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by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of special meeting
held on Thursday, 20 October 2011, at 5:30 pm
in Conference Room 1 of the Legislative Council Complex

- Members present** : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
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
Hon Paul TSE Wai-chun
Hon LEUNG Kwok-hung
- Non-Panel Members attending** : Hon WONG Kwok-hing, MH
Dr Hon PAN Pey-chyou
- Members absent** : Dr Hon Priscilla LEUNG Mei-fun, JP (Deputy Chairman)
Hon LAU Kong-wah, JP
Hon Timothy FOK Tsun-ting, GBS, JP
- Public Officers attending** : Item I

Department of Justice

Mr WONG Yan-lung, SC
Secretary for Justice

Mr Frank POON
Solicitor General

Mr Eamonn Moran
Law Draftsman

Mr Kevin Zervos, SC
Director of Public Prosecutions

Ms Susie HO
Director of Administration & Development

Home Affairs Bureau

Mr TSANG Tak-sing, GBS, JP
Secretary for Home Affairs

Mr CHAN Heung-ping, William
Director of Legal Aid

Mr CHENG Yan-chee, JP
Deputy Secretary for Home Affairs (1)

Miss CHOW Kam-yuk, Christine
Principal Assistant Secretary (Civil Affairs) 2

Item II

Miss Jennifer MAK
Director of Administration

Miss Agnes WONG
Deputy Director of Administration

**Attendance by : Item II
invitation**

The Law Society of Hong Kong

Ms CHU Wing-shuet, Christine
Deputy Secretary General

Ms Maggie CHENG
Assistant Director of Practitioners Affairs

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

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

Miss Ivy LEONG
Senior Council Secretary (2)3

Ms Wendy LO
Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

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I. Briefing on the Chief Executive's 2011-2012 Policy Address

[LC Paper No. CB(2)47/11-12(01) and (02), The 2011-2012 Policy Address – "From Strength to Strength" and The 2011-2012 Policy Agenda booklet]

Briefing by the Administration

At the invitation of the Chairman, Secretary for Justice ("SJ") and Secretary for Home Affairs ("SHA") each gave a presentation to highlight the policy initiatives within the respective purview of the Department of Justice ("DoJ") and the Home Affairs Bureau ("HAB") for 2011-2012 [LC Paper Nos. CB(2)47/11-12(01) and (02)]. Copies of their speaking notes were tabled at the meeting and issued vide LC Paper Nos. CB(2)134/11-12(01) and (02) on 24 October 2011.

Issues raised by members

Development of mediation services

2. Mr WONG Kwok-hing enquired whether the Administration would consider exploring suitable venues in the New Territories for extension of mediation services in the coming year. He hoped that some venues could be made available in Tsuen Wan and Yuen Long in New Territories West to provide mediation services to the local residents there. SJ responded that at present mediation venues in two community centres were made available (i.e. the Leighton Hill Community Hall in Hong Kong Island and the Henry G Leong Yaumatei Community Centre in Kowloon) under the Pilot Project on

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Community Venue for Mediation which sought to promote pro-bono mediation free of charge by mediation service providers. Subject to the review on the effectiveness of the Pilot Project which would end in 2012, the Administration would revisit the provision of venues and facilities for promotion of mediation services.

3. Ms Emily LAU shared Mr WONG Kwok-hing's view and enquired whether there was a large demand for mediation service in the community. SJ responded that the mediation venues provided at the two community centres at present were not fully utilized. He said that apart from the review on the provision of venues for mediation in the community, the Mediation Task Force would consider and propose public education and publicity initiatives to enhance the confidence of the general public in the use of mediation to resolve disputes. Ms LAU suggested that the possibility of utilizing school halls for such usage could be explored.

