立法會
Legislative Council

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Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 28 June 2004 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Hon Margaret NG (Chairman) Hon Jasper TSANG Yok-sing, GBS, JP (Deputy Chairman) Hon Albert HO Chun-yan Hon Martin LEE Chu-ming, SC, JP Hon Ambrose LAU Hon-chuen, GBS, JP Hon Audrey EU Yuet-mee, SC, JP
Members absent	:	Hon James TO Kun-sun Hon CHAN Kam-lam, JP Hon Miriam LAU Kin-yee, JP Hon Emily LAU Wai-hing, JP Hon TAM Yiu-chung, GBS, JP
Public officers attending	:	Items II & III Judiciary Administration Mr Wilfred TSUI Judiciary Administrator Mr Augustine CHENG Deputy Judiciary Administrator (Operations)
Attendance by invitation	:	Items II, III & IV The Hong Kong Bar Association Mr Philip DYKES, SC

Items III & IV

The Law Society of Hong Kong

Mr Duncan FUNG (Item III only)

Mr Stephen HUNG

Item IV

The Administration

Mr Stephen WONG
Deputy Solicitor General

Mr Peter H H WONG
Senior Assistant Solicitor General

Mr Leonard NG
Government Counsel

Clerk in attendance : Mrs Percy MA
Chief Council Secretary (2)3

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mr Paul WOO
Senior Council Secretary (2)3

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I. Information papers issued since the last meeting
(LC Paper Nos. CB(2)2606/03-04(01) and 2841/03-04(01)).

Members noted that the following papers had been issued -

(a) LC Paper No. CB(2)2606/03-04(01) - Letter dated 21 May 2004 from the Law Society of Hong Kong on court procedure for repossession of premises; and

(b) LC Paper No. CB(2)2841/03-04(01) - Letter dated 16 June 2004 from the Panel Chairman to the Secretary for Justice on the Professional Indemnity Scheme of the Law Society of Hong Kong.

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Professional Indemnity Scheme of the Law Society of Hong Kong

2. The Chairman referred members to a letter dated 28 June 2004 from the Law Society of Hong Kong which was tabled at the meeting (circulated after the meeting vide LC Paper No. CB(2)2992/03-04(01)). The letter was in response to the Panel's request at the special meeting on 14 June 2004 for the Law Society to revert to the Panel at this meeting on the updated position on its consultation with its membership on the preferred future indemnity scheme. According to the Law Society's written reply dated 28 June 2004, it was awaiting the responses to the questionnaire issued to its members, the closing date for which was end of June 2004. The Law Society considered that it was not likely that it could conclude discussions with the Administration and report to the Panel before the end of the current legislative session.

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3. In view of the Law Society's reply, members agreed that the issue should be followed up by the Panel in the next legislative session.

II. Resource Centre for Unrepresented Litigants
(LC Paper No. CB(2)2918/03-04(01))

4. Judiciary Administrator (JA) briefed members on the Judiciary Administration's progress report on the operation of the Resource Centre for Unrepresented Litigants (the Centre) since the Centre commenced operation on 22 December 2003. The paper highlighted on -

(a) publicity on the Centre;

(b) usage of facilities and services of the Centre;

(c) production of new videos on civil litigation procedures; and

(d) monitoring of services and way forward.

5. JA informed members that the Judiciary would conduct a review after one year of commencement of operation of the Centre with a view to evaluating its effectiveness and assessing whether further improvement was required to meet the needs of users. For this purpose, the Judiciary was setting up a consultative committee comprising judges and members from the Bar Association, the Law Society, the Legal Aid Department, the Duty Lawyer Service, the Hong Kong Council of Social Service, the Law Faculty of the University of Hong Kong and the Law Faculty of the City University of Hong Kong.

6. In response to the Chairman, Mr Philip DYKES said that the Bar Association would participate in the review of the operation of the Centre

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through the Judiciary's consultative committee. He said that his preliminary view was that a considerable number of users of the Centre would be those facing legal and regulatory problems relating to, for example, immigration and public housing matters. He hoped that the Centre could effectively assist those people.

