立法會
Legislative Council

LC Paper No. CB(2)887/06-07
(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, 27 November 2006, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Hon Margaret NG (Chairman) Hon Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon Jasper TSANG Yok-sing, GBS, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Audrey EU Yuet-mee, SC, JP
Members absent	:	Hon MA Lik, GBS, JP (Deputy Chairman) Hon Emily LAU Wai-hing, JP Hon LI Kwok-ying, MH, JP
Public Officers attending	:	Item IV The Administration Department of Justice Mr Stephen WONG Deputy Solicitor General Miss Michelle TSANG Senior Assistant Solicitor General Mr Michael SCOTT Senior Assistant Solicitor General Ms Kitty FUNG Senior Government Counsel Mr Byron LEUNG Senior Government Counsel

Ms Stella CHAN
Government Counsel

Item V

Judiciary Administration

Miss Emma LAU
Judiciary Administrator

Mr Augustine CHENG
Deputy Judiciary Administrator (Operations)

Miss Vega WONG
Assistant Judiciary Administrator (Development)

Item VI

The Administration

Administration Wing, Chief Secretary for Administration's Office

Miss Elizabeth TSE
Director of Administration

Mr Benjamin CHEUNG
Director of Legal Aid

Mr William CHAN
Deputy Director of Legal Aid

Mrs Alice CHEUNG
Assistant Director of Administration

Attendance by invitation : Item IV

Hong Kong Bar Association

Mr P Y LO

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

Staff in attendance	:	Mr Arthur CHEUNG Senior Assistant Legal Adviser 2 Mrs Eleanor CHOW Senior Council Secretary (2)4

Action

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)427/06-07 - Minutes of meeting on 23 October 2006)

The minutes of the meeting held on 23 October 2006 were confirmed.

II. Information paper issued since last meeting
(LC Paper No. CB(2)388/06-07(01) - Paper provided by the Judiciary Administration on "Revised Arrangement on Claims for Leave Passage Allowance by Eligible Judges and Judicial Officers")

2. Members noted the paper issued since the last meeting.

III. Items for discussion at the next meeting and future meetings
(LC Paper No. CB(2)431/06-07(01) - List of outstanding items for discussion

LC Paper No. CB(2)431/06-07(02) - List of items tentatively scheduled for discussion at Panel meetings in 2006-2007 session

LC Paper No. CB(2)431/06-07(03) - List of follow-up actions)

Meeting on 12 December 2006

3. Members agreed to discuss the following agenda items proposed by the Administration at the next meeting to be held on Tuesday, 12 December 2006 -

(a) Development of Hong Kong as a legal services centre;

(b) Civil Justice Reform; and

(c) Implementation of a five-day week for the Judiciary.

Work plan for the Panel in 2006-2007

4. With reference to the List of outstanding items for discussion (the List) and the List of items tentatively scheduled for discussion at Panel meetings in 2006-2007 session, members discussed the work plan for the Panel in the 2006-2007 as follows -

Action

(a) Five-yearly review of the criteria for assessing financial eligibility of legal aid applicants (item 2 on the List)

The Administration had proposed to discuss the criteria for assessing financial eligibility of legal aid applicants at the Panel meeting on 26 February 2007. Members agreed that other issues relating to the legal aid such as the scope of legal aid should also be discussed and interested parties should be invited to give views at the meeting;

(*Post meeting note* : The Director of Administration was advised of the decision of the Panel on 28 November 2006.)

(b) Applicability of the laws of the Hong Kong Special Administrative Region (HKSAR) to offices set up by the Central People's Government in the HKSAR (item 1 on the List)

Mr James TO expressed dissatisfaction at the lack of progress since the item was last discussed by the Panel on 26 June 2001. Members agreed that the Administration should be requested to provide a progress report on the item. Meanwhile, the Secretariat would prepare a background brief on the previous discussions of the Panel. The Chairman said that consideration could be given to scheduling the item for discussion in the first quarter of 2007;

(*Post meeting note* : The Secretary for Constitutional Affairs was requested to provide a progress report by mid January 2007.)

(c) Juvenile justice system (item 9 on the List)

The Chairman informed members that the Administration had been requested to provide a progress report on the item before the end of December 2006. Members agreed to consider the way forward after receiving the progress report;

(*Post meeting note :* The progress report was issued to members vide LC Paper No. CB(2)765/06-07(01) on 3 January 2007.)

