

立法會
Legislative Council

Ref : CB2/BC/3/09

LC Paper No. CB(2)176/10-11
(These minutes have been seen
by the Administration)

**Bills Committee on Matrimonial Proceedings
and Property (Amendment) Bill 2010**

**Minutes of the second meeting
held on Friday, 10 September 2010, at 2:30 pm
in Conference Room B of the Legislative Council Building**

Members present : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon Miriam LAU Kin-ye, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Cyd HO Sau-lan

Members absent : Hon LAU Kong-wah, JP
Hon Paul TSE Wai-chun

Public Officers attending : Department of Justice

Miss Michelle TSANG
Senior Assistant Solicitor General

Mr CHENG Kim-fung
Senior Assistant Law Draftsman

Ms Alice CHOY
Senior Government Counsel

Mr Alan CHONG
Senior Government Counsel

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Ms Clara TAM
Assistant Legal Adviser 9

Ms Wendy LO
Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

Action

I. Meeting with the Administration

[LC Paper Nos. CB(3)813/09-10, LP 5060/1C, CB(2)1615/09-10(01), CB(2)2031/09-10(01) to (02), CB(2)2228/09-10(01) to (02) and CB(2)2237/09-10(01)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Follow-up actions

- Admin 2. The Administration agreed to remove the proposed section 29AB(3) from the Bill.
- Admin 3. The Administration was requested to -
- (a) reconsider the legal adviser's suggestion of revising the Chinese text of the proposed section 29AB(2) by placing the supposition "如" before "婚姻任何一方再婚" rather than "一段婚姻在香港以外地方遭解除或廢止之後";
 - (b) provide information as far as possible on the rationale behind the relevant provision of the Matrimonial Proceedings and Property Ordinance (Cap. 192) on which the proposed section 29AB(3) was based, i.e. a remarriage that was by law void or voidable would operate as a bar to an application for financial relief;
 - (c) explain, with reference to relevant case law in the United Kingdom (and other overseas jurisdictions if available), the meaning of "substantial ground" in the proposed section 29AC(2);
 - (d) reconsider whether "充分理由" was an appropriate Chinese rendition for "substantial ground" in the proposed section 29AC(2); and
 - (e) refine the drafting of the proposed section 29AC(3) in light of members' views.

Action

II. Any other business

Date of next meeting

4. Members agreed that the next meeting be held on 5 October 2010 at 4:30 pm.
5. There being no other business, the meeting ended at 4:35 pm.

Council Business Division 2
Legislative Council Secretariat
1 November 2010

**Proceedings of the second meeting of the
Bills Committee on Matrimonial Proceedings
and Property (Amendment) Bill 2010
on Friday, 10 September 2010, at 2:30 pm
in Conference Room B of the Legislative Council Building**

| Time Marker | Speaker(s) | Subject(s) | Action required |
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| 000050 - 000228 | Chairman | Opening remarks | |
| 000229 - 003249 | Administration Chairman | <p>Briefing by the Administration on its paper [LC Paper No. CB(2)2228/09-10 (01)] providing the following information requested by members at the last meeting -</p> <p>(a) <u>relevant cases concerning application for financial relief under Part III of the English Matrimonial and Family Proceedings Act 1984 ("the 1984 Act")</u></p> <p>The Administration highlighted the recent English Supreme Court ("SC") case of <i>Agbaje v Agbaje</i> ([2010] UKSC 13) which set out the proper approach for the courts to take when considering applications made under Part III of the 1984 Act and the general principles in determining the amount of provision to be made;</p> <p>(b) <u>estimated caseload arising from implementation of the proposed legislation</u></p> <p>Members noted that the two legal professional bodies and the Judiciary had not provided any estimate of applications made pursuant to the Bill should it be enacted. The Administration advised members that additional resources would be sought should there be a substantial increase in caseload arising from the implementation of the proposed legislation;</p> <p>(c) <u>transfer of applications from the District Court to the High Court</u></p> <p>The Administration advised that by virtue of the proposed addition of the new rule 103E to the Matrimonial Causes Rules (Cap. 179A) ("MCR") under clause 12 of the Bill, the procedure for transferring an application for ancillary relief from the District Court to the Court of First Instance provided under rule 80 of MCR would also apply to applications to be made under the new Part IIA of the Matrimonial Proceedings and Property Ordinance (Cap. 192) ("MPPO"); and</p> <p>(d) <u>factors that the Hong Kong courts might take into account when considering the jurisdictional requirement of "substantial connection" in divorce proceedings</u></p> <p>The Administration advised that the relevant case law demonstrated that the Hong Kong courts tended to adopt a liberal approach in the interpretation of "substantial connection with Hong Kong" in divorce proceedings. In deciding the issue, the courts would have regard to all relevant facts instead of limiting to particular circumstances. The presence of a matrimonial home in Hong Kong, nature of the parties' stay in</p> | |

