

立法會
Legislative Council

LC Paper No. CB(2)2654/06-07
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Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 25 June 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 Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
- Member attending** : Hon LEE Wing-tat
- Members absent** : Hon MA Lik, GBS, JP (Deputy Chairman)
Hon Jasper TSANG Yok-sing, GBS, JP
Hon LI Kwok-ying, MH, JP

Public Officers attending : Item IV

The Administration

Administration Wing, Chief Secretary for Administration's Office

Ms Elizabeth TSE, JP
Director of Administration

Mrs Alice CHEUNG
Assistant Director of Administration 2

Legal Aid Department

Mr Benjamin CHEUNG, JP
Director of Legal Aid

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

Item V

The Administration

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

Ms Elizabeth TSE, JP
Director of Administration

Mrs Alice CHEUNG
Assistant Director of Administration 2

Legal Aid Department

Mr Benjamin CHEUNG, JP
Director of Legal Aid

Ms Alice CHUNG
Assistant Director of Legal Aid/Application & Processing

Item VI

The Administration

Department of Justice

Miss Susie HO, JP
Director of Administration and Development

Mr Gilbert MO
Deputy Law Draftsman (Bilingual Drafting and
Administration)

**Attendance by
invitation** :

Item IV

The Law Society of Hong Kong

Ms Maureen MUELLER
Member of the Alternative Dispute Resolution Committee

Ms Helena YUEN
Member of the Alternative Dispute Resolution Committee

Item V

Hong Kong Bar Association

Mr Philip DYKES SC

Ms Audrey CAMPBELL-MOFFAT

The Law Society of Hong Kong

Mr Lester HUANG
President

Mr Stephen HUNG
Council member and Chairman of the Criminal Law and
Procedure Committee

Mr Kevin STEEL
Member of the Criminal Law and Procedure Committee

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

Miss Vivien POON
Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2)2219/06-07 - Minutes of meeting on 23 April 2007)

The minutes of the meeting held on 23 April 2007 were confirmed.

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II. Information papers issued since last meeting

(LC Paper No. CB(2)1989/06-07(01) - Hong Kong Bar Association's position paper on "Proposed reorganisation concerning the Legal Aid Department"

LC Paper No. CB(2)1989/06-07(02) - Hong Kong Human Rights Monitor's submission on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau"

LC Paper No. CB(2)2058/06-07(01) - The Law Society of Hong Kong's submission on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau"

LC Paper No. CB(2)2058/06-07(02) - Legal Aid Services Council's letter dated 4 June 2007 on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau"

LC Paper No. CB(2)2058/06-07(03) - Panel Clerk's letter dated 6 June 2007 to the Legal Aid Services Council on "Proposed transfer of legal aid portfolio to the Home Affairs Bureau"

LC Paper No. CB(2)2059/06-07(01) - Administration's further paper on "Implementation of international agreements in the Hong Kong SAR"

LC Paper No. CB(2)2117/06-07(01) - 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)2123/06-07(01) - Hong Kong Bar Association's second position paper on "Proposed transfer of the legal aid portfolio to the Home Affairs Bureau"

LC Paper No. CB(2)2251/06-07(01) - Legal Aid Services Council's letter dated 21 June 2007 on "Proposed transfer of the legal aid portfolio to the Home Affairs Bureau")

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)2221/06-07(01) - List of outstanding items for discussion

LC Paper No. CB(2)2221/06-07(02) - List of items tentatively scheduled for discussion at Panel meetings in the 2006-2007 session

LC Paper No. CB(2)2221/06-07(03) - List of follow-up actions)

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Outstanding issues

Juvenile justice system

3. The Chairman said that the Administration had reported on the effectiveness of the enhanced measures introduced to strengthen the support for unruly children and young offenders since October 2003 and the outcome of the Administration's view on the development of a new juvenile justice system incorporating the principles and practices of restorative justice to the Panel at the meeting on 23 April 2007. She suggested and members agreed that a report on the deliberations of the Panel would be made to the House Committee. The Clerk informed members that the statistics and information sought by the deputations at the meeting were being prepared by the Administration.

