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(These minutes have been seen by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 21 December 2010, at 4:30 pm
in Conference Room A 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 James TO Kun-sun Hon LAU Kong-wah, JP Hon Emily LAU Wai-hing, JP Hon TAM Yiu-chung, GBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon Paul TSE Wai-chun Hon LEUNG Kwok-hung
Member attending	:	Hon WONG Kwok-hing, MH
Members absent	:	Dr Hon Philip WONG Yu-hong, GBS Hon Miriam LAU Kin-yee, GBS, JP Hon Timothy FOK Tsun-ting, GBS, JP
Public Officers attending	:	Items III and IV Ms Grace LUI Kit-yuk Deputy Secretary for Home Affairs Ms Christine CHOW Kam-yuk Principal Assistant Secretary for Home Affairs Mr KWONG Thomas Edward Deputy Director of Legal Aid/Applications and Processing

Ms Alice CHUNG Yee-ling
Deputy Director of Legal Aid/Administration

Item V

Judiciary Administration

Miss Emma LAU
Judiciary Administrator

Mr NG Sek-hon
Deputy Judiciary Administrator (Operations)

Miss Clara TANG
Assistant Judiciary Administrator (Development)

Item VI

Department of Justice

Ms Adeline WAN
Senior Assistant Solicitor General
(General Legal Policy)

Mr LEE Tin-yan
Senior Government Counsel

Attendance by invitation :

Item IV

Legal Aid Services Council

Hon Paul M P CHAN
Chairman

Ms Corinne Remedios
Member and Chairperson of the Interest Group on Scope of Supplementary Legal Aid Scheme

Mr Michael Delaney
Member

Mr Raymond F K LAW
Secretary

Hong Kong Bar Association

Mr Ruy Barretto, SC

Mr Kumar Ramanathan, SC

Mr Nicholas Pirie

The Law Society of Hong Kong

Ms Alison LIU
Member of the Legal Aid Committee

Mr Leslie YEUNG
Member of the Legal Aid Committee

Item V

Hong Kong Bar Association

Mr Kumar Ramanathan, SC

The Law Society of Hong Kong

Mr Nicholas Hunsworth
Chairman of the Civil Litigation Committee

Item VI

Hong Kong Bar Association

Mr Alexander Stock

Clerk in attendance	**:**	Miss Flora TAI Chief Council Secretary (2)3
Staff in attendance	**:**	Mr KAU Kin-wah Assistant Legal Adviser 6
		Ms Amy YU Senior Council Secretary (2)3
		Mrs Fonny TSANG Legislative Assistant (2)3

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I. Confirmation of minutes of meeting

[LC Paper No. CB(2)589/10-11]

The minutes of the special meeting held on 22 October 2010 were confirmed.

II. Information papers issued since last meeting

2. Members noted that the following papers had been issued since the last meeting -

(a) The Ombudsman's views on inclusion of the statutory Independent Police Complaints Council ("IPCC") under the purview of The Ombudsman [LC Paper No. CB(2)530/10-11(01)]; and

(b) Law Reform Commission's ("LRC") report on "The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse" and a summary [LC Paper Nos. CB(2)574/10-11(01) and (02)].

3. In respect of the paper referred to in paragraph 2(a) above, the Chairman said that The Ombudsman had indicated that he had no objection in principle to having the statutory IPCC under his purview. Members noted that the item was already on the Panel's list of outstanding items for discussion and the timing of discussion had yet to be decided by the Panel.

4. As regards the LRC report referred to in paragraph 2(b) above, members noted that LRC hoped to have the Panel's views, if any, on the report's proposal to abolish the common law presumption that a boy under 14 was incapable of sexual intercourse preferably by 15 January 2011. Members agreed to discuss the LRC report tentatively at its regular meeting on 28 February 2011.

Clerk

III. Items for discussion at the next meeting

[LC Paper Nos. CB(2)591/10-11(01) to (03)]

Items for discussion at the regular meeting on 24 January 2011

5. Members noted that according to the "List of items tentatively scheduled for discussion at Panel meetings in 2010-2011 session" [LC Paper No. CB(2)591/10-11(03)], the following items had been tentatively scheduled for discussion at the next regular meeting on 24 January 2011 -

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(a) Legislative amendments to implement the proposals arising from the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants ("five-yearly review");

(b) Criminal legal aid fees system; and

(c) Reciprocal recognition/enforcement of arbitral awards with Macao.

6. For the items referred to in paragraph 5(a) and (b) above, the Chairman informed members that the Administration had indicated that it would revert to the Panel on the two items in February 2011 and March/April 2011 respectively instead of January 2011 as originally scheduled. Deputy Secretary for Home Affairs ("DSHA") explained that the Administration had proposed to slightly defer the discussion of the two items as it had just provided a paper to the Panel [LC Paper No. CB(2)638/10-11(01)] on the latest progress of work on the preparation of legislative amendments to implement recommendations arising from the five-yearly review and the criminal legal aid fees review. Members noted the revised schedule for discussion of the two items.

