立法會
Legislative Council

Ref : CB4/PL/AJLS

LC Paper No. CB(4)1427/14-15
(These minutes have been seen by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 22 June 2015, at 4:30 pm
in Conference Room 1 of the Legislative Council Complex

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

Public Officers attending :

Item III

Department of Justice

Mr Keith YEUNG, SC
Director of Public Prosecutions

Mr William TAM, SC
Deputy Director of Public Prosecutions

Mrs Apollonia LIU
Deputy Director
Administration and Development Division

Item IV

Department of Justice

Ms Christina CHEUNG
Law Officer (Civil Law) (Acting)

Mr Simon LEE
Deputy Law Officer (Civil Law)

Ms Jenny FUNG
Senior Assistant Law Officer (Civil Law)

Mr William LIU
Senior Government Counsel

Ms Lisa WONG, SC
Member, Steering Committee on Mediation

Attendance by invitation :

Item III

Hong Kong Bar Association

Mr Edwin CHOY Wai-bond

Mr Kay CHAN Kwok-wai

Mr Joe CHAN Wai-yin

Item IV

Hong Kong Bar Association

Ms Kim Margaret ROONEY

Clerk in attendance	**:**	Miss Mary SO Chief Council Secretary (4)2
Staff in attendance	**:**	Mr KAU Kin-wah Senior Assistant Legal Adviser 3
		Mr Oscar WONG 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

LC Paper No. CB(4)1084/14-15(01) -- Information paper on "Subsidiary Legislation relating to Privileges and Immunities Conferred on Consular Posts" provided by the Administration Wing of the Chief Secretary for Administration's Office

Members noted that above information paper and did not raise any queries.

II. Items for discussion at the next meeting

LC Paper No. CB(4)1168/14-15(01) -- List of outstanding items for discussion

LC Paper No. CB(4)1168/14-15(02) -- List of follow-up actions

Action

2. Members agreed to discuss the following items at the next regular meeting scheduled for 20 July 2015 at 4:30 pm:

(a) Implementation of the recommendations made by the Law Reform Commission;

(b) Procedure for the making of subsidiary legislation relating to the legal professional bodies; and

(c) The administration of the Estate of the late Mrs Nina WANG.

3. Referring to the list of outstanding items for discussion (LC Paper No. CB(4)1168/14-15(01)), the Chairman drew members' attention to the possible timing/status for discussing the following issues:

(a) Mechanism for handling complaints against judicial conduct - 4th quarter of 2015;

(b) Legal issues relating to the co-location arrangements at the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link - the Department of Justice ("DoJ") was yet in a position to advise when it could brief members on the subject matter; and

(c) Granting and refusal of bail – whilst the DoJ agreed that it did have a role to play in the process of handling bail under the Criminal Procedure Ordinance (Cap. 221), the granting or refusal of court bail was a matter of judicial functions. The Judiciary however did not consider it appropriate for them to discuss the subject matter on the grounds of maintaining judicial independence.

III. Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone

LC Paper No. CB(4)1168/14-15(03) -- Administration's paper on "Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone"

Action

LC Paper No. CB(4)1168/14-15(04) -- Background brief on "Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone" prepared by the Legislative Council Secretariat

Briefing by the Administration

4. Director of Public Prosecutions ("DPP") briefed members on the information collated by the Administration regarding matters raised at the Panel meeting on 22 April 2014 on the issue of "Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone", details of which were set out in the DoJ's paper (LC Paper No. CB(4)1168/14-15(03)).