Legal aid issues

4. Referring to some comments that legal aid applications should not have been approved in respect of certain judicial review cases and that the legal aid services had been abused, Ms Audrey EU enquired about the assessment criteria in processing legal aid applications and the criteria of assigning lawyers by the Legal Aid Department ("LAD"). Director of Legal Aid ("DLA") said that all legal aid applications were processed by in-house lawyers of LAD to determine whether there were reasonable grounds to grant legal aid. Section 9(d) of the Legal Aid Ordinance ("LAO") (Cap. 91) also empowered DLA to refer an application for legal aid to a counsel or a solicitor to give opinion on the case to assess its merits. DLA further said that legal aid would not be granted only to cases which had high chance of success. Section 10 of LAO which set out the criteria for granting legal aid was such that the case to which the application related had reasonable grounds for legal aid to be granted.

5. DLA further advised that section 13(1) of LAO stipulated that LAD could assign counsel or solicitor selected by the aided person to act for them. In the assignment of legal aid cases, LAD adhered to the fundamental principle that the aided person's interest was of paramount importance. Other factors, such as the nature and complexity of cases, experience and performance of the counsel or solicitor would also be taken into account when considering assignment. He added that confidence in one's own legal representative was essential in the conduct of legal proceedings. As long as the solicitor or counsel nominated by the aided person was legally qualified and did not have poor performance record, LAD would normally accede to and would not reject an aided person's choice unless there were compelling reasons to do so.

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6. Mr Paul TSE enquired whether different assessment criteria were adopted for legal aid applications in respect of judicial review cases and other cases involving personal interests. He also enquired whether initiatives had been taken to enhance transparency in processing legal aid applications to safeguard against any possible abuse of legal aid services. Mr TSE considered that LAD should maintain an impartial view when processing legal aid applications.

7. DLA advised that under the existing legal aid system, each legal aid application was considered on an individual basis. Provided the applicant satisfied both the means and merits test, legal aid would be granted. In processing legal aid applications, in particular judicial review cases, the primary consideration was whether the applicant had a sufficient interest in the case to justify the grant of legal aid. DLA stressed that public interest was not a decisive factor in assessing the merits of an application.

8. DLA supplemented that according to LAO, any applicant who passed both the means test and the merits test was eligible for legal aid. It was his duty to assess the applications to determine whether there were reasonable grounds to grant legal aid. He reiterated that political, social and economic implications of a case were not the considerations.

9. Dr PAN Pey-chyou said that there were concerns that some lawyers might persuade low income people to apply for legal aid and nominate the lawyers to act for them. He asked whether the present arrangement for an aided person to nominate his counsel or solicitor should be revised to safeguard against abuses of legal aid services. He also enquired whether LAD could reject an aided person's choice of lawyer. DLA replied that an aided person was allowed under the existing legislation to nominate his own counsel or solicitor to represent him in the case. He added that aided persons might feel that their right of access to justice was compromised if their choices of lawyers were rejected and they subsequently lost their cases.

10. The Chairman advised that the Panel on Administration of Justice and Legal Services ("the Panel") had discussed the policy of LAD on briefing out legal aid cases to private counsel in the past. At her suggestion, members agreed that issues relating to the provision of legal aid for judicial review cases and the policy of LAD on briefing out legal aid cases to private counsel be discussed at a future meeting.

Legal advice for litigants in person ("LIPs")

11. Noting that HAB intended to launch a two-year pilot scheme to provide advice on the rules and procedures relating to court proceedings to LIPs, Ms

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Emily LAU enquired about the number of LIPs to be benefited under the scheme each year and the response of the legal profession to the scheme. SHA replied that a provision of around \$6 million would be earmarked to operate the scheme on a pilot basis for a period of two years. Volunteer lawyers would be recruited to provide pro-bono legal advice and a full-time centre-in-charge with legal qualification would manage the operation of the scheme with the support of a full-time resident lawyer and other support staff. Ms Emily LAU urged the Administration to allocate more resources for the implementation of the scheme. SHA said that the Administration would further consult the Panel in November 2011 on the relevant recommendation in detail.

