

立法會
Legislative Council

LC Paper No. CB(2)1741/03-04

(These minutes have been
seen by the Administration)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

**Minutes of meeting
held on Thursday, 29 January 2004 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 Ambrose LAU Hon-chuen, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP

Member absent : Hon CHAN Kam-lam, JP

Public officers attending : Item IV

Mr S Y CHAN
Director of Legal Aid

Miss Eliza LEE
Deputy Director of Administration

Mr Benjamin CHEUNG
Deputy Director of Legal Aid

Mrs Fanny YU
Deputy Director of Legal Aid

Mr CHAN Yum-min, James
Assistant Director of Administration

Item V

Mr Wilfred TSUI
Judiciary Administrator

Mr Augustine CHENG
Deputy Judiciary Administrator (Operations)

Mr S K WONG
Acting Chief Judicial Clerk

Mr TAM Wing-pong, JP
Deputy Director (Strategy)
Housing, Planning and Lands Bureau

Mr Gilbert KO
Assistant Director (Private Housing)
Housing, Planning and Lands Bureau

Mr CHAN Kwok-fan
Senior Rent Officer
Rating and Valuation Department

**Attendance by : Item IV
invitation**

Legal Aid Services Council

Mr J P LEE, JP, OBE
Chairman

Mr LI Tin-yiu
Secretary

The Hong Kong Bar Association

Mr Andrew BRUCE, SC

The Law Society of Hong Kong

Mr Amirali NASIR
Member of the Legal Aid Committee

Mr Dennis HO
Member of the Legal Aid Committee

Clerk in attendance : Mr Paul WOO
Senior Council Secretary (2)3

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Action

I. Confirmation of minutes of meeting

(LC Paper Nos. CB(2)842/03-04 and 1105/03-04)

The minutes of the meetings held on 14 November 2003 and 18 December 2003 respectively were confirmed.

II. Information papers issued since last meeting

2. Members noted that the following papers had been issued -

- (a) LC Paper No. CB(2)855/03-04(01) - Letter dated 18 December 2003 from the Director of Administration to Mr CHAN Siu-lun on section 18(3) of the Hong Kong Court of Final Appeal Ordinance;
- (b) LC Paper No. CB(2)855/03-04(02) - Mr CHAN Siu-lun's letter dated 28 December 2003 in response to the Director of Administration's letter dated 18 December 2003;
- (c) LC Paper No. CB(2)1079/03-04(01) - Letter dated 21 January 2004 from the Director of Administration on "System for the Determination of Judicial Remuneration"; and
- (d) LC Paper No. CB(2)1092/03-04(01) - Amended Review Report provided by the Law Society of Hong Kong on Insurance Arrangements of the Hong Kong Solicitors Indemnity Scheme prepared by Willis China (Hong Kong) Limited.

III Items for discussion at the next meeting

(LC Paper No. CB(2)1100/03-04(01) and (02))

Agenda for meeting in February 2004

3. Members agreed to discuss the following items at the next meeting on 23 February 2004 -

Action

- (a) Review of sexual offences in Part XII of the Crimes Ordinance; and
- (b) Use of official languages for conducting court proceedings.

Items for discussion at future meetings

Performance of Court Interpreters

4. The Chairman referred members to press reports that during the trial of a recent Magistracy case, the Magistrate had criticized a part-time Court Interpreter for arbitrarily adding personal opinions in the course of interpreting the evidence given by the witness. The Magistrate suspended the trial and ordered a retrial on the ground that what the Court Interpreter had done had prejudiced the conduct of a fair trial.

Clerk 5. The Chairman suggested and members agreed that the Judiciary Administration should be requested to provide a paper on the case and to explain the duties and responsibilities of Court Interpreters (including part-time interpreters) and measures to monitor the performance of Court Interpreters. The issue might be discussed by the Panel after receipt of the paper from the Judiciary Administration.

