

立法會
Legislative Council

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LC Paper No. CB(2)1333/10-11
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 24 January 2011, at 4:30 pm
in Conference Room A of the Legislative Council Building

- Members present** : Dr Hon Margaret NG (Chairman)
Dr Hon Priscilla LEUNG Mei-fun (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 Timothy FOK Tsun-ting, GBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Paul TSE Wai-chun
- Member attending** : Hon IP Wai-ming, MH
- Members absent** : Hon Albert HO Chun-yan
Dr Hon Philip WONG Yu-hong, GBS
Hon LEUNG Kwok-hung
- Public Officers attending** : Item IV
Ms Grace LUI Kit-yuk
Deputy Secretary for Home Affairs
Ms Christine CHOW Kam-yuk
Principal Assistant Secretary for Home Affairs
Mr KWONG Thomas Edward
Deputy Director of Legal Aid/Applications and Processing

Ms Alice CHUNG Yee-ling
Deputy Director of Legal Aid/Administration

Attendance by : Item IV
invitation

Legal Aid Services Council

Hon Paul M P CHAN
Chairman

Ms Corinne Remedios
Member and Chairperson of the Interest Group on
Scope of Supplementary Legal Aid Scheme

Mr Michael Delaney
Member

Mr Witman W M HUNG
Member

Miss Alice TSAO
Secretary

Hong Kong Bar Association

Mr Kumar Ramanathan, SC

Mr Ruy Barretto, SC

Mr Nicholas Pirie

Mr Ashok Sakhrani

The Law Society of Hong Kong

Ms Alison LIU
Member of the Legal Aid Committee

Mr Leslie YEUNG
Member of the Legal Aid Committee

Society for Community Organization

Mr TSOI Yiu-cheong, Richard
Community Organizer

Civic Party

Mr Dennis KWOK
Member

The Hong Kong Federation of Trade Unions Rights
& Benefits Committee

Mr TAM Kin-sun
Committee Member

Association for Protection of Building Owners

Mr LAW Yan
Chairman

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

Staff in attendance : Mr KAU Kin-wah
Senior Assistant Legal Adviser 3

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)848/10-11]

The minutes of the meeting held on 22 November 2010 were confirmed.

II. Information papers issued since last meeting

2. Members noted that the following paper had been issued since the last meeting:

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LC Paper No. - Press release issued by the Hong Kong Human Rights Monitor on 21 December 2010 expressing its view over the Government's decision to press charge against two juvenile demonstrators
CB(2)733/10-11(01)

III. Items for discussion at the next meeting

[LC Paper Nos. CB(2)836/10-11(01) - (03)]

3. Members agreed to discuss the following items at the next regular meeting to be held on 28 February 2011:

- (a) Law Reform Commission Report on "The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse";
- (b) Reciprocal recognition/enforcement of arbitral awards with Macao;
- (c) Membership of Secretary for Justice in the Judicial Officers Recommendation Commission; and
- (d) Legislative amendments to implement the proposals arising from the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants.

4. In response to the Chairman's enquiry, Deputy Secretary for Home Affairs ("DSHA") advised that the Administration planned to consult the Panel on its recommendations on the proposed expansion of the Supplementary Legal Aid Scheme ("SLAS") at the Panel meeting in March 2011.

IV. Expansion of the Supplementary Legal Aid Scheme

[LC Paper Nos. CB(2)570/10-11(01) to (02), CB(2)591/10-11(04) to (05), CB(2)638/10-11(02), CB(2)657/10-11(01), CB(2)836/10-11(04) to (05) and IN02/10-11]

Response of the Legal Aid Services Council ("LASC") to the views raised by members and the legal professional bodies at the meeting on 21 December 2010

5. Ms Corinne Remedios, member of LASC and Chairperson of the Interest Group on Scope of SLAS ("Interest Group"), said that while SLAS was a very

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effective scheme, it covered only plaintiffs and could not provide the complete solution to the problem of unrepresented litigants.

