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Report of the Panel on Administration of Justice and Legal Services for submission to the Legislative Council

PURPOSE

The report gives an account of the work of the Panel on Administration on Justice and Legal Services during the 2005-2006 Legislative Council (LegCo) session. It will be tabled at the Council meeting on 12 July 2006 in accordance with Rule 77(14) of the Rules of Procedure of the Council.

THE PANEL

2. The Panel was formed by a resolution passed by the Council on 8 July 1998 and as amended on 20 December 2000 and 9 October 2002 for the purpose of monitoring and examining Government policies and issues of public concern relating to administration of justice and legal services. The terms of reference of the Panel are in **Appendix I.**

3. The Panel comprises eight members, with Hon Margaret NG and Hon LI Kwok-ying elected as Chairman and Deputy Chairman of the Panel respectively. The membership of the Panel is in **Appendix II**.

MAJOR WORK

Matters relating to the Judiciary

Budgetary arrangement for the Judiciary

4. In the last session, the Panel was concerned that the savings measures introduced by the Judiciary to cope with budgetary constraints since 2003-2004 had given rise to problems in the face of increasing workload, i.e. the lengthening of waiting times at all levels of court. The Panel considered that the Judiciary's budgetary arrangement should be reviewed to build in clearer institutional safeguards to ensure that judicial independence was not subject to executive influence, and that the Judiciary was provided with adequate resources for the proper administration of justice. The Panel had made a number of suggestions for the consideration of the Administration and the Judiciary, such as there should be a general rule against reduction of the Judiciary budgetary provision and the Judiciary should have autonomy to determine its budget based on objective yardsticks.

5. The Administration did not agree to members' suggestion that there should be a general rule or practice against reduction of the Judiciary's budgetary provision, as the Administration could not rule out the need for downward adjustments to the Judiciary's funding provision having regard to overall economic constraints.

6. However, the Administration agreed to adopt a revised budgetary arrangement for the Judiciary's draft Estimates for 2006-2007. Under the revised arrangement, the Judiciary had submitted to the Administration its resource requirements for 2006-2007 in August 2005, prior to the Administration drawing up the operating expenditure envelope for the Judiciary. The Judiciary considered that the revised budgetary arrangement was working satisfactorily, and the Administration was agreeable to extending the revised arrangement as a standing practice for the coming Estimates.

7. The Panel requested the Administration and the Judiciary to consider whether there was further scope to improve the budgetary arrangement for the Judiciary, such as to consider the Panel's earlier suggestion that the Judiciary should have autonomy to determine its budget on the basis of some objective yardsticks or predetermined formulae. Both the Administration and the Judiciary advised the Panel that they would adopt an open mind on any suggested measures within the parameters of the Basic Law. However, as the revised budgetary arrangement had just been in place and had worked satisfactorily, the situation would be closely monitored before they would consider whether any further measures were necessary.

Staffing implications arising from the implementation of the Interception of Communications and Surveillance Bill

8. The Panel held a joint meeting with the Panel on Security to discuss the staffing implications arising from the implementation of the Interception of Communications and Surveillance Bill (the Bill). Members noted that under the proposed regime, the authority for authorising all interception of communications and the more intrusive covert surveillance operations would be vested in a member of a panel of judges, consisting of three to six Court of First Instance (CFI) judges. Moreover, a Commissioner on Interception of Communications and Surveillance (the Commissioner) would be appointed as an independent oversight authority to oversee compliance by law enforcement agencies and their officers with the relevant requirements. The Commissioner was proposed to be a sitting or retired judge not below the level of a CFI judge.

9. The Panel noted that apart from non-directorate posts, the following directorate posts would be required –

(a) two posts of CFI judges (D8 level) given the impact on judicial resources arising from judicial authorisation and the oversight authority; and

(b) one Principal Executive Officer (D1 level) to serve as the Secretary of the Secretariat for the Commissioner.

