

立法會
Legislative Council

LC Paper No. CB(2)1386/01-02
(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 Monday, 25 February 2002 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 Miriam LAU Kin-yee, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Hon Albert HO Chun-yan
Hon Mr Ambrose LAU Hon-chuen, GBS, JP

Public Officers Attending : Item IV

Mr Wilfred TSUI
Judiciary Administrator

Mr S Y CHAN
Director of Legal Aid

Mr Benjamin CHEUNG
Deputy Director of Legal Aid

Mr T E KWONG
Assistant Principal Legal Aid Counsel

Item V

Mr Stephen WONG
Deputy Solicitor General

Mr Patrick CHEUNG
Senior Assistant Director of Public Prosecutions

Mr Llewellyn MUI
Senior Government Counsel
Legal Policy Division

Mr Peter KAM
Senior Government Counsel (Acting)
Legal Policy Division

By Invitation : The Hong Kong Bar Association

Item IV

Mr P Y LO
Mr Hectar PUN

Item V

Mr Edward LASKEY
Mr HAU Chi-kit

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

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

Action
Column

I. Confirmation of minutes of meetings
(LC Paper No. CB(2)1155/01-02)

The minutes of the meeting held on 28 January 2002 were confirmed.

II. Information paper issued since last meeting

(LC Paper No. CB(2)1088/01-02(01))

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

III. Items for discussion at future meetings

Meeting on 20 March 2002

(LC Paper No. CB(2)1145/01-02(01))

3. Members agreed that the following items should be discussed at the next regular meeting on 20 March 2002 -
- (a) Proposed research outline on "Mechanism for handling complaints against judges in selected countries";
 - (b) Consultation Paper on proposed amendments to the Conveyancing and Property Ordinance (Cap. 219) concerning execution of conveyancing documents by corporations;
 - (c) Taking of evidence from abroad by live video-link; and
 - (d) Recruitment of Court Prosecutors.

4. On item (b), members agreed that representatives from the two legal professional bodies, the Consumer Council, real estate developers and major estate agency associations should be invited to submit views on the subject.

Government's policy on legislation and administrative measures

(Item 13 of LC Paper No. CB(2)1145/01-02(01))

5. The Chairman drew members' attention to a letter dated 7 February 2002 from the Chief Secretary for Administration (CS) (LC Paper No. CB(2)1145/01-02(02)) in relation to the Panel's invitation to him to attend a meeting to discuss the above issue. In his letter, CS expressed the view that it would be more appropriate to have an exchange of view with Members at his next regular meeting with the House Committee because Members other than members of the Panel might also be interested in the Administration's views on the subject. The Chairman sought members' views on CS's letter.
6. The Panel agreed to the suggestion of CS to discuss the matter at a House Committee meeting and to recommend to the House Committee that -
- (a) the matter be included as separate agenda item for CS's next regular meeting with the House Committee; and

- (b) adequate time should be provided for the discussion.

Directorate establishment of the Department of Justice

7. The Chairman suggested and members agreed that the Administration should be requested to prepare a paper on the above subject, which would be discussed at a future meeting of the Panel.

IV. Implications of the Court of Final Appeal judgment in the cases of Ng Siu Tung, Sin Hoi Chu and Li Shuk Fan on litigation involving a large number of parties

(LC Paper Nos. CB(2)1145/01-02(03); 1185/01-02(01) and 1192/01-02(01))

8. At the invitation of the Chairman, Director of Legal Aid (DLA) and Judiciary Administrator introduced their papers on the subject (LC Paper Nos. CB(2)1145/01-02(03) and 1192/01-02(01) respectively). The former paper explained the "representative cases" approach adopted by the Department of Legal Aid (LAD) in handling a large number of applications for legal aid involving common issues of public importance. The latter detailed the operation of "representative proceedings" under the current system of civil justice which was governed by the procedural rules under Order 15 rules 12 and 13 of the High Court Rules (HCR). In the main, representative proceedings was a case management mechanism which allowed issues common to a group of plaintiffs to be decided in a single set of proceedings rather than in a proliferation of collateral proceedings. Under the representative cases approach adopted by LAD in appropriate cases involving a large number of applicants, representative applicants were selected as lead applicants in legal proceedings funded by legal aid so that issues of law and facts common to all applicants were submitted to the court for decision. This approach had the benefit of keeping the volume of litigation within reasonable bounds and keeping costs at a minimum while ensuring that all relevant legal issues were determined.

