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Paper for the House Committee meeting on 19 June 2020

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

Purpose

This paper reports on the deliberations of the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2019 ("the Bill").

The Bill

2. The Bill is an omnibus bill proposing miscellaneous amendments which are minor, technical and non-controversial to various Ordinances, including the High Court Ordinance (Cap. 4) and the Interpretation and General Clauses Ordinance (Cap. 1). The Bill comprises five Parts. Part 1 contains the short title and commencement clauses. The major proposed amendments, which are grouped under Parts 2 to 5, relate to matters including:

- (a) Part 2 - extension of the use of two Justices of Appeal ("two-JA bench") of the Court of Appeal ("CA") under Cap. 4 to hear and determine appeals and applications within its jurisdiction under Cap. 4;
- (b) Part 3 - extension of references made to Ordinances, which are provided for 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 (i.e. the Hong Kong e-Legislation);
- (c) Part 4 - 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) Part 5 - other miscellaneous amendments to various Ordinances which are of technical nature.

3. The Bill, if passed, would come into operation on the expiry of 30 days beginning on the day on which it is published in the Gazette as an Ordinance, except that:

- (a) Part 2 (i.e. amendments to Cap. 4) will come into operation on a day to be appointed by the Chief Justice by notice published in Gazette; and
- (b) Division 11 of Part 4 (i.e. an amendment to the Chinese text of a defence to an offence by owner and tenant of an unlicensed hotel or guesthouse in section 5A of the Hotel and Guesthouse Accommodation Ordinance (Cap. 349) will come into operation on the later of the following dates:
 - (i) the date on which the Bill is published in the Gazette as an Ordinance; or
 - (ii) the date on which Part 2 of the Hotel and Guesthouse Accommodation (Amendment) Bill 2018 comes into operation after it is passed by the Legislative Council ("LegCo")¹.

The Bills Committee

4. At the special meeting of the House Committee held in the afternoon of 8 May 2020, Members agreed to form a bills committee to scrutinize the Bill. The membership list of the Bills Committee is in **Appendix I**.

5. Under the chairmanship of Hon CHEUNG Kwok-kwan, the Bills Committee has held one meeting with the Administration and the Judiciary Administration.

Deliberations of the Bills Committee

6. In principle, the Bills Committee does not object to the proposed amendments under various Parts of the Bill. The major views and concerns expressed by members are summarized in the ensuing paragraphs.

¹ This Bill was passed by the LegCo on 11 June 2020.

Part 2 - Amendments to the High Court Ordinance (Cap. 4)
(clauses 3 to 6)

7. Members note that Part 2 of the Bill seeks to amend section 34B of Cap. 4 to:

- (a) extend the use of a two-JA bench to hear and determine (i) applications for leave to the Court of Final Appeal ("CFA") against the decisions made by CA consisting of less than three JAs; and (ii) appeal against decisions made by the Court of First Instance ("CFI") to refuse to grant leave to apply for judicial review ("JR") or to grant such leave on terms, pursuant to Order 53, rule 3(4) of the Rules of the High Court (Cap. 4A) (clauses 6(1) and 6(2));
- (b) provide that when a CA duly constituted under subsection (4) of section 34B of Cap. 4 cannot reach a unanimous decision, in addition to a party to the appeal (or application) being allowed to apply to re-argue the case before a CA consisting of an uneven number of JAs not less than three, CA may also make such an order on its own motion (clauses 6(4) and 6(5)); and
- (c) provide for transitional arrangements relating to the relevant appeal (or application) that are duly filed before the commencement date of Part 2 of the enacted Ordinance after the Bill is passed by LegCo (clause 6(3)).

Part 2 of the Bill also seeks to amend sections 2, 4 and 5 of Cap. 4 to clarify that a JA may act as an additional judge of CFI and a CFI judge may act as an additional judge of CA without physically sitting in the relevant court. The effect would be to put beyond doubt that additional judges in CFI or CA have the power to dispose of cases before them on paper without physically sitting in court (clauses 3, 4 and 5).²

Expected effectiveness of proposed legislative amendments

8. The Administration has explained that the rapid surge in civil caseloads in recent years, particularly those arising from JR cases involving

² Section 4(2) and 5(2) of Cap. 4 provide respectively that a JA may sit in CFI and act as a judge of CFI, while a CFI judge may sit as an additional judge in CA. However, there could arguably be ambiguities as to whether such additional judges in CA or CFI could exercise their judicial power without physically sitting in the relevant court and whether the additional judges could exercise their judicial power to dispose of cases before them on paper.

non-refoulement claims, has imposed great pressure on the workload of the Judiciary, in particular for the High Court (comprising CFI and CA) and CFA. The Judiciary therefore proposes amendments to Cap. 4 as mentioned in paragraph 7 above to ensure that all cases, whether or not they are related to non-refoulement claims, are handled as expeditiously as is reasonably practicable.