Clerk

7. The Chairman suggested and members agreed to further discuss the subject of expansion of the Supplementary Legal Aid Scheme ("SLAS") at the next meeting scheduled for 24 January 2011. To allow more time for in-depth discussion of the subject, members also agreed to defer the discussion of the item of "Reciprocal recognition/enforcement of arbitral awards with Macao" originally scheduled for the January 2011 meeting. Members further agreed that in addition to the Legal Aid Services Council ("LASC") and the two legal professional bodies, deputations which had recently made submissions to the Panel on issues relating to SLAS would be invited to the meeting.

Clerk

Applicability of Hong Kong Special Administrative Region ("HKSAR") laws to offices set up by the Central People's Government ("CPG") in HKSAR

8. Ms Emily LAU expressed dissatisfaction with the slow progress made by the Administration on the extension of the applicability of HKSAR laws to CPG offices in HKSAR since the handover of sovereignty and considered that the Panel should follow up more closely on the matter. She also expressed concern that the Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance ("PDPO") recently published by the Administration was silent on the issue of applicability of PDPO (Cap. 486) to CPG offices in Hong Kong. The Chairman said that Members could follow up the issue during their scrutiny of the legislative amendments to be made to PDPO arising from the review.

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IV. Report on the study conducted by LASC's Interest Group on the Scope of SLAS
[LC Paper Nos. CB(2)570/10-11(01) to (02), CB(2)591/10-11(04) to (05), CB(2)638/10-11(01) to (02) and IN02/10-11]

Briefing by LASC

9. Ms Corinne Remedios, member of LASC and Chairperson of the Interest Group on Scope of SLAS ("IG"), briefed members on the recommendations of LASC on expansion of SLAS as set out in the letter dated 13 December 2010 from the Chairman of LASC to the Chief Executive ("CE") [LC Paper No. CB(2)570/10-11(01)]. In gist, LASC recommended that SLAS be extended by way of establishing a parallel scheme with a wider scope of coverage ("SLAS Part II") to be administered separately from the existing scheme ("SLAS Part I"); and that the entire sum of $100 million earmarked by the Administration for injection into the SLAS fund should be set aside for SLAS Part II and handed over to the Director of Legal Aid ("DLA") as soon as possible. Ms Remedios then elaborated on the detailed recommendations of LASC as follows -

SLAS Part II

(a) the types of cases to be covered by SLAS Part II should be introduced on an incremental basis, starting with the less risky types of cases. With this in mind, LASC recommended that SLAS Part II should cover the following types of cases in the first batch: (i) professional negligence claims against accountants, architects, engineers and surveyors; (ii) claims for property damage against incorporated owners of a multi-storey building; and (iii) derivative claims;

(b) the following types of cases might worth consideration after the first batch was introduced: (i) claims against estate agents, independent financial consultants and insurance agents; (ii) claims against developers in the sale of new flats, offices or shop premises; and (iii) small marine accidents;

(c) LASC did not recommend the inclusion of the following types of cases under SLAS Part II: (i) claims in respect of trusts; (ii) claims involving disputes between limited companies or their minority shareholders; and (iii) sale of goods and provision of services;

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(d) higher application fees and contribution rates should be adopted for SLAS Part II claims to reflect the complexity of such claims and the higher risks involved;

(e) SLAS Part II should be tested for its viability and effectiveness and be reviewed and fine-tuned periodically;

SLAS Part I

(f) employee claims on appeal from the Labour Tribunal should be included under SLAS Part I without size limit as this was socially deserving; and

(g) medical, dental and legal professional negligence claims be transferred from the existing SLAS to SLAS Part II to align the administration of legal aid for claims against professional negligence and having regard to the complexity and risk profile of such cases.

10. At the request of the Chairman, LASC agreed to provide the Chinese version of the report of IG on expansion of SLAS [LC Paper No. CB(2)570/10-11(02)] as soon as practicable to facilitate relevant organizations to give views on the subject at the meeting on 24 January 2011.

LASC

Briefing by the Administration

11. DSHA introduced the Administration's paper [LC Paper No. CB(2)591/10-11(04)] setting out, among others, the Administration's timetable on processing LASC's proposals on expansion of SLAS. DSHA said that the Administration noted LASC's recommendations that SLAS be extended on an incremental basis starting with the less risky types of cases, and that higher contribution rates be set for cases under SLAS Part II to help sustain the long-term financial viability of the scheme. The Administration would carefully consider the recommendations of LASC and the views of stakeholders before formulating its position. She added that the Administration also noted LASC's recommendation that derivative claims be covered not only under SLAS Part II, but also the Ordinary Legal Aid Scheme ("OLAS"). While this was outside the scope of the review on SLAS, the Administration would study the viability of the proposal.

