立法會
Legislative Council

LC Paper No. CB(2)387/03-04
(These minutes have been seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 27 October 2003 at 5:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Hon Margaret NG (Chairman) Hon Albert HO Chun-yan Hon Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon CHAN Kam-lam, JP Hon Ambrose LAU Hon-chuen, GBS, JP Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP
Members absent	:	Hon Jasper TSANG Yok-sing, JP (Deputy Chairman) Hon Miriam LAU Kin-yee, JP Hon TAM Yiu-chung, GBS, JP
Public officers attending	:	Item IV Mr Andrew H Y WONG Director of Administration Mr Benjamin CHEUNG Acting Director of Legal Aid Miss Eliza LEE Deputy Director of Administration Mrs Fanny YU Deputy Director of Legal Aid

		Mr William CHAN Assistant Director of Legal Aid
		Mr CHAN Yum-min, James Assistant Director of Administration
Attendance by invitation	:	The Hong Kong Bar Association Mr Andrew Bruce, SC
Clerk in attendance	:	Mrs Percy MA Chief Assistant Secretary (2)3
Staff in attendance	:	Mr Arthur CHEUNG Senior Assistant Legal Adviser 2 Mr Paul WOO Senior Assistant Secretary (2)3

Action

I. Confirmation of minutes of meeting

(LC Paper No. CB(2)98/03-04)

The minutes of the meeting held on 9 October 2003 were confirmed.

II. Information paper issued since the last meeting

2. Members noted the letter dated 14 October 2003 from the Law Society of Hong Kong to the Panel on "Professional Indemnity Scheme" (LC Paper No. CB(2)118/03-04(01)). In its letter, the Law Society proposed to follow up the issue of review of the Professional Indemnity Scheme of the Law Society with the Panel in December 2003 or January 2004.

3. Members agreed that the Law Society should be requested to revert to the Panel on the progress of its review on the Scheme at the meeting in December 2003.

(*Post-meeting note* : The Panel's request was conveyed to the Law Society in writing on 28 October 2003)

III. Items for discussion at the next meeting
(LC Paper Nos. CB(2)159/03-04(01) and (02))

4. Members agreed to discuss the following items at the regular meeting of the Panel on 24 November 2003 -

(a) Budgetary arrangements for the Judiciary; and

(b) Resource Centre for Unrepresented Litigants.

In relation to item (b) above, the Chairman proposed and members agreed that arrangements should be made with the Judiciary Administration for members of the Panel to pay a visit to the Resource Centre before the Panel's meeting in November 2003.

(*Post-meeting note* : The Chairman of the Resource Centre for Unrepresented Litigants has invited members of the Panel and other interested Members of the Council to a briefing session to be held at the Resource Centre on 8 December 2003, before the commencement of operation of the Resource Centre by the end of December 2003. On the instruction of the Chairman, item (b) was deferred to the meeting in December, and the item "Draft Solicitors Corporation Rules" was added to the agenda of the November meeting.)

List of outstanding items for discussion

Government's policy on implementation of resolution and conventions made by the United Nations (Item 15 on the list)

5. Members noted that the report of the Subcommittee on United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 and United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002 (the Subcommittee) was presented to the House Committee on 3 October 2003. As recommended by the Subcommittee, the Chairman of the House Committee conveyed the conclusions of the Subcommittee to the Chief Secretary for Administration in writing on 6 October 2003. Members agreed that the item should be removed from the list.

Court procedure for enforcement of maintenance order (Item 20 on the list)

6. Members noted that the Director of Administration had advised that the Home Affairs Bureau (HAB) would be ready to discuss the item in January 2004. Members agreed that as matters relating to enforcement of maintenance order were within the policy purview of HAB, the item should be referred to the Panel on Home Affairs for follow-up.

