

立法會
Legislative Council

Ref : CB2/PL/AJLS

LC Paper No. CB(2)584/08-09
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 24 November 2008, at 4:30 pm
in Conference Room A of the Legislative Council Building

- Members present** : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan (Deputy Chairman)
Hon James TO Kun-sun
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon Paul TSE Wai-chun
- Public Officers attending** : Item IV
Department of Justice

Ms Susie HO
Director of Administration and Development

Mr John Reading, SC
Deputy Director of Public Prosecutions
- Item V
Home Affairs Bureau

Mr CHAN Heung-ping, William
Deputy Director of Legal Aid (Administration)

Mr Thomas Edward KWONG
Deputy Director of Legal Aid (Litigation)

Miss Christine CHOW Kam-yuk
Principal Assistant Secretary for Home Affairs

Ms Elaine MAK Tse-ling
Assistant Secretary for Home Affairs

Attendance by invitation : Item IV

Hong Kong Bar Association

Mr Rimsky YUEN, SC

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Mr Watson CHAN
Head, Research and Library Services Division

Mr Thomas WONG
Senior Council Secretary (1)9

Ms Amy YU
Senior Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

Action

I. Confirmation of minutes of meeting
[LC Paper No. CB(2)209/08-09]

The minutes of the meeting held on 14 October 2008 were confirmed.

II. Information papers issued since last meeting

2. Members noted that no information paper had been issued since the last meeting.

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III. Items for discussion at the next meeting
[LC Paper Nos. CB(2)309/08-09(01) - (03)]

Work plan of the Panel

3. The Chairman informed members that she and the Deputy Chairman had met with the Administration to discuss the work plan of the Panel for the current session on 6 November 2008. Based on the discussion, the Secretariat had prepared a "List of items tentatively scheduled for discussion at the Panel meetings in the 2008-2009 session" [LC Paper No. CB(2)309/08-09(01)]. The Chairman said that members could inform the Clerk if they had any views on the list or wished to propose other discussion items.

Discussion items for the next meeting

4. Members agreed to discuss the following items at the next regular meeting to be held on 16 December 2008:

- (a) Criminal legal aid fee system;
- (b) Limited liability partnership for legal practice; and
- (c) Solicitors' rights of audience.

Judgment rate

5. The Deputy Chairman said that he had received a letter expressing the legal profession's concern about the high level of the judgment rate, which was the rate of interest on judgment debts determined by the Chief Justice (CJ) under the High Court Ordinance and District Court Ordinance. The judgment rate, currently 8.25%, was too high compared to the market rate and should be reviewed. Ms Miriam LAU shared the concern. The Deputy Chairman suggested that the Panel should follow up the matter with the Judiciary Administration (JA).

6. The Chairman said that she had also received a letter on the same issue. Some legal practitioners had pointed out that it would be particularly unfair to impose such a high interest rate in cases where the delay was caused by court administration and the parties were not to blame. The Chairman informed members that she had already written to JA to relay these concerns expressed by legal practitioners. She had also requested JA to explain the basis upon which the rate was set by CJ and to revert on whether the Judiciary would conduct a review on the matter in the short term. She suggested that the Panel could decide how to follow up the issue upon receiving JA's reply. Her letter to JA would be circulated to members for reference.

Clerk

IV. Court Prosecutors system

[LC Paper Nos. CB(2)2634/07-08(01) and CB(2)309/08-09(04) - (06)]

Briefing by the Administration

7. Deputy Director of Public Prosecutions (DDPP) briefed members on the latest developments of the Court Prosecutors (CPs) system as detailed in the Administration's paper issued in July 2008 [LC Paper No. CB(2)2634/07-08(01)]. He said that in considering the issue of CPs, it was the Administration's guiding principle that the bulk of prosecutions ought to be conducted by the legally qualified, if not in the short term, then in the medium to long term. However, in the light of the large number of vacancies in the CP grade (10 out of an establishment of 102), it was necessary to conduct a recruitment exercise to ease the tight manpower situation. The Department of Justice (DoJ) would continue to brief out some of its summary prosecution cases to junior barristers to provide them with exposure to prosecution work. It was expected that the number of cases prosecuted by counsel on fiat in lieu of CPs would increase by 20% over the next couple of years.

