administration

Ms Miranda CHIU

Deputy Director of Administration

Item VIII

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

Mr Peter CHEUNG, JP
Director of Administration and Development

Mr Anthony WU
Deputy Law Officer (Civil Law) (Civil Litigation Unit)

By Invitation : Items V and VI

Hong Kong Bar Association

Mr Philip DYKES, SC

Item VII

Steering Committee on the Review of Legal Education
and Training in Hong Kong

Mr Robert C ALLCOCK, BBS
Solicitor General

Professor Albert CHEN
Dean of Faculty of Law
University of Hong Kong

Mr David SMITH
Acting Dean of School of Law
City University of Hong Kong

Professor Michael WILKINSON
Head of Department of Professional Legal Education
Faculty of Law
University of Hong Kong

Mr Anthony CHOW
Immediate past President
Law Society of Hong Kong

Mr Alan LEONG, SC
Vice Chairman
Hong Kong Bar Association

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

Staff in Attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser

Ms Eva LIU
Head, Research and Library Services Division

Mr Paul WOO
Senior Assistant Secretary (2)3

Action
Column

- I. Confirmation of minutes of meeting**
(LC Paper No. CB(2)144/00-01 - Minutes of meeting on 10 October 2000;
LC Paper No. CB(2)306/00-01 - Minutes of meeting on 16 October 2000)

The above two sets of minutes of meeting were confirmed.

- II. Endorsement of proposed Terms of Reference of the Panel**
(LC Paper No. CB(2)338/00-01(01) - Proposed Terms of Reference)

2. The Chairman said that the House Committee had suggested that all Panels be invited to endorse the respective proposed Terms of Reference (TOR) before they were recommended for the Council's approval.

3. Members noted that the changes proposed in items 2 and 3 of the proposed TOR were technical amendments, whereas the wording of the proposed new items 4 and 5 reflected more clearly the provisions in Rule 77(3) and 77(14) of the Rules of Procedure. Members endorsed the proposed TOR.

III. Information papers issued since last meeting

(LC Paper No. CB(2)78/00-01(01) - Letter dated 15 June 2000 from the Acting Chief Secretary for Administration on the progress of the review of applicability of Personal Data (Privacy) Ordinance to CPG offices in Hong Kong and other issues;

LC Paper No. CB(2)209/00-01 - Chinese translation of a paper prepared by the Law Society of Hong Kong on "Refined immigration appeal mechanism in Hong Kong" (original English version of the paper previously circulated under LC Paper No. CB(2)62/00-01(08));

LC Paper No. CB(2)257/00-01 - Chinese version of the Progress Report on Research Study on "Measurement of Efficiency of the Administration of the Judiciary" prepared by the Research and Library Services Division (RLSD) (English version of the Report previously circulated under LC Paper No. CB(2)62/00-01(04));

LC Paper No. CB(2)267/00-01(01) - Information note prepared by RLSD on the findings of the research study on "Measurement of Efficiency of the Administration of the Judiciary";

LC Paper No. CB(2)350/00-01(03) - Information note provided by the Administration on progress of arrangement for enforcement of arbitral awards between Hong Kong and Macau.)

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

IV. Items for discussion at the next meeting

(LC Paper No. CB(2)338/00-01(02) - List of issues to be considered;

LC Paper No. CB(2)338/00-01(03) - List of follow-up actions)

5. Members went through the list of issues to be considered and agreed that the following items should be discussed at the next regular meeting to be held on 19 December 2000 -

(a) Proposed fee increases for court services under section 9 of the Criminal Procedure Ordinance, section 134(1) of the Magistrates Ordinance and section 54 of the Matrimonial Causes Ordinance; and

(b) Incorporation of solicitors.

