立法會
Legislative Council

LC Paper No. CB(2)1310/00-01
(These minutes have been seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of the meeting
held on Tuesday, 20 February 2001 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members Present	:	Hon Margaret NG (Chairman) Hon Jasper TSANG Yok-sing, JP (Deputy Chairman) Hon Albert HO Chun-yan Hon Martin LEE Chu-ming, SC, JP Hon Mrs Miriam LAU Kin-yee, JP Hon Mr Ambrose LAU Hon-chuen, JP Hon Emily LAU Wai-hing, JP
Member Absent	:	Hon James TO Kun-sun
Members Attending	:	Hon Cyd HO Sau-lan Hon Audrey EU Yuet-mee, SC, JP
Public Officers Attending	:	Item IV Mr James CHAN Assistant Director of Administration Mr S Y CHAN, JP Director of Legal Aid

		Mr Benjamin CHEUNG Deputy Director of Legal Aid (Application & Processing)
		Mrs Fanny YU Deputy Director of Legal Aid (Policy & Administration)
		Mrs Annie WILLIAMS Assistant Principal Legal Aid Counsel/ Official Solicitor's Office
		Items V and VI
		Mr Michael SCOTT Senior Assistant Solicitor General
		Miss Agnes CHEUNG Senior Government Counsel, Legal Policy Division
By Invitation	**:**	Item VI
		Hong Kong Bar Association
		Ms Corinne REMEDIOS
		The Law Society of Hong Kong
		Mr Michael JACKSON Mr Christopher KNIGHT
Clerk in Attendance	**:**	Mrs Percy MA Chief Assistant Secretary (2)3
Staff in Attendance	**:**	Mr Jimmy MA, JP Legal Adviser
		Mr Paul WOO Senior Assistant Secretary (2)3

Action
Column

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)862/00-01)

The minutes of the meeting on 19 December 2000 were confirmed.

II. Information paper issued since last meeting
(LC Paper No. CB(2)730/00-01(01) - "Opening statement by the Director of Public Prosecutions in respect of general prosecution policy and binding over orders" at the meeting on 16 January 2001; and
LC Paper No. CB(2)730/00-01(02) - The Administration's paper enclosing five submissions in response to the consultation exercise on marital rape and related sexual offences)

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

III. Items for discussion at the next and future meetings
(LC Paper No. CB(2)864/00-01(01))

3. Members agreed that the following items should be discussed at the next regular meeting to be held on 20 March 2001 -

(a) Drafting policy on bilingual legislation; and

(b) Recent developments in the review of legislation.

4. On item (a) above, members noted that at a recent meeting of the Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000, members of the Bills Committee expressed concern that there were differences in drafting and style between the Chinese and English texts of the Securities and Futures Bill. In various clauses of the Bill, the Chinese and English texts were structured somewhat differently. The Bills Committee had also noted that this new drafting practice had not been brought to the attention of the Council and that the relevant professional bodies had not been consulted. While the Bills Committee would follow-up the issues pertaining to its purview, it was agreed that this Panel should discuss the policy aspects of this new approach in law drafting, in particular in the context of how, in principle, the new approach would apply in drafting legislation in future, and whether there were implications in terms of the legal effect of the two texts of legislation.

5. Members agreed that in addition to the representatives of the two legal professional bodies, representatives of the law school of the University of Hong Kong and the City University of Hong Kong respectively should be invited to attend the next meeting for discussion of the item.

Action
Column

6. On item (b), members noted that as requested by the Panel at the meeting on 16 October 2000 at which the issue of a review of outdated and unclear legislation was raised, the Administration had submitted an information paper on the subject (circulated vide LC Paper No. CB(2)889/00-01(01)). Members agreed that the Administration should be invited to brief the Panel on the matter.

Revision of Judiciary fees and charges

7. The Chairman drew members' attention to the Administration's response to the issues raised by members at the meeting on 19 December 2000 (circulated vide LC Paper No. CB(2)782/00-01(01)) at which the matter of global (i.e. departmental as opposed to individual item) costing method for calculating Judiciary fees and charges, among others, was discussed.

8. The Chairman added that, pursuant to the request of the House Committee, the Panel on Financial Affairs (FA Panel) would discuss, as a general issue, what types of costs were included in the cost computations of specific services under the recovery of costs principle. The item "Government fees and charges" had been scheduled for discussion at a meeting of the Panel on 7 March 2001.

9. Members agreed that the concern that the global costing method had resulted in unreasonably high fees and charges for certain Judiciary services rendered to the public should be conveyed to the FA Panel, and that the FA Panel should be requested to discuss this method of calculating Judiciary fees in the context of the agenda item on "Government fees and charges" at its meeting on 7 March 2001. This Panel would decide whether the issue should be further pursued, depending on the outcome of the result of discussion by the FA Panel.

