

Consultation Paper on the Administration of Justice (Miscellaneous Provisions) Bill

PURPOSE

This paper invites views on the Judiciary's various legislative proposals relating to the court operations.

PROPOSALS AND JUSTIFICATIONS

2. The Judiciary proposes to introduce miscellaneous legislative amendments into the Legislative Council to improve various court-related matters, i.e. the calculation of qualifying experience for appointment of Magistrates, the mode of delivery of reasons for verdicts and sentences in criminal proceedings in the District Court, evidence-taking by live television links for criminal proceedings, the administration of suitors' funds at various courts/tribunals, and the operation of the Labour Tribunal.

1. Calculation of Qualifying Experience for Appointment as Magistrates

3. At present, pursuant to sections 5AA and 5AB of the Magistrates Ordinance (Cap. 227), a person who is qualified to practise as a barrister, solicitor or advocate in a court in Hong Kong or other common law jurisdictions is eligible to be appointed as a Permanent Magistrate or a Special Magistrate if he has the respective relevant professional experience of no less than five years.

Permanent Magistrates

4. Under section 5AA(1) of Cap. 227, a legally qualified person is eligible for appointment as a Permanent Magistrate if that person has, for a period of or periods totalling not less than five years, (a) practised as a barrister, solicitor or advocate; or (b) served as a legal officer or taken up

a designated post (as specified in section 5AA(1)(b)(iii) to (v)) in the relevant Government departments¹.

5. Alternatively, a legally qualified person is eligible to be appointed as a Permanent Magistrate pursuant to section 5AA(2) of Cap. 227 if he has been a Special Magistrate for a period of or periods totalling not less than five years.

6. Section 5AA(3) of Cap. 227 provides that in calculating the five-year period of legal practice or service as a legal officer/in the designated posts, periods of less than five years of such practice or service may be combined. The legislation does not, however, allow period(s) of being a Special Magistrate to be combined with other qualifying period(s).

7. The existing arrangement does not accord with our policy intent that periods of less than five years of all types of qualifying experience, be it the legal experience under section 5AA(1) or the judicial experience under section 5AA(2), should be allowed to be combined. We therefore propose legislative amendments to rationalize this situation.

Special Magistrates

8. We also suggest that similar legislative amendments be introduced for appointment of Special Magistrates.

9. According to section 5AB(1) of Cap. 227, a legally qualified person is eligible for appointment as a Special Magistrate if he has for a period of or periods totalling not less than five years, (a) practised as a barrister, solicitor or advocate; or (b) served as a legal officer or taken up a designated post (as specified in section 5AB(1)(b)(iii) to (v)) in the relevant Government departments².

10. Section 5AB(2) also allows a legally qualified person to be eligible for appointment as a Special Magistrate if, whether before or

¹ These Government departments include the Department of Justice, the Lands Department, the Companies Registry, the Lands Registry, the Legal Aid Department, the Official Receiver's Office and the Intellectual Property Department.

² The relevant Government departments are the same as those set out in footnote 1 above.

since becoming so qualified, he has served as a court prosecutor, court interpreter or judicial clerk in the Government (“court-related officer”) for a period of or periods totalling not less than five years.

11. Section 5AB(3) of Cap. 227 stipulates that for the purpose of calculating the five-year period of legal practice or service as a legal officer/in the designated posts, periods of less than five years of such practice or service may be combined. Similar to the case for Permanent Magistrates, the legislation does not provide for the period(s) of serving as a court-related officer to be combined with other qualifying period(s).

Proposed Legislative Amendments

12. To rationalize the above arrangements, we suggest amending Cap. 227 to allow a person’s period(s) of experience as a Special Magistrate or a court-related officer to be combined with period(s) of other types of qualifying professional experience to fulfill the requisite minimum five-year period for the eligibility to be appointed as a Permanent Magistrate or a Special Magistrate respectively. A marked-up version showing the proposed amendments is at **Annex A**.