Development of Hong Kong as a legal services centre

6. The Chairman said that the Panel had received a briefing from the Administration on the Chief Executive's Policy Address 2004 at the special meeting on 15 January 2004. In considering a paper prepared by the Department of Justice on its policy initiatives, members agreed that the item on development of Hong Kong as a legal services centre should be discussed at the Panel's meeting in March 2004.

Clerk 7. The Chairman asked the Secretariat to request a paper from the Department of Justice on the item for the consideration of the Panel.

Guides to Judicial Conduct

8. The Chairman said that the Chief Justice (CJ) had mentioned in his address at the Opening of the Legal Year 2004 that a Working Party appointed by him had recommended that a Guide to Judicial Conduct should be prepared to provide judges with useful and practical guidelines on judicial conduct. The recommendation was accepted by CJ and the work of drafting the Guide had commenced.

Clerk 9. The Chairman suggested and members agreed that the Judiciary Administration should be requested to provide a paper to explain the content of the Guide and the progress of preparation of the Guide. The Panel would decide when the item would be discussed upon receipt of the paper.

Action

IV. Review on provision of legal aid services

(LC Paper Nos. CB(2)370/03-04(01), 644/03-04(01), 1094/03-04(01) to (03), 2581/02-03(02))

10. The Chairman informed members that subsequent to the meeting on 27 October 2003 when the item on review on provision of legal aid services was last discussed, the Panel had received the following papers for its further consideration -

- (a) LC Paper No. CB(2)370/03-04(01) - letter dated 14 November 2003 from the Administration enclosing a background paper on the Court of Appeal Case CACC 365 of 2000 and a copy of the Court of Appeal's judgment;
- (b) LC Paper No. CB(2)644/03-04(01) - submission dated 28 November 2003 from the Bar Association on "Provision of Legal Services";
- (c) LC Paper No. CB(2)1094/03-04(01) - letter dated 15 January 2004 from the Administration responding to the Bar Association's submission of 28 November 2003;
- (d) LC Paper No. CB(2)1094/03-04(02) - submission from the Law Society on the five-yearly review of criteria for assessment of financial eligibility of legal aid applicants; and
- (e) LC Paper No. CB(2)1094/03-04(03) - paper dated 12 December 2003 provided by the Legal Aid Services Council on the five-yearly review of the criteria for assessing financial eligibility of legal aid applicants conducted in 2003.

Court of Appeal Case CACC 365 of 2000 ("Mr Wu's case")

11. The Director of Legal Aid (DLA) briefed members on the Administration's paper on Mr Wu's case. The gist of the case was as follows -

- (a) the appellant (Mr Wu) was charged in the Court of First Instance (CFI) with the offences of murder and kidnapping. In conducting means investigation, the Legal Aid Department (LAD) found that the financial resources of Mr Wu had exceeded the financial eligibility limit for legal aid. Nevertheless, LAD considered it desirable to grant legal aid under Rule 15(2) of the Legal Aid in Criminal Cases Rules (LACCR), subject to payment of a contribution by Mr Wu towards the cost of legal representation;
- (b) as Mr Wu did not agree to pay the contribution, the legal aid offer lapsed. Mr Wu subsequently applied for reconsideration of the

Action

decision, and mentioned to LAD for the first time a loan which he had to repay. After further investigation, LAD was not satisfied that the moneys dissipated were used for paying the allegedly outstanding debt, and maintained its decision to require payment of a contribution for grant of legal aid;

- (c) Mr Wu applied to the trial Judge of CFI for legal aid. The Judge granted a legal aid certificate, but did not exempt payment of the contribution. Mr Wu was unrepresented at the trial in CFI, and was convicted of the offences;
- (d) Mr Wu applied for legal aid to appeal against conviction. The application was refused by LAD on grounds of means. Subsequent to the refusal by LAD, the Court of Appeal granted Mr Wu an appeal aid certificate. The appeal was heard and the Court of Appeal quashed the convictions and ordered a retrial on both counts.