Review of jury system in Hong Kong

10. The Chairman informed members that when the Jury (Amendment) Bill 1997 was considered by the Bills Committee, the Administration agreed to conduct a comprehensive review of the jury service 12 months after jury trials conducted in Chinese had been introduced in the High Court. One of the issues for review was whether the standard of education (Form 7) used to ensure that jurors had a sufficient knowledge of English should be lowered. The Bill was passed on 17 June 1997. She suggested and members agreed that the Administration should be requested to advise the Panel of the outcome of its review at a future meeting.

Panel

IV. Proposal to create a permanent post of Assistant Principal Legal Aid Counsel for the Application and Processing Division of the Legal Aid

Action
Column

Department
(LC Paper Nos. CB(2)864/00-01(02) and (03))

11. The Chairman pointed out that the above proposal had been previously presented to the Panel for discussion at a meeting held on 20 April 1999. The Panel was then not fully convinced of the need for the proposed new post and considered that the Administration should provide further justifications for it. The Administration now re-submitted the proposal for the Panel's consideration.

12. Director of Legal Aid (DLA) took members through the Administration's paper (LC Paper No. CB(2)864/00-01(03)) which explained the grounds for the proposed creation of a permanent post of Assistant Principal Legal Aid Counsel (APLAC) and to regularize the existing directorate structure of the Application and Processing Division (A&PD) of the Legal Aid Department (LAD). He advised that in view of the significant growth in the volume and complexity of the work of A&PD and the need to provide better service to legal aid applicants, certain interim arrangements had been implemented in April 1997, namely -

(a) temporary redeployment of one APLAC from the Litigation Division (LD) to the Hong Kong Office (HKO) of A&PD. The additional APLAC had been assigned to head a newly created section responsible for processing and monitoring of personal injury cases, which were of a more complex nature; and

(b) temporary loan of one APLAC from the Official Solicitor's Office (OSO) to underpin the Deputy Principal Legal Aid Counsel in the Kowloon Branch Office (KBO) of A&PD.

For operational reasons, the temporary loan arrangement referred to (b) above had ceased in September 2000 and the incumbent had returned to OSO to restore the appropriate level of support to DLA in the discharge of OS's duties. As a stop-gap measure, another APLAC from the Insolvency, Costing and Enforcement Section (ICE) of LD was temporarily redeployed to KBO since September 2000.

13. DLA added that the temporary redeployment of the two APLAC posts mentioned above had greatly contributed to the efficient operation of A&PD as a whole and proved to be effective in sustaining the improvements introduced in recent years. Hence, it was considered necessary to, firstly, create an additional APLAC post for A&PD to replace the one currently redeployed to KBO which would then be returned to ICE, and secondly, formalize the current redeployment of an APLAC from LD to HKO by making such arrangement permanent.

Action
Column

14. Ms Emily LAU noted that, as stated in the paper, the total civil legal aid applications processed by A&PD rose from 18 056 in 1991 to 21 736 in 2000. She asked whether there had been actually a steady increase in the caseload in recent years. Concerning the performance pledge on processing legal aid applications within three months from the date of application, she enquired whether the target of fulfilling that pledge for 85% of the applications was achievable only subject to the creation of the proposed APLAC post.

15. In response, DLA provided the number of civil legal aid applications processed in recent years as follows -

Year	Number of applications
1996	25 476
1997	27 440
1998	25 617
1999	31 578
2000	21 736

He pointed out that the drastic increase in the number of applications in 1999 was to a large part attributable to the upsurge in the number of applications relating to right of abode claims. There had been also a steady upward trend of legal aid applications for the period from 1992 to 1996.

16. DLA added that the temporary redeployment since April 1997 which originated from a consultant-led process re-engineering study had enabled A&PD to achieve improved efficiency as well as implement improvement measures to provide a more customer-focused service to the public. He was confident that the performance target could be surpassed on a longer term basis provided that the proposed creation of post was approved.

17. Ms Emily LAU expressed concern as to whether the proposed permanent post of APLAC was justified in view of the fact that the number of legal aid applications in 2000 was the lowest in five years since 1996.

18. Mr TSANG Yok-sing pointed out that the statistics in paragraph 15 above did not show a steady increasing trend of legal aid applications. He asked on what basis did the Administration set the performance target. He also enquired whether the present achievable target meant that 85% of the applications were simple and straight-forward cases.

