立法會
Legislative Council

LC Paper No. CB(2)3001/05-06
(These minutes have been seen by the Administration)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 26 June 2006 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Hon Margaret NG (Chairman) Hon LI Kwok-ying, MH (Deputy Chairman) Hon Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon Miriam LAU Kin-yee, GBS, JP Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP
Members attending	:	Hon Albert HO Chun-yan Hon CHAN Kam-lam, SBS, JP Hon Jasper TSANG Yok-sing, GBS, JP Hon Alan LEONG Kah-kit, SC Hon Ronny TONG Ka-wah, SC
Member absent	:	Hon MA Lik, GBS, JP
Public Officers attending	:	Item IV Office of the Ombudsman Ms Alice TAI The Ombudsman Mr. Tony MA Assistant Ombudsman

Items V, VI and VII

Judiciary Administration

Miss Emma LAU
Judiciary Administrator

Ms Sally WONG
Deputy Judiciary Administrator (Development)

Miss Vega WONG
Assistant Judiciary Administrator (Development)

Attendance by invitation :

Item IV

Hong Kong Bar Association

Mr Philip DYKES, SC

Item V

Hong Kong Bar Association

Mr Philip DYKES, SC

Mr Anthony ISMAIL

Item VI

Hong Kong Bar Association

Mr Philip DYKES, SC

Mr Anthony ISMAIL

Mr PY LO

Item VII

Hong Kong Bar Association

Mr Philip DYKES, SC

Mr Anthony ISMAIL

Mr PY LO

		Hong Kong Human Rights Monitor Mr LAW Yuk-kai Director JUSTICE, The Hong Kong Section of the International Commission of Jurists Mr Ruy BARRETTO, SC
Clerk in attendance	:	Mrs Percy MA Chief Council Secretary (2)3
Staff in attendance	:	Mr Arthur CHEUNG Senior Assistant Legal Adviser 2 Ms Amy YU Senior Council Secretary (2)3 Mrs Fonny TSANG Legislative Assistant (2)3

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I. Confirmation of minutes of meeting

(LC Paper No. CB(2)2526/05-06 – Minutes of special meeting on 3 February 2006

LC Paper No. CB(2)2494/05-06 – Minutes of meeting on 24 April 2006)

The minutes of the meetings held on 3 February 2006 and 24 April 2006 were confirmed.

II. Information papers issued since last meeting

(LC Paper No. CB(2)2117/05-06(01) – Consultation paper prepared by the Department of Justice on the Domicile Bill 2006

LC Paper No. CB(2)2312/05-06(01) – Consultation paper prepared by the Chief Justice's Working Party on Solicitors' Rights of Audience

LC Paper No. CB(2)2460/05-06 – Draft report of the Panel on "Issues relating to the imposition of criminal liability on the Government" incorporating the Administration's comments)

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2. Members noted that the above papers had been issued to the Panel.

III. Items for discussion at the next meeting

(LC Paper No. CB(2)2517/05-06(01) – List of outstanding items for discussion

LC Paper No. CB(2)2517/05-06(02) – List of follow-up actions)

3. The Chairman proposed that the Panel should discuss the Consultation Paper on Solicitors' Rights of Audience. Members agreed. The Chairman further said that the item could be discussed after the expiry of the consultation period of the Consultation Paper on 31 August 2006.

4. Referring to the Consultation Paper on the Domicile Bill 2006, Ms Audrey EU said that she would like to seek clarification from the Administration on the differences she had noted between the Consultation Paper and the report of the Domicile Subcommittee of the Law Reform Commission, of which she was the Chairman. After discussion, members agreed that Ms EU would write to the Administration to seek clarification first. Subject to the response of the Administration, the matter could be discussed at a Panel meeting if necessary.

5. The Chairman said that the following items had originally been scheduled for discussion at the next regular Panel meeting on 24 July 2006 –

(a) Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform; and

(b) Court procedure for repossession of premises.

However, the Judiciary Administration had indicated that it might not be in a position to revert to the Panel on these two items at the regular meeting on 24 July 2006. As there was no other items proposed by the Administration for discussion at the meeting, members agreed that the meeting be cancelled.

(*Post-meeting note*: Subsequent to the meeting, members agreed that the agenda item on "Political affiliation of judges" would be further discussed at the Panel meeting scheduled for 24 July 2006.)

