立法會
Legislative Council

Ref : CB4/PL/AJLS

LC Paper No. CB(4)523/16-17
(These minutes have been seen by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 28 November 2016, at 4:30 pm
in Conference Room 1 of the Legislative Council Complex

Members present : Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)
Hon Dennis KWOK Wing-hang (Deputy Chairman)
Hon James TO Kun-sun
Hon Abraham SHEK Lai-him, GBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon CHAN Hak-kan, BBS, JP
Hon CHAN Kin-por, BBS, JP
Hon Paul TSE Wai-chun, JP
Hon LEUNG Kwok-hung
Hon Michael TIEN Puk-sun, BBS, JP
Hon Steven HO Chun-yin, BBS
Hon Frankie YICK Chi-ming, JP
Hon WU Chi-wai, MH
Hon YIU Si-wing, BBS
Hon MA Fung-kwok, SBS, JP
Hon Charles Peter MOK, JP
Hon CHAN Chi-chuen
Hon KWOK Wai-keung
Hon Christopher CHEUNG Wah-fung, SBS, JP
Dr Hon Fernando CHEUNG Chiu-hung
Dr Hon Helena WONG Pik-wan
Dr Hon Elizabeth QUAT, JP
Hon Martin LIAO Cheung-kong, SBS, JP
Hon POON Siu-ping, BBS, MH
Ir Dr Hon LO Wai-kwok, SBS, MH, JP
Hon CHUNG Kwok-pan
Hon Alvin YEUNG
Hon Jimmy NG Wing-ka, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon SHIU Ka-chun

Action

Hon Wilson OR Chong-shing, MH
Hon YUNG Hoi-yan
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung
Hon LUK Chung-hung
Hon Jeremy TAM Man-ho
Dr Hon YIU Chung-yim

Non-Member attending : Dr Hon KWOK Ka-ki

Members absent : Hon WONG Kwok-kin, SBS, JP
Hon Mrs Regina IP LAU Suk-yee, GBS, JP
Hon LEUNG Che-cheung, BBS, MH, JP
Hon Alice MAK Mei-kuen, BBS, JP
Dr Hon CHIANG Lai-wan, JP
Hon CHU Hoi-dick
Hon HO Kai-ming
Hon Kenneth LAU Ip-keung, MH, JP
Hon Nathan LAW Kwun-chung

Public officers attending : Item III

Department of Justice

Mr Rimsky YUEN, SC, JP
Secretary for Justice

Ms Christina CHEUNG
Law Officer (Civil Law)

Mr Simon LEE
Deputy Law Officer (Civil Law)

Mr William LIU
Senior Government Counsel

Action

Item IV

Department of Justice

Mr Rimsky YUEN, SC, JP
Secretary for Justice

Mr Peter WONG
Deputy Solicitor General (Policy Affairs)

Mr Simon LEE
Deputy Law Officer (Civil Law)

Mr LEE Tin-yan
Senior Assistant Solicitor General

Mr Bernard YUE
Senior Government Counsel

The Law Reform Commission of Hong Kong

Ms Kim M ROONEY, Barrister
Chair
Third Party Funding for Arbitration Sub-committee

Mr Robert Y H PANG, SC
Member
Third Party Funding for Arbitration Sub-committee

Mr Justin D'AGOSTINO
Member
Third Party Funding for Arbitration Sub-committee

Ms Michelle AINSWORTH
Secretary

Ms Kitty FUNG
Secretary
Third Party Funding for Arbitration Sub-committee

Action

Attendance by Invitation	:	Item IV Hong Kong Bar Association Mr Devin SIO Chan-in
Clerk in attendance	:	Miss Mary SO Chief Council Secretary (4)2
Staff in attendance	:	Mr Stephen LAM Senior Assistant Legal Adviser 2 Miss Joyce CHING Senior Council Secretary (4)2 Ms Jacqueline LAW Council Secretary (4)2 Miss Vivian YUEN Legislative Assistant (4)2

I. Information paper(s) issued since the last meeting

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

II. Items for discussion at the next meeting

LC Paper No. CB(4)150/16-17(01)	--	List of outstanding items for discussion
LC Paper No. CB(4)105/16-17(01) & (02)	--	Two letters dated 2 November 2016 from Hon Holden CHOW Ho-ding requesting to (i) discuss the issue of "Measures for protecting mentally incapacitated persons during court

Action

		proceedings" and (ii) to set up a sub-committee under the Panel to study the issue of raising the amount of claims that could be handled by the Small Claims Tribunal to HK$100,000.
LC Paper No. CB(4)172/16-17(01)	--	Letter dated 22 November 2016 from Hon Holden CHOW Ho-ding requesting to discuss the relevant provisions of the railway contracts entered by the Mass Transit Railway Corporation with the contractors in the event that the projects concerned incurred cost overrun.
LC Paper No. CB(4)150/16-17(02)	--	List of follow-up actions

2. Members agreed to discuss the following items at the next regular meeting scheduled for 19 December 2016 at 5:30 pm:

(a) Biennial review of criminal legal aid fees, prosecution fees and duty lawyer fees;

(b) Reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland; and

(c) Proposed permanent retention of one post of Deputy Principal Government Counsel in the Legal Policy Division of the Department of Justice ("DoJ").

