

立法會
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LC Paper No. CB(4)743/14-15
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 16 February 2015, at 2:30 pm
in Conference Room 3 of the Legislative Council Complex

- Members present** : Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)
Hon Albert HO Chun-yan
Hon CHAN Kam-lam, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, GBS, JP
Hon Starry LEE Wai-king, JP
Hon LEUNG Kwok-hung
Hon Alan LEONG Kah-kit, SC
Hon WONG Yuk-man
Hon NG Leung-sing, SBS, JP
Hon Steven HO Chun-yin
Hon MA Fung-kwok, SBS, JP
Hon Alice MAK Mei-kuen, JP
Hon TANG Ka-piu, JP
Dr Hon CHIANG Lai-wan, JP
- Members absent** : Hon Dennis KWOK (Deputy Chairman)
Hon James TO Kun-sun
Hon TAM Yiu-chung, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Paul TSE Wai-chun, JP
Dr Hon Elizabeth QUAT, JP
Hon Martin LIAO Cheung-kong, SBS, JP
Hon CHUNG Kwok-pan

Public Officers : Item III
attending

Judiciary Administration

Ms Wendy CHEUNG
Assistant Judiciary Administrator
(Development)

Department of Justice

Mr Francis KWAN
Senior Assistant Law Officer (Civil Law)

Mr David GROVER
Acting Assistant Law Officer (Civil)

Miss Yvonne CHEUNG
Government Counsel

Item IV

Home Affairs Bureau

Mr Laurie LO Chi-hong, JP
Deputy Secretary for Home Affairs (1)

Ms Aubrey FUNG Ngar-wai
Principal Assistant Secretary for Home Affairs
(Civic Affairs) 2

Legal Aid Department

Ms Alice CHUNG Yee-ling
Deputy Director of Legal Aid
(Policy and Administration)

Mr Chris CHONG Yan-tung
Deputy Director of Legal Aid
(Application and Processing)

Clerk in attendance : Miss Mary SO
Chief Council Secretary (4)2

Staff in attendance : Ms Carrie WONG
Assistant Legal Adviser 4

Ms Cindy CHAN
Senior Council Secretary (4)2

Ms Rebecca LEE
Council Secretary (4)2

Miss Vivian YUEN
Legislative Assistant (4)2

I. Information paper(s) issued since the last meeting

Members noted an information paper on "Subsidiary legislation relating to privileges and immunities conferred on consular posts" provided by the Administration (LC Paper No. CB(4)505/14-15(01)) which set out:

- (a) the granting of privileges and immunities ("Ps&Is") by the Central People's Government to specific career consular posts established in the Hong Kong Special Administration Region ("HKSAR") as well as their respective personnel; and
- (b) the progress of the HKSAR Government's preparation of the subsidiary legislation relating to the Ps&Is conferred on the Consulate General of Japan and its personnel, which would be submitted to the Legislative Council for negative vetting in May 2015.

2. Members further noted that the Administration was prepared to discuss the paper with members at the Panel meeting scheduled for 23 March 2015, should members consider it useful to do so.

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II. Items for discussion at the next meeting

LC Paper No. CB(4)493/14-15(01) -- List of outstanding items for discussion

LC Paper No. CB(4)493/14-15(02) -- List of follow-up actions

3. Members agreed to discuss the following items at the next regular meeting of the Panel scheduled for 23 March 2015 at 4:30 pm:

- (a) Provision of legal aid and assignments of lawyers to legally aid persons by the Legal Aid Department; and
- (b) Subsidiary legislation relating to privileges and immunities conferred on consular posts.

III. Draft Court Procedural Rules for the Competition Tribunal

LC Paper No. CB(4)493/14-15(03) -- Judiciary Administration ("the JA")'s paper entitled "Proposed Subsidiary Legislation on the Procedures to be adopted by the Competition Tribunal"

Briefing by the JA

4. Assistant Judiciary Administrator (Development) ("AJA(Dev)") briefed members on the following four sets of draft procedural and fees rules for the Competition Tribunal ("the Tribunal") of the Judiciary ("the Draft Rules"), details of which were set out in LC Paper No. CB(4)493/14-15(03):

- (a) the Competition Tribunal Rules ("the CTR") which set out the procedural rules for the Tribunal to cater for different types of proceedings that the Tribunal might need to deal with;
- (b) proposed amendments to the Rules of the High Court ("the RHC") (Cap. 4 sub. leg. A) which provided for (i) the procedures for proceedings transferred between the Tribunal and the Court of First Instance ("CFI") of the High Court ("HC"); and (ii) the procedures for applications to the Court of Appeal for leave to appeal from the decisions of the Tribunal;

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- (c) the Competition Tribunal Fees Rules which set out the fees to be paid by users of the Tribunal for various purposes; and
- (d) the Competition Tribunal Suitors' Funds Rules which governed the administration of suitors' funds for the Tribunal in a way similar to that of the HC, including how suitors' funds were lodged in and paid out of the Tribunal, investment of the funds, provision of interest for individual suitors' accounts and preparation of annual statements for the funds.