10. Some members were concerned whether the additional manpower proposed for the Judiciary would be sufficient to cater for the actual workload after the statutory regime came into operation. The Administration assured members that the situation would be closely monitored, and any additional resources required would be acquired in accordance with the normal procedures. Some members stressed that the panel of judges and the oversight authority should be completely independent of the Administration, including their office accommodation. The Administration advised that the panel of judges and their supporting staff would be accommodated in the Judiciary. A suitable office independent from other parts of the Administration was being identified for the Commissioner and his supporting team. Some members suggested that the Secretariat should be filled by non-civil service staff, so as to maintain the independence of the Secretariat for the Commissioner. The Administration explained that given the sensitive nature of the Secretariat's work and the limited prospect of career development within such a small organisation, it was appropriate for it to be staffed by civil servants.

11. The proposed creation of the three directorate posts was endorsed by the Establishment Subcommittee on 14 June 2006 for submission to the Finance Committee on 7 July 2006.

Civil Justice Reform

12. The Working Party on Civil Justice Reform (CJR), which was established by the Chief Justice, published its Final Report on 3 March 2004 with a total of 150 recommendations. The Working Party recommended that the proposed reforms should be implemented by way of amendments to the Rules of the High Court rather than by adopting an entirely new procedural code along the lines of the Civil Procedure Rules 1998 of the English system. The Chief Justice had accepted the recommendations made in the Final Report, and established a Steering Committee on CJR to take overall charge of the implementation of the recommendations pertaining to the Judiciary.

13. On 12 April 2006, the Steering Committee published a Consultation Paper on proposed legislative amendments for the implementation of the CJR for public consultation for three months. The Panel noted that whilst the proposed legislative amendments related primarily to the recommendations in the Final Report, they had also taken into account the developments and various other matters deliberated by the Steering Committee since the publication of the Final Report. In the light of the comments received, the Steering Committee would revise and refine the draft legislation as appropriate. The Judiciary Administration would report back to the Panel on the views received and the proposed way forward in due course.

14. The Judiciary Administration advised the Panel that as the practice and procedure in civil proceedings in the District Court largely mirrored those in the High Court, and most of the 84 CJR recommendations requiring amendments to subsidiary legislation under the High Court Ordinance were applicable to the District Court, similar amendments were proposed to be introduced to the District Court. Some

members expressed concern about the need to introduce similar amendments to the District Court in the same legislative amendment exercise, as the consultation exercise conducted on the CJR in the past mainly focused on the review of the civil rules and procedures of the High Court. Some members requested the Judiciary Administration to make an assessment on whether the proposed reforms would achieve the objectives of improving cost-effectiveness of the civil justice system and reducing litigation costs.

Political affiliation of judges

15. The Guide to Judicial Conduct issued by the Judiciary in October 2004 provided that a judge should refrain from membership in or association with political organizations applied to full-time judges. The issue of whether part-time judges (i.e. Recorders of the High Court and External Deputy Judges at various levels of Court) should have political affiliation had aroused public concern. On 16 June 2006, the Chief Justice issued a guideline in relation to part-time judges and participation in political activities. In gist, it was not objectionable for a part-time judge simply to be a member of a political party. However, different considerations would apply to more active participation by a part-time judge in political activities. The following activities were considered unacceptable for a part-time judge –

(a) active participation in the activities of a political party. Examples included holding office in the party, membership of its committees, acting as spokesman, participating in fund raising and recruitment of members for the party; and

(b) standing as a candidate or nominating or campaigning for candidates (in either case whether the candidature is sponsored by a political party or otherwise) for elections to the District Council, the LegCo, the Election Committee constituted under the Chief Executive Election Ordinance and the office of Chief Executive.

16. At its meeting in June 2006, the Panel received views from a number of deputations including political parties and legal professional bodies. Some deputations considered that public confidence in the Judiciary and administration of justice would be undermined if part-time judges were allowed to be members of political parties. 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 of conduct applicable to full-time judges. Moreover, as far as public interest was concerned, judicial independence should prevail over the freedom of association.

17. Some other deputations, however, pointed out that 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. In many jurisdictions similar to Hong Kong, there were no rules preventing part-time judges from joining political parties. The common law principles as to when a judge

should disqualify himself from sitting in a particular case applied to both full-time and part-time judges. As the Judiciary was independent of both the executive and the legislature, it was important that the Panel should not become a vehicle for interference with the independence of the Judiciary. Following the issuance of the guideline in relation to part-time judges and participation in political activities, the matter should be closed.