IV. Research Report on the Jurisdiction of Ombudsman Systems in Selected Places

(LC Paper No. CB(2)2458/05-06(01) – Letter dated 16 June 2006 from the Director of Administration concerning its attendance at the Panel meeting

RP05/05-06 – Research report on "Jurisdiction of Ombudsman Systems in Selected Places")

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6. Referring to the letter dated 16 June 2006 from the Director of Administration, the Chairman informed members that the Administration would not be represented at the meeting for discussion of this item, as the Ombudsman was still conducting her internal review and the Administration did not consider it appropriate to intervene at this stage.

7. Head of Research and Library Services Division (H/RL) briefed the meeting on the Research Report on the Jurisdiction of Ombudsman Systems in Selected Places (the Research Report) by way of a power-point presentation. Members noted that the research had studied the jurisdiction of the ombudsman systems in the United Kingdom (UK), New Zealand, the Province of British Columbia in Canada (BC) and Australia, focusing on the arrangement of ombudsman services, the organisations covered, and the investigation powers and purview of the Ombudsmen.

(*Post-meeting note*: The Chinese version of the Research Report and the power-point presentation materials provided by the Research and Library Services Division were tabled at the meeting and issued to members vide LC paper No. CB(2) 2578/05-06 on 27 June 2006.)

8. In response to the Chairman's question, the Ombudsman said that ombudsmen would not normally conduct general policy reviews. She agreed to broaden the scope of her jurisdictional review partly in response to Members' suggestions. Hence her jurisdictional review would consist of two parts: the first would be an "operational" review of the Ombudsman Ordinance (Cap. 397) (the Ordinance), and the second a more generalised review of developments in ombudsmanship.

9. The Ombudsman further said that the review of the Ordinance would focus on some of the uncertainties or difficulties encountered in investigations by the Ombudsman's Office. In this regard, the Ordinance was last revised in 2001 when the Office was delinked from the Government. Hence, this exercise would likely be further fine-tuning, rather than a major overhaul. Some of the issues to be addressed would include –

(a) whether some restrictions on the Ombudsman's investigative powers as set out in Schedule 2 to the Ordinance could be relaxed;

(b) whether more, and if so, what organisations should be brought within the Ombudsman's jurisdiction under Schedule 1 to the Ordinance; and

(c) whether there was conflict between the secrecy requirement in the Ombudsman Ordinance and similar provisions in other ordinances enacted after the Ombudsman Ordinance.

10. As regards Part II of the review, the Ombudsman said that the focus would be to consider new areas of development for ombudsman offices in other jurisdictions, as possibilities for extending the purview of the Ombudsman. One such area was the Ombudsman's involvement in human rights matters. In this regard, Hong Kong

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followed the classical ombudsman model. While the Ombudsman was not explicitly charged with human rights responsibilities, the essence of an ombudsman's work was to ensure the protection of individual rights by the public administration. In considering whether the Ombudsman should have a mandate for the advocacy of human rights, one must consider the implications this would have on the existing ombudsman system and its operation.

11. The Ombudsman further said that another area to examine was the principles for deciding what organisations should be subject to the Ombudsman's jurisdiction, and on the basis of such principles, whether its jurisdiction should be extended to include some other organisations. In this regard, she pointed out that in Hong Kong, while the Police and the Independent Commission against Corruption (ICAC) were excluded from the Ombudsman's jurisdiction, they had their own complaints handling mechanism. This was different from some other jurisdictions. Whether an organisation should be subject to the Ombudsman's jurisdiction would ultimately be a matter of policy decision.

12. In response to the Chairman on whether the Ombudsman could make recommendation in relation to the establishment of specialised ombudsmen, the Ombudsman advised that the development of specialised ombudsmen would be addressed in the second part of the review in response to Members' suggestion at an earlier meeting. However, she might not make specific recommendations which would ultimately be policy decision outside her area of responsibility.

13. Mr Philip DYKES of the Hong Kong Bar Association said that the existing scope of the Ombudsman's purview was too restrictive. Given that many public services, particularly those in the economic, social and cultural fields, were delivered by subvented agencies and such services would have to be provided by the Government if these agencies did not exist, Mr DYKES took the view that subvented agencies should be brought within the remit of the Ombudsman insofar as their public functions were concerned, as was the case in some other countries. He further said that as a general rule, agencies that were amenable to judicial review should also be amenable to the jurisdiction of the Ombudsman as regards maladministration.

