

**Extract from Panel on Administration of Justice and Legal Services
meeting on 18 December 2003**

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V. Review of legislative provisions containing the drafting formula "to the satisfaction" of an enforcement agency

(LC Paper No. CB(2)693/03-04(01))

31. Senior Assistant Law Draftsman (SALD) briefed members on DoJ's paper which examined, in the light of the Lam Geotechnics case, the extent of the problem with respect to provisions in subsidiary legislation containing the drafting formula "to the satisfaction" of an enforcement agency. The paper also set out DoJ's preliminary view on the conduct of a review of those provisions.

32. Members noted that the background to the issue was that in the Lam Geotechnics case, the Court of First Instance (CFI) ruled that the elements of offence purportedly set out in regulation 44 of the Construction Sites (Safety) Regulations (Cap. 59 sub. leg. I) were incompletely defined because of the uncertainty in the words "to the satisfaction of the Commissioner". Regulation 44(1) was therefore ultra vires and fell outside the enabling powers conferred on the Commissioner for Labour by section 7 of the Factories and Industrial Undertakings Ordinance. In the light of CFI's ruling, regulation 44 was recently amended to prescribe the specific measures required. As the ruling had impact on other legislative provisions containing the drafting formula "to the satisfaction" of an enforcement agency, DoJ had conducted a preliminary search on those provisions.

33. SALD referred members to the Annex to the paper which set out the provisions in subsidiary legislation that contained the drafting formula and whose validity might become doubtful because of the Lam Geotechnics case. A total of 88 provisions had so far been identified.

34. SALD further advised members that a number of other provisions also contained the drafting formula but they were not included in the Annex because such provisions would not be ultra vires their respective enabling provisions. The three categories of such provisions were explained under paras 5 to 15 of the paper.

Issues raised by members

35. Ms Audrey EU pointed out that legislative provisions containing other drafting formula such as "as the Commissioner thinks fit" could also lead to similar problem as in the Lam Geotechnics case.

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36. SALD responded that DoJ was aware of other similar drafting formula such as those containing the words "acceptable to" or "in the opinion of". He pointed out that provisions containing such references were limited in number, and some of them were not offence provisions. Such provisions would have to be looked at individually.

37. The Chairman and Ms Audrey EU opined that to undertake a comprehensive review of provisions in subsidiary legislation which contained the drafting formular in question would be an onerous task. They asked whether the Administration had studied and accepted the grounds of CFI's ruling before undertaking the preliminary review. The Chairman said that CFI had not given detailed reasons for its ruling. Ms Audrey EU said that the ruling raised two issues, i.e. the subsidiary legislation was incompletely defined and ultra vires the principal ordinance. While she was not in dispute with the ruling, she considered that the Administration should first satisfy itself that a genuine problem existed before proceeding further. She added that the fact that the case was not appealed would not necessarily mean that the Administration accepted the ruling.

38. SALD replied that he had not attempted to find out why there was no appeal to CFI's ruling. The preliminary review was conducted in the light of the ruling in the Lam Geotechnics case.

Admin 39. The Chairman suggested that DoJ, or a private counsel engaged by DoJ, should undertake an analysis of the CFI's ruling with a view to assessing the extent of its impact on other similar provisions, the need for a comprehensive review and legislative exercise, before the Administration would proceed further. SALD undertook to convey members' views to DoJ for consideration.

40. Mr Albert HO pointed out that the CFI's ruling was binding on the Magistrates' Courts. He opined that the Administration should study the grounds for the ruling and come up with a view as soon as possible.

Admin 41. The Chairman requested the Administration to revert to the Panel on the subject matter in due course.

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