(d) Limited liability for professional practices (item 10 on the List)

Members noted that the Administration had replied in early 2006 that no further studies would be carried out into the proposals of limited liability during the remainder of the Chief Executive's term of office. Members agreed to consider the way forward at a future meeting;

(e) Solicitors' right of audience (item 11 on the List)

Members noted that the consultation paper issued by the Working Party

Action

on Solicitors' Right of Audience to solicit public views on whether solicitors should be granted extended right of audience in the higher courts of Hong Kong had ended on 31 August 2006. Members agreed that the Judiciary Administrator (JA) should be requested to provide information on the timetable and the approach of the next stage of work of the Working Party;

(*Post meeting note* : A letter was sent to JA by the Clerk on 28 November 2006. The Secretary to the Working Party on Solicitors' Rights of Audience gave a reply to the Panel on behalf of JA on 7 December 2006 (issued to members vide LC Paper No. CB(2)591/06-07(01) on 8 December 2006).)

(f) Enforcement of judgment in civil cases (item 14 on the List)

The Chairman advised members that letters had been sent to request the two legal professional bodies to provide relevant information to facilitate consideration of the Panel;

(g) Review of jurisdiction of the Office of the Ombudsman (item 19 on the List)

The Chairman advised members that the Ombudsman had informed the Panel that Part I of its review on the Ombudsman Ordinance (Cap. 397) would be completed in November 2006 and submitted to the Administration for consideration in the same month. Members agreed that the Administration should be requested to advise when it could discuss the review report with the Panel.

(*Post meeting note* : A letter was sent to the Director of Administration by the Clerk on 1 December 2006.)

IV. Legislative proposals

(LC Paper No. CB(2)429/06-07(01) - Paper provided by the Administration on "Reciprocal Enforcement of Judgments in Commercial Matters between the HKSAR and the Mainland"

LC Paper No. CB(2)429/06-07(02) - Paper provided by the Administration on "Domicile Bill 2007"

LC Paper No. CB(2)429/06-07(03) - Paper provided by the Administration on "Statue Law (Miscellaneous Provisions) Bill 2007")

Action

Reciprocal Enforcement of Judgments in Commercial Matters between the HKSAR and the Mainland

5. Deputy Solicitor General (DSG) said that the proposed arrangement for reciprocal enforcement of judgments in commercial matters between the HKSAR and the Mainland had been discussed by the Panel at a number of meetings. On 14 July 2006, the Department of Justice (DoJ) and the Supreme People's Court signed the "Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned" (the Arrangement). In order to implement the Arrangement, the Administration was in the process of drafting the Mainland Judgments (Reciprocal Enforcement) Bill (the Bill) with a view to introducing it into the Legislative Council (LegCo) in the current session. DSG briefed members on the main features of the Bill as set out in the Administration's paper.

6. Mr P Y LO of the Hong Kong Bar Association said that the Bar Association did not have many views before the Bill was gazetted. He suggested that the DoJ be requested to provide the following for reference of the Panel and the Bar Association -

(a) a copy of the Arrangement signed on 14 July 2006 before the introduction of the Bill; and

(b) a copy of the judicial interpretation on details of the procedures for implementing the Arrangement to be promulgated by the Supreme People's Court.

7. The Chairman said that apart from the information requested by the Bar Association, it would be useful to have information on the existing problems encountered in enforcement of the Mainland judgments in the HKSAR, the methods employed for and the success rate of enforcement of such judgments, to facilitate consideration by the LegCo when the Bill was introduced.

8. On paragraph 6(a) above, DSG undertook to provide a copy of the Arrangement which was available on the Government website to the Panel after the meeting. As regards paragraph 6(b) above, DSG said that the DoJ had yet to receive information on the judicial interpretation to be promulgated by the Supreme People's Court. He assured members that upon receipt of the information, he would consult the Panel and the two legal professional bodies.

9. Mr James TO said that if judgments given by HKSAR courts could really be enforced in the Mainland, there were merits in the Arrangement. It was important for Members to understand the pros and cons of the Arrangement before they could decide whether to support the Bill. He expressed concern that apart from the Intermediate People's Court level or above, the Arrangement also covered a small number of Basic Level People's Courts that were designated to handle foreign-related civil and commercial cases.

Action

10. Mr James TO noted that if the HKSAR courts had exclusive jurisdiction over a case, it could refuse to register a foreign judgment. In the event that both the courts of the HKSAR and the Mainland had jurisdiction over a commercial dispute case, he asked which jurisdiction would be the forum for settlement of disputes.

