

立法會

## *Legislative Council*

LC Paper No. CB(2)1104/03-04

(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, 18 December 2003 at 4:30 pm**

**in Conference Room A of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)  
Hon Albert HO Chun-yan  
Hon Martin LEE Chu-ming, SC, JP  
Hon CHAN Kam-lam, JP  
Hon Miriam LAU Kin-ye, JP  
Hon Ambrose LAU Hon-chuen, GBS, JP  
Hon Emily LAU Wai-hing, JP  
Hon TAM Yiu-chung, GBS, JP  
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)  
Hon James TO Kun-sun
- Public officers attending** : Item IV  
  
Mr Michael SCOTT  
Senior Assistant Solicitor General  
  
Ms Kitty FUNG  
Senior Government Counsel  
Legal Policy Division  
  
Item V  
  
Mr Lawrence PENG  
Senior Assistant Law Draftsman  
  
Ms Cindy YAU  
Senior Government Counsel

Item VI

Mr Wilfred TSUI  
Judiciary Administrator

Mr Augustine CHENG  
Deputy Judiciary Administrator (Operations)

Miss Vega WONG  
Assistant Judiciary Administrator (Development)

**Attendance by invitation** : Item IV

The Law Society of Hong Kong

Mr IP Shing-hing  
President

Mr Chris HOWSE  
Chairman of Steering Committee on  
Review of Professional Indemnity Scheme

Mr Peter LO  
Council Member

Ms Vivien LEE  
Assistant Director, Professional Indemnity Scheme

Mr Patrick MOSS  
Secretary General

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

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

Mr Paul WOO  
Senior Assistant Secretary (2)3

---

Action

**I. Confirmation of minutes of meeting**  
(LC Paper No. CB(2)729/03-04)

The minutes of the meeting held on 24 November 2003 were confirmed.

**II. Information papers issued since last meeting**

2. Members noted that the Department of Justice (DoJ) had issued a "Consultation paper on Enduring Powers of Attorney" to invite views from the Panel on Administration of Justice and Legal Services (AJLS Panel) and Panel on Health Services (HS Panel), among others, by 31 January 2004 (LC Paper No. CB(2)658/03-04(01)). The purpose of the consultation paper was to seek views on the proposed legislative amendment to remove the requirement that an enduring power of attorney be executed in the presence of a medical practitioner. Under the proposal, it was considered sufficient for the deed to be executed in the presence of the donor, the attorney and an independent solicitor.

3. The Chairman informed members that the HS Panel had invited the Administration to brief members on the proposal at its next meeting at 8:30 am on 5 January 2004. With the agreement of the Chairmen of the two Panels, members of the AJLS Panel had been invited to attend the meeting of the HS Panel on 5 January 2004 for discussion of the item.

4. The Chairman proposed and members agreed that DoJ should be requested to revert to this Panel in due course on the outcome of the consultation exercise.

Admin

**III Items for discussion at the next meeting**  
(LC Paper Nos. CB(2)731/03-04(01) and (02))

Date of meeting in January 2004

5. The Panel agreed to reschedule the meeting on 28 January 2004 at 4:30 pm to 29 January 2004 at 4:30 pm.

Agenda for meeting in January 2004

6. Members agreed to discuss the following items at the next meeting on 29 January 2004 -

- (a) Review on provision of legal aid services; and
- (b) Court procedure for repossession of premises.

Action

7. The Panel agreed that members of the Panel on Housing and the Bills Committee on Landlord and Tenant (Consolidation) (Amendment) Bill 2003 should be invited to attend the meeting for discussion of the item in paragraph 6(b) above.

**IV. Professional Indemnity Scheme of The Law Society of Hong Kong**  
(LC Paper Nos. CB(2)692/03-04(01); 725/03-04(01) - (03); 731/03-04(03) and 773/03-04(01))

8. The Chairman informed members that she had conducted an opinion survey in October 2003 to seek views from practising solicitors on the Professional Indemnity Scheme of The Law Society of Hong Kong (the Law Society). She had provided the results of the survey for the Panel's information and discussion at the meeting (LC Paper No. CB(2)731/03-04(03)).

