

立法會

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Bills Committee on the Statute Law (Miscellaneous Provisions) Bill 2019

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper gives an account of the deliberations of the Panel on Administration of Justice and Legal Services ("the Panel") on the proposed amendments to the High Court Ordinance (Cap. 4) included in the Statute Law (Miscellaneous Provisions) Bill 2019 ("the Bill"), which seeks to make miscellaneous amendments to various Ordinances.

Background

Review of the court procedures to help address the surge in civil caseload

2. As advised by the Judiciary Administration, the rapid surge in civil caseloads in recent years, particularly those arising from judicial review ("JR") cases from non-refoulement claims¹, has imposed great pressure on the workload of the Judiciary, in particular for the High Court (comprising the Court of First Instance ("CFI") and the Court of Appeal ("CA")) and the Court of Final Appeal ("CFA"). To ensure that all cases are handled as expeditiously as is reasonably practicable whether or not they are related to non-refoulement claims, the Judiciary has reviewed certain procedures in relation to the conduct of proceedings in the High Court to help address the rapidly rising caseloads, and proposed to amend Cap. 4 in certain areas as identified in the review².

¹ Under the Immigration Ordinance (Cap. 115), a torture claimant who has been aggrieved by the decision of the Immigration Department over his or her claim for non-refoulement protection in Hong Kong may lodge an appeal to the Torture Claims Appeal Board ("TCAB"). The decision by TCAB may further be challenged by the claimant through a judicial review.

² For details of the Judiciary Administration's review and proposal, see its paper to the Panel on Administration of Justice and Legal Service in June 2019 [LC Paper No. CB(4)1007/18-19(07)]

Proposed amendments to High Court Ordinance (Cap. 4)

3. To ensure that all cases are handled as expeditiously as is reasonably practicable, the Judiciary proposes the following amendments to Cap. 4:

- (a) to amend section 34B(4) of Cap. 4 to extend the use of a 2-Judge bench of CA ("2-Judge CA") to determine:
 - (i) applications for leave to appeal to CFA against the decisions made by CA consisting of less than 3 Justices of Appeal; and
 - (ii) appeals against CFI's decisions to refuse to grant leave to apply for JR or to grant such leave on terms;
- (b) to amend section 34B(5) of Cap. 4 so that when the 2-Judge CA in various types of proceedings cannot reach a unanimous decision, in addition to a party being allowed to apply to re-argue the case before a 3-Judge CA, the Court may also make such an order on its own motion; and
- (c) to amend sections 4(2) and 5(2) of Cap. 4 to clarify that an additional judge in CFI or CA has the power to dispose of cases on paper without physically "sitting" in court.

4. The Judiciary anticipates that the proposed amendments to Cap. 4 in general will facilitate the processing of cases, including JR involving non-refoulement claims. If more cases are being heard by a 2-Judge CA instead of a 3-Judge CA, it would increase the flexibility in deployment of judicial manpower in taking up other court cases, and therefore put judicial resources to the best use. Furthermore, the clarification of the powers of the additional CFI or CA judge, as the case may be, to dispose of cases on paper can further enhance the Judiciary's intention to promote just, expeditious and economical disposal of proceedings on paper where appropriate, thus increasing the overall efficiency of case handling.

Statute law (Miscellaneous Provisions) Bill 2019

5. According to the Administration, it has been using statute law (miscellaneous provisions) bills (i.e. "omnibus bills") in appropriate cases as an efficient way of effecting miscellaneous amendments to update or improve existing legislation from time to time. The amendments included are largely minor, technical and non-controversial in nature but are important for the

purpose of updating or improving existing legislation. This avoids the need to make bids for separate slots relating to each Ordinance, the amendments to which typically involve only a few clauses. The last Statute Law (Miscellaneous Provisions) Ordinance was enacted in 2018 and the Administration advised in the Legislative Council Brief issued in December 2019 (LP3/00/15/C) that there was a need to introduce the Bill to make miscellaneous amendments to various Ordinances.

6. The Bill was published in the Gazette on 27 December 2019 and received its First Reading at the Council meeting on 15 January 2020. It seeks to introduce miscellaneous amendments to various Ordinances, including Cap. 4 and the Interpretation and General Clauses Ordinance (Cap. 1). The major amendments proposed relates to matters including:

- (a) extension of the jurisdiction of CA which consists of two Justices of Appeal under Cap. 4 as set out in paragraph 3 above;
- (b) extension of references made to Ordinances, which are recognized under Cap. 1, to those references made according to the title, citation or chapter number used in the verified copies that are directly printed from the approved website of an electronic database of the legislation of Hong Kong;
- (c) standardization of the Chinese text of the defence containing the phrase "could not with reasonable diligence have (done something)" in various Ordinances to reflect the meaning of the defence more explicitly; and
- (d) other miscellaneous amendments to various Ordinances which are of technical nature.

Major views and concerns of members

7. The Judiciary Administration briefed the Panel on 24 June 2019 on the proposed amendments to Cap. 4 to facilitate the more effective handling of cases, including those relating to non-refoulement claims. Their major views and concerns are summarized in the ensuing paragraphs. An information paper was issued by the Administration in November 2019 briefing the Panel on the major legislative proposals to be included in the Bill, including those regarding Cap. 4. However, the Panel has not yet discussed the other parts of the Bill as set out in the information paper.

