

立法會
Legislative Council

LC Paper No. CB(2)2425/03-04

(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, 26 April 2004 at 4:30 pm
in Conference Room A of the Legislative Council Building**

Members present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, GBS, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon CHAN Kam-lam, JP
Hon Miriam LAU Kin-yee, JP
Hon Audrey EU Yuet-mee, SC, JP

Members absent : Hon Ambrose LAU Hon-chuen, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP

Public officers attending : Item V
The Administration

Mr Michael SCOTT
Senior Assistant Solicitor General

Miss Kitty FUNG
Senior Government Counsel

Attendance by invitation : Item V
The Law Society of Hong Kong

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

Mr Peter LO
Council Member

Mr Patrick MOSS
Secretary General

Item VI

Domicile Subcommittee of Law Reform Commission

Ms Audrey EU, SC, JP
Chairman

Mr Byron LEUNG
Secretary

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

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

Mr Paul WOO
Senior Council Secretary (2)3

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I. Confirmation of minutes of meeting
(LC Paper Nos. CB(2)1920/03-04; 2004/03-04 and 2120/03-04))

The minutes of the meetings held on 15 January, 23 February and 22 March 2004 were confirmed.

II. Information papers issued since last meeting
(LC Paper Nos. CB(2)1816/03-04(01); 1837/03-04(01); 2017/03-04(01) to (03))

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

- (a) LC Paper No. CB(2)1816/03-04(01) - Letter dated 9 March 2004 from Mr David FONG of Hip Shing Hong Development Company Limited on repossession of premises;

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- (b) LC Paper No. CB(2)1837/03-04(01) - Guidelines issued by the Chief Judge of the High Court for Judges and Judicial Officers on the use of Chinese in court proceedings;
- (c) LC Paper No. CB(2)2017/03-04(01) - A document on the Hong Kong International Arbitration Centre Mediator Accreditation Committee with relevant papers explaining, among other things, the requirements to be an accredited mediator, the procedures for accreditation of mediators and appointment of accredited mediators;
- (d) LC Paper No. CB(2)2017/03-04(02) - Information on the number of qualified mediators accredited by the Hong Kong International Arbitration Centre as at 31 March 2004; and
- (e) LC Paper No. CB(2)2017/03-04(03) - A paper dated March 2004 by the National Alternative Dispute Resolution Advisory Council entitled "Who Says You're a Mediator? Towards a National System for Accrediting Mediators".

III. Items for discussion at the next meeting

(LC Paper No. CB(2)2129/03-04(01) and 2129/03-04(02))

Joint meeting with the Panel on Manpower on 24 May 2004

3. The Chairman suggested and members agreed that a joint meeting with the Panel on Manpower would be held from 4:30 pm to 5:30 pm on 24 May 2004 to discuss the following issues -

- (a) Research Report on "The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places"; and
- (b) Review on the operation of the Labour Tribunal.

Regular meeting of the Panel on 24 May 2004

4. Members agreed that the next regular meeting of the Panel would be held from 5:30 pm to 6:30 pm on 24 May 2004 to discuss the item "Court procedure for repossession of premises". The Judiciary Administration would be invited to revert to the Panel on the progress of the new measures to streamline the court procedure for repossession of premises since the item was last discussed at the meeting on 29 January 2004.

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IV. Matters arising

(LC Paper Nos. CB(2)2008/03-04(01) and (02))

Review of sexual offences in Part XII of the Crimes Ordinance (Cap. 200) and related issues

5 The Chairman drew members' attention to the following papers -

- (a) LC Paper No. CB(2)2008/03-04(01) - Background brief prepared by the Legislative Council Secretariat on "Review of sexual offences in Part XII of the Crimes Ordinance and related issues"; and
- (b) LC Paper No. CB(2)2008/03-04(02) - Administration's written response dated April 2004 on review of sexual offences in Part XII of the Crimes Ordinance.

6. The Chairman informed members that the Administration had advised in its written response that because of the "minimalist" approach adopted by the Bills Committee on the Statute Law (Miscellaneous Provisions) Bill 2001 to narrow the scope of the amendments proposed in the Bill to deal only with the offence of marital rape, the ambiguities in the other sexual offences in Part XII of Cap. 200 which were originally sought to be addressed by the Bill had not been dealt with in that legislative exercise. The Administration was prepared to continue reviewing those other provisions which it originally proposed to amend in the previous legislative exercise.

7. Members agreed to the approach proposed by the Administration. The Chairman requested the Clerk to inform the Administration of the Panel's position and to request it to revert to the Panel on the outcome of the review in due course.