11. DSG explained that one of the pre-requisites for implementing the Arrangement was that the parties to a commercial contract had to come to an agreement on the choice of court, i.e. to designate either a court of the Mainland or the HKSAR to have exclusive jurisdiction for resolving disputes.

12. Mr James TO asked that in the event that Party A did not agree to the judgment made by a Mainland court on the ground that the choice of court agreement was entered into with Party B by fraud, whether the court in Hong Kong could refuse to register the Mainland judgment. He also asked that if Party A had brought the same case for re-trial by a HKSAR court, whether the judgment to be given could be enforced in the Mainland.

13. Following up the case quoted by Mr TO, the Chairman asked whether the Arrangement prohibited a party from resolving disputes in a court other than that specified in the choice of court agreement. If the choice of court agreement was rendered ineffective or considered to be ineffective because it was signed in ignorance of a fraudulent act of a party to the agreement, whether the other party could institute legal proceedings in another court. DSG said that the Arrangement did not address such issues. In the case quoted by Mr TO, if both parties to the agreement decided to institute legal proceedings against each other in the courts of different jurisdictions, notices would be served to the parties concerned. It was for them to decide what action should be taken.

14. Mr James TO asked whether reciprocal enforcement of judgments would apply in the case of parallel proceedings. DSG responded that an application for recognition and enforcement might be refused if the court of the place where enforcement was sought had made a prior judgement on the same cause of action, or where the judgement had been fully executed in another jurisdiction as in the case of an arbitral award made by an arbitration body.

15. Mr James TO said that parallel proceedings could be instituted in the courts of both jurisdictions and concluded at different times. In the event that the trial in the Mainland was concluded before the one in Hong Kong, HKSAR courts had no ground to refuse registration of the Mainland judgement. He suggested that the Bill should strike a balance between empowering HKSAR courts to refuse the registration of a foreign judgment when legal proceedings of the same case was going on in Hong Kong, and providing safeguards to prevent legal proceedings from dragging on for too long in HKSAR courts. Mr TO further said that a Hong Kong businessman might be under pressure to agree to designate a Mainland court as the forum for resolving disputes in order to secure a commercial contract with his Mainland business partner. The Bill should clearly set out the legal effect of the choice of court

Action

agreement, e.g. whether the chosen court would have sole jurisdiction for determining disputes and its judgment could be enforced in either designated courts of the Mainland or HKSAR courts.

16. The Chairman expressed concern that some parties could resort to "forum shopping" for the settlement of disputes arising from commercial contracts in order to reduce litigation costs or secure a judgment from a jurisdiction which was advantageous to their cause. As litigation costs in the Mainland courts were less costly, the Arrangement could result in fewer cases handled by the courts of the HKSAR than expected, which would impede Hong Kong from developing into a centre for legal services and dispute resolution. She asked whether the Administration had conducted an assessment on the number of Mainland judgments that would likely be enforced by the courts of the HKSAR as a result of the implementation of the Arrangement. She also asked about the measures taken to prevent "forum shopping".

17. DSG said that it had been the aim of the DoJ to develop Hong Kong as a regional centre for legal services and dispute resolution. Given the lack of information on the number of commercial dispute cases handled by Mainland courts, it was difficult to estimate the number of Mainland judgments that parties would seek to enforce in Hong Kong under the Arrangement. Chambers of commerce and trade associations had been advised to inform the legal professional bodies and the DoJ should they encounter difficulties in enforcing judgments. As regards measures to prevent "forum shopping", Article 18 of the Arrangement provided that in the event of any problem arising from the course of implementing the Arrangement or a need for amendment of the Arrangement, it should be resolved through consultation between the Supreme People's Court and the Government of the HKSAR.

18. The Chairman urged the Administration to organise meetings for the legal and judicial sectors in Hong Kong and the Mainland to discuss issues such as how to implement reciprocal enforcement of judgments and how to prevent "forum shopping". In addition, the DoJ should also assess the impact of the Bill on litigation in Hong Kong.

19. In response to the Chairman, DSG said that subject to the progress of drafting, the Bill would be introduced into the LegCo in the first quarter of 2007. The Chairman requested the DoJ to provide a written response to address the issues raised in paragraph 6, 7 and 18 above to the Panel prior to the introduction of the Bill.

