

立法會
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LC Paper No. CB(2)2330/09-10
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

**Minutes of special meeting
held on Wednesday, 21 July 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 Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Paul TSE Wai-chun
Hon LEUNG Kwok-hung
- Members attending** : Hon LI Fung-ying, SBS, JP
Hon WONG Kwok-hing, MH
Dr Hon PAN Pey-chyou
- Members absent** : Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-ye, GBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon IP Wai-ming, MH
- Public Officers attending** : Ms Grace LUI Kit-yuk
Deputy Secretary for Home Affairs
- Mr Thomas Edward KWONG
Director of Legal Aid (Acting)
- Ms Alice CHUNG Yee-ling
Assistant Director of Legal Aid
- Ms Elaine MAK Tse-ling
Assistant Secretary for Home Affairs

- Attendance by invitation** : Hong Kong Bar Association
Mr Ruy Barretto, SC
Mr Nicholas Pirie
Mr Valentine YIM
The Law Society of Hong Kong
Mr Patrick Burke
Member of the Legal Aid Committee
Mr Leslie YEUNG
Member of the Legal Aid Committee
The Hong Kong Federation of Trade Unions Rights & Benefits Committee
Mr SO Pak-tsan
Committee Member
Civic Party
Mr Dennis KWOK
Member
The Federation of Hong Kong and Kowloon Labour Unions
Mr LAM Chun-sing
Director of Social Affairs Committee
Mr KO Chun-kit
Coordinator of Social Affairs Committee
- Clerk in attendance** : Miss Flora TAI
Chief Council Secretary (2)3
- Staff in attendance** : Mr Kelvin LEE
Assistant Legal Adviser 1
Ms Amy YU
Senior Council Secretary (2)3
Mrs Fanny TSANG
Legislative Assistant (2)3
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Action

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

[LC Paper Nos. CB(2)1148/09-10(01), CB(2)1200/09-10(01), CB(2)1364/09-10(01), CB(2)1600/09-10(01), CB(2)1601/09-10(01), CB(2)1654/09-10(01), CB(2)2076/09-10(01), CB(2)2081/09-10(01), CB(2)2099/09-10(01), CB(2)2103/09-10(01) and CB(2)2105/09-10(01) to (02)]

Briefing by the Administration

Deputy Secretary for Home Affairs ("DSHA") briefed members on the Administration's paper [LC Paper No. CB(2)2076/09-10(01)] setting out its response to issues raised by members at the meeting on 24 May 2010, namely the rationale for the revised financial eligibility limits ("FELs") for the two legal aid schemes and the proposal for waiving the means test for cases involving wage claims. On the expansion of the scope of the Supplementary Legal Aid Scheme ("SLAS"), DSHA advised that owing to the self-financing nature of SLAS, it should only cover cases involving monetary claims of a reasonable size, with a high success rate and a reasonably good chance of recovering damages. She stressed the need to exercise great prudence in considering the types of cases to be covered under SLAS to ensure that the SLAS Fund would not be exposed to financial risk. The Administration noted that the Legal Aid Services Council's ("LASC") Interest Group on Scope of Legal Aid was studying whether there was room for expanding SLAS and the views of LASC would be taken into account in examining the case for expansion of the scope of SLAS. In response to the Chairman, DSHA said that it was her understanding that LASC had indicated at the meeting on 24 May 2010 that it would revert to the Panel on the views of the Interest Group on the expansion of SLAS in about six months' time. DSHA added that the Administration was considering Members' suggestion of lowering the age requirement for the proposal of disregarding part of the savings of the elderly in assessing their financial eligibility for legal aid.

2. Members noted the updated background brief prepared by the Legislative Council ("LegCo") Secretariat on the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants ("five yearly review") [LC Paper No. CB(2)2081/09-10(01)].

Views of deputations

The Federation of Hong Kong and Kowloon Labour Unions ("FHKKLU")
[LC Paper No. CB(2)2099/09-10(01)]

3. Mr LAM Chun-sing said that while welcoming the Administration's proposals of raising FELs and the level of personal allowance in calculating disposable income, FHKKLU queried whether the proposed increase of FELs was sufficient to meet the needs of the grassroots and the middle class. FHKKLU supported LASC's proposal of raising FEL for SLAS to \$1.3 million. It was also supportive of the proposal of

Action

waiving the means test for employees who had to face further litigation when their employers appealed against the awards of the Labour Tribunal ("LT") and for employees in the filing of winding-up/bankruptcy petitions against their insolvent employers, so as to assist employees to get back their entitlements.