(*Post-meeting note* : A report (LC Paper No. CB(2)2369/06-07) was made to the House Committee on 6 July 2007.)

Legal aid

4. The Chairman said that at the meeting held earlier that day, the Committee on Rules of Procedure had discussed whether the terms of reference of the Panels should be re-aligned to tie in with the re-organisation of the Government Secretariat. The initial thinking was that the current policy portfolios of Panels should remain status quo. In other words, the legal aid portfolio would continue to be covered by this Panel rather than the Panel on Home Affairs. Ms Miriam LAU held the view that the legal aid portfolio, as an integral component of legal services, should continue to be handled by this Panel until the end of the current LegCo term.

5. The Chairman informed members that in response to the Panel, the Legal Aid Services Council (LASC) had elaborated on the actions it would take to step up its supervisory role and in pursuing the subject of establishment of an independent legal aid authority (LC Paper No. CB(2)2251/06-07(01)). The Chairman suggested and members agreed that the LASC should be invited to give a briefing on its work plan at a meeting in the next session.

Agenda for the next meeting

6. Members agreed that the Chairman would decide whether to hold/cancel the next meeting on 23 July 2007 depending on members' availability. In the event that the meeting would be held as scheduled, the following items could be discussed -

- (a) Briefing by Principal Officials of the new term Government - Ms Miriam LAU informed members that the House Committee agreed at its meeting on 22 June 2007 that individual Panels should invite Principal Officials of the new term Government to brief members on their visions for governance and ways to establish working relationship with LegCo

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as early as possible. The Panel might wish to consider whether the Secretary for Justice (SJ) should be invited to attend the next meeting. The Chairman said that the usual practice was to invite the SJ to brief the Panel on his work plan at the beginning of the session. Members agreed that the item should be included in the agenda of the meeting on 23 July 2007 subject to the availability of the Principal Officials concerned to attend the meeting;

- (b) Consultancy study on the demand for and supply of legal and related services - Ms Audrey EU suggested and members agreed that the item should be discussed at the next meeting, if the Administration was ready to do so;
- (c) Implementation of international agreements in local legislation - Members noted that the item was last discussed at the Panel meeting on 26 March 2007 and agreed that the item should be further discussed at the next meeting; and
- (d) Enforcement of judgment in civil cases - Members noted that the item was last discussed at the Panel meeting on 23 October 2006 and agreed that the item should be followed up at the next meeting.

(Post-meeting note: On item (a), both the SJ and the Secretary for Home Affairs had replied that they were unable to attend the meeting on 23 July 2007. The Administration advised that it was not in a position to revert to the Panel on items (b) and (d) above. On item (c), the Administration had provided a further paper which was issued to members vide LC Paper No. CB(2)2059/06-07 on 5 June 2007. In view of the foregoing developments and the fact that the Administration had not proposed any other items for discussion at the Panel meeting on 23 July 2007, the Chairman decided that the meeting should be cancelled. A circular was issued vide LC Paper No. CB(2)2427/06-07 on 9 July 2007 to inform members of the cancellation of the meeting.)

IV. Pilot Scheme on Mediation in Legally-aided Matrimonial Cases

(LC Paper No. CB(2)2221/06-07(04) - Administration's paper on "Pilot Scheme on mediation in legally aided matrimonial cases"

LC Paper No. CB(2)2228/06-07(01) - Background brief prepared by the LegCo Secretariat on "Pilot Scheme on mediation of legally aided matrimonial cases"

LC Paper No. CB(2)2294/06-07(01) - The Law Society of Hong Kong's submission on the Pilot Scheme on legal aid for mediation)

Briefing by the Administration

7. Director of Administration (D of Adm) briefed members on the Administration's paper which set out the outcome of the evaluation of the Pilot Scheme on Mediation in Legally-Aided Matrimonial Cases (the Pilot Scheme) and the proposed way forward. She said that the one-year Pilot Scheme was launched by the Legal Aid Department (LAD) in March 2005 and legal aid certificates had been granted for 6 297 matrimonial cases. Legally aided persons in 297 of these cases had indicated an interest to attempt mediation; 107 of such cases had been referred to mediators and 88 mediated cases reached either full (48) or partial (13) agreement.