II. Delivery of Reasons for Verdicts and Sentences in Criminal Proceedings in the District Court

13. At present, under section 80 of the District Court Ordinance (Cap. 336), a District Judge is required to orally deliver the verdict and any sentence, as well as the reasons, in criminal proceedings. The Judge is also required to reduce the reasons to writing within 21 days after the hearing or the trial.

14. There is currently no flexibility for a District Judge to directly hand down the reasons for the verdict and any sentence in writing. They have to deliver the reasons orally first. This is unnecessary and represents a waste of legal costs and court resources in many cases. For example, in a case in 2011, ten counsel sat for two days listening to a District Judge reading out the reasons. The fees of the ten counsel and their instructing solicitors, the public expense and the two days’ time of the District Judge were unnecessarily spent.

Proposed Legislative Amendments

15. We suggest amending section 80 of Cap. 336 to dispense with the requirement for a District Judge to orally deliver the reasons for the verdict and any sentence. As such, the Judges would have the flexibility to hand down the reasons in writing direct in appropriate cases.

16. Moreover, to ensure that the reasons for the verdicts and sentences will remain accessible to the parties concerned as well as the public in the future even if they are handed down in written form direct, we suggest that the written reasons be given to each of the parties and be made available for public inspection.

17. A marked-up version showing the proposed legislative amendments to Cap. 336 is at **Annex B**.

III. Evidence-Taking by Live Television Links

18. At present, Part IIIA of the Criminal Procedure Ordinance (Cap. 221) provides for special procedures for vulnerable witnesses³ in criminal proceedings. Section 79B (in Part IIIA) sets out the circumstances in which a vulnerable witness is permitted to give evidence or be examined by way of a live television link.

19. The term “live television link” is defined in section 79A (in Part IIIA) of Cap. 221 in a rather narrow way. It restricts the technology to be a “closed circuit television system”.

20. With the advancement of technologies, we suggest amending the legislation to enable other suitable audio-visual facilities, such as video conferencing facilities, to be adopted. We will ensure that any such technologies that may be used will satisfy our requirements in terms of, for example, security (say by encryption) and reliability.

Proposed Legislative Amendments

21. A marked-up version showing the proposed amendments to Cap. 221 is at **Annex C**.

³ According to section 79B of Cap. 221, vulnerable witnesses may include children, mentally incapacitated persons and witnesses in fear.

IV. Administration of Suitors' Funds

22. Suitors are parties to suits in a court of law. They may need to pay or transfer funds into court (including tribunals) or deposit funds in court for various purposes, for example, as security against possible default on legal costs, in satisfaction of claims or judgment debts, or as bail money. Depending on the outcome of the lawsuits, the funds may have to be paid out of court to the persons entitled to such payment as the court orders. In general, suitors' funds may be accepted in the form of money, securities and/or movable properties.

23. Suitors' funds rules are now provided in the legislation to govern the administration of such funds, including how suitors' funds are lodged in and paid out of court, investment of the funds, provision of interest for individual suitors' accounts and preparation of annual audited financial statements for the funds.

24. At present, suitors' funds are administered in the Court of Final Appeal (CFA), the High Court, the District Court, the Lands Tribunal, the Labour Tribunal and the Small Claims Tribunal. While most of them are being operated on the basis of the respective dedicated suitors' funds rules in the subsidiary legislation⁴, the suitors' funds for the CFA and the Lands Tribunal have been operated administratively in accordance with the rules of the other similar courts.

25. To provide a clearer legal basis like the other courts and tribunals, we suggest introducing dedicated suitors' funds rules for the CFA and the Lands Tribunal, to be supported by specific rule-making powers in the respective principal legislation. For the sake of clarity and consistency, the opportunity is also taken to provide for more specifically-worded rule-making powers for the Labour Tribunal and the

⁴ The suitors' funds rules are spelt out in the following subsidiary legislation :
(a) the High Court Suitors' Funds Rules (Cap. 4B);
(b) the District Court Suitors' Funds Rules (Cap. 336E);
(c) the Labour Tribunal (Suitors' Funds) Rules (Cap. 25D); and
(d) the Small Claims Tribunal (Suitors' Funds) Rules (Cap. 338D).

