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by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 30 March 2009, 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 : Items IV, V and VII

Mr Benjamin CHEUNG King-man
Director of Legal Aid

Mr Thomas Edward KWONG
Deputy Director of Legal Aid

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

Ms Elaine MAK Tse-ling
Assistant Secretary for Home Affairs

Item VI

Mr WONG Yan-lung, SC, JP
Secretary for Justice

Mr Ian Wingfield, GBS, JP
Solicitor General

Ms Amelia LUK
Law Officer (International Law)

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

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

Ms Amy YU
Senior 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)1063/08-09]

The minutes of the meeting held on 13 January 2009 were confirmed.

II. Information papers issued since last meeting

2. Members noted that the following papers had been issued since the last meeting -
- (a) Judiciary Administration (JA)'s paper on "Caseload and manpower situation of the District Court" [LC Paper No. CB(2)1030/08-09(01)];
 - (b) JA's paper on "Death investigations by the Coroner's Court" [LC Paper No. CB(2)1030/08-09(02)]; and
 - (c) JA's paper on "Proposed Resolution of the Legislative Council to Amend the Judicial Officers Recommendation Commission Ordinance" [LC Paper No. CB(2)1161/08-09(01)].

III. Items for discussion at the next meeting
[LC Paper Nos. CB(2)1152/08-09(01) - (03)]

Discussion items for the next meeting

3. In accordance with the list of items tentatively scheduled for discussion in the current session [LC Paper No. CB(2)1152/08-09(01)], members agreed to discuss the following items at the next regular meeting scheduled for 27 April 2009 -
- (a) Pilot Scheme for Building Management Cases in the Lands Tribunal; and
 - (b) Review of the jurisdiction of the Office of The Ombudsman.

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Drafting of legislation

4. The Chairman said that the item of "Drafting of legislation" was referred to the Panel by the Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions (the Subcommittee). The Subcommittee noted that the Law Drafting Division (LDD) of the Department of Justice (DoJ) had embarked on initiatives to improve the drafting of existing legislation and considered that the Law Draftsman should be invited to update the Panel on the work of LDD, in particular its improvement work on law drafting. The Chairman further said that at the special Finance Committee meeting held on 23 March 2009, the Secretary for Justice (SJ) informed Members that a Drafting Techniques and Legislative Style Committee had been set up in LDD to put forward proposals to improve the comprehensibility of the Laws of Hong Kong. At the suggestion of the Chairman, members agreed that the Panel should write to the Law Draftsman to enquire about the progress made in this regard and the appropriate timing for LDD to revert to the Panel on this item.

Clerk

Appointment of Temporary/Deputy Judges and Judicial Officers

5. The Chairman noted that the Judiciary had engaged and deployed temporary judicial resources to help reduce court waiting times and JA had provided related information to Members in the Examination of Estimates of Expenditure 2009-2010. To facilitate consideration of the issue, members agreed to request JA to provide further information on -

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- (a) the actual numbers of Temporary/Deputy Judges and Judicial Officers (JJOs) at various levels of courts;
- (b) the respective numbers of these JJOs appointed from outside the Judiciary; and
- (c) the number of cases heard by JJOs not of substantial appointment.

IV. Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants

[LC Paper Nos. CB(2)1152/08-09(04) and (05), CB(2)1215/08-09(01)]

6. Members noted that a letter dated 27 March 2009 from the Law Society of Hong Kong expressing views on this item and "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases" under item V below was tabled at the meeting.

[*Post-meeting note:* The letter was issued to members vide LC Paper No. CB(2)1215/08-09(01) on 31 March 2009.]

7. Members also noted that the Legislative Council (LegCo) Secretariat had prepared a background brief on the subject [LC Paper No. CB(2)1152/08-09(05)].

Progress of the five-yearly review

8. The Chairman said that the Administration informed the LegCo Secretariat on 19 March 2009 that it was not in a position to report its recommendations to the Panel on the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants (the five-yearly review) at this meeting and requested that it be replaced by an item "Annual and biennial review of financial eligibility limits of legal aid applicants". As the five-yearly review was a major agenda item, she had requested the Administration to attend the meeting to give a full explanation on the unexpected difficulties which had arisen and advise members as to the date by which the Administration would be ready to proceed with the matter.

