立法會
Legislative Council

LC Paper No. CB(2)2621/04-05
(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 Tuesday, 12 July 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-yee, GBS, JP Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP Hon MA Lik, GBS, JP Hon KWONG Chi-kin
Public Officers attending	:	Item III Miss Emma LAU Judiciary Administrator Mr Augustine CHENG Deputy Judiciary Administrator (Operations) Miss Vega WONG Assistant Judiciary Administrator (Development) Ms Elizabeth TSE Deputy Secretary for Financial Services and the Treasury (Treasury) Miss Eliza LEE Deputy Director of Administration

Item IV

Miss Emma LAU
Judiciary Administrator

Mr Augustine CHENG
Deputy Judiciary Administrator (Operations)

Miss Vega WONG
Assistant Judiciary Administrator (Development)

Item V

Mr Stephen WONG Kai-yi
Deputy Solicitor General

Mr Michael SCOTT
Senior Assistant Solicitor General

Item VI

Mr Stephen WONG Kai-yi
Deputy Solicitor General

Mr Michael SCOTT
Senior Assistant Solicitor General

Mr Lawrence PENG
Senior Assistant Law Draftsman

Mr Joseph WONG
Senior Government Counsel

Ms Cindy YAU
Senior Government Counsel

Attendance by invitation : Item IV

City University of Hong Kong

Mrs Anne SCULLY-HILL
Associate Professor, School of Law

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

Staff in attendance	**:**	Mr Arthur CHEUNG Senior Assistant Legal Adviser 2 Ms Bernice WONG Assistant Legal Adviser 1 (Item V only) Mr Paul WOO Senior Council Secretary (2)3

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2)2232/04-05 – Minutes of the meeting on 23 May 2005)

The minutes of the meeting held on 23 May 2005 were confirmed.

II. Information papers issued since the last meeting
(LC Paper No. CB(2)2174/04-05(01) – Speaking note of the three members of the Professional Indemnity Scheme Action Group attending the Panel meeting on 27 June 2005

LC Paper No. CB(2)2210/04-05(01) – Letter dated 24 June 2005 from the Consumer Council on "Limited Liability Partnership")

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

III. Budgetary arrangement for the Judiciary
(LC Paper No. CB(2)2234/04-05(01) – Letter dated 25 May 2005 from Clerk to Panel to Secretary for Financial Services and the Treasury

LC Paper No. CB(2)2234/04-05(02) – Letter dated 5 July 2005 from the Judiciary Administrator setting out the Judiciary's position on the suggestions made by Panel members at the meeting on 23 May 2005

LC Paper No. CB(2)2234/04-05(03) – Paper provided by the Financial Services and the Treasury Bureau)

3. Judiciary Administrator (JA) briefed members on the Judiciary Administration's letter dated 5 July 2005 to the Panel (LC Paper No. CB(2)2234/04-05(02)), which responded to the issues raised during previous Panel discussion on the budgetary arrangement for the Judiciary. She summarised the response as follows –

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(a) in January 2004, having considered the Judiciary's proposal to adopt the recommendations and views contained in Sir Anthony Mason's Consultancy Report on "System for the Determination of Judicial Remuneration", the then Chief Executive (CE) had asked an independent body, the Standing Committee on Judicial Salaries and Conditions of Service, to make recommendations to him on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration and in particular, to make recommendations on whether the proposal of the Judiciary based on the Consultancy Report should be accepted. The Standing Committee had yet to report to the CE;

(b) the Judiciary had achieved a total of $148 million in savings in the financial years of 2000-01 to 2005-06, meeting the targets set by the Administration. The savings target for 2006-07 had not been set by the Administration;

(c) as regards the Judiciary's budget for 2006-07, in order to ensure that the Judiciary was provided with adequate resources to deliver judicial services of high quality and to avoid further worsening of the court waiting time, the Judiciary was exploring various options, including the withdrawal of some savings measures submitted to the Government and making a bid to the Government for a reasonable increase of resources in subsequent financial years. The Judiciary was finalising a proposal to the Administration regarding its budget in 2006-07, having regard to the existing and anticipated caseload;

(d) in relation to the withdrawal of some savings measures submitted to the Administration –

(i) the Tsuen Wan Magistrates' Courts would not be closed in January 2006 as planned. The position would be reviewed after 2006-07;

(ii) the Judiciary considered that the freeze on the recruitment of Judges and Judicial Officers (JJOs) in the years ahead should be lifted. It was therefore reviewing the savings committed attributable to the planned recruitment freeze in the coming years;

(iii) to avoid worsening of waiting times, in particular for the High Court and the Magistrates' Courts, the Judiciary was considering the extent to which Deputy JJOs should be appointed to cope with the judicial work and the additional provisions which would be required to cater for court support staff in order to provide the necessary support to any newly recruited JJOs and additional Deputy JJOs.