IV. Review on provision of legal aid services
(LC Paper Nos. CB(2)2581/02-03(03); 159/03-04(03) and (04))

7. Director of Administration (D of A) briefed members on the Administration's letter dated 20 October 2003 to the Panel which set out its response to the issues raised by members at the meeting on 29 July 2003 (LC Paper No. CB(2)159/03-04(03)).

Issues raised by members

Review on legal aid policy and financial eligibility limits

8. Mr Martin LEE opined that the Administration should seriously review the existing legal aid regime. In his view, the Administration should not simply look at the inflationary or deflationary trends as reflected in movements of consumer prices in adjusting the financial eligibility limits for legal aid. He said that with Hong Kong advancing into a more civilized society, the Administration should move with the times and re-examine its policy on legal aid with new concepts and perspectives.

9. D of A said that the existing mechanism for review on financial eligibility limits for legal aid was established in accordance with the recommendations made in the legal aid policy review conducted in 1997 and implemented in 2000. Under the present system, reviews on the financial eligibility limits were conducted annually to take account of inflation, and biennially to take account also of changes in litigation costs. The purpose was to ensure that the real value of the limits was maintained. Moreover, reviews on a five-yearly basis were conducted to examine the criteria for assessing the financial eligibility limits.

10. D of A added that the Government's policy was to provide publicly funded legal aid to those who had a genuine need to pursue litigation but could not afford the costs of conducting litigation on a private basis. That said, as the provision of legal aid services necessarily involved a charge on the public purse, and as public funding was not unlimited, mechanisms had to be put in place to determine priorities and who should get assistance from public funds. He said that under the existing system, the Administration was able to strike a balance and achieve the policy objective.

11. Ms Audrey EU said that she held no contrary view to that of the Administration on the prudent use of public money and the need for setting financial eligibility limits for legal aid. However, she considered that the Administration's stated position that the existing system was operating satisfactorily in providing legal aid to those in need did not reflect the true situation. She said that under the existing financial eligibility limits, a lot of applicants had been refused legal aid on grounds of means. Many of these

people had a meritorious case to pursue and yet they were not able to do so as they could not afford the huge costs of private litigation. Ms Audrey EU further said that she had observed that in about half of the litigation cases in Hong Kong, at least one of the litigants involved in the case was not legally represented. She questioned whether the present financial eligibility limits for legal aid had been realistically set.

12. The Chairman opined that the crucial issue for the system of provision of legal aid services was that it should ensure that litigants in real need could seek justice through legal proceedings. She pointed out that the International Covenant on Civil and Political Rights (ICCPR) prescribed, among other things, that no one should be deprived of a fair trial because of a lack of means. The Hong Kong Bill of Rights Ordinance (BORO) was enacted to give effect to the provisions of ICCPR as applied to Hong Kong. Moreover, Article 39 of the Basic Law provided that the relevant provisions of international covenants and conventions on human rights as applied to Hong Kong should remain in force. The Chairman said that as a large number of applicants who were refused legal aid on means (including persons charged with serious criminal offences) were practically unable to afford the costs of litigation, it was doubtful whether the existing policy had given full effect to the principles and spirit of ICCPR and BORO. The Chairman opined that the Administration should review its existing broad-brush approach of setting a financial eligibility limit for applications across the board, and undertake a fundamental review on the criteria used for determining eligibility for legal aid, taking into account all relevant factors including the nature of the case and the seriousness of the offence concerned.

13. D of A said that in jurisdictions where legal aid was supported by public funding, it was a norm that financial eligibility limits were set as an objective basis for identifying applicants who should be entitled to legal aid from those who were able to afford the costs of litigation. In administering legal aid, the Administration was mindful of the need to provide assistance to those who were genuinely in need. D of A advised that under both the existing financial eligibility limits and the revised limits as proposed by the Administration, more than half of the total households in Hong Kong would be eligible for legal aid. He said that the Administration was satisfied that the coverage of legal aid was fair and reasonable, and the existing system in Hong Kong complied with human rights principles.

