立法會
Legislative Council

LC Paper No. CB(2)889/06-07
(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 Tuesday, 12 December 2006, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Hon Margaret NG (Chairman) Hon MA Lik, GBS, JP (Deputy 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 Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP Hon LI Kwok-ying, MH, JP
Public Officers attending	:	Item IV The Administration *Department of Justice* Mr Stephen WONG Deputy Solicitor General Ms Kitty FUNG Senior Government Counsel Items V & VI Judiciary Administration Miss Emma LAU Judiciary Administrator Miss Annie TANG Deputy Judiciary Administrator (Development)

		Miss Vega WONG Assistant Judiciary Administrator (Development)
Attendance by invitation	:	Items V & VI Hong Kong Bar Association Mr Anthony ISMAIL
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 Miss Vivien POON Council Secretary (2)3

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I. Confirmation of minutes of meeting

(LC Paper No. CB(2)566/06-07 - Minutes of special meeting on 20 October 2006)

The minutes of the special meeting held on 20 October 2006 were confirmed.

II. Information papers issued since last meeting

(LC Paper No. CB(2)3152/05-06(01) - Administration's response to the Consultation Paper on Conditional Fees concerning Supplementary Legal Aid Scheme

LC Paper No. CB(2)557/06-07(01) - Paper dated 9 October 2006 and entitled "Hong Kong Bar Association's Views on Consultation Paper on Wasted Costs in Criminal Cases"

LC Paper No. CB(2)563/06-07(01) - Paper provided by the Administration on "2006 Biennial Review of Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fees"

LC Paper No. CB(2)591/06-07(01) - Letter from the Secretary of the Working Party on Solicitors' Rights of Audience on "Solicitors' Rights of Audience")

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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)568/06-07(01) - List of outstanding items for discussion

LC Paper No. CB(2)568/06-07(02) - List of items tentatively scheduled for discussion at Panel meetings in 2006-2007 session

LC Paper No. CB(2)568/06-07(03) - List of follow-up actions)

Meeting on 22 January 2007

3. The Panel agreed to discuss the following agenda items at the next meeting to be held on 22 January 2007 -

(a) Transcript fees; and

(b) Recovery agents.

Meeting on 26 February 2007

4. Ms Miriam LAU noted that the item on "Professional Indemnity Scheme of the Law Society" had been scheduled for discussion at the February meeting. To her understanding, the Law Society had made little progress and had nothing substantive to report to the Panel. The Chairman said that the Secretariat would liaise with the Law Society on the timing for it to revert to the Panel.

5. Ms Emily LAU said that at the Members' Meeting with the Ombudsman chaired by Ms Miriam LAU the day before, the Ombudsman had confirmed that she had already sent Part I of the review report on the jurisdiction of the office of the Ombudsman (the Review Report) concerning the operational review of the Ombudsman Ordinance (Cap. 397) to the Administration in November 2006. Part II of the Review Report under preparation by the Ombudsman would review overseas developments in ombudsmanship. Ms Emily LAU said that the Administration should be asked to give its view on Part I of the Review Report, and to advise whether it would conduct a comprehensive review on the jurisdiction of the office of Ombudsman with a view to considering whether its jurisdiction should be expanded, and whether it would consult the public in the process of conducting the review. Ms Miriam LAU suggested and members agreed that the Administration should be requested to discuss the issue at the meeting on 26 February 2007.

(*Post-meeting note* : The letter to the Administration and the Administration's response were issued to members vide LC Paper No. CB(2)766/06-07(01) and (02) respectively on 3 January 2007.)

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IV. Development of Hong Kong as a legal services centre
(LC Paper No. CB(2)568/06-07(04) - Paper provided by the Department of Justice on "Development of Hong Kong as a legal services centre")

Promoting Hong Kong as a legal services centre

6. Deputy Solicitor General (DSG) introduced the Administration's paper which set out the major measures taken and progress made during the last two years in building up Hong Kong as a regional centre for legal services and dispute resolution, and the way forward.