V. 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

(Research Reports (English version) issued vide LC Paper No. CB(2)339/00-01 and Chinese version of the Reports tabled at the meeting)

6. The Chairman said that in the light of members' concern about the process of appointment of judges, the former Panel decided to review the existing system of judicial appointment including the operation of the Judicial Officers Recommendation Commission (JORC) and how the Legislative Council (LegCo) should properly exercise its power under Article 73(7) of the Basic Law (BL) to endorse an appointment made by the Chief Executive. The Research and Library Services Division (RLSD) had been requested to conduct a research study on the process of appointment of judges in some foreign countries, i.e. the United States (US), the United Kingdom (UK) and Canada. RLSD had recently completed the research reports on the US and the UK after soliciting the views and comments contributed by some members of the Panel on the draft reports prepared by RLSD.

7. At the invitation of the Chairman, Head of RLSD (H/RL) took members through the two research reports, which focused on the procedures for judicial appointments, the judicial selection standards and the role played by the legislature in the appointment process.

8. Mr Martin LEE enquired about whether or not the US Senators had followed the party line when they voted on a judicial nomination. In reply, H/RL said that judicial nominations in the US were referred to the Senate Judiciary Committee by the Senate. As the majority party in the Senate controlled a majority of the committee seats, the voting results on the Committee were generally representative of the voting preference in the full Senate.

9. In reply to a further question from Mr Martin LEE, H/RL said that judges in US could have a party background. Mr Martin LEE suggested that RSLD should provide further information on the political background of the Presidents vis-a-vis the judges appointed by them. Members agreed.

H/RL

10. Ms Emily LAU suggested that the legal professional bodies as well as the academia should be invited to give views on the subject and take part in a future discussion with the Panel. Mr Albert HO said that to avoid a discussion which might become too academic, the scope of the discussion should be suitably defined. In his opinion, the discussion should focus on the practical aspects of how the judicial nomination and selection system could be improved within the constitutional framework.

11. The Chairman said that the discussion should start from the relevant provisions of BL, namely BL 73(7), which provided, inter alia, a role of the LegCo to consider a judicial appointment made by the Chief Executive (CE) and put to it for endorsement. Hence, an important focus of the discussion should be on how best LegCo should carry out this function to preserve the independence of the Judiciary which was fundamental to the rule of law in Hong Kong. The Panel should also consider whether or not there was a need to increase the transparency of the selection and appointment process, and if so, how the existing system could be improved. Mr Martin LEE expressed similar views.

12. Mr Martin LEE added that the US and UK systems were drastically different, and he was not convinced that Hong Kong should adopt either system completely. He was concerned that the stringent procedures of the US system under which a nomination would be investigated, testified and voted in the Senate, if followed in Hong Kong, would deter people who might otherwise be willing to accept a nomination. He opined that thorough discussion should take place in the Panel to enable members to come to an agreed stand as to how LegCo should discharge its constitutional duty as prescribed under the BL.

13. Mr Martin LEE suggested that copies of the research reports should be sent to the legal professional bodies in US and UK to solicit opinions and other information which might assist the Panel in its discussion. The Chairman suggested that in addition to the Hong Kong Bar Association and the Law Society of Hong Kong, the law schools at the University of Hong Kong and the City University of Hong Kong respectively should also be invited to give views on the matter. Members agreed. The Chairman said that the letters sent to these bodies would be circulated to members for information. Members who would like to suggest additional bodies to be consulted at this stage could approach the Clerk.

(Post-meeting note - Copies of the letters were circulated to members vide LC Paper No. CB(2)489/00-01 on 14 December 2000)

14. In reply to the Chairman, H/RL said that the research report on the judicial appointment system in Canada and supplementary information on the Hong Kong system would be ready by mid-February 2001.

15. Members agreed that the Panel should further discuss the subject at another meeting in February or March 2001. The legal professional bodies and academics would be invited to present their expert opinions on the matter to the Panel in due course.

