

立法會
Legislative Council

LC Paper No. CB(2)2540/06-07
(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, 28 May 2007, at 4:30 pm
in Conference Room A of the Legislative Council Building

- Members present** : Hon Margaret NG (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
- Member attending** : Dr Hon Fernando CHEUNG Chiu-hung
- Members absent** : Hon MA Lik, GBS, JP (Deputy Chairman)
Hon LI Kwok-ying, MH, JP

Public Officers attending : Item III

The Administration

Administration Wing, Chief Secretary for Administration's Office

Miss Elizabeth TSE
Director of Administration

Miss Shirley YUEN
Deputy Director of Administration

Department of Justice

Mr Ian Wingfield
Solicitor General

Item IV

Judiciary Administration

Miss Emma LAU
Judiciary Administrator

Mr Clement LI
Assistant Judiciary Administrator (Corporate Services)

The Administration

*Administration Wing, Chief Secretary for Administration's
Office*

Miss Elizabeth TSE
Director of Administration

Miss Shirley YUEN
Deputy Director of Administration

Financial Services and the Treasury Breaux

Miss Amy TSE
Deputy Secretary for Financial Services and the Treasury
(Treasury)

Item V

The Administration

Department of Justice

Mr Frank POON
Deputy Solicitor General (Acting)

Miss Amy CHAN
Senior Government Counsel

**Attendance by
invitation** :

Item III

Hong Kong Bar Association

Mr Rimsky YUEN, SC
Chairman

Mr P Y LO
Member of Bar Council

Law Society of Hong Kong

Mr Junius HO
Chairman of Legal Aid Committee

Hong Kong Human Rights Monitors

Mr LAW Yuk-kai
Director

Item V

Hong Kong Bar Association

Mr Gary SOO

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

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

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Action

I. Confirmation of minutes of meeting

(LC Paper No. CB(2)1966//06-07 - Minutes of meeting on 26 March 2007)

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

II. Items for discussion at the next meeting

(LC Paper No. CB(2)1968/06-07(01) - List of outstanding items for discussion

LC Paper No. CB(2)1968/06-07(02) - List of items tentatively scheduled for discussion at Panel meetings in 2006-2007 session

LC Paper No. CB(2)1968/06-07(03) - List of follow-up actions)

2. Members agreed to discuss the following items at the meeting on 25 June 2007 –

(a) The Pilot Scheme on Legal Aid for Mediation in Matrimonial Cases;
and

Action

(b) Policy relating to recruitment of law draftsmen.

(Post-meeting note : On 1 June 2007, the Chairman instructed that the item "Criminal legal aid fees system" be added to the agenda of the next meeting.)

III. Proposed transfer of legal aid portfolio to the Home Affairs Bureau

(LC Paper No. CB(2)1968/06-07(04) - Administration's paper on "Re-organisation of the Government Secretariat : Proposed transfer of the legal aid portfolio to the Home Affairs Bureau"

LC Paper No. CB(2)1968/06-07(05) - Supplementary information provided by the Administration

LC Paper No. CB(2) 1989/06-07(01) - The First Position Paper from the Hong Kong Bar Association

LC Paper No. CB(2) 1989/06-07(02) - Submissions from the Human Rights Monitor

LC Paper No. CB(2) 2058/06-07(01) - Submissions from the Law Society of Hong Kong

LC Paper No. CB(2) 2058/06-07(02) - Letter dated 4 June 2007 from the Legal Aid Services Council

LC Paper No. CB(2) 2123/06-07(01) - The Second Position Paper from the Hong Kong Bar Association)

3. The Chairman welcomed representatives of the Administration and the deputations to the meeting. She said that the Chief Executive (CE) had announced a plan to re-organise the policy bureaux of the Government Secretariat with effect from 1 July 2007. The purpose of the meeting was to receive views on the proposed transfer of the legal aid portfolio from the Administration Wing of the Chief Secretary for Administration's Office (the Administration Wing) to the Home Affairs Bureau (HAB) (the proposed transfer). The Chairman said that the Legal Aid Services Council (LASC), which was established to advise the CE on legal aid policy, had been invited to attend this meeting but its chairman was out of town. Given that the proposed transfer would impact on access to justice and the judicial system, the Panel had also issued invitation to the Secretary of Justice (SJ) and Solicitor General (SG) was attending the meeting on behalf of SJ.

