

Panel on Administration of Justice and Legal Services

List of outstanding items for discussion

(position as at 20 January 2012)

**Proposed
timing for
discussion**

1. Applicability of Hong Kong Special Administrative Region ("HKSAR") laws to offices set up by the Central People's Government in HKSAR

The Administration advised the Panel in April 2008 on the following -

To be advised by
Constitutional
and Mainland
Affairs Bureau

- (a) 15 Ordinances which expressly bind the Government but are silent on their applicability to the Central People's Government ("CPG") offices - amendments would be introduced to four Ordinances in the 2008-2009 legislative session. The Administration would discuss further with CPG on the remaining 11 Ordinances;
- (b) Personal Data Privacy Ordinance ("PDPO") - the Administration and CPG were studying whether and if so how PDPO should apply to CPG offices set up in Hong Kong; and
- (c) 35 Ordinances which contain express references to the "Crown" - six of these Ordinances required no further action (viz. three had already been adapted, and three had been repealed). The Administration would continue to examine how the remaining 29 Ordinances should be adapted.

In respect of (a) above, the Adaptation of Laws Ordinance was passed by the Legislative Council ("LegCo") in April 2009 and commenced operation on 8 May 2009. The Ordinance has extended the applicability of four Ordinances, namely the Legislative Council Commission Ordinance (Cap. 443), Plant Varieties Protection Ordinance (Cap. 490), Patents Ordinance (Cap. 514) and Registered Designs Ordinance (Cap. 522), to the three offices set up by CPG in HKSAR. The Arbitration Ordinance (Cap. 341) which was passed on 10 November 2010 has provided that, aside from being applicable to the Government, the Ordinance will also apply to the offices set up by CPG in the HKSAR.

The Administration is working on the extension of the applicability of the other Ordinances in (a) above to CPG offices in HKSAR. The Administration will consider separately the issues in (b) and (c) above.

In May 2011, the Constitutional and Mainland Affairs Bureau advised that the Administration was still studying the extension of the applicability of the remaining 10 Ordinances to offices set up by CPG in HKSAR in phases. As more time was needed by the Administration to consider the issues involved, the Administration hoped to report further to the Panel in the course of the 2011-2012 legislative session.

2. Professional Indemnity Scheme of the Law Society of Hong Kong

In accordance with the recommendation made by the former Subcommittee on Solicitors (Professional Indemnity) (Amendment) Rules 2001, the Panel has monitored the review of the insurance arrangement under the Professional Indemnity Scheme ("PIS") of the Law Society of Hong Kong and received progress reports from the Law Society.

To be advised by
Law Society

In November 2004, members of the Law Society voted for a Qualifying Insurers Scheme ("QIS") to replace the existing scheme.

In May 2006, the Law Society informed the Panel that its members had voted by a large majority not to replace the existing PIS by a QIS at its Extraordinary General Meeting on 27 April 2006. The Law Society had set up a Professional Indemnity Scheme Review Working Party to identify any deficiencies in the existing scheme, consider how they might be remedied, and make appropriate recommendations.

At the Panel meeting in February 2007, the Law Society gave a report on the progress of work of the Review Working Party. The Working Party would proceed to consider a number of outstanding issues and submit a report with recommendations to the Council of the Law Society in due course.

The Law Society's second and third reports on the progress of work of the Review Working Party were issued to the Panel on 25 April 2008 (LC Paper No. CB(2)1722/07-08(01)) and 20 October 2009 (LC Paper No. CB(2)148/09-10(01)) respectively. According to the third progress report, the reinsurance contract had been

extended from 1 October 2009 for a period of four years, with an option to terminate after two years should PIS be replaced by an alternative form of indemnity arrangement.

The Law Society advised in October 2009 that it had commissioned actuaries and brokers respectively to review the formula for calculating the contributions payable under PIS and to compare the costs of insurance to law firms under a Master Policy Scheme and PIS, and that it would be better able to advise on an appropriate time for discussion of the review of PIS when these findings were available.