The Hong Kong Federation of Trade Unions, Rights and Benefits Committee ("HKFTU")

[LC Paper Nos. CB(2) 1600/09-10(01) and CB(2)2105/09-10(02)]

4. Mr SO Pak-tsan reiterated HKFTU's view that legal aid should be granted unconditionally to employees in the filing of winding-up/bankruptcy petitions against employers defaulting awards of LT. He pointed out that as the costs of engaging a private lawyer for the filing of winding-up/bankruptcy petitions (about \$60,000) was often disproportionate to the amount of the wage claim (the median amount of such claims was about \$40,000), employees concerned who were not able to pass the means test for legal aid were practically forced to give up their right to recover outstanding wages.

5. Mr SO PAK-tsan said that while the Administration stated in its paper that for cases where the insolvent employer employed less than 20 employees, and there was sufficient evidence to support the presentation of a winding up/bankruptcy petition but it was unreasonable or uneconomical to do so, the Legal Aid Department ("LAD") would make a recommendation to the Commissioner for Labour to make ex-gratia payment to the employees concerned, it was his understanding that the Labour Department seldom exercised such discretion and the criteria for exercising the discretion was also unclear. In any event, such discretion was not applicable to cases where the insolvent employer employed more than 20 employees. HKFTU therefore maintained its view that legal aid should be granted unconditionally to employees in the filing of winding-up/bankruptcy petitions against employers defaulting awards of LT.

6. Mr SO Pak-tsan further said that the Administration had failed to respond in its paper to the proposal of waiving the means test for cases where employees had been granted an award by LT but the employers concerned lodged an appeal to the High Court on a point of law. He urged the Administration to give serious consideration to the proposal to help employees to seek justice in recovering their entitlements.

Civic Party

7. Mr Dennis KWOK considered that the provision of community legal service should be reviewed together with the provision of legal aid service as they were inter-related. He advised that in the report entitled "Transforming the Legal Aid System" published by the New Zealand Ministry of Justice in 2009, it was pointed out that an extensive network of community-based agencies that provided initial advice and assistance could help prevent cases from escalating and requiring expensive legal solutions, thereby reducing the demand for legal aid services and the pressure on the

Action

judicial system. According to the findings of the recent study on the demand for and supply of legal and related services in Hong Kong commissioned by the Department of Justice ("DoJ"), some 98% of the respondents considered the existing provision of free legal service inadequate in helping them solve their legal problems, which clearly pointed to the need for a more extensive and organized professional system of community advice service. He urged the Administration to face squarely and tackle expeditiously the problem of inadequate community legal service.

The Law Society of Hong Kong ("Law Society")
[LC Paper No. CB(2)2103/09-10(01)]

8. Mr Patrick Burke said that the underlying principle in determining financial eligibility for legal aid as laid down in the Scott Report of 1986 was that a person should have access to legal representation without suffering undue financial hardship, having regard to the costs of litigation and his total financial resources. Referring to the Annex to the Administration's paper [LC Paper No. CB(2)2076/09-10(01)] setting out the median litigation costs for civil legal aided cases, Mr Burke said that it was wrong to use median costs in determining the appropriate figures for financial eligibility limits for legal aid because the true potential costs to a person involved in litigation should be the costs incurred when his case was taken all the way to trial; and if he lost the case, he had to pay not only the costs of his own lawyers, but also that incurred by his opponent which would generally be similar to the amount incurred by his own lawyers. According to the cases he had handled, the average private litigation costs were almost twice of the median litigation costs for civil legal aided cases set out in the Annex to the Administration's paper. Mr Burke further said that after the true potential litigation costs had been ascertained, it should then be determined whether undue financial hardship would be caused if an applicant for legal aid had to pay such cost, which was the principle put forth in the Scott Report. In considering what undue financial hardship might cover, it would be necessary to raise such questions as whether a person would suffer undue financial hardship if he had to sell his house or stop sending his children to fee paying schools in order to pay for his litigation costs. Mr Burke further opined that in setting the financial eligibility limits, the Administration should also take into account the fact that, unlike some jurisdictions such as Canada and the United Kingdom, conditional fee arrangements, which could widen the scope for a litigant to fund his case, were not permitted in Hong Kong and there was also no legal expense insurance available in Hong Kong as an alternative funding source for legal actions.