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4. Deputy Secretary for Financial Services and the Treasury (Treasury) (DS(Tsy)) briefed the Panel on the paper provided by the Administration (LC Paper No. CB(2)2234/04-05(03)). She highlighted the major response of the Administration as follows –

(a) the Administration had taken note of the view that it should not impose on the Judiciary savings targets set for bureaux and departments, which might affect the resources available to the Judiciary for the proper administration of justice. To enhance efficient consultation with the Judiciary, the Administration was agreeable to consulting the Judiciary on its overall resource requirements, prior to the setting of government budgetary targets. This would not however preclude discussions on modifications or exempt the Judiciary from following the due process for resource bidding;

(b) the Administration did not agree that there should be a general rule or practice against reduction of the Judiciary's budgetary provision. Much as the Administration would strive to accommodate justifiable funding requirements for the Judiciary to the extent possible, the Administration could not rule out the need for downward adjustments to the Judiciary's funding provision having regard to overall economic constraints. The Administration believed that some degree of efficiency savings inevitably existed for an organisation with about 160 JJOs and about 1 500 supporting staff from the civil service. While the Administration would not compromise judicial independence, it preferred a more pragmatic approach in discussing with and consulting the Judiciary Administrator on the annual draft estimates for the Judiciary rather than imposing a rigid bar on budgetary reductions; and

(c) with regard to the Judiciary's 2006-07 budget, the Administration would accord it with the usual top priority. The Administration would be as facilitating and constructive as possible in considering the Judiciary's resource requirements.

Issues raised

5. In response to the Chairman and Ms Emily LAU, JA said that the Judiciary welcomed the agreed measure for the Administration to consult the Judiciary on its overall resource requirements prior to the setting of government budgetary targets. She considered that the new arrangement would be conducive to enhancing objective discussion between the two parties on the resource requirements of the Judiciary. DS(Tsy) added that the arrangement could address the concern that the Government's savings targets might impose pre-set limitations on the Judiciary in preparing its own budget, before any consultation between the two sides actually started.

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6. In relation to the proposed measures set out in paragraph 3 (d) above, JA said that the Judiciary might be able to submit its finalised proposals to the Administration in August 2005.

7. Ms Emily LAU expressed support for the Judiciary's proposal to withdraw some of its savings measures originally submitted to the Administration in order to maintain the quality of judicial services. She said that as the Judiciary was in the best position to decide its priority areas of work and the resource needs, it should be given the greatest possible autonomy in preparing its own budget, with input of views from the Administration. She added that there was monitoring within the Administration and by the public to ensure that the resources of the Judiciary would be effectively used.

8. DS(Tsy) said that the Administration was conscious of the importance of maintaining judicial independence. She advised that under the current system of resource allocation, the Administration would not normally be involved in drawing up the annual funding requirements for the Judiciary, or in determining how the approved provision should be allocated amongst different performance areas. Basically, the Administration would only consider the Judiciary's overall resource requirements and discuss with the Judiciary any discrepancy between the Judiciary's overall estimates and the Administration's proposed provisions, taking into account the need for upholding the Judiciary's independent and efficient operation, before finalising the estimates. The Administration would continue to count on the advice of JA, who was the Controlling Officer responsible for preparing the budget of the Judiciary.

9. JA emphasised that in preparing the Judiciary's estimates of expenditure, the necessity to maintain the quality of judicial services and the requirement of effective utilisation of resources had been given paramount importance.

10. The Chairman noted that the Administration had not indicated support for the Panel's proposal that the Judiciary should have autonomy to prepare its own budget on the basis of some objective yardsticks or predetermined formulas, which was a practice adopted in some overseas jurisdictions. Such yardsticks included the Judiciary's caseload, existing and forecast resource needs and staff remuneration etc. She called upon the Judiciary Administration and the Administration to reconsider the proposal seriously.

