

立法會
Legislative Council

LC Paper No. CB(2)1419/99-00
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Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services
Minutes of meeting
held on Tuesday, 18 January 2000 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Ambrose LAU Hon-chuen, JP
Hon Mrs Miriam LAU Kin-yee, JP
Hon Emily LAU Wai-hing, JP

Members Absent : Hon James TO Kun-sun
Hon Martin LEE Chu-ming, SC, JP

Public Officers Attending : Item IV

Mr Timothy TONG
Deputy Secretary for Security

Mr K S SO
Principal Assistant Secretary for Security

Ms Cynthia WONG
Assistant Secretary for Security

Mr Ian WINGFIELD
Law Officer (Civil Law)

Mr P T CHOY
Deputy Director of Immigration

Mr P K LEUNG
Principal Immigration Officer

Item V

Ms Miranda CHIU
Deputy Director of Administration

Ms Rosanna LAW
Assistant Director of Administration

Mr S Y CHAN
Director of Legal Aid

Mrs Fanny YU
Deputy Director of Legal Aid (Administration)

**Attendance by :
Invitation**

Item III

Professor Paul REDMOND
Dean, Faculty of Law
University of New South Wales

Mr Christopher ROPER
Director, Centre for Legal Education
Sydney

Hong Kong Bar Association

Items IV and V

Mr Philip DYKES, SC

Mr Andrew LI

Legal Aid Services Council

Item V

Mr LEE Jark-pui, OBE, JP
Chairman

Mr CHONG Chan-yau, MBE
Member

Mrs Elsie TU, GBM, CBE
Member

Mrs Angela CHEUNG
Secretary

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

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Overseas duty visits

Before going to the first agenda item, the Chairman consulted members as to whether there was any plan for the Panel to conduct a duty visit overseas during the remainder of the current legislative session, i.e. up to 30 June 2000. Members made no specific proposal.

I. Information papers issued since last meeting

(LC Paper No. CB(2)819/99-00 - Hon Margaret NG's letter dated 7 January 2000 to the Administration on Conveyancing and Property Ordinance and judgments of the Court of First Instance and Court of Appeal)

(LC Paper No. CB(2)849/99-00(01) - Administration's letter dated 11 January 2000 on review of applicability of the Personal Data (Privacy) Ordinance to "State" organs in Hong Kong)

2. Members noted that the above information papers had been issued.

II. Items for discussion at the next meeting

(LC Papers Nos. CB(2)848/99-00(01) and (03))

3. Members agreed that the following items should be discussed at the next regular meeting to be held on 15 February 2000 -

(a) Mediation as an alternative dispute resolution mechanism; and

(b) Court's power under section 13(1) of the Conveyancing and Property Ordinance (Cap. 219)

III. Meeting with the two overseas consultants in relation to the proposed comprehensive review of legal education and training in Hong Kong

(LC Paper No. CB(2)585/99-00(01) - Letter dated 30 November 1999 from Solicitor General (Acting) to Chairman of the Panel reporting on the progress of the proposed review of legal education in Hong Kong)

4. Members noted LC Paper No. CB(2)585/99-00(01). According to the Steering Committee, the review would be carried out in two stages, namely, a consultancy stage followed by a further study by a Review Panel. The two overseas experts engaged for the initial consultancy study had been invited to come to Hong Kong to attend a series of briefings with a wide range of interested bodies and organizations for the purpose of collecting views and information relevant to the conduct of the study.

5. The Chairman welcomed Professor Paul REDMOND and Mr Chris ROPER, the two consultants, to the meeting.

6. At the invitation of the Chairman, Professor REDMOND briefly explained the target timetable for the consultancy study as follows –

- writing of a consultation document in the form of an issues paper after identifying important issues of concern and preparation of the brief for a survey of manpower needs and future direction of legal education and training in Hong Kong (February to April 2000);
- wide distribution of the issues paper for extensive public consultation and comments (by end of June 2000);
- consideration of responses to the issues paper (July to August 2000);
- the consultants to come to Hong Kong again to conduct meetings and discussions with those who had made submissions and other relevant parties (September 2000);
- preparation of the draft report and recommendations (by end of December 2000);
- discussion of the draft report and recommendations between the consultants and the Steering Committee and other parties and submission of a final report (before end of February 2001).