9. The Chairman said that as pointed out in the LAD's paper, where a representative case involving contentious issues of public law affecting a large number of people was litigated, it could be assumed that the principles declared, being answers to the question of law, in the representative case would be applied to persons in a similar position including applicants not chosen as representative parties in the case. However, in the right of abode (ROA) claims in Ng Ka Ling and Chan Kam Nga (the "Ng & Chan" cases), the judgments of the Court of Final Appeal (CFA) of 29 January 1999 gave rise to the subsequent interpretation by the Standing Committee of the National People's Congress (NPCSC) of Articles 22(4) and 24(2)(3) of the Basic Law

(BL). The NPCSC interpretation made on 26 June 1999 displaced the precedential value of the former CFA judgments, and because of BL 158(3), resulted in the non-representative applicants being deprived of the benefit of ROA acquired under the CFA's judgments as they were not the actual parties in the relevant legal proceedings. She asked whether the outcome of the "Ng & Chan" cases had affected the way LAD handled the subsequent appeal cases of Ng Siu Tung, Sin Hoi Chu and Li Shuk Fan (the "Ng, Sin & Li" cases), and how LAD would deal with multi-party public law cases involving the Government as a party in future.

10. DLA responded that in dealing with the "Ng, Sin & Li" cases, LAD generally followed the approach in the "Ng & Chan" cases. He said that in future the viability of adopting the representative cases approach in handling cases involving a large number of parties having common issues for the court's decision would be closely examined on a case by case basis. It would be decided upon a consideration of matters including, inter alia, court directions and whether the opposite parties (including the Government in cases where it was a party thereto) would undertake to give effect to the court decisions in the representative cases in other cases. In any event, counsel's advice would be sought before deciding the most cost effective way of funding the intended litigation while ensuring that all the applicants' interests were conserved.

11. The Chairman sought the views of representatives of the Bar Association.

12. Mr Hectar PUN and Mr P Y LO highlighted the following major points made by the Bar Association in its submission (circulated under LC Paper No. CB(2)1185/01-02(01)) -

- (a) The representative proceedings under Order 15 rule 13 of HCR were not suitable for applications for judicial review under Order 53 of HCR. The provisions of Order 53 precluded the court from making an order under Order 15 rule 13 for a certain applicant in judicial review proceedings to represent other individuals who were not parties before the court by way of their own judicial review proceedings. Any new applicants would need to bring independent proceedings themselves. The Bar Association considered the situation undesirable. It therefore suggested that there might be a need to consider the introduction of procedures to enable a large number of applicants seeking to settle their common issues by way of judicial review proceedings to have their rights and obligations litigated at the same time;
- (b) The CFA majority judgment of 10 January 2002 delivered in "Ng, Sin & Li" cases ruled that upon the true construction of "judgment previously rendered shall not be affected" in BL 158(3), the

judgments in "Ng & Chan" cases were binding only on the actual parties in those cases. The Bar Association shared the view that as the CFA judgments of 29 January 1999 were subsequently displaced and their "precedential" value destroyed by the NPCSC interpretation of the BL, the applicants represented by the selected representative applicants in those cases could not possibly claim the benefit of the CFA judgments of 29 January 1999 as they were not the actual parties to the proceedings. The same result would apply to other people purportedly having the same background as the representative litigants and seeking the same relief in separate proceedings; and

- (c) The Bar Association considered that one possible way to mitigate the effect of (b) above would be for the CFA to determine and dispose in its judgment the rights and obligations of both the representative litigants and those represented by them. Such judgments would then come within BL 158(3) as "judgments previously rendered" and hence the represented litigants would not be affected in the event of a subsequent NPCSC interpretation overturning the CFA's decision.

