

立法會

Legislative Council

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Draft report of the Panel on Administration of Justice and Legal Services for submission to the Legislative Council

Purpose

The report gives an account of the work of the Panel on Administration of Justice and Legal Services for tabling at the meeting of the Legislative Council on 7 July 1999 in accordance with Rule 77(14) of the Rules of Procedure of the Legislative Council.

The Panel

The Panel was formed by a resolution of this Council on 8 July 1998 for the purpose of monitoring and examining Government policies and issues of public concern relating to administration of justice and legal services. The terms of reference of the Panel are in **Appendix I**.

3. The Panel comprises 8 members. Hon Margaret NG and Hon TSANG Yok-sing were elected Chairman and Deputy Chairman of the Panel respectively. A membership list of the Panel is in **Appendix II**.

Major work

Review of Ordinances binding on the Government but not on relevant “State” organs and related issues

4. Section 66 of the Interpretation and General Clauses Ordinance (Cap. 1) which, as at 30 June 1997, provided that “no Ordinance shall in any manner whatsoever affect the right of or be binding on the Crown unless it is therein expressly provided or unless it appears by necessary implication that the Crown is bound thereby”. By way of the Adaptation of Laws (Interpretative Provisions) Bill which was passed by the Provisional Legislative Council on 7 April 1998, the reference to “Crown” in section 66 of Cap. 1 was adapted to “State”. There was wide concern within the legal profession and the community at large as to why certain ordinances should be binding on the Hong Kong Government, but not on relevant “State” organs. The Administration then undertook to conduct a review of the 17 relevant Ordinances (**Appendix III**) that expressly bound the Government, but were otherwise silent on their applicability to “State” organs in Hong Kong.

5. After review, the Administration reported its conclusion to the Panel in February 1999 that, as a matter of policy, the “State” organs and their personnel should abide by 15 of these Ordinances. The Administration would consider the amendments required and whether there should be any exemptions. The two remaining Ordinances were the Social Workers Registration Ordinance (Cap. 505) and the Personal Data (Privacy) Ordinance (Cap. 486). As the former Ordinance applied to individuals and not their employers, it therefore had no relevance to either the “Government” or “State” organs. The Administration advised that the time taken to examine the latter Ordinance would be longer as the Ordinance was more complicated and it had to discuss the matter with the Central People’s Government (CPG). The Panel had repeatedly requested the Administration to expedite the review on this Ordinance and report its outcome to the Panel.

6. The Panel discussed related issues at two subsequent meetings. On what constituted “subordinate organs”, the Panel noted that a subordinate organ of the CPG or of relevant Central Authorities was within the definition of “State” under section 66 of Cap. 1 if it satisfied the three-fold test. At present, there were only three subordinate organs of the CPG in the Hong Kong Special Administrative Region (HKSAR), namely, the People’s Liberation Army Garrison, the Commissioner’s Office of the Ministry of the Foreign Affairs and the Xinhua News Agency (Hong Kong Branch).

7. A few members pointed out that replacing “Crown” with “State” in section 66 of Cap. 1 thereby allowing “State” organs not to be bound by certain Ordinances clearly infringed the letter and spirit of Article 22 of the Basic Law which spelt out that all offices set up in HKSAR by departments of the Central Government should abide by the laws of HKSAR. The Panel noted the Administration’s explanation that the legal presumption of exclusion of the “State” in relation to application of legislation was consistent with common law principles and the Basic Law. Article 22 of the Basic Law merely meant that the “State” organs should abide by such laws as the SAR legislature might enact and apply to them.

Adaptation of laws programme

8. The Panel noted that a total of 600-odd Ordinances which required adaptation were divided into 54 Adaptation Bills for introduction into the Legislative Council within the 1998-99 legislative session. The decision of the Standing Committee of the National People’s Congress on 23 February 1997 set out a number of essential principles for interpreting and adapting the laws previously in force in Hong Kong and which were maintained as laws of the HKSAR. Regarding references to the “Crown”, the relevant principles of interpretation were in sections 1, 2 and 21 of Schedule 8 and

section 7 of Schedule 9 to Cap. 1. Members also noted the Legal Adviser's view that the adaptation of reference to the "Crown" in section 66 of Cap. 1 was done and enacted. The question of whether or not the legal presumption of exclusion of the "State" in section 66 was justified was a separate issue not related to law adaptation.

