

立法會
Legislative Council

LC Paper No. CB(2)1077/99-00
(These minutes have been
seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 16 November 1999 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
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

Member Attending : Hon NG Leung-sing

Members Absent : Hon Albert HO Chun-yan
Hon Emily LAU Wai-hing, JP

Public Officers Attending : Item IV

Department of Justice

Mr Robert ALLCOCK
Solicitor General (Acting)

Mrs Pamela TAN
Director of Administration & Development

Mr Peter CHEUNG
Deputy Director (Administration)

Mr Peter WONG
Senior Assistant Solicitor General

Item V

Legal Aid Department

Ms Lolly CHIU
Policy and Administration Co-ordinator

Mr Thomas KWONG
Assistant Principal Legal Aid Counsel

Item VI

Department of Justice

Mr Ian WINGFIELD
Law Officer (Civil Law)

Mr Robert ALLCOCK
Solicitor General (Acting)

Security Bureau

Mr Timothy TONG
Deputy Secretary for Security (3)

Miss Cathy CHU
Principal Assistant Secretary (Security)C

Mr Andy CHAN
Assistant Secretary (Security) C2

Immigration Department

Mr P K LEUNG
Principal Immigration Officer

Item VII

Director of Administration

Ms Miranda CHIU
Deputy Director of Administration

Ms Rosanna LAW
Assistant Director of Administration

Legal Aid Department

Mr S Y CHAN
Director of Legal Aid

Ms Lolly CHIU
Policy and Administration Co-ordinator

Attendance by Invitation : Hong Kong Bar Association

Item VI & VII

Mr Philip DYKES, SC
Mr Andrew LI

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

Action Column

- I. Confirmation of minutes of meeting**
(LC Paper No. CB(2)364/99-00 - minutes of meeting on 5 June 1999)
(LC Paper No. CB(2)365/99-00 - minutes of meeting on 15 June 1999)
(LC Paper No. CB(2)366/99-00 - minutes of meeting on 7 October 1999)

The three sets of minutes were confirmed.

II. Information papers issued since the last meeting

(LC Paper No. CB(2)151/99-00(01) - Administration's response to concerns raised by members at the meeting on 13 October 1999)

(LC Paper No. CB(2)187/99-00(01) - The establishment of an independent legal aid authority)

(LC Paper No. CB(2)352/99-00(01) - Progress of review of applicability of the Personal Data (Privacy) Ordinance to state organs in Hong Kong)

2. Members noted the above information papers.

III. Items for discussion at the next and future meetings

(LC Papers Nos. CB(2)379/99-00(01) and (02))

3. Members noted the list of outstanding issues to be considered (LC Paper No. CB(2)379/99-00(01)) and agreed that the following items would be discussed at the next regular meeting to be held on 21 December 1999 -

(a) Briefing by Hon CHAN Kwok-keung on amendments to the Legal Aid Ordinance; and

(b) Legal representation in Labour Tribunal.

4. Members noted that item (b) above was raised by Hon Andrew CHENG Kar-foo at the House Committee meeting on 23 April 1999 when the Committee discussed the Labour Tribunal (Amendment) Bill 1999. His concern was that for "complex cases" heard in the Labour Tribunal, legal representation should be allowed for both sides. The Chairman requested the Secretariat to invite Hon Andrew CHENG to attend the next meeting for discussion of the item.

Clerk

The age of criminal responsibility in Hong Kong

5. Referring to the Consultation Paper on The Age of Criminal Responsibility in Hong Kong issued by the Law Reform Commission (LRC) in January 1999, the Chairman sought members' view on whether the subject should be discussed by the Panel.

6. After some discussion, members agreed that as public consultation on the LRC Paper had ended in March 1999, the Panel could discuss the issue at a later stage pending the LRC's final report, which was expected to be available around mid 2000.

IV. Proposed retention of a Deputy Principal Government Counsel (DL2) post in Legal Policy Division of Department of Justice

(LC Paper No. CB(2)379/99-00(03) - Paper prepared by the Department of Justice)

7. At the invitation of the Chairman, Solicitor General (Acting) (SG(Ag)) introduced the Administration's paper which explained the justifications for establishing a permanent Deputy Principal Government Counsel (DPGC) post to head the Basic Law Unit in the Legal Policy Division of the Department of Justice (D of J). He advised that the major responsibility of the DPGC was to provide specialist advice on the Basic Law and related constitutional issues to both the Administration and internally within the D of J. The existing supernumerary post of DPGC, designated as DPGC/Basic Law (DPGC/BL) and created since 1 March 1997, would lapse on 1 March 2000. The Secretary for Justice (SJ) had recently reviewed the work of the Basic Law Unit and had come to the conclusion that there was a functional need for retention of the DPGC/BL post, having regard to the increasing volume and complexity of its work after the Reunification. It was considered that substantial input at the directorate level was required for the satisfactory performance of the job. Therefore, the Administration proposed the creation of a permanent DPGC post at DL2 level with effect from 1 March 2000 when the existing supernumerary post would lapse.

