

立法會
Legislative Council

Ref : CB2/BC/4/06

LC Paper No. CB(2)2277/06-07
(These minutes have been seen
by the Administration)

Bills Committee on Domicile Bill

**Minutes of the second meeting
held on Monday, 30 April 2007 at 8:30 am
in Conference Room B of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP

Public Officers attending : Item III
Mr Michael SCOTT
Senior Assistant Solicitor General

Ms Kitty FUNG
Senior Government Counsel

Miss Betty CHEUNG
Senior Government Counsel

Mr Byron LEUNG
Senior Government Counsel

Clerk in attendance : Mrs Percy MA
Chief Council Secretary (2)3

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Action

I. Application for late membership from Hon Martin LEE

Members acceded to the request of Mr Martin LEE for late membership on the ground that his application was not received by the LegCo Secretariat due to technical problems.

II. Confirmation of minutes of meeting

(LC Paper No. CB(2)1705/06-07 – Minutes of meeting on 15 March 2007)

2. The minutes of the meeting held on 15 March 2007 were confirmed.

III. Meeting with the Administration

(LC Paper No. CB(3)335/06-07 – The Bill)

LC Paper No. CB(2)1314/06-07(03) – Marked-up copy of clauses 14 and 15 of the Bill

LC Paper No. CB(2)1707/06-07(01) - Mr YIP Ming's written submission dated 13 February 2007

LC Paper No. CB(2)1707/06-07(02) - Administration's response to issues raised at the meeting on 15 March 2007)

3. The Bills Committee deliberated (index of proceedings attached at **Annex**).
4. Senior Assistant Legal Adviser 2 (SALA2) introduced his paper which set out a number of legal and drafting issues on the Bill, some of which arose from the Administration's response to the issues raised by members at the last meeting (the paper prepared by SALA2 was tabled and issued to members vide LC Paper No. LS69/06-07 after the meeting). The Bills Committee discussed the Administration and SALA2's papers. The Administration was requested to provide a written response to address the issues raised in SALA2's paper and questions raised by members at the meeting.
5. The Administration was also requested to provide a written response to Mr YIP Ming's submission.

IV. Date of next meeting

6. Members agreed that the next meeting would be held on 28 May 2007 at 8:30 am.

Action

(Post-meeting note : The meeting has been rescheduled to 1 June 2007 at the request of the Administration and subsequently deferred to 28 June at 8:30 am because of the lack of a quorum .)

