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Legislative Council

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seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 19 October 1999 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 Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon Ambrose LAU Hon-chuen, JP Hon Mrs Miriam LAU Kin-yee, JP
Member Attending	:	Hon LAW Chi-kwong, JP
Member Absent	:	Hon Emily LAU Wai-hing, JP
Public Officers Attending	:	*Item IV* Department of Justice Ms Venner CHEUNG Deputy Director (Administration)(Acting) Mr Anson CHAU Chief Management Services Officer

Legal Aid Department

Ms Lolly CHIU
Policy and Administration Co-ordinator

Mr Benjamin CHEUNG
Deputy Director of Legal Aid

Mrs Fanny YU
Assistant Director of Legal Aid

Mr William CHAN
Assistant Director of Legal Aid

Judiciary

Mr Wilfred TSUI
Judiciary Administrator

Item V

Legal Aid Department

Ms Lolly CHIU
Policy and Administration Co-ordinator

Mr Benjamin CHEUNG
Deputy Director of Legal Aid

Mrs Fanny YU
Assistant Director of Legal Aid

Mr William CHAN
Assistant Director of Legal Aid

Attendance by Invitation : *Item V*

Hong Kong Bar Association

Mr Philip DYKES, SC
Mr Andrew LI

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

Staff in Attendance	**:**	Mr Jimmy MA Legal Adviser Mr Paul WOO Senior Assistant Secretary (2)3

Action Column

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)61/99-00)

The minutes of the meeting held on 27 May 1999 were confirmed.

II. Information paper issued since the last meeting
(LC Paper No. CB(2)69/99-00(01))

2. Members noted the Administration's reply circulated vide LC Paper No. CB(2)69/99-00(01) which summarized the progress made in respect of the proposed comprehensive review of legal education and training since the Panel meeting held on 5 June 1999.

III. Items for discussion at the next and future meetings
(LC Papers Nos. CB(2)100/99-00(01) and (02); CB(2)102/99-00(01) and (02))

3. Members agreed that the following items would be discussed at the next regular meeting on 16 November 1999 -

(a) Proposed retention of a Deputy Principal Government Counsel (DL2) post in Legal Policy Division of the Department of Justice;

(b) Policy and practice on removal of illegal immigrants; and

(c) Independent legal aid authority.

(*Post-meeting note* - At the request of the Administration, an additional item on "Proposed creation of a supernumerary post of Assistant Principal Legal Aid Counsel for implementation of an Information System Strategy in the Legal Aid Department" has been included for discussion at the meeting in November).

4. In relation to item (b) above, Members noted a recent case in which two illegal immigrants claiming to have right of abode in the Hong Kong Special Administrative Region (HKSAR) were removed. The removal took place just before the issuance of legal aid certificate for application for judicial review and application for an injunction order against the removal order. The subject had been discussed briefly by the Panel on Home Affairs at a meeting held on 12 October 1999 in the context of the HKSAR's report on the International Covenant on Civil and Political Rights (ICCPR) presented

Action Column

to the United Nations Committee on Human Rights. During the course of discussion at that meeting, members of the Panel sought clarification from the Administration on the assurance given by the then Attorney General at the resumption of the Second Reading debate on the Supreme Court (Amendment) Bill 1997 on 25 June 1997 that "as a matter of practice, once an application of habeas corpus has been made and solicitors are acting for the applicant, the applicant will not be removed from the jurisdiction without prior notification to the solicitors".

5. After some discussion, members agreed, for the purpose of facilitating follow-up discussion of the subject at the next meeting, to request the Administration to provide an information paper giving, inter alia, information on the existing policy and practice on removal of illegal immigrants who had prior to the removal applied for legal aid; the background of the then Attorney General giving the above assurance to the LegCo; and whether the handling of the case in question, or other similar cases if any, was in line with the spirit of that assurance and established policy.

