

立法會
Legislative Council

LC Paper No. CB(4)961/17-18
(These minutes have been seen
by the Administration)

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Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 27 November 2017, at 4:30 pm
in Conference Room 2 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 CHAN Kin-por, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon CHAN Chi-chuen
Hon Martin LIAO Cheung-kong, SBS, JP
Ir Dr Hon LO Wai-kwok, SBS, MH, JP
Hon CHUNG Kwok-pan
Hon Alvin YEUNG
Hon CHU Hoi-dick
Hon Jimmy NG Wing-ka, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung

Members absent : Hon Abraham SHEK Lai-him, GBS, JP
Dr Hon Fernando CHEUNG Chiu-hung

**Public officers
attending**

: Agenda item III

Department of Justice

Mr Peter WONG
Deputy Solicitor General (Policy Affairs)

Ms Peggy AU YEUNG
Senior Assistant Solicitor General
(Special Duties) (Acting)

Miss Melissa KIANG
Senior Government Counsel (Acting)

Agenda item IV

Administration Wing, Chief Secretary for
Administration's Office

Ms Kitty CHOI Kit-yu, JP
Director of Administration

Home Affairs Bureau

Mr Patrick LI Pak-chuen, JP
Deputy Secretary for Home Affairs (1)

Legal Aid Department

Mr Thomas Edward KWONG, JP
Director

Mr Chris CHONG Yan-tung, JP
Deputy Director
(Policy & Administration)

**Attendance by
invitation**

: Agenda item III

Hong Kong Bar Association

Mr William WONG M F, SC

Agenda item IV

Hong Kong Bar Association

Mr Azan Aziz MARWAH

Clerk in attendance : Mr Lemuel WOO
Chief Council Secretary (4)6

Staff in attendance : Mr YICK Wing-kin
Senior Assistant Legal Adviser 2

Ms Macy NG
Senior Council Secretary (4)6

Ms Emily LIU
Legislative Assistant (4)6

Action

I. Information papers issued since the last meeting

(LC Paper No. CB(4)255/17-18(01) - Letter from Hon Holden CHOW requesting to discuss the work progress of introducing a class action regime in Hong Kong)

Members noted Mr Holden CHOW's request for discussing the work progress of introducing a class action regime in Hong Kong. They raised no objection to including the request of Mr Holden CHOW in the Panel's list of outstanding items for discussion.

2. The Deputy Chairman said that the Panel of Administration of Justice and Legal Services ("the Panel") had been following up the issue for years and, to his understanding, the cross-sector working group on Class Actions ("Working Group") which was set up by the Department of Justice ("DoJ") would publish a report on the matter soon.

3. The Chairman recalled that at the Panel meeting on 30 October 2017, the Administration had advised that there was not yet a timetable for publishing the report. She would liaise with the Administration with a view to discussing the matter at a Panel meeting within the 2017-2018 legislation session.

II. Items for discussion at the next meeting

(LC Paper No. CB(4)240/17-18(01) - List of outstanding items for discussion

LC Paper No. CB(4)240/17-18(02) - List of follow-up actions)

4. Members agreed to discuss the following items at the next regular meeting to be held on 20 December 2017 –

- (a) Enhancing the operation model for the Law Reform Commission in Hong Kong; and
- (b) Security in Court Buildings.

III. Proposed arrangement with the Mainland on reciprocal recognition and enforcement of judgments in civil and commercial matters

(LC Paper No. CB(4)240/17-18(03) - Administration's paper on proposed arrangement with the Mainland on reciprocal recognition and enforcement of judgments in civil and commercial matters)

5. Deputy Solicitor General (Policy Affairs) of DoJ ("DSG(P)) briefed members on the background and key features of a proposed arrangement with the Mainland on reciprocal recognition and enforcement of judgments ("REJ") in civil and commercial matters ("the Proposed Arrangement") which sought to expand the scope of the two existing arrangements with the Mainland for REJ in civil and commercial matters¹, as set out in the Administration's paper.