Views of the Hong Kong Bar Association

5. Mr Edwin CHOY reiterated the views of Hong Kong Bar Association ("the Bar Association") made at previous meetings of the Panel about the possible extension of jury trials to the District Court for the following reasons:

Jurisprudential aspect

(a) introducing a division of labour between judgment of facts by jurors and judgment of law by judges into the trials of criminal offences would improve jurisprudence. First, although judges were supposed to wipe their mind completely clean of inadmissible evidence that they had seen in trying cases, it was questionable whether judges could give no regard to such inadmissible evidence in all instances. Hitherto, there was no neurological or psychological evidence that one could really give no regard to the things they had seen or considered in deciding matters. Second, it would be difficult to expect judges, particularly those of certain seniority, to bring a freshness of mind in trying cases which were very similar to those cases they tried day in and day out for a long time. This however would not be the case for jurors who were novice to the justice system. Moreover, being persons from different background, jurors could better understand things from the defendant's/victim's perspective. Unlike in the past, jurors were no longer persons who were extremely well educated and/or from a social stratum completely different from that of the accused;

Action

(b) at present, the only party that could decide whether a defendant would be tried in the District Court by a judge alone or in the Court of First Instance of the High Court before a judge together with a jury if the criminal case concerned could be tried in either way was the DPP or the Secretary for Justice. Removing such a dissymmetry in the criminal justice system of the prosecution electing the venue to trial would let all sides see that the criminal justice system was impartial;

Social educational aspect

(c) expansion of jury service would enable more citizens to take part and get involved in their civic duties and help them better understand how the justice system worked; and

Public acceptance aspect

(d) a verdict by jurors would improve acceptance of the verdict which in turn would add confidence to the justice system in that a verdict by jurors allowed the accused to be judged by ordinary people or peers. Whilst judges were all of extremely high professional standards, in the minds of the ordinary people judges were very much seen as persons of the establishment.

6. Mr CHOY further said that given that Hong Kong was a fairly affluent society, the Bar Association considered that it would not be right for the Administration not to consider extending the jury system to the District Court with the merits mentioned above just because such extension would entail some escalating costs. The Bar Association agreed with the Administration that extending the jury system to the District Court warranted detailed and in-depth study and suggested that serious consideration should be given to inviting the Law Reform Commission ("LRC") to conduct the study.

Discussion

7. Mr WONG Yuk-man concurred with the points made by the Bar Association for introducing jury trials at the District Court, and urged the Administration not to drag its feet in extending the jury system to the District Court to better safeguard the rights of defendants in criminal proceedings on the ground of huge resource implications. Mr WONG further said that:

(a) he disagreed with the DoJ's views mentioned in paragraph 17 of the DoJ's paper which implied that the introduction of jury trials at the

Action

District Court would adversely impact on the jurisprudential dimension over the whole criminal justice system, as the criminal justice system of other jurisdictions such as Canada, the United Kingdom and the United States, where the accused was given a jury trial, had been working well;

(b) although the Hong Kong Court of Appeal held in *Chiang Lily v Secretary for Justice*, CACV 55/2009 and the Court of Final Appeal also held in *Chiang Lily v Secretary for Justice (2010) 13 HKCFAR 208* that there was no right to trial by jury in Hong Kong, this did not mean that extending jury trial to the District Court was prohibited by Article 86 of the Basic Law ("BL") which provided that the principle of trial by jury previously practised in Hong Kong should be maintained. In *Secretary for Justice v Lau Kwok Fai & Another* [2005] 3 HKLRD 88, the Court of Final Appeal considered the phrase "shall be maintained" referred to in the second sentence of BL 103 which read that "Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals" and held that preservation of that system did not entail preservation of all the elements of which the system consisted. Some elements might change and be modified or replaced without affecting the continuity of the system as a whole. In the light of the Court of Final Appeal's decision in the *Lau Kwok Fai* case, the use of the phrase "shall be maintained" in BL 86 should not inhibit changes to the principle of trial by jury previously practised in Hong Kong provided that any such changes were not so material that it became another principle;

(c) the fact that the conviction rates at the Magistrates' Court and the District Court in Hong Kong, stood at over 90% respectively, were consistently higher than those at similar levels of courts in other common law jurisdictions which gave a jury trial to the accused suggested that some of the accused in Hong Kong tried in the Magistrates' Court and the District Court did not get a fair trial;

(d) introduction of jury trials in the District Court would make the criminal justice system more fair and just in that a jury was, in theory, unbiased because it was not part of the justice system and jurors were allowed to apply common sense and local values to the evidence and facts of the case. Moreover, a jury trial would prevent the existing situation whereby the accused could bargain with the presiding judge

Action

for a reduced sentence;

(e) with the increasing use of Chinese language in the District Court and the higher educational attainment of Hong Kong people, Hong Kong now possessed the necessary framework to introduce jury trials in the District Court; and

(f) as a first step, consideration could be given to allowing the accused in criminal proceedings to elect trial by jury in the District Court.

