

**立法會**  
***Legislative Council***

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LC Paper No. CB(4)422/15-16  
(These minutes have been seen  
by the Administration)

**Panel on Administration of Justice and Legal Services**

**Minutes of meeting**  
**held on Monday, 23 November 2015, at 4:30 pm**  
**in Conference Room 2 of the Legislative Council Complex**

**Members present** : Hon Martin LIAO Cheung-kong, 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 TAM Yiu-chung, GBS, JP  
Hon LEUNG Kwok-hung  
Hon WONG Yuk-man  
Hon NG Leung-sing, SBS, JP  
Hon Steven HO Chun-yin, BBS  
Hon Alice MAK Mei-kuen, BBS, JP  
Hon TANG Ka-piu, JP  
Dr Hon CHIANG Lai-wan, JP

**Members absent** : Hon Starry LEE Wai-king, JP  
Hon MA Fung-kwok, SBS, JP  
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP  
Hon Alan LEONG Kah-kit, SC  
Dr Hon Elizabeth QUAT, JP

**Public officers  
attending** : Item III

Administration Wing  
Chief Secretary for Administration's Office

Ms Kitty CHOI, JP  
Director of Administration

Mrs DO PANG Wai-yee, JP  
Deputy Director of Administration

Item IV

The Law Reform Commission of Hong Kong

Ms Kim M ROONEY, Barrister  
Chairman  
Third Party Funding for Arbitration Sub-committee

Mr Victor DAWES, SC, Barrister  
Member  
Third Party Funding for Arbitration Sub-committee

Ms Michelle AINSWORTH  
Secretary

Ms Kitty FUNG  
Secretary  
Third Party Funding for Arbitration Sub-committee

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

**Staff in attendance :** Mr Stephen LAM  
Senior Assistant Legal Adviser 2

Mr Joey LO  
Senior Council Secretary (4)2

Ms Rebecca LEE  
Council Secretary (4)2

Miss Vivian YUEN  
Legislative Assistant (4)2

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The Chairman informed members that he had received a letter dated 19 November 2015 from Ms Claudia MO informing him of her decision to withdraw from the membership of the Panel.

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

2. Members noted a letter dated 17 November 2015 from the Administration enclosing a table which summarized the current position of those ordinances/certain provisions of ordinances which had been enacted for over three years (i.e. in or before 2012) but were yet in operation (LC Paper No. CB(4) 246/15-16(01)) and did not raise any queries.

**II. Items for discussion at the next meeting**

LC Paper No. CB(4)226/15-16(01) -- List of outstanding items for discussion

LC Paper No. CB(4)226/15-16(02) -- List of follow-up actions

3. Members agreed to discuss the following items at the next regular meeting scheduled for 21 December 2015 at 5:30 pm:

(a) Proposed legislative amendments to implement the final phase of a five-day week in the Judiciary; and

(b) Bilingual legislation drafting.

4. Members further agreed to include the item on "Terms and conditions of service of part-time interpreters in the Judiciary", proposed by Ms Alice MAK in her letter dated 18 November 2015 addressed to the Chairman (vide LC Paper No. CB(4)240/15-16 dated 19 November 2015), in the list of outstanding items for discussion by the Panel.

5. The Chairman reported the following changes made to the list of outstanding items for discussion by the Panel, following his and the Deputy Chairman's work plan meeting with the Administration and the Judiciary Administration on 12 November 2015:

(a) item on "Criticisms made by the Magistracies about the misuse of power by the Police" (proposed by Mr Alan LEONG") had been

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referred to the Panel on Security for follow up, as the subject matter concerned the Police Force which came under the purview of the Panel on Security. Where necessary/appropriate, this Panel might hold a joint meeting with the Panel on Security;