DoJ 7. The Chairman requested and DSG agreed to provide further information as follows -

(a) a list of the activities (visits, conferences, symposiums, forums, seminars and exhibitions) organised or sponsored by the Department of Justice (DoJ) in promoting Hong Kong as a legal services centre with relevant information such as the date(s), background and purpose, venue, organiser(s) and participants of these activities (paragraphs 50-53 of the Administration's paper refer);

(b) the number of arbitration cases handled by individual arbitrators and mediators over the last few years (paragraph 41 of the Administration's paper refers); and

(c) supplementary information on the specific measures for strengthening Hong Kong as a regional legal services centre (paragraph 55 of the Administration's paper refers).

8. In response to the Chairman, Mr Anthony ISMAIL of the Hong Kong Bar Association said that in view of the considerable amount of work done by the DoJ over the past two years, the Bar Association did not have strong views on the overall measures taken by the Administration to develop Hong Kong as a legal services centre.

Third Supplement to the Closer Economic Partnership Arrangement between the Mainland and Hong Kong (CEPA III)

9. Mr Anthony ISMAIL said that the Bar Association was concerned about the commitments in relation to legal services made by the Central People's Government in CEPA III. According to paragraph 46(iv) of the Administration's paper, Hong Kong barristers would be allowed "to act as agents in civil litigation cases in the Mainland in the capacity of citizens". He sought clarification as to whether "civil litigation" in that context was limited to any specific type of civil litigation or referred to civil litigation generally.

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10. DSG responded that it was the understanding of the DoJ that there should be no restriction on the types of civil litigation for which barristers could act as agents. The DoJ was seeking clarification from the Supreme People's Court about the meaning of "barristers to act as agents in civil litigation cases in the Mainland in the capacity of citizens" and expecting its reply within the coming two weeks. From its discussion with the Mainland authorities, the DoJ's understanding was that one could appear in a Mainland court either as a legal practitioner or as a citizen. The relative or friend of a litigant could appear in court in the capacity of a citizen and he would need clearance from the relevant authorities before appearing in court. When appearing in court as a citizen, he had more or less the same right as a legal representative including the right of advocacy. The major difference between acting as a legal representative and as a citizen in court was that the latter could not charge fees. The DoJ was awaiting clarification from the Mainland authorities as to whether barristers acting in the capacity of citizens in civil proceedings in the Mainland could not charge professional fees.

11. Mr Martin LEE asked about the Bar Association's understanding on the role of barristers when acting as agents in civil litigation cases in the Mainland but in the capacity of citizens, e.g. whether they should apply their knowledge of law to help their principals. He also asked whether the Bar Association had any objection for a barrister acting as a friend or as an agent of a litigant in a civil litigation case in the Mainland.

12. Mr Anthony ISMAIL said that it appeared that an agent for the litigation presumably was the agent for the litigant rather than the agent for any particular firm, and when a barrister acted as an agent in a Mainland court, he could not charge professional fees. The Bar Association was not in a position to give further comments pending clarification from the Mainland authorities on what "agents" and "in the capacity of citizens" meant. He requested the DoJ to seek clarification from the Mainland authorities as to whether barristers who acted in the capacity of citizens in a Mainland court would be exposed to any personal liability.

DoJ

13. Mr Martin LEE referred to paragraph 8 of the Administration's paper and sought clarification as to whether a foreign corporation entering into a contract with a Mainland entity could choose to apply Hong Kong laws to that contract and to have any dispute arising from that contract to be resolved in the court of Hong Kong. If the answer was positive, he asked whether the same principle would apply to arbitration cases.

14. DSG explained that as a general rule, Mainland laws allowed parties to a foreign-related contract to choose the applicable laws and venue for dispute resolution. Hence, in negotiating and signing contracts with Hong Kong or Mainland enterprises, the foreign parties could consider choosing the court or an arbitration body in Hong Kong as the venue for resolution of contractual disputes and the law of Hong Kong as the applicable law. Recently, there was concern that some parties, being a China legal entity and having chosen the dispute to be resolved by way of arbitration in Hong Kong, had difficulty in enforcing the arbitral awards in the Mainland. The

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problem arose as some of these foreign companies had entered the Chinese market in the form of a Mainland company. This had triggered the legal argument on whether these companies, as a matter of law, were Mainland companies and therefore not foreign-related. He had raised the question with the Supreme People's Court in September 2006 and explained the concerns of the legal profession. The Mainland authorities had responded that they had understood then the concerns and would look into the matter and revert to the DoJ. He had also requested the Mainland authorities to clarify the meaning of the term "foreign elements" referred to in the laws of China, in particular, relating to the substance and parties of a contract.

