

立法會
Legislative Council

LC Paper No. CB(4)125/13-14
(These minutes have been seen
by the Administration)

Ref : CB4/SS/8/12

Subcommittee on Solicitors (General) Costs (Amendment) Rules 2013

Minutes of the second meeting
held on Tuesday, 24 September 2013, at 2:30 pm
in Conference Room 2A of the Legislative Council Complex

Members present : Hon Dennis KWOK (Chairman)
Hon James TO Kun-sun
Hon TAM Yiu-chung, GBS, JP
Hon Ronny TONG Ka-wah, SC
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon Paul TSE Wai-chun, JP

Public officers attending : Agenda item I

Ms Adeline WAN
Senior Assistant Solicitor General
Department of Justice

Mr Michael LAM
Senior Assistant Law Draftsman
Department of Justice

Miss Amy CHAN
Senior Government Counsel
Department of Justice

Ms Phyllis POON
Senior Government Counsel
Department of Justice

Clerk in attendance : Miss Mary SO
Chief Council Secretary (4)2

Staff in attendance : Mr Kelvin LEE
Assistant Legal Adviser 1

Ms Cindy CHAN
Senior Council Secretary (4)5

Ms Mandy WAN
Administrative Assistant (4)1

I. Meeting with the Administration

The Legislative Council ("LegCo") -- LegCo Brief
Brief provided by The Law Society
of Hong Kong

L.N. 110 of 2013 -- Solicitors (General) Costs
(Amendment) Rules 2013

LC Paper No. LS65/12-13 -- Legal Service Division Report
on Solicitors (General) Costs
(Amendment) Rules 2013
(L.N. 110)

LC Paper No. LS69/12-13 -- Legal Service Division
Further Report on Solicitors
(General) Costs (Amendment)
Rules 2013 (L.N. 110)

LC Paper No. CB(4)915/12-13(01) -- Letter from The Law Society
of Hong Kong dated 9 July
2013 to the Clerk to the House
Committee (English version
only)

LC Paper No. CB(4)915/12-13(02) -- Letter from the Legal Adviser
of the Legislative Council
dated 9 July 2013 to the
Secretary for Justice

LC Paper No. CB(4)915/12-13(03) -- Letter from the Department of
Justice dated 18 July 2013
(English version only)

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LC Paper No. CB(4)989/12-13(01) -- Letter from the Clerk to Subcommittee dated 22 July 2013 to the Secretary for Justice (English version only)

LC Paper No. CB(4)989/12-13(02) -- Letter from the Department of Justice dated 9 September 2013

The Subcommittee deliberated (index of proceedings attached at **Annex**).

2. As the Solicitors (General) Costs (Amendment) Rules 2013 ("the Rules") were made by the Council of The Law Society of Hong Kong ("The Law Society") instead of by the Costs Committee as required under section 74 of the Legal Practitioners Ordinance (Cap. 159) ("LPO"), the Subcommittee considered that the only proper way to deal with the matter was for the Secretary for Justice to move a motion to repeal the Rules. In response, the Administration proposed the following options -

- (a) Option 1 – Publication of a new set of rules to be made by the Costs Committee with a corrigendum in the Gazette to explain the error;
- (b) Option 2 – Express repeal of the Rules under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO");
or
- (c) Option 3 – Validation of the Rules by legislation.

3. The Administration advised that it was more inclined towards Option 1 in the context of the present case for the following reasons -

- (a) Option 2 rest on the premise that the subsidiary legislation was validly made and had already had legal effect. It was clear that the Rules were invalid because they were not made by the correct authority prescribed by law. Moreover, section 1 of the Rules provided that the Rules would "come into operation on a day to be appointed by the President of The Law Society of Hong Kong by notice published in the Gazette". No commencement notice had ever been issued in the present case. On the basis of the legal principle that subsidiary legislation which had been passed and

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which had not yet come into operation did not have the full effect of statute, it was doubtful whether it was necessary to have an express repeal of the Rules; and

- (b) Option 3 was previously adopted for subsidiary legislation, referred to in LC Paper No. CB(4)989/12-13(02), which had already been in operation for several years before the defect was discovered. In the present case, the Rules had not come into operation. Moreover, it did not seem appropriate to adopt Option 3 to validate the Rules which had been erroneously made by the wrong party.

4. Assistant Legal Adviser 1 advised that he agreed with the Administration that Option 3 was not an appropriate option for the present case. Whilst Options 1 and 2 were feasible options, it should be pointed out that under common law, decision on whether a piece of subsidiary legislation is legally effective rests with the court, rather than with the legislature. In this regard, the adoption of an express repeal approach, i.e. Option 2, would avoid any possible infringement of the common law principle.