DoJ

Domicile Bill 2007

20. DSG introduced the proposals in the Domicile Bill 2007 as set out in the paper. In gist, the Bill introduced a major change in the domicile of children so that it would no longer be tied to the parents' domicile. The Bill also proposed to abolish the concept of domicile of origin to make the domiciliary rules more in tune with modern conditions.

Action

21. Mr P Y LO said that the Bar Association had been consulted on the Bill. The Bar Association would give its comments, if any, after the Bill was gazetted.

22. In response to the Chairman, DSG said that the Bill had been drafted and would be introduced into the LegCo between February and April 2007.

Statute Law (Miscellaneous Provisions) Bill 2007

23. DSG said that the Statute Law (Miscellaneous Provisions) Bill 2007 sought to introduce a number of amendments to various ordinances which were technical and non-controversial in nature. Relevant parties had been consulted on amendments relating to the legal system and the responses received indicated general support for the amendments proposed in the Bill, except for the proposed amendment to section 2 of the Costs in Criminal Cases Ordinance (Cap. 492) (the Proposed Amendment).

Costs in Criminal Cases Ordinance (Cap. 492)

24. DSG said that the Proposed Amendment sought to enable the courts, in appropriate cases, to require legal or other representatives to compensate in costs a party injured as a result of unjustifiable conduct on their part. The Proposed Amendment was opposed by the Bar Association and the Law Society of Hong Kong (the Law Society).

25. Mr P Y LO said that the Bar Association had been consulted a few months ago on the proposal to empower the Court of Appeal to order the legal or other representative concerned to meet wasted costs in any criminal proceedings to compensate in costs a party injured as a result of unjustifiable conduct on their part. The Bar Association opposed the proposal. He gave the following views -

(a) the Bar Association did not consider that the recommendation made by the Chief Justice's Working Party on the Civil Justice Reform in respect of wasted costs in civil proceedings should be extended to cover criminal proceedings. The two regimes were not analogous and there were distinctive differences between the civil and criminal jurisdictions;

(b) the Court of Appeal was strict in granting leave for criminal appeal. Some barristers had expressed concern that the threat of a wasted costs order could diminish creativity and deter legal representatives from fearlessly presenting reasons to lodge an appeal in ways which they considered to be in the best interests of their clients; and

(c) there was inequity arising from the difference in treatment in respect of lawyers in private practice and Government lawyers as the former would be personally liable to payment of costs under a wasted costs order, while that of the latter was funded by public money.

(*Post-meeting note* : The submission from the Bar Association to the Department of Justice dated 9 October 2006 on wasted costs in criminal cases

Action

was issued to members vide LC Paper No. CB(2)557/06-07 on 5 December 2006.)

26. DSG said that the Proposed Amendment sought to ensure that the purpose of deterring extremely deficient work of the nature identified in the relevant judgments of the Court of Appeal was balanced against the interest in maintaining a vibrant and uncowed adversarial component in the criminal justice system. To address the concerns of the legal profession, the Administration had proposed in paragraph 24 of its paper to include a provision which required the court to take into account the public interest in fearless advocacy when determining whether or not to make a wasted costs order against a legal representative.

27. Mr P Y LO responded that the proposal set out in paragraph 24 was new and the draft provision was an example only. The Bar Association needed time to study the new proposal and would give its view when the actual wording of the new provision was available.

28. On the different treatment of lawyers in private practice and in the Government, DSG said that it was the policy of the Government that Government lawyers would not be personally liable to wasted costs orders made by the court in the course of discharging duties in the service of the Government. Government lawyers were bound by the Code of Practice of their professional bodies and subject to the same, if not harsher, sanctions applicable to lawyers in the private practice. In addition, disciplinary proceedings could be instituted by the Government against them for unjustifiable conduct.

29. Ms Miriam LAU said that although the wasted costs provisions would apply equally to the prosecution, there was a difference between making the payment from one's own purse as in the case for private legal practitioners and public purse as in the case for Government lawyers. She wondered whether the DoJ had ever instituted disciplinary proceedings against its staff. In her view, a legal representative, irrespective of whether he was a solicitor, barrister or Government counsel, had to pay his price if he had caused loss or expenses to persons as a result of unjustifiable conduct on his part in legal proceedings. While she appreciated the concerns of the Bar Association that lawyers should be able to conduct a case without inhibition or pressure, she did not agree that barristers should be exempted from liability for unjustifiable conduct. Looking at the matter from another angle, the interest of consumers should also be protected. Ms LAU asked whether the Administration had consulted the public on the Proposed Amendment, apart from consulting the legal profession and the Consumer Council.