3. Regarding the two letters dated 2 November 2016 from Mr Holden CHOW requesting to (i) discuss the issue of "Measures for protecting mentally incapacitated persons during court proceedings" and (ii) to set up a sub-committee under the Panel to study the issue of raising the amount of claims that could be handled by the Small Claims Tribunal to HK$100,000, the Chairman informed that DoJ planned to brief members on "Measures for protecting mentally incapacitated persons during court proceedings" in March 2017 and the Judiciary Administration planned to brief members on the results of the "Review of the financial jurisdiction limits of the District Court and the Small Claims Tribunal" in April 2017.

Action

4. Members also noted another letter dated 22 November 2016 from Mr Holden CHOW requesting to discuss the relevant provisions of the railway contracts entered by Mass Transit Railway Corporation with the contractors in the event that the projects concerned incurred cost overrun. Mr Dennis KWOK was of the view that the subject matter should be discussed at the Panel on Transport, Panel on Development or Subcommittee on Matters Relating to Railways as it not only related to provisions of the contracts, but also involved issues such as overall economic situation in Hong Kong and construction work progress of the projects concerned. The Chairman concurred with Mr KWOK, and said that she would liaise with the Chairman of the Panel on Transport to see whether it was necessary to arrange a joint meeting to discuss this matter.

(*Post-meeting note*: Mr Holden CHOW had sent a letter to the Chairman of Panel on Transport on 5 December 2016 requesting to arrange a joint meeting with this Panel to discuss the aforesaid issue.)

III. Proposed Apology Legislation

LC Paper No. CB(4)150/16-17(03)	--	Administration's paper on "Report of Second Round Public Consultation on Enactment of Apology Legislation and Final Recommendations"
LC Paper No. CB(4)150/16-17(04)	--	Updated background brief on "Proposed Apology Legislation" prepared by the Legislative Council Secretariat
LC Paper No. CB(4)174/16-17(01)	--	Submission from the Hong Kong Bar Association (English version only)

5. The Chairman said that some members including the Deputy Chairman had expressed dissatisfaction because they could only receive the report entitled "Enactment of Apology Legislation in Hong Kong: Final Report and Recommendations" ("the Final Report") published by the Steering Committee on Mediation ("the Steering Committee") on the day of this meeting and did not have sufficient time to read through it before the discussion. The Chairman hoped that in future the Administration would provide the

Action

meeting papers and/or other relevant information to members one week before the meeting, so that members could have a more in-depth discussion on the agenda items during the meeting.

6. In reply to Mr Dennis Kwok's enquiry, Secretary for Justice ("SJ") confirmed that the Administration's paper (LC Paper No. CB(4)150/16-17(03)) distributed to members one week before the meeting summarized the gist of the Final Report and their contents were basically the same.

Briefing by the Department of Justice

7. At the invitation of the Chairman, SJ briefed members that the Steering Committee on 28 November 2016 published the Final Report which had been distributed to members through the LegCo Secretariat. It set out the responses received during the second round public consultation conducted from February to April 2016, the Steering Committee's comments on those responses, its final recommendations and the latest draft Apology Bill, details of which were set out in the Administration's paper and the Final Report.

8. SJ explained that the main objective of putting forward apology legislation was to promote and encourage the making of apologies in order to facilitate settlement of disputes by stating the legal consequences of making an apology. With reference to the experience of other overseas jurisdictions such as the United States, Australia, Canada and Scotland, the enactment of apology legislation could help prevent the escalation of the disputes into legal action. In addition, the majority of responses received from the two rounds of consultation supported the recommendation that apology legislation should be enacted in Hong Kong. SJ appealed to members to support the proposed legislation.

9. SJ further said that DoJ would prepare for the enactment of the apology legislation in the legislative year 2016/2017. Subject to the LegCo's passage of the proposed legislation, Hong Kong would become the first jurisdiction in the Asia Pacific region to enact apology legislation, which would strengthen Hong Kong's position as a leading centre for international legal and dispute resolution services in the region.

Discussion

Protection of statements of fact conveyed in an apology

10. Mr Dennis KWOK said that the legal sector was generally in support of the enactment of apology legislation in Hong Kong. It was quite common

Action

for the attending physicians in medical mishaps to tender apology with accompanying factual information. Noting that the Hong Kong Bar Association ("the Bar Association") had expressed concerns on whether the statements of fact accompanying an apology should be admissible as evidence and provided an analysis in its submission on the issue of applicability of apology legislation to the factual information, Mr KWOK enquired DoJ's responses in this regard.

