

立法會
Legislative Council

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LC Paper No. CB(2)1096/09-10
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 25 January 2010, 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-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon IP Wai-ming, MH
Hon Paul TSE Wai-chun
- Members absent** : Dr Hon Philip WONG Yu-hong, GBS
Hon Timothy FOK Tsun-ting, GBS, JP
Hon LEUNG Kwok-hung
- Public Officers attending** : Items IV, V and VI
Home Affairs Bureau

Mr Jacky LUM
Acting Deputy Secretary for Home Affairs (1)

Ms CHOW Kam-yuk, Christine
Principal Assistant Secretary for Home Affairs (Civic Affairs)2

Legal Aid Department

Mr CHAN Heung-ping, William
Director of Legal Aid

Mr KWONG Thomas Edward
Deputy Director of Legal Aid / A&P

Attendance by invitation : Item IV

Hong Kong Bar Association

Mr Ruy Barretto, SC

Ms Audrey Campbell-Moffat

The Law Society of Hong Kong

Mr Amirali Nasir

Council member and member of the Legal Aid Committee

Mr Leslie YEUNG

Member of the Legal Aid Committee

Ms CHU Wing-shuet, Christine

Assistant Director of Practitioners Affairs

Society for Community Organization

Mr TSOI Yiu-cheong

Community Organizer

Item V

Hong Kong Bar Association

Mr Ruy Barretto, SC

Ms Audrey Campbell-Moffat

The Law Society of Hong Kong

Mr Amirali Nasir

Council member and member of the Legal Aid Committee

Mr Leslie YEUNG

Member of the Legal Aid Committee

Mr Michael Vidler

Member of the Criminal Law and Procedure Committee

Ms CHU Wing-shuet, Christine

Assistant Director of Practitioners Affairs

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Mr TSOI Yiu-cheong

Community Organizer

Item VI

Hong Kong Bar Association

Mr Ruy Barretto, SC

Ms Audrey Campbell-Moffat

The Law Society of Hong Kong

Mr Michael Vidler

Member of the Criminal Law and Procedure Committee

Ms CHU Wing-shuet, Christine

Assistant Director of Practitioners Affairs

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 }
} For item IV only
Dr Yuki HUEN }
Research Officer 8 }

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)787/09-10]

The minutes of the meeting held on 23 November 2009 were confirmed.

Action

II. Information papers issued since last meeting

2. Members noted that the following papers had been issued since the last meeting -

- (a) letter dated 9 December 2009 from the Secretary for Home Affairs to the Chairman and Members of the Criminal Law & Procedure Committee on "Criminal Legal Aid Fees" [LC Paper No. CB(2)569/09-10(01)];
- (b) information paper provided by the Law Drafting Division of the Department of Justice (DoJ) on the document design of draft legislation [LC Paper No. CB(2)615/09-10(01)]; and
- (c) information paper provided by the Judiciary Administration on "Mediation Information Office of the Judiciary" [LC Paper No. CB(2)634/09-10(01)].

3. The Chairman said that the Secretary for Home Affairs had advised in his letter dated 9 December 2009 (item referred to in paragraph 2(a) above) that the Administration had proceeded to make preparation for the legislative process to put in place the revised criminal legal aid fees system, in the hope that a consensus could be reached with the Law Society of Hong Kong (the Law Society) on the issue of fee rates. The Chairman further said that the subject of review on criminal legal aid fees system was on the Panel's list of outstanding items for discussion and the Administration had been requested to report to the Panel on the progress of the review in due course.

III. Items for discussion at the next meeting

[LC Paper Nos. CB(2)782/09-10(01) - (03)]

4. Members agreed to discuss the following items at the next regular meeting to be held on 22 February 2010:

- (a) Transcript fees;
- (b) Development of mediation services;
- (c) Non-civil service appointment of a Deputy Principal Government Counsel in DoJ for implementation of the recommendations of the Working Group on Mediation; and
- (d) Arbitration in Hong Kong of Mainland-related disputes.

5. Members also agreed that the Judiciary Administration be requested to give a briefing on the Mediation Information Office recently set up in the Judiciary, which was the subject of the information paper referred to in paragraph 2(c) above, under the agenda item of "Development of mediation services" (item 4(b)).

