

立法會
Legislative Council

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LC Paper No. CB(2)1551/11-12
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 28 November 2011, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex

- Members present** : Dr Hon Margaret NG (Chairman)
Dr Hon Priscilla LEUNG Mei-fun, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-yeet, 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, JP
- Members absent** : Hon Timothy FOK Tsun-ting, GBS, JP
Hon LEUNG Kwok-hung
- Public Officers attending** : Item IV
Home Affairs Bureau
Mr CHENG Yan-chee, JP
Deputy Secretary for Home Affairs (1)
Miss CHOW Kam-yuk, Christine
Principal Assistant Secretary for Home Affairs
(Civil Affairs) 2

Item V

Department of Justice

Mr Kevin P Zervos, SC
Director of Public Prosecutions

Miss Susie HO
Director of Administration and Development

Ms Christina CHEUNG
Deputy Law Officer (Civil Law)

Item VI

Department of Justice

Miss Susie HO
Director of Administration and Development

Ms Roxana CHENG
Deputy Solicitor General

**Attendance by :
invitation**

Item IV

Hong Kong Bar Association

Ms SZE Kin
Co-ordinator of Bar Free Legal Service Scheme

Ms Karen CHEUNG
Administrative Secretary

The Law Society of Hong Kong

Mr Junius HO
President of Council

Ms Melissa PANG
Council Member

Ms Joyce WONG
Director of Practitioners Affairs

Item V & VI

The Law Society of Hong Kong

Mr Junius HO
President of Council

Ms Joyce WONG
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 Cindy HO
Senior Council Secretary (2)3

Ms Wendy LO
Council Secretary (2)3

Mrs Fonny TSANG
Legislative Assistant (2)3

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I. Confirmation of minutes of meeting
[LC Paper No. CB(2)274/11-12]

The minutes of the meeting held on 13 October 2011 were confirmed.

II. Information papers issued since last meeting

2. Members noted that no information paper had been issued since the last meeting.

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III. Items for discussion at the next meeting

[LC Paper Nos. CB(2)380/11-12(01) to (03)]

Work plan of the Panel

3. The Chairman informed members that she and the Deputy Chairman had met with the Administration to discuss the work plan of the Panel for the current legislative session on 8 November 2011. Based on the discussion, the Secretariat had prepared a "List of items tentatively scheduled for discussion at Panel meetings in the 2011-2012 session" [LC Paper No. CB(2)380/11-12(01)].

Discussion items for the regular meeting in December 2011

4. Members agreed that the following items be discussed at the next regular meeting on 20 December 2011 –

- (a) Role and work of the Law Reform Commission ("LRC");
- (b) Proposed construction of the West Kowloon Law Courts Building;
and
- (c) Further expansion of the Supplementary Legal Aid Scheme.

Outstanding items for discussions at future meetings

5. With reference to the list of outstanding items for discussion of the Panel, members agreed that the items of "Procedural matters of appeal boards" and "The trend of legislative proposals being put forward by the Administration in the form of subsidiary legislation" be deleted from the list. Members also agreed that the item of "Inclusion of the statutory Independent Police Complaints Council under the purview of The Ombudsman" should remain in the list.

IV. Free legal advice service – A two-year pilot scheme to provide legal advice for litigants in person

[LC Paper Nos. CB(2)380/11-12(04) and (05)]

Briefing by the Administration

6. Deputy Secretary for Home Affairs (1) ("DSHA") introduced the Administration's paper setting out the operational framework of a proposed two-year pilot scheme to provide legal advice for litigants in persons ("LIPs") [LC Paper No. CB(2)380/11-12(04)]. Members noted that a LIPs office would

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be set up which would be staffed by a centre-in-charge, resident lawyer(s) (one full-time or two part-time), members of the two legal professional bodies and interested law firms/chambers ("the community lawyers"), a para-legal and a clerical assistant.

7. Members also noted the background brief prepared by the Legislative Council ("LegCo") Secretariat on "Free legal advice service – A two-year pilot scheme to provide legal advice for litigants in person" [LC Paper No. CB(2)380/11-12(05)].

