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Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 18 July 2017, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex

Members present : Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)
Hon James TO Kun-sun
Hon Paul TSE Wai-chun, JP
Hon Steven HO Chun-yin, BBS
Hon CHAN Chi-chuen
Dr Hon Fernando CHEUNG Chiu-hung
Dr Hon Elizabeth QUAT, JP
Hon Martin LIAO Cheung-kong, SBS, JP
Hon POON Siu-ping, BBS, MH
Hon CHUNG Kwok-pan
Hon Alvin YEUNG
Hon CHU Hoi-dick
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung

Members absent : Hon Dennis KWOK Wing-hang (Deputy Chairman)
Hon Frankie YICK Chi-ming, SBS, JP
Hon Jimmy NG Wing-ka, JP
Hon YUNG Hoi-yan

Public officers attending : Item II

Department of Justice

Ms Michelle AINSWORTH
Secretary

Inter-departmental Working Group on Gender
Recognition

Mr Eric CHEUNG

Member

Inter-departmental Working Group on Gender
Recognition

Miss Jenny LAW

Senior Government Counsel

Item III

Home Affairs Bureau

Mr Patrick LI

Deputy Secretary for Home Affairs (1)

Ms Karyn CHAN

Principal Assistant Secretary for
Home Affairs (Civic Affairs) 2

Legal Aid Department

Mr Thomas KWONG

Director of Legal Aid

Ms Alice CHUNG

Deputy Director of Legal Aid (Policy and
Administration)

Item IV

Home Affairs Bureau

Mr Patrick LI

Deputy Secretary for Home Affairs (1)

Ms Karyn CHAN

Principal Assistant Secretary for
Home Affairs (Civic Affairs) 2

Security Bureau

Mr Andrew TSANG Yue-tung
Principal Assistant Secretary (Security) E

Mr Michael YEUNG Pok-man
Assistant Secretary (Security) E3

Item V

Department of Justice

Mr Martin HUI, SC
Deputy Director of Public Prosecutions

Mr Paul HO
Senior Assistant Director of Public Prosecutions

**Attendance by
invitation** : Item III

Hong Kong Bar Association

Mr Nicholas F F PIRIE

Item IV

Hong Kong Bar Association

Mr Graham A HARRIS, SC

Item V

Hong Kong Bar Association

Mr Graham A HARRIS, SC

Mr P Y LO

Clerk in attendance : Ms Sophie LAU
Chief Council Secretary (4)2

Staff in attendance : Mr Stephen LAM
Senior Assistant Legal Adviser 2

Miss Joyce CHING
Senior Council Secretary (4)2

Miss Vivian YUEN
Legislative Assistant (4)2

I. Information paper(s) issued since the last meeting

LC Paper No. CB(4)1386/16-17(01) -- Information paper entitled "Judiciary's Proposed Removal of the Payment Collection Functions of Magistrates' Courts for Fixed Penalty in respect of Traffic Contraventions not Involving Court Proceedings" provided by the Transport and Housing Bureau and Judiciary Administration

Members noted the above paper issued since the last meeting.

II. Progress of work of the Inter-departmental Working Group on Gender Recognition

LC Paper No. CB(4)1386/16-17(02) -- Administration's paper on "Progress of the work of Inter-departmental Working Group on Gender Recognition"

Consultation Paper on Gender Recognition by Inter-departmental Working Group on Gender Recognition

2. At the invitation of the Chairman, Secretary of Inter-departmental Working Group on Gender Recognition ("IWG") gave an overview on the

progress of the work of IWG and briefed members on the Consultation Paper: Part 1: Gender Recognition ("the Consultation Paper") issued by IWG on 23 June 2017 to invite views from the community on a number of issues concerning legal gender recognition, details of which were set out in the IWG's paper and the Executive Summary to the Consultation Paper [LC Paper No. CB(4)1386/16-17(02)]. The consultation would last until 31 October 2017. Secretary of IWG remarked that other issues, such as same-sex marriage, civil partnership and discrimination against sexual minorities were outside the scope of the IWG's study. After studying the results of the public consultation, the IWG would proceed to the second part of the study concerning the impact of gender recognition on existing laws and practice in the event that a gender recognition scheme was to be established in Hong Kong. The IWG would continue to consult widely in the course of its work before finalizing its recommendations to the Government.

