

立法會
Legislative Council

LC Paper No. CB(2)946/04-05
(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 January 2005 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present : Hon Margaret NG (Chairman)
Hon LI Kwok-ying, MH (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon KWONG Chi-kin

Member absent : Hon MA Lik, JP

Public Officers attending : Item IV
Mr Stephen WONG Kai-yi
Deputy Solicitor General
Ms Nilmini DISSANAYAKE
Deputy Law Draftsman (Acting)
Mr Michael SCOTT
Senior Assistant Solicitor General
Ms Mary HO
Senior Government Counsel
Civil Division
Item V
Mr Tony YEN, SBS, JP
Law Draftsman

Mr Gilbert MO
Deputy Law Draftsman

- Attendance by invitation** : Item IV
The Hong Kong Bar Association
Mr Andrew BRUCE, SC
- 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 No. CB(2)710/04-05 –Minutes of meeting on 14 December 2004)

The minutes of the meeting held on 14 December 2004 were confirmed.

II. Information papers issued since the last meeting

(LC Paper No. CB(2)507/04-05(01) – Paper provided by the Administration on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases"

LC Paper Nos. CB(2)512/04-05(01) and (02) – The Chairman's letter dated 20 December 2004 to the Administration and reply dated 28 December 2004 from the Administration on "Professional Indemnity Scheme of the Law Society of Hong Kong"

LC Paper No. CB(2)551/04-05(01) – Copies of the bilateral treaties/ agreements together with a list of the countries that have entered into such treaties/agreements provided by the Administration

LC Paper No. CB(2)602/04-05(01) – Paper provided by the Administration on "Deletion of a Principal Executive Officer Post in the Office of The Ombudsman"

LC Paper No. CB(2)714/04-05(01) – Letter dated 18 January 2005 from the Solicitor General on proposal in the Statute Law (Miscellaneous Provisions) Bill 2005 to provide for representatives of the proposed third law school to be included in the membership of the Standing Committee on Legal Education and Training

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LC Paper No. CB(2)714/04-05(02) – Administration’s paper on "Proposed establishment of a third law school"

LC Paper No. CB(2)728/04-05(01) – Letter dated 20 January 2005 from the Law Society of Hong Kong on the draft Solicitor Corporations Rules

LC Paper No. CB(2)728/04-05(02) – Letter dated 20 January 2005 from Hon Margaret NG to the Law Society of Hong Kong on the draft Solicitor Corporations Rules)

2. Members noted that the above papers had been issued to the Panel.

Proposed establishment of a third law school at the Chinese University of Hong Kong

3. The Chairman referred members to the letter dated 18 January 2005 from the Solicitor General and the Administration’s paper, which responded to the concern expressed by members at the last meeting on 14 December 2004 about consultation on the proposed establishment of a third law school in Hong Kong and the likely impact of such a development on the provision of legal services. Members agreed that representatives of the Chinese University of Hong Kong, the law schools of the University of Hong Kong and the City University of Hong Kong, the two legal professional bodies and the Administration should be invited to exchange views on the relevant issues at a meeting to be held after April 2005. Members of the Panel on Education would also be invited to attend the meeting for discussion of the item.

4. To facilitate future discussion, the Chairman asked the Clerk to request the Chinese University of Hong Kong to provide more information relating to the proposed law school, including the progress of planning of the law school and the law programme which would be offered.

(Post-meeting note : The Clerk wrote to the three universities, the Department of Justice and the University Grants Committee on 1 February and 2 February 2005 on a proposal to discuss the subject matter at the regular meeting of the Panel on 23 May 2005. The meeting arrangements would be finalized subject to the responses from the parties.)

III. Items for discussion at the next meeting

(LC Paper No. CB(2)724/04-05(01) – List of outstanding items for discussion

LC Paper No. CB(2)724/04-05(02) – List of follow-up actions)

5. Members agreed that the following items should be discussed at the next regular meeting on 28 February 2005 –

- (a) Pilot Scheme on mediation of legally aided matrimonial cases;
- (b) Subsidiary legislation relating to consular matters; and
- (c) Appointment of Special Advocates.

