

立法會
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Panel on Administration of Justice and Legal Services

Minutes of special meeting
held on Friday, 22 October 2010, at 5:30 pm
in the Chamber of the Legislative Council Building

- Members present** : Dr Hon Margaret NG (Chairman)
Dr Hon Priscilla LEUNG Mei-fun (Deputy Chairman)
Hon Albert HO Chun-yan
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Paul TSE Wai-chun
- Member attending** : Hon WONG Kwok-hing, MH
- Members absent** : Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
Hon Timothy FOK Tsun-ting, GBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon LEUNG Kwok-hung
- Public Officers attending** : Department of Justice

Mr WONG Yan-lung, SC
Secretary for Justice

Mr Frank POON
Solicitor General

Mr Eamonn Moran
Law Draftsman

Ms Susie HO
Director of Administration & Development

Mr Kevin Zervos, SC
Deputy Director of Public Prosecutions

Home Affairs Bureau

Mr TSANG Tak-sing, JP
Secretary for Home Affairs

Mr CHAN Heung-ping, William
Director of Legal Aid

Ms LUI Kit-yuk, Grace, JP
Deputy Secretary for Home Affairs

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Ms Amy YU
Senior Council Secretary (2)3

Mrs Fonny TSANG
Legislative Assistant (2)3

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- I. Briefing on the Chief Executive's 2010-2011 Policy Address**
[LC Paper Nos. CB(2)36/10-11(01) to (02), the 2010-2011 Policy Address – "Sharing Prosperity for a Caring Society" and the 2010-2011 Policy Agenda booklet]

Briefing by the Administration

The Chairman welcomed representatives of the Administration to the meeting to brief the Panel on the initiatives in the 2010-2011 Policy Agenda relating to the Department of Justice ("DoJ") and those of the Home Affairs Bureau ("HAB") in respect of legal aid.

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2. At the invitation of the Chairman, Secretary for Justice ("SJ") and Secretary for Home Affairs ("SHA") each gave a presentation to highlight the policy initiatives within their respective purview for 2010-2011. Copies of their speaking notes (Chinese version only) were tabled at the meeting and issued vide LC Paper Nos. CB(2)132/10-11(01) and (02) on 26 October 2010.

Issues raised by members

Development of mediation services

3. Mr WONG Kwok-hing enquired about the time frame of the legislative process for the proposed Mediation Ordinance and the resources required for implementing the initiatives for promoting mediation in Hong Kong. Mr WONG Kwok-hing and Mr LAU Kong-wah considered that the availability of adequate resources was crucial to the successful development of mediation, particularly at the initial take-off stage.

4. SJ responded that in its report issued for public consultation in February 2010 ("the Report"), the Working Group on Mediation ("Working Group") had recommended enacting legislation on mediation. The majority of the respondents in the consultation exercise had expressed support for the recommendation and the proposed coverage of the legislation as set out in the Report. On the basis of the legislative framework outlined in the Report, the Administration aimed at initiating the legislative process for the proposed Mediation Ordinance in 2011.

5. On the resources for development of mediation, SJ said that he recognized the importance for the Government to take on a leading role during the initial stage of development of mediation. The Working Group chaired by him and comprising representatives from relevant stakeholders had worked together to make recommendations on how to promote and facilitate wider use of mediation. With the support of Members, a non-civil service position of Deputy Principal Government Counsel was created in August 2010 for furthering the development of mediation. To take forward the development of mediation services on different fronts, a mediation task force would also be set up to advise on and assist in the implementation of the Working Group's recommendations. Where necessary, the Administration would seek additional resources if needs were identified during the implementation process. SJ further said that apart from the Administration, other stakeholders including the legal profession, mediation service providers and the Judiciary had also contributed resources to promote the development of mediation in Hong Kong. SJ added that while it was vital for the Government to spearhead the

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development of mediation in the initial stage, its sustainable development would depend on market demand for the service and availability of quality service to meet the service demand. The mediation task force would consider how the Working Group's recommendations in the three important areas of accreditation and training, public education and promotion of mediation and the promulgation of the Mediation Ordinance could be taken forward.