Discussion

5. Mr Albert HO noted that the CTR, which were procedural rules for the Tribunal, were largely modelled on the practice and procedure of the CFI of the HC provided under the RHC. Mr HO enquired about the key differences in the procedures to be adopted by the Tribunal and those adopted by the CFI.

6. AJA(Dev) responded as follows:

- (a) pursuant to section 144(3) of the Competition Ordinance (Cap. 619) ("the CO"), the Tribunal was to conduct its proceedings with as much informality as was consistent with attaining justice;
- (b) section 147 provided that other than in certain proceedings, the Tribunal was not bound by the rules of evidence and might receive and take into account any relevant evidence or information;
- (c) as confidential commercial and sensitive information (including that relating to leniency agreements) might be involved in Tribunal cases, dedicated rules were proposed to deal with compulsory disclosure of documents by one party to another (rule 24 of the CTR); and tackle information which a party sought to disclose to the Tribunal in full but not to some or all of the other parties or the public (rule 37 of the CTR); and
- (d) a more specific and elaborate procedure was proposed to facilitate early intervention by interested parties in the Tribunal. For example, under rule 19 of the CTR, the Registrar must publish a notice after the filing of an application under the CO; the granting of leave to apply for a review of a reviewable determination of the Competition Commission ("the Commission"); the receipt of a follow-on claim brought under the CO; the transfer of any proceedings from the CFI to the Tribunal; or in any other proceedings, the Tribunal had given a direction to do so. Further,

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under rule 20 of the CTR, a person who had a sufficient interest in the matters to which the proceedings of the Tribunal related might apply for leave to intervene in the proceedings.

7. Responding to Mr Albert HO's enquiry as to whether the Tribunal would have concurrent jurisdiction with the CFI on follow-on claims, AJA(Dev) said that the CO provided that the Tribunal had a primary jurisdiction on competition matters. However, the Tribunal might transfer certain proceedings to the CFI under suitable circumstances, e.g. if the Tribunal considered that it was in the interests of justice to do so. The criteria and mechanism for the transfer of proceedings from the CFI to the Tribunal and vice versa were provided under sections 113 to 116 of the CO.

8. Mr Albert HO further asked the following questions:

- (a) whether taking of evidence from witnesses outside Hong Kong by way of a live television link for the purposes of proceedings in Hong Kong would be permitted by the Tribunal; and
- (b) how would the legal costs of the Tribunal cases be determined and borne by suitors.

9. AJA(Dev) replied in the positive to the first question although witnesses would be encouraged to fly to Hong Kong to appear before the proceedings. As regards how the legal costs of Tribunal cases would be determined and borne by suitors, AJA(Dev) said that the practice of the CFI would be followed. AJA(Dev) further explained that although the determination of legal costs and the bearing of legal costs by the losing party were not specified in the CTR, rule 4 of the CTR provided that where there was no provision in the CO and the CTR for a matter, the RHC applied to all proceedings before the Tribunal, so far as they might be applicable to that matter.

10. The Chairman asked whether follow-on claims, regardless of the amounts of the claims involved, would be heard by the Tribunal. AJA(Dev) replied that the Judiciary did not intend to set a limit on the amount of the claims that might be handled by the Tribunal.

11. Responding to the Chairman's concern that not all litigants to the proceedings of the Tribunal could afford the legal costs which could be high, AJA(Dev) said that rule 30 of the CTR provided, among others, that (i) parties might choose to act in person; (ii) with leave granted by the Tribunal, a company might be represented by its director; (iii) the Tribunal be given a reserve power to allow any other person to appear on a party's behalf. AJA(Dev) pointed out that one of the objectives of rule 30 was to help reduce

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the legal costs of the parties under suitable circumstances, particularly those who brought follow-on actions under Part 5 of the CTR.