11. SJ concurred that the issue relating to the protection of statements of fact conveyed in an apology by the apology legislation was a controversial one and it had aroused a lot of discussions in overseas jurisdictions, such as the debate of the Apologies (Scotland) Bill which was passed by the Scottish Parliament in January 2016. SJ pointed out that currently no overseas jurisdiction made reference to statements of fact in its apology legislation. Having regard to the experiences of overseas jurisdictions in the enactment of apology legislation, three proposed approaches to address the issue of protection of statements of fact were set out in the interim report published for the second round public consultation:

(a) Statements of fact in connection with the matter in respect of which an apology had been made should be treated as part of the apology and should be protected. The Court did not have any discretion to admit the apology containing statements of fact as evidence against the maker of the apology ("First Approach");

(b) The wordings regarding statements of fact were to be omitted from the apology legislation and whether the statements of fact should constitute part of the apology would be determined by the Court on a case by case basis. In cases where the statement of fact was held by the Court as forming part of the apology, the Court did not have any discretion to admit the statement of fact as evidence against the maker of the apology ("Second Approach"); and

(c) Statements of fact in connection with the matter in respect of which an apology had been made should be treated as part of the apology and be protected. However, the Court retained the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances ("Third Approach").

12. SJ said that after considering the responses received, the Steering Committee took the view that the Third Approach would be the most

Action

appropriate option as compared with the other two approaches. The blanket protection under the First Approach might unduly affect the claimants' right to a fair hearing and this might not be rationally connected with the legitimate aim of the proposed legislation; while the Second Approach would not be adequate to address the concerns expressed in relation to the uncertainty that might arise if the Court had to deal with the issue of admissibility on a case by case basis. The Third Approach appeared to be a more balanced approach since the Court could exercise its discretion to admit the factual information given in an apology as evidence in exceptional circumstances, e.g. such statements were the only evidence available to the claimant, so that the claimant's rights to a fair hearing could be protected.

13. Mr Holden CHOW noted that whether the proposed apology legislation should protect statements of fact conveyed in an apology was one of the major concerns in the discussions among the public and the stakeholders. He said that in the absence of apology legislation, a wrongdoer would generally be reluctant to put forward an apology to an injured party for fear that his/her apology might be used by a plaintiff in civil or other non-criminal proceedings (such as disciplinary proceedings) as evidence of an admission of fault or liability by the defendant for the purpose of establishing legal liability. Such reluctance to apologize was not conducive to the amicable resolution of disputes, as the injured persons or their families might expect an apology or expression of regret or sympathy from the persons causing injury so that their bereavement and anger could be soothed. In view of the above, Mr CHOW enquired what was DoJ's position regarding the protection of statements of fact conveyed in an apology.

14. SJ responded that as revealed by empirical studies and research, a bare apology without disclosure of facts or explanation of causes of the accident was considered ineffective for preventing escalation of disputes into legal action or facilitating parties to reach a settlement, particularly in the event of medical or other types of accidents. Research on apology legislation in the United States also indicated that the victims and/or family members of the victims of the medical accidents would request for (a) an explanation of the causes of the medical accidents, (b) measures/steps to be taken in order to prevent the recurrence of similar medical accidents, (c) an apology made by the attending doctors/the hospital concerned and lastly (d) monetary compensation. In the light of this, the Steering Committee took the view that the Third Approach would better achieve the policy objective of the proposed apology legislation, i.e. to encourage people to make a fuller and more meaningful apology for the purpose of facilitating resolution of disputes by stating the legal consequences of making an apology.

Action

15. Dr Junius HO asked whether the Administration would devise any guidelines on how to disclose facts for makers of the apology so that the factual information conveyed in an apology would not be admissible as evidence of fault or liability. SJ replied that the Government had no intention to devise such guidelines at this stage. By stating the legal consequences of making apologies through the enactment of apology legislation, SJ hoped that people's mindset could be changed and that more people would be willing to tender apologies in suitable occasions as suggested by the experience in overseas jurisdictions (such as Australia) which had enacted apology legislation.

16. Noting that the Steering Committee had studied the experience of leading common law jurisdictions when drafting the proposed apology legislation, Dr Junius HO asked whether the Administration would provide the precedent cases and the relevant case law in other overseas jurisdictions in which the factual information conveyed in an apology had been admitted as evidence against the apology maker by the Court to the general public for reference.

17. SJ advised that certain organizations in Australia and the Ombudsmen in other overseas jurisdictions had prepared guidelines on making of apologies with a view to facilitating resolution of disputes. While the Government would not devise any guidelines concerning the statements of fact accompanying an apology at this stage, SJ said that the Government remained open as to whether similar guidelines as those in Australia should be prepared and would review any such need some time after the apology legislation had come into operation. Apart from the enactment of apology legislation, efforts would be spent on the promotion of the apology legislation and the Ombudsman services to promote a culture of making apologies for reaching settlement. The views expressed by Dr Junius HO would be taken into consideration when pursuing relevant promotional work in the future.

The Court's discretion to admit statements of fact as evidence

18. Dr Junius HO expressed concern on how the Court would exercise its discretion to admit an apology containing statements of fact as evidence against the maker of the apology. SJ advised that such kind of discretion by the Court was not uncommon in civil proceedings under common law and statues, and the Court practising common law was very experienced in exercising its discretion conferred under the relevant legislation. In general, the Court would make reference to the objective of the respective legislation and the grounds of giving discretion in order to ensure its discretion was exercised in a fair and just manner. Citing the proposed apology legislation as an example, SJ said that the Court would consider the evidence available in the litigation and other

Action

relevant circumstances so as to strike a balance between the legislative intent of enacting apology legislation and the claimant's right to seek justice through judicial proceedings to ensure the exercise of its discretion in a fair and equitable manner.

