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Legislative Council

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Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of special meeting
held on Thursday, 14 March 2002 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 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
Public Officers Attending	:	Ms Emma LAU Deputy Judiciary Administrator Ms Rebecca PUN Assistant Judiciary Administrator Mr Yu-yuen WONG Assistant Secretary, Administration Wing
By Invitation	:	Consumer Council Mrs CHAN WONG Shui Chief Executive Ms CHAN One, Wendy Senior Legal Counsel

Hong Kong Bar Association

Mr Ronny K W TONG, SC

Mr Anselmo REYES, SC

Mr Richard KHAW

Hong Kong Mediation Council
(a division of Hong Kong International Arbitration Centre)

Mr Les LESLIE

Ms Maureen MUELLER

Mr Christopher TO

Legal practitioners

Mr Nicholas PIRIE

Mr Warren GANESH

Ms Sheena M Y CHAN

Clerk in Attendance	**:**	Mrs Percy MA Chief Assistant Secretary (2)3
Staff in Attendance	**:**	Mr Jimmy MA, JP Legal Adviser
		Mr Arthur CHEUNG Senior Assistant Legal Adviser 2
		Mr Paul WOO Senior Assistant Secretary (2)3

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I. Presentation of paper by Legal Adviser
(LS66/01-02 - Paper prepared by the Legal Service Division)

Senior Assistant Legal Adviser 2 briefed the Panel on the paper prepared by the Legal Service Division. The paper sought to assist members to navigate through the background and the various proposals made by the Chief Justice's Working Party on Civil Justice Reform published in its Interim Report and Consultative Paper on Civil Justice Reform (IRCP) in November 2001.

II. Meeting with deputations
(LC Paper Nos. CB(2)1307/01-02(01) and (02); 1356/01-02(01); 1374/01-02(01) and (02) - written submissions from the deputations)

2. The Chairman informed members that the Law Society of Hong Kong had written to advise that its Council was finalizing comments on the IRCP and would provide a copy of its report to the Panel in due course. Members noted the advice of Mr Ronny TONG, Chairman of the Committee set up by the Bar Association to study the IRCP, that the submission presented to the Panel was only a provisional submission.

3. The Chairman invited the deputations to present their views on IRCP. The deputations' views were summarized in **Appendix**.

4. Ms Audrey EU sought comments from the Bar Association and the Consumer Council on the following issues -

(a) Litigation proceedings naturally involved costs. For complex cases, the costs could be huge. In this regard, how could a right balance be struck between the objective of cost-saving on the one hand and achieving justice on the other?

(b) The Bar Association had expressed reservations about the proposal of disclosure of costs. However, it was already a requirement for disclosure of costs in family court cases. Hence, it might be argued that the same requirement should be extended to other civil litigation cases;

(c) The Consumer Council had stated that it supported a procedural scheme to deal with multi-party litigation. It also urged that more invitations should be extended to *amicas curiae* (a friend of the court) to assist the courts in specific cases involving a large number of unrepresented litigants. In this connection, should consideration be given to adopting a system similar to that in other jurisdictions, e.g. the US where certain third-party organizations would be allowed to represent definite groups of small individual litigants in

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courts, and provide expert opinion or information to assist the courts, given the special nature of the litigation in question?

5. In response, Mr Ronny TONG said that the Bar Association emphasized the need for a balance between safeguarding quality of judicial decisions and measures to expedite proceedings to save expenses and costs. The position held by the Bar Association was that in implementing reforms to the civil justice system to simplify court procedures, the guiding principle was that expediency must not be achieved at the expense of justice. He said that the Bar Association reserved its position on the proposal to require parties to disclose costs as disclosure by a litigating party to his opponent might reveal confidential information relating to the strength or weakness of his case. Moreover, a party might inflate its legal costs to pressurize the other party. He pointed out that these problems would be less serious in family court cases which were relatively less complicated and with less cost variations as compared with other litigation cases.

