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Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 27 June 2011, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Dr Hon Margaret NG (Chairman) Dr Hon Priscilla LEUNG Mei-fun (Deputy Chairman) Hon Albert HO Chun-yan Hon James TO Kun-sun Hon LAU Kong-wah, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Emily LAU Wai-hing, JP Hon TAM Yiu-chung, GBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon Paul TSE Wai-chun Hon LEUNG Kwok-hung
Members absent	:	Dr Hon Philip WONG Yu-hong, GBS Hon Timothy FOK Tsun-ting, GBS, JP
Public Officers attending	:	Item III Department of Justice Mr WONG Yan-lung, SC Secretary for Justice Mr Kevin Zervos, SC Director of Public Prosecutions Item IV Judiciary Administration Miss Emma LAU Judiciary Administrator

		Mrs Angela LO Assistant Judiciary Administrator (Corporate Services)
Attendance by invitation	:	Item III Mr Kumar Ramanathan, SC Chairman Hong Kong Bar Association Mr Simon YOUNG Ngai-man Associate Professor & Director of Centre for Comparative and Public Law Faulty of Law The University of Hong Kong Mr I Grenville Cross, SC Mr Alan HOO, SC Chairman of the Basic Law Institute Item IV Mr Kumar Ramanathan, SC Chairman Hong Kong Bar Association
Clerk in attendance	:	Miss Flora TAI Chief Council Secretary (2)3
Staff in attendance	:	Mr KAU Kin-wah Senior Assistant Legal Adviser 3 Miss Ivy LEONG Senior Council Secretary (2)4 Ms Wendy LO Council Secretary (2)3 Mrs Fonny TSANG Legislative Assistant (2)3

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I. Information papers issued since last meeting

[LC Paper No. CB(2)1134/10-11]

Members noted that no information paper had been issued since the last meeting.

II. Items for discussion at the next meeting

2. Members agreed to discuss the following items at the special meeting to be held on 21 July 2011 -

(a) Draft Mediation Bill; and

(b) Free legal advice service.

III. Issues relating to prosecution – an independent Director of Public Prosecutions and prosecution policy and practice

[LC Paper Nos. CB(2)2154/10-11(01)-(02) and CB(2)2201/10-11(01)-(02)]

Briefing by the Administration

3. Secretary for Justice ("SJ") briefed members on the Administration's stance on the role of SJ and the Director of Public Prosecutions ("DPP") in relation to prosecutions as detailed in the Administration's paper [LC Paper No. CB(2)2154/10-11(01)]. In gist, the Administration considered that as head of Department of Justice ("DoJ"), SJ was under a constitutional obligation to act independently in respect of prosecutions and, as guardian of the public interest, he had a legitimate interest in prosecution decisions. A complete transfer of SJ's prosecution responsibilities to DPP would amount to an abdication of the duties of SJ as head of department and would be inconsistent with Article 63 of the Basic Law ("BL 63") which provided that DoJ shall control criminal prosecutions free from interference. Mr Kevin Zervos, the DPP, introduced the Administration's paper [LC Paper No. CB(2)2154/10-11(02)] on the current prosecution policy and practice. Members noted the recent initiatives to improve the quality and efficiency of the work of the Prosecutions Division of DoJ as elaborated in the paper.

4. Members also noted the background brief prepared by the Legislative Council ("LegCo") Secretariat on the subject [CB(2)2201/10-11(01)].

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Presentation of views

5. Mr Kumar Ramanathan, SC said that the Hong Kong Bar Association considered that while it was institutionally not permissible under BL 63 to have an independent DPP to control prosecutions, it was arguable that an DPP could be made independent from the operational perspective as the vast majority of prosecution decisions with very few exceptional cases were made by DPP in practice. The Bar Association was in the course of examining the independence issue of DPP and whether a protocol similar to the "protocol between the Attorney General ("AG") and the prosecuting departments" of the United Kingdom ("the UK Protocol") should be adopted in Hong Kong. It would submit its position paper to the Panel once its views were formulated. The Chairman suggested that the Bar Association could include in its submission the differences between the political roles of AG in UK and SJ in Hong Kong for members' reference.