VI. Appointment of the Chief Judge of the High Court

(LC Paper No. CB(2)338/00-01(04) - Paper prepared by the Administration)

16. Director of Administration (D of A) introduced the Administration's paper which explained the legal and constitutional framework for the appointment of the Chief Judge of the High Court as well as the process and considerations pertaining to the current exercise concerning the appointment of Mr Justice LEONG Shiu-chung as the Chief Judge of the High Court. He advised that pursuant to BL 90, it was the intention of the Administration to give notice in due course to move a motion to obtain the endorsement of LegCo of the recommended appointment. The Administration intended to seek the views of the Panel on the matter before moving the motion.

17. The Chairman pointed out that as opposed to the Court of Final Appeal Ordinance which contained statutory provisions on matters relating to the appointment of the Chief Justice of the Court of Final Appeal (CFA), the High Court Ordinance (HCO) did not set out similar provisions regarding the appointment of the Chief Judge of the High Court. She asked whether the Administration would consider it desirable to include specific provisions in HCO in this regard.

18. D of A responded that as explained in paragraphs 7 to 9 of the Administration's paper, the legal and constitutional procedures for making senior judicial appointments, including the appointment of the Chief Judge of the High Court, were stipulated in the BL. Specifically, in accordance with BL 88, judges should be appointed by CE on the recommendation of JORC. In the case of the appointment of the Chief Judge of the High Court, BL 90 provided that CE should, in addition to following the procedures prescribed in BL 88, obtain the endorsement of LegCo. CE should also report such appointment to the Standing Committee of the National People's Congress for the record under BL 90. He said that the Administration would consider the suggestion of the Chairman to incorporate specific provisions in HCO as a separate exercise.

Adm

19. Mr Albert HO asked whether the practice of first seeking the endorsement of LegCo of a judicial appointment before CE making the appointment would be followed in future appointments.

20. D of A replied in the positive. He said that the arrangement with regard to the current appointment exercise was adopted in accordance with the requirements of the BL, and having regard to the concerns expressed by members of the Panel concerning the appointment of seven judges of the CFA in May 2000 that the CE's appointment should not be made prior to obtaining the LegCo's endorsement.

21. The Chairman pointed out that BL 90 was silent as to whether or not LegCo's endorsement should be obtained before the CE making an appointment. She sought the views of Senior Assistant Legal Adviser (SALA) and Mr Philip DYKES in this regard.

22. SALA responded that in his view, the endorsement of LegCo was a prerequisite for the judicial appointment by CE to be legally effective. It would be reasonable for one to expect that the endorsement should be obtained first. Mr Philip DYKES said that BL 90 only stipulated that LegCo's endorsement was a necessary condition for a judicial appointment made by CE. He held no view as to which should come first.

23. Ms Emily LAU said that she preferred an arrangement under which the endorsement of LegCo should first be sought in order to avoid undesirable complications.

24. Ms Emily LAU pointed out that according to paragraph 22 of the Administration's paper, an initial long list of over 50 persons eligible for the post of Chief Judge of the High Court were put before JORC for consideration. JORC then came up with a shortlist of six candidates and eventually recommended that Mr Justice LEONG should be appointed. She asked whether the Administration could provide additional information on how the long list of potential candidates came about and the criteria for and process of shortlisting the candidates leading to the final recommendation for appointment.

25. Judiciary Administrator (JA) said that subject to the constraints of confidentiality under which JORC operates, he would be happy to provide information to Members on the workings of JORC relating to judicial appointments generally outside the context of particular judicial appointment. It was not proper for him to disclose information such as the list of eligible persons and JORC's deliberations concerning individual eligible persons involved in the appointment exercise. He said that list of eligible persons would be put up to JORC by the Secretary for JORC in consultation with the Chairman of JORC. JORC then considered the suitability of the candidates having regard to the responsibilities of the position and the qualities required of the office holder and taking into account the requirements specified under the relevant legislative provisions.

26. In further response to the Chairman and Ms Emily LAU, JA said that vacancies at High Court and above were not advertised, and only eligible persons of the highest standing would be considered.

