

立法會
Legislative Council

LC Paper No. CB(2)729/03-04
(These minutes have been seen
by the Administration)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

**Minutes of meeting
held on Monday, 24 November 2003 at 4:30 pm
in Conference Room A of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon Miriam LAU Kin-ye, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon CHAN Kam-lam, JP
Hon Ambrose LAU Hon-chuen, GBS, JP
Hon TAM Yiu-chung, GBS, JP
- Public officers attending** : Item IV

Mr Andrew H Y WONG
Director of Administration

Miss Eliza LEE
Deputy Director of Administration

Ms Elizabeth TSE
Deputy Secretary for Financial Services
and the Treasury (Treasury)

Mr Wilfred TSUI
Judiciary Administrator

Miss Florence HO
Assistant Judiciary Administrator
(Corporate Services)

Item V

Mr Michael SCOTT
Senior Assistant Solicitor General

Ms Kitty FUNG
Senior Government Counsel
Legal Policy Division

Attendance by : Item V
invitation

The Law Society of Hong Kong

Mr Patrick MOSS

Mr Junius HO

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

Staff in : Mr Arthur CHEUNG
attendance Senior Assistant Legal Adviser 2

Mr Paul WOO
Senior Assistant Secretary (2)3

Item IV

Mr Watson CHAN
Head, Research and Library Services Division

Miss Kitty LAM
Research Officer 8

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2)387/03-04)

The minutes of the meeting held on 27 October 2003 were confirmed.

II. Information papers issued since last meeting

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

- (a) LC Paper No. CB(2)199/03-04(01) - Letter dated 30 August 2003 from Mr CHAN Siu-lun to the Director of Administration on section 18(3) of the Hong Kong Court of Final Appeal Ordinance;
- (b) LC Paper No. CB(2)249/03-04 - Report on the work of the Judicial Officers Recommendation Commission covering the period from 1 July 1997 to 31 December 2002;
- (c) LC Paper Nos. CB(2)253/03-04(01) - (03) - Extracts from the minutes of the meetings of the House Committee on 10 and 24 January 2003 on "Admission and Registration (Amendment) (No. 2) Rules 2002" and "Legal Practitioners (Risk Management Education) Rules", and letter dated 5 September 2003 from the Law Society of Hong Kong on "Risk Management Education Rules";
- (d) LC Paper No. CB(2)370/03-04(01) - The Administration's reply dated 14 November 2003 on "Court of Appeal Case CACC 365 of 2000";
- (e) LC Paper Nos. CB(2)375/03-04(01) and (02) - Letter dated 17 November 2003 from the Law Society of Hong Kong on "Summary Disposal of Complaints (Solicitors) Rules" and extract from the report of the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001; and
- (f) LC Paper No. CB(2)393/03-04(01) - Letter dated 18 November 2003 from the Judiciary Administration on "Post-retirement employment and pension benefits of and acceptance of advantages by judicial officers".

3. On paragraph 2(d) above, the Chairman said that the judgment on the appeal case would be considered by the Panel at a future meeting to follow up the issue of review on provision of legal aid services.

4. On paragraph 2(e) above, the Chairman said that the Summary Disposal of Complaints (Solicitors) Rules was gazetted on 21 November 2003. Senior

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Assistant Legal Adviser 2 (SALA2) advised members that the Legal Service Division would prepare a paper on the Rules for the consideration of the House Committee at its meeting on 28 November 2003.

III. Items for discussion at next meeting

(LC Paper Nos. CB(2)390/03-04(01) and (02); LS9/03-04))

Date of meetings in December 2003 and January 2004

5. The Panel agreed to reschedule the meetings on 22 December 2003 and 25 January 2004 at 4:30 pm to 18 December 2003 and 28 January 2004 at 4:30 pm respectively.

Agenda for meeting in December 2003

6. Members agreed to discuss the following items at the next meeting on 18 December 2003 -

- (a) Professional Indemnity Scheme of the Law Society of Hong Kong;
- (b) Review of legislative provisions containing the drafting formula "to the satisfaction" of an enforcement agency; and
- (c) Resource Centre for Unrepresented Litigants.

