

立法會
Legislative Council

LC Paper No. CB(2)927/07-08
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Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Thursday, 13 December 2007, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present : Hon Margaret NG (Chairman)
Hon Martin LEE Chu-ming, SC, JP (Deputy Chairman)
Hon James TO Kun-sun
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk, JP
Hon LI Kwok-ying, MH, JP

Members absent : Hon Audrey EU Yuet-mee, SC, JP

Public Officers attending : Item III
Judiciary Administration
Mr NG Sek-hon
Deputy Judiciary Administrator (Operations)
Miss Vega WONG
Assistant Judiciary Administrator (Development)

Item IV
Judiciary Administration
Miss Annie TANG
Deputy Judiciary Administrator (Development)

Mr Stuart STOKER
Secretary, Working Party on Solicitors' Rights of Audience

Item V

The Administration

Administration Wing, Chief Secretary for Administration's
Office

Miss Jennifer MAK
Director of Administration

Miss Shirley YUNG
Deputy Director of Administration

Mr Arthur AU
Assistant Director of Administration

**Attendance by
invitation** :

Item III

Hong Kong Bar Association

Mr Rimsky YUEN, SC
Chairman

Item IV

Hong Kong Bar Association

Mr Rimsky YUEN, SC
Chairman

The Law Society of Hong Kong

Mr Andrew JEFFRIES

Mr Mark LIN

**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

Mrs Fony TSANG
Legislative Assistant (2)3

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- I. Information paper issued since last meeting**
(LC Paper No. CB(2)485/07-08(01) - Judiciary Administration's paper on "Further implementation of five-day week in the Judiciary")

Members noted that the above paper had been issued since the last meeting.

- II. Items for discussion at the next meeting**
(LC Paper No. CB(2)559/07-08(01) - List of outstanding items for discussion

LC Paper No. CB(2)559/07-08(02) - List of items tentatively scheduled for discussion at Panel meetings in 2007-2008 session

LC Paper No. CB(2)559/07-08(03) - List of follow-up actions

LC Paper Nos. CB(2)559/07-08(04) and (05) - Correspondence with the Administration on "Review of the non-commencement of ordinances")

Agenda for the next meeting

2. Members agreed that the following items would be discussed at the next meeting on 28 January 2008 -

- (a) Reform of the law of arbitration; and
- (b) Enforcement of judgment in civil cases.

New item to be included in the outstanding list

3. The Chairman said that it had come to her attention that certain parts of the Wills (Amendment) Ordinance 1995 (No. 56 of 1995) (i.e. new Part IIA and new Schedule for the implementation of the Convention on International Wills) had not yet come into operation despite the fact that the relevant Bill was passed in July 1995. The Panel had written to the Administration requesting it to provide information on the situation of the non-commencement of ordinances. As the Administration had undertaken to revert to the Panel around February or March 2008, the Chairman suggested and members agreed that the item be included in the list of outstanding issues and scheduled for discussion in February 2008.

III. Pilot Scheme for Building Management Cases in the Lands Tribunal
(LC Paper No. CB(2)401/07-08(01) - Judiciary Administration's paper on "Pilot Scheme for Building Management Cases in the Lands Tribunal")

4. Deputy Judiciary Administrator (Operations) (DJA) introduced the paper which set out the main features of the Pilot Scheme for Building Management Cases in the Lands Tribunal to be launched on 1 January 2008 (the Pilot Scheme).

5. The Chairman sought views from the Hong Kong Bar Association (the Bar Association) on the making of adverse costs order against parties who had unreasonably refused or failed to attempt mediation in building management disputes.

6. Mr Rimsky YUEN, Chairman of the Bar Association, said that the Bar Association supported the Pilot Scheme. As adverse costs order had been imposed in England for more than 10 years, he could understand the rationale for introducing it under the Pilot Scheme.

7. The Chairman asked about the services provided by the Building Management Co-ordinator's Office (BMMCO) set up in the Lands Tribunal under the Pilot Scheme. DJA explained that the BMMCO served as a co-ordinator and not a mediator for building management disputes. It would conduct information sessions for parties who were willing to attempt voluntary mediation before or after they issued proceedings in the Lands Tribunal. The actual mediation service would be provided by accredited mediators. In this regard, the BMMCO would maintain a list of accredited mediators who were willing to participate in the Pilot Scheme, whether on a pro bono or fee-charging basis. It would also liaise with mediators on mediation outcome.