9. Principal Assistant Secretary for Home Affairs (PASHA) explained that the Administration was not able to report its recommendations on the five-yearly review as it needed more time to consider carefully the way forward and the relevant financial and other implications. She added that the Administration noted that the motion moved by Dr Priscilla LEUNG on relaxing the eligibility criteria for legal aid was passed at the Council meeting on 11 February 2009 and would take into account the views expressed by Members during the motion debate in formulating its recommendations on the review.

10. In response to the Chairman's enquiry on when the Administration would be able to revert to the Panel on its proposals, PASHA said that she was not able to provide a definite time frame at this stage. She further said that according to past practice, the Administration would consult the Legal Aid Services Council (LASC) when its recommendations were ready before reverting to the Panel. Subject to the views of LASC, the Administration would consider consulting the Panel in parallel with its consultation with LASC, with a view to expediting the process. She undertook to revert to the Panel on the matter as soon as practicable.

11. The Chairman said that it was incumbent upon the Administration to provide a full explanation on its request to defer the discussion of the item just 10 days before the scheduled meeting. She pointed out that the five-yearly review was a major agenda item which had long been scheduled by agreement for discussion in March 2009 and recently re-confirmed. The relevant issues had been discussed for years, and many relevant organizations had been awaiting eagerly for the Administration's recommendations. She requested the Administration to inform members of its latest thinking on each of the issues concerned and explain whether it had encountered unexpected difficulties in examining any of them.

12. PASHA said that it would be inappropriate to inform the Panel of the Administration's position on each issue in a fragmented manner, as the issues were interactive among each other and had to be considered as an integrated package. She elaborated by way of illustration that the approach for assessing the financial eligibility of legal aid applicants was interrelated with the methods of computing disposable income and disposable capital as well as the level of the financial

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eligibility limits. She added that the Administration was considering critically various options with a view to identifying the optimal package of proposals which represented the most effective use of public resources, and having regard to the views expressed by the Panel and relevant organizations. She assured members that the Home Affairs Bureau had accorded a high priority to the five-yearly review and would strive to revert to the Panel on its recommendations as soon as practicable.

13. Mr LAU Kong-wah said that having already received extensive views and proposals from major stakeholders, including LegCo, and the general public on various issues relating to the five-yearly review, the Administration's most important task at the present stage was to conduct a systematic analysis on the views and formulate its recommendations. He considered that the review process would be more fruitful and efficient if the Administration could consult LegCo on the outcome of its analysis and its preliminary thinking before finalizing the proposals. The Chairman pointed out that she did not object to the Administration consulting the Panel in two stages. What she considered dissatisfying was that the Administration had not been sharing its views with the Panel on issues concerning the review. PASHA said that the Administration would consider Mr LAU's suggestion and see whether it would be feasible to consult the Panel on its proposals in parallel with its consultation with LASC.

Issues raised by members

Expansion of Supplementary Legal Aid Scheme (SLAS)

14. Ms Miriam LAU expressed disappointment with the Administration's delay in reporting to the Panel on its recommendations for the five-yearly review. She urged the Administration to consider seriously expanding SLAS by raising the financial eligibility limits and increasing the types of cases covered by SLAS, so as to provide the middle class with greater access to justice. She opined that the expansion of SLAS would not have any adverse impact on the financial viability of the scheme, given that only applicants whose cases had been assessed to have good prospects of winning would be granted assistance under the scheme. Noting from paragraphs 20 and 21 of the Administration's paper that the amount of contribution received from SLAS cases had dropped significantly in recent years, Ms LAU said that relaxing the criteria for assessing the financial eligibility of SLAS applicants could help increase the number of SLAS applications, hence augmenting the income of the SLAS fund.

15. The Deputy Chairman echoed the view that the scope of SLAS should be expanded to promote access to justice for those who could not afford the high costs of litigation. He further remarked that the current fund balance of SLAS, at some \$88 million, should be sufficient for sustaining the operation of the scheme, and that he did not see how the expansion of SLAS would impact adversely on its financial viability.

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Methods of computing disposable income and disposable capital

16. Ms Miriam LAU cited a case where an application to SLAS concerning a personal injury case had been rejected because the applicant who owned a taxi had failed the means test, notwithstanding the fact that the taxi was his only asset and means of livelihood. In her view, an asset which was the only means of livelihood of a legal aid applicant should be disregarded in assessing his financial eligibility.