7. On paragraph 6(b) above, SALA2 advised members that the item was referred from the Subcommittee on proposed resolution under section 7 of the Factories and Industrial Undertakings Ordinance via the House Committee to the Panel for follow-up. He briefed members on the paper prepared by the Legal Service Division on the relevant issues identified by the Subcommittee(LC Paper No. LS9/03-04).

8. Members noted that the issue identified by the Subcommittee involved law drafting as well as policy considerations of specific offences. A comprehensive review on the relevant legislation would involve different policy bureaux/departments. Members agreed that the Panel should hold a preliminary discussion with the Department of Justice on the extent of the problem, its impact on similarly drafted legislative provisions and, where a review was considered necessary, the scope and timetable of the review. The views of the two legal professional bodies should also be sought.

9. Regarding paragraph 6(c) above, the Clerk reminded members that a briefing session on the Resource Centre had been arranged for the Panel and other interested Members on 8 December 2003 at 5 pm.

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IV. Budgetary arrangements for the Judiciary

(RP02/03-04 and LC Paper No. CB(2)390/03-04(03))

Research Report on "Budgetary arrangements for overseas judiciaries"

10. Head, Research and Library Services (H/RL) gave a power-point presentation on the Research Report prepared by the Research and Library Services Division (RLSD) (RP02/03-04). The Report provided an overview of the budgetary arrangements for the judiciaries in the United States of America (US), England and Wales (UK), and the Province of Ontario of Canada, and a comparison of the various attributes of the overseas budgetary arrangements with that of the Judiciary of Hong Kong. In particular, the following aspects of the budgetary arrangements for the judiciaries in the three overseas jurisdictions were covered in the Report -

- (a) preparation of budget;
- (b) approval of budget;
- (c) safeguards to ensure allocation of sufficient resources;
- (d) participation of judges in the allocation of voted resources;
- (e) pay adjustment of judges;
- (f) safeguards against manipulation of judicial remuneration through budgeting;
- (g) source of funding; and
- (h) public accountability.

Budgetary arrangements for the Judiciary in Hong Kong

11. Deputy Secretary for Financial Services and the Treasury (Treasury) (DS(Tsy)) briefed members on the paper jointly prepared by the Treasury Branch of the Financial Services and the Treasury Bureau (FSTB) and the Administration Wing, Chief Secretary for Administration's Office (LC Paper No. CB(2)390/03-04(03)). The paper explained the budgetary arrangements for the Judiciary, including preparation of the Judiciary's budget, allocation of resources for and within the Judiciary, the respective roles of the parties involved in the appropriation of resources for the administration of justice, and efficiency savings in the Judiciary.

12. DS (Tsy) said that the Administration fully appreciated the importance of safeguarding the independence, and the perception of independence, of the

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Judiciary. In approving the allocation of resources for the Judiciary, the Administration would ensure that the fundamental principle of judicial independence was upheld.

Issues raised by members

Public accountability

13. In response to Ms Miriam LAU, H/RL explained about the respective parties in the three overseas jurisdictions which were answerable to the legislature for the resources allocated to the judiciary. The relevant information was contained in paragraph 6.8.1 and Appendix I in the Research Report.

14. Judiciary Administrator (JA) informed members that being the Controlling Officer for Head 80 (expenditure of the Judiciary) in the Estimates, he prepared the annual estimates of expenditure of the Judiciary, monitored expenditure against approved provisions, ensured compliance with relevant financial and accounting regulations, and took up with the Treasury Branch of FSTB or other relevant authorities requests for extra resources. To discharge these responsibilities, he reported to the Chief Justice (CJ) and sought the latter's directions as appropriate. JA added that he also appeared before the Finance Committee, the Public Accounts Committee of LegCo and this Panel to answer questions relating to the operation of the Judiciary, the effects of caseload and resources of the Judiciary on its operation, how the Judiciary's resources had been put to efficient use, and measures to enhance efficiency etc. Any views expressed by Members would be conveyed for CJ's consideration.

