

立法會
Legislative Council

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LC Paper No. CB(2)2325/07-08
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 28 April 2008, 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 Audrey EU Yuet-mee, SC, JP
Hon LI Kwok-ying, MH, JP

Public Officers attending : Item IV
The Administration

Mr Arthur HO Kin-wah
Permanent Secretary for Constitutional and Mainland Affairs
(Acting)

Mr Gary POON Wai-wing
Principal Assistant Secretary for Constitutional and Mainland
Affairs

Mr Benedict LAI Ying-sie
Law Officer (Civil Law)

Mr Gilbert MO Sik-keung
Deputy Law Draftsman (Bilingual Drafting & Administration)

Item V

Department of Justice

Mr Eamonn Moran
Law Draftsman

Mr Gilbert MO Sik-keung
Deputy Law Draftsman (Bilingual Drafting & Administration)

Item VI

Judiciary Administration

Miss Emma LAU
Judiciary Administrator

Miss Vega WONG
Assistant Judiciary Administrator (Development)

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 Fanny TSANG
Legislative Assistant (2)3

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2)1697/07-08 - Minutes of meeting on 25 February 2008)

The minutes of the meeting held on 25 February 2008 were confirmed.

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II. Information papers issued since last meeting

(LC Paper No. CB(2)1473/07-08(01) - Judiciary Administration's paper on "Court waiting times"

LC Paper No. CB(2)1674/07-08(01) - Copy of the corrigenda provided by the Administration on Consultation Paper : Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill

LC Paper No. CB(2)1691/07-08(01) - Summary of the disclosure guidelines prepared by the Standing Committee on Disclosure)

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

III. Items for discussion at the next meeting

(LC Paper No. CB(2)1699/07-08(01) - List of outstanding items for discussion

LC Paper No. CB(2)1699/07-08(02) - List of items tentatively scheduled for discussion at Panel meetings in 2007-2008 session

LC Paper No. CB(2)1699/07-08(03) - List of follow-up actions)

Agenda for the next meeting

3. Members agreed that the following items would be discussed at the next meeting on 26 May 2008 -

- (a) Interim Research Report on "Legal aid systems in selected places" prepared by the Research and Library Services Division of the Legislative Council (LegCo) Secretariat;
- (b) Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants;
- (c) Creation of posts to strengthen the establishment of judges and judicial officers and the directorate structure of the Judiciary Administration; and
- (d) System for the determination of judicial remuneration.

Agenda for a special meeting

4. Members agreed to hold a special meeting to discuss the item "Demand for and supply of legal and related services" which was originally scheduled for discussion at the meeting in May 2008. The Chairman said that the two legal professional bodies and the Consumer Council should be invited to give views on the item. The date of the special meeting would be worked out after the meeting.

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(*Post-meeting note: With the concurrence of the Chairman, the special meeting will be held on 29 May 2008 at 2:30 pm.*)

Pre-trial interviewing of witnesses by prosecutors

5. The Chairman said that it had come to her attention that the Prosecutions Division would conduct a monitoring exercise to collect relevant statistics and information to assess the need to introduce the pre-trial interviewing of witnesses by prosecutors in Hong Kong. The correspondence between the Panel and the Administration were tabled at the meeting (issued to members vide LC Paper No. CB(2)1762/07-08 on 30 April 2008). The Chairman consulted members on the need and the timing for discussing the issue. Members agreed to discuss the issue at the regular meeting in June 2008.

IV. Applicability of HKSAR laws to offices set up by the Central People's Government in the HKSAR

(LC Paper No. CB(2)1356/07-08(01) - Background Brief prepared by the Legislative Council Secretariat on "Applicability of Ordinances to offices set up by the Central People's Government in the Hong Kong Special Administrative Region"

LC Paper No. CB(2)1356/07-08(02) - Administration's paper on "Applicability of HKSAR laws to offices set up by the Central People's Government in the HKSAR"

LC Paper No. CB(2)1699/07-08(04) - Administration's further paper on "Applicability of HKSAR laws to offices set up by the Central People's Government in the HKSAR"

LC Paper No. CB(2)1699/07-08(05) - Submission from the Hong Kong Bar Association on "Applicability of HKSAR laws to offices set up by the Central People's Government in the HKSAR")

6. Permanent Secretary for Constitutional and Mainland Affairs (Acting) (PSCMA(Atg)) briefed the Panel on the supplemental paper on "Applicability of HKSAR laws to offices set up by the Central People's Government in the HKSAR" (LC Paper No. CB(2)1699/07-08(04)) which was prepared in response to the issues raised by members at the last meeting.