11. JA responded that the Judiciary had noted the suggestion. She said that the Judiciary's position was that it would keep an open mind on any suggested measures within the parameters of the Basic Law governing budgetary arrangements which would safeguard judicial independence and ensure that the Judiciary was provided with adequate resources to administer justice without delay.

12. The Chairman pointed out that there had already been incidents which showed that the administration of justice by the Judiciary had been affected because of insufficient resources. She pointed out that a number of Mainland visitors on two-way permits had been arrested for involving in pornographic and other vice

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activities. Some of them were detained in custody for protracted periods pending trial, due to the long waiting times of the courts. There was also feedback that some of the arrested persons pleaded guilty in the hope that they could be sent back to the Mainland at an earlier time.

13. Mr Martin LEE expressed the view that with the enactment of the Bill of Rights Ordinance (BORO), the chances of the Government being sued by prosecuted persons for damages for prolonged custody had increased. He pointed out that there were precedent cases in some European countries where even convicted offenders could seek compensation for excessively long period of custody pending tiral. He urged that the Administration and the Judiciary Administration should ensure that there would be sufficient number of JJOs to dispose of court cases expeditiously.

14. The Chairman and Mr Martin LEE said that the Judiciary Administration should provide information on the number of additional JJOs and Deputy JJOs required, and the consequences of not increasing the number of JJOs such as the impact on the courts' waiting times. JA responded that the number of additional JJOs required had yet to be decided. The Judiciary Administration would provide detailed information and justifications when it submitted the relevant proposals to the Administration in due course.

15. Mr Albert HO enquired about the reasons for the Judiciary's decision not to close the Tsuen Wan Magistrates' Courts in January 2006, and whether the planned closure reflected a less than thorough assessment of the resource requirements of the Judiciary.

16. JA responded that the plan to close or merge certain Magistrates' Courts was to achieve more efficient utilisation of court resources through strengthened centralisation of the resources. However, after a review of the closure of two Magistrates' Courts (the Western Magistrates' Court and North Kowloon Magistrates' Court) and with the current proposed plan to de-freeze the recruitment of JJOs and appoint additional Deputy JJOs, the Judiciary considered that it would not be desirable to close more Magistrates' Courts in order to ensure that the Judiciary had the necessary flexibility and capacity to maintain sufficient number of courts to deal with the increased caseload.

JA

17. The Chairman requested JA to explain in writing the factors which the Judiciary had considered in deciding to withdraw the planned closure of the Tsuen Wan Magistrates' Court, e.g. whether there had been an unforeseen large increase in the caseload and difficulties in handling cases diverting from the closed Magistrates' Courts by other courts.

JA

18. Regarding the impact of closure of Magistrates' Courts, Mr Albert HO requested JA to provide information on the number (and the percentage in relation to the total) of cases which had been listed for trial on a particular date but subsequently adjourned because the court had no time to deal with the case on the trial date.

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19. In reply to Ms Emily LAU's enquiry on the work of the Standing Committee on Judicial Salaries and Conditions of Service, Deputy Director of Administration (DD of Adm) informed members that the Standing Committee had provided its preliminary observations on Sir Mason's Consultancy Report to the CE in late 2004, and considered it prudent to take more time to conduct the study on the mechanism for determination of judicial remuneration in the light of the Consultancy Report's proposals. A concrete timetable for completing the study had not yet been set by the Standing Committee.

20. In further response to Ms Emily LAU, DD of Adm said that the Standing Committee was chaired by Mr Christopher CHENG Wai-chee, and members included Dr Victor FUNG Kwok-king, Mr Henry FAN Hung-ling, Mr Anthony NEOH and Mr Herbert TSOI Hak-kong.

21. Ms Emily LAU said that the community expected a high level of transparency in the operation of the Standing Committee and its deliberations, and that the Committee should conduct wide-ranging consultations before finalising its recommendations.

22. DD of Adm reported that the Administration had conveyed the views expressed by the Panel and the two legal professional bodies in previous discussions on remuneration of JJOs to the Committee for its consideration. The Administration would report to the Panel on developments in due course.