Allocation of resources to the Judiciary and safeguard of judicial independence

15. The Chairman referred to paragraph 5 of the Administration's paper, which stated that given the Administration's budgetary constraints, it had not been possible for all bids for additional resources, whether from Government bureaux/departments or other bodies receiving direct funding from the Government, to be acceded to. The Chairman enquired about the existing system for the Judiciary to bargain for resources in the annual allocation exercise, and how the existing system of budgetary arrangements would guard against interference of the Administration in the operation of the Judiciary through imposing budgetary constraints.

16. Ms Emily LAU asked how requests for resources by the Judiciary were handled by the Administration. Referring to DS(Tsy)'s comment in paragraph 12 above, she said that it was questionable whether FSTB, which was an executive arm of the Government, should be in a position to judge whether such requests would have any impact on judicial independence.

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17. Director of Administration (D of A) said that according to the Research Report, except in the case of US, the system in Hong Kong was broadly similar to that in UK and Ontario of Canada in that there was no statutory provision requiring the Executive to include, in its overall budget to the Legislature, the Judiciary's proposal without revision. In the US, Congress could modify the budget proposal, but judges' salaries were regarded as mandatory spending. D of A explained that as the Judiciary's Estimates of expenditure formed part of the overall Estimates of the Administration, as with Government bureaux and departments, had to compete for resources. He said that as the Administration had the duty to ensure the prudent use of public money and control of overall public expenditure, bids for Government funding had to be assessed on grounds of merits. In discharging this responsibility, the Administration was accountable to LegCo, which had a constitutional role in monitoring and approving public expenditure. D of A further said that the Administration attached the highest importance to upholding the independence of the Judiciary and there was no question of undue interference by the Administration in the allocation of resources to the Judiciary.

18. DS(Tsy) said that Treasury Branch would not interfere with the operation of the Judiciary. Although JA had to agree with Treasury Branch the contents of his Controlling Officer's Report including the overall provision for the Judiciary for the coming year, such discussions were prompted primarily by the need to ensure consistency in the presentation of Government's overall Estimates. There was no question of judicial independence being compromised through these technical exchanges. Regarding bids for additional resources by the Controlling Officers, for each request, due regard was given to the merits of the proposal and the consequences of not proceeding with it. The proponent was given an opportunity to be heard and explain the justifications for its request before any decision was reached within the Administration. The decision process involved all relevant parties concerned, including the Chief Secretary of Administration and the Financial Secretary, etc. Thus, it was not just a matter between FSTB and the proponent. JA added that during the discussion process, he could make his views known to the highest level in the Government, including the Chief Secretary for Administration and the Financial Secretary.

19. JA said that CJ had stated, in his speech at the opening of the Legal Year 2003 on 13 January 2003, that the budgetary constraints might lead to lengthening of the waiting times for some cases to be heard by the courts. However, the quality of justice had to be maintained. He said that if the situation of waiting times worsened to an extent that was considered unacceptable by the Judiciary, the Judiciary would take up the matter with the Administration and seek additional resources.

20. In response to Ms Emily LAU on examples of rejection of budget proposals made by the Judiciary, JA advised that not too many requests for additional resources had been made in these few years due to budgetary

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constraints. As far as he remembered, subsequent to the increase of the civil jurisdictional limits of the District Court (DC) a few years ago, additional resources had been provided for the creation of three additional posts of Judges and Judicial Officers to cope with the increased caseload of DC.

21. The Chairman pointed out that apart from the lengthening of the waiting times at courts, CJ had said that further reduction in resources available to the Judiciary could pose difficulties for the Judiciary in filling certain vacant judicial posts and appointing temporary judges, which might impact on the operation of the courts. She opined that the Administration should take these into careful consideration in examining the Estimates submission from the Judiciary.

22. Ms Emily LAU said that she did not consider that the existing system for allocation of resources for the Judiciary would safeguard judicial independence, since the final decision on resource allocation was made by the Administration and imposed on the Judiciary. She opined that express constitutional safeguards should be introduced to ensure that the independent operation of the Judiciary would not be subject to executive interference and affected by budgetary constraints.