Provision of legal and arbitration services in Qianhai

12. Ms Miriam LAU enquired about the measures taken by the Administration in facilitating the provision of legal arbitration services in Qianhai, Shenzhen by Hong Kong service providers. SJ said that under the "Regulations on Qianhai Shenzhen-Hong Kong Modern Services Industries Co-operation Area" promulgated in June 2011, initiatives were proposed to –

- (a) set up a special tribunal for hearing of commercial disputes in Qianhai with a view to applying laws other than Chinese laws in resolving disputes;
- (b) encourage the establishment of a mechanism for the verification of the law of other jurisdictions to promote the use of Hong Kong legal services in resolving commercial disputes; and
- (c) encourage Hong Kong arbitration bodies to provide arbitration services to enterprises set up in Qianhai.

13. SJ further said that he had met with the two legal professional bodies and arbitration institutions in Hong Kong to explore the effective ways to implement the proposals with a view to enhancing the promotion of Hong Kong's legal and arbitration services in the Mainland. At the Chairman's suggestion, members agreed to follow up on the Administration's initiatives in facilitating the provision of legal and arbitration services in Qianhai by Hong Kong service providers at a future meeting.

Prosecution policy

14. Mr Albert HO said that he had received complaints from the public from time to time that DoJ did not explain to them the reasons for not making prosecutions in some cases notwithstanding the fact that the complainants had

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provided a lot of information on the cases. For example, parties involved in some election-related cases had been given warning but the complainants concerned were not informed of such actions.

15. SJ replied that he appreciated that some victims of crime were not satisfied with the replies of DoJ in respect of their cases and considered that the information disclosed by DoJ was inadequate. It should, however, be noted that not all evidence of a case could be disclosed to the complainant and it was difficult to specify the extent of disclosure in different circumstances. Nevertheless, DoJ had explained to the Panel on decisions not to prosecute in some controversial cases that involved public interest in the past. Director of Public Prosecutions ("DPP") supplemented that there was a difference between complaints lodged by informants and victims of crimes. He said that DoJ sometimes did not know who reported a case to the law enforcement agency (e.g. whether he was the victim himself), but the law enforcement agency which handled the case would normally have that kind of information. He assured members that DoJ would explain its prosecution decisions to the victims of crime or anyone affected by DoJ's decision as much as possible. DoJ would also accede to the requests from complainants referred to the department for explanations on the prosecution decisions as far as possible.

16. Mr Albert HO reiterated that DoJ should provide sufficient explanations, in particular the legal views on the cases, to the complainants. He enquired whom the complainants could turn to if they were not satisfied with the explanations given by DoJ. SJ replied that he would be accountable for all the prosecution decisions made by DoJ. He assured members that it was the policy of DoJ to provide information on the cases to the victims of crime and other parties concerned as far as possible. Resources had also been allocated for that area of work.

Creation of a supernumerary post of Deputy Principal Government Counsel in DoJ

17. Ms Audrey EU noted that DoJ proposed to create a supernumerary post of Deputy Principal Government Counsel ("DPGC") in its Legal Policy Division in anticipation of the increase in demand for advice on constitutional development and electoral matters. However, she observed that Electoral Affairs Commission ("EAC") normally would not provide detailed answers to enquiries concerning electoral affairs and people were always advised to seek legal advice on their own. She queried whether the creation of the post could address the need for legal advice on electoral matters.

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18. SJ replied that in view of the increased demand for advisory service in relation to the application of existing election-related legislation and the preparation for the coming Chief Executive ("CE") and Legislative Council ("LegCo") elections, it was proposed that a supernumerary DPGC post would be created in the Legal Policy Division of DoJ to provide legal advice and services to relevant policy bureaux and departments on issues relating to constitutional development and electoral affairs, particularly on the implementation of universal suffrage for the selection of CE and for forming LegCo in accordance with democratic procedures. The holder of the proposed post would also provide legal advice to EAC on electoral matters. The Panel would be further consulted on the staffing proposal at its regular meeting in November 2011.