Views of the Hong Kong Bar Association

8. At the invitation of the Chairman, Mr Rimsky YUEN, Chairman of the Hong Kong Bar Association (Bar Association), presented the views of the Bar Association as follows –

- (a) It had long been the stand of the Bar Association that all the prosecution work at the Magistrates' Courts level should be conducted by the legally qualified. To achieve such, the CP system should be grandfathered and gradually phased out in the long run;
- (b) The Bar Association had been briefed by DoJ on the need to recruit CPs to fill the existing vacancies and did not object to the recent recruitment exercise, on the understanding that the new recruits would, unless they were legally qualified, generally concentrated on general court and administrative duties. The Bar Association had also been given assurance that the recruitment exercise would not reduce the cases to be briefed out to counsel on fiat; and
- (c) With a view to enhancing the standards of junior barristers, the Bar Association had set up a task force headed by Mr Peter Duncan, SC to oversee the introduction of a training course for junior members of the Bar with special emphasis on criminal prosecution. A training programme had already been drawn up and it was the Bar Association's plan to launch it before the end of 2008.

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Issues raised by members

Time frame for achieving the goal of having the bulk of prosecutions conducted by the legally qualified

9. Noting that it was one of the Administration's guiding principles that the bulk of prosecutions ought ideally be conducted by the legally qualified, if not in the short term, then in the medium to long term, Mr LAU Kong-wah enquired about the time frame for achieving such goal, and whether a phased approach would be adopted.

10. Director of Administration and Development (DAD) responded that at the present stage it would be difficult for the Administration to give a time frame for achieving the goal. She pointed out that over the years, many CPs had acquired legal qualifications. Among the 92 serving CPs, 31 held law degrees, seven obtained PCLL, six were admitted as barristers and two were studying for law degrees. It would take time for CPs with law degrees to obtain professional qualification. In the meantime, DoJ would continue to brief out more prosecution cases at the summary level to counsel in private practice. With the implementation of the training programme organised by the Bar Association, there might be room for further increasing the amount of briefing out work to the private Bar. DAD further said that it had been suggested that the work of CPs could be taken up by Government Counsel (GC). However, considering that DoJ had encountered difficulties in recruiting GC, it would not be possible for GC to branch into another area of work, at least at the present stage. It would also be hard to recruit legally qualified persons as CPs when there were difficulties in filling the vacancies of GC which had a higher starting salary than the CP rank. Having regard to all these factors, it would be difficult for the Administration to comment on the time frame for achieving the goal at this stage.

11. DDPP supplemented that in considering the issue of the phasing out of CPs, the prime concern of the Administration was to maintain a high standard of prosecution at the summary level. The CPs had been doing a very good job in providing high quality prosecution services, while the same could not be said of junior barristers across-the-board. Due to the lack of training, some junior barristers had not performed satisfactorily when doing prosecution work for the Government. The Administration welcomed the initiative of the Bar Association to enhance the training of its junior members in prosecution work and would do what it reasonably could to assist in that process. DDPP further said that not all legally qualified persons were suited for prosecution work. He pointed out that in the last recruitment exercise of CPs conducted in 2002, a number of barristers/solicitors had been interviewed but were not selected for appointment.

12. Mr Rimsky YUEN said that although he had to concede that some members at the junior end of the Bar were not doing as good a job as the CPs in prosecuting at the summary level, it was attributable mainly to their lack of opportunities to conduct prosecution work. It was in fact a chicken-and-egg situation. He explained that unlike CPs who prosecuted cases in the Magistrates' Courts day in and day out, junior

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members of the Bar had little chance to do prosecution work. Hence, it was not surprising that some of them did not compare favourably with CPs in this regard. He further said that the Bar Association was committed to enhancing the standards of junior barristers. To this end, the Bar Association had put in place a training programme with special emphasis on practical aspects of prosecution work.