12. DLA advised that during the appeal, it was contended on Mr Wu's behalf that the CFI Judge had either failed to appreciate he had a discretion to waive the requirement to pay a contribution or alternatively failed to exercise his discretion properly. In hearing the appeal, the Court of Appeal came to the view that the CFI Judge's approach to, and determination of, Mr Wu's application to him for legal aid did not represent a proper exercise, if such it was, of the discretion vested in him under Rule 13(2) of LACCR, and concluded that the trial was not a fair one. Accordingly, the appeal was allowed and a retrial was ordered.

13. In response to the Chairman, Mr Andrew BRUCE said that in the view of the Bar Association, the fundamental consideration was that it was necessary to ensure that the defendant got a fair trial. However, it appeared that Mr Wu's case had demonstrated that the absence of legal representation for the defendant had placed the fairness of trial at risk. He considered that the case had underlined the need for application of a greater degree of flexibility in the approach to the administration of legal aid, particularly in respect of cases where the defendants were charged with very serious offences.

14. Mr Andrew BRUCE added that as pointed out in the Bar Association's paper (LC Paper No. CB(2)644/03-04(01)), Article 11 of the Hong Kong Bill of Rights Ordinance required that if an applicant for legal aid did not have sufficient means to pay for legal assistance, then legal assistance should be provided to him if it was in the interests of justice to do so. The Bar Association had suggested that an absolute financial eligibility limit in respect of legal aid for criminal cases should be removed. Instead, a gradation of eligibility restriction could be introduced to enable DLA to require contributions from the aided persons towards the cost of higher court representation if that was reasonable in all the circumstances of the case.

Action

15. Mr Martin LEE referred to paragraph 52 of the Court of Appeal's judgment on Mr Wu's case, which stated that "*...to have allowed (Mr Wu) to go to trial without representation was a false economy. What the public purse may have saved, on the one hand, by the judge's refusal to let (Mr Wu) off the payment of his assessed contribution would, on the other hand, have been lost by the substantial lengthening of the proceedings by reason of the prosecution being put to strict proof on every issue in the trial.*" Mr LEE asked what lesson LAD had learnt from the judgment made by the Court of Appeal.

16. DLA said that he had indeed exercised the discretion under Rule 15(2) of LACCR to offer legal aid to Mr Wu, notwithstanding that his financial resources exceeded the eligibility limit. Having considered all the circumstances of the case, LAD was not satisfied that Mr Wu had actually used the money diverted from his bank account to pay off a debt, and was of the view that Mr Wu should have sufficient means to pay for the cost of the proceedings. Hence, legal aid was offered on the condition that Mr Wu should pay a contribution towards the cost of legal representation. This decision was in accordance with the policy and the legislation and it had not been criticized by the Court of Appeal.

17. DLA added that according to the decision in another former appeal case, namely, *R v Mirchandani* (Criminal Appeal No. 350 of 1990), two conditions must be satisfied concerning free legal assistance in criminal proceedings, i.e. "the interest of justice" must require that legal aid be provided but only if the person concerned "does not have sufficient means to pay for it".

18. The Chairman referred to paragraph 72 of the Court of Appeal's judgment. She said that the Judge in the case was of the view that "*there had been no suggestion that the debt which Mr Wu paid with the funds in his bank account was anything other than a genuine one.*". Mr James TO asked whether LAD had provided any proof to the Judge to substantiate that Mr Wu did not have a genuine debt.

19. DLA responded that the statement made in paragraph 72 of the judgement did not mean that the court had found as a matter of fact that Mr Wu had used the funds to pay off a genuine debt. He said that having conducted detailed investigation, LAD believed that Mr Wu had diverted the funds away, not for the purpose of repaying a debt, but because he was unwilling to pay the required contribution. He added that Mr Wu's financial situation had been looked into in great detail during a series of three pre-trial reviews, all of which took place before the trial Judge when Mr Wu applied for legal aid to be granted to him. LAD, however, was not represented in those pre-trial reviews. Eventually, although the Judge granted Mr Wu a legal aid certificate, the Judge did not exempt Mr Wu from the requirement to pay the contribution.