(Post-meeting note : The Administration was informed in writing on 29 April 2004.)

V. Professional Indemnity Scheme of the Law Society of Hong Kong

(LC Paper Nos. CB(2)2129/03-04(03) and (04); 773/03-04(01); 1092/03-04(01) and 2185/03-04(01))

Letters from solicitors on the Solicitors Professional Indemnity Scheme

8. The Clerk informed members that about 200 solicitors had sent letters to the Panel expressing views on the insurance arrangements under the present indemnity scheme. As the letters were identical in content, only a sample of

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the letters and a list showing the names of the solicitors had been issued to the Panel for reference (LC Paper Nos. CB(2) 2129/03-04(03) and (04) refer). The Clerk further advised members that identical letters from about 20 more solicitors had been received shortly before the meeting. An updated list would be provided for the Panel's reference.

(Post-meeting note : An updated list was issued to the Panel vide LC Paper No. CB(2)2303/03-04(01) on 10 May 2004.)

Letter from Chairman of the Panel to the Commissioner of Insurance on Policyholders' Protection Fund (PPF)

9. The Chairman referred members to a letter dated 24 March 2004 from her to the Commissioner of Insurance, a copy of which was tabled at the meeting (circulated to the Panel after the meeting vide LC Paper No. CB(2)2185/03-04(01)). The letter reflected the concerns expressed at a recent gathering held by the Chairman for legal practitioners and the Commissioner of Insurance to discuss the consultation document on the proposed PPF and the relevance of the PPF in tackling the problems encountered in the provision of professional indemnity of solicitors.

Verbal report by the Law Society of Hong Kong

10. At the invitation of the Chairman, Mr Peter LO briefed the Panel on the progress of consultation of the Law Society with its members on the report on Consultancy Study on Review of Insurance Arrangements of the Hong Kong Solicitors Indemnity Scheme (the Willis Report), since the item was last discussed by the Panel at its meeting on 18 December 2003. The latest position was summarized as follows -

- (a) at a recent Extraordinary General Meeting (EGM), two proposed resolutions were put to members of the Law Society by the Council of the Law Society (the Council) for consideration. The resolutions involved a choice between a Master Policy Scheme (MPS) and a Qualifying Insurer Scheme (QIS). The proposals, however, were considered by some members of the Law Society to be unsatisfactory. The EGM was adjourned pending a further meeting to be held to further discuss the matter;
- (b) the general sentiment expressed at the EGM was that members of the Law Society were strongly opposed to the existing mutual scheme arrangements with solicitors being the insurers of the last resort for each other. This had been identified in the Willis Report as the major dissatisfaction with the existing indemnity scheme. Some members of the Law Society also considered that compulsory professional indemnity for solicitors should be

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dispensed with altogether. Nevertheless, the Law Society had stated its stance that it was in favour of a compulsory scheme. The Willis Report had also recommended the retention of an indemnity scheme. According to the two surveys conducted by Willis, two-thirds of the respondents agreed that professional indemnity insurance for solicitors should remain compulsory;

- (c) the Council was seeking to address the issue by way of a MPS or QIS, the features of which had been explained to the members. The proposed MPS was an amendment to the existing scheme, under which the mutual fund (the Solicitors Indemnity Fund (SIF)) would absorb the first HK\$1.5 million of any claim. The balance of \$8.5 million would be borne by a syndicate of insurers, instead of by SIF in the event of the collapse of the insurer. Under the proposed QIS, the Law Society would set out standard reinsurance terms and invite insurers to participate on those terms. Individual members of the Law Society would, however, need to negotiate with the insurers on the insurance premium payable. A major problem with QIS was that some solicitors firms, because of the lack of a satisfactory track record, might encounter difficulties in obtaining insurance cover. The practice in England was that insurers who sold insurance to members of the profession agreed to issue insurance cover under an assigned risks pool (ARP) for those solicitors who were unable to find an insurer in the open market. These otherwise uninsurable solicitors then paid premiums, usually at high levels, for the indemnity cover provided under the ARP. The experience in England was that the premium could account for 25% to 30% of the gross income of the firms. In England, QIS was also backed up by a PPF, where in the event of a failure of an insurer, the insured might turn to the PPF for the amount which the insurer in default would have paid; and
- (d) since the last EGM, the Council had further discussed with some of the members who had voiced objection to the proposals. It was hoped that another general meeting could be held within the next few weeks so that the Council could have a clear indication of the preference of the members and the direction in which to proceed.