8. D of Adm explained that the small caseload (1.4%) of the Pilot Scheme was not surprising as most cases were not suitable for mediation, and the percentage was comparable to the 1.5% of the Judiciary's Pilot Scheme on Family Mediation. She added that on average, some \$5,000 and 8 hours were spent on each mediated case. There were no conclusive findings as to whether mediation had reduced the total costs (i.e. litigation costs plus mediation costs). As regards the users' rating of the Pilot Scheme, 90% of those surveyed gave a positive rating.

9. On the way forward, D of Adm informed members that the Administration proposed to extend legal aid to cover mediation in legally-aided matrimonial cases as a permanent arrangement. The features of the proposed permanent arrangement were set out in paragraph 18 and the Annex to the Administration's paper. The features of the Pilot Scheme should be adopted except for the following areas -

- (a) instead of funding mediation in legally-aided matrimonial cases through an administrative scheme as the Pilot Scheme, future funding would be done on a statutory basis through amending the Legal Aid Ordinance (Cap. 91). By doing so, the powers and duties of the Director of Legal Aid (DLA) in relation to mediation would be defined by statute;
- (b) only the legally-aided persons' share of the mediator's fees would be publicly funded, in line with the current legal aid policy; and
- (c) mediators' fees and legal costs incidental to mediation would be subject to the DLA's first charge on any property recovered or preserved for the aided persons.

Views of the Law Society of Hong Kong (the Law Society)

10. Ms Maureen MUELLER, Member of the Alternative Dispute Resolution Committee of the Law Society (ADRC), presented her views as set out in the paper (tabled at the meeting and issued vide LC Paper No. CB(2)2294/06-07(01) on 27 June 2007). She said that the Law Society and some non-government organisations (NGOs) welcomed the Administration's proposal to extend legal aid to cover mediation in legally-aided matrimonial cases. While mediation was essential to society and would help reduce pressure on the workload of the court, the present

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caseload was too small to create any impact. In her view, mediation was a long-term investment which would benefit families and children. She further said that a reasonable level of fees for mediators was necessary to attract participation from the legal profession. However, the current hourly rate offered by the LAD was unfair to the legal profession, given that a professional mediator and a trainee solicitor currently charged at \$3,000 per hour and \$1,400 per hour respectively, whereas an experienced mediator funded by the LAD would only be paid \$600 per hour. Ms MUELLER pointed out that unlike NGOs, solicitor firms could not afford to run mediation services at the current hourly rate.

11. Ms Helena YUEN, Member of ADRC, shared Ms MUELLER's view. She pointed out that with the fixed rate of \$600 per hour for mediators, law firms would be operating mediation services at a loss. In the circumstance, many lawyers were discouraged from taking part in mediation and clients would have fewer choices in selecting their mediators. Ms YUEN said that as the nature of matrimonial disputes varied from case to case and in complex cases, mediators who were of legal background would stand a better chance of helping the two parties reach an agreement. Ms YUEN also elaborated on a mediation case which she had handled and was advised not to reach an agreement.

Discussion

12. Ms Miriam LAU said that the Law Society had highlighted the practical problems of the Pilot Scheme. Mediation should not be taken up by solicitors on pro bono basis, and the Administration should not expect the legal profession to subsidise funding of mediation services on a long-term basis. While Ms LAU expressed support for adopting mediation as an alternative dispute resolution, she was disappointed at the small caseload of the Pilot Scheme and doubted whether the caseload would be increased under the proposed permanent arrangement. She urged the Administration to seriously review how the proposed permanent arrangement should be implemented to make it more attractive. She was aware that mediation services in Australia had been successful, as it was a statutory requirement for parties involved in matrimonial disputes to go through mediation first. She said that mediation practices in overseas jurisdictions would provide useful reference for Hong Kong.

13. D of Adm responded that the Administration would work towards improving the proposed permanent arrangement, especially in terms of public education and publicity. Any members' views would be taken into account in formulating the detailed implementation plan.