19. The Chairman said that she was supportive of enacting apology legislation in Hong Kong. In her view, an apology in civil proceedings was important to the plaintiff not only because it could alleviate his/her anger and resentment, but also affect the plaintiff's future career development in the profession. In this connection, the employer was often requested to apologize to the employee in settling a labour dispute. Besides monetary compensation, an apology that included disclosure of facts could be an effective redress to the victims and/or family members of the victims in medical accidents, and to the employees in labour disputes or other kinds of disputes happened in schools or sizable organizations. The Chairman was concerned that if the Third Approach was adopted, the rights of the claimants would be unduly affected as the statements of fact given in an apology were protected and not regarded as admissible evidence in court during litigation.

20. SJ replied that the claimants' rights would not be unduly affected as he had explained in paragraph 12 above. As explained in paragraph 10 of the Administration's paper, the Court's discretion would only be invoked in appropriate circumstances under the Third Approach, e.g. the statement of fact accompanying an apology was the only evidence available to the claimant. In other words, it was not necessary for the Court to exercise its discretion in most cases and thereby minimizing the legal uncertainty in this regard. SJ noted that an apology or even a reference letter was often requested by the employee in labour disputes. It was hoped that the proposed apology legislation would encourage the employer to give an apology in order to facilitate an amicable resolution of labour disputes.

21. In response to the Chairman's enquiry on whether the Court had any discretion to admit the statement of facts given in an apology as evidence which might be considered beneficial to the defence side, SJ responded that the proposed apology legislation only provided that the statements of fact given in an apology were not admissible by the Court to the prejudice of the maker of the apology. On the contrary, it did not impose any restrictions on the apology maker who might want to use his/her apology as evidence in court.

22. For the purpose of attaining legal clarity, Mr Holden CHOW asked whether the Administration would consider to specify in the proposed apology legislation that the Court would only exercise its discretion to admit statements of fact as evidence against the maker of the apology under the circumstance that

Action

the statements of fact conveyed in an apology were the only evidence available for determining the issue concerned in court proceedings.

23. SJ advised that the Administration would not stipulate in full in the proposed apology legislation the circumstances under which the Court would have the discretion to admit statements of fact as evidence against the maker of the apology, as this might rule out other possible circumstances where the Court found it just and equitable to do so having regard to all the relevant circumstances. In the early stage of implementation of the proposed apology legislation, SJ believed that where necessary the Court would refer to the consultation papers and reports on the proposed apology legislation published by the Steering Committee when it considered when and how to exercise its discretion to admit statements of fact as evidence against the maker of the apology. Whether the factual information contained in an apology was the only evidence available was an important factor for the Court to consider how to exercise its discretion.

24. Mr CHEUNG Kwok-kwan noted that the Third Approach was recommended by the Steering Committee under which the Court retained discretion to admit statements of fact as evidence against the maker of the apology. As a lawyer, the legal advice he would be able to give to his clients who would like to tender an apology was that statements of fact in connection with the matter in respect of which an apology had been made should be treated as part of the apology and be protected; however, the Court retained the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances. Having regard to the uncertainty arising from the Court's discretion, it was possible that the clients might choose not to disclose any facts when making apologies. Mr CHEUNG opined that the Third Approach actually created uncertainty and therefore discouraged people from disclosing facts when making apologies.

25. SJ responded that comparing with the other two approaches, the Third Approach was the most appropriate option to ensure the efficacy of the legislation as it struck a balance between the promotion of making apologies and the protection of the right of the claimants to a fair hearing. Besides the legal advice that a lawyer might render to his/her clients mentioned by Mr CHEUNG, SJ believed that the lawyer concerned should also explain to the clients the circumstances under which the Court might exercise its discretion and the possibilities for these circumstances to happen were relatively low. Having regard to the fact that the Court's discretion would only be invoked in exceptional circumstances, e.g. the statement of fact accompanying an apology was the only piece of evidence available, the legal representative should be able to advise their clients whether the factual information conveyed in an apology

Action

would be regarded as admissible evidence by reviewing if there was any other evidence available for establishing legal liability. SJ agreed that the uncertainty mentioned by Mr CHEUNG existed but the risk was fairly low. If the proposed apology legislation made no reference to the issue of protection of statements of fact, like the Apologies (Scotland) Bill, more satellite litigations might be found. After balancing the three approaches, the Third Approach should be the most suitable option as explained in paragraph 13 of the Administration's paper.

26. The Chairman suggested DoJ to consider revising the wordings of the provisions concerning the Court's discretion mentioned in the Third Approach, and specifying that in principle the factual information accompanying an apology was protected, and the Court might exercise its discretion only under limited circumstances. She was of the view that this would minimize the need to exercise discretion by the Court and thus increase the certainty of the proposed legislation. SJ agreed and would convey the views to the Law Drafting Division of the DoJ for consideration.