Action

IV. Research report on "Legal aid systems in selected places"

[LC Paper Nos. CB(2)357/09-10(01) - (04), CB(2)782/09-10(04), RP01/08-09, IN01/09-10 and FS05/09-10]

6. The Chairman drew to Members' attention the following documents prepared by the Research and Library Services Division of the Legislative Council (LegCo) Secretariat (RLSD) which provided supplementary information to the Research Report on "Legal aid systems in selected places" (Research Report) [RP01/08-09] -

- (a) information note on income level, number of legal aid applications received and granted, and updated figures of legal aid expenditure in Hong Kong and the selected places [IN01/09-10]; and
- (b) fact sheet on client contributions, costs received and legal aid expenditure in Hong Kong and the selected places [FS05/09-10].

Views of deputations

7. The Chairman informed members that the Legal Aid Services Council (LASC) had been invited to attend the meeting but its chairman was out of town and was not able to attend. It had, however, provided a submission [LC Paper No. CB(2)357/09-10(03)] to the Panel on the Research Report.

The Hong Kong Bar Association (Bar Association)

8. Mr Ruy Barretto highlighted the following points in the submission of the Bar Association [LC Paper No. CB(2)357/09-10(01)] -

- (a) the Administration had been dragging its feet on the expansion of the Supplementary Legal Aid Scheme (SLAS) which had long been advocated by the two legal professional bodies and the wider community;
- (b) the Research Report provided yet more evidence on the need to expand SLAS. The grant rate of legal aid applications in Hong Kong was some 30% lower than that in England and Wales in respect of both civil and criminal cases, pointing to a high degree of unmet needs in respect of legal aid. Legal aid services were not a form of social welfare but an integral part of administration of justice. It was incumbent upon the Administration to put forward proposals to fill this gap of unmet needs;
- (c) the Administration had indicated in its paper that it was examining the proposals on expansion of SLAS in the course of conducting the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants (five-yearly review). The Bar Association considered that the Administration should conduct a review on SLAS this year, and not just bundled it up as part of the five-yearly review;

Action

- (d) there was a need for provision of publicly-funded legal representation service in various tribunals which were currently not available except on a pro-bono basis by legal practitioners; and
- (e) the Administration had highlighted in its paper [LC Paper No. CB(2)782/09-10(04)] the point made in the Bar Association's submission that the means assessment mechanism for legal aid should take into account the circumstances for elderly applicants. It should be noted that the problem with the means assessment mechanism was not simply one affecting the elderly, and the difficulties faced by elderly applicants was but an example used to illustrate the injustice of the existing mechanism.

The Law Society

9. Mr Amirali Nasir briefed members on the salient points in the Law Society's submission [LC Paper No. CB(2)357/09-10(02)] as follows -

- (a) the Law Society had long advocated and continued to advocate for the establishment of an independent statutory legal aid authority;
- (b) the need for legal aid services at the community level was not met by the existing piecemeal approach. The Administration should expand the role of legal aid to provide community legal services such as those offered in the overseas jurisdictions covered in the Research Report;
- (c) SLAS should be expanded to widen access to justice;
- (d) a full review of the financial eligibility limits should be conducted so that more members of the public would be eligible for legal aid; and
- (e) according to the Research Report, the per capita spending on legal aid in Hong Kong was much lower than the Province of Ontario of Canada (Ontario), England and Wales and the States of New South Wales of Australia (NSW). The Administration had a duty to facilitate the community's access to justice by increasing legal aid funding.

Society for Community Organization (SOCO)

10. Mr TSOI Yiu-cheong presented the views of SOCO as detailed in its submission [LC Paper No. CB(2)357/09-10(04)]. He highlighted the following points -

- (a) a comprehensive review on the legal aid system was long overdue. Legal aid was an integral part of administration of justice and a comprehensive review should be conducted expeditiously with a view to enhancing the accessibility of legal aid services. The Administration should provide a timetable for conducting such review;

Action

- (b) like the overseas jurisdictions covered in the Research Report, the Government should provide subsidies to support the provision of legal services at the community level by non-governmental organizations;
- (c) the discretion of the Director of Legal Aid (DLA) to waive the upper financial limit of legal aid applicants should be extended to cover proceedings involving human rights issues brought under the Basic Law, the Personal Data (Privacy) Ordinance (Cap. 486), the anti-discrimination legislation and relevant international human rights conventions; and
- (d) publicly-funded legal advice should be made available to persons detained in police stations. LASC considered the suggestion worth looking into and had referred the matter to a working party for in-depth study. It was his understanding that the working party supported in principle the provision of such service.