27. The Chairman noted that, as stated in the Administration's paper, not all eligible persons meeting the minimum statutory requirements were put forward for JORC's consideration. She requested the Administration to provide

supplementary information on the exact number of eligible persons included in the preliminary list of candidates, how the Secretary in consultation with the Chairman of JORC came up with the proposed list, and how JORC decided on the shortlisting of candidates.

28. Ms Emily LAU referred to paragraph 24 of the paper, which stated that Mr Justice LEONG would reach his retirement age of 65 on 14 July 2001, and that JORC had recommended that Mr Justice LEONG's term of office be extended to 13 July 2003 so that he could serve as the Chief Judge of the High Court for about two and half years until he reached 67. She enquired about whether the proposed extension of office beyond the retirement age was due to a lack of qualified persons for the post. Ms LAU added that according to BL 90, the Chief Judge of the High Court should be a Chinese citizen with no right of abode in any foreign country. As far as she knew, only three out of the existing nine Justices of Appeal of the Court of Appeal satisfied the Chinese nationality requirement. She asked whether the nationality requirement was a significant factor preventing many people otherwise well qualified for the post from being considered.

29. JA said that the choice of the candidates was not limited to serving judges, and qualified legal professionals outside the Judiciary and the public service were also included. The Basic Law requirements, in particular the Chinese nationality requirement, were of course relevant considerations in coming up with the shortlist of eligible persons. He added that the recommendation of JORC on the appointment of Mr Justice LEONG was decided after thorough consideration and deliberations on the suitability of the shortlisted candidates and having regard to the responsibilities of the post and the qualities required of the right candidate. Concerning the age factor, he advised that HCO specified a retirement age of 65. In practice, however, that limit could be extended on grounds of operational needs. After taking all relevant factors into consideration, JORC was satisfied that Mr Justice LEONG was the best candidate for the post and that his term of office should be extended on operational grounds up to the age of 67. He further advised that under HCO, the total period of extension of term of office should not exceed five years.

30. Mr Albert HO asked whether any further extension of the term of office of the Chief Judge would necessitate another appointment exercise requiring the endorsement of LegCo.

31. D of A agreed to seek legal advice to clarify this point. He also undertook to revert to the Panel in writing to address the other issues raised by members.

(Post-meeting note - The Administration's replies concerning the points raised in paragraphs 27 and 30 were circulated to members vide LC Paper Nos. CB(2)441/00-01(01) and (02) on 7 December 2000)

32. In response to the Chairman's enquiry, D of A said that the Administration intended to move a motion on the appointment before the end of December 2000. A copy of the wording of the motion was tabled at the meeting.

(Post-meeting note - The motion was moved at the Council meeting on 20 December 2000)

VII. Consultation Paper on Legal Education and Training in Hong Kong : Preliminary Review

(LC Paper No. CB(2)45/00-01 - The Consultation Paper and the Summary of Consultation Paper;
LC Paper No. CB(2)338/00-01(05) - Paper prepared by the Administration)

33. Solicitor General (SG) introduced the Administration's paper which provided a brief account of the background, contents and way forward of the Consultation Paper on Legal Education and Training in Hong Kong : Preliminary Review, which was released in September for public consultation. He said that members of the Steering Committee would be happy to hear the views of the Panel for communicating to the consultants engaged to conduct the review.

34. Ms Emily LAU opined that the views expressed in the consultations and set out in paragraph 1.5 of the Summary of Consultation Paper concerning the importance of language skills were pertinent comments. She shared the concern of many people that the language standards of law students in both Chinese and English had been dropping. To address the situation, she would like to see a system to be put in place which would be capable of producing students with good knowledge and language skills that could measure up to the required standards.