- (b) item on "Means to deter members of the public from insulting to the Police" (proposed by Dr CHIANG Lai-wan) had also been referred to the Panel on Security for follow up, as the subject matter concerned the Police Force which came under the purview of the Panel on Security. One of the outstanding items for discussion by the Panel on Security, i.e. "Training on psychological quality of Police officers", proposed for discussion in the 2nd quarter of 2016, would cover the suggestion of "Enactment of legislation against the offence of insulting Police" raised by a member at the meeting of the Panel on Security held on 15 October 2015;
- (c) item on "Proposed amendments to Rule 4B(2) of the Solicitors' Practice Rules and Rule 8(4) of the Foreign Lawyers Practice Rules" (submitted by the Law Society of Hong Kong) had been deleted from the list as the proposed amendments were minor;
- (d) item on "Sentencing policy" (proposed by Dr CHIANG Lai-wan) had been deleted from the list, as the Judiciary had advised that it was not appropriate for it to send any representative(s) to attend any meeting of the Panel for discussion of this item. The reason being that sentencing involved judiciary discretion, in accordance with the principle of judicial independence;
- (e) item on "Duty lawyer service for non-refoulement claims under the unified screening mechanism" (proposed by Mr Dennis KWOK) had been deleted from the list, as the item would be followed up by the Panel on Security;
- (f) item on "Granting and refusal of bail" (proposed by Mr Paul TSE) had been deleted from the list, as the concern arose from a single court case; and
- (g) item on "Inclusion of the Independent Police Complaints Council ("IPCC") under the purview of The Ombudsman" had been deleted from the list, as IPCC did not agree to such inclusion and no Panel member had since September 2011 asked to pursue this item.

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**III. 2015-2016 Judicial Service Pay Adjustment**

CSO/ADM CR 6/3221/02 -- Legislative Council  
("LegCo") Brief

LC Paper No. CB(4)226/15-16(03) -- Updated background brief on  
"Judicial Service Pay  
Adjustment" prepared by  
LegCo Secretariat

Briefing by the Administration

6. At the invitation of the Chairman, Director of Administration ("D of Admin") briefed members on the proposal to increase the pay of judges and judicial officers ("JJOs") by 4.41% for 2015-2016 with effect from 1 April 2015, details of which were set out in the LegCo Brief (CSO/ADM CR 6/3221/02). Subject to members' views, the Government would seek the approval of LegCo Finance Committee on the proposed pay adjustment.

Discussion

*Judicial remuneration*

7. Mr Dennis KWOK expressed concern that the proposed pay increase of 4.41% for JJOs for 2015-2016 was below the headline inflation averaged at 4.5% for the 12-month period ended March 2015.

8. D of Admin responded that whilst judicial remuneration was determined under a mechanism which was separate from that of the civil service, similar to annual civil service pay adjustment, the aim of annual pay adjustment for JJOs was not to track inflation. In fact, there had been cases in the past whereby the annual pay adjustments for JJOs were lower than the headline inflation rates for the years concerned. As explained in the relevant LegCo Brief, in coming up with the recommendation for the proposed pay increase for JJOs, the Standing Committee on Judicial Salaries and Conditions of Service ("the Judicial Committee") had taken into account the basket of factors as approved by the Chief Executive in Council in May 2008 (items (a) to (l) of paragraph 33 of the LegCo Brief), the principle of judicial independence and the position of the Judiciary.

9. The Chairman noted that the proposed pay increase of 4.41% for JJOs for 2015-2016 was based on the private sector pay trend indicator ("PTI") as adjusted by the cost of increments for JJOs (net PTI for JJOs) at 3.91% in 2015 plus 0.5%. Further noting that the adoption of the "plus 0.5%" approach

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followed that adopted for civil service pay adjustment in 2015, the Chairman asked whether adding 0.5% on top of the net PTI for JJOs in 2015 was to boost the morale of JJOs as in the case of the civil servants.

10. D of Admin responded that the Judiciary considered that if the civil service pay adjustment was based on the net PTI plus 0.5%, the same approach should be adopted for the judicial pay adjustment in 2015. If the "plus 0.5%" was not adopted for the judicial pay adjustment in 2015, it would put the position of judicial remuneration in a disadvantaged position when compared to the public sector pay adjustment as a whole.