19. Ms Miriam LAU enquired whether the holder of the proposed post would assist EAC in developing a set of more comprehensive election-related guidelines to address the problems identified in the conduct of previous elections. SJ replied that EAC would spearhead the drawing up of election-related guidelines to resolve any ambiguities identified and the holder of the proposed post would provide legal advice to EAC in this aspect. However, he cautioned that if election-related guidelines were too elaborately drafted, their implementation might be difficult.

Promotion of Basic Law ("BL")

20. Mr Paul TSE enquired whether the Administration had kept documentary materials relating to the drafting, implementation and interpretation of BL so that the public could make use of the collection for better understanding and research on BL. He considered that the Administration should step up its work on promotion and publicity of BL to enhance the public's understanding of the provisions, in particular those controversial ones.

21. SJ advised that the Basic Law Institute in the Hong Kong Central Library housed a collection of materials on BL for research by the public. He said that DoJ was duty-bound to provide advice to the Government on the interpretation of controversial provisions of BL, the contents of which would be further clarified through legal proceedings and court judgments. DoJ had also educated the public on the content of BL through various means such as its participation in the work of the Basic Law Promotion Steering Committee, the provision of legal advice to Government departments in organizing activities to enhance knowledge of BL and the regular publication of the Basic Law Bulletin summarizing recent court cases related to BL.

Training for lawyers

22. Ms Miriam LAU expressed support for the training programs organized by DoJ for prosecutors. She enquired whether private counsels were required to complete the training programs before they were engaged by DoJ to provide prosecution services. DPP responded that newly qualified lawyers were required to attend the Joint Training Programme which comprised of training session on prosecution practices and a two-week placement arrangement in courts. DoJ would assess the performance of the participants after the training based on the criteria agreed with the two professional bodies to determine whether they were qualified to be included in the Fiat List of the Prosecutions Division for briefing out cases. He added that the new requirement would not apply to the existing private counsel already on the List.

Use of Chinese in court proceedings

23. Referring to the article titled "the dilemma of conducting civil litigation in Chinese – conversant either in Chinese or the law but not in both" written by Justice Susan Kwan, the Chairman highlighted the problems in the use of Chinese in court proceedings including the growing number of LIPs who fell short of legal knowledge and the lack of bilingual legal practitioners. She sought views from the Administration on the issue.

24. SJ agreed that there were challenges ahead in developing a bilingual legal system. Nevertheless, the Judiciary had been providing assistance to LIPs actively and DoJ had also endeavoured to enhance the comprehensibility of Chinese legislation and built up experiences in conducting litigation in Chinese in district courts and magistrates in recent years. Regarding support to LIPs, SHA said that HAB had provided sponsorship to set up the Community Legal Information Centre in collaboration with the University of Hong Kong to provide bilingual community legal information on the Internet. At the Chairman's suggestion, members agreed that the Panel should explore the need of the work to be done on various fronts for further development of the use of Chinese in court proceedings at a future meeting.

Calculation of election expenses

25. Ms Audrey EU said that according to the Guidelines on Election-related Activities in respect of the CE Election, election expenses would start to be incurred when a person who had publicly declared his intention to stand for election at any time before the close of the nominations for the election, regardless of whether he had submitted his nomination form. It was

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regrettable that the Administration was unable to tell unequivocally whether the "potential candidates" for the election of CE as recently reported by the media had officially declared their candidacies and whether the expenses incurred in the conduct of relevant activities should be counted towards election expenses. She asked SJ to clarify the issue.

26. SJ said that he believed that EAC would make clarifications on the issue if necessary. However, it should be noted that section 2(1) of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) had clearly stipulated that "election expenses" meant expenses incurred or to be incurred, before, during or after an election, by a candidate or his election expense agent on his behalf for the purpose of promoting his election, or prejudicing the election of another candidate or other candidates and included the value of election donations consisting of goods and services used for that purpose. The term "candidates" in relation to election expenses was also clearly defined in law. Any expenditure incurred for such election purpose should be regarded as election expenses. SJ further said that candidates who intended to run for the CE election should abide by the relevant electoral legislation as any breach of the requirements might involve legal responsibilities.