14. Ms Emily LAU shared Mr DYKES's view. Ms LAU pointed out that the Ombudsmen in some places covered in the Research Report had been given jurisdiction to investigate organisations such as school boards, advisory groups and electoral bodies. Some Ombudsmen had been given new functions in investigating complaints caused by service failure, performing a supervisory role in the freedom of information and protected disclosure areas and ensuring the quality of service to the public by government contractors, in addition to their traditional role of investigating complaints of maladministration. Ms LAU asked whether the Ombudsman would take into account these research findings in considering the organisations and matters that should be brought within the remit of the Ombudsman in conducting her review.

15. The Ombudsman responded that to her knowledge, some public sector ombudsmen of some countries also doubled up as ombudsmen for specific services or

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industries. In cases where specialised ombudsmen were established to oversee the services of particular industries, it would be quite logical for such industry ombudsmen to act to ensure service quality. She added that she would make reference to the Research Report and other relevant information, and take into account the comments of Mr DYKES and Ms LAU in conducting the review.

16. The Ombudsman further advised that nearly half of the complaints received by her Office each year were found to be outside the Ombudsman's jurisdiction. Overall speaking, she agreed that the list of actions which were not subject to investigation of the Ombudsman as set out in Schedule 2 to the Ordinance was appropriate, such as actions taken in relation to personnel matters and commercial transactions. However, she considered that the present provisions of the Ordinance were too restrictive. Without encroaching onto the substantive decision itself, there could be maladministrative issues relating to the actions set out in Schedule 2 that could conceivably be opened to the Ombudsman's scrutiny. By way of illustration, she said that while a complaint relating to a disciplinary case was a personnel matter and should quite appropriately be excluded from the Ombudsman's jurisdiction, a complaint of inordinate delay (say, delay in terms of years) in handling a disciplinary case could well be a matter of procedural inefficiency leading to grievance for the complainant.

17. In response to Ms Audrey EU, the Ombudsman said that there were different types of outside-jurisdiction cases, such as those involving court/professional judgments or Government policies. She added that in the review report she would address the issue of whether there was room for relaxing some of the restrictions on the Ombudsman's investigation powers set down in Schedule 2 to the Ordinance.

18. Responding to Ms Margaret NG's enquiry, the Ombudsman confirmed that complaints concerning inter-departmental coordination were within her jurisdiction. She further said that the problem of inadequate inter-departmental coordination among government departments was featured in the annual report of the Ombudsman in the past few years. She was concerned that government departments were unwilling to assume responsibility or a coordinating role in addressing problems that cut across departmental responsibilities. Cases involving drying laundry in public places and the proliferation of cages on pavements had illustrated this inadequacy amply.

19. In response to the Chairman, the Ombudsman said that she expected to complete the review for submission to the Director of Administration in a few months' time.

20. Ms Emily LAU said that as the jurisdiction of the Office of the Ombudsman was a matter of concern to the general public, the Administration should issue a consultation document to seek public views on the conclusions and recommendations made by the Ombudsman in her report. Ms LAU further said that the Ombudsman should also consult the public when conducting the review.

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21. The Ombudsman responded that her Office was aware of public views and expectations from correspondence received daily from complainants. The nature of the outside-jurisdiction complaints received by the Office also threw light on what the public expected of the Ombudsman. She opined that it would not be appropriate for the Ombudsman to conduct a public consultation exercise. The appropriate channel was for her to submit her review report to the Government, and where her recommendations were accepted, for the Government to introduce legislative amendments to the Ordinance to give effect to the recommendations.

Clerk

22. The Chairman suggested and members agreed that the Panel should write to the Director of Administration requesting the Administration to –

(a) provide a copy of the review report prepared by the Ombudsman to the Panel for information when it was available; and

(b) issue a consultation document to seek public views on the report prepared by the Ombudsman before deciding the way forward.

(*Post-meeting note*: A letter was sent to the Director of Administration on 30 June 2006. Her reply dated 5 July 2006 was issued to members vide LC paper No. CB(2) 2688/05-06 on 10 July 2006.)