Briefing by the Administration and the deputations

4. Director of Administration (D of Adm) briefed members on the position of the Administration as set out in its papers.

Action

5. Mr Rimsky YUEN, Chairman of the Hong Kong Bar Association, briefed members on the Bar's position paper. In gist, the Bar Association did not support the proposed transfer. The Bar Association raised three main concerns. First, the proposed transfer would diminish the independence or the perception of the independence of the Legal Aid Department (LAD). Second, there was potential conflict of interest as some decisions made pursuant to the statutory powers of the Secretary for Home Affairs (SHA) and the Director of Home Affairs (DHA) were amenable to judicial review. The proposed transfer would raise question as to whether the LAD would be subject to tighter control in respect of legal aid in cases against the Government. Third, by failing to consult the LASC, the Government was acting contrary to the intent and spirit of the LASC Ordinance (Cap. 489).

6. Mr Junius HO, Chairman of Legal Aid Committee of the Law Society of Hong Kong, said that the Law Society adopted a neutral stance on the proposed transfer. The Law Society considered that a more meaningful policy review was to ensure that both the LAD and LASC were independent of the Administration. At the request of the Chairman, the Law Society agreed to provide a position paper to the Panel after the meeting.

7. Mr LAW Yuk-kai of the Human Rights Monitor (HMR) said that the HMR advocated the independence of the LAD and did not support the proposed transfer. The views of HMR were set out in its submission provided after the meeting.

(Post-meeting note : The submissions from the HMR and the Law Society of Hong Kong were circulated to members vide LC Paper Nos. 1989/06-07(02) and 2058/06-07(01) on 28 May 2007 and 6 June 2007 respectively.)

Discussion

8. Mr Martin LEE said that instead of making the LAD independent, as requested by some Members more than 10 years ago, the Administration had now proposed that the LAD should be placed under a policy bureau. Mr LEE asked why the Administration had acted contrary to the request of LegCo Members.

9. In response to the views of the deputations and Mr Martin LEE, D of Adm made the following points –

- (a) the Administration maintained the view that legal aid was a stand-alone policy area. As legal aid policy was getting increasingly complex and comprehensive, it was logical and appropriate to place the subject on par with other equally important policies, viz. under a policy bureau. As compared with the current set-up in the Administration Wing, the HAB, led by a Director of Bureau and underpinned by a Permanent Secretary, would be able to offer enhanced policy support to legal aid issues;
- (b) safeguards existed in statute and in practice to ensure that the powers and functions of the Director of Legal Aid (DLA) would continue to be

Action

exercised in an impartial, transparent and accountable manner. The Legal Aid Ordinance and the relevant regulations required the DLA to conduct means and merits tests on legal aid applications based on criteria laid down in the statute. Moreover, the decisions of the DLA not to grant legal aid could be examined or reviewed by the court or Registrar of the High Court as appropriate;

- (c) there were precedents of persons granted legal aid instituting legal proceedings against certain decisions of the Government under the existing arrangement and the proposed transfer would not change that practice; and
- (d) other than access to justice and legal considerations, the legal aid policy carried a livelihood or community interface perspective. It was for this reason that the LASC had established interest groups with members drawn not just from the legal aid panel lawyers, but also from representatives of non-government organisations (NGOs), members of District Councils, academics and accountants. The LASC had also maintained liaison with different stakeholders by organising seminars and meeting with a number of NGOs to discuss legal aid issues. Given its extensive social network, the Administration considered it appropriate to place the legal aid portfolio under the purview of the HAB.

10. SG supplemented that the Legal Policy Division of the Department of Justice dealt with questions relating to access to justice. According to the LASC Ordinance, the function of LASC was two-fold. First, it monitored and oversaw the administration of legal aid services provided by the LAD. Second, it acted as the CE's advisory body on legal aid policy. The re-assignment of responsibility from the Administration Wing to the HAB did not change the functions of the LASC. While it was not mandatory for the LASC to be consulted on the proposed transfer, it might be desirable to do so. On the comment that the LAD would be subject to tighter control after the proposed transfer, SG responded that the statutory powers and functions of the DLA were not subject to any direction or control by the Chief Secretary for Administration (CS) under the current arrangements, nor by the SHA after the proposed transfer. He also affirmed that the resolution relating to the proposed re-organisation did not contain any reference to the functions of the DLA. The proposed transfer was purely an administrative arrangement.