Other submissions

11. Members noted the submission from the Hong Kong Federation of Trade Unions which was tabled at the meeting.

(Post-meeting note: The submission was issued to members vide LC Paper No. CB(2)824/09-10 dated 26 January 2010. A submission provided by the Hong Kong Human Rights Monitor after the meeting was also issued to members vide LC Paper No. CB(2)833/09-10 dated 27 January 2010.)

Administration's response

12. Principal Assistant Secretary for Home Affairs (PASHA) briefed members on the Administration's response to the Research Report and the major concerns raised by the deputations in their written submissions as set out in its paper [LC Paper No. CB(2)782/09-10(04)].

SLAS

13. On the Bar Association's view that a comprehensive review should be conducted on SLAS, PASHA said that SLAS was a self-financing scheme funded by contributions from damages recovered in successful cases. In reviewing SLAS, regard must be given to the fundamental principle of maintaining its financial viability. To ensure the financial sustainability of SLAS, its scope should be confined to cases which involved monetary claims of a reasonable size, with a high success rate and a reasonably good chance of recovering damages. As regards the timetable for the review of SLAS, PASHA said that the Administration would take the opportunity of the five-yearly review to consider whether there was any room for improving the scheme without compromising its financial viability and would revert to the Panel on its recommendations for the review in March 2010.

Action

Community legal services

14. Regarding the views given by the Law Society and SOCO on the provision of community legal services, PASHA said that the Administration noted that LASC would investigate into ways and means to enhance legal aid services at the community level and would keep in view LASC's views in this regard. The Administration would report to the Panel its preliminary views on proposals to enhance the provision of community legal aid services at the meeting scheduled for March 2010.

HAB

15. As regards the timetable for the Administration to revert to the Panel on its consideration of the proposal for the provision of publicly-funded legal advice service to detainees in police station, PASHA said that the Administration would ascertain the progress of the review undertaken by LASC's working party and would consider LASC's views in examining the proposal. At the Chairman's invitation, Mr TSOI Yiu-cheong informed the meeting that he had participated in the work of the working party and it was his understanding that the working party tentatively aimed at submitting its recommendations to LASC in March 2010. He further said that the proposal was raised many years ago and the Administration should review the proposal expeditiously and come to its own view on the matter rather than waiting for LASC's recommendations. At the request of the Chairman, PASHA undertook to revert to the Panel on its consideration of the proposal under the subject of "Free Legal Advice Scheme" in March 2010.

HAB

Legal aid expenditure

16. On the per capita legal aid expenditure in Hong Kong vis-à-vis the selected places covered in the Research Report, PASHA stressed that a direct comparison was not feasible, given that the revenue and expenditure figures of legal aid in Hong Kong and the selected places were calculated and expressed in different ways. She further said that while Hong Kong had been stated as having the lowest expenditure per capita among the places covered in the Research Report, it had the highest level of expenditure per granted application. Referring to table 5 in the supplementary information note (IN01/09-10), she said that the legal aid expenditure per granted application in 2007-2008 was HK\$41,000 in Hong Kong, HK\$35,997 in England and Wales, HK\$14,646 in Ontario and HK\$14,070 in NSW. In response to the Chairman, Head of RLSD explained that the legal aid expenditure of HK\$66.1 per capita in Hong Kong was calculated on the basis of a total of seven million population, while the legal aid expenditure of HK\$41,000 referred to the average legal aid costs (excluding administrative costs) for each granted application in Hong Kong.

17. PASHA further said that the legal aid expenditure of HK\$66.1 per capita in Hong Kong in 2007-2008 as stated in the supplementary fact sheet [FS05/09-10] had not taken into consideration the Administration's subvention to the Duty Lawyer Service (DLS) and LASC totalling some HK\$100 million per year as well as the expenditure of various government departments other than LAD which had provided legal-aid related services. According to the Administration's calculation, the per capita legal aid expenditure in Hong Kong should be around HK\$110, if such expenditure was included.

Action

18. In response to the Chairman, PASHA said that the provision for the three legal assistance schemes under DLS, namely the Duty Lawyer Scheme, the Free Legal Advice Scheme and the Tel-Law Scheme, in 2008-2009 was around HK\$96 million. The Chairman pointed out that the bulk of the HK\$96 million was allocated for the Duty Lawyer Scheme for provision of legal representation services for criminal cases in the Magistrates' Courts, while the annual provision for the Free Legal Advice Scheme was less than HK\$1 million and that for the Tel-Law was also very small. At the request of the Chairman, PASHA undertook to explain in writing how it arrived at the figure of HK\$110 per capita in legal aid spending.