3. Secretary of IWG emphasized a number of key points in relation to the launch of public consultation on gender recognition: (a) the subject of gender recognition involved legal, medical, social and human rights issues which were complicated and controversial, and might have wide-ranging policy implications; (b) it was evident from the research conducted by IWG that there was no single uniform approach around the world to the procedures for legal gender recognition and the complex issues that it raised; (c) the Consultation Paper sought views of the community on a number of issues concerning legal gender recognition, including whether a gender recognition scheme should be established in Hong Kong and, if so, the contents of such scheme; and (d) in view of the complexity of the issues and the different approaches adopted by different jurisdictions around the world, the IWG maintained an open mind and did not have any preferred position at this moment. Accordingly, the consultation paper sought to discuss the relevant issues as objectively and comprehensively as possible, so as to promote an informed debate within the community. Secretary of IWG said that in deciding the way forward on its recommendations to the Government, the IWG would carefully analyze and take into account as appropriate the views of the public received during the consultation exercise.

Discussion

4. Mr Holden CHOW enquired whether the adoption of an administrative scheme for gender recognition, such as maintaining the existing administrative measures for amending the sex entry on the Hong Kong Identity Card, would be enough to address issues concerning legal gender recognition problems facing transsexual person in all areas of law. He also sought the views of IWG on the requirement of sex reassignment surgery ("SRS") for gender recognition. He was concerned that a gender recognition scheme

without a SRS requirement might give rise to much controversy in the community over the issue.

5. Secretary of IWG pointed out that as mentioned in the Consultation Paper, the IWG had no confirmed views on any of the issues presented in the Consultation Paper, including the criteria for determining whether a person would be eligible for gender recognition, whether the gender recognition scheme should be a legislative scheme or a scheme involving administrative measures only. IWG wished to seek the views of the public on these issues through the public consultation exercise underway. It was envisaged that a number of post-recognition issues concerning the legal status of transgender and transsexual persons would be raised in the event that a gender recognition scheme was to be introduced in Hong Kong. In this connection, whether simply administrative measures could cover the purpose of the study would need to be explored at a later stage.

6. Expressing dissatisfaction at the Government's delay in undertaking the consultation exercise, Mr CHAN Chi-chuen and Dr Fernando CHEUNG asked about the specific timetable for the completion of the study and the subsequent legislative amendments. Mr Alvin YEUNG shared similar views. Having regard to the fact that the judgment of the case *W v Registrar of Marriages* ("the W case") was delivered by the Court of Final Appeal ("CFA") in 2013, Mr Alvin YEUNG took the view that the existence of vacuum period in legislation concerning gender recognition upon the delivery of the judgment was against the principle of justice. Dr Fernando CHEUNG opined that legislation for protecting the rights of transgender and transsexual persons in response to the CFA's judgment should be introduced as soon as practicable.

7. Citing an incident in July this year that a transgender person had allegedly committed suicide in Tai Wai MTR Station, Mr CHAN Chi-chuen urged the Government to implement short-to medium-term measures in areas such as search, detention and imprisonment arrangements, with a view to facilitating the transgender and transsexual persons to live with dignity. Mr CHAN further said that the problems faced by transgender and transsexual persons could not be completely addressed even though a gender recognition scheme was established in Hong Kong and therefore urged for legislation against discrimination on the grounds of sexual orientation and gender identity.

8. Secretary of IWG responded that given that the consultation exercise was still in progress and the IWG would need time to analyze the responses received and then consider the way forward, it would be too early to give an indication of when the study would be completed. As regards the implementation of short- to medium-term measures, Secretary of IWG said that while she was not in a position to respond on behalf of the Government, the

Government would no doubt further examine the various issues raised in the Consultation Paper and consider possible interim measures.

9. Mr Eric CHEUNG, Member of IWG, said that although he was not in a position to reply on behalf of the IWG regarding the specific timeframe for the completion of study, he totally understood the concerns of transgender and transsexual persons and wished to expedite the study where possible. With regard to the implementation of short-term measures, Mr CHEUNG was of the view that it might not be necessary for the Government to wait for the recommendations of IWG to proceed. On Mr CHAN Chi-chuen's enquiry regarding enacting legislation to prohibit discrimination on the grounds of sexual orientation and gender identity, Mr CHEUNG reiterated that this matter was outside the scope of the IWG's study. That said, Mr CHEUNG was of the view it was incumbent upon the Government and the Legislative Council ("LegCo") to follow up in this regard.

10. Mr Alvin YEUNG opined that with regard to Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights, the scope of CFA's Order not only applied to transsexual persons who had gone through full SRS, but also those not suitable, not necessary and not willing to undergo SRS. Secretary of IWG observed that the Consultation Paper covered both transsexual and transgender persons generally, and so included persons who for one reason or another did not undergo SRS. Medical requirements for gender recognition, including requirements related to SRS, was one of the issues discussed in the paper calling for views of the community.

