

立法會
Legislative Council

Ref : CB4/PL/AJLS

LC Paper No. CB(4)826/15-16
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 22 February 2016, at 4:30 pm
in Conference Room 2 of the Legislative Council Complex

Members present : Hon Martin LIAO Cheung-kong, SBS, JP (Chairman)
Hon Dennis KWOK (Deputy Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon NG Leung-sing, SBS, JP
Hon Steven HO Chun-yin, BBS
Hon MA Fung-kwok, SBS, JP
Hon Alice MAK Mei-kuen, BBS, JP
Dr Hon Elizabeth QUAT, JP
Hon TANG Ka-piu, JP
Dr Hon CHIANG Lai-wan, JP

Members absent : Hon TAM Yiu-chung, GBS, JP
Hon Starry LEE Wai-king, JP
Hon WONG Yuk-man

Public officers : Item III
attending

Department of Justice

Mr Rimsky YUEN, SC, JP
Secretary for Justice

Ms Christina CHEUNG
Law Officer (Civil Law)

Mr Simon LEE
Deputy Law Officer (Civil Law)

Ms Jenny FUNG
Senior Assistant Law Officer (Civil Law) (Mediation)

Mr William LIU
Senior Government Counsel

Steering Committee on Mediation

Ms Lisa WONG, SC
Member

Mr CHAN Bing-woon
Member

Mr Raymond LEUNG
Member

Mr Francis LAW
Member

Item IV

Home Affairs Bureau

Mr Laurie LO Chi-hong, JP
Deputy Secretary for Home Affairs (1)

Ms Karyn CHAN Ching-yuen
Principal Assistant Secretary for Home Affairs
(Civic Affairs) 2

Legal Aid Department

Mr Thomas Edward KWONG, JP
Director of Legal Aid

Ms Juliana CHAN Oi-yung
Deputy Director of Legal Aid (Litigation) (Atg)

Ms Sherman CHEUNG Suk-ying
Assistant Director of Legal Aid (Litigation)

**Attendance by
invitation** : Item III

Hong Kong Bar Association

Mr Vod CHAN

Ms Kinsey Yanan KANG

Item IV

Hong Kong Bar Association

Mr Robert PANG, SC

Clerk in attendance : Miss Mary SO
Chief Council Secretary (4)2

Staff in attendance : Mr Stephen LAM
Senior Assistant Legal Adviser 2

Miss Joyce CHING
Senior Council Secretary (4)2

Ms Jacqueline LAW
Council Secretary (4)2

Miss Vivian YUEN
Legislative Assistant (4)2

I. Information paper(s) issued since the last meeting

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

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II. Items for discussion at the next meeting

LC Paper No. CB(4)604/15-16(01) -- List of outstanding items for discussion

LC Paper No. CB(4)573/15-16(01) -- Letter from Hon Emily LAU Wai-hing dated 29 January 2016 requesting to discuss the issue of "Decision of the Department of Justice not to initiate criminal proceedings against the former ICAC Commissioner, Mr Timothy TONG Hin-ming"

LC Paper No. CB(4)604/15-16(02) -- List of follow-up actions

2. Members agreed to discuss the following items at the next regular meeting scheduled for 21 March 2016 at 4:30 pm:

- (a) Mechanism for handling complaints against judicial conduct; and
- (b) Creation of one permanent post of Deputy Principal Government Counsel in the Legal Policy Division of the Department of Justice ("DoJ").

3. The Chairman sought members' view on a request made by Ms Emily LAU to discuss the issue of "Decision of the Department of Justice not to initiate criminal proceedings against the former ICAC Commissioner, Mr Timothy TONG Hin-ming". Members agreed to include the issue in the list of items for discussion by the Panel.

4. The Chairman next sought members' view on a request made by Mr Kenneth LEUNG, a non-Panel Member, in his letter dated 19 February 2016 requesting to consult the Panel on a private member's bill, namely, the draft "Public Interest Disclosure Bill 2016". Mr LEUNG's letter (issued vide LC Paper No. CB(4) 630/15-16 dated 19 February 2016) was also tabled at the meeting.