6. Mrs CHAN WONG Sui said that speaking for the Consumer Council, she was of the opinion that the issues raised by Ms Audrey EU in paragraph 4(c) above were worth further consideration by the Chief Justice's Working Party. She undertook to raise the matters with the Working Party. She added that the Consumer Council was recently involved in a case of *amicas curiae* where a large number of unrepresented litigants and important public interest were involved.

Pre-action protocols / case management / costs

7. Mr Albert HO said that in many cases, the parties concerned might expect an early settlement of their disputes without actually proceeding to trial. Strict pre-action protocols would therefore create unnecessary legal costs to the parties and also unnecessary waste of the court's time and resources.

8. Mr Ronny TONG responded that if the proposals on pre-action protocols were implemented, a litigant would be required to get his case "absolutely right", on a detailed consideration of the merits of the claim, before a writ was issued. It would be necessary, for example, to verify the claim on oath which was not presently required. This would incur substantially more costs on the litigants.

9. Ms Emily LAU asked whether the proposed reform measures would benefit the general public with significant reduction in litigation costs.

10. Mr Ronny TONG said that there was no question that the proposed reform was generally welcomed. However, on the issue of saving of costs, as reported by some on the experience of the Civil Procedure Rules (CPR) enacted in the UK, there was no clear evidence so far to show that the reform

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had resulted in noticeable drop in litigation costs, particularly in relation to the more complex types of cases.

11. Mr Warren GANESH pointed out that in UK, anecdotal evidence was that for those "fast-track" cases involving less than about HK$150,000, there had been saving of costs because of the streamlined "standard directions" which automatically applied to the litigation process. With regard to the very complex cases, not many of those had actually come about since the CPR came into force in April 1999. His calculated guess was that the civil procedural reform would not lead to substantial reduction in costs because of the complexity of the issues involved and the "labour-intensive" processes in dealing with such cases.

12. Mr Les LESLIE said that as far as mediation in family court cases and construction cases in Hong Kong were concerned, the settlement rate was in the order of 80%. Savings were achieved in terms of reduced expenses and time for resolving the disputes.

13. Ms Miriam LAU asked whether the Bar Association would support the more drastic reform proposals in IRCP other than procedural fine-tuning of existing rules.

14. In response, Mr Ronny TONG said that the Bar Association supported many of the recommendations made in IRCP. However, the Bar Association would like to emphasize its view that a sustained and gradual reform, such as to amend and improve on certain areas of the High Court Rules, was preferable to an abrupt and complete over-haul. Certain proposals, e.g. those relating to pre-action protocols might not be suitable for all cases alike. Moreover, there were pre-conditions for the success of the proposed reforms, e.g. a sustained commitment to upgrade the quality of barristers, solicitors and judges. On the proposal to give more judicial management power to judges, the Bar Association considered that it would be more acceptable for a specialist list judge to have greater control over the conduct of cases on his list. The Bar Association proposed that more specialist lists be established and more judges be trained to deal with these cases.

15. Referring to Principle 3 in paragraph 5 of the Bar Association's submission, Mr TSANG Yok-sing asked whether it was the intention of the Bar Association to make recommendations which did not fall within the scope of the terms of reference of the Chief Justice's Working Party.

16. Mr Ronny TONG said that many members of the Bar Association held the view that the proposed reforms should not only be confined to cases handled in the High Court but also be extended to cases in the District Court. Some considered that the proposed reforms should better be tried out first in the District Court before being adopted for the more complex cases in the High

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Court. He said that the Bar Association would make a detailed submission to the Working Party for its consideration in due course.

17. Mr Nicholas PIRIE expressed the view that if the Judiciary was concerned about improving access to justice and saving of costs by court-users, it should give serious consideration to introducing practical measures to enhance user-friendliness of the system for court-users, apart from just looking at the internal house-keeping of the courts. He pointed out that nearly 20 years ago, a proposal was made for the installation of a computer system in the High Court to facilitate automation of certain court processes such as filing of statements of claim with the courts. However, that proposal had never materialized.

Alternative dispute resolution (ADR)

18. Mr Albert HO said that he had doubts about the effectiveness of mandatory mediation if the disputing parties were unwilling to negotiate for a settlement. He also asked whether mediators should be required to make a report to the court or to give evidence in court if mediation failed.