Member's Bill to amend the Legal Aid Ordinance

6. In relation to item 11 on the list of issues to be considered (LC Paper No. CB(2)102/99-00(01)), members noted that Hon CHAN Kwok-keung wished to brief the Panel on his Member's Bill to be introduced.

7. In response to the Chairman, Policy and Administration Co-ordinator, Legal Aid Department (PAC) advised that the concern which was the subject of the Member's Bill, i.e. the proposed waiving of the upper limit of means test for legal aid under certain circumstances for labour dispute cases, had been considered in the context of the Legal Aid Policy Review 1997. On this matter, the view of the Working Group was that there were insufficient justifications to treat Labour Tribunal cases differently from other cases, such as cases in the Small Claims Tribunal and the Minor Employment Claims Adjudication Board (paragraphs 39 and 40 of the Booklet on Legal Aid Policy Review 1997 refer). She informed members that the Administration had introduced the Legal Aid (Amendment) Bill 1999 into the LegCo on 13 October 1999 which aimed at implementing the recommendations of the Legal Aid Policy Review 1997.

8. The Chairman requested the Secretariat to provide the relevant extracts from the report on the Legal Aid Policy Review 1997 for Hon CHAN Kwok keung's consideration, and to invite him to seek the advice of the Legal Service Division as to whether the subject matter could be pursued within the ambit of the Legal Aid (Amendment) Bill 1999 for which a Bills Committee had been formed.

Clerk

Mediation as an alternative dispute resolution mechanism

9. Mr Albert HO referred to the new development of the introduction of mediation as an option to resolve matrimonial disputes in Hong Kong. He suggested and

Action
Column

members agreed that the subject of whether mediation could be extended to deal with dispute cases in other areas should be discussed at a future meeting.

IV. Year 2000 (Y2K) compliance exercise in Government, Government-funded and Government-regulated organizations
(LC Papers Nos. CB(2)102/99-00(03) - (05))

10. Members noted that the subject was last discussed at the meeting on 20 April 1999. The Secretary for Justice, the Director of Legal Aid and the Judiciary Administrator had subsequently confirmed that the outstanding Y2K rectification work had been completed by the end of June 1999 as originally targeted.

11. In pursuance of the decision of the House Committee on 24 September 1999, the Chairman requested the Administration to brief the Panel on details of the contingency plans to cope with emergency situations in case of unforeseen Y2K-induced failures.

12. Representatives from the Administration informed members of the following contingency measures -

Department of Justice

Y2K contingency plans covered all systems in the Department, including administrative computer systems, end-user developed computer systems and embedded systems. Arrangements for the six non-mission-critical administrative computer systems consisted mainly of reference to manual records; reverting to hardcopies of legal references and use of manual delivery of correspondence to replace electronic ones. Testing would continue to be done and sufficient manpower would be made available to ensure that any contingency situation could be handled effectively. Line communication systems (such as telephone and fax and security alarm systems) had been confirmed to be Y2K compliant. Finally, the Department had set up a Y2K Co-ordination Centre to oversee the implementation of the necessary contingency measures.

Legal Aid Department

(a) Contingency measures included data and system backup, downloading essential data from the network systems to stand-alone personal computers as well as a complete manual system in the event of breakdown of all computer systems including personal computers. As most information stored in the computer systems were available in hardcopies, the Department envisaged that it would be able to provide satisfactory service to the public even if the mission-critical systems failed to run properly;

Action Column

(b) "Wellness check" for all mission-critical systems would be conducted on 1 January 2000. In case of systems failure, rectification work would commence immediately; and

(c) A Y2K Monitoring Committee had been set up to oversee the preparation of the contingency plans and to co-ordinate actions in case of failures.

