

立法會

Legislative Council

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Report of Panel on Administration of Justice and Legal Services for submission to the Legislative Council

Purpose

This report gives an account of the work of the Panel on Administration of Justice and Legal Services for tabling at the meeting of the Legislative Council (LegCo) on 4 July 2001 in accordance with Rule 77(14) of the Rules of Procedure of LegCo.

The Panel

2. The Panel was formed by a resolution of this Council on 8 July 1998 and as amended on 20 December 2000 for the purpose of monitoring and examining Government policies and issues of public concern relating to administration of justice and legal services. The terms of reference of the Panel are in **Appendix I**.

3. The Panel comprises 8 members. Hon Margaret NG and Hon TSANG Yok-sing were elected Chairman and Deputy Chairman of the Panel respectively. A membership list of the Panel is in **Appendix II**.

Major work

Applicability of Ordinances to the offices set up by the Central People's Government (CPG) in the Hong Kong Special Administrative Region (HKSAR)

4. The subject of the applicability of Ordinances to the CPG offices was discussed by the Panel at a number of meetings since the 1998-99 legislative session. At the Panel meeting on 15 May 2001, members were briefed on the outstanding issues relating to the subject. The Panel expressed dissatisfaction with the slow progress of work in the amendment and adaptation of the relevant Ordinances.

5. The Administration confirmed in October 1998 that as a matter of policy, 15 Ordinances that expressly bound the Government should also bind the CPG offices, and undertook to work out the necessary legislative amendments to these Ordinances. Members noted that there had not been much progress made since then because the Administration was still working on an appropriate formulation to extend the applicability of the Arbitration Ordinance, one of the 15 Ordinances, to the CPG offices. The Administration advised that the formulation, once worked out, could be suitably applied to the other 14 Ordinances. The Panel requested the Administration to expedite its work without further delay. In addition, members considered that the relevant policy bureaux should accord priority to the proposed amendments in the legislative programme.

6. As regards the Personal Data (Privacy) Ordinance, the Administration advised in October 1998 that because of the complexity of the Ordinance, it would need to discuss with the CPG to assess whether, and if so, how the operation of a particular CPG office would be affected by the Ordinance. The Panel had closely monitored the progress of the review of the Ordinance since then. At the Panel meeting on 15 May 2001, the Administration advised that it was still awaiting information from the Hong Kong and Macau Affairs Office on the result of their consultation with the relevant authorities. Members expressed grave concern about the extraordinarily protracted "consultation" with the CPG. Some members pointed out that whether an ordinance should or should not bind the CPG offices in the HKSAR was not a matter for the CPG to give consent to. Given that Article 22 of the Basic Law required that the CPG offices set up in the HKSAR and their personnel to be bound by the laws of HKSAR, the decision as to whether an ordinance should bind the CPG offices should be a matter of principle, regardless of its complexity. Members suggested that the Administration should bring the matter to the attention of the Chief Executive in order that the matter could be resolved early with the involvement of both sides at a higher level.

7. As regards the 53 Ordinances that were expressed to bind, or apply to, the "Crown", the Administration advised that the relevant provisions in 18 of these Ordinances had already been either wholly or partly adapted. Members urged the Administration to proceed with the adaptation exercise expeditiously.

8. On 18 May 2001, the Panel made a report to the House Committee on the unsatisfactory state of affair. The House Committee agreed that the matter should be raised with the Chief Secretary for Administration (CS). Members noted that the matter was subsequently discussed by the Chairman of the House Committee with CS on a number of occasions.

9. At the meeting of the Panel held on 26 June 2001, representatives of the Constitutional Affairs Bureau informed members that CS had given clear instruction that action should be expedited. Members were also informed that CPG was last consulted in May and September 2000 on the formulation relating to

the application of the Arbitration Ordinance. Members noted that the Administration was still working on the adaptations involving the Garrison. They covered about 90 Ordinances and subsidiary legislation. Members decided to follow up the matter at the Panel meeting in October 2001.

Review of the process of appointment of judges

10. The review arose from discussions of the Panel in June 2000 on how LegCo should discharge its function under Article 73(7) of the Basic Law to endorse the appointment of seven judges of the Court of Final Appeal. The two main concerns of the Panel were the lack of information and procedure as a basis for LegCo to perform a meaningful role, and the lack of transparency and accountability in the present system of appointing judges. The Panel decided to make reference to overseas experience and requested the Research and Library Services Division of the LegCo Secretariat to conduct a research study on the process of appointment of judges in the United States, United Kingdom, Canada and Hong Kong.

11. The Panel had also set up a working group to consider the way forward. After holding a meeting on 9 June 2001, the working group agreed that a consultation paper on possible options to address the two main concerns of members should be prepared for consideration of the Panel and wider consultation with the relevant parties.