5. Mr Dennis KWOK queried whether apart from this Panel, other Panel(s) should also be consulted on the draft Public Interest Disclosure Bill 2016, as the issues covered by the Bill appeared to straddle several policy areas.

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6. Senior Assistant Legal Adviser 2 ("SALA2") advised that according to established practice, a Member wishing to present his/her bill into the Council must, amongst others, consult the relevant Panel on the legislative proposal or draft bill. As the Bill mainly sought to protect employees who made certain disclosures of information in public interest from civil liabilities including dismissal by their employers, members might wish to consider whether the Bill should more appropriately be consulted at the meeting of the Panel on Manpower. SALA2 further advised that although the Bill might be consulted at the meeting of the Panel on Manpower, all other LegCo Members would be invited to join the discussion of the Bill by the Panel on Manpower according to established practice.

7. The Chairman instructed the Secretariat to advise the office of Mr Kenneth LEUNG of the Panel's view that the Bill should more appropriately be consulted at the meeting of the Panel on Manpower.

8. Miss Alice MAK requested to advance the discussion of the issue of "Terms and conditions of service of part-time interpreters in the Judiciary" from May 2016 to March 2016.

9. The Chairman said that he could not accede to Miss MAK's request as the Panel had already agreed to discuss the two items set out in paragraph 2 above. SALA2 referred members to paragraph 2.14 of the Handbook for Chairmen of Committees that it was normal practice for the Chairman, upon the request of the Administration or individual members, to decide whether a special or urgent item should be added to the agenda of a meeting. In considering whether to accede to the request, the Chairman should have regard to:

- (a) whether sufficient time could be allotted to the item;
- (b) whether sufficient notice could be given to members, the Administration and other parties concerned; and
- (c) whether relevant information about the item could be provided to members at a reasonable time before the meeting to facilitate discussion on it.

III. Proposed Apology Legislation

LC Paper No. CB(4)604/15-16(03) -- DoJ's paper on "Report of Public Consultation on Enactment of Apology Legislation and Second Round Consultation"

LC Paper No. CB(4)604/15-16(04) -- Background brief on "Public Consultation on enactment of Apology Legislation" prepared by the Legislative Council ("LegCo") Secretariat

Briefing by DoJ and the Steering Committee on Mediation ("Steering Committee")

10. Secretary for Justice ("SJ") gave an overview of the responses received on the Consultation Paper entitled "*Enactment of Apology Legislation in Hong Kong*" ("Consultation Paper"), which was published by the Steering Committee for first round public consultation from 22 June 2015 to 3 August 2015, and explained the background of the second round public consultation launched by the Steering Committee on 22 February 2016, details of which were set out in the DoJ's paper. In gist,

- (a) a total of 75 written responses were received by the Steering Committee on the Consultation Paper, the majority of which were supportive of the proposal that apology legislation should be enacted in Hong Kong. Having considered the responses, the Steering Committee had made the following final recommendations:

Final Recommendation 1

An apology legislation should be enacted in Hong Kong;

Final Recommendation 2

The apology legislation should apply generally to civil and other forms of non-criminal proceedings including disciplinary and regulatory proceedings with exceptions, on which public views are invited;

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Final Recommendation 3

The apology legislation should cover full apologies;

Final Recommendation 4

The apology legislation should apply to the Government;

Final Recommendation 5

The apology legislation should expressly preclude an admission of a claim by way of an apology from constituting an acknowledgment of a right of action for the purposes of the Limitation Ordinance (Cap 347);

Final Recommendation 6

The apology legislation should expressly provide that an apology should not affect any insurance cover or indemnity that was, or would be, available to the person making the apology and that any contracting out of the apology legislation should be prohibited or declared void;

Final Recommendation 7

The apology legislation should take the form of a stand-alone legislation; and

Final Recommendation 8

As to whether the apology legislation should cover statements of fact in connection with the matter in respect of which an apology has been made, public views are invited; and

- (b) in the light of certain responses received on two specific issues, viz: (i) whether the proposed apology legislation should cover all disciplinary and regulatory proceedings and (ii) whether factual information conveyed in an apology should be protected by the proposed apology legislation; and the suggestion that a draft Apology Bill should be made available for consideration, the Steering Committee decided to launch a second round public consultation to seek further views on the following three matters before making its final recommendations on these matters:

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- (i) excepted proceedings to which the proposed apology legislation should not apply;
- (ii) whether the factual information conveyed in an apology should likewise be protected by the proposed apology legislation; and
- (iii) the draft Apology Bill as prepared by DoJ.