11. The Chairman informed that to implement the CFA's Order in the W case, the Government had introduced the Marriage (Amendment) Bill 2014 ("the Bill") but the motion for the Bill to be read for the second time did not pass the LegCo in October 2014. Notwithstanding this, the fact that the Bill was not passed did not affect the right of post-operative transsexual persons who had received full SRS to get married, as the Registrar of Marriages had been implementing the CFA's Order since July 2014.

12. The Chairman said that some members of the community might feel embarrassed regarding the use of sex-specific facilities, such as changing rooms and toilets, by pre-operative transgender persons according to their preferred gender. She asked whether such embarrassing situations had been addressed in the Consultation Paper. Mr Eric CHEUNG replied in the positive and added that arguments both in support and against various issues concerning gender recognition were contained in the Consultation Paper for seeking the views of the public.

13. Noting that there was no single uniform approach in overseas jurisdictions to gender recognition and the issues it raised, and in certain jurisdictions in the United States, SRS was not required for legal gender recognition, the Chairman enquired whether the IWG had studied the possible social issues in this regard.

14. Secretary of IWG responded that the IWG had been examining the possible social issues arising from different requirements for gender recognition in the course of its study. She advised that the matter could also be looked at in the context of the post-recognition part of the study. The analysis of gender recognition schemes in other jurisdictions at this stage mainly focused on their legal positions. Apparently, some jurisdictions adopted a self-declaration model, whereas others imposed stricter requirements in matters relating to gender recognition. Secretary of IWG reiterated that the approach the IWG had adopted in preparing the Consultation Paper was to provide to the public information that was as comprehensive as possible so that the public could have an informed view on relevant issues from the perspectives of both transgender/transsexual persons and other members of the public.

15. In response to the enquiry of the Chairman on the administrative measures to assist people having gender identity disorder or gender dysphoria who could not afford SRS, Secretary of IWG said that expenses of undertaking SRS in Hong Kong should not be an issue as the service was provided by public hospitals under the Hospital Authority.

16. The Chairman further enquired what administrative measures were in place to assist transgender persons who preferred not to undergo SRS or whose physical conditions were not suitable for SRS. Secretary of IWG advised that existing administrative measures under which a transsexual person might apply for a change in the sex entry on their Hong Kong Identity Card applied to transsexual persons who had undergone full SRS. Apart from this, administrative measures and potential legislation to protect the rights of transgender persons were being examined by the IWG in the course of its study.

17. Mr Eric CHEUNG added that the IWG had received briefings from relevant experts and learnt that gender dysphoria patients could be categorized into two types: some patients had the feeling that they were born into the wrong body and therefore had a strong desire to undergo SRS, while another type of patients had the belief that they belonged to another gender but SRS was not necessary to them. In the light of this, SRS was not a precondition for gender recognition in some overseas jurisdictions. In Hong Kong, most of the people with gender dysphoria who received medical treatments in public hospital belonged to the former type. Before a surgical operation was considered, the

patients would receive counseling and were required to undergo "real life experience".

18. The Chairman said that as far as she knew, a transgender person might switch back to their original sex after legally changing their gender identity through the gender recognition scheme. She was concerned whether this would give rise to confusion and social chaos in Hong Kong's situation. Mr Eric CHEUNG said that reversibility of the transition was found in some cases and thus SRS requirement was mandatory in certain jurisdictions so as to ensure permanence of the transition. Arguments for and against the requirement of SRS for gender recognition were also set out in the Consultation Paper to facilitate an informed debate within the community.

Public hearing

19. Mr CHAN Chi-chuen suggested that a public hearing be held to listen to various stakeholders' views on the Consultation Paper. Dr Fernando CHEUNG concurred with Mr CHAN's suggestion. The Chairman said that the public hearing could be arranged before the end of the consultation period, i.e. around end of September or early October 2017. Members did not object.

(Post-meeting notes: a special meeting was scheduled on 20 November 2017 to receive public views on the Consultation Paper.)

III. Measures to prevent the misuse of the legal aid system in Hong Kong and assignment of lawyers in legal aid cases

LC Paper No. CB(4)1386/16-17(03) -- Home Affairs Bureau's paper on "Measures to prevent the misuse of the legal aid system in Hong Kong and assignment of lawyers in legal aid cases"

LC Paper No. CB(4)1386/16-17(04) Background brief on "Measures to prevent the misuse of the legal aid system in Hong Kong and assignment of lawyers in legal aid cases" prepared by LegCo Secretariat

LC Paper No. CB(4)1419/16-17(01) Submission from Mr Azan Marwah

LC Paper No. CB(4)1419/16-17(02)	Submission from the Hong Kong Bar Association
LC Paper No. CB(4)1422/16-17(01)	Submission from The Law Society of Hong Kong
LC Paper No. CB(4)1427/16-17(01)	Submission from Justice Centre Hong Kong

Briefing by the Administration

20. At the invitation of the Chairman, Deputy Secretary for Home Affairs ("DSHA") (1) briefed members on the measures implemented by the Legal Aid Department ("LAD") to prevent the misuse of the legal aid system in Hong Kong and the assignment criteria for assigning lawyers in private practice to handle legal aid cases.