12. The Chairman enquired about the Administration's position on LASC's

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recommendation that medical, dental and legal professional negligence claims currently covered under the existing SLAS be transferred to SLAS Part II. DSHA responded that the recommendation would not affect the coverage of such professional negligence claims under SLAS. It would, however, mean that aided persons for such claims would have to pay the higher contribution rates proposed for SLAS Part II. The Administration recognized that the proposed higher contribution rates would have a positive impact on the financial viability of the scheme, and would carefully examine the recommendation in the light of stakeholders' views before coming to its view on the matter.

Views of the two legal professional bodies

Hong Kong Bar Association ("Bar Association")

13. Mr Ruy Barretto, Mr Kumar Ramanathan and Mr Nicholas Pirie presented the views of the Bar Association as detailed in its submission [LC Paper No. CB(2)638/10-11(02)].

14. Mr Ruy Barretto said that at its meeting on 21 July 2010, the Panel had reached a consensus that the Administration should study the proposals put forward in the Bar Association's submission dated 20 July 2010 as the basis for improving legal aid services. The Bar Association was disappointed with the recommendations of LASC which had failed to address fully the integrated package of proposals put forward by the Bar Association. For instance, LASC had not responded to the proposals for further increasing the financial eligibility limits ("FELs") for OLAS and SLAS to $350,000 and $3 million respectively. Neither had LASC indicated whether it agreed with the Administration's proposal of lowering the age requirement for the special elderly provision for calculation of financial resources to 60. In addition, LASC had also failed to provide a clear timetable for implementing its proposal of expanding the scope of SLAS on an incremental basis.

15. Mr Kumar Ramanathan said that there was a fundamental conceptual error with the LASC report. He elaborated that there was no such thing as a risky type of claim, but one could have risky individual cases. Individual cases of all types of claims could be difficult and complex, and risk assessment should be based on the facts and merits of each individual case, and not the type of claim it belonged to. In response to the Chairman's enquiry on the Bar Association's view on LASC's proposal of dividing SLAS into Part I and Part II, Mr Ramanathan said that there should only be one scheme of SLAS, pointing out that IG, in paragraph 53 of its report, envisaged that the two schemes would be merged eventually. In any event, the Bar Association considered that the

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professional negligence claims currently covered under the existing SLAS should not be transferred to the proposed SLAS Part II, bearing in mind that part of the surplus in the existing SLAS Fund came from damages recovered from such types of cases. The Bar Association did not see any good reasons for dividing SLAS into two schemes.

16. Mr Nicholas Pirie said that he was pleased to see that LASC agreed with the Bar Association's proposal of extending SLAS to cover claims concerning financial products. Pointing out that the Financial Services and Treasury Bureau had indicated that it would implement the proposal of establishing a Financial Dispute Resolution Centre to handle disputes arising from services provided by financial institutions to individual consumers, he saw no reason why legal aid should not be made available under SLAS for claims concerning financial products. Mr Pirie further said that the proper test for expansion of scope of SLAS should be recoverability of damages. Applying such a test, he considered that claims against independent financial consultants should be included in the expansion of SLAS, given that all persons registered under the Securities and Futures Ordinance (Cap. 571) had been required to take out compulsory insurance since 1994. He considered that legal aid should also be made available for class actions should legislation be introduced for class actions. Noting that with the reduction of the contribution rates, the annual operating surplus of the SLAS Fund had been steadily declining, he was of the view that consideration should be given to increasing the contribution rates for all SLAS cases to strengthen the financial position of the SLAS Fund.

Law Society of Hong Kong ("Law Society")

17. Mr Leslie YEUNG referred members to the submission of the Law Society tabled at the meeting for its preliminary observations on LASC's recommendations on expansion of SLAS. He highlighted that the Law Society considered LASC's proposed contribution rates for SLAS Part II at 20% and 15% (for cases settled before delivery of brief to counsel) of the awarded damages too high, and this would turn the middle class to engage recovery agents. He added that the Law Society had no strong view on the proposed creation of SLAS Part II to cover the new types of claims, having regard to the complexity of such claims and given that the proposed SLAS Part II would be tested for viability and subject to review.

(*Post-meeting note*: The Law Society's submission was issued to members vide LC Paper No. CB(2)657/10-11(01) on 22 December 2010.)

LASC's response to the views of the two legal professional bodies

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18. Mr Paul CHAN, in his capacity as Chairman of LASC, said that LASC was well aware of the discussions of the Panel over the past year on reform of legal aid services. He explained that his letter to CE dated 13 December 2010 had focused on SLAS. Half of the members of LASC were drawn from the legal profession while the other half were lay members; and the quorum requirement was 70% of total membership of LASC. The composition and quorum requirement of LASC ensured a balanced representation of views during LASC's discussions. Apart from the views of the legal profession, LASC would also consider the views of stakeholders from other sectors of the community. He stressed that as an independent advisory body, LASC would examine carefully the views of all stakeholders before reaching its own conclusion on issues under study.