Legal Aid Policy Review 1997

9. The Panel discussed the review at three meetings. Members took note of public responses to the findings and recommendations of the Legal Aid Policy Review 1997 as contained in a consultation paper released in December 1997 and exchanged views with the Administration on a number of the recommendations. Having regard to members' views and after discussion with the Law Society of Hong Kong, the Administration intended to revise its proposal on enhanced protection of legal fund. On some members' proposal that legal aid should be extended to cover cases where a person died in official custody or to coroner's inquests ordered to be held by the Secretary for Justice, the Administration considered that the proposal involved policy implications and would need to be considered carefully. Nevertheless, the Administration agreed to take into account views expressed by members in finalising the recommendations.

Study on an independent legal aid authority

10. Following the completion of a consultancy study commissioned by the Legal Aid Services Council (LASC) to assess the desirability, practicability and cost-effectiveness of setting up an independent legal aid authority (LAA), the LASC submitted its recommendations to the Chief Executive for consideration.

11. On 15 September 1998, the LASC was invited to brief the Panel on its recommendations. The Panel noted that the LASC had made some revisions to the Consultant's proposed model and recommended that an independent statutory LAA should be established by a phased approach. According to LASC, many LegCo Members and the legal professionals were in favour of the establishment of an independent LAA. However, views among the legal aid practitioners and clients of Legal Aid Department (LAD) about the need for change were divergent. A public opinion survey reflected that about 20% of the public considered the LAD did not operate independently. As for staff of the LAD, departmental staff such as legal counsels and law clerks were not in support of disestablishment of the LAD. Members agreed to discuss the matter again after the Administration had considered the LASC's Report in detail.

Criminal jurisdiction of the Mainland and HKSAR courts

12. Following wide public concern about the judicial jurisdiction of the HKSAR arising from two cases, the Panel held a special meeting on 16 January 1999 to discuss the issue. Legal academics and professionals were invited to present their views to the Panel. Much of the discussion was focused on the Administration's purposive interpretation of Article 7 of the Chinese Criminal Code 1997 (CCC) which provided that the Law was applicable to Chinese citizens who committed a crime prescribed under the Law outside the Chinese territory.

13. Some members agreed with the majority of the legal academics and professionals attending the meeting that the Administration's interpretation of "territory" as "jurisdictional territory" violated the plain and literal meaning of the term. The term "territory" referred to the geographical territory under the PRC sovereignty. Article 7 was not applicable to crimes committed in the HKSAR by

Mainland residents and it did not confer on Mainland courts jurisdiction over such crimes. They also opined that the concern raised by the Administration about the need to bring to justice the perpetrators of crimes committed in the HKSAR by non-SAR residents should be dealt with by enactment of new laws in the SAR, rather than by extending the application of the CCC to the HKSAR. In addition, the lack of rendition arrangements between the Mainland and the HKSAR did not reinforce the Administration's interpretation.

14. The Administration reiterated its position on the matter and explained that the necessary meaning of the term "territory" in Articles 6 and 7 of the CCC was "jurisdictional" territory and not "geographical" territory. Hence, Article 7 should be interpreted as applying only to Mainland residents who committed crimes outside the PRC jurisdictional territory which did not include the HKSAR. It also pointed out that courts in HKSAR did not have exclusive judicial jurisdiction over cross-border offences and offences committed in Hong Kong involving Mainland residents.

Prosecution policy

15. The Panel was briefed on the principles and factors to be taken into account in the decision to prosecute, as well as private prosecution procedure and intervention in a private prosecution. The Panel noted that while the Secretary for Justice could at any stage of the proceedings before the Magistrate intervene and assume the conduct of the proceedings, this power would only be exercised in most exceptional circumstances and in the interests of the public. Of the 19 private prosecutions for the period from 1996 to September 1998, six requests were made for the Secretary for Justice's intervention. Since 1995, only two cases were terminated by the Government.

Secretary for Justice (SJ)'s decision not to prosecute Ms AW Sian

16. To follow up on SJ's undertaking to make a statement about her decision not to prosecute Ms AW Sian after the trial of the Hong Kong Standard case given at the Panel meeting on 23 March 1998, and following the delivery of judgment on the case on 20 January 1999, a special meeting was held on 4 February 1999 for SJ to address the Panel on the matter.

17. In her statement to the Panel, SJ explained that she had reached her decision not to prosecute Ms AW after the most careful evaluation of the evidence, the advices of her advisers and the representations from Ms AW's lawyers. Having examined the evidence, she concluded that there was no reasonable prospect of securing a conviction and that it would be wrong to bring a prosecution. She had also given serious consideration to the representations from lawyers acting for Ms AW. She considered that if Ms AW was prosecuted, it would be a serious obstacle to the restructuring of the Sing Tao Group of which Ms AW was the Chairman. Should a well-established and important media group collapse, it would send a very bad message to the international community, not to mention about the interests of about 1,900 local and overseas employees of the Group at a time when unemployment was on the rise. SJ had considered the potential effects of a prosecution upon other people and whether the possible consequences of the prosecution were proportionate to the seriousness of the alleged offence. In the circumstances, SJ also decided that it was not in the public interest to initiate a prosecution of Ms AW.