Applicable proceedings of the proposed apology legislation

27. Dr YIU Chung-yim declared that he was engaged by the Government to conduct a mediation consultancy study on a redevelopment project three years ago. Since the consultancy study was completed and its report had been submitted to LegCo, Dr YIU said that he had no pecuniary interests in the item under discussion.

28. Dr YIU said that provisions for resolving disputes through mediation or arbitration were commonly founded in the standard contracts used by construction sector. It was therefore not necessary for the parties in disputes to bring the cases to court to resolve the disputes. Noting that the Steering Committee recommended that the Court should retain the discretion to admit the statements of fact as evidence against the maker of the apology where it found it just and equitable having regard to all the circumstances, Dr YIU enquired the application of the apology legislation in construction projects since the disputes were to be settled by arbitration instead of litigation.

29. In response, SJ advised that the apology legislation would be applicable to arbitral proceedings. The arbitrators would have the discretion to admit the facts disclosed in an apology as evidence in the arbitration process in exceptional circumstances.

Action

30. Mr HUI Chi-fung said that individual LegCo Members were asked by some members of the public to apologize because of their conduct/misbehaviour during the oath-taking or Council meeting. Noting that the proposed apology legislation applied to judicial, arbitral, administrative, disciplinary and regulatory proceedings, Mr HUI enquired how it applied to the business of LegCo given that LegCo performed its powers and functions within the framework of the Legislative Council Ordinance (Cap. 542) and the Legislative Council (Powers and Privileges) Ordinance (Cap. 382).

31. SJ replied that the proposed apology legislation was not intended to force the wrongdoers to make apologies. In the absence of apology legislation in Hong Kong, people were generally reluctant to tender their apologies for fear of the potentially adverse legal consequences. As such, lawyers might counsel their clients against making apologies to safeguard their position, and provisions in some insurance contracts also prohibited the insured to apologize or admit liability without the insurer's consent otherwise the insurance cover or indemnity might be adversely affected. The objective of the legislation was to promote and encourage the making of apologies in order to facilitate the amicable resolution of disputes by stating the legal consequences of making an apology, so that people, in considering whether or not to make apologies, would clearly know in advance the legal consequences.

32. SJ further explained that the proposed apology legislation would apply to all civil proceedings including disciplinary and regulatory proceedings with the exception of proceedings conducted under the Commissions of Inquiry Ordinance (Cap. 86), the Coroners Ordinance (Cap. 504) and the Control of Obscene and Indecent Articles Ordinance (Cap. 390), which were fact-finding in nature and did not involve any determination of liability. SJ said that he did not see how the apology legislation, if enacted, would affect the Court's adjudication on the cases concerning the oath-taking of individual LegCo Members. While it was not appropriate for him to comment on the cases pending judicial review proceedings, he pointed out that the legal dispute in relation to the oath-taking of individual LegCo Members was about the constitutional requirement under the Basic Law. The issue was very different from that in civil proceedings which mainly involved determination of liability and/or compensation.

33. Mr HUI Chi-fung further enquired if the concerned LegCo Members tender an apology regarding his/her oath-taking at the Council meeting, whether the apology and the accompanying statements of fact would be protected by the proposed apology legislation. SJ responded that the Government considered that the oath-taking of the concerned LegCo Members constituted the situation provided for in Section 21 of the Oaths and Declarations Ordinance (Cap. 11),

Action

and hence whether the concerned LegCo Members had apologized was not relevant to the legal proceedings commenced by the Government against the Members concerned.

Conclusion

34. Summing up, the Chairman said that the Panel in general supported the proposed apology legislation.

IV. Law Reform Commission's Report on Third Party Funding for Arbitration

LC Paper No. CB(4)150/16-17(05)	--	Executive Summary of the Law Reform Commission's Report on Third Party Funding for Arbitration
LC Paper No. CB(4)150/16-17(06)	--	Administration's paper on "Response to the Law Reform Commission of Hong Kong Report on Third Party Funding for Arbitration and Proposed Amendments to the Arbitration Ordinance (Cap. 609) and the Mediation Ordinance (Cap. 620)"
LC Paper No. CB(4)150/16-17(07)	--	Background brief on "Law Reform Commission's Report on Third Party Funding for Arbitration" prepared by the Legislative Council Secretariat
LC Paper No. CB(4)174/16-17(02)	--	Submission from the Hong Kong Bar Association (English version only)

Action

Briefing by the Law Reform Commission ("LRC")