19. On the proposed division of SLAS into Part I and Part II, Mr Paul CHAN said that the proposal was made having regard to the self-financing design of SLAS and the need to maintain its financial viability by a high success rate in litigation of cases under SLAS. He pointed out that in 2008, the loss of one SLAS case had cost the SLAS Fund some $17 million. Hence, great prudence was needed in considering the additional types of cases to be covered under SLAS. As SLAS operated as a kind of mutual insurance fund, it was considered appropriate to charge higher contribution rates for cases under SLAS Part II given the higher risks involved.

Discussion

20. Noting from paragraph 7 of the Administration's paper that the Administration would consult the relevant bureaux before formulating its position on LASC's recommendation to remove the $60,000 limit for employees' claims cases, Mr WONG Kwok-hing enquired when the Administration would come to its decision on the matter. Referring to paragraph 18 of the same paper, DSHA advised that the Administration would report to the Panel in February/March 2011 on its position on the proposed expansion of SLAS, including the proposal for removing the $60,000 limit for employees' claims cases.

21. Mr WONG Kwok-hing enquired whether individual members of Incorporated Owners ("IOs") could apply for legal aid to defend against claims brought against them in their capacities as members of IOs. Deputy Director of Legal Aid/Applications and Processing advised that under the existing legal aid system, IOs could not apply for legal aid for taking or defending legal proceedings. On the other hand, if a person was being sued by IOs, he could

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apply for legal aid to defend against the legal action.

22. While welcoming LASC's proposed expansion of SLAS, Ms Audrey EU expressed disappointment with its recommendation that claims against estate agents and claims against developers in the sale of new flats be considered at a later stage on the ground that the Government would introduce legislation to strengthen the regulation over selling of new flats. In her view, irrespective of whether such legislation would be introduced, the general public could hardly afford to take legal action against developers if they had no recourse to legal aid. She urged LASC to re-consider its recommendation in this regard. Mr Albert HO, Mr LAU Kong-wah and Mr LEUNG Kwok-hung also expressed support for including claims against developers in SLAS. Mr Albert HO considered that monetary claims between buyers and sellers arising from sale of flats (such as those involving forfeiture of deposits) should also be covered under SLAS.

23. Mr LAU Kong-wah noted from the letter of LASC's Chairman to CE that the success rate of claims by new flat buyers against property developers was very low, and even for the few successful cases, the recovery of both damages and costs was very small or even empty. However, he also noted from a previous submission of the Bar Association that there was a high rate of recovery in respect of such claims. He sought clarification on the apparently conflicting information.

24. Mr Paul CHAN explained that the statistics cited in his letter to CE was based on claims by new flat buyers against property developers dealt with under OLAS in the past 10 years as provided by the Legal Aid Department ("LAD"). The statistics showed that the success rate of this type of claims was very low. In one of the cases, two senior counsel had been engaged in different stages of the proceedings but eventually the case was lost. To facilitate the Panel's consideration, LASC would provide the relevant statistics to members after the meeting. Mr CHAN further said that LASC had recommended not including such claims under SLAS Part II for the time being as it reckoned that they would have a higher success rate after the Government had introduced legislation to strengthen the regulation over the sale of new flats. Mr Ruy Barretto reiterated the Bar Association's view that LASC had muddled up the criteria for expansion of types of cases covered under SLAS, which should be based on reasonable prospects of recovery of damages, with the merits test conducted by LAD professionals in processing individual cases.

LASC

25. Mr Albert HO expressed disagreement with LASC's view that claims in

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respect of trusts should not be included in SLAS as they would probably be covered under professional negligence. He pointed out that not all such claims could be covered under professional negligence, given that trustees and executors of wills were not necessarily professionals.

26. Mr Albert HO also did not subscribe to LASC's view that claims arising out of the sale of goods and provision of services could be taken care of by the Consumer Council and hence should not be included under SLAS. He stressed that the mechanism for dealing with consumer claims under the Consumer Legal Action Fund was no substitute for legal aid, as the size of the Fund was small and only cases involving significant public interest might be granted with assistance under the Fund after a rigorous selection process. Echoing the view that the Consumer Legal Action Fund was inadequate to meet the needs of the general public for legal assistance in respect of claims arising from the sale of goods and provision of services, Mr LAU Kong-wah sought elaboration from LASC on its rationale for not recommending the inclusion of such types of claims under SLAS.