13. Mr Hectar PUN said that a procedural reform to deal with multi-party judicial review proceedings suggested in (a) above should be considered as a matter of urgency. He cautioned that there was an imminent possibility that a large number of public housing tenants might apply for legal aid to seek redress for excessive rent which they had paid to the Housing Authority. He said that without an effective case-management mechanism, similar group actions involving large amount of litigants applying for legal aid were likely to impose tremendous strain on the resources of the LAD as well as the courts.

14. Mr James TO said that there was an inherent danger in using the representative cases approach to deal with multi-party litigation involving contentious issues of general public importance, as the judgment of the CFA might be overruled by an NPCSC interpretation of the BL and hence could not be applied to the parties represented by the representative litigants. He pointed out that as demonstrated by the ROA litigation, a prior undertaking made by the Government to follow the CFA's judgment would not help under such circumstances. He asked whether LAD would review its approach in handling future cases, particularly litigation proceedings which involved the interpretation of the BL and the Government as a litigation party. In his view, in handling future applications, DLA should always alert himself on the possibility of a NPCSC interpretation of the BL in the cases concerned.

15. Mr Martin LEE said that the ROA cases were a deplorable example of the litigating parties having wrongly trusted the Government. He said that apart from the thousands of ROA applicants who were pursuing their claims in

Hong Kong, there were innumerable potential claimants in the Mainland who did not come to Hong Kong in the belief that the Hong Kong Special Administrative Region Government would honour its undertaking to comply with the judgment of the CFA in the representative cases. He added that LAD itself was a victim as it might be sued by the applicants for giving wrong advice. In his view, in future cases, it might be necessary to require that any undertaking made by the Government that it would abide by the decision of the CFA should be made to the Court.

16. DLA said that the NPCSC interpretation of the BL in the "Ng & Chan" cases was not anticipated by the LAD. He could not foresee whether there would be further cases of NPCSC interpretation in the future. He reiterated that whether or not representative cases approach would be adopted would be considered in the particular context and circumstances of the case. He further advised that in handling legal aid applications in the "Ng, Sin & Li " and the "Ng & Chan" cases, LAD had based its decisions, inter alia, on the advice of legal representatives acting on behalf of the aided parties to the proceedings as well as court directions. Counsel then agreed on the way the cases should thereafter proceed which could safeguard the best interests of all parties concerned. He added that in the "Ng & Chan" cases, all the 1,000-plus applicants had in fact been granted legal aid. Other new applicants who approached the LAD after the cases had already proceeded to the CFA on appeal were registered with the Department, pending the CFA's judgment, as there was no need to commence fresh proceedings to litigate on the same points already covered in those cases.

17. DLA further added that as pointed out by the Bar Association in its submission, it was hoped that discussion of the Interim Report and Consultative Paper on Civil Justice Reform concerning, inter alia, multi-party litigation and "Group Litigation Orders" could provide useful insight on how proceedings involving a large number of parties could be more effectively handled in the future.

18. Mr James TO asked whether it was possible, firstly, to add new parties to the proceedings after a first instance trial was completed, and secondly, extend the benefit of the judgment in relation to the representative litigants to all the represented parties by way of a consent order. Mr Hectar PUN responded that in his view, under the present system, the answer was negative.

19. Ms Emily LAU pointed out that in multi-party litigation where the Government was involved as a party to the proceedings, the Government might refuse to accept the use of representative proceedings and to apply the decisions of the court to all the representative and the represented litigants alike. She said that in such situation, it would be worrying if LAD had resource constraints to grant legal aid for individual applicants to commence proceedings.

20. DLA said that the agreement of the opposite parties to give effect to the court judgment in the representative cases in other cases was a relevant, but not the sole, factor in deciding whether legal aid should be given to applicants with common issues to resolve through representative proceedings. LAD, in considering any application, would act in the best interest of the applicants have regard to all relevant factors and the particular circumstances of the case.