Criteria for selecting candidates for appointment as CPs

13. Mr LAU Kong-wah further asked whether there was any guiding principle for the selection of candidates in the current recruitment exercise of CPs to help achieve the long-term goal of having all prosecutions conducted by the legally qualified. DAD advised that there was no change to the entry requirement of the CP rank and legal qualification was not a prerequisite for appointment as CPs. In selecting candidates for appointment, regard would be given to their suitability for the post and their performance during the interview. In a choice between two candidates, preference would normally be given to the candidate who was legally qualified provided all other aspects of these candidates were assessed to be of the same quality.

14. Dr Priscilla LEUNG said that consideration should be given to stating in the recruitment advertisement that preference would be given to legally qualified candidates so as to attract new law graduates to apply for the post. In response, DAD said that the recruitment advertisement had already been placed in late October 2008 and the application period had just been closed. DAD further said while it had not been stated in the recruitment advertisement that preference would be given to candidates with legal qualification, it was understandable that candidates with legal qualifications would have a competitive edge over other candidates.

15. In response to Mr LAU Kong wah's enquiry on whether candidates with substantial relevant experience could be appointed at the higher ranks of the CP grade (*viz.* the ranks of Senior CPI, Senior CPII and Chief CP), DAD explained that in line with the relevant civil service arrangements, when vacancies of higher CP ranks arose, they would normally be filled by internal promotion in the first instance. Where no suitable candidate could be identified internally, the post would then be advertised for open recruitment.

16. Noting that there were cases in past recruitment exercises where candidates without legal qualification were chosen over those who were legally qualified, Dr Priscilla LEUNG enquired about the essential or preferred attributes DoJ would look for in selecting candidates for appointment as CPs. In response, DDPP said that presentation skills and bilingualism were among the essential qualities for conducting prosecution work effectively.

17. Dr Priscilla LEUNG said that new law graduates would be attracted to engage in a prosecution profession if there were good promotion prospects. The experience as a CP would also be useful should they wish to pursue a career in private practice in future. In response to Dr LEUNG's enquiry on the promotion prospects of the post, DDPP said that if the Administration was able to attract legally qualified persons to

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join the CP grade, it could serve a potential source of recruitment for GC. For CPs with legal qualification, their experience as advocates in the Magistrates' Courts would no doubt stand them in good stead should they apply for appointment as GC.

Entry qualification of the CP rank

18. Dr Priscilla LEUNG considered that the minimum entry qualification of the CP rank should be raised to a university degree, having regard to the increasing number of university graduates. Mr Albert HO echoed a similar view. The Chairman advised that raising the minimum entry qualification of the CP rank would mean increasing the salary level which the Administration was not willing to do. DAD responded that when the grade was established, the entry requirement of the CP rank had been set at the matriculation level. She explained that according to the established procedure, a grade structure review had to be conducted before consideration could be given to any proposed change in the rank or pay structure of civil service grades and ranks. DDPP supplemented that while the entry qualification was matriculation, the Administration would look beyond the minimum qualification where suitable candidates could be identified. He pointed out that in the last CP recruitment exercise conducted in 2002, all the eight recruits had a university degree, albeit not a law degree.

19. The Deputy Chairman said that to achieve the goal of having the bulk of prosecution work conducted by the legally qualified, the Administration should stop appointing non-legally qualified persons as CPs. With three law schools in Hong Kong, the supply of law graduates should not be an issue. He, however, agreed that the position of current CPs should be respected. At the same time, they should be encouraged to acquire legal qualification to further enhance their standards as well as their career prospects. He considered it indisputable that legally qualified practitioners, having acquired relevant experience, would be better able to handle prosecution work than unqualified persons. In this regard, the Administration should continue to brief out a certain percentage of the prosecution cases in the Magistrates' Courts to junior barristers and solicitors for the purpose of providing them with exposure to prosecution work.

20. DAD reiterated that while the Administration agreed with the principle that the bulk of the prosecution work ought ideally to be conducted by the legally qualified, the position was such that it could not be achieved in the short run. She also assured members that DoJ recognised that it had a role to play in assisting junior barristers to develop and would continue its policy of briefing out part of the prosecution cases to junior barristers.