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| | | <p>Hong Kong, place of education of the children of the marriage, as well as maintaining bank accounts and acquiring family assets in Hong Kong might all be relevant.</p> | |
| 003250 - 010944 | <p>Mr James TO Administration Chairman Mr Albert HO Ms Audrey EU</p> | <p>Referring to the English cases of <i>Holmes v Holmes</i> and <i>Jordan v Jordan</i>, Mr James TO expressed concern that the court would make an order for financial relief only when the financial provision made by a foreign order was manifestly unjust or inadequate. Mr TO was concerned that the court had set a high threshold for granting financial relief after a foreign divorce in such cases.</p> <p>The Chairman, Mr Albert HO and Ms Audrey EU did not share Mr TO's concern, having regard to the following -</p> <ul style="list-style-type: none"> (a) the threshold for granting financial relief as laid down in the proposed section 29AF(1) (i.e. "whether in all the circumstances of the case it would be appropriate for the order to be made by a court in Hong Kong") was not high; and (b) in the recent case of <i>Agbaje v Agbaje</i> (2010), the SC had set out clearly the proper approach for the courts to take when considering applications for financial relief under Part III of the 1984 Act. SC specifically stated that both hardship and injustice should not be regarded as pre-conditions of the exercise of jurisdiction. <p>Mr James TO remained concerned that the court might adopt a high threshold when considering applications made under the new Part IIA of MPPO and suggested stating explicitly in the proposed section 29AF(1) that injustice of a foreign order was not a pre-condition for the making of an order for financial relief by the court.</p> <p>The Administration responded that -</p> <ul style="list-style-type: none"> (a) the proposed section 29AF(1) provided that the Hong Kong courts should have regard to all relevant circumstances of a case in making an order for financial relief; (b) in <i>Agbaje v Agbaje</i>, SC had set out the proper approach for the courts to take in considering applications for financial orders after a foreign divorce. It was held that the proper approach depended on a careful application of sections 16, 17 and 18 of the 1984 Act (the equivalents of sections 29AF, 29AG and 29AH of the Bill respectively) in the light of the legislative purpose, which was the alleviation of the adverse consequences of no, or inadequate financial provision being made by a foreign court. SC had also stated that hardship and injustice were not pre-conditions for the exercise of jurisdiction; and (c) the proposed section 29AF(1) was modeled on section 16(1) of the 1984 Act. Applicability of relevant UK case law would be affected if amendments were made to the proposed section 29AF(1). | |

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| 010945 - 011040 | Chairman | <p><u>Clause-by-clause examination of the Bill</u></p> <p>Long title</p> | |
| 011041 - 011152 | Chairman Administration | <p>Part 1 - Preliminary</p> <p><u>Clause 1 – Short title</u></p> <p><u>Clause 2 – Commencement</u></p> <p>In response to the Chairman's enquiry, the Administration advised that it intended to bring the Amendment Ordinance (if enacted) into operation as soon as possible i.e. within one or two months after its enactment.</p> | |
| 011153 - 011403 | Chairman Administration | <p>Part II - Amendments to MPPO</p> <p><u>Clause 3 – Part IIA added</u></p> <p><u>Section 29AA – Interpretation of Part IIA</u></p> | |
| 011404 - 012038 | Chairman Administration ALA9 Ms Audrey EU Mr James TO | <p><u>Section 29AB – Applications for financial relief after divorce, etc. outside Hong Kong</u></p> <p><i>Section 29AB(2)</i></p> <p>On the legal adviser's suggestion of revising the Chinese text of the proposed section 29AB(2) by placing the supposition "如" before "婚姻任何一方再婚" rather than "一段婚姻在香港以外地方遭解除或廢止之後", the Administration responded that it considered no revision necessary, as the Chinese text follows the syntax of the Chinese language and properly reflected the meaning of the English text.</p> <p>The Chairman's view that the revision proposed by the legal adviser would help enhance the clarity and comprehensibility of the Chinese text.</p> <p>The Administration was requested to reconsider the legal adviser's suggestion on the drafting of the Chinese text of the proposed section 29AB(2).</p> <p><i>Section 29AB(3)</i></p> <p>The Administration advised that it agreed with the legal adviser's view that the proposed section 29AB(3) was not necessary and could be removed, given that a similar provision had already been provided in section 2(2) of MPPO.</p> | <p>Admin (para 3 of minutes)</p> <p>Admin (para 2 of minutes)</p> |
| 012039 - 012518 | Mr James TO Administration Chairman | <p>While noting that the proposed section 29AB(3) would be removed, Mr James TO queried whether it was reasonable to provide that a remarriage that was by law void or voidable would operate as a bar to an application for financial relief after divorce.</p> <p>The Administration responded that -</p> | |