Views of the two legal professional bodies

Hong Kong Bar Association ("Bar Association")

8. Ms SZE Kin, Co-ordinator of Bar Free Legal Service Scheme, said that the Bar Association supported in principle the proposed pilot scheme. The Executive Committee of the Bar Council would meet tentatively on 1 December 2011 to consider the scheme. The submission of the Bar Association would be made available in due course.

Law Society of Hong Kong ("Law Society")

9. Mr Junius HO, President of Council of the Law Society, said that the Law Society in principle would not object to the proposed pilot scheme and a Task Force would follow up on the scheme with particular regard to the participation of its members as community lawyers on a pro bono basis. Details of their views would be furnished in due course. However, he was concerned that the pilot scheme would not address adequately the needs of LIPs if the scope of service was limited to legal advice on civil procedural matters while merits of the case were not to be discussed. He said that the Government should not shift the burden to the legal profession to provide pro bono service to help satisfy the unmet needs for legal services of LIPs instead of allocating sufficient funding for providing such service. Otherwise, court proceedings would be unduly lengthened.

10. Mr Junius HO further said that the Law Society had all along been supportive of the Government's initiatives to provide community legal services through the Duty Lawyer Scheme ("DLS"), the Free Legal Advice Scheme, the Tel-Law Scheme and the Convention Against Torture Scheme. However, the proposed rate of \$300 for a three-hour shift payable to the community lawyers under the pilot scheme was unreasonably low when compared to those fees payable to counsel on the Fiat List of the Prosecutions Division of the Department of Justice ("DoJ") (prosecution fees), the duty lawyers providing

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legal representation under the Duty Lawyer Scheme (DLS fees) or the Convention Against Torture Scheme. Mr HO added that there would be practical difficulties for lawyers to make themselves available during office hours to serve as community lawyers without causing disruption to their work. He suggested that the Administration might consider enhancing the existing DLS to provide the said service. By operating the service under DLS, this would help bring the remuneration to a reasonable level.

Discussion

11. Noting that the Administration planned to launch the pilot scheme in the second quarter of 2012, the Chairman commented that it might be too rush as the Administration was still sounding out the two legal professional bodies on the scheme. DSHA explained that in order to meet the target time frame, preparatory work was in the pipeline, including earmarking a venue for the operation of the pilot scheme in the High Court Building.

12. Noting that resident lawyers would be employed under the pilot scheme and community lawyers could join the scheme on a pro bono basis, the Chairman enquired how the pilot scheme would be operated to meet the needs of LIPs, particularly as compared with the Resource Centre for Unrepresented Litigants ("Resource Centre") operated by the Judiciary Administration in the High Court Building. DSHA explained that while the Resource Centre would only provide information on civil procedural matters, community lawyers of the proposed pilot scheme would provide legal advice on civil procedural matters to assist LIPs. Resident lawyer(s) would also be employed under the pilot scheme for handling urgent cases. If a community lawyer was unable to attend a scheduled session, the resident lawyer(s) could also stand in for him/her where practicable. Responding to the comments made about the rate payable to the community lawyers, DSHA emphasized that the service was a means to promote the culture of providing pro bono legal advice by the legal profession, and the amount would be an honorarium to cover transportation cost.

13. Ms Emily LAU said that initially she was delighted to learn that the Administration was going to introduce such a pilot scheme. However, she was concerned whether it could provide concrete assistance to LIPs. She urged that the Administration should put in more resources including enhanced provision of legal aid to address the needs of LIPs. In this connection, Ms SZE Kin echoed the concern of Ms Emily LAU who cast doubt on the effectiveness of the pilot scheme which was confined to court procedural matters. She added that according to her personal experience, civil procedures were too complicated and

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the scheme would not be able to satisfy the needs of LIPs who were concerned about the merits of their case, and the Administration would need to put in more resources for enhancing the service to LIPs. Ms SZE also considered it not practicable to expect a lawyer having only two years of experience to have sufficient knowledge and expertise to deal with all sorts of enquiries relating to civil procedural matters. Ms Audrey EU suggested that the qualification requirement in respect of community lawyers would have to be reviewed in order to ensure that they had the knowledge to provide accurate advice on procedural matters.