20. In response to Ms Miriam LAU, DLA said that if there was genuine proof that a legal aid applicant had used part of his funds to repay a debt, the funds so dissipated would not be included as the applicant's financial resources.

Action

21. Mr Albert HO opined that it would be a better approach for DLA to first provide legal assistance to Mr Wu, and take steps subsequently to recover from Mr Wu the contribution which he was required to make. This could have avoided the undesirable consequence, as pointed out by the Court of Appeal, of prolonging the proceedings due to absence of legal representation for the defendant. Echoing Mr HO's view, Mr Martin LEE pointed out that Rule 16(2)(b) of LACCR provided that the amount of any contribution required to be paid should be a debt due to DLA payable in a lump sum or by instalments on such day or within such periods as DLA might determine.

22. DLA responded that by virtue of Rule 16 of LACCR, legal aid would be provided to an applicant provided that the applicant agreed to pay the contribution calculated in accordance with Part I of Schedule 3 to the Legal Aid (Assessment of Resources and Contributions) Regulations. In Mr Wu's case, LAD had in fact offered to provide legal aid to Mr Wu subject to payment of the contribution. However, as Mr Wu did not accept the requirement to pay the contribution, the offer of legal aid therefore lapsed.

23. The Chairman opined that Mr Wu's case had brought to light the possible scenario that a defendant charged with a serious criminal offence could be deprived of legal representation in the court, despite that the defendant had no sufficient means to pay for the costs of private litigation or a contribution towards the litigation costs. The Chairman said that as pinpointed in the Court of Appeal's judgement, this was an extremely undesirable situation. In her view, DLA should review how he should better exercise the statutory discretionary power in respect of grant of legal aid in future cases to ensure that a fair trial would be available to the defendants.

24. In response to the Chairman, Mr J P LEE said that LASC had yet to examine in detail the implications of Mr Wu's case on the policy and measures to improve the administration of legal aid. He said that LASC would conduct an internal discussion in this respect.

LASC

Submission from the Bar Association and the Administration's response

25. Deputy Director of Administration (DD/A) briefed members on the Administration's paper (LC Paper No. CB(2)1094/03-04(01)) which responded to the Bar Association's submission on provision of legal aid services (LC Paper No. CB(2)644/03-04(01)). She summarized the Administration's responses as follows -

- (a) under Rule 15(2) of LACCR, DLA had the discretion to grant legal aid if he was satisfied that it was desirable in the interests of justice to do so, notwithstanding that the applicant's financial resources exceeded the financial eligibility limit. DLA had indeed exercised

Action

his discretion on past occasions. For instance, in 2003, out of 64 applications which passed the merit test but failed the means test, DLA had exercised the discretion to waive the financial eligibility limit in 50 cases;

- (b) since legal aid was funded by the public coffer, there should be an inbuilt mechanism to regulate and limit the costs. Means testing was accordingly one of the two cardinal criteria (the other being the merit test) for the grant of legal aid. The Administration did not support on policy ground the proposal to remove the financial eligibility limit, as it could mean that those who had sufficient means to pursue litigation in private would also get publicly assisted legal aid services;
- (c) although the financial eligibility test of legal aid applicants was abolished for criminal representation in England since April 2001, it was understood that the UK authorities were now assessing the impact of the abolition, and were considering measures to ensure that the scheme would be able to operate within budgets and deliver value for money services, including the possibility of reintroducing means testing, in the context of a review commencing 2003. Moreover, it was the established practice of many jurisdictions to conduct means test for criminal legal aid applications; and
- (d) as regards the Bar Association's suggestion to replace a clear-cut financial limit with a gradation of eligibility requirements, the Administration was of the view that introducing different eligibility limits for different applicants/types of cases would give rise to uncertainty and confusion as well as concerns of subjectivity and arbitrariness in the assessment process of legal aid applications.

26. In response to Mr Martin LEE, DD/A advised that about 55% of the total households in Hong Kong were financially eligible for legal aid under OLAS, whereas about 70% of the total households were covered under the SLAS.