Law Society's response to letters from solicitors

11. Mr Peter LO responded to the issues raised in the letters from solicitors on the indemnity scheme (LC Paper No. CB(2)2129/03-04(03)) as follows -

- (a) the Law Society shared the concern expressed by solicitors that solicitors as a whole should not be required to act as insurers of

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last resort for each other. The historical development was that a master insurance policy was put in place when the scheme was first introduced in 1980. Some years later, members of the Law Society felt that they were being "held to ransom" by the insurer by having to pay huge premiums. The option of a mutual indemnity fund to replace the master policy was subsequently approved by members. The possibility of the insurance company turning insolvent as happened in the case of the HIH Group, however, did not occur in the minds of members at that time;

- (b) the shortfall of \$416.8 million mentioned in the solicitors' letters had in fact been covered by the SIF. The call made to solicitors in 2003 for top-up contribution was to deal with the deficit of \$132 million as at 30 September 2002. Whether or not a further call for contribution would be made would depend on whether a deficit existed as at 30 September 2003. The position was not known at the present stage;
- (c) another factor which might affect the situation was the amount of insurance premiums to be paid towards the end of 2004. Under the existing arrangements with the insurers, if there were more than 340 claims at the end of the current indemnity year, the premiums payable would be about \$350 million. If the claims were in the region of 250, the premiums payable would be about \$250 million. Based on historical figures, the amount which the Law Society expected to collect from its members was about \$200 million to \$220 million. There would have to be adequate reserves in SIF to meet the payment of premiums, otherwise a call for contribution would have to be made. During the peak years in terms of claims against the insurers, the loss ratio of the insurers was higher than 300%, i.e. for every \$100 received in premiums, the insurers paid out more than \$300. As a result, the premiums had been sharply increased; and
- (d) the Law Society appreciated the concern of its members that there was no other profession in Hong Kong which was required to operate a mutual indemnity scheme. However, in view of the present legislative requirements and the need to protect public interest, an appropriate balance would have to be struck in considering a transfer of risk away from the solicitors as a whole to other parties including the ordinary members of the public.

Issues raised by members

The alternative options

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12. Referring to the letters submitted by solicitors, the Chairman said that the major concern raised was that solicitors should not act as insurers of last resort for each other and for unlimited amounts in the event of insurer insolvency. The solicitors considered that it was unfair that having already fulfilled the statutory requirement of paying their contribution to the SIF, they still had to pay extra contributions when unforeseen situations arose. The Chairman asked how the Law Society would address the concern.

13. Mr Peter LO said that under the option of MPS explained above, solicitors would not be liable for unlimited amounts. However, there would still be an element of mutuality so far as the retained portion of \$1.5 million per claim to be borne by SIF was concerned, in that a top-up contribution by solicitors might be called if the reserves of SIF were insufficient to meet claims up to the \$1.5 million limit. Under the proposed QIS, there would be no mutuality at all as individual solicitors would take out insurance cover on their own with an insurer. He said that it would be for the members to judge the advantages and disadvantages of the schemes and decide on which option to adopt.

14. Ms Miriam LAU said that in principle she supported a professional indemnity scheme as it could help protect the interests of the public. Nonetheless, the scheme, having run for more than 20 years, did not appear to have assisted members of the profession as a whole and a lot of problems had occurred. For example, the existence of a mutual scheme appeared to have encouraged certain undesirable practices in the profession amounting to negligence and less than satisfactory diligence on the part of some solicitors in carrying out their duties, despite that these still only happened in a minority of cases. Ms LAU said that she had doubts as to whether the proposed MPS and QIS could address the problems.

15. Mr Chris HOWSE said that he agreed that it was unfair that solicitors were the only profession in Hong Kong required to take out a compulsory indemnity scheme to mutually insure each other. He said that the overwhelming view expressed at the Law Society's recent EGM was that there should be a transfer of risk and that mutuality should be dispensed with. The fundamental element in both of the two options of MPS and QIS recommended in the Willis Report and the Council was the transfer of risk. Under QIS, the risk would be totally transferred away from the profession as a whole as each solicitor would choose his own insurer nominated by the Law Society. There would be no mutuality of liability at any level. If the insurer went into liquidation, the solicitor would be totally on his own. On the other hand, there would be no safety net for the members of the public as claimants, other than claims directly against the liable solicitors and whatever relief might be obtained from the PPF to be put in place. He added that there were other issues which needed to be carefully considered under a QIS, for example, the extent to which

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some solicitors and law firms might be disadvantaged because they would have to negotiate the best possible terms they could get from insurers in the market with less bargaining power than that of the Law Society.