17. On the case quoted by Ms Miriam LAU, Director of Legal Aid (DLA) said that if a legal aid applicant owned a taxi which was his only means of livelihood, the computation of taxi's value in assessing his financial means would depend on whether the taxi had been fully paid for or there was still a mortgage on it. If the latter was the case, the taxi would be treated as a business owned by the applicant in calculating his disposable capital. At the request of the Chairman, PASHA agreed to provide further information on the assessment of financial eligibility of the case cited by Ms LAU when the Administration reverted to the Panel on the five-yearly review.

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18. Citing as an example a case where the legal aid applicant was a taxi owner who worked one shift himself and rented his taxi to another person for another shift, Mr James TO remarked that it was not always easy to determine whether an asset should be considered the only means of livelihood of an applicant. In his view, a simpler approach to extending the ambit of legal aid was to raise the financial eligibility limits for the legal aid schemes, say to \$1 million for SLAS, and to apply flexibly the contribution rate payable by legally-aided persons, e.g. by requiring applicants whose financial resources had exceeded a certain level to make a higher contribution rate.

19. Ms Miriam LAU said that she cited the case in paragraph 16 above to highlight the need to adopt a flexible approach in assessing the financial eligibility of legal aid applicants. In the case that she had just cited, the applicant did not own any residential property and his only asset was the taxi. Having regard to the fact that the value of any interest in the only or main dwelling of an legal aid applicant would be disregarded in calculating his disposable capital, she considered it unfair, in the case of the taxi owner, not to disregard the value of the taxi which was his only asset and only means of livelihood.

20. Ms Audrey EU shared the view that it was important to adopt a flexible approach in assessing the financial eligibility of legal aid applicants. Citing another example to illustrate the point, she said that under the present system, a person who rented out his only residential property in order to obtain funding to support his litigation would not be eligible for legal aid as the value of the property would be included as his disposable capital, while he would have been eligible if he had continued to reside in the property instead of renting it out.

Scope of provision of legal aid

Defamation proceedings and money claims concerning financial derivative products

21. The Deputy Chairman said that there was a need to review the present scope of cases covered by legal aid. He elaborated that at present many types of proceedings, such as those relating to defamation, disputes over partnerships and money claims in financial derivative products, were not covered by legal aid. He considered that defamation cases should be covered by legal aid, at least for respondents in defamation cases. In his view, the incident related to Lehman Brothers' minibonds also pointed to the need to review the exclusion of cases involving money claims in respect of financial derivative products, as many victims in the incident should be entitled to legal aid due to their financial situation. He requested the Administration to review critically the types of cases currently excluded from the scope of legal aid and revert to the Panel on the matter when the subject was next discussed.

22. PASHA responded that defamation proceedings were excluded from legal aid in view of the difficulties inherent in assessing the merits of this type of cases and quantifying in monetary terms the damages for loss of reputation. As for proceedings relating to money claims in financial derivative products, the Administration's current position was that it would not be a reasonable use of limited public funds to grant legal aid for disputes arising from investment in high risk financial products. Nevertheless, the Administration noted the Deputy Chairman's views and would provide a response when it reverted to the Panel on the five-yearly review.

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23. Mr James TO said that in the incident of the Lehman Brothers minibonds, many consumer investors had been misled into purchasing the minibonds and it was not their intention to invest in high risk financial products. He pointed out that the incident had exposed a problem with the existing legal aid system under which there was a blanket exclusion for money claims in respect of financial derivative products, even though alleged misselling of financial products was involved.

Litigation cases in the Mainland involving Hong Kong permanent residents

24. Dr Priscilla LEUNG said that as she had pointed out during the motion debate on relaxing the eligibility criteria for legal aid at the Council meeting on 11 February 2009, the middle class should be provided with better access to justice, and one way of doing so was to extend the scope of the existing legal aid services to cover litigation cases in the Mainland involving Hong Kong permanent residents who were working and living in the Mainland. Ms Audrey EU shared the view that the Administration should consider actively the suggestion.