9. In response to the request of members, the Administration has provided statistics on non-refoulement claim cases filed with CFI, CA and CFA from 2016 to 2019 (**Appendix II**). Members note with grave concern about the sharp increase in the numbers of applications for leave to apply for JR, civil appeal cases and leave applications (civil) filed to CFI, CA and CFA respectively in the past few years, and the number of cases pending to be handled.

10. According to the Administration, the proposed amendments to Cap. 4 will facilitate the processing of cases, including JR involving non-refoulement claims, and increase the flexibility in deployment of judicial manpower in taking up other court cases. Furthermore, the clarification of the powers of the additional CFI or CA judges by the proposed amendments to Cap. 4 to dispose of cases on paper can promote just, expeditious and economical disposal of court proceedings on paper where appropriate, thus increasing the courts' overall efficiency of case handling.

11. Concern has been raised as to how effective the proposed amendments will speed up the handling of JR cases (especially cases involving non-refoulement claims), including the amount of time that can be reduced for processing of cases after the proposed amendments have come into operation. The Judiciary Administration has advised that the amendments should have positive impact to alleviate the overall workload of CA. However, the Judiciary is not in a position to estimate how the proposed amendments will impact on the time taken to process a JR case, given that the number of cases filed, including leave to apply for JR, is beyond the control of the courts and would largely depend on the parties' own decisions to take out legal proceedings. The processing and the eventual disposal of an individual case can be affected by a wide range of factors, including the complexity of a case, the preparedness of the parties, etc, some of which are also beyond the control of the courts.

12. Concern has also been raised on the shortage of judicial manpower. Some members consider there is a need for the Judiciary Administration to explore measures other than the proposed legislative amendments to cope with the increased caseload and to reduce waiting time for cases in the long run. The Judiciary Administration has advised that the proposed amendments are among the measures to alleviate the heavy workload of the Judiciary in recent years. In view of the need to cope with increasing workload, the Judiciary has put forward to the Panel on Administration of Justice and Legal Services of the

LegCo a staffing proposal to create a judicial post of JA, and a works project proposal to construct additional courtrooms and associated facilities in the High Court Building. The Judiciary will continue to strengthen the judicial and other staffing resources, review the accommodation needs of the Judiciary, and promote the use of electronic technology in relation to court proceedings to maximize operational efficiency.

Re-argument arrangement

13. In respect of paragraph 7(b) above, section 34B(5) of Cap. 4 is amended so that if CA which is duly constituted under section 34B(4) of Cap. 4 (i.e. a two-JA bench) becomes equally divided in an appeal (or application), the appeal (or application) may, upon application by the parties to the proceeding or by the order of CA on its own motion, be re-argued before an uneven number of JAs not less than three, before any appeal to CFA. Some members consider that the re-argument arrangement will lead to prolonged court proceedings, thus wasting the time and resources of the appellants or litigants which in turn might cause unfairness to those appellants or litigants who lack sufficient financial resources.

14. Noting that some matters under the civil jurisdiction of CA as prescribed by section 34B(4) of Cap. 4 are heard and determined by a two-JA bench at present, some members have enquired about the number of cases where a two-JA bench could not reach a unanimous decision and then re-argued pursuant to the arrangement provided by section 34B(5) of Cap. 4. As advised by the Judiciary Administration, it is extremely rare that the members of a two-JA bench are equally divided and the case has to be re-argued as stipulated under section 34B(5) of Cap. 4. According to the recent records available, they could identify one such case heard in 2002. The case, arising from an employee compensation dispute, was then re-argued before a CA consisting of three JAs ("three-JA bench") subsequently.

15. The Legal Advisor to the Bills Committee has sought clarification on (a) where a CA that consists of four JAs under section 34B(3) of Cap. 4 ("four-JA bench") (e.g. when one of the five JAs cannot continue to hear an appeal) is equally divided in a civil appeal, whether the appeal will be re-argued before a three-JA bench or a five-JA bench, and (b) whether by virtue of the proposed amendment made to section 34B(5) of Cap. 4, the re-argument arrangement before an uneven number of JAs not less than three will no longer be applicable to a four-JA bench.