Judiciary

(a) Contingency plans had been prepared to cope with unforeseen failure of the embedded systems, line communication systems and mission-critical computer systems. For each of the Judiciary buildings, sufficient manpower would be sidelined during the rollover to year 2000 to deal with possible disruptions to ordinary business. This included, for example, adequate deployment of staff to attend at public counters to answer enquiries from court-users;

(b) All information stored in the network systems were available in hardcopies, and data recovery from the systems was possible;

(c) Disaster Recovery Drills had been conducted between July and August 1999. A "wellness check" of all mission-critical systems was undertaken on 9 September 1999. Similar wellness checks would be conducted on 1 January 2000 and on other Y2K-critical dates; and

(d) A Y2K Contingency Plan Working Group was established to co-ordinate the formulation of an overall Y2K Contingency Plan for the Judiciary.

Discussion

13. In response to the Chairman, Judiciary Administrator (JA) said that in the event of a computer system breakdown, there might be some delay and inconvenience in handling public enquiries about the updated positions of particular trial cases because the staff would have to refer to the information contained in the relevant case files. Service of summonses, which at present was handled electronically through the computer systems, would be done manually where necessary, under agreed arrangements between the Judiciary and the prosecuting authorities. JA said that, as the computer systems in the Judiciary were relatively new, there should not be significant adverse impacts on the business of the courts brought about by temporarily reverting to a manual mode of operation.

14. PAC advised that a computer system failure in the Legal Aid Department would not lead to loss of essential information relating to legal aid applications, with the availability of hardcopies of such information maintained in the case files.

Action Column

Admittedly, though, a temporary breakdown of the systems would affect efficiency to a certain extent, such as in handling accounting matters like computation of legal aid costs etc.

15. Chief Management Services Officer of Department of Justice (CMSO) informed members that to ensure that no confusion would be caused, manual records on trial dates had been kept by staff of the Department. All essential documents for cases to be heard in January and February 2000 would be made available in separate files for prosecuting officers in advance of the hearings. In addition, important information and papers would be printed in hardcopies before the rollover to year 2000.

16. Mr TSANG Yok-sing enquired about the frequency of updating backup copies of data stored in the computer systems. JA replied that important documents in the Judiciary such as judgments of the courts were originally produced in hardcopies before they were stored in the computer system. Many court documents were statutory forms filed with the courts and properly maintained in the physical files.

17. Mr TSANG Yok-sing asked whether a system breakdown would hamper the law drafting work significantly. CMSO replied in the negative. He said that with data and system backup in the network systems, information could be restored after a temporary failure.

18. Mrs Miriam LAU was concerned that confusion might arise for the courts in handling trial cases in early 2000. She suggested that the Judiciary should examine whether it was necessary to adopt the practice of the Department of Justice to prepare advance hardcopies of essential documents for use in emergency situations. JA agreed to consider the proposal.

JA

V. Legal aid policy
(LC Paper No. CB(2)102/99-00(06))

19. At the invitation of the Chairman, Deputy Director of Legal Aid (DDLA) briefed members on the Administration's paper (LC Paper No. CB(2)102/99-00(06)) which set out in detail the criteria (the means and merits tests) for legal aid to pursue civil and criminal proceedings as well as the existing mechanism for appealing against the Director of Legal Aid's (DLA) decision to refuse legal aid.

Points raised by members

20. The Chairman and Mr Albert HO enquired about whether legal aid could be granted for cases which raised a substantial point of law of great public importance, such as cases involving matters of constitutional rights, irrespective of whether in the opinion of the DLA the case in question had a reasonable prospect of success. The Chairman pointed out that there were precedent cases where a legal aid applicant had

Action Column

obtained leave of the court for an application for judicial review of a Government decision, hence suggesting that there were reasonable grounds for the applicant to bring the action, and yet the application for legal aid was rejected by the DLA. Mr Albert HO asked whether the DLA had a discretion under the Legal Aid Ordinance to waive both the means test and the merits test or lower the standards for the tests in certain circumstances, and if not whether a reform in that direction could be considered.