Points raised by members

8. Mr Martin LEE said that both the Sino-British Joint Declaration and the Basic Law provided that the Hong Kong Special Administrative Region (HKSAR) should have a high degree of autonomy after the Reunification under the principles of "One Country, Two Systems" and "Hong Kong people ruling Hong Kong". To safeguard the spirit of a high degree of autonomy, it was necessary for the DPGC/BL to develop an independent thinking for the purpose of a proper and unbiased understanding and interpretation of the Basic Law. Mr LEE was concerned that with constitutional litigation involving private citizens and the Government becoming a more common phenomenon after the Reunification, officers in the D of J might face increasing difficulties in dealing with situations where they saw a potential conflict between making an impartial interpretation of the Basic Law on the one hand, and defending Government policies on the other. He asked what measures were in place to safeguard the independent role of DPGC/BL in advising on Basic Law issues.

9. SG(Ag) advised that the role of the D of J in relation to litigation varied in civil and criminal proceedings. In civil cases, the decision to take proceedings ultimately rested with the relevant policy bureaux, having regard to the views of the D of J as to whether the case had a reasonable prospect of success. In criminal cases, SJ decided on whether or not to prosecute. He said that the duty of a counsel was to give the best legal advice that he was professionally competent to give, rather than giving advice which was merely popular with the client. The same criterion applied to counsel in

the D of J.

10. Mr Martin LEE said that a potential conflict could arise in a situation where certain arguments relating to the interpretation of the Basic Law, which the D of J considered as conducive to enhancing the prospect of success of a case, might be seen by the community as having the effect of cutting down on the high degree of autonomy of the HKSAR.

11. In response, SG(Ag) said that in litigation, counsel might sometimes find it necessary to test the validity of certain arguments in court, provided that in so doing they were not distorting the law in any way. This was also relevant in the context of the Basic Law provisions, the interpretation and application of which the HKSAR courts had not yet had an opportunity to give guidance on. He further pointed out that where there was different opinion between officers in the relevant policy bureau and the D of J on certain issues relating to the Basic Law, the matter would be progressively raised to a higher level, where appropriate, so that the difference could be resolved.

12. Senior Assistant Solicitor General added that the Legal Policy Division, in advising on new policies and legislative proposals initiated by the Administration, as well as amendments to existing laws and regulations, was duty-bound to ensure that they were consistent with the Basic Law. Such advice of the Division was given after taking into account a wide range of legal opinions and background materials relating to the Basic Law, and detailed research into international and comparative jurisprudence and practices in other common law jurisdictions. He said that many legislative proposals had been substantially amended, from the Basic Law angle, before they had been introduced into the Legislative Council.

13. The Chairman opined that the creation of the DPGC/BL post must not be for the purpose of buttressing the thinking of the Administration and whatever policies the Administration wished to push forward. In view of the importance of the DPGC/BL post, the right candidate for the post must have an independent mind as well as in-depth knowledge and experience in constitutional law, common law and advocacy in order to make sound judgment on Basic Law issues. She asked whether the post would be filled by internal promotion or by other means.

14. Deputy Director (Administration) replied that in accordance with established procedure for filling posts at directorate levels, the Administration could either redeploy a DL2-substantive officer to take up the DPGC/BL post and fill the consequential vacancy by way of a promotion exercise, or the Administration could directly advertise for the filling of the DPGC post. In trying to fill the vacancy internally, the Administration would invite applications from eligible officers in the legal and judicial group of Departments. A Promotion Board normally chaired by a Law Officer at DL6 level would be convened to deal with the appointment matters, and the Chairman of the Public Service Commission would be invited to attend as

observer. It would be a matter for the Board to identify the qualities required of the right candidate having regard to the nature of work of the post.