35. Professor Albert CHEN said that the Consultation Paper was prepared by the two overseas consultants commissioned by the Steering Committee. He participated in the consultation process in a dual capacity - as a member of the Steering Committee and as the Dean of the Faculty of Law of The University of Hong Kong. In the latter capacity, he would convey the views of the Faculty to the consultants and the Steering Committee. The Faculty would put forward a formal submission in response to the Consultation Paper. He agreed that the problem of language proficiency of law students was an important issue which needed to be addressed in the review. He pointed out

that the Faculty of Law already got the best students in terms of the standard of English, as reflected in the fact that the average results in English achieved in the Advanced Level Examinations among Bachelor of Laws (LLB) students were higher than those of students enrolled in other faculties. He said that the Faculty would try its best to raise the language ability of its students. For example, it had introduced an English for Law course which was a compulsory course for students in the first year of the LLB programme. The course was taught by expert language teaching staff of the English Centre of the University. He added that the Faculty of Law was prepared to take on board and consider any proposals which might come out of the consultants' comprehensive review.

36. Mr David SMITH informed members that at the City University of Hong Kong, the English language requirement and the academic requirement for students entering the LLB programme had been raised two years ago. The School of Law of the University required law students to attend both a special course of English language for lawyers plus an English language course for all students in the University. Furthermore, half of the LLB students at present were non-JUPAS students, most of whom possessed an undergraduate degree in other disciplines and had studied in a foreign country like the UK, Australia or North America etc. Hence, these students generally had a very high level of standard of English. He opined that in restructuring legal education and training in Hong Kong, there was a tremendous advantage in attracting students who already had a first degree in other disciplines or at least some training in other disciplines in English before they began their law study. In moving towards this direction, the City University had organized a joint degree programme in law and accountancy where students studied three years in law and accountancy and then they might convert into the LLB programme if their academic results were up to standard.

37. The Chairman sought the views of representatives of the Law Society of Hong Kong and the Hong Kong Bar Association.

38. Mr Anthony CHOW said that the legal profession shared the sentiments about the noticeable drop in the language and communication skills of law students and newly trained lawyers. The Society was of the view that necessary steps should be taken to improve the situation. In his view, it was very difficult to improve one's language skills after one had graduated from the university and entered the profession. Therefore, improvement measures had to be taken at the early stages of education in order to achieve significant results. He informed the Panel that the Law Society had been considering ways to "benchmark" practitioners in terms of their language ability with a view to deciding on what appropriate measures might be taken to improve the situation.

39. Mr Alan LEONG echoed Mr Anthony CHOW's views. He said that the language problem with law students was an issue which the Government had to look at seriously in the general context of how to improve language standards of students at the secondary school level.

40. In response to the Chairman and Ms Emily LAU, Mr Anthony CHOW clarified that the internal "benchmarking" initially contemplated by the Law Society was not intended to be in the form of any test or examination. What it intended to achieve was to enable the Law Society to gauge and monitor the level of English language proficiency of solicitors and to assist relevant authorities to consider what measures should be taken. He added that in view of the comprehensive review which was under way, the Law Society preferred to wait for and consider the proposals which would come out of the review in the first place.

41. Mr Martin LEE said that he personally had experience of encountering practising barristers whose ability in using English and Chinese still left much to be desired. He considered that in the absence of any test or effective means to assess the language skills of newly trained legal professionals, it would be difficult for practitioners to continue to hold themselves out as lawyers competent to use both languages to practise.

42. Professor Michael WILKINSON pointed out that the Hong Kong system of law study was modelled upon the UK system of a three-year undergraduate degree course followed by a nine-month professional training. At present, this was the shortest course offered in common law jurisdictions. This meant that Hong Kong was producing lawyers as cheaply as anywhere else in the world. Furthermore, as opposed to the case in UK, lawyers in Hong Kong were trained to practise in two languages instead of one. He added that there was no short-cut to a perfect situation. In his view, if the community wanted to have lawyers with improved standards of English and Chinese, then law students would need to undergo a longer period of education, and more resources should be spent in the provision of such education and training. He said that he welcomed the current review whose major objective was to find out what an ideal system of legal education and training would be for Hong Kong and how much it would cost for that system to be implemented.

