

立法會
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Panel on Administration of Justice and Legal Services

**Minutes of special meeting
held on Friday, 20 October 2006, from 4:30 pm to 5:30 pm
in the Chamber of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon LI Kwok-ying, MH, JP
- Members absent** : Hon MA Lik, GBS, JP (Deputy Chairman)
Hon James TO Kun-sun
Hon Jasper TSANG Yok-sing, GBS, JP
- Public Officers attending** : Item I
Department of Justice
Mr WONG Yan-lung, SC, JP
Secretary for Justice
Mr Robert ALLCOCK, BBS, JP
Solicitor General
Miss Annie TAM, JP
Director of Administration & Development
Mr John READING, SC
Deputy Director of Public Prosecutions

Administration Wing, Chief Secretary for Administration's
Office

Miss Elizabeth TSE
Director of Administration

Ms Shirley YUEN
Deputy Director of Administration

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

Staff in attendance : Mrs Vivian KAM
Assistant Secretary General 2

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Action

I. Briefing by the Secretary for Justice and the Director of Administration on the Chief Executive's 2006-07 Policy Address

(2006-07 Policy Address - "Proactive Pragmatic Always People First")

2006-07 Policy Agenda

Leaflet on 2006-07 Policy Address

LC Paper No. CB(2)31/06-07(01) - Paper provided by the Administration on "Policy Initiative of the Administration Wing, Chief Secretary for Administration's Office"

LC Paper No. CB(2)31/06-07(02) - Paper provided by the Administration on "2006-07 Policy Initiatives of the Department of Justice")

Briefing by the Administration

The Chairman welcomed representatives of the Administration to the meeting to brief the Panel on the initiatives in the 2006-07 Policy Agenda relating to the Department of Justice (DOJ) and the Administration Wing, Chief Secretary for Administration's Office.

2. Secretary for Justice (SJ) briefed members on the paper provided by the Administration on the 2006-07 policy initiatives of DOJ (LC Paper No. CB(2)31/06-07(02)). A copy of SJ's speaking note was tabled at the meeting and issued to members vide LC Paper No. CB(2)161/06-07 after the meeting.

Action

3. Director of Administration (D of Adm) briefed members on the paper provided by the Administration on the policy initiatives of the Administration Wing, Chief Secretary for Administration's Office (LC Paper No. CB(2)31/06-07(01)).

Issues raised by members

Judicial review and the Basic Law

4. Mr LI Kwok-ying said that the number of judicial reviews seeking to challenge the compliance of local legislation with the Basic Law had increased since July 1997. He asked whether DOJ had adequately performed its role in giving legal advice to Government bureaux and departments and drafting legislation, so as to ensure that their policies and legislative initiatives complied with the Basic Law. He pointed out that loopholes and grey areas in law and different interpretations of the Basic Law could give rise to legal challenges. He asked whether measures such as promoting the public understanding of the Basic Law would be introduced to address these problems. He specifically asked about the involvement of DOJ in promoting the public awareness and understanding of the Basic Law in schools, including tertiary institutions and law schools.

5. SJ disagreed with the view that the increase in judicial reviews was a reflection on the work of DOJ, or that there were a lot of loopholes or grey areas in local legislation. He explained that the majority of judicial reviews were related to human rights issues. The Basic Law came into force in July 1997 and its Chapter III set out the fundamental rights and duties of the residents of Hong Kong. The human rights protection enshrined therein was substantive, as it encompassed international covenants on human rights applicable to the people of Hong Kong. If existing laws could not meet the human rights standard prescribed in the Basic Law, they would be subject to legal challenge. The judgments handed down by the court revealed that certain laws did not meet the requirement and the relevant provisions had to be struck down. However, this did not mean that the legal system was flawed. It merely reflected the breadth of the human rights protection conferred by the Basic Law. SJ informed members that Hong Kong was not the only place having this problem. Since the Human Rights Act came into operation in the United Kingdom (UK) in 2002, similar legal challenges had been lodged in court. Hong Kong would face this challenge in a proactive manner, by reviewing and refining relevant legislative provisions to ensure compliance with the Basic Law.

6. SJ further said that DOJ would do its best to ensure that new policies and initiatives introduced by the Government complied with the requirements of the Basic Law. At the same time, promotion on the public awareness and understanding of the Basic Law would continue. DOJ had assisted in this aspect by providing legal advice to the Basic Law Promotion Steering Committee led by the Chief Secretary for Administration. It had also participated in the publication of the Basic Law Bulletin, provided training material and produced a self-learning booklet for promoting the Basic Law. Between January and September 2006, it had organised seminars on the

Action

implementation of the Basic Law for civil servants and the public. Through the Committee on Promotion of Civic Education, DOJ had also assisted in the promotion of the Basic Law in schools.