15. Members were of the view that the proposed retention of the DPGC/BL post should be further considered at the next Panel meeting in December. To facilitate discussion at the next meeting, the Administration was requested to provide a supplementary paper to advise on the following -

- (a) The qualities and qualifications required of the right candidate to match the importance of the post of DPGC/BL;
- (b) As the duty of DPGC/BL involved advising the Government on sensitive Basic Law and related constitutional issues, what safeguards were in place to ensure the independence of DPGC/BL in performing his advisory role, particularly in cases where there might be a potential conflict between adherence to policy and upholding of a high degree of autonomy in the HKSAR;
- (c) The DPGC/BL was ultimately answerable to SJ who assumed the overall responsibility for advising the Chief Executive and the policy bureaux on legal matters. In this connection, how did SJ envisage her own unique and independent role in safeguarding the rule of law and a high degree of autonomy in the HKSAR, where there was difference in opinion between the policy bureaux and the D of J in relation to certain Basic Law issues; and
- (d) Any other additional information which might facilitate members' consideration of the proposed post.

Adm

V. Proposed creation of a supernumerary post of Assistant Principal Legal Aid Counsel for implementation of an Information System Strategy in the Legal Aid Department

(LC Paper No. CB(2)379/99-00(04) - Paper prepared by the Legal Aid Department)

16. Members noted the information paper prepared by the Legal Aid Department on the proposed creation of post.

17. Policy and Administration Co-ordinator of Legal Aid Department (PAC) pointed out that the additional full annual average staff costs of the proposal, including salaries and staff on-cost, at \$2,135,232 as stated in paragraph 10 of the information paper might lead to a misunderstanding that the amount represented an additional recurrent provision. She clarified that as the proposal in question involved only the creation of a supernumerary post of Assistant Principal Legal Aid Counsel for a period of 15 months, the actual arrangement would be to internally redeploy an Assistant

Principal Legal Aid Counsel to fill the proposed post for the entire period and redeploy a Senior Legal Aid Counsel to act up in the post left vacant by the Assistant Principal Legal Aid Counsel. Such arrangement would involve only a total acting allowance of \$150,000. The work originally performed by the Senior Legal Aid Counsel would be redistributed and/or briefed out to the private sector as necessary.

18. In response to the Chairman, PAC advised that the supernumerary post was proposed to be created for 15 months with effect from April 2000.

VI. Policy and practice on removal of illegal immigrants

(LC Paper No. CB(2)100/99-00(02) - Paper on removal of LUI Kwan-chung and CHAN Fung on 21 July 1999)

(LC Paper No. CB(2)379/99-00(05) – Submission from the Hong Kong Bar Association)

(LC Paper No. CB(2)379/99-00(06) - Paper prepared by the Security Bureau and Department of Justice)

(LC Paper No. CB(2)411/99-00(01) - Submission from the Hong Kong Human Rights Monitor tabled at the meeting)

Points raised by members

19. Referring to the Administration's paper, the Chairman sought clarification on the assurance given by the then Attorney General (AG) at the resumption of the Second Reading debate on the Supreme Court (Amendment) Bill 1997 (the Bill) on 25 June 1997 that -

"as a matter of practice, once an application of habeas corpus has been made and solicitors are acting for the applicant, the applicant will not be removed from the jurisdiction without prior notification to the solicitors."

20. In response, Law Officer (Civil Law) (LO(CL)) explained the historical background of the above AG's assurance to members. He said that the Bill in its original form provided for applications to the High Court alleging that a named person was being detained without lawful justification and requesting the issue of a writ of habeas corpus in respect of that person. Proposed section 22A(11)(b) of the Bill prohibited the removal from Hong Kong of a person in respect of whom an application had been made or a writ issued, except under the authority of an enactment or of the High Court. As a result of the deliberation of the Bills Committee on the Bill and in order to address the concern raised by the Bills Committee that the exception under section 22A(11)(b) should be removed, the Administration then agreed to move a Committee Stage amendment to the Bill, which was accepted by the Bills Committee, to provide that once a writ of habeas corpus had been issued the Director of Immigration might not remove the person concerned until the writ was discharged or the proceedings were concluded. The above-mentioned assurance given by the AG was seen as a balancing act between the Administration and the Bills Committee to

allay fears that a person might be removed without his legal representative's knowledge before the writ of habeas corpus could be issued.

21. The Chairman recalled that whilst the Bill dealt with the writ of habeas corpus, the matter of injunction order had also been discussed by the Bills Committee in the process of vetting the Bill. She said that the concern of members of the Bills Committee was that a person should not be removed from the jurisdiction of Hong Kong when judicial remedies to protect him from removal were in progress. Therefore, the scenario of injunction against removal should also be covered in the context of the general spirit of the AG's assurance. Arising from the incident on 21 July 1999 in which two Mainland residents (Mr LUI Kwan-chung and Mr CHAN Fung) were removed just before the issuance of legal aid certificate for application to the court for leave for judicial review and for an injunction, members were concerned whether the spirit of the AG's assurance had been observed in that removal incident.