11. Mr Albert HO said that he had no objection to the proposed pay increase of 4.41% for JJOs for 2015-2016. Responding to Mr HO's enquiry as to whether JJOs had been consulted on the proposed pay increase, D of Admin said that she believed that the Judiciary had consulted their JJOs before seeking a pay increase of 4.41% for the judicial service in 2015-2016 from the Government.

12. Dr CHIANG Lai-wan said that she had no objection to the proposed pay increase of 4.41% for JJOs for 2015-2016. Responding to Dr CHIANG's enquiry on how the net PTI for JJOs at 3.91% in 2015 was arrived at, D of Admin said that it was calculated by subtracting the consolidated cost of increments (0.55%) in 2014 from the gross PTI of private sector employees in the highest salary range (+4.46%) for the 12-month period from 2 April 2014 to 1 April 2015.

13. Noting that the Judicial Committee had decided to conduct another benchmark study in 2015 to ascertain whether judicial pay had been kept broadly in line with the movements of legal sector earnings over time, Dr CHIANG Lai-wan enquired about the progress of the benchmark study.

14. D of Admin responded that preparation for the 2015 Benchmark Study was underway. To her understanding, the consultant engaged by the Judicial Committee to carry out the Benchmark Study was presently collecting information from the legal practitioners in private practice through a questionnaire, to be followed by 15 to 20 rounds of interviews with the respondents. The Judicial Committee hoped to draw on the findings of the 2015 Benchmark Study in the context of the next year, i.e. 2016, judicial remuneration review. D of Admin added that the findings of the last Benchmark Study conducted in 2010 revealed that no clear trends on the differentials between judicial pay and legal sector earnings could be established and remuneration was not a key concern in considering judicial appointment.

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15. Responding to Dr CHIANG Lai-wan's enquiry as to whether judicial pay would be reduced if the findings of the 2015 Benchmark Study should reveal that judicial pays were higher than legal sector earnings, D of Admin said that she was not in a position to answer the question but the Judicial Committee had emphasized that the findings of the 2015 Benchmark Study should not directly be reflected as actual figures in the judicial service pay adjustment. The 2015 Benchmark Study would be conducted to ascertain whether judicial pay was kept broadly in line with the movements of legal sector earnings over time. The Judicial Committee would take into account the findings of the 2015 Benchmark Study as one of the factors before making recommendation on judicial salary pay adjustment in 2016.

*Judicial manpower*

16. Noting that the vacancy rate of judicial posts still stood at 11.9% as of November 2014 despite the numerous rounds of recruitment exercises conducted by the Judiciary, Mr Dennis KWOK said that the Judiciary should expedite its review on the retirement ages of JJOs so as to better attract quality candidates and experienced private practitioners to join the bench. Responding to Mr KWOK's enquiry about the progress of the review on retirement ages of JJOs, D of Admin said that to her understanding, the Judiciary had recently engaged an outside consultant to review the retirement ages of JJOs at different levels of courts. The Judiciary planned to apprise the Government of the results of the review once the results became available.

17. Mr Dennis KWOK requested that information be sought from the Judiciary on the progress of the review on retirement ages of JJOs and when the review was expected to be completed.

18. Mr James TO questioned the need for the Judiciary to hire an outside consultant to review the retirement ages of JJOs, as the Judiciary was well versed with the legal sector. Mr TO requested D of Admin to convey his view to the Judiciary.

19. Mr Albert HO said that to address the recruitment difficulties, particularly at the Court of First Instance ("CFI") level, the Judiciary should also recruit judges from outside Hong Kong. Mr HO queried whether, apart from the higher costs of appointing eligible overseas applicants for judicial posts, another reason for the Judiciary not to recruit judges from outside Hong Kong since the handover was due to the need for judges to be bilingual.

