# *立法會*
# *Legislative Council*

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**Bills Committee on**
**Administration of Justice (Miscellaneous Provisions) Bill 2014**

**Background brief**

## Purpose

This paper gives an account of the views expressed by members of the Panel on Administration of Justice and Legal Services ("the Panel") when being consulted on the Administration of Justice (Miscellaneous Provisions) Bill ("the Bill").

## Background

2. The Judiciary proposed the following legislative amendments to improve various court-related matters:

(a) amending the Hong Kong Court of Final Appeal Ordinance (Cap. 484) so that all appeals in civil matters, whether or not the matter in dispute amounts to or is worth more than $1 million, should only lie at the discretion of the Court of Final Appeal ("CFA")/Court of Appeal[1];

(b) amending the Criminal Procedure Ordinance (Cap. 221) to enable other suitable audio-visual facilities, such as video conferencing facilities, to be adopted;

(c) amending section 80 of the District Court Ordinance (Cap. 336) to dispense with the requirement for a District Judge to orally deliver the reasons for the verdict and any sentence in criminal proceedings;

[1] According to section 22(1)(a) and (b) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), an appeal from any final judgment of the Court of Appeal in any civil cause or matter lies to the Court of Final Appeal ("CFA") as of right where the matter in dispute amounts to or is of the value of $1 million or more. For other cases, leave to appeal to the CFA will only be allowed if, in the opinion of the Court of Appeal or the CFA, the question involved is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision.

(d) amending the Magistrates Ordinance (Cap. 227) to allow a person's period(s) of experience as a Special Magistrate to be combined with period(s) of other types of qualifying professional experience to fulfill the requisite minimum five-year period for the eligibility to be appointed as a Permanent Magistrate;

(e) amending the Labour Tribunal Ordinance (Cap. 25) to improve its operation in a few areas, including clarifying its jurisdiction, enhancing its case management powers and aligning the time limit for enforcing its awards or orders with other civil claims; and

(f) amending the relevant legislation to include more specifically-worded rule-making powers in the administration of suitors' funds. Suitors' funds are administered in the CFA, High Court, District Court, Lands Tribunal, Labour Tribunal and Small Claims Tribunal on the basis of rules (subsidiary legislation), except for the CFA and Lands Tribunal (administratively).

**Discussions at the Panel**

3. The Panel was briefed on the legislative proposals at its meetings held on 23 July 2013 and 28 January 2014. The major concerns and views of the Panel members are summarized below.

Appeals in civil matters to the CFA

4. According to sections 22(1)(a) and (b) of Cap. 484, an appeal lies to the CFA as of right where the matter in dispute amounts to or is worth $1 million or more. For other cases, appeals to the CFA will only be allowed if the question involved is of great general or public importance, or otherwise.

5. The Panel noted the following reasons given by the Judiciary Administration ("JA") for amending the law so that all appeals in civil matters to the CFA became subject to discretionary leave:

(a) linking a right of appeal to an arbitrary financial limit was objectionable as a matter of principle, as this meant that litigants involved in litigation beyond the threshold limit in effect had more rights than other litigants with smaller claims, regardless of the merits of their cases;

(b) allowing appeals to be lodged to the CFA as of right led to situations whereby unmeritorious appeals had to be heard by the CFA, which was not conducive to an effective system of appeals. Unmeritorious appeals did not benefit the appellants either, not to mention the respondents. Such appeals served only to saddle the litigating parties with more legal costs to pay;

(c) unmeritorious appeals prevented the CFA from hearing in good time genuine and much more meritorious appeals; and

(d) almost every other common law jurisdiction to which Hong Kong had the closest affinity required that "leave" be obtained before appeals could be made to their highest appellate court. These included appeals to the Australian High Court, the Supreme Court of New Zealand, and appeals from English and Wales to the Supreme Court of the United Kingdom. As for appeals to the Canadian Supreme Court, leave to appeal was required in most cases.