14. The Chairman said that she was aware that mediation was not particularly successful in the United Kingdom. She had recently read a report on mediation prepared by Professor Dame Hazel Genn and she would arrange for its executive summary to be circulated to members for reference. The Chairman also requested the Administration to provide information on the mediation scheme in Australia for reference of the Panel. DLA responded that the Administration did not have much

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information on overseas practices, as mediation was court based or directed in many overseas jurisdictions. It was therefore difficult to draw a direct comparison between Hong Kong and other overseas countries on mediation practices.

(Post-meeting note : The Table of Contents and Executive Summary of the report entitled "Twisting arms : court referred and court linked mediation under judicial pressure" was issued to members vide LC Paper No. CB(2)2312/06-07(01) on 27 June 2007.)

15. Referring to paragraph 14 of the Administration's paper, Ms Audrey EU said that participation of the legal profession in mediation was conducive to resolving disputes among the parties concerned. It was a win-win situation for the disputed parties, the legal profession, and the LAD. From the public perspective, mediation should be supported. It went without saying that mediation services could not be promoted without sufficient funding. It was unreasonable to expect the legal profession to provide mediation services free or at a loss. The Administration should seriously consider the funding policy for implementing the proposed permanent arrangement. Ms EU questioned the logic of the Administration's view in paragraph 11 that mediation might not necessarily reduce the overall costs of the cases.

16. DLA responded that one could not estimate what the costs involved in the 31 mediated cases would otherwise have been, if mediation had not been made available to these cases. In addition, in the event of an unsuccessful mediation case, the combined costs of mediation and litigation would definitely be higher than a case which incurred litigation costs alone. It was therefore difficult to conclude that mediation could in fact reduce the overall costs.

17. Ms Audrey EU questioned the logic of making reference to unsuccessful cases in the Administration's analysis. She pointed out that as far as successful mediation cases were concerned, they must be less expensive than those having to go through the legal proceedings. In addition, cases selected for mediation in the first place would have a better chance of reaching agreements and hence a higher possibility of reducing litigation costs. She expressed concern that the Administration had sent a wrong message to the public that mediation was not cost effective and had downgraded the mediation service as an alternative dispute resolution. She hoped that the Administration would convey a positive message about mediation to the public, including the fact that mediation would help reduce social cost.

18. Assistant Director of Administration explained that the Administration merely wanted to bring out the point, which was shown from the Pilot Scheme, that in a case where litigation and mediation costs were involved, the total costs could be higher than a case which involved litigation costs only. DLA added that the Administration was mindful that had mediation not been made available to the 31 mediated cases, the litigation costs might have been higher.

19. Mr Martin LEE said that if mediation was worth pursuing, issues such as small caseload and mediators' fees were not matters of concern. A main concern was how to convince the public to use mediation, as an agreement reached through mediation

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was often regarded as less authoritative than a court ruling. He shared the view of Ms Audrey EU about social cost and pointed out that as compared with litigation, agreements reached through mediation were less antagonistic and caused less harm to family relationships.

20. Ms Maureen MUELLER said that mediation was an investment in the future. It was difficult to quantify the success of mediation based on the cases of the Pilot Scheme. For legally-aided matrimonial cases, the clients were usually those who were not ready to make a decision on their own and would prefer the court to resolve the dispute. Those who had gone through mediation might later find that making the final decision was too hard to bear and would resort to litigation. Despite this, legal proceedings might be shortened as a result of the mediation conducted earlier on.

21. Mr Martin LEE expressed concern about the case mentioned by Ms Helena YUEN in paragraph 11 above. DLA responded that he was not aware of such a case. Ms Helena YUEN clarified that the case was under the Judiciary's Pilot Scheme on Family Mediation. The legal proceedings of the case had gone on for a number of years before she took it up as a mediator. While she had successfully helped the parties reach an agreement, it turned out that the litigation costs previously incurred exceeded the amount of the settlement agreed. In the circumstances, she was advised not to conclude the case. In her view, in such a case, if mediation had been provided at an early stage or if the litigation costs incurred had been made known earlier, the mediator would be in a better position to consider how to deal with the case.