22. Deputy Secretary for Security (DS(S)) agreed that the spirit of the 1997 assurance could be extended to apply to the situation of an injunction against removal. Such spirit of the assurance was reflected in the four guiding principles regarding removal of illegal immigrants including those who were legal aid applicants, which were set out in paragraph 4 of the Administration's paper (LC Paper No. CB(2)379/99-00(06))-

- "(a) the Director of Immigration will suspend a removal if court proceedings have commenced, or if he knows that court proceedings are about to commence;
- (b) the Director of Immigration will notify the Director of Legal Aid if a detainee who has applied for legal aid, but has not been granted it, is about to be removed;
- (c) a removal will be temporarily withheld once legal aid is granted to the detainee; but
- (d) an applicant for legal aid does not constitute a reason for a scheduled removal to be withheld."

DS(S) advised that in respect of the removal incident on 21 July 1999, the Immigration Department (ID), acting in accordance with the above principles, had given notice to the Legal Aid Department (LAD) of the impending removal. Although the circumstances of the case were different from those envisaged by the AG when the assurance was given in 1997 in that there was no application for habeas corpus and there were no solicitors acting for the two illegal immigrants, the spirit of the assurance had in fact been observed.

23. DS(S) further informed members that in the past year, about 14 000 illegal immigrants had been removed from Hong Kong. The figure for 1999 as it presently stood was about 10 000. He said that the incident on 21 July 1999 was an unfortunate event and yet a single incident, in that the Administration was not aware of any similar case in the past.

24. Mr James TO said that according to LC Paper No. CB(2)100/99-00(02) which detailed the sequence of events that took place on 21 July 1999, LUI and CHAN were handed over to the Mainland authorities (at 1503 hours) three minutes before documents were received at the Victoria Immigration Centre from LAD showing that Emergency Aid Certificates were issued to the two persons (at 1506 hours). He said that this information was contrary to the version given to him by the Deputy Director of Legal Aid personally that LAD had informed ID before 1500 hours (between 1430 to 1500 hours) by phone and by fax that legal aid certificates had been issued and that the assigned solicitors were then appearing before the court to apply for an injunction against the removal of the two persons. Mr TO pointed out that judging from all the information available, it appeared to be apparent that ID had been trying to speed up the removal process ahead of actions taken by LAD. He said that the Administration should clarify the matter, failing which he would propose that LegCo should consider invoking the powers under the Legislative Council (Powers and Privileges) Ordinance to summon all parties concerned to give evidence.

25. Mr Martin LEE opined that in the circumstances of the case, the removal of LUI and CHAN on 21 July 1999 by the Administration was a “sharp practice” which was unfair to the persons concerned.

26. DS(S) responded that the Administration did not consider it appropriate to discuss the details of the case at the present point in time as the application for judicial review was still before the court. He said that when this case was raised at the meeting of the Panel on Home Affairs on 12 October 1999, both members of the Panel and the Administration shared the view that the Government should learn from this incident and the best way forward was to review and improve the removal mechanism as a whole. He further advised that so far as a removal was concerned, after an illegal immigrant from the Mainland had been taken to the border for repatriation, there would be difficulty for the removal action to be suspended for reason of operational constraints. As a result of a review following the recent incident, arrangements were now in place to ensure that the LAD would have sufficient time to consider applications of the same kind before removal was carried out. In return, the LAD would notify the ID of any request it might have for such removal to be suspended, while allowing sufficient time for the action to be physically withheld.

27. Mr James TO enquired about whether it was possible to arrange with the Mainland authorities to bring the two persons back to Hong Kong for the court hearing. Echoing Mr TO's view, Mr Martin LEE said that the purpose of an interim injunction was to preserve the status quo of the persons, allowing them to remain in Hong Kong

while awaiting the court's decision on their claims. By removing them from Hong Kong, the Government had deprived them of the right to an injunction which the court was prepared to grant them.

28. DS(S) replied that the Administration was of the view that the two persons were illegal immigrants and their removal from Hong Kong was lawful and in accordance with established policy and practice. As such, no special steps to arrange for the re-entry of the two persons to Hong Kong were being contemplated.

29. The Chairman opined that the Administration could not justify its removal action on the basis of its view that the two persons were illegal immigrants. It was precisely that view which the two persons, who claimed that they had the right of abode in Hong Kong, wished to challenge in court.

30. LO(CL) said that as matters stood at present, the Administration remained of the view that the removal action was lawful. In the event of the court making a different judgment, the Government would take necessary action in the light of the court's decision.