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Solicitor Corporations Rules

6. The Chairman informed members that the Law Society of Hong Kong had requested the Panel to defer discussion of the item as it was considering the amended draft Solicitor Corporations Rules received lately from DOJ.

Criminal legal aid fees system

7. The Chairman said that the Administration originally proposed to brief the Panel on the outcome of the biennial review of criminal legal aid fees, prosecution fees and duty lawyer fees at the next meeting on 28 February 2005. However, as the Administration was still in the process of consulting the relevant parties on the way forward, it had lately proposed to defer the item until further notice.

IV. Government's policy on subsidiary legislation

(LC Paper No. CB(2)696/04-05(01) – Background brief prepared by the LegCo Secretariat

LC Paper No. CB(2)696/04-05(02) – Paper provided by the Administration

LC Paper No. CB(2)745/04-05(01) – Paper provided by the Hong Kong Bar Association)

8. The Chairman informed members that the issue of Government's policy for determining what kind of instrument made under an ordinance should be subsidiary legislation was referred to this Panel for follow-up by the Bills Committee on Boilers and Pressure Vessels (Amendment) Bill 2001. She drew members' attention to the background brief prepared by the Secretariat (LC Paper No. CB(2)696/04-05(01)).

9. At the invitation of the Chairman, Deputy Solicitor General (DSG) briefed members on the paper provided by the Administration, which set out the Administration's views on factors relevant to determining whether or not an instrument was subsidiary legislation (LC Paper No. CB(2)696/04-05(02)).

Views of the Hong Kong Bar Association

10. At the invitation of the Chairman, Mr Andrew BRUCE briefed members on his written submission made on behalf of the Bar Association which was tabled at the meeting (LC Paper No. CB(2)745/04-05(01) issued to members after the meeting). The following was the gist of the submission –

- (a) the law should be both certain and accessible. However, section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), which stated that subsidiary legislation meant “any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any ordinance and having legislative effect”, would not help in clearly determining whether or not a particular instrument was subsidiary legislation. It was because the definition could not limit the possibility of arguments as to whether certain

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instrument was intended to have legislative effect. The definition was inadequate to provide guidance in terms of legal certainty and predictability; and

- (b) while there was no perfect solution to resolve the problem, a clearer definition should be provided to reduce the scope of possible dispute. Consideration might be given to the approach adopted by Australia or the UK, by referring specifically to the express terms of the instruments in question. For example, if a particular instrument was expressly stated as a rule or regulation, then it should be regarded as subsidiary legislation having legislative effect.

Issues raised

11. In response to the Chairman, Senior Assistant Legal Adviser 2 (SALA2) briefed members on his views as follows –

- (a) it was inherently difficult to work out a comprehensive definition or guidelines for determining whether any instrument was subsidiary legislation, even with the principles and criteria set out by the Administration. Under the existing definition, the problem of deciding whether or not an instrument was subsidiary legislation having legislative effect would arise occasionally. The matter would have to be dealt with by a bills committee on a case-by-case basis, applying the relevant principles and criteria;
- (b) in doubtful cases, it was good practice for the Government to express its views in the bill on the character of an instrument and whether the instrument was subsidiary legislation. This would serve to bring up the issue for consideration by the bills committee at an early opportunity; and
- (c) Legislative Council (LegCo) Members might not agree with the Government on whether certain instrument was subsidiary legislation, particularly in cases where the Government held that the instrument had no legislative effect. Where Members were not in agreement with the Government, they could introduce Committee Stage amendments to the relevant bill to override the Government's position. It would be a matter for the Council to decide whether the amendments should be passed, subject to the existing voting procedures. The views of Members as reflected in the Council's decision were an indispensable element in determining the legislative intent, and the Government should take into account Members' views seriously.