HAB

Discussion

Financial eligibility limits for legal aid services

19. Mr IP Wai-ming considered the existing financial eligibility limits for legal aid services too low. As a result, access to legal aid services was beyond the means of many people. He stressed that there was an urgent need for the Administration to resolve the issue. He sought confirmation as to whether the Administration would report its proposals on review of the financial eligibility limits to the Panel in March 2010. PASHA responded that the Administration was aware of demands for increasing the financial eligibility limits and would report the outcome of the review to the Panel in March 2010. The Chairman said that the issue had been a long standing concern of the Panel but the Administration had never undertaken any fundamental review on it.

20. Ms Emily LAU said that it was evident that the legal aid system in Hong Kong did not compare favourably with the three selected places in the Research Report. As legal aid was the pillar of the rule of law, it was important for the Administration to make improvements to the legal aid system expeditiously. She expressed dissatisfaction that the Administration had been dragging its feet on the matter for years and proposed that the Chairman, on behalf of the Panel, should move a motion at a Council meeting urging the Administration to reform the legal aid system.

21. The Chairman said that at the Council meeting on 11 February 2009, Dr Priscilla LEUNG had moved a motion on "Relaxing the eligibility criteria for legal aid" covering various aspects of the legal aid system.

22. PASHA said that raising the financial eligibility limits was one of the main issues discussed during the debate on the motion moved by Dr Priscilla LEUNG. The proposals formulated by the Administration for the current five-yearly review to be reported to the Panel in March 2010 would include proposals relating to financial eligibility limits.

23. The Chairman enquired whether the Administration would make any proposal on raising the financial eligibility limits. PASHA responded that the Administration had just completed the five-yearly review and was consulting LASC on its proposals. It would report the outcome of the review to the Panel in March 2010 after consultation with LASC.

Action

24. The Deputy Chairman said that apart from LASC, the Administration should have also consulted other stakeholders such as the two legal professional bodies and users of legal services before finalizing its proposals for the five-yearly review. PASHA responded that during the process of the current five-yearly review which commenced in 2007, the Administration had paid heed to the views of relevant stakeholders and the Panel. She added that the views of various stakeholders would also be reflected through LASC, as the membership of LASC comprised representatives from the two professional bodies and its working parties set up to review various legal aid issues included representatives from relevant stakeholders.

SLAS

25. Mr TSOI Yiu-cheong opined that the financial eligibility limits for SLAS and the Ordinary Legal Aid Scheme should be raised and the scope of cases covered by SLAS should be expanded.

26. Mr James TO was concerned that the high success rate of SLAS cases and the consequent building up of the fund balance of SLAS over the years might reflect that an overly stringent approach had been adopted for assessing the merits of applications under the scheme and that only cases with very high chance of success would be funded.

27. DLA said that there was no question of a more stringent approach being adopted for assessing the merits of applications under SLAS. The Legal Aid Department (LAD) would assess the merits of all legal aid applications according to the criteria laid down in section 10 of the Legal Aid Ordinance (Cap. 91) (LAO) and decide whether the applicants had reasonable grounds for taking or defending such proceedings. He explained that the high success rate of SLAS cases was primarily attributable to the fact that SLAS covered mainly claims arising from personal injuries and death or work-related accidents. According to data collected by LAD over the years, these types of cases normally had a high success rate of over 80%.

28. Mr TAM Yiu-chung agreed on the need to conduct regular reviews on the financial eligibility limits of legal aid schemes. According to his experience, most of the legal aid cases he had dealt with related to failure of the applicants to satisfy the means test. The merits test served a useful purpose of weeding out unmeritorious applications and ensuring prudent use of public resources. He did not share the view that LAD's assessment of the merits of legal aid applications was too stringent. He also urged the Administration to consider the proposal of the Hong Kong Federation of Trade Unions, as set out in its submission, that amendments be made to section 5AA of LAO to extend DLA's discretion to waive the upper financial eligibility limit of legal aid applicants to cases where an employee had been granted an award by the Labour Tribunal in connection with employment-related debts by the employer.