19. Mr Les LESLIE said that the basic principle behind mediation was that it was voluntary in essence. The mandatory part of it was that disputing parties should initially be made to attempt the mediation process to see whether there was a chance to resolve their differences with the assistance of a mediator. The parties would then be at liberty to decide whether they should continue to participate in the process. He said that in this regard, the ability of the mediator to get the parties in dispute to negotiate in a co-operative manner would be a crucial factor for the success of the mediation process.

20. Mr Les LESLIE supplemented that Australia and Canada were practising mandatory mediation for specific types of litigation proceedings.

21. Mr Warren GANESH said that mediation and other forms of ADR should be consensual. What happened in the ADR process should be confidential. He further advised that in UK and some Australian states, the courts could encourage the parties to use ADR. The judge could order a stay of the proceedings for about four to 12 weeks and during that stay encourage the parties to get down to negotiate for a settlement. In a sense this was the mandatory part of the process. If the parties failed to take part in the appropriate spirit of ADR, they would go back to the same judge who then dealt with and disposed of the case finally with the possibility of imposing certain cost sanctions for the parties' conduct in the ADR. He further said that not all cases were amenable to ADR, and it was very important for the judges to have sufficient knowledge to enable them to identify the suitable cases.

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22. Both Mr Warren GANESH and Mr Nicholas PIRIE pointed out that mediation would not necessarily result in cost-saving for the litigating parties. The services of mediators and facilities required for the conduct of mediation could add up to considerable amount of costs.

23. Ms Miriam LAU said that she reserved her position on the proposal to make ADR mandatory, although she supported that judges should encourage the use of ADR as a means to resolve disputes.

24. At the request of the Chairman, Mr Les LESLIE agreed to provide information on how the system of mandatory mediation was operating in Australia and Canada, and the benefits of the system in the light of the experience of the jurisdictions.

HK Mediation Council

The way forward

25. The Chairman thanked the deputations for presenting their views on the IRCP to the Panel, and invited the deputations to submit any further views for the consideration of the Panel.

26. Deputy Judiciary Administrator said that the consultation period for IRCP would expire on 30 April 2002. She called upon all interested parties to make written submissions to the Working Party by then.

27. The Chairman informed members that she had applied for a slot to move a motion on the Civil Justice Reform for debate at the Council meeting on 24 April 2002.

28. There being no other business, the meeting ended at 6:40 pm.

Council Business Division 2
Legislative Council Secretariat
19 April 2002

Appendix

LegCo Panel on Administration of Justice and Legal Services
Meeting on 14 March 2002

Civil Justice Reform - Interim Report and Consultative Paper (IRCP)

Summary of Views of Deputations

Organizations / Individual legal practitioners (reference of submission)	**Major Views on IRCP**
The Consumer Council (LC Paper No. CB(2)1307/01-02(02))	***Overriding Objective*** - The Council supported in principle the proposal to adopt a comprehensive case management approach for the civil justice system. The proposal should aim at expediting the legal process without compromising justice. Adequate supporting resources should be provided to implement the proposed reform; - However, some litigants might file claims without a serious intention to go to trial. The proposal might force these litigants to proceed quickly to trial, thus incurring unnecessary expenses. The Working Party should study the impact of the new proposal on this type of litigants. ***Multi-party Litigation*** - The Council supported in principle the adoption of a procedural scheme to deal with multi-party litigation, subject to further studies to be conducted on schemes in other jurisdictions such as the class action scheme in US and the group litigation order scheme in UK.