The second round public consultation would end on 5 April 2016.

11. Ms Lisa WONG, Steering Committee member, supplemented that:

- (a) comments received on the two issues raised in the Consultation Paper viz: (i) whether the proposed apology legislation should apply to regulatory proceedings and (ii) whether factual information conveyed in an apology should be protected by the proposed apology legislation, and the Steering Committee's analyses and responses to these comments were set out in Chapters 4 and 10 of the *Enactment of Apology Legislation in Hong Kong: Report & 2nd Round Consultation* ("Consultation Report") respectively; and
- (b) the draft Apology Bill was set out in Annex 2 to the Consultation Report.

The current draft Apology Bill had been provisionally drafted on the bases that the two questions set out in paragraph 10(b)(i)-(ii) above were to be answered in the affirmative, as shown in square brackets.

Views of the Hong Kong Bar Association ("Bar Association")

12. Mr Vod CHAN said that the Bar Association had submitted its views on the enactment of apology legislation in Hong Kong to the Steering Committee. The Bar Association had nothing to add to the proposed apology legislation at this stage.

Discussion

Efficacy of apology legislation

13. Mr Albert HO said that it was questionable whether an apology legislation, which sought to separate apology from liability, could resolve dispute or prevent the escalation of the dispute into legal action. The efficacy of the apology legislation would further be reduced if factual information conveyed in an apology should also be protected by the apology legislation, not to mention that such protection would give rise to injustice to the injured party seeking damages from the party causing the injury.

14. SJ responded that whilst the concerns made by Mr Albert HO in paragraph 13 were understandable, it should be pointed out that in the absence of apology legislation, a party causing the injury would generally be reluctant, for various reasons, to offer an apology to the injured party for fear that his/her apology might be used by a plaintiff in civil or other non-criminal proceedings (such as disciplinary proceedings) as evidence of an admission of fault or liability by the defendant for the purpose of establishing legal liability. Overseas experience and research indicated that a dispute following a mishap might be resolved (or at least partially resolved) by an apology or an expression of sympathy or regret, thus preventing the escalation of the dispute into legal action or making it more likely for the legal action to be settled.

15. SJ further said that even if statements of fact were protected by the apology legislation, it did not necessarily mean that this would bring injustice to the injured party seeking damages from the wrongdoers. As also pointed out from the debate of the Apologies (Scotland) Bill ("the Bill") in the Scottish Parliament, injustice to the injured party would only arise if statements of fact conveyed in an apology were the only evidence available and it was rarely the case that there was no other evidence available on liability. For example, in a traffic accident, apart from the wrongdoer's own admission of fault, there would normally be other evidence available on liability for the harm caused by the wrongdoer. As protecting factual information conveyed in an apology would potentially affect the claimants' rights in certain circumstances and as such protection had not been covered in the existing apology legislation elsewhere (the Bill was passed by the Scottish Parliament on 19 January 2016 and there was no reference to statements of fact in the Bill), the Steering Committee had put forward the following three alternative options to address the handling of statements of fact conveyed in an apology set out in paragraph 10.14 of the Consultation Report:

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- (a) *Option 1*: statements of fact conveyed in an apology should be treated as part of the apology and should be protected and the Court did not have any discretion to admit the apology containing the statements of fact as evidence against the maker of the apology;
- (b) *Option 2*: the wordings of statements of fact were to be omitted from the apology legislation and whether the statements of fact should constitute part of the apology would be determined by the Court on a case by case basis. If the statements of fact were held by the Court as forming part of the apology, the Court did not have any discretion to admit the statement of fact as evidence against the maker of the apology; and
- (c) *Option 3*: statements of fact conveyed in an apology should be treated as part of the apology and should be protected. However, the Court retained the discretion to admit such statements of fact as evidence against the maker of the apology in appropriate circumstances.

