

立法會
Legislative Council

LC Paper No. CB(2)1966/06-07
(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, 26 March 2007, at 4:30 pm
in Conference Room A of the Legislative Council Building

- Members present** : Hon Margaret NG (Chairman)
Hon MA Lik, GBS, JP (Deputy Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon LI Kwok-ying, MH, JP
- Member absent** : Hon Emily LAU Wai-hing, JP
- Public Officers attending** : Item IV
The Administration
Administration Wing, Chief Secretary for Administration's Office

Miss Elizabeth TSE
Director of Administration

Mr Benjamin CHEUNG
Director of Legal Aid

Miss Shirley YUEN
Deputy Director of Administration

Mr William CHAN
Deputy Director of Legal Aid (Administration)

Ms Jennie HUI
Deputy Director of Legal Aid (Application and Processing)

Mrs Alice CHEUNG
Assistant Director of Administration

Item V

The Administration

Department of Justice

Ms Lena CHI
Deputy Law Officer (Treaties and Law)

Mr Frank POON
Deputy Principal Government Counsel
(Treaties and Law)

Miss S K LEE
Deputy Principal Government Counsel
(Treaties and Law) (Acting)

Ms Frances HUI
Senior Government Counsel
(Law Drafting Division)

**Attendance by
invitation** :

Item IV

Legal Aid Services Council

Mr. Paul CHAN, MH
Chairman

Mr Victor LI
Secretary

Hong Kong Bar Association

Mr Rimsky YUEN, SC
Chairman

Mr P Y LO
Member of Bar Council

1st Step Association

Mr SO Chiu-kwong
Vice-Chairman

Miss NG Yan-yee
Senior Organizer

Disable and Carer Concern Group

Mr CHAN Chi-chiu
Executive member

Miss FAN Ngan-yau
Carer's member

Item V

Hong Kong Bar Association

Mr Rimsky YUEN, SC
Chairman

Mr P Y LO
Member of Bar Council

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

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

Miss Monna LAI
Assistant Legal Adviser 7 (Item V only)

Mrs Eleanor CHOW
Senior Council Secretary (2)4

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2)1393/06-07 - Minutes of meeting on 26 February 2007)

The minutes of the meeting held on 26 February 2007 were confirmed.

II. Information paper issued since last meeting
(LC Paper No. CB(2)1241/06-07(01) - Administration's letter dated 28 February 2007 on "Limited liability for professional practices")

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LC Paper No. CB(2)1362/06-07(01) - Administration's reply on "Legal aid in coroners' inquest"

LC Paper No. CB(2)1414/06-07(01) - Administration's response to issues relating to "Civil Justice Reform" and "Implementation of a five-day week for the Judiciary")

2. Members noted that the above papers had been issued to the Panel.

III. Items for discussion at the next meeting

(LC Paper No. CB(2)1398/06-07(01) - List of outstanding items for discussion

LC Paper No. CB(2)1398/06-07(02) - List of items tentatively scheduled for discussion at Panel meetings in 2006-2007 session

LC Paper No. CB(2)1398/06-07(03) - List of follow-up actions

LC Paper Nos. CB(2)1321/06-07(01) - (04) - Papers on "Scheme of Provision of Certificate by Counsel under section 26A of the Legal Aid Ordinance")

3. Members agreed to discuss the following items at the next meeting on 23 April 2007 -

(a) Recovery agents

Members noted that at the Panel meeting on 22 January 2007, the Administration agreed to revert to the Panel in April 2007 on the outcome of the investigation into cases of recovery agents suspected of engaging in illegal activities and related issues. Members agreed that the deputations which had given views at the meeting in January 2007 would be invited to attend the next meeting; and

(b) Juvenile justice system

Members noted that the Administration had provided a paper to report progress of the review of the proposal to incorporate the principles and practices of restorative justice in dealing with juvenile offenders. Members agreed to follow up the relevant issues at the next meeting. Members also agreed that members of the Panel on Security and the Panel on Welfare Services, as well as other LegCo Members, would be invited to join the discussion. The deputations which had given views to the former Subcommittee on Juvenile Justice System would be invited to give views to the Panel.

4. The Chairman sought members' views on whether the Panel should discuss the operation of the Scheme of Provision of Certificate by Counsel under section 26A of

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the Legal Aid Ordinance as requested by Mr CHAN Siu-lan, a member of the public. No member considered it necessary for the Panel to discuss the matter.