Mediation for building management cases

6. The Deputy Chairman said that she had all along supported the promotion of wider use of mediation in Hong Kong. Noting the increasing number of disputes concerning building management and compulsory land sale, she said that the Administration should consider the provision of free mediation service for such cases to facilitate their expeditious resolution at an early stage. Mr LAU Kong-wah shared the view that the provision of free mediation service at the district level could help resolve many community disputes.

7. SJ responded that with the implementation of Civil Justice Reform, the Court had taken on the duty as part of active case management to encourage the parties to attempt mediation before litigation. In addition, a number of pilot schemes had been/would be in place to promote the use of mediation in resolving specific types of disputes. He elaborated that the Lands Tribunal had introduced a pilot scheme in 2008 under which parties to building management cases were encouraged to resolve their disputes by way of mediation, and the measures in the pilot scheme had subsequently been adopted as standard practice with effect from 1 July 2009. In respect of compulsory land sale cases, the Development Bureau had been working closely with the mediation service providers to set up a pilot scheme to facilitate parties involved in or contemplating compulsory sale applications under the Land (Compulsory Sale for Redevelopment) Ordinance to undertake mediation on a voluntary basis. Furthermore, the Financial Services and the Treasury Bureau had proposed the establishment of a Financial Disputes Resolution Centre to handle financial disputes using mediation and arbitration. The proposal was put to public consultation and it was expected that there would be a decision by the end of this year on whether or not the Centre would be set up. To promote wider use of community mediation, two District Councils had agreed to make available community venues free of charge for the conduct of mediation by pro bono mediators. Apart from the Government, the mediation service providers had also collaborated in setting up the Joint Mediation Helpline Office to provide a one-stop mediation referral service for parties in need of mediation service. These concerted efforts by the Government and stakeholders would help promote and facilitate the wider use of mediation.

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8. Ms Audrey EU agreed with the view that the Administration should provide greater support to facilitate the resolution of building management disputes at an early stage to prevent the disputes from escalating. Noting that meetings of owners' corporations ("OCs") were often attended by staff of the Home Affairs Department ("HAD") playing the role of observer, she suggested to explore the feasibility of HAD staff playing a more active role in facilitating the resolution of building management disputes.

9. SHA responded that one of the policy initiatives relating to building management featuring in the Policy Address for 2010-2011 was the establishment of a panel of advisors familiar with building management matters to provide owners involved in building management disputes with impartial and authoritative advice. If the disputing parties were willing to resolve their dispute by mediation, the Panel would provide necessary assistance.

10. Ms Audrey EU considered that with appropriate assistance and timely intervention, many building management disputes could be resolved at an early stage without the need to refer them to the proposed panel of advisors. Pointing out that the proposed panel of advisors would not be established at the district level, she was concerned that the disputes might have already escalated by the time they reached the panel of advisors. She maintained her view that it would be more effective and cost-efficient for HAD staff to offer assistance in facilitating the settlement of building management disputes.

11. The Chairman said that as OC meetings were often attended by HAD staff, should building management disputes arise during those meetings, it would facilitate the resolution of the disputes at an early stage if HAD staff attending the meetings could provide mediation service on the spot or advise the parties concerned to attempt mediation and where necessary provide a list of mediators specializing in building management for their reference.

12. Mr Albert HO shared the view that mediation could help resolve many building management disputes. He was, however, concerned that parties to such disputes might not be willing to attempt mediation due to cost consideration. In his view, it would be more desirable if the Administration could provide free mediation service to facilitate resolution of building management disputes at an early stage. Consideration could also be given to providing relevant training to HAD staff so that they could provide mediation service in such disputes. He believed that such a measure would help promote social harmony on the one hand, and reduce the heavy caseload of the Lands Tribunal on the other.

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13. SHA said that the Administration recognized the need to work out a mechanism to facilitate the resolution of building management disputes at the district level. To this end, it was proposed that a panel of advisors be established to provide owners involved in building management disputes with impartial and authoritative advice. He added that as HAD staff did not have a background in legal studies or relevant professional training, there was difficulty in offering professional mediation services beyond the assistance currently provided in resolving disputes.

14. SJ considered it more practicable to have HAD staff referring cases to relevant non-Governmental organizations for mediation than to have them trained as mediators. The Administration would explore means to improve referral services to help members of public gain access to mediation services. Referring to Mr Albert HO's comment on the cost of mediation, SJ said that the cost for providing mediation service to disputes on building management matters was normally lower than that for commercial disputes. He added that training and quality of mediators was crucial for the successful development of mediation and the mediation task force to be set up would also work on the development of the system of accrediting mediators, among others.