7. JA said that the work of the Centre mainly focused on provision of advice on court rules and procedural matters in civil proceedings in the High Court and the District Court. Callers to the Centre with problems falling outside the scope of services provided by the Centre or who wished to look for legal advice would be provided with information on the channels through which they could obtain assistance.

8. Ms Audrey EU noted that for the first five months of operation up to 21 May 2004, the Centre had received 1 635 visitors and 991 telephone enquiries, i.e. about 15 visitors and nine telephone enquiries for each working day. She said that the figures indicated an under-utilization of the facilities and services of the Centre. She suggested that the Judiciary should consider strengthening publicity on the Centre. Mr TSANG Yok-sing suggested that users' opinion surveys should be conducted to categorize the nature of the enquiries of and services sought by the visitors and callers, so as to evaluate the extent to which the Centre had achieved its objectives and the need for improvement. The Chairman noted that for the first five months of the operation of the Centre, a total of 83 765 hits at the Resource Centre webpage was recorded. However, the figure did not reflect the nature of the services sought and whether the members of the public obtained the information they looked for after visiting the webpage. She agreed that users' satisfaction surveys should be conducted.

9. JA said that members' views would be conveyed to the consultative committee for consideration.

10. Ms Audrey EU also noted that the services which were mostly used by visitors were general counter enquiries services (1 635 visitors), while some facilities were under-used, e.g. computer facilities for legal information (55 visitors) and viewing of videos on court procedure (25 visitors). She said that it would be a waste of resources if facilities available at the Centre were not put to their best use. She suggested that the Judiciary should consider the feasibility of making the facilities available to non profit making voluntary organizations which were prepared to offer free legal advice to the public. Ms EU said that she understood that there were some non-government organizations (NGOs) which had the expertise but not the venue and facilities to provide pro bono legal assistance. She cited the Society for Community Organizations as one of them.

11. JA responded that the Judiciary was aware that the usage rate of the services of the Centre fell short of original expectation. However, as the Centre was still in its early stage of operation, it was expected that the number of users

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would continue to increase at a faster rate. Measures were being taken to enhance the services provided to the public, e.g. the production of six more videos on civil litigation procedures by the end of 2004. On the other hand, manpower resources employed for maintaining the operation of the Centre would be monitored and adjusted according to operational needs.

12. JA said that the suggestion of inviting NGOs to make use of the facilities of the Centre in providing free legal advice to members of the public would be actively considered. He added that as explained to members previously when he briefed the Panel on the setting up of the Centre, the Judiciary supported the idea of provision of free legal assistance at the Centre by non-government service providers and had liaised with relevant organizations including the two legal professional bodies. However, some of them indicated that given their existing commitments and resource constraints, they were not able to offer their service at the Centre at this stage.

13. Mr Albert HO said that the Building Management Resource Centres (BMRCs) run by the Home Affairs Department, with the assistance of the Duty Lawyer Service, provided free legal advice to members of the public on building management matters. He suggested that the Judiciary Administration could make reference to the mode of operation of the BMRCs in improving the services of the Centre.

14. In response to Ms Audrey EU, JA said that samples of completed court forms were available for reference by visitors to the Centre. Such samples were found to be useful in assisting unrepresented litigants in filling out the relevant court forms, and saving the court's time in explaining court procedures to unrepresented litigants. Ms Aurdrey EU suggested that a wider variety of sample forms should be included, e.g. forms for filing claims and statement of defence etc. She added that more feedback from the judges should be collected on the extent of the saving of court's time and introduction of new improvement measures.

15. Mr Philip DYKES agreed that new measures should be explored to reduce the court's time taken up by standard and routine procedures in dealing with unrepresented cases. He said that he was aware of an experimental scheme implemented in England in Wales several years ago for the purpose of saving the Court of Appeal's time spent on unrepresented litigants seeking leave to appeal, under which the UK Bar Association assisted in examining cases to identify meritorious cases from those with no grounds for appeal. He suggested that the operation of the scheme in UK and its effectiveness might be studied. The Chairman requested the Judiciary Administration to consider the proposal.

