

立法會
Legislative Council

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(These minutes have been
seen by the Administration)

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Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of the meeting
held on Monday, 29 October 2001 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Mrs Miriam LAU Kin-yee, JP
Hon Mr Ambrose LAU Hon-chuen, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP

Member Attending : Hon LI Fung-ying, JP

Public Officers Attending : Item II

Ms Elsie LEUNG, JP
Secretary for Justice

Mr Robert ALLCOCK
Solicitor General

Mr Kevin HO
Director of Administration and Development

Item III

Mr Andrew H Y WONG, JP
Director of Administration

Ms CHANG King-yiu
Deputy Director of Administration (1)

Miss Eliza LEE
Deputy Director of Administration (2)

Mr S Y CHAN
Director of Legal Aid

Mrs Fanny YU
Deputy Director of Legal Aid

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

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I. Confirmation of minutes of previous meetings
(LC Paper Nos. CB(2)152/01-02 and 156/01-02)

The minutes of the meetings held on 15 May and 11 October 2001 respectively were confirmed.

II. Briefing by the Secretary for Justice on the Chief Executive's Policy Address 2001
(Booklet on Policy Objective for Department of Justice; LC Paper No. CB(2)140/01-02(01))

2. The Chairman welcomed the Secretary for Justice (SJ) and her colleagues from the Department of Justice (D of J) to the meeting to discuss D of J's policy programme. She referred members to SJ's speech delivered in the Policy Address debate at the Council meeting on 19 October 2001 (LC Paper No. CB(2)140/01-02(01)). The Chairman then invited members to raise questions.

Promoting Hong Kong as a legal services centre

3. Mrs Miriam LAU asked SJ to brief members on issues relating to promoting Hong Kong as a legal services centre, international legal co-operation and reciprocal enforcement of judgments.

4. SJ said that an important initiative highlighted in the Chief Executive's Policy Address was to promote the development of legal professional services in Hong Kong and to extend the market for the services. To help achieve this end, D of J considered that action should be taken on the following fronts -

- (a) promoting Hong Kong as a legal services centre for the negotiation and documentation of China-related contracts, and as a dispute resolution centre for such contracts;
- (b) as part of that promotion, to develop litigation and arbitration business in Hong Kong so that contract parties could choose the courts and arbitration bodies in Hong Kong as the forum for resolving contractual disputes; and
- (c) to encourage the use of Hong Kong law as the applicable law for resolution of disputes.

5. SJ said that professional development was basically a matter within the autonomy of the professional bodies. The Government's role was to provide a good business environment and to assist the profession in their endeavour, introducing new legislation where necessary. She advised that in 2000, D of J had set up a steering committee, which was chaired by the Solicitor General and comprised the chairpersons of the Bar Association and the Law Society. The objective of the steering committee was to assist local legal practitioners to gain entry into the Mainland legal services market upon China's accession to the World Trade Organisation (WTO). With the assistance of the Administration, the Bar Association and the Law Society had undertaken several visits to the Ministry of Justice, the Hong Kong and Macau Affairs Office (HKMAO) and the other relevant authorities and made representations on measures to enhance the access by Hong Kong lawyers to the legal services market in the Mainland of China. These included -

- (a) permitting Hong Kong lawyers to sit for the Mainland's Lawyers' Qualifying Examination of the Peoples' Republic of China (PRC);
- (b) more scope of setting up offices in the Mainland by the abolition of the rule of "one city, one firm"; and
- (c) co-operation with Mainland law firms.

6. SJ informed members that the rule of "one city, one firm" had been removed. The proposal that Hong Kong lawyers could sit for the Lawyers' Qualifying Examination was accepted in principle. However, as Regulations were promulgated in the Mainland in July 2001 for the unified examination of judges, procurateurs and lawyers, the rules of the examination had to be worked out between the three branches before the request from Hong Kong would be followed up. She further advised that the Draft Regulations on Foreign Law Firms setting up Offices in the PRC provided for a specified period of time within which application for setting up offices by foreign firms (including Hong Kong firms) had to be decided, thus shortening the time for obtaining approval and making the procedure more open. However, the current situation that foreign law firms could not employ Mainland lawyers was likely to remain for some time because of the need for uniform treatment as such restriction had not been liberalised under China's bilateral WTO Agreements with the United States and the European Community.