12. On the views expressed by Mr Andrew BRUCE and SALA2 above, DSG said that it was difficult to provide a definition for instruments with or without legislative effect. He said that the approach adopted by the Administration, since 1999, to include in the legislation an express provision declaring or clarifying the character of an instrument, was considered a good practice and it would continue. The

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Administration's position was that the existing definition of subsidiary legislation in section 3 of Cap. 1 had stood the test of time. The definition was familiar to LegCo Members, the legal practitioners as well as other users of legislation in Hong Kong. It allowed each instrument, when drafted, to be classified according to its substance, whereas a mechanical test or definition might result in misclassification of an instrument as either legislative or administrative. The Administration also considered that where justified by the circumstances, express provisions could be included in individual ordinances for the purpose of reducing ambiguities. Nonetheless, the practical impossibility of trying to define a precise threshold for differentiating legislative instruments and administrative instruments might be irreducible.

13. Mr Andrew BRUCE opined that the existing definition of subsidiary legislation in section 3 of Cap. 1, instead of enabling instruments to be effectively classified, created problems in classification because of the difficulty which he had pointed out. He further said that the legislative intent was an essential factor in determining whether or not an instrument had legislative effect, and law drafters should be clearly explained of the policy intention in drafting legislation.

14. Referring to the opinion of SALA2 in paragraph 11(c) above, Ms Audrey EU pointed out that under the existing voting mechanism on bills and motions prescribed under the Basic Law, a motion which differed from the Government's position might not be passed in the Council, even though it had the support of the majority Members. She opined that in such cases, the Government should still respect the substantial views of Members.

15. The Chairman opined that legislative intent was not ultimately dictated by LegCo. She said that the legislative intent was embodied and reflected in the concrete provisions of the legislation, which the Administration had to explain and clarify in detail to the bills committees in the course of the legislative process. Mr Martin LEE agreed with the Chairman's views.

16. Mr Albert HO asked what would be the legal consequences if an instrument having legislative effect was not published in the Gazette. SALA2 opined that the failure to publish in such cases should not affect the status of the instrument as subsidiary legislation. He added that while Cap. 1 provided that subsidiary legislation should be gazetted and laid on the table of LegCo, the requirement could be displaced by an express provision in the principal ordinance under which the instrument was made. An example was the English Schools Foundation Ordinance (Cap. 1117), which specified that the English Schools Foundation (ESF) might make regulations and it should not be necessary for any regulations made to be published or laid on the table of LegCo.

17. Mr Andrew BRUCE opined that where an instrument had legislative effect in substance, a declaration of the Administration that the instrument was not subsidiary legislation on the ground that it was intended not to have legislative effect would be invalid. He said that the court's ruling on the ESF case (ESF v Bird [1997]3 HKC434) that the regulations made by ESF did in fact have legislative effect demonstrated the problem that instruments which had legislative effect might escape

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the scrutiny by LegCo. Therefore, the existing definition of subsidiary legislation should be improved to provide a clearer dividing line to reduce the scope of possible legal dispute.

18. DSG said that in case of a dispute as to whether or not an instrument was subsidiary legislation, it would be a matter for the court to adjudicate ultimately. There was only a limited number of doubtful cases in which the court's decision on the nature of the particular instrument was sought. The court, in making its decision, would take all relevant factors into account, including the relevant provisions of Cap. 1, any express provision in the principal legislation declaring the character of the instrument, as well as an objective assessment of the legislative intent.

19. The Chairman said that disputes over whether certain instrument had legislative effect were not common. In most cases, where an instrument was intended not to have legislative effect and hence was not subsidiary legislation, there would be an express clarification to that effect in the principal legislation.