19. In reply, DLA said that the introduction of a performance pledge originated from a pilot study conducted in 1997. Since then, the target had been closely monitored in the light of the actual number of applications processed. He added that the time required for processing applications would depend on the nature of individual cases. At present, the vast majority of applications could be processed within six months, except for the more

Action
Column

complex ones such as medical cases which often required the production and careful examination of expert medical reports for deciding whether or not legal aid should be granted. In practice, applications which could not be determined within six months would be brought to the attention of the Deputy Director of Legal Aid.

20. The Chairman asked whether legal aid could be granted partially at different stages of legal proceedings. DLA responded that this was possible for some cases. However, this arrangement had to be carefully weighed against the interests of the applicants since in some cases they had to pay a cost of contribution once legal aid was granted. Furthermore, it could also entail greater workload for A&PD in processing the applications.

21. Mrs Miriam LAU said that as the redeployments described in paragraph 12 above had been in place since 1997, there was no answer as to whether A&PD could actually achieve its performance target by other means. The Chairman added that the Administration had given no assurance that the services provided by A&PD could be improved with the creation of the proposed APLAC post. Mr Albert HO enquired whether the duties of APLAC/ICE warranted a directorate officer at DL1 level.

22. In response to the above observations, DLA explained that the interim measures to improve the operation of A&PD could not be carried on in the long-term without the creation of an additional APLAC post. It was not possible to permanently redeploy to KBO of A&PD the APLAC post from OSO or ICE or indeed from any other sections without affecting the effective and proper functioning of LAD and the quality of work of the other sections. As regards ICE, at present, it handled all insolvency cases and provided legal support both for LD and A&PD in the assessment and taxation of legal costs and the enforcement of unsatisfied judgments and orders for all in-house and assigned-out cases. In recent years, sensitive cases attracting wide public concern such as wage claims of employees against insolvent employers and recovery of judgment debts by taking winding-up and bankruptcy proceedings etc. had been on the rise. Such cases required the special care and attention of an APLAC. Furthermore, the APLAC, in addition to assuming the overall responsibility for administration and operation of the five Units in ICE, had to appear in litigation proceedings in court in handling some of the sensitive and high profile cases.

Conclusion

23. In reply to the Chairman, DLA said that the Administration intended to submit the proposal to the LegCo Establishment Subcommittee (ESC) in May 2001.

Action Column

Adm

24. The Chairman called upon the Administration to prepare its submission to ESC in the light of members' comments.

V. Court's power under section 13 of the Conveyancing and Property Ordinance (Cap. 219)
(LC Paper Nos. CB(2)864/00-01(04); 908/00-01(01); 921/00-01(01) and (02))

25. Members noted that subsequent to previous discussions on the subject, the Administration had conducted a consultative exercise on whether the Conveyancing and Property Ordinance (CPO) should be amended to enable a court to order return of any deposit. The Administration had now come up with a proposal that -

(a) a provision equivalent to section 49(2) of the UK Law of Property Act 1925 (the UK Act) be introduced by way of amendment to section 12 of CPO; and

(b) such amendment included an express prohibition against contracting out of the provision.

26. Mrs Miriam LAU enquired about how provisions similar to section 49(2) of the UK Act operated in other common law jurisdictions, particularly in relation to the question of whether a provision as such would interfere with the sanctity and certainty of contract.

27. Senior Assistant Solicitor General (SASG) replied that it was envisaged that the provision, if implemented, would not be materially different from section 49(2) of the UK Act and section 55(2A) of the New South Wales Conveyancing Act 1919 (which was identical to section 49(2)). He pointed out that operation of the provisions in England and Australia had been explained in the Administration's paper (paragraphs 17 to 24 of LC Paper No. CB(2)864/00-01(04)). He said that Hong Kong was one of the few common law jurisdictions in which there was no equivalent of section 49(2). As far as the Administration could gather from the experience of other jurisdictions, there did not appear to have been a plethora of litigation where such provision had been introduced, and the way in which this type of provision operated in other jurisdictions had not caused any problems for the sanctity and certainty of contract.

28. SASG added that in the Administration's view, the use of the proposed discretionary power of the court in ordering repayment of deposit to a purchaser would not jeopardize the certainty and sanctity of contract and lead

Action
Column

to increased litigation. In essence, the purpose of the proposed provision was to allow the court to do justice in individual cases. The exercise of such power would involve a consideration of the interests of achieving justice between the two parties to a particular contract, rather than the stating of a general rule. In particular, such provision would only operate in exceptional circumstances where it would be unconscionable for a vendor to forfeit a deposit due to a trivial, technical breach by an innocent purchaser which actually caused the vendor no loss, and might enable the vendor to make a windfall profit.