Declaration of Interest

21. Mr Paul TSE declared that his law firm had engaged in legal aid assignments.

Discussion

Alleged misuse of legal aid

22. Mr Nicholas PIRIE presented the views of the Hong Kong Bar Association ("Bar Association") on the issues relating to alleged misuse of the legal aid system as detailed in its submission. The Bar Association considered the legal aid system had adequate protections against abuse. Mr PIRIE said that to his understanding, access to justice was denied in many cases since there was no legal aid at the initial stage and that many solicitors and counsel were compelled to work on pro bono basis before legal aid certificates were granted. The Bar Association was of the view that there must be proper payment for the legal work conducted by professionals prior to granting of legal aid and it was essential that a strong and up-to-date legal aid system would be kept in place to ensure there was continuing access to justice. The Chairman raised similar concern on pro bono legal work. Mr PIRIE further pointed out that the success rate for civil cases was high and that the pro bono preparation had assisted in this high success rate.

23. Mr HUI Chi-fung noted that pursuant to Regulation 11 of Legal Aid Regulation ("LAR"), if anyone had repeatedly applied for legal aid after being

refused, the Director of Legal Aid ("DLA") might order that no consideration shall be given to any future application by that person for up to a period of three years if it appeared to DLA that his/her conduct had amounted to an abuse of the services provided by the Legal Aid Ordinance. Whilst noting that there was alleged misuse of the legal aid system, Mr HUI was worried that the Administration might misuse its power given under Regulation 11 of the LAR thereby denying the applicants' right of access to justice.

24. DLA responded that a legal aid applicant who was aggrieved by any order or decision made under Regulation 11 of the LAR might appeal to the Registrar of the High Court whose decision was final. Hence, there was sufficient safeguard in place to protect the applicant.

25. Mr Paul TSE asked about the number of orders made under Regulation 11 of the LAR in the past three years and the respective period of each order. DLA responded that the number of orders made in the year 2014, 2015 and 2016 was 43, 25 and 28 respectively and that all the orders were in force for a period of three years.

26. Referring to the orders made under Regulation 11 of LAR as mentioned by DLA, Mr Holden CHOW said that there had been abuse of legal aid in the past years and asked about the implication of processing of these abuse cases on other cases with merits.

27. DLA responded that in considering whether to make an order under Regulation 11 of the LAR, LAD would take into account a number of factors, including the previous applications from the applicant, the merits of those applications as well as the outcomes of the legal aid appeals. DLA further said that whilst the applicant had the right to appeal to the Registrar of the High Court, LAD had to take note of the resource implication and impact on the operation of the whole appeal mechanism which involved both the Judiciary and LAD resulting from the non-meritorious appeals being repeatedly lodged by the applicant.

28. Dr Elizabeth QUAT acknowledged that legal aid was an essential means to access to justice. However, a few individual cases of abuse, in particular a recent case involving JR, might give the public the impression that legal aid system was susceptible to misuse. To facilitate public scrutiny and avoid misuse, Dr QUAT suggested the Administration to enhance transparency of the processing of legal aid applications, say by making public the assessment criteria and approval/rejection reasons.

29. Mr Nicholas PIRIE of the Bar Association expressed a contrary view with regard to publicizing the details of legal aid applications. Mr PIRIE said

that the legal aid system as well as its appeal channel should be run on a confidential basis since the cases involved private affairs which should not be subject to public scrutiny.

30. The Chairman remarked that the legal aid system should be subject to public scrutiny since it involved the spending of public money. To address the confidentiality issue raised by Mr Nicholas PIRIE, the Chairman said that sensitive information could be withheld and anonymity of persons to whom the private information referred could also be preserved in any publication.

Legally-aided cases involving judicial review ("JR")

31. Mr Nicholas PIRIE of the Bar Association pointed out that a large number of illegal immigrants were not properly dealt with by the Immigration Department and the recent upsurge in JR applications were attributed to social and policy change. Mr PIRIE further pointed out that the rapid drop in percentage of grants for JR applications which were related to non-refoulement claims during 2014 to 2016 required further careful inquiry and that the grant percentage for other JR cases had also fallen to very low rate. Upon a purely numerical basis, the LAD should not be criticized for too many grants for JR cases.

32. Mr Alvin YEUNG asked for the breakdown of the appeal cases against DLA's decisions by JR related and non-JR cases in respect of the applications as shown in paragraph 7 under civil legal aid for the years 2014, 2015 and 2016 of LC Paper No. CB(4)1386/16-17(03).