20. DSG informed members that in addition to the ESF case, another relevant judgment was handed down in early January 2005 (Julita F Raza v CE in Council HCAL No. 30 of 2003). In the case, it was held that an approval by the Chief Executive in Council (CE in Council) of a scheme for importation of foreign domestic helpers as a "labour importation scheme" under section 14(3) of the Employees Retraining Ordinance (Cap. 423), which made the employers of foreign domestic helpers liable to pay a levy in respect of each helper employed, had no "legislative effect". He quoted the Judge as saying that the approval of CE in Council did not make law or alter law. It gave rise to no more than an administrative arrangement. The legislature, in vesting the discretion in the CE in Council "from time to time" to approve a scheme as a labour importation scheme, had done no more than saying that it was within the discretion of the CE in Council in the general application of Hong Kong's immigration policies, which were themselves administrative in nature, to determine as a matter of policy the eligibility criteria for each scheme.

21. Ms Miriam LAU referred to Appendix II to the background brief prepared by the Secretariat (LC Paper No. CB(2)696/04-05(01)), which was an extract from a paper provided by the Administration to the Panel on Constitutional Affairs in July 1999. In the paper, the Administration had advised that "subsidiary legislation" was statutorily defined in Malaysia and Singapore in essentially the same way as Hong Kong, and the courts in either jurisdiction appeared to have occasionally been required to determine whether an instrument was of a legislative character. Ms LAU requested the Administration to provide information on –

- (a) whether there was any case law or other information to illustrate how Malaysia and Singapore had dealt with the problem of determining whether certain instrument was of a legislative character; and
- (b) previous cases decided by the court of Hong Kong on whether certain instrument was subsidiary legislation having legislative effect, apart from the two examples (the ESF case and the foreign domestic helpers scheme case) quoted by the Administration.

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(*Post-meeting note* : The Administration's written reply was issued to the Panel vide LC Paper No. CB(2)827/04-05(01) on 4 February 2005.)

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22. Referring to the ESF case, SALA2 suggested that the Administration should consider incorporating the regulations made by ESF in the loose-leaf edition of Hong Kong laws, as the court had ruled that the regulations were subsidiary legislation. The Chairman requested the Administration to follow up the suggestion, pointing out that there was nothing to prohibit the publication of such regulations. She further opined that the Administration should introduce amendments to the English Schools Foundation Ordinance to make clear that the regulations made by ESF were legislative in character, in the light of the court's decision. She suggested that such amendments could be included in the Statute Law (Miscellaneous Provisions) Bill 2005, which was now under preparation by the Administration and would be introduced into LegCo for scrutiny in the current legislative session.

23. Mr Martin LEE asked whether the definition of subsidiary legislation in section 3 of Cap. 1 was based on any similar UK Acts. Senior Assistant Solicitor General (SASG) replied that a similar definition existed in the Rules Publication Act 1893, prior to the enactment of the Statutory Instruments Act 1946. Under the Statutory Instruments Act, subsidiary legislation made under pre-1948 UK statutes included only instruments of a "legislative" character. In determining whether an instrument was "legislative" in substance, essentially the same criteria for determining whether an instrument was subsidiary legislation having legislative effect pursuant to the Interpretation and General Clauses Ordinance were applied. Subsidiary legislation made under post-1947 statutes in UK was termed "Statutory Instruments" to which a mechanical test applied. In other words, an instrument created under a statute which was not expressly declared to be a "Statutory Instrument" was not required to be published and introduced before the Parliament. He added that about 20% of the instruments now made under statutes in UK were not subject to the requirement of publication and scrutiny by the Parliament.

24. SASG added that in Hong Kong, subsidiary legislation was published in the Legal Notices section of the Gazette while instruments which were not subsidiary legislation were published in the General Notices section of the Gazette.

25. SALA2 said that if an instrument made under an ordinance was expressly stated not to be subsidiary legislation, it would not have to be gazetted. However, for good administrative reasons, certain instruments which were administrative in nature, e.g. codes of practice, had been published in the General Notices section of the Gazette or in other parts of the Gazette. These instruments, which were not legislative in nature, were not included in the loose-leaf edition of Hong Kong laws.

Way forward

26. Mr Martin LEE opined that having pursued the relevant issues, it might not be necessary for this Panel to have further deliberation of the subject matter, given the inherent difficulties in coming up with a definition that could satisfy all, and the fact that any disputes over whether or not an instrument was subsidiary legislation would ultimately have to be decided by the court. He also pointed out that it was

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impracticable to review all past instruments to determine whether they should be subsidiary legislation or not.