14. D of A further advised that the Working Party on Civil Justice Reform appointed by the Chief Justice was looking into, among other things, the situation of unrepresented litigants in Hong Kong and means to assist unrepresented litigants. He said that the Working Party had noted that there were cases where litigants chose to represent themselves, without legal representation. As regards the issue of insufficient means to pursue litigation, D of A said that the existing mechanism allowed applicants who were initially

refused legal aid on means to apply for legal aid again at subsequent stages of the proceedings. Legal aid might be granted if they then met the financial eligibility criteria.

15. Ms Audrey EU said that cases where the litigants chose not to have legal representation were very exceptional. She said that she could provide ample case examples to support her contention that there was a substantial number of applicants who could not meet the costs of private litigation and wished to seek legal representation through the legal aid system, but their applications were rejected because of failure to pass the means test.

16. In response to the Chairman's invitation for comments, Mr Andrew BRUCE opined that the eligibility limits for legal aid should be set at a level which reflected realistically the financial viability to engage in private litigation. He said that from his personal experience, there were cases where even certain "middle-class" litigants could not afford to litigate to the extent that was needed to obtain justice in the particular situation of the case, because of the high legal fees involved. He further said that the position of the Bar Association was that notwithstanding there were financial constraints for the provision of legal aid, the paramount consideration was that legal aid should be granted where the justice of the case so required.

Bar Association/ Law Society

17. The Chairman said that the two legal professional bodies should be requested to provide written views on the following matters for the consideration of the Panel -

(a) whether the refusal of the Director of Legal Aid (DLA) to grant legal aid on grounds of means to a person charged with a serious criminal offence and who was unable to meet the costs of litigation would contravene the BORO, taking into consideration the Administration's response set out in its letter to the Panel; and

(b) the principles which should be adopted in considering the issue of financial eligibility limit for legal aid services, and how the limit should be set to give effect to the right of access to justice.

Indebtedness of legal aid applicants

18. The Chairman asked whether the Administration would review its decision that the debt of a legal aid applicant should not be deducted from his financial resources. D of A said that the Administration did not see justification for treating debt as a deductible item in calculating an applicant's financial resources. To do so would be unfair to other applicants who did not resort to raising debts to support their livelihood. D of A further said that an indebted applicant could use his financial resources to repay his debt first. With a reduction in his financial resources, he might pass the means test and become eligible for legal aid.

19. The Chairman said that she was aware of cases where LAD still refused to grant legal aid to the applicants whose resources fell below the financial eligibility limits after paying off their debts. D of A said that he would ask DLA to look into such cases if relevant particulars could be provided.

Scope of the Supplementary Legal Aid Scheme (SLAS)

20. Mr Martin LEE noted that the Administration had advised in its letter to the Panel that during the period from 2000/01 to 2002/03, there was a claim against a bank which incurred a net loss to LAD of about $11.7M whilst the case was on legal aid (the overall legal cost of the case was more than $22M). He opined that it would not be sufficient justification for the Administration to refer to just a few isolated cases in arguing against the proposal to expand the scope of SLAS. He considered that the Administration should undertake in-depth analysis into cases which incurred significant losses to LAD to find out if the losses could in fact have been avoided had the cases been better handled by LAD and counsel.

21. D of A said that the information provided by the Administration on loss incurred in a number of cases was in response to the Bar Association's proposal to include certain types of proceedings in SLAS. He said that the information provided was not exhaustive but it served to provide examples to illustrate the Administration's concern that the financial viability of SLAS might be jeopardized if the scope of SLAS were extended to cover proceedings which did not meet the guiding principles for SLAS cases.

22. Mr Martin LEE said that SLAS was launched more than 20 years ago of which he was one of the advocators. It started off as a small, self-financing scheme with very limited funding, and hence legal assistance could only be provided for restricted types of proceedings in order to maintain its financial viability. He said that with the successful operation of SLAS over the years, it was time for the Administration to consider expanding the scope of SLAS. He further commented that the risk of incurring loss existed in every legal aid funded case. However, that was not a valid reason for not enlarging the scope of SLAS to cover more types of proceedings to provide better legal aid services to the public.