LASC's paper dated 12 December 2003 on the five-yearly review on the criteria for assessing financial eligibility of legal aid applicants

27. Mr J P LEE briefed members on LASC's paper (LC Paper No. CB(2)1094/03-04(03)) which detailed the views of LASC on the paper previously provided by the Administration on the five-yearly review conducted in 2003 (LC Paper No. CB(2)2581/02-03(02)). The paper highlighted the views of LASC on the following major issues -

- (a) the various criteria used for assessing the disposable income and disposable capital of legal aid applicants;

Action

- (b) proposal to increase the financial eligibility limit for SLAS; and
- (c) possibility of broadening the scope of SLAS.

28. In response to the Chairman, Mr J P LEE said that LASC agreed with the Administration that the ordinary legal aid scheme should target at the lower middle class and below. LASC, however, considered that both median household income and median household expenditure should be used as the yardsticks for defining households belonging to lower middle class and below. Moreover, LASC recommended that Consumer Price Index A (CPI(A)) should be used for adjusting the financial eligibility limit for OLAS, as CPI(A) measured price changes covering about 50% of the less well off households in Hong Kong.

29. On the Administration's position that debt should not be included as a deductible item in the assessment of financial resources of legal aid applicants, Mr J P LEE said that LASC was of the view that debts owed to an authorized or licensed financial institution could be taken into account, subject to the applicant making a declaration to LAD to disclose the details of the debts.

30. Regarding SLAS, Mr J P LEE said that LASC was of the view that the financial eligibility limit should be adjusted from \$471,600 to \$672,000 to reflect the price changes between 1984 and 1992. LASC was in the process of formulating viable proposals to expand the scope of SLAS. LASC through its Working Party on the Scope of Legal Aid would advise the Administration once it had come up with suitable proposals.

31. Mr Martin LEE expressed the view that the scope of SLAS should be expanded to cover other types of cases, for example, defamation cases, provided that there was a reasonable chance of success in recovering damages.

Submission from the Law Society on the five-yearly review of criteria for assessment of financial eligibility of legal aid applicants

32. Mr Dennis HO briefed members on the Law Society's submission (LC Paper No. CB(2)1094/03-04(02)) on the five-yearly review conducted by the Administration. He said that the Law Society was in broad agreement with the comments made by LASC.

33. In response to the Chairman, Mr Dennis HO said that the Law Society was of the view that loans should be excluded in calculating a legal aid applicant's disposable capital, provided that such loans were properly documented.

Action

Way forward

Admin

34. DD/A said that the Administration would respond in writing to the submissions from LASC and the Law Society. She undertook to provide the response for the Panel's consideration.

35. The Chairman said that it was anticipated that the Working Party on Civil Justice Reform appointed by the Chief Justice would soon release the report on its deliberations on the reform to be introduced to the civil justice system. She said that the issue of review on the provision of legal aid services could be further discussed by the Panel when appropriate, taking into account the relevant recommendations of the Working Party.

V. Court procedure for repossession of premises

(LC Paper Nos. CB(2)1100/03-04(01) to (05), CB(1)886/03-04(01))

36. Judiciary Administrator (JA) briefed members on the paper provided by the Judiciary Administration (LC Paper No. CB(2)1100/03-04(03)), which explained the impact of the Landlords and Tenant (Consolidation) (Amendment) Ordinance 2002 on the Lands Tribunal and the recent measures introduced by the Judiciary within its jurisdiction to streamline the court procedure for repossession of premises. He summarized the issues as follows -