3. Inclusion of the statutory Independent Police Complaints Council ("IPCC") under the purview of The Ombudsman

During the discussion on the subject of "Review of jurisdiction of the Office of The Ombudsman" at the Panel meeting on 27 April 2009, members raised the issue of whether the statutory IPCC to be established on 1 June 2009 should be subject to The Ombudsman's jurisdiction. Members noted that the Administration's view during the scrutiny of the IPCC Bill was that the statutory IPCC should not be brought under The Ombudsman's ambit for the time being. Members agreed to bring up the issue for discussion after the statutory IPCC had been in operation for some time.

To be decided by
the Panel
Admin Wing

The Administration Wing of the Chief Secretary for Administration's Office ("Admin Wing") advised in September 2010 that the subject would continue to be followed up at the forum of the Panel on Security.

To facilitate the Panel's further consideration of the issue, the Clerk wrote to The Ombudsman on 3 November 2010 inviting his views on whether the statutory IPCC should be subject to The Ombudsman's jurisdiction. In his reply dated 3 December 2010 (LC Paper No. CB(2)530/10-11(01)), The Ombudsman advised that during the scrutiny of the IPCC Bill in 2008, the then Ombudsman had pointed out that the statutory bodies included under Part I of Schedule 1 to The Ombudsman Ordinance (Cap. 397) had the common features of being substantially funded by the General Revenue or statutory fees or charges; performing administrative functions, and are not solely advisory, adjudicative or appellate in nature; and having interface with or impact on the public in the course of discharging their functions. Given that the statutory IPCC as proposed in the draft Bill shared these features, the then Ombudsman saw no objection in principle to bringing the statutory

IPCC within her purview though it was recognized that the decision was ultimately one of policy. The Ombudsman considered these observations regarding the statutory IPCC still applicable after it had come into operation and advised that he also had no objection to having the statutory IPCC put under his purview.

In September 2011, the Admin Wing advised that it had consulted the Security Bureau on this issue. The Security Bureau advised that IPCC discussed the proposal on the inclusion of IPCC under the purview of The Ombudsman in May 2011. IPCC members raised unanimous concern to the suggestion of putting IPCC under the purview of The Ombudsman. IPCC members' consensus was that the proposal would undermine the image and the public's perception of IPCC being an independent oversight body established under the IPCC Ordinance if it were subjected to the scrutiny of another statutory authority.

At the meeting on 28 November 2011, members noted the view of IPCC members and agreed that the Panel should review the issue in future.

4. The role of the Judiciary in the adjudication system under the Control of Obscene and Indecent Articles Ordinance ("COIAO")

The Commerce and Economic Development Bureau ("CEDB") has embarked on a review of COIAO with two rounds of public consultation. During the first round of public consultation conducted from 3 October 2008 to 31 January 2009, the Judiciary and some members of the legal profession proposed to remove the administrative classification function (i.e. making an interim classification and, upon appeal, a final classification on a submitted article) from the Obscene Articles Tribunal, leaving it to deal with judicial determinations only (i.e. determining whether an article is obscene or indecent upon referral by a court or a magistrate arising from a civil or criminal proceeding). According to CEDB, this issue would discuss within the Government and with the relevant stakeholders and look for possible improvement measures in the second round of public consultation to be commenced in the end of 2009. During the Panel's visit to the Judiciary on 13 July 2009, participating Members agreed that the Panel should follow it up at a future meeting.

January 2012
CEDB/Judiciary
Administration
("JA")

The CEDB confirmed in September 2011 that the appropriate timing for discussion of the item was yet to be determined. At the

Work Plan Meeting, it was agreed that the Administration should be requested to explain why it could not address the Judiciary's concern which had been expressed to the Administration for such a long time.

5. Law Reform Commission ("LRC") Report on Hearsay in Criminal Proceedings

The Report on Hearsay in Criminal Proceedings was published by the LRC in November 2009. At the meeting on 15 December 2009, the Panel agreed to discuss relevant issues at a future meeting.

