

立法會
Legislative Council

LC Paper No. CB(2)1418/99-00

(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, 21 December 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 Albert HO Chun-yan
Hon James TO Kun-sun
Hon Martin LEE Chu-ming, SC, JP
Hon Ambrose LAU Hon-chuen, JP
Hon Mrs Miriam LAU Kin-yee, JP

Member Attending : Hon CHAN Kwok-keung
(attending for agenda item V)

Members Absent : Hon Emily LAU Wai-hing, JP

Public Officer 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

Mrs Carrie YAU
Director of Administration

Ms Rosanna LAW
Assistant Director of Administration

Mrs Fanny YU
Deputy Director of Legal Aid (Administration)

Mr Thomas KWONG
Assistant Principal Legal Aid Counsel
(Application and Processing)

Item VI

Mrs Carrie YAU
Director of Administration

Ms Rosanna LAW
Assistant Director of Administration

Mr Michael SCOTT
Senior Assistant Solicitor General

Mr David LEUNG
Assistant Judiciary Administrator

Clerk in Attendance : Mrs Justina LAM
Assistant Secretary General 2

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

I. Confirmation of minutes of meetings

(LC Paper No. CB(2)648/99-00 - Minutes of meeting on 13 October 1999)

(LC Paper No. CB(2)649/99-00 - Minutes of meeting on 19 October 1999)

The two sets of minutes were confirmed.

II. Information papers issued since last meeting

(LC Paper No. CB(2)454/99-00(01) - Letter dated 20 November 1999 from the Administration advising the present position regarding Messrs LUI Kwan-chung and CHAN Fung who were removed to the Mainland on 21 July 1999)

(LC Paper No. CB(2)553/99-00(01) - Letter from the Administration providing information on the proposed creation of one Deputy Principal Government Counsel post in Department of Justice)

2. Members noted that the above information papers had been circulated.

III. Items for discussion at the next and future meetings

(LC Paper No. CB(2)651/99-00(01) - List of issues to be considered)

(LC Paper No. CB(2)585/99-00(01) - Letter dated 30 November 1999 from the Administration on "Review of legal education")

(LC Paper No. CB(2)651/99-00(02) - Letter dated 11 December 1999 from the Law Society of Hong Kong on "Review of legal education")

(LC Paper No. CB(2)651/99-00(03) - List of follow-up actions required of the Administration)

3. The meeting went through the above papers. Members agreed that the following items should be discussed at the next regular meeting to be held on 18 January 2000 -

(a) Meeting with the two overseas consultants regarding the proposed comprehensive review of legal education and training in Hong Kong;

(b) Right of access to the courts in removal cases; and

(c) Independent legal aid authority.

Review of applicability of the Personal Data (Privacy) Ordinance to "State" organs stationed in the Hong Kong Special Administrative Region (HKSAR)

4. Having considered the Administration's interim reply dated 9 November 1999 concerning the progress of the review of the Personal Data (Privacy) Ordinance, members agreed that the Secretariat should issue another letter to the Administration to

Action
Column

enquire about the latest development of the HKSAR Government's discussion with the Central People's Government of the matter as well as the expected timetable for completion of the review.

(Post-meeting note : The Administration's written response dated 11 January 2000 has been circulated to members vide LC Paper No. CB(2)849/99-00(01))

Mediation as an alternative dispute resolution mechanism

5. The meeting noted that the Working Group to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong appointed by the Chief Justice in October 1997 had recommended that a pilot scheme should be conducted to test the effectiveness of mediation in resolving matrimonial disputes in Hong Kong. Members agreed to seek information on the pilot scheme and its progress from the Working Group before deciding on the timing for discussion of the matter.

Clerk

Improved mechanism for enforcing defaulted alimony payments

6. Mrs Miriam LAU suggested that the above issue should be discussed at a future meeting.

Rule of law and judicial independence

7. Mr Martin LEE referred to a newspaper report which quoted the Chairman of the Hong Kong Bar Association as calling upon the Administration to take urgent steps to restore public confidence in the independence of the Judiciary of Hong Kong, in view of the widespread concern arising from the recent decisions of the Court of Final Appeal on the flag case and the right of abode cases. He suggested that item 3 of the "List of issues to be considered" (LC Paper No. CB(2)651/99-00(01)) should be followed up.