Matters relating to the policy portfolio of the Department of Justice

Establishment of a third law school

18. In the last session, the Panel discussed the establishment of the School of Law of The Chinese University of Hong Kong (CUHK) and the likely impact of such a development on the provision of legal services. The Panel noted that it was CUHK's firm target to offer the Bachelor of Laws (LLB) programme in the academic year 2006-2007, and a planned target to offer the Postgraduate Certificate in Laws (PCLL) programme by 2007-2008.

19. In April 2006, the Panel was briefed on the progress of the establishment of the School of Law of CUHK, with particular reference to the advisory and governance structure of the School, progress of appointment of academic staff, details of the law programmes, and physical accommodation for the School's undergraduate and post-graduate programmes.

20. The Panel noted that when the Steering Committee on Legal Education and Training (replaced by the Standing Committee on Legal Education and Training set up under the Legal Practitioners Ordinance (Cap. 159) in August 2005) was consulted in March 2004 on the proposed establishment of a new law school by CUHK, differing views were expressed by its members on whether it would be beneficial to professional legal education to establish a third PCLL course, and there was concern about the commencement date of the PCLL at CUHK. After thorough deliberation, members of the Standing Committee unanimously agreed in March 2006 that the PCLL at CUHK should commence in 2008, instead of 2007. The undergraduate and post-graduate programmes would commence in September 2006 as originally planned.

21. One of the Panel's concerns was the English standard of law students. The Panel was advised that the Law School had introduced a quality assurance mechanism to ensure that its students were properly assessed to have attained a certain standard for graduation. In addition, the Standing Committee on Legal Education and Training had recommended that all students must achieve a result of Band 7.0 or better in the International English Language Testing System (IELTS) for entry into the PCLL programme, so as to safeguard the English standard required for entry into PCLL.

22. Some members expressed concern that the undergraduate programme of LLB would be delivered on campus in Shatin, whereas the post-graduate programmes

would be delivered at the Graduate Law Centre (GLC) in Central. They pointed out that the separation of the teaching venues would hinder interaction between the undergraduates and the post-graduates, which was an integral part of a desirable learning environment. In addition, it would be very difficult for CUHK to build up an identity for its law school. The Panel was assured that many activities of the post-graduate programmes would be conducted on the campus in Shatin. Shuttle services between Shatin and Central would be provided for students in different programmes, if necessary. Courses and activities could also be organised at the weekend so as to facilitate interaction between students and teachers of different programmes.

Professional Indemnity Scheme of the Law Society of Hong Kong

23. The Panel had closely monitored the progress of the review on the Professional Indemnity Scheme (PIS) conducted by the Law Society. In 2001, the Law Society undertook to review the PIS and report to LegCo on what insurance arrangements would be in the best interests of the legal profession and the public. The main criticism of the PIS was that it made solicitors the insurers of last resort for each other and for unlimited amounts in the event of insurer insolvency. In April 2004, the Law Society consulted members of the profession on the two options proposed by the consultant commissioned by the Law Society, namely, a Master Policy Scheme and a Qualifying Insurers Scheme (QIS). Members of the Law Society voted in favour of a QIS at an Extraordinary General Meeting (EGM) in November 2004.

24. The Administration's position was that any new scheme to replace the existing PIS should be in the public interest. A prime concern was the manner in which a new scheme would deal with an insolvent insurer. Although the Law Society had explored ways of providing, under the QIS, some protection to consumers against insurer insolvency, this was not possible. The Panel considered that the new scheme to be adopted by the Law Society should provide reasonable and not maximum protection to consumers. As the QIS was a reasonable solution, the Administration should not object to the implementation of the Scheme. The Panel requested the Administration to be more proactive in its discussion with the Law Society on the implementation of the QIS.

