

立法會

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Report of the Panel on Administration of Justice and Legal Services for submission to the Legislative Council on 14 June 2000

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 14 June 2000 in accordance with Rule 77(14) of the Rules of Procedure of the Legislative Council.

The Panel

2. 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 TSANG Yok-shing were elected Chairman and Deputy Chairman of the Panel respectively. The membership list of the Panel is in **Appendix II**.

Major work

Independent legal aid authority

4. The issue of the desirability and feasibility of the establishment of an independent legal aid authority was a matter of great concern to the Panel. The Legal Aid Services Council (LASC) submitted its report on the matter to the Chief Executive on 8 September 1998, and also briefed the Panel on its recommendations on 15 September 1998. The Panel discussed the Administration's decision at two of its meetings.

5. On the LASC's recommendation that an independent legal aid authority should be established by a phased approach, the Administration did not agree that legal aid administration was not independent and that there was sufficient public concern to justify the recommendation. According to the consultancy study commissioned by

the LASC, the majority of the stakeholders, including the legal professional bodies, lawyers undertaking legal aid work, community groups, clients and staff of the Legal Aid Department (LAD) as well as the general public at large, believed that legal aid was administered independently in Hong Kong. The concern about the independence of legal aid administration mainly focused on a minority of sensitive cases that presented a challenge to the Government. However, funding of numerous legal aid cases against the Government both before and after the reunification bore ample evidence to the fact that legal aid was administered independently in Hong Kong.

6. On the LASC's recommendation that the authority should be financed by public revenue with no ceiling on expenditure on legal services, the Administration pointed out that it was against the Government's long established public finance management principle to provide an infinite budget for a body that was independent from the Government. According to the findings of the Administration, legal aid budgets were invariably finite for jurisdictions which had in place an independent legal aid authority. The countries which the consultants and the Administration had studied were invariably faced with the pressure to contain cost and reduce service, and were in fact moving towards a more restrictive legal aid system in different pace. The Administration also cautioned about the unsettling effect of a disestablishment exercise on staff morale. Staff of the LAD had been consulted on the proposal to set up a new and independent legal aid authority, and they generally expressed a fairly opposite view.

7. Some Members deplored the Administration's decision not to establish an independent legal aid authority to replace the LAD, contrary to the LASC's primary recommendation. They pointed out that the reasons adduced by the Administration, such as resource implications and the possible impact on staff morale in LAD, etc should not be the prime considerations. The Administration's decision had drawn strong criticisms from the legal profession which was in support of the establishment of an independent legal aid authority.

8. While the LASC expressed its disappointment at the Administration's decision, it was of the view that it could conduct a further review at some future time, taking into account new developments and changing social needs of the community relating to the demand and delivery of legal aid services. Pending this further review, it was in the course of embarking on a series of work targets with a view to enhancing its role and independent operation in overseeing the provision of legal aid services in Hong Kong.

9. The Administration undertook to keep under review the legal aid system to ensure that it would continue to meet the policy objective that those with reasonable grounds for pursuing a legal action would not be prevented from seeking justice because of lack of means. The Panel agreed that it would continue to take a strong interest in the general question of the independence of legal aid administration.

Legal aid policy

10. Arising from a case concerning the refusal of the Director of Legal Aid (DLA) to grant legal aid to an application for judicial review on a right of abode case, the Panel received a briefing by the Administration on the criteria for granting legal aid and the existing mechanism for appealing against the DLA's decision to refuse legal aid.

11. Members discussed in detail whether legal aid could be granted for a case which raised a substantial point of law of great public importance, such as a matter of constitutional right, irrespective of whether in the opinion of the DLA the case had a reasonable prospect of success. Some members held the view that refusing legal aid in such cases might cast doubt on the public's mind as to whether legal aid was administered in a fair manner. They considered that there existed a good cause for the person concerned to commence proceedings for the purpose of safeguarding that right.

12. The Administration advised that merits test involved a consideration of the legal merits of the case and the reasonableness of the application. Legal aid could only be granted if the DLA was satisfied that the case had a reasonable chance of success. The DLA would seek independent legal advice in difficult cases. An aggrieved applicant could appeal against the DLA's decision to the Registrar of the High Court.

13. As legal aid was not available to applicants appealing against the decision of the DLA to grant legal aid, the Panel suggested that the Hong Kong Bar Association to consider whether private counsel could provide pro bono legal assistance to those in need in appropriate cases. Noting that applicants who were refused legal aid would not be advised of the reasons of refusal in writing, the Panel requested the Administration to review and streamline, in consultation with the legal profession, the existing appeal procedures.