The Bar Association
[LC Paper Nos. CB(2)1601/09-10(01) and CB(2)2105/09-10(01)]

9. Mr Ruy Barretto said that the Bar Association's latest submission [LC Paper No. CB(2)2105/09-10(01)] focused on addressing the Administration's concern that expanding the coverage of SLAS would undermine the financial viability of the scheme. The submission set out various types of cases which were already covered by insurance either as a matter of law or practice, such as mis-selling of financial and

Action

insurance products, claims against other types of professional negligence presently not covered by SLAS, such as services provided by accountants, estate agents, surveyors and engineers, and disputes relating to trusts. The Bar Association proposed that SLAS should be expanded to cover these areas, for which recoverability of damages should not be an issue. He referred members to Appendix 1 to the Bar Association's submission for details of its proposed amendments to the Legal Aid Ordinance (Cap. 91) ("LAO") to raise FELs for the Ordinary Legal Aid Scheme ("OLAS") and SLAS to \$350,000 and \$3 million respectively, expand the scope of SLAS and disregard part of the savings of persons aged 50 and above in calculating their financial resources with a view to reducing the undue financial hardship to persons approaching retirement age. At the request of the Chairman, Mr Barretto agreed to provide for members' reference the Chinese version of Appendix 1 to Bar's submission as soon as practicable. Mr Barretto further said that the Panel had served as a useful forum for discussion of legal aid issues which had helped advance significantly the cause of legal aid reform over the past year. He hoped that such useful process would continue.

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Discussion

Assistance to employees in wage claims

10. Mr WONG Kwok-hing expressed grave disappointment with the Administration's response to HKFTU's proposal for waiving the means test for cases involving wage claims. He criticized that the Administration was mean in rejecting the proposal on the ground that it was not justifiable to exempt a particular group of persons from the means test on the basis of their background or the type of cases they were pursuing. He pointed out that the recent case of the closure of Gainway Cleaning Limited cited in HKFTU's submission pointed to the plight faced by employees in recovering wages from insolvent employers. It would not be worthwhile for individual employees to engage lawyers to assist in their wage claims as the legal costs involved often exceeded the amount of the claim. He strongly requested the Administration to come up with measures to assist the disadvantaged employees.

11. DSHA stressed that in considering whether the means test should be waived for wage claims, it was necessary to consider where the line should be drawn and whether such exemption should also apply to other types of cases involving other disadvantaged groups such as maintenance payees. The Administration hoped that by raising FELs, all disadvantaged groups could benefit equally from the extended ambit of legal aid services.

12. The Chairman said that the raising of FELs could not provide a practical solution to the difficulties faced by employees in wage claims. She urged the Administration to devise ways to help employees recover wages and related entitlements.

Action

13. Regarding the case of the recent closure of Gainway Cleaning Limited, Director of Legal Aid (Acting) informed Members that so far LAD had received four legal aid applications involving the wage claims of 88 employees. LAD had met with the four applicants on 22 June 2010 concerning the means test. On 16 July 2010, the applicants had requested for more time to provide information on their financial eligibility. LAD would continue to follow up on the cases.

14. Ms LI Fung-ying considered it unfair that employees had to shoulder the litigation costs in cases where they had been granted an award by LT but their employers appealed against the award on a point of law. In her view, the party being challenged in these appeal cases was in fact LT rather than the employees concerned, hence the litigation costs incurred should be borne by the Government.

15. The Chairman said that under section 32 of the LT Ordinance (Cap. 25), a party could appeal against an award by LT on two grounds, namely it was erroneous in point of law or outside the jurisdiction of LT, which were also grounds for judicial review. If an award by LT was challenged by way of judicial review rather than appeal to the High Court, the respondent would be LT rather than the employee concerned, who would only be an interested party in the action. This would then obviate the need to relax the financial eligibility for the employees concerned.

16. The Deputy Chairman said that many employees were unwilling to engage a lawyer in appeals concerning wage claims lodged by their employers for fear that they could not afford to pay the legal costs of the opponent should they lose the case. He agreed on the need to resolve expeditiously the problems faced by employees in recovery of wages, which might be by way of legal aid, capping of legal costs payable to the opposing party or changes to the relevant legal procedure as suggested by the Chairman.