27. The Chairman said that the concern about the subject matter arose from previous discussions of bills committees, and the Bills Committee on Boilers and Pressure Vessels (Amendment) Bill 2001 had specifically requested the Panel to follow up the matter. In summing up the discussion of the Panel, the Chairman said that the Panel took the view that –

- (a) in future cases, the Government should seriously consider the views expressed by Members of LegCo in deciding its position on the nature of an instrument and whether or not it should be subsidiary legislation; and
- (b) regarding instruments which had already been put into effect, where a dispute occurred as to whether a particular instrument had legislative effect, the matter should ultimately be left for the court to decide.

28. The Chairman said that the Panel would make a report to the House Committee on its deliberation on the subject matter.

V. Manpower position of drafting counsel in the Department of Justice
(LC Paper No. CB(2)315/04-05(01) – Paper provided by the Administration)

29. At the invitation of the Chairman, Law Draftsman (LD) briefed members on the Administration's paper on the manpower position of the Law Drafting Division (LDD) of DOJ and measures to cope with the demand for legislative drafting service (LC Paper No. CB(2)315/04-05(01)). He also informed members of the recent development that DOJ had obtained special approval from the Panel co-chaired by the Chief Secretary for Administration and the Financial Secretary to proceed with the open recruitment of 12 Government Counsel (GC). It was anticipated that the new recruits could assume duty by year-end, and some of the appointed candidates might be posted to LDD.

Issues raised

Staffing position of LDD

30. Ms Audrey EU said that it was important to maintain an adequate pool of experienced and professionally trained GC to undertake legislative drafting duties, given the scarce expertise in this specialized field and the exceptionally difficult job of law drafting in Hong Kong which involved bilingual drafting in both Chinese and English. It was also rather impractical to brief out the drafting work to private counsel who did not have the relevant exposure to government policies. Ms EU considered that the vacancies of GC grade officers in LDD should be filled as soon as possible.

31. Ms Emily LAU also expressed support for providing additional manpower resources for LDD.

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32. In response, LD said that at present there were a total of 33 GC Grade officers with legislative drafting experience in LDD. There were three GC vacancies in LDD. As vacancies also existed in the other divisions of DOJ, the exact number of newly recruited GC to work in the different divisions would be finalized, subject to a review of the operational needs of the Department as a whole and the capability, experience and expertise of the candidates applying for the job. The interest of the applicants would also be taken into account. Hence, whether or not all the three vacancies in LDD could be filled could not be determined at this stage, pending the result of the recruitment exercise.

33. LD assured members that he was mindful of the need to have enough experienced law drafters in LDD to cope with the demand for legislative drafting service, and he would strive to fill the vacant posts far as practicable, subject to availability of suitable candidates. He added that apart from the new recruitment, appropriate measures would be taken in DOJ as and when necessary in ensuring smooth operation, including internal postings and redeployment among the various divisions.

34. Referring to Appendix I in the Administration's paper on the staffing position of LDD as at 1 November 2004, Ms Audrey EU pointed out that there were only seven GC in LDD, compared with 14 Senior Government Counsel (SGC) and 10 Deputy Principal Government Counsel (DPGC). She considered that this ratio of a greater number of senior officers vis-à-vis the junior ones was unusual. She was concerned that the situation could worsen if the number of drafting counsel at GC rank would fall further in future.

35. LD explained that the ratio and number of GC at different ranks varied among the divisions of DOJ. Because of the very specialized nature of law drafting, it was considered necessary to have the relatively more experienced GC Grade officers to undertake the work. This accounted for a higher proportion of GC at SGC and DPGC levels in LDD as compared with other divisions.