16. Mr Martin LEE asked whether the Judiciary Administration had information on the success rate of unrepresented litigation. JA replied that there was no such data available. He said that the outcome of litigation

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depended not only on whether legal representation was available but a whole range of relevant factors including evidence and merits of the case.

17. Mr Martin LEE suggested that the following measures to assist unrepresented litigants should be considered -

(a) cases involving unrepresented parties who could only use Chinese in court proceedings should be heard by judges competent in conducting trials in the Chinese language; and

(b) under certain prescribed conditions, pupils and trainee solicitors might be allowed to provide pro bono legal assistance to litigants who could not afford the cost of litigation in civil cases in the Distict Courts and Magistrates' Courts.

18. On Mr Martin LEE's suggestion at paragraph 17(a) above, JA responded that the Chief Judge of the High Court had issued guidelines for the judges on the use of Chinese in court proceedings, which set out a range of factors which a judge might take into consideration in exercising the discretion as to which official language should be used in conducting proceedings. The judges had encountered no problems in observing the guidelines. He added that interpretation service was provided in court proceedings where necessary.

19. Mr Martin LEE opined that an unrepresented litigant, who could only speak Chinese and had to face the other party with legal representation before a judge who did not understand Chinese, would be placed in an extremely disadvantageous position. To rely on interpretation service for the conduct of proceedings in such cases was far from satisfactory in protecting the interests of the unrepresented litigants. He said that his suggestion should be seriously considered.

20. Regarding Mr Martin LEE's suggestion at paragraph 17(b) above, JA said that whether and how the matter should be taken forward required detailed consideration by the Judiciary and the legal professional bodies concerned.

21. JA agreed to reflect Mr Martin LEE's suggestions for the Judiciary's consideration.

JA

22. In concluding, the Chairman requested the Judiciary Administration to take into consideration the above views expressed by the Panel.

III. Transcript Fees
(LC Paper Nos. CB(2)2918/03-04(02) - (03))

23. JA briefed members on the Judiciary Administration's paper (LC Paper

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No. CB(2)2918/03-04(02)), which set out the Judiciary's responses to the issues raised at the Panel meeting on 23 June 2003 on fees payable by court users for transcripts of proceedings and the impact of the fees on litigants' ability to pursue appeals in both criminal and civil cases.

24. Mr Stephen HUNG noted from the Judiciary Administration's paper that in both criminal and civil appeal cases, the judgment of the lower court would be provided without charge to the appellant and the respondent. In his view, the judgment of the court was highly important to a convicted person in deciding whether or not to appeal against the conviction. Therefore, the judgment should be provided to the convicted person upon request, even before an appeal was actually lodged. He pointed out that while there were written judgments for cases tried in the District Court, cases tried in the Magistrates' Courts were normally without written reasons for verdict. The party who wished to get the reasons for verdict in writing had to apply for the transcripts for that part of the proceedings. He asked whether such transcripts would be provided free of charge to the convicted person before the latter actually filed a notice of appeal.

25. Mr Duncan FUNG informed members that he was aware that in one Labour Tribunal case where the hearing had lasted for four days, a party had paid $13,260 for the notes of proceedings. He suggested that in respect of any court proceedings, a party should be entitled to receive a copy of the audio recording of the proceedings at a nominal fee.

26. The Chairman agreed that a convicted person should be entitled to obtain the court's judgment, regardless of whether an appeal would be lodged. A written judgment, if needed to be charged, should be available at an affordable fee. She added that the provision of an audio recorded tape of the proceedings would be an acceptable alternative for the purpose of assisting the party concerned to decide whether or not to appeal.

27. JA explained that for cases heard in the Magistrates' Courts, where the Magistrate had prepared written reasons for verdict or sentence, a copy would be given to the parties free of charge. Where no written reasons for verdict or sentence had been prepared, the transcripts for that part of the proceedings would be supplied free of charge on application by the parties. This was applicable even if no appeal had been lodged.

28. JA added that under certain circumstances, the court had the power to waive the transcript fees in both criminal and civil appeal cases.