Review of Legal education and training in Hong Kong

14. The Panel welcomed the comprehensive review of legal education and training which was initiated by the two legal professional bodies and supported by the Administration and the law schools of The University of Hong Kong and The City University. The Panel noted that the review would be carried out in two stages, namely, a consultancy stage to be followed by a further study by a Review Panel. A Steering Committee would oversee the work throughout both stages.

15. The two overseas consultants engaged for the consultancy study were invited to come to Hong Kong in January 2000 to meet members of the Steering Committee and representatives of interested bodies and organizations for the purpose of collecting views and information relevant to the conduct of the study. At a Panel meeting with the consultants, members impressed upon them the need to devise a

legal education and training system that was capable of maintaining Hong Kong's competitiveness as an international and financial centre, and meeting the unique characteristics of Hong Kong such as the operation of a bilingual system in court. On timetable, members noted that the consultants would prepare a document for public consultation by end of June 2000. The consultants would come to Hong Kong again to conduct meetings and discussions with relevant parties in September 2000. The final report of the consultants would be submitted to the Steering Committee before the end of February 2001.

Funding for the Postgraduate Certificate in Laws (PCLL) course

16. The attention of the Panel was drawn to reports suggesting that the University Grants Committee (UGC) was in the process of considering to make recommendations to withdraw public funding for the PCLL course. The Panel received representations from law students and law teaching institutions expressing great anxiety. The matter was discussed by the Panel on 21 March 2000 and attended by representatives from the Administration, the law schools of the two universities and the two legal professional bodies.

17. It was the consensus of the meeting that the PCLL course was the wrong target for consideration of withdrawal of public funding. First, the PCLL course was an integral part of the four-year programme of university legal education and a statutory requirement for professional qualification. It was therefore entirely distinguishable from purely academic or stand-alone postgraduate courses, and rather more on a par with the fourth and fifth years of the five-year course for the training of doctors, dentists and architects. Secondly, withdrawal of public funding would inevitably mean a substantial increase in fees for the PCLL course, with the result that a legal career would be reserved for the well-to-do. Thirdly, withdrawal of public funding for the PCLL course might have the effect of pre-empting the eventual recommendations of the comprehensive review on legal education and training being conducted.

18. The Panel resolved that the Chairman should write to apprise the Chairman of the UGC of the consensus of the meeting. In reply, the Chairman of the UGC advised that the UGC had no plans specifically to recommend any changes in the future status of existing PCLL course pending the outcome of the review on legal education and training. Nevertheless, the Panel's view would be drawn to the attention of the UGC at its meeting in April 2000.

Pilot scheme on family mediation

19. In the light of the recommendation of the Working Group appointed by the Chief Justice that a three-year pilot scheme should be run to test the effectiveness of mediation in resolving matrimonial disputes in Hong Kong, the Panel held a meeting to discuss the matter. Representatives of the Hong Kong Family Law Association and Hong Kong International Arbitration Centre were invited to attend the meeting.

20. On implementation of the scheme, members noted that the pilot scheme would commence before the end of the current financial year. A steering committee would be set up to oversee the implementation and evaluation of the scheme. A Mediation Coordinator would be appointed to publicize and coordinate the provision of mediation services. Applicants for the services would be given a choice of family mediators from the Social Welfare Department, non-governmental organizations and mediators in private practice, to try out different means of providing the services. An independent research team would be commissioned to evaluate the effectiveness of the scheme.

21. The meeting also discussed issues such as the merits of family mediation vis-a-vis litigation, success rate of using mediation in resolving matrimonial disputes, measures to ensure adequate supply of trained mediators, and the desirability of introducing a process of mandatory mediation for resolving family disputes. Members also raised the possibility of extending the scope of mediation to other types of disputes such as neighbourhood or building management disputes, and noted that the Administration had no plans to do so at this stage.

Policy and practice on removal and deportation of illegal immigrants

22. Arising from the incident on 21 July 1999 in which two Mainland residents were removed just before the issuance of legal aid certificate for application to the court for leave for judicial review and for an injunction order, the Panel held two meetings to discuss related issues.