Small Claims Tribunal,⁵ similar to those for the High Court and the District Court.

26. Separately, following the enactment of the Competition Ordinance (14 of 2012) in June 2012, a new Competition Tribunal will be set up under the Judiciary to hear cases on alleged acts of anti-competition. Suitors' funds will also need to be administered. As the Competition Tribunal will be a superior court of record (pursuant to section 134 of the Competition Ordinance), we suggest specifying the rule-making powers and detailed suitors' funds rules for the Competition Tribunal by modelling on those for the High Court.

Proposed Legislative Amendments

27. We suggest amending the relevant principal legislation to provide for the above more specifically-worded rule-making powers for the various courts and tribunals, and to make other related amendments. The marked-up versions showing the proposed amendments to the following ordinances are at **Annex D** :

- (a) Hong Kong Court of Final Appeal Ordinance (Cap. 484);
- (b) High Court Ordinance (Cap. 4);
- (c) Competition Ordinance (14 of 2012);
- (d) District Court Ordinance (Cap. 336);
- (e) Lands Tribunal Ordinance (Cap. 17);
- (f) Labour Tribunal Ordinance (Cap. 25); and
- (g) Small Claims Tribunal Ordinance (Cap. 338).

28. We also suggest that, after the above amendments to the ordinances have been enacted, we will make minor enhancements to the existing suitors' funds rules in various courts and tribunals. Similar changes will also be adopted for the new dedicated suitors' funds rules for the CFA, the Competition Tribunal and the Lands Tribunal.

29. For instance, according to the respective existing suitors' funds rules, generally no interest shall be credited to individual suitors' accounts if the amount is less than \$7,500 in the High Court or \$2,500 in

⁵ The present general rule-making powers for the Labour Tribunal and the Small Claims Tribunal are set out respectively in section 45 of the Labour Tribunal Ordinance (Cap. 25) and section 36 of the Small Claims Tribunal Ordinance (Cap. 338).

the District Court. Besides, no interest shall be credited to suitors for the first 14 days of the lodgment of funds in the High Court or District Court if they are paid for certain specified purposes⁶, unless an order directs otherwise. For the sake of fairness to suitors and with reduced manual efforts for allocating interest to individual suitors, we consider it timely to consider abolishing the monetary threshold and reducing the minimum duration for interest to accrue (from the present 15th calendar day to the proposed fourth business day) for individual suitors.

30. Other proposed miscellaneous amendments include those on improving the documentary proof of lodgment of suitors' funds, and repealing obsolete provisions, etc.

31. In preparing the dedicated new suitors' funds rules for the CFA, the Competition Tribunal and the Lands Tribunal, we have made reference to the existing rules for the respective similar courts. For the CFA and the Competition Tribunal, we have modelled their draft rules on those for the High Court, whereas we have modelled the draft rules for the Lands Tribunal on those for the District Court.

32. The marked-up proposed changes to the following suitors' funds rules and the proposed new dedicated suitors' funds rules are shown at **Annex E** :

- (a) High Court Suitors' Funds Rules (Cap. 4B);
- (b) District Court Suitors' Funds Rules (Cap. 336E);
- (c) Labour Tribunal (Suitors' Funds) Rules (Cap. 25D);
- (d) Small Claims Tribunal (Suitors' Funds) Rules (Cap. 338D);
- (e) Hong Kong Court of Final Appeal Suitors' Funds Rules;
- (f) Competition Tribunal (Suitors' Funds) Rules; and
- (g) Lands Tribunal (Suitor's Funds) Rules.