15. The Chairman proposed that the Panel should further follow-up at a future meeting on members' suggestion that the Administration should implement practicable measures to facilitate expeditious resolution of building management disputes by mediation such as provision of such free service by HAD. Members agreed.

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Legal aid issues

16. Mr WONG Kwok-hing urged the Administration to consider waiving the means test in respect of legal aid applications by employees for wage claims. SHA responded that the Government's legal aid policy required that applicants must satisfy both the means test and the merits test. Nevertheless, as pointed out by the Chief Executive in his 2010-2011 Policy Address, the Administration was considering the feasibility of expanding the scope of the Supplementary Legal Aid Scheme ("SLAS") to cover more types of cases, including claims to recover outstanding wages and other employee benefits.

17. Mr WONG Kwok-hing said that in the hearings of appeals against refusal of legal aid, the Legal Aid Department ("LAD") was represented by barristers. He considered this unfair to legal aid applicants concerned who had little legal knowledge and requested LAD to review such inequality of footing between the parties. Director of Legal Aid ("DLA") clarified that the lawyers representing LAD in the hearings of appeals against refusal of legal aid were in-house

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counsel, not barristers in private practice. DLA further explained that an appeal against refusal of legal aid was not court proceedings. Such appeals were heard by the Registrar of the High Court who would review the application and make a recommendation on whether the applicant should be granted legal aid. Mr WONG Kwok-hing maintained that it was necessary to work out measures to provide legal assistance to legal aid applicants in appeals against refusal of legal aid to ensure fairness in the appeal procedure.

18. While welcoming the Administration's proposal of raising the financial eligibility limit ("FEL") of SLAS to \$1.3 million, the Deputy Chairman urged the Administration to also consider further increasing the FEL for the Ordinary Legal Aid Scheme from the proposed \$260,000 to \$500,000. She also considered that the scope of SLAS should be extended to cover claims for damages for professional negligence in a wider range of cases.

19. Noting from HAB's paper that the Government would earmark \$100 million for injection into the SLAS fund when necessary, Mr Paul TSE sought clarification on whether the proposed injection of funding was subject to certain conditions being met or whether it was an undertaking on the part of the Administration. SHA assured members that the Administration was committed to injecting \$100 million into the SLAS fund. He explained that as the approval of the Finance Committee was required, the Administration could only state that it had earmarked the amount for injection into the SLAS fund when necessary. The Chairman said that in her view, the phrase "when necessary" meant that the amount of injection into the SLAS fund would depend on the actual needs and would not be capped at \$100 million.

20. Ms Audrey EU urged that serious consideration be given to extending the scope of legal aid to cover defamation cases, in particular cases where whistleblowers were being sued for defamation. She considered it grossly unjust and contrary to public interest that persons seeking to expose corruption or other wrongdoings had no recourse to legal aid to undertake defence in defamation proceedings arising from their righteous acts. SHA said that he would consider Ms EU's views.

21. Mr Albert HO said that apart from defamation cases, the coverage of legal aid should also be extended to cover claims against financial products. He considered the Administration's proposal for the establishment of a Financial Disputes Resolution Centre to handle financial disputes inadequate because not all financial disputes could be settled by mediation and some might eventually be taken to the court. He reiterated his strong view that the scope of legal aid should be extended to cover claims against financial products.

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22. The Chairman said that claims against financial products was one of the types of cases proposed by the Hong Kong Bar Association for expansion of SLAS, and the Administration had undertaken to consider the proposals. She hoped that the expansion of scope of SLAS would cover not only claims for damages for professional negligence and claims to recover outstanding wages, but also others such as claims relating to financial disputes and defamation cases.

23. Mr Paul TSE considered that given the limitation in the scope of legal aid, the Administration should consider allowing some form of conditional/contingency fee arrangements in Hong Kong to provide an alternative funding avenue for litigants who could not afford the high legal costs and were not eligible for legal aid.