22. The Chairman asked how litigation costs already incurred in a legal aid case would generally speaking be settled after mediation. DLA explained that the lawyer handling the case had the responsibility to advise his client the estimated legal costs. To be on par with all civil legal aid cases, it had been proposed that mediators' fees and legal costs incidental to mediation should be subject to the DLA's first charge on any property recovered or preserved for the aided persons under the permanent arrangement.

23. The Chairman said that the Panel noted the Administration's evaluation of the Pilot Scheme, including its view that mediation did not necessarily reduce the overall costs or shorten the duration of some cases. The Panel supported the Administration's proposal to implement mediation as a standing LAD arrangement for legally aided matrimonial cases. However, the Administration should address a number of issues raised at the meeting, such as the funding arrangement for the proposed scheme, the level of mediators' fees, and the desirability of making mediation mandatory. In addition, the Administration should consider how the mediation and legal services could best interface under the permanent arrangement, as a legally-aided person and the other party involved in a matrimonial case could opt for mediation before or after the commencement of proceedings. The Chairman requested the Administration to work out a detailed proposal for the implementation of the permanent arrangement, taking into account the concerns raised. She said that the Administration should consult the LASC and the Panel on the implementation proposal.

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24. D of Adm responded that paragraph 18 of the Administration's paper sought to provide a framework for the proposed permanent arrangement. The Administration would consider how the issues raised at the meeting could be addressed in the proposal and work out a comprehensive proposal in due course.

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V. Criminal legal aid fee system

(LC Paper No. CB(2)1127/06-07(02) - Administration's paper on "Review of criminal legal fees system" for the Panel meeting on 26 February 2007

LC Paper No. CB(2)2221/06-07(05) - Director of Administration's letter dated 18 June 2007 on "Review of criminal legal aid fee system"

LC Paper No. CB(2)2221/06-07(06) - Extract from minutes of meeting on 26 February 2007

LC Paper No. CB(2)2264/06-07(01) - Submission from the Law Society of Hong Kong on "Review of criminal legal aid fee system")

Briefing by the Administration

25. D of Adm briefed members on the progress of the review of the criminal legal aid fee system as set out in her letter dated 18 June 2007 (LC Paper No. CB(2)2221/06-07(05)). In gist, the Administration Wing of the Office of the Chief Secretary and the LAD had since March 2006 invited stakeholders, namely the Judiciary, the Hong Kong Bar Association, the Law Society and the Department of Justice (DoJ), to participate in the discussion on the review of the criminal legal aid fee system in the Joint Working Group (JWG). As reported at the Panel meeting on 26 February 2007, a broad consensus had been reached with the two legal professional bodies on the proposed fee structure that would operate on a marked-brief basis. Further refinements proposed by the two legal professional bodies had since been made, including -

- (a) a new item on "reading fee", payable to solicitors on an hourly basis (90 pages were regarded as one hour's reading); and
- (b) a separate item on "preparation fee", payable to solicitors on a half-day basis, for pre-trial preparation after reading.

As regards rates, the Administration had offered to the two legal professional bodies the proposed rates for the various items applicable to different levels of court in March 2007. Since the rates were being negotiated between parties concerned, the Administration considered it inappropriate to make open the rates at this juncture.

Views of the deputations and the Administration's response

26. Referring to the submission tabled at the meeting (issued to members vide LC Paper No. CB(2)2264/06-07(01)), Mr Lester HUANG, President of the Law Society, made the following points -

- (a) while there was a consensus over the proposed fee structure, the rates for the various payment items would need to be examined. The Law Society found the proposed rates unreasonable, despite an overall increase in criminal legal aid expenditure of 30%. At the Panel meeting on 26 February 2007, the Law Society provided an example where the solicitor concerned was paid at a rate of HK\$118.3 per hour, or HK\$153.8 per hour after a 30% increase under the proposed fee structure. Such rates meant that legal practitioners would need to engage in criminal legal aid work on a charitable basis, and the more experienced and capable solicitors would be discouraged from providing the service. Eventually, there would be a diminution in the service or a reduction in accessibility to justice;
- (b) the proposed rates were based on the existing statutory fees in Rule 21 of the Legal Aid in Criminal Cases Rules (Cap. 221D) which had been substantially revised in 1992. The Administration had refused to provide any information on the basis of the 1992 Review;
- (c) the Administration had not explained why a system similar to the civil legal aid fee system with the right to taxation should not be adopted for criminal legal aid work; and
- (d) the proposed fee structure should uphold the principle of equal pay for equal work and properly reflect the responsibilities of solicitors in criminal legal aid work.