9. The Chairman further informed members that the Law Society had written to her before the meeting and expressed concern about whether she could lead the discussion of the item with due objectivity on the ground that she was representing the views of solicitors who were in opposition to the Scheme. The Chairman said that on knowing the Law Society's concern, she had asked the Deputy Chairman of the Panel whether he could chair this part of the meeting in her stead. Nevertheless, the Deputy Chairman was unable to attend the meeting. The Chairman sought members' views on whether she should chair the meeting for this item.

10. Mr Martin LEE said that to avoid the possible perception of conflict of role, it might be preferable for a non-lawyer member of the Panel to chair the meeting for the item.

11. The Chairman said that the question of a role conflict did not exist as she was holding no personal interest in the matter. She said that the survey carried out by her was for the purpose of gathering opinions from practising solicitors, having regard to the serious concerns expressed by the solicitors who had approached her about the heavy burden imposed upon them by the Professional Indemnity Scheme. She had presented the findings of the survey with a view to ensuring that the widest possible views were presented before the Panel to facilitate discussion on the matter.

12. Ms Miriam LAU, Ms Emily LAU and Mr CHAN Kam-lam said that they held no objection to the Chairman chairing the meeting.

13. In response to the Chairman, Mr Chris HOWSE said that he did not object to her continuing to chair the meeting.

Action

Review Report on Insurance Arrangements of the Hong Kong Solicitors Indemnity Scheme prepared by Willis China (Hong Kong) Limited (the Willis Report)

---

(LC Paper Nos. CB(2)692/03-04(01) & 773(01))

14. Mr Chris HOWSE outlined the background to, and the salient features and findings of, the Willis Report as follows -

- (a) the review was conducted in accordance with the Law Society's undertaking made to the Legislative Council that it should review the current insurance arrangements and report on what insurance arrangements were in the best interests of the legal profession and the public, having investigated into the present problems with professional indemnity insurance of solicitors in Hong Kong;
- (b) a fundamental concern widely shared by solicitors in Hong Kong was that under the present arrangements, solicitors were the insurer of last resort for each other in the event of failure of the commercial insurer. This had given rise to grave problems for the solicitors when the commercial insurer turned insolvent, as in the case of the collapse of the HIH Group, resulting in calls on solicitors for extra contributions to the Solicitors Indemnity Fund (SIF) to make up for the shortfall. Another major concern was that the present insurance scheme had failed to address the balance of risk between solicitors who were responsible for claims and those who were not. The Willis Report had looked at possibilities of adopting different types of schemes or amending the existing scheme. A major proposal was to alter the current arrangements so that in the event of failure of the commercial insurer, the liability would be on the particular law firm responsible for the claim. If the law firm concerned was unable to meet the claim, the claimant would have no further recourse and no calls would be made on the rest of the membership of the Law Society. This proposed new arrangement represented a fundamental and significant policy change involving transfer of risk from members of the Law Society ultimately to the general public making claims against solicitors; and
- (c) the Willis Report proposed increasing the level of deductible (i.e. a determined amount payable by an insured firm in respect of any claim) from the present maximum level of \$200,000, which had remained unchanged since 1986, to \$500,000. It also proposed risk banding in determining the contributions to be paid by members of the Law Society on the principle that high risk work should account for a greater amount of contribution. Moreover, there should be increased loading for firms making claims on SIF on the principle that a user paid more.

Action

15. The Chairman drew members' attention to the letter dated 18 December 2003 from the Law Society, which set out the major proposals put forward in the Willis Report (LC Paper No. CB(2)773/03-04(01)). According to the Law Society, it would put the proposals to its members for comment and discussion. The Council of the Law Society had yet to discuss the Willis Report or form a view on the proposals contained in it.