IV. Provision of legal aid services

(LC Paper No. CB(2)1395/06-07(01) - Background brief prepared by the LegCo Secretariat

LC Paper No. CB(2)1395/06-07(02) - Administration's paper on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants"

LC Paper No. CB(2)1472/06-07(01) - Submission from the Legal Aid Services Council

LC Paper No. CB(2)1472/06-07(02) - Submission from the 1st Step Association

LC Paper No. CB(2)1472/06-07(03) - Information note from the Office of Hon Margaret NG)

5. The Chairman welcomed representatives of the Administration and the deputations to the meeting. She said that the purpose of the meeting was to receive views on the approach of the five-yearly review of the criteria for assessing financial eligibility limits of legal aid applicants and issues relating to the provision of legal aid services.

Briefing by the Administration

6. Director of Administration (D of Adm) introduced the paper which set out the Administration's proposed scope of the 2007 five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants. She said that the means test and the merits tests were the two cardinal criteria for granting legal aid. In assessing the financial eligibility of legal aid applicants, the Administration adopted a "financial capacity" approach. The Administration had introduced in 2006 a number of deductible items in computing the disposable income and disposable capital. According to the statistics of 2006-2007, only 5% of the legal aid applicants did not pass the means test under the Ordinary Legal Aid Scheme (OLAS) and the Supplementary Legal Aid Scheme (SLAS). For criminal legal aid, less than 1% of the applicants did not meet the means test. Under the current legal aid scheme, about 55% of the households in Hong Kong were eligible for the OLAS and over 70% of the households were eligible for the OLAS and SLAS.

7. D of Adm further said that the Administration would formulate more specific proposals for the five-yearly review in the latter half of 2007. She noted that members were concerned about the scope of the SLAS. The Administration would take the opportunity of this review to examine whether there was scope of improving the SLAS without undermining or jeopardising the financial viability of the scheme.

Views of deputations

8. Mr Paul CHAN, Chairman of the Legal Aid Services Council (LASC), made the following suggestions -

- (a) legal aid should be extended to mediation, an alternative form of dispute resolution;
- (b) the savings of legal aid applicants who were about to retire should be disregarded in computing their disposable capital;
- (c) the personal allowance deductible in calculating disposable income of applicants, which was currently equivalent to 35-percentile household expenditure, should be increased; and
- (d) issues such as the number of cases handled by assigned lawyers in private practice, the absolute right of legal aid applicants to select lawyers to represent them, and the role and operation of recovery agents in legal aid cases should also be considered in the context of the five-yearly review.

9. Mr Rimsky YUEN, Chairman of the Hong Kong Bar Association, said that the Bar Association supported the view of the Chairman of LASC that legal aid should be extended to mediation. He presented the Bar Association's views on the SLAS as follows -

- (a) the Bar Association, in giving views on the Law Reform Commission (LRC) 's Consultation Paper on Conditional Fees, had proposed that the existing financial eligibility limit of \$439,800 for the SLAS should be adjusted upward. The Bar Association had previously proposed that the limit should be increased to \$1 million. The main consideration was that the limit should be set at a reasonable level so as to allow the middle class who could not afford the high litigation costs to be eligible for legal aid and to have access to justice;
- (c) while the Bar Association did not support the proposed conditional fee regime, it proposed that the scope of the SLAS could be expanded to cover certain types of cases recommended by the LRC for the proposed regime, such as commercial cases in which an award of damages was the primary remedy sought and probate cases involving an estate.

10. Mr P Y LO, Member of the Bar Council, gave views on the financial eligibility limits as follows -

- (a) at present, the Director of Legal Aid (DLA) had discretion to waive the upper limit of means test in meritorious cases involving a possible breach of the Hong Kong Bills of Rights or an inconsistency with the

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International Covenant on Civil and Political Rights. DLA's discretionary power should be expanded to cover cases involving the fundamental rights of residents as stipulated in Chapter III of the Basic Law;

- (b) it was the Government policy to review the financial eligibility limits annually to take account of movements in CPI(C) and biennially to take account of changes of costs in private litigations. In the absence of information on changes in private litigations costs, he questioned whether it was appropriate for the Government to rely solely on the movements in CPI(C) in reviewing the financial eligibility limits for legal aid applicants; and
- (c) he agreed with the Chairman of the LASC that there was scope for increasing the allowance for household expenditure in calculating a legal aid applicant's disposal income.

11. Representatives of the 1st Step Association presented their views on financial eligibility limits for legal aid. They said that the stringent criteria for assessing financial eligibility of legal aid applicants had deterred victims of personal injuries from seeking legal aid. The Association suggested that the means test should be waived for the following types of legal aid applications -

- (a) employees' compensation claims;
- (b) professional negligence claims made by legal aid applicants who had become totally incapacitated as a result of personal injury by accident in the course of the employment, or who had reached retirement age; and
- (b) claims for damages made by legal aid applicants on behalf of family members who died by accident in the course of the employment.