HAB

33. In response, DLA said the number of legal aid appeal cases involving JR should be small but he did not have the figures at hand. DLA undertook to provide a written response on the requested information. Noting the small number of appeal cases against DLA's decision involving JR cases, Mr Alvin YEUNG expressed that there should be no abuse of legal aid in this regard.

34. Noting that the table in paragraph 11 (under page 6) of LC Paper No. CB(4)1386/16-17(03) indicated that the total legal expenditure on legally-aided cases involving JR in the financial year of 2016-17 was \$36.3 million and accounted for 5.02% of the total legal aid cost of 2016-17, Dr Junius HO asked how many JR cases were involved in the financial year. DLA undertook to provide a written response.

HAB

35. Dr Junius HO also noted that legally-aided cases involving JR only accounted for around 1% of the total caseload while the legal expenditure spent on those cases accounted for around 5% of the total legal aid costs. Based on the above quoted figures, Dr HO considered that the amount spent on JR cases

was on the high side. Dr HO also sought clarification on whether there was no cap on the legal aid budget and queried whether the amount spent on JR cases was reasonable.

36. DLA confirmed that there was no cap on the budget of legal aid and advised that the success rate for legally-aided cases involving JR cases had been maintained at a high level, with the success rate for 2016 at around 70%. The high success rate indicated that only cases with reasonable grounds were granted legal aid. Moreover, LAD would also closely monitor the merits of these cases to ensure that the continuance of legal aid was justified.

37. Noting the high success rate and low grant rate for legally-aided cases involving JR, Dr Fernando CHEUNG believed that legal aid applications involving JR were subject to stringent vetting and that there should not be any abuse of legal aid in this regard.

HAB 38. Dr Elizabeth QUAT asked for the success rate for legally aided cases involving JR (i.e. judgments in favour of the legally-aided persons) for the past 10 years.

HAB 39. Referring to the total number of civil assignments to top 10 solicitors and counsel as shown in the tables in Annex B of LC Paper No. CB(4)1386/16-17(03), Dr Junius HO asked how many were JR-related cases and the amount of fees payable for each assignment.

HAB 40. Mr Paul TSE queried whether different assessment criteria would be applied to legal aid applications involving JR of different nature. Mr Paul TSE then asked for the breakdown of "JR cases other than non-refoulement claims" by nature in respect of the legal aid applications involving JR received and certificates granted as shown in the second and third column of the table in paragraph 11 (under page 5) of LC Paper No. CB(4)1386/16-17(03).

41. DLA undertook to provide written responses on the information requested above and advised that in conducting merit tests for legal aid applications, same merits tests would be adopted irrespective of the nature of the applications. In assessing legal aid applications involving JR, the LAD would also assess whether the applicants had locus standi to obtain leave for JR.

Legal aid assignments to lawyers

42. Mr Nicholas PIRIE presented the views of the Bar Association on the issues relating to assignment of lawyers as detailed in its submission. Mr PIRIE pointed out that there had been repeated criticism of "favouritism" of over allocation of cases to various lawyers. The Bar Association opined that the

Administration should be looking at the quality of work instead of just setting limits on cases or payment. Mr PIRIE pointed out that HAB's paper did not explain the factual or legal basis for their adjustments and that the Bar Association was not consulted on this issue. Moreover, the Bar Association was against the proposal set out in paragraph 19 of HAB's paper which proposed that as a general policy a counsel who had earlier given a section 9 opinion would not be assigned to handle the case if legal aid was subsequently granted. Among others, the Bar Association pointed out that the consideration relating to class action was a major omission in the discussion of the proposal.

43. Referring to the tables in Annex B of LC Paper No. CB(4)1386/16-17(03), the Chairman requested for separate lists showing the distribution of the assignments, with information on the number of nominated lawyers involved and the breakdown for different types of assignments (including civil, criminal and section 9 assignments) and different categories of cases, for the year from 2014 to 2016 in order to ascertain whether there was a fair distribution of assignments. Dr Junius HO also urged the Administration to ensure that legal aid cases would not be assigned to certain lawyers and a fair distribution of the amount spent on each case. DLA undertook to provide the information as requested above.

HAB

44. Dr Elizabeth QUAT expressed concern about touting activities and the practice of nomination of lawyers by the aided persons which might give rise to conflict of interest. In response to Dr QUAT's enquiry on whether the Administration had formulated measures to address the above concern, DLA advised that LAD had in place a "Declaration System" for legal aid cases. The system sought to ensure that, among others, the aided person's choice of lawyer was not affected by the champerty or improper touting activities on the part of the lawyer concerned. A nominated lawyer who was unable to accept the conditions set out in the declaration condition would not be allowed to take up assignment of the case.