43. Ms Emily LAU opined that the Universities were the "gate-keepers" in ensuring that graduates were up to standard in terms of both academic and language capabilities. She said that she also felt disturbed after reading the adverse comments and perceptions about newly trained lawyers as set out in paragraphs 2.2.1 to 2.2.9 of the Summary of the Consultation Paper. In her view, the critical comments amounted to an indictment of the education system in Hong Kong.

44. SG said that those comments were the subjective views of some people responding to the consultants and they were reflected in the Consultation Paper in order to stimulate further discussion. He said that neither the consultants nor the Steering Committee should be assumed to endorse those views.

45. Mr Albert HO added that those comments were equally applicable to many people in other fields and that it was unfair to single out lawyers in this aspect.

46. Mr Anthony CHOW and Mr Alan LEONG said that they had come across many newly trained lawyers who were highly competent by all standards. Hence, it would not be fair to take those adverse comments as reflecting the true picture of lawyers generally in Hong Kong.

47. The Chairman asked about the way forward on the review, pointing out that the views so far expressed on the subject were very divergent. SG said that it was for the two consultants to formulate proposals for the consideration of the Steering Committee. The two consultants would return to Hong Kong in January 2001 to meet some of those who had made submissions on the Consultation Paper and other interested parties. The consultants would then prepare their final report to the Steering Committee by June next year.

VIII. Supplementary provisions for Subhead 243 "Hire of legal services and related professional fees"

(LC Paper No. CB(2)338/00-01(06) - Paper prepared by the Administration)

48. Law Officer (Civil Law) (LO(CL)) briefed members on the paper prepared by the Administration. He informed members that the Administration would seek the approval of the Finance Committee of LegCo on 15 December 2000 for a supplementary provision of \$35 million under Subhead 243. The additional requirement was mainly due to additional/unforeseen/slippage of requirements on hire of legal services in respect of civil cases.

49. The Chairman asked how much the Department of Justice had overspent under Subhead 243 in the past years.

50. In response, LO(CL) tabled a supplementary paper containing information on the original provision and the actual expenditure under Subhead 243 since 1991-92 and up to 2000-01 (1 April to 31 October 2000) for members' reference (circulated after the meeting vide LC Paper No. CB(2)393/00-01(02)). He pointed out that there was an over-expenditure of \$32.9 million in 1991-92, and then some marginal over-expenditure in the following two years. In the five years that followed, i.e. from 1994-95 to 1998-99, there was in fact an under-expenditure rather than an over-

expenditure. He added that the actual expenditure in 1991-92 was \$162.9 million, as compared to \$176.2 million in 1999-2000. Hence, there had not been a remarkable increase in the absolute expenditure over the years.

51. LO(CL) supplemented that apart from 1991-92, the Administration had not sought approval from the Finance Committee of additional provision under Subhead 243. The amount of over-spending in 1992-93 and 1993-94 was met under the delegated authority of the Secretary for the Treasury. He further said that it was quite impossible for the Administration to predict precisely in advance the actual briefing out costs required for a particular financial year. The problem with estimating expenditure was not only one of assessing the amount of potential expenditure on a particular case but also assessing in which year that expenditure would fall. He pointed out that a complicated and protracted case could run for a number of years before the Administration could determine with certainty which financial year the expenditure would fall in. Hence, a slippage of a case from one year to the next would affect the expenditure figures in both years.

52. In answer to Mr Martin LEE's enquiry about the case of *Campenon Bernard/Maeda Corporation J.V. v The Government of the Hong Kong Special Administrative Region* in relation to the two Strategic Sewage Disposal Scheme deep tunnelling contracts, LO(CL) said that the estimated value of the combined claims and counterclaims was approximately \$2.5 billion. The number of counsel/legal firms and other professionals involved in the various aspects of the projects was 24.

53. Members raised no objection to the proposed supplementary provision of \$35 million under Subhead 243 to meet anticipated expenditure for the remainder of the current financial year.

54. There being no other business, the meeting ended at 6:40 pm.

Legislative Council Secretariat

11 January 2001