14. Mr Paul TSE suggested that consideration could be given to arranging lawsuit-related talks for LIPs at the stage of pre-trial review hearings. Ms Audrey EU, however, considered that though such talks had always been welcomed by the public for enhancing their general knowledge, it would not be able to cater for the specific needs of persons who were involved in legal proceedings.

15. Mr LAU Kong-wah said that the LIPs were bound to be disappointed upon knowing that merits of the case were not to be discussed under the pilot scheme. He queried why the pilot scheme could not be operated under the DLS. From his experience in providing legal services at district level, Mr Albert HO also found it not practicable to confine the legal advice solely to civil procedural matters. He further commented that some cases might not be worth pursuing in the first place due to just a technical or legal error. If the merits of the case were not to be discussed, the litigating party would not be suitably advised, resulting in unnecessary lawsuits and wasting legal costs. Ms Miriam LAU was of the view that the needs of LIPs for legal advice should be addressed from an overall perspective. If the underlying cause for the growing number of LIPs was the high level of legal fees for engaging private lawyers, provision of legal aid instead of legal advice would be the solution. Hence, the present approach for providing legal advice on a pro bono basis might seem inadequate.

16. The Chairman said that LIPs who were short of legal knowledge did pose a challenge to the court. As the Resource Centre operated by the Judiciary Administration would only provide information and no legal advice was offered, there stood a need to fulfil the unmet needs of LIPs. The Chairman enquired whether the pilot scheme was put forward on the basis of some successful overseas experience. DSHA replied that, in drawing up the scheme, the Administration had considered overseas practices including the operation of a similar scheme in the United Kingdom whereby procedural advice to LIPs was provided, and the provision of pro bono legal service in Australia.

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17. Addressing the concerns of members about the scope of service, DSHA said that the proposed pilot scheme was geared to the needs of those who had not been granted legal aid. There was a comprehensive legal aid system in place to provide legal advice and representation to those in need and litigants could obtain the service subject to the means test and the merits test. He assured members that the legal aid regime was subject to constant reviews with a view to ensuring that no one with reasonable grounds for pursuing or defending a legal action would be denied access to justice because of a lack of means. As for the reason for not providing legal advice on merits of the case, DSHA explained that as different lawyers might have different legal opinion on points of law, it was the intention to introduce a pilot scheme to address the procedural problems encountered by LIPs as soon as possible to help relieve the strain on the judicial resources as a first step.

18. Mr LAU Kong-wah noted that the centre-in-charge of the proposed LIPs office could refuse to provide service to a client if it was found that the client had means to pay for legal advice privately. He enquired how the centre-in-charge of the proposed LIPs office might ascertain whether the client would be eligible for the pilot scheme. DSHA replied that it would mainly rely on a declaration system by applicants whereby staff of the LIPs office would explain the rules to the applicants at the application stage.

19. Members generally recognised the need for enhancing the legal advice service for LIPs given the pressure exerted by the growing number of civil proceedings involving LIPs on judicial time and resources and that it would be unfair to the other party to the proceedings with legal representation if they had to pay more legal costs arising from prolonged proceedings. However, they were not convinced that the pilot scheme as currently proposed by the Administration would effectively meet the needs of LIPs. In view of Members' reservations about the pilot scheme, the Chairman requested that the Administration should revisit its proposal having regard to views of Members and the two legal professional bodies. The Chairman also requested that when reverting to the Panel at a future meeting, the Administration should provide information on how similar schemes had operated successfully in overseas jurisdictions. DSHA agreed that the Administration would revert to the Panel on these issues at a future meeting.