6. Ms Corinne Remedios further said that when considering the expansion of SLAS, it was essential to assess the risk profile of the new categories of claims to ensure that the financial viability of the scheme would not be jeopardized. Referring to the table in paragraph 10 of the Interest Group's Report [LC Paper No. CB(2)570/10-11(02)], she pointed out that the success rate of cases covered under SLAS had been very high over the years. Notwithstanding the high success rate of SLAS cases, with the reduction of the percentage contribution of SLAS, the annual operating surplus of the SLAS Fund had been steadily declining in recent years. As shown in the table in paragraph 12 of the Interest Group's Report, the scheme would have incurred a net loss in recent years had it not been supplemented by bank interest earned on the unused Fund. In 2008, the loss of a SLAS case with estimated costs of \$17 million had resulted in a drastic reduction of the SLAS Fund. She stressed that a substantial number of won cases would be needed to cover the costs of both parties in one lost case, hence the need to proceed with caution in considering the types of cases to be covered under the expanded SLAS. This also explained why LASC had recommended that SLAS should be expanded on an incremental basis, starting with cases of a lower risk profile, and that Part I and Part II of SLAS should be administered separately so that the new types of cases under SLAS Part II could be monitored and reviewed separately on a regular basis. She clarified that under LASC's proposal, there would only be one SLAS scheme but with the two parts being administered and monitored separately.

7. Ms Corinne Remedios further said that the Legal Aid Ordinance (Cap. 91) ("LAO") was silent on the criteria for selection of cases to be covered under the legal aid schemes. The merits test as provided in section 10(3) of LAO, which stipulated that a person should not be granted a legal aid certificate in connection with any proceedings unless he showed that he had reasonable grounds for taking or defending such proceedings, was applicable to individual legal aid applications, and not the selection of cases to be covered under the legal aid schemes.

8. Ms Corinne Remedios added that LASC had considered whether a timetable should be set for including other types of cases under SLAS Part II after introducing the first batch of new cases. After consideration, LASC concluded that, as new territories were being chartered, it would be arbitrary to set a timetable at this stage. Given that the timeframe for introducing the second batch of cases would depend, in part, on the take-up rate of the new

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categories of cases implemented in the first batch, it was important that the viability of the expanded scheme be closely monitored and reviewed on an annual basis before its scope was further expanded.

9. Mr Witman HUNG, member of LASC, said that as SLAS operated as a kind of mutual insurance scheme, LASC considered it appropriate that a higher contribution rate should be charged for cases under SLAS Part II which had a higher risk profile. The bulk of the existing SLAS cases had been personal injury cases with very high success rate. Given that professional negligence cases had a much lower success rate than personal injury cases, LASC recommended that medical, dental and legal professional negligence claims currently provided under SLAS Part I be transferred to SLAS Part II for which a higher contribution rate of 15% would be payable.

Views of deputations

Hong Kong Bar Association ("Bar Association")
[LC Paper No. CB(2)886/10-11(01)]

10. Mr Kumar Ramanathan said that the LASC had not provided a comprehensive response to the package of proposals for improving provision of legal aid put forth by the Bar Association in July 2010. He further said that it appeared that LASC had changed its stance on the issue of whether there should be one or two SLAS schemes. He noted from Ms Corinne Remedio that LASC was not proposing that there be two SLAS schemes, but only that the scheme be divided into two parts administratively to facilitate monitoring and comparison. He added that the larger the pool of cases covered under SLAS, the larger would be the income generated for the SLAS Fund. He urged the Administration to take forward the expansion of SLAS expeditiously to widen access to justice.