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| | | <p>(a) the proposed section 29AB(3) was modeled upon section 12(3) of the 1984 Act; and</p> <p>(b) restriction similar to the restriction provided in section 29AB(3) existed under the MPPPO and applied to applications for ancillary relief after a marriage had been dissolved in Hong Kong.</p> <p>The Administration undertook to provide a written response on the rationale behind the proposed section 29AB(3).</p> | <p>Admin (para 3 of minutes)</p> |
| 012519 - 012909 | Chairman Administration Mr Albert HO | <p>In response to the Chairman's enquiry concerning recognition in Hong Kong of the validity of overseas divorces and legal separations, the Administration advised that according to section 55 of the Matrimonial Causes Ordinance (Cap. 179) ("MCO"), overseas divorces and legal separations that had been obtained by means of judicial or other proceedings in any country outside Hong Kong and were effective under the law of that country were recognized in Hong Kong.</p> | |
| 012910 - 013712 | Mr James TO Chairman Administration Ms Cyd HO ALA9 | <p>Referring to the proposed section 29AB(1)(b), Mr James TO enquired under what circumstances would an overseas divorce or legal separation not be recognized as valid by the law of Hong Kong.</p> <p>The Administration responded that the criteria set out in section 55 of MCO should be taken into account when considering the validity of an overseas divorce or legal separation under the proposed section 29AB(1)(b).</p> <p>The legal adviser informed the meeting that sections 56 and 61 of MCO further set out respectively the grounds for recognition and exceptions from recognition of an overseas divorce or legal separation.</p> | |
| 013713 - 014110 | Mr Albert HO Chairman Ms Audrey EU Administration | <p><u>Section 29AC – Leave of court required for applications for financial relief</u></p> <p>Mr Albert HO expressed concern that the threshold of "substantial ground" required for granting leave under the proposed section 29AC(2) was too high and sought information on the application of such threshold by the English courts. Ms Audrey EU enquired whether other overseas jurisdictions adopted the same threshold for the granting of leave for such applications.</p> <p>The Administration responded that -</p> <p>(a) the proposed section 29AC(2) was modeled on section 13(1) of the 1984 Act; and</p> <p>(b) other than the United Kingdom ("UK"), the Administration was not aware of any other overseas jurisdictions that had in place legislation empowering the court to deal with an application for financial relief after a foreign divorce.</p> <p>The Chairman's view that there was discrepancy in meaning between the term "substantial ground" and its Chinese rendition of "充分理由" in the proposed section 29AC(2).</p> | |

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| | | <p>The Administration was requested to -</p> <p>(a) explain, with reference to relevant case law in UK (and other overseas jurisdictions if available), the meaning of "substantial ground" in the proposed section 29AC(2); and</p> <p>(b) reconsider whether "充分理由" was an appropriate Chinese rendition for "substantial ground" in the proposed section 29AC(2).</p> | <p>Admin (para 3 of minutes)</p> |
| 014111 - 014324 | Chairman Administration | <u>Section 29AD – Interim orders for maintenance</u> | |
| 014325 - 015818 | Mr James TO Administration Chairman Ms Miriam LAU Ms Audrey EU | <p>Mr James TO expressed concern that the scope of an order for financial relief under the proposed section 29AC(3) was too narrowly drafted, pointing out that an order for financial relief could cover more than the making of payment or transfer of property, for instance, an order requiring a party to surrender his/her rights under a family trust.</p> <p>Ms Miriam LAU shared Mr James TO's view. In view of the court's wide discretion in making orders for financial relief, she suggested amending the proposed section 29AC(3) along the following lines:</p> <p>"The court may grant leave under this section despite the fact that an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property <u>providing financial relief</u> to, or for the benefit of, the applicant or a child of the family."</p> <p>The Administration was requested to refine the drafting of the proposed section 29AC(3) in light of the members' views.</p> | <p>Admin (para 3 of minutes)</p> |
| 015819 - 020234 | Administration Chairman Ms Audrey EU | <p>Ms Audrey EU shared the concern that the threshold of "substantial ground" for granting leave under the proposed section 29AC(2) was too high. She considered it unreasonable that the threshold for granting leave under the proposed section 29AC(2) was higher than that for making an order for financial relief under the proposed section 29AF.</p> <p>The Administration responded that -</p> <p>(a) the requirement for leave was to act as a filter to prevent abuse of the mechanism for application for financial relief after a foreign divorce; and</p> <p>(b) the English court had held that in determining whether there was "substantial ground" for the making of an application for financial relief, the court should take into account the factors stated in section 16 of the 1984 Act (the equivalent of section 29AF of the Bill).</p> <p>The Administration undertook to provide a written response to explain the threshold of "substantial ground" in the proposed section 29AC(2).</p> | <p>Admin (para 3 of minutes)</p> |

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| 020235 - 020354 | Chairman | Date of next meeting | |

Council Business Division 2
Legislative Council Secretariat
1 November 2010