35. Ms Kim ROONEY, Chair, Third Party Funding for Arbitration Sub-committee of the LRC ("the Subcommittee") briefed members on the LRC's Report on Third Party Funding for Arbitration ("The Report") released on 12 October 2016 which discussed the responses received to the consultation paper issued by the Subcommittee and set out the analysis and final recommendations on third party funding for arbitration and related matters, including a set of draft provisions to amend the Arbitration Ordinance ("the Proposed AO Amendment"). Ms ROONEY reported that 73 responses were received from a wide range of institutions following the publication of the consultation paper issued on 19 October 2015, including from Government bureaux and departments, accounting firms, arbitral institutions, arbitrators, barristers, chambers of commerce, consumer and public interest groups, the financial sector, third party funders, insurers and insurers' associations, law firms, insolvency practitioners, professional bodies and academics. Their comments had already been taken into account in the Report. The LRC had concluded that reform of Hong Kong law is needed to make it clear that third party funding of arbitration and associated proceedings under the Arbitration Ordinance is permitted under Hong Kong law provided that appropriate financial and ethical safeguards are complied with. The LRC considered that such reform would be in the interests of arbitration users and of the Hong Kong public and consistent with the relevant principles that the Court of Final Appeal has formulated. Compliance with the ethical and financial safeguards set out in the Report by third party funders of arbitration with the proposed monitoring, supervision and review framework would protect against potential abuse. The LRC considered that these reforms are necessary to enhance Hong Kong's competitive position as an international arbitration centre and to avoid Hong Kong being overtaken by its competitors (as set out in paragraph 2.6 of the Report).

36. In summary, the LRC's final recommendations were that:

(a) The Arbitration Ordinance (Cap. 609) ("AO") should be amended to provide that third party funding for arbitration was permitted under Hong Kong law and state that the common law doctrines of maintenance and champerty (both as to civil and criminal liability) do not apply to arbitration to which the AO applies, to proceedings before emergency arbitrators as defined under the AO, and to mediation and court proceedings under the AO ("Arbitration") (Recommendation 1, as set out in paragraph 2.8 of the Report and details of which were discussed in Chapter 3 of the Report);

Action

(b) Clear standards (including ethical and financial standards) for third party funders providing third party funding to parties to Arbitration should be developed (Recommendation 2, as set out in paragraph 2.9 of the Report and details of which were discussed in Chapter 4 of the Report);

(c) A "light touch" approach to the regulation of third party funding of Arbitration in Hong Kong should be adopted for an initial period of 3 years. Among other things, the issuance of a Third Party Funding for Arbitration Code of Practice ("Code") by an authorized body under the AO ("The Authorized Body") and the consequences of failure to comply with a provision of the Code, as well as measures to facilitate the monitoring of third party funding of arbitration by an advisory body ("The Advisory Body") were proposed (Recommendation 3, as set out in paragraph 2.10 of the Report and details of which were discussed in Chapters 5 and 6 of the Report); and

(d) In principle an arbitral tribunal ("the Tribunal") should be given the power under the AO to award costs against a third party funder, in appropriate circumstances, after according its due process, following any application for such costs. However it was considered to be premature at this stage to amend the AO to provide for this power, and further consideration should be given as to how to provide for equal treatment, fairness and efficiency for all involved and that there was no need to give a Tribunal the power to order security for costs against a third party funder as the powers of a Tribunal under the AO to order a party to give security for costs afford adequate protection (Recommendation 4, as set out in paragraph 2.11 of the Report and details of which were discussed in Chapters 7 and 8 of the Report).

Views of DoJ

37. SJ gave an overview of the Administration's response to the recommendations made in the Report and the proposed legislative amendments to implement the recommendations in the Report, details of which were set out in the Administration's paper (LC Paper No. CB(4)150/16-17(06)). In gist,

(a) the Administration took the preliminary view that, from the perspective of promoting Hong Kong's arbitration service, the proposed law reform was desirable, so that Hong Kong, as one of

Action

the leading centres for international legal and dispute resolution services in the Asia Pacific region, could keep up with the latest international arbitration practice and hence its competitive position (detailed recommendations as set out in the Report and the Administration's responses to those recommendations was at Annex A of the Administration's paper);

(b) in implementing the final recommendations 1(1) and 1(2) as set out in the Report, the Administration proposed to introduce legislative amendments to the AO and the Mediation Ordinance (Cap. 620) ("MO"), to ensure that third party funding of arbitration and associated proceedings was not prohibited by the common law doctrines of maintenance and champerty, and to the MO to extend the proposals to mediation within the scope of the MO;

(c) the Administration also agreed that the Code should be issued by an authorized body in accordance with the procedure to be set out in the AO and the MO. A draft Code prepared by DoJ was at Annex B of the Administration's paper for Members' reference;

(d) DoJ had written to the legal and arbitration professional bodies set out at Annex C of the Administration's Paper to consult them on the recommendations of the Report. The organisations which had responded had indicated their support to the proposed reform;

(e) the Steering Committee on Mediation was consulted by DoJ and the Steering Committee supported the proposed consequential amendments to the MO (final recommendation 1(2) of the Report referred); and

(f) subject to further views from all relevant stakeholders on LRC's recommendations, the Administration intended to implement the above mentioned legislative proposals by introducing an amendment bill into the Legislative Council by the end of 2016 or in early 2017.