23. The Chairman agreed with the comment made by Ms Emily LAU. She invited the Administration to take note of the budgetary arrangements in US and UK in relation to the maintenance of the independent operation of the Judiciary. She pointed out that the Administrative Office of the US Courts produced the budget estimates for the Federal Judiciary as a whole, based on the courts' projected needs, workload, staffing and resource formulas, and new legislation or other new programmes and initiatives. About 95% of the funds allotted to individual courts were determined by formulas which were developed by the Judiciary as an objective means for determining the workload and resource needs of the Judiciary, and were used to justify budget estimates to the Congress. In UK, the Lord Chancellor appointed the Chief Executive of the Court Service, allocated resources to the Court Service, and approved its corporate and business plans. The Lord Chancellor, however, did not intervene in the day to day management of the Court Service, which was the responsibility of the Chief Executive. The Lord Chancellor required the Chief Executive, in determining priorities of the Court Service, to ensure that all courts were provided with adequate resources to meet their workload and planned level of sittings. The Chief Executive was required "to have discussed with the Judiciary" the content of his corporate and business plans before they were submitted for approval. The Lord Chancellor also required the Chief Executive to discuss with the Judiciary "plans for dealing with any major in-year change in resource allocation which may materially affect the performance of the Court Service", before putting the revised plans for his approval. The Chairman said that in both US and UK, the budget for the judiciary was prepared and approved by the judicial branch without involvement of the executive branch.

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Judicial remuneration and staff emoluments of the Judiciary

24. The Chairman pointed out that there were safeguards in the overseas jurisdictions studied against manipulation of judicial remuneration through budgetary means. Both the US and UK had statutory provisions prohibiting the reduction of most judges' salaries. The US Constitution guaranteed that salaries of federal judges appointed according to Article III of the Constitution could not be reduced. In UK, judicial remuneration was charged on the Consolidated Fund and did not require annual parliamentary approval. In Ontario of Canada, the annual adjustment was automatic and based on an index. Where the adjustment rate turned out to be negative, judges' salaries would only be frozen but not be reduced. She opined that the overseas practices could be useful reference for Hong Kong.

25. D of A informed members that the Judiciary had commissioned Sir Anthony Mason to undertake a Consultancy Study on the appropriate system for the determination of judicial remuneration in Hong Kong. In April 2003, the Chief Executive had received from the Chief Justice the Consultancy Report and the Judiciary's proposal. The Administration was considering the Judiciary's proposal and would keep the Panel posted of any new development.

26. Ms Audrey EU noted that the Administration's paper had explained that the Judiciary required resources for the following two programme areas under Head 80 -

- (a) Programme (1) : Courts and Tribunals, for maintaining an independent and competent judicial system which upheld the rule of law, safeguarded the rights and freedom of individuals and commanded domestic and international confidence; and
- (b) Programme (2) : Support Services for Courts' Operation, for providing efficient and effective services to support the operation of courts.

Ms EU enquired about the component of Programme (1) which represented the remuneration of judges.

27. DS(Tsy) explained that of the \$765.3 million allocated for Programme (1) in 2003-04, \$275.5 million represented the remuneration of judges. She pointed out that the reductions in salaries of civil servants which had become effective were not applicable to judges and judicial officers. Regarding the staffing situation of the Judiciary, she advised members that the establishment of the Judiciary as at 31 March 2004 was estimated to be 1 853 posts, including 180 directorate posts. Of the 180 directorate posts, 174 posts were judges and judicial officers.

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28. Ms Miriam LAU enquired about the percentage of remuneration of judges and judicial officers vis-à-vis that of supporting staff of the Judiciary under Head 80.

29. JA replied that about 27% of the total provision of \$1,031.3 million in 2003-04 was used to meet remuneration of judges and judicial officers, while about 50% was to meet salaries and allowances of other staff of the Judiciary. He added that on the advice of CJ, he had made it clear to the Administration that the fact that the remuneration of judges and judicial officers had not been reduced should not be used as a reason for cutting resources in the other areas in the Judiciary's Estimates.

30. Ms Miriam LAU further enquired about the measures taken by the Judiciary in achieving the cost saving target under EPP without sacrificing quality.