Action

Grant rate of legal aid applications

29. DLA sought clarification on the data concerning the grant rate of legal aid applications in England and Wales set out in table 3 of the supplementary information [IN01/09-10]. According to the table, the total number of applications for criminal legal aid in England and Wales in 2007-2008 was 573 036, of which 532 060 cases had been granted, representing a grant rate of 92.8%. DLA said that it was his understanding that the figures included only the cases dealt with by the magistrates' courts in England and Wales. As magistrates' courts did not handle appeal cases, the high grant rate was not surprising. As a matter of fact, the grant rate for criminal legal aid applications in Hong Kong was also very high if appeal cases were omitted. By way of illustration, he pointed out that the grant rate of legal aid applications for criminal trials (i.e. excluding appeal cases) in the District Court and the Court of First Instance was 98.7% in 2009. The Chairman requested RLSD to look into the matter and update the note to the Panel should any adjustments to the data be required.

RLSD

Way forward

30. The Chairman said that one of the main foci of discussion at the meeting was the question of resources. It was clear from the data in the Research Report and the supplementary information that Hong Kong was lagging behind other jurisdictions in terms of public spending on legal aid. As shown in tables 3 and 4 of the supplementary information note [IN01/09-10], not only was its legal aid expenditure per capita the lowest among the jurisdictions covered in the Research Report, the grant rate of legal aid applications in Hong Kong was also significantly lower than the other jurisdictions with the exception of Ontario. In terms of per capita spending, the per capita cost of HK\$66 was much lower than the other three jurisdictions. In this regard, she noted from the Bar Association's submission that if one omitted the cost of running LAD and took into consideration only the net costs expended on legal aid cases, the per capita spending on legal aid in Hong Kong was merely HK\$33. These data, coupled with the low financial eligibility limits for legal aid services in Hong Kong and the high legal costs in Hong Kong, pointed unequivocally to the inadequacy of public resources spent on legal aid. Over the years, the Panel and relevant organizations had put forward many proposals for improving the legal aid system. These included raising the financial eligibility limits of the two legal aid schemes, extending the coverage of SLAS cases, expanding legal aid to cover community legal advice service and extending the discretion of DLA to waive the upper financial eligibility limit in respect of cases involving human rights and Labour Tribunal proceedings. The Panel had been repeating its calls for improving the legal aid system for years, but to no avail. She invited members' views on the way forward.

31. Ms Emily LAU said that members could decide what action to take after considering the report to be given by the Administration on its proposals on the five-yearly review in March 2010. Should members find the report unsatisfactory, the Panel should consider the proposal for the Chairman, on behalf of the Panel, to move a motion in a Council meeting to condemn the Administration for ignoring the Panel's long-standing call for improving the legal aid system.

Action

32. Members agreed to further discuss the follow-up action after considering the Administration's report on the five-yearly review in March 2010. At the suggestion of Ms Emily LAU, members also agreed to invite the deputations present at the meeting to join the discussion on the five-yearly review at the meeting scheduled for March 2010.

Clerk

V. Independent statutory legal aid authority
[LC Paper Nos. CB(2)782/09-10(05) - (06)]

Briefing by the Administration

33. PASHA briefed members on the Administration's paper [LC Paper No. CB(2)782/09-10(05)] setting out its response to the findings of the recent review conducted by LASC on the need for an independent legal aid authority in Hong Kong. Members noted that LASC considered that there was no pressing need to disestablish LAD and substitute it by an independent legal aid authority, in view of the very satisfactory service currently provided by LAD, the views of the LAD staff on the matter and the present financial position of the Government. Members also noted the Administration's view that legal aid services should continue to be operated in the present manner and under the existing institutional setup.

34. The Chairman drew to members' attention that the findings of LASC's recent review on the independence issue were set out in LASC Chairman's letter to the Chief Executive (CE) dated 16 October 2009 (LASC Chairman's letter) [Appendix II to LC Paper No. CB(2)782/09-10(06)].