The scope of legal aid

45. Considering the current scope of legal aid was rather limited, Mr Alvin YEUNG suggested the Administration to expand the scope of legal aid and expedite the work relating to the reform of class action regime and conditional fee arrangement. The Chairman also opined that there was the need to expand the scope of legal aid since access to justice was denied in many cases where no legal aid was available.

46. The Bar Association expressed concern about the situation of unrepresented litigants and requested the Panel to discuss the issue of "review of financial eligibility limits of legal aid applicants".

Conclusion

47. In conclusion, the Chairman said that she supported an uncapped budget for legal aid and stressed that there should be a fair distribution of the legal aid assignments. She urged the Administration to enhance the transparency of the information, among others, details of the nominated lawyers involved, with the breakdown for the different types of assignments as well as the amount spent on each case should be provided. The Panel would continue to follow up on issues relating to the scope of legal aid.

IV. Provision of legal advice services for persons detained in police stations

LC Paper No. CB(4)1386/16-17(05) -- Home Affairs Bureau's paper on "Legal Aid Services Council's Proposals on the provision of legal advice services for persons detained in police stations"

LC Paper No. CB(4)1415/16-17(01) Submission from The Law Society of Hong Kong

48. At the invitation of the Chairman, Deputy Secretary for Home Affairs (1) ("DSHA(1)") briefed members on the findings and recommendations of a study on "Legal Assistance to Detainees at Police Stations" completed by the Legal Aid Services Council ("LASC") and the key features of LASC's proposed pilot scheme. In brief, LASC recommended that a publicly funded scheme be made available to ensure detainees could have access to legal advice on their rights once their liberty was restricted. LASC proposed that the service be introduced on a pilot basis, implemented in stages and kept under review.

Declaration of interest

49. Mr Alvin YEUNG declared that he was a practising criminal barrister.

Discussion

50. Mr Graham HARRIS said that the Bar Association welcomed the pilot scheme and looked forward to seeing its implementation. Mr Alvin YEUNG also expressed support for the proposal to provide legal assistance to detainees at police stations and Dr Junius HO had no objection to the proposal.

Dr Elizabeth QUAT said that she would not be able to conclude whether she supported the proposal yet, given the limited information provided by the Administration at this stage.

51. Mr Holden CHOW said he supported the proposal in principle but the Administrationshould need to clarify on some details before proceeding with the proposal. He asked whether access to lawyers would be made available 24 hours a day at all police stations for giving legal advice to detainees in person and whether the call centre would operate 24 hours a day upon the full implementation of the scheme. Noting that the majority view under the LASC's recommendation was that the service to be provided to a detainee should not last for more than one hour, Mr CHOW asked about the types of legal advice to be covered and the basis for setting the proposed time limit. In particular, Mr CHOW asked whether the lawyers' attendance during statement taking would be available. Mr CHOW pointed out that the questioning and taking of statement at police station would usually take at least two to three hours. In this case, the proposed time limit of one hour was considered to be unrealistic.

52. Considering the proposal to provide legal advice to detainees would entail substantial financial and operational implications, Dr Elizabeth QUAT asked whether assessment had been made on the number of persons detained per year at police stations and the financial implication of providing legal advice to them. Sharing Mr Holden CHOW's view on the proposed time limit of one hour, Dr QUAT urged the Administration to review LASC's recommendations and provide further detailed assessment on the proposal. Dr Junius HO said that the Administration might also need to take into account the waiting time when considering the time limit for the service.

53. In response to the above enquiries and views, DSHA(1) advised that since LASC's proposal would entail substantial financial and operational implications, the Administration had been carefully examining the feasibility of LASC's recommendations. LASC proposed that as a start, four representative police stations might be identified to take part in the pilot scheme for a period of less than two years. An interim review after the first year and a comprehensive review after the second year were recommended by LASC. With regard to the proposed time limit of one hour, DSHA(1) said that LASC had not made a firm recommendation on whether the advice should be subject to a time limit and if so, how much time should be spent on giving such advice. LASC held the view that the attending lawyer should use their professional judgement to decide how much time should be spent on each case and might extend the service beyond the time limit in such cases as serious offences or special circumstances. DSHA(1) assured that Panel members' view and suggestions would be given due consideration in deliberating the way forward.

54. In response to Dr Elizabeth QUAT's enquiry of whether LASC had consulted relevant enforcement departments before making the recommendations, DSHA(1) responded in the affirmative.

55. Mr Holden CHOW further asked whether the Police had planned any necessary internal arrangement for the implementation of the pilot scheme, including extra interview rooms for the detainees and designing procedures to facilitate the provision of legal advice at the police stations.

