

立法會
Legislative Council

LC Paper No. CB(2)2737/05-06
(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 Monday, 22 May 2006 at 5:30 pm
in Conference Room A of the Legislative Council Building

- Members present** : Hon Margaret NG (Chairman)
Hon LI Kwok-ying, MH (Deputy Chairman)
Hon James TO Kun-sun
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Martin LEE Chu-ming, SC, JP
Hon MA Lik, GBS, JP
- Public Officers attending** : Item V

Mr Benjamin CHEUNG
Director of Legal Aid

Ms Shirley YUEN
Deputy Director of Administration

Ms Jennie HUI
Deputy Director of Legal Aid

Mrs Alice CHEUNG
Assistant Director of Administration

Item VI

Department of Justice

Mr Stephen WONG
Deputy Solicitor General

Mr Michael SCOTT
Senior Assistant Solicitor Counsel

**Attendance by
invitation** : Item V

The Hong Kong Bar Association

Mr Robin EGERTON

**Clerk in
attendance** : Mrs Percy MA
Chief Council Secretary (2)3

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

Miss Lolita SHEK
Senior Council Secretary (2)7

Mrs Fanny TSANG
Legislative Assistant (2)3

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2)2048/05-06 – Minutes of the meeting on 27 March 2006)

The minutes of the meeting held on 27 March 2006 were confirmed.

II. Information papers issued since last meeting
(LC Paper No. CB(2)1787/05-06(01) – Consultation Paper on the Proposed Implementation of a Five-day Week in the Judiciary)

LC Paper Nos. CB(2)1854/05-06(01) and (02) – Correspondences between the Panel Chairman and Ms Susan LIANG on "Qualifying Insurers Scheme of the Law Society of Hong Kong"

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LC Paper No. CB(2)1864/05-06(01) – Consultation paper prepared by the Administration on "Proposed amendments to section 13 of the Conveyancing and Property Ordinance (Cap. 219)"

LC Paper Nos. CB(2)1937/05-06(01) and (02) – Chairman's letter to the Secretary for Justice and the latter's reply on "Language proficiency requirements for appointment as legislative draftsmen"

LC Paper No. CB(2)1951/05-06(01) – Information provided by the Environmental Protection Department on "Issues relating to the imposition of criminal liabilities on the Government"

LC Paper No. CB(2)2058/05-06(01) – Letter dated 15 May 2006 from the Director of Administration concerning the progress of the review of criminal legal aid fees system

LC Paper No. CB(2)2061/05-06(01) – Letter dated 16 May 2006 from the Secretary for Financial Services and the Treasury on "Limited liability for professional practices"

LC Paper No. CB(2)2079/05-06(01) – Letter dated 18 May 2006 from the Law Society of Hong Kong on the latest position on "Qualifying Insurers Scheme of the Law Society of Hong Kong")

2. Members noted that the above papers had been issued to the Panel.
3. Regarding the Consultation Paper on the Proposed Implementation of a Five-day Week in the Judiciary, the Chairman proposed that the Panel should discuss the Consultation Paper and the impact of the proposal on court users. Members agreed.
4. Regarding the letter dated 18 May 2006 from the Law Society of Hong Kong on the latest position on the Qualifying Insurers Scheme (QIS) of the Law Society of Hong Kong, the Chairman explained that as agreed at the meeting on 24 April 2006, the Law Society had informed the Panel of the decision of its members on the QIS reached at the Extraordinary General Meeting on 27 April 2006. According to the Law Society's letter, its members had voted by a large majority not to replace the existing Professional Indemnity Scheme by a QIS. The Law Society had set up a Professional Indemnity Scheme Review Working Party to identify any deficiencies in the existing scheme, consider how they might be remedied, and make appropriate recommendations. The Chairman suggested that the Law Society be requested to keep the Panel posted of further developments. Members agreed.