35. Members also noted the background brief prepared by the LegCo Secretariat on the subject under discussion [LC Paper No. CB(2)782/09-10(06)]

Views of deputations

The Bar Association

36. Mr Ruy Barretto, SC said that the findings of LASC's recent review represented a significant departure from those set out in its "Report on the feasibility and desirability of the establishment of an independent legal aid authority" published in 1998 (the 1998 report). The key finding in the 1998 report was that it was an institutionally flawed arrangement for legal aid to be administered by civil servants and an independent legal aid authority should be established to provide for institutional independence of legal aid. However, in its recent review, LASC's view was that while it would be an ideal for a separate entity to administer legal aid independent of the government, there was no pressing need to do so. He further said that there were areas for improvement in the service of LAD and there was no room for complacency in this regard. The Bar Association did not see any step forward on the independence issue. On the contrary, the transfer of the legal aid portfolio from

Action

the Administration Wing of the Chief Secretary for Administration's Office (Administration Wing) to the Home Affairs Bureau (HAB) in 2007 was a retrograde step. He requested the Administration to advise what steps would be taken to enhance the independence of legal aid from the Administration in the ensuing three to six months.

The Law Society

37. Mr Amirali Nasir said that it was important to have in place an independent legal aid authority to give expression to institutional protection for operational independence of legal aid services through clear separation of powers. It was not a question of the quality of services of LAD. He further said that the Law Society had earlier on written to LASC to request a copy of the report on its recent review on the independence issue. The request was, however, turned down on the basis that the report was for internal consideration only.

SOCO

38. Mr TSOI Yiu-cheong said that it had been the long-standing position of SOCO that an independent legal aid authority should be set up for providing legal aid services. It was essential to the administration of justice that legal aid services must be delivered independently and impartially and manifestly perceived to be so. The status of LAD as a Government department gave rise to the perception of a lack of independence from the Government, particularly when handling sensitive cases. The transfer of the legal aid portfolio from the Administration Wing to HAB in 2007 had further aggravated the situation. Referring to paragraph 5(d) of the Administration's paper, Mr TSOI queried the basis for LASC's view that the service currently provided by LAD was very satisfactory. He wondered whether LASC had conducted any survey or consulted stakeholders on LAD's service. According to his observation, members of the public had been very dissatisfied with the lack of independence of LAD. He further referred to paragraph 5(e) of the Administration's paper wherein it was stated that LASC had proposed to revisit the independence issue in late 2011/early 2012 when hopefully the finances of the Government would allow a greater flexibility in proposing changes to the legal aid regime. He opined that the statement implied that constraint in resources was one of the reasons for LASC's conclusion that it was not the opportune time to pursue with further study on the establishment of an independent legal aid authority. He requested the Administration to clarify whether it had provided any information relating to the financial position of the Government to LASC.

Discussion

39. The Deputy Chairman opined that the study on the independent administration of legal aid services appeared to be retrogressing. He recalled that before 1997, two motions urging the establishment of an independent legal aid authority had been passed by LegCo. Upon its establishment in 1996, one of the principal functions of LASC was to advise the Government on "the feasibility and desirability of an

Action

independent legal aid authority". In its 1998 report, LASC recommended the setting up of an independent legal aid authority in phases. In the context of the Panel's discussion on the proposed transfer of the legal aid portfolio to HAB in 2007, LASC had undertaken to seek a review of the independence issue. However, in its recent review, LASC concluded that it saw no pressing need to establish an independent legal aid authority. He did not subscribe to LASC's view that it was only an ideal for a separate entity to administer legal aid independent of the Government, pointing out that in many overseas jurisdictions, the authority responsible for delivering legal aid services was independent from the Government. He also queried the basis for LASC's view that the service of LAD was very satisfactory. He stressed that the perception of independence of legal aid administration was important. There were cases of complaints against LAD where the complainants perceived that LAD had not handled their cases impartially on account of its lack of independence. He expressed grave anger and dismay at the retrograde step taken on the independence issue and proposed that the Chairman, on behalf of the Panel, should move a motion at a Council meeting to strongly condemn such retrogression.

40. The Chairman opined that the study conducted by LASC in 1998 on the establishment of an independent legal aid authority was professional and comprehensive.

41. Ms Emily LAU concurred with Mr Albert HO's view that the independence of legal aid was retrogressing. She criticised that LAD staff appeared to be the only stakeholder consulted by LASC during its review. Noting that LASC had consulted directorate officers of LAD and non-directorate officers including Legal Aid Counsel and Law Clerks, who did not support any proposal to delink LAD from the Government, she enquired about the concerns of LAD staff on the independence of LAD.