20. D of Admin responded that appointments of JJOs were all made through open recruitment exercises. Candidates from local and overseas might

Judiciary  
Administration  
("JA")

Admin Wing  
& JA

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apply. According to the Judiciary, of the 81 judicial posts filled in the past four years, 51 and 30 were filled by candidates outside and within the Judiciary respectively.

21. Responding to Mr Albert HO's enquiry on the number of eligible overseas applicants appointed for judicial posts in the past years, the Clerk said that similar information had been sought from the Judiciary when the issue on "Manpower and other support for the Judiciary" was discussed at the Panel meeting on 18 May 2015.

*(Post-meeting note: The Judiciary's reply on the recruitment of eligible overseas applicants appointed for the Judge of CFI post had been issued to members vide LC Paper No. CB(4) 1369/14-15 on 27 July 2015.)*

22. Mr LEUNG Kwok-hung said that to instill public confidence in the judicial system, the Judiciary should refrain from appointing former prosecutors from the Department of Justice to become judges and ensure high standard of judicial conduct. In respect of the latter, Mr LEUNG cited an incident where a Judge of the Court of Appeal inappropriately delegated his judicial duties to a Master.

*Judicial support*

23. Mr Dennis KWOK said that as lack of judicial support was another major factor discouraging outside law talents to join the bench, the Judiciary should expand the Scheme on Judicial Assistants to provide assistance to judges other than appellate judges in the Court of Final Appeal and Court of Appeal of the High Court. Mr KWOK said that a response should be sought from the Judiciary on expanding the Scheme on Judicial Assistants. Mr LEUNG Kwok-hung and Mr Albert HO expressed support.

24. Mr Albert HO pointed out that the heavy caseload of judges had given rise to long court waiting times as well as the long time required for judges to deliver judgements. Responding to Mr HO's request to seek information from the Judiciary on the time taken by judges at different levels of courts to deliver judgements, the Clerk said that such information was previously requested at the Panel meeting on 15 October 2015. The response from the Judiciary was awaited.



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Conclusion

25. The Chairman concluded that members generally supported the proposed judicial service pay adjustment.

26. Dr CHIANG Lai-wan suggested and members agreed to invite the Judiciary to update members on judicial manpower situation and support for JJOs at a future meeting of the Panel.

**IV. Law Reform Commission's Consultation Paper on Third Party Funding for Arbitration**

LC Paper No. CB(4)226/15-16(04) -- Executive Summary of the Law Reform Commission ("LRC")'s Consultation Paper on Third Party Funding for Arbitration

Briefing by LRC

27. Ms Kim ROONEY, Chairman, Third Party Funding for Arbitration Sub-committee of the LRC ("the Sub-committee"), briefed members on the Consultation Paper on Third Party Funding for Arbitration ("the Consultation Paper") released by the Sub-committee on 19 October 2015 proposing that third party funding for arbitrations taking place in Hong Kong should be permitted under Hong Kong law, details of which set out in the above Executive Summary (LC Paper No. CB(4)226/15-16(04)). In gist, the Sub-committee members were unanimously of the view that the current law in Hong Kong needed to be reformed to expressly permit third party funding for arbitration taking place in Hong Kong, subject to compliance by third party funders with appropriate ethical and financial standards. Although the doctrines of maintenance and champerty permitted third party funding of litigation in three exceptional areas, i.e. (i) where a third party had a legitimate interest in the outcome of the litigation; (ii) where a party should be permitted to obtain third party funding, so as to enable him/her to have access to justice; and (iii) in a miscellaneous category of proceedings including insolvency proceedings where third party funding was regularly allowed by the Hong Kong courts, it was unclear under the Hong Kong law whether the operation of the doctrines of maintenance and champerty in Hong Kong also applied to third party funding for arbitrations taking place in Hong Kong. This question was expressly left open by the Court of Final Appeal in 2007 in the case of *Unruh v Seeberger* (2007) 10 HKCFAR 31. The Sub-committee considered that the reform could bring clear