Legal advice

25. The Chairman urged the Administration to consider extending the scope of legal aid from litigation to legal advice, to complement the changes brought about by the Civil Justice Reform. She pointed out that due to insufficient understanding of the merits of their cases, some unrepresented litigants had wasted much time and money as well as judicial resources to pursue groundless cases, while some others who had deserving cases had chosen not to bring legal actions for fear of high litigation costs, thus forgoing their legal rights. She further opined that the Free Legal Advice Scheme of the Duty Lawyer Service was inadequate in assisting would-be legal aid applicants as it only provided preliminary legal advice but not detailed analysis of the merits of individual cases and their prospects of winning. She added that the money spent by the Legal Aid Department in obtaining legal advice from lawyers in private practice to facilitate its assessment of the merits of legal aid applications might as well be used for providing legal advice to the applicants directly to help them better appreciate the merits of their own cases. In response, PASHA said that the Administration would make its best endeavour to report to the Panel its preliminary views on this issue in the context of the discussion on demand for and supply of legal and related services in Hong Kong scheduled for June 2009.

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26. Ms Miriam LAU expressed support for extending the scope of legal aid to the provision of legal advice. She further opined that Hong Kong people who were involved in legal proceedings in the Mainland should at least be provided with legal advice service under legal aid. The Chairman said that as a matter of fact, the Hong Kong Economic and Trade Office in Guangdong provided an annual funding of some \$0.4 million to the Hong Kong Federation of Trade Unions for provision of legal advice services in the Mainland. She could not see why the same services should not be provided under the legal aid system.

Financial eligibility limits

27. PASHA said that at present, a single financial eligibility limit applied to all types of cases under the Ordinary Legal Aid Scheme (OLAS) as well as criminal legal aid cases, with another limit for SLAS. There had been calls for posing different limits for different types of cases, which could be one possible direction of the Administration's proposals. On the other hand, there were views that in line with the global trend of simplifying the mechanism for assessing and approving legal aid applications, consideration should be given to adopting a simpler approach of raising the respective financial eligibility limit of OLAS and SLAS with a view to extending the ambit of the legal aid system. In this regard, it would be helpful to have views from the Panel on the appropriate level of increase to the existing financial eligibility limits of the two schemes.

28. Dr Priscilla LEUNG said that as she had mentioned during the motion debate on 11 February 2009, consideration could be given to raising the financial eligibility limit for OLAS to \$0.5 to 1 million, and that for SLAS to \$1 to 3 million(s), so that more people in need were eligible to apply for legal aid.

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29. Mr James TO, however, said that it was far too simplistic to look only at raising the financial eligibility limits of the existing legal aid schemes. To ensure access to justice, he considered it important also to have regard to the nature and litigation costs of different types of cases with a view to setting an appropriate financial eligibility limit for each type of case.

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30. The Chairman expressed concurrence with Mr James TO's view, pointing out that during previous discussions on the subject, many Panel members including her had questioned the appropriateness of the existing approach of having a one-line financial limit for all types of cases without regard to the peculiarities of different types of cases. She stressed that the Administration should provide a response to the Panel on this concern when the subject was next discussed.

31. Mr Paul TSE opined that the Administration should have a radical rethink of the legal aid system. Instead of focusing merely on the question of where to draw the line for financial eligibility for legal aid, a more flexible and holistic approach should be adopted to the provision of legal aid services. For instance, legal aid could be granted to an applicant who had a deserving case with a reasonable prospects of winning but who was above the means test threshold on the condition that he agreed to make a higher contribution rate. To reduce the inequality in cases where one party to a proceeding had access to legal aid while the other was marginally excluded, the Administration should devise strategies that would provide assistance to the latter, for instance by implementing some form of conditional fee arrangement. He added that consideration could also be given to providing legal assistance to the public through a legal service voucher scheme.

32. PASHA said that when the current five-yearly review started, its scope had been confined to the major issues listed in the Administration's paper, viz. the financial capacity approach in assessing the financial eligibility of legal aid applicants, methods of computing disposable income and disposable capital, financial eligibility limits and SLAS. Nevertheless, she undertook to give some thought to Mr TSE's views.

33. The Deputy Chairman said that in respect of legal aid for civil proceedings under OLAS, the Director of Legal Aid (DLA) might waive the financial eligibility limit in meritorious cases involving a possible breach of the Hong Kong Bill of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights. He was of the view that the means test should also be waived for meritorious cases involving the fundamental rights of residents as stipulated in the Basic Law.

Conclusion

34. The Chairman requested the Administration to revert to the Panel on its proposals for the five-yearly review as soon as practicable. The Administration was also requested to provide detailed responses to the issues raised by members at this meeting when it reverted to the Panel on the subject.