6. Regarding the prosecution cases involving public obstruction and juvenile offenders, Mr Ramanathan said that the Bar Association was supportive of the Administration's decision to formulate policy and draw up guidelines on prosecution relating to the public order ordinance. The Bar Association considered that the proposed guidelines should have a high level of transparency and be made easily accessible in order to facilitate the public's understanding.

7. Mr Simon YOUNG of the University of Hong Kong pointed out that BL did not stipulate that the prosecution system in Hong Kong must be maintained without any change after the handover in 1997 and the extent of control on criminal prosecutions by SJ was not specified in BL 63. In his view, the review on the independence issue of DPP was not strictly a constitutional matter. He considered that Hong Kong enjoyed prosecutorial independence in practice but not organisational independence under the existing prosecution system. Mr YOUNG further elaborated in details on the experience of Canada where an independent federal prosecution agency was established by the Director of Public Prosecutions Act in 2006. He highlighted that the federal DPP, in consequence of the Act, was allowed to act independently in the discharge of the prosecutorial function and AG was required to give notice in the Government Gazette to inform the public of his wish to intervene in a particular case. Mr YOUNG considered that the Canadian model under which the roles of DPP and AG were clearly stipulated in legislation could ensure a high level of transparency in prosecution which would be free from political interference.

8. Mr I Grenville Cross, the former DPP, was of the view that while BL 63 would not permit an independent office of DPP, sufficient flexibility was provided for in BL to allow DPP to control prosecutions and operate

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independently within DoJ. He stressed that public confidence in the prosecutorial independence would be undermined if a political appointee was involved in making prosecution decisions. As there was a significant trend in common law jurisdictions to disengage a member of the government, whether AG, justice secretary, or law minister, from the prosecution process for the purpose of promoting public confidence in the integrity of the prosecution system, it was high time for the Administration to consider adopting such arrangement to keep in line with the international practice. He added that the protocol of UK which stipulated clearly the strict circumstances where AG could be involved in prosecution would serve as guidance for Hong Kong to improve its prosecution system.

9. Mr Alan HOO, Chairman of the Basic Law Institute pointed out that the role of AG in UK in relation to criminal prosecutions was to uphold the rule of law. He considered that it was not a common law principle that SJ had to act as the guardian of public interest and address the public interest issue in prosecution. While he agreed with the Administration that the prosecution system of Hong Kong was similar to that of UK having regard that both AG and SJ were superintendents of the prosecuting authorities, he was concerned that Hong Kong did not adopt a protocol similar to the UK Protocol which clearly stipulated that AG would not be consulted on prosecution decisions involving political matters. He considered that SJ, being a political appointee since the implementation of the Accountability System in 2002, was bound to be more exposed to political considerations in making prosecution decisions than AG in UK who was seldom required to attend Cabinet meetings. In his view, it was important for SJ to ensure that the prosecution system in Hong Kong should not only be impartial and free from political interference but should be seen to be so.

Discussion

10. Ms Emily LAU noted the view of Mr I Grenville Cross that if an independent DPP were responsible for prosecution decisions, there would not be any public perception problem arising from the SJ's dual role in the recent cases ranging from the alleged assault on the Chief Executive to the allegations that no enforcement action was taken against government officials in respect of the illegal structures in their properties. She enquired about the views of Mr Cross on the current prosecution system, how the system could be improved and whether he was able to act independently when he was DPP.

11. Mr I Grenville Cross replied that although the existing prosecution system in Hong Kong had been functioning well, there was still room for improvement to align with the practices of other common law jurisdictions where the importance of an independent DPP in the discharge of the prosecutorial function

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was increasingly recognized. From his experience, the community was far more prepared to accept the prosecution decisions being made by an independent DPP without any involvement from a law minister. As far as he was aware, political considerations did not play any role in his past prosecution decisions. Mr Cross reiterated that public confidence in the integrity of the prosecution system would be enhanced if SJ was disengaged from the prosecution process to allow DPP operate independently within DoJ. He stressed that the UK prosecution system governed by the UK protocol had been functioning well and could serve as a model for Hong Kong to follow.