6. A member expressed opposition to the proposal of abolishing the as of right appeal mechanism, as this would suppress the rights of the persons disagreed with the decisions of the lower courts to request the CFA to re-hear their cases. The member pointed out that retaining the as of right appeals for civil matters should not create significant workload to the CFA, as the number of as of right appeals was small compared with the number of other civil appeals and criminal appeals heard by the CFA. Furthermore, the implementation of the proposal would not save a lot of judicial resources, as the persons disagreed with the decisions of the lower courts might still apply for leave to appeal to the CFA. Another reason for retaining the as of right appeals for civil matters was that the number of occasions whereby the CFA overturned the decisions of the lower courts was very high compared with that in many common law jurisdictions. To reduce the number of as of right appeals which were unmeritorious, consideration could be given to raising the financial limit of the matter in dispute.

7. Members noted from the information provided by the JA that of the 27 civil cases filed in the CFA in 2012, six of them were as of right appeals. Of these six as of right appeals, two were successful (or 33%). Members further noted that

the number of leave applications for criminal and civil appeals allowed by the CFA from 2008 to 2012 only constituted a small percentage of leave applications disposed of in the CFA during the same time period, i.e. ranging from 12% to 28%. In the light of this, a member considered that more substantial justifications should be given to support the abolition of the as of right mechanism.

8. The JA pointed out that the CFA did not operate as a second court of appeal operating on the same basis as the Court of Appeal of the High Court. Allowing appeals to be lodged to the CFA as of right might lead to justice being delayed to the party who had the merits in a case. The abolition of the as of right appeal mechanism would not prevent litigants from applying for leave to appeal under the existing procedures and the CFA would hear meritorious appeals.

9. The JA further pointed out that the workload and resources for dealing with a leave application and a substantive appeal by the CFA were different. For consideration of leave applications, they might be disposed of on paper under the procedures of rule 7 of the Cap. 484A. If the court directed for a hearing, the hearing time normally lasted for about one to two hours and only three Judges were involved. For substantive appeals, the hearing bundles involved were normally much more substantial and the hearing time normally lasted for one or more days and five Judges were involved.

10. Some members were of the view that if insufficient judicial resources was part of the reason for abolishing the as of right appeal mechanism, the Judiciary should review and, where necessary, put up requests for additional resources.

11. Some members asked the Judiciary to make reference to relevant legislation in overseas jurisdictions and consider whether it was necessary to amend local legislation to the effect that the reasons/considerations for consideration of an application for leave to appeal to the CFA should be set out, especially if the as of right appeal mechanism were to be abolished.

12. The JA advised that following the proposed abolition of the as of right appeal mechanism, all appeals in civil matters to the CFA would be subject to discretionary leave. All such appeals should be heard by the CFA only if the question involved in the appeal was one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision. Whilst the CFA primarily dealt with questions of "great general or public importance", there was also an "or otherwise" provision. Existing case law had established the "or otherwise" limb as an exceptional one with a limited scope of application, for example, when there was perceived grave injustice. Instead of rigidly setting out the considerations for approving or rejecting an application for

leave under this limb, the Administration considered it more appropriate to let the jurisprudence on this limb further develop on its own, just like all case law. If the Judiciary spelt out other factors such as "general commercial significance" in the legislation like some other jurisdictions, it would still offend the matter of principle set out in paragraph 5(a) above in that commercial cases with a higher monetary value would then seem to enjoy more rights.

13. On the question as to whether Hong Kong was the only common law jurisdiction which retained the as of right appeal mechanism, the JA replied that although there was in general an automatic right of appeal for civil matters in Singapore and Ireland, there was no equivalent intermediate court of appeal between the High Court and the highest appellate court.

Delivery of reasons for verdicts and sentences in criminal proceedings in the District Courts

14. The JA explained that the reason for amending section 80 of Cap. 336 was to enable the District Judges to have the flexibility to hand down the reasons for verdicts and sentences in criminal proceedings in writing direct in appropriate cases. Currently, there was no flexibility for a District Judge to directly hand down the reasons for the verdict and any sentence in writing. A District Judge was required to first orally deliver the verdict and any sentence, as well as the reasons, in criminal proceedings. The Judge was also required to reduce the reasons to writing within 21 days after the hearing or the trial. This was unnecessary and represented a waste of legal costs and court resources in many cases.

15. On the suggestion that the circumstances under which a District Judge would directly deliver the reasons for the verdict in writing or orally first should be clearly spelt out in the Bill, the JA replied that a District Judge would give due consideration to such factors as the likely duration needed for the oral delivery, the complexity of a case, availability of legal representation and background of the parties concerned (for examples language fluency and any other special needs). Whilst the Judiciary did not consider it appropriate to spell out such factors in the Bill, it should be noted that a District Judge would still have the discretion to orally deliver the reasons for a verdict. This could be arranged upon the request of a defendant and/or if the Judge considered it desirable.