7. As regards co-operation with Mainland law firms, SJ said that discussion between the Hong Kong legal professional bodies and the Mainland authorities on different forms of co-operation was still going on. She added that during her recent visits to Shanghai and Beijing in May and June 2001 when she had discussions with the Ministry of Justice, academics and lawyers involved in WTO studies, she realised that there were ample opportunities for the legal profession of Hong Kong to open up the legal services market and to serve the increasing number of overseas investors going into the Chinese market. Among other things, the common law system, an independent judiciary, use of English as one of the official languages in courts, an independent public prosecutor, availability of both local and overseas lawyers, legal representation and the right to challenge the actions of the executive in courts etc, which remained part of Hong Kong's structure, provided advantages for Hong Kong to develop as the hub for regional trade and investment.

Dispute resolution

8. Members enquired about the situation of contract parties choosing Hong Kong courts and arbitral bodies to settle civil and commercial disputes.

Reciprocal enforcement of judgments

9. SJ said that in her recent approach to the Ministry of Foreign Trade and Economic Cooperation and HKMAO, the feasibility of the proposal to promote Hong Kong as a forum for dispute resolution using Hong Kong law as the applicable law was verified, and the proposal had received positive response. HKMAO had advised that the proposal was consistent with the Mainland Law, but the free choice of the parties must be respected. It also suggested that the Hong Kong Special Administrative Region (HKSAR) should proceed to discuss with the Mainland authorities on an agreement for reciprocal

enforcement of judgments in respect of civil and commercial cases as soon as possible and that the Hong Kong legal profession should widely publicise its services to facilitate Mainland clients to make their choice of the means to resolve disputes. D of J was now working closely with the legal profession, the Trade and Industry Department, the overseas Economic and Trade Offices and the relevant organisations. A working group comprising three representatives each from the Bar Association and the Law Society was formed to consider how best the matter should be taken forward.

10. SJ further advised that arrangements had been made with the Mainland authorities on the reciprocal service of judicial documents in civil and commercial matters and reciprocal enforcement of arbitral awards. Arbitral awards made in the Mainland and in Hong Kong had been mutually enforceable since June 1999. Arbitration was based on the agreement of the contract parties. As with reciprocal enforcement of arbitral awards, the proposal on reciprocal enforcement of judgments was intended to apply only to civil and commercial cases in which the parties had by contract agreed to have the dispute decided by the Hong Kong courts or the Mainland courts. Also, under the proposed system, foreign-related judgments made in the Mainland would be enforceable in the Intermediate Peoples' Courts and not lower courts.

11. SJ said that contract parties who had business in the Mainland would be more likely to choose Hong Kong courts as the forum for dispute resolution if the resulting judgment could be enforced in the Mainland. The HKSAR was currently participating in multilateral negotiations at the Hague Conference on Private International Law which were directed towards settling the text of a multilateral agreement which would, among other things, provide for the reciprocal enforcement of judgments. She said that, based on the experience drawn from reciprocal enforcement of arbitral awards, arrangements for mutual enforcement of judgments between the Mainland and the HKSAR were expected to be finalised within two years. The Administration would seek the views of LegCo Members in the process.

12. The Chairman said that she had reservations about the possible development in the mutual enforcement of court judgments on commercial disputes between the Mainland and the HKSAR. She said that she had set out some of her concerns in the Policy Address debate on 19 October 2001. The Chairman declared interest as she was currently handling a case of similar nature.

13. The Chairman further pointed out that at present, judgments made by Mainland courts could be enforced in Hong Kong, although the enforcement was not automatic without a mutual agreement. In the absence of a mutual agreement between the two places, enforcement followed the common law practice.

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Adm

14. The Chairman requested the Legal Adviser to prepare an information paper on the existing legal framework of reciprocal enforcement of foreign judgments for the Panel's consideration. She also requested the Administration to explain in writing the operation of the existing mechanism for enforcement of judgments and provide information on the content of the multilateral convention which was being negotiated at the Hague Conference for discussion at a future meeting.