12. Representatives of the Disable and Carer Concern Group presented a case which involved a claim for damages arising from the death of an applicant's son. While the applicant had appeared to be able to pass the merits test, her disposable capital had exceeded the financial limit. Although she had a strong case to institute legal proceedings, she could not do so because of the high litigation costs involved and the risk of losing the case. The case illustrated that the current financial eligibility limits had prevented her from having access to justice.

Discussion

13. The Chairman said that when the Panel received views on legal aid services in 2001-2002, some victims of personal injuries cases advised members that they had resorted to engaging recovery agents because of the difficulty in passing the means test for legal aid. The Chairman urged the deputations to provide information on cases involving recovery agents to the Administration for follow-up. They were also

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welcome to be present at the next meeting of the Panel to be held on 23 April 2007 when the item of recovery agents was discussed.

14. The Chairman referred members to the note prepared by her office on statistics relating to legal aid applications from 2004-2005 to 2007-2008 (tabled at the meeting and issued vide LC Paper CB(2) 1472/06-07(03) after the meeting). She pointed out that the number of legal aid applications received only represented some 40% of the number of enquires received, and legal aid was granted to 50% of the applicants. The note also provided the number of applications refused on means and on merits respectively. Noting that the actual expenditure on legal aid cases was lower than the estimated provision for four consecutive years from 2004-2005 to 2007-2008, the Chairman asked whether this was due to the stringent criteria on merits, and whether the legal aid scheme had addressed the needs of society.

15. Mr James TO held the view that in assessing the financial eligibility of a legal aid applicant, the Administration should take into account other relevant factors such as age and physical condition. For instance, in computing disposable capital, consideration should be given to disregarding the savings of an applicant who had passed the merits test and was approaching retirement age or had become incapacitated. Since the Administration had processed many legal aid applications in the past, it should have the knowledge on what other items could be included as deductibles in computing the disposable income and capital of an applicant.

16. Mr James TO conveyed the view of Mr Martin LEE, who had just left the meeting, that the existing legal aid schemes had not addressed the needs of the middle class and had not kept pace with social developments. The Administration should consider adopting new concepts to operate the SLAS, such as expanding the scope of the SLAS to cover other types of cases and increasing its financial eligibility limit.

17. D of Adm made the following points -

- (a) the fundamental principle that the SLAS was self-financing should be maintained. On whether the scope of the SLAS could be expanded to cover new types of cases, the Administration would need to assess the financial implications involved before it was in a position to formulate any specific proposals;
- (b) the Administration was positive towards the suggestion of the LASC that legal aid should be extended to mediation. In fact, the Pilot Scheme on Legal Aid for Matrimonial Cases was launched in March 2005, and the Administration would conduct an evaluation of the Pilot Scheme; and
- (c) following the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants in 2002, a number of deductible items (e.g. maintenance payment, insurance money received from personal injuries claims) had been included in computing the

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disposable income and capital of an applicant. The purpose of the five-yearly review was to respond to social needs and development. The Administration would take into account the views and suggestions of members and the deputations in conducting the review.

18. Addressing the concern that a person was not eligible for legal aid because he was assessed to be over on means, DLA said that if a person considered that his case was meritorious and had a high chance of recovering damages, he could consider instituting legal action on a private basis first. When his financial resources had dropped to a level below the financial eligibility limit after incurring costs on litigation, he could then apply for legal aid.

19. The Chairman and Ms Miriam LAU pointed out that no one could tell with certainty that he could win a court case, no matter how meritorious the case was. It was unwise to advise a person to take the course of action mentioned by DLA.

20. Ms Miriam LAU said that the Liberal Party did not support the proposed conditional fee regime. While the SLAS should remain to be self-financing, the Liberal Party considered that its scope should be expanded to cover other types of cases. She enquired about the contribution rates payable by legally aided persons and whether the SLAS was making a profit.

21. D of Adm and DLA responded that the contribution rates under the SLAS were reduced from 15%/7.5% to 12%/6% in 2002, and further to 10%/6% in 2006. At present, 80% of the claims made contribution at a rate of 6%. DLA added that there were quite a number of unsuccessful claims and the legal costs incurred had to be written off. In fact, the SLAS Fund would have incurred a deficit if not for income from interest.

22. Mr Rimsky YUEN said that the contribution rate and the financial limit under the SLAS could be applied flexibly. For instance, legal aid could be granted to an applicant whose financial resources exceeded the statutory financial limit, on the condition that he agreed to make a higher contribution rate, say 15%.