Views of the Hong Kong Bar Association

6. The Chairman invited Mr William WONG to present the views of the Hong Kong Bar Association ("the Bar Association"). Mr William WONG presented the Bar Association's views as follows:

¹ The two arrangements are the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to the Choice of Court Agreements between Parties Concerned* ("Choice of Court Arrangement") and the *Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region* ("Matrimonial Arrangement")

- (a) The Bar Association supported the Proposed Arrangement in view of the difficulties in enforcing Mainland judgments in Hong Kong, and the enforcement of Hong Kong judgments in the Mainland (where such judgments were outside the scope of the Choice of Court Arrangement and the Matrimonial Arrangement);
- (b) as regards the jurisdictional basis for determining the eligibility of a judgment for reciprocal recognition and enforcement (paragraph 20 of the Administration's paper), the Bar Association was in favour of the second option as set out in paragraph 20(2) of the Administration's paper because detailed indirect jurisdictional rules would provide a higher degree of certainty and clearer guidance to the parties in their choice of forum and litigation strategies. However, it was suggested that the indirect jurisdictional rules should be subject to the final discretion of the court;
- (c) The Bar Association supported covering interim reliefs in the Proposed Arrangement (paragraph 29 of the Administration's paper). The Choice of Court Arrangement only applied to money judgments, meaning that interim reliefs, e.g. injunction orders, granted by Hong Kong courts in civil cases were unenforceable in the Mainland;
- (d) The Bar Association suggested extending the scope of the Proposed Arrangement to cover REJ of court on winding-up of companies and personal bankruptcy since many insolvency disputes heard before Hong Kong courts involved joint ventures of Hong Kong and Mainland companies, or operational subsidiaries of Hong Kong companies in the Mainland;
- (e) as the Mainland regime for winding-up of companies was complicated and the relevant Mainland laws were lagging behind international practices, consideration should be given to amending Hong Kong's companies law to enable non-local companies (including Mainland companies) to opt for the winding up procedures in Hong Kong; and
- (f) consideration might also be given to extending the Proposed Arrangement to cover court orders for appointment of provisional liquidators and official receivers and their powers, as such would help promote Hong Kong as a regional debt restructuring hub.

7. Mr William WONG further said that the Bar Association was concerned with the suggestion of excluding disputes on the registration or validity of intellectual property ("IP") rights from the Proposed Arrangement (paragraph 18 of the Administration's paper) as many disputes over IP rights concerned the validity of the IP rights. He asked about the reasons for the suggestion.

8. DSG(P) explained that as the registration and validity of IP rights was subject to territorial jurisdiction at common law, the Administration did not recommend including them in the Proposed Arrangement.

Members' views

9. The Deputy Chairman expressed support for the Proposed Arrangement and urged the Administration to take forward the consultation work as soon as possible to expedite the legislative process. The Chairman also expressed support for the Proposed Arrangement but requested the Administration to elaborate on the problems with the existing REJ in civil and commercial matters.

10. DSG(P) said that as the Choice of Court Arrangement and the Matrimonial Arrangement each provided for a specific scope of application, they were unable to fully address the need for more comprehensive REJ mechanism in civil and commercial matters and such need had become acute given the increasingly close interaction and cooperation between Hong Kong and the Mainland.

11. DSG(P) pointed out that the Choice of Court Arrangement, for instance, only applied to money judgments made by the courts of both sides where the parties to a commercial contract had agreed in writing that the court of either side would have exclusive jurisdiction to determine a dispute arising from that contract. On the contrary, the Proposed Arrangement would provide a legal mechanism with a wider scope of coverage for REJ, thereby reducing the need for re-litigation of the same disputes and offering better protection to the parties' rights in a wider range of civil and commercial matters.

12. Mr James TO expressed reservation on the Proposed Arrangement as he had doubt on whether the legal systems of the Mainland and Hong Kong were truly compatible for reciprocal recognition and enforcement. He was particularly concerned about the independence of the judicial system in the Mainland as there were worries that the system was susceptible to the influence by political considerations, malpractices and corruption.

13. Mr James TO also said that while several grounds for refusal of recognition and enforcement of a relevant judgment had been proposed as

safeguards (in paragraph 22 of the Administration's paper), such as refusing a judgment obtained by fraud, it would be difficult to adduce evidence to prove that in court. He also expressed concerns that the Proposed Arrangement might not be able to guard against injustice such as unequal bargaining power of the parties.

14. DSG(P) said that REJ of foreign courts had been an international trend. He drew members' attention to the fact that under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319), judgments from about 10 foreign jurisdictions were currently enforceable in the Hong Kong Special Administration Region ("HKSAR"), and the Hague Judgments Project² would further widen the coverage of REJ between Hong Kong and other foreign jurisdictions when completed and implemented in the HKSAR.

15. DSG(P) further said that the proposed safeguards, which were in line with the latest international practices and Hong Kong's statutory and common law regime, together with the proposed indirect jurisdictional rules, should help strike an appropriate balance between the advantages brought by a more comprehensive REJ mechanism and the risks perceived by the members.

16. Mr William WONG opined that while Mr James TO's concerns were not unreasonable, the proposed safeguards should help address them to some extent as they were internationally recognized measures. However, consideration might be given to introducing new measures to strengthen the safeguards when necessary.