7. The Chairman and Ms Emily LAU asked the consultants how they would assess the needs of the Hong Kong society for law graduates and legal practitioners and propose solutions for improving the quality of trained legal professionals to meet those needs. In reply, Mr Chris ROPER said that the objective of the issues

paper was precisely to serve the purpose of ascertaining needs by seeking a broad range of submissions and responses from stakeholders. Furthermore, the manpower survey to be conducted would play an important part in gauging the occupational needs of the society for legal professionals as well as assessing the qualifications and skills appropriate to satisfy those needs. Mr ROPER added that the consultants were not really given the task of identifying society's needs for legal services. Rather, they had been engaged to assist in developing a legal education and training system capable to meet the future demands of Hong Kong society as identified by the relevant parties through the various processes of consultation.

8. Professor Paul REDMOND said that in carrying out the consultancy study, they would make reference to a number of alternative models adopted in other overseas countries relating to what might be called the academic stage of legal education. In the light of the merits of those models and their relative suitability for adoption in Hong Kong, and having regard to the outcome of consultation on the issues paper and the manpower survey, they would make recommendations on the development of a series of appropriate benchmarks by reference to which the quality and standard of legal education in Hong Kong might be adjudged. There would be a second stage of a Review Panel of experts who would consider the recommendations in detail.

9. The Chairman and Mr TSANG Yok-sing considered that the review of legal education should also look at the specific needs of Hong Kong in a wider perspective, i.e. in the context of how lawyers in Hong Kong compared with their counterparts elsewhere. It was hoped that any reform that came out from the review would produce a steady supply of competent legal professionals to enable Hong Kong to maintain its competitiveness as an international commercial and financial centre. The Chairman pointed out that a feeling of crisis had been in existence within the profession for some time that the present system had failed to produce lawyers of the right quality.

10. In response, Professor Paul REDMOND said that they were conscious of the need to preserve Hong Kong's international role. A task central to the present review would be to develop a system most suited to Hong Kong which could produce that degree of skill formation essential for a strong and viable legal profession to perform a wide range of services on a competitive basis with a competitive level of excellence.

11. Regarding the concern about declining quality of lawyers, Professor Paul REDMOND said that they were in the process of forming judgments on the problem through a measured scrutiny of all relevant issues. These included, among others, detailed assessment of the mode of teaching at the law schools, structure of programmes, selection of students, language skills, relationship between the academic phase of legal education and the practical stage as well as the involvement of stakeholders in the profession etc. Mr Chris ROPER added that a concern

expressed by interested bodies was that Hong Kong lawyers tended to have a narrow outlook on a legal problem before them. Thus, one of the problems with Hong Kong's legal education and training system might be that graduates and practitioners were required to be more multi-disciplinarily trained.

12. Mr Albert HO pointed out a prominent feature of Hong Kong's legal system was that it practised bi-lingualism in court. He suggested that this should be taken into consideration in the review. The consultants replied that the issue of bi-lingualism was very much on the agenda for the review. As they prepared the issues paper, they would gain assistance from the experience of other overseas countries which operated a bi-lingual system, such as Canada and Malaysia. In addition, the Department of Justice had provided useful material in relation to the background and content of the policy on development of bi-lingualism in Hong Kong.

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13. The Chairman advised that this Panel had had extensive discussions on issues relating to the use of Chinese in court during the period between 1996 and 1997. She asked the Secretariat to provide copies of the relevant records of meetings and discussion papers for the consultants' attention.

14. Before closing, the Chairman said that members of the Panel looked forward to the opportunity of meeting the consultants again to discuss the progress of the review upon their return to Hong Kong later in the year for a period of consultation on the issues paper. She requested for copies of the issues paper to be provided to the Panel when available.

