

立法會
Legislative Council

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LC Paper No. CB(4)511/15-16
(These minutes have been seen
by the Judiciary Administration
and the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 21 December 2015, at 5:30 pm
in Conference Room 1 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 Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Starry LEE Wai-king, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon WONG Yuk-man
Hon NG Leung-sing, SBS, JP
Hon MA Fung-kwok, SBS, JP
Hon Alice MAK Mei-kuen, BBS, JP
Dr Hon CHIANG Lai-wan, JP

Members absent : Hon CHAN Kam-lam, SBS, JP
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon Steven HO Chun-yin, BBS
Hon TANG Ka-piu, JP
Dr Hon Elizabeth QUAT, JP

**Public officers
attending** : Item III

Administration Wing
Chief Secretary for Administration's Office

Ms Christine WAI
Assistant Director of Administration (3)

Judiciary Administration

Miss Patricia SO
Deputy Judiciary Administrator
(Development)

Ms Wendy CHEUNG
Assistant Judiciary Administrator
(Development)

Item IV

Department of Justice

Mr Gilbert MO
Law Draftsman (Acting)

**Attendance by
invitation** : Item III

Hong Kong Bar Association

Mr Anthony ISMAIL

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

Miss Vivian YUEN
Legislative Assistant (4)2

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

Members noted that no information paper had been issued since the last meeting.

II. Items for discussion at the next meeting

LC Paper No. CB(4)359/15-16(01) -- List of outstanding items for discussion

LC Paper No. CB(4)359/15-16(02) -- List of follow-up actions

2. Members agreed to discuss the following items at the next regular meeting scheduled for 25 January 2016 at 4:30 pm:

(a) Briefing on the Chief Executive's 2016 Policy Address; and

(b) Arbitrability of Intellectual Property rights.

3. Whilst noting that the timing for discussing the issue of "Terms and conditions of service of part-time interpreters in the Judiciary" (item 9 on the list of outstanding items for discussion by the Panel) proposed by the Judiciary Administration was the second quarter of 2016, Miss Alice MAK hoped that the subject could be discussed earlier; and in any case, within the current legislative session.

Letter from Dr CHIANG Lai-wan

4. Referring to her letter dated 10 December 2015 (vide LC Paper No. CB(4)366/15-16(02), Dr CHIANG Lai-wan requested to discuss the issue of "Measures to prevent misuse of judicial review". Dr CHIANG pointed out that judicial review had increasingly been used by members of the public to challenge government's decisions, to the detriment of public interest. For instance, the construction of the Hong Kong-Zhuhai-Macao Bridge ("HZMB") project had experienced serious delay and significant rise in cost, because of a judicial review lodged against the HZMB project by a member of the public. This point was also recently made by the former Permanent Judge of the Court of Final Appeal, Mr Henry LITTON. Dr CHIANG also requested to discuss the issue of "Granting of legal aid for judicial review cases on appeal". Dr CHIANG pointed out that there were instances whereby the Registrar of the High Court overturned the Director of Legal Aid ("DLA")'s decision not to grant legal aid to judicial review. There were also instances whereby the court

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refused to grant leave to successful legal aid applicants to apply for judicial review.

5. The Chairman said that the issue of "Measures to prevent misuse of judicial review" could be discussed by the Panel from a legal policy perspective. He, however, would not agree to the discussion of the issue of "Granting of legal aid for judicial review cases on appeal" which was the Judiciary's discretion.

6. Mr Dennis KWOK said that he did not see the need to discuss the two issues proposed by Dr CHIANG Lai-wan for the following reasons:

- (a) applications for judicial review were prescribed under Order 53 of the Rules of the High Court (Cap. 4 sub. leg. A). Further, since the Court of Final Appeal's decision on the case of *Chan Po Fun Peter v Cheung CW Winnie & Anor* [2005] 5 HKC 145 in 2007, the court had applied a higher threshold for granting leave to apply for judicial review from cases with potential arguability to those with reasonable arguability, i.e. whether the case was one which enjoyed realistic prospects of success;
- (b) under the Legal Aid Ordinance (Cap. 91), an applicant for judicial review would, apart from the means test, be subject to if he/she had a sufficient interest in the matter to which the judicial review application related and the case had reasonable grounds in order to be granted legal aid. If the facts of the case or the legal issues involved were complicated, the DLA might seek the opinion of counsel or solicitors in private practice before making a decision; and
- (c) it was inappropriate for the Panel to discuss the decision of the Registrar of the High Court on an appeal against DLA's decision not to grant legal aid to the applicant, as to do so would undermine judicial independence.