21. In reply, DDLA said that DLA had the power to waive the upper limit of means test pursuant to section 5AA of the Legal Aid Ordinance, where the case involved issues relating to Bill of Rights or the ICCPR. Merits test involved a consideration of the legal merits of the case and the reasonableness of the application. Legal aid could only be granted if the DLA was satisfied that the relevant action, cause or matter had a reasonable chance of success. He said that the question of waiving or relaxing the tests under certain specified circumstances was a policy issue outside the purview of the DLA.

22. Assistant Director of Legal Aid (ADLA) advised that the Legal Aid Ordinance imposed upon the DLA a responsibility to manage the legal aid scheme competently so that public funds were not wasted. Legal aid in civil action was granted to persons of limited means who passed both the means test and the merits test. Section 10 of the Ordinance imposed a statutory requirement for the DLA to consider all cases fairly and independently. According to the merits test, legal aid could be granted if there were reasonable grounds for the applicant to commence or defend in the proceedings or be a party to the proceedings.

23. The Chairman asked whether "reasonable grounds for commencing or defending in the proceedings" and "reasonable prospects for success" were two separate and sufficient factors for fulfilling the merits test. She said that in a case involving, for example, a matter of constitutional right, there certainly existed a good cause for the person to commence proceedings for the purpose of safeguarding that right. However, the same case, according to the judgment of the DLA, might not satisfy the criterion of a "reasonable prospect of success". The Chairman opined that to refuse legal aid in those cases might cast doubt on the public's mind as to whether legal aid was administered in a fair manner.

24. In response to the Chairman's question, ADLA said that the two factors were inseparable in the process of the DLA coming to a decision on a legal aid application. Both were essentially related to a consideration of the legal merits of the case. The burden was on the legal aid applicant to show that there were reasonable grounds for bringing or defending in the proceedings. It was a matter for the DLA to assess the prospect of success in the particular circumstances of the case and having regard to the availability and strength of evidence. He said that whereas estimating the prospects of success of a case was sometimes a very difficult task, officers in the Legal Aid Department discharged that professional duty carefully, fairly and independently. He

Action Column

pointed out that, as accepted by *Simon Brown J* in the case of *R. v. Legal Aid No. 8 (Northern) Appeal Committee ex parte Angell and others [1990]* -

> *"Difficult though inevitably it is for Legal Aid Committee in cases like these to reach an informed view upon the various applicant's prospects of success, they must try to do so"; and*
>
> *"the system has to rely to a great extent upon their experience, their good sense and above all their 'judgment' about whether further public funds should be committed to the particular case."*

ADLA added that, according to *Scott Baker J* in *R.v. Legal Aid Board ex parte Owners Abroad (Tour Operator) [1997]* -

> *"A legal aid certificate is a very valuable weapon in civil proceedings and it cannot and must not be treated as a blank cheque. A number of cases reach the courts where, at the conclusion of the proceedings, the question is asked 'why was this litigant even given legal aid?' The Legal Aid Board should do its best to ensure that the number of cases where such a question can justifiably be asked is kept to the barest minimum."*

25. ADLA further advised that safeguard of the interests of legal aid applicants was provided under an appeal mechanism whereby the aggrieved applicants could appeal to the Registrar of the High Court.

26. Mr James TO said that as legal aid would not be available to persons who wished to appeal to the Registrar of the High Court against the DLA's decision to refuse legal aid on the original application, it would be extremely difficult for those persons to pursue further with their claims. He suggested that the two legal professional bodies should explore the possibility of enlisting better support from private practitioners who were prepared to offer legal assistance on a pro bono basis. He said that, because of the huge expenses involved in litigations, particularly in complicated appeal cases or judicial review proceedings to which the Government was a party, a person was unlikely to proceed with a claim without legal representation. Mr TO considered that the services provided under the Duty Lawyer Service Scheme should also be enhanced.

27. Mr James TO also queried whether the DLA should be the sole authority to judge on the legal merits and the prospects of success of cases which involved matters of great public concern.