**V. Supplementary Provision to Head 92 – Department of Justice ("DoJ")
Subhead 234 – Court costs**
[LC Paper Nos. CB(2)372/11-12(02) and (03)]

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Briefing by the Administration

20. At the invitation of the Chairman, Director of Administration and Development ("DAD") briefed members on the Administration paper [LC Paper No. CB(2)372/11-12(02)] which sought a supplementary provision of \$86.61 million to its Subhead 234 – Court costs for meeting the estimated shortfall in 2011-2012. DAD said that as a result of the unanticipated court costs requirements for some mega cases and the deferment of some payments from 2010-2011 to 2011-2012 due to protracted negotiation process, the original provision was insufficient to meet the likely court costs payment required for the remainder of 2011-2012 for which the Government was under legal obligation to make timely payment. Subject to members' support, the Administration would seek the approval of the Finance Committee at its meeting on 16 December 2011.

21. Members noted the information note prepared by the LegCo Secretariat on "Supplementary Provision to Head 92 - DoJ Subhead 234 - Court costs" [LC Paper No. CB(2)372/11-12(03)].

Views of the Law Society

22. Noting that the total provision would amount to some \$186 million if the supplementary provision was provided, Mr Junis HO said that it was an alarming figure which revealed two issues, namely, the correctness of the decision to prosecute or appeal and the quality of the legal advice leading to prosecution. Referring to the case of *HKSAR v Kevin Barry Egan* (FACC 3/2009), Mr HO said the career of the defendant as a practicing barrister was tarnished by the judicial process and cast doubt on the criteria in making the decision to prosecute the case.

Discussion

23. The Chairman observed that the huge amount of court costs paid in some cases could have been avoided because the acquittal was a consequence of an error on the part of the prosecution. She added that Members had expressed concern over the quality of prosecution and the legal advice given to the Government when an oral question on "Litigations to which the Government was a party" was raised at the Council meeting of 16 November 2011.

24. Director of Public Prosecutions ("DPP") made the following responses -

- (a) whilst the majority of prosecutions had resulted in convictions, there remained some less successful prosecutions where the Government had to bear the costs of the defendants and in most instances it

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involved complicated and long running trials. Such cases necessarily incurred substantial costs and it was only after the trials had been conducted and then taken on appeal, generally before the Court of Final Appeal, that convictions were quashed. Most of these cases dated back in time and had now come up and that was why the request for funding was required;

- (b) the decision to prosecute was based on a reasonable prospect of conviction according to the available evidence prevailing at the time and the criteria detailed in the Statement of Prosecution Policy and Practice of the DoJ. A favourable outcome of about 70% in contested trials was a common phenomenon in common law jurisdictions. All the cases were subject to extensive scrutiny by the prosecution authority to ensure that they had been carefully evaluated. In addition, the Prosecutions Division regularly briefed members of the private bar to conduct its cases, as was the situation with most of the cases that had incurred costs. Counsel on fiat would also keep the case under review. However, the role of the prosecution authority was to present the case to the court and the outcome was to be decided by the court on being satisfied beyond a reasonable doubt.
- (c) DoJ would review decisions to prosecute by conducting evaluation of cases as an important and on-going exercise.

25. Given that the deviation between the estimated court costs and the actual expenditure was great, Mr Paul TSE enquired how the original estimates were derived, and whether risk assessment had been conducted in the process. He also asked whether there was any precedent that the Administration had sought a supplementary provision which was 100% of the original provision.

26. DAD replied that a precedent case was identified in 1995-1996 where a supplementary provision of \$22.7 million was sought against the original allocation of \$32.6 million. She explained that draft annual estimates for court costs were worked out on the basis of the prevailing and available knowledge of the progress of the cases at the time of preparing the estimates as well as historical spending pattern. In the present circumstance, the unanticipated court costs requirements for some mega cases were not known before the cut-off date for submitting the estimates and there was also deferment of payments from 2010-2011 to 2011-2012 as a result of protracted negotiation process. Noting that historical spending pattern would provide a reference, Mr TSE was concerned whether a supplementary provision for the current financial year would lead to an over-provision for the next financial year. He suggested that the process be reviewed by conducting a risk assessment on all outstanding cases.

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DAD, however, advised that there would be practical difficulties to do so given that the position would only be clear after the case was heard by the appellate courts or where the case was at the final stage of negotiation of court costs.

