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Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 28 April 2008

Issues of concern raised by Members relating to the Law Drafting Division

Purpose

This paper summarizes the main issues raised/discussed by Members relating to the work or staffing matters of the Law Drafting Division (LDD) of the Department of Justice (DoJ) since the first term of the Legislative Council (LegCo).

Drafting of bilingual legislation

Background

2. Before April 1989, all legislation in Hong Kong were drafted and enacted in English only. The Official Languages Ordinance (Cap. 5) and the Interpretation and General Clauses Ordinance (Cap. 1) were amended in 1989 to provide statutory authority for enacting legislation in both Chinese and English.
3. Before the reunification, the Bilingual Legislation Programme consisted of two elements. New enactments were drafted and enacted in English and Chinese. As regards ordinances enacted previously in English only, Chinese texts were prepared under the Law Translation Programme. The Chinese texts were declared authentic by the Governor-in-Council after consulting the Bilingual Laws Advisory Committee. The Law Translation Programme was completed in May 1997. Since July 1997, all new legislation have been drafted and enacted bilingually.
4. Section 10B(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that both the English text and the Chinese text of an ordinance were equally authentic. While the English text is usually drafted first and forms the basis upon which the Chinese text is prepared, the Chinese text is not a translation. In terms of legal status and effect, both texts are equal and should be treated as such.
5. The LDD of the DoJ is responsible for drafting all legislation promoted by the Administration. Law draftsmen in the LDD are members of the Government Counsel (GC) grade, one of the degree/professional grades.

6. According to the DoJ, the drafting policy for the two texts is the same. The policy is to draft legislation that -

- (a) can accurately reflect the policy intent; and
- (b) subject to (a), is easy to comprehend and understand.

As between the two texts, there must not be any discrepancy in meaning. The Chinese text must convey the same idea to the readers of the Chinese text as the English text to its readers.

Past discussions

7. The standard and quality of drafting of bilingual legislation was raised/discussed at a number of special meetings of the Finance Committee (in the 1999-2000, 2000-2001, 2003-2004, 2005-2006, 2006-2007 and 2007-2008 sessions) and meetings of the Panel on Administration of Justice and Legal Services (in the 2000-2001, 2004-2005, 2005-2006 and 2006-2007 sessions). Some of the general problems highlighted by Members are summarized below -

- (a) the drafting of some bills showed that there was a need for more research into related ordinances to ensure that the provisions would be consistent with existing provisions of related ordinances;
- (b) in the case of some bills on monetary and financial matters, the drafting reflected insufficient understanding of the subject matters;
- (c) the bills were drafted in a cumbersome style with complicated and convoluted sentences which were difficult to understand, especially for the Chinese text of the provisions;
- (d) the progress of bilingual drafting in plain and modern language was less than satisfactory; and
- (e) due to staff changes, there had been occasions when the law draftsman attending the meetings of the Bills Committee was not the one who drafted the bill.

8. The Panel discussed the drafting policy on bilingual legislation at its meeting on 20 March 2001. The discussion was prompted by the concern expressed by members of the Bills Committee during the scrutiny of the Securities and Future Bill which was introduced into the LegCo on 29 November 2000. The Bills Committee noted that there were differences in the drafting and style between the English and Chinese texts of the Bill. Members of the Bills Committee were concerned that this would lead to different interpretation of the two texts of the Bill which might have far-reaching implications.

9. The Panel noted that different approaches were adopted in drafting the Securities and Future Bill as follows -

- (a) the Chinese text contained less details than the English text;
- (b) there was structural difference between the English and Chinese texts; and
- (c) the reader of the Chinese text had to refer to another part of the Bill for details.

10. The Panel's views were that -

- (a) it would be preferable for the two texts of a bill to be drafted by the same team of law draftsmen working closely with each other;
- (b) the two texts of legislation should match as far as possible in order to minimize the chance of textual differences giving rise to different legal interpretation;
- (c) the personal style of presentation should not feature in the drafting of legislation; and
- (d) new legislation in bilingual versions should be made in plain and comprehensible language.

11. The Panel asked DoJ to consider adding another element to its drafting policy in paragraph 6 above, i.e. both the Chinese and English texts should also match language-wise as far as possible. DoJ had no objection and agreed to review its internal criteria having regard to the Panel's view.