8. In response to the Chairman on the qualification and experience of, and fees charged by, the accredited mediators, DJA said that the Administration had contacted the relevant bodies, including, among others, the Hong Kong International Arbitration Centre and the Hong Kong Mediation Council. Some 120 accredited mediators had expressed interest in participating in the Pilot Scheme. The charges of these mediators ranged from a hundred dollars to several thousand dollars per hour. More than 100 accredited mediators had indicated that they would participate in the Pilot Scheme on a pro bono basis.

9. Assistant Judiciary Administrator (Development) (AJA) supplemented that the BMMCO maintained a list of accredited mediators whose years of experience in mediation ranged from one year to over 10 years. The BMMCO could provide information on the mediators, such as their qualifications and working experience, to participants of the Pilot Scheme.

10. Noting that the Pilot Scheme would apply primarily to cases with legal representation on both sides, Mr James TO asked about the estimated number of cases to be covered by the Pilot Scheme. DJA said that the Lands Tribunal handled

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about 400 building management cases a year. It was estimated that about 30 to 40 cases would be covered by the Pilot Scheme.

11. Mr James TO said that it might be more meaningful to expand the scope of the Pilot Scheme to cover cases without legal representation on both sides. DJAO responded that as a first step, the Pilot Scheme would apply to cases with legal representation. He would not rule out the possibility of extending the Pilot Scheme to cases with unrepresented litigants. Subject to the response received on the Pilot Scheme, the Judiciary would consider expanding its scope.

12. Ms Emily LAU asked whether the setting up of the BMMCO would facilitate more efficient and expeditious disposal of building management cases. She also asked whether the small number of cases estimated to be covered by the Pilot Scheme was due to the shortage of manpower or other reasons.

13. DJAO explained that the aim of the Pilot Scheme was to facilitate more efficient and expeditious disposal of building management cases. Unnecessary hearings would be cut down and in circumstances where directions could fairly be given on paper without any oral hearing, the Tribunal would do so. Unnecessary interlocutory applications would be discouraged and in appropriate cases, cost sanctions would be imposed. The Judiciary Administration considered it a fair guess that about 30 to 40 cases would be covered by the Pilot Scheme as a start.

14. Ms Emily LAU asked the Bar Association whether in a building management case which was legally represented, the lawyers concerned would be involved in the mediation process. Mr Rimsky YUEN said that the training for lawyers undertaking litigation and mediation was different. Depending on the complexity of cases, mediators would prefer not having lawyers involved in the mediation process. In England and some countries in Europe, lawyers were not involved at the initial stage of the mediation. However, when a dispute could be resolved by mediation, lawyers would be brought in to ensure that an appropriate settlement was signed between the two parties. The Bar Association considered that there should be a cultural change in the community to accept mediation as an alternative dispute resolution mechanism. The Bar Association would provide training to facilitate the participation of barristers in mediation. At present, only a few of the some 1 040 barristers in Hong Kong had experience in mediation.

15. In response to the Chairman on the review of the Pilot Scheme and scope of the review, DJAO said that it would take three to six months for the Judiciary to evaluate the effectiveness of the Pilot Scheme after it had been launched for 12 months. The review report would provide information on the effectiveness of the Pilot Scheme, the caseload, the number of mediators participating in the Scheme, the mediation cost, the user feedback, and whether the Scheme should continue etc. The Chairman said that the Panel would follow up the review with the Administration in March or April 2009.

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IV. Solicitors' rights of audience

(LC Paper No. CB(2)559/07-08(06) - Background Brief prepared by the Legislative Council Secretariat on "Solicitors' rights of audience"

LC Paper No. CB(2)464/07-08(01) - Final Report of the Working Party on Solicitors' Rights of Audience

LC Paper No. CB(2)464/07-08(02) - Press release concerning the Final Report

LC Paper No. CB(2)559/07-08(07) - Judiciary Administration's paper on "Final Report of the Working Party on Solicitors' Rights of Audience")

16. Mr Stuart STOKER, Secretary of the Working Party on Solicitors Rights of Audience (the Working Party), briefed members on the Final Report of the Working Party (the Report). He said that the Working Party comprising, among others, representatives from the Bar Association, the Law Society of Hong Kong (the Law Society) and the Judiciary had unanimously agreed to extend higher rights of audience to suitably qualified solicitors. He highlighted the guiding principle and the recommendations of the Working Party as set out in paragraphs 5 and 67 of the Report respectively.