11. Mr Nicholas Pirie elaborated on Appendix 2 to the Bar Association's submission which highlighted the need for SLAS to cover class actions and protection of minority rights. He said that as Hong Kong had become a major financial and listing centre, and with the wider spread of share ownership in Hong Kong over the past 20 years, the Bar Association believed that individual shareholders' rights should be protected and that assistance from SLAS should be made available to aid impecunious minority shareholders. He further said that according to statistics on unrepresented litigants obtained from the Judiciary, there had been a continuous rise in the percentage of civil cases involving unrepresented litigants in the High Court and District Court in recent years. It was the Bar Association's view that the Administration and LASC should

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consider extending SLAS to class actions and minority protection cases to meet the community's unmet demand for legal services.

12. Mr Ruy Barretto said that the Bar Association had put forth in July 2010 a package of proposals on improving the provision of legal aid, which, if implemented, would cumulatively serve to increase the pool of legal aid cases, thereby achieving economies of scales as well as spreading risk across a wider spectrum so that SLAS could continue to be self-sustaining. The Bar Association was disappointed that LASC had failed to address this package approach. For instance, LASC had not responded to Bar's proposals of further increasing the financial eligibility limits ("FELs") for the Ordinary Legal Aid Scheme ("OLAS") and SLAS to \$350,000 and \$3 million respectively, lowering the age requirement for the special elderly provision for calculation of financial resources to 50 and extending the coverage of SLAS to proceedings in the Court of Final Appeal. Mr Barretto added that LASC's proposal of extending the coverage of SLAS to derivative claims appeared to be only a partial answer to the Bar Association's proposal of covering claims concerning financial products or provision of financial services. It was also unclear as to what LASC's position was in respect of claims against developers in the sale of new flats and those arising out of sale of goods and provision of services.

The Law Society of Hong Kong ("Law Society")
[LC Paper No. CB(2)898/10-11(01)]

13. Mr Leslie YEUNG said that the Law Society agreed with the Bar Association on the need to expand the scope of SLAS. The Law Society had no strong objection to having two tiers of SLAS provided that it was to facilitate administration and collection of data for future analysis, and the means and merits tests for the two parts of SLAS were the same. He added that in view that the discussion on the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants had dragged on for a long time, the Law Society considered that, in the interest of the public, the Administration should commence the legislative process to implement its proposals as early as possible.

Society for Community Organization ("SOCO")

14. Mr TSOI Yiu-cheong said that he was a member of the Interest Group. As an organization representing the grassroot, SOCO hoped that expeditious improvements could be made to the FEL and scope of OLAS. SOCO also supported the need to expand SLAS by increasing its FEL and extending its scope to widen the middle class' access to justice. In terms of the FEL for

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SLAS, SOCO agreed with the Bar Association's view that it should be increased to \$3 million. As regards the question of whether there should be one or two SLAS schemes, SOCO had no particular view but considered that in the long run there should only be one scheme. He also urged the Administration to consider extending SLAS to cover proceedings involving constitutional and human rights issues, Personal Data (Privacy) Ordinance (Cap. 486) and the anti-discrimination legislation.

Civic Party

[LC Paper No. CB(2)886/10-11(02)]

15. Mr Dennis KWOK said that the Civic Party considered LASC's proposals for expansion of SLAS too conservative both in terms of the pace and the scope of the reform. The Civic Party was most concerned with the exclusion of claims against developers arising from the sale of new flats from the first phase of SLAS Part II. The numerous complaints received by the Civic Party in relation to the sale of new flats clearly pointed to the need for extension of SLAS to cover such cases, particularly in view of the great disparity in financial resources between individual flat buyers and developers.

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

[LC Paper No. CB(2)911/10-11(01)]

16. Mr TAM Kin-sun presented the views of HKFTU as detailed in its submission tabled at the meeting. Regarding LASC's proposal that employee claims on appeal from the Labour Tribunal ("LT") be included without size limit under SLAS Part I, Mr TAM said that while HKFTU supported removing the \$60,000 limit for such employee claims, it was concerned that employees would not be able to benefit from the proposal given that the means test would still apply. Even if the employees concerned could satisfy the means test, the amount of contribution they had to pay would often make it not worthwhile to pursue their claims. He reiterated HKFTU's request that legal aid should be granted unconditionally for employee claims on appeal from LT.