7. Members noted that the three offices set up by the Central People's Government (CPG) in the Hong Kong Special Administrative Regions (HKSAR) were the Liaison Office of the CPG in the HKSAR, the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the HKSAR, and the Hong Kong Garrison of the Chinese People's Liberation Army. The first paper provided by the Administration (LC Paper No. CB(2)1356/07-08(02)) set out the latest development of the following issues -

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- (a) legislative work relating to the 16 ordinances (listed at Annex A to the paper) that expressly bound the Government but were silent on their applicability to offices set up by the CPG in the HKSAR; and
- (b) adaptation of the 35 Ordinances (listed at Annex B to the paper) that were expressed to bind, or apply to, the "Crown".

8. Ms Emily LAU expressed dissatisfaction with the little work progress achieved by the Administration after a lapse of 10 years. She was particularly concerned about the applicability of the Personal Data (Privacy) Ordinance (PDPO) (Cap. 486) to offices of the CPG stationed in the HKSAR and whether these offices were beyond the reach of Hong Kong law. Ms LAU also referred to paragraph 4 of the Administration's supplemental paper and pointed out that it did not make sense to make reference to the practices in the United Kingdom and New Zealand, which unlike Hong Kong, were sovereign states.

9. Miss CHOY So-yuk asked whether the Administration had discussed the applicability of the PDPO to the CPG offices set up in the HKSAR with the Central Authorities.

10. PSCMA(Atg) explained that paragraph 4 of the supplemental paper sought to point out that the principle that legislation did not bind the sovereign power unless it expressly said so or it appeared by necessary implication that this was so intended was commonly adopted by some other common law jurisdictions, including the United Kingdom and New Zealand. He further said that the Government had been studying and discussing with the relevant authorities of the CPG on whether and how the ordinances listed at Annex A could be made applicable to the CPG offices. Progress had been made. In accordance with the consensus reached, as a start, the Administration intended to introduce amendments to four ordinances in the 2008-2009 legislative session to expressly provide that they would also apply to the offices set up by the CPG in the HKSAR. The four ordinances were The Legislative Council Commission Ordinance (Cap. 443), Plant Varieties Protection Ordinance (Cap. 490), Patents Ordinance (Cap. 514) and Registered Designs Ordinance (Cap. 522). As regards the PDPO, it was one of the 16 ordinances listed in Annex A. Given the complexity of the PDPO, the Administration needed more time to study whether and if so how it should apply to the CPG offices. The Administration could not give a timetable at this stage.

11. The Chairman expressed concern that the Administration was unable to tell the public unequivocally whether the PDPO applied to the CPG offices set up in the HKSAR. She pointed out equality before the law and the clarity of the law were fundamental requirements of the rule of law. Given that Article 22(3) of the Basic Law (BL22(3)) required that the CPG offices and their personnel should abide by the laws of the HKSAR, allowing the CPG offices not to be bound by Hong Kong laws clearly infringed the letter and spirit of BL22(3).

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12. The Chairman said that following the adaptation of "Crown" in section 66(1) of the Interpretation and General Clauses Ordinance (Cap. 1) to "State", section 66(1) read "No Ordinance shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby". The Chairman raised the following concerns -

- (a) as BL 22(3) provided that the CPG offices should abide by the laws of Hong Kong, section 66(1) was inconsistent with BL 22(3); and
- (b) "State" was defined in Cap. 1 to include, among others, "the President of the People's Republic of China" and "the Central People's Government". It was inconceivable how the HKSAR could pass an Ordinance to bind its sovereign state.

13. The Administration explained that the fundamental principle that everyone was subject to the law did not mean that it was necessary or appropriate for every ordinance to bind every person or body. Although BL 22(3) stipulated that the CPG offices and their personnel must abide by the laws of the HKSAR, it should not be taken to mean a particular ordinance must be binding on them. The scope of applicability of an ordinance should reflect the policy intention.