Views of the Hong Kong Bar Association ("the Bar Association")

38. Mr Devin SIO said that the Bar Association was in general in support of the recommendation in the Report and noted that many of the comments which the Bar Association submitted in January 2016 had been considered/

Action

reflected in the Report. Mr SIO then presented the views of the Bar Association in relation to the constitution of the "Authorized Body" and "Advisory Body" as recommended in the Report, details as follows:

(a) in relation, the Bar Association observed that there were not much details in the recommendation as to its constitution. Since the "Authorized Body" would be responsible to prepare the Code (which set out the standards and practices, including the financial and ethical standards), the Bar Association suggested that its membership, or the standing consultation committee to the Authorized Body, should include practitioners from the third party funded arbitration field or those with such experience;

(b) in relation to the "Advisory Body", the Bar Association noted from the recommendation of the Report that the Advisory Committee on the Promotion of Arbitration ("the Advisory Committee") should be nominated to be the Advisory Body. The Bar Association also observed that members of the Advisory Committee seemingly consisted of no representatives from the practitioners from the third party funded arbitration field or those with such experience. Since the Advisory Body would be responsible to review the development of the new "industry" and subsequently the improvements of the regulation and supervision, the Bar Association believed that its membership, or at least a sub-committee of the Advisory Body, should include practitioners from the third party funded arbitration field or those with such experience.

Discussion

39. Mr Dennis KWOK said that he welcomed the proposed reform recommended by LRC and urged the Administration to introduce the proposed legislative amendments to the AO and the MO as soon as possible. Mr KWOK then raised queries on the following two aspects of the Report:

(a) he noted from paragraph 3.35 of the Report that the definition of "Third Party Funding" had been drafted to exclude lawyers and persons providing legal services from its scope. While agreeing to the above mentioned approach, Mr KWOK asked about the regulation with regard to foreign lawyers (but who were not registered foreign lawyers) who participated in Hong

Action

Kong based arbitration and if they did have funding arrangement with their clients in Hong Kong; and

(b) Noting from recommendation under paragraph 6.67 of the Report that the Advisory Body should be entitled to request, and the third party funder should have a duty to provide such further information or clarification of any matter as requested by the Advisory Body with regard to the annual return, Mr KWOK asked about the consequence of failure to comply with such duty by the third party funder. He further asked whether a "list of satisfactory third party funders" ("the List") would be kept, if so, whether the List would be published and made accessible to the public.

40. Responding to the first question from Mr Dennis KWOK, Ms Kim ROONEY said the scope of the proposal made under the Report was restricted to Arbitration taking place and/ or work being done in Hong Kong and that foreign lawyers, despite not being registered foreign lawyers, could engage in cases funded by third party funders in Hong Kong. Nevertheless, they could not be regulated as lawyers. Ms ROONEY supplemented that the focus of the proposed reform would be the regulation of the third party funders under the current regime of arbitration.

41. As to Mr Dennis KWOK's second question, SJ said that keeping the List was a good suggestion and that the Administration would keep an open mind on this matter. Before the conclusion of the consultation of the draft Code, the possibility of the suggestion made by Mr KWOK would not be excluded. At the moment, the Administration would aim at adopting the "light touch" approach to its regulation and making it voluntarily effective. SJ supplemented that whether the non-compliance with the Code could be a factor to be taken into account by the courts in subsequent proceedings (particularly in proceedings where the third party funders would like to enforce any of their rights under the third party funding agreement against the funded parties) would be, from the commercial point of view and the perspective of the third party funders, one of the most important considerations and thus that would be an important aspect to be borne in mind when fine-tuning and finalizing the draft Code.

42. Mr Dennis KWOK further said that, based on his understanding, the Advisory Body had no power, under the law, to request for information (as set out under paragraph 6.68(10) of the Report) from the third party funders nor could the Advisory Body do anything if the third party funders refused to provide the information requested from them. In response, Ms Kim ROONEY

Action

clarified that, the obligation of the third party funders to provide information as required by the Advisory Body was stated in the statute, under section 98M(1)(j) of the Proposed AO Amendment (page 124 of the Report referred). If there was failure to comply with the requirements, the Advisory Body was proposed to be taking the role of monitoring, supervising and recommending, which was, in a way, a "carrot and stick" approach.

43. SJ supplemented that the approach described by Ms Kim ROONEY would be similar to the Consumer Council's way of handling the situation and that the Administration would resort to both legal and extra-legal means to ensure compliance by the third party funders.

44. Mr Robert PANG, Member, the Subcommittee said he envisaged that most of the disputes would be between third party funders and funded parties and the fact that any failure to comply with the provision of the Code might be taken into account by courts would be part of the "stick" which worked against the third party funders to ensure that they would comply with their obligations.

45. Dr Junius HO said that he supported the recommendations made under the Report. Dr HO then asked:

(a) whether third party funding was equivalent to conditional fee arrangement and whether there would be any cap on the amount of third party funding arrangement;

(b) whether the security for costs arrangement was adequate; and

(c) whether the after the event ("ATE") insurance was permitted under Hong Kong law. If not, whether reference would be made to the practice adopted in the United Kingdom.