16. Ms Lisa WONG supplemented that in formulating the proposed apology legislation, the Steering Committee sought to strike a balance that the apology legislation could achieve the desired goals while safeguarding justice to all. Ms WONG further said that members of the public were welcomed to suggest other alternative options that might address the handling of statements of fact conveyed in an apology in the apology legislation.

17. Mr Albert HO remained unconvinced that apology legislation could bring about amicable settlement of disputes. In his view, apology legislation would have the negative effect of encouraging insincere and strategic apologies.

18. Ms Emily LAU concurred with Mr Albert HO. Ms LAU then asked whether there were any cases to support that apology legislation resulted in amicable settlement of disputes.

19. SJ responded that results from empirical studies and research on the apology legislation in the United States revealed that the legislation had helped to reduce the number of medical malpractice lawsuits, as apologies made by the attending physicians were found to be a very effective type of redress to alleviate the sorrow and anger of the victims and/or family members of the victims of medical accidents, as compared to giving a simple explanation of the causes of the medical accidents, taking steps/measures to prevent the recurrence of similar medical accidents or monetary compensation.

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20. Whilst expressing support for the enactment of apology legislation in Hong Kong, Mr TANG Ka-piu asked whether consideration could be given to, say, requiring the wrongdoers to make apologies to the injured persons, say, the attending doctors and not the hospital concerned, and empowering the Labour Tribunal and other tribunals tasked to settle disputes to require the wrongdoers to make apologies to the parties filing the claims.

21. SJ responded that the proposed apology legislation was not intended to force the wrongdoers to make apologies to the injured persons. That said, with the wider use of mediation to resolve disputes, coupled with the enactment of apology legislation, there should be much greater general willingness amongst parties causing the injuries to offer apologies to the injured parties.

22. Mr Dennis KWOK said that the Civic Party was supportive of enacting apology legislation in Hong Kong. Mr KWOK pointed out that long time was presently taken by the Medical Council of Hong Kong, sometimes as long as eight to 10 years, to settle a dispute following a medical accident, because the attending doctor was afraid that his/her apology would be used by the patient and/or family members of the patient as evidence of admission of fault for the purpose of establishing legal liability.

23. Dr Priscilla LEUNG hoped that apology legislation could be enacted in Hong Kong as soon as possible, as many disputes could be resolved amicably without resorting to legal action if the wrongdoers made apologies after injuries to reduce, tension and antagonism.

Applicable proceedings of the proposed apology legislation

24. Mr Dennis KWOK noted from paragraph 8 of the DoJ's paper that there were two responses from regulatory bodies which expressed opposing views and concerns that their regulatory functions and power might be compromised if the apology legislation applied to regulatory proceedings. In the light of this, Mr KWOK asked why the Steering Committee recommended that the apology legislation should generally be applicable to regulatory proceedings.

25. Ms Lisa WONG explained that although the main reason given by the two respondents, i.e. Securities and Futures Commission and Mandatory Provident Fund Schemes Authority, for opposing the application of the apology legislation to regulatory proceedings was that the fact that the apology legislation would render an apology not admissible in applicable proceedings might jeopardize their regulatory functions and powers, the Steering Committee

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considered that similar to disciplinary proceedings, liability in regulatory proceedings would seldom be established solely on the basis of apologies.

26. Mr LEUNG Kwok-hung asked why the proposed apology legislation would only be applicable to civil and non-criminal proceedings and not also criminal proceedings.

27. SJ explained that unlike civil proceedings which were instituted to protect private rights and enforce remedies, criminal proceedings were instituted under the name of the Government from a public interest perspective to deter crimes and punish criminals. SJ further said that no apology legislation enacted elsewhere covered criminal proceedings explicitly.

Application of the proposed apology legislation to the Government

28. Noting that one of the final recommendations made by the Steering Committee was that the apology legislation should apply to the Government, Mr Dennis KWOK asked whether DoJ would devise a "Code of Practice" to enable public monitoring of the application of the apology legislation by bureaux/departments ("B/Ds").

29. SJ responded that the Government supported the application of apology legislation to the Government. DoJ would consider the need of devising a "Code of Practice" on the application of the apology legislation by B/Ds some time after the apology legislation had come into operation.

Conclusion

30. In closing, the Chairman said that the Panel hoped to be updated on the outcome of the second round public consultation on the enactment of apology legislation in Hong Kong.

