

Ref : CB2/PL/AJLS

**LegCo Panel on
Administration of Justice and Legal Services**
Minutes of the Third Meeting
held on Monday, 11 November 1996 at 4:30 pm
in Conference Room B of the Legislative Council Building

Members Present : Hon Andrew CHENG Kar-foo (Deputy Chairman/Chairman of the meeting)
Hon Mrs Miriam LAU Kin-yee, OBE, JP
Hon Emily LAU Wai-hing
Hon Eric LI Ka-cheung, OBE, JP
Hon James TO Kun-sun
Hon David CHU Yu-lin
Hon Ambrose LAU Hon-chuen, JP
Hon Bruce LIU Sing-lee

Members Absent : Hon Margaret NG (Chairman) - out of town
Hon Martin LEE Chu-ming, QC, JP }
Hon Ronald ARCULLI, OBE, JP }other
Dr Hon Philip WONG Yu-hong }commitments
Hon Albert HO Chun-yan }

Public Officers Attending : Item No. IV

Mr James COLLINS
Senior Assistant Solicitor General, Attorney General's Chambers
(AGC)

Mr Peter H H WONG
Senior Crown Counsel, AGC

Item No. V

Mr Richard HOARE, OBE, JP
Director of Administration

Item No. VI

Mr Tony YEN, JP
Law Draftsman, AGC

Mr Peter H K CHEUNG
Chambers Manager, AGC

Item No. VII

Mr Tony YEN, JP
Law Draftsman, AGC

Mr Anthony N. WATSON-BROWN
Senior Law Draftsman, AGC

Clerk in Attendance : Mrs Betty LEUNG
Chief Assistant Secretary (2) 3

Staff in Attendance : Mr Jimmy MA
Legal Adviser

Miss Flora TAI
Senior Assistant Secretary (2) 3

Action
Column

I. Confirmation of minutes of previous meetings and matters arising

The minutes of meeting held on 7 October 1996 had been issued to Members vide LegCo Paper No. CB(2) 341/96-97 on 6 November 1996 and the minutes of meeting held on 18 October 1996 had been issued vide LegCo Paper No. CB(2) 377/96-97 on 8 November 1996. No amendment was received and these minutes were taken as confirmed.

II. Date of next meeting and items for discussion

2. The next regular meeting would be held on Monday, 9 December 1996 at 4:30pm. Members present agreed to defer consideration of: (a) "Criminal Procedure Ordinance, Cap. 221, and Mental Health Ordinance, Cap. 136" and (b) "effectiveness of the Inspectorate Scheme conducted by the Law Society of Hong Kong" to the regular meeting in January 1997. Members present further agreed that the next regular meeting should discuss :

- a) Funding proposal of the Judiciary Administrator's Office for Judiciary Information Systems Strategy Phase II Computerisation Project;
- b) Staffing proposal of the Legal Department; and
- c) Progress of work of the Legal Aid Services Council.

III. List of information papers circulated to Members of the Panel since the last meeting

3. Members noted the list of information papers circulated to them since the last meeting attached to the agenda.

IV. Enduring Power of Attorney Bill 1996 - Briefing by the Attorney General's Chambers

(LegCo Paper No. CB(2) 326/96-97)

Features of the proposed enduring power of attorney

4. At the invitation of the Chairman, Mr James COLLINS briefed members on the reasons for creating the enduring power of attorney (EPA) which was a new type of power of attorney. He informed members that figures for registration of EPA after the enactment of the Enduring Power of Attorney Act 1985 in England illustrated its substantial demand. Members noted that the figure rose from 2,500 in 1990 to 5,500 in 1994. Mr COLLINS then highlighted the main features of the proposed EPA, as follows: (a) it would continue in force notwithstanding the donor's subsequent mental incapacity, subject to conditions and safeguards; (b) its scope would be limited to property and financial affairs; (c) there would be a simple registration system for EPA, which would become a public record although the registration would not have any bearing on its validity; (d) the Court Registry would have no obligation to scrutinise the form of the EPA; (e) a certification by both a solicitor and a registered medical practitioner would be required in respect of the donor's capacity to execute the EPA; (f) the attorney would be under a fiduciary obligation and liable to compensate the donor for loss caused by his/her mismanagement; and (g) an interested party might apply to the High Court for a variety of orders. The Bill would provide that the definitions of "mentally incapable" and "mental incapacity" would depend on the definition of "mental disorder" in the Mental Health Ordinance, Cap. 136. Members noted that further consultation with the two branches of the legal profession would be made.

5. Mrs Miriam LAU asked and Mr Peter WONG confirmed that the proposed EPA would not affect the operation of irrevocable powers of attorney and there was no requirement for irrevocable powers of attorney to be registered with the High Court.

6. At the request of Members, Mr COLLINS agreed to provide: (a) copies of submissions on the consultation paper on the proposed EPA scheme issued in December 1993, subject to the consent of the consultees; (b) a summary of these submissions; and (c) the names of consultees referred to in para. 14 of the information note.