8. DPP responded as follows:

(a) although resource implications were certainly one of the considerations related to the extension of the jury system to cover criminal trials in the District Court, the DoJ agreed that costs should not be the reason for not taking effective measure to ensure the rights of all parties to legal proceedings to fair trials;

(b) information on the estimated overall resource implications if jury trials were to be introduced in the District Court, as set out in the DoJ's paper, was provided at the request of the Panel at its meeting held on 22 April 2014. DoJ had no preference for trial by judge alone or otherwise in the District Court;

(c) in other jurisdictions where a criminal offence to be tried by judge and jury was a right of their citizens, some criminal offences were still tried by judges alone. All criminal justice systems across the world were based on the premise of trusting the professional judgment and ability of judges in conducting trials in a fair and just manner. If jurors were believed to be able to give no regard to the evidence which they considered to be weak or false, there was no reason to doubt that judges could not do the same. Whilst it was possible that judges might not bring "fresh ideas" to the same types of cases they tried day in and day out as commented by the Bar Association, it was far more important that judges had adequate judicial experience to decipher evidence presented by witnesses and the accused in order to reach a rational and just decision;

(d) the suggestion that there was a dissymmetry in the current criminal justice system in Hong Kong because the prosecution could decide the venue for trial if the case concerned could either be tried in the District Court by a judge alone and in the Magistrates Courts by a judicial officer alone, or before a judge together with a jury which

Action

only took place in the Court of First Instance, was inappropriate for the following reasons. First, as confirmed by the Court of Final Appeal, the choice of the venue for a prosecution was a matter covered by BL 63 which gave control of prosecutions to the Secretary for Justice without any external interference. Second, the suggestion was based on the assumption that an offence tried by judge and jury was fairer than the same offence tried by judge alone. However, there was no sufficient evidence to support that an offence tried by judge and jury was fairer than the same offence tried by judge alone. In fact, the conviction rates (including guilty plea) at the Court of First Instance were over 90% in 2012 and 2013 respectively, which were comparable to that at the District Court during the same period;

(e) whilst there was no dispute that it was a social education for members of the public to serve as jurors in criminal proceedings, it was questionable whether such an aspect could be a strong merit in support of the introduction of jury trials at the District Court, not to mention that serving as jurors in criminal proceedings was not the only means to raise the awareness of members of the public of their civic duties and help them better understand how the criminal justice system worked; and

(f) judicial independence was a cornerstone for upholding the rule of law in Hong Kong and was accepted by the community generally. Judges had all along carried out their judicial duties in an independent and impartial manner. In particular, they would need to give a fully reasoned judgment for their decision in each case, which might then be scrutinized on appeal. On this basis, it was doubtful if there could be sufficient evidence to refer to judges as members of the establishment.

9. Mr Edwin CHOY of the Bar Association clarified that the reason he referred judges as members of the establishment was because judges were persons at the pinnacle of the society. There was no intention of the Bar Association to infer judges as part of the Government.