April 2012
Department of
Justice ("DoJ")

6. Implementation of the scheme for granting higher rights of audience to solicitors

This item was referred to the Panel by the Bills Committee on Legal Practitioners (Amendment) Bill 2009 which was passed by LegCo on 20 January 2010.

January 2012
DoJ

The Bills Committee considered it necessary to review the scheme for granting higher rights of audience to solicitors at an appropriate junction, say around two years after its implementation, and had referred the issue to the Panel for follow-up.

According to the Administration, the Higher Rights Assessment Board which was formed in July 2010 is preparing the related subsidiary legislation. The new regime will be brought into full operation as soon as practicable after the subsidiary legislation is finalized and approved by LegCo.

7. Report on Double Jeopardy to be published by LRC

The consultation period on the Consultation Paper published by the LRC's Double Jeopardy Subcommittee ended on 31 May 2010. At the Work Plan Meeting, it was agreed that the Panel should discuss the relevant report to be published by LRC at a future meeting.

April 2012
DoJ/LRC

8. Framework Agreement on Hong Kong/Guangdong Co-operation ("Framework Agreement") relating to co-operation on legal matters

At the meeting on 23 May 2011, the Administration briefed the Panel on the implementation of measures concerning co-operation on legal matters under the Framework Agreement. The two legal professional bodies had expressed views on the development of legal services under the Framework Agreement and the Mainland

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DoJ

and Hong Kong Closer Economic Partnership Arrangement. For the Panel's further discussion of the subject, the Panel agreed that the Administration should provide a written response to the views expressed for the consideration of the legal professional bodies.

When the Panel was briefed on the 2011-2012 policy initiatives of DoJ at its meeting on 20 October 2011, members agreed to follow up on the initiatives to be undertaken by the Administration in facilitating the provision of legal and arbitration services in Qianhai, Shenzhen by Hong Kong service providers.

9. Free legal advice service

At the meeting on 22 June 2009, the Panel received a progress report on the Administration's consideration of the Reports on the Consultancy Study on the Demand for and Supply of Legal and Related Services in Hong Kong commissioned by DoJ. Members expressed strong dissatisfaction with the absence of concrete proposals from the Administration to address the gaps in service availability and unmet legal needs identified in the Reports. Members were particularly dissatisfied that the Administration had not put forth any proposal for reviewing the effectiveness and adequacy of the existing Free Legal Advice Scheme, notwithstanding that the Reports had clearly pointed to an unmet demand for legal advice service in the community. The Administration was requested to work out proposals for improving the existing operation of and support to the free legal advice service and report to the Panel.

February 2012
HAB

At the meetings on 29 March 2010 and 19 April 2011, the Home Affairs Bureau ("HAB") briefed the Panel on its plan to enhance the support services for volunteer lawyers under the Free Legal Advice Scheme and its recommendations for expanding free legal advice service, including to embark on a trial scheme for provision of free legal service to litigants in person on procedural matters respectively. The Panel held a special meeting on 21 July 2011 to further discuss the issue with HAB, service operators of various free legal advice schemes and non-governmental organizations which are frequent users of such services. Members were of the view that the Administration should make reference to the relevant experience in England and Wales, Scotland, and the Netherlands and conduct a comprehensive review of the free legal advice service. Members agreed that the Panel should follow up on the progress of the Administration's work in this regard.

The Administration consulted the Panel on 28 November 2011 on its recommendations to launch a two-year pilot scheme to provide legal advice for litigants in person in the second quarter of 2012. The Administration was requested to consider the views of members and the two legal professional bodies, and to provide information on relevant overseas experience. Members agreed that the Panel should further discuss the Administration's proposal at a future meeting. The Administration would revert to the Panel in February 2012.

