

立法會
Legislative Council

Ref : CB2/PL/AJLS

LC Paper No. CB(2)506/09-10
(These minutes have been seen by
the Administration)

Panel on Administration of Justice and Legal Services

Minutes of special meeting
held on Thursday, 22 October 2009, at 5:30 pm
in Conference Room B 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 Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon IP Wai-ming, MH
Hon Paul TSE Wai-chun
- Member attending** : Hon WONG Kwok-hing, MH
- Members absent** : Dr Hon Philip WONG Yu-hong, GBS
Hon LAU Kong-wah, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon LEUNG Kwok-hung
- Public Officers attending** : Department of Justice
Mr WONG Yan-lung, SC
Secretary for Justice

Mr Ian Wingfield
Solicitor General

Ms Susie HO
Director of Administration & Development

Mr Eamonn Moran
Law Draftsman

Mr Kevin Zervos, SC
Deputy Director of Public Prosecutions

Home Affairs Bureau

Mr TSANG Tak-sing
Secretary for Home Affairs

Ms Florence HUI
Under Secretary for Home Affairs

Mr Benjamin CHEUNG
Director of Legal Aid

Ms Grace LUI
Deputy Secretary for Home Affairs (1)

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

Staff in attendance : Ms Amy YU
Senior Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

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I. Briefing on the Chief Executive's 2009-2010 Policy Address

[LC Paper Nos. CB(2)31/09-10(01) and (02), the 2009-2010 Policy Address – "Breaking New Ground Together" and the 2009-2010 Policy Agenda booklet]

Briefing by the Administration

The Chairman welcomed representatives of the Administration to the meeting to brief the Panel on the initiatives in the 2009-2010 Policy Agenda relating to the Department of Justice (DoJ) and those of the Home Affairs Bureau in respect of legal aid.

2. At the invitation of the Chairman, Secretary for Justice (SJ) and Secretary for Home Affairs (SHA) each gave a presentation to highlight the policy initiatives within their respective purview for 2009-2010. Copies of their speaking notes (Chinese version only) were tabled at the meeting and issued vide LC Paper Nos. CB(2)111/09-10(01) and (02) on 27 October 2009.

Issues raised by members

Procedures to fill the anticipated vacancy of the Chief Justice (CJ)

3. Referring to the recent remarks made by Prof WANG Zhenmin, Dean of the Law School of Tsinghua University, that the successor of CJ, who would leave office by August 2010, should enjoy eminent standing in the legal and judicial fields, and have a good knowledge of the common law, the Basic Law as well as the national law of China, the Chairman sought clarification as to whether these were requirements laid down in the Basic Law.

4. SJ said that he was not in a position to elaborate on the remarks made by Prof WANG Zhenmin. In response to the Chairman's enquiry on whether DoJ had any role to play in the appointment of CJ, SJ said that the procedures to fill the anticipated vacancy of CJ were stipulated in the Basic Law and the Judicial Officers Recommendation Commission Ordinance (Cap. 92) and DoJ would render legal support in the process where necessary.

Legal aid issues

5. Mr WONG Kwok-hing expressed concern about the mechanism for appeal against refusal of legal aid. He cited a case where a person had applied for legal aid for judicial review against the refusal of his application for disability allowance. The legal aid application was rejected on merits. The applicant wanted to appeal against the refusal of legal aid, but could not afford to hire a lawyer to do so. Mr WONG considered it unreasonable that a legal aid applicant had to hire a lawyer to appeal against refusal of legal aid, considering that the very reason for his application for legal aid was lack of means.

6. Director of Legal Aid (DLA) explained that an appeal against refusal of legal aid was not court proceedings per se, albeit the appeal was made to the Registrar of the High Court. An applicant who was refused legal aid or an aided person who was aggrieved by any order or decision of DLA could appeal to the Registrar of the High Court who would then review the application and make a determination on the appeal. He stressed that it was not necessary for the applicant or aggrieved person to seek legal representation for the appeal. In response to Mr WONG Kwok-hing, DLA further explained that LAD had sought advice from a barrister in private practice on the legal aid application concerned and the refusal was based on that legal advice.