27. Mr Paul CHAN said that except for claims under the Employees' Compensation Ordinance (Cap. 282), the existing SLAS only covered cases where the claim was likely to exceed $60,000. In general, claims arising from the sale of goods and provision of services involved small amounts of claims, and the litigation costs involved usually far exceeded the values of the damages. Owing to the small amounts involved in such claims, not much contributions were expected to be generated from successful cases; on the other hand, one lost case could impact heavily on the SLAS Fund which had to bear the costs of both sides. This was one of the reasons why LASC had recommended against the inclusion of such claims under SLAS. The Chairman said that given the $60,000 threshold requirement, she did not consider that the small size of such claims was a valid reason for excluding altogether this type of claims from SLAS.

28. Mr LEUNG Kwok-hung opined that in considering the types of cases to be covered under SLAS, LASC should give predominant weight not to financial consideration, but to the importance of widening access to justice and promoting equality before the law. In his view, extending the scope of SLAS to cover claims against developers in the sale of flats as well as claims arising from the sale of goods and provision of services could help deter unfair or unscrupulous trade practices by large corporations.

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29. On LASC's proposal of dividing SLAS into Part I and Part II and setting higher contribution rates for claims under SLAS Part II, Ms Audrey EU considered it unjustifiable to propose that higher contribution rates be charged for cases under SLAS Part II on the ground that they were more risky types of cases. She pointed out that irrespective of the type of claims they belonged to, all legal aid applications had to satisfy the merits test, and cases assessed to have a low chance of success or recovery of damages would not be granted legal aid. Mr Albert HO shared the view that there was a conceptual problem with the proposed division of SLAS into Part I and Part II. He considered it wrong in principle to say that certain types of cases were more risky than the others, as risk assessment should be based on the facts and merits of each case. The Chairman said that the Bar Association had also elaborated on this point in paragraphs 11 to 15 of its submission and requested LASC to make a response to this at the next meeting.

LASC

30. Dr Priscilla LEUNG said that LASC's recommendations for expansion of SLAS had responded in part to the long-standing call of Members for enhancing the middle class' access to justice. For instance, Members' proposals of extending the scope of SLAS to cover claims concerning financial products and a wider range of professional negligence claims had been taken on board by LASC. However, she was concerned that LASC's recommendations had not addressed the demand for extension of legal aid to cover disputes concerning compulsory land sale, provision of legal assistance to Hong Kong residents involved in litigation on the Mainland, and cases where whistleblowers were being sued for defamation and there was great disparity in the financial resources between the two parties. She called on LASC to consider including these types of cases in its recommendations for expansion of SLAS.

31. Mr TAM Yiu-chung expressed support for LASC's recommendation to establish SLAS Part II to extend the coverage of SLAS. He, however, considered that the contribution fees under the existing SLAS and OLAS should be lowered so that more people could benefit from the expanded ambit of legal aid.

32. Ms Emily LAU said that it appeared that financial consideration was the prime concern of LASC in considering the types of cases to be covered under the expansion of SLAS. She enquired whether members of LASC who were drawn from the legal profession and lay members held different views on the expansion of SLAS and how LASC sought to strike a proper balance between maintaining the financial viability of SLAS and widening the middle class' access to justice in making its recommendations on expansion of SLAS.

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33. Mr Paul CHAN said that members of LASC had indeed expressed different views during their deliberations on expansion of SLAS; however, it could not be said that lawyer members and non-lawyer members inevitably differed in views. He reiterated that given the self-financing nature of SLAS, LASC must take account of the financial viability of SLAS in considering the type of cases to be covered under the scheme. He stressed that all members of LASC were committed to expanding the coverage of SLAS to widen access to justice.

34. Concluding the discussion, the Chairman said that further discussion would be held on the expansion of SLAS at the next regular meeting scheduled for 24 January 2011. She requested LASC to respond to the concerns raised by members and the legal professional bodies. She also requested the Clerk to prepare the minutes of this discussion item as soon as possible to facilitate the discussion at the January 2011 meeting.

LASC

Clerk

V. Implementation of Civil Justice Reform

[LC Paper Nos. CB(2)591/10-11(06) to (07)]

Briefing by the Judiciary Administration

35. Judiciary Administrator ("JA") briefed members on the findings on the first year of implementation of the Civil Justice Reform ("CJR") (i.e. from 2 April 2009 to 31 March 2010), details of which were set out in the Judiciary Administration's paper [LC Paper No. CB(2)591/10-11(06)]. She advised that the implementation of CJR had on the whole been smooth in the first year. While the reform was heading towards the right direction, it was still at an early stage of implementation and it would take at least two to three years before meaningful trends and conclusions could be drawn.

36. The Chairman said that the main objectives of CJR were to make civil proceedings more efficient and expeditious; cut out unnecessary interlocutory applications; reduce litigation costs; and promote wider use of mediation to facilitate early resolution of disputes. She asked JA to elaborate on how far these objectives had been achieved and the impact of the implementation of CJR on unrepresented litigants.