(Post-meeting note: The relevant papers have been provided to the two consultants on 21 January 2000.)

15. The Chairman thanked the consultants for attending the meeting.

IV. Right of access to the courts in removal cases

(LC Paper No. CB(2)848/99-00(03) - Paper entitled "Policy and practice on removal and deportation" provided by the Administration)

(LC Paper No. CB(2)900/99-00(01) – Submission from the Law Society of Hong Kong)

16. The meeting noted that this item was intended to be a follow-up to the discussion at the meeting on 16 November 1999. At that meeting, members took note of the concern expressed by the Hong Kong Bar Association and the Hong Kong Human Rights Monitor about the need to safeguard the rights of people faced with the prospect of being removed from Hong Kong, including the right of access to the court and the right of an appeal against the Government's decision to remove.

17. At the invitation of the Chairman, Deputy Secretary for Security (DS(S)) briefly took members through LC Paper No. CB(2)848/99-00(03), which highlighted the existing policy and practice in relation to three types of removal actions, i.e. summary removal, removal under a removal order, and deportation under a deportation order. The paper also contained copies of a number of declaration and notification documents issued to people under detention at various stages advising the persons of their rights and obligations (Annex A to H of the paper).

18. DS(S) further informed members that in 1999, a total of 12 982 illegal immigrants (IIs) and 16 921 refused landing passengers were summarily removed under section 18(1) of the Immigration Ordinance (the Ordinance), 881 persons were removed under a removal order under section 18(2) of the Ordinance, while deportation orders under section 20(1) were carried out in respect of 677 persons.

19. The Chairman invited the Administration to respond to the comment made by the Law Society in its submission that *“if detainees have not always been given access to a telephone, the right to telephone his consul, solicitor or relatives would be illusory”*.

20. Deputy Director of Immigration (DD of Imm) explained that after an II was apprehended, he would be detained under section 26 of the Ordinance for enquiries. As soon as the II was in custody, he would be informed of the reasons and the provisions under which he was so detained. A copy of such notification was provided at Annex A of the paper. Before commencement of an interview for the purpose of making enquiries under section 26 to ascertain whether a person had the statutory right or strong humanitarian grounds for non-removal, a notice entitled “Notice to persons in custody or under immigration enquiries” (copy at Annex B of the paper) would be served on the person. The notice informed the person his right, among others, to telephone a friend or relative or his legal representative. Such notice was also displayed prominently in all interview rooms and detention cells. DD of Imm stressed that no detainees would be prevented from making phone calls during the period of detention, except in circumstances where there were reasons to believe that the making of a telephone call by a detainee would prejudice the proper conduct of investigation. Where necessary, a detainee could make telephone calls using the official telephones in the Centre. Detainees could also send out letters through the arrangement of the centre, and visits by relatives or friends were permitted.

21. DS(S) informed members that the right of a detainee pending enquiry/examination/repatriation/removal/deportation to telephone consul, solicitor or friends and relatives was specified in a notice (Annex E of the paper) served on the detainee.

22. Members asked how the right to appeal was explained to a person pending removal. The Administration advised that a right to appeal to the Immigration Tribunal was available to persons who were the subject of a removal order under section 19(1)(b) of the Immigration Ordinance, i.e. where the persons had been in Hong Kong for more than two months. Such right, together with the reasons for removal, was made known to the IIs or refused landing passengers concerned by way of a “Notice of removal order and right of appeal” (copy at Annex F of the paper). However, IIs or refused landing passengers who had been in Hong Kong for less than two months prior to being apprehended were not entitled to such right of appeal. Those persons would be the subject of a summary removal under section 18(1)(a) without the need for a removal order. In such cases, the persons involved had a right to apply to the court for a habeas corpus, an injunction or a judicial review against the removal.