17. Mr Andrew JEFFRIES of the Law Society of Hong Kong said that the Law Society endorsed the Report. He urged for early implementation of the proposed scheme for granting solicitors higher rights of audience (the proposed scheme) and said that the Law Society was prepared to assist in drawing up the rules for the granting of higher rights of audience to solicitors.

18. Mr Rimsky YUEN said that the Bar Association supported the recommendations of the Working Party in principle. The Bar Association would keep a close watch on the following areas -

- (a) how the standards of applicants for higher rights of audience would be assessed; and
- (b) how the conduct and discipline of solicitor-advocates would be properly regulated.

19. The Chairman asked whether a bill on higher rights of audience would be introduced into the LegCo in the current session. As the Department of Justice (DoJ) was not represented at the meeting, Mr STOKER informed members that the Chief Justice had accepted the Working Party's recommendations and sent the Report to the Secretary for Justice. To his understanding, the DoJ was planning to write formally to the two legal professional bodies to seek their views on the recommendations of the Report. The Chairman said that the consultation might not be necessary given that the two legal professional bodies were represented in the Working Party and had expressed support for the recommendations. She was of the view that the primary

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legislation to implement the proposed scheme should be introduced within the current session. Mr STOKER said that he was not in a position to respond on behalf of the DoJ. Hopefully, the formal consultation process would not delay the legislative process unduly. He would relay the Chairman's concern to the DoJ.

20. Mr Martin LEE asked whether the Bar Association intended to discuss the proposed scheme at a general meeting. Mr Rimsky YUEN responded that the subject of higher rights of audience had been discussed on a number of occasions in the past and relevant papers had been circulated to members of the Bar Association. A special committee chaired by Mr Philip DYKES had produced a report on the subject in around 2004-2005. Two seminars had been held for the Young Bar and the Bar respectively shortly after the consultation paper was published by the Working Party in May 2006. The Bar Association had responded to the consultation paper. The Bar Council would consider the Report at its next meeting.

21. Mr Martin LEE asked if one or more solicitors of a law firm had become solicitor-advocates, whether they could form themselves into a separate firm and take up cases on the instruction of other firms, as if they were barristers.

22. Mr Andrew JEFFRIES responded that drawing from the experience of England, predominately solicitor-advocates would deal with advocacy work on their own cases as litigation solicitors and assist junior solicitors in advocacy work within their firms. There was a possibility under the scheme for a solicitor to deal with purely advocacy on the instruction of other firms, but the experience in England indicated that such cases were rare. In Australia, solicitors who specialised in advocacy were a firm in themselves and they almost performed the work of barristers. Mr JEFFRIES added that the conduct and discipline of solicitor-advocates would be regulated by a code of conduct to be drafted by the Council of the Law Society. The code would address whether and to what extent the so-called "cab rank rule" should apply to solicitor-advocates.

23. Mr Rimsky YUEN said that as a result of an informal consultation with members of the Bar in the United Kingdom, he was given to understand that the exercise of higher rights of audience by solicitors was not frequent, although the scheme had been introduced in England for quite some time.

24. Mr Martin LEE requested to put on record that when a bill was introduced into the LegCo, the code of conduct should be ready for members' consideration. He asked whether the Working Party had discussed the details of the proposed code of conduct for solicitor-advocates and considered the codes of conduct of other jurisdictions. His request was supported by Ms Miriam LAU.

25. Mr Stuart STOKER said that materials on overseas practices had been given to members of the Working Party for reference. He did not recall the Working Party having specifically discussed the nature of the code of conduct. The Working Party had reached broad agreement on the way forward and agreed to leave matters of detail,

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such as the drafting of the code, until a later stage. The Working Party agreed that the conduct and discipline of solicitor-advocates would be the responsibility of the Council of the Law Society, who would draw up a code of conduct in consultation with the Bar Association and the Judiciary.