12. The Chairman noted that persons who brought follow-on actions in the Tribunal would most likely be owners of small businesses and, to some extent, members of the general public, who might not be able to afford to engage lawyers to act on their behalf, whereas defendants in follow-on claims would generally be owners of big companies who would most certainly be represented by lawyers. To address the adverse situation of litigants in person in follow-on claims, the Chairman asked whether the Tribunal would be empowered to disallow a party to the proceedings to engage a lawyer to act on his/her behalf if the other party to the proceedings was a litigant in person.

13. AJA(Dev) replied that the Tribunal was a superior court of record, with a status similar to the CFI. As such, in general, the Judiciary proposed that the rights of audience in the Tribunal be co-extensive with those in the CFI. In other words, legal representatives would be allowed. However, to help save efforts and legal costs of the parties (including litigants in persons) to the proceedings of the Tribunal, it was proposed in the CTR that the Tribunal be provided with the flexibility to dispense with the application of the RHC under certain specific conditions. To further help reduce legal costs to the litigants, similar to the CFI, it was also proposed in the CTR that the Tribunal would be empowered to allow consolidation of cases if, for instance, the cases arose from a common set of facts/laws, the reliefs sought were similar, or the reliefs were sought against the same defendant/respondent.

14. Regarding the handling of sensitive information referred to in paragraph 6(b) above, the Chairman asked about the criteria which would be adopted by the Tribunal in determining (a) an application from a party to the proceedings for an order for discovery and production of a document relating to the proceedings from a person for inspection and (b) an application from a party to the proceedings to treat the whole or part of the documents relating to the proceedings as confidential.

15. AJA(Dev) responded as follows:

- (a) rule 24(3) of the CTR provided that the Tribunal might make or refuse an order for discovery and production of a document having regard to all the circumstances of the case, including:
 - (i) the need to secure the furtherance of the purposes of the CO as a whole;
 - (ii) whether the information contained in the document sought to

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be discovered or produced was confidential;

- (iii) the balance between the interests of the parties and other persons; and
 - (iv) the extent to which the document sought to be discovered or produced was necessary for the fair disposal of the proceedings; and
- (b) rule 37(6) of the CTR provided that the Tribunal might make or refuse an order for treating the whole or part of the document provided by a party to the proceedings as confidential having regard to all the circumstances of the case, including:
- (i) the public interest;
 - (ii) for any commercial information relating to an undertaking - the legitimate business interests of the undertaking;
 - (iii) for any information relating to the private affairs of a natural person - the interests of the natural person; and
 - (iv) the interests of justice.

16. The Chairman sought elaboration on what acts would constitute contravention of the First Conduct Rule and the Second Conduct Rule under the CO.

17. Acting Assistant Law Officer (Civil) ("ALO(Civil)(Atg)") explained that the First Conduct Rule prohibited agreements, concerted practices and decisions of trade associations if the object or effect was to which prevent, restrict or distort competition in Hong Kong. The term "agreement" was widely defined and potentially included non binding "gentlemen's agreements". Conduct that might infringe the First Conduct Rule included collusive behaviour amongst competitors (i.e. a horizontal agreement) to, for example, fix prices, allocate sales, territories, customers or markets for the production or supply of goods or services if the object or effect was to prevent, restrict or distort competition in Hong Kong. On the other hand, retail price maintenance was an example of a vertical agreement setting a fixed or minimum resale price when a product was marketed and potentially contravened the First Conduct Rule. Retail/resale price maintenance was generally regarded as having the object of harming competition but in some cases might satisfy the terms of the general exclusion for agreements enhancing overall economic efficiency in section 1 of Schedule 1 to the CO. It was not confined to retail sales but could apply to any

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resale/level in the supply chain.

18. As regards the Second Conduct Rule, ALO(Civil)(Atg) said that it prohibited undertakings that had a substantial degree of market power in a market from abusing that power by engaging in conduct that had as its object or effect the prevention, restriction or distortion of competition in Hong Kong. An example of such misconduct was predatory pricing which involved an undertaking with a substantial degree of market power in a market pricing the supply of its goods below cost so as to force its competitors out of the market and/or prevent potential competitors from entering the market. Whilst losses might be incurred in the beginning, the expectation was that prices would be raised in the longer term.