14. The Administration stressed that section 66 of Cap. 1 did not place anybody above the law. One had to study the legislative intent of an ordinance and if the policy intention was that it should apply to the CPG offices in the HKSAR, amendment should be made to the ordinance to include a provision to that effect. The Administration held the view that section 66 of Cap. 1 was not inconsistent with the Basic Law.

15. Mr Martin LEE disagreed with the view of the Administration. As a member of the Drafting Committee for the Basic Law, he recalled that the purpose of BL 22(3) was to ensure that the CPG offices in Hong Kong should abide by the laws of the HKSAR. The presumption of exclusion of the "State", which included the CPG offices, to the HKSAR laws in section 66 of Cap. 1 was inconsistent with BL 22(3). He said that the Administration should consider reviewing the formulation of section 66(1) and the definition of "State" in Cap. 1. The Administration reiterated that the principle behind section 66 of Cap. 1 was adopted by some other common law jurisdictions, and that this principle was not inconsistent with the Basic Law.

16. The Chairman said that the uncertainty of the application of the PDPO, which touched upon the right to privacy of the public and regulated the collection, maintenance and use of personal data, was only one example of the larger issue of applicability of Hong Kong legislation to the CPG offices set up in the HKSAR.

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17. Ms Audrey EU suggested that the Panel should follow up the matter by writing to the Secretary for Justice. Ms Emily LAU suggested that the Panel should make a report to the House Committee and the Chairman should move a motion for debate in Council on behalf of the Panel. The Chairman said that she would write a letter to the Secretary for Justice conveying the discontent and concerns of the Panel. The letter would be copied to the Chief Secretary for Administration and the Secretary for Constitutional and Mainland Affairs. The Panel would consider the next course of action after receiving the reply from the Secretary for Justice. Members agreed.

(Post-meeting note: The Chairman's letter was issued on 5 May 2008.)

V. Meeting with the Law Draftsman

(LC Paper No. CB(2)1699/07-08(06) - Background Brief on "Issues of concern raised by Members relating to the Law Drafting Division" prepared by the Legislative Council Secretariat

LC Paper No. CB(2)1699/07-08(07) - Administration's paper on "The Law Drafting Division of the Department of Justice")

18. Law Draftsman (LD) updated members on the latest position with respect to the issues raised by members relating to the work and staffing of the Law Drafting Division (LDD) of the Department of Justice (DoJ), as set out in the Administration's paper.

19. Ms Miriam LAU expressed disappointment about the quality of drafting of the Chinese texts of legislation. Although bilingual legislation had been implemented for some 20 years, she still found that the Chinese texts difficult to follow. In an effort to maintain equal authenticity of legislation, the Chinese texts were sometimes unnatural and not easily readable. Given the many differences between the English and Chinese languages, such as grammar, sentence structure, etc., the objective should be to ensure that there was no discrepancy in meaning between the two languages, instead of matching the two texts too closely.

20. LD said that given that he was monolingual, he could not comment on the readability of the Chinese legislation. Since a long English text would add complexity to the Chinese rendition, the LDD would continue its effort to make the drafting of the English text as plain and simple as possible so as to assist the drafting of the Chinese text.

21. DLD supplemented that one of the practical difficulties faced by law draftsmen was that by the time the English text was finalised, there was limited time left for preparation of the Chinese text, and even less time to refine it. There were cases in which law draftsmen tried to achieve clarity by structuring the Chinese text in a manner different from that of the English text, Members and the Legal Service Division of LegCo commented that the two texts did not match, although no one could really point out that there was any discrepancy in the meaning of the two texts.

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22. Ms Miriam LAU said that on those occasions, the draftsman should convince Members that the drafted version was more readable than a word-for-word translation. The Chairman said that she was aware that there had been a movement away from word-for-word translation in recent law drafting.

23. Ms Emily LAU said that she supported the drafting policy of the DoJ that both the English and Chinese texts should accurately reflect the policy intent and should be easy to comprehend and understand. The duty of the LD was to ensure that legislation in Hong Kong could achieve that goal. Given the difficulty in finding someone who was equally proficient in English and Chinese to fill the position of the LD, she was in support of the position being filled by a top class monolingual professional. That said, bilingual drafting was important as the vast majority of the population in Hong Kong were Chinese. She asked whether the LDD would deploy more resources to provide sufficient training for bilingual draftsmen. She also enquired about the process for drafting legislation.