27. Mr Stephen HUNG, Chairman of the Criminal Law and Procedure Committee of the Law Society, supplemented with the following -

- (a) the review of the criminal legal aid fee system had been put on hold in the past few years due to economic downturn and it was now an opportune time for the Administration to actively review the system to ensure access to justice at a reasonable and realistic cost;
- (b) negotiation on rates had reached an impasse because the Administration refused to deviate from the basis of the statutory rates prescribed in Rule 21;
- (c) he did not see why the proposed rates offered to the two legal professional bodies could not be made open. The Administration had offered hourly rates of \$425 and \$300 for High Court and District Court

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cases respectively, which were far below the expectation of the Law Society. The Law Society was given to understand that the rates were not negotiable and they were even lower than the one offered to mediators under the Pilot Scheme on Mediation in Legally-Aided Matrimonial Cases (\$600 per hour); and

- (d) the proposed fee would discourage senior practitioners from taking on criminal legal aid work, and it would also deter junior practitioners from developing a meaningful criminal practice. Thus the pool of talent would shrink and the standard would be bound to deteriorate eventually.

28. Mr Philip DYKES of the Hong Kong Bar Association (the Bar Association) said that he sympathised with the Law Society's request for a fair remunerative system to give solicitors sufficient incentives to engage in criminal legal aid work. He agreed with the Law Society that a court-supervised taxation system should be adopted to ensure fairness in resolving disputes over criminal legal aid fees. As regards the criticism about the Administration's refusal to reveal the basis of the 1992 Review, Mr DYKES believed that the basis was lost in time and the Administration did not know the premises for that Review.

29. Ms Audrey CAMPBELL-MOFFAT of the Bar Association said that the Bar Association was content with the proposed criminal legal aid fee system. At the Panel meeting on 26 February 2007, Mr Philip DYKES had expressed the view that there should be no distinction in the rates between the Court of First Instance and District Court cases, and that the Administration should be mindful of the knock-on effect of the proposed fee system on the calculation of fees by the DoJ and under the Duty Lawyer Scheme. She believed that these issues would be addressed at a future meeting of the JWG. She pointed out that the position of the Law Society and that of the Bar Association were quite different as the methodologies for remunerating solicitors and barristers differed, with the latter resembling the methodology adopted by the DoJ. From the perspective of the Bar Association, there was no impasse on the negotiation of the criminal legal aid fee system.

30. In response to the comments made by the representatives of the Law Society and the Law Society's written submission to the Panel, D of Adm made the following points -

- (a) since March 2006, the Administration had responded to the Law Society's various suggestions in a positive manner. The negotiations on the proposed fee structure and rates for the various payment items had been difficult. One should be mindful that the amount of litigation costs involved in criminal legal aid cases was substantial. In working out an improved criminal legal aid fee system, the Administration had to balance the need to provide reasonable remuneration to assigned lawyers, and the duty to be prudent in public money spending;