12. Referring to the former SJ's decision not to prosecute Ms AW Sian and the prosecutions brought against himself by the former DPP, Mr LEUNG Kwok-hung expressed strong dissatisfaction about the different approaches taken by DoJ in making the prosecution decisions. He considered that the Administration had a duty to enact legislation or issue a protocol to ensure that SJ could not intervene in the prosecution decisions made by DPP and that the prosecution decisions made by SJ and DPP were entirely free from political interference. Dr Priscilla LEUNG, however, said that while she appreciated the view that there were flaws with the common law system, she considered that the power of prosecution should continue to be rested with SJ.

13. Mr LAU Kong-wah was of the view that it was not permissible to abdicate SJ from his constitutional responsibility to control criminal prosecutions as stipulated in BL. He also observed that the public did not express dissatisfaction about the current prosecution system. Noting that SJ would personally make prosecution decisions in very few cases that DPP brought to his attention, he enquired about the circumstances under which DPP would consult SJ in prosecution. He was concerned as to how the public would perceive a prosecution decision if different views were held by SJ and DPP.

14. SJ explained that most of the prosecution decisions were made by DPP or other counsel in the Prosecutions Division of DoJ in practice. Only a few exceptional and sensitive cases were brought to him by DPP for his consideration. As far as he could recall, consensus was reached by SJ and DPP on all those cases. Should there be any cases of difference in views, independent opinions could be sought from outside counsel and SJ, as the head of DoJ, would be accountable for the final decision.

15. While appreciating that it would be an ideal situation to have an independent DPP to control prosecutions in a common law system, Ms Miriam LAU said that she did not envisage a public outcry if such arrangement was not adopted in Hong Kong. She asked Mr I Grenville Cross and Mr Alan HOO whether public discontent would be expected unless an

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independent DPP was put in place under the current system. She further asked Mr HOO whether it was acceptable if a protocol similar to the UK Protocol was adopted in Hong Kong.

16. Mr I Grenville Cross reiterated that the prosecution system in Hong Kong in general worked well but there was still room for improvement having regard to the overseas experience. Mr Alan HOO informed members that the issue of whether a protocol similar to UK Protocol should be adopted in Hong Kong had been examined by the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress but the results of the study had yet to be published. In his opinion, the control of prosecutions by SJ would not be undermined if a similar protocol was adopted in Hong Kong.

17. SJ said that prosecutorial independence was constitutionally guaranteed under BL 63 and was safeguarded by appropriate checks and accountability mechanisms, and the Administration considered that the existing prosecution system in Hong Kong was functioning well. He stressed that Hong Kong adopted a prosecution system with arrangements consistent with those in many other common law jurisdictions, and such arrangements worked well in Hong Kong as in other jurisdictions. Under the current mechanism, for example, SJ could disengage himself from the prosecution process to avoid any possible perception of bias in sensitive cases where conflicts of interests were perceived. He did not subscribe to the view that recent cases mentioned by Mr Cross in his submission would give rise to perception problem on prosecutorial independence which necessitated changes to the existing system.

18. Regarding the prosecution system in UK, SJ further pointed out that AG, as a minister responsible to the Parliament, remained as superintendent of the prosecuting authorities and was not entirely disengaged from the prosecution process. In drafting the protocol, the UK government had examined whether an independent office for prosecuting authorities should be set up. It was concluded that there was no need to do so on the ground that it was important for AG to retain his role as the law officer and directly accountable to the Parliament. SJ stressed that the UK Protocol, issued in 2009, was drawn up on the basis of the specific situation of UK and its efficacy was still under review. It would be hasty in introducing changes to the existing prosecution system of Hong Kong based on the UK model at the current stage, not to mention the suggestion of abdicating SJ from his constitutional obligation to control prosecutions. He assured members that the Administration would keep in view the development of the prosecution system and take into account the views of the Bar Association in that aspect.

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19. In summing up, the Chairman said that the concern of the community over the prosecutorial independence in Hong Kong had not been allayed. There were views that prosecution process should be made independent from SJ either by changing the existing mechanism or adopting a protocol similar to the UK Protocol to ensure prosecutorial independence on the operational front. She suggested that the Panel should be invited to consider how the issue should be followed up in the next legislative session when the written submission from the Bar Association was available for the consideration of the Panel and the Administration.