26. Responding to Mr Rimsky YUEN's concerns as expressed in paragraph 18 above, Ms Miriam LAU pointed out that the Bar Association would be represented in the Higher Rights Assessment Board (the Assessment Board), and would be actively involved in the drafting of the code of conduct for solicitor-advocates.

27. Mr Rimsky YUEN said that the Bar in principle supported the concept of higher rights of audience because it was in the interest of the public. However, whether or not the concept would work would depend on the implementation details. The Bar Association would like to ensure that the general public would be enjoying a proper standard of advocacy in all courts, whether they were represented by a solicitor or a member of the Bar Association.

28. Ms Miriam LAU asked whether the code of conduct for solicitor-advocates would be modelled on those of England, Wales and Scotland with modifications, and whether the Law Society had already drafted the rules.

29. Mr Andrew JEFFRIES responded that the position of the Law Society was that the codes of conduct for solicitor-advocates in England and Wales and Scotland had worked well and they would be a good reference for Hong Kong. There was a need to review those rules for adaptation to the circumstances of Hong Kong. The draft rules were available and had been seen by the Working Party. He affirmed that the Bar Association, the Judiciary, the Law Society and a lay member were supervising the formulation of these rules and the criteria in assessing applications for higher rights of audience.

30. Ms Emily LAU asked about the benefits of the proposed scheme to the public and whether it would bring down litigation costs.

31. Mr Rimsky YUEN said that whether the proposed scheme would result in savings in litigations costs would depend on the complexity of the cases involved. For cases involving only a few court hearings, such as simple bankruptcy cases, there would likely be savings if they were handled by solicitor-advocates instead of barristers. If a solicitor had been handling a case for a long time, there could be savings in preparatory work if he later took up advocacy work. However, for complex cases, solicitor-advocates would not handle the case alone. If a team headed by a solicitor-advocate took up such a case, the litigation costs involved would not necessarily be lower than that of a team headed by a barrister, in particular when the solicitor-advocate was more senior in comparison with the barrister. Extending higher rights of audience to qualified solicitors therefore would not necessarily bring down the costs of litigation, but it would provide more choices to customers by enlarging the pool of advocates.

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32. Mr Andrew JEFFRIES said that the real benefit to the public was the freedom of choice, which did not exist at present. He informed members that he had worked as a solicitor-advocate in London for a number of years before coming to Hong Kong. His experience was that a solicitor-advocate would not choose to take up advocacy in each and every case. While it would be more efficient and cost-effective for a solicitor-advocate to take up advocacy himself in many cases, there were also occasions on which he was too busy to deal with the matter or he considered that it was in the client's best interest for a specialist from the Bar to take up the case. For that reason, the Bar in London had thrived and grown despite competition from solicitor-advocates. He agreed with Mr Rimsky YUEN that extending higher rights of audience did not always bring down litigation costs. There were, however, many examples where significant costs were saved. Mr Mark LIN of the Law Society added that under the Solicitor's Guide to Professional Conduct, a solicitor had the duty to advise his client of the costs of the different options. He also had a duty to do what was in the client's best interest, including bringing in a member of the Bar to better serve his client.

33. Mr Martin LEE expressed concern about the response of the Young Bar on the proposed scheme, given that the membership of the Working Party did not include junior barristers. Mr Stuart STOKER informed the Panel that one member joined the Working Party as a junior member of the Bar but had later become senior counsel.

34. The Chairman said that shortly after the release of the Report, she had personally consulted some junior members of the Bar. While they were ready to accept the new development, they had also expressed concerns about their position. As solicitor-advocates who were granted higher rights of audience by the Assessment Board would have their seal of approval, the Chairman asked what the Bar Association intended to do to increase the competitive edge of the Young Bar on a corporate level.

35. Mr Rimsky YUEN responded that apart from holding a forum specifically with the Young Bar, junior members of the Bar were consulted on the consultation paper before the Bar Association putting forth its position paper on the subject. Mr YUEN said that since he took up chairmanship, the Bar Council had considered means to enhance the public's confidence in barristers who had completed pupillage, for example, in the form of examination or accreditation. The task, however, was more difficult than anticipated. Some progress had been made but it was not as fast as expected. He assured members that something was being done by the Bar Council in this respect.