17. Echoing similar views, Mr TAM Yiu-chung said that should the Administration maintain its view that the means test could not be waived for cases involving wage claims, it should find other means to help the employees concerned, for instance, through certain Government funds or the use of the judicial review process as proposed by the Chairman.

18. Whilst also agreeing in principle that assistance should be provided to employees in recovery of wages, Mr Paul TSE cautioned that the Administration should strike a proper balance between different interests and considerations in coming up with measures to assist employees.

19. DSHA undertook to consult the relevant parties, including DoJ, the Judiciary, the Labour and Welfare Bureau and LAD, on the views and suggestions raised by the Chairman and Members regarding measures to assist employees in wage claims and revert to the Panel in due course.

Expansion of SLAS

20. Noting from the Bar Association that SLAS was initially capitalized by the Jockey Club in the amount of \$1 million, the Chairman enquired when was the last time the Administration injected money into the SLAS Fund. In response, DSHA said that the Administration had injected \$27 million into the SLAS Fund in 1995 when the scope of SLAS was expanded to cover medical, dental and legal professional negligence with a view to preserving the financial viability of the scheme. DSHA stressed that the Administration did not rule out the expansion of the scope of SLAS; however, in considering the case for expansion of SLAS to cover more cases, the overriding principle must always be to ensure that the financial viability of the scheme would not in any way be undermined or jeopardized. The Chairman, however, considered that if the Administration was concerned that the expansion of the scope of SLAS would undermine its financial viability, it could inject money into the SLAS Fund.

21. Ms LI Fung-ying shared the view that the Administration should inject money into the SLAS Fund to enhance access to justice particularly given the fact that the last time the Administration injected funding into the scheme already dated back to 1995.

22. DSHA responded that as SLAS was established as a self-financing scheme, it would run counter to the objective of the scheme if the Administration had to inject money into the SLAS Fund frequently. It was on account of the self-financing nature of the scheme that there was room for raising its FEL to \$1 million. She further stressed that it should be borne in mind that in calculating whether a SLAS applicant's financial capacity exceeded the proposed FEL of \$1 million, a number of deductible items were disregarded, such as a personal allowance for general household expenditure, payment of salaries tax, maintenance payments and the value of any interest in his only or main dwelling. Mr Nicholas Pirie said that there would have been more reserve in the SLAS Fund if the rate of contribution from recovered damages payable by SLAS applicants had not been lowered from the initial 15% to the present 10%.

23. Ms LI Fung-ying and Mr LEUNG Kwok-hung queried whether the Administration's criteria for expansion of scope of SLAS were reasonable. They pointed out that even if the scope of SLAS was expanded to cover more types of cases, applicants still had to satisfy other threshold such as the means test and the merits test. They stressed that the most important consideration in the provision of legal aid services was to ensure that no one would be denied access to justice due to a lack of means.

24. The Deputy Chairman considered the proposals put forward by the Bar Association for expansion of SLAS reasonable and worthy of in-depth consideration by the Administration. Mr TAM Yiu-chung and Mr Paul TSE also agreed that the Administration should study the Bar Association's proposals. DSHA undertook to do so and revert to the Panel on its consideration in due course.

Action

25. Mr Ruy Barretto advised that the proposals made by the Bar Association for the expansion of SLAS were actually initiated by the LASC's Interest Group on Scope of Legal Aid some eight years ago in 2002. Hence, the proposals had been in the pipeline for many years.

Motion moved at the meeting

26. The Deputy Chairman moved the following motion which was seconded by Mr LEUNG Kwok-hung -

"本會認為政府應基於香港大律師公會提出修訂法援條例的建議，盡快進行研究採取措施，以擴充和改善法援的服務。"

(Translation)

"That this Panel considers that the Government should, based on the Hong Kong Bar Association's proposal for amending the Legal Aid Ordinance, conduct a study as soon as possible on the implementation of measures to expand and improve legal aid services."

27. Mr Paul TSE declared interest that his law firm took up legal aid cases. The Chairman also declared interest that she had been engaged by LAD to handle legal aid cases.

