

Panel on Administration of Justice and Legal Services

List of outstanding items for discussion

(position as at 10 October 2011)

**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 three had already been adapted, and three had been repealed).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

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 decided
by the Panel
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.

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.

To be decided by the Panel
CEDB/Judiciary Administration
("JA")

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

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.

To be decided by the Panel
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.

December
2011/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. Consultation Paper on Double Jeopardy published by the Double Jeopardy Subcommittee of LRC

The LRC's Double Jeopardy Subcommittee has published the above Consultation Paper for public consultation until 31 May 2010. The Panel agreed to discuss the Consultation Paper at a future meeting.

To be decided by the Panel
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 and Hong Kong Closer Economic Partnership Arrangement. For

To be decided by the Panel
DoJ

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.

9. Procedural matters of appeal boards

The item was referred to the Panel by the former Bills Committee on Building Energy Efficiency Bill.

To be decided by
the Panel
DoJ

The Bills Committee has noted that there is no universal treatment across the board regarding procedural matters of appeal boards. At present, the procedure is either provided in the principal ordinance, in subsidiary legislation as authorized in the principal ordinance, or is left to the appeal boards to decide if the procedure is not provided in the laws. The Bills Committee has also noted that there is no uniform definition for "costs of appeal proceedings". The Panel has been requested to follow up these issues.

At the Panel's request, DoJ has provided an information paper on the relevant issues which was issued vide LC Paper No. CB(2)2413/10-11(01) on 19 July 2011. According to DoJ, there is no hard and fast rule for determining whether the procedures of appeal boards should be provided in the principal ordinance or in subsidiary legislation, and each case should be considered on its own. The flexibility and effectiveness of an appeal board would be enhanced if it is given a residual power to control its own process subject to the relevant provisions in the legislation. It is also the Administration's view that it would not be practicable or appropriate to apply a uniform definition for "costs of appeal proceedings" in all legislation across the board.

10. The trend of legislative proposals being put forward by the Administration in the form of subsidiary legislation

At the meeting of the Committee on Rules of Procedure on 2 November 2009, some members expressed concern about the trend of legislative proposals being put forward by the Administration in the form of subsidiary legislation and not bills. There was concern that given their importance and far reaching implications, some of the legislative proposals should be put forward in the form of bills or subsidiary legislation subject to the positive vetting procedure, rather than subsidiary legislation subject to the negative vetting procedure, so as to allow sufficient

To be decided by
the Panel
DoJ

time for LegCo to scrutinize the proposals. The issue has been referred to the Panel for consideration.

11. Proposed construction of the West Kowloon Law Courts Building

JA consulted the Panel on the construction of the West Kowloon Law Courts Buildings at its meeting on 26 April 2010. According to the Judiciary's paper (LC Paper No. CB(2)1349/09-10(04)) provided for the meeting, the next consultation with the Panel is scheduled for the second quarter of 2011.

December 2011
JA

On 21 February 2011, JA advised that as the invitation of tender for the West Kowloon Law Courts Building would be deferred to March 2011, the proposed timing for discussion of this item would have to be deferred to the fourth quarter of 2011.

12. 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.

November 2011
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 has planned to consult the Panel in November 2011 on its recommendations to launch a two-year pilot scheme to provide legal advice for litigants in person starting from early 2012.

13. 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.

To be decided by
the Panel
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 also agreed that the Panel should be invited to consider in the new legislative session as to how the issue should be followed up.

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

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

December 2011

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 has planned to brief the Panel on the legislative amendments and submit report 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, in the next legislative session.

15. Role and work of the Law Reform Commission

At its meeting on 19 April 2011, the Panel noted the information paper provided by LRC on its role and work including the state of implementation of the Commission's recommendations made in its reports published during the last 15 years. Members expressed concern that many of these recommendations had not yet been followed up and agreed that the Panel should hold a discussion

Before the end
of 2011
DoJ/LRC

with SJ, the Chairman of LRC, on his role in the law reform of Hong Kong and the work of the Commission. Members further agreed that legal profession and human rights bodies should also be invited to join the discussion.

16. 2011-2012 Judicial Service Pay Adjustment

The Chief Executive-in-Council has decided to accept the recommendation of the Standing Committee on Judicial Salaries and Conditions of Service to increase the pay for Judges and Judicial Officers for 2011-2012 by 4.22% with retrospective effect from 1 April 2011. Details are set out in the LegCo Brief issued to all LegCo Members on 20 September 2011 (File Ref: CSO/ADM CR 6/3221/02). It is the Administration's initial plan to seek the approval of the Finance Committee on the proposed pay adjustment on 18 November 2011. The Administration has offered to brief the Panel before its submission of the financial proposal.

October 2011
Admin Wing

17. 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

18. Propose creation of a supernumerary post of Deputy Principal Government Counsel in the Legal Policy Division of DoJ

DoJ proposes to create a supernumerary post of Deputy Principal Government Counsel in the Legal Policy Division.

November 2011
DoJ

19. Supplementary Provision to Head 92 – DoJ Subhead 234 – Court costs

DoJ proposes to seek Finance Committee's approval for a supplementary provision to Head 92 – DoJ Subhead 234 – Court costs.

November 2011
DoJ

20. Procedure adopted by the Court in making 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

To be decided

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.

by the Panel
DoJ

Council Business Division 2
Legislative Council Secretariat
10 October 2011