5. Mr TAM Yiu-chung, Dr Priscilla LEUNG, Mr Paul TSE and Mr James TO preferred Option 1 for the following reasons. Firstly, it was apparent that the Rules were not made by the proper authority vested with the requisite powers under the LPO. Both the Administration and The Law Society admitted this to be the case. Secondly, there was no pending or on-going court case to challenge the legal effect of the Rules as a piece of subsidiary legislation. Thirdly, the Rules had not yet come into operation. Fourthly, there were precedent cases on the adoption of Option 1, i.e. publication of a new piece of subsidiary legislation with a corrigendum in the Gazette to explain the background. Finally, Option 1 was more straight-forward than moving a motion to repeal the Rules under section 34(2) of IGCO.

6. The Chairman and Mr Ronny TONG were of the view that Option 2 would ensure complete legal certainty and finality, having regard to the fact that the corrigendum to be published in the Gazette together with the new set of rules to be made by the Costs Committee would only state the background for making and gazetting the new set of rules and without expressly stating that the Rules were not legally effective and/or were repealed. The possible operation of an implied repeal in these circumstances was unclear, and was based on uncertain legal principles where the applicability of the same was in doubt. The Chairman and Mr TONG were also of the view that adopting Option 1 to resolve the problem of a piece of subsidiary legislation erroneously made by the wrong

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body, and which had already been published in the Gazette, would set a bad precedent if similar incidents were to take place in the future.

7. The Administration advised that assuming that the Subcommittee would agree to the adoption of Option 1, the Costs Committee would be requested to make a set of new amendment rules with a corrigendum explaining the reasons behind the need for the making of the new rules and the mistake made by The Law Society. The new rules to be published in the Gazette would be subject to negative vetting by the Legislative Council.

8. Members urged the Administration to request the Costs Committee to expedite the making of a new set of rules together with the publication of a Corrigendum in the Gazette to clarify the matter and to explain the background and history. The Chairman also urged the Administration to request The Law Society to take steps to prevent the recurrence of similar incidents in the future.

Way forward

9. The Chairman concluded that the majority of the members of the Subcommittee considered that Option 1 should be adopted, albeit members had different views on how the matter should be resolved. The Chairman suggested and members agreed that the report on the deliberations of the Subcommittee for submission to the House Committee ("HC") should clearly set out the views of members and that the report should be circulated to members for consideration before submission to HC.

10. Members agreed that the Chairman should, on behalf of the Subcommittee, move a motion at a Council meeting to extend the scrutiny period of the Rules from 16 October 2013 to 6 November 2013.

11. There being no other business, the meeting ended at 3:25 pm.

Council Business Division 4
Legislative Council Secretariat
6 November 2013

Subcommittee on Solicitors (General) Costs (Amendment) Rules 2013

Proceedings of the second meeting on Tuesday, 24 September 2013, at 2:30 pm in Conference Room 2A of the Legislative Council Complex

Time Marker	Speaker(s)	Subject(s)	Action required
000600 - 001535	Chairman Administration	Briefing by the Administration on the three options to deal with the Solicitors (General) Costs (Amendment) Rules 2013 ("the Rules").	
001536 - 001835	Chairman Assistant Legal Adviser 1	Assistant Legal Adviser 1 ("ALA1")'s explanation regarding the various possible implications for the Subcommittee to recommend each of the three options in the present case.	
001836 - 005200	Chairman Mr TAM Yiu-chung Mr James TO Administration Dr Priscilla LEUNG Mr Ronny TONG Mr Paul TSE	Mr TAM Yiu-chung, Mr James TO, Dr Priscilla LEUNG and Mr Paul TSE's view that Option 1 should be adopted. The Chairman and Mr Ronny TONG's view that Option 2 should be adopted.	
005201 - 005530	Chairman ALA1	The Chairman's conclusion that the majority of the members of the Subcommittee considered that Option 1 should be adopted, albeit members had different views on how the matter should be resolved. The Chairman suggested and members agreed that the report on the deliberations of the Subcommittee for submission to the House Committee should clearly set out the views of members and the report should be circulated to members for consideration before submission to the House Committee. Members agreed that the Chairman should, on behalf of the Subcommittee, move a motion at a Council meeting to extend the scrutiny period of the Rules from 16 October 2013 to 6 November 2013.	