11. Ms Emily LAU, Dr Fernando CHEUNG and Ms Audrey EU were unconvinced that there was a need for the proposed transfer. They pointed out that there had been calls for the establishment of an independent statutory legal aid authority for many years by some LegCo Members, the LASC and the legal professional bodies. The move to place the LAD under a policy bureau would downgrade its status and undermine its independence and therefore a retrogression. With more senior Government officials such as a Director of Bureau and a Permanent Secretary overseeing the portfolio, the LAD would be subject to an additional layer of control.

Action

They also expressed concern that prior consultation was not conducted with the LASC, the two legal professional bodies and the public. Judging from the views received from the public on the proposed re-organisation at the two meetings held by the Panel on Constitutional Affairs, the Administration had underestimated public response to the proposed transfer. They considered that access to justice was a crucial element of the rule of law. It was important to ensure that those with a lack of means could institute legal proceedings against large consortiums and the Government when warranted.

12. D of Adm reiterated that the transfer of the legal aid portfolio to a policy bureau sought to provide better and more comprehensive services to the public. The proposed transfer would not in any way affect the status of the LAD and therefore was not a retrogression. While the LASC would advise on the Administration on measures to improve the legal aid system, the actual work on the review on criminal legal aid fees, the annual and biennial reviews of financial eligibility limits of legal aid applicants and the five-yearly review of the criteria for assessing the financial eligibility limits of legal aid applicants were undertaken by the Administration Wing. The Administration considered it more appropriate for such matters to be initiated and co-ordinated by a policy bureau.

13. D of Adm further said that it was the Government policy that no one with reasonable grounds for taking legal action in the courts of Hong Kong was prevented from doing so because of a lack of means. Under the current legal aid scheme, over 70% of the households were eligible for the Ordinary Legal Aid Scheme and the Supplementary Legal Aid Scheme. Customer surveys conducted revealed that over 90% of the persons granted legal aid were satisfied with the services provided by the LAD and assigned lawyers. The Administration would continue to improve legal aid policies and maintain the service quality of the LAD following the proposed transfer. She added that the independence of the LAD was a big issue and outside the scope of the proposed transfer.

14. Dr Fernando CHEUNG asked whether the concept behind the proposed transfer would also apply to other independent statutory bodies performing public functions, such as the Independent Commission Against Corruption and the Office of the Ombudsman. D of Adm replied in the negative. She reiterated that the proposed transfer was part of the exercise to improve the distribution of responsibilities within the Government Secretariat.

15. Ms Audrey EU asked about the impact of the proposed transfer on the staff establishment of the LAD. D of Adm affirmed that the LAD would remain a Government department and there was no change to its staff establishment after the proposed transfer, i.e. there were some 500 members of staff of which over 300 were of professional grade.

16. Ms Audrey EU asked whether the LASC had ever discussed the proposed transfer. D of Adm responded that the Administration had briefed the LASC on 10 May 2007 after the announcement of the proposed re-organisation by the CE on

Action

3 May 2007. The LASC was informed that there would not be any change to the statutory powers and functions of the LAD and LASC after the proposed transfer. At that meeting, questions were raised on whether the proposed transfer would help expedite the review of the legal aid policy and affect the funding provided to the LAD. The Administration had replied that the purpose of the proposed transfer was to improve legal aid services and there was no change to the operation or funding of the LAD.

17. Ms Miriam LAU held the view that the proposed transfer was neither a retrogression nor an advancement. She was open to the proposal as it was more or less on par with the existing arrangement. Given that many of the legal aid applicants came from the grassroots, she asked whether that was one of the considerations of the Administration to place the legal aid portfolio under the HAB.

18. D of Adm responded that the HAB would be able to facilitate the tapping of community feedback on legal aid services, given the extensive social network it had developed. In addition, since many of the legal aid cases related to matrimonial disputes and the Administration had been advocating resolving these disputes by mediation, there were advantages in entrusting the HAB to promote public awareness of mediation service.

19. Ms Miriam LAU said that the concerns raised by some deputations were conceptual rather than real. For example, the belief that the control exercised by the SHA over the LAD was tighter than that of CS was unfounded. As regards the concern about conflict of interest, statutory framework was in place to ensure that the DLA would discharge his functions in a fair and accountable manner. While there might be doubts about the impartiality of the HAB in granting legal aid, one should have confidence in the High Court which would review cases appealing against refusal of legal aid by the LAD.