Adm

15. SJ replied that the proposed international convention had yet to be finalised. The Administration could provide the major extracts from the proposed convention for the Panel's information and explain how it would work. The Solicitor General said that the Administration could also provide an analysis of the advantages of the proposed system of reciprocal enforcement of judgments as opposed to the common law system.

Development of arbitration services

16. On the issue of arbitration services available in Hong Kong, Mrs Miriam LAU said that she was aware of complaints and concerns time and again that local arbitrators with the experience and expertise capable to handle big cases were lacking in Hong Kong. Hence, the local arbitration business was losing out to large international competitors. She considered that the matter should be looked into in detail.

17. On the point raised by Mrs Miriam LAU, the Chairman said that the Hong Kong International Arbitration Centre had expressed concern about problems faced by the local arbitration community in developing arbitration services in Hong Kong. This included problems relating to professional training of arbitrators and provision of adequate premises for expanded arbitration activities etc. The Centre was of the view that the Government should provide more support and assistance to the arbitration sector to overcome the problems. She added that she had also recently received a letter from the Hong Kong Institute of Arbitrators. The Institute welcomed the Government's initiative to promote Hong Kong as a regional dispute resolution centre and expressed an interest to present its views and suggestions before the Panel.

Adm/
Clerk

18. After some further discussion, members agreed that the Administration, the two legal professional bodies and the arbitral bodies should be invited to attend the next meeting to exchange views on the matter. To facilitate discussion, the Administration was requested to provide a background paper on the subject. Also, the two arbitral bodies mentioned above would be requested to provide, among others, the following information -

- (a) breakdown of the number of arbitral awards made in Hong Kong involving a Hong Kong party and a Mainland party or a party in a foreign jurisdiction;
- (b) breakdown of the number of arbitral awards made in Hong Kong involving disputes between individuals and major disputes of high international profile;
- (c) tendency of parties to contracts choosing to conduct arbitration in Hong Kong or in a jurisdiction outside Hong Kong; and
- (d) problems encountered by the local arbitration industry, measures required for improving business and promoting Hong Kong as a major international arbitration centre, and what the Government could do in assisting in that regard.

Use of mediation as dispute resolution

19. Mrs Miriam LAU also sought the Administration's views on whether there was a need to strengthen the degree of professionalism of mediators. SJ said that the objective of mediation as an alternative dispute resolving mechanism was to achieve an amicable and mutually acceptable solution which the disputing parties concerned would be more likely to comply with than under a court judgment forced upon them. A pilot scheme for introducing mediation for resolving matrimonial disputes was being implemented. She added that there were different views as to the qualifications required of a mediator. As she understood it, the trend was towards a higher degree of professionalism, and there was good progress made by the relevant institutions concerned in the training of mediators.

20. Mrs Miriam LAU expressed the view that there were merits in promoting the use of mediation as an alternative method for resolving disputes. However, she cautioned that the provision of a more professionalised mediation service should not result in an expensive service which could not be afforded by the general members of the public.

Legislation on anti-terrorism

21. Mr Martin LEE requested SJ to advise members on the need to enact new legislation on anti-terrorism consequent to the terrorist attacks in the United States on 11 September 2001.

22. SJ informed members that the Security Council of the United Nations (UN) had passed two Resolutions (UN Resolution 1267 and 1333 of 19 December 2000) which imposed sanctions on Usama bin Laden and the Taliban. The PRC being a UN member, the Central People's Government had

directed the HKSAR Government to give effect to the decision of the UN Security Council. To implement the Resolution, the United Nations Sanctions (Afghanistan) (Arms Embargoes) Regulation was gazetted on 12 October 2001 (L.N.211 of 2001). The Regulation provided for, inter alia, prohibiting the making of funds available to Usama bin Laden and any person or organisation connected with him and imposing restrictions on the supply or delivery of arms and related material and assistance to the territory of Afghanistan under Taliban control.