25. The Administration advised the Panel in March 2006 that it supported in principle the implementation of the QIS, on the condition that the Law Society should continue to give adequate consideration to the interest of consumers when finalising the details of the new scheme, and proactively publicise and explain the new scheme through the media and the Consumer Council. Since then, the Law Society and the Administration had been engaged in a series of working sessions to finalise the draft QIS Rules, with a view to putting the entire QIS proposal as embodied in the QIS Rules to its members for approval at an EGM on 27 April 2006.

26. The Law Society had subsequently advised the Panel that its members voted by a large majority not to replace the existing PIS by a QIS at the EGM. The Council of the Law Society at its meeting on 16 May 2006 resolved to set up a Professional

Indemnity Scheme Review Working Party to identify any deficiencies in the existing scheme, consider how they might be remedied, and make appropriate recommendations to the Council. Meanwhile, arrangements would be made to negotiate with insurers for renewal of the existing cover. The Panel had requested the Law Society to keep members informed of further developments in due course.

Limited liability for professional practices

27. The Administration advised the Panel in March 2006 that it had considered proposals for the limitation of liability to pay compensation put forward by organisations representing various sectors including the legal, accounting and medical professions. The proposals included the introduction of proportionate liability, either generally or in some modified form; the introduction of limited liability partnerships; and the introduction of caps on the amount of compensation to the awarded. The Administration considered that the proposals to impose proportionate liability and to introduce caps on compensation awarded would depart from the long held common law principle that the full cost of wrong doing should be borne by the wrong doer. All the proposals would have the effect, to a greater or lesser extent, of shifting liability from the professional service providers to the consumers. As the professional sectors had been given recognition and a degree of protection under the law, this must be balanced against the need to safeguard the interests of consumers and service users. The Government had concluded that it would not at this time consider upsetting the balance. No further studies would be carried out into the proposals for limitation of liability during the remainder of the Chief Executive's term of office.

28. The Panel and the two professional bodies had expressed great disappointment at the Administration's decision. The Panel pointed out that under the existing liability framework, partners in professional practices had to bear the risk of having unlimited liability for the consequences of another partner's negligence. As Hong Kong had developed into a global financial and business centre, the increasingly litigious environment had increased the risk of firms being wiped out by catastrophic claims against them. Hong Kong's liability framework had not evolved in step with its economic and financial developments. In addition, Hong Kong was also trailing behind other sophisticated jurisdictions, such as Australia, Bermuda, Canada, Singapore, the United Kingdom and some European Union countries, in implementing professional liability reform. As professional liability reform had significant implications on Hong Kong's competitiveness as a leading international financial centre in the Asia-Pacific region, the Panel agreed that the views expressed by the Panel should be referred to the Financial Secretary for consideration.

29. On 16 May 2006, the Secretary for Financial Services and the Treasury gave a reply on behalf of the Financial Secretary to the Panel, reiterating the Administration's position in paragraph 28 above.

Policy relating to recruitment of law draftsmen

30. In the course of discussing the work of the Law Drafting Division of the Department of Justice (DoJ), the Panel expressed concern about the recruitment of draftsmen who were experienced and competent in drafting legislation in English. The Panel was given to understand that in line with the language proficiency requirements for entry to the Civil Service, new appointees to the Government Counsel grade on civil service terms were required to obtain, inter alia, a Grade E or above in Chinese Language in the Hong Kong Certificate of Education Examination or equivalent. As members of that grade, law draftsmen of DoJ were subject to the same recruitment criterion. The Panel had expressed dismay at the application of the Chinese language proficiency requirement to law draftsmen of the Government Counsel grade. It was clearly not conducive to attracting the best available drafting talent and maintaining a high quality of legislative drafting as far as the English text was concerned, with the English language being the *lingua franca* of the common law. The Panel considered that DoJ should recruit the most suitable candidates as law draftsmen, including Anglophone candidates who might not meet the Chinese language proficiency requirement.

31. While the Panel noted that some retirees had been re-employed by DoJ as Non-Civil Service Contract (NCSC) staff to work in the Law Drafting Division, they did not consider that this was a wholly satisfactory solution to address the problem. As the terms and conditions of service for NCSC staff were usually less favourable than those applicable to civil servants in comparable civil service ranks, they would not be as attractive to candidates of high calibre who might otherwise consider applying for work in the Law Drafting Division, other than retirees not looking for long term prospects.