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V. Pilot Scheme on Mediation of Legally Aided Matrimonial Cases

[LC Paper Nos. CB(2)1152/08-09(06) and (07), CB(2)1215/08-09(01)]

35. Deputy Director of Legal Aid (DDLA) briefed members on the latest development in the implementation of the permanent arrangement for mediation in legally aided matrimonial cases, details of which were set out in the Administration's paper [LC Paper No. CB(2)1152/08-09(06)]. He said that the drafting of the relevant legislative amendments was underway and it was the Administration's plan to introduce the bill into LegCo in mid 2009. Members noted that the LegCo Secretariat had prepared a background brief on the subject for members' reference [LC Paper No. CB(2)1152/08-09(07)].

36. Regarding the number of hours of mediation under the permanent arrangement, DDLA said that the Administration's original proposal was to set the initial cap at 15 hours per case. However, having taken into account Ms Audrey EU's suggestion of introducing an interim checkpoint approach, the Administration had amended its proposal such that the mediation process would be initially capped at nine hours and be extended for another six hours when there was a need to do so.

37. In response to Ms Audrey EU, DDLA explained that the mediation process was proposed to be capped at nine hours at a start, as the Pilot Scheme on Mediation in Legally-aided Matrimonial Cases launched in March 2005 had shown that the average time spent per mediated case was 8.9 hours. Although the initial cap was set at nine hours, the mediation process could be further extended for another six hours subject to the approval of DLA. Additional hours required for completing the mediation process beyond the ceiling of 15 hours (i.e. 9 + 6) would be subject to further approval of DLA on a case-by-case basis. He further explained that the initial nine hours was not for determining whether the case was suitable for mediation. Before a case was referred to a mediator, the Judiciary's Mediation Coordination Office would provide information sessions for the legally aided person and the other party, and assessed whether the case was suitable for mediation. A case would be referred to a mediator only after it had been identified as suitable for mediation and if the parties so agreed.

38. Ms EU further sought clarification as to whether the initial cap of nine hours per case included preparatory work done by a mediator. DDLA responded that the number of hours allowed for the mediation process referred to the actual time spent in the mediation process, and excluded preparatory work done by a mediator. He added that according to his experience, mediation in matrimonial cases did not involve complex preparatory work with the bulk of the work lying in the actual mediation process.

39. The Chairman concluded that members were generally supportive of the proposal to extend legal aid to cover the costs of mediation in matrimonial cases.

VI. Immunity from prosecution

[LC Paper Nos. CB(2)1189/08-09(01) and (02)]

Briefing by the Administration

40. Secretary for Justice (SJ) briefed members on the incident concerning Mrs Grace Mugabe, First Lady of Zimbabwe, who was alleged to have assaulted a photojournalist and a colleague of his on 15 January 2009 during her visit to Hong Kong. SJ informed members that the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China (OCMFA) in the Hong Kong Special Administrative Region (HKSAR) had advised the HKSAR Government that Mrs Mugabe had been granted immunity and inviolability pursuant to Article 22.1(3) of the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities (the Regulations), which applied to Hong Kong by virtue of their inclusion in Annex III of the Basic Law and their promulgation by the Promulgation of National Laws Notice 1997. OCMFA had further advised that the privileges and immunities that Mrs Mugabe enjoyed included the immunity from criminal jurisdiction equivalent to that enjoyed by diplomatic agents under Article 14 of the Regulations.

[*Post-meeting note*: SJ's speaking note was issued to members vide LC Paper No. CB(2) 1215/08-09(02)] on 31 March 2009.]

Discussions

41. Referring to Article 22.1(3) of the Regulations which provided that "The following persons shall enjoy immunity and inviolability necessary for their transit through or sojourn in China: ... (3) other visiting foreigners to whom the Chinese Government has granted the privileges and immunities specified in the present Article.", Ms Audrey EU enquired about the definition of "immunity and inviolability necessary". Specifically, Ms EU sought clarification on whether Mrs Mugabe's case came under "immunity and inviolability necessary" when she was not exercising any official functions during her stay in Hong Kong. SJ responded that according to OCMFA, the privileges and immunities that Mrs Mugabe enjoyed under Article 22.1(3) of the Regulations included the immunity from criminal jurisdiction equivalent to that enjoyed by diplomatic agents under Article 14 of the Regulations, irrespective of whether the relevant act was performed in the exercise of official functions, given that no such distinction was provided for under Article 14.