20. In response to Ms Miriam LAU, Mr Rimsky YUEN made the following points –
- (a) the actual and perceived independence of legal aid administration was of paramount importance to confidence in the rule of law;
 - (b) SHA and DHA were vested with numerous statutory powers such as licensing, trust funds and village representative elections. By putting the LAD under the purview of the HAB, there was a potential conflict of interest when decisions had to be made whether to grant legal aid to applications for judicial reviews against decisions of the SHA and DHA; and
 - (c) in order to avoid possible conflict of interest, the LAD might have to seek independent legal opinion on a more frequent basis under section 9 of the Legal Aid Ordinance concerning legal aid applications. This would add burden to public funding.

Action

21. Mr P Y LO, Member of the Bar Council, recalled that the Scott Report in 1986 and the Consultative Paper on Legal Aid in 1993 had both acknowledged that the perception of the independence of legal aid administration was important. At the Council meeting on 21 July 1993, Hon Simon IP moved a motion urging the Government to set up an independent statutory authority to be responsible for the administration of legal aid. In his speech, Hon Moses CHENG had said that he was convinced that the powerful perception of "the fox guarding the hen-house" must be washed away from our justice system. The importance of legal aid as an independent part of the justice system was unquestioned.

22. Mr LAW Yuk-kai said that with the proposed transfer, the LAD would be subject to the interference of both the SHA and the CS. The more the interference from policy bureaux, the less the legal aid administration could remain impartial. The late Ms Pam BECKER, who used to work for the LAD and later departed, had worked under great pressure in legal aid cases involving legal action against the Government over issues relating to Vietnamese boat people. He pointed out that it was also difficult for a legal aid applicant who was refused legal aid to win an appeal against the refusal.

23. The Chairman said that the LAD had funded cases relating to human rights, refugees, political asylums and immigration. As litigation against the Government was not uncommon, the situation where the LAD, if placed under a policy bureau, had to decide whether a person should be entitled to legal aid to litigate against that policy bureau was unacceptable. The Chairman said that the Finance Committee would consider the financial proposal relating to the proposed re-organisation on 8 June 2007 and the Administration intended to implement the proposal on 1 July 2007. However, the Panel would pursue the matter in the following manner -

- (a) the LASC would be requested to state its position on the proposed transfer before the Finance Committee meeting on 8 June 2007;
- (b) the Administration was requested to provide a paper to elaborate on the implications of the proposed transfer; and
- (c) the subject of independent legal aid administration would be followed up by the Panel in future.

(Post-meeting note : The LASC's written response was issued to Panel members and copied to all Members vide LC Paper Nos. CB(2) 2058/06-07(02) on 6 June 2007. The Administration's paper was issued to Panel members vide LC Paper CB(2) 2117/06-07 on 7 June 2007.)

IV. Budgetary arrangement and resources for the Judiciary

(LC Paper No. CB(2)1968/06-07(06) - Background brief prepared by the LegCo Secretariat)

Action

LC Paper No. CB(2)1940/06-07(01) - Judiciary Administration's paper on "Budgetary arrangement and resources for the Judiciary"

LC Paper No. CB(2)1040/06-07(02) - Administration's paper on "Budgetary arrangement and resources for the Judiciary"

LC Paper No. CB(2)1940/06-07(03) - Bar Association's letter dated 10 May 2007)

24. Judiciary Administrator (JA) briefed the Panel on the Judiciary's position on budgetary arrangement and resources for the Judiciary as set out in LC Paper No. CB(2)1940/06-07(01). In gist, the Judiciary was satisfied with the revised budgetary arrangement, i.e. the Judiciary would submit to the Administration its forecast resource requirements for the forthcoming financial year, prior to the Administration drawing up the operating expenditure envelope for the Judiciary. The Judiciary had further proposed and the Administration had agreed to extend the revised arrangement to cover manpower resources in the annual budget exercises in the future. As regards the system for the determination of judicial remuneration, the Judiciary supported the recommendations and views contained in Sir Anthony Mason's Consultancy Report (the Mason Report) submitted to the Chief Executive in April 2003.