Review of legal education and training in Hong Kong

12. The Panel had closely monitored the progress of the comprehensive review of legal education and training in Hong Kong which was initiated by the two legal professional bodies and supported by the Administration and the law schools of The University of Hong Kong and The City University of Hong Kong. The review would be carried out in two stages, namely, a consultancy stage to be followed by a further study by a Review Panel. A Steering Committee would oversee the work throughout both stages.

13. In November 2000, the Panel was briefed by the Steering Committee on the Consultation Paper released by the two overseas consultants engaged for the review. At the meeting on 24 April 2001, the Panel was briefed on the updated position of the review including a proposed outline of the final report on the review. The model proposed in the outline included an academic stage of an extended four-year Bachelor of Laws degree (LLB) with a foundation year aiming at broadening law students' horizons beyond strictly legal subjects. At the vocational training stage, it was envisaged that the present Postgraduate Certificate in Laws (PCLL) would be replaced by a new practical legal training course of around 15-week duration focusing on skills training. This would be taught by a new Practical Legal Training Institute jointly run by the two legal professional bodies.

14. The Panel noted that the representatives of the two legal professional bodies and the two law schools who attended the meeting on 24 April 2001 had yet to form any concluded views on the preliminary proposal to restructure the LLB and PCLL programmes, pending final recommendations of the consultants. However, one main concern raised was whether any new proposals arising from the review would be publicly funded.

15. The Panel noted that the consultants would submit their draft and final reports to the Steering Committee by May 2001 and end of June 2001 respectively. Following the submission of the final report by the consultants, a high-power Review Panel consisting of four or five local and overseas experts (but with no representatives from the legal profession or the universities) would be established. The Review Panel would make final recommendations. In response to members' concern about the composition of the Review Panel, the Steering Committee agreed to consult the Panel on the appropriate persons to be invited to serve on the Review Panel in due course. The Panel also requested the Steering Committee to brief members on the Final Report when it was completed.

16. At the meeting on 26 June 2001, members were informed that the consultants' final report would be published by early August 2001. A further period of about three months would be allowed for the interested parties to give their views on the final report, and the Steering Committee would decide in October 2001 on how it would proceed with the second stage of the review. Members decided to discuss the matter with the Steering Committee in October 2001.

"Public interest" consideration in prosecution policy

17. In view of wide public concern about the Department of Justice (D of J)'s decision not to pursue further in the prosecution of the accused person in two recent cases (viz. HKSAR v Poon Kai-tik and HKSAR v Nguyen Gia-huy), the Panel held a meeting on 16 January 2001. The Administration was invited to brief members on the principles and factors which regulated general prosecution policy, with particular reference to public interest factors, and on the use of the bind over procedure where the decision was taken not to pursue a prosecution which was in train.

18. Regarding the Nguyen case, the Administration explained why it was necessary to seek independent legal advice from outside the D of J and why the case had been disposed of by way of offering no evidence on condition that the accused agreed to be bound over to be of good behaviour (ONE/BO). Some members as well as the legal professionals and academics who attended the meeting considered that the discretion of not pursuing with prosecution in the Nguyen case should be exercised in similar cases and that the ONE/BO procedure was more effective in the rehabilitation of young offenders who had no previous

conviction record and committed less serious offences. They also requested that clear guidelines on the use of the ONE/BO procedure should be promulgated. Concern was expressed as to whether the same factors which had been taken into account by the prosecutor in the Nguyen case had been given equal weight in other similar cases.

19. The Administration advised the Panel that there was no set policy in respect of the ONE/BO procedure. The D of J would take into account the merits and circumstances of individual cases in determining whether the particular facts of a case warranted a departure from the existing prosecution policy and guidelines. The ONE/BO procedure was rarely invoked for simple possession of dangerous drugs which was regarded as a serious offence. While issuing prosecution guidelines on specific categories of cases would be a difficult task, the Administration was prepared to consider ways to achieve greater uniformity in handling prosecution cases, including those handled by Police officers and Court Prosecutors.

Marital rape under section 118 of the Crimes Ordinance (Cap. 200)

20. The item was discussed by the Panel at a number of meetings. The Panel expressed concern that "unlawful sexual intercourse" in the offence of rape under section 118 of the Crimes Ordinance (Cap. 200) might still mean intercourse outside the bounds of matrimony, and that the Ordinance should be amended to make it clear that marital rape was an offence.