Adm

Conditions and safeguards

7. Mr Bruce LIU expressed concern that the proposed EPA scheme which had a very simple registration system might be subject to abuse. Mr WONG pointed out that the High Court was empowered to make order to revoke the EPA and to require the attorney to produce accounts. He stressed that the risk of EPA for the donor was no higher than that of an ordinary power of attorney, especially in the light that additional safeguards had been provided for. He further explained that: (a) the interest of a third party would be protected if he/she had no knowledge of the revocation of the EPA or of any abuse of power of the attorney; (b) registration itself was a pre-condition of the exercise of the power where the donor had become mentally incapacitated; (c) the Administration would incline to consider the part of EPA covering things other than property and financial affairs as void due to inconsistency with the scheme; and (d) registration of the EPA with the Land Registry, as far as conveyancing transactions were concerned, would be voluntary.

8. Mr David CHU asked and Mr COLLINS responded that the proposed EPA was meant to be a supplementary measure to the existing power of attorney, since it would not be necessary to resort to EPA under many circumstances. Mr WONG supplemented that the proposed scheme differed from existing power of attorney in that an EPA would have more restrictions and safeguards and therefore would be more complicated than an ordinary power of attorney.

9. Mr Ambrose LAU queried the logic for requiring certification by both a solicitor and a registered medical practitioner of the donor's capacity to execute the EPA on the one hand and requiring a certification by a solicitor alone to execute an ordinary power of attorney on the other hand. He asked whether England or other EPA models had similar legal requirements. To the first question, Mr WONG explained that in the case of an EPA, certification would be a legal requirement, whereas in the case of an ordinary power of attorney, witness of the signature of the donor was not a legal requirement but only a matter of practice. To the second question, Mr WONG confirmed that the corresponding English legislation did not have such a provision. However, the English Law Commission took the view that it would provide better protection of the donor's interest. Certification by a registered medical practitioner was required for EPA because an ordinary power of attorney was automatically revoked if a donor became mentally incapable whereas the EPA would continue in force notwithstanding the donor's subsequent mental incapacity. It was therefore important to ensure that the donor was mentally capable at the time when he/she signified the instrument. Mr LAU was not convinced of the

argument and requested the Administration to provide a table comparing practices in various jurisdictions regarding certification by a registered medical practitioner for members' reference. Mrs Miriam LAU then urged the Administration to consider the practicality of such a legal requirement from the angle of the general public.

Adm

Advantages of the proposed enduring power of attorney

10. Mr James TO queried why the Administration did not consider simplifying the procedures for appointing a committee under the Mental Health Ordinance, Cap 136, to protect the donor's interest when he/she became mentally incapacitated. He inclined to reserve his position on the proposed EPA scheme. Mr WONG said that the proposed EPA scheme had advantages over the appointment of a committee, which were: (a) it was relatively more effective and inexpensive and (b) there was no need to resort to court unless an attorney had to be removed or in other specified circumstances in the proposal. Mr WONG pointed out that the scheme was proposed in the light of other existing alternatives such as the appointment of a committee or that of a receiver.

11. Mrs Miriam LAU asked whether introduction of EPA had experienced any problems in other jurisdictions. Mr WONG said that the models in UK and various Commonwealth countries had been studied and found to be working effectively. He pointed out, however that the proposed EPA scheme was not a strict adaptation from any particular jurisdiction. In response to Mrs LAU's request, Mr WONG undertook to provide information from Law Commission Reports of relevant jurisdictions in relation to the operation of the scheme for members' reference.

Adm

12. The Chairman then concluded and said that Members were not oppose to the proposed EPA scheme in principle although they were concerned about its actual operation. The Chairman also suggested the Administration to include all information requested by Members in the LegCo Brief to be submitted to LegCo in January 1997.

Adm

V. Follow-up on Judge Caird' case
(LegCo Paper No. CB(2) 404/96-97)

13. Ms Emily LAU expressed concern that Judge Caird's application for resignation on medical ground could be for avoiding further enquiry. Mr Richard HOARE explained that the purpose of establishing a Judicial Tribunal was to consider whether a judge ought to be removed from office. If Judge Caird's application for early retirement was granted, there would be no need to remove him. Mr Eric LI said that as the normal practice of

professional bodies did not permit their members to resign in the process of disciplinary cases, particularly if the cases involved integrity of the profession. Therefore Judge Caird should not be permitted to resign until all the issues had been cleared. Ms LAU asked and Mr HOARE responded that the Medical Board established by the Director of Health had commenced work. Its present assessment was that it would be able to submit its report by the end of November 1996. In response to members' expressed opinion that the report should be made public, Mr HOARE said that it would be a matter for the Governor or the acting Chief Justice to decide and he would relay Members' request.

Adm

14. Mr James TO expressed fear that some fundamental issues might have been covered up. He pointed out that paras. 3 and 4 of the statement made by Judge Caird's solicitor were contradictory to each other. He felt that a commission of inquiry under the Commissions of Inquiry Ordinance, Cap. 86 should be appointed, in order to ensure the integrity of the Judiciary and to clear all doubts about deliberate cover-up. Mr HOARE responded that it would be a matter personally for the Governor and the decision he had taken at this stage was to withhold any action on the Judicial Tribunal until he had received the report of the Medical Board.