21. Mr James TO said that BL 158(3) specified that "judgments previously rendered shall not be affected". It was clear that "judgments" could not be taken to include "public statements of the Government". Hence, with the NPCSC's interpretation of the BL which overturned the CFA's judgments, the Government was not legally bound by its previous undertaking to apply the CFA's judgments in other similar cases. He sought the views of the Bar Association on whether there were other provisions in the BL which had similar effect as BL 158.

22. Mr P Y LO responded that in his view, BL 159 on the power of the National People's Congress to amend the BL also had the potential effect of displacing or damaging the "precedential" value of a court judgment.

23. In concluding the discussion, the Chairman said that the subject of proceedings involving a large number of parties could be further considered in the context of the Interim Report and Consultative Paper on Civil Justice Reform relating to multi-party litigation.

24. As suggested by Mr James TO, members agreed that the Secretary for Justice should be requested to provide comments on the issues raised at this meeting from a legal policy angle for the consideration of the Panel.

Clerk

V. Competence and compellability of spouses in criminal proceedings
(LC Paper Nos. CB(2)1889/00-01(01); 1134/01-02(01) and (02);
1202/01-02(01))

25. The Chairman drew members' attention to the papers circulated to members, and a letter dated 25 February 2002 from the Law Society of Hong Kong (LC Paper No. CB(2) 1202/01-02(01)) which was tabled at the meeting.

26. At the invitation of the Chairman, Deputy Solicitor General (DSG) briefed members on the paper prepared by the Administration (LC Paper No. CB(2)1134/01-02(02)) which contained the following information as requested by the Panel when the issue of competence and compellability of spouses in criminal proceedings was last discussed at the meeting on 26 June 2001 -

- (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.

27. DSG advised that with a view to addressing the concern of the Panel and some of the respondents in the public consultation, the Administration further proposed to add to the bill, which was scheduled to be introduced into LegCo shortly, an exemption provision to provide the court the discretion to exempt the spouse of an accused from giving evidence for the prosecution or on behalf of the co-accused.

28. DSG further said that the proposed discretion of the court to grant exemption was based on Australian legislation. In South Australia, a spouse might apply to the court for an exemption from the obligation to give evidence against his or her accused spouse. The discretion of the court to exempt the spouse wholly or in part required the judge to consider, inter alia, the risk of harm to the spouse and the relationship if no exemption was granted. He added that apart from the above provision, the proposed bill was largely modelled on the previous Criminal Procedure (Amendment) Bill 1990 which was not passed by LegCo, and the recommendations of the Law Reform Commission (LRC) in its report in 1988 on the competence and compellability of spouses to testify in criminal proceedings.

29. DSG further drew members' attention to Annex C to the Administration's paper which set out a list of the crimes which justified compelling spousal testimony. In the opinion of the Administration, a spouse should be compelled to testify against his or her spouse or spouse's co-accused, or on behalf of the co-accused, only in the following circumstances -

- (a) the offence charged involved an assault on, or injury or a threat of injury to, the wife or husband of the accused or an assault on, or injury or a threat of injury to, or causing the death of, a child of the family who was at the material time under the age of 16;
- (b) the offence charged was a sexual offence alleged to have been committed in respect of a child of the family who was at the material time under the age of 16 ("sexual offence" meant an offence under Part VI or XII of the Crimes Ordinance (Cap. 200)); and

- (c) the offence charged consisted of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b).

30. The Chairman sought the Bar Association's views on the subject.

31. Mr Edward LASKEY said that as explained in its previous submission, the Bar Association was in general support of the principles underlying the legislative changes proposed by the Administration. However, it would like to reserve its final position until it had the chance to consider the legislative proposals in detail. He suggested that the Administration should consider the following two issues -

- (a) the meaning of "a child of the family" should be clarified, e.g. whether it would include step children or foster children, bearing in mind that the reference carried different meanings under different pieces of legislation. There were also different interpretations under case law in common law jurisdictions; and
- (b) an accused person might be concurrently charged for different offences of which only one came within the list of crimes justifying spousal testimony. Safeguards should be introduced to ensure that while the spouse of the accused was compellable to give evidence for the prosecution in relation to that particular charge which justified compellability, the witness spouse would not be compelled to give evidence on matters relating to the other charges. The Bar Association proposed that there should be separate trials for different alleged offences.