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- (b) as mentioned in the Finance Committee paper on 16 October 1992, and as already been explained in the discussion meeting, the basis of the 1992 Review was that the Administration had difficulty in recruiting experienced barristers and solicitors for criminal legal aid work;
- (c) the basis of the current review was very different from that of the 1992 Review. Since the 1992 Review, the situation had improved. During 2003-2006, an increasing number of private legal practitioners had expressed an interest in taking up legal aid cases, and many of them had over 10 years' working experience. Amongst those actually engaged in legal aid work, the number of barristers with over 10 years' working experience rose from 73% in 2003 to 88.6% in 2006 and that for solicitors rose from 74% to 81.9% during the period. At present, the LAD had not encountered difficulties in engaging suitable private legal practitioners to take up criminal legal aid cases on the basis of the current rates;
- (d) the Administration had explained at the Panel meeting on 26 February 2007 why it did not see the need for a taxation system for resolving disputes on criminal legal aid fees. In addition, the legal aid fee system for criminal and civil cases were different;
- (e) the Administration had accepted most of the suggestions put forth by the two legal professional bodies on the fee structure. The Administration had never said that the proposed rates for the various payment items were not negotiable. Although there was limited room for negotiating the overall criminal legal aid expenditure, there was room to discuss the specific rates. The Administration held the view that the rates under negotiation should be kept confidential;
- (f) the difference in the fees proposed for barristers and solicitors reflected the different nature of work engaged by the respective legal practitioners in a criminal case;
- (g) the comment that the brief fee for court attendance would be further reduced under the proposed fee system was factually incorrect. In response to the suggestion of the Law Society, there would be a change in the fee structure in that the present brief fee payable to a solicitor, which comprised fees for preparation and court attendance would be split into two parts, by paying court attendance separately; whereas the part for the fees for preparation would be separated into two items, namely a "reading fee" and a "preparation fee" as explained in paragraph 25 above, to better reflect the nature of the work done by solicitors;
- (h) the comment that no conference fee rates had been proposed for solicitor advocates in District Court cases was incorrect. Having regard to the nature of the work of solicitor advocates who performed the tasks of

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both barrister and solicitor in a court proceeding, conference fee would be paid through the new "additional preparation fee";

- (i) despite differences in opinion, the Administration was serious about the review of criminal legal aid fee system. The Administration could not accept the Law Society's accusation that the review was a sham and would like to put this on record; and
- (j) the Administration would continue to discuss with the stakeholders on the proposed rates for the various payment items with a view to resolving differences.

Discussion

31. Mr Kevin STEEL, Member of the Criminal Law and Procedure Committee of the Law Society, referred to the Administration's response in paragraph 30(c) above and said that the increase in the number of private legal practitioners engaged in criminal legal aid cases should not be interpreted as an indicator of the system's adequacy, particularly when many of them had worked on a charitable basis. He pointed out that a responsible law firm would not send in an inexperienced solicitor to the High Court to deal with criminal cases where the liberty of a person was at risk. All the Law Society asked was a reasonable level of remuneration for services rendered, and that could not be achieved unless the public purse was open.

32. Mr Martin LEE concurred with Mr STEEL. He said that private legal practitioners could not subsidise legal aid service on a long-term basis. The rates offered by the Administration were unreasonable and insulting.

33. The Chairman reminded the deputations that the Panel was not a forum for negotiating the criminal legal aid fees. The purpose of this meeting was to gauge whether the negotiation had come to a standstill and how the matter could be proceeded with. She said that the incumbent Chief Executive, in his capacity as the Chief Secretary for Administration, had undertaken a few years ago to conduct a comprehensive review of the criminal legal aid fee system having regard to the unreasonable remuneration provided to assigned lawyers. Given that little improvement had been made to the remuneration under the proposed legal aid fee system, she doubted whether the CE was sincere about his undertaking.

34. The Chairman further said that while the Law Society had found the proposed rates unreasonable, the Administration had indicated that there was not much latitude to negotiate on the fee levels. Given the divergence of views of the two parties, she did not have the confidence that a consensus could be reached soon. She asked when the next meeting of the JWG would be held. She also expressed concern whether the transfer of the legal aid portfolio to the Home Affairs Bureau with effect from 1 July 2007 would impact on the review of the criminal legal aid fee system.

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35. D of Adm responded that the next meeting of the JWG had yet to be scheduled. She assured members that the transfer of the legal aid portfolio would not affect the review, as the Administration attached great importance to the review and hoped to resolve differences as soon as possible.

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36. The Chairman urged the parties to the JWG to overcome their differences in order to reach a mutually acceptable solution, and requested the Administration to report to the Panel on further developments in the next session.

VI. Policy relating to recruitment of law draftsmen

(LC Paper No. CB(2)2221/06-07(07) - Administration's paper on "Policy relating to recruitment of law draftsmen"

LC Paper No. CB(2)2221/06-07(08) - Extract from minutes of meeting on 24 April 2006)

37. Director of Administration and Development of the DoJ (DAD) highlighted the salient points of the Administration's paper (LC Paper No. CB(2)2221/06-07(07)). She said that English and Chinese language proficiency was set as a general entry requirement for recruitment of the Government Counsel (GC) grade, and law draftsmen in the Law Drafting Division (LDD) of the DoJ were members of the GC grade. The Administration recognised the operational needs of the LDD to recruit from time to time Anglophone counsel to fill particular vacancies, and exemption could be sought to relieve eligible candidates from the Chinese language proficiency requirement when justified.