15. Noting that the package of liberalisation measures of CEPA III would be implemented on 1 January 2007, Mr Anthony ISMAIL enquired about the progress of putting in place the relevant rules and regulations.

16. DSG responded that the relevant rules and regulations were being devised and reviewed by the Mainland authorities at the moment. When the DoJ last discussed with the Mainland authorities, it was informed that they were working on them. He assured members that the relevant information would be provided to the Bar Association and the Panel once available.

Arbitration services

17. The Chairman sought information on the number of arbitral awards made in Hong Kong that could and could not be enforced in the Mainland. Referring to paragraph 17 of the Administration's paper, she pointed out that the number of cases handled by the Hong Kong International Arbitration Centre (HKIAC) remained much the same despite the promotional effort made by the Administration.

18. DSG said that the Mainland authorities did not have a systematic method to collect statistics relating to arbitration cases, given the large number of courts involved and the large geographical areas covered. In a recent discussion, the Mainland authorities had hoped that a system would be put in place. In Hong Kong, the DoJ had conducted two surveys with a view to obtaining feedback from relevant parties on the difficulties encountered in enforcement of Hong Kong arbitral awards in the Mainland, but there was a lack of response.

19. The Chairman agreed that the result of such surveys might not be fruitful. She suggested that the DoJ should request the HKIAC to provide information on the arbitration cases it had handled. The DoJ could then follow up by sending questionnaires to enquire whether award creditors who chose to have their awards enforced in the Mainland had been successfully. DSG responded that he would discuss the matter with the HKIAC.

DoJ

Mediation services

20. Ms Emily LAU enquired about the cost effectiveness of mediation vis-à-vis court proceedings in resolving disputes. She expressed concern on the two proposals

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referred to in paragraph 36 of the Administration's paper, i.e. the Legal Aid Department should have power in suitable cases to limit its initial funding of persons who qualified for legal aid to the funding of mediation, and the courts should be able to deprive a winning party of costs because of an unreasonable refusal of mediation. She pointed out that some people would prefer resolving disputes in court rather than by mediation because the judgment made by the court was more authoritative.

21. DSG said that mediation did not involve court proceedings and it was generally regarded as a quick and inexpensive procedure producing a win-win solution with which both parties could live. He agreed that in the views of the general public, the word "mediation" might lack authority. There was hence a need to educate the public about the benefits of mediation and promote its usage in the business and community sectors.

22. DSG explained that the two proposals quoted in paragraph 36 of the Administration's paper were recommendations on mediation in the Final Report on the Civil Justice Reform which required further study. The DoJ had commissioned a study on mediation practices with a view to exploring the possibilities for expanding the service. One of the interesting findings about the English system was that the court had the power to deprive a winning party of litigation costs because of an unreasonable refusal of mediation. This power was conferred on the court in April 2005 by the Civil Procedure Rules which were introduced in 1999, and it had been reported that the implementation of the rule had resulted in a marked increase in the number of disputes resolved by mediation since 1999.

23. The Chairman cautioned that if mediation was made mandatory, the right of a person to take legal action in courts would be affected.

24. Ms Emily LAU said that different forms of dispute resolution would help settle different kinds of disputes. For instance, it was not easy to reach a settlement by mediation if the two sides held adversarial views, and in this case arbitration would be a better option. Given that not every one could afford to pay legal fees, a less expensive and expeditious form of dispute resolution should be made available. She noted that mediation services were provided for construction and insurance disputes. She called for the introduction of mediation services for building management and labour disputes.

25. DSG said that the Government had on different occasions explained its policy objective 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. In July 2004, the DoJ had commissioned a consultancy study on the demand for, and supply of, legal and related services in Hong Kong and a report was expected to be published soon. The DoJ was also exploring the feasibility of practising community mediation in areas such as building management and labour disputes.