Training for drafting counsel

36. In reply to Ms Miriam LAU, LD said that some in-house training provided for GC in LDD was organized continuously while some was provided on a need basis. The former included training sessions on major topics, and the Mentorship Programme which enabled SGC and GC to gain exposure to more complicated work and acquire knowledge more conveniently from the experienced colleagues. Some training, on the other hand, such as the workshop sessions on drafting in plain English, had been suspended after 2003.

37. Referring to Appendix II to the Administration's paper on training for drafting counsel, Ms Emily LAU asked why the overseas legislative drafting course for SGC had stopped after 1998.

38. LD replied that the overseas course was a costly one for which funding was only sufficient to allow one SGC to attend the course each year. Moreover, the course was planned for participants from other jurisdictions and was not tailor-made

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to suit the needs of drafting counsel of LDD. As the overseas course was not cost-effective, an in-house tailor-made 24-week full-time legislative drafting course was organized to replace it since 1999. The in-house course, conducted by specialists in plain language drafting, had benefited a greater number of drafting GC.

39. LD further said that the Mentorship Programme implemented since November 2001 and the attachment programmes under which drafting counsel of LDD were sent on a short-term basis to work in other divisions of DOJ and the policy bureaux of the Government Secretariat were very useful in broadening their horizons and exposures. He said that so far four drafting counsel had been seconded to policy bureaux to undertake the work of Assistant Secretaries.

40. Ms Emily LAU requested LD to provide supplementary information relating to the in-house legislative drafting course and overseas legislative drafting course organized by LDD for the Panel's reference.

(Post-meeting note : The information provided by the Administration was issued to the Panel vide LC Paper No. CB(2)835/04-05(01) on 7 February 2005.)

41. Ms Emily LAU opined that the Administration should review the effectiveness of the Mentorship Programme, and requested the Administration to inform the Panel of the result of the review in due course.

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Bilingual drafting

42. Ms Miriam LAU pointed out that the Bilingual Legislation Programme had been introduced in the 1980s. Since the reunification, all new legislation had been drafted and enacted bilingually. The drafting policy aimed at producing bilingual legislative provisions in plain language that were clear and readable to users of legislation and the ordinary members of the public. However, in vetting legislative proposals, LegCo Members were disappointed to find that bills produced nowadays were still drafted in a cumbrous style with complicated and convoluted sentences which were difficult to understand, especially for the Chinese text of the provisions. Mr Martin LEE expressed similar views. He opined that problems existed in both Chinese and English drafting.

43. LD said that LDD recognized the need to draft laws in clear and simple language so as to make the laws more accessible to the public. He pointed out that he had explained to the Panel at a previous meeting the problems encountered in bilingual legislative drafting, as well as the Administration's policy and initiative to review the existing legislation with a view to redrafting outdated provisions in plain and modern language. The review to identify "old" legislative provisions for redraft had not started, as Members of LegCo and the legal professional bodies had reservations about the need for an urgent review and considered that priority should be given to the drafting of new legislation. The Administration shared the view that modernization was a gradual and continuous process, and a balanced approach would have to be adopted.

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44. LD further said that in pursuing the modernization programme, it was found that certain existing “old-style” provisions in the statutes had been drafted, based on legal and judicial interpretations and other relevant authorities. Such provisions had become precedents for law drafters in subsequent legislative drafting on related subjects. The LDD therefore considered that in drafting subsequent amendment legislation, particularly in cases where the amendments aimed at amending only a certain part of an ordinance, it might be a preferred approach not to redraft those old-style provisions in order to maintain consistency and continuity, subject of course to the true reflection of the intended policy. LD added that generally speaking, new legislation drafted in recent years was relatively clearer and more comprehensible than that drafted in early years.

45. LD further pointed out that LDD acted on the drafting instructions issued by the policy bureaux, which were more predominately concerned with the accurate reflection by the legislative provisions of the genuine policy intention than their style and presentation.

46. Ms Miriam LAU and Mr Martin LEE considered that the progress of bilingual drafting in plain and modern language was still less than satisfactory. They urged LDD to keep up the efforts in this regard.

47. The meeting ended at 6:35 pm.