10. Whilst agreeing that neither the BL nor the Hong Kong Bill of Rights Ordinance conferred on a defendant the right to choose trial by jury, Mr Albert HO said that trying an offence by judge and jury rather than by judge alone, on balance, could better ensure that the defendant would receive the fairest possible trial and improve the acceptance of the verdict. Mr HO pointed out that apart from the Court of First Instance, a death inquest must also be held with a jury if the person concerned died in official custody, for example, in a prison or a

Action

police cell. Mr HO further pointed out that a jury trial was particularly suitable for trying cases which mainly involved a judgment of facts. If extending the jury system to cover criminal trials in the District Court could not be implemented for the time being, Mr HO asked whether, as a first step, consideration could be given to providing District Judges with the discretion to decide whether an offence, which could be tried in either the District Court or the Court of First Instance, to be tried at the District Court by a jury upon application by the accused.

11. The Chairman said that although BL86 stated that the principle of trial by jury previously practised in Hong Kong should be maintained, it did not prohibit the extension of jury trial in criminal proceedings to the District Court. Despite the cons of a jury system, such as jurors might be easily influenced by presentation and showmanship over substance and they were not likely to have a complete understanding of every point of law raised in the case, she was inclined to support providing District Judges with the discretion to decide whether an offence should be tried at the District Court by a jury upon application by the accused.

12. Mr LEUNG Kwok-hung strongly urged the DoJ to reform the current criminal justice system by allowing the accused charged with criminal offences to choose to be tried by a jury at the District Court.

13. Mr Paul TSE said that the main reason why the District Court was created in 1952 to try cases without a jury was for expediency, as there were not sufficient number of persons who had a knowledge of the English language sufficient to enable them to understand the evidence of witnesses, the address of counsel and the Judge's summing up which were all delivered in the English language. This however was not the case nowadays as evidenced by the increasing wide use of the Chinese language in court proceedings. To enable the accused to be tried by "peers", jury trials should immediately be extended to the District Court. As time was needed to construct a new purpose-built court building with suitable and adequate facilities in support of jury trials at the District Court level, as a first step, the accused should be allowed to choose to be tried with a jury at the District Court.

14. DPP responded that whilst based on cases in other common law jurisdictions, trial by jury was considered as a constitutional right, it was not applicable in Hong Kong after the introduction of the current system of trial by judge alone in the District Court in 1952. DoJ was of the view that any fundamental changes to the current system, which had worked well so far, should be carefully considered. This notwithstanding, DoJ had already introduced improvements to the current arrangements by providing more detailed guidelines under the Prosecution Code to better articulate the prosecution policy in respect of

Action

the selection of venue of trial by the prosecution. To allow the accused to choose to be tried in the District Court or to provide District Judge with discretionary power to decide what cases should be tried by a jury, would require in-depth study and holistic consideration. This was because the maximum level of sentence that the District Court could impose was seven years' imprisonment, and if a defendant could be allowed to choose to be tried in the District Court, he/she would in effect be allowed to choose his/her maximum sentence. Noting that different practices were adopted in overseas jurisdictions regarding the choice of venue of trial, a host of issues would need to be considered, e.g. which types of offences should be allowed to be tried by a jury at the District Court level, the criteria that should be adopted by District Judge for exercising his/her discretionary power to allow an offence to be tried by a jury and the court procedures concerned to be adopted.

15. DPP also pointed out that although justice should not be sacrificed for resources consideration, the costs of any change to the current system would need to be justifiable with due regard to the benefits that such change would bring. Members should take note of the concern of the Judiciary, as set out in their note at Annex to DoJ's paper, that the resource implications of extending jury trials to the District Court would be extremely substantial and far-reaching. And apart from the key direct, tangible costs so far identified, as set out in paragraph 15 of the DoJ's paper, depending on the number of additional cases involving trial by jury that any change to the system might generate, there might also be a question as to whether there were sufficient judges/prosecutors/defence counsel who had the necessary skills to handle jury trials. As such, the desirability and feasibility of proposals related to the extension of jury trial to the District Court or providing District Judge with the discretion to decide which offence should be tried with a jury should be considered in greater depth, for example by the LRC (as proposed by the Bar Association) as well as by other stakeholders.