Exchanges between the legal profession in Hong Kong and the Mainland

7. Ms Audrey EU considered that the Administration should promote mutual legal understanding between Hong Kong and the Mainland. She noted that many legal disputes which involved Hong Kong and the Mainland mainly arose as a result of different legal opinions and different legal systems of the two jurisdictions. She suggested that the Administration should facilitate exchanges between members of the legal profession in both jurisdictions on the academic front by organizing seminars and court visits with a view to identifying practical problems and resolving legal differences. She pointed out that at present, visits of members of the Hong Kong Bar Association to the Mainland could not be arranged easily. She hoped that DOJ could take the lead in breaking the political barrier so that more informal exchanges could be arranged for members of the legal profession with their counterparts in the Mainland.

8. SJ responded that DOJ would promote mutual understanding among the legal communities of Hong Kong and the Mainland on both official and unofficial basis. On the official level, during his visit to Beijing in April this year, he had met officials of the State Council and the Standing Committee of the National People's Congress. Following the announcement of China joining the World Trade Organisation (WTO) in December 2001, the Mainland had embarked on a large volume of legislative work. The Mainland counterparts were interested to know how such legislation was made in Hong Kong. To this end, DOJ had undertaken to provide relevant textual material for their reference and to discuss legal issues relating to WTO matters with them as and when necessary. Efforts of this nature to enhance mutual legal assistance and cooperation would continue to be pursued by DOJ.

9. SJ said that DOJ had entered into Legal Services Co-operation Agreements with the Justice Bureaux of seven provinces and municipalities, namely Qingdao, Chongqing, Beijing, Nanjing, Shanghai, Zhejiang and Shenzhen. By virtue of these Agreements, DOJ and the Justice Bureaux had provided training and paid visits to officials of the other side. SJ further said that these activities organized for the Mainland counterparts were academic in nature, which included visits to the Hong Kong Bar Association, the Law Society of Hong Kong, courts and the law faculties of tertiary institutions. SJ added that in November 2005, the Hong Kong Bar Association, the Law Society of Hong Kong and DOJ had attended the China Lawyers Forum in Tianjin, and participants had the opportunity to exchange views on the legal systems of the two jurisdictions. Representatives of the Hong Kong Bar Association had called on the Ministry of Justice in Beijing after attending the forum in Tianjin. The Hong Kong Bar Association had also benefited from the Closer Economic Partnership Arrangement (CEPA) between Hong Kong and the Mainland. One of the advantages offered to the law firms under CEPA was that Hong Kong permanent residents with Chinese citizenship were allowed to become qualified on the Mainland after examination and engage in specific legal work in Mainland law firms. SJ

Action

stressed that it was important for Government officials and the legal profession to join hands to promote mutual legal understanding between Hong Kong and the Mainland.

Developing mediation services

10. Ms Audrey EU said that mediation was not popular in resolving legal disputes. She asked whether this was due to the lack of awareness on the part of the public or the lack of mediators to undertake the work, and requested DOJ to consider measures to promote mediation in the community.

11. SJ said that mediation as a form of alternative dispute resolution had been rapidly developing in other jurisdictions. In Hong Kong, mediation entailed a change in culture. He noted that some lawyers were sceptical about mediation as they were under the impression that this might result in less work for them. SJ further said that it was necessary to enhance promotion of and instil public confidence in mediation. The community would appreciate the merit of mediation if disputes could be resolved to the satisfaction of users. It was also necessary to provide local and overseas training to ensure professionalism of the mediators. This year, the Judiciary had invited two leading mediation specialists from UK to give a briefing to judges and lawyers on the effectiveness of mediation.

12. Ms Miriam LAU disagreed that solicitors were afraid of losing business and hence sceptical about mediation. She pointed out that the Chairman of the Hong Kong Mediation Council was a solicitor and she herself was also a member of that Council. Solicitors were aware of the merits of mediation and that successful mediation could result in a win-win situation for the parties concerned. The public also found the idea of mediation innovative. The crux of the issue was that appropriate measures should be introduced to promote the public understanding of mediation. She said that mediation could be implemented in the following areas -

- (a) labour disputes - it would be better for mediation to be initiated by the labour sector as its preference to settle disputes in court was not conducive to improving employee and employer relationships or developing mediation services;
- (b) claims for personal injuries; and
- (c) disputes in the community e.g. building management disputes.