7. Mr WONG Kwok-hing opined that while legal representation was not required for an appeal against refusal of legal aid, it was understandable that the applicant concerned might consider it necessary to seek legal assistance to argue his case and refute the legal points against his application. The Chairman said that while legal representation was not required as a matter of procedure for an appeal against refusal of legal aid, the applicant might need legal assistance if his application was refused on merits. The Panel could follow-up the issue during future discussions on review of the legal aid system.

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8. Ms Audrey EU said that she had recently written to the Legal Aid Department (LAD) concerning a complaint she had received from a legally-aided person on the amount of legal costs she was required to pay. Ms EU elaborated that the complainant was granted legal aid for her application for ancillary relief in divorce proceedings. However, it turned out that the financial provision she was awarded was not sufficient for paying the legal costs incurred and she had to rely on Comprehensive Social Security Assistance for a living. Ms EU asked whether LAD had in place any mechanism to monitor the costs of legal aid cases to ensure that any award received would not be eaten up by the legal costs.

9. DLA responded that that LAD had an established mechanism for monitoring the progress and costs of legal aid cases. In respect of the case mentioned by Ms EU, DLA said that to his knowledge, the lawyer assigned to the case had clearly explained to the aided person the potential liability for costs if the case proceeded to hearing. The aided person, however, insisted on taking her case to trial. After the trial, the assigned lawyer had offered to reduce the amount of legal fees, but the aided person insisted on having the costs taxed, and the money recovered was not sufficient to cover the taxed costs.

10. Ms Miriam LAU said that many small enterprises operating on the Mainland encountered difficulties in handling commercial disputes. Noting that one of the new initiatives of DoJ in 2009-2010 was to enhance legal co-operation in civil and commercial matters between Hong Kong and the Mainland to facilitate resolution of civil and commercial disputes, Ms LAU asked whether there were any concrete measures to provide legal assistance to small enterprises operating on the Mainland involved in legal proceedings.

11. SJ responded that under the Closer Economic Partnership Arrangement (CEPA), there had been progressive development in collaboration in legal practice between Hong Kong and the Mainland. The recently announced Supplement 6 to CEPA incorporated further liberalization measures on legal services, with particular emphasis on enhancing collaboration between Hong Kong and Guangdong. These collaboration measures would strengthen the provision of legal services to Hong Kong people living or doing business on the Mainland. SJ further said that apart from litigation, arbitration offered an alternative forum for dispute resolution. Hong Kong businessmen entering into contracts on the Mainland could choose the law of Hong Kong as the applicable law and the court or the arbitral institutions of Hong Kong to settle their contractual disputes.

12. In response to Ms Miriam LAU's enquiry on whether consideration would be given to providing Hong Kong people living or working on the Mainland with legal advice service under legal aid if involved in legal proceedings on the Mainland, SHA said that careful consideration had to be given to the cost-effectiveness and resources implications of the proposal.

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13. Dr Priscilla LEUNG said that improving the middle class's access to legal aid services had been a long-standing concern of the Panel, and enquired whether any concrete proposal would be made in this regard. SHA responded that the Administration was formulating concrete proposals in respect of the current Five-yearly Review of the Criteria for Assessing the Financial Eligibility of Legal Aid Applicants and would revert to the Panel as soon as practicable after consultation with the Legal Aid Services Council later this year.

Development of mediation services

14. Mr IP Wai-ming noted that there had been greater use of mediation in the judicial system, having regard to the benefits of mediation such as reduction in time and costs for the parties concerned and relieving the strain on the judicial system. Regarding employment injury compensation cases, he pointed out that the employees concerned had all along relied on their legal representatives for advice on matters such as the amount of claim. With the greater use of mediation in resolving employment injury compensation disputes in lieu of litigation, he expressed concern about the availability of support services to employees in the mediation process, particularly in respect of advice on the amount of compensation. He further sought information on the number and percentage of employment injury compensation cases in which mediation service had been used.