15. Mr James TO, supported by Ms Emily LAU, asked whether the report made by the acting Chief Justice, which presumably included statements given by Judge Caird, Judge Beeson, Judge Hawkes and the two senior prosecutors of the Legal Department, could be disclosed to members, without compromising the independence of the Judiciary. Mr HOARE suggested that the Panel might consider approaching the Judiciary directly for the report. After discussion, Members agreed that the Panel should write to the acting Chief Justice. Members also reaffirmed their staunch support of the constitutional principles of the independence of the Judiciary and the separation of powers.

Clerk

16. Members expressed that the main thrust of public concern was whether or not Judge Caird had been subject to political pressure in hearing the Natrass case. The best way to maintain the public's confidence in the judicial system was to conduct an overall enquiry. Mr HOARE emphasised that the issue of a Judicial Tribunal was still open and the Governor had only decided not to take any further action to appoint a Judicial Tribunal until he had received the report of the Medical Board. The Chairman asked and Mr HOARE agreed to relay members' views expressed at the meeting and at the previous special meeting on 24 September 1996 to the Governor. At Ms Emily LAU's suggestion, Members agreed that Judge Caird's case would be an agenda item for discussion in the Panel's December meeting.

Adm

Clerk

VI. Staffing proposal of the Legal Department

(LegCo Paper Nos. CB(2) 337/96-97 and CB(2) 382/96-97)

17. Mr Tony YEN said that there was a practical need to retain the existing supernumerary Deputy Principal Crown Counsel (DPCC) post for the localisation and adaptation of laws for a period of six months from 1 April 1997 to 30 September 1997. Mrs Miriam LAU asked whether such request for extension would mean that the work related to both programmes would extend beyond 1 July 1997. Mr YEN explained that the Preliminary Working Committee had proposed a general interpretation principle as a transitional arrangement to be followed by detailed textual amendments of adaptation proposals. The Administration was seeking clarification with the Chinese side on this through the Join Liaison Group channel. If the proposal was adopted, work relating to and arising out of the adaptation of laws, mainly in the area of drafting textual amendments to individual Ordinances of the Laws of Hong Kong would continue after 30 June 1997. Mrs LAU asked why the Legal Department did not request for an extension of three months only. Mr YEN said that a review would be made within the Department in June 1997 to assess whether the DPCC post would be required after 1 July 1997, even if an extension up to 30 September 1997 was approved.

VII. Style change - using a schedule for definitions in the legislation

(LegCo Paper No. CB(2) 311/96-97)

18. Mr Tony YEN informed members that Hong Kong had usually placed definitions under the “*Interpretation*” section which was placed in the second section of an ordinance. However, it had, as other jurisdictions, followed a different pattern for some ordinances when necessary. Mr Bruce LIU supported the proposal in principle. However, he asked whether objective criteria would be set if the discretion was given to the Law Draftsman to use a Schedule to a Bill for definitions. Mr YEN responded that it would not be appropriate to set down strict quantitative criteria. The main considerations were to improve the presentation of legislation and to facilitate the readers, especially for ordinances which were likely to have a wide audience.

19. Mrs Miriam LAU expressed concern that the proposal to use a schedule for definitions would cause confusion to the readers, particularly to legal practitioners who were used to the traditional approach, if definitions appeared in different parts of the legislation. Mr Anthony WATSON-BROWN responded that : (a) a flag would be placed at section 2 of the ordinance to reduce confusion to regular readers; (b) Australia, Canada, New Zealand and South Africa had allowed such discretion to the Law Draftsman; (c) bills presented to the Parliament in the United Kingdom were traditionally placed at the end of the substantive sections; and (d) textbook writers had considered the proposed approach an

acceptable alternative. Mrs LAU then asked and Mr WATSON-BROWN explained that the approach had only been adopted for new legislation in Australia, Canada, New Zealand and South Africa. Mrs LAU held the view that a reader could easily refer to the index of the ordinance to locate the relevant sections. She had reservation on the proposal.

20. In response to Mrs Miriam LAU, Mr YEN said that the two branches of the profession had not been consulted on the proposal because no change of policy was intended. The need to adopt such a proposed approach would rarely happen. Mr WATSON-BROWN supplemented that one of the features of the recent exercise relating to the Securities and Futures Commission Ordinance, which had been positively commented on, was that its definitions were placed in a Schedule at the back of the Ordinance with appropriate cross references. Mrs LAU suggested and Mr YEN agreed to consult the two branches of the legal profession. The Chairman also requested that feedback from the legal profession should be forwarded to the Panel so that it could make recommendation to the House Committee.

Adm

(Post-meeting notes : In response to Mr Anthony Watson-Brown's invitation, the Hong Kong Bar Association and the Law Society of Hong Kong have given their views in their letters dated 15 November 1996 and 27 November 1996 respectively which have been issued to members vide LegCo Paper No. CB(2) 556/96-97.)

VII. Any other business

21. There being no other business, the meeting ended at 6:25 pm.

LegCo Secretariat
2 December 1996