7. Mr LEUNG Kwok-hung said that he opposed to inviting the Judiciary to attend before the Panel to answer members' concerns/questions on judicial review. Mr LEUNG further said that despite the growth in judicial review, it had become increasingly difficult for members of the public to obtain legal aid to apply for judicial review and leave from the court to apply for judicial review. There was also no evidence that the public was using judicial review to challenge Government's decisions on political grounds. For instance, the reason why a member of the public applied for judicial review against the

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Government's decision to construct the HZMB was that the Government had omitted to carry out an environmental impact assessment on the project.

8. Mr Albert HO said that although there had been many unsuccessful judicial review cases, there were also quite a number of successful judicial review cases against Government's decisions due to abuse of power by the Government. The judicial review case of Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region (HCAL 107/2005), which challenged the validity of existing legislative and administrative framework authorizing and regulating secret monitoring, was a case in point. Mr HO further said that he would not object to, say, discuss the procedures for judicial review proceedings, if members so agreed.

9. Mr Alan LEONG expressed opposition to discuss the issue of "Measures to prevent misuse of judicial review" even from a legal policy perspective, as the issue was a false proposition having regard to the reasons given by Mr Dennis KWOK in paragraph 6(a) and (b) above. Mr LEONG referred members to an article written by the former Chief Justice of the Court of Final Appeal, the Honourable Andrew LI, for a newspaper on judicial review published on 13 December 2015. In the article, Mr LI considered the criticisms made by Mr Henry LITTON against judges for being insufficiently robust in dealing with judicial review cases and the Judiciary generally for not meeting contemporary needs recently were unjustified. Mr LI emphasized that judicial review should not be viewed negatively as a nuisance to government. On the contrary, it should be viewed positively as effective judicial review was and remained a cornerstone for good governance. Mr LI further emphasized that the pursuit of efficiency must not be at the expense of justice. Mr LEONG further said that he would not object to the Panel inviting the Administration to discuss the provision of legal aid to apply for judicial review if members so agreed.

10. Ms Starry LEE disagreed that the issue of "Measures to prevent misuse of judicial review" was a false proposition, as the growing use of judicial review to challenge Government's decisions had become an issue of wide public concern. To avoid undermining judicial independence, Ms LEE said that the Panel could invite the Department of Justice ("DoJ") to respond to concerns/questions from members on judicial review mechanism and the Home Affairs Bureau ("HAB") and the Legal Aid Department ("LAD") to respond to concerns/questions from members on provision of legal aid to judicial review cases. It would be useful if members could also be apprised of the judicial review mechanism in overseas jurisdictions as compared to that of Hong Kong.

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11. After deliberations, members agreed to the Chairman's suggestion of including the issue of "Judicial review mechanism and its implementation" in the list of outstanding items for discussion by the Panel and that representatives from DoJ, HAB and LAD should be invited to brief the Panel on the issue as soon as practicable. To facilitate better discussion, Mr TAM Yiu-chung suggested and Dr CHIANG Lai-wan agreed to provide a letter setting out her concerns/questions on judicial review to the Secretariat for onward transmission to the Administration.

Letter from Mr WONG Yuk-man

12. The Chairman said that as the issue of "Legal issues relating to the co-location arrangements at the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link" was already on the list of outstanding items for discussion by the Panel, he suggested to incorporate the request made Mr WONG Yuk-man in his letter dated 2 December 2015 (vide LC Paper No. CB(4)366/15-16(01)) to follow up on the comments made by the Secretary for Justice on 21 November 2015 that permitting Mainland officers to enforce Chinese laws at the Guangzhou-Shenzhen-Hong Kong Express Rail Link ("XRL")'s West Kowloon terminus was inevitable if the co-location arrangement was to go ahead. In the letter, Mr WONG had pointed out that permitting Mainland officers to enforce Chinese laws at the XRL's West Kowloon terminus would violate Article 18 of the Basic Law which stipulated, inter alia, that national laws should not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to the Basic Law. Members agreed.

13. As the issue of "Legal issues relating to the co-location arrangements at the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link" involved the implementation of the Basic Law, the Chairman suggested inviting the Panel on Constitutional Affairs to hold a joint meeting with this Panel to discuss the issue or, failing which, inviting members of the Panel on Constitutional Affairs to join the discussion of this issue. Members raised no query.