V. Proposed implementation of a five-day week for the Judiciary

(LC Paper No. CB(2)1787/05-06(01) – Consultation paper dated April 2006 on the proposed implementation of a five-day week in the Judiciary

LC Paper No. CB(2)2287/05-06(01) – Paper provided by the Judiciary Administration on "Implementation of a Five-day Week for the Judiciary"

LC Paper No. CB(2)2517/05-06(03) – Letter dated 20 June 2006 from the Law Society of Hong Kong on the proposed implementation of a five-day week for the Judiciary)

Briefing by the Judiciary Administrator

23. The Judiciary Administrator (JA) said that following the release of the Consultation Paper on Proposed Implementation of a Five-Day Week for the Judiciary, the Judiciary Administration had, as at 22 May 2006, received a total of 41 submissions, including those from the two legal professional bodies, the Department of Justice and other court users. JA briefed members on the implementation of a five-day week in the Judiciary by three phases –

(a) Phase I would commence on 1 July 2006. No court sittings would normally be listed on Saturdays, except for admission ceremonies for senior counsel, barristers and solicitors in the High Court. A five-day week would also apply to those back offices without any interface with members of the public;

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(b) Phase II, which would commence on 1 January 2007, covered services with a public interface where the implementation of a five-day week would require administrative preparations but not legislative amendments. The offices which were likely to be covered under Phase II included libraries and the Resource Centre for Unrepresented Litigants (the Resource Centre); and

(c) Phase III would cover services with a public interface where the implementation of a five-day week would require legislative amendments. These included the court registries and general offices of Magistrates' Courts, Accounts Offices, Bailiffs' Offices, Probate Registry and Oaths and Declarations Office. The implementation of Phase III and its timing would depend on the outcome of the comprehensive study being conducted by the Judiciary Administration on all necessary amendments to legislation as well as Practice Directions.

Phase I

24. Mr Anthony ISMAIL of the Bar Association asked whether the present arrangement whereby duty judges at various levels of court were designated to deal with urgent applications under various ordinances outside office hours would continue after the implementation of a five-day week in the Judiciary.

25. JA replied in the affirmative, and explained that upon the implementation of a five-day week in the Judiciary, the duty judges at various levels of court would be on duty for the whole day of Saturday in the same way as they were now on duty in Saturday afternoons, on Sundays and public holidays.

26. In response to Ms Audrey EU's enquiry on the impact of the implementation of a five-day week on the training and development activities for judges, JA explained that not all training activities were currently held on Saturdays. Some seminars and small scale training activities were held on weekdays. While training and development activities conducted by the Judicial Studies Board would usually take place on weekdays after the implementation of a five-day week, some large scale training events would continue to be held on Saturdays. JA assured members that the implementation of a five-day week would not result in a reduction of training activities, which would continue to be an important focus of the Judiciary.

Phase II

27. Regarding the opening hours of libraries, Mr Anthony ISMAIL said that consideration should be given to opening the High Court Library on those Saturdays for which court sittings had been scheduled, for the convenience of litigants and legal practitioners involved in the cases concerned.

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28. Ms Audrey EU was of the view that libraries should be open on Saturdays, irrespective of whether there was any court sitting. She also considered that the Resource Centre should be open on Saturdays to cater for court users who were unable to use these services on weekdays.

29. Mr LI Kwok-ying shared Ms EU's view that libraries should be open on Saturdays, as their usage rate on Saturdays was quite high. He asked about the criteria to be adopted by the Judiciary Administration in deciding whether libraries would be open on Saturdays.

30. JA responded that the Judiciary would take into account the views expressed by members, the two professional bodies and other court users. According to the experience of the Judiciary, the usage rates of libraries and the Resource Centre on Saturdays were on the low side, although they did not have any concrete data at hand. Starting from June 2006, the Judiciary would monitor the usage rates of libraries and the Resource Centre on Saturdays as compared to weekdays before taking a final decision as to whether they should be covered in Phase II. JA further pointed out that should it be decided that they would be closed on Saturdays, their opening hours on weekdays would be extended.

31. Mr Anthony ISMAIL urged the Judiciary not to focus only on the usage rate in determining the opening hours of libraries, but should also take into account other relevant considerations, such as the needs of small law firms and junior members of the Bar.

Phase III

32. Ms Miriam LAU said that according to paragraphs 17 and 18 of the Consultation Paper, the number of court users served in the registries/offices on a Saturday morning was about 1 500. She was aware that many unrepresented litigants would file documents to the registries on Saturdays as they were unable to do so during weekdays. Closing the registries/offices on Saturdays would create great inconvenience to them. She further said that the Judiciary Administration should seriously consider the needs of the court users in deciding whether a five-day week should be implemented in these registries/offices.

33. JA stressed that the implementation of a five-day week in the registries/offices under Phase III would require legislative amendments. The Judiciary Administration was undertaking a comprehensive study on all necessary legislative amendments to be made, and the timing of implementation of Phase III would depend on the outcome of the comprehensive study. She added that the Judiciary would ensure that the implementation of a five-day week in the Judiciary would not adversely affect its existing level of services to court users.