16. Regarding the MPS, Mr HOWSE said that an amendment to the existing scheme was that an element of mutual insurance would be retained, but with the level of mutual risk reduced from \$10 million to \$1.5 million per claim. The responsible solicitor would be solely liable for the \$8.5 million if his insurer became insolvent, with no recourse to the other members of the profession. One of the advantages of MPS when compared with QIS was that it retained an element of assured public protection up to \$1.5 million. Moreover, the smaller law firms would be able to benefit from a relatively cheaper premium resulting from bulk-buying in the insurance market.

17. Mr Chris HOWSE further advised that members of the Law Society who attended the recent EGM did not unanimously reject the two options altogether, but they indicated that more time was needed to consider the proposals. A diversity of views had been expressed. For example, another proposal which had been put forward by some members was to abolish the professional indemnity insurance for solicitors. Some members also expressed the view that legislative amendments with retrospective effect should be introduced, if necessary, to relieve solicitors from the obligation to make further contributions to the SIF, which had already paid out an enormous amount of \$132 million to meet the shortfall. The predominant view of members, however, was that mutuality under the existing indemnity scheme should not be continued. Mr HOWSE added that whether mutuality should be allowed to end remained a policy issue to be resolved with the Administration, and the support from Members of the Legislative Council was needed.

18. Mr Albert HO said that he shared the concern that it was unfair to solicitors that they should act as insurers of last resort for each other and be mutually liable for unlimited amounts. He opined that solicitors should only be required to make a prescribed contribution to the indemnity scheme so as to satisfy the condition for practice. They should not, however, be called upon to pay further contributions from time to time to meet unforeseen shortfalls. Mr HO sought clarification on whether the existing legislation imposed a mandatory obligation on solicitors that they had to comply with any calls made by the Law Society Council for additional contributions.

19. Senior Government Counsel said that under the Legal Practitioners Ordinance, a solicitor for the purpose of practice was required to comply with the indemnity rules made by the Law Society. The Solicitors (Professional Indemnity) Rules made by the Law Society required, among other matters, that an indemnity fund should be established and maintained by contributions which should be made or caused to be made by solicitors.

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20. The Chairman asked whether there had been any discussion between the Department of Justice (DoJ) and the Law Society on the implementation of a new scheme. Senior Assistant Solicitor General replied that the Solicitor General had discussed with the Law Society and the Commissioner of Insurance the options of MPS and QIS, as well as means to supplement the scheme such as by way of the PPF. He said that the parties would continue to discuss the issues that needed to be resolved.

21. The Chairman opined that professional indemnity of solicitors was a legal policy issue, and whether solicitors should continue to be required to take out professional indemnity insurance on a mutual basis should be reviewed in the context of policy. She said that the problems with the present mutual indemnity scheme were acknowledged by all parties. She urged DoJ to have discussion with the Law Society Council as soon as possible, taking into account the fundamental policy issues involved. She said that until the two parties could come to an agreement on those issues, it would be difficult for this Panel to offer views on any proposed changes and monitor the progress of implementation at every step. The Chairman added that she had requested the Solicitor General in writing to take urgent action on the matter.

22. The Chairman requested the Administration to respond in writing to the following matters -

- (a) the policy objectives of the existing legislative requirements, taking into account the concern expressed by solicitors that there was no other profession in Hong Kong whose members had to act as insurers of last resort for each other; and
- (b) whether under the existing legislation and the mandatory indemnity scheme solicitors had a liability to mutually pay for any shortfall in compensation of unlimited amounts, and if so, whether it was the intended policy.

Indemnity under a levy system

23. Mr Albert HO said that the Administration and the Law Society should look at all possible options to address the problems identified. He suggested that the possibility of setting up a fund financed by a levy imposed on certain types of transactions to settle claims which were ultimately left uncovered by the indemnity fund should be considered. The levy collected could also be used to meet claims, including claims against solicitors for fraud which were presently not covered by the solicitors indemnity scheme. The level of levy could be set in proportion to the fees which solicitors charged their clients for specific types of transactions. Mr HO opined that this proposed scheme could serve the dual purpose of protection of public interest and upholding the integrity of the legal profession.

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24. Mr Chris HOWSE said that the suggestion of a levy system had been considered previously and certain issues had been looked into, such as whether the levy should be imposed on all types of transactions or only limited to conveyancing transactions. A major problem which had been identified was the drastic drop in property related transactions resulting from the fall of the property market which limited the viability of a levy system.