31. JA responded that the Judiciary Administration had provided a paper on "Initiatives on efficiency savings in the Judiciary" for discussion by the Panel at its meeting on 24 February 2003. The major initiatives to achieve cost saving included, for example, merging of Magistrates' Courts to make the best use of existing court premises and support facilities, rationalization of support staff structure through natural wastage, re-prioritization and work process re-engineering, tightening of operational expenditure by streamlining services and re-prioritizing enhancements of information technology systems etc.

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32. The Chairman requested the Administration to provide a breakdown of the components of Programme (1) for the Panel's information.

Charging of fees for court services

33. Ms Miriam LAU asked whether the fees charged on court users for services provided by the Judiciary, such as transcript fees, could be reduced if the Judiciary was able to reduce its operating costs. JA replied that most of the existing fees charged by the Judiciary were related to services provided by registries of the various courts and tribunals, such as registration fees and charges for making photo-copies of documents etc. Certain fees were charged to cover payment for professional services contracted out to private agencies, such as production of transcripts of court proceedings. He said that the judiciary fees and charges were determined in accordance with the criteria set by FSTB, and subject to regular reviews. He added that the reduction in operating costs of the Judiciary might be taken into consideration in conducting future costing reviews.

34. DS(Tsy) informed members that FSTB would review government fees and charges every year and conduct full costing reviews on a regular basis. As far as she remembered, the existing judiciary fees and charges could not in

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overall terms achieve full-cost recovery. She added that FSTB was inviting Government departments to review the rate of cost recovery of the fees items under their respective purview and whether fee adjustment was required.

35. The Chairman requested FSTB to explain in writing -

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- (a) the existing items of judiciary fees and charges and the rate of cost-recovery; and
- (b) the methodology used for calculating the judiciary fees and charges.

Way forward

36. The Chairman informed members that RLSD was preparing supplementary information on the system of budgetary arrangements in Ontario of Canada. The information would be provided to the Panel when available. She opined that the item could be further considered by the Panel where necessary, upon receipt of the Administration's response.

V. Solicitor Corporations

(LC Paper Nos. CB(2)390/03-04(04) - (06); 394/03-04(01))

Submission from The Law Society of Hong Kong

37. Mr Patrick MOSS introduced the paper provided by The Law Society of Hong Kong which enclosed a copy of the Solicitor Corporations Rules, Solicitor Corporations (Fees) Rules and Amendment to the Solicitors (Professional Indemnity) Rules (LC Paper No. CB(2)394/03-04(01)). In the main, the paper explained that the Legal Practitioners Ordinance (Cap. 159) was amended by the Legal Services Legislation (Miscellaneous Amendments) Ordinance in 1997 to enable solicitors to incorporate their practices as solicitor corporations. The amendments required the Council of the Law Society to make rules in respect of the establishment of solicitor corporations and fees payable to the Law Society for applications for registration as a solicitor corporation, as well as professional indemnity cover of solicitor corporations. The amendments, which were contained in Part II AA of Cap. 159, should take effect on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

38. Mr MOSS took members through the Solicitor Corporations Rules (the Rules) attached at Annex A to the Law Society's paper clause by clause.

39. Mr MOSS remarked that there had been misunderstanding as to the effect of incorporation of solicitors' practices in relation to the level of liabilities of members of such corporations arising from actions in tort. He clarified that under the general law of agency, a director as agent of a company who

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undertook work negligently for the company might be liable even though the tort itself was committed by the company. In the context of a solicitor corporation, a solicitor director who had direct contact with the corporation's clients and who acted negligently towards his clients might be personally liable in tort to the client, notwithstanding that the client had entered into a contract with the solicitor corporation. Regarding professional indemnity cover, the proposed amendments to the Solicitors (Professional Indemnity) Rules would in effect put the solicitors and their staff working within a solicitor corporation in the same position as though they were practising through the existing forms of sole proprietorship or partnership, and any claims against the corporation would proceed against the Professional Indemnity Fund in the normal way.