37. JA said that the key to success of the reforms was a change in culture in the conduct of court proceedings and of dispute resolution on the part of judges and the legal profession. Since the reforms were implemented, progress had been made in achieving the necessary change in culture. She further said that

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one of the key features of CJR was active case management by the court. At the Masters' level, Case Management Conferences ("CMCs"), an important tool of case management, had been conducted extensively. At Judges' level, priority had been given to long cases and specialist lists, and there was already effective case management in these cases. The percentages of milestone dates which were varied were low. Active case management by the court had assisted the parties to identify the true nature of the issues at an early stage leading to shorter trials. Nevertheless, in view of the small population of cases, it was pre-mature to draw any firm conclusions at this stage on whether CJR had achieved the objective of expediting civil proceedings. As regards the number of interlocutory applications, the first year of implementation of CJR did not see any reduction in the number of interlocutory applications, which was most likely due to the exceptional increase in caseload in the last three months prior to the implementation of CJR. A longer period of time would be required to evaluate the changes in this regard. On cost matters, JA advised that there had been greater use of summary assessment of costs, which had helped to cut down unnecessary taxation hearings, thereby saving time and costs. As it was still in the early days of the implementation of CJR, the full impact of the reforms in terms of the saving of litigation costs had yet to be seen.

38. In respect of mediation, JA said that the Practice Direction on Mediation ("PD 31") applicable to all relevant civil cases in the Court of First Instance ("CFI") and the District Court ("DC") came into effect on 1 January 2010. As statistics on mediation were available for three months only, a longer period of observation was required. The Judiciary's Working Party on Mediation chaired by Hon Mr Justice Johnson LAM would continue to monitor closely the use of mediation in civil cases in CFI, DC and the Lands Tribunal. To facilitate evaluation on the effectiveness of mediation, the CJR Monitoring Committee had also been exploring how the legal practitioners might assist in collecting more data relating to mediation. JA added that apart from mediation, the new mechanism of sanctioned offers and payments had also contributed to early settlement of disputes.

39. JA further said that the increasing number of unrepresented litigants presented a challenge to the courts. With the implementation of CJR, the Judiciary continued to provide procedural assistance to unrepresented litigants through the Resource Centre for Unrepresented Litigants ("Resource Centre"). The facilities in the Resource Centre had been enhanced, for example, the brochures on outline of civil proceedings had been updated. The number of enquiries at the Resource Centre had increased after the implementation of CJR. She stressed that to maintain the independence and neutrality of the Judiciary, it would be inappropriate for the Resource Centre to provide legal advice to

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unrepresented litigants. The provision of legal assistance to unrepresented litigants (for instance, through legal aid and pro bono services) would require the concerted efforts of various parties including the Executive Authorities and the legal profession.

Views of the two legal professional bodies

Bar Association

40. Mr Kumar Ramanathan said that given the short time frame of the implementation of CJR, it was too early to tell the effect of the reforms. Nevertheless, the reforms appeared to be going in the right direction, as reflected in the feedback from members of the Bar Association. The success of the reforms would require a change of mindset and culture not only on the part of judges and legal practitioners, but also of litigants, and such change could not be achieved overnight. Referring to paragraph 61 of the Judiciary Administration's paper, he said that the Bar Association was concerned about the trend of increasing number of unrepresented litigants, which indicated that a significant portion of members of the public were outside the ambit of legal aid. The Bar Association believed that the expansion of SLAS would address some of the unmet needs for legal services and would hopefully lead to a reduction of unrepresented litigants over time.

Law Society

41. Mr Nicholas Hunsworth shared the view of the Bar Association that it was too early to reach any firm conclusions on the effectiveness of CJR. He considered that there was also no real evidence as yet that the reforms were having a downward effect on costs. Anecdotal evidence suggested that the more active use of case management might have led to an increase in costs. It was, however, clear that the reforms would result in a reduction of unnecessary interlocutory applications. While there had not been much reduction in the length of time to set to trial, it was probably because the courts had had to deal with a sizable backlog of cases, and progress might be seen on this front after the backlog had been cleared. He further said that he was not aware that the introduction of the requirement of leave to appeal had caused any injustice; he considered it one of the best initiatives of CJR which would stop tactical appeals being used to delay cases. As regards unrepresented litigants, there had not been any decrease in number after the implementation of CJR. In his view, unrepresented litigants would not find the new system any easier to navigate than the old one. On mediation, while there was evidence on change in mindset among legal practitioners in their willingness to embrace mediation,

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it was too early to tell from the statistics whether mediation was working in facilitating settlement of disputes.

42. The Chairman asked Mr Nicholas Hunsworth whether there was any basis for the concern about sham mediation referred to in paragraph 49 of the Judiciary Administration's paper and, if so, the steps taken by the Law Society to address such concern.