16. Mr Edwin CHOY of the Bar Association said that the suggestion of providing District Judge with the discretion to decide which offence should be tried by a jury was worthy for consideration. Mr CHOY pointed out that in the Court of First Instance of the High Court, it was not compulsory to have a jury to hear a defamation case. According to section 33A of the High Court Ordinance (Cap. 4), either the plaintiff or the defendant in a defamation case could apply to have a jury trial if they so desired. However, the Court might refuse to grant the request for a jury trial if it was of the opinion that the trial required any prolonged examination of documents or accounts or any scientific or local investigation which could not conveniently be made with a jury. As implementing the suggestion of providing District Judge with the discretion to decide which offence should be tried by a jury would require legislation, Mr CHOY hoped that members would follow up the suggestion with the Administration.

Action

17. Mr Dennis KWOK said that jury trials should be introduced to the District Court to better instil public confidence in the criminal justice system, as there was increasing wide public concern about the conduct of prosecutions by the DoJ. Mr KWOK pointed out that whilst charges were swiftly laid against persons arrested for participating in the "Occupy Central" movement, no charges had yet been laid against the seven Police officers arrested for beating a person during the same movement. Another example was that the DoJ had yet to announce whether it would lay charges against Mr Donald TSANG, the former Chief Executive ("CE"), for accepting advantages from business tycoons during his office as CE, despite the fact that the Independent Commission Against Corruption had completed the investigation into the allegations involving Mr TSANG after it received complaints against Mr TSANG for the alleged misconduct in office some three years ago.

18. DPP responded that he could not see how allowing the accused to choose trial by jury could address the possible concerns about prosecutorial decisions. DPP however reiterated that the DoJ had never and would never be influenced by political interest in deciding whether to or not to prosecute. In respect of the two cases mentioned by Mr KWOK, as explained previously, independent outside counsel were engaged by the DoJ to advise on them, and the public would be duly informed about the decision, after they had been taken, in respect of those cases. As for the handling of other cases related to the "Occupy Central" movement, DPP further said that even if the choice of jury trial was to be allowed, given the nature of the offences involved, such cases would unlikely fall within the types of cases where such choice could apply. Indeed, a summary charge would likely be laid by the prosecution in other jurisdictions for offences of a similar nature.

Conclusion

19. In closing, the Chairman said that the Panel would continue to follow up the reform of the current system to determine whether an offence was to be tried by judge and jury or by judge alone.

IV. Public consultation on the proposed Apology Legislation

LC Paper No. CB(4)1168/14-15(05) -- Administration's paper on "Public Consultation on Enactment of Apology Legislation"

Action

Briefing by the Administration and Steering Committee on Mediation

20. Acting Law Officer (Civil Law) briefed members on the background of the public consultation to be launched by the Steering Committee on Mediation ("the Steering Committee") in respect of the question of whether an apology legislation should be enacted in Hong Kong as well as the main objective of and the pros and cons of enacting an apology legislation, details of which were set out in paragraphs 2 to 27 of the Administration's paper (LC Paper No. CB(4)1168/14-15(05)). Acting Law Officer (Civil Law) added that a Consultation Paper on the Enactment of Apology Legislation in Hong Kong ("the Consultation Paper") and an Executive Summary of the Consultation Paper prepared by the Steering Committee had been provided to LegCo Secretariat on 22 June 2015 for distribution to all LegCo Members. The Consultation Paper and an Executive Summary of the Consultation Paper had also been made available online on 22 June 2015. The public consultation exercise would start on 22 June 2015, and would last for six weeks.

21. Ms Lisa WONG, Steering Committee member, next briefed members on the following seven recommendations for consultation, details of which were set out in the Executive Summary of the Consultation Paper:

(a) an apology legislation was to be enacted in Hong Kong;

(b) the apology legislation was to apply to civil and other forms of non-criminal proceedings including disciplinary proceedings;

(c) the apology legislation was to cover full apologies;

(d) the apology legislation was to apply to the Government;

(e) the apology legislation was to expressly preclude an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance (Cap. 347);

(f) the apology legislation was to expressly provide that an apology should not affect any insurance coverage that was, or would be, available to the person making the apology; and

(g) the apology legislation was to take the form of a stand-alone legislation.