56. DSHA(1) responded that the necessary arrangement would be worked out as appropriate to meet the operational need of the pilot scheme. Principal Assistant Secretary (Security) E supplemented that the Security Bureau and enforcement departments were concerned about the possible resource and operational implications of the proposal, including the need for enhancement of facilities, additional manpower, security and translation service, which would need to be carefully assessed. There were also concerns about the availability of lawyers providing the free services, which would affect the duration of detention.

57. In response to Mr Alvin YEUNG's enquiry about the criteria for identifying the four police stations for the pilot scheme, DSHA(1) responded that details of the identification process were yet to be worked out and members' views would be welcome. Mr Alvin YEUNG said that, besides the number of detainees, the Administration had to work out other criteria for identifying the most representative police stations.

58. Mr Alvin YEUNG enquired about the rationale and policy intent for proposing the service to be extended only to persons where bail was refused by the police or where the detainee could not afford the bail money. In response, DSHA(1) advised that the basic principle for the provision of legal advice services in the police stations was to ensure that detainees could have access to legal advice on their rights once their liberty was restricted.

59. Mr Alvin YEUNG expressed reservation on the above principle and opined that provision of legal advice to protect the legal rights of detainees should be available as soon as practicable after the arrest, regardless of whether bail was granted or refused. Mr YEUNG pointed out that the decision of whether to refuse bail or not was often made after statement taking and he opined that timely access to a lawyer should be made available for detainees to protect their rights before interrogation.

60. Dr Junius HO pointed out that currently legal aid was mainly available for criminal cases tried in the District Court or above whereas people being

charged of an offence in the Magistrates' Court would have to approach the liaison officer of the Duty Lawyer Scheme for legal assistance at the appropriate Magistrates' Court instead. To better tie in with the existing schemes, Dr HO suggested the proposed scheme of legal advice for persons detained in police station should be incorporated into the Duty Lawyer Scheme instead of the existing legal aid scheme. Mr Alvin YEUNG echoed with Dr HO's suggestion and said that consideration should be given to extending the list of Duty Lawyers Scheme for the purpose of listing as attending lawyers for legal advice services for persons detained in police station.

61. Noting that a contribution in the range of \$500 to \$1,000 was proposed to be paid by the detainee for any subsequent visit to a detainee, Dr Junius HO pointed out that there might be cases where a detainee could not afford the payment. Dr HO suggested the Administration to give further thoughts on issues relating to payment and allocation of funding. Dr HO also suggested the Administration to provide incentives to encourage lawyers to join the pilot scheme since they were often required to work during odd hours to provide free legal services under the scheme.

62. In conclusion, DSHA(1) undertook to take into account members' views and suggestions in considering the way forward for the proposed pilot scheme. The Chairman said that this Panel would continue to keep in view the implementation of the pilot scheme.

V. The Rule of Law and the Role of the Prosecutor

LC Paper No. CB(4)1386/16-17(06) -- Administration's paper on "The Rule of Law and the Role of the Prosecutor "

LC Paper No. CB(4)1386/16-17(07) -- Background brief on "The rule of law and the role of the prosecutor" prepared by LegCo Secretariat

63. At the invitation of the Chairman, Deputy Director of Public Prosecutions ("DDPP") briefed members on the principle of the rule of law in Hong Kong and the role of the prosecutor in upholding this principle. Details of which were set out in the paper provided by the Department of Justice ("DoJ") [LC Paper No. CB(4)1386/16-17(06)].

Views of the Bar Association

64. Mr Graham HARRIS said that the Bar Association did not have particular comments on the DoJ's paper since the principles mentioned therein were not new. In his view, there would not be major problems so long as the Prosecution Code was adhered to throughout the prosecution process. Mr P Y LO supplemented that members might wish to refer to paragraphs 1.2, 1.4 and 3.2 of the Prosecution Code, which set out the independence of the prosecutor, the guarantee of prosecutorial independence stipulated in Article 63 of the Basic Law and the role of the prosecutor as set out in paragraph 3.2 of the Prosecution Code.

Discussion

Prosecutorial independence and prosecution decision

65. Dr Elizabeth QUAT concurred with Mr P Y LO that the independence of the prosecutor was of utmost importance to uphold the rule of law in Hong Kong. In respect of the allegations made by certain members of the community that the Government had used recent prosecutions as a political tool to suppress opposing views, Dr QUAT sought Mr LO's and DoJ's response in this regard.

66. Mr P Y LO replied that the Bar Association had to a certain extent trusted the prosecutors of DoJ discharging their duties in accordance with the Prosecution Code. Furthermore, Hong Kong has an independent judicial system under which judges would consider whether there was legally sufficient evidence to support the prosecution, ensure the trials were conducted in a fair and just manner and make rulings accordingly.