⁶ These specified purposes are (a) as security for costs; (b) by way of satisfaction or amends for claims or counterclaims; or (c) in compliance with an order giving leave to defend upon such payments. Rule 16(3)(a) of the High Court Suitors' Funds Rules (Cap. 4B) and that of the District Court Suitors' Funds Rules (Cap. 336E) refer.

V. Improving the Operation of the Labour Tribunal

33. The Labour Tribunal seeks to provide a quick, simple, cheap and informal forum for resolving disputes between employers and employees.

34. We have reviewed the operation of the Labour Tribunal. We consider that there is room to improve its operation in a few areas, including clarifying its jurisdiction, enhancing its case management powers, encouraging parties' early disclosure of information and aligning the time limit for enforcing its awards or orders with other civil claims.

Clarifying the Jurisdiction

35. According to section 7 of the Labour Tribunal Ordinance (Cap. 25), the Labour Tribunal has jurisdiction to inquire into, hear and determine the claims specified in the Schedule. Paragraph 1 of that Schedule refers to a claim for a sum of money which arises from certain breaches or non-compliance under a few employment-related Ordinances⁷.

36. There are different interpretations in case law as to the meaning of the term "a sum of money". Some legal precedents interpret it to be confined to liquidated damages (i.e. damages for which the amount has been contractually agreed between the parties or fixed by a statute). Others construe it as extending to also cover unliquidated damages (i.e. damages that are at large and fall to be assessed by the court under the general principles of law). In practice, the latter line of case law is usually followed in the Labour Tribunal.

37. In practice, it is exceptional to have terms in employment contracts fixing the amount to be paid by way of damages in the event of breach. Most employment claims will therefore be unliquidated damages. As the Labour Tribunal is intended to be a simple and informal forum for resolving employment-related disputes, the objectives of the Tribunal will be better served if it has clear power to deal with all types of monetary claims relating to employment claims, including unliquidated damages. We propose to clarify this in the law.

⁷ These Ordinances include the Minimum Wage Ordinance (Cap. 608), the Employment Ordinance (Cap. 57) and the Apprenticeship Ordinance (Cap. 47).

Enhancing Case Management Powers

38. Case management is an integral part of the adjudication process. While the Labour Tribunal is already equipped with certain case management powers to curtail some unnecessary excesses in the adjudication process, there are still instances where parties attempt to abuse the adjudication process as a delaying tactic. For example, parties deliberately fail to comply with the directions of presiding officers and tribunal officers, cause adjournment of hearings unnecessarily, and make groundless applications for review of a Tribunal's award. All of these conducts are oppressive to other litigating parties.

39. We see the need to enhance the Tribunal's case management powers to minimise undue delays or abuses of the adjudication process. This would in turn help ensure that claims are dealt with in an expeditious and just manner.

40. For instance, section 29A of Cap. 25 currently empowers the Labour Tribunal to impose any conditions on a party as it thinks fit on adjournment of a hearing. Section 30 of Cap. 25 however restricts the power of the Tribunal to order security upon such adjournment only to cases where the adjournment may result in prejudice to a party because of a disposal or loss of control of assets by the defendant. This is sometimes difficult to establish. Further, a claimant's hardship caused by delays in having the sum adjudicated could not be relieved.

41. Similarly, pursuant to section 31 of Cap. 25, the Tribunal may review an award or order made and re-open the case within 14 days after the granting of an award or order. Under section 31(4) of Cap. 25, on a party's application for review, the Tribunal may order the party to make payment into the Tribunal or give security only if there is a possibility that the assets available for satisfying an award may be disposed of to the prejudice of other party. This is comparatively restrictive. By contrast, on a party's application to restore a claim or set aside an award or order made in the absence of another party, sections 20A and 21A of Cap. 25 confer on the Tribunal a general power to impose terms as it thinks just.