23. SJ further advised that subsequent to the terrorist attacks in US on 11 September 2001, UN Resolution 1373 was adopted by the UN Security Council. The Resolution required UN member states to fight terrorism on various fronts including the prevention and suppression of the financing of terrorism, establishing terrorist acts as serious criminal offences in domestic laws and enhancing the exchange of information and intelligence to fight terrorism. The HKSAR Government had been directed by the Central People's Government to implement the UN Resolution.

24. SJ added that she had recently held discussions with Consuls-General in Hong Kong to exchange views on combating terrorist activities and strengthening co-operation. The Administration had received useful information on legislative and administrative measures adopted in other countries. She said that measures to fight terrorism could be implemented by existing legislation, administrative measures and new legislation. Administrative measures included, for instance, refusal to grant entry visas to suspected persons and refusal to issue travel documents for suspected persons leaving Hong Kong etc. As regards the need for new legislation on anti-terrorism, SJ said that it should come under the policy purview of the Security Bureau and the Financial Services Bureau. D of J was responsible for law drafting after any policy decision was taken.

25. The Chairman considered that D of J also had a role to play in explaining the legal framework on which any new legislation would be based and in ensuring that the legislation would be in accordance with the rule of law and the international human rights covenants.

26. Mr Albert HO pointed out that apart from security issues, the imposition of the UN sanctions relating to the freezing of funds and financial resources of suspected persons or organisations etc might have implications on the Hong Kong business sector.

27. Ms Emily LAU and Ms Audrey EU suggested and members agreed that the relevant Panels should hold a joint meeting to discuss the issues involved. After some further discussion, members agreed that it would be appropriate for a joint meeting of the relevant Panels to be held to discuss -

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- (a) legislation for anti-terrorism - existing laws on anti-terrorism, details of UN Resolutions 1333 and 1373, administrative and legislative measures to implement UN Resolution 1373 and the legal basis for such measures;
- (b) measures to combat terrorist financing and the impact of such measures on the banking system and the business sector; and
- (c) issues relating to postal items suspected to contain anthrax.

(Post-meeting note : A joint meeting of the Panels on Security and Administration of Justice and Legal Services was held on 30 November 2001)

Adm

28. The Chairman also requested the Administration to provide information on the relevant measures adopted in other countries.

Political appointment for the office of Secretary for Justice

29. Ms Audrey EU referred to the Chairman's concern expressed in the Policy Address debate on 19 October 2001 about making the post of SJ a political appointment under the proposed new accountability system for principal officials. She proposed that the issue should be considered at a future meeting.

30. SJ said that details of the new accountability system had yet to be finalised. She suggested that it might be appropriate for the matter to be discussed by the Panel on Constitutional Affairs in due course.

31. The Chairman referred members to SJ's response to the matter made at the Council meeting on 19 October 2001. She said that the issue at stake concerned the constitutional functions of SJ and the impact of politicising the post on public confidence on SJ's independence and the rule of law. Hence, it would be appropriate for the matter to be discussed by this Panel. Members agreed that the subject should be included in the list of issues to be considered at a future meeting.

Panel

III. Briefing by the Director of Administration on the Chief Executive's Policy Address 2001

(Booklet on Policy Objective for Administrative Wing of the Chief Secretary for Administration's Office)

32. At the invitation of the Chairman, Director of Administration (D of A) made his opening statement on the policy objectives of the Administration

Wing. He reported on the progress in the past year and the way forward in the coming 12 months in respect of the work relating to administrative redress and legal aid services (copy of D of A's opening statement was circulated under LC Paper No. CB(2)219/01-02(01)).

Legal aid services

33. Regarding the target for processing legal aid applications for criminal cases, Director of Legal Aid (DLA) said that the Legal Aid Department would continue to review the existing mechanism with a view to further improving efficiency in processing applications.

34. Mr Albert HO asked whether the Administration would undertake a review to widen the scope of legal aid services as set out in the Legal Aid Ordinance (LAO). He pointed out that for instance, defamation cases and cases involving disputes between business partners were not covered under existing services.

35. Mr HO further pointed out that under existing arrangements, there were no provisions for appeal against DLA's refusal to grant legal aid in criminal cases, on grounds of means or merits. He opined that a review would be desirable to decide whether an appeal mechanism should be introduced.