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(*Post-meeting note: A letter conveying the decision of the Panel was sent to the Law Society on 23 May 2006. In its reply letter dated 5 June 2006, the Law Society advised that the Professional Indemnity Scheme Review Working Party would report back to the Law Society Council in six months' time, and it would revert to the Panel in due course.*)

5. Regarding the Consultation Paper prepared by the Administration on "Proposed amendments to section 13 of the Conveyancing and Property Ordinance (Cap. 219)", the Chairman said that the proposals in the Consultation Paper would affect transactions of properties. The Panel would keep in view further developments.

III. Items for discussion at the next meeting

(LC Paper No. CB(2)2052/05-06(01) – List of outstanding items for discussion

LC Paper No. CB(2)2052/05-06(02) – Letter dated 11 May 2006 from Hon LI Kwok-ying

LC Paper No. CB(2)2052/05-06(03) – List of follow-up actions)

6. The Chairman referred members to the letter dated 11 May 2006 from Mr LI Kwok-ying. According to Mr LI, it had been reported in the press recently that some part time judges were members of a political party. This had given rise to public concern about the impartiality of judges. Mr LI had expressed concern that the guidance in the Guide to Judicial Conduct that judges should refrain from membership in or association with political organisations only applied to full time judges, and not part time judges. He requested that the matter be discussed by the Panel.

7. Members agreed that the following items should be discussed at the next meeting on 26 June 2006 –

- (a) Research report on the Jurisdiction of Ombudsman Systems in Selected Places;
- (b) Consultation Paper on Proposed Implementation of a Five-Day Week for the Judiciary;
- (c) Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform; and
- (d) Political affiliation of judges.

8. Members also agreed that the meeting should be extended by one hour to 7:30 pm to allow for sufficient time for discussion of the above four agenda items.

9. Regarding paragraph 7(d) above, Members agreed that to facilitate discussion, the Judiciary Administration should be requested to provide a paper to set out, inter

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alia, the different categories of judges in the Judiciary, their duties and responsibilities, the applicability of the Guide to Judicial Conduct concerning political affiliation to these judges, and an explanation as to why the Guide did not apply to certain categories of judges. The Panel should also request the Judiciary Administration to provide relevant information in some overseas jurisdictions, if available, for the information of members.

10. The Chairman suggested that representatives from the Hong Kong Human Rights Monitor be invited to attend the meeting for discussion of this item, as freedom of association was involved. Ms Emily LAU suggested that academics from the law schools of the local universities should also be invited to give views on the issue, and to provide relevant information in overseas jurisdictions, if available. Members agreed.

11. Ms Miriam LAU said that she adopted an open mind on the matter. However, the Panel should discuss how to address the public concern about the impartiality of judges if part time judges were allowed to be members in or associated with political organisations. The Panel should take into consideration any submissions received from interested organisations or members of the public.

12. The Chairman said that as the Civic Party was involved in the matter of which she was a member, it would be more appropriate for the discussion of the item be presided by another Panel member. She further said that Mr LI Kwok-ying had also agreed that as he had proposed the agenda item, it would not be appropriate for him to preside over the discussion as the Deputy Chairman. The Panel should therefore elect another member to preside over the discussion of the item at the next meeting.

IV. Matters arising

(LC Paper No. CB(2)2052/05-06(04) – Draft report of the Panel to the House Committee on "Issues relating to the imposition of criminal liability on the Government")

13. Members endorsed the draft report on "Issues relating to the imposition of criminal liability on the Government", and agreed that it should be forwarded to the Administration for comments.

14. On behalf of Ms Audrey EU, Ms Emily LAU sought clarification on why the information on the measures taken in respect of the 156 cases of contravention of environment-related legislation reported to the Chief Secretary for Administration (LC Paper No. CB(2)1951/05-06(01)) had been classified as confidential.

15. The Clerk explained that she had sought clarification from the Administration but the latter had requested that the paper be issued as a confidential document. The Clerk added that a similar confidential paper had been provided to the Working Group to Study Issues relating to Imposition of Criminal Liability on the Government or Public Officers and was discussed at the closed meetings of the Working Group.