Association for Protection of Building Owners

[LC Paper No. CB(2) 886/10-11(03)]

17. Mr LAW Yan urged that legal aid be made available to individual flat owners involved in litigations with incorporated owners.

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LASC's response to the views of depositions

18. Mr Paul CHAN, in his capacity as Chairman of LASC, made the following points -

- (a) LASC was well aware of the package of proposals put forward by the Bar Association for improving the legal aid system. His letter to the Chief Executive ("CE") dated 13 December 2010 [LC Paper No. CB(2)570/10-11(01)] had focused on SLAS which was the subject of discussion at the recent Panel meetings;
- (b) under LASC's proposal, there was only one SLAS scheme. However, given the differences in the risk profiles and the proposed contribution rates for cases under Part I and Part II of SLAS, LASC had suggested that the two parts be administered separately to facilitate monitoring;
- (c) LASC had reservation about the view that the larger the pool of cases under SLAS, the better the economies of scale achieved. It would depend on the types of cases covered under SLAS. If cases with high risk profile or those not involving monetary claims (such as cases concerning protection of minority shareholders' rights) were included in SLAS, the financial viability of the scheme would be jeopardized;
- (d) LASC considered the revised FEL of \$1.3 million acceptable; and
- (e) LASC supported in principle the inclusion of derivative claims under SLAS and OLAS, but the details of the proposal had yet to be worked out.

19. Regarding claims against developers in the sale of new flats, Ms Corinne Remedios said that LASC's view was that such cases should be covered under SLAS but in a later batch, pending the introduction of new legislation to strengthen regulation over the sale of new flats. As the new legislation would assist in the proof of liability, LASC had recommended that claims against developers should not be included in SLAS for the time being but to keep the matter under review.

The Administration's response

20. DSHA said that the Administration noted that LASC had recommended a

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phased approach for the expansion of SLAS. It was the Administration's understanding that under LASC's proposal, there was only one SLAS scheme but with its two divisions of cases administered separately. As far as aided persons were concerned, the only implication of such an arrangement was that different contribution rates would be applicable to the two divisions of cases.

21. In response to HKFTU's concern about the contribution payable for employee claims on appeal from LT under SLAS Part I, Deputy Director of Legal Aid/Applications and Processing explained the application fee and contributions payable by an applicant/aided person under the existing SLAS. He elaborated that on application, an applicant had to pay an application fee of \$1,000. On approval of the application, the aided person was required to pay an interim contribution calculated at 25% of the FEL for OLAS. On the basis of the existing FEL for OLAS (i.e. \$175,800), the interim contribution was \$43,950. On successful conclusion of the case, the aided person was required to pay a contribution from any damages recovered while the interim contribution, after deducting the legal costs which were not recoverable from the opposite party, would be refunded to him. The rates of contribution payable by a successful applicant were currently set at 6% for cases settled before delivery of brief to counsel and 10% for other cases.

Discussions

Employee claims on appeal from LT

22. The Chairman pointed out that while the interim contribution payable under SLAS would be refunded to an aided person who was successful in his proceedings, the aided person was still liable for the legal expenses which were not recoverable from the other party, and this might amount to tens of thousands of dollars. Given the relatively small size of employee claims on appeal from LT, she urged the Administration to consider amending the legislation to waive the payment of interim contribution for such claims so that the proposal could be of real assistance to the employees concerned. Ms Emily LAU concurred with the Chairman's view. At the request of the Chairman, DSHA agreed to provide for members' reference an analysis, with different scenarios, on the total amount of contributions payable for employee claims on appeal from LT should such claims be covered under SLAS Part I as proposed by LASC.