IV. Review of criminal legal aid fees

LC Paper No. CB(4)604/15-16(05) -- Home Affairs Bureau's paper on "Proposed Increase of Criminal Legal Aid Fees"

LC Paper No. CB(4)604/15-16(06) -- Updated background brief on "Review of criminal legal aid fees" prepared by the LegCo Secretariat

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Declaration of interests

31. The Chairman, Mr Albert HO and Mr Dennis KWOK declared that they were on the Legal Aid Panel under the Legal Aid Department ("LAD").

Briefing by the Administration

32. Deputy Secretary for Home Affairs (1) ("DSHA(1)") briefed members on the Government's proposed package of increases payable to counsel and solicitors undertaking criminal litigation work on behalf of LAD (i.e. criminal legal aid fees), details of which were set out in the Administration's paper (LC Paper No. CB(4) 604/15-16(05)). Subject to members' views, the Government would submit amendments to the Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) under the Criminal Procedure Ordinance (Cap. 221) to the Criminal Procedure Rules Committee ("Rules Committee"), chaired by the Chief Judge of the High Court, for approval. Subject to the Rules Committee's approval, the Government would move a resolution in LegCo to effect the legislative changes in the second quarter of 2016 and appoint the commencement date as soon as possible upon LegCo's approval.

Views of Bar Association

33. Referring members to the submission dated 19 February 2016 from the Bar Association on the proposed increase in criminal legal aid fees tabled at the meeting (issued to members vide LC Paper No. CB(4)641/15-16(01) on 23 February 2016), Mr Robert PANG said that the Bar Association welcomed the Government's proposed increase of criminal legal aid fees which would go some way to redress the disparity between criminal and civil legal aid fees which was leading to a situation where the best and brightest of young counsel were forsaking criminal work for civil work. The Bar Association hoped that in future, the difference between criminal and civil legal aid fees would be further reduced, so that the criminal side of the profession would no longer be perceived as unattractive for young counsel.

34. Mr PANG further said that the Bar Association also hoped that the proposed increase in criminal legal aid fees could be implemented as soon as possible, and should take effect at least from the start of the next financial year, i.e. 1 April 2016, for the following reason. The proposed increase only took into account the changes in the Consumer Price Index (C) ("CPI(C)") recorded between July 2012 and July 2014. By the earliest effective date of the proposed legislative changes in the second quarter of 2016, the CPI(C) level would have already been two years out of date, and the time gap between the

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implementation of the new fees and that of the last biennial review of criminal legal aid fees would be about three years.

Discussion

Proposed increase in criminal legal aid fees

35. Dr Elizabeth QUAT asked whether the proposed increase in criminal legal aid fees would attract more young lawyers to take up criminal legal aid work.

36. DSHA(1) responded that LAD had not encountered any difficulty in attracting counsel and solicitors to join the Legal Aid Panel to undertake criminal legal aid cases. As explained in paragraphs 3 and 4 of the paper, the Government proposed to increase criminal legal aid fees to bring the remuneration for criminal legal aid lawyers to a more reasonable level and enable defendants to have better access to more experienced criminal lawyers and criminal justice for the defence of liberty. In the long run, with more legal talents attracted to the criminal law field, there would be a larger pool of experienced and well-qualified criminal law practitioners from which the Judiciary could source for appointment as judges. Director of Legal Aid ("DLA") supplemented that at present, over 88% of counsel and 90% of solicitors on the Legal Aid Panel who were assigned criminal legal aid cases had more than 10 years' post-qualification experience. LAD hoped that the proposed increase in criminal legal aid fees would attract more young lawyers to take up criminal legal aid work.

37. Whilst welcoming the proposed increase in criminal legal aid fees, Mr Dennis KWOK hoped that the Administration would continue to enhance criminal legal aid fees so as to attract more young lawyers to take up criminal legal cases and retain experienced lawyers to stay on the Legal Aid Panel.

Assignment of lawyers to legally aided persons

38. Dr Priscilla LEUNG said that the fact that the existing civil legal aid fees were higher than those of criminal legal aid had discouraged many young lawyers to pursue criminal work. Apart from this, comments had been made by some members of the legal profession that LAD often assigned criminal as well as civil legal aid cases to the same solicitors and counsel on the Legal Aid Panel.