27. Concluding the discussion, the Chairman remarked that as the Government was under legal obligation to make payment for court costs incurred, the Panel supported the Administration's proposal for a supplementary provision for meeting the expected higher-than-normal payment in court costs in 2011-2012. However, she cautioned that any decision to prosecute was a vital one, particularly a decision to appeal to a higher level of courts, having regard to the financial implication on both the Administration and the persons to be prosecuted, not to mention the losses in terms of time and mental stress to the persons concerned. She hoped that DoJ would conduct a review to ensure that all decisions to prosecute would be made prudently.

VI. Proposed creation of a supernumerary post of Deputy Principal Government Counsel in the Legal Policy Division of DoJ
[LC Paper No. CB(2)372/11-12(01)]

Briefing by the Administration

28. DAD briefed members on the proposal for creation of a supernumerary post of Deputy Principal Government Counsel ("DPGC") at DL2 on the Directorate (Legal) Pay Scale in the Legal Policy Division to handle the legal work in respect of constitutional development and electoral affairs as set out in the Administration's paper [LC Paper No. CB(2)372/11-12(01)]. Members noted that subject to the Panel's views, the Administration would seek the endorsement of the Establishment Subcommittee on 18 January 2012 for the approval of the Finance Committee on 13 April 2012 to create the posts with effect from April 2012 for a period of five years.

Views of the Law Society

29. Mr Junius HO said that while the Law Society inclined to support the Administration's proposal to enhance the staffing support in handling the legal work, he had observed an inequality issue in terms of allocation of public resources. He expressed dissatisfaction that the staff cost for hiring a DPGC and a Personal Secretary amounted to over \$2,700,000 per year but the Administration was only willing to set aside around \$3 million a year to operate the pilot scheme for LIPs, which was a much needed service by members of the public.

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Discussion

30. Mr Albert HO supported the Administration's proposal which, he considered, would be conducive to constitutional development of Hong Kong through enhancing legal advisory service to the concerned bureaux and enforcement agencies on matters relating to constitutional development and electoral affairs. He envisaged that there would be a substantial increase in demand for legal advice arising from suspected vote-planting cases, complaints and election petitions related to the District Council elections held in November 2011. Mr HO cautioned that DoJ should consider seriously how to cope with the heavy workload. Ms Emily LAU expressed a similar view. Dr Priscilla LEUNG considered that concerted efforts of the departments concerned would be required to eradicate the problems relating to the voter registration system. Ms LAU stressed that the Administration should deal with any suspected vote-planting cases swiftly through provision of additional resources to all concerned departments in order to protect the integrity of the electoral system.

31. DAD said that a supernumerary DPGC post had been created for a period of six months in the Civil Division to provide for advisory service in relation to the application of existing election legislation and the coming Chief Executive and LegCo Elections in 2012. In coping with any new work, DAD said that as a rule of thumb, DoJ would first absorb the additional work through internal deployment of resources, only when the existing manpower could not cater for such demand then requests for new resources would be raised. She assured members that the situation would be kept under review.

32. Noting from the Administration paper that there was a rising demand for legal advisory service in relation to constitutional development and electoral affairs over the years, the Chairman commented that the root of the problem might be that the laws and regulations in certain areas were made too complicated. As a result, relevant departments would need to resort to DoJ for advice. She considered that DoJ would be in a better position to advise the Administration on specific areas which might require a review of the relevant policies. The Chairman enquired if the proposed DPGC would participate in the policy reviews in respect of the electoral system and the voter registration system to identify possible problems.

33. Deputy Solicitor General ("DSG") explained that as a matter of policy, review of policies should fall within the remit of the policy bureaux, while the new DPGC would be primarily responsible for the provision of legal advice to the Administration relating to constitutional development and electoral affairs, which included, inter alia, advising on legal issues and legislative proposals.

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34. The Chairman was of the view that legal policies and policy issues were inter-related. With accumulated knowledge and experience, the new DPGC would be in a better position to rationalize relevant regulations and system in respect of those policy areas in need of a review. She hoped that the new DPGC would perform such useful role in the future.

VII. Any other business

35. There being no other business, the meeting ended at 6:17 pm.

Council Business Division 2
Legislative Council Secretariat
29 March 2012