34. Referring to paragraph 28 of the Consultation Paper, Ms Miriam LAU expressed grave concern about the impact of a five-day week on the operation of time limits. In the absence of any statutory provision to extend a time limit which expired

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on a Saturday as in the case of a public holiday under section 71(1) of the Interpretation and General Clauses Ordinance (Cap. 1), she was worried that a litigant would be deprived of the right to perform an act at a court office where the time limit expired on a Saturday. She stressed that it was important to ensure that the public's legal rights were not adversely affected by the Judiciary's implementation of a five-day week.

35. JA clarified that when the Consultation Paper was prepared in April 2006, it was the understanding of the Judiciary Administration that the Administration did not intend to amend section 71(1) of Cap. 1 in connection with the implementation of the five-day week in the Judiciary. During the consultation period, the Judiciary Administration had received views from the Bar Association, the Law Society and the Department of Justice that amendments to section 71 of Cap. 1 had to be amended for the implementation of a five-day week in the Judiciary. As set out in the paper provided by the Judiciary Administration for this Panel meeting (LC Paper No. CB(2)2287/05-06(01)), the Judiciary would look into the necessary amendments to be made to section 71(1) of Cap. 1 in its comprehensive study on legislative amendments.

36. Mr Anthony ISMAIL concurred that the implementation of a five-day week for the Judiciary should not infringe the legal rights of the public. Mr ISMAIL said that the Bar Association was agreeable to the Judiciary conducting a comprehensive study on the necessary legislative amendments, and urged it to seriously consider amending all the relevant primary and subsidiary legislation, in particular section 71(1) of Cap. 1 for the purpose of implementing a five-day week under Phase III.

37. The Chairman said that the question was not what legislative amendments should be made to enable the implementation of a five-day week in the Judiciary, but whether the Judiciary, in the light of its present duties under the law, should implement a five-day week.

38. JA responded that the Judiciary was now studying the issue and had not yet come to a conclusion. She added that the Judiciary would further discuss the matter with the Panel in due course.

Judiciary Admin

39. The Chairman requested the Judiciary Administration to provide a paper to inform the Panel of the final decision of the Judiciary concerning the implementation of a five-day week under Phase II and Phase III in due course. JA agreed.

VI. Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform

(LC Paper No. CB(2)2517/05-06(04) – Background brief prepared by the LegCo Secretariat on "Civil Justice Reform"

LC Paper No. CB(2)1728/05-06 – Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform

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LC Paper No. CB(2)1728/05-06(01) – Press release on "Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform")

40. With the aid of power-point, Assistant Judiciary Administrator (Development) briefed members on the proposed legislative amendments for the implementation of the recommendations in the Final Report (Final Report) on Civil Justice Reform (CJR). Members noted that the majority of the recommendations involved amendments to the existing rules and practice of the High Court. In respect of the High Court, 21 of the recommendations required amendments to primary legislation, whereas 84 required amendments to subsidiary legislation under the High Court Ordinance. Members also noted that as the practice and procedure in civil proceedings in the District Court largely mirrored those in the High Court, similar amendments were proposed to be introduced to the Rules of the District Court. The consultation period would end on 12 July 2006.

(*Post-meeting note*: The power-point presentation materials provided by the Judiciary Administration were tabled at the meeting and issued to members vide LC paper No. CB(2) 2578/05-06(02) on 27 June 2006.)

41. Mr Philip DYKES, Chairman of the Bar Association, said that the Consultation Paper had been the subject of consideration by a special committee of the Bar Association. As he had received a report from the special committee on that day, the Bar Council had not yet considered the report. Mr P Y LO, a member of the special committee, supplemented that it took the special committee some two months to complete its report since it started work in early May. As the Bar Council would need time to consider the large number of recommendations made by the special committee, the Bar Association might not be able to submit its views to the Judiciary Administration by the deadline of the consultation period, i.e. 12 July 2006. Mr LO further said that the three-month consultation period was too short, given the complexity and the multitude of the recommendations set out in the Consultation Paper.