8. In response to the Chairman, Solicitor General (Acting) (SG(Ag)) said that the Administration supported any steps which could be taken to increase confidence in the rule of law and judicial independence in Hong Kong, and the Administration was thinking as to what could be done in this respect.

9. To facilitate future discussion of the item, the Chairman requested the Administration to provide a paper on what measures were being considered to achieve the objective.

Adm

Legal aid for parties involved in defamation cases

10. Mr Martin LEE pointed out that under the existing policy of legal aid

administration, legal aid services were not available to litigants involved in defamation cases. He proposed that the question of whether a review of the present policy was necessary should be examined. He undertook to discuss with the Legal Adviser with a view to providing some background information on the subject matter to facilitate the Panel's discussion.

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) - Administration's paper for Panel meeting on 16 November 1999)

(LC Paper Nos. CB(2)651/99-00(04) & (05) - Supplementary paper and revised ESC Paper provided by the Administration)

11. At the invitation of the Chairman, SG(Ag) highlighted the points made in LC Paper No. CB(2)651/99-00(04) in response to the issues raised at the last meeting concerning the proposed creation of a permanent Deputy Principal Government Counsel post for the Basic Law Unit (DPGC/BL) in Department of Justice (D of J). The Administration's response to members' concerns was summarized as follows -

- (a) Given the international, domestic and constitutional dimensions of the Basic Law and the complexities associated with its interpretation, it was essential that the candidate for the DPGC/BL post possessed a solid background in the common law tradition and be an expert in the underlying values of Hong Kong's legal system including the rule of law, independence of the Judiciary and respect for fundamental rights and freedoms;
- (b) In relation to safeguards to ensure the independence of DPGC/BL, it was important to note that, like every other lawyer in Hong Kong, the holder of the post was under a professional duty to give advice to his clients (in this case the client Bureaux and Departments) to the best of his ability, based on sufficient knowledge of the relevant facts and adequate consideration of the applicable law. There was no question of policy dictating what legal advice should be given. In fact, D of J was doing its utmost to impress upon the Government the need to formulate policies which followed legal advice;
- (c) As provided for under Article 63 of the Basic Law, D of J, supervised and headed by the Secretary for Justice (S for J), "shall control criminal prosecutions, free from any interference". This meant that for Basic Law cases in the criminal context, the decisions to prosecute were independent and departmental, as opposed to governmental, ones. If a case involved issues of broad governmental policies or constitutional implications, D of J

would consult the relevant policy Bureaux but the decision as to whether or not to prosecute and the conduct of the proceedings (including the Basic Law arguments) would remain that of S for J. Furthermore, S for J, as a member of the Executive Council, could offer advice as to whether a government policy proposal was consistent with the Basic Law; and

- (d) Regarding the DPGC/BL post in question, all that the Administration was proposing to do at this stage was to maintain the status quo of the operational structure of having a directorate officer at DL2 level to take charge of the Basic Law Unit. Under an appropriate supervisory relationship within the Legal Policy Division, the post-holder was to act as a vital link in the chain within D of J in providing Basic Law advice and litigation support to the Prosecutions Division and Civil Division.

Discussion

12. Referring to paragraph 13 of the Administration's paper, Mr Martin LEE said that he had yet to be convinced of the remark made therein that "[t]he advice must be honest and candid, clearly stating what the officer honestly thinks about the merits of the case". He expressed the view that in those few cases involving the Basic Law which had come to be widely reported, the practice of counsel for the Government to argue some "half-points" before the court which were of dubious validity in relation to the interpretation of certain provisions of the Basic Law was not acceptable, because of the undue influence which it might create on the court's decision. He opined that in constitutional litigation, counsel for the Government, as opposed to private practitioners, had an additional duty to discharge in the sense that they were vested with the responsibility to safeguard the Basic Law and uphold the high degree of autonomy given to the HKSAR under the principle of "one country, two systems". This message would need to be clearly driven home, especially to senior officers in D of J. Mr LEE said that he felt bound to make these remarks, which he qualified were not intended to be arguments against the proposed creation of the permanent DPGC/BL post.