23. The Administration further advised that the vast majority of IIs pending removal under a removal order were willing to sign a declaration signifying their willingness to give up the right to an appeal and leave Hong Kong voluntarily (copy of the declaration form at Annex C of the paper). The major reason for their willingness to leave was that most of the IIs were aware that they had no statutory right to remain in Hong Kong. Where a person acknowledged that he was prepared to leave voluntarily, the question of an appeal should not arise.

24. In response to Mr Albert HO, the Administration said that the existing policy was that a person would not be prosecuted for the offence of illegal entry or breach of condition of stay under the Ordinance, provided that he was not convicted of other criminal offences. Persons who were served the declaration at Annex C were those against whom no prosecution action was contemplated by the authorities.

25. At the invitation of the Chairman, Mr Philip DYKES summarized his views on the Administration’s paper as follows –

- (a) The declaration at Annex C of the paper should contain a clear explanation of the right of appeal to enable a detainee to make an informed decision of whether or not to exercise such right;
- (b) Section 53 of the Ordinance allowed a person who was refused permission to land in Hong Kong a right to seek a review of that decision. However, the refusal notice at Annex D did not set out that right;
- (c) The power of the Chief Executive to make a deportation order under section 20(1)(a) of the Ordinance had been delegated to the Secretary for Security. However, the “Notice of Consideration of Deportation” at Annex H only invited representations to be made to the Director of Immigration (D of Imm). This would deprive the person subject to

deportation the knowledge of possible recourse to the Secretary for Security. Furthermore, it was unclear whether the person had the opportunity to respond to D of Imm's comments on his representations, before a decision was made by the Secretary for Security; and

- (d) Although D of Imm could consider applying for a person's deportation on the ground of his criminal conviction, it did not necessarily follow that the convicted person's continued presence in Hong Kong was undesirable. Thus, D of Imm should give an indication in Annex H as to why he had come to such a conclusion.

26. Referring to Mr Philip DYKES' query concerning Annex H, Law Officer (Civil Law) (LO/CL) said that the explanatory note which formed part of the Notice in fact recited section 20 of the Ordinance, in which it was stated that the Chief Executive of Hong Kong might make a deportation order.

27. On section 53 of the Ordinance, LO/CL said that an objection lodged against a decision to refuse entry, if sustained, would only have a bearing upon the person's re-entry. The objection could not possibly be allowed in respect of the first arrival because the person would have already been removed on that occasion in accordance with the refusal notice.

28. The Chairman asked why the right to make an objection under section 53 of the Ordinance was not set out in the refusal notice. LO/CL said that the objection under section 53 was not a right of appeal but a general right to have a decision of any public officer under the Ordinance reviewed. It was only one of a number of possible remedies for a person who was refused permission to land in Hong Kong. Other remedies were also available, such as to seek leave to apply for a judicial review of the public officer's decision.

29. The Chairman expressed the view that the content of the refusal notice could be improved to enable the person affected to be aware of what remedies he could seek. She suggested that the Administration should revise and modernize all the notices discussed as they appeared to have been couched in out-dated and complicated language not readily understood by lay people. Such documents should also be made available in simplified Chinese characters. The Chairman stressed that the overriding consideration was that people involved in removal actions should be well aware of their legitimate rights and such rights should be well preserved.

30. The Chairman opined that a site visit might enable members to get a better understanding of how things actually worked out at the detention centres. DS(S) said that the Administration would be pleased to make such arrangements if members so wished.

V. Independent legal aid authority

(LC Paper No. CB(2)229/98-99(01) – Submission dated 1 September 1998 from the Hong Kong Bar Association)

(LC Paper No. CB(2)848/99-00(04) - Letter dated 6 January 2000 from the Law Society of Hong Kong)

(LC Papers Nos. CB(2)379/99-00(07) and 848/99-00(05) - Papers provided by the Administration)

31. At the invitation of the Chairman, Mr LEE Jark-pui summarized the views of the Legal Aid Services Council (LASC) on the Administration's decision not to establish an independent legal aid authority as follows -