67. DDPP said that prosecutors and other public officers within DoJ had all along upheld the principle of prosecutorial independence that all criminal cases were handled in an impartial manner. DDPP stressed that when making prosecution decisions, prosecutors in Hong Kong must act fairly and operate within the framework of defined and transparent prosecution policy guidelines as set out in the Prosecution Code, so that such decisions were made based on the evidence available without political consideration.

68. In reply to Dr Elizabeth QUAT's enquiry on whether the Chief Executive had the power requesting DoJ to withdraw a prosecution, DDPP advised that pursuant to Article 63 of the Basic Law, DoJ shall control criminal prosecutions, free from any interference. As such, the prosecutor ought not to be influenced by any other elements when making decisions, including departments or bureaux or officials of the Government (including the Chief Executive) as well as possible pressure from the public and the media.

69. Dr Junius HO expressed that "justice delayed is justice denied". He noted with concern that DoJ did not commence prosecutions in respect of certain criminal cases which happened two to three years ago. In particular, Dr HO said that amongst the total of 1 003 persons arrested by the Police during the Occupy Central Movement in 2014, only around 30% of them had been prosecuted. He was of the view that the prosecution rate was fairly low and the prosecution work carried out by DoJ had been slowly discharged. In this connection, Dr HO asked how DoJ would balance the requirements of public interest in the light of paragraphs 5.8 and 5.9(d) of the Prosecution Code.

70. DDPP responded that while it was not appropriate to comment on individual cases, he assured Dr Junius HO that colleagues of the Prosecutions Division would make all efforts to undertake prosecution work having due regard to the nature and complexity of each case. DDPP agreed with Dr Junius HO that in all common law jurisdictions, delay in making prosecution decision would amount to injustice. Notwithstanding this, the time required to process a criminal case would vary depending on the nature and complexity of the case. Hence, it was not appropriate to suggest that the prosecution work of all criminal cases had to be completed within a specific timeframe. DDPP said that in determining whether or not and when to prosecute a case, prosecutors had to consider all available evidence strictly according to the principles set out in the Prosecution Code and the applicable laws in a holistic manner.

(To allow sufficient time for discussion, the Chairman advised that the meeting would be extended by 15 minutes.)

71. Mr Holden CHOW said that he had every confidence in prosecutors who had performed their duties independently and professionally without any political or other improper influence to uphold prosecutorial independence. Noting that individual participants of the Occupy Central Movement who had been prosecuted by DoJ alleged that the prosecution was political by nature, Mr CHOW considered that such kind of allegation was meant to smear the officers of DoJ.

72. Dr Elizabeth QUAT asked whether a request made to DoJ for not pursuing prosecution against someone who was alleged to have committed a crime would amount to perverting the course of justice in Hong Kong. In reply, DDPP said that the decision to prosecute would hinge on two required components. The first was that the admissible evidence available demonstrated a reasonable prospect of conviction. The second was that general public interest must require that the prosecution be conducted. In this regard, there was no question of the DoJ deciding whether or not to prosecute without fully evaluated the evidence and the public interest consideration.

DDPP emphasized the importance of prosecutorial independence and pointed out that the prosecutor, when making decisions, ought not to be influenced by irrelevant considerations.

73. Dr Elizabeth QUAT further enquired whether the rule of law in Hong Kong would be undermined in view of the allegations made by some members of the community, including those legally trained, that certain prosecutions made by the Government, particularly the judicial review proceedings commenced against individual Members of the Legislative Council to disqualify them from office, were politically motivated. DDPP advised that both judicial and prosecutorial independence were important elements in the foundation of the rule of law. Despite different views expressed by members of the public or organizations, it was vital to maintain the independence of the prosecution and the judiciary in handling a case, such that the rule of law in Hong Kong could be properly safeguarded.

Briefing out of cases

74. The Chairman enquired whether DoJ would consider briefing out cases to barristers and solicitors in private practice in case there was a sudden upsurge in prosecution work relating to criminal cases. DDPP advised that it was necessary to brief out certain number of cases to barristers and solicitors in private practice to meet operational needs since there were only around 130 counsel in the Prosecutions Division and the manpower was not sufficient to deal with the daily caseload. DDPP said that considerations for briefing out cases included, amongst others, the nature and complexity of the case, whether the case involved important law points and whether there were suitable in-house counsel to handle the case. In response to the Chairman's enquiry, DDPP said that depending on the merit of the case, DoJ would consider briefing it out if there was an upsurge in caseload so as to relieve the workload of the in-house counsel of DoJ.

VI. Any other business

75. There being no other business, the meeting ended at 7:33 pm.