13. In response to the points made by Mr Martin LEE, SG(Ag) said that D of J was firmly of the view that the way it had handled past litigation relating to the Basic Law was appropriate. The Department had been doing its best to ensure that the arguments put forward before the court were consistent and in line with the Basic Law and upholding of a high degree of autonomy in Hong Kong. In the long run, the way litigation was conducted and cases were decided would prove to people in Hong Kong that the rule of law and the independence of the courts remained intact. He further advised that the Basic Law Unit was not actually in charge of litigation. The existing structure was that the Prosecutions Division and the Civil Division each had their own specialist units to deal with Basic Law-related prosecution and litigation, and the requisite research and advisory input support would be provided by the Basic Law Unit

through the inter-divisional Basic Law Litigation Committee.

14. The Chairman concluded that the Panel did not object to the post of DPGC/BL being made permanent. She thanked the Administration for providing a comprehensive supplementary paper for the Panel's consideration.

V. Briefing by Hon CHAN Kwok-keung on proposed amendments to Legal Aid Ordinance

(LC Paper No. CB(2)348/99-00 - Hon CHAN Yuen-han's letter dated 9 October 1999 on Member's Bill to amend the Legal Aid Ordinance)

(LC Paper No. CB(2)651/99-00(06) - Member's Bill)

(LC Paper No. CB(2)651/99-00(07) - Marked-up copy of Member's Bill)

(LC Paper No. CB(2)651/99-00(08) - Paper provided by the Administration)

(LC Paper No. CB(2)674/99-00(01) - Paper provided by Hon CHAN Kwok-keung)

15. The Chairman said that in line with the existing practice for a proposer of a bill to brief the relevant Panel before introduction of the bill into LegCo, Mr CHAN Kwok-keung was invited to the meeting to brief members on his proposed amendments to the Legal Aid Ordinance (the Ordinance). The Administration was also invited to respond to the proposal.

16. At the invitation of the Chairman, Mr CHAN Kwok-keung elaborated on his proposed Bill. He advised that the proposal was to add a new provision (i.e. the newly proposed paragraph (b)) to section 5AA of the Ordinance which had the effect of empowering the Director of Legal Aid (DLA) to grant legal aid to a person involved in claims where a breach of the provisions of an employment contract or the Employment Ordinance was an issue, even though the person's financial capacity exceeded the eligibility limits for the standard legal aid scheme. The object of the amendments was to extend the discretion of DLA to waive the upper limit of financial eligibility for legal aid to those types of cases.

17. Mr CHAN further explained to the meeting that the proposal was made because of the fact that many employees involved in employment disputes had experienced great difficulties in pursuing their claims in the event of their employers defaulting payment or appealing to a higher court against the Labour Tribunal's decision. Where an appeal from the judgment of the Labour Tribunal was brought to the Court of First Instance, an employee without legal aid could hardly afford the cost of conducting litigation on his own. In the end, the employee might have to give up his claim in order to avoid the risk of paying a substantial amount of legal costs, including those incurred by his employer which might be awarded against him, in the event of losing his case. This would render the original judgment of the Labour Tribunal useless.

18. Mr CHAN Kwok-keung added that the existing section 5AA of the Ordinance empowered DLA to grant legal aid to a person with financial resources exceeding the upper limits of the means test for the standard legal aid scheme, in cases where a breach involving the Hong Kong Bill of Rights Ordinance or an inconsistency with the International Covenant on Civil and Political Rights was in issue. In his opinion, in the context of protection of human rights, a dismissed employee being denied his entitlements under the terms of an employment contract or in accordance with the provisions of the Employment Ordinance (such as severance payment, wages in lieu of notice of termination, arrears of wages etc.) should be afforded the same kind of protection as currently provided for under section 5AA.

19. The Chairman said that she could also see a justification for waiving the upper limits of the means test in cases where an appeal against the Labour Tribunal's decision was brought on ground of an error in law.