39. DLA responded that when assigning legal aid cases, LAD always adhered to the fundamental principle that the aided person's interest was of

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paramount importance. Hence, LAD's primary duty towards the aided persons was to facilitate their access and attainment of justice through competent legal representation. Counsel or solicitors were selected by Legal Aid counsel having regard to the level of experience, expertise of the practitioners concerned, and the type and complexity of the particular case. Generally speaking, most legal aid cases were assigned to counsel or solicitors who had at least 10 years' post-qualification experience.

40. Dr Priscilla LEUNG hoped that LAD could assign more legal aid cases to counsel and solicitors who had, say, five years or more post-qualification experience, so as to enable young lawyers to gain litigation experience which in turn would help increase the number of experienced and well-qualified law practitioners for appointment as judges.

41. DLA responded that LAD had to strike a balance between safeguarding the interests of the aided persons and providing opportunities for young lawyers to take up criminal legal aid work so as to help them acquire litigation experience, which in the long run would also help develop more experienced criminal law practitioners for appointment as judges. The proposed increase in criminal legal aid fees was a move in attracting young legal talents to undertake criminal legal aid work. Although most of the assigned-out legal aid cases were distributed to lawyers with at least 10 years of post-qualification experience, LAD had been and would continue to assign legal aid cases to lawyers with less experience if the lawyers concerned had attained the relevant experience and expertise required to take up the assignment.

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42. At the request of Dr Priscilla LEUNG, DLA undertook to provide information on the distribution of criminal legal aid cases assigned to counsel and solicitors on the Legal Aid Panel respectively each year in the past five years and with breakdown by years of post-qualification experience of these assigned counsel/solicitors after the meeting.

Further expansion of the scope of the Supplementary Legal Aid Scheme ("SLAS")

43. Responding to Mr Dennis KWOK's enquiry on the progress of the review on expansion of the scope of SLAS, DSHA(1) said that subsequent to the substantial expansion of the scope of SLAS in November 2012 following the previous review, the Government had invited the Legal Aid Services Council ("LASC") to conduct a further review on the scope of SLAS with a view to presenting a new round of recommendations to the Government. The LASC had formed a Working Group on Expansion of SLAS ("Working Group") to follow up on the review. According to the Government's

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understanding, LASC was studying the review report submitted by the Working Group as well as the views submitted by the two legal professional bodies before finalising its recommendations to the Government. DSHA(1) undertook to relay the views of Mr KWOK to LASC that it should expedite its actions.

Provision of legal assistance for persons detained in Police stations

44. Mr Dennis KWOK asked whether the Government would consider extending the provision of legal aid to persons detained in Police stations. The Chairman queried about the feasibility of providing legal aid to persons detained in Police stations, as under the Legal Aid Ordinance (Cap. 91), a person was required to satisfy the means and merits tests to qualify for legal aid.

45. Mr Dennis KWOK said that due to the possible dire consequence to the detainees for making statements in Police stations in the absence of legal advice provided to them, the Administration should provide legal aid to detainees to safeguard their rights, albeit there were technical issues which needed to be resolved. Mr LEUNG Kwok-hung suggested that the Administration could consider asking the detainees to declare their financial resources. If the financial resources of the detainees were subsequently found to exceed the financial eligibility for legal aid and/or the cases concerned failed to pass the merits test, LAD could then cease to provide legal aid to these detainees.

46. DSHA(1) responded that the proposal of providing legal assistance to detainees at Police stations would entail substantial financial and operational implications. The Home Affairs Bureau was studying the issue in consultation with relevant bureaux and departments. DLA supplemented that LASC's Interest Group on Scope of Legal Aid, which included members from the two legal professional bodies, also conducted a study on the matter. DSHA(1) said that the Government would take into account LASC's findings and brief the Panel on the issue in due course.

Conclusion

47. In closing, the Chairman concluded that members supported the proposed package of increases in criminal legal aid fees as set out in the Government's paper.

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V. Any other business

48. There being no other business, the meeting ended at 6:24 pm.

Council Business Division 4
Legislative Council Secretariat
14 April 2016