25. The Chairman said that she had also heard of similar proposals from some legal practitioners. She requested the Administration to provide a written response to the option of a levy system as proposed by Mr Albert HO.

(Post-meeting note : A paper from the Administration which responded to the issues raised in paragraphs 22 and 25 above was issued vide LC Paper No. CB(2)2582/03-04(01) on 31 May 2004.)

Way forward

26. The Chairman said that the Panel should follow up the issue at a future meeting. She requested the Clerk to liaise with the Law Society on whether it would be in a position to revert to the Panel at the next meeting of the Panel on 24 May 2004 on the progress of the Law Society's consultation with its members.

(Post-meeting note : A special meeting of the Panel to follow up the item was scheduled for 14 June 2004.)

VI. Consultation Paper of Law Reform Commission on Rules for Determining Domicile
("Consultation Paper on Rules for Determining Domicile"; LC Paper No. CB(2)2129/03-04(05))

27. Ms Eudrey EU, Chairman of the Domicile Subcommittee of the Law Reform Commission (LRC), briefed members on the Consultation Paper. She informed members that the central notion of domicile was that of a long-term relationship between person and place, i.e. a "connection factor" which determined under which system of law and within the jurisdiction of which country's courts certain issues (principally those relating to status and property) were to be determined. The concept of domicile was used in various areas of law, both at common law and by statute. Despite the significance of the concept of domicile, the rules for determining a person's domicile had been criticized as unnecessarily complicated and technical, and as sometimes leading to absurd results. The Consultation Paper aimed at improving this complex and confusing area of common law by simplifying the concept of domicile and making the determination of a person's domicile easier.

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28. Ms EU took members through the recommendations of the Consultation Paper to modify the existing rules for determining a person's domicile as detailed in Chapter 5 of the Consultation Paper. She pointed out that in practical terms, the recommendations would not change the domicile of many people except married women, with the proposed disapplication of the common law concept of domicile of dependency applicable to married women at present. Another major change was that on the domicile of children. The relevant recommendation was that a child's domicile should be in the country with which the child was most closely connected, instead of dependent on the domicile of the father. Moreover, there should be no differentiation between legitimate and illegitimate children in determining their domicile.

29. Ms Miriam LAU asked whether objective criteria had been recommended for determining a person's domicile in a place if the person died outside that place.

30. Ms Audrey EU replied that the Domicile Subcommittee had looked into the matter and found that disputes could happen only in a minority of cases where the persons had different places of residence and they were in possession of assets and properties in the places concerned. She said that the major criteria to be taken into consideration were that a person's domicile should be in the place with which he was most closely connected, the actual presence of the person in the place, and the intention of the person to make a home in that place for an indefinite period. She added that difficulties in determining the persons' domicile in fact rarely occurred because in most of these cases the persons concerned had supporting documents, such as documents of ownership of properties etc, to prove his long-term intimate connection with a certain place and the intention to live in the place permanently or indefinitely. In some cases, for example, a Hong Kong resident who spent most of his time working alone in the Mainland, his family particulars such as whether he had family members and relatives living in Hong Kong would also be taken into account. Ms EU further said that where disputes arose in individual cases, the court would decide having regard to all relevant factors.

Way forward

31. Members noted that the consultation period for the Consultation Paper ran up to 31 May 2004. The Chairman suggested and members agreed that the Panel could follow up the issue, if necessary, in the next term of the Legislative Council when the LRC had finalized its proposals.

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VII. Procedure for endorsement of removal of judges by the Legislative Council under Article 73(7) of the Basic Law

(LC Paper Nos. CB(2)2122/03-04(01) and (02); 2148/03-04(01))

32. Members noted that the Administration and the Judiciary had no further views on the proposed procedure for endorsement of removal of judges. Nonetheless, they had provided comments on certain issues raised in the Law Society's submission dated March 2004 to the Panel.

33. Members noted the paper prepared by the Secretariat on "Procedure for endorsement of removal of judges by the Legislative Council under Article 73(7) of the Basic Law" (LC Paper No. CB(2)2122/03-04(01)). The paper was prepared after taking into account the views received from the Administration, the Judiciary and the two legal professional bodies.

34. The Chairman said that the Panel would make a report to the House Committee on the matter.

35. The meeting ended at 6:10 pm.

Council Business Division 2
Legislative Council Secretariat
31 May 2004