21. Regarding the point made by the Deputy Chairman that consideration could be given to setting a requirement on the minimum years of practice experience of fiat counsel for taking up certain types of prosecution cases, Mr Rimsky YUEN said that at present there was no such requirement. He urged that the present system be maintained to ensure that junior members of the Bar could have sufficient exposure to prosecution work in early stage of their career.

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Wastage of CPs

22. In response to Mr Paul TSE's enquiry on the wastage of the CP grade, DAD said that of the six CPs recruited in 2002, four had left the grade. The wastage rate of CPs recruited in earlier recruitment exercises was lower. Some former CPs had been appointed as GC or magistrates. With a view to encouraging serving CPs to obtain professional qualification and as a measure to attract and retain talent, paid study leave would be granted to two CPs each year for pursuing PCLL starting from next year.

(Post-meeting note: The Administration subsequently advised that in 2002, eight CPs were recruited and six had left the grade.)

Briefing out arrangement

23. Mr Paul TSE echoed the view that the main reason why some junior barristers did not perform as well as CPs was their lack of practical experience in prosecution work. He suggested reviewing the briefing out arrangement to enable fiat counsel to take up prosecution work for a more extended period of time, say, two weeks to one month, on each occasion. Such an arrangement would provide more training opportunities to junior barristers and help enhance their prosecutorial skills.

24. DDPP said that under the present arrangement, fiat counsel were briefed to do a list of cases for one day each time, which might comprise four or five cases in the traffic courts or five trials before a Magistrate. The Bar Association had made a proposal similar to the one proposed by Mr TSE. Some Senior CPs had also suggested extending the duration of briefing out work as it would facilitate their assessment of the performance of fiat counsel. DDPP undertook to consider the proposals.

25. Mr Rimsky YUEN confirmed that the Bar Association had indeed put forth a proposal to DoJ on briefing out arrangement. Under the proposal, junior members of the Bar with less than three years of experience would be put onto a separate list, and those on the list would be briefed out for one to two weeks on each occasion to enable them to acquire more experience on prosecution work on an intensive basis.

Prosecution system

26. Mr Paul TSE considered that in the long run, consideration should be given to separating general court administrative duties from prosecution duties, both of which were performed by the CP grade under the present system, and have them performed by two different grades of staff, in view of the differences in job nature and requirements. The Chairman shared Mr TSE's view. DDPP responded that there were advantages in having CPs take up both administrative and prosecution duties, as their experience as prosecutors and knowledge of the prosecution system would assist them in conducting the court administrative duties more effectively.

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27. The Chairman said that apart from prosecutorial skills and familiarity with court procedures, independence and objectivity of prosecutors were also essential to the administration of justice. It was important that a prosecutor could see a case from both the prosecution and defence perspectives. Compared with CPs who only performed the role of a prosecutor, lawyers in private practice had a more balanced expertise in both prosecution and defence work which was pivotal to ensuring the independence and objectivity of the judicial system. She therefore had reservations against any idea of having a profession in prosecution work.

28. Mr Rimsky YUEN echoed the Chairman's views. He said that in one of its submissions to DoJ, the Bar Association had expressed the view that it was important for barristers in private practice to have exposure in both prosecution and defence work so that if they joined the Judiciary in future, they would bring with them a more balanced perspective and be in a better position to perform the role of a judge.

V. Review of the provision of legal aid services

[LC Paper Nos. CB(2)309/08-09(07) and (08), IN03/08-09 and CB(2)335/08-09(01)]

29. At the invitation of the Chairman, the Clerk briefed members on the salient points in the background brief prepared by the Legislative Council (LegCo) Secretariat on the review of the provision of legal aid services [LC Paper No. CB(2)309/08-09(07)], which gave an overview of the major issues discussed by the Panel in the past and related developments.

30. Deputy Director of Legal Aid (Administration) [DDLA(Admin)] briefed members on the major aspects of legal aid services in Hong Kong, details of which were set out in the Administration's paper [LC Paper No. CB(2)309/08-09(08)]. He invited members to note that unlike many overseas jurisdictions where an applicant's disposable income and disposable capital were separately assessed in calculating his financial eligibility for legal aid, the approach in Hong Kong was to aggregate an applicant's yearly disposable income and his disposable capital in conducting the means test.