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16. Ms Emily LAU said that she did not agree that the paper should be classified as confidential. She considered that the paper should be discussed by the Panel at an open meeting, and the Administration should be requested to explain why the paper had been so classified.

17. The Chairman requested the Clerk to seek clarification from the Administration, and members could consider how to follow up upon receipt of the reply from the Administration.

(Post-meeting note: A letter was sent to the Administration on 23 May 2006. The Constitutional Affairs Bureau had subsequently advised that having consulted departments handling the matter, the information in the paper might be treated unclassified. The Panel was advised of the Administration's advice vide LC Paper No. CB(2) 2460/05-06 on 19 June 2006.)

V. Pilot Scheme on Mediation of Legally Aided Matrimonial Cases

(LC Paper No. CB(2)2039/05-06(01) – Paper provided by the Administration on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases")

LC Paper No. CB(2)2052/05-06(05) – Background brief prepared by the LegCo Secretariat on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases")

18. Deputy Director of Administration (DD of Adm) said that as requested by members, an interim update on the progress of the Pilot Scheme on Mediation of Legally Aided Matrimonial Cases (the Pilot Scheme) launched by the Legal Aid Department (LAD) on 15 March 2005 had been provided for members' reference. The paper provided information on the caseload and progress of the Pilot Scheme as of 7 April 2006, the panel of mediators, publicity of the Pilot Scheme, the observations made by the Steering Committee overseeing the Pilot Scheme, and the way forward put forth by the Administration.

19. Mr Robin EGERTON of the Hong Kong Bar Association said that mediation was constructive in resolving disputes in matrimonial cases. The provision of mediation services would be beneficial not only to the legally aid persons but also to the taxpayers.

Discussion

20. The Chairman noted from paragraphs 5 to 8 of the Administration's paper that both the take-up rate and success rate of the Pilot Scheme were quite low. The legally aided persons in 194 out of 4 781 cases had expressed interest to attempt mediation. Only 68 out of the 194 cases were referred to mediators, of which 26 completed mediation with full or partial agreement, and 23 were still in process. The Chairman asked whether the Administration had decided to turn the Pilot Scheme into

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a standing feature of legal aid services in spite of the low take-up rate and success rate.

21. Director of Legal Aid (DLA) explained that the small caseload did not come as a surprise. This was because there was a large number of cases for which mediation was not suitable (i.e. domestic violence/child abuse was involved), not necessary (i.e. there was no real issue in dispute), or not possible (i.e. aided person/opposite party was a mental patient, the opposite party could not be located/refused to participate).

22. DLA added that although the Pilot Scheme ended on 14 March 2006, most of the cases were ongoing. Assistance would continue to be provided under the Pilot Scheme to legally aided matrimonial cases where the parties had applied for legal aid before that date.

23. DD of Adm explained that mediation was an alternative dispute resolution process. The Pilot Scheme had provided a viable option for legally aided persons. They could choose to use mediation service at any stage as their cases progressed. DD of Adm added that as most of the cases were still ongoing, the Administration would conduct the final evaluation of the Pilot Scheme and consider the way forward when more cases had been concluded. It would examine the propriety of turning the Pilot Scheme into a standing feature of legal aid services and would evaluate the resource implications of providing legal aid for mediation of matrimonial cases, including cost and the duration for completing the legally aided cases, as well as the operational and legislative requirements involved. The Administration aimed to provide a final evaluation report in 2007.

24. Mr James TO pointed out that as the mediation service was paid by LAD, the opposite parties in matrimonial cases could have the perception that if they agreed to mediate, the legally aided persons would be in an advantaged position. They could therefore be unwilling to use the mediation service under the Pilot Scheme, and that could have lowered the take-up rate.

25. DLA clarified that the opposite parties were contacted by the Judiciary's Mediation Coordinator's Office (MCO), and not by LAD. The parties concerned were invited to attend an information session arranged by MCO at which they would be briefed on the details of the Pilot Scheme. It would also be explained to them that mediation service would be provided to them free of charge. DLA added that the parties concerned could choose their own mediators. There should not be concern about the impartiality of the mediators.