Mentorship Scheme and training programmes

12. Some Members expressed concern about the measures to enhance the drafting skills of law draftsmen and considered that a mechanism should be in place to monitor the quality of law drafting. Some Members considered that more resources should be allocated to the DoJ for providing sufficient training to law draftsmen.

13. In April 2006, the Panel was briefed on the operation of the Mentorship Scheme which started as a trial scheme in November 2001 and became permanent in September 2005. Under the Scheme, each counsel (mentee) in the Senior GC or GC rank was assigned a mentor at the directorate level. The Scheme had dual purpose. It was a quality control mechanism under which the drafting of the mentee was vetted by the mentors. It also served a training function. The arrangement allowed junior drafters to gain exposure to more complicated work at an early stage of their career, and enabled them to acquire knowledge more conveniently from the experienced colleagues.

14. The Panel was advised that arrangement had been made for two SGC to attend the following two short-term overseas training attachments in 2005 -

- (a) Legislative Services Branch of the Department of Justice and House of Commons, Ottawa of Canada; and
- (b) Parliamentary Counsel Office, London of United Kingdom.

The continued arrangement of similar training in future would be subject to availability of host offices, funds and suitable candidates. Members considered that similar overseas training attachments should be arranged if such attachments were conducive to enhancing the quality of law drafting.

15. In response to a question from a Member during the examination of Estimates of Expenditure 2007-2008, the DoJ advised that the Mentorship Programme would continue in 2007-2008. In addition, a number of in-house seminars and workshops would be organized in 2007-2008 to enhance the drafting skills of counsel.

LegCo question

16. Some Members considered that where necessary, the service of experts in the professions concerned should be engaged to assist in the drafting of bills of a highly technical or specialized nature. Hon Eric LI raised a relevant written question at the Council meeting on 5 April 2000. He asked the DoJ to consider engaging persons such as accountants to provide professional input when drafting bills on regulation of financial market.

17. In response, the Secretary for Justice advised that the role of the DoJ in respect of the preparation of bills was to provide legal, and legal policy, advice on the legislative proposals and law drafting services. The duty to ensure that the provisions of a bill were appropriate rested with the Policy Bureau that had carriage of the bill. It was therefore neither necessary, nor appropriate, for the DoJ to engage persons who were familiar with the operation of the financial markets for the purposes of drafting such bills.

Staffing position of law draftsmen

18. Law Draftsmen in the LDD are members of the GC grade. As the general civil service recruitment freeze applied to the GC grade, the Panel was concerned that the recruitment freeze would impact on the succession planning of GC grade officers, affect the quality of law drafting, and create difficulties for the effective scrutiny of legislation by the LegCo. The Panel discussed the matter at its meeting on 24 January 2005.

19. DoJ advised the Panel that it had obtained special approval from the Committee co-chaired by the Chief Secretary for Administration and the Financial Secretary to proceed with the open recruitment of 12 GC. It was expected that the new recruits could assume duty by year-end, and some of the appointed candidates might be posted to LDD as law draftsmen.

20. Members considered that the vacancies of the GC grade should be filled as soon as possible. It was important to maintain an adequate pool of experienced and professionally trained GC to undertake legislative drafting duties, given the scarce expertise in this specialized field and the exceptionally difficult job of law drafting in Hong Kong which involved bilingual drafting in both Chinese and English. In addition, it was impractical to brief out the drafting work to private counsel who did not have the relevant exposure to government policies.

Policy on the Chinese language proficiency requirement in the recruitment of law draftsmen

21. In April 2006, the Panel expressed concern whether the recruitment policy of law draftsmen would preclude the appointment of monolingual GC with experience and expertise in drafting legislation in English. It requested the DoJ to review its policy relating to the recruitment of law draftsmen to the LDD, e.g. to consider, inter alia, relaxing the requirement in respect of Chinese language proficiency for appointment.

22. DoJ conducted a review on the arrangements and reverted to the Panel in June 2007. DoJ advised that, in the light of the experience in the recent GC recruitment exercises, none of the candidates who were found suitable for joining LDD in respect of professional qualifications and other qualities had been disqualified because of failure to meet the language proficiency requirements (i.e. a pass in both the Use of English and Use of Chinese papers in the Common Recruitment Examination) which was applicable to all civil service posts in degree/professional grades. DoJ did not see a need for relaxing the language proficiency requirements for recruitment to the entry rank of the GC grade.