29. Mr Albert HO said that from his personal experience, convicted persons had no serious difficulties in obtaining the written verdict. In practice, counsel acting for the convicted would file a notice of appeal in the first instance. On filing the notice, the court would prepare the appeal bundle and supply the bundle to the parties without charge. The bundle included, inter alia, the reasons for verdict or sentence. Mr HO added that he had noticed that the

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existing practice had rather given rise to resource wastage in preparing the appeal bundle because in the majority of cases the convicted parties withdrew the appeal after considering the written verdict. In his view, the written verdict should be provided as soon as possible after a notice of appeal had been filed to facilitate the party to decide whether an appeal should actually proceed, while the transcripts of other parts of the proceedings might be supplied later if necessary.

30. Referring to paragraph 11 of the Judiciary Administration's paper on transcript of proceedings for civil appeal cases, Mr Ambrose LAU opined that the fee of $85 per page was too high. Mr Philip DYKES agreed that transcript fees should be set on the basis that they should not become an impediment to a litigant's ability to appeal.

31. The Chairman said that the Administration had previously explained to the Panel that the setting of transcript fees was based on a "user-pay" principle for the purpose of achieving cost recovery. In her view, the charging of a high transcript fee was inconsistent with the principle that court users should not be deprived of the right of access to the court because of insufficient financial means.

32. The Chairman pointed out that for criminal appeals from the District Court and the Court of First Instance to the Court of Appeal, where the appellant was not legally aided but was represented, a fee of $17 per page was charged for the transcripts included in the appeal bundle prepared by the Appeals Registry of the Clerk of Court Office. However, for civil appeals from the District Court and the Court of First Instance to the Court of Appeal, the transcript fee for a non-legally aided appellant was $85 per page. She opined that the fee charging mechanism for both criminal and civil appeal cases should be standardized. She further said that the Judiciary Administration should specify clear policy guidelines on the circumstances under which the court might exercise discretion to waive the transcript fees in appeal cases.

Way forward

33. Members agreed that the Panel should follow up the item with the Judiciary Administration in the next legislative session.

Panel

IV. Report of Working Group to study issues relating to imposition of criminal liability on the Government or public officers

(LC Paper No. CB(2)2917/03-04(01))

34. The Chairman recapitulated that in the last legislative session, the Panel had formed a working group to study issues relating to imposition of criminal liability on the Government or public officers in the course of discharging public duties for contravening any legislative provisions binding on the Government

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(the Working Group). She said that the Working Group had completed its work and prepared a report for the consideration of the Panel (LC Paper No. CB(2)2917/03-04(01)).

35. The Chairman briefed members on the report which detailed the deliberation of the Working Group, highlighting, in particular -

(a) the existing reporting mechanism adopted in Hong Kong to deal with contraventions committed by Government departments;

(b) the approach adopted in the United Kingdom (UK), i.e. the court might declare unlawful any act or omission of the Crown which constituted a contravention;

(c) the approach adopted in New Zealand (NZ), i.e. enactment of legislation which enabled the prosecution of Crown organizations (which included a government department) for specified offences;

(d) the position of the Administration on the issue of criminal liability of the Government and public officers; and

(e) the recommendation of the Working Group.

36. In response to the Chairman, Deputy Solicitor General (DSG) explained the position of the Administration as follows -

(a) there was no precedent in the Hong Kong legislation which clearly and unequivocally rendered the Government or government departments liable to criminal proceedings. To enforce statutory requirements through the machinery of prosecution would be a departure from the usual practice, and would raise complex questions of procedure and efficacy, e.g. the question of whether a government department had legal personality. It also involved the legal policy as to whether one government department could prosecute another government department;

(b) immunity of the Crown itself from criminal liability was not removed in UK and other common law jurisdictions which the Administration had studied. The immunity was expressly provided for in certain statutes;

(b) the Administration was of the view that the existing reporting mechanism in Hong Kong had been working satisfactorily. Under the reporting mechanism, contraventions of statutory provisions by Government departments were reported to the Chief Secretary for Administration, or the relevant policy secretary, as appropriate, to ensure that the breaches were dealt with effectively. Accordingly,

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there was no need for a radical change to the existing system. However, the reporting mechanism would be constantly reviewed and improved; and

(c) the Administration did not believe that this was the time to adopt the approach of UK or NZ. It was not aware of any court case in UK which involved an application for a declaration of unlawfulness. The NZ approach, on the other hand, was narrow and restrictive, covering only safety-related offences. So far, only two prosecutions had been brought under the relevant legislation in NZ.