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23. Mr IP Wai-ming considered that the amount of contribution payable should be based on the compensation/damages recovered rather than the financial resources of the aided persons. In his view, while the interim

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contribution could be refunded if the aided person was successful in his claim, many employees would find it difficult to fork out \$43,950 for paying the interim contribution. Given that legal representation was not allowed in LT and appeals against LT awards were made on a point of law, and having regard to the implications of the judgments on later cases, he considered it unfair that employees had to shoulder the litigation costs for such appeals. He supported HKFTU's view that legal aid should be granted unconditionally to employees in such cases. The Chairman said that for judicial review cases involving clarification on a point of law of public interest, the court might not order the losing side to pay the cost of the winning side. She opined that consideration might be given to applying the same principle to employee claims on appeal from LT. DSHA said that the Administration would take into account members' views in formulating its recommendations for expansion of scope of SLAS.

FEL

24. Ms Emily LAU considered that the FEL for SLAS should be further increased beyond \$1.3 million to benefit more middle class. She requested LASC to explain its view that the proposed FEL of \$1.3 million was acceptable.

25. Mr Paul CHAN said that as explained in his letter to CE dated 13 December 2010, LASC had considered the calls from some stakeholders for the FEL for SLAS to be further increased. After deliberation, LASC concluded that, given its recommendation to expand the scope of SLAS horizontally by establishing SLAS Part II and the higher risks that this might impose on the financial viability of SLAS, it would be appropriate to set the FEL for SLAS at \$1.3 million for the time being. The issue could be revisited after reviewing the viability and effectiveness of the proposed horizontal expansion of SLAS.

26. DSHA said that at the meeting on 30 September 2010, the Administration had informed the Panel of its proposal to further increase the FEL for SLAS from \$1 million to \$1.3 million after considering the views of various stakeholders. The Administration was working on the relevant legislative amendments to implement the proposal.

Scope of the expanded SLAS

27. Ms Emily LAU shared the view that claims against developers in the sale of new flats should be included in the first phase of expansion of SLAS. She further opined that consideration should be given to SOCO's proposal of

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extending the ambit of legal aid to cover proceedings involving constitutional and human rights issues. DSHA responded that the Administration would consider the views expressed by members and stakeholders on the scope of the expanded SLAS and would revert to the Panel on its recommendations in March 2011.

28. The Chairman said that the Bar Association had elaborated in Appendix 1 to its submission its objection to the creation of two SLAS schemes on the ground that it was contrary to the normal concepts of spreading risk across a wider and larger pool of cases. She requested the Administration to consider the Bar's view.

29. Ms Emily LAU noted that there was a view that it was wrong to divide cases into risky and less risky types and that it should be for the Legal Aid Department ("LAD") to assess the risk of litigation in individual cases using the merits test when processing individual applications. She was concerned that the categorization of cases into risky and less risky cases would result in the exclusion of certain types of cases from SLAS altogether, which would in effect impose an additional threshold on the grant of legal aid under SLAS, apart from the means and the merits tests.

30. Ms Corinne Remedios clarified that LASC had not proposed the imposition of any additional or higher threshold on the grant of legal aid under SLAS. She explained that financial viability of SLAS depended on both the choice of claims covered and the merits test, which operated in a two-stage process. As a matter of policy, only certain types of cases which met the criteria in respect of risk profile would be selected for inclusion into SLAS. For those types of claims which had been selected for inclusion into SLAS, individual applications would have to satisfy the means test and the merits test before legal aid would be granted. In applying the merits test, the LAD would take into account all relevant considerations, including whether the claim had a reasonable prospect of success and whether only a trivial advantage would be gained by the applicant from such proceedings. Legal aid would not normally be granted where it was unlikely that any judgment obtained could be enforced, or where the applicant would gain no real benefit from the proceedings.