26. Mr James TO said that the Judiciary's Pilot Scheme on Family Mediation was launched in 2000 when there was relatively less awareness of mediation. However, he noted from the background brief prepared by the Legislative Council Secretariat that the success rate of the 930 cases funded by the Judiciary's Pilot Scheme was about 78%, which was higher than that of LAD's Pilot Scheme, although the latter was launched as recently as early 2005.

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27. DLA replied that the 930 cases funded by the Judiciary's Pilot Scheme had included non-legally aided cases. As controversial issues or larger amounts of money were involved in some of these cases, it was natural for the parties concerned to resort to mediation to resolve their disputes.

28. DLA further explained that a possible factor affecting the take-up rate of LAD's Pilot Scheme was the Judiciary's Pilot Scheme on Financial Dispute Resolution (FDR), which involved the reform of ancillary relief procedures in matrimonial proceedings. The FDR scheme appeared to have facilitated settlement of quite a number of cases at an early stage. However, the take-up rate of the Judiciary's Pilot Scheme was not affected because it was completed before the launch of the FDR scheme.

29. In response to the Chairman, DLA informed members that the FDR scheme was also a pilot scheme. The scheme would operate until December 2006 after which a review would be conducted.

30. Mr James TO said that LAD should analyse the 930 cases funded by the Judiciary's Pilot Scheme to find out the number of non-legally aided cases and the reasons for their high success rate. He requested the Administration to analyse the 194 cases referred to MCO under the LAD's Pilot Scheme, in order to obtain information on the stages at which the legally aided persons had decided to opt for mediation. DLA undertook to provide the information.

Adm

31. Ms Miriam LAU said that she supported the promotion of mediation as an alternative dispute resolution process as it could often bring about a win-win solution, and society as a whole could benefit. The small caseload of the Pilot Scheme was understandable since mediation was a new kind of service. It was necessary to change the common public perception that there was bound to be confrontation between the two parties involved in matrimonial cases, and to promote the use of mediation for resolving matrimonial disputes.

32. Ms LAU further said that it would be difficult to persuade legally aided persons to opt for mediation as the legal costs of the court proceedings were not a concern to them.

33. DLA explained that under the Court's Practice Directions, lawyers were required to file a document with the court certifying that they had advised their clients of the availability of mediation. Lawyers doing legally aided cases were required by LAD to advise their clients of the Pilot Scheme and to report to LAD on whether their clients would attempt mediation under the Pilot Scheme. DLA believed that the lawyers concerned would duly explain the advantages of using mediation service to their clients.

34. Mr LI Kwok-ying noted from the Administration's paper that while the number of hours for mediation under the Pilot Scheme was capped at 15 hours per case, the average time spent per mediated case was only 8.5 hours. Mr LI pointed out that

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since resources were scarce, the Administration should reduce the maximum number of hours for mediation in light of the average time spent per mediated case under the Pilot Scheme so as to save resources, if mediation service would continue to be provided in future.

35. In response to the Chairman, DLA informed members that there were only a very small number of cases in which the total time spent exceeded 15 hours. Less than 15 hours were spent in most of the cases. DLA added that the maximum number of hours for mediation per case had not yet been determined, if mediation service would continue to be provided. The Administration would take into account the views of Mr LI Kwok-ying in the final evaluation of the Pilot Scheme.

36. The Chairman, however, considered that the number of hours for mediation per case should not be capped, as it would hinder the effective operation of the Scheme.

37. DD of Adm explained that the Pilot Scheme was modelled on the Judiciary's Pilot Scheme on Family Mediation launched in 2000. In line with the Judiciary's Pilot Scheme, the number of hours for mediation under the Administration's Pilot Scheme was capped at 15 per case. DD of Adm added that mediators were required to submit reports to MCO and LAD on the number of hours used. Based on the mediators' reports, LAD could approve funding beyond the initial 15 hours in suitable cases.