16. Regarding statistics on claims made in the past, Mr Chris HOWSE informed members that it was observed, as set out in Table 7 of the Willis Report, that although the absolute number of claims had increased in the past 15 years, the proportion of the number of claims to the number of solicitors in Hong Kong had remained stable when compared with the situation in 1986/87. In the last 13 years, the number of solicitors firms with multiple paid claims was 16. One third of the total firms had notified claims.

Survey conducted by the Chairman

17. The Chairman briefed members on the background to and findings of her survey conducted in October 2003 on solicitors' views on the Professional Indemnity Scheme. The results were set out in detail in her paper circulated to the Panel under LC Paper No. CB(2)731/03-04(03).

Submission from Rene Hout & Co.

18. The Chairman referred members to a paper prepared by Mr John KU (LC Paper No. CB(2)725/03-04(03)) and a letter from Mr Larry KO dated October 2003 (LC Paper No. CB(2)725/03-04(02)) submitted by Rene Hout & Co. acting on behalf of the Action Committee on Professional Indemnity Reform. As advised by Rene Hout & Co., the two papers set out the major concerns expressed by solicitors on the Professional Indemnity Scheme. The Chairman informed members that Rene Hout & Co. had provided a large bundle of documents and correspondences on the subject. She said that members could approach the Clerk if they wished to make reference to the other papers submitted.

Issues raised by members

*Surveys conducted by Willis*

19. In response to the Chairman, Mr Chris HOWSE said that the brief given by the Law Society to Willis required that Willis should seek the widest possible consultation with the membership of the Law Society in undertaking the review. A number of members' forums had been held during the process in which Willis reported on the progress of the review and invited the membership to voice their views and make suggestions. Appointments were also made for Willis to meet with the solicitors firms to discuss concerns and measures to improve the

Action

existing arrangements. Many members of the profession had also written to Willis to express opinions. Mr HOWSE drew members' attention to pages 20 to 32 of the Willis Report, which set out the results of the two surveys conducted in November 2002 and October 2003 respectively.

20. In response to the Chairman's observation that the majority of the respondents in the two surveys conducted by Willis preferred to arrange their own insurance, Mr Chris HOWSE said that the responses should not be taken in isolation without considering other relevant factors, including the practicality of making such arrangement. He pointed out that firstly, there were law firms in Hong Kong, in particular the smaller firms, which would find it extremely difficult to purchase their own insurance in the present unprecedented hard insurance market situation, i.e a market with limited capacity to provide insurance cover and the existence of a very high level of demand. Hence, insured solicitors firms could be charged with hefty premium. Secondly, a major factor which governed professional indemnity was to protect the interests of the public. If firms were allowed to arrange their own insurance free from restrictions, there would be the risk that their insurance might be placed in undesirable insurers. The public's interests would then be prejudiced. Mr HOWSE said that in the view of Willis, the option for individual law firms to take out insurance cover on their own would not be to the benefit of solicitors and the public as a whole.

21. The Chairman pointed out that the surveys conducted by Willis showed that two thirds of the respondents agreed that professional indemnity insurance for solicitors should remain to be compulsory. Mr Chris HOWSE considered that the response was encouraging, given that compulsory insurance was appropriate for the protection of the public. That said, there was nevertheless a feeling amongst members of the profession that the balance had shifted too strongly in favour of the public and away from the solicitors, and that it was unfair under the present system to make solicitors as a whole the insurer of last resort. The situation therefore warranted consideration as to whether legislative amendments should be introduced to bring about necessary changes to the existing indemnity insurance arrangements.

*Options proposed by the Willis Report*

22. At the request of the Chairman, Mr Chris HOWSE briefed members on Option One and Option Two set out in Section 2 of the Willis Report. Option One was recommended by Willis to be adopted in 2005. In gist, the proposals in Option One included -

- (a) the retention of the existing limit of indemnity of HK\$10 million;
- (b) the insured should continue to be responsible for a deductible;
- (c) the SIF to be responsible for HK\$1.5 million to HK\$2 million in excess of the insured's deductible;

Action

- (d) the balance up to HK\$10 million to be covered by policy taken out with commercial insurers;
- (e) there should be risk banding so that solicitors who practised in areas of law that could more likely result in claims should contribute more; and
- (f) there should be increased claims loading for firms making claims.