	Costs - The Council supported the proposals for flexible use of costs awards throughout the proceedings, the court's consideration of the reasonableness of the parties' conduct and the extension of the court's power to make wasted costs orders to cover barristers; - The Council expressed concern that benchmark costs might become a form of price fixing and result in market distortion. Benchmark costs might eventually become the floor rather than the ceiling, thus defeating the purpose of restraining costs; - It was desirable to introduce a statutory duty to disclose the basis and estimate of costs, with appropriate sanctions for breach, to further increase transparency. However, disclosure of costs by the litigation parties might encourage engagement of more senior legal professionals who charged higher fees. This could be used as a means to exert undue pressure on the opposing party; - The present taxation process was disproportionately expensive. Reforms should be directed at avoiding taxation in appropriate cases and streamlining procedures to save taxation costs. Consumers' awareness of the taxation process should be enhanced. ***Alternative Dispute Resolution (ADR)*** - A court-annexed mediation scheme could provide a simpler, cheaper and more custom-designed approach for resolving disputes. The Council suggested that a pilot scheme for certain classes of cases should be implemented before a full-scale reform on ADR was launched; - However, if mediation before litigation was made mandatory, and failing a settlement, the mediation costs would become an additional burden to the parties;

	- It was advisable to extend legal aid to arbitration so that the underprivileged would be on an equal footing in the course of the arbitration procedure. Pro bono legal advice and mediation services should be provided to unrepresented litigants; - The Council recommended that any ADR reform should ensure that the ADR services (e.g. services of the mediator or arbitrator, the ADR venue) were provided to consumers free of charge. ***Unrepresented Litigants*** - In the long run, the Government should study the experience in other jurisdictions (e.g. the UK's conditional fee agreement system and the US's contingency fee system) in assisting unrepresented litigants; - "Unbundled legal assistance", being a possible short-term solution, might be limited in its effectiveness e.g. not all unrepresented litigants were able to conduct litigation effectively on their own; - More invitations should be extended to *amicas curiae* (a friend of the court) to assist the courts in deserving cases. ***Further Issues of Consumer Concern*** - Some problems identified in the Interim Report were also applicable to the District Court and the Small Claims Tribunal. Reform to the procedures of the two lower courts should also be considered; - The public should be better educated on the civil justice system, in particular, its costs implications to litigants.

The Hong Kong Bar Association (provisional submission) (LC Paper No. CB(2)1356/01-02(01))	***Overall*** - The Bar supported a large number of proposals in the IRCP which were procedural fine-tuning of existing rules. The Bar believed that a sustained and gradual reform was more fruitful than an abrupt and complete overhaul. ***Guiding Principles of Reform*** - The Bar considered that reform should not lose sight of (a) justice and fair hearing should take precedence; (b) the need to up-grade the quality of judges; and (c) the need for a continuous dialogue between the Judiciary and the legal profession to work out specifics. ***Pre-action Protocols*** - Pre-action protocols would lead to front-end loading of costs, hence creating difficulties for the poorer or unrepresented litigants. The parties might also miss out on the chance of a cheap settlement early into the proceedings. The Bar considered that this proposal should be carefully considered. ***Judicial Control*** - The proposal to give substantial judicial management power to judges would pose problems for the Judiciary as over 50% of the judges were deputy or inexperienced judges, and impair the image of neutrality of judges; - The Bar proposed that more judges should be trained to deal with special list cases within a particular field of expertise. It would be more acceptable to let a specialist list judge to have greater control over the conduct of cases on his list.

	Appeals - On the proposal to give finality to proceedings and discourage unmeritorious appeals, the Bar was not convinced that the Judiciary had reached a stage where one could safely rely on a first level judgment. Also, a right of appeal was a fundamental right of a litigant; - The Bar proposed that there should be at least a one-tier unrestricted appeal with appeals thereafter restricted by leave. There should be 'leapfrog" appeals to enable cases which were bound to go to higher courts to skip some intermediate hearings, thus resulting in saving of costs and judicial time. ***Costs*** - The Bar did not consider statutory-enforced disclosure of rates charged by lawyers was necessary in a free market such as Hong Kong where market forces dictated. No other profession was subject to such control; - The setting up of benchmark costs was not likely to limit costs. The Bar did not see the need for a benchmark system on top of the present system which already had a process where unusually high fees were taxed off; - Disclosure of costs incurred by a party to his opponent would reveal privileged information relating to the strength or weakness of his case. A party could also inflate his costs to try to scare off his opponent. The Bar had serious reservations about this proposal; - The Bar supported the proposed system of immediate costs orders as it would discourage unnecessary interlocutory applications.