- (a) LASC was disappointed at the Administration's decision which went counter to the LASC's primary recommendation to set up an independent body in place of the Legal Aid Department (LAD). Yet, LASC did not feel restrained in its role to further pursue the cause. In fact, as required under the Legal Aid Services Council Ordinance, one of the major tasks of the Council was to advise the Government on legal aid policy, in particular the desirability and feasibility of establishing an independent legal aid authority. Given that statutory role, LASC was of the view that it could conduct a further review at some future time, taking into account new developments and changing social needs of the community relating to the demand for and delivery of legal aid services;
- (b) Pending that further review, LASC was in the course of embarking on a series of work targets with a view to enhancing its role and independent operation in overseeing the provision of legal aid services in Hong Kong, including -
 - i) to engage legal experts to review the existing provisions of the Legal Aid Services Council Ordinance and the Legal Aid Ordinance to consider if there was a need to introduce new measures to enable LASC to perform its functions more effectively;
 - ii) to enhance LASC's image of independence by recruiting its own staff; and
 - iii) to establish closer contact with relevant bodies and organizations such as those in the social service sector, to assess more accurately the needs of potential users of legal aid services, and to strengthen education and publicity effort to give the general

public a better understanding of the goals and objectives of the legal aid system.

32. The Chairman sought the Bar Association's views on the issue. In reply, Mr Andrew LI advised that the Bar Association's comments had been clearly stated in a previous submission made in September 1998 (LC Paper No. CB(2)229/98-99(01)). He said that the Bar Association and the Law Society were unanimous in supporting the establishment of an independent legal aid authority. That position had not changed. He summarized his views as follows -

- (a) An important common feature of the bodies that contributed significantly to the administration of justice in Hong Kong, e.g. the Judiciary, the Independent Commission Against Corruption and the Bar, was "independence". This element of independence was indispensable if Hong Kong were to preserve the rule of law and justice in the community;
- (b) In a fair and equitable society governed by the rule of law, it was not enough for justice to be done but also for justice to be seen to be done. The provision of legal aid services by an independent body free from any perception of conflict of interest and undue influence from the Government would undoubtedly contribute to enhancing public confidence in the fair administration of justice in the society;
- (c) In July 1993, the Legislative Council (LegCo) supported by a majority vote the establishment of an independent legal aid authority. Developments since then did not seem to have reversed the call for independence in the community. On the contrary, the increase in the number of constitutional litigation cases involving the Government in recent years and social changes in the community produced an even greater demand for an independent body to provide legal aid services to those in need; and
- (d) Regarding overseas experience, it should be noted that most advanced common law jurisdictions with a mature and well-developed legal aid system adopted an independent model. For example, an examination of the legal aid systems set out at Annex D of LC Paper No. CB(2)848/99-00(05) showed that legal aid services in all those countries were administered by an independent institution created by statute and not run by a Government department.

33. The Chairman requested the Director of Legal Aid (DLA) to respond to the views expressed. In reply, DLA said that safeguards were in place to ensure that legal aid was administered independently. Officers in LAD were bound by a statutory obligation as required under the Legal Aid Ordinance to consider all legal

aid applications independently. In difficult cases, particularly cases against the Government involving public law issues, LAD would seek independent legal advice, which was given sufficient weight in reaching its decision. Moreover, all public law litigation, including judicial reviews against the Government or Government related bodies, and most criminal cases, were assigned to lawyers in private practice. On the proposal to set up a new and independent legal aid authority, staff of LAD had been consulted and they generally expressed a fairly opposite view. Their concern had been reflected to LASC.

34. DLA concluded that LAD was well aware of the need to preserve its image of independence in the administration of legal aid. It would continue to strive hard to improve service quality and transparency in performing its functions.

35. Mrs Elsie TU said that although she agreed in principle to the establishment of an independent body for the provision of legal aid services, she did not think that the setting up of an independent body was necessary at this point in time. She opined that the major issue of concern appeared to involve only the perception of independence, or lack of independence, of LAD. In her opinion, LAD was already making tremendous strides in improving the quality and transparency of its operation since the debate in LegCo seven years ago.