23. The Chairman said that apart from the issues raised by members and the deputations at the meeting, the Administration should take into account the following issues when conducting the five-yearly review -

- (a) there was a consensus among the Bar Association, the Law Society, the LRC, the LASC and the LegCo that the scope of the SLAS should be expanded;
- (b) the policy objective of legal aid was to ensure that no one with reasonable grounds for taking or defending legal action in the Hong Kong court was prevented from doing so because of a lack of means. The Administration should consider the appropriateness of having a one-line financial eligibility limits for all types of cases; and

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- (c) consideration should be given to extending the present scope of legal aid from litigation to legal advice.

V. Implementation of international conventions in local legislation

(LC Paper No. CB(2)1398/06-07(04) - Administration's paper on "Implementation of international agreements in the Hong Kong SAR"

LS50/06-07 - Background brief on "Review of legislative provisions implementing international conventions in local legislation")

24. Deputy Law Officer (Treaties and Law) (DLO) briefed members on the various methods employed to implement international agreements which applied to Hong Kong. In gist, legislation to implement international agreements would not be required where the relevant provisions of the international agreements were related to matters of principle, or to matters which were already dealt with under existing legislation, or where the international obligations could be implemented by administrative means. Where legislation to implement international agreements was required, different approaches could be adopted. These included -

- (a) incorporating agreement texts into the implementing legislation, usually in a Schedule, and where necessary, introducing additional provisions to supplement the incorporated agreement text;
- (b) transforming the wording and terminology of an agreement to conform to the normal usage in the domestic context; and
- (c) referring to the requirements under an international agreement in the implementing legislation without setting out the text. This approach had been used where the relevant agreement provisions were technical.

25. DLO further said that the Administration would need to continue to employ different approaches to implement international agreements, having regard to the different nature and contents of each international agreements. These approaches were not unique to Hong Kong but were also used in other common law jurisdictions. In practice, the approach adopted would be decided on a case-by-case basis by the responsible policy bureau/department, having regard to its policy objectives and requirements and nature and substance of the international agreement in question, and after consulting the Department of Justice.

26. The Chairman said that the issue was referred by the Bills Committee on Hazardous Chemicals Control Bill which had expressed concern about the consistency in the implementation of international agreements in local legislation. The Chairman invited representatives of the Bar Association to give views on the issue.

27. Mr Rimsky YUEN made the following points -

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- (a) where an international agreement was to apply to Hong Kong partly, the wording of the applicable provisions should be examined and suitably adapted in local legislation;
- (b) where an international agreement was to apply to Hong Kong wholly, the ideal arrangement was to incorporate its text in the relevant Ordinance in the form of a Schedule. If not, it might give rise to the question of whether future amendments to international requirements would automatically be applied to Hong Kong without going through the legislative process;
- (c) the use of a general reference clause to international agreements, which were technical in nature, in local legislation was understandable. While any amendments to such international agreements needed not undergo the legislative process, consideration could be given to designating a person or a body such as the CE-in-Council the responsibility to examine such amendments; and
- (d) some international agreements were available in Chinese and English versions. The Administration might need to consider whether a mechanism should be put in place to deal with disputes arising from any discrepancies in the two versions, if such international agreements were incorporated into local legislation as a Schedule.

28. Assistant Legal Adviser 7 (ALA7), legal adviser to the Bills Committee on Waste Disposal (Amendment) Bill 2005 and the Bills Committee on Hazardous Chemicals Control Bill, introduced the background brief. She said that the main concern of the two Bills Committees was the implications of the use of a general reference clause to implement international conventions in local legislation, apart from the question of adopting a consistent approach to implement these conventions. She explained that the prevailing approach in implementing international conventions in local legislation was to expressly set out the relevant parts of the conventions that were to have the force in Hong Kong in the Ordinances concerned, often in a Schedule, with or without adaptation. Under this approach, the provisions of international conventions which had the force of law in Hong Kong as enacted by the Legislative Council were clear and certain.

29. ALA 7 added that in the two Bills in question, a general reference was made to the conventions concerned. The Administration was unable to identify the exact scope of the conventions concerned which it proposed to be included in the Bills. The approach to include a general reference clause on convention requirements, as proposed in the two Bills, would create uncertainty and ambiguity and future amendments to the conventions concerned would have the force of law in Hong Kong without undergoing the law-making process when adaptation could be made to suit local needs in Hong Kong. It would also set an undesirable precedent for the mode of implementation of international conventions applicable to Hong Kong in local legislation. In view of the concerns of the Bills Committees, the Administration agreed to delete the proposed general reference clauses from the two Bills.