16. Concern was raised about the lack of time limit in the Bill to require a District Judge to deliver the reasons for a verdict in writing.

Calculation of qualifying experience for appointment as Permanent Magistrates

17. Whilst members generally did not object to the proposal to amend Cap. 227 to allow a person's period(s) of experience as a Special Magistrate to be combined with period(s) of other types of qualifying professional experience to fulfill the requisite minimum five-year period for appointment as a Permanent Magistrate, there was concern that some Special Magistrates did not practice law prior to their appointments as Special Magistrates.

18. Suggestion was made that section 5AB of Cap. 227 be similarly amended so as to allow a person's period(s) of experience as a Court Prosecutor, Court Interpreter or Judicial Clerk in the Government to be combined with period(s) of other types of qualifying professional experience to fulfill the requisite minimum five-year period for appointment as a Special Magistrate. The JA advised that such a proposal should be studied separately.

Operation of the Labour Tribunal

19. As a breach of the statutory duty not to use the documents and information disclosed for any purpose other than for the purpose of the Tribunal proceedings by the receiving party would give rise to a liability of contempt of court under the proposed legislative amendments, concern was raised that such provisions would deter employees from seeking claims from their employers through the Labour Tribunal. This was because in most instances, the employees would enlist the assistance of trade unions, and in so doing, the employees would invariably need to disclose the information received, including those not in the public domain, to the trade unions.

20. Having regard to members' concern on disclosure of documents, the JA agreed to take out from the Bill the part relating to the proposed restriction or prohibition on the receiving party to use documents and information disclosed in the Labour Tribunal proceedings for any purpose other than for purpose of the relevant Tribunal proceedings under Cap. 25.

21. Members sought clarification on whether an office bearer of a registered trade union to appear as a party's authorized representative at Labour Tribunal proceedings had the rights to speak before the Tribunal.

22. The JA advised that according to section 23(1)(e) of Cap. 25, an office bearer of a registered trade union or of an association of employers should have a right of audience before the Labour Tribunal. However, such an office bearer must be authorized in writing by a claimant or defendant to appear as his representative and leave of the Tribunal must be obtained before the office bearer could exercise the right of audience.

23. On the procedures of the Labour Tribunal for handling claims which involved prolonged absence or death of one of the parties to the claims, the JA advised that:

(a) where either an employee or an employer had died before the commencement of or during the proceedings in the Tribunal and the claimant was aware that probate or administration had been granted in respect of the estate of the deceased, the claim was dealt with in the Tribunal in the same way as the other claims;

(b) where the claimant did not know whether probate or administration had been granted or the identity of the executor or personal representative appointed to represent the estate of the deceased, he could carry out a search at the Probate Registry in the High Court. If the search showed that probate or administration had been granted, the claim could be made or amended to name the executor or personal representative representing the estate of the deceased as a party so that a future award or order could be enforced against the estate. Thereafter, the claim would proceed in the Tribunal in the same way as the other claims; and

(c) where no probate or administration was granted, the claimant might not wish to continue with the claim as he did not know whether the estate had any asset to satisfy the award. If he would still like to pursue the claim, the case would be transferred to either the District Court or the Court of Fist Instance depending on the amount of the claim, and the Rules of the District Court (Cap. 336H) and the Rules of the High Court (Cap. 4A) would apply to the claim as appropriate.

Given the present arrangements, the Judiciary did not consider it necessary to amend the law, not to mention that there were very few claims in the Tribunal where a deceased party was involved.

**Relevant papers**

24. A list of the relevant papers on the Legislative Council website is set out in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat

30 May 2014

**Appendix**

## Relevant papers

| Committee | Date of meeting | Paper |
|---|---|---|
| Panel on Administration of Justice and Legal Services | 23.7.2013 (Item II) | Agenda<br>Minutes<br>CB(4)871/12-13(01) |
| Panel on Administration of Justice and Legal Services | 28.1.2014 (Item IV) | Agenda<br>Minutes<br>CB(4)329/13-14(01)<br>CB(4)329/13-14(02)<br>CB(4)344/13-14(01) |