30. Senior Assistant Solicitor General (SASG) responded that a Government lawyer who had performed serious deficient work would be subject to close scrutiny and possible disciplinary proceedings. In addition, section 32 of the Public Finance Ordinance (Cap. 2) provided that the Financial Secretary could surcharge a public officer who had improperly incurred expenditure or was responsible for any loss of public moneys. In this connection, Government lawyers were not necessarily

Action

immune from having to pay from their own pockets for this type of wasted costs order. Regarding the consultation on the Proposed Amendment, SASG said that although the wider public had not been consulted, the Consumer Council was considered to be reasonably representative of the public interest at large. The Administration had consulted the legal profession and invited feedback from individual practitioners. The outcome of the consultation was summarised in paragraph 23 of the Administration's paper.

31. Addressing members' concern, DSG stressed that the wasted costs order was targeted at lawyers who had performed "extremely deficient work" in criminal proceedings. He envisaged that such orders made by the Court of Appeal would be few.

32. The Chairman said that the making of a wasted costs order in respect of "extremely deficient work" could be a subjective judgment of the court. In the absence of any objective criteria, wasted costs orders could be misused resulting in unfairness to legal representatives.

33. DSG said that judges had practised as lawyers and would be cautious in exercising their power to make a wasted costs order. Judges could also make reference to cases of "extremely deficient work" identified in the relevant judgments of the Court of Appeal.

34. Ms Miriam LAU held the view that a court would not make a wasted costs order without justification and the justification would be tested if an appeal was lodged. At present, there was inherent jurisdiction in the superior courts to order costs against solicitors. As solicitors were personally liable to payment of such costs, they had exercised great care and skill in conducting their client's affairs.

35. The Chairman said that given the controversial nature of the Proposed Amendment, she considered that the setting up of a bills committee to study the Bill would be inevitable.

Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240)

36. Referring to paragraphs 10 and 11 of the Administration's paper, Mr James TO noted that following the repeal of section 69 of the Magistrates Ordinance (Cap. 227), it was doubtful whether a magistrate had power to award costs in respect of proceedings under section 3A of the Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240). He was under the impression that the fixed penalty tickets issued by the Police had included a note to the effect that if a person who had not paid a fixed penalty or notified the Commissioner of Police that he wished to dispute liability, he would be ordered to pay the fixed penalty together with an additional penalty equal to the amount of the fixed penalty, and the magistrates could order costs in such proceedings. Mr TO asked the Administration to clarify whether such a note was

Admin

included in the fixed penalty tickets and said that if the answer was positive, the matter should be rectified as the power of the magistrate to award costs was in doubt.

Action

DSG undertook to refer the matter to the relevant department and provide a response in writing.

V. Court procedure for repossession of premises - Review of Lands Tribunal Ordinance and Lands Tribunal Rules

(LC Paper No. CB(2)430/06-07(01) - Background brief prepared by the LegCo Secretariat on "Court procedure for repossession of premises - Review of the Lands Tribunal Ordinance and the Lands Tribunal Rules"

LC Paper No. CB(2)430/06-07(02) - Paper provided by the Judiciary Administration on "Review of the Lands Tribunal Ordinance (Cap. 17) and the Lands Tribunal Rules (Cap. 17A)")

37. JA informed members that following the discussion on the Judiciary Administration's paper on the Review of the Lands Tribunal Ordinance (Cap. 17) (LTO) and the Lands Tribunal Rules (Cap. 17A) (LTR) (the Review) at the Panel meeting on 25 April 2005, the Judiciary Administration had consulted the two legal professional bodies on the Review and the draft Amendment Rules to implement those recommendations requiring amendments to the LTR. The Law Society had indicated that it endorsed the proposals in the Review to streamline the repossession of premises; and had no comments on the draft Amendment Rules. The Bar Association had commented on certain recommendations and proposed some technical amendments to the draft Amendment Rules. The issues raised by the Bar Association and the Judiciary's response were set out in the Judiciary Administration's paper. Having noted the Judiciary's position and clarification on the issues raised, the Bar Association had indicated either its agreement to the proposed amendments or no further comments. Subject to any further views from members, the Judiciary Administration would take necessary action for the Amendment Rules to be introduced into the LegCo for negative vetting.