40. Mr MOSS referred members to rule 3(1)(d)(i) of the Rules, which specified that subject to subrule (2), every member and every director of a solicitor corporation must be an individual who was a solicitor holding a current practising certificate which was not subject to any condition other than the condition that he should comply with the Continuing Professional Development Rules and any other continuing legal education rules made under section 73 of Cap. 159. He said that with the coming into force of the Practising Certificate (Special Conditions) Rules, which enabled the Law Society to impose conditions on the practising certificate of a solicitor, concern had been raised as to whether the conditions imposed would bar the solicitor from becoming a member or director of a solicitor corporation. He informed members that the issue would be considered at a meeting of the Council of the Law Society on 25 November 2003. Subject to a resolution made by the Council on the matter, an amendment would be made to rule 3(1)(d)(i), if necessary.

41. Regarding the proposed consequential amendments to the Solicitors (Professional Indemnity) Rules (Annex C to the Law Society's paper), Mr MOSS informed members that CJ had approved the amendments to Rule 6 of Schedule 3 to the Rules but had not yet approved the amendments to Rule 2.

Views of the Administration

42. Senior Government Counsel (Legal Policy Division) briefed members on the Administration's letter dated 17 November 2003 to the Panel (LC Paper No. CB(2)390/03-04(06)). She informed members that the Administration considered that the only outstanding issue regarding solicitor corporations was whether it was necessary for solicitor corporations to take out top-up insurance. In this connection, the Administration had agreed not to insist on a requirement for top-up insurance at this stage, after considering the circumstances put forward by the Law Society. The Administration also considered that whether the issue of top-up insurance should be further assessed would depend on the outcome of the Law Society's review on its existing professional indemnity scheme and the practical operation of the Solicitor Corporations Rules.

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Issues raised by members

43. Referring to the condition in rule 3(2) of the Rules that a solicitor corporation established by a sole practitioner must have a second member in order to comply with the requirements of the Companies Ordinance, Ms Audrey EU asked whether the subrule was still required in the light of the amendments recently made to the Companies Ordinance. Mr Patrick MOSS responded that he was unaware that the amendments had been brought into effect. His personal view was that even if the amendment was passed, the safeguard in rule 3(2) might still be necessary. Ms Audrey EU pointed out that the reference to the Companies Ordinance might not be necessary. Mr MOSS agreed to follow up the issue raised.

44. Ms Audrey EU asked whether the proposed Rules on solicitor corporations had any precedents elsewhere and whether the formation of solicitor corporations would become the norm for legal practice after the Rules were passed.

45. Mr Patrick MOSS advised that there was similar legislation in some jurisdictions including Singapore. He added that he doubted many practitioners would actually incorporate their practice by establishing solicitor corporations, which, in his opinion, though suited the needs of some, were not a particularly effective way of running a legal practice. He further said that some people had supported the formation of solicitor corporations on the misunderstanding that practitioners could limit their liabilities and the problems associated with professional indemnity could be solved. However, this was not the case in reality.

46. The Chairman asked whether the Law Society had consulted its members on the Rules. Mr Patrick MOSS replied that the Law Society had sought views from its members about a year ago and minor amendments had been made to the Rules since then. He said that the members would be consulted again if the Council of the Law Society considered that further amendments were necessary.

47. In response to the Chairman, Mr Patrick MOSS said that the finalised Rules would be submitted to CJ for approval after the Council of the Law Society had resolved the relevant outstanding issues and a Chinese version of the Rules was prepared. The Rules would then be gazetted. He said that it was expected that this could be done by end of 2003/early 2004.

Way forward

48. The Chairman said that it was likely that a subcommittee would be formed to study the Rules in detail after the Rules had been tabled in LegCo. To facilitate future deliberations on the Rules, the Chairman requested the Law Society to provide a paper to explain -

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- (a) the differences between legal practice in partnership and in a solicitor corporation after passage of the Rules; and
 - (b) the differences between the liability of a legal practitioner in partnership and in a solicitor corporation under the existing Professional Indemnity Scheme of the Law Society.

49. The meeting ended at 6:35 pm.

Council Business Division 2
Legislative Council Secretariat
17 December 2003