19. Responding to the Chairman's enquiry about the penalties for contraventions under the CO, ALO(Civil)(Atg) said that the Tribunal had a broad-range of sanctions available to levy against a contravening party. These included imposing a pecuniary penalty, disqualification orders, award of damages in follow-on actions and various other orders set out in Schedule 3. The Tribunal might award a pecuniary penalty up to 10% of the turnover of the undertakings involved for up to three years in which the contravention occurred.

20. Mr LEUNG Kwok-hung opined that it would be difficult for two or more undertakings to fix prices for the supply of certain goods or services if these undertakings did not have a substantial degree of market power for the supply of such goods or services.

21. ALO(Civil)(Atg) responded that the Second Conduct Rule was concerned with unilateral conduct not collusion. An undertaking with a substantial degree of market power might be able to engage in predatory pricing without any element of collusion although the two might co-exist. ALO(Civil)(Atg) however also pointed out that the fact that an undertaking took advantage of its market power to set prices did not necessarily mean it was engaging in abusive conduct in contravention of the Second Conduct Rule. For example, an undertaking which was the sole supplier of certain goods in certain areas of Hong Kong might sell the goods at prices above market levels because of the convenience accorded to consumers.

22. The Chairman pointed out that the two large supermarket chains in Hong Kong had driven many small businesses out of the market or had made them very difficult to sustain operation. The Chairman enquired whether the pricing of goods by these supermarket chains had infringed the Second Conduct Rule.

23. ALO(Civil)(Atg) responded that the mere fact that some small businesses could not survive did not necessarily mean that this was due to any

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anti-competitive conduct by big businesses, and might be due to the lack of economies of scale or operational efficiency of the small businesses.

24. Responding to the Chairman's enquiry on how small businesses and members of the general public could commence legal actions against anti-competitive conduct by big businesses, ALO(Civil)(Atg) said that they must approach the Commission which was tasked to, amongst others, investigate conduct that might contravene the competition rules of the CO and enforce the provisions of the CO.

Way forward

25. AJA(Dev) said that given the volume of the Draft Rules, JA suggested the Legislative Council ("LegCo") form a subcommittee to scrutinize the Draft Rules, before JA gazetted and tabled the proposed amendments at LegCo for negative vetting. This might give more time for LegCo Members to scrutinize the Draft Rules as necessary.

26. Members agreed to propose to the House Committee ("HC") for the appointment of a subcommittee under the HC to scrutinize the Draft Rules. Members further agreed to request the following additional information from the JA and the Commerce and Economic Development Bureau, where appropriate, for the consideration of the proposed subcommittee:

- (a) relationship between the contravention of the First Conduct Rule under section 6 of the CO and the Second Conduct Rule under section 21 of the CO;
- (b) comparison of the key procedures adopted by the Small Claims Tribunal and the Lands Tribunal and to be adopted by the Tribunal;
- (c) comparison of the key differences in the procedures to be adopted by the Tribunal and those adopted by the CFI;
- (d) rules and practice applicable to the competition-related courts in other common law jurisdictions; and
- (e) procedures for members of the public to seek remedies due to contravention of the requirements in the CO.

(Post-meeting note: At the HC meeting on 27 February 2015, Members agreed to the appointment of a subcommittee under the HC to study the Draft Rules.)

IV. Proposed amendment of the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91B) and adjustment of the financial eligibility limits of the Ordinary and Supplementary Legal Aid Schemes

LC Paper No. CB(4)493/14-15(04) -- The Administration's paper entitled "Proposed amendment of the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91B) and adjustment of the financial eligibility limits of the Ordinary and Supplementary Legal Aid Schemes"

Briefing by the Administration

27. Deputy Secretary for Home Affairs (1) ("DSHA(1)) briefed members on the proposed amendments to Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations (Cap. 91 sub. leg. B") ("LAR") to revise the bandwidths of assessed financial resources of aided persons in relation to the contribution payable under the Ordinary Legal Aid Scheme ("OLAS"), so that the bandwidths would be represented as percentages of the financial eligibility limit ("FEL") of the OLAS rather than the current absolute figures; and would be more evenly distributed. The proposed amendments would avoid the need of regular legislative amendments in future to keep the bandwidths up-to-date with the FEL under the OLAS as might be revised from time to time. Subject to the proposed amendments to the resources bandwidths, the FELs of the OLAS and the Supplementary Legal Aid Scheme ("SLAS") would also be adjusted upward by 7.7% in accordance with changes of the Consumer Price Index (C) ("CPI(C)") to maintain their respective real values. DSHA(1) further said that subject to members' views, the Administration planned to introduce the amendment regulations for the resources bandwidths and move the LegCo resolution to adjust the FELs of OLAS and SLAS in the second quarter of 2015.