42. To better guard against the risk of undue delays or abuses of adjudication processes, we suggest enhancing the case management powers of the Labour Tribunal. Specifically, we propose to give a general power to the Tribunal so that it can order a party to give security for the payment of any award or order, at any time during a proceeding

for applying or reviewing an award or order, so long as the Tribunal considers it just and expedient to do so.

43. Possible circumstances for the Tribunal to order security from a party may include (a) there is a real risk of dissipating that party's asset to prejudice the satisfaction of an award or order; (b) that party is delaying the adjudication process; (c) that party fails to comply with the Tribunal's directions, etc without reasonable excuse; and/or (d) that party makes an application for review which is devoid of merits. If the party fails to give security upon such order, the Tribunal may dismiss his claim/application for review, stay the proceedings or enter judgment on the claim against him as appropriate.

Early Disclosure of Information

44. For the purpose of better case preparation and case management, the parties should be encouraged to adopt an open and co-operative approach and make full disclosure of information at the beginning of the Tribunal process. With more transparent information, the issues at stake can be clearly identified at an early stage for the parties to properly assess their position. Early disclosure of all the necessary and relevant information will also obviate the need for pre-trial hearings. It will also enable the Tribunal to have a realistic estimate of the duration of the trial when listing the claim.

45. A party may be reluctant or may even refuse to provide copies of documents for the other party for fear that the documents may be misused by the latter. To address this concern, we propose that the receiving party should be imposed a general statutory duty not to use the documents and information disclosed for any purpose other than for the purpose of the Tribunal proceedings, unless the document has been put into the public domain. Moreover, similar to the other levels of court such as the High Court and the District Court, we propose that a breach of this statutory duty in the Labour Tribunal would give rise to a liability of contempt of court.

Aligning the Time Limit for Enforcing Awards

46. According to section 38 of Cap. 25, in order to enforce an award or order of the Tribunal, a person has to obtain a certificate of award or order from the Tribunal and then have it registered in the District Court. Upon registration, the award or order becomes a judgment

of the District Court and may be enforced like any District Court judgment.

47. Under Rule 12(2) of the Labour Tribunal (General) Rules (Cap. 25A), registration of the award or order must be made within 12 months after the making of the award or order. Those not so registered may only be enforced by way of a separate claim commenced in the Small Claims Tribunal, the District Court or the Court of First Instance, depending on the amount of the award or order in question.

48. The time limit of 12 months for registration of the award or order does not exist for other civil judgments/orders. In the High Court and the District Court, a judgment/order for the payment of money may be enforced by a writ of execution within six years, after which leave of the court will have to be obtained for the issue of such a writ⁸. We do not see any reason for treating the awards or orders of the Labour Tribunal differently.

49. This is particularly so because the judgment creditor in a Tribunal's award or order may have given indulgence to the judgment debtor by allowing the latter to pay by instalments, and inadvertently allow the 12 months to elapse. To require the judgment creditor to commence a new action for enforcement of the award or order will not be reasonable and will cause him inconvenience. We therefore suggest repealing the 12-month time limit, thereby aligning the enforcement period of the Tribunal awards or orders with that for the other civil claims (namely, six years in general).

Other Minor Drafting Changes

50. We have also taken the opportunity to enhance the drafting of the existing provisions in light of the latest drafting conventions, e.g. for section 38 of Cap 25 and rule 12 of Cap 25A. We also suggest making some very minor amendments to the subsidiary legislation of Cap 25, e.g. to delete the reference to "19xx" from the forms.

⁸ Order 46, rule 2(1) of the Rules of the High Court (Cap. 4A) and that of the Rules of the District Court (Cap. 336H) respectively refers.

Proposed Legislative Amendments

51. A marked-up version showing the various proposed legislative amendments to Cap. 25 and its subsidiary legislation is at **Annex F**.

VIEWS SOUGHT

52. The Judiciary would be grateful for views on the above proposed legislative amendments as set out in the Annexes by **close, 27 May 2013**.

Judiciary Administration
March 2013