42. DLA responded that it was his understanding that LAD staff being consulted provided their views to LASC on a confidential basis. It was also his understanding that directorate staff of LAD objected to the independence of LAD not on account of monetary considerations. He had worked in LAD for more than twenty years, and was not aware that LAD staff had been subject to any form of pressure from the Administration when handling legal aid cases involving legal action against the Government. As a matter of fact, many legal aid applications against the Government had been granted by LAD. A recent example was the granting of a legal aid application to lodge a judicial review to challenge the environmental impact assessment report on the Hong Kong-Zhuhai-Macao Bridge. He stressed that there were safeguards in the current system to protect the operational independence of legal aid. Legal aid applicants who were aggrieved by the decision of LAD had the right to appeal to the Registrar of the High Court. There were cases where the Registrar had overturned LAD's decision to refuse legal aid. In the light of these considerations, LAD staff did not see the need to delink LAD from the Government.

Action

43. Mr James TO did not consider the existing appeal mechanism sufficient in safeguarding the independence of legal aid and was supportive of the establishment of an independent legal aid authority. He further said that the question was not whether LAD had funded cases against the Government. Even though LAD might have funded numerous cases against the Government, its credibility would suffer so long as there were a small handful of cases where the legal aid applicants who were refused legal aid to initiate action against the Government had the perception that the refusal was due to LAD being a Government department. To avoid any conflict of interest, LAD should consider seeking independent legal advice outside the Government in respect of all cases against the Government. DLA responded that under the existing system, LAD would in most cases seek independent counsel's opinion on merits of legal aid applications seeking to challenge Government decisions.

44. The Chairman declared interest that she had been engaged by LAD to provide legal advice on legal aid applications.

45. Mr TAM Yiu-chung did not consider it necessary or urgent to establish an independent legal aid authority, given that LAD had been operating well and an appeal mechanism was in place to ensure that the powers of DLA were not abused.

46. Referring to the opening sentence of LASC Chairman's letter, Ms Emily LAU doubted whether LASC had prepared any report on the findings of its recent review and sought clarification from the Administration in this regard. PASHA responded that the Administration had only received LASC Chairman's letter and had not received any report on the review. Ms Emily LAU expressed grave dissatisfaction with the Administration's handling of the matter. She considered it unacceptable that the Administration had formulated its view on the issue merely on the basis of the four-page letter from the Chairman of LASC without seeking further information from LASC on details of the review and the basis for its recommendations.

47. The Chairman said that when the Administration proposed to transfer the legal aid portfolio from the Administration Wing to HAB, the two legal professional bodies had expressed concern and urged the Administration to review the independence of legal aid. Both the Administration and LASC had responded positively then. LASC had advised that it would undertake a review on the independence issue again, which had taken two years to complete. The Chairman considered that the Panel should write to the Chairman of LASC to request further information concerning the review, including the issues it had studied and the work it had undertaken in relation to the review; the stakeholders consulted during the review apart from LAD staff, in particular whether the two legal professional bodies, the Consumer Council and relevant non-governmental organizations had been consulted; details of its consultation with LAD staff, including the number of staff consulted and the views expressed by staff of different ranks; and the basis for its view that the service currently provided by LAD was very satisfactory.

Clerk

Action

48. Mr James TO opined that as both DLA and members of LASC were appointed by CE, there was a risk that legal aid matters would be subject to the interference of CE. Noting from LASC Chairman's letter that in arriving at its recommendations, LASC had considered the present financial position of the Government, Mr TO enquired whether the Administration had provided any information relating to the financial position of the Government to LASC. PASHA responded that HAB had not provided any such information to LASC. She reckoned that LASC had made reference to relevant information which was publicly available. At the suggestion of the Chairman, members agreed that the Panel should also seek clarification from the Chairman of LASC on whether LASC had requested or received such information from any bureau or Government department.

Clerk

49. Mr Leslie YEUNG of the Law Society informed members that in a letter from LASC to the Law Society in November 2009, it was mentioned that the working party set up by LASC to review the independence issue had submitted a report on the review to LASC. The Law Society had written to LASC to request a copy of the report. LASC had turned down the request on the ground that it was an internal document.

50. Mr James TO asked if the Administration had enquired with LASC as to whether a report had been prepared on the review. PASHA replied in the negative. She explained that the Administration had not done so as it considered that LASC Chairman's letter represented LASC's final recommendations on the matter and the information therein was adequate.

51. The Chairman suggested and members agreed that the Panel should write to the Chairman of LASC to request a copy of its report on the review.