Impacts of the sharp increase in the number of court cases in relation to non-refoulement claim cases

8. At the Panel meeting on 24 June 2019, members expressed concerns about the sharp increase in the number of applications for leave to apply for JR made to CFI from 2016 to 2018, as well as the number of civil appeal cases and leave applications (civil) in relation to non-refoulement claim cases filed to CA and CFA respectively during the same period. They queried whether and how the court would prioritize the applications for leave to apply for JRs in relation to cases concerning non-refoulement claims and cases other than those, and whether the progress of handling the latter type would be affected by the former.

9. In response, the Judiciary Administration said that there was no separate listing arrangement to cater for application for leave to apply for JR cases arising from different causes. Although the sharp increase in the number of JRs arising from the surge in non-refoulement claim cases would affect the progress in handling JR cases arising from other causes, the Judiciary would try to ensure that all cases were handled as expeditiously as was reasonably practicable.

Views of the Hong Kong Bar Association

10. The Bar Association, which was invited to attend the Panel meeting on 24 June 2019, expressed the views that since the proposed legislative amendments would apply to all JRs and not just those concerning non-refoulement claim cases, careful considerations should be given to ensuring a balanced expedience and upholding the high standards of fairness in these cases before the amendments were introduced. The Bar Association also questioned whether the sharp increase in JRs arising from non-refoulement claim cases was a short-term problem owing to the United Screening Mechanism introduced in 2014 (when a large volume of Torture Claims which had been determined under the Immigration Ordinance (Cap. 115) had to be re-screened under all applicable grounds other than torture) so that a significant bottleneck was caused, or whether it was a trend which was set to continue necessitating the proposed legislative amendments in the long term.

11. The Bar Association was of the view that measures other than the proposed legislative amendments to relieve the pressure on the courts, such as increasing judicial manpower and improving the quality of the decisions made by Immigration Department and the Torture Claims Appeal Board ("TCAB")/Non-refoulement Claims Petitions Office, should also be explored.

Special considerations for non-refoulement claim cases

12. Members agreed with the Bar Association's view that any legislative amendments which had the potential to lower the standard of fairness had to be closely scrutinized, since upholding the standard of fairness was highly important to the rule of law. In particular, there should be well-founded reason behind section 34B(2) of Cap. 4 which provided that CA was duly constituted if it consisted of an uneven number of Justices of Appeal not less than three (i.e. 3-Judge CA) in the exercise of its civil jurisdiction. Therefore, whether the proposed legislative amendments would have a negative impact on the standard of fairness to the appeals in JR cases arising from the non-refoulement claim cases should be carefully considered.

13. The Judiciary Administration said that it had been careful to ensure a high standard of fairness in a judicial proceeding. Currently, a number of matters under the civil jurisdiction of CA were already determined by two Justices of Appeal, including appeal of which all parties had filed a consent to the appeal being heard and determined by a 2-Judge CA, etc. In the event of a 2-Judge CA not being able to reach a unanimous decision, the party lodging appeal could apply to have the case re-argued before a 3-Judge CA under the current mechanism. Therefore, the high standard of fairness of a judicial proceeding should not be affected by the proposed legislative amendments.

Effectiveness of the proposed legislative amendments

14. In response to members' queries regarding the potential shortening of time for dealing with JRs in relation to non-refoulement claim under the proposal, the Judiciary Administration said that it was difficult to estimate how the proposed amendments would impact on the time taken to process a case, given that the court was in a passive position in receiving applications for leave to apply for JRs, and each case might have unique circumstances that could affect the time for its processing and eventual disposal.

Other measures to facilitate the more efficient handling of cases by the court

15. Members raised concerns about the long-standing problem of shortage in judicial manpower, which was a fundamental reason for the slow progress of processing cases and delivering judgments by the court in addition to the sharp increase in the non-refoulement claim. In response, the Judiciary Administration said that it would put forward bids for additional judicial and other staffing resources to the Government according to the established mechanism of the budgetary arrangement between the Judiciary and the Government if required.

Latest position

16. The House Committee decided on 8 May 2020 to set up a Bills Committee to scrutinize the Bill.

Relevant papers

17. A list of relevant papers is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
28 May 2019

Bills Committee on the Statute Law (Miscellaneous Provisions) Bill 2019

List of relevant papers

Meeting	Date	Item
Panel on Administration of Justice and Legal Services	December 2019	Legislative Council Brief LP 3/00/15/C
	November 2019	Paper to the Panel CB(4)139/19-20(01)
	24.6.2019 (Item V)	Agenda Paper (CB(4)1007/18-19(07)) minutes Submission from Bar Association Judiciary Administration's response to the Bar Association Follow-up paper from the Judiciary Administration
	28.1.2019	Joint letter from Hon CHEUNG Kwok-kwan, Dr Hon Elizabeth QUAT and Dr Hon CHIANG Lai-wan on the problem of the Judiciary's pressure arising from non-refoulement claim cases (Chinese version only)