42. Ms Audrey EU further sought clarification on whether the privileges and immunities specified under Article 22.1(3) of the Regulations were granted by the Central People's Government (CPG) on a blanket approval basis or on a case-by-case basis. SJ responded that the OCMFA had advised the HKSAR Government that in accordance with customary international law and Chinese diplomatic practice, CPG in general conferred diplomatic privileges and immunities specified in Article 22.1(3) of the Regulations to spouses of foreign heads of states during their stay in China, including Hong Kong, and had requested the HKSAR Government to handle Mrs Mugabe's case accordingly.

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43. Ms Audrey EU said that to her understanding, the government of the sending state could waive diplomatic immunity and allowed persons otherwise immuned to face prosecution in the host country. In respect of Mrs Mugabe's case, Ms EU enquired whether the privileges and immunities were granted to her by CPG before her visit to Hong Kong.

44. SJ reiterated OCMFA's advice that in accordance with customary international law and Chinese diplomatic practice, CPG in general conferred diplomatic privileges and immunities to spouses of foreign heads of states during their stay in China, and Mrs Mugabe's case was also handled in line with such general practice. In response to Ms EU, SJ further said that it was not necessary for people with diplomatic privileges and immunities to claim such privileges and immunities in order to enjoy them. On the other hand, diplomatic immunity could be revoked only if it was specifically waived by the sending country concerned. He added that the issue of waiver of diplomatic immunity was a foreign affairs matter which was outside the responsibility of the HKSAR Government.

45. Mr James TO enquired whether the HKSAR Government would ask the Ministry of Foreign Affairs to request the Zimbabwean government to waive the immunity in Mrs Mugabe's case, should the alleged assault be substantiated. In response, SJ reiterated that waiver of immunity was a diplomatic matter for which CPG was responsible. SJ also assured members that the HKSAR Government had raised the concerns of the community about the incident to CPG. In further response to Mr TO, SJ said that the decision to waive diplomatic immunity rest entirely with the sending country and not the individual concerned.

46. Ms Audrey EU said that according to media reports, Mrs Mugabe's bodyguards were also involved in the alleged assault. She enquired whether the bodyguards were also immuned from prosecution. SJ said that when the alleged assault was reported to the Police, Mrs Mugabe and her bodyguards had already left Hong Kong. The Administration was currently verifying, through OCMFA, the capacity in which the bodyguards were visiting Hong Kong.

47. Ms Audrey EU further said that the incident had raised wide public concern about the rule of law in Hong Kong. To prevent the recurrence of similar incidents, she asked whether the HKSAR Government could declare Mrs Mugabe to be persona non grata. SJ said that the declaration of any person entitled to diplomatic privileges and immunities to be persona non grata was a diplomatic matter which came within the responsibility of CPG pursuant to the Basic Law. He stressed that the Administration was aware of the concerns of the community of Hong Kong about the incident and had already conveyed such concerns to CPG.

48. In response to Ms Audrey EU's enquiry on whether the HKSAR Government had power to ban the entry of Mrs Mugabe into Hong Kong, SJ said that pursuant to Article 154 of the Basic Law, the HKSAR Government was authorized to apply immigration controls on entry into, stay in and departure from HKSAR by persons

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from foreign states and regions. While he would not comment on any individual cases, he confirmed that the HKSAR Government had the power to deny a person's entry into Hong Kong. Such power was exercised by the Immigration Department having regard to the relevant laws and policies as well as the circumstances of each case.

49. Mr James TO pointed out that Mrs Mugabe was likely to visit Hong Kong again, since she had a house and a daughter who was studying in Hong Kong. He said that Mrs Mugabe posed a threat to Hong Kong people and called on the HKSAR Government to bar her from entering into Hong Kong if she tried to come again. SJ reiterated that under the Basic Law and the Immigration Ordinance (Cap. 115), the HKSAR Government was empowered to apply immigration controls on, inter alia, entry into Hong Kong by persons from other countries. He would not, however, comment on individual cases. The matter also fell outside his policy portfolio.

50. In response to Mr Paul TSE's enquiry on whether the HKSAR Government could bar Mrs Mugabe from entering into Hong Kong if she was not declared to be persona non grata, SJ said that the persona non grata status was not a pre-requisite for denying a person's entry into Hong Kong.