46. In response to Dr Junius HO's questions, Ms Kim ROONEY replied as follows:

(a) the arrangement of conditional fees and contingency fees was not permitted in Hong Kong and the LRC's proposals did not seek to change the current situation. Ms ROONEY supplemented that, under the current situation, the lawyers would still be paid (regardless whether the cases were successful or not) and that the share of the proceeds of the successful cases would only be paid to funded parties and third party funders, but not to the lawyers;

Action

(b) the reason for not recommending to give the Tribunal the additional power to order security for costs against a third party funder was that under the AO the Tribunal already had the power to order security for costs against the funded party. Ms ROONEY further said that the LRC had also recommended that the funded party must disclose the existence of the funding at the beginning of a proceeding so that the other parties would be aware of the funding arrangement and it would be up to them to decide whether to apply for security for costs.

(c) ATE insurance was not being done in Hong Kong and that the relevant law in the United Kingdom had been amended not so long ago to provide that the costs of ATE insurance could not be recovered in arbitration proceedings. Ms ROONEY believed that this issue would be looked at further in the future.

47. SJ responded to the question of whether there would be any cap on the amount of third party funding arrangement. SJ said that the Administration was not proposing any cap at the moment as there was no policy justification to impose such a cap. SJ explained, by way of an analogy, that the rule of maintenance and champerty did not apply in a situation where a liquidator was allowed to conduct litigation through third party funding and in the same vein there was no cap. SJ further said that one of the rationale behind the proposal to allow third party funding for arbitration, especially international arbitration, was that the funders were the "commercial big boys" in most of the cases and the funding arrangements were made under consensual situation.

48. Dr YIU Chung-yim said that the proposal relating to third party funding for arbitration was basically welcomed and asked whether the current proposal would apply to arbitration involving Government as a party to the funding arrangement, for instance, under the pilot scheme of arbitration for resolving land premium disputes launched by the Government, which individual owners did not have the financial capability to engage in arbitration with the Government. Dr YIU asked whether the land acquisitor, normally the developer, could be a third party funder under the kind of land premium arbitration in the given example.

49. SJ responded in the affirmative and said that the current proposal did not distinguish the type of arbitration to which the proposed amendment would apply. SJ further said that, in the example given by Dr YIU, the developer who would be involved in the land premium arbitration pilot scheme, if it so wished,

Action

(after the passing of the legislative amendment) could seek to obtain third party funding in the land premium arbitration pilot scheme cases.

50. Mr Holden CHOW said that based on his understanding on the Report, a funding agreement (which set out arrangement for matters including conflict of interests and control) must be made between the parties involved in the arbitration and that a third party funder would have certain extent of control over the arbitration itself. In this case, Mr CHOW worried that the third party funder would probably have the right to make the final decision, which might turn out not to be in the best interest of the funded party. Mr CHOW then asked whether any guidance would be provided for monitoring the behavior of the third party funder, especially the control over the arbitration itself.

51. SJ responded that control in the sense which Mr CHOW suggested was not allowed. SJ then invited members to look at paragraph 2.11 of the draft Code with regard to "Control" under Annex B of the Administration's paper. In gist, the control by third party funder, whether direct or indirect, would not be allowed since it would be contrary to the initial rationale of allowing third party funding.

52. Ms Kim ROONEY supplemented that the LRC did look at the issue of "Control" and had made reference to what had been done in other common law jurisdictions, for example, in the United Kingdom and Australia. Ms ROONEY further said that the recommended approach was more on the English line, that was "to keep control in the party".

53. Referring to the Final Recommendation 4(1) under the Report which read as "*While we consider that, in principle, a Tribunal should be given the power under the AO to award Costs against a Third Party Funder, in appropriate circumstances, after according it[s] due process, following any application for such Costs, we consider that it is premature at this stage to amend the AO to provide for this power….*", the Chairman asked for the reason why it was considered to be premature.

54. Ms Kim ROONEY said that since arbitration was a consensual and contractual arrangement between parties that privity of contract was very important. Ms ROONEY further said that Hong Kong had a very detailed framework to make arbitration work and to allow for the recognition and enforcement of arbitration awards in Hong Kong and overseas. Ms ROONEY explained that the framework operated on the premise that the parties to the arbitration had entered into an agreement to arbitrate, while third party funders were not parties to the arbitration agreement, i.e. third party funders did not fall within the scope of the current framework. Ms ROONEY further explained

Action

that in considering whether to amend the AO to give power to a Tribunal to award costs against a third party funder, careful consideration had to be given to due process to the third party funders, who were the subjects of the cost application, but who were not parties to the Arbitration, so that the integrity and enforcement of the Arbitration process would be preserved.

55. In response to the Chairman's query of whether the recommendation of not providing such power (to award costs against a third party funder) to a Tribunal was in line with international practice, Ms Kim ROONEY responded in the affirmative.

56. In conclusion, The Chairman said that the LRC had kicked off a good start at this stage and she hoped that when the situation got more mature, consideration would be given to providing the Tribunal more power with a view to facilitate a more effective role to be played by it and to avoid any litigation to follow.

V. Any other business

57. The Chairman said the visit to the Judiciary was tentatively scheduled for the morning of 21 April 2017 (Friday).

58. There being no other business, the meeting ended at 6:29 pm.

Council Business Division 4
Legislative Council Secretariat
14 February 2017