24. SJ responded that in its Report on Conditional Fees published in July 2007, the Law Reform Commission had concluded that conditions were not appropriate for the introduction of conditional fees as after-the-event insurance was not likely to be available in Hong Kong, and had recommended the expansion of SLAS to enhance access to justice. In so far as the availability of after-the-event insurance was concerned, he did not consider that there had been any change in the matter since the Report was published three years ago.

25. The Chairman said that given that the costs rule in Hong Kong was different from that in the United States, a conditional fee regime would not be feasible in Hong Kong in the absence of insurance arrangements to cover the opponent's legal costs if the legal action was unsuccessful.

Free legal advice service

26. Mr LAU Kong-wah said that many Hong Kong people who encountered legal problems on the Mainland had no recourse to legal assistance. He considered that the Administration should provide legal advice service to Hong Kong people involved in litigation on the Mainland.

27. Deputy Secretary for Home Affairs responded that the Administration had made clear on various occasions its position that it would not extend legal aid services to cover litigations on the Mainland. Nevertheless, the Administration was exploring the feasibility of collaborating with relevant organizations to enhance the provision of legal information on the Internet, which could cover information on Mainland legal issues frequently encountered by Hong Kong residents such as those relating to matrimonial matters and commercial disputes. Mr LAU Kong-wah considered the mere provision of legal information inadequate and urged the Administration to consider providing legal advice service to people involved in legal proceedings on the Mainland.

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28. Noting from HAB's paper that the Administration would explore means to provide enhanced assistance to unrepresented litigants, Mr Albert HO urged the Administration to consider providing them with publicly-funded free legal advice service which was currently not available at the Resource Centre for Unrepresented Litigants.

Co-operation between the legal professions in Hong Kong and the Mainland

29. Mr LAU Kong-wah said that while a number of liberalization measures on legal services had been agreed on under the Mainland and Hong Kong Closer Economic Partnership Arrangement ("CEPA") and its various Supplementary Agreements and the Framework Agreement on Hong Kong/Guangdong Co-operation had been signed recently to strengthen co-operation between the legal professions in Hong Kong and the Mainland, legal professionals in Hong Kong had reflected the concern that they had encountered difficulties in gaining a foothold in the legal service market on the Mainland. He enquired about the difficulties faced by legal professionals and measures taken by the Administration to assist them.

30. SJ responded that the Administration had been in close liaison with the two legal professional bodies to gauge their needs in developing legal services on the Mainland and recognized the difficulties faced by the legal profession in this regard. He said that the initiatives under CEPA were intended for the mutual interest of both sides, and the Mainland authorities would have regard to the needs and development of its legal profession in considering the liberalization measures under CEPA. It should also be noted that the legal service market on the Mainland was very competitive. Legal professionals in Hong Kong were facing keen competition not only from lawyers on the Mainland, but also those from other countries. Furthermore, given the different legal systems in Hong Kong and the Mainland, Hong Kong lawyers who had obtained qualifications as Mainland lawyers were subject to certain restrictions in their practice on the Mainland. Nevertheless, he assured members that the Administration would strive for more liberalization measures under CEPA to facilitate the legal profession's development on the Mainland.

31. The Chairman suggested and members agreed that the two legal professional bodies be invited to give views on the development of legal services under CEPA, including any difficulties encountered by the legal profession.

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Other issues

32. Mr Paul TSE said that the United Kingdom Supreme Court had recently made a ruling on the enforceability of a pre-nuptial agreement. He enquired whether the Administration had any plan to reform the existing matrimonial law in respect of pre-nuptial agreements. SJ responded that the Administration had yet to study the Supreme Court judgment. He further advised that pre-nuptial agreements were not recognized under the existing law. In deciding whether any change should be made to the existing law, regard should be given not only to the experience in other jurisdictions, but also the relevant societal values of the Hong Kong community.

33. Referring to the recent controversy over the power of the Legislative Council to amend the subsidiary legislation relating to the extension of the South East New Territories Landfill, Mr Paul TSE opined that the Administration should make clear its legal views on important matters of public concern at an early stage to prevent matters from escalating into serious disputes which might lead to judicial reviews. SJ responded that the Administration agreed in principle that controversial legal issues should be discussed as early as practicable. He stressed that the Administration attached great importance to the relationship between the Executive Authorities and the Legislature.

II. Any other business

34. There being no other business, the meeting ended at 6:35 pm.