51. Mr Albert HO said that there might be hundreds of people in Hong Kong who enjoyed similar diplomatic privileges and immunities as Mrs Mugabe. He was concerned that it would be a grave threat to the rule of law in Hong Kong if the HKSAR Government could do nothing even if these people had committed serious crimes such as murder. He asked whether the Police had the power to stop people with immunities from committing crimes such as assault.

52. SJ said that while people accorded with diplomatic immunities could not be prosecuted, they were bound to respect the laws and regulations of HKSAR pursuant to Article 25(1) of the Regulations. He stressed that the fact that a person who had committed a criminal offence enjoyed immunity from prosecution did not mean that there would be no other consequences. He reiterated that the HKSAR Government had already conveyed to CPG the concerns of the community about the incident. He also assured members that diplomatic immunity was not a licence to break the law. As the issue of privileges and immunities was a foreign affairs matter, the proper venue for redress lay at diplomatic level. On the question of whether the Police had the power to stop people with immunities from committing crimes, SJ said that the Police, who were charged with the responsibility to protect the personal safety of the public, could use the appropriate level of force to stop people with immunity if they endangered other people's lives. Such action taken by the Police to protect the personal safety of the public would not violate the person's immunity from prosecution.

53. Mr James TO noted from paragraphs 9 and 10 of the SJ's speaking note that in the cases of the United Kingdom (UK) and Australia, diplomatic immunities conferred to foreign heads of states and their spouses included not only immunity from criminal jurisdiction, but also immunities from arrest or detention. He wondered how the

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Police could protect a person from being assaulted if the Police could not even arrest the assaulter. He was concerned that frontline police officers might be confused over what they could do to stop crimes committed by people with diplomatic immunities. SJ said that in extreme cases where an alleged assault was committed right before the Police, he believed that the Police could use reasonable force to stop the assault so as to protect the personal safety of the victim. This had nothing to do with whether he had the power to arrest the assaulter.

54. Ms Miriam LAU shared the view that the incident had raised grave concern that people enjoying diplomatic immunities would have a free reign to commit crimes, including serious crimes such as murder, without facing any consequences. She said that the incident was serious in that it involved a blatant assault committed in a public place. The Chairman echoed Ms LAU's views. Apart from conveying the views of the community to CPG, Ms LAU considered that the HKSAR Government should at least request the Ministry of Foreign Affairs to issue a statement of protest to the Zimbabwean government against the incident.

55. SJ said that commission of serious crimes by diplomatic personnel was rare. If it did occur, the matter would be dealt with at diplomatic level. When a serious crime had been committed by a diplomat, the sending country concerned could waive his immunities to ensure that the proper course of justice could proceed. Depending on the seriousness of the crime committed, the receiving state could declare the individual to be persona non grata and request that he be recalled to his home country, or in extremely serious cases, sever its diplomatic tie with the sending state concerned. SJ reiterated that the HKSAR Government had already conveyed to CPG the concerns of the Hong Kong public about the incident. He trusted that CPG would take account of the views of the Hong Kong community, including LegCo Members, and handle the incident in an appropriate manner.

56. In response to Ms Miriam LAU's question on whether the Hong Kong public would be informed of any action taken by CPG concerning the incident, SJ reiterated that under our constitutional framework, it was for CPG to handle incidents relating to foreign affairs having regard to the seriousness of each incident. He pointed out that it would not be appropriate for CPG to disclose all matters in the diplomatic arena to the public. Nonetheless, he believed that for very serious incidents, CPG would appreciate the public's wish to know what actions could be taken to handle the incidents.

57. Dr Priscilla LEUNG said that there were many cases in other countries where diplomatic personnel had committed serious crimes. She noted that there was not much that the receiving countries could do in such cases. They could at best declare the individual concerned to be persona non grata, and only in the most extreme cases would severance of diplomatic ties be contemplated. She was aware of only one case where the sending country had agreed to waive the immunity of the diplomatic personnel concerned. She considered the incident concerning Mrs Mugabe unfortunate; yet at the same time she also recognized that it was a diplomatic practice to grant privileges and immunities to spouses of foreign heads of state and that it was

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for CPG to handle the incident as foreign affairs were involved. In Mrs Mugabe's case, she considered that the HKSAR Government should suggest to CPG declaring her to be persona non grata in HKSAR, having regard to the public outcry over the alleged assault.