43. Mr Nicholas Hunsworth said that there was indeed evidence suggesting that some legal practitioners/mediators had participated in sham mediations without any serious intention to settle. With the implementation of PD 31, the court was empowered to apply costs sanctions against a party who was found to have unreasonably rejected the use of mediation, which explained why there were sham mediations. The Law Society had issued a circular to remind its members that participating in sham mediations either as a solicitor or a mediator was an act of professional misconduct. The same position was taken by the Bar Association. Mr Hunsworth added that he was optimistic that it was a teething problem which could be dealt with by means of professional disciplinary action.

Discussion

44. Mr Paul TSE asked whether any problems had occurred since the implementation of CJR. He further asked whether reference had been made to the experience of other jurisdictions which had implemented similar reforms, in particular the United Kingdom.

45. JA responded that the implementation of CJR had on the whole been smooth. According to the feedback received, no major problems were identified; all issues raised were minor and operational in nature and were resolved quickly. She further said that before the implementation of CJR, the Steering Committee on CJR chaired by the Chief Judge of the High Court had organized a series of courses on CJR to train judges as well as support staff. In terms of infrastructural support, the computer systems had been enhanced and a set of detailed operational manuals on the reformed areas had also been prepared to provide guidance to support staff on implementation. The two legal professional bodies had also devised extensive training programmes for their members to prepare them for the implementation of CJR. All these preparation and training had contributed to the smooth implementation of the reforms.

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46. Regarding the experience of other jurisdictions in similar reforms, JA said that the Working Party on CJR had made reference to the experience of the United Kingdom in planning the implementation of CJR. The reforms in the English civil justice system were not replicated in Hong Kong in a wholesale manner and account had been taken of the actual situation in Hong Kong in deciding which reforms to implement.

47. Mr Paul TSE noted that for some of the statistics on the implementation of CJR cited in the Judiciary Administration's paper, no pre-CJR statistics were presented, hence comparison could not be made with the pre-CJR situation. He queried the usefulness of such statistics for assessing the effectiveness of CJR.

48. JA said that the CJR Monitoring Committee considered that the collection of relevant statistics would help monitor the implementation of CJR and had endorsed a list of 32 key indicators in six broad areas for assessment of the effectiveness of CJR. Where similar statistics were available prior to the implementation of CJR, they would be presented for comparison purpose. However, for statistics relating to new CJR initiatives, there would not be any pre-CJR data. In some cases, pre-CJR statistics were not available because they had not been captured in the database before the implementation of CJR. Even though no pre-CJR statistics were available for some key indicators for comparison purpose, the post-CJR statistics could, in the course of time, help throw light on development trends. She stressed that as CJR had only been in place for a year, a longer period of time would be required to build up the statistics for meaningful evaluation.

49. Mr Paul TSE enquired whether the Judiciary had collected feedback directly from legal practitioners on the effectiveness of CJR. JA responded that both the CJR Monitoring Committee and the Civil Court Users' Committee included representatives from the two legal professional bodies. These were major channels through which views of legal practitioners on CJR were gathered.

50. Mr TAM Yiu-chung noted with concern the rise in the number of unrepresented litigants which had added to the courts' burden. He enquired whether the main reason for self-representation in civil proceedings was the unavailability of legal aid, and whether any study had been conducted on the reasons why litigants went unrepresented. JA advised that the Judiciary did not have such information. The Judiciary had conducted surveys among users of the Resource Centre, but the surveys were focused on the facilities and services of the Resource Centre.

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51. The Chairman said that apart from posing challenges to judges, unrepresented litigants also added to the burden of the other party who was represented.

52. Mr LEUNG Kwok-hung sought the following information: (a) in respect of cases where one of the parties was unrepresented, the percentage of cases where the unrepresented parties had lost the cases; (b) the number of appeals lodged by unrepresented litigants who had lost their cases in the lower court; and (c) the number of legal aid applications made by unrepresented litigants for lodging appeals. JA replied that the Judiciary did not have such information. The Clerk was requested to write to LAD to seek information, if available, for the past years on the number and outcome of legal aid applications involving applicants who applied for legal aid to lodge an appeal after having represented themselves in person and lost their cases in the lower court.

Clerk

53. Noting from Table 19.2 in the Judiciary Administration's paper that over 50% of the hearings in DC involved unrepresented litigants, Ms Emily LAU echoed the concern that the increasing number of unrepresented litigants had added burden to the operation of the courts. She enquired about the Judiciary's views on how to tackle the problem.

54. JA said that the increasing number of unrepresented litigants had indeed presented a challenge to the courts. The Judiciary would make its best efforts to provide assistance to unrepresented litigants on procedural matters. However, in order not to compromise the courts' impartiality, assistance which the courts could give to unrepresented litigants would be limited. She stressed the need for different parties to work together to address the issues arising from the increasingly large number of unrepresented litigants. The expansion in legal aid would contribute to the solution. Encouraging unrepresented litigants to attempt mediation in appropriate cases might also help. Further, it would be necessary for the legal profession to do its fair share to provide pro bono services.