25. D of Adm informed members of the latest development of the revised budgetary arrangements for the Judiciary and the review of the judicial remuneration mechanism as set out in LC Paper No. CB(2)1940/06-07(02). The Administration welcomed the opportunity to further refine the current mechanism with the Judiciary in respect of manpower requirements. On review of the judicial remuneration mechanism, the CE had appointed the Standing Committee on Judicial Salaries and Conditions of Service (the Judicial Committee) in January 2004 to study the matter and make recommendations on whether the Mason Report should be accepted. The Study Report was submitted to the CE on 25 November 2005.

26. The Chairman recalled that there was a proposal for judges to reduce their remuneration, to be in line with the arrangement for directorate grade staff some years ago. There had been protest against the proposal at the time. She asked whether the recent pay adjustment for civil servants would be applied to judges and judicial officers.

27. D of Adm affirmed that there had been no salary reduction for judges in the recent past. Before a new mechanism was put in place, the Administration would continue with the existing mechanism in reviewing the remuneration for judges and judicial officers, i.e. the Administration would consult the Judiciary on whether the proposed pay adjustment for the civil service should also apply to judges and judicial officers.

Action

Admin 28. Ms Emily LAU expressed concern that the Administration had taken a long time to consider the recommendations made in the Mason Report and the Study Report of the Judicial Committee. She requested the Administration to provide a paper to explain how much longer it would take to consider the two Reports and its concerns about the Reports.

Admin 29. D of Adm responded that given that the recommendations of both the Mason Report and the Study Report of the Judicial Committee would have very far-reaching effect on the judicial remuneration system in Hong Kong, the Administration needed some more time to consider the matter. She would reflect Ms LAU's concerns to the Administration.

30. Ms Emily LAU referred to paragraphs 3 and 5 of the Judiciary's paper and sought clarification on the basis for the Judiciary's advice that its resource requirements for 2007-2008 represented an increase of 10.5% over that of 2006-2007. JA explained that the increase was calculated on the basis of the revised estimates of 2006-2007. As she did not have the relevant data on hand, she would provide a written response after the meeting.

(Post-meeting note : The Judiciary advised after the meeting that the revised estimates for 2005-2006 and 2006-2007 were \$892.9 million and \$900.6 million respectively.)

V. Reform of the law of arbitration

(LC Paper No. CB(2)1941/06-07(01) - Administration's paper on "Reform of the law of arbitration")

31. Deputy Solicitor General (Acting) (DSG(Atg)) informed members of the progress of the reform of the law of arbitration as set out in the paper. He said that the Working Group formed to examine the proposals in a report issued by the Committee on Hong Kong Arbitration Law of The Hong Kong Institute of Arbitrators in 2003 to abolish the distinction between domestic and international arbitrations under the existing Arbitration Ordinance (Cap. 341) had held a number of meetings. A sub-committee was formed under the Working Group to study the working draft of the new Arbitration Bill (the draft bill) produced by the Department of Justice (DoJ). The sub-committee held over 30 meetings during January 2006 to May 2007 to examine in detail the legislative proposals reflected in the draft bill. The DoJ intended to issue a Consultation Paper on the reform of the law of arbitration annexing a draft Bill of the Arbitration by the end of 2007, and to introduce the Bill into LegCo during the 2008-2009 legislative session at the earliest.

32. Mr Gary SOO of the Bar Association said that the Bar Association had participated in the discussion on reform of the law of arbitration since 2003. The Bar Association supported the law reform as it was conducive to developing Hong Kong into an arbitration centre. The Bar Association hoped that the consultation would soon take place and the bill would be introduced into LegCo as soon as practicable.

Action

33. The Chairman recalled that at a legal forum convened by her, there were heated arguments on whether the provisions of the existing domestic arbitration regime relating to appeal against an arbitral tribunal's award on a point of law should be retained. She asked whether a consensus had been reached on the issue.

34. DSG(Atg) responded that the Working Group had spent a lot of time to discuss how to retain the current domestic arbitration regime. The construction industry had expressed the view that the appeal mechanism, in particular, should be retained. The Administration was inclined to include these provisions as part of the draft Bill. In other words, an "opting in" system would be adopted to enable users of arbitration to continue to use certain provisions of the existing domestic arbitration regime.

35. There being no other business, the meeting ended at 6:20 pm.

Council Business Division 2
Legislative Council Secretariat
23 July 2007