13. SJ clarified that it was not his personal view that lawyers were sceptical about mediation; only some were. This view was shared by some members of the Hong Kong Mediation Council and the Hong Kong International Arbitration Centre. To correct the misconception, the Judiciary had recently organised a two-day briefing on the subject. SJ agreed that disputes relating to labour and building management might be two areas suitable for practising community mediation. Successful cases of resolving disputes by mediation would help promote understanding of the service and boost demand in the market. SJ stressed that he had accorded priority in developing

Action

mediation services. He believed that this could be achieved with the collaborative effort of the relevant parties such as insurance companies, legal and medical sectors, arbitration and mediation bodies. SJ added that he was aware that the insurance industry had resorted to the use of mediation to resolve compensation matters for a personal injury case. In addition to the pilot scheme on mediation of legally aided matrimonial cases which was on-going, the Hong Kong International Arbitration Centre had been promoting mediation in the fields of construction and family law.

14. Mr Martin LEE expressed concern that the existing insurance policy of motor vehicles required an insured party not to admit liability for an accident without the consent of the insurer. In his view, disputes involving motor vehicle accidents could be easily resolved by mediation in particular when the party at fault was willing to admit liability. However, an insured party was discouraged from admitting liability because in doing so, he would not be covered by the insurance policy. Mr LEE said that law should be enacted to render void such provisions in a motor vehicle insurance policy.

15. SJ said that as insurance companies were responsible for payment for claims, their interest had to be safeguarded. It would be prudent for the insured party to keep the insurance company informed of the details of the accident before he applied for compensation claims. The suggestion to render certain provisions in the insurance policy ineffective when an insured party admitted liability in an accident required careful consideration, as it would impact on the long-established practice of the insurance industry. SJ added that mediation was not the only form of dispute resolution and it should not be promoted at the expense of other parties, say an insurance company. In a claim where an insurance company was involved, it could play an active role in dispute resolution. He noted that the insurance industry was positive about mediation and was well aware that it could save litigation costs.

Development of Hong Kong as a legal services centre

16. Ms Miriam LAU said that the initiative of DOJ to develop Hong Kong as a regional centre for legal services, dispute resolution and arbitration should be pursued more pro-actively. She expressed concern that although Hong Kong had 400 to 500 arbitrators, the arbitration cases handled per year amounted to about 300 only and the majority were local cases. She said that more could be done to promote Hong Kong as a centre for international arbitrations, among which was to enhance legal co-operation with Mainland provinces with a view to attracting legal disputes to be arbitrated in the courts of Hong Kong.

17. SJ said that the initiative to develop Hong Kong as a regional centre for legal services and dispute resolution involved a great amount of work and it had to be tackled on different fronts. Apart from maintaining professionalism in the provision of legal services, Hong Kong had to take account of competition in the region. The theme of promoting Hong Kong as a legal centre was its quality services. As part of China, Hong Kong had a competitive edge over other places in establishing a foothold in the market. In July 2006, Hong Kong had signed an agreement to implement the

Action

arrangement for reciprocal enforcement judgments in specific commercial matters with the Mainland. The arrangement would attract Mainland commercial disputes to be resolved in Hong Kong. To enhance participation in the international front, a consultation exercise would be conducted in respect of the Hague Convention on Choice of Court Agreements which, if applied to Hong Kong, would make similar provision for choice of courts and reciprocal enforcement of judgments with other parties to the Convention. At the local front, the review of the law of arbitration was being undertaken with participation from the legal profession, arbitration experts and others for the purpose of simplifying the law to make it more user-friendly. All these would help consolidate and enhance the position of Hong Kong as a regional centre for legal services and dispute resolution.

18. The Chairman said that the Panel would discuss the issue at the meeting on 12 December 2006. She requested DOJ to prepare a paper setting out the progress and the effectiveness of the measures taken to develop Hong Kong as a regional centre for legal services and dispute resolution.

Recovery agents

19. Ms Audrey EU said that victims of personal injuries had been approached by recovery agents who claimed to be able to help them in their claims for compensation. Recovery agents would charge about 20% of the compensation received as their service fees if the claims were successful. Ms EU said that publicity had to be stepped up to enhance public awareness that such practice of recovery agents was illegal. She asked about the measures taken by the Administration in this respect.

20. Ms Miriam LAU said that the public should be informed of the illegal activities of recovery agents and the risks involved in engaging recovery agents. If an accident victim who had a case which was likely to be successful in his claim for compensation, it would cost him nothing to be represented by a lawyer in court because it was the losing party who had to pay for litigation costs. However, if he had engaged a recovery agent, he would be charged a percentage of the compensation received. For an accident victim whose claim for compensation was unlikely to be justified, a lawyer would have advised him against instituting legal proceedings. However, if he engaged a recovery agent, he might not receive the proper legal advice such as the risk of bearing the defendant's litigation costs when he lost the case. Ms LAU added that an accident victim could run into financial difficulty if he had made an uninformed decision in engaging a recovery agent.