10. Prosecutorial independence

At its meeting on 27 June 2011, the Panel held a discussion with SJ, the incumbent Director of Public Prosecutions ("DPP"), the former DPP, legal profession and legal academics on the issues relating to an independent DPP. Some members were of the view that the existing arrangement of having SJ, a political appointee, to control prosecutions would undermine the public perception of the prosecutorial independence. They considered that the power to make prosecutions should rest with an independent DPP to ensure that prosecution decisions were free from political interference. Some other members, however, shared the Administration's view that it was SJ's constitutional responsibility to control criminal prosecutions as stipulated in Article 63 of the Basic Law ("BL 63") and the control of prosecutions should continue to be rested with SJ.

May 2012
DoJ

Members noted that in the United Kingdom, a protocol between the Attorney General and the prosecuting departments was drawn up setting out when, and in which circumstances that the Attorney General would or would not be consulted on prosecution decisions and how the Attorney General and the Directors of the prosecuting departments would exercise their functions in relation to each other. The Administration was suggested to consider whether a similar protocol should be adopted in Hong Kong. Members agreed that the Panel should be invited to consider as to how the issue should be followed up when the written submission of the Bar Association is available.

11. Further expansion of the Supplementary Legal Aid Scheme ("SLAS")

At the meeting on 28 March 2011, the Administration briefed the

June 2012

Panel on its proposals for expanding the scope of SLAS and undertook to introduce relevant legislative proposals into LegCo in September/October 2011 with a view to implementing the proposals before the end of 2011. The Administration has subsequently advised that it would introduce the legislative proposals into LegCo in the latter half of 2011 for LegCo's scrutiny. Members noted that the Administration would also conduct a study on amending the Legal Aid Ordinance (Cap. 91) with a view to enabling money claims in derivatives of securities, currency futures or other futures contracts be covered under the Ordinary Legal Aid Scheme ("OLAS") when fraud, misrepresentation/deception was involved at the time of purchase and intended to consult the Panel and the Legal Aid Services Council on the detailed proposals in the next legislative session. The Administration, however, did not support other proposals for expanding the scope of SLAS to cover claims against property developers by minority owners in respect of compulsory sales of building units, claims against sale of goods and provision of services, claims in respect of trusts, property damage claims against incorporated owners, claims against small marine boat accidents and claims involving disputes between limited companies and their minority shareholders. HAB

Members agreed that the Panel should monitor closely the work of the Administration in taking forward the legislative proposals and the proposal for including derivative claims under OLAS. The Administration briefed the Panel on the legislative amendments and reported on the review of outstanding issues related to SLAS expansion in December 2011. Members also agreed that the Panel should follow up on other proposals not supported by the Administration, particularly the proposed inclusion of claims against property developers by minority owners in respect of compulsory sales of building units and claims against sale of goods and provision of services under SLAS at a future meeting.

12. Judicial manpower situation

At its meeting on 27 June 2011, members discussed the appointment of serving Justices of Appeal of the Court of Appeal of the High Court as non-permanent Hong Kong judges of the Court of Final Appeal ("CFA") and the judicial manpower situation at CFA and other levels of court. Members agreed to follow up on the judicial manpower situation. Members requested that information on the waiting times for court cases and the number of

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JA/Adm Wing

occasions where deputy judges were engaged in the interim before substantive appointments were made should be made available to facilitate members' deliberation on the subject.

At its meeting on 20 October 2011, the Panel was briefed on the 2011-2012 Judicial Service Pay Adjustment recommended by the Standing Committee on Judicial Salaries and Conditions of Service. Members were of the view that there should be a consensual mechanism for judicial remuneration review and agreed to consider the issue when the judicial manpower situation was discussed at a future meeting.

13. Statute Law (Miscellaneous Amendments) Bill 2012

DoJ proposes to introduce the Bill in the early part of 2012, subject to a legislative slot being available. This Bill seeks to, among other things, implement the LRC Report on the common law presumption that a boy under 14 is incapable of sexual intercourse. The LRC Report recommends the abolition of the presumption.