36. DLA responded that the scope of legal aid services was a matter which had always been kept under review. A comprehensive review of legal aid policy was completed in 1997. Legislative amendments arising from that review were implemented in July 2000. Among the various improvements to the legal aid scheme, the scope of services had been extended to cover next of kin of the deceased in coroner's inquests involving cases of great public concern. On defamation cases, he pointed out that as a result of the concern raised by the Panel, the Administration had conducted an internal review and subsequently provided a paper to the Panel explaining the Administration's position that such cases should continue to be excluded from the scope of legal aid scheme.

37. As to legal aid in criminal cases, DLA explained that legal aid was available for most criminal proceedings. The merits test would apply to applications for legal aid in criminal appeal cases. Legal aid would be granted if there were meritorious grounds for appeal.

38. D of A further said that although the Administration was of the view that there was no immediate need to conduct another comprehensive review of legal aid services, the financial eligibility limit for the legal aid scheme would be reviewed annually to take into account inflation, and biennially to take account of other factors, including the change in litigation costs etc. Moreover, a review of the criteria used to assess financial eligibility of

applicants would be conducted every five years in order to tie in with the timing of the release of census and bi-census results. Furthermore, issues of concern which called for attention would be dealt with as a matter of priority as and when necessary.

39. The Chairman drew members' attention to the Administration's paper on defamation cases which was circulated to the Panel in November 2000. She said that the issue remained on the list of items to be considered by the Panel and would be discussed in detail at a future meeting.

40. Mr Albert HO said that his request for a review of legal aid services arose from his observation that many people with meritorious claims were deprived of legal aid and hence the chance of pursuing their case, simply because the existing scope of services did not cover such cases.

41. The Chairman added that the LAO had not specified any principle to determine the nature and type of cases for which legal aid should be granted. This gave rise to queries as to why certain cases were excluded from the application of the Ordinance and the question of whether justice was seen to be done. She said that on one occasion a judge had pointed out that in some countries defendants involved in serious criminal cases such as murder were legally represented by experienced counsel even at the initial trial stage. However, the system in Hong Kong appeared to be different.

The way forward

42. The Chairman pointed out that the last review of legal aid policy was conducted in 1997. In her opinion, the time was ripe for another major review. She suggested and members agreed that a working group should be formed under the Panel to identify issues relating to the administration of legal aid for review by the Administration.

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Duty Lawyer Service (DLS)

43. In response to the Chairman, D of A advised that the Administration was committed to assisting the legal professional bodies in providing the service under the DLS scheme. To enable the public to have easier access to free legal advice service, the DLS had opened a new free legal advice centre in the Eastern District in August and was planning to open another new centre in Wong Tai Sin later this year. Furthermore, training would continue to be provided to improve the interview technique of staff of Home Affairs Department assisting in conducting preliminary interviews with clients before they met with the duty lawyers.

44. The Chairman said that she understood that the DLS had faced problems in its bid for resources to expand provision of free legal advice service to the

public. She said that members of the legal profession had committed a lot of time and resources to the DLS. She urged the Administration to do its best to assist in improving the service.

45. Mr Albert HO said that the present scope of DLS did not cover offence cases handled by summons. He suggested that a review to consider the desirability of including such cases might be conducted.

IV. Report of the Working Group on Process of Appointment of Judges
(LC Paper No. CB(2)149/01-02(01))

46. As discussion of the former agenda items had been overrun, members agreed that consideration of the Report of the Working Group on Process of Appointment of Judges should be deferred to the meeting on 26 November 2001.

V. Items for discussion at the next meeting on 26 November 2001

47. Members agreed that the following items should be discussed at the meeting on 26 November 2001 -

- (a) Report of the Working Group on Process of Appointment of Judges;
- (b) Review of section 18(3) of the Hong Kong Court of Final Appeal Ordinance;
- (c) Jurisdiction to award costs in criminal proceedings; and
- (d) Promoting Hong Kong as an international arbitration centre.

48. There being no other business, the meeting ended at 6:35 pm.