Discussion

28. Whilst expressing support for the proposed amendment of Cap. 91B and adjustment of the FELs of OLAS and SLAS, Mr LEUNG Kwok-hung urged the Administration to do more in helping the "sandwich" class to gain access to justice.

29. DSHA(1) responded that policy objective of legal aid was to ensure that no one with reasonable grounds for pursuing or defending a legal action

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was denied access to justice because of a lack of means. As legal aid services were funded by public funds, applicants were required by law to satisfy the means and merits tests in order to be qualified for legal aid. There were statutory allowances and deductibles applicable when assessing the financial resources of the legal aid applicants, for example, the value and mortgage payment or rent of an applicant's primary residence would be excluded in the assessed financial resources. DSHA(1) further said that the subject proposal was technical in nature and provided room for future adjustments of the FELs including the regular inflation-linked adjustments to maintain their real values. DSHA(1) also remarked that the existing legal aid framework had already strived to balance the prudent use of public resources and applicants' access to justice.

30. Mr LEUNG Kwok-hung suggested that the LAD should waive the FELs of OLAS and SLAS for applicants in cases which sought to clarify a point of law/legal principle which affected the general public. Mr LEUNG further suggested that the Administration should consider adopting the contingency fee regime in Hong Kong so that persons not qualified for legal aid could still have access to legal services from lawyers in the private sector.

31. Mr NG Leung-sing noted from paragraph 6 of the Administration's paper that the Director of Legal Aid ("DLA") might waive the OLAS FEL for applicants in meritorious cases. Whilst agreeing that the DLA should have the aforesaid discretion, noting that certain applicants applied for legal aid on multiple occasions, and that a selected group of legal professionals would often be nominated to handle the cases, Mr NG asked whether there was any mechanism in place to ensure that legal aid would not be abused by applicants.

32. DSHA(1) responded that DLA had the discretion to waive the OLAS FEL for applicants in meritorious cases in which a breach of the Hong Kong Bill of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong was an issue. He said that there were multiple mechanisms and safeguards to ensure the independent and fair handling of legal aid cases. In particular, LAD had to assess legal aid applications in accordance with the statutory means and merits tests. Safeguards were also in place to ensure the proper and fair provision of legal aid services, and LAD's provision of legal aid services was overseen by the independent Legal Aid Services Council ("LASC"). A statutory appeal mechanism was also in place as appeals against LAD's decisions in legal aid applications could be lodged with the Registrar of the High Court whose decision should be final.

33. To better facilitate members' discussion on the provision of legal aid in the March 2015 meeting of the Panel, Dr CHIANG Lai-wan requested the

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Administration to provide information on the provision of legal aid aiming at the middle-class, including examples of services similar to SLAS in overseas jurisdictions.

34. Mr Albert HO said that in order to improve access to justice for persons of limited means, the existing FELs of OLAS and SLAS should be raised and the scope of SLAS should also be expanded to cover more types of cases, such as defamatory libel cases. Mr HO further said that the LAD should also review the assessment of financial resources of applicants to enable more people to gain access to legal aid. Mr HO pointed out that at present, the determination of an applicant's financial resources would include those of the applicant's spouse, even though the applicant had separated from his/her spouse. Another example was that in determining an application for a probate case, the LAD would assess the financial resources of all of the beneficiaries of the estate concerned. As such, if, say, only the financial resources one of the five beneficiaries exceeded the FEL of OLAS or SLAS, legal aid would be refused.

35. DSHA(1) responded that the scope of SLAS had been substantially expanded in November 2012. Notwithstanding that, the Government had already invited the LASC to further examine the scope of SLAS with a view to presenting a new round of recommendations to the Government.

36. The Chairman said that she had moved a motion at the Council meeting on 11 February 2009 to urge the Administration to relax the eligibility criteria for legal aid. The Chairman further said that the Administration should review the mechanism for seeking opinion from lawyers in private practice on the merits of legal aid applications, as well as the appeal mechanism against DLA's decisions.

Conclusion

37. In closing, the Chairman said that members generally supported the proposed amendments of Cap. 91B and adjustment of the FELs of OLAS and SLAS.

V. Any other business

38. There being no other business, the meeting ended at 4:30 pm.