23. Members drew the attention of the Administration to the assurance given by the then Attorney General at the resumption of the Second Reading debate on the Supreme Court (Amendment) Bill 1997 that "...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." They considered that the spirit of the assurance should be extended to apply to the situation of an injunction against removal. The Administration held the view that it had acted in accordance with the four guiding principles regarding removal of illegal immigrants in the incident in question. Although the circumstances of the incident were different from those envisaged by the Attorney General when the assurance was given in 1997, the spirit of the assurance had in fact been observed.

24. The Administration also assured members that although the incident was unfortunate, it was only a single incident. As a result of a review following the incident, arrangements were now in place to ensure that the Legal Aid Department (LAD) would have sufficient time to consider applications of the same kind before removal was carried out. In return, the LAD would notify the Immigration Department of any request it might have for such removal to be suspended, while allowing sufficient time for the action to be physically withheld.

25. The Panel was also concerned about the means to safeguard the rights of people faced with the prospect of being removed from Hong Kong, including the right of access to the court and the right of an appeal against the Government's decision. The Panel was briefed on the policy and practice in making summary removal, removal under a removal order, and deportation under a deportation order. Copies of declaration and notification documents advising persons under detention at various stages of their rights and obligations were also provided to the Panel for reference. The Panel suggested that the Administration should revise and modernize the notices as they all appeared to have been couched in out-dated and complicated language not readily understood by lay people. Consideration should also be given to make available such documents in simplified Chinese characters.

Prosecutions conducted by staff of law enforcement departments

26. Arising from a case of wrongful imprisonment of a teenage girl for alleged possession of a counterfeit passport, the Panel requested the Administration to brief the Panel on the practice of prosecutions conducted by staff of law enforcement departments.

27. The Panel was informed that it had long been the practice in Hong Kong for the Secretary for Justice, through the Director of Public Prosecutions, to delegate, pursuant to sections 12 and 13 of the Magistrates Ordinance (Cap. 227), the authority to prosecute in the Magistrates Court for specified offences to officers of certain ranks of other government departments. At present, there were 20 such delegations. These prosecutions accounted for approximately 1/3 of all cases dealt with in the Magistrates Court. The balance of the cases were prosecuted by Court Prosecutors, Government Counsel and Counsel on Fiat.

28. Members raised a number of queries. On overseas practices, the Administration advised that the system adopted in a number of overseas jurisdictions was similar to that of Hong Kong in that non-legally qualified people were empowered to prosecute less complicated cases, provided that they had access to quality legal advice when such assistance was required. On the mechanism for ensuring the quality of prosecutions conducted by law enforcement departments, the Administration advised that the departments concerned could seek legal advice from the Department of Justice if necessary. In appropriate cases where complicated issues were involved, requests for Government Counsel to take over the prosecution were made and acceded to. On cost-effectiveness of the use of legal practitioners for prosecutions vis-à-vis the existing system, the Administration was of the view that the bulk of the cases handled by departmental prosecutors were of a routine or trivial nature which could be disposed of within a day. In 1999, the cost of prosecutions conducted by prosecutors of the law enforcement departments was estimated to be \$3,284 per day. This compared to \$5,670 to \$8,530 per day if the prosecutions were conducted by counsel-on-fiat.

Rule of law and related matters

29. In view of widespread concern over the Government's decision to request for an interpretation by the Standing Committee of the National People's Congress (NPCSC) of Articles 22(4) and 24(2)(3) of the Basic Law in May 1999, the Panel requested the Administration to advise on the measures taken to restore confidence in the rule of law and judicial independence.

30. The Administration briefed members on the ways to boost confidence in Hong Kong's legal system. These included restating the Government's continued commitment to the rule of law and judicial independence, correcting misconceptions about the right of abode issue, clarifying issues relating to judicial independence, defending the courts if they came under unwarranted attack, continuing to promote local and overseas awareness of the rule of law and of the legal system, and reassuring the community about resort to NPCSC interpretations.

31. Some members demanded that the Government should give an unequivocal assurance that it would not again seek an interpretation from the NPCSC in order to restore confidence in Hong Kong's legal system. The Administration declined to do so and reiterated that the Government would only seek an NPCSC interpretation in highly exceptional circumstances. Noting the advice of the Hong Kong Bar Association that there was no provision in the Basic Law for referring a question to the NPCSC for interpretation except by judicial referral through the Court of Final Appeal under Article 158(3), some members raised the question of the legality of the Government's decision to request for an NPCSC interpretation in May 1999. The Administration reiterated its firm view that the request was lawful and constitutional, and did not interfere with judicial independence. The decision of the Court of Final Appeal on 3 December 1999 supported that position.