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V. Civil Justice Reform

(LC Paper No. CB(2)568/06-07(05) - Background brief prepared by the LegCo Secretariat on "Civil Justice Reform"

LC Paper No. CB(2)568/06-07(06) - Paper provided by the Judiciary Administration on "Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform")

26. Judiciary Administrator (JA) introduced the paper which informed members of the outcome of the consultation exercise on the proposed legislative amendments for the implementation of the Civil Justice Reform (CJR) and the way forward. The necessary legislative amendments would be introduced into the LegCo in the second half of the 2006-2007 legislative session, i.e. by May/June 2007.

27. Members noted that the Final Report on CJR (the Final Report) published by the Working Party to review the civil rules and procedures of the High Court had made 150 recommendations. The Steering Committee on CJR (the Steering Committee) chaired by Justice MA, Chief Judge of the High Court, which took overall charge of the implementation of the recommendations pertaining to the Judiciary had identified 21 recommendations which required amendments to primary legislation and 84 which required amendments to subsidiary legislation.

28. The Chairman expressed concern about the time required for scrutinising a large number of legislative amendments. JA responded that many of the amendments were non-controversial and the Panel had been briefed on the proposed amendments at the meeting on 26 June 2006.

29. The Chairman noted that the Bar Association had made a number of comments on the proposed legislative amendments and asked whether differences between the Bar Association and the Judiciary had been resolved to mutual satisfaction after discussions.

30. Mr Anthony ISMAIL responded that the concerns of the Bar Association were summarised in paragraph 26 of the Background Brief. The Bar Association considered that in order to evaluate the effect of implementing the recommendations in the Final Report, it was necessary to consider the yet to be promulgated Practice Directions and Pre-action protocols, in addition to the proposed legislative amendments, as an integrated package.

31. JA informed members that the Judiciary had held separate meetings with the two legal professional bodies. The discussions were mainly focused on the major concerns raised by the two legal professional bodies. After exchanging views at those meetings, their concerns had largely been addressed. Some of the comments of the Bar Association were taken on board. As regards the Practice Directions, the Judiciary had agreed to consult the two legal professional bodies on the drafts before their promulgation. The approach was considered acceptable by the two professional bodies.

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32. Mr Martin LEE said that the civil justice system in Hong Kong as governed by the Rules of the High Court (RHC) basically followed the English Rules of Supreme Court before 1998. Following the complete revamp in the civil justice system in the United Kingdom (UK), the English Rules of Supreme Court was replaced by the Civil Procedure Rules 1998 (CPR). The Working Party had recommended that the RHC should be suitably amended, with some existing rules being retained and some rules of the CPR proven to be successful in the UK operation to be introduced in the RHC. Mr LEE expressed concern about the selective adoption of provisions of the CPR in Hong Kong. He pointed out that if new rules were created or rules were modified from those of the CPR for use in the High Court, there would be no precedent case law in UK for Hong Kong to make reference to.

JA

33. JA said that she did not envisage the problem raised by Mr LEE but she would give a written response to the Panel after the meeting. She explained that the Working Party had concluded in the Final Report that Hong Kong would not adopt the UK CPR in a wholesale manner. The Working Party had recommended that the proposed reforms should be implemented by way of amendment to the RHC rather than by adopting a new set of rules along the lines of the CPR. The proposed legislative amendments were considered to be practicable operationally in Hong Kong, as reference was made to the successful implementation of the relevant rules in the CPR.

34. The Chairman referred to paragraphs 23 and 24 of the Background Brief about UK's experience in implementing the CPR and said that while the CPR might not be successful in reducing litigation costs, there could still be merits in the package of CPR as a whole. By not adopting the wholesale application of the CPR, Hong Kong might be able to avoid the shortcomings of the CPR, but at the same time could not benefit from its merits. She expressed concern about the interface between the existing RHC and the revised RHC as the latter had adopted part of the CPR. She pointed out that it was not meaningful to make reference to the related case law if only certain provisions of the CPR were adopted in Hong Kong.

35. Mr Martin LEE expressed concern that the measures introduced in the CPR such as pre-action protocols had actually led to an increase in litigation costs in some cases. He said that pre-action protocols, if implemented in Hong Kong, would mean that judges could give direction after summons was served. In the circumstances, court proceedings would begin at a much earlier stage than otherwise and this would incur additional litigation costs. At present, summonses served could be set aside and sometimes resolved out of court.

36. JA responded that unlike the UK, pre-action protocols would not be prescribed for cases across the board in Hong Kong. The recommendations in the Final Report were inter-related and when implemented in its entirety, would enhance cost effectiveness of the system of civil procedure.