(The Chairman proposed at this juncture to extend the meeting for 15 minutes to allow more time for discussion of the next item.)

II. 2011-2012 Judicial Service Pay Adjustment

[LegCo Brief on 2011-2012 Judicial Service Pay Adjustment]

Briefing by the Administration

27. Director of Administration ("D of Admin") briefed members on the judicial service pay adjustment for the 2011-2012 as detailed in the LegCo Brief.

Views of deputations

28. Ms Christine CHU said that the Law Society of Hong Kong ("the Law Society") welcomed the determination of judicial remuneration by the independent Standing Committee on Judicial Salaries and Conditions of Service ("Judicial Committee") to uphold the principle of judicial independence. While the Law Society did not have particular view on the proposed pay adjustment, it was concerned about the general increase in average waiting times for civil cases. For example, the waiting time from application to fix date to hearings for civil cases in the Court of First Instance of the High Court has been increased from 145 days in 2008 to 179 days in 2009 and to 215 days in 2010. The Law Society

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opined that the increase in waiting times for cases reflected the heavy workload of judicial officers and was unfair to litigants. It considered that the Administration should review the judicial manpower situation and allocate more resources to the Judiciary where necessary.

Discussions

29. The Chairman noted the concern of the Law Society on the court waiting time and advised that the Panel would follow up on the issue at a future meeting. She informed the Panel that the Hong Kong Bar Association indicated support for the 2011-2012 judicial service pay adjustment in principle. However, it noted with concern that the proposed pay increase recommended by the Judicial Committee (i.e. 4.22%) did not meet with the increase sought by the Judiciary (i.e. 4.23%) despite the difference was only 0.01%. D of Admin explained that both the Judiciary and the Judicial Committee agreed in principle that the cumulative effect of the private sector pay trends should be taken into account in determining judicial pay adjustment for 2011-2012 and had based their respective calculations on the same set of data. The difference in the proposed pay increase was due to the fact that the Judiciary had worked out the cumulative percentage of pay increase on a year-by-year basis with figures rounded up each year for the basis of the multiplication in the following year. On the other hand, the calculation of the Judicial Committee was carried out in succession with no rounding up until the final figure was arrived at. The Administration considered the calculation method adopted by the Judicial Committee more appropriate. The Judiciary indicated that it would leave it to the Administration to decide on whether the judicial pay increase should be 4.23% or 4.22%.

30. In response to Ms Emily LAU's enquiry about the operation of the judicial service pay adjustment mechanism, D of Admin advised that judicial service pay adjustment was recommended by the independent Judicial Committee which had taken into account a basket of factors as detailed in the LegCo Brief and the Judiciary was consulted in the process. The Administration had invited the Judiciary to give its further response to the Judicial Committee's recommendation after the Judicial Committee submitted its recommendation to the CE to determine the judicial service pay adjustment.

31. Ms Emily LAU further enquired about the judicial service pay adjustment arrangements of overseas jurisdictions. D of Admin responded that the Administration noted that the judicial service pay adjustments in overseas jurisdictions were generally reviewed by independent committees which had taken prudent actions in their latest annual pay reviews for judges based on a basket of factors similar to Hong Kong such as the workload of judicial officers and the local economy.

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32. The Chairman was of the view that there should be a consensual mechanism for judicial remuneration review. At her suggestion, members agreed to consider the judicial service pay adjustment mechanism when the judicial manpower situation was discussed at a future meeting. The Chairman concluded that members in general supported the Administration to seek approval from the Finance Committee on the proposed pay adjustment.

III. Any other business

33. There being no other business, the meeting ended at 7:05 pm.

Council Business Division 2
Legislative Council Secretariat
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