	Alternative Dispute Resolution (ADR) - The Bar opposed the proposal of compulsory mediation before litigation. Mediation should be encouraged, not forced upon the parties. Recourse to the court was a fundamental right of litigants which should not be compromised. Also, compulsory mediation could be used as a means of delay or an escape route from the full rigour of liability.
Hong Kong Mediation Council (no written submission)	***ADR*** - The proposal to promote the use of ADR processes, in particular mediation, in resolving disputes was supported. Mediation, as opposed to litigation, would lead to greater client satisfaction and less costs and delay in reaching a settlement. Mediation should be integrated as a necessary part of the civil justice system; - ADR, however, might not work in all dispute cases. It was necessary to clarify the mechanism for making ADR mandatory in specific cases. Pilot projects on the use of mandatory mediation as a method of dispute resolution for certain categories of cases should be implemented. For example, personal injury and professional litigation cases might be suitable cases for mediation; - The public should be educated on how mediation worked in resolving disputes and the benefits that could be derived from participating in the process; - It was important to ensure that mediators were not only accredited but also achieved recognized international standard of training and continuing professional development in the field.
Mr Nicholas PIRIE (LC Paper No. CB(2)1374/01-02(01))	***Pre-action Protocols*** - Pre-action protocols would lead to front-end loading of costs and deter litigants from using the courts.

	Access to the Judicial System - The legal aid system in Hong Kong worked well. The scope of the Supplementary Legal Aid Scheme should be expanded to cover consumer cases; - Government assistance should be provided to the pro bono scheme operated by the Bar Association. The Law Society should consider introducing a scheme similar to the "Green Form Scheme" operating in the UK where solicitors provided consultation service to would-be litigants at a fixed fee, with the Law Society funding the balance of the fees with government's assistance. ***Other Issues*** - In order to retain good lawyers in practice, they had to be remunerated appropriately. People would lose faith in the administration of justice if they perceived lawyers were being poorly paid; - In view of the large number of tourists visiting Hong Kong, special rules and procedures should be established to deal with cases of tourists injured in Hong Kong. At present, the requirement to provide security for costs effectively stopped tourists from taking proceedings.
Mr Warren GANESH (LC Paper No. CB(2)1374/01-02(02))	***Civil Justice Reform in UK*** - Enactment of the Civil Procedure Rules in England and Wales only came into force in 1999. The most complex types of cases had yet to come to trial. Any evidence as to the effectiveness of the reforms was only anecdotal. There were comments that the reforms were done too quickly. The rules were no less complex than before, and procedural delays had not been reduced.

	Pre-action Protocols - Pre-action protocols would only lead to front loading of costs, not saving of costs, particularly for the complex cases. ***Case Management*** - Case management should be done by a single judge to achieve continuity and consistency. Inconsistency would be a concern for Hong Kong with the high proportion of deputy judges and junior judges in the Judiciary; - More resources should be provided for training of judges to minimize the number of appeals. ***Expert Evidence*** - Care should be taken to avoid the situation of experts instructing experts, resulting in huge extra costs. ***Appeals*** - Procedural reforms to filter out unmeritorious appeals to the Court of Appeal should be proceeded with care in order not to damage Hong Kong's reputation as an international dispute resolution forum. ***Insurance for Costs*** - After-the-event insurance schemes should be introduced to protect a litigation party from having to bear the other party's costs.

	ADR - Increased use of ADR was a good move. ADR, however, should be consensual, not mandatory.
Ms Sheena M Y CHAN (no written submission)	***Case Management*** - Enhanced duty of judges to manage cases necessitated more resources be devoted to training of judges to improve their competence; ***Costs*** - Increased transparency of costs would strengthen consumer protection and enable the general public to better appreciate the implications of litigation; ***Unrepresented Litigants*** - Litigation in person put a strain on court's time and resources. Schemes similar to the Duty Lawyer Service which was now only available for Magistrates' Court cases should be set up to help unrepresented litigants in the High Court.

Council Business Division 2
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