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benefits to those interested in arbitration in Hong Kong and enhance Hong Kong's competitive position as an international arbitration centre. The Sub-committee's recommendations were:

- (a) the Arbitration Ordinance (Cap. 609) should be amended to expressly provide that third party funding for arbitration taking place in Hong Kong was permitted under Hong Kong law;
- (b) clear ethical and financial standards for third party funders providing third party funding to parties to arbitrations taking place in Hong Kong should be developed to minimize potential risks arising from third party funding;
- (c) submissions should be invited as to:
  - (i) whether the development and supervision of the applicable ethical and financial standards should be conducted by a statutory or governmental body; or by a self-regulatory body such as by third party funders agreeing to comply with a code of conduct. (Whilst third party funding for arbitration was permitted in all but one of the jurisdictions (Singapore) reviewed, there was little uniformity in the form of regulation of third party funding. The main trend was toward a light touch approach either by including statutory regulation of financial and conflicts issues, for example, Australia or self-regulation, for example England and Wales); and
  - (ii) how the ethical or financial standards should address relevant ethical and financial matters such as capital adequacy, conflicts of interest, confidentiality and privilege, extent of extra-territorial application, control of the arbitration by third party funder, disclosure of third party funding to a tribunal and other party/parties to the arbitration, grounds for termination of the third party funding, and complaints and enforcement procedures under the third party funding agreement; and
- (d) submissions should also be invited as to:
  - (i) whether or not a third party funder should be directly liable for adverse costs orders in a matter it had funded;
  - (ii) if the answer to sub-paragraph (d)(i) was yes, how such liability could be imposed as a matter of Hong Kong law, and

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for the purposes of recognition and enforcement under the Convention for Recognition and Enforcement of Foreign Arbitral Awards 1958;

- (iii) whether there was a need to amend the Arbitration Ordinance to provide for the tribunal's power to order third party funders to provide security for costs; and
- (iv) if the answer to sub-paragraph (d)(iii) was yes, the basis for such power as a matter of Hong Kong law, and for the purposes of recognition and enforcement under the Convention for Recognition and Enforcement of Foreign Arbitral Awards 1958.

The consultation would end on 18 January 2016.

Discussion

28. Mr Dennis KWOK said that he welcomed the Sub-committee's proposal to expressly permit third party funding for arbitration taking place in Hong Kong under Hong Kong law. Mr KWOK then asked:

- (a) to what extent was third party funders of litigation funding arbitration in Hong Kong, how it was done and market practice; and
- (b) whether consideration would be given to bringing a test case to the court to see if the operation of the doctrines of maintenance and champerty also applied to third party funding for arbitrations taking place in Hong Kong, having regard to the long time that would take the Administration to amend the Arbitration Ordinance to expressly permit third party funding for arbitration taking place in Hong Kong.

29. Responding to Mr KWOK's first question, Ms Kim ROONEY said that she was informed by the overseas funders attending the Hong Kong Arbitration Week held in October 2015 that the cases they were involved in in Hong Kong were all confined to insolvency litigation which was one of the three exceptional areas permitted for third party funding under the doctrines of maintenance and champerty in Hong Kong. Mr Victor DAWES, Sub-committee member, supplemented that whilst it could not be ruled out that third party funding for arbitration was taking place in Hong Kong, it was

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impossible for the Sub-committee to obtain any market data on such as funders all seemed to carry out their funding activities in a coy manner.

30. As to Mr KWOK's second question, Ms Kim ROONEY said that the Sub-committee considered that the most effective way to provide for third party funding for arbitration taking place in Hong Kong under Hong Kong law was to amend the Arbitration Ordinance. Mr Victor DAWES supplemented that although bringing a test case to the court was one way to establish whether the doctrines of maintenance and champerty in Hong Kong also applied or did not apply to third party funding for arbitration taking place in Hong Kong, there were uncertainties as to whether the court would again leave the legal question open and whether the court ruling on exempting third party funding for arbitration taking place in Hong Kong from the doctrines of maintenance and champerty in Hong Kong could address all the legal issues involved.