28. Ms Audrey EU and Ms Emily LAU indicated support for the motion moved by the Deputy Chairman.

29. The Chairman put the motion to vote. Five members voted for the motion, no member voted against the motion and no member abstained. The Chairman declared that the motion was carried.

Scope of legal aid

30. The Deputy Chairman said that apart from expansion of the scope of SLAS, the Administration should also consider extending the scope of OLAS to cover disputes relating to financial products and defamation cases. In respect of the latter, he considered that legal aid should be made available at least to the defendants. Mr Paul TSE, however, expressed grave reservation about the proposal of extending the ambit of legal aid to defendants in defamation cases as he was concerned that it might have the effect of encouraging irresponsible comments.

Percentage of households eligible for legal aid

31. Mr TAM Yiu-chung said that according to the data provided by the Administration in 2009, about 55% of the households in Hong Kong were eligible for OLAS and about 70% of the households were eligible for OLAS and SLAS. He sought information on the percentage of eligible households after the proposed increase of the FELs. DSHA explained that the Administration used to calculate the percentage of total households eligible for legal aid on the basis of information provided by legal aid applicants on their household income and assets. However, the Administration no longer did so as it considered the sample size too small and the data did not provide a very useful reference on the needs for legal aid services in Hong Kong.

Timetable for legislative amendments

32. In response to the Chairman's enquiry on the Administration's timetable for the legislative amendments to implement the proposals arising from the recently completed five-yearly review, DSHA said that the Administration hoped to submit to the Legislative Council the legislative amendments for implementing the proposed improvement measures, including the revised FELs for OLAS and SLAS, at the beginning of the 2010-2011 legislative session. According to this timetable, LASC's proposals for the expansion of SLAS would probably have to be dealt with at a later stage.

33. Ms LI Fung-ying did not consider it necessary for the Administration to implement the improvement measures in two different stages, given that the relevant issues had been discussed by the Panel many times and Members' views on the issues were clear. The Administration should come to its view expeditiously on whether it would accept Members' proposals instead of further dragging its feet on the matter. DSHA clarified that it was the Administration's plan to submit at the beginning of the next legislative session the legislative amendments for effecting the proposals for adjusting FELs of OLAS and SLAS, raising the level of deductible allowance in calculating disposable income and disregarding part of the savings of the elderly in assessing their financial eligibility for legal aid. The Administration would, therefore, come to a decision soon on the levels of increase of FELs and whether to relax the age requirement for its proposal of disregarding part of the savings of the elderly in assessing their financial eligibility. As regards the proposals raised by Members and deputations for waiving the means test for cases involving wage claims and extending the scope of SLAS, the Administration needed more time to examine the proposals, given that any waiver of means test would be a major departure from the prevailing legal aid policy and Administration had to await the outcome of LASC's study in considering the expansion on SLAS. In order not to delay the implementation of other improvement measures, the Administration considered it advisable to deal with these proposals at a later stage.

Action

Conclusion

34. The Chairman said that members could consider the need to form a subcommittee under the Panel to study legal aid related issues. Ms Emily LAU indicated support for appointing such a subcommittee which could provide a dedicated forum for more focused discussion on the subject. On the other hand, Mr TAM Yiu-chung considered it not necessary to do so. In his view, legal aid issues could be discussed by the Panel whenever members deemed it necessary to do so, or could be made a regular item for discussion. The Chairman said that as the current session was drawing to a close, it would be more appropriate for the Panel to consider the need for appointment of such a subcommittee in the next session if necessary.

Clerk

35. At the Chairman's suggestion, members agreed that a special meeting be held in September 2010 to continue the discussion on issues raised by Members and deputations at the meeting concerning the five-yearly review. Members also agreed that the Panel on Manpower and all other LegCo Members be invited to join the discussion of the item. The Administration was requested to revert to the Panel at that special meeting on its consideration of the proposals put forward by the Bar Association for expanding the scope of SLAS and its proposed amendments to LAO, as well as specific measures to assist employees in the filing of winding-up/bankruptcy petitions against insolvent employers and appeals lodged by their employers against LT awards. The Administration was also requested to co-ordinate the attendance of representatives of the Labour and Welfare Bureau for the special meeting in September 2010.

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(Post-meeting note: With the concurrence of the Panel Chairman, the special meeting was scheduled for 30 September 2010 at 4:30 pm.)

II. Any other business

36. There being no other business, the meeting ended at 6:22 pm.