38. As regards the higher success rate in non-legally aided cases, Mr Robin EGERTON was of the view that the parties involved in non-legally aided cases would be more willing to opt for mediation so as to reduce legal costs. For legally aided cases, there was usually a wrong perception that the result would have impact on resources, particularly in cases where custody and maintenance issues were involved.

Adm

39. The Chairman requested the Administration to analyse the data on the relevant schemes of the Administration and the Judiciary, and provide the findings for members' reference. She also requested the Administration to revert to the Panel on the final evaluation of the LAD's Pilot Scheme and the FDR scheme, as well as the latter's impact on the Pilot Scheme.

VI. Maximum sentence for offence of perverting the course of justice

(LC Paper No. CB(2)2037/05-06(01) – Paper provided by the Administration on "Review of penalty for perverting the course of public justice")

40. Deputy Solicitor General (DSG) briefed members on the Administration's proposed amendment to section 101I of the Criminal Procedure Ordinance (Cap. 221) to remove the limit for the maximum period of imprisonment of seven years for an offence of doing an act tending and intended to pervert the course of public justice, and to provide for such an offence to be punishable by fine and imprisonment at the discretion of the court. The Administration had put forth the proposal taking into account the concern of the Court of Appeal regarding appropriate sentencing in the

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worst types of such offence, and experience in other common law jurisdictions. DSG added that subject to the views of members, the proposed legislative amendment would be introduced in an omnibus bill in the next legislative session.

41. Mr James TO asked whether there were other court cases in which the offence of perverting the course of public justice was of similar gravity as that in the case quoted in the Administration's paper (*Secretary for Justice v WONG Kwok-kau* [2004] 3 HKLRD208).

42. DSG responded that the court was satisfied that the maximum sentence of seven years was a sufficient punishment for such an offence in most cases. However, in *Wong Kwok-kau*, the Court of Appeal considered that the maximum sentence for the offence was not a sufficient deterrent for a defendant who was faced with a sentence of fourteen years or more for the dangerous drug offence.

43. Ms Emily LAU asked whether public consultation would be conducted on the proposed legislative amendment. She also expressed concern about the consistency in the imprisonment sentence to be imposed by the court, as it would be determined at the discretion of the court under the Administration's proposal.

44. DSG assured members that a consultation exercise would be conducted in line with the usual practice for legislative proposals. DSG added that the court would make reference to case law and sentencing guidelines in imposing sentence of imprisonment. The existing problem was that the court could not impose a higher sentence commensurate with the gravity of the offence.

45. In response to the Chairman, DSG said that the two legal professional bodies had not been consulted on the proposed amendment. The Chairman remarked that there could be controversies over the proposed amendment when public consultation was conducted. She pointed out that punishment for perverting the course of public justice was, at present, subject to the limits provided under section 101I(1) of the Criminal Procedure Ordinance which stated that "where a person is convicted of an offence which is an indictable offence and for which no penalty is otherwise provided by any Ordinance, he shall be liable to imprisonment for 7 years and a fine". The Administration had proposed to amend section 101I so as to empower the court to determine the length of imprisonment for the offence at its discretion without any limit on the maximum sentence. The Chairman expressed reservation on the basis for granting such a discretion to the court, as well as for lifting the maximum sentence limit in respect of the offence of perverting the course of public justice only, and not other indictable offences which could be of similar gravity. She added that the offence of perverting the course of public justice could also differ in gravity in different cases.

46. DSG responded that the Administration had studied the situations in other common law jurisdictions in putting forth the proposed legislative amendment. As described in paragraphs 8 to 10 in the Administration's paper, the offence was punishable in England by fine and imprisonment at the discretion of the court without a limit on the period of imprisonment.

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47. The Chairman and Mr LI Kwok-ying requested the Administration to provide the following additional information –

- (a) the maximum years of imprisonment for the offence of perverting the course of public justice and the sentences imposed by the courts in other common law jurisdictions; and
- (b) the relevant case law in respect of (a) above.

Adm DSG undertook to provide the requested information to members for reference.

VII. Any other business

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

Council Business Division 2
Legislative Council Secretariat
17 July 2006