23. Where there was a need to recruit experienced counsel from outside to join at the promotion rank, DoJ, having regard to the operational needs of the particular vacancy, might seek exemption from the Chinese language proficiency requirement. For example, in the recruitment exercise for appointment to the position of the Law Draftsman, exemption from the Chinese language proficiency requirement had been granted. There were also other examples of exemption from the Chinese language proficiency requirement for recruitment of counsel with specialized expertise and skills to the promotion ranks in the DoJ.

Experience of law draftsmen

24. In response to the Panel's concern about the drafting experience of law draftsmen in the LDD, DoJ provided information on the years of legislative drafting experience of counsel in the LDD in the past 10 years (as at 1 April 2007) (**Appendix I**).

Latest development

25. The Panel has invited Mr Eamonn Moran, Head of the LDD, to brief the Panel about his work at the meeting on 28 April 2008. Mr Moran assumed the post of Law Draftsman on 21 January 2008.

Relevant papers

26. A list of relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix II**.

Council Business Division 2
Legislative Council Secretariat
23 April 2008

**Years of legislative drafting experience of Counsel in the Law Drafting Division
as at 1 April 2007**

Legislative drafting experience	1 Apr 97	1 Apr 98	1 Apr 99	1 Apr 00	1 Apr 01	1 Apr 02	1 Apr 03	1 Apr 04	1 Apr 05	1 Apr 06	1 Apr 07
16 years or more	4	5	5	5	5	4	5	5	5	4	4
12 to less than 16 years	2	2	2	3	4	4	4	5	5	6	10
8 to less than 12 years	5	4	6	6	8	8	13	11	13	13	8
4 to less than 8 years	8	9	13	15	14	14	7	11	7	6	8
Less than 4 years	23	21	13	10	7	8	9	3	3	2	3
Total*	42	41	39	39	38	38	38	35	33	31	33
Average years of experience	6yrs	7yrs	7.3yrs	8yrs	9yrs	8.6yrs	9.3yrs	10yrs	10.4yrs	11.3yrs	10.9yrs

* Excluding officers on final leave.

Issues of concern raised by Members relating to the Law Drafting Division

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
Finance Committee (Special meeting)	24 March 2000	Minutes of meeting
Legislative Council	5 April 2000	Official Record of Proceedings of the Council on a written question raised by Hon Eric LI on "Provision of professional input when drafting bills on regulation of financial market"
Panel on Administration of Justice and Legal Services	20 February 2001	Minutes of meeting [LC Paper No. CB(2)1310/00-01]
	20 March 2001	Paper prepared by the Legal Service Division on "Drafting of Bilingual Bills" [LC Paper No. LS74/00-01] Administration's paper on "Drafting policy on bilingual legislation" [LC Paper No. CB(2)1085/00-01(02)] Minutes of meeting [LC Paper No. CB(2)1516/00-01]
Finance Committee (Special meeting)	22 March 2001	Minutes of meeting
	30 March 2004	Minutes of meeting
Panel on Administration of Justice and Legal Services	24 January 2005	Administration's written response on "Drafting Counsel in the Department of Justice" [LC Paper No. CB(2)315/04-05(01)]
		Administration's written response on "Manpower position of drafting counsel in the Department of Justice" [LC Paper No. CB(2)835/04-05(01)]

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
		Minutes of meeting [LC Paper No. CB(2)946/04-05]
	17 October 2005	Minutes of meeting [LC Paper No. CB(2)677/05-06]
Finance Committee (Special meeting)	16 March 2006	Minutes of meeting
Panel on Administration of Justice and Legal Services	24 April 2006	Administration's paper on "Mentorship Scheme in the Law Drafting Division, Department of Justice" [LC Paper No. CB(2)1755/05-06(03)] Administration's paper on "Training attachments to overseas jurisdictions" [LC Paper No. CB(2)1755/05-06(04)] Chairman's letter to the Secretary for Justice and the latter's reply on "Language proficiency requirements for appointment as legislative draftsmen" [LC Paper Nos. CB(2)1937/05-06(01) and (02)] Minutes of meeting [LC Paper No. CB(2)2494/05-06]
Finance Committee (Special meeting)	22 March 2007	Minutes of meeting
Panel on Administration of Justice and Legal Services	25 June 2007	Administration's paper on "Policy relating to recruitment of law draftsmen" [LC Paper No. CB(2)2221/06-07(07)] Minutes of meeting [LC Paper No. CB(2)2654/06-07]