36. Deputy Director of Administration (DDA) said that it was of importance to take into account the perception of stakeholders in deciding whether there was a lack of operational independence in the provision of legal aid services. She pointed out that according to the consultancy study commissioned by LASC between 1997 and 1998, the majority of stakeholders, including the legal professional bodies, lawyers undertaking legal aid work, community groups, clients and staff of LAD as well as the general public at large, believed that legal aid was administered independently in Hong Kong. The consultants' conclusion was that, while there was some concern about the independence of legal aid administration from the Government, the focus of the concern was on the handling of a minority of sensitive cases that presented a particular challenge to the Government. DDA said that the Administration was not convinced that the conclusion indicated that legal aid administration was not independent. Indeed, the funding of numerous legal aid applications involving cases against the Government both before and after the reunification bore ample evidence to the fact that legal aid was administered independently. The Administration considered that the genuine concern of the public was over the quality of legal aid services. To address this concern, the Administration would continue to look at ways to improve service to achieve a high degree of public satisfaction.

37. Ms Emily LAU said that she was in support of an independent legal aid authority. Referring to the latest round of appeals brought by some several thousands of people from the Mainland claiming to have right of abode in Hong Kong, she said that the recent decision of DLA to grant legal aid to some of the

appellants to pursue their claims appeared to be a dramatic "U-turn" from his earlier decision. She asked whether independent legal advice had been sought before DLA made those decisions. Ms LAU added that the result of those legal aid applications relating to the right of abode cases might give rise to doubts as to whether DLA had exercised his judgments independently.

38. The Chairman declared interest as counsel acting for the applicants in the legal aid appeals. She also drew members' attention to Rule 41(2) of the Rules of Procedure of the Legislative Council, which stated that "*Reference shall not be made to a case pending in a court of law in such a way as, in the opinion of the President or Chairman, might prejudice that case*".

39. In response to Ms LAU's queries, DLA said that the decision on 7 December 1999 to refuse to grant legal aid to the applicants was made on the basis of the Court of Final Appeal's ruling delivered on 3 December 1999, which upheld the legality and binding effect of the re-interpretation of certain Articles of the Basic Law on right of abode by the Standing Committee of the National People's Congress (NPCSC) in June 1999. The applicants then appealed to the Registrar of the High Court to review the decision to refuse legal aid, in the course of which counsel for the applicants put forward new submissions involving a separate issue of who were the people affected by the NPCSC's re-interpretation. He accepted the counsel's views that there were new grounds for proceedings. The parties subsequently agreed that legal aid should initially be granted to ten selected lead applicants for the purpose of testing their case in fresh proceedings to be initiated. DLA stressed that his decisions concerning legal aid for the claimants actually involved two types of applications of different nature in relation to different proceedings. The question of a "U-turn" decision did not arise.

40. Ms Emily LAU enquired about the monitoring role of LASC in respect of LAD's decisions on legal aid applications. In response, Mr LEE Jark-pui advised that LASC did not have the statutory power to direct LAD on the handling of individual cases. However, the Department should provide such information as was reasonably requested by LASC for the purpose of fulfilling its functions under the Legal Aid Services Council Ordinance, e.g. reports on cases of great public concern. He said that LASC might request a report from DLA on the right of abode cases after such cases had been decided. He agreed to inform the Panel of LASC's observations in due course.

LASC

41. The Chairman concluded that the issue of desirability and feasibility of the establishment of an independent legal aid authority was a matter of prime importance to those who shared a common interest in the fair administration of justice in Hong Kong. She opined that there was apparent concern that some problems existed in the present system of legal aid administration which needed to be carefully looked into. The Chairman said the Panel would continue to take a strong interest in the general question of independence of legal aid administration,

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and would continue to discuss the question with the Administration in future.

42. The meeting ended at 7:00 pm.

Legislative Council Secretariat

17 March 2000