32. Mr Martin LEE said that he had reservations about the legislative proposal concerning compellability. In his view, the proposal, if implemented, would impact adversely on the institution of marriage. The risk of harm which might be done to a wife compelled to testify against her accused husband should also be considered.

33. The Chairman pointed out that the adverse effect on the sanctity of marriage was also a reason adduced by the Law Society in opposing to the proposal of compellability of spousal testimony against the accused.

34. Referring to the offences set out in Annex C to the Administration's paper, Mr Martin LEE raised the following queries -

- (a) In criminal law, the offence of assault did not necessarily require actual bodily harm being done or even body touching. An act

which put somebody in threat or fear sufficed for it to amount to an assault;

- (b) A husband who assaulted his wife might subsequently get the forgiveness from his wife. It would be undesirable to compel the wife to give evidence against the husband under such circumstances;
- (c) one of the sexual offences specified in Part XII of the Crimes Ordinance was "letting premises for use as a vice establishment". Whether the commission of this offence had to be also in relation to a child of the family was not clear.

35. In response to (c) above, DSG said that under the proposal, the sexual offences which compelled spousal testimony against the accused were offences under Part VI or XII of the Crimes Ordinance and such offences were alleged to have been committed in respect of a child of the family who was at the material time under the age of 16.

36. DSG added that the Administration would consider the points raised by Mr Martin LEE in finalizing the drafting of the bill. He pointed out that the proposed provision empowering the judge to exercise a discretion to exempt a spouse from giving evidence might help address the concern. He also pointed out that the proposals which would be included in the bill generally followed the LRC's recommendations which had secured the wide support of the community, including woman organizations consulted on the subject.

37. On the issue concerning assault charges, Mr Edward LASKEY opined that it would be difficult to define serious and minor offences committed with violence. Also, as far as compellability was concerned, it would be difficult to argue that offences committed with minor violence should not count.

38. Ms Audrey EU said that she was in general support of the legislative proposals. With regard to the proposed provision for the court's discretion to exempt a spouse from testifying against the accused spouse, she asked whether the discretion would also apply to co-habitees living in a state equivalent to a spousal relationship.

39. DSG replied that the Administration had considered the issue of co-habitation and was inclined to follow the LRC's recommendation that co-habitees should not be included. He added that the common law meaning of spouses did not include co-habitees.

40. In response to the Chairman's enquiry about the legislative timetable, DSG advised that the proposed bill would be introduced into LegCo on 15 May 2002. Meanwhile, the Administration was waiting for the response of the two

Action
Column

legal professional bodies to the revised proposals.

41. The Chairman said that she expected that a Bills Committee would be formed in due course to scrutinize the bill in detail.

VI. Report of Working Group on Legislation concerning the Provision of Legal Aid Services

(LC Paper No. CB(2)1145/01-02(04))

42. Members endorsed the report (circulated under LC Paper No. CB(2)1145/01-02(04)) prepared by the Working Group.

43. Members agreed that the Panel should hold a special meeting on 25 April 2002 at 4:30 pm to receive views from interested parties on the preliminary list of issues for review identified by the Working Group (Appendix II to the Working Group's report). The two legal professional bodies, the Hong Kong Council of Social Service and the 18 District Councils would be invited to give written views and/or present their views to the Panel at the meeting.

Clerk

44. Members also agreed that a copy of the Working Group's report should be provided to the Administration and the Legal Aid Services Council for their consideration/information.

Clerk

45. There being no other business, the meeting ended at 6:30 pm.

Council Business Division 2
Legislative Council Secretariat
19 March 2002