42. Mr P Y LO gave his personal views on the Consultation Paper as follows –

(a) many of the proposed legislative amendments set out in the Consultation Paper were modelled upon the English Civil Procedure Rules 1998. Care should be taken to ensure that the terminology of the proposed amendments was consistent with that of the existing Rules of the High Court;

(b) the Consultation Paper only set out the proposed legislative amendments to the relevant primary legislation and subsidiary legislation. However, in order to evaluate the effect of implementing the recommendations in the Final Report on the CJR, it was necessary to consider the yet to be promulgated Practice Direction and the Pre-action protocols, in addition to the proposed legislative amendments, as an integrated package;

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(c) following the submission of the Bar Association on the Interim Report and Consultative Paper (IRCP) on CJR in 2002, he had reservation on whether the reforms could lead to reduction in litigation costs or greater convenience for unrepresented litigants. For instance, unrepresented litigants might not be aware of the many procedural rules prescribed in the Pre-action protocols and would have to seek sanction for relief from the Court in case of non-compliance;

(d) noting that judges would be given more power to control the conduct of cases under the proposed reforms, he was concerned about the consistency in the case management approach adopted by different judges; and

(e) a review of the Rules of the District Court could be conducted after the new Rules of the High Court had been introduced and operated for a period of time. Any amendments to the Rules of the District Court should be separately considered and could be introduced in a separate legislative exercise.

43. The Chairman expressed concern about the proposal to introduce similar amendments to the District Court in the current legislative amendment exercise, as the consultation exercise conducted on the CJR in the past mainly focused on the review of civil rules and procedures of the High Court.

44. In response, JA explained that prior to 2000, the High Court Rules and the District Court Rules were quite different from each other. When the District Court Ordinance was amended in 2000 to raise the financial limits of the civil jurisdiction of the District Court, it was also decided that the provisions of the District Court Rules should generally follow those in the High Court Rules, unless special considerations justified differences. Moreover, the objectives of improving cost-effectiveness, cutting delays and reducing complexity applied equally to the District Court. Similar amendments were therefore proposed to be introduced to the Rules of the District Court so as to achieve consistency with the Rules of the High Court.

45. Ms Miriam LAU asked whether the Judiciary Administration had made an assessment on whether the proposed reforms would achieve the objectives of improving cost-effectiveness of the civil justice system and reducing litigation costs.

46. JA responded that all the 150 recommendations in the Final Report were made with a view to achieving the objectives of CJR, and the recommendations had been generally supported by those who responded in the consultation exercise, including the two legal professional bodies. The reforms had now progressed to the implementation stage whereby the recommendations in the Final Report would be implemented through the legislative amendments proposed in the Consultation Paper.

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47. Ms Miriam LAU maintained that the Judiciary Administration should make an assessment on whether the proposed reforms would meet the objectives of CJR. Ms Emily LAU expressed agreement with Ms Miriam LAU that it was important to assess whether the proposed reforms would result in savings in litigation costs and time.

48. The Chairman said that when the Panel discussed the IRCP a few years back, members had also raised the question of whether the proposed reform measures would bring about reduction in civil litigation costs. It was pointed out then that there was no clear evidence so far to show that the civil justice reform introduced in England and Wales in 1998 had resulted in noticeable drop in litigation costs. Moreover, while the introduction of pre-action protocols could result in a drop in the number of litigations, it would also lead to a front-end loading of costs, making litigation more expensive. The Chairman requested the Clerk to provide members with information on the relevant past discussions of the Panel on this point when the subject was next discussed.

Clerk

VII. Political affiliation of judges

(LC Paper No. CB(2)2517/05-06(05) – LegCo question raised by Hon MA Lik at the Council meeting on 24 May 2006 and the Judiciary's reply

LC Paper No. CB(2)2443/05-06(01) – Guideline in relation to part-time Judges and participation in political activities issued by the Chief Justice on 16 June 2006

LC Paper No. CB(2)2517/05-06(06) – Paper provided by the Judiciary Administration on "Political affiliation of judges"

LC Paper No. CB(2)2281/05-06(01) – Submission from the Civic Party on “Judicial Independence and Freedom of Association – Criteria and balance”

LC Paper No. CB(2)2500/05-06(01) – Submission from Hon LI Kwok-ying on "Principles of the independence and impartiality of the Judiciary"

LC Paper No. CB(2)2530/05-06(01) – Letter from the Law Society of Hong Kong on "Part-Time Judges and Participation in Political Activities"

LC Paper No. CB(2)2530/05-06(02) – Submission from JUSTICE, The Hong Kong Section of the International Commission of Jurists on "Affiliations of Judges")

49. The Chairman said that as the Civic Party was involved in the matter of which she was a member, and the agenda item was proposed by the Deputy Chairman, Mr LI Kwok-ying, both of them had agreed not to preside over the discussion of this item. The Chairman invited the Panel to elect another member to be the Presiding Member for the discussion of this item. Ms Miriam LAU was elected as the Presiding Member for this item.