The Clerk

IV. Appointment of serving Justices of Appeal as non-permanent judges of the Court of Final Appeal ("CFA") and judicial manpower situation in CFA and other levels of courts situations

[LC Paper Nos. CB(2)2154/10-11(03) and CB(2)2201/10-11(3)]

Briefing by the Administration

20. Miss Emma LAU, Judiciary Administrator ("JA"), briefed members on the Judiciary's view on the appointment of serving Justices of Appeal of the Court of Appeal of the High Court ("HC") as non-permanent Hong Kong judges ("HKNPJs") of CFA and the judicial manpower situation at CFA and other levels of court as set out in the Judiciary Administration's paper [LC Paper No. CB(2)2154/10-11(03)].

21. Members also noted the background brief prepared by the LegCo Secretariat on the subject [CB(2)2201/10-11(03)].

Discussion

Appointment of serving Justices of Appeal of Court of Appeal of HC as HKNPJs

22. Mr Kumar Ramanathan reiterated the Bar Association's view that the arrangement of having Justices of Appeal of the Court of Appeal of HC to sit in CFA as HKNPJs would erode public confidence in the administration of justice, particularly in criminal cases where the defendant had been convicted in a trial in HC and further lost the appeal in the Court of Appeal. Instead of appointing serving Justices of Appeal as HKNPJs to CFA, the Bar Association considered that the Administration should appoint more retired judges to enlarge the pool of CFA judges. Referring to the Judiciary Administration's previous advice that it was envisaged that serving Justices of Appeal would be required to sit in no more than 10 CFA cases in total each year, Mr Ramanathan opined that 10 cases was no small number in relation to the total caseload of 40 in CFA.

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23. Referring to paragraph 15(b) (i) and (ii) of the Judiciary Administration's paper which elaborated that a HKNPJ would not be selected to sit in the event CFA was asked to resolve the conflicting decisions in previous cases of the Court of Appeal of which the judge was a member or where the judge had written a leading decision in a previous case and the correctness of the decision in that case was before CFA, the Chairman asked whether such arrangements could allay the concerns of the Bar Association.

24. Mr Ramanathan reiterated that perception of bias remained as the serving Justices of Appeal appointed as HKNPJs would hear appeals against the decisions of the Court of Appeal which their colleagues in HC had made. Noting from paragraph 15(a) of the Judiciary Administration's paper that the CFA cases in which serving Justices of Appeal were selected to sit would be limited, he sought clarification on the latest estimation of such cases. JA advised that only two CFA cases were heard by a serving Justice of Appeal as HKNPJ in the past nine months.

Judicial manpower situation

25. Referring to paragraph 16 (a) and (b) of the background brief on the manpower situation of the Court of Appeal from 2004 and 2007 and the waiting times for cases of the Court of First Instance ("CFI"), Ms Emily LAU queried whether the current judicial establishment was sufficient to cope with the prevalent workload of the Judiciary. Referring to the recent concern expressed by the President of the Law Society of Hong Kong over the judicial manpower shortage in Hong Kong, Ms LAU considered that a comprehensive review of the judicial manpower situation should be carried out.

26. JA replied that the judicial establishment was substantially enhanced in July 2008, when a net addition of seven judges and judicial officers ("JJOs") posts were created, including one Justice of Appeal post and five judges of CFI posts at HC. She said that all these new posts had been filled and the manpower situation of HC was considered satisfactory at one stage with all posts in the Court of Appeal taken up by substantive judges. However, with the then Chief Judge of the High Court ("CJHC") appointed as the Chief Justice in 2010 and the retirement of three Justices of Appeal in 2011, the availability of judicial manpower at the Court of Appeal had indeed been affected for the past year or so. Nevertheless, the CJHC vacancy and two of the vacancies of Justices of Appeal had recently been filled with only one vacancy left to be filled. JA further stressed that at the present stage, the judicial establishment at HC was considered sufficient to cope with the workload. The temporary manpower shortage of the Judiciary would be alleviated with the conduct of open recruitment exercises to fill the remaining vacancy.