31. Head of the Research and Library Services Division of the LegCo Secretariat (RLSD) (H/RL) highlighted to members the findings in the information note prepared by RLSD (LC Paper No. IN3/08-09) on legal aid services in Hong Kong, England and Wales of the United Kingdom (UK), the province of Ontario of Canada and the State of New South Wales of Australia in respect of the following: (i) authorities responsible for providing legal aid services; (ii) scope of legal aid services; (iii) source of funding for legal aid services; and (iv) legal aid expenditure per capita. He said that English draft of the full report on "Legal aid systems in selected places" would be completed soon.

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32. In response to the Chairman's enquiry on whether there was any large scale non-Government run legal aid scheme in the three selected places of study, Senior Council Secretary (1)9 said that in Ontario, legal assistance was available through community legal clinics operated jointly by local communities and non-profit organisations, details of which would be covered in the research report.

33. Noting from the information note prepared by RLSD that legal aid services were normally not provided for personal injury cases in UK, Mr Albert HO enquired about the rationale for such, considering that personal injury was one of the most frequently aided types of cases.

34. The Chairman explained that following the introduction of Conditional Fee Arrangements in UK some ten years ago, personal injury cases had been removed from the ambit of the government-funded legal aid system. Personal injury work was now done almost entirely on the basis of conditional fee agreements rather than through the legal aid system. To her understanding, the introduction of such arrangements was aimed primarily at reducing government spending on legal aid. She requested RLSD to include such background information in respect of the UK legal aid regime in the research report.

RLSD

Issues raised by members

Accessibility to legal aid for the middle class

35. Mr LAU Kong-wah said that it had been a long-standing concern of the Panel that a vast majority of middle-class people had no access to legal aid services. He enquired about the Administration's current position on the expansion of the Supplementary Legal Aid Scheme (SLAS) to give the middle class greater access to justice. He further sought information on the accessibility to legal aid for the middle class in other jurisdictions.

36. On the Administration's current position, Principal Assistant Secretary for Home Affairs (PASHA) said that as indicated by the Secretary for Home Affairs in the Panel meeting on 20 October 2008, the Administration was open-minded about the possible expansion of SLAS and would carefully consider whether there was room for doing so.

37. In respect of Mr LAU's enquiry on the availability of legal aid to the middle class in other jurisdictions, DDLA(Admin) said that to his understanding, Hong Kong was the only place which had in place a supplementary legal aid scheme to cater for the middle-income group. H/RL said that according to the information gathered by RLSD, no scheme akin to SLAS was found in the three selected places of study. H/RL further said that in the three selected places, an applicant's income and his capital were separately assessed when determining his financial eligibility for legal aid. For instance, in Ontario, the upper financial eligibility limit in respect of annual income for a two-person family was CAN\$12,900 (about HK\$80,000). In UK, a

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person with gross income of less than £2,530 (about HK\$30,000) per month was eligible for civil legal aid.

38. In response to DDLA(Admin), H/RL said that in UK, eligibility for civil legal aid was assessed on the basis of monthly income, while that for criminal legal aid weekly income.

39. Mr LAU Kong-wah said that judging from the data cited by H/RL, it would appear that in some overseas jurisdictions like UK, the middle class were better provided for in legal aid than was the case in Hong Kong.

HAB

40. The Chairman requested the Administration to provide for members' reference information on how Hong Kong compared to other jurisdictions in terms of accessibility of the middle class to legal aid.

41. The Chairman drew members' attention to paragraphs 25 to 27 of the background brief prepared by the LegCo Secretariat on the Report on Conditional Fees published by the Law Reform Commission in July 2007, which had recommended, inter alia, the setting up of a Conditional Legal Aid Fund to screen applications for the use of conditional fees, brief out cases to private lawyers, finance the litigation, and pay the opponent's legal costs should the litigation prove unsuccessful. It was believed that the proposed fund could help the middle class get better access to justice. The Administration, however, had yet to respond on its current view on the recommendation.