32. The Panel requested the Administration to review the policy relating to recruitment of law draftsmen so as to facilitate and not to preclude the engagement or development of draftsmen with expertise in legislative drafting in the English language, e.g. to consider relaxing the requirement in respect of Chinese language proficiency for appointment of law draftsmen in DoJ. DoJ agreed to conduct a review of the present arrangements and would consult the Civil Service Bureau in the process.

Recovery agents

33. In its previous discussions on legal aid services, the Panel noted that a number of organisations had advertised services under a "no win, no charge" basis. These organisations, commonly known as recovery agents (RAs), provided services to help clients handle their claims for accident compensation in return for a fee as a percentage of the recovered damages.

34. The Panel held a meeting in November 2005 to discuss the issue with the Administration and the legal profession. The Panel expressed grave concerns about the legality of the operation of RAs and the legality and professional ethics issues of

lawyers working with RAs. The Administration advised the Panel that at common law, it was both a civil wrong and a criminal offence to assist or encourage a party to litigation in circumstances that amounted to "maintenance" or "champerty". Under the Legal Practitioners Ordinance (Cap. 159) and the Law Society's Guide to Professional Conduct, a solicitor should not act in contentious proceedings on the basis of a contingency fee arrangement. The Bar's Code of Conduct also prohibited barristers from accepting any brief or instructions on a contingency fee basis.

35. In response to the request of the Panel for the Administration to consider measures to regulate RAs, including instituting prosecution and introducing legislation, the Administration advised that –

(a) measures had been implemented to increase the public awareness of the inappropriate activities of RAs, including putting up of posters or notices in the relevant Government departments and hospitals;

(b) the Law Society had supplied DoJ with information concerning advertisements on the internet and the local media relating to a number of RAs. The Police were conducting investigations of certain suspected cases involving illegal activities of RAs. If evidence of criminal acts was uncovered, DoJ would consider bringing prosecution proceedings; and

(c) it would be more appropriate to see whether the practice of illegal RAs could be stopped by prosecution before considering any legislative amendments. For the time being, a case for legislation had not been made out.

36. The Administration also advised the Panel that the current developments in the United Kingdom concerning the statutory framework for the regulation of RAs, and the outcome of the consultation on conditional fees conducted by the Law Reform Commission might have a bearing on the policy regarding RAs. The Administration would continue to monitor the situation in Hong Kong before deciding the way forward.

<u>The case of Mr Michael WONG Kin-chow</u>

37. The Panel held a special meeting on 3 February 2006 to discuss the decision of the Director of Public Prosecutions (DPP) not to prosecute Mr Michael WONG Kin-chow, a retired judge of the Court of Appeal of the High Court. The investigation of Mr WONG by the Independent Commission Against Corruption (ICAC) centred on the issue of whether Mr WONG had, on three occasions, deliberately made improper applications to the Government for reimbursement of Leave Passage Allowance (LPA), in respect of air-trips which he and his family had made between 1998 and 2001.

38. The Panel noted that DPP had decided that a prosecution of Mr WONG for an offence under the Prevention of Bribery Ordinance could not be justified on the following grounds –

(a) the materials made available to the prosecution by Mr WONG showed that Ms Rosaline WONG, Mr WONG's daughter, had made the travel arrangements for her parents, and that Mr WONG had duly reimbursed Miss WONG in kind for the expenses she had incurred on his behalf by paying for her shopping expenses (i.e. ladies' jewellery and handbag) after he had received reimbursement from the Government;

(b) two senior lawyers in the area of commercial crime and corruption, one in Hong Kong, the other in London, had each separately advised DPP not to prosecute Mr WONG. After considering their opinions, DPP concluded that criminality could not be established to the required standard on the evidence as a whole, since it could not be proved that Mr WONG had acted dishonestly in relation to the air tickets or in relation to his claims for reimbursement of LPA on the three occasions between 1998 and 2001. The Secretary for Justice concurred with DPP's conclusion; and

(c) it was the duty of prosecutors to ensure that only meritorious cases based on sound and solid evidence would proceed to trial so as to defend the rights of the suspects.