28. ADLA advised that it was not uncommon practice that the Registrar of the High Court, in handling appeals from legal aid applicants, adjourned the case pending consideration of an independent legal opinion. He added that in difficult cases, DLA could seek independent legal advice, pursuant to section 9 of the Legal Aid Ordinance.

Action
Column

29. PAC informed members that in 1998, there were a total of 1 042 appeals against the DLA's decision to refuse granting of legal aid, of which 46 were allowed. The vast majority of the appeals were not legally represented.

30. Echoing Mr James TO's views, Mr Andrew LI agreed that in the majority of cases a person would be seriously handicapped in taking proceedings without the support of legal assistance. He said that the Bar Association was actively considering the matter of how private counsel were able to provide pro bono legal assistance, within the limits of their resources, to those in need in appropriate cases.

31. In response to the Chairman's question relating to the public law aspects of legal aid, Mr Philip DYKES said that occasionally a judge hearing a judicial review might hold a view different from that of the DLA. Often this happened because the facts before the judge and the DLA might not be the same, or there could have been a change of circumstances which the judge did not know about. He said that where leave had been granted by a judge for an application for judicial review, the burden was on the DLA to identify a "knock-out point" to show that the case could not succeed. Mr DYKES said that, according to his experience, the DLA by and large tended to attach important weight to the views of the judge, except in cases where the DLA knew material facts and evidence which the judge did not know.

32. In addressing the point on public law administration, ADLA referred members to the following statements made by *Staughton L. J.* in *R. v. The Legal Aid Board ex parte Hughes [1992]* -

> *"We in these court, with hindsight, not infrequently consider that a particular claim did not deserve support; occasionally we discover that a claim which did not receive support is well-founded; and all too often we regret the delay which occurs while the Board makes up its mind. But I would not wish it to be thought that we underestimate the difficulties faced by the Board, which has no hindsight, in discharging its important and responsible duty"*; and
>
> *"The judge and the Legal Aid Board may well reach different decisions where there is new material before one of them which the other has not seen, or if there has been a change of circumstances. And even if the material is the same and the circumstances are unchanged, it is still the duty of the Board to make up its own mind. If the Board considers the judge was wrong in granting leave, the Board is entitled and bound to refuse legal aid."*

33. In response to the Chairman, Mr Philip DYKES expressed the view that where the DLA refused an application for legal aid, the DLA should give full reasons for his decision. He considered that a lot of frustrations felt by the applicants could be assuaged by a "reasoned" decision set out in non-technical language which could be understood by lay people. The availability of a detailed explanation of that sort

Action Column

would also enable the applicants to make an informed judgment as to whether or not there were good reasons to proceed with an appeal. He opined that a legal aid applicant could exercise the right of appeal effectively only if the reasons for refusal were fully explained at the earliest possible point in time.

34. Mr Philip DYKES also proposed that the Administration might conduct a review to consider the possibility of streamlining the existing procedures in order to save time and expense spent in appeals. Matters which could be examined included, for example, extending the existing subsidiary legislation made under the Legal Aid Ordinance to deal with procedures to tidy up the process of appeals, standardizing the various forms in use and allowing applicants to make written submissions in circumstances where they could not appear in person etc.

35. Mrs Miriam LAU concurred with the view that applicants who were refused legal aid on merits should be explained in writing of the gist of the reasons at the time when he was first notified of the refusal. She said that a lay person was unlikely to be able to fully understand an oral explanation involving complicated points of law. DDLA responded that in cases where a legal aid applicant appealed to the Registrar of the High Court, a written explanation in English of the DLA's decision would be provided for the High Court's consideration.

36. The Chairman considered that there should be clear directives to specify that whenever the DLA decided to refuse granting of legal aid, he should give detailed reasons for the decision in writing. She requested the Administration to consider, in consultation with the Judiciary and the legal profession, the proposal to streamline the existing appeal procedures. The Administration agreed to examine the matters and revert to the Panel in due course.

Adm

37. The meeting ended at 6:30 pm.

Legislative Council Secretariat
8 December 1999