23. The Chairman said that various proposals had been made concerning the expansion of the coverage of SLAS, including consideration of the feasibility of adopting a conditional fees system for certain types of civil proceedings. She pointed out that the matter was being studied by the Law Reform Commission but it was envisaged that there would be problems in introducing such a system for SLAS. The Chairman considered that relevant issues relating to the scope of SLAS should be further discussed by the Panel in due course.

Granting of legal aid by the court in a criminal appeal case

24. Mr Martin LEE pointed out that in relation to a recent criminal appeal case handled by him and others in which the defendant was charged with murder, DLA refused the application of the defendant for legal aid. However, the Court of Appeal subsequently overturned DLA's decision and granted legal aid to the defendant. He considered that the case signified a need for review of the criteria used by DLA in deciding whether legal aid should be granted in serious criminal cases.

25. Deputy Director of Legal Aid advised members that in exercising his discretion under Rule 15(2) of the Legal Aid in Criminal Cases Rules to waive the upper financial eligibility limit for a particular legal aid applicant, DLA would assess the "interest of justice" taking into account the standards set out in the "Widgery Criteria", which had a long history in the English practice (Appendix to the Administration's letter). Guidelines issued by the court in previous cases would also be taken into account.

26. The Chairman requested the Administration to provide the following for the consideration of the Panel -

(a) a background paper on the case referred to by Mr Martin LEE and the relevant court judgment; and

(b) advice on whether the Administration would review its legal aid policy in the light of the court judgment.

(*Post-meeting note* : The Administration's written response was issued vide LC Paper No. CB(2)370/03-04(01) on 18 November 2003)

2003 annual review of financial eligibility limits

27. D of A informed members that the Administration had recently completed the 2003 annual review of the financial limits of legal aid applicants to take account of inflation during the reference period, i.e. from July 2002 to July 2003. He advised members that the change in Consumer Price Index (C) for the period was -4.5%. In the light of the significant decrease in consumer prices, the Administration considered that there was a case to further adjust the eligibility limits downward to maintain the real value of the limits. Accordingly, the Administration proposed that the financial limits for the Ordinary Legal Aid Scheme (OLAS) and SLAS should be revised from $169,700 to $155,800, and from $471,600 to $432,900 respectively, to take into account the cumulative reduction in consumer prices of -8.2% recorded during July 2000 to July 2003.

28. D of A recapitulated that in conducting the biennial review of the financial eligibility limits to take account of changes in litigation costs during the period July 2000 to July 2002, the Administration had attempted to ascertain the changes in litigation costs from the two legal professional bodies, LAD and the Judiciary. However, due to the absence of hard evidence to establish a definite trend on changes in litigation costs, the Administration considered it appropriate in the meantime to revise the eligibility limits on the basis of movements in consumer prices. D of A said that the Administration hoped that the two legal professional bodies could provide information on counsel/solicitors fees to assist the Administration in ascertaining whether there had been real changes in litigation fees for the purpose of reviewing the financial eligibility limits for legal aid.

29. The Chairman said that she was counsel engaged by LAD in a legal aid funded case a few years ago. In that case, as counsel fees payable to her were not settled long after the fees had become due, she eventually accepted LAD's offer of a reduced payment at 90% of the original fees. The Chairman said that she understood that there had been similar cases encountered by counsel/solicitors. She cautioned that information on legal fees should be examined with care.

30. On the Administration's proposal on a further downward adjustment of the eligibility limits for OLAS and SLAS, the Chairman said that it would be a matter for the House Committee to consider whether a subcommittee should be set up to scrutinize the relevant subsidiary legislation after its tabling in the Legislative Council.

31. The meeting ended at 6:35 pm.

Council Business Division 2
Legislative Council Secretariat
21 November 2003