32. On 5 May 2000, the Panel Chairman wrote to the Secretary for Justice seeking a full explanation of the reasons as to why the Government refused to give an assurance as to the future, and further clarifications on other areas of concern. The Panel would follow up the matter at a meeting in June 2000.

Leapfrog appeals to the Court of Final Appeal (CFA)

33. In response to the Panel's request, the Administration agreed to review the question of introducing a leapfrog procedure by which civil appeals could, in certain cases, go direct to the CFA, bypassing the Court of Appeal. The Administration made a report to the Panel in April 2000.

34. The Panel noted that in conducting the review, the Administration had considered the arguments for and against a leapfrog procedure, as well as the experience of leapfrogging in the United Kingdom (UK) and other jurisdictions. The provisional view of the Administration was that a leapfrog procedure should be

introduced to enable certain civil appeals to be made to the CFA direct from the Court of First Instance. This, in effect, would make the leapfrog procedure more or less the same as that presently in place in the UK under sections 12 and 13 of the Administration of Justice Act 1969. In addition, it was proposed that questions of the interpretation of the Basic Law be excluded from the leapfrog procedure, except where the Court of Appeal was bound either by its own decision or a decision of the CFA.

35. Members expressed support for the proposed leapfrog procedure. On the way forward, members noted that the Administration would consult all parties concerned on the implementation details of the leapfrog procedure, before introducing the proposal by way of amending the Court of Final Appeal Ordinance in the next legislative session.

Review of the applicability of Personal Data (Privacy) Ordinance (PDPO) to the Central People's Government(CPG) offices in Hong Kong.

36. The Administration undertook to review 17 ordinances that expressly bound the Government, but were silent otherwise on their applicability to "State" organs in Hong Kong. The review, except the PDPO, was completed in February 1999. The Administration advised that the review of the PDPO would need more time because of its complexity and discussions on its applicability to CPG offices were being held with the CPG. Despite repeated requests of the Panel in the past 14 months, the Administration had no substantive progress to report.

37. The Panel followed up the matter at a meeting in May 2000. Members were advised that discussions with the CPG were continuing but details of the discussions could not be disclosed. Members were dissatisfied with the time taken for completing the review. Some members held the view that the decision as to whether an ordinance should bind the CPG offices in Hong Kong should be a matter of principle, regardless of its complexity. Moreover, the decision should not be subject to the consent of the CPG. In the course of discussion, members had quoted a number of examples to illustrate that the question of the binding effect of legislation on CPG offices was affecting the legislative process. On behalf of the Panel, the Chairman wrote to the Chief Secretary for Administration requesting her to expedite the review of the PDPO and to address the other issues raised.

Appointment of judges of the Court of Final Appeal (CFA)

38. Article 73(7) of the Basic Law conferred on the LegCo the power and function to endorse the appointments of CFA judges and the Chief Judge of the High Court. Following the notice given by the Administration to move a motion to seek the Council's endorsement for the appointment of seven persons as permanent and non-permanent judges of the CFA, the Panel requested a briefing from the Administration on the matter at a special meeting on 3 June 2000.

39. The Administration briefed members on the composition of the CFA, procedures for appointment of CFA judges, the function of the Judicial Officers Recommendation Commission (JORC) and the role of the LegCo. The Administration considered that the Council's endorsement should only be withheld if it was satisfied that the requirements set out in the Basic Law regarding judicial appointments had not been followed. Members took the view that the power conferred by Article 73(7) was a substantive power to be exercised responsibly and with due regard for the independence of the judiciary. Noting that the JORC was entrusted with the function to advise or make recommendations to the Chief Executive regarding the filling of vacancies in judicial offices, the Panel decided to invite representatives of the JORC to attend a special meeting on 13 June 2000. In order to have a better understanding of the process whereby appointments of CFA judges were made, the JORC was requested to provide information regarding the general procedure for nomination/application and selection, and the criteria of selection for recommendation including any policy and other considerations.

Other issues

40. The Panel also discussed a number of other issues, including Court's power under section 13(1) of the Conveyancing and Property Ordinance (Cap. 219) and whether the law should be amended to make it clear that marital rape is a crime. The Panel would follow up the relevant issues in the next legislative session.

41. 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

42. Between October 1999 and June 2000, the Panel held a total of 13 meetings. Representatives of the Hong Kong Bar Association and the Law Society of Hong Kong attended the majority of the meetings.

Legislative Council Secretariat

9 June 2000

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

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Date : 7 October 1999