55. Ms Emily LAU further enquired whether the Judiciary could provide quantified information on the amount of additional resources the courts had used on civil proceedings involving unrepresented litigants. JA responded that such information was not available.

56. The Chairman said that there were different reasons why people represented themselves in litigations. For example, some were not eligible for legal aid and could not afford legal representation; some were eligible for legal

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aid but had their applications rejected for failing to satisfy the merits test; and some might simply choose to represent themselves. For people who were forced to represent themselves due to a lack of means, the expansion of legal aid would help. She recalled that a study had been conducted on issues relating to unrepresented litigants including reasons for self-representation. She requested the Clerk to collate relevant information for members' reference.

Clerk

57. The Chairman enquired when the Judiciary Administration planned to provide a further written report to the Panel on the progress of implementation of CJR. JA undertook to revert to the Panel after consultation with the CJR Monitoring Committee. The Chairman requested the Judiciary Administration to include views of the legal profession on CJR in its next report to the Panel.

Jud Admin

Jud Admin

VI. Proposed amendment to the Enduring Powers of Attorney Ordinance (Cap. 501)

[LC Paper Nos. CB(2)591/10-11(08) to (10)]

Briefing by the Administration

58. Senior Assistant Solicitor General (General Legal Policy) ("SASG") briefed members on the Administration's paper on the proposed amendments to the Enduring Powers of Attorney Ordinance (Cap. 501) ("EPA Ordinance") [LC Paper No. CB(2)591/10-11(08)]. In particular, the Administration would like to solicit the Panel's views on whether the existing requirement in section 5(2) of the EPA Ordinance that an EPA be signed before a medical practitioner should be abolished ("Recommendation 1") or whether the requirement should be relaxed by allowing the donor and the solicitor to sign the EPA within 28 days after it had been signed by a medical practitioner ("Recommendation 2").

Views of the Bar Association

59. Mr Alexander Stock said that the Bar Association had concerns about Recommendation 1 as it regarded the existing requirement for medical certification as a desirable safeguard in the interests of donors given the importance of EPAs. The Bar Association preferred and supported the more cautious Recommendation 2.

(*Post-meeting note*: The submission provided by the Bar Association after the meeting was circulated to members vide LC Paper No. CB(2)667/10-11(01) after the meeting.)

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Discussion

60. Mr TAM Yiu-chung expressed support for relaxing the existing requirement that both the doctor and the lawyer be present at the time of execution of EPAs. He also considered the proposed time limit of 28 days between medical certification and execution under Recommendation 2 acceptable.

61. Mr Albert HO indicated support for Recommendation 1. He queried the need for the retaining the requirement for medical certification for the execution of EPAs under Recommendation 2, given that solicitors were generally well aware that where there might be capacity issues, they should be cautious and should obtain a medical assessment to prevent the possibility of the validity of the EPA being challenged. He further pointed out that while an EPA was an important document, it was no more important than a will, the execution of which did not require any medical certification. Mr Paul TSE expressed concurrence with Mr HO's views.

62. SASG explained that some respondents from the medical and social welfare sectors had expressed objection to the removal of the requirement for medical certification. They pointed out that as the circumstances in which an EPA was likely to be executed were those in which it was anticipated that mental incapacity was likely to occur in the future, the requirement for a medical certification on the mental state of the donor before the execution of an EPA would help safeguard the donor's interests; and a medical practitioner would be in the best position to assess the donor's mental capacity.

63. Referring to paragraph 16 of the Administration's paper, the Chairman said that the relevant guidelines on the issue of mental capacity of clients as set out in *Hong Kong Solicitors' Guide to Professional Conduct* were not very stringent. Given that an EPA was a document of considerable importance which could not be revoked after the onset of the donor's mental incapacity, it was understandable that some sectors of the community had expressed objection to the removal of the requirement for medical certification of EPAs. In her view, unless there were considerable difficulties in complying with the proposed 28-day time limit between medical certification and execution under Recommendation 2, consideration should be given to adopting Recommendation 2 to allay the concern expressed by some sectors of the community.

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64. Mr Albert HO said that while he supported Recommendation 1, he did not object to the relaxation of the existing execution requirements along the lines of Recommendation 2.

65. Summing up the discussion, the Chairman said that while Panel members had indicated different preferences on whether Recommendation 1 or Recommendation 2 should be adopted, no member had expressed objection in principle to the policy intent of relaxing the existing certification requirements proposed under Recommendation 2.

VII. Any other business

66. There being no other business, the meeting ended at 6:45 pm.

Council Business Division 2
Legislative Council Secretariat
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