58. SJ reiterated that the HKSAR Government appreciated the public's concerns about the incident and had conveyed such concerns to CPG. He reiterated that the declaration of a person as a persona non grata was a diplomatic matter the right of which resided in CPG. Dr Priscilla LEUNG said that the HKSAR Government should at least write to OCMFA to convey its wish to have Mrs Mugabe declared to be persona non grata. SJ took note of Dr LEUNG's view.

59. In response to Mr James TO, SJ said that he did not have information on whether Mrs Mugabe used a diplomatic passport to enter Hong Kong. SJ, however, pointed out Mrs Mugabe was granted diplomatic privileges and immunities on account of her capacity as the spouse of a head of state, and not the type of passport she was holding when entering Hong Kong. In further response to Mr TO, SJ said that the HKSAR Government had not sought the view of OCMFA in this regard.

60. Mr Paul TSE asked whether the Administration would consider expressing its regrets to Mr Richard Jones and his colleague who were alleged to have been assaulted by Mrs Mugabe, over the occurrence of the incident in Hong Kong. SJ responded that he saw no reason why the Administration should do so. Mr James TO shared SJ's view. Mr TO, however, opined that should the alleged assault be substantiated after investigation, the HKSAR Government should request the Ministry of Foreign Affairs to seek an apology from the Zimbabwean government. SJ said that the Administration had listened to members' views carefully and would consider conveying members' views to CPG if appropriate.

61. Referring to paragraphs 9 and 10 of the SJ's speaking note on the relevant legislation in UK and Australia, the Chairman pointed that such legislation were irrelevant as they did not apply to Hong Kong. The Chairman further said that she did not subscribe to the Administration's view, as stated in paragraph 12 of the SJ's speaking note, that the incident did not have the effect of undermining the rule of law or the principle of one country two systems and high degree of autonomy laid down in the Basic Law. First, she considered that there was no clear legal basis for conferring Mrs Mugabe with diplomatic privileges and immunities under the Regulations, and such ambiguity was incompatible with the rule of law. Second, even if there was clear legal basis for conferring her with diplomatic privileges and immunities, the rule of law would certainly be undermined if a person enjoying diplomatic privileges and immunities could commit an assault blatantly and intentionally without facing any consequences. In her view, if CPG did not take any action to address the public concern about the incident, the principle of one country two systems would also be undermined.

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62. In response, SJ made the following points -

- (a) the relevant legislation in UK and Australia were cited not because they applied to Hong Kong, but to illustrate the fact that the practice of granting privileges and immunities to spouses of foreign heads of states was common in many countries;
- (b) the basis for conferring Mrs Mugabe with diplomatic privileges and immunities had been clearly explained earlier at the meeting and set out in his speaking note ;
- (c) as pointed out by Dr Priscilla LEUNG, cases in other countries showed that host countries had no power to prosecute a person who enjoyed diplomatic immunities. Such practice was not unique to China and Hong Kong. The Department of Justice had taken into account all relevant laws and factors and had acted in strict accordance with the law in Mrs Mugabe's case; and
- (d) under the Basic Law, foreign affairs were matters for CPG, and the HKSAR Government could not in any way dictate how CPG would handle the incident. The HKSAR Government had conveyed to the CPG the concerns of the community of Hong Kong about the incident, and he trusted that CPG was fully aware of such concerns.

63. The Chairman said that what was particularly worrying about the incident was that Mrs Mugabe would likely come to Hong Kong again, given that she had a house and a family member in Hong Kong, posing a serious threat to the rule of law in Hong Kong. Concluding the discussions, the Chairman said that members had expressed serious concerns about the incident and requested the Administration to keep members informed about any latest developments concerning the incident.

DoJ

VII. Any other business

Annual and biennial review of financial eligibility limits of legal aid applicants
[LC Paper No. CB(2)1152/08-09(08)]

64. The Chairman said that the Administration's paper sought to inform the Panel that in the light of the outcome of the latest annual and biennial reviews, the Administration intended to move a resolution in LegCo in April 2009 to raise the financial eligibility limits for legal aid by 6.1%, i.e. from \$165,700 to \$175,800 for OLAS and criminal legal aid, and from \$460,300 to \$488,400 for SLAS, taking account of movements in Consumer Price Index (C).

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65. Members had not commented on the legislative proposal.
66. There being no other business, the meeting ended at 6:45 pm.

Council Business Division 2
Legislative Council Secretariat
19 May 2009