15. On the use of mediation in resolving employment injury compensation disputes, SJ responded that it was a global trend to promote the use of mediation, and employment injury compensation claims was one of the areas where mediation could potentially play a vital role in dispute resolution, as evidenced by the success of the pilot scheme launched jointly by the Hong Kong Federation of Insurers and Hong Kong Mediation Council earlier on to promote the use of mediation in resolving such disputes. Indeed, one of the pilot scheme cases, where the parties concerned succeeded in mediating a satisfactory settlement within a matter of weeks, had become a model case on mediation. The Administration would continue its efforts in promoting the use of mediation in personal injury cases and other appropriate areas. The Administration would provide the information sought by Mr IP if available.

DoJ

16. Regarding Mr IP's concern about availability of advice to the employees on the amount of injury compensation in the mediation process, SJ said that the quality of mediators and the parties' trust in the mediators were of crucial importance to success in mediating satisfactory settlements. In this regard, the Working Group on Mediation chaired by him was reviewing issues relating to the accreditation, training and regulation of mediators with a view to ensuring the quality of mediators and safeguarding consumer interests. He added that in terms of support services on mediation, the Mediation Co-ordinator's Office of the Judiciary provided information on mediation and maintained a list of accredited mediators for the reference of parties who were willing to attempt mediation.

17. The Chairman said that with the implementation of the Civil Justice Reform, in proceedings where all parties were legally represented, they were required to consider alternative resolutions for their disputes such as mediation prior to the commencement

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of proceedings. For parties who were legally-aided, their assigned legal representatives would provide them with any necessary assistance and advice concerning settlement by mediation, including the amount of claim. DLA added that the parties could attempt settlement by mediation at any stage of the proceedings.

18. Mr IP said that not all workers with employment injury claims were eligible for legal aid. He reiterated his concern about the lack of support services on mediation for parties who were not legally represented, particularly in respect of legal advice on the amount of claim.

19. SJ stressed that in such cases insistence on legal advice in the mediation process might not necessarily be conducive to the achievement of a satisfactory settlement. The mediator would be in a best position to provide the necessary support to the parties with a view to facilitating early settlement with minimal costs.

20. Ms Miriam LAU enquired whether the Administration had any plan to embark on discussions with the Mainland authorities on mutual recognition and enforcement of mediation settlement between Hong Kong and the Mainland, which would benefit the development of mediation services in Hong Kong.

21. SJ said that mediation had been a popular method of resolving disputes on the Mainland for decades. Most mediations on the Mainland, however, were conducted by People's Mediation Commissions, which were mediation bodies organized by ordinary citizens for settling disputes. SJ believed that with the gradual development of commercial mediation on the Mainland, there would be greater scope for collaboration on mediation services between Hong Kong and the Mainland. SJ further said that it was not uncommon in recent years for mediation to be used in the arbitration process, hence the term Med-Arb. As there was arrangement between Hong Kong and the Mainland on reciprocal enforcement of arbitral awards, any mediation settlement reached during arbitration would also be mutually enforceable as an arbitral award.

Proposed amendments to the Matrimonial Proceedings and Property Ordinance

22. Mr Albert HO said that some recent judgments concerning claims for ancillary relief and custody in divorce proceedings had raised concern among family law practitioners. In one case, the husband pursued parallel divorce proceedings on the Mainland making claims on matrimonial assets after divorce proceedings had been initiated in Hong Kong. The husband appealed against the order on ancillary relief made by the Hong Kong court on the ground that a divorce had already been obtained from a Mainland court. The appeal was allowed. In the second case, the Hong Kong court had granted custody of a child to the wife, who had sent the child to study abroad. The husband had subsequently obtained an order from a Mainland court ordering the wife to let the husband see the child twice a week, which had put the wife in a very difficult situation. Mr HO said that cases such as these had raised questions on recognition of orders relating to matrimonial proceedings between Hong Kong and the Mainland.