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27. In response to the enquiry of Ms Emily LAU on whether the Bar Association considered the existing manpower strength in the Judiciary adequate to meet the operational need, Mr Ramanathan expressed concern over the increasing vacancies of judges in HC. He said that in addition to the existing five CFI judges vacancies as stated in the Judiciary Administration's paper, it was envisaged that at least four to five vacancies would arise from the retirement of HC judges in the coming year, making a total of up to 10 vacancies in HC. He was also concerned that the present arrangement of having only about five permanent HC judges handling court cases, with other posts filled by deputy judges, would erode public confidence in the administration of justice. He added that the Bar Association considered the Judiciary understaffed which would put pressure on judges who were required to play a more active role in case management after the implementation of the Civil Justice Reform.

28. Ms Emily LAU suggested that the Panel should follow up on the judicial manpower situation in the next legislative session and information on the waiting times for court cases and the number of occasions where deputy judges were engaged in the interim before substantive appointments were made should be made available for members' reference. The Chairman directed that the item be included in the outstanding items for discussion of the Panel.

The Clerk

Recruitment of judges

29. Noting that the Judiciary might have difficulties in recruiting suitable candidates to fill the vacancies of judges, the Chairman enquired about the details of the open recruitment exercises to be conducted and how the conduct of such exercises could improve the judicial manpower situation. Mr LEUNG Kwok-hung expressed concern that the manpower shortage problem would have adverse impact on the quality of work of the Judiciary and enquired how the Judiciary Administration would address the issue.

30. JA replied that the Judiciary acknowledged that the appointment of temporary judicial manpower to meet the operational needs of the courts could only be a short term measure. In the long term, all vacancies should be filled by substantive judges. Following a review on the appointment of JJOs conducted by the Judiciary some years ago, it had been the established policy to conduct open recruitment exercises to fill the vacancies below the level of the Justice of Appeal of HC, such as CFI judges, District Judges, permanent magistrates and special magistrates. Similar to the practice in other common law jurisdictions, vacancies of the Justices of Appeal of the Court of Appeal of HC would be filled by internal promotion.

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31. JA further advised that open recruitment exercises had been conducted in the past few years. The Judiciary had placed recruitment advertisements in local newspapers and informed serving JJOs, the two legal professional bodies and relevant organizations of the vacancies. In the last open recruitment exercise, a sufficient number of suitable candidates were identified to fill the vacancies. JA further said that a new round of recruitment exercises would soon be launched with a view to filling the vacancies arising from retirement and elevation of JJOs to higher levels of court.

32. In response to the enquiry of the Chairman as to whether private counsel considered the posts of judges unattractive, Mr Ramanathan replied that most of the judges appointed in the recent two years came from the Bar. As the number of legal practitioners who were considered eligible for the posts of judges was small, he believed that there would be difficulties in recruiting judges unless the pool of candidates could be further expanded.

33. The Chairman further enquired if overseas recruitment was impracticable having regard to the language requirement. JA replied that the Judiciary would follow the specific requirements laid down in law in recruiting JJOs. It should be noted that judges were not necessarily required to be proficient in Chinese and some of the judges appointed in the last recruitment exercise were not bilingual. She added that candidates from different backgrounds, including serving JJOs at the lower levels of court, private practitioners and eligible persons in government departments, had applied in the past open recruitment exercises and some of them were appointed. JA reiterated that the conduct of local open recruitment exercises was effective in recruiting suitable candidates to fill vacancies in the Judiciary.

Usage of the Legislative Council Building

34. The Chairman asked about the plan of the Judiciary for the usage of the existing Legislative Council Building after its handover to the Judiciary. JA replied that the Judiciary was planning to relocate the CFA to the building. At Ms Emily LAU's suggestion, the Chairman requested JA to report to the Panel on its plan to use the Building in the next legislative session.

JA

V. Any other business

35. There being no other business, the meeting ended at 6:32 pm.

Council Business Division 2
Legislative Council Secretariat
8 December 2011