21. The Administration initially took the view that since following the decision of the House of Lords in *Reg v R* {1991} 1 WLR 767, a husband might be guilty of rape if, in the circumstances of the case, his wife did not consent to sexual intercourse, the law is sufficiently clear without legislative amendment. However, in view of the Panel's concern, the Administration undertook to consider whether a legislative amendment should be made to put the matter beyond doubt.

22. After conducting a consultation exercise in November 2000, the Administration proposed to delete "unlawful" from section 118 and to add an express provision to the effect that a marital relationship was immaterial to the offence of rape. In respect of other sexual offences, the Administration also proposed to define "unlawful" non-exhaustively in section 117 to include non-consensual marital intercourse. The Panel noted that the scope of the proposed amendment had been expanded to cover other sexual offences, as against the original intention to deal with marital rape only, and it was not clear that the proposed expansion was supported by the two legal professional bodies. The Administration assured members that the proposal would overcome the uncertainty arising from deleting "unlawful" from section 118 alone. The Administration and the legal profession held no divergent views on the legal policy principle that marital rape was an offence in Hong Kong and that the law should be amended to

clarify that beyond doubt. It was a matter of how to work out an amendment that would reflect the policy intent. The Panel requested the Administration to reconsider whether the proposed legislative amendment should also cover other sections in the Ordinance relating to sexual offences after consulting the legal profession.

23. The Administration subsequently informed the Panel that it had decided to introduce amendments to the Crimes Ordinance to clarify the law regarding rape and relevant sexual offences. The proposed amendments have been included in the Statute Law (Miscellaneous Provisions) Bill 2001 introduced into the Council on 4 July 2001.

Court's power under section 13 of the Conveyancing and Property Ordinance (Cap. 219)

24. The proposal that the court in Hong Kong should be given a discretionary power similar to that of the court in England and Wales under section 49(2) of the Law of Property Act 1925 (LPA) had been discussed by the Panel. Section 49(2) of LPA allowed the court the discretion to order the vendor to return the purchaser's deposit in a situation where the vendor was not in breach of the contract.

25. The Administration advised the Panel in June 2000 that it had completed an exercise to consult the relevant organizations on the proposal. In view of the controversial initial responses received and the complex issues involved which could have far-reaching implications on the local conveyancing system and practice, the Administration would need more time to consider the relevant issues.

26. In giving a further report to the Panel at its meeting on 20 February 2001, the Administration proposed that a provision similar to section 49(2) of LPA be introduced by way of an amendment to section 12 of the Conveyancing and Property Ordinance (Cap 219). According to the Administration, the proposal would not jeopardize the certainty and sanctity of contract and allow the court to do justice in individual cases. The Panel noted that the latest submissions to the Panel on the proposal from the two legal professional bodies were at variance with their original positions and that they had divergent views on the matter. In addition, members attending the meeting had different views on the proposal. The Panel therefore requested the Administration to take into account the newly submitted views in finalizing its proposal. In reverting to the Panel on its position in April 2001, the Administration remained of the view that it would proceed with its earlier proposed amendment.

Other issues

27. The Panel also discussed a number of other issues, including the

appointment of the Chief Judge of the High Court, revision of Judiciary fees and charges, incorporation of solicitors' practices, drafting policy on bilingual legislation, recent developments in the review of legislation, competence and compellability of spouses in criminal proceedings and the operation of the Legal Aid Services Council.

28. In addition, the Panel was consulted on a number of legislative and financial proposals before their submission to the Finance Committee or introduction into the Council.

Panel meetings

29. Between the period from October 2000 and June 2001, the Panel held a total of 13 meetings. Representatives of the Hong Kong Bar Association and the Law Society of Hong Kong attended most of the meetings.

Legislative Council

Panel on Administration of Justice and Legal Services

Terms of Reference

1. To monitor and examine, consistent with maintaining the independence of the Judiciary and the rule of law, policy matters relating to the administration of justice and legal services, including the effectiveness of their implementation by relevant officials and departments.
2. To provide a forum for the exchange and dissemination of views on the above policy matters.
3. To receive briefings and to formulate views on any major legislative or financial proposals in respect of the above policy areas prior to their formal introduction to the Council or Finance Committee.
4. To monitor and examine, to the extent it considers necessary, the above policy matters referred to it by a member of the Panel or by the House Committee.
5. To make reports to the Council or to the House Committee as required by the Rules of Procedure.

**Legislative Council
Panel on Administration of Justice and Legal Services**

Membership list

Chairman	Hon Margaret NG (Chairman)
Deputy Chairman	Hon Jasper TSANG Yok-sing, JP
Members	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 Ambrose LAU Hon-chuen, JP Hon Emily LAU Wai-hing, JP (Total : 8 Members)
Clerk	Mrs Percy MA
Legal Adviser	Mr Jimmy MA
Date	10 October 2000