Clerk

52. Mr Ruy Barretto asked, short of institutional independence, what steps would be taken by the Administration to enhance the independence of legal aid services. PASHA responded that the Administration's position on the matter had been made clear in its paper to the Panel. LASC had indicated that it would review the issue again in late 2011/early 2012. Concerned organizations were welcomed to submit their views on the issue to the Administration for consideration. The Chairman said that the Panel should also request LASC to provide its views on Mr Barretto's enquiry.

Clerk

53. Members agreed to further discuss the subject at a future Panel meeting. Members also agreed to invite the Chairman of LASC to the meeting to exchange views with members on the subject. Ms Emily LAU suggested that members of LASC should also be invited to the meeting.

Clerk

VI. Legal Aid in Criminal Cases Rules

[LC Paper Nos. CB(2)782/09-10(07) - (09), CB(2)1428/08-09(01) and CB(2)1618/08-09(05)]

Briefing by the Administration

54. DLA briefed members on the Administration's response to the proposals made by the Hong Kong Human Rights Monitor (HKHRM), the legal adviser to the Panel and the Bar Association to amend the Legal Aid in Criminal Cases Rules (Cap. 221D) (the Rules) as set out in its paper [LC Paper No. CB(2)782/09-10(07)]. The Administration agreed to the need to amend the Rules to provide expressly that legal aid might be granted for cases considered by the Court of Final Appeal (CFA) and also the Court of Appeal (CA) which did not involve a conviction. In respect of CA cases not involving a conviction, the Administration, having considered the legal adviser's views, agreed that for the avoidance of doubt, express provision could be included in the Rules to make legal aid available for appeals to CA after the defendant who had not been granted legal aid was acquitted or discharged, such as appeals made under sections 81E and 81F of the Criminal Procedure Ordinance (Cap. 221).

55. The Chairman said that the legislative amendments involved were technical in nature.

56. Members noted the background brief prepared by the LegCo Secretariat on the coverage of legal aid services under the Rules [LC Paper No. CB(2)782/09-10(08)].

Views of the profession

Bar Association

57. Ms Audrey Campbell-Moffat said that the Bar Association welcomed the Administration's decision to amend the Rules. It was her understanding that the Administration was reviewing the Bar Association's proposal of making available legal aid to an accused person in respect of a reservation by the trial judge for the consideration of CA of a question of law pursuant to section 81 of the Criminal Procedure Ordinance, and the Bar Association was awaiting Administration's response to the proposal.

Law Society

58. Mr Michael Vidler said that the Law Society also welcomed the Administration's proposed amendments to the Rules. The proposed amendments, however, did not appear to cover references by CE to CA under section 83P of the Criminal Procedure Ordinance. Under section 83P, CE might refer a case or any point arising from a case to CA where a person had been convicted on indictment or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability. The Law Society considered that legal aid should also be extended to such circumstances. There might also be other situations where legal aid should be granted but were not covered by the proposed amendments. To plug such

Action

possible loopholes, the Law Society proposed that a general provision be incorporated to empower DLA to grant legal aid in such circumstances as he thought fit. The Chairman enquired whether it was a new point raised by the Law Society. Mr Vidler responded that in its letter to the Panel dated 14 April 2009, HKHRM had touched upon the matter in its reference to cases where a person who had been made the subject of a hospital order after a determination not involving a conviction.

59. DLA said that cases where a person had been made the subject of a hospital order without involving any conviction would be covered by the Administration's proposed amendments. In response to the Chairman's enquiry as to whether consideration would be given to the Law Society's proposal, DLA said that consideration of the proposal could possibly delay the timetable for the legislative amendments.

60. The Chairman appreciated that there was urgency in introducing the proposed legislative amendments. She requested the Administration to consider the Law Society's proposal and have it incorporated into the current legislative amendment exercise if it required simple and straightforward amendments. On the other hand, should complicated issues be involved, the Administration should inform the Law Society and the Panel of such.

HAB

Timetable for the legislative amendments

61. In response to the Chairman's enquiry on the timetable for the proposed legislative amendments, DLA said that the Administration would proceed to issue drafting instructions to DoJ as soon as practicable. It was the Administration's aim to invite the Criminal Procedure Rules Committee to consider the proposed amendments by June 2010 and seek LegCo's approval within 2010.

VII. Any other business

62. There being no other business, the meeting ended at 6:34 pm.