7. The meeting ended at 10:20 am.

Council Business Division 2
Legislative Council Secretariat
26 June 2007

**Proceedings of the second meeting of the
Bills Committee on Domicile Bill
on Monday, 30 April 2007 at 8:30 am
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker(s)	Subject(s)	Action required
000000 - 000822	Chairman Ms Audrey EU Ms Miriam LAU	Application for late membership from Hon Martin LEE	
000823 - 000933	Chairman	Confirmation of minutes of meeting	
000934 - 001116	Chairman	Submission from Mr YIP Ming on clause 4 of the Bill (LC Paper No. CB(2)1707/06-07(01))	Adm to respond
001117 - 001600	Admin Chairman	Administration's response to the issues raised by members at the meeting on 15 March 2007 (LC Paper No. CB(2)1707/06-07(02))	
001601 - 003556	SALA2	Legal and drafting issues raised by SALA2 arising from the Administration's response (paragraphs 1 to 6 of LC Paper No. LS69/06-07)	
003557 - 005631	Chairman Admin SALA2 Ms Miriam LAU	<p>Discussion on the Administration's response and the issues raised by SALA2</p> <p>Questions raised by members in relation to a scenario where a person had landed unlawfully in Hong Kong and was subsequently imprisoned -</p> <p>(a) whether the presence of the person in Hong Kong during his imprisonment was lawful;</p> <p>(b) how to deal with that person's estate if he had declared in his will that he had acquired a domicile in Hong Kong and his will only covered part of his movables; and</p> <p>(c) whether the meaning of "lawfully present" should be defined in clause 6(1) of the Bill</p> <p>Response of the Administration -</p> <p>(a) the court would not accept the declaration of domicile in the will as decisive. The court would consider circumstances surrounding the case</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>before making a determination on the person's domicile;</p> <p>(b) the scenario quoted was rare; overseas jurisdictions mentioned in the Law Reform Commission Report did not make laws to address such a problem; and</p> <p>(c) the Administration had reservation on the need of including a provision in the Bill to cover a rare scenario</p> <p>Response of members -</p> <p>(a) the person might distribute his estate based on the understanding that he was domiciled in Hong Kong. If the court had ruled otherwise, it might affect the validity of the will; and</p> <p>(b) although the scenario quoted was rare, such questions might arise for the legal adviser to a prisoner</p>	
005632 - 005818	Mr Jasper TSANG	<p>Views of Mr TSANG -</p> <p>(a) paragraph 1(d) of SALA2's paper pointed out that the Administration held the view that a person during his imprisonment should not be able to form an intention to make a home in a place where he was imprisoned for an indefinite period. This view, if correct, could mean that the issue of whether an imprisonment should be interpreted as lawful or unlawful presence would be irrelevant because under clause 5(2)(b), a person only acquired a new domicile in Hong Kong if he had such an intention; and</p> <p>(b) whether the term "lawful presence" appeared in other legislation. If not, consideration could be given to defining in the Bill that the imprisonment of a person who had landed in Hong Kong unlawfully should be regarded as lawful or unlawful presence</p>	
005819 - 010326	Ms Audrey EU	<p>Views of Ms EU -</p> <p>(a) to her understanding, the term "lawful presence" was not defined in the laws of Hong Kong or overseas jurisdictions;</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>(b) whether or not a prisoner was lawfully present in a place varied from case to case;</p> <p>(c) the intention of a person to make a home in a place for an indefinite period and his imprisonment were unrelated issues. Dicey and Morris (14th ed, 2006, para 6-059) stated that a prisoner, "even if he can be considered to reside where he is imprisoned, is unlikely to intend to reside there permanently or indefinitely". The view of the Administration that a person during his imprisonment should not be able to form an intention to make a home in a place where he was imprisoned for an indefinite period could be too rigid; and</p> <p>(d) it might be appropriate not to define "lawful presence" in the Bill so as to allow flexibility</p>	
010327 - 010717	Mr Jasper TSANG Chairman Admin	<p>Queries raised by Mr TSANG -</p> <p>(a) whether domicile gave rise to a benefit for a person; and</p> <p>(b) if a prisoner had satisfied clause 5(2)(a), i.e. he was lawfully present in Hong Kong, whether he could satisfy clause (5)(2)(b) to acquire a new domicile in Hong Kong would be his choice, given that only he would know whether he intended to make a home in Hong Kong for an indefinite period. In the circumstances, clause 5(2)(a) appeared to serve as the gate keeper for acquisition of a domicile</p> <p>Response of the Administration -</p> <p>(a) domicile was a conclusion of law drawn from the facts of each case irrespective of the direct wish or choice of a person; and</p> <p>(b) it was the prisoner's intention to make a home in a country or territory for an indefinite period that was relevant; and such intention must be borne out by all the evidence as a whole, and a declaration was merely one piece of evidence among others</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
010718 - 011004	SALA2 Chairman	<p>Views of SALA2 -</p> <p>(a) whether a prisoner could satisfy clause (5)(2)(b) to acquire a new domicile in Hong Kong would depend on circumstances surrounding the case, it was not decided by the wish of the prisoner alone;</p> <p>(b) there was a difference between "intention to make a home" in clause 5(2)(b) of the Bill and "intend to reside" in the quotation from Dicey and Morris; and</p> <p>(c) the concept of "domicile of choice" under common law appeared to be different from that of clause 5(2)(b) of the Bill. Whether or not the common law rules such as those for determining domicile of choice were still applicable over certain provisions of the Bill was questionable</p>	
011005 - 011310	Ms Miriam LAU Chairman	<p>Views of Ms LAU -</p> <p>(a) according to the Administration, if a person had landed in Hong Kong unlawfully, his presence in Hong Kong during his imprisonment could not be lawful. In the circumstances, clause 6(1) would apply and the prisoner's intention under clause 5(2)(b) had no relevance; and</p> <p>(b) under the circumstance, the court did not have much flexibility in determining a prisoner's domicile</p> <p>Views of the Chairman that the presence of a prisoner in Hong Kong during imprisonment could be lawful as the imprisonment was based on the lawful order of the court</p>	
011311 - 012344	Chairman SALA2 Admin	<p>Discussion on clause 6(2) which provided that an adult's presence in Hong Kong should be presumed to be lawful unless the contrary was proved</p> <p>Concerns raised by SALA2 and the Chairman about circumstances where there might not be an opposing party</p> <p>A scenario quoted by the Administration to illustrate how proof of the contrary under clause 6(2) might occur</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
012345 - 013240	Mr Jasper TSANG Chairman SALA2 Ms Miriam LAU Ms Audrey EU Admin	<p>Questions raised by members in relation to a scenario where a person's domicile in Hong Kong was questioned many years after he died intestate on the ground that his presence in Hong Kong had been unlawful -</p> <p>(a) the person acquired a domicile in Hong Kong because his lawful presence was not challenged under clause 6(2). After his lawful presence was proven subsequently, whether and when he would be regarded as not having domicile in Hong Kong;</p> <p>(b) if his estate had already been distributed based on the presumption that he was domiciled in Hong Kong, whether and how the opposing party could recover the estate distributed; and</p> <p>(c) whether the problems raised in (a) and (b) above existed under the current domicile regime</p>	
013241 - 014724	SALA2	Other legal and drafting issues raised by SALA2 on the Bill (paragraphs 7 to 16 of LC Paper No. LS69/06-07)	
014725 - 015009	Chairman Ms Miriam LAU Ms Audrey EU Chairman	<p>The Administration was requested to provide a written response to address the issues raised in SALA2's paper and questions raised by members at the meeting</p> <p>Date of next meeting</p>	Admin to follow up