38. Mr Martin LEE said that it would be difficult to recruit overseas law draftsmen of high calibre with expertise in drafting legislation in the English language, if the Chinese language proficiency requirement was imposed.

39. The Chairman concurred with Mr LEE. She reiterated the Panel's concern over the quality of law drafting, and the Panel's view that there should not be unnecessary constraints to preclude the appointment of Anglophone counsel with expertise in law drafting. She said that given that the LDD had a pool of bilingual draftsmen, they could work hand in hand with experienced Anglophone draftsmen to improve the overall quality of law drafting. In addition, she envisaged that the LDD would need time to consolidate the bilingual drafting expertise. At this stage, it was important to maintain the quality of law drafting in the English language by recruiting drafting talents.

40. The Chairman further said that in recruiting law draftsmen, the Administration should not regard bilingual proficiency as more important than experience and competence. She noted from the Administration's paper that while bilingual proficiency was an entry requirement for both the GC grade and law draftsmen in an open recruitment (as opposed to internal promotion or in-service recruitment), such

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requirement was relaxed for promotion posts if it was justified by operational needs. She referred to the Annex to the Administration's paper and requested the Administration to provide information on the number of counsel under the different groupings (grouped by years of experience) of the LDD who had been exempt from the Chinese language proficiency requirement.

41. DAD responded that where there were no suitable in-house candidates to fill a post and there was a need to bring in outside expertise and experience, there was a need for greater flexibility on the language requirement in an open recruitment. Where there was a need to recruit experienced counsel from outside to join at the promotion ranks, the DoJ could also seek exemption from the Chinese language proficiency requirement. On the information requested by the Chairman, she clarified that the requirement for Chinese language proficiency had been adopted as a general entry requirement for recruitment of GC grade in the DoJ only after 1997. She would provide information on the number of bilingual and monolingual counsel in the LDD after the meeting.

(Post-meeting note : The DoJ has advised after the meeting that there are 33 counsel in the Law Drafting Division, 31 are bilingual while two are monolingual counsel.)

42. Referring to the Annex, Mr Martin LEE enquired why the staff establishment of LDD had decreased from 42 in 1997 to just 33 in 2007. The Deputy Law Draftsman (Bilingual Drafting and Administration) of the DoJ (DLA) explained that the figures represented the staff establishment and some of the vacancies had yet to be filled. Staff establishment of the LDD had been reduced following the completion of two projects after the handover, i.e. the adaptation of law exercise and the authentication of Chinese text of legislation exercise. The LDD would review its staff establishment from time to time, taking account of its workload.

43. The Chairman said that the work of LDD had become more complex after the handover. As Hong Kong could no longer make reference to English law alone, it was necessary for the LDD to conduct more legal research in respect of laws of other common law jurisdictions. The LDD was also involved in implementing many international agreements in local legislation. In addition, Government departments sometimes did not give sufficient time for the LDD to prepare draft legislation. The Chairman said that it was about time for the LDD to review its workload and staffing requirement, including the need to recruit counsel with specialised expertise and drafting skills. The Chairman asked about the progress of recruiting the Law Draftsman, the vacancy of which had remained unfilled for quite some time.

44. DLA shared the Chairman's observations about the increasing complexity of the work of the LDD. He said that the LDD had recently recruited two candidates to fill the entry rank of the GC grade, providing a total staff establishment of 35. On the recruitment of the Law Draftsman, DAD said that an open recruitment exercise was currently under way. Exemption from the Chinese language proficiency

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requirement had been sought for the post. Apart from advertising the vacancy locally and overseas, the Administration had instructed a head hunter to assist in the recruitment. The DoJ would keep the Panel informed of the progress.

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

Council Business Division 2
Legislative Council Secretariat
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