HAB

42. The Chairman further said that the Administration had been reluctant to expand SLAS on the ground that it might adversely affect the financial viability of the scheme which was self-financing in nature. To facilitate members' discussion in this regard, she requested and DDLA(Admin) undertook to provide information on the number of successful and unsuccessful SLAS cases in recent years, the net gain arising from recovery of damages/compensation in successful cases, as well as the costs for unsuccessful ones.

43. While agreeing with the need to set a financial eligibility limit for legal aid, Mr Paul TSE considered that some flexibility should be built into the assessment mechanism to safeguard the public's right to access to justice. He pointed out that it would be unjust to deny legal aid assistance to a person who had a deserving case but whose financial resources had just slightly exceeded the financial eligibility limit. Consideration should be given to applying the contribution rate under SLAS flexibly, so that legal aid might be granted to an applicant whose financial resources exceeded the statutory financial limit, on the condition of the applicant making a higher contribution rate. To provide the middle class with greater access to justice, the Administration could also consider setting up a fund to provide loans to litigants subject to the passing of a merits test.

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44. Referring members to paragraphs 44 and 45 of the background brief prepared by the LegCo Secretariat, the Chairman said that during past discussions on legal aid, members had also put forward many related views on improving access to legal aid. Apart from the suggestions raised by Mr Paul TSE, it had also been suggested that the Administration should consider restructuring the legal aid regime to provide "unbundled legal assistance", i.e. with private lawyers providing advice and assistance at key points in the proceedings, which would not only extend the scope of legal aid but would also assist the Legal Aid Department in assessing the merits of a case at difference stages of the proceedings and accordingly decide whether legal aid should continue to be granted.

45. Dr Priscilla LEUNG echoed the concern on the unavailability of legal aid to the middle class. She considered the present financial eligibility limit for legal aid too low and should be raised significantly to a more realistic level, so as to allow middle class who could not afford the high litigation costs to be eligible for legal aid and to have access to justice. She also urged the Administration to revisit seriously the numerous suggestions put forth by the Panel in the past on review of the legal aid regime, such as the establishment of an independent statutory legal aid authority.

Contributions payable by legal aid clients

46. The Chairman said that the amount of contribution required to be made by an aided person would impact on his/her decision as to whether to apply for legal aid or accept the grant of legal aid. The Chairman requested and DDLA(Admin) undertook to provide statistics on the amount and percentage of contributions required to be paid by the aided persons under the Ordinary Legal Aid Scheme and SLAS and the number of persons aided under the two Schemes in the past few years.

HAB

Consultation with stakeholders on the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants

47. Noting that it was the Administration's plan to revert to the Panel in March 2009 after consultation with stakeholders on proposals for financial eligibility limits, Mr LAU Kong-wah asked how such consultation would be conducted and which stakeholders would be consulted. PASHA responded that stakeholders would be consulted on specific preliminary proposals formulated by the Administration having regard to the views expressed by the Panel and relevant organisations. As regards the stakeholders to be consulted, PASHA said that as in the past five-yearly reviews on financial eligibility criteria of legal aid applicants, the major stakeholders to be consulted would include the Legal Aid Services Council (LASC), the two legal professional bodies and LegCo.

48. The Chairman said that there had been criticism in the past that the consultation conducted by the Administration was confined mainly to the organisations represented in LASC and there was a lack of wider scope of public consultation. Mr LAU Kong-wah shared the view that the scope of consultation to

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be conducted on the five-year review should be widened. At the request of the Chairman, PASHA agreed to provide for members' reference a list of the stakeholders to be consulted on the five-yearly review.

Clerk

49. Members noted that the Society for Community Organisation had provided a submission on legal aid services [LC Paper No. CB(2)335/08-09(01)] for members' reference. On the timing for the Panel to receive public views on issues relating to legal aid, members agreed that deputations would be invited to give views after the Administration had reported to the Panel on the results of the consultation and the preliminary proposals on the five-yearly review in March 2009.

VI. Any other business

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

Council Business Division 2
Legislative Council Secretariat
6 January 2009