17. The Chairman said that while she understood Mr James TO's concerns, the community's need for the Proposed Arrangement should not be underrated. She pointed out that there were Hong Kong residents who, though having won their lawsuits in the Mainland courts, were unable to enforce the relevant Mainland judgment in Hong Kong and had to take out fresh proceedings in Hong Kong due to the lack of an REJ arrangement with the Mainland.

Trial Supervision System

18. The Chairman enquired about the impact of the trial supervision system in the Mainland on REJ arrangements with the Mainland, and how the Proposed Arrangement would deal with it.

² The Hague Judgments Project refers to the work undertaken by the Hague Conference on Private International Law since 1992 on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of their judgments abroad.

19. In reply, DSG(P) said that at common law, the recognition and enforcement of a foreign judgment (including a Mainland judgment) was allowed if certain conditions were satisfied, such as if the judgment was given by a competent court for a fixed sum of money and it was a final judgment that was conclusive upon the merits of the claims. Under the trial supervision system in the Mainland, it was possible for certain parties to initiate a review of a legally effective judgment subject to the fulfilment of certain conditions. This could result in the retrial of the case by the original trial court and there were cases decided by the Hong Kong court in which Mainland judgments were not considered as final and conclusive for the purpose of enforcement in Hong Kong under the common law.

20. To address the common law requirements of finality, DSG(P) said that special procedures had been adopted in the Choice of Court Arrangement (Art 2(3)), so that where a case was to be retried by a people's court of the Mainland in accordance with the Mainland law after an application for recognition and enforcement of the judgment in the same case had been filed with a court of the HKSAR, the case should be brought up for retrial by a people's court one level higher than the people's court which made the legally effective judgment. On the other hand, a different approach was adopted under the Matrimonial Arrangement given the specific nature of judgments in matrimonial and family cases, particularly in the case of enforcement of maintenance orders. For the Proposed Arrangement, the Administration would further study and consider how best to address the issues of finality along the lines set out in paragraph 27 of the Administration's paper, noting that the options would include whether to follow the approach of the Choice of Court Arrangement or whether a more flexible approach be adopted.

Recognition and enforcement of court orders in relation to winding-up of companies and personal bankruptcy

21. The Deputy Chairman echoed the Bar Association's views in paragraph 6(d) above that the scope of the Proposed Arrangement should be extended to cover the reciprocal recognition and enforcement of court orders in relation to the winding-up of companies and personal bankruptcy.

22. DSG(P) said that for winding-up cases in the Mainland, Mainland courts would take a serious view of the interests of various stakeholders, including the creditors and employees. Given the complexity of the issues involved, the Administration would need to seek views from relevant stakeholders and exercise caution in considering the matter. However, he said that the Administration would keep an open mind to the suggestion.

23. The Deputy Chairman urged the Administration to review Hong Kong's companies law with a view to removing any obstacles for the winding up of non-local companies (including Mainland companies) in Hong Kong. He said that he was arranging a meeting with the Financial Services and the Treasury Bureau ("FSTB") and the Law Society's Insolvency Law Committee to discuss the debt restructuring regime in Hong Kong and related matters, including recognition of appointment of joint liquidators and winding-up orders made by Hong Kong courts, and how debt restructuring for Mainland companies could be made in Hong Kong.

24. In response, DSG(P) said that although debt restructuring was under the policy purview of FSTB, the Civil Division of DoJ had been providing legal support as appropriate. He also advised that under current Hong Kong law, Hong Kong courts could provide legal assistance for the winding-up of a non-local company in certain aspects, such as in obtaining documents or information.

25. Mr Holden CHOW asked whether the Administration had explored with the Mainland Authorities on the feasibility of recognizing Hong Kong court's orders on winding-up of companies, debt restructuring and personal bankruptcy in the Mainland. In this regard, the Chairman was of the view that REJ on winding-up and bankruptcy involving Mainland companies might have other policy implications when state-owned assets were involved.

26. In reply, DSG(P) said that as the policy issues relating to debt restructuring fell outside DoJ's purview, he would refer members' suggestions and concerns to the relevant Bureau. He was of the view that, as a first step, it would be advisable to implement the Proposed Arrangement which would widen the scope of the current REJ regime between Hong Kong and the Mainland in civil and commercial matters.

Hague Convention on Choice of Court Agreements

27. The Deputy Chairman noted that in September 2017, the Central Government ("CG") signed the Hague Convention of 30 June 2005 on Choice of Court Agreements ("Choice of Court Convention") and that CG would need to ratify the Choice of Court Convention before the People's Republic of China was bound by the terms of the Convention. He asked about the follow-up actions that would be taken by DoJ.