23. Option Two was a qualifying insurer scheme similar to that adopted in the United Kingdom. Mr Chris HOWSE said that Willis had conducted a market research and concluded that the option probably would not work in Hong Kong. He referred members to paragraphs 3.4.8 to 3.4.10 of the Willis Report, which provided a detailed analysis on the research result.

24. In response to the Chairman on the other proposals in the Willis Report relating to modernisation of the decision making process and management structures, Mr Chris HOWSE said that any new measures to improve administration would be considered carefully by the Council of the Law Society. He opined that to appoint a professional manager from outside the legal profession to manage SIF was worth consideration, but the cost factor had also to be taken into account.

*Implications of the proposals*

25. Ms Miriam LAU said that the proposals on risk banding and increased claims loading, if implemented, might result in increased premium, hence affecting firms particularly the small and medium sized firms engaging in high risk work (e.g. conveyancing) which was more likely to result in claims. She expressed concern that with the present keen competition in the profession resulting in, e.g. drastic cuts in conveyancing fees charged by solicitors firms, practitioners would continue to face a difficult situation.

26. Mr Chris HOWSE said that he shared the concern that law firms were having a hard time under the present depressing economy. He pointed out that the extraordinary increase in the number of claims over the period from 1996 to 1999-2000 as well as the collapse of HIH Group had adversely impacted on the SIF. As the legislation now stood, the Law Society was obliged under the statutory indemnity arrangements to deal with the problem, and hence calls had been made on firms to make extra contributions. Going forward, nevertheless, there were ways to address the situation which hinged on, to a significant extent, how the balance of risk might be shifted from solicitors to the public. The Willis Report proposed that something should be done, including consideration of the option of introducing legislative measures, to improve the system so that the risk of hardship on the general membership of the Law Society could be significantly reduced. Mr HOWSE said that in his view, the proposals in the

Action

Willis Report regarding risk banding, increased loading and deductible etc were fair and sensible measures which could help address some of the major concerns of solicitors, such as imbalance in the distribution of risks amongst solicitors.

27. Mr Chris HOWSE added that he agreed that competition in the legal profession had caused problems. He opined that the reduction in conveyancing fees due to competition had reached a ludicrous level which prompted one to question whether the work could be properly done by solicitors for the price that they were receiving. Mr HOWSE pointed out that the Willis Report had in section 3.8.5 made reference to the pending introduction under the Land Titles Bill of a registered title system for interests in land in Hong Kong. It was hoped that the introduction of a registered title system would have benefits in reducing liabilities in the long term for conveyancing claims that were related to a solicitor failing to investigate or identify a defect in the title.

Way forward

28. Ms Emily LAU noted that the Law Society had advised in its letter dated 18 December 2003 that it had yet to form a view on the Willis Report and it would be putting forward the proposals to its members for discussion. She enquired about the timeframe for consultation and reverting back to this Panel on the progress.

29. Mr Patrick MOSS said that the Law Society was bound by the requirements under existing legislation on professional indemnity arrangements. It was also constrained by the fact the present contract with the reinsurers would not expire until September 2005. The Council of the Law Society had not yet studied the Willis Report in detail, but it would ensure that by April 2004 the Society would be in a position to agree on what options to adopt and the necessary legislative amendments. The Law Society would then proceed to liaise with DoJ on law drafting matters.

30. The Chairman remarked that despite that the Legislative Council had a veto power in relation to subsidiary legislation made by the Law Society, it would not normally exercise that power as it respected the role of the Law Society as a self-regulating body which had full knowledge of the operation of the profession and the needs of its members. The Chairman and Ms Emily LAU said that they hoped that the Law Society could come to a consensus view on the proposals and amendments with its members as soon as possible and revert to the Panel for further discussion.