36. In response to members, the Chairman said that the Secretary of Justice would be requested to advise members on the legislative timetable and the steps involved before introducing the legislation.

(Post-meeting note: The response of the Administration on the timetable for introducing the legislation was issued to members vide LC Paper No. CB(2)878/07-08(01) on 17 January 2008.)

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V. Review of the jurisdiction of the Office of the Ombudsman

(LC Paper No. CB(2)559/07-08(08) - Administration's paper on "Review of the jurisdiction of the Office of the Ombudsman"

LC Paper Nos. CB(2)559/07-08(09) and (10) - Extracts from minutes of meeting on 26 June 2006 and the Administration's response to para. 22 of the minutes of the meeting

LC Paper No. CB(2)559/07-08(11) - Schedules 1 and 2 to the Ombudsman Ordinance (Cap. 397))

37. Members noted that the review of the jurisdiction of the Office of the Ombudsman (the Review) consisted of two parts. Part I was an operational review of The Ombudsman Ordinance (Cap. 397) (TOO) and Part II provided a more generalised review of developments in ombudsmanship. The Ombudsman submitted Part I and Part II of the Review to the Administration in November 2006 and November 2007 respectively.

38. Director of Administration (D of Adm) introduced the paper which set out the Administration's initial response to the recommendations made in Part I of the Review.

39. Ms Emily LAU said that LegCo Members held a meeting with the Ombudsman on 11 December 2007. She expressed concern that the Administration had taken one year to respond to the recommendations made in Part I of the Review. She urged the Administration to give a prompt response to the recommendations made in Part II of the Review which covered, among others, handling complaints on human rights issues. Noting that the Registration and Electoral Office (REO) and the Home Affairs Department (HAD) were currently subject to the Ombudsman's jurisdiction under Part I of Schedule 1 to TOO, Ms LAU asked whether the Ombudsman could investigate a complaint against the REO or HAD about electoral arrangements on a polling day.

40. D of Adm responded that if the complaint was related to the work of the REO and HAD, the Ombudsman could follow it up. However, she was not in a position to provide a definite reply to Ms LAU's question unless specific details of the complaint were available.

41. In response to Ms Emily LAU, D of Adm said that the Ombudsman had recommended the inclusion of eight bodies in Part I of Schedule 1 after taking their executive powers, extensive interface with or impact on the public and the main source of funding into account. Other than the Electoral Affairs Commission (EAC) and the District Councils (DCs), the Administration considered that the following six bodies should be consulted on the recommendation -

- (a) Auxiliary Medical Service;

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- (b) Civil Aid Service;
- (c) Board of Management of Chinese Permanent Cemeteries;
- (d) Chinese Temples Committee;
- (e) Consumer Council; and
- (f) Estate Agents Authority.

42. Mr Martin LEE noted that the Administration did not see a case for including the EAC and the DCs in the Schedule as recommended by the Ombudsman. He requested the Administration to provide a paper explaining why subjecting the EAC to the Ombudsman's jurisdiction would affect its independence and impartiality. The Administration should also explain in the paper why DCs should not be subject to the Ombudsman's jurisdiction.

D of Adm

43. On the latter question, D of Adm explained that from January 2008 onwards, the role of DCs would be expanded within the existing legislative framework. However, the day-to-day management of district facilities would continue to be handled by the relevant executive departments which were already subject to the jurisdictions of the Ombudsman. Hence, it was not appropriate to place the DCs under the Ombudsman's jurisdiction.

44. Ms Emily LAU said that there were justifications for the Ombudsman to recommend the inclusion of eight bodies in Part I of Schedule 1. She did not understand why the Administration did not provide a copy of the Ombudsman's Review for members' reference.

45. D of Adm explained that the Administration could only provide its initial views on the recommendations made in Part I of the Review at this stage and it was still considering other recommendations made by the Ombudsman. The Administration would give a comprehensive response in due course.

46. The Chairman said that she could understand the position of the Ombudsman that it was inappropriate for her to provide a copy of the Review to the Panel directly. However, if the Ombudsman raised no objection, the Administration should provide a copy of the Review to the Panel for reference. Members agreed that the Panel would further discuss the issue at a meeting in early 2008 when more information was available.

D of Adm

47. There being no other business, the meeting ended at 6:16 pm.