28. DSG(P) replied that DoJ would keep in view of the relevant follow-up actions regarding the Choice of Court Convention, in particular the relevant judicial interpretation or legislative proposals that would be made. He added that DoJ had sent a representative to participate in the Hague Judgments Project

as a member of the Chinese delegation. It was envisaged that CG's ratification of the Choice of Court Convention would contribute to Hong Kong's further development as a centre for international legal and dispute resolution services.

29. Senior Assistant Solicitor General (Special Duties) (Acting) briefed members on the current mechanism of the two places on succession of a deceased person's estate and the consideration being given by the Administration on whether succession matters should be covered by the Proposed Arrangement. She drew members' attention to the non-exhaustive list of specific issues on succession, as well as other matters set out at Annex A of the Administration's paper.

30. The Chairman asked whether the Choice of Court Arrangement would continue to operate after the Proposed Arrangement had come into effect. In reply, DSG(P) advised that the preliminary view of the Administration was that the Proposed Arrangement would only cover those Mainland judgments not covered by the Choice of Court Arrangement and the Matrimonial Arrangement. He added that the Administration would keep an open mind to other suggestions.

IV. Transfer of the legal aid portfolio

(LC Paper No. CB(4)240/17-18(04) - Administration's paper on transfer of legal aid portfolio

LC Paper No. CB(4)240/17-18(05) - Paper on transfer of the legal aid portfolio from Home Affairs Bureau to the Chief Secretary's Office prepared by the Legislative Council Secretariat (background brief)

LC Paper No. CB(4)290/17-18(01) - Submission from The Law Society of Hong Kong

LC Paper No. CB(4)290/17-18(02) - Submission from the Standing Committee on Legal Aid Reform of the Hong Kong Bar Association)

Declaration of interests

31. The Chairman declared that she was a barrister and teaching law at the City University of Hong Kong. Mr Holden CHOW declared that he was a practising solicitor. Mr Paul TSE declared that he and his law firm had handled legal aid cases.

Briefing by the Administration

32. Deputy Secretary for Home Affairs (1) ("DSHA(1)") briefed members on the proposed transfer of the legal aid portfolio from the Home Affairs Bureau ("HAB") to the Chief Secretary for Administration's Office ("CSO") ("the proposed transfer"). He said that the proposed transfer was to implement the Legal Aid Services Council ("LASC")'s earlier proposal to transfer the responsibilities for formulating legal aid policy and housekeeping the Legal Aid Department ("LAD") from HAB to CSO.

33. DSHA(1) further briefed members on the consequential changes to the establishments of HAB and CSO, and informed them that the transfer exercise would be cost-neutral.

Views of the Hong Kong Bar Association

34. The Chairman invited Mr Azan Aziz MARWAH to present the views of the Bar Association, which were also detailed in the Association's submission [LC Paper No. CB(4)290/17-18(02)]. In gist, the Bar Association expressed explicit support for the proposed transfer as it would enhance the operational independence of LAD and better protect the basic rights of Hong Kong people. The Administration was invited to meet with the Bar Association's Standing Committee on Legal Aid Reform to discuss the pressing issues relating to legal aid policies with a view to enhancing legal aid services in Hong Kong.

Members' views

35. The Chairman, the Deputy Chairman, Mr Holden CHOW and Dr Junius HO indicated support for the proposed transfer. Noting that legal aid played an essential role in upholding the rule of law in Hong Kong, the Deputy Chairman considered that the proposed transfer would further enhance the importance and operational independence of LAD.

36. Dr Junius HO expressed concern about how LAD would enhance its operational efficiency in delivering quality legal aid services after it was re-positioned and made directly accountable to the Chief Secretary for Administration. In response, Director of Administration ("DoA") said that the Administration would ensure a seamless transition of the legal aid portfolio from HAB to CSO. After the transition, CSO would continue to follow up the on-going reviews undertaken by HAB, listen to the views of the Bar Association and The Law Society of Hong Kong on legal aid related issues, and ensure the delivery of quality legal aid services.

37. Mr Paul TSE noted that the legal aid portfolio was transferred from CSO to HAB in July 2007 on the grounds that legal aid was a stand-alone policy subject that was getting increasingly detailed and complex, and hence was placed under the Secretary for Home Affairs (a Director of Bureau) on par with other equally important policies. Mr TSE enquired about the underlying reasons for the proposed transfer.