39. Some members expressed concern whether a third party had paid for the air tickets referred to in Mr WONG's claims for reimbursement of LPA. The Administration explained that there was no evidence to prove that the air tickets concerned were given to Mr WONG as a gift by a third party. While DoJ had exceptionally given more information than normal on the reasons for the decision not to prosecute in this case, DoJ would not disclose information concerning individuals other than Mr WONG. The disclosure of the information would not be fair to those individuals, since it would facilitate a public trial of the case without the protection afforded by the criminal justice process.

40. Some members raised other queries. First, although Mr WONG had submitted claims to the Government for payment of LPA in 1998, 2000 and 2001 respectively, he had not actually made reimbursements to his daughter until December 2000 and 2001. In addition, in respect of the 1998 trip, the reimbursement was made more than two years later. Second, the ladies' jewellery and handbag paid for by Mr WONG could have been bought for someone other than Miss WONG such as Mrs WONG. Third, given the position of Mr WONG and the fact that public money was involved, it was dubious of him to have made his travel arrangements in such a haphazard and undisciplined manner.

41. The Panel expressed concern about the implications of Mr WONG's case on the integrity of the existing system of payment of LPA by the Government to eligible

civil servants. The Administration was requested to consider whether any improvement to the system was necessary in the light of Mr WONG's case. The Civil Service Bureau had subsequently advised the Panel that the existing system had struck a reasonable balance between administrative efficiency and the need to ensure proper disbursement of the allowance by the Government. In the light of members' concern, the Bureau would consult the parties concerned, including the Treasury and the ICAC, on whether any improvement to the existing system on payment of LPA to eligible civil servants was warranted.

Matters relating to the policy portfolio of the Administration Wing

Reciprocal enforcement of judgments in commercial matters between the HKSAR and the Mainland

42. The Panel was first briefed by the Administration in December 2001 on the suggestion of establishing an arrangement on reciprocal enforcement of judgment (REJ) with the Mainland (the Arrangement). Under the initial proposal, the Arrangement would cover only money judgments given by a court of either the Mainland (at the Intermediate People's Court level or higher) or the HKSAR (at the District Court level or higher) exercising its jurisdiction pursuant to a valid choice of forum clause contained in a commercial contract. Following a consultation exercise conducted by the Administration, it reported to the Panel in May 2002 that the majority of the respondents indicated support to the initial proposal. The Administration then proceeded to discuss with the Mainland authorities on details of the proposed arrangement. The Panel received progress reports from the Administration on two occasions in 2004.

43. The Panel was briefed on the latest developments in the current session. Pursuant to the discussions with the Mainland authorities and having regard to members' views and concerns, the Administration had come up with a revised proposal which would apply to money judgments of commercial cases made pursuant to a valid exclusive choice of court agreement in writing. A comparison of the initial proposal and the revised proposal was set out below –

(a) choice of court - the revised proposal was more restrictive in that it would only apply if the parties concerned expressly agreed in writing to designate a court of the Mainland or the HKSAR to have exclusive jurisdiction for resolving any dispute;

(b) finality – a set of special procedures were in place under the revised proposal to address the common law requirements of finality which would be set out clearly in the Arrangement. The Administration would provide in the implementing legislation that only Mainland judgments which were considered final in accordance with the special procedures would be enforced in Hong Kong; and

(c) level of courts – the Administration had accepted the Mainland side's counter-proposal that the Arrangement should also cover a small number of Basic Level People's Courts designated to handle foreign-related civil and commercial cases. Only about one percent out of the about 3 100 Basic Level People's Courts was so designated.

44. On members' suggestion that certain better developed cities in the Mainland having proven trade or economic activities with the HKSAR should initially be selected as "trial points" for the implementation of the Arrangement, the Administration advised that the Mainland authorities did not agree to the suggestion for a number of reasons. First, the Arrangement would be implemented through the promulgation of regulations or judicial explanation which must be applied across all provinces in the Mainland. It would not be feasible or practical to exclude certain parts of the Mainland from the uniform application of the regulations or judicial explanation. Second, there was little established or objective basis for selecting "trial points". Third, areas selected as "trial points", as compared with other areas, might attract more foreign investments, which might bring about or reinforce uneven regional development in the Mainland. Fourth, the "trial point" arrangement might also exacerbate forum shopping, i.e. parties might seek to adjudicate their contractual disputes by the courts in areas selected as "trial points".