29. Ms Audrey EU said that she had serious reservations about the Administration's proposal. At the invitation of the Chairman, she took members through her paper prepared on the subject (tabled at the meeting and circulated after the meeting vide LC Paper No. CB(2)921/00-01(02)). The issues raised were summarized as follows -

(a) At present, the court already had power to grant relief against forfeiture of the deposit, or part thereof, to do justice in certain circumstances, for example, in cases of fraud, accident, surprise or mistake;

(b) In cases where the transaction fell through because of the fault of the purchaser's solicitor, the purchaser could sue his solicitor for negligence and recover the deposit. Furthermore, the court would limit the forfeitable amount to the conventional 10% of the purchase price. Therefore, the injustice to the purchaser could be somewhat mitigated;

(c) In real life, justice to one party could be injustice to the other party. In view of the fluctuating property market in Hong Kong, it was arguable whether a forfeiture of the deposit was a complete "windfall" for the vendor. It was because once a deposit was paid, it committed the vendor to hold the property for the purchaser and the vendor could not sell the property at a better price. This "loss of opportunity" was a price or consideration for the receipt of deposit by the vendor;

(d) The certainty of contract was at stake, and it was unwise to create uncertainty from the public interest point of view. If a statutory blanket discretion was given to the court to order return of any deposit, its mere existence was sufficient to create uncertainty and encourage people to litigate. However, litigation was a very costly exercise; and

(e) The situation in England and Australia was very different from that in Hong Kong, particularly with regard to the property market and

Action Column

proof of land title etc. With the introduction of the Land Titles Bill, which might successfully solve the associated problems, it would be advisable for the Administration to deal with the matter of amending the CPO with extreme caution.

30. Mrs Miriam LAU opined that in situations where a solicitor acting for a purchaser found that there were faults with proof of a good title, the solicitor would have no choice but to advise his client to the effect of what he had observed. Sometimes, this gave rise to the purchaser refusing to complete and the vendor forfeiting the deposit. She said that if the law was changed such that the court had an express power to order return of any deposit, purchasers whose deposits were forfeited were likely to turn to litigation in the hope that they then stood a better chance to get back the money through the court. Hence, the likely consequence of a legislative amendment would be an increase in litigation.

31. Mr Albert HO said that there were strong arguments both for and against a legislative change in the direction as suggested by the Administration. He opined that the concerns expressed by Ms Audrey EU must have already been considered in other jurisdictions where similar legislative provisions existed. He said that he tended to support the Administration's proposal at the outset but considered that the matter would require further detailed deliberations.

32. The Chairman noted that the latest submissions from the Hong Kong Bar Association (LC Paper No. CB(2)908/00-01(01)) and the Law Society of Hong Kong (LC Paper No. CB(2)921/00-01(01)) on the subject, the former arguing against the Administration's proposal and the latter in favour of it, were at variance with their original positions expressed in the initial consultation conducted by the Administration. She opined that as the Administration had yet to have time to fully consider and respond to the newly submitted views, the issue should be further discussed at another meeting. She requested the Administration to provide a written response one week before the next meeting on 20 March 2001 for the Panel's consideration.

Adm

33. Members agreed that the Panel should decide how the matter should be pursued at the next meeting after considering the Administration's reply.

Panel

Proposal to provide for (1) a standard provisional sale and purchase agreement and (2) a cooling-off period in property transactions
(LC Paper No. CB(2)864/00-01(05))

34. Members noted that the Administration's paper was prepared in response to certain issues discussed at the meeting on 20 June 2000 which touched on, inter alia, arrangements for sale and purchase of properties in Hong Kong. As advised in the Administration's paper, the relevant issues were covered in the Law Reform Commission (LRC) consultation paper on "Local Completed

Action Column

Residential Properties : Sales Description and Pre-contractual Matters" issued in January 2001. In view of the consultation paper, the Administration did not propose to undertake any separate review.

35. Members agreed that the matters should be dealt with in the context of the LRC consultation paper.

VI. Proposed creation of a new offence of "persistent sexual abuse of a child"

(LC Paper Nos. CB(2)864/00-01(06); 893/00-01(01) and 908/00-01(02))

36. The Chairman informed members that the Panel had received two submissions on the subject, one from the Association Concerning Sexual Violence Against Women (LC Paper No. CB(2)893/00-01(01)) and the other from the Hong Kong Bar Association and the Law Society of Hong Kong jointly (LC Paper No. CB(2)908/00-01(02) tabled at the meeting).