38. DSHA(1) replied that, following the consultancy study commissioned by LASC which had been completed in 2013, LASC acknowledged that the degree of independence upheld and exercised by LAD was sufficient and it should remain a government department. LASC considered that any suspicion about the lack of independence was more of a perception issue which could be addressed by introducing improvement measures to the legal aid administration framework without the need to change LAD's institutional structure. LASC recommended, among other things, that LAD be re-positioned and made directly accountable to the Chief Secretary for Administration. As the issue of "independence" was more of a perception issue, the Administration agreed with LASC's recommendation that the proposed transfer could address the concerns of some quarters in the community.

39. Mr HUI Chi-fung said that while he did not object to the proposed transfer, the establishment of an independent legal aid agency ("ILAA") with non-civil service legal aid staff should be the ideal arrangement. He suggested conducting a fresh consultancy study on this subject.

40. In response to members' views, both DSHA(1) and DoA advised that there had been safeguards in statute and in practice to ensure the operational independence of LAD. DSHA(1) said that all legal aid applications would be assessed by the means and merits tests as provided under the Legal Aid Ordinance (Cap. 91) ("LAO"). There was also a statutory appeal mechanism under which appeals against LAD's decisions in civil legal aid applications could be lodged to the Judiciary.

Improvements to the legal aid regime

41. The Chairman considered that the legal aid regime in Hong Kong was well established and effective and there was no pressing need for setting up an ILAA. However, there was room for improvement such as the financial eligibility limits ("FELs") which should be further relaxed. She pointed out that the high legal costs had thwarted many, even the middle class, in taking legal actions to protect their legitimate interest and rights.

42. The Deputy Chairman suggested that a comprehensive review of the legal aid regime should be conducted to cover all the long-standing issues such as further expansion of the scope of Supplementary Legal Aid Scheme ("SLAS"), relaxation of FELs, and the difference in the criminal and civil legal aid fees structure. Mr Paul TSE expressed concern about the abuse of the legal aid system and the need to guard against the problem.

43. Mr Holden CHOW pointed out that the hourly rate for lawyers with 10 years' post-qualification experience engaged in criminal legal aid cases was much lower than that for civil cases litigated in the Court of First Instance. He suggested that the Administration should review the criminal legal aid fees to attract legal talents to undertake criminal litigation work on behalf of LAD.

44. In response to members' views, DSHA(1) said that the Administration would continue to review the various mechanisms under the legal aid regime on a need basis. Regarding SLAS, he said that the Administration had briefed the Panel in April 2017 on LASC's review of SLAS and its recommendations on the proposed expansion of SLAS. The Administration planned to consult the Panel on the proposed legislative amendments pursuant to the review in the first half of 2018.

45. DSHA(1) also invited members to note that a proposed resolution to amend the Schedule to the Legal Aid in Criminal Cases Rules (Cap. 221D) was under the scrutiny of the Legislative Council, the passage of which would increase the fees payable to counsel and solicitors undertaking criminal litigation work on behalf of LAD.

46. The Chairman said that consideration should be given to provide cross-boundary legal aid to Hong Kong residents for legal representation in the Mainland courts in view of the increasing trend of legal disputes in the Mainland involving Hong Kong residents. In reply, Director of Legal Aid ("DLA") advised that in accordance with LAO, the scope of legal aid was confined to legal proceedings taking place in the courts of Hong Kong. Therefore, the existing legal aid services did not cover litigations in the Mainland involving Hong Kong residents.

(At 6:26 pm, the Chairman suggested and members supported extending the meeting for 15 minutes to 6:45 pm.)

47. The Chairman said that for the sake of fairness for assigning legal aid cases to practising lawyers, LAD should formulate measures, such as a rotation system, to facilitate an equitable assignment of legal aid work to lawyers of different years of experience.

48. In reply, DLA advised that it had been a fundamental and long standing principle for LAD to attach great importance to the interests of legal aid recipients. In the assignment of legal aid cases, LAD had a duty to assign competent lawyers to act for the aided persons and therefore legal aid work would not be distributed to counsel or solicitors on the Legal Aid Panel evenly regardless of merits. Furthermore, in accordance with section 13 of LAO, LAD would not reject a legal aid recipient's choice of lawyer unless there were compelling reasons to do so, for instance, the preferred lawyer had been suspended from practice or removed from the Legal Aid Panel.

Conclusion

49. After discussion, the Chairman concluded that the Panel generally supported the Administration's submission of the staffing proposal on the transfer of the legal aid portfolio to the Establishment Subcommittee of the Finance Committee for consideration.

V. Any other business

50. There being no other business, the meeting ended at 6:36 pm.