20. In response to the Chairman, Director of Administration (D of A) explained the Administration's preliminary comments on Mr CHAN Kwok-keung's proposal as follows -

- (a) The question of whether the upper limits of the means test should be waived for employees in appeals brought by employers against the Labour Tribunal had been examined thoroughly in the recently completed Legal Aid Policy Review. It was the long-established principle that all legal aid applicants should be subject to both the merits and the means tests. The Administration did not see any strong reason for departing from this principle by treating the type of cases differently. The argument of inequality in the financial capacity of employers and employees adduced to support differential treatment in respect of legal aid also existed in other cases such as landlords and tenants in private litigation. At present, DLA did not have the power to waive the upper limits of means test for a legal aid applicant except for Bill of Rights cases. If DLA were given the same power of exemption in respect of the type of applications mentioned by Mr CHAN Kwok-keung, DLA might probably find it necessary to grant legal aid to almost all applicants who passed the merits test. This would result in opening the floodgate for exempting other types of cases; and
- (b) Experience had shown that most employees in dispute cases were able to satisfy the means test for legal aid. In 1998, Legal Aid Department received a total of 375 applications involving employment disputes. 82 applications were successful. 86 (i.e. 23%) were rejected on means ground, while 160 were rejected on merits ground. The remaining 47 applications were either withdrawn subsequently or were still being processed when the figure for the year was compiled.

21. Mr James TO enquired whether it was an established practice for DLA not to approve an application where the potential legal costs were considered out of proportion with the amount of the claim involved. In reply, the Administration explained that DLA in considering an application would take into account all factors which would affect a client's decision to bring proceedings in private litigation, including whether only a nominal award would be gained from the proceedings which did not justify the action. Sometimes, because of the amount of legal costs and contribution required to be paid by the applicant were so significant in comparison with the size of the claim, the approval of legal aid in such cases might be of no benefit to the applicant whatsoever as any sum that might be awarded in the proceedings would be consumed entirely by legal costs. However, as far as the 86 rejected cases were concerned, the applications were turned down on the ground that the applicants' financial capacity had exceeded the eligibility limit for legal aid, and not because of the consideration of "trivial advantage". The Administration added that the factor of "trivial advantage" would not come into play in cases concerning the Hong Kong Bill of Rights Ordinance.

22. Mrs Miriam LAU said that Mr CHAN Kwok-keung's proposed amendments to the Legal Aid Ordinance, as presently drafted, would cover all employees irrespective of their financial capacity. She asked Mr CHAN whether this was the intended purpose of the amendment. She also pointed out that one might argue that the spirit of protection for the less privileged implicit in Mr CHAN's proposal should also apply to small employers faced with the prospect of being sued by their employees.

23. Mr CHAN Kwok-keung explained that his proposal aimed at benefiting employees with moderate means whose financial resources barely exceeded the eligibility limits for the standard legal aid scheme. Another precondition under his proposed amendments for an employee to be entitled to legal aid was that the Labour Tribunal had entered a judgment in favour of the applicant in respect of his claim against the employer. The underlying purpose of the amendments was to prevent employers from using appeals as a means to threaten employees to give up their legitimate claims which had been allowed by the Labour Tribunal. Mr CHAN added that in the end it would be a matter for DLA to decide whether or not to exercise the discretion to waive the eligibility limits of the means test in individual cases.

24. Regarding the question of means test, Mr Albert HO suggested that consideration might be given to expand the scope of the Supplementary Legal Aid Scheme, the financial eligibility limits of which were higher than those for the standard scheme, to cover the type of cases referred to by Mr CHAN Kwok-keung.

25. On the scope of Mr CHAN Kwok-keung's proposed amendments, Legal Adviser was of the view that the reference to "a person" did not necessarily mean "an employee only". The amendment could apply to any person including an employee and an employer.

26. Mr CHAN Kwok-keung said that he would reconsider the drafting of his proposed amendments having regard to the above comments.

27. Mr Martin LEE agreed that the scope of Mr CHAN Kwok-keung's proposed Bill should be narrowed in order to reflect more accurately its intended objective. He opined that as DLA would have the final say in deciding whether or not to waive the upper limits of the means test in deserving cases, the amendments would not open a floodgate of applications for which legal aid would have to be granted. Mr LEE further opined that he doubted that Mr CHAN's proposed Bill could be introduced into LegCo in view of the restrictions imposed under Article 74 of the Basic Law. He asked the Administration whether it would be prepared to take over the proposed amendments having regard to the views expressed on the issue.