16. The Judiciary Administration has advised that in a case where a four-JA bench cannot reach a unanimous decision in a civil appeal and the case needs to be re-argued, the Chief Judge of the High Court will be consulted on the relevant listing arrangement as necessary, taking into account the unique

circumstances of each case. However, CA has rarely (if at all) been constituted pursuant to section 34B(3) of Cap. 4. That said, it is not the Judiciary's intention to disapply the present re-argument arrangement under section 34B(5) of Cap. 4 to a CA duly constituted pursuant to section 34B(3) of Cap. 4 by initiating the current proposed amendments in the Bill. As such, the Administration has submitted for members' consideration an amendment to clause 6(4) of the Bill (i.e. the proposed section 34B(5)(a) Of Cap. 4) to ensure that the re-argument arrangement under section 34B(5) of Cap. 4 will apply to a CA duly constituted under either sections 34B(3) or 34B(4) of Cap. 4 upon commencement of the operation of the proposed amendments to Cap. 4 introduced by the Bill. Members have raised no objection to the proposed amendment (on re-argument arrangement) to the Bill.

Part 3 - Amendment to Interpretation and General Clauses Ordinance (Cap.1)
(clause 7)

17. The Bills Committee has not raised any queries on Part 3 of the Bill, which seeks to amend section 13(2) of Cap. 1 to provide that references made to an Ordinance may be made according to the title, short title, citation, number or chapter number used in verified copies of legislation that are printed directly from the approved website of an electronic database of the legislation of Hong Kong established by the Secretary for Justice under section 3 of Cap. 614, in addition to those used in copies of the Ordinance printed by the Government Printer.

Part 4 - Amendment to the Chinese text of certain defence provisions containing "could not with reasonable diligence" reference in various Ordinances
(clauses 8 to 48)

18. Members note that at present, there are variations in the Chinese text of the defence containing the phrase "could not with reasonable diligence have (done something)" in different Ordinances and certain versions of the Chinese text can give an impression that the defence refers to a test or situation other than an objective test or a hypothetical situation. Part 4 seeks to standardize the Chinese text of the defence in various Ordinances to make it read "即使作出合理努力也不能..." so as to reflect more explicitly that the defence refers to an objective test based on a hypothetical situation.³

19. According to the Administration, confirmation has been sought from the relevant policy bureaux that the policy intent of the Ordinances concerned will not be affected by the proposed amendment under Part 4.

³ *HKSAR v Kong Hing Agency Ltd* [2008] 2 HKLRD 461 and 香港特別行政區訴楊啟強 [2018] 2 HKLRD 1320 (paragraphs. 43-53).

Part 5 - Other miscellaneous amendments
(clauses 49 to 126)

20. The Administration has explained that Part 5 of the Bill contains miscellaneous and technical amendments to various Ordinances which include updating the references to the titles of certain ordinances, amending cross-references and updating certain terms and expressions in Ordinances to achieve consistency, and to make provisions for correcting minor errors.

Proposed amendment to the Bill

21. As mentioned in paragraph 16 above, members have raised no objection to the Administration's proposed amendment to the Bill in **Appendix III**. The Bills Committee will not propose any amendment to the Bill.

Resumption of Second Reading debate

22. The Bills Committee has no objection to the Administration's proposal to resume the Second Reading debate on the Bill at the Council meeting of 8 July 2020.

Advice sought

23. Members are invited to note the deliberations of the Bills Committee.

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2019

Membership list

Chairman Hon CHEUNG Kwok-kwan, JP

Members Hon Abraham SHEK Lai-him, GBS, JP
Hon Paul TSE Wai-chun, JP
Dr Hon CHIANG Lai-wan, SBS, JP

(Total : 4 members)

Clerk Ms Angel WONG

Legal Adviser Mr YICK Wing-kin

Date 18 May 2020

**Statistics on non-refoulement claim cases filed
In different levels of court**

Level of Court	Case Type	2016	2017	2018	2019	
Court of First Instance, High Court	Applications for leave to apply for Judicial Review	Total	228	1,146	3,014	3,899
		<i>(a) Non-refoulement claim</i>	60	1,006	2,851	3,727
		<i>(b) Other than non-refoulement claim</i>	168	140	163	162
Court of Appeal, High Court	Civil Appeals	Total	246	298	611	597
		<i>(a) Non-refoulement claim</i>	1	26	393	351
		<i>(b) Other than non-refoulement claim</i>	245	272	218	246
Court of Final Appeal	Leave Applications (Civil)	Total	68	47	127	426
		<i>(a) Non-refoulement claim</i>	0	0	65	388
		<i>(b) Other than non-refoulement claim</i>	68	47	62	38

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Committee Stage

Amendment to be moved by the Secretary for Justice

Amendment Proposed

Clause

- 6(4) In the proposed section 34B(5)(a), by deleting “subsection (4)” and substituting “subsection (3) or (4)”.