The Hong Kong Bar Association's views

31. At the invitation of the Chairman, Mr Philip DYKES summarized the views of the Bar Association as follows -

- (a) Persons who were the subject of deportation orders or removal orders, whether or not in custody, should have the right of access to the courts and there should be satisfactory measures to facilitate exercise of that right;
- (b) The English Habeas Corpus Act 1679 put together a number of common law principles respecting habeas corpus, and afforded certain protection to an individual when a writ had been issued. It would be an issue worthy of consideration from the legal policy angle as to whether or not removal of a person in the knowledge that an application for legal aid for access to the courts was underway should be treated as something analogous to contempt of court, in accordance with the spirit of the above English Act;
- (c) As much as the right of access to the courts being a protection to persons in removal cases was the right of access to an appeal or review. Where a removal order was made, the Director of Immigration should advise the person of such rights; and
- (d) As far as the incident on 21 July 1999 was concerned, it would be a sensible approach to withhold removal of the persons for such period as it required for leave of the application for judicial review and application for injunction to be determined by the court.

On item (c) above, Mr DYKES drew members' attention to the remark made in the submission from the Hong Kong Human Rights Monitor (HKHRM) that "*the Government has so far refused to inform those aggrieved by the Director of Immigration's decision of their limited right to administrative appeal to the Chief Executive provided for by Section 53 of the Immigration Ordinance.*" Furthermore, in its Review of Immigration Law and Practice Regarding Persons Without the Right of Abode in Hong Kong [September 1996], the HKHRM pointed out that the Immigration Ordinance imposed no obligation upon immigration officers to inform visitors and immigrants about the right under section 53 of the Ordinance. The HKHRM questioned whether there was extensive public awareness of the right and it doubted that visitors, not being members of the public in Hong Kong, were aware of it at all.

32. In response to the above concerns, LO(CL) advised that matters relating to removal orders under section 19 of the Immigration Ordinance were not applicable to the particular removal incident on 21 July 1999. A removal order under section 19 of the Ordinance was required in respect of persons who had remained in Hong Kong for more than two months, whereas in the case of LUI and CHAN the persons had been in Hong Kong for just a few days. They were removed by virtue of section 18 of the Ordinance under a summary procedure which did not require an order.

33. LO(CL) added that the submissions from the Bar Association and the HKHRM had raised a number of issues which the Administration had not previously envisaged in the context of the present discussion. To address such issues might eventually broaden into a more wide-ranging review of the Immigration Ordinance. He opined that should there be a need for a significant review of the Ordinance, it would probably be more a matter for the Panel on Security to deal with.

34. The Chairman said that in the present discussion, this Panel was particularly concerned about safeguarding the right of access to the courts of persons faced with the prospect of being removed from Hong Kong. She requested the Administration to provide a paper to explain, inter alia, the mechanism for advising people in removal cases of their right of access to the courts, including the right to an appeal against the Government's decision to remove.

35. The meeting agreed that the matter should be further discussed at the Panel meeting in January 2000.

(*Post-meeting note* : A letter dated 20 November 1999 from the Administration advising the updated position of the case concerning Mr LUI Kwan-chung and Mr CHAN Fung has been circulated to members of the Panel vide LC Paper No. CB(2)454/99-00(01)).

VII. Independent legal aid authority

(LC Paper No. CB(2)229/98-99(01) - The Bar Association's views on the need to establish an independent legal aid authority)

(LC Paper No. CB(2)379/99-00(07) - Paper prepared by the Director of Administration)

36. Since the Panel had overrun its time in discussing the foregoing agenda items, members agreed to defer discussion of the subject "Independent legal aid authority" to the meeting in January 2000. Meanwhile, the Administration was requested to prepare a supplementary paper on the following issues for the purpose of future discussion -

- (a) information on the UK model of legal aid administration;
- (b) a comparison on the scope of legal aid services in UK vis-à-vis Hong Kong, both before and after UK adopted a more restrictive system by reducing the scope of legal aid services;
- (c) major proposals of the UK Access to Justice Act 1999 (the UK Act);
- (d) public response in UK towards the major changes introduced by the UK Act; and
- (e) a comparison on the staff costs vis-à-vis total legal aid costs in Hong Kong and UK.

The Chairman also requested the Secretariat to seek the views from the two branches of legal profession in UK on the UK model of legal aid administration, particularly on the major changes introduced by the UK Act.

Clerk

37. Members agreed to invite the Legal Aid Services Council to attend the meeting in January 2000 for discussion of the subject.

38. The meeting ended at 6:40 pm.

Legislative Council Secretariat
30 December 1999