28. D of A responded that under the terms of the proposed amendments, it was difficult to draw a dividing line to determine when DLA should or should not approve legal aid in respect of an applicant who had failed the means test. She pointed out that the effect of the proposal was that where an application by an employee had satisfied the merits test, the circumstances under which DLA could refuse to waive the means test would be very limited. The Administration was not inclined to support the amendments because of the serious repercussions they had on the existing policy relating to the administration of legal aid. However, the Administration was prepared to consider other means to address the concerns raised by Mr CHAN Kwok-keung, such as in the context of a review of the Supplementary Legal Aid Scheme as suggested by Mr Albert HO. She added that the Administration welcomed any other suggestions on how the matter could be taken forward.

29. In closing, the Chairman thanked Mr CHAN Kwok-keung for briefing the Panel on his proposed Bill.

VI. Legal representation in Labour Tribunal

(LC Paper No. CB(2)1795/98-99 - Extract from minutes of meeting of House Committee on 23 April 1999)

(LC Paper No. CB(2)651/99-00(09) - Paper prepared by the Administration)

30. The Chairman informed members that this item was raised by Hon Andrew CHENG at the House Committee meeting on 23 April 1999 when the Labour Tribunal (Amendment) Bill 1999 was discussed. According to Mr CHENG, the question of whether the Presiding Officers of the Labour Tribunal should be given discretion to allow legal representation for both parties in complex cases should be examined. The House Committee had referred the issue to the Panel for follow-up discussion.

31. The Chairman further advised that Mr CHENG had been invited to attend the

Panel's discussion of this item but he could not attend the meeting.

32. At the invitation of the Chairman, D of A introduced the Administration's paper (LC Paper No. CB(2)651/99-00(09), which explained the existing operation of the Labour Tribunal and the Administration's comments on Mr Andrew CHENG's proposal. The Administration's view was that the introduction of legal representation in the Labour Tribunal would not be desirable for the following major reasons -

- (a) The existing legislation already provided a mechanism to address the concern about the difficulties faced by employees as litigants in legal proceedings. Should the Presiding Officer of the Tribunal consider that the matter before the Tribunal involved some complications or that the employee would be at a disadvantage in not being able to deal with the matter himself, the Presiding Officer could, in accordance with section 10(1) and (2) of the Labour Tribunal Ordinance, decline jurisdiction over the case and transfer the case to a higher court, i.e. the District Court or the Court of First Instance, so that the employee could either instruct his own lawyer or apply for legal aid; and
- (b) Although not explicitly set out in the Labour Tribunal Ordinance, all Presiding Officers of the Labour Tribunal were legally qualified. They were able to assist self-represented litigants during the course of a hearing to ensure that such litigants received a fair hearing, and to decide that a case should be transferred to a higher court if the circumstances of the case so warranted.

33. Mr Albert HO said that the proposal made by Mr Andrew CHENG arose from a number of complaints about qualified lawyers acting in the capacity of officers or employees for certain companies which were parties to proceedings before the Labour Tribunal. This arrangement was unfair to the employees concerned, who were ordinary lay people with no legal knowledge or training. He asked what safeguards were in place to avoid such inequitable situations.

34. In reply, the Administration advised that the purpose of establishing the Labour Tribunal was to provide an expeditious, inexpensive and informal means for settling some of the more common type of disputes between employers and employees, without legal representation of both parties. One distinguishing feature of the operation of the Labour Tribunal was that the Tribunal Officers had a statutory role under the Labour Tribunal Ordinance to make inquiries necessary for the preparation of a summary of facts relating to a claim before the Tribunal. The Presiding Officers and Tribunal Officers were required to explain the facts of the case and the issues in dispute as well as the relevant legislative provisions to both parties during the process of the hearing of a case. Such unique investigative function of the officers helped to ensure that the interests of the employees would not be prejudiced despite there was no legal

Action
Column

representation.

35. Mr Albert HO said that he would present some actual cases for further discussion of the matter by the Panel, if necessary.

36. There being no other business the meeting ended at 6:15 pm.

Legislative Council Secretariat

17 March 2000