Action

**V. Review of legislative provisions containing the drafting formula "to the satisfaction" of an enforcement agency**  
(LC Paper No. CB(2)693/03-04(01))

31. Senior Assistant Law Draftsman (SALD) briefed members on DoJ's paper which examined, in the light of the Lam Geotechnics case, the extent of the problem with respect to provisions in subsidiary legislation containing the drafting formula "to the satisfaction" of an enforcement agency. The paper also set out DoJ's preliminary view on the conduct of a review of those provisions.

32. Members noted that the background to the issue was that in the Lam Geotechnics case, the Court of First Instance (CFI) ruled that the elements of offence purportedly set out in regulation 44 of the Construction Sites (Safety) Regulations (Cap. 59 sub. leg. I) were incompletely defined because of the uncertainty in the words "to the satisfaction of the Commissioner". Regulation 44(1) was therefore ultra vires and fell outside the enabling powers conferred on the Commissioner for Labour by section 7 of the Factories and Industrial Undertakings Ordinance. In the light of CFI's ruling, regulation 44 was recently amended to prescribe the specific measures required. As the ruling had impact on other legislative provisions containing the drafting formula "to the satisfaction" of an enforcement agency, DoJ had conducted a preliminary search on those provisions.

33. SALD referred members to the Annex to the paper which set out the provisions in subsidiary legislation that contained the drafting formula and whose validity might become doubtful because of the Lam Geotechnics case. A total of 88 provisions had so far been identified.

34. SALD further advised members that a number of other provisions also contained the drafting formula but they were not included in the Annex because such provisions would not be ultra vires their respective enabling provisions. The three categories of such provisions were explained under paras 5 to 15 of the paper.

Issues raised by members

35. Ms Audrey EU pointed out that legislative provisions containing other drafting formula such as "as the Commissioner thinks fit" could also lead to similar problem as in the Lam Geotechnics case.

36. SALD responded that DoJ was aware of other similar drafting formula such as those containing the words "acceptable to" or "in the opinion of". He pointed out that provisions containing such references were limited in number, and some of them were not offence provisions. Such provisions would have to be looked at individually.

Action

37. The Chairman and Ms Audrey EU opined that to undertake a comprehensive review of provisions in subsidiary legislation which contained the drafting formular in question would be an onerous task. They asked whether the Administration had studied and accepted the grounds of CFI's ruling before undertaking the preliminary review. The Chairman said that CFI had not given detailed reasons for its ruling. Ms Audrey EU said that the ruling raised two issues, i.e. the subsidiary legislation was incompletely defined and ultra vires the principal ordinance. While she was not in dispute with the ruling, she considered that the Administration should first satisfy itself that a genuine problem existed before proceeding further. She added that the fact that the case was not appealed would not necessarily mean that the Administration accepted the ruling.

38. SALD replied that he had not attempted to find out why there was no appeal to CFI's ruling. The preliminary review was conducted in the light of the ruling in the Lam Geotechnics case.

Admin 39. The Chairman suggested that DoJ, or a private counsel engaged by DoJ, should undertake an analysis of the CFI's ruling with a view to assessing the extent of its impact on other similar provisions, the need for a comprehensive review and legislative exercise, before the Administration would proceed further. SALD undertook to convey members' views to DoJ for consideration.

40. Mr Albert HO pointed out that the CFI's ruling was binding on the Magistrates' Courts. He opined that the Administration should study the grounds for the ruling and come up with a view as soon as possible.

Admin 41. The Chairman requested the Administration to revert to the Panel on the subject matter in due course.

**VI. Resource Centre for Unrepresented Litigants**  
(LC Paper Nos. CB(2)731/03-04(04); 772/03-04)

42. The Chairman said that the Judiciary had arranged a visit to the Resource Centre for Unrepresented Litigants (the Resource Centre) for members of the Panel and other interested Members of the Legislative Council. She thanked the Judiciary for the arrangements.