21. SJ said that the problem of recovery agent could not be resolved overnight. He was told that some recovery agents had employed aggressive marketing tactics such as preparing soup for accident victims in hospitals in order to tout for business. Under common law, assisting or encouraging a party to file a lawsuit might constitute such civil or criminal offences as maintenance and champerty. However, gathering sufficient evidence to justify prosecution was not easy. SJ added that the relevant law enforcement agency was conducting an investigation of one suspected case. If evidence of criminal conduct was uncovered, DOJ would consider appropriate prosecution proceedings.

Action

22. SJ informed members that the common law offences of maintenance and champerty were abolished in UK, but they remained as common law offences in Hong Kong. However, regulation of recovery agents in the form of legislation was being considered in UK. Looking at the issue from a wider prospective, recovery agents were providing a form of claims service to the public. It was usually related to the issue of the conditional fee arrangement (or "no win, no fee arrangements") which was being studied by the Conditional Fees Sub-committee of the Law Reform Commission. SJ said that the Consultation Paper on Conditional Fees was issued for public comment and the Sub-committee was in the process of finalizing the report. SJ pointed out that measures had been taken to prevent the illegal activities of recovery agents, such as posting of notices in some Hospital Authority hospitals to alert accident victims to the possible pitfalls of seeking help from recovery agents to pursue a claim in court.

Victims of Crime Charter

23. Ms Emily LAU said that her office had been vandalized and she had requested the Police to keep her informed when the suspects were tried in court. She was aware that the suspects were fined but she was not notified of the date of the trial as the Police had withheld the information on the ground of protection of privacy. She expressed dissatisfaction that, as a victim of crime, she was deprived of the right to information as provided in the Victims of Crime Charter (the Charter). She referred to paragraph 7 of SJ's speaking note and asked what measures would be put in place to ensure "a fair deal for victims and witnesses in dealing with crime".

24. Deputy Director of Public Prosecution (DDPP) said that he was not in a position to comment on individual cases. He explained that, under the Charter, those involved in the justice system were obliged to keep victims informed of the progress of the case. If the case was tried in court, it was usually the Police who should inform the victim of the date of hearing. When there was insufficient evidence to prosecute, DOJ would send a letter to inform the victim of the decision and the reasons for it. Some victims would contact DOJ to follow up the matter. An officer within DOJ had been designated to answer queries from these victims in relation to the matters raised in their cases.

25. DDPP further said that the usual procedure in court was that, on the first day of the hearing, the defendant would be asked whether or not he would plead guilty. If he pleaded guilty, the case would be dealt with on that occasion. If he pleaded not guilty, the case would be adjourned for trial. The witnesses including the victim would be called to give evidence. As regards publicity, notices of the Charter which set out the rights and duties of victims of crime were posted in District Offices, Police stations and Government buildings.

26. SJ supplemented that witnesses were also protected by the Charter. In the case of "sensitive" witnesses such as children, DOJ and the Police were required to take special measures to ensure greater protection having regard to the relevant

Action

guidelines. For instance, arrangements would be made for the trial to take place as early as possible and special arrangements such as video would be used to collect evidence from witnesses.

27. Ms Emily LAU said that many victims were not aware of their rights and duties. She said that the issue should be taken up by the Panel on Security for further discussion.

Application of the Prevention of Bribery Ordinance to the Chief Executive

28. Ms Emily LAU said that almost ten years had lapsed since the change of sovereignty of Hong Kong in 1997 and the Administration had yet to introduce a bill on the application of the Prevention of Bribery Ordinance (POBO) to the Chief Executive (CE). She expressed concern that the 2006-2007 Policy Address was silent on the subject. She asked about the timing for introducing the bill into LegCo.

29. D of Adm responded that since the issue fell under the purview of the Panel on Constitutional Affairs, it was therefore not included in her paper prepared for this Panel. She said that the proposal to apply certain provisions of POBO to CE was submitted to and deliberated by the Subcommittee on Application of Certain Provisions of the Prevention of Bribery Ordinance to the Chief Executive in late 2005. Subsequently, the Administration had proceeded with the preparation of the necessary legislative amendments to POBO. In the course of drafting the proposed legislative amendments, the Administration considered that a careful assessment of the implications of some amendments was required, e.g. whether the scope of some amendments was too wide or whether they were legally enforceable. She assured members that the Administration was actively following up the matter and was working towards introducing the bill in the 2006-2007 legislative session.

30. SJ supplemented that some complex issues had arisen from drafting the proposed amendments. For example, under section 8 of POBO, the offering of any advantages to any "prescribed officer" by a person without lawful authority or reasonable excuse while having dealings of any kind with the Government through any department should be guilty of an offence. He explained that if a "prescribed officer" was to include CE, a member of the public who presented a small gift to CE could be caught by the law.

31. There being no other business, the meeting ended at 5:38 pm.