- (a) the Amendment Ordinance had not created any adverse impact in terms of caseload, waiting time for hearing at the Lands Tribunal and execution of Writs of Possession by the Bailiff Service;
- (b) the Judiciary had considered the proposal made by the Bills Committee on Landlord and Tenant (Consolidation) (Amendment) Bill 2001 to streamline the repossession procedure by allowing landlords to set down the case for hearing at the time of lodging an application for repossession. The Judiciary found that for a straightforward case, the existing lead time between the date of application for repossession and the date of first hearing was about 35 days. The existing statutory requirements under the Lands Tribunal Rules would require a minimum of 32 days for completing the necessary procedures before an application for repossession could proceed to a hearing. Hence, the existing lead time of 35 days meant an effective waiting time of only three days, which was very short by any standard;
- (c) in about 50% of the repossession cases, the landlords were able to obtain a default judgment for repossession without a hearing because the tenants did not file a notice of opposition. The time for filing a notice of opposition was 14 days after receiving the notice of

Action

application for repossession by the landlord. If the proposal of the Bills Committee was implemented, by the time the landlord knew that the tenant had not filed a notice of opposition and he then applied to vacate the hearing, the hearing date would just be a few days ahead. It was unlikely that the Tribunal would be able to fix another hearing for the vacated slot. This would result in a waste of court resources and lengthen the waiting time; and

- (d) since January 2004, the Lands Tribunal had adjusted its listing practice by assigning a court to deal exclusively with repossession cases for at least one day in a week, with the hearing in the form of a callover hearing. Through this new measure, a large number of straightforward cases were disposed of expeditiously. It was estimated that 80% of the cases could be disposed of in this manner.

37. In response to Ms Audrey EU, JA said that since the time when the former Amendment Bill was examined, the Judiciary Administration had introduced a process re-engineering initiative in the execution of Writs of Possession by the Bailiffs. In 2003, 92% of the writs were executed within 30 days, the average being 25 days. He further advised that in 2003, the Lands Tribunal received 5 616 applications for repossession and granted 1 354 Writs of Possession.

38. Ms Audrey EU pointed out that judges sitting in the Lands Tribunal were limited in number. She said that it was expected that with the anticipated removal of the existing provisions on security of tenure, the number of repossession cases would further increase. She asked whether the Lands Tribunal could handle the caseload.

39. JA replied that at present the Lands Tribunal had two judges and two members who were specialists in fields relating to the Tribunal's work. He said that the Tribunal could cope with the work in the meantime. He added that the Judiciary Administration was in liaison with the Housing, Planning and Lands Bureau in connection with the implications on the work of the Lands Tribunal which might result from the removal of the security of tenure provisions.

40. On the new listing practice of the Lands Tribunal introduced since January 2004, Ms Audrey EU asked whether the landlords applying for repossession could be allowed to elect to have their cases dealt with by way of a callover hearing or a formal hearing. JA replied that under the new practice, all repossession cases would first be dealt with in the form of a callover hearing. Straightforward cases could be disposed of immediately and the more complicated cases would be adjourned to follow the regular listing schedule. The Judiciary was monitoring the operation of the new practice. If necessary, the number of callover hearings in a week could be increased. He added that the Judiciary would examine the need and the practicality of Ms EU's proposal.

Action

JA

41. Ms Miriam LAU said that she supported the new listing practice implemented by the Judiciary. She suggested that to further expedite the disposal of repossession cases, the Judiciary could consider assigning a specific time slot on a daily basis during which callover hearings would be conducted. Ms LAU further proposed that in cases where the time for the tenant to file a notice of opposition had elapsed and the tenant had not filed the notice, the Lands Tribunal should grant a default order for possession right away. JA undertook to convey Ms LAU's views to the Judiciary for consideration.

Way forward

JA

42. At the request of the Panel, JA agreed to revert to the Panel in April 2004 on further progress made in expediting the procedure for repossession of premises.

VI. Any other business

Visits to the Judiciary on 26 April 2004

43. The Chairman informed members that arrangements were being made with the Judiciary for Panel members and other interested Members of the Council to pay a visit (including a luncheon) to the Judiciary on 26 April 2004 to meet with the Chief Justice and other members of the Judiciary to discuss matters of interest. She said that the Secretariat would issue an invitation to all Members shortly.

(Post-meeting note : The invitation was issued to Members on 28 January 2004.)

Council Business Division 2
Legislative Council Secretariat
16 March 2004