24. LD said that a number of seminars had been organised to enhance the Chinese drafting skills of counsel. He was aware that colleagues were keen to produce good Chinese texts. On some occasions, changes were made to the English texts in order to help drafting the Chinese texts. Nevertheless, colleagues in drafting Chinese texts were in a less advantageous position because of the shortage of time. By convention, the initial text was produced in English. After clearing the English text with the policy bureau, limited time was left for the Chinese text. DLD supplemented that legislation invariably had to be drafted in English first, because the drafting instructions were issued in English only. In addition, some members of the drafting team and some colleagues in policy bureaux were monolingual.

25. The Chairman said that given that counsel in Hong Kong learnt their law in English, it was natural that their working language was English. In addition, some legal concepts in common law had no direct or equivalent in Chinese.

26. Mr Martin LEE expressed concern that there had been far too many cross references in existing legislation. Given that the modern trend was to have less cross references, he asked whether there was any conscious policy statement within the LDD to cut down cross references in legislation unless they were absolutely unavoidable.

27. LD confirmed that the modern trend was to move away from building in excessive cross references in legislation, as people had to read a law in context. He considered that the existing law in Hong Kong was not over laboured with cross references. Although there was no conscious policy within the LDD to cut down cross references, the LDD was committed to drafting law in plain language. He pointed out that an excessive amount of cross references made the text difficult to read and ran against the policy of drafting in plain language. Law draftsmen would reduce and remove unnecessary cross references as far as possible.

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28. The Chairman said that while cross references made text difficult to read, a definition that was complicated and carried a meaning different from common sense also made the law difficult to comprehend. She recalled that during the process of scrutinising the Interception of Communications and Covert Surveillance Bill, the scope of the Bill became apparent only when one had read the "Long Title" together with the definition of the term "communication". As artificial and complicated definitions would require cross referencing, it should be avoided in legislation.

29. LD responded that in terms of getting messages across, law draftsmen sometimes used tools such as explanatory notes to help readers to get the complete picture of the underlying policy objective behind a proposal. He pointed out that no one law operated on its own; it operated on a whole body of other laws whether the common law or other statutes. In a complex area, law draftsmen struggled to produce a text to enable someone who had no background to pick up the meaning readily from the law. No matter how much law draftsmen were committed to drafting in plain language, they had to recognise the limitation. Hence, law draftsmen might try to use explanatory materials to help in getting the meaning across.

30. The Chairman asked about the working relationship between the LDD and policy bureaux in introducing legislation. LD said that the best way was to let policy bureaux know that fully developed proposals and adequate time were necessary for producing good text. Ideally, if a policy was clearly made at the outset and would not shift as it went through the drafting process, the LDD could then concentrate to deliver that policy intent in the best possible way. However, the reality was, when law draftsmen asked about details of a proposal, policy bureaux sometimes began to rethink about the proposal and that would allow less time for drafting.

31. The Chairman concluded by saying that the LDD might need to work out some operational rules with policy bureaux to improve upon the present situation.

VI. Transcript fees

(LC Paper No. CB(2)1699/07-08(08) - Background Brief on "Fees for transcript and record of proceedings" prepared by the Legislative Council Secretariat

LC Paper No. CB(2)1699/07-08(09) - Judiciary Administration's paper on "Fees for Transcript and Record of Proceedings")

32. Judiciary Administrator (JA) introduced the paper which reported on the actions taken by the Judiciary Administration since the item was last discussed.

33. In response to Mr Martin LEE, JA confirmed that "76%" which appeared in the table under paragraph 5 and paragraph 6 of the paper should read "75%".

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34. Members raised no more queries on the paper. JA informed members that the Judiciary Administration would conduct an overall costing review of transcript and recording services by end-2008.

(Post meeting note: The Law Society of Hong Kong's letter dated 25 April 2008 concerning transcript fees was issued to members vide LC Paper No. CB(2)1769/07-08 on 30 April 2008. The Judiciary Administration has been requested to take into account the view of the Law Society in conducting the overall review by end-2008.)

35. There being no other business, the meeting ended at 6:15 pm.

Council Business Division 2
Legislative Council Secretariat
19 June 2008