45. The Panel noted that the Administration would reach agreement on the Arrangement with the Mainland as soon as possible. The Arrangement would only become effective when the HKSAR had completed the relevant legislative procedures and the Mainland had promulgated a judicial interpretation to give effect to the Arrangement.

Pilot Scheme on Mediation of Legally Aided Matrimonial Cases

46. A one-year Pilot Scheme on Mediation of Legally Aided Matrimonial Cases (the Scheme) was launched by the Legal Aid Department (LAD) on 15 March 2005. The Scheme aimed to establish whether extending funding to cover mediation of legally aided matrimonial cases was justified on grounds of cost-effectiveness and the full implications. In May 2006, the Administration provided an interim progress report to the Panel on the Pilot Scheme.

47. The Panel expressed concern about the low take-up rate and success rate, as only 194 out of 4 781 cases had expressed interest to attempt mediation. Only 68 out of the 194 cases were referred to mediators, of which 26 completed mediation with full or partial agreement, and 23 were still in process. The Administration explained that it was estimated that about 120 cases would use the mediation service under the Pilot Scheme. This was because there was a large number of cases for which mediation was not suitable (i.e. domestic violence/child abuse was involved), not necessary (i.e. there was no real issue in dispute), or not possible (i.e. aided person/opposite party was a mental patient, or the opposite party could not be located/refused to participate). Another possible factor affecting the take-up rate of Pilot Scheme was the Judiciary's Pilot Scheme on Financial Dispute Resolution

(FDR), which involved the reform of ancillary relief procedures in matrimonial proceedings. The FDR scheme appeared to have facilitated settlement of quite a number of cases at an early stage.

48. The Panel noted that the Administration would examine the propriety of turning the Pilot Scheme into a standing feature of legal aid services, and evaluate the resource implications of providing legal aid for mediation of matrimonial cases, including cost and the duration for completing the legally aided cases, as well as the operational and legislative requirements involved.

Criminal legal aid fees system

49. The Panel received submissions concerning criminal legal aid fees from the Hong Kong Bar Association and the Law Society of Hong Kong in April and June 2005 respectively. The two legal professional bodies considered that the current system and level of remuneration of lawyers who undertook criminal legal aid work was unsatisfactory and unrealistically low, and urged that a comprehensive review on the remuneration system be conducted by the Administration. The Panel also noted that the Legal Aid Services Council (LASC) was in support of a review of the fees system. The Panel requested the Administration to give a substantive response to the submissions.

50. In December 2005, the Panel discussed how the matter should be taken forward. The Panel noted that the Administration was working on a mechanism to facilitate direct exchange of views with the two legal professional bodies on the subject of criminal legal aid fees system. The Panel expressed disappointment that the Administration had yet to commence the review despite the fact that it had received the submissions from the two legal professional bodies six months ago. The Panel considered that a comprehensive review of the criminal legal aid fees system should be conducted without further delay, and suggested that the Administration should set up a working group with the two legal professional bodies to take the review forward.

51. The Administration advised the Panel in May 2006 that two meetings had been held with the relevant stakeholders to discuss matters such as the principles of the review, alternatives to improve the existing system, and detailed arrangements of a possible "marked brief" system, based on a paper prepared by the Bar Association. The Administration would report to the Panel on further developments in due course.

Other issues

Imposition of criminal liability on the Government

52. The Panel formed a working group in October 2002 to study issues relating to the imposition of criminal liability on the Government or public officers in the course of discharging their public duties for contravening any legislative provisions binding on the Government. With respect to the continuing operation of Crown immunity in Hong Kong, the Panel recommended 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 arise; and

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

53. After studying the issues with the relevant bureaux and departments, the Administration reverted to the Panel on its position on imposition of criminal liability on the Government and public officers in February 2006. The Administration considered that the existing policy of not imposing criminal liability on the Government and public officers should be retained. In addition, the existing system of reporting any contraventions to the Chief Secretary for Administration (CS) had been working satisfactorily, and in the case of non-compliance with statutory requirements, public officers might face disciplinary actions according to established civil service regulations. The Administration also pointed out that in the two pioneering jurisdictions i.e. the UK and NZ, changes had been introduced on a very restrictive basis and for a limited period of time. It would not be prudent for Hong Kong to adopt the UK or NZ approach without a clear idea of the full impact of the changes arising from the proposal.