III. Proposed legislative amendments to implement the final phase of a five-day week in the Judiciary

LC Paper No. CB(4)359/15-16(03) -- Judiciary Administration's
paper on "Judiciary (Five-day
Week) (Miscellaneous
Amendments) Bill"

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LC Paper No. CB(4)359/15-16(04) -- Letter dated 30 October 2015 from the Hong Kong Bar Association ("HKBA") to the Judiciary regarding the Judiciary's responses to the comments made by HKBA on the Judiciary's consultation paper on the draft provisions in the Judiciary (Five-day Week) (Miscellaneous Amendments) Bill 2015 in May 2015

Briefing by the Judiciary Administration

14. At the invitation of the Chairman, Deputy Judiciary Administrator (Development) ("DJA(D)") briefed members on the legislative proposals to implement the final phase (Phase III) of a five-day week in the Judiciary, details of which were set out in the paper provided by the Administration and the Judiciary Administration (LC Paper No. CB(4)359/15-16(03)). Specifically, the final phase intended to cover those services which had a public interface and the switch to a five-day week entailed legislative amendments. These were mainly the services provided by court offices and included court registries and accounts offices of various levels of court, Bailiffs' Offices, Probate Registry as well as Oaths and Declarations Office. Subject to members' views, the Government aimed to finalize the Judiciary (Five-day Week) (Miscellaneous Amendments) Bill ("the Bill") to implement the final phase of a five-day week in the Judiciary with a view to introducing the Bill to the Legislative Council ("LegCo") in the 2015-2016 legislative session, if possible.

Views of HKBA

15. Mr Anthony ISMAIL said that the HKBA was generally supportive of the legislative proposals to implement the final phase of a five-day week in the Judiciary on condition that essential services would not be affected as a result. HKBA was generally satisfied with the operational arrangements that the Judiciary would put in place, as set out in paragraph 11 of LC Paper No. CB(4)359/15-16(03), to facilitate the possible opening of court offices on Saturdays when necessary, and that the Judiciary would refine these arrangements, six months after the proposed legislative amendments came into effect, if necessary.

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Discussion

16. Dr CHIANG Lai-wan enquired about the impact of the full implementation of a five-day week in the Judiciary on the public. Dr CHIANG expressed concern that parties to court proceedings would have to attend longer period of court trials upon the full implementation of a five-day week in the Judiciary.

17. DJA(D) responded that since the implementation of Phase I of a five-day week in the Judiciary on 1 July 2006, there were now generally no court sittings on Saturdays and the need for the services of the court offices on Saturdays was not high. Hence, it was expected that there should not be much overall impact on public services after the proposed implementation of the final phase of the five-day week in the Judiciary. In addition, with the Government's implementation of a five-day week in the executives authorities since 2006, the public had generally become receptive to a five-day week arrangement. DJA(D) pointed out that the primary consideration of the Judiciary in implementing a five-day week was to ensure that essential services provided by the Judiciary would not be affected. For instance, although sittings had since 1 July 2006 been generally listed on weekdays only, sittings had been and would continue to be listed on Saturdays as well as on Sundays and public holidays where necessary.

18. Responding to Dr CHIANG Lai-wan's enquiry on whether bail applicants could only make bail payments on weekdays upon the implementation of the final phase of a five-day week in the Judiciary to also over accounts offices, Assistant Judiciary Administrator (Development) ("AJA(D)") said that to cater for any possible bail payments on Saturday mornings after the full implementation of a five-day week, a bail applicant might contact the relevant registry of the Court of Final Appeal, High Court and District Court not later than 5:00 pm on a Friday if he/she wanted to make a bail payment on the following Saturday morning. Upon receiving such a request, the respective registry and accounts office would make arrangement for staff to be on duty to handle such payments, and where necessary, arrangement would also be made for the relevant Registrar/Master to attend urgent matters related to the approval of surety. For Magistrates' Courts, the seven Magistrates' Courts had formed three groupings to take turn to handle fresh remand cases, including bail payments, on Saturdays. This grouping of courts would continue to operate upon full implementation of a five-day week in the Judiciary.

19. Dr CHIANG Lai-wan further enquired whether the opening hours of the court offices, to be covered under the final phase of a five-day week, would

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be suitably extended. AJA(D) replied that the opening hours of the court offices would be extended so that they would open from 8:45 am to 1:00 pm and from 2:00 pm to 5:30 pm from Mondays to Fridays. That said, where necessary, the Judiciary would facilitate the possible opening of court offices on Saturdays or even Sundays and public holidays.

Conclusion

20. The Chairman concluded that members were generally supportive of the legislative proposals to implement the final phase of a five-day week in the Judiciary and the related operational arrangements.