31. Referring to the statistics on claims by flat buyers against property developers under OLAS compiled by LAD [LC Paper No. CB(2)836/10-11(05)], Dr Priscilla LEUNG said that in considering the scope of SLAS, consideration should first be given to whether a certain type of claims should, in principle, be covered under SLAS before taking into account the success rate and chance of recovery of such claims. Dr LEUNG further opined that the scope of SLAS

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and OLAS should be extended to cover compulsory sale cases under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545) to provide assistance to small flat owners involved in disputes arising from compulsory land sale.

32. The Chairman said that during the relevant debate at Council meeting, she had expressed support for the view that legal costs for all compulsory land sale cases dealt with in the Lands Tribunal should be paid by the developers concerned, as they were the ones to initiate the compulsory land sales and to profit from them. Dr Priscilla LEUNG, however, considered it more appropriate to have such cases covered under legal aid as the screening mechanism by LAD would help prevent abuse.

33. The Chairman said that LASC's proposals of expanding SLAS to cover claims for property damage against incorporated owners of a multi-story building and derivative claims were improvements which should be taken on board by the Administration. However, she considered LASC's proposed transfer of medical, dental and legal professional negligence claims from the existing SLAS to SLAS Part II to be a backward step. She requested the Administration to provide a response to all the recommendations made by LASC on expansion of the scope of SLAS, including its recommendations to consider claims against estate agents and those against developers in the sale of new flats at a later stage and its recommendations of not including claims involving disputes between minority and majority shareholders and claims in respect of sales of goods and provision of services. She added that the Panel had passed a motion in July 2010 requesting the Administration to study the Bar Association's proposals for amending the relevant legislation to improve the provision of legal aid. She requested the Administration to also respond to the Bar Association's proposals for expansion of SLAS when it reverted to the Panel on its recommendations in March 2011.

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34. DSHA stressed that in considering the expansion of the scope of SLAS, regard must be given to the self-financing nature of the scheme and the need to maintain its financial viability. She pointed out that the conduct of the merits test also incurred costs and legal aid could not be made available for all people regardless of their financial capacity and the types of claims involved. She reiterated that to maintain the financial viability of SLAS, great prudence must be exercised in deciding the types of cases to be included in the scheme. She added that the proposed \$100 million injection into the SLAS Fund was to provide a cushion for cash flow and not for payment of legal costs of SLAS cases.

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Financial situation of the SLAS Fund

35. The Chairman said that the declining annual operating surplus of the SLAS Fund was partly attributable to the reduction of the contribution rates. She opined that consideration could be given to increasing the contribution rate, for instance by standardizing the rate of contribution to 10% for all cases. The Chairman further said that the Administration should not over-emphasize that the loss of a SLAS case in 2008 had resulted in a drastic reduction of the SLAS Fund. In her view, while it was necessary for LAD to review whether better cost control should have been put in place, the Administration should not take an overly conservative approach in expanding the scope of SLAS on account of one individual case. DSHA said that LAD was conducting different analyses to facilitate the Administration in its formulation of recommendations on the expansion of the scope of SLAS. The Administration would take due account of the impact of the 2008 case in its consideration.

Legislative timetable

36. The Chairman said that according to the working timetable as set out in the Administration's paper [LC Paper No. CB(2)591/10-11(04)], the Administration would consult the Panel on its recommendations on the proposed expansion of SLAS and the relevant legislative amendments in March 2011 and April/May 2011 respectively, and submit the amendment rules to the Legislative Council ("LegCo") in May/June 2011. Subject to the scrutiny of LegCo, the amendments rules were expected to be put into effect in June/July 2011. DSHA said that the working timetable would be subject to members' views on the Administration's recommendations on the expansion of SLAS when the Panel was consulted on the matter in March 2011. In response to the Chairman, DSHA further advised that the working timetable was premised on the assumption that no amendment to the primary legislation was required to put in place the proposals for expansion of SLAS.

V. Any other business

37. There being no other business, the meeting ended at 6:30 pm.