43. The Judiciary Administration provided a copy of the "Report of the Steering Committee on Resource Centre for Unrepresented Litigants" and a set of seven brochures on civil proceedings to Panel members at the meeting (LC Paper No. CB(2)772/03-04). According to the Judiciary Administration, the booklets would be made available at the Resource Centre for public reference when the Resource Centre came into operation on 22 December 2003.

Action

44. The Judiciary Administrator (JA) briefed members on the paper which highlighted -

- (a) the role of the Steering Committee on Resource Centre for Unrepresented Litigants;
- (b) the objectives and operation of the Resource Centre; and
- (c) the facilities and services provided at the Resource Centre.

Issues raised by members

*Scope of service of Resource Centre*

45. Ms Audrey EU said that she had received feedback that a lot of litigants without legal representation had difficulties in understanding the content of court orders and documents issued by the Judiciary in English. Some of the documents might specify that certain action had to be taken by the litigant in relation to the litigation. She suggested that as the Judiciary had staff experienced in translating court documents, interpretation service should be made available at the Resource Centre to assist those litigants.

46. JA responded that in considering the scope of service of the Resource Centre, the Steering Committee had taken the view that the Resource Centre would mainly provide advice on court rules and procedural matters in civil proceedings in the High Court and the District Court. Given the importance of maintaining the neutrality of the courts, the Resource Centre could not provide legal advice. Hence, the Resource Centre would offer advice which was informative in nature, but not advice on legislation or interpretation of legal procedure. Moreover, resource constraints would also have to be taken into account in considering the scope of service provided by the Resource Centre. He further pointed out that enquiry service would continue to be provided by the staff of the respective registries.

47. Ms Emily LAU asked why the services provided by the Resource Centre would not be extended to litigants in criminal proceedings. JA replied that at present, litigants in more than 90% of the criminal cases were legally represented, while the number of unrepresented litigants in civil cases had been increasing. It was therefore considered that assistance provided by the Resource Centre should target at litigants in civil proceedings.

*Pro bono service*

48. Ms Emily LAU said that she supported the approach mentioned in the Report of the Steering Committee in relation to promotion of pro bono service at the Resource Centre. JA said that as explained in paragraph 16 of the Judiciary

Action

Administration's paper, the Steering Committee had exchanges of views with various pro bono service providers, including the two legal professional bodies, on opportunities for providing free legal assistance at or through the Resource Centre. The service providers indicated that they had already been contributing significantly to a variety of other pro bono services. They were not prepared to offer their services at or through the Resource Centre for the time being due to manpower and resources considerations.

49. In response to Ms Emily LAU, the Chairman said that she and Ms Audrey EU had initiated the setting up of a Community Legal Services Centre offering free legal assistance to the public. It was planned that pro bono service would be provided by legal practitioners and law students and the operation of the Centre would be supervised by paid legal professionals. She said that it was hoped that progress could be made in a year's time when the economic situation improved.

*Effectiveness of Resource Centre in saving court's time and reducing costs*

50. In response to Ms Emily LAU, JA said that one of the objectives of the Resource Centre was to save the courts' time in explaining rules and procedures to the unrepresented litigants, thereby expediting the court process and lowering legal costs. He pointed out that at present, judges would explain relevant court procedures to litigants who did not have legal representation. This might prolong the court proceedings and sometimes gave rise to a wrong perception, particularly on the part of the other parties in the case, that the judge was not acting impartially in adjudicating the case. With the establishment of the Resource Centre providing advice on procedural matters, the court proceedings could be shortened.

JA 51. Ms Emily LAU noted that the Judiciary Administration had secured \$5.7 million for the establishment of the Resource Centre. She said that to justify that money was well spent in the setting up of the Resource Centre, the Judiciary Administration should revert to the Panel on the operation of the Resource Centre and explain how and to what extent the Resource Centre had achieved its intended objectives. Members agreed that the Judiciary Administration should provide a progress report on the operation of the Resource Centre for discussion of the Panel in June 2004.

52. The meeting ended at 6:40 pm.