38. In response to the Chairman, JA confirmed that no new proposal had been introduced in the draft Amendment Rules since the issue was last discussed by the Panel. As the Judiciary had to revise the draft Amendment Rules taking into account the comments from the Bar Association, the Amendment Rules would be introduced into LegCo within the next two months.

39. Ms Miriam LAU expressed dissatisfaction at the pace legislative proposals were introduced into LegCo, including those discussed under Agenda item IV above. She urged the Administration to introduce expeditiously the Amendment Rules, given that they were non-controversial in nature. JA responded that the drafting of the Amendment Rules would be completed in December 2006. As regards the proposed amendments to the LTO, they would be introduced in early 2007.

Action

VI. 2006 review of financial eligibility limits of legal aid applicants
(LC Paper No. CB(2)431/06-07(04) - Paper provided by the Administration on "Annual and Biennial Review of Financial Eligibility Limits of Legal Aid Applicants")

Annual and biennial review

40. Director of Administration (D of A) introduced the paper which reported on the outcome of the annual and biennial review of the financial eligibility limits of legal aid applicants. On the annual review of the limits, the Administration proposed to increase the limits upward by 2.5% in accordance with the change in CPI(C) during July 2005 to July 2006. The biennial review aimed to take account of changes in private litigation costs. The data collected during the reference period were not conclusive to justify a change in the litigation costs.

41. D of Adm added that the Administration would move a resolution in the Council to give effect to the proposed increase. Consequential changes to the Legal Aid (Assessment of Resources and Contributions) Regulations would follow.

42. Ms Audrey EU referred to paragraph 9 of the Administration's paper and asked the following -

(a) how the median litigation costs of the different types of civil legal aid cases were derived;

(b) how the weighted average of the changes in median costs of -1.9% was calculated;

(c) whether a decrease of 1.9% of median costs of civil legal aid cases from 2004 to 2006 had accurately reflected the change in private litigation costs; and

(d) whether consideration had been given to the use of average legal costs or hourly rates charged by the legal profession, instead of median litigation costs, in the calculation.

43. D of Adm, the Director of Legal Aid (DLA), and Assistant Director of Administration responded with the following -

(a) to capture the median litigation costs, cases under each case category were ranked in the order of litigation costs. For instance, the median costs of the 2 438 matrimonial cases from January to July 2006 was $14,540, which was the costs of the 1 219th case;

(b) the 1.9% drop represented the weighted average of the changes in median costs of all legally-aided civil cases from 2004 to 2006. The weighted average was calculated by summing up the weighted

Action

percentage change of each type of case calculated as follows : percentage change x (median litigation costs x total number of cases) / total litigation costs of all types of cases;

(c) the cost trend of civil legal aid cases should broadly be indicative of the trend in private litigation costs, because in determining the amount of fees payable to lawyers in civil legal aid cases, the Legal Aid Department was required by law to have regard to the amount allowed or would have been allowed by the Taxing Masters of the Judiciary, or fixed costs if applicable. However, since legally aided civil cases accounted for only about 30% of all civil cases and the cost variation that was captured for legal aid cases was not significant (-1.9%), the Administration considered that the findings could only be used as a reference and was not conclusive to justify a change in litigation costs; and

(d) the Administration had consulted the Census and Statistics Department on the calculation method to be adopted in measuring the change in costs for legally aided cases. The Department advised that median cost was appropriate for the measure of central tendency when dominating large or small values were present which might affect the average value compiled. As the range of litigation costs for the same type of legal aid cases could vary greatly, say from $100,000 to $10,000, using median costs was more meaningful and appropriate than using the average;

(e) consideration had not been given to using average costs in the calculation, having regard to the advice of the Census and Statistics Department. In any case, since some legal aid cases, such as matrimonial cases, were charged on fixed costs basis, there was no question of using hourly legal fees.

Supplementary Legal Aid Scheme (SLAS)

44. Mr Martin LEE said that the Government's policy objective on legal aid was to ensure that no one with reasonable grounds for taking legal action in the Hong Kong courts was prevented from doing so because of a lack of means. However, the two schemes provided by the Legal Aid Department, namely the Ordinary Legal Aid Scheme and the SLAS, had not addressed the needs of the middle class who was often not eligible for legal aid. He noticed that the SLAS, which started off with a seed money of $1 million and financed by applicants' contributions and compensation recovered, had been profitable. The Administration, however, had no intention to expand its scope to cover other types of cases and relax its financial eligibility limit to address the demand of the middle class for legal aid services. Mr LEE held the view that the policy of the Administration had not kept pace with social developments.