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23. SJ explained that unlike the United Kingdom, there was no legislation in Hong Kong conferring jurisdiction on the Hong Kong courts to deal with claims for ancillary relief and custody after the dissolution of a marriage in a jurisdiction outside Hong Kong. The Administration recognized this deficiency in the law and planned to introduce legislation to address such deficiency.

24. Solicitor General (SG) supplemented that the Administration had reached a broad consensus with the two legal professional bodies on how the law should be reformed and aimed at introducing a bill towards the end of the current session to empower the Hong Kong courts to deal with matters concerning matrimonial assets after recognition of a decree of divorce granted outside Hong Kong. The bill dealt only with matters concerning matrimonial property and not custody, as the latter involved complex issues and more time was needed to study the matter. In this regard, the Administration was proposing to have discussion with the Mainland authorities on broad issues relating to matrimonial proceedings and recognition of orders made in those proceedings.

25. Ms Audrey EU said that the legislative amendments involved were fairly simple and straightforward and it should not have taken the Administration so long to introduce the bill. She hoped that the Administration would consider extending the applicability of the legislation retroactively to cover on-going cases.

Legal assistance to torture claimants

26. Mr James TO said that following a court ruling in December 2008, the Administration had reviewed the torture claim screening mechanism and adopted a number of enhancement measures to ensure procedural fairness. One such measure was the provision of publicly-funded legal assistance through the Duty Lawyer Service (DLS) to torture claimants who lacked economic means. He understood that the Administration had been in discussion with DLS on the level of remuneration for duty lawyers providing legal assistance to torture claimants under the new scheme, and urged DoJ to provide input on the appropriate level of fee rates with a view to ensuring procedural fairness and justice.

27. SJ responded that the Security Bureau had consulted DoJ on the matter. To his understanding, there had been some progress in the discussion between the Administration and DLS on fee rates which was still on-going.

Removal of persons refused entry into Hong Kong

28. Ms Audrey EU said that the incident of Mr ZHOU Yongjun who was repatriated to the Mainland after having been refused entry into Hong Kong had raised wide public concern for the rule of law in the territory. She pointed out that there was no arrangement between Hong Kong and the Mainland for the surrender of fugitive offenders, not to mention that Mr ZHOU was not a fugitive offender. She expressed concern whether the Immigration Department had handled Mr ZHOU's entry application in accordance with the law.

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29. SJ said that as a matter of principle, it was not appropriate to comment on individual cases. In general, a passenger whose travel document did not meet the entry requirement would be repatriated to his or her place of embarkation or origin. To his understanding, such arrangement was also applicable to Mr ZHOU's case, and there was no question of the Immigration Ordinance being abused for surrendering a fugitive offender. Persons who considered that they had not been treated fairly or that their rights had been infringed could seek judicial review or lodge a complaint with the Chief Executive.

Settlement of claims arising from the incident which occurred at the Kwun Tong Bypass on 13 July 2009

30. Mr James TO said that a taxi-driver whose taxi was damaged when it was deployed by the Police to form a roadblock to stop illegal car racers at the Kwun Tong Bypass in mid-July 2009 had yet to receive compensation for his losses arising from the incident. The taxi-driver urgently needed money to pay the repair bill. According to the Police, his compensation claim was sent to DoJ in early August 2009. Mr TO queried why it took so long to handle the claim. At the request of the Chairman, SJ undertook to provide written information on the time taken for considering the claim.

(Post-meeting note: In its written reply dated 29 October 2009, DoJ advised that after receiving instructions from the Police to consider the claims on 5 August 2009, it had been processing the claims without delay. DoJ explained that as it was not a simple case and altogether six claims were involved, time was required for considering carefully the information related to the incident, relevant Police procedures, information/advice relating to quantum, and relevant legal principles. Clarification and further instructions were also sought from client during the process. According to DoJ, it had made offers to the claimants on 23 October 2009 and would closely monitor the progress.)

II. Any other business

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