At the close of the public consultation on 3 August 2015, the Steering Committee would consider the views and comments received during the public consultation

Action

period and make a final recommendation.

Views of the Bar Association

22. Ms Kim Margaret ROONEY said that the Bar Association in principle supported the enactment of an apology legislation to promote and encourage the making of apologies in order to facilitate the amicable settlement of disputes by clarifying the legal consequences of making an apology. The Bar Association would carefully study the recommendations raised in the Consultation Paper and provide its views on the recommendations in due course.

Discussion

23. The Chairman welcomed the launching of the public consultation exercise by the Steering Committee. The Chairman then asked the following questions:

(a) whether there was any consequence for a person causing injury refusing to make apologies under the proposed apology legislation;

(b) whether partial apology would also be covered by the proposed apology legislation; and

(c) what was the scope of non-criminal proceedings under the proposed apology legislation.

24. Ms Lisa WONG of the Steering Committee responded as follows:

(a) the purpose of the proposed apology legislation was not to compel apologies. The main objective of the legislation was to promote and encourage the making of apologies in order to facilitate the amicable settlement of disputes. The proposed apology legislation as contemplated by the Steering Committee should comprise three elements. First, an apology would not constitute an admission of liability in law. Second, an apology admitting fault or liability by a party causing the injury would not be admissible as evidence in legal proceedings by the plaintiff to establish legal liability. Third, apologies would not be relevant to the determination of legal liability by the court;

(b) whilst it was recommended that the proposed apology legislation should cover full apology, which referred to an apology admitting liability or fault, a "partial apology", which referred to an apology which did not admit liability or fault should also be covered by the

Action

legislation. The reason for protecting full apologies was that full apologies were viewed as more effective than either a partial apology or no apology. This conclusion was consistent with the approach taken in the latest apology legislation in Canada and the Apologies (Scotland) Bill; and

(c) the proposed apology legislation was to apply to civil and other forms of non-criminal proceedings. As there were a number of arguments for and against applying the proposed apology legislation to disciplinary proceedings, which were in the nature of civil proceedings, and regulatory proceedings, which were between civil and criminal proceedings, public views were sought as to whether the legislation should apply to these proceedings.

25. Responding to the Chairman's enquiry on the definition of regulatory proceedings, Ms Lisa WONG of the Steering Committee said that they referred to proceedings involving the exercise of regulatory powers by a regulatory body under an enactment. Examples of regulatory proceedings included proceedings brought before the Market Misconduct Tribunal or the Securities and Futures Appeals Tribunal under the Securities and Futures Ordinance (Cap. 571).

26. Mr LEUNG Kwok-hung queried why the admission of facts by the person making the apology could not be used as evidence in legal proceedings.

27. Ms Lisa WONG of the Steering Committee responded that there were pros and cons for covering statements of facts in the proposed apology legislation. The main argument for applying apology legislation to statements of facts was that without such protection, people might just offer bare apologies which would be meaningless and ineffective and might even be regarded as insincere. On the other hand, there were arguments against applying apology legislation to statements of facts. If statements of facts were inadmissible, the plaintiff's claims might be adversely affected or even stifled in some circumstances, such as where the facts could not otherwise be obtained through specific discovery. In the light of this, the Steering Committee did not make any recommendation as to whether the apology legislation should also apply to statements of facts accompanying an apology. Comments and opinions were sought from the public in this regard. Ms WONG however pointed out that the Apologies (Scotland) Bill which had just been introduced into the Scottish Parliament covered a statement of fact in relation to the act, omission or outcome.

Conclusion

28. In closing, the Chairman said that the Panel would closely monitor the

Action

progress of enacting an apology legislation in Hong Kong.

V. Any other business

29. There being no other business, the meeting ended at 6:43 pm.

Council Business Division 4
Legislative Council Secretariat
24 August 2015