Action

45. D of Adm responded that the SLAS was introduced in 1984. Since then, measures had been taken to improve the scheme. She disagreed that the SLAS could not cope with changes in the market. In 1995, legal aid was extended to cover claims for professional negligence such as medical and dental services. In 2006, the contributions payable by legally aided persons had been adjusted downward from 12% to 10%. She pointed out that the fundamental principle of the SLAS was self-financing. To sustain its financial viability, the SLAS needed to focus itself on the types of litigation cases which involved monetary claims of reasonable size, with high success rate and a reasonable good chance of recovering damages.

46. DLA supplemented that consideration had been given to expanding the scope of SLAS to cover other types of cases. There were concerns that cases which had a good chance of success but low chance of recovering damages could jeopardise the fundamental principle that the SLAS should be self-financing. At present, the SLAS covered mainly cases where the defendants were covered by insurance (e.g. claims for damages for personal injuries arising from road traffic and work-related accidents). The high chance of recovering damages helped ensure the financial sustainability of the scheme.

47. Mr Martin LEE said that while he did not dispute the three principles mentioned by D of Adm (last sentence of paragraph 45 refers), the scope of the SLAS was too narrow. As far as the middle class was concerned, damages to one's reputation was far more serious than personal injuries. The Administration should consider expanding the scope of the SLAS to cover cases such as libel. He was aware that the SLAS had started off as a self-financing scheme with limited funding provided for restricted types of proceedings. As the society was getting more affluent, it was time for the Administration to consider allowing certain cases which might incur loss to be covered by the SLAS.

48. Ms Miriam LAU said that the five-yearly review of criteria for assessing financial eligibility of legal aid applicant to be conducted next year would not serve any meaningful purpose if new ideas were precluded. She asked about the progress of the Consultation Paper on Conditional Fees published by the Law Reform Commission and whether the outcome of consultation would be available in February 2007, to tie in with the Panel's discussion on the scope of SLAS. She was given to understand that many lawyers and people from the middle class did not like the concept of conditional fees. They, however, unanimously considered that the scope of the SLAS should be expanded to provide legal assistance to the middle class. Conditional fees, if implemented, might address some of the concerns of the middle class, but might also give rise to other problems. If the Law Reform Commission concluded that conditional fees should not be pursued, there was a real need to study how legal aid could be provided to the middle class under the SLAS.

49. In response to members, the Clerk said that the Administration had responded to the Consultation Paper on Conditional Fees, insofar as it concerned the SLAS. The paper (LC Paper No. CB(2)3152/05-06(01)) had been circulated to members on 5 October 2006.

Action

50. The Chairman said that the Administration had reservations about expanding the SLAS. The Law Reform Commission, however, had recommended in the Consultation Paper on Conditional Fees that consideration should be given to expanding the SLAS on a gradual incremental basis, by raising the financial eligibility limits and by increasing the types of cases which could be taken up by the SLAS. However, it was a matter for the Administration to consider.

51. Ms Audrey EU said that the Administration should provide specific proposals on the issue of expanding SLAS at the February meeting. She considered that instead of limiting the scope of the SLAS to restricted types of cases, the recoverability of damages of a case could be one of the criteria for assessing eligibility under the SLAS.

52. DLA said that recoverability had always been a criterion in granting legal aid. Despite this safeguard, there were still quite a number of unsuccessful claims and the legal costs incurred had to be written off.

53. The Chairman said that while the prospect of recovering compensation or damages and the prudent use of public money were important, the public's right to access to justice should also be safeguarded. The Chairman urged the Administration to seriously consider the views of members, the legal professional bodies and other relevant organisations and to revert to the Panel in February 2007.

VII. Any other business

Visits to the Judiciary

54. The Chairman said that members had expressed interest to visit the Small Claims Tribunal at the last session. She suggested and members agreed that a circular would be issued to ascertain members' interest in the visit. Subject to members' feedback, the Secretariat would work out with the Judiciary Administration the detailed visit programme for members' consideration.

(*Post-meeting note* : A circular was issued to members vide LC Paper No. CB(2)519/06-07 on 1 December 2006.)

55. There being no other business, the meeting ended at 5:27 pm.

Council Business Division 2
Legislative Council Secretariat
18 January 2007