54. The Panel was not convinced that the Government and public officers should be exempt from criminal liability for contravention of statutory provisions while performing public duties. The Panel considered that all people, including public officers and private individuals, should abide by the statutes applicable to them in the same way and in all circumstances. Adopting different approaches in dealing with the issue of criminal liability was unfair and inconsistent with the principle of equality before the law.

55. The Panel was disappointed that the Administration had refused to consider following the alternative approaches adopted in the two leading common law jurisdictions, namely the UK and NZ. The Panel also considered that the Administration should adopt an open mind and make reference to the experience of non-common law jurisdictions on the issue of imposition of criminal liability on the Government and public officers.

56. The Panel expressed reservations about the transparency and effectiveness of the reporting mechanism in deterring public officers from committing contraventions. The Panel considered that the names of the public officers involved in cases of contraventions should be included in the report submitted to CS. The Panel also considered that the Administration should conduct a detailed investigation into cases of contravention of statutory requirements by the Government and public officers. Apart from taking remedial measures to terminate the contravention or avoid recurrence, any public officer identified by the investigation as personally responsible for the contravention should face disciplinary actions as appropriate.

57. The Panel concluded that in the context of regulatory offences, the issue of whether there should be Crown immunity from criminal liability was essentially a matter of policy and not a matter of constitutional or legal principle. When legislative proposals were introduced into LegCo imposing obligations which were also binding on the Government, the issue of public officers' immunity from criminal liability, if they were in breach of those obligations in discharging their public duties, should be considered on a case-by-case basis in the same way as the other policy proposals of a bill. Where a reporting mechanism was provided in lieu of criminal liability on the public officers concerned, measures should be taken to ensure the effectiveness and transparency of the mechanism by taking appropriate disciplinary action against individual officers responsible for the contravention and making public such disciplinary action. The Panel reported its deliberations to the House Committee on 7 July 2006.

Consultation papers

58. During the session, the Panel was briefed on the following consultation papers –

(a) Consultation Paper published by the Conditional Fees Sub-committee of the Law Reform Commission in September 2005;

(b) Consultation Paper published by the Hearsay in Criminal Proceedings Sub-committee of the Law Reform Commission in November 2005; and

(c) Consultation Paper issued by the Working Party on Solicitors' Rights of Audience established by the Chief Justice in June 2006.

PANEL MEETINGS

59. Between the period from October 2005 and June 2006, the Panel held a total of 14 meetings. Of these meetings, one was a joint meeting held with the Panel on Security.

Council Business Division 2
Legislative Council Secretariat
7 July 2006

Appendix I

Panel on Administration of Justice and Legal Services

Terms of Reference

1. To monitor and examine, consistent with maintaining the independence of the Judiciary and the rule of law, policy matters relating to the administration of justice and legal services, including the effectiveness of their implementation by relevant officials and departments.

2. To provide a forum for the exchange and dissemination of views on the above policy matters.

3. To receive briefings and to formulate views on any major legislative or financial proposals in respect of the above policy areas prior to their formal introduction to the Council or Finance Committee.

4. To monitor and examine, to the extent it considers necessary, the above policy matters referred to it by a member of the Panel or by the House Committee.

5. To make reports to the Council or to the House Committee as required by the Rules of Procedure.

Appendix II

Panel on Administration of Justice and Legal Services

Membership list for 2005 - 2006 session

Chairman	Hon Margaret NG
Deputy Chairman	Hon LI Kwok-ying, MH, JP
Members	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 Hon MA Lik, GBS, JP (Total : 8 members)
Clerk	Mrs Percy MA
Legal Adviser	Mr Arthur CHEUNG
Date	13 October 2005