37. On the situation in UK, DSG informed members that the UK Government had established an inter-departmental working group to consider the State's immunity from criminal proceedings. He said that the Administration would follow up the matter and inform the Panel of the progress in due course.

Issues raised by members

38. Referring to paragraphs 12 and 13 of the Working Group's report, Ms Audrey EU said that she disagreed with the Administration's view that it was meaningless to impose a fine on the Government as the money to pay for the fine would be from the public coffer. She also doubted that the reporting mechanism in Hong Kong was an effective deterrent for public officers against violation of the law. Ms EU considered that the issue should be seen from the standpoint of ensuring the maintenance of a high standard of public conduct. In her view, if a public officer contravened the provisions of the law and committed regulatory offences, the officer might be personally liable for the unlawful act, and should face appropriate punishment and disciplinary actions, which might include payment of a fine or a pay reduction.

39. Mr Albert HO shared the views of Ms Audrey EU. He said that he was in support of the approach adopted in NZ.

40. The Chairman pointed out that according to the Administration, a total of 156 cases of contravention of environmental legislation were reported to the Chief Secretary for Administration under the existing reporting mechanism. However, no disciplinary actions had been taken against the public officers concerned.

41. In response to Mr Albert HO, Senior Assistant Solicitor General said that whether a certain statutory body was an agent of the Government depended on the terms of the relevant provisions of the legislation; and that if such a statutory body was performing the function of an agent of the Government under the relevant legislation, then it would have the same immunity against criminal liability as that enjoyed by the Government.

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42. The Chairman said that the Working Group was of the view that in the context of Hong Kong, imposition of criminal liability on the Government or public officers should be a matter of policy in individual cases, instead of a constitutional issue. She pointed out that the official position in UK was that Crown immunity was being removed as legislative opportunities arose. As far as regulatory offences were concerned, whether Crown immunity should be removed was essentially a matter of policy and not a matter of fundamental constitutional principle. In NZ, specific legislation was enacted to enable prosecution of Crown organizations for contravention of statutory provisions relating to health and safety matters. She said that the Working Group agreed that the latest developments in UK and NZ deserved further study in the future.

43. In response to the Chairman, Mr Philip DYKES said that he shared the view of the Working Group that the issue of Crown immunity should be reviewed in the context of legal policy. He said that Crown immunity was not entrenched constitutionally, either in UK or in the Basic Law of the Hong Kong Special Administrative Region. In UK, the immunity had been eroded over the years by legislation and by decisions of the courts. He further pointed out that many regulatory functions undertaken by Government departments in Hong Kong were undertaken by local authorities in UK, to which no immunity against liability attached. In his view, imposing criminal liability on the authorities concerned would enhance the confidence of the public and users of the services provided by the authorities. He supported that the Administration should take a policy view on the matter, and decide whether exemptions from liability were justified on a case by case basis.

44. Mr DYKES further said that the Bar Association would be prepared to make more detailed submissions on the subject matter when the Panel followed up the relevant issues in future.

45. Mr Duncan FUNG opined that a clearly stated policy regarding the issue of criminal liability of the Government was desirable and would serve as useful guidance for the executive departments and public officers in discharging their public duties.

46. The Panel endorsed the recommendation of the Working Group set out in paragraph 35 of its report, namely, that the Administration should consider -

(a) in respect of regulatory offences, that Crown immunity should be removed as a matter of policy on a case-by-case basis and when legislative opportunities arose; and

(b) the development of alternative approaches taken in UK and NZ in removing Crown immunity.

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Way forward

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47. The Panel agreed that the issue should be followed up with the Administration in the new legislative session.

48. The meeting ended at 6:30 pm.

Council Business Division 2
Legislative Council Secretariat
7 September 2004