31. Dr CHIANG Lai-wan asked whether parties to an arbitration agreement reached in a place which permitted third party funding for arbitration, such as England, and who were funded by third party funders could be permitted to have their arbitration taking place in Hong Kong.

32. Ms Kim ROONEY replied that it was unclear under the current Hong Kong law whether the operation of the doctrines of maintenance and champerty in Hong Kong also applied to third party funding for arbitration taking place in Hong Kong. Hence, the Sub-committee's recommendation to amend the Arbitration Ordinance to expressly provide for third party funding for arbitration taking place in Hong Kong.

33. Noting that arbitrations taking place in Hong Kong generally involved commercial or contractual disputes, Dr CHIANG Lai-wan enquired whether the Sub-committee would consult the views of the major chambers of commerce in Hong Kong on the issues presented in the Consultation Paper.

34. Ms Kim ROONEY responded that the Consultation Paper aimed to seek views and suggestions from all members of the public on the issues presented in the Consultation Paper. Ms ROONEY further said that the Sub-committee did not consult the views of the major chambers of commerce in Hong Kong in drawing up the Consultation Paper.

35. Dr CHIANG Lai-wan opined that to facilitate the smooth reform of the law to provide for third party funding for arbitration taking place in Hong Kong, the Sub-committee should consult the views of the major chambers of commerce in Hong Kong in drawing up the Consultation Paper. Dr CHIANG hoped that the Sub-committee would give due regard to the views expressed by

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the major chambers of commerce in Hong Kong on the issues presented in the Consultation Paper before concluding its final recommendations.

36. Mr TANG Ka-piu asked why arbitration was rarely used by individuals to settle consumer disputes, employment disputes and disputes relating to medical incidents.

37. Mr Victor DAWES explained that whether a dispute could be settled through arbitration depended on the existence of an arbitration agreement entered into between the parties involved. In the majority of cases involving consumer disputes, employment disputes and disputes relating to medical incidents, an arbitration agreement did not exist and the parties had no alternative but to bring the case to court if they could not settle the disputes amongst themselves. In many commercial contracts, an arbitration agreement existed and disputes could be resolved through arbitration.

38. Noting that many arbitrators were practising lawyers, Mr TANG Ka-piu expressed concern about conflict of interests which might arise in an arbitration if the arbitrator had previously been the counsel of a party to the arbitration. Mr TANG enquired whether such conflict of interest was the reason why Singapore had hitherto not permitted third party funding for arbitration taking place in Singapore.

39. Ms Kim ROONEY responded that there were very strict rules governing the conduct of arbitrators for avoidance of conflict of interest. Ms ROONEY further said that there were recent reports that Singapore was reviewing its law to expressly provide for third party funding for arbitration taking place in Singapore to ensure its competitiveness as an international arbitration centre.

40. The Chairman opined that in order to secure the support of the community to permit third party funding for arbitration taking place in Hong Kong would depend on whether such third party funding would be underpinned by an effective regulatory framework. The Chairman further said that the Sub-committee should also take into account the concerns of Singapore in its review of the current position relating to third party funding for arbitration.

**V. Any other business**

Visit to the Judiciary

41. Members agreed to accept the invitation from the Chief Justice to visit the new Court of Final Appeal Building and to exchange views with the

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Judiciary on issues of concern in January 2016. Members also agreed to invite other non-Panel members to join the visit as in the past. A circular would be issued to ask members' availability on the date of the visit, i.e. in the morning of 18 or 25 January 2016.

*(Post-meeting note: The visit to the Judiciary would be held in the morning of 18 January 2016.)*

42. There being no other business, the meeting ended at 6:10 pm.

Council Business Division 4  
Legislative Council Secretariat  
31 December 2015