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50. JA briefed members on its paper entitled "Political affiliation of judges". Members noted that there were two broad categories of judges in the Judiciary, namely full-time judges and part-time judges (i.e. Recorders of the High Court and External Deputy Judges at various levels of Court). Full-time judges were on the Judiciary's establishment, while part-time judges were not. Part-time judges sat for only limited periods and were either in full-time practice in the legal profession or retired Judges. The Guide to Judicial Conduct which provided that judges should refrain from membership in or association with political organisations or activities applied to full-time judges. As indicated in the "Guideline in relation to part-time Judges and participation in political activities" issued by the Chief Justice on 16 June 2006, the Judiciary did not consider it objectionable for a part-time judge simply to be a member of a political party, though different considerations would apply to more active participation by a part-time judge in political activities.

51. Mr LI Kwok-ying highlighted the following points made in his submission –

(a) it was of fundamental importance that judicial independence and impartiality be maintained and seen to be maintained. Judicial independence was not an entitlement of judges, but a right belonging to the citizen;

(b) given that the duty of both full-time and part-time judges was the same, i.e. to exercise civil and criminal jurisdictions as conferred by law, there was no reason for part-time judges not to be subject to the same code; and

(c) in the Guideline issued by the Chief Justice on political affiliation of part-time judges, it was recognised that certain restrictions had to be imposed on freedom of association so as to ensure that judicial independence and impartiality were maintained. As far as public interest was concerned, judicial independence should prevail over freedom of association.

52. Ms Audrey EU presented the salient points of the submission from the Civic Party as follows-

(a) internationally recognised principles of judicial independence and impartiality reaffirmed that judges enjoyed the same rights and freedom as ordinary people, including the freedom of association;

(b) a proper balance should be struck between judicial independence and impartiality on the one hand and freedom of association on the other by drawing a distinction between political membership and other types of political activities, and between full-time judges and part-time judges;

(c) there were many differences between full-time judges and part-time judges, which explained why they should be subject to different

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restrictions in respect of political affiliation. A full-time judge enjoyed security of tenure and was expected never again to return to private practice as a barrister or a solicitor, whereas a part-time judge would only sit as a judge for four weeks in any given year and his full-time occupation was practising in the legal profession. Moreover, unlike a full-time judge, a part-time judge could vote in the elections of the legal functional constituency of the Legislative Council and of the Election Committee constituted under the Chief Executive Election Ordinance;

(d) the public's right to a fair hearing was protected by the common law principles as to when a judge should disqualify himself from sitting in a particular case, which applied to both full-time and part-time judges; and

(e) as the Judiciary was independent of both the executive and the legislature, and the Chief Justice had already issued a Guideline in relation to the political activities of part-time judges, neither the executive nor the legislature should further interfere in the matter.

53. Mr Philip DYKES of the Bar Association informed members that according to the feedback he had received from members of the Bar Association so far, the Guideline issued by Chief Justice in relation to part-time judges was considered reasonable and appropriate. He said that it would be disproportionate to place further restrictions on part-time judges, having regard to the fact that serving as a part-time judge was a form of public service which should be encouraged, and that it was a feature of our system that the Judiciary could rely on the barrister and the solicitor professions to provide competent, fair and impartial judges.

54. Mr DYKES further said that he did not see any actual conflict between political membership and judicial independence. He added that protection of the right to a fair hearing was afforded by the established legal principles regarding bias, as recently updated by the English Court of Appeal in Locabail Ltd. v. Bayfield Properties (2000), which provided for the disqualification of a judge from sitting where there was actual, presumed or apparent bias.

55. Mr Ruy BARRETTO of JUSTICE highlighted the following points in JUSTICE's submission –

(a) the Guideline promulgated by the Judiciary in relation to part-time judges had struck the right balance between the principle of judicial impartiality on the one hand, and the principles of freedom of association and independence of the judiciary/separation of power on the other;

(b) the principle of separation of power should be respected. There should be no further interference from the legislature on the guidelines on judicial conduct formulated by the Judiciary; and

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(c) a general ban on persons from taking up part-time judicial appointments on the basis of their political beliefs was unnecessary and discriminatory. Instead of a general ban on political membership across-the-board, the proper approach to ensuring judicial impartiality was to apply the legal test on bias in a given case, which provided that a judge should be disqualified from sitting if the circumstances were such as would lead a reasonable, fair-minded and well-informed observer to conclude that there was a real possibility that the judge would be biased.