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30. DLO said that it was a common approach to implement an international agreement by incorporating its text in the form of a Schedule into the implementing legislation. In the past three years, international agreements were implemented in Hong Kong by way of 32 items of primary and subsidiary legislation. 23 of the 32 items, which were subsidiary legislation, adopted such an approach to implement international agreements in four main areas, namely, consular relations, avoidance of double taxation, surrender of fugitive offenders and mutual legal assistance in criminal matters. As mentioned earlier, the Administration also adopted other approaches in implementing international agreements. On the use of a general reference clause, DLO agreed that such an approach should not be adopted if it would give rise to ambiguity. The approach was not commonly used and was usually adopted for international requirements which were technical in nature. For example, under section 10 of the Chemical Weapons (Convention) Ordinance (Cap. 578), the Director-General of Trade and Industry, when exercising his authority in suspending/revoking permits or adding/varying permit conditions, had to be satisfied that it was appropriate to do so for the purpose of implementing the requirements of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction ("Convention"). Furthermore, some of the reference clauses could be quite specific, making reference to a particular chapter or Articles in the relevant international agreement. Addressing members' concern about the risk of automatic application of future amendments to international agreements to Hong Kong, DLO said that if the amendments involved matters of principle or went further than what was permitted under the implementing legislation, it was necessary for the Administration to amend the legislation to reflect the new requirements through the normal legislative process.

31. In the case of adopting a general reference clause in local legislation, the Chairman asked whether Hong Kong's obligations under an international agreement would remain as at the time of enactment of the implementing legislation or would change as the international agreement was amended. Deputy Principal Government Counsel (Treaties and Law) (Acting) (DPGC (Atg)) advised that it would depend on how the international agreement was defined in the implementing legislation in question. In some cases, the international agreements concerned were defined in the implementing legislation as the agreements "as amended from time to time".

32. DPGC (Atg) drew members' attention to the approach adopted in the Chemical Weapons (Convention) Ordinance (Cap. 578). DPGC (Atg) pointed out that the Administration had proposed Committee Stage Amendments to remove the text of the Convention from the Bill in response to suggestions by the Bills Committee. From the Bills Committee report, one of the considerations appeared to be that the text of the Convention could be amended from time to time. To introduce legislative amendments to reflect changes to the Convention from time to time might not represent efficient use of resources. In addition, even if the Convention was not set out in the Ordinance, members of the public could still have access to the full text of the Convention through the Internet or other avenues. It appeared that the reference to Convention requirements in that Bill and the reference to the Convention "as amended from time to time" was not necessarily considered inappropriate by the Bills Committee in that case.

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33. Mr P Y LO held the view that the approach had been wrongly taken. He pointed out that state parties to international agreements had the prerogative not to implement new obligations provided by way of amendments. The approach to make reference to the requirements of an international agreement in local legislation with the result that any future amendments to the agreements concerned would have the force of law in Hong Kong without considering whether the People's Republic of China had accepted the amendments and undergoing the law-making process was considered inappropriate.

34. The Chairman concurred with Mr LO and said that as People's Republic of China (PRC) was the sovereign state, Hong Kong was not in a position to implement amendments to international agreements automatically. She pointed out that in implementing sanctions passed by the Security Council of the United Nations, the Chief Executive would make regulations upon receipt of instructions from the PRC.

35. DPGC said that he agreed with the view that international agreements would not directly have effect in Hong Kong without undergoing the legislative process or being implemented by administrative measures. Amendments to international agreements would not automatically be applied to Hong Kong either. For international agreements to which the PRC was not a party but which were applied to Hong Kong, the application of subsequent amendments to Hong Kong would be decided by the Government of the HKSAR. For international agreements to which the PRC was a party, the application of the agreements and their subsequent amendments to Hong Kong should be decided by the Central People's Government, in accordance with the circumstances and needs of Hong Kong, and after seeking the views of the Government of the HKSAR. DPGC added that any amendments to an international agreement involving changes to policy or matters of principle rarely took effect automatically. They had to be approved and ratified by the signatory states.

36. In the light of the discussion and the Bills Committees' concern about the implications of the approach of making a general reference to the requirements under an international agreement in the implementing legislation without setting out its text, the Chairman requested the Administration to provide a paper to respond to the issues raised at this meeting. The Legal Service Division was also requested to assist by looking at any existing statutory provisions which might have problems in implementing international agreements. Upon receipt of the Administration's paper, the Panel would decide whether the matter should be further discussed at a meeting.

37. There being no other business, the meeting ended at 6:32 pm.