IV. Bilingual legislation drafting

LC Paper No. CB(4)359/15-16(05) -- DoJ's paper on "Bilingual legislation drafting"

Briefing by DoJ

21. Law Draftsman (Acting) ("LD(Atg)") briefed members on DoJ's response to the suggestion made by the LegCo Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions ("the Subcommittee") of setting up a panel of advisory language specialists to help ensure that there were no discrepancies between the English and Chinese defined terms in the drafting of legislation, details of which were set out in the DoJ's paper (LC Paper No. CB(4)359/15-16(05)). Specifically, DoJ did not see the need to set up the proposed panel for the following reasons. First, the Law Drafting Division ("LDD") of DoJ had put in place a number of quality assurance measures to maintain a high standard in the draft legislation prepared by its counsel. Second, drafters with LDD had sufficient experience and expertise to ensure that there were no discrepancies in the defined terms in the two language texts of the legislation prepared by LDD. Third, the involvement of outside experts at the drafting stage could be a sensitive matter as legislative proposals, particularly at the early stage of drafting, were confidential and subjected to continuous development. Fourth, the ability of LDD counsel to meet the deadlines imposed by the legislative timetable might be compromised if external panels were required to vet the legislation before it was finalized. Although DoJ did not see the need to set up a panel of panel of advisory language specialists for defined terms, LDD was committed to enhancing and developing its counsel's expertise in bilingual legislative drafting. In addition to internal discussions and training sessions, when the opportunities arose,

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external scholars and professionals were invited to share their knowledge and to exchange ideas with LDD counsel.

Discussion

22. Dr CHIANG Lai-wan opined that as the Chinese text of legislation was often difficult for the general public to comprehend, the setting up of a panel of language specialists suggested by the Subcommittee should help to improve the user-friendliness of legislation.

23. LD(Atg) responded that the proposed panel was only for ensuring no discrepancies between the English and Chinese defined terms. Besides, the discrepancies detected by the Subcommittee in the Chinese equivalents of the defined terms "specified person" and "designated person" in the English text of the regulations made under the United Nations Sanction Ordinance (Cap. 537) had been rectified. That said, LDD was committed to enhancing and developing its counsel's expertise in bilingual legislative drafting. For instance, LDD had maintained informal contacts with external scholars and professionals to enable the sharing of knowledge and exchanging of ideas on bilingual legislative drafting. LD(Atg) further said that as the primary objective of LDD was to ensure that the English and Chinese texts of legislation accurately reflected the policy intent and with no discrepancies in meaning between the English and Chinese texts to avoid legal uncertainty, it was inevitable that ease of comprehension might at times be compromised. To improve ease of comprehension of legislation by the general public, LDD had been trying out different approaches in the drafting of legislation. One of these approaches was drafting the legislation in Chinese language first. The Promotion of Recycling and Proper Disposal (Electrical Equipment and Electronic Equipment) (Amendment) Bill 2015 was a case in point. As the results of drafting legislation in Chinese language first had so far been positive, LDD planned to draft more legislation in Chinese language first in future.

24. Mr Alan LEONG said that many LegCo Members, including himself and others with legal training, were often frustrated by the reluctance of LDD counsel to depart from their drafting practice to make the drafting of legislation more user-friendly. Mr LEONG hoped that LD(Atg) would convey such sentiments to the new Law Draftsman who would assume office on 4 January 2016. Mr LEONG then asked whether DoJ had ruled out setting up of a panel of external experts to give advice to LDD counsel in the drafting of legislation.

25. LD(Atg) responded that DoJ had not ruled out setting up of a panel of external specialists to advise LDD counsel on general law drafting issues. He would discuss such proposition with the new Law Draftsman after she had

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assumed office. LD(Atg) further said that LDD had all along adopted an open-minded attitude towards any views and suggestions raised on drafting issues by LegCo Members, and had frequently adopted their views in drafting legislation.

DoJ

26. Responding to Mr Alan LEONG's request to provide the names of the external scholars and professionals who had been invited by LDD to share their knowledge and to exchange ideas with LDD counsel, LD(Atg) said that he would provide the names upon obtaining the consent of these external scholars and professionals.

27. The Chairman enquired whether the need for confidentiality was the sole concern of DoJ in not setting up a specialist panel to assist LDD in the drafting of legislation. If that was the case, the concern could be addressed by requiring the panel members to sign a confidentiality undertaking.

28. LD(Atg) explained that the reasons for not setting up a panel of external specialists to give advice to LDD counsel in the drafting of legislation were set out in paragraph 21 above. However, if the panel of external specialists were to give advice to LDD counsel on general drafting matters, different considerations would be given for setting up such a panel.

29. Dr CHIANG Lai-wan agreed that there might not be a strong case for DoJ to set up a panel of advisory language specialists for defined terms. She was also of the view that the decision on whether and when to engage outside experts to give advice on drafting matters should best be left with DoJ.

V. Any other business

30. The Chairman informed members that based on the results of the questionnaire to seek members' availability to attend a visit to the Judiciary in the morning of either 18 or 25 of January 2016, a majority of members indicated their availability to attend the visit in the morning of 18 January 2016.

31. There being no other business, the meeting ended at 6:55 pm.