18. A member queried whether it was necessary for SJ to consider the public interest at all if it had been decided that there was insufficient evidence to bring a prosecution against Ms AW. Some members did not agree with SJ's understanding of public interest. They pointed out that under the rule of law, everyone was equal

and no one should be above the law. In deciding whether or not to prosecute a person, it would be irrelevant and grossly unfair to have regard to factors such as the person's financial position, the nature of his/her business or the number of people under his/her employment. The Panel was advised that SJ's decision was not based on consideration of a person's status and financial position. In the circumstances of the Hong Kong Standard case, the consideration of the interests of the employees concerned was within the broad parameters of public interest considerations specified in the Prosecution Policy of the Department of Justice. However, SJ would be prepared to review her decision not to prosecute Ms AW should there be any new evidence.

Legal education

19. On 5 June 1999, the Panel held a special meeting to discuss legal education with representatives of the University of Hong Kong, the City University of Hong Kong and the two legal professional bodies. Views were exchanged on matters including quality of new entrants and graduates, entry requirements and curriculum of the Universities, continuing legal education and Government recruitment. All parties were in agreement that a comprehensive review of legal education in Hong Kong should be conducted. Noting that the Law Society of Hong Kong had applied to the Services Support Fund for Government funding for the review, members agreed that the Chairman should write to the Services Support Fund to express the Panel's support for the application. The letter was sent on 9 June 1999.

Other issues

20. The Panel was also briefed on a number of other issues, including reciprocal enforcement of arbitration awards and service of judicial documents in civil and commercial matters between the Mainland and the HKSAR, jurisdiction of the District Court and Small Claims Tribunal, Consultation Paper on The Procedure Governing the

Admissibility of Confession Statements in Criminal Proceedings, the role and conduct of Hong Kong solicitors and China appointed attesting officers in China properties transactions, and proposed abolition of the corroboration rules for sexual offences. In addition, the Panel was consulted on a number of financial and legislative proposals before their submission to the Finance Committee or introduction into the Legislative Council.

Panel meetings

21. From July 1998 to June 1999, the Panel held a total of 16 meetings. Representatives of the Hong Kong Bar Association and the Law Society of Hong Kong attended the majority of the meetings.

Legislative Council Secretariat

11 June 1999

Legislative Council

Panel on Administration of Justice and Legal Services

Terms of Reference

1. To monitor and examine, consistent with maintaining the independence of the Judiciary and the rule of law, policy matters relating to the administration of justice and legal services, including the effectiveness of their implementation by relevant officials and departments.
2. To provide a forum for the exchange and dissemination of views on related policy matters.
3. To receive briefings and to formulate views on any major legislative or financial proposals in the relevant policy areas prior to their formal introduction to the Council or Finance Committee.
4. To examine and to report on any major issues of wide public concern in the relevant policy areas as referred by the Council or House Committee or raised by the Panel itself.

Legislative Council

Panel on Administration of Justice and Legal Services

Membership List

Hon Margaret NG (Chairman)

Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)

Hon Albert HO Chun-yan

Hon Martin LEE Chu-ming, SC, JP

Hon James TO Kun-sun

Hon Mrs Miriam LAU Kin-ye, JP

Hon Ambrose LAU Hon-chuen, JP

Hon Emily LAU Wai-hing, JP

Total : 8 Members

Date : 14 July 1998

Review of the 17 relevant Ordinances

- (1) Gas Safety Ordinance (Cap. 51)
- (2) Occupational Safety and Health Ordinance (Cap. 509)
- (3) Sex Discrimination Ordinance (Cap. 480)
- (4) Disability Discrimination Ordinance (Cap. 487)
- (5) Family Status Discrimination Ordinance (Cap. 527)
- (6) Ozone Layer Protection Ordinance (Cap. 403)
- (7) Dumping at Sea Ordinance (Cap. 466)
- (8) Marine Parks Ordinance (Cap. 476)
- (9) Environmental Impact Assessment Ordinance (Cap. 499)
- (10) Plant Varieties Protection Ordinance (Cap. 490)
- (11) Patents Ordinance (Cap. 514)
- (12) Registered Designs Ordinance (Cap. 522)
- (13) Arbitration Ordinance (Cap. 341)
- (14) The Legislative Council Commission Ordinance (Cap. 443)
- (15) Mandatory Provident Fund Schemes Ordinance (Cap. 485)
- (16) Social Workers Registration Ordinance (Cap. 505)
- (17) Personal Data (Privacy) Ordinance (Cap. 486)