56. Mr LAW Yuk-kai of the Hong Kong Human Rights Monitor agreed that as far as political affiliation was concerned, part-time judges should not be subject to the same restrictions as full-time judges, as part-time judges were full-time legal practitioners and did not enjoy the security of tenure of full-time judges. He further said that the Guideline issued by the Judiciary in relation to the political affiliation of part-time judges was reasonable and had taken due consideration of the normal practice in other common law jurisdictions.

(*Post-meeting note*: The submission from the Human Rights Monitor was issued to members vide LC paper No. CB(2) 2578/05-06(03) on 27 June 2006.)

57. Referring to Annex B to the Judiciary Administration's paper, Mr Jasper TSANG sought confirmation on his understanding that full-time judges in all the three overseas jurisdictions mentioned in Annex B had to sever all ties with political parties, and that this requirement did not infringe the right to freedom of association.

58. JA responded that paragraphs 76 and 77 of the Judiciary's Guide to Judicial Conduct, which was promulgated by the Chief Justice having regard to all the relevant considerations, had set out clearly the guidelines concerning political affiliation for full-time judges.

59. Mr Jasper TSANG said that the information provided by the Judiciary Administration on judicial participation in political activities in overseas jurisdictions (i.e. Annex B) did not show unequivocally that part-time judges in other jurisdictions were not subject to the same guidelines on political affiliation as their full-time counterparts. In the case of Canada and Australia, the relevant guidelines did not expressly address the position of part-time judges. As for England and Wales, he pointed out that paragraph 3.7 of the Guide to Judicial Conduct stated that "the guidance applies to fee-paid as well as full-time and part-time judges", which seemed to be at odds with the Judiciary Administration's claim, in paragraph 2 of Annex B, that fee-paid judges was the equivalent of part-time judges.

60. JA responded that the information as set out in Annex B was based on the Judiciary's understanding. She added that it was the Judiciary's understanding that part-time judges in UK included fee-paid as well as non-fee-paid judges.

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61. Ms Margaret NG said that to her understanding, fee-paid judges in England and Wales included part-time judges such as Recorders and Deputy Judges. She further said that the guidance which was said to be applicable to "fee-paid as well as full-time and part-time judges" in paragraph 3.7 referred to the guidelines on disqualification of a judge from hearing a case, rather than the ban on political membership.

62. Mr Albert HO said that he concurred that there was no need to subject part-time judges to the same restrictions in respect of political activities as full-time judges, as there was a world of difference between them.

63. Mr CHAN Kam-lam, however, said that despite their differences, full-time judges and part-time judges exercised the same judicial power. Part-time judges should therefore be subject to the same code of conduct applicable to full-time judges.

64. Ms Margaret NG said that the fact that full-time judges and part-time judges exercised the same judicial power meant that they should be subject to the same rules on disqualification from sitting, not the same restrictions on political activities. In many jurisdictions similar to Hong Kong, there were no rules preventing part-time judges from joining political parties. She further said that the Judiciary had already issued its own guidelines in relation to part-time judges and the Panel should not become a vehicle for interference with the independence of the Judiciary.

65. Mr LI Kwok-ying said that as the terms of reference of the Panel was, inter alia, to monitor policy matters relating to the administration of justice and legal services, he saw no reason why the issue could not be discussed by the Panel. He added that the issue should be further discussed at another meeting so as to allow more time for discussion.

66. Ms Margaret NG cautioned against the legislature overstepping the line and pressurising the Judiciary over its internal guidelines on the political affiliation of judges.

67. Mr CHAN Kam-lam said that there was no question of the legislature pressurising the Judiciary. He added that if there were problems with the system, members should raise their concerns.

68. Due to time constraint, Ms Miriam LAU suggested that the issue should be further discussed at another meeting to be scheduled.

(*Post-meeting note*: Mr LI Kwok-ying wrote to the Chairman on 27 June 2006 requesting that the issue be further discussed at another meeting (LC Paper No. CB(2) 2612/05-06(01)). As agreed by members, the item had been scheduled for discussion at the meeting on 24 July 2006.)

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VIII. Any other business

69. There being no other business, the meeting ended at 7:45 pm.

Council Business Division 2
Legislative Council Secretariat
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