37. The Chairman said that the legislative amendments relating to the civil justice system would be scrutinised in detail by LegCo upon introduction.

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VI. Implementation of a five-day week for the Judiciary
(LC Paper No. CB(2)568/06-07(07) - Extract from the minutes of meeting of the Panel on 26 June 2006

LC Paper No. CB(2)568/06-07(08) - Paper provided by the Judiciary Administration on "Implementation of a Five-day Week in the Judiciary")

Briefing by JA

38. JA informed members that Phase I of the implementation of a five-day week in the Judiciary which covered court sittings and back offices had been operating smoothly since its commencement on 1 July 2006. Phase II to be implemented on 1 January 2007 essentially covered offices which had a public interface but the switch to a five-day week would involve administrative arrangements rather than legislative amendments. Phase III would mainly cover the remaining offices which had a public interface in respect of which the implementation of a five-day week would require legislative amendments to primary and/or subsidiary legislation. The implementation of Phase III was under consideration by the Judiciary.

39. JA said that the offices covered under Phase II were -

(a) Information Counters and Public Enquiry Services in the Court of Final Appeal and the High Court;

(b) Libraries in the Court of Final Appeal and the District Court;

(c) Press and Public Relations Office;

(d) Complaints Office; and

(e) Resource Centre for Unrepresented Litigants.

The Judiciary had decided that the High Court Library would not be covered under Phase II and would review the situation by July 2007.

Phase I

40. On Phase I, Mr Martin LEE enquired whether judges had raised any objection to the arrangement that court sittings would generally not be listed on Saturdays. He pointed out that many judges had continued to work during weekends to prepare for hearings on Mondays. He expressed concern that back offices operated under five-day week could not provide support services to judges and judicial officers on Saturday mornings.

41. JA explained that as a general rule, no court sittings would be listed on Saturdays, except for admission ceremonies for senior counsel, barristers and solicitors in the High Court. Judges, however, had the discretion to list a court sitting

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on a Saturday when warranted, for example in a part-heard case that had to be concluded quickly. In the circumstance, the necessary support services would be rendered for that court sitting on Saturday. JA said that she had not received any complaints from judges about the inconvenience caused by the implementation of Phase I. In fact, the feedback received so far had been positive.

42. Mr Martin LEE said that judges might not be aware that they had the discretion to list court sittings on Saturdays under the five-day week arrangement. JA assured members that judges had been kept fully informed of the court arrangement under five-day week and their discretionary power to list court sittings on Saturdays. In response to the request of the Chairman, she undertook to provide a written response on the measures taken in this respect for the information of the Panel.

JA

Phase II

43. On Phase II, Mr Martin LEE expressed concern that libraries in the Court of Appeal and the District Court would be operating five-day week, given that barristers who in practice worked seven days a week might need to use the service during weekends.

44. JA responded that the existing arrangement for libraries opening on Saturday mornings had struck a balance between the efficient use of public resources and public usage of the library facility. Given that the development of information technology had facilitated information readily accessible by court users and members of the public through the Judiciary website, the implementation of five-day week under Phase II with the operating hours of libraries extended during weekdays would satisfy the demand of the majority of the users.

45. In response to the Chairman, Mr Anthony ISMAIL said that the Bar Association was satisfied that the High Court Library would continue to open on Saturdays, subject to a review of the situation by July 2007.

46. The Chairman said that the Judiciary should give a report to the Panel in due course on the operation of the offices set out in paragraph 39 above after the implementation of five-day week. She expressed particular concern about the effect of five-day week on the operation of the Resource Centre for Unrepresented Litigants. She said that the report should cover details such as the usage rates and areas for service improvement.

JA

VII. Any other business

Visit to the Judiciary

47. The Chairman thanked the Judiciary for assisting in arranging a Panel visit to the Judiciary on 27 March 2007, which would also be attended by non-Panel members. She said that during the visit, members could raise issues of concern with judges, such

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as the impact of five-day week on the Judiciary. The Chairman invited members to suggest issues for discussion prior to the visit.

48. There being no other business, the meeting ended at 6:00 pm.

Council Business Division 2
Legislative Council Secretariat
19 January 2007