37. SASG highlighted the Administration's proposal to amend the Crimes Ordinance (Cap. 200) to create a new offence of "persistent sexual abuse of a child", which was intended to deal with multiple offences of sexual abuse of a child where the offences were alleged to have occurred over a lengthy period and where the complainant was unable to identify specific allegations with particularity. The proposed offence was a response to the ruling in Chim Hon-man v HKSAR [1999] 1 HKC 428. In that particular case, there was evidence that the defendant had raped his stepdaughter on a number of occasions over a lengthy period. As the complainant was unable to differentiate significantly between any of the particular acts of sexual molestation, the prosecution brought specimen charges of rape against the accused, and led evidence of the various acts of molestation on a number of occasions. The Court of Final Appeal quashed the convictions of the defendant. It was held by the Court that in the absence of any act or acts being identified as the subject of an offence charged in an indictment, the prosecution could not lead evidence that was equally capable of referring to a number of occasions, any one of which might constitute an offence as described in the charge and then invite the jury to convict on any one of them.

38. SASG said that the Administration's paper (LC Paper No. CB(2)864/00-01(06)) set out the grounds for creating such a new offence, the arguments against it and the proposed major features of the new offence.

39. At the invitation of the Chairman, Ms Corinne REMEDIOS took members through the joint submission from the Bar Association and the Law Society. She said that whereas the two legal professional bodies fully appreciated and shared the public concern as to the seriousness of offences involving sexual abuse of a child, and supported measures to ensure that

Action Column

perpetrators of such offences be brought to justice, they were of the opinion that it was not necessary to introduce the proposed statutory offence. The arguments were detailed in the joint submission and summarized as follows -

(a) The difficulties highlighted in Chim's case of particularizing offences were not insurmountable. Those were essentially procedural problems which could be overcome by way of proper drafting of the indictment (the joint submission made reference to the approach suggested by Sir Anthony Mason NPJ in [*Archbold 1998 Ed p 49*] to deal with the problems in prosecuting offences alleged to have been repeatedly committed over a period of time);

(b) Furthermore, the "latent ambiguity" resulted from the leading of evidence of the commission of more than one offence in proof of the one offence charged would not necessarily result in the trial being aborted. In the case of HKSAR v Kwok Kau Kan [2000]1 HKC 789, Chan CJHC held that […with sufficient directions from the judge, even if evidence relating to other acts is also adduced, the prejudicial effect of such evidence on the jury would be eliminated or kept to a minimum]. The proposed legislative measure to create a new offence was not necessary to prevent the collapse of trials due to the introduction of such evidence;

(c) The proposed new legislation would not solve the existing difficulties. In particular, the need to particularize the offence period and the nature of the offences still remained. Under the proposed legislation, the jury or, where sitting alone, the judge, must be satisfied that the defendant must have committed at least three specific acts, each of which amounted to a sexual offence, during the specified period of time. Therefore, the need to ensure that the evidence established the same three occasions would require the child to be able to distinguish the particular conduct of the three specific occasions in question;

(d) It was conceptually unacceptable that the accused might be found guilty or sentenced upon criminal conduct that did not form part of the charge upon which he was indicted, as situations of miscarriage of justice would occur. Proof of guilt beyond reasonable doubt should be proof of a reasonably identifiable offence, not any alleged wrong doing of a like nature within a specified period.

40. Ms REMEDIOS further informed members that the legal professional bodies were in the process of obtaining comments from other jurisdictions on how they coped with the issues in question. They would make further submissions at a later stage when such views were received and when a draft Bill was available.

Action Column

41. Mr Martin LEE said that he agreed with the view that the problems encountered in the Chim's case were procedural and that it would be unwise to enact a new offence just to overcome procedural problems in prosecution. He opined that as provided under the proposed legislation, the requirement of proof of the commission of certain sexual offences against a child on at least three occasions would create even greater difficulties in the conviction of the offender.

42. Mrs Miriam LAU considered that the joint submission from the legal profession had presented very cogent arguments on the subject. She suggested that the matter be further discussed at another meeting.

43. The Chairman said that in view of the fact that the submissions on the subject were received only shortly before the meeting, it was necessary to allow the Administration sufficient time to respond in detail. She suggested that the Administration should discuss with the two legal professional bodies on the issues raised and revert to the Panel on any new developments.

Adm

44. Members agreed to adjourn discussion in the meantime until another meeting was fixed to further pursue the matter.

Panel

VII. Any other business

Rescheduling of meeting

45. The Chairman proposed that, due to heavy commitments on her part, the meeting originally scheduled for 17 April 2001 be deferred to 24 April 2001. Members agreed.

46. The meeting ended at 6:35 pm.

Legislative Council Secretariat
23 April 2001