To be advised by DoJ

14. Procedure under BL158(3) for the Court to make a reference to the Standing Committee of the National People's Congress ("NPCSC") for an interpretation of BL

At the House Committee meeting on 7 October 2011, Members noted an information paper provided by DoJ on the procedure adopted for referring questions on the interpretation of paragraph 1, Article 13 and Article 19 of BL of HKSAR to NPCSC in the case *Democratic Republic of Congo & Ors v FG Hemisphere Associates LLC*. Members agreed that as the matter was of great importance, SJ should be invited to a meeting of this Panel to brief Members on the matter.

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DoJ

15. Issues relating to the provision of legal aid for judicial review cases

At the meeting on 20 October 2011, members enquired about the assessment criteria in processing legal aid applications in respect of judicial review cases and the procedure/criteria for assigning lawyers. The Panel agreed that the Director of Legal Aid should brief members at a future meeting on the relevant issues including the policy to brief out legal aid cases to private counsel.

January 2012
HAB

At the Work Plan Meeting, it was agreed that statistics on the

number of cases where the counsel were assigned based on the aided persons' nominations; the distribution of the assigned legal aid cases among private counsel; and the initiatives taken by the Legal Aid Department to facilitate an equitable distribution of legal aid work among private counsel should also be made available to facilitate the discussion.

16. Use of Chinese in court proceedings

At the meeting on 20 October 2011, the Chairman highlighted the problems in the use of Chinese in court proceedings including the growing number of unrepresented litigants who fell short of legal knowledge and the lack of bilingual legal practitioners. It was suggested that the Panel should explore the work needed to be done on various fronts for further development in this regard.

March 2012
DoJ/JA/HAB

At the Work Plan Meeting, it was agreed that information on the relevant training offered by local law schools to enhance the proficiency of law students in using Chinese legal language and the initiatives taken by various authorities to enhance the development of a bilingual legal system and nurture bilingual legal talents should be sought to facilitate members' discussion on the subject.

17. Relocation of the Court of Final Appeal ("CFA") to the site of the former LegCo Building

At the meeting on 27 June 2011, members had enquired about the Judiciary's plan regarding the usage of the former LegCo Building after its handover to the Judiciary. JA has provided an update which was issued vide LC Paper No. CB(2)312/11-12 on 16 November 2011. The Judiciary and the Architectural Services Department will consult the Panel on the proposed facilities of CFA to be provided at the Building and the works programme at a future meeting.

To be advised by
JA

18. Implementation of Civil Justice Reform ("CJR")

The Panel has been monitoring the progress on the implementation of CJR. The CJR Monitoring Committee chaired by the Chief Judge of the High Court has endorsed a list of 32 key indicators in six broad areas for assessment of the effectiveness of CJR.

To be decided
by the Panel
JA

The Panel was briefed on the findings on the first year of implementation of CJR (i.e. from 2 April 2009 to 31 March 2010) at its meeting on 21 December 2010. At the Panel's request, JA has provided an update by including relevant findings of the second year of implementation (i.e. from 1 April 2010 to 31 March 2011) which has been issued vide LC Paper No. CB(2)713/11-12(01). The Panel will discuss the updated position with JA at a future meeting.

19. Review of the "as of right" provision in section 22(1)(a) of the Hong Kong Court of Final Appeal ("CFA") Ordinance

According to section 22(1)(a) of the Hong Kong CFA Ordinance, a civil appeal lies as of right from any final judgment of the Court of Appeal where the matter in dispute amounts to or is worth \$1 million or more. In two CFA judgments (FAMV No. 20 of 2011 and FACV No. 2 of 2011), the Court has expressed the view that this "as of right" ground of appeal should be re-considered/abolished. At its meeting on 20 December 2011, the Panel agreed to take up the issue with the Administration.

To be advised by
Admin Wing

In his speech delivered at the Ceremonial Opening of the Legal Year 2012 on 9 January 2012, the Chief Justice called for necessary legislative changes so that the type of cases that fell within section 22(1)(a) of the Hong Kong CFA Ordinance shall also be subject to the requirement of leave to appeal.