Admin

23. In reply to the Chairman, DD of Adm said that previous reductions in civil service salaries in 2002, 2004 and 2005 did not apply to JJOs.

24. In concluding, the Chairman made the following remarks –

(a) the Panel welcomed the Administration's statements made in its paper that it was inconceivable that the Administration would need to or wish to contemplate not seeking sufficient appropriation to meet payment of judicial remuneration, and that it would be as facilitating and constructive as possible in considering the JA's proposal on the Judiciary's resource requirements for 2006-07. The Administration should fully observe these commitments;

(b) the Panel supported the Judiciary's proposals to withdraw some of the savings measures and to appoint additional number of JJOs and Deputy JJOs;

(c) the Judiciary Administration and the Administration should reconsider the proposal that the Judiciary should have autonomy to determine its budget on the basis of some objective yardsticks or predetermined formulas in the light of the merits of such a system, e.g. greater objectivity and transparency in the determination of appropriate resource allocation for the Judiciary; and

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JA/Admin

(d) the Judiciary Administration and the Administration should advise the Panel in due course whether the arrangement for the Administration to consult the Judiciary on its overall resource requirements, prior to the setting of government budgetary targets, was successful in enhancing independence of the Judiciary in preparing its budget and bringing about more effective consultation between the Judiciary and the Administration on resource bidding by the Judiciary.

25. The Chairman said that the Panel could follow up developments of the relevant issues at a later stage.

IV. Chambers hearings in civil proceedings

(LC Paper No. CB(2)2089/04-05(01) – Paper provided by the Judiciary Administration

LC Paper No. CB(2)1772/04-05(01) – Press release issued by the Judiciary on 1 June 2005 on chambers hearings in civil proceedings

LC Paper No. CB(2)1772/04-05(02) – Practice Direction 25.1 – Chambers Hearings in Civil Proceedings in the High Court, the District Court, the Family Court and the Lands Tribunal

LC Paper No. CB(2)1772/04-05(03) – Practice Direction 25.2 – Reports on Chambers Hearings not open to the public)

26. At the invitation of the Chairman, JA briefed members on the paper provided by the Judiciary Administration which set out the background, the present position and the way forward regarding the opening up to the public of chambers hearings in civil proceedings in the High Court, the District Court, the Lands Tribunal and the Family Court; and Practice Directions (PD) 25.1 and 25.2.

27. JA explained that under PDs 25.1 and 25.2, subject to certain exceptions as laid down in Schedules 1 and 2 in PD25.1, chambers hearings would generally be open to the public and the hearings might be reported in the same way as hearings in court, hence enhancing transparency in the judicial process. The two PDs would come into operation on 18 July 2005. This would give the legal profession time to make appropriate arrangements to comply. In the meantime, the Judiciary was putting in place the practical arrangements, as detailed in paragraph 11 in the Judiciary Administration's paper, to ensure the smooth implementation of the new arrangements under the two PDs.

28. JA added that the Judiciary had consulted the two legal professional bodies, the Director of Legal Aid, the Official Receiver and the Department of Justice (DOJ) on the opening up of chambers hearings by way of PDs.

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Views of Ms Anne SCULLY-HILL, Associate Professor, City University of Hong Kong

29. At the invitation of the Chairman, Ms Anne SCULLY-HILL elaborated on her personal views with reference to PDs 25.1 and 25.2, summarised as follows –

Chambers hearings closed to the public by virtue of the excepted proceedings in Schedule 2 to PD 25.1

(a) the opening of chambers hearings to the public was welcomed as it would contribute to the development of Hong Kong's common law sources, and provide a valuable teaching tool in legal education to enable law students to become more familiar with the Hong Kong law. While there were good reasons, by virtue of the requirement of Article 10 of the BORO, for maintaining confidentiality in respect of the types of proceedings specified under Schedule 2 to PD 25.1, it would benefit legal practitioners, academics and students in the field of family law in terms of accessibility, clarity, consistency and certainty of law if a systematic system of reporting was in place. In fact, the Family Court had made available selected judgments on the Judiciary's website and PD 25.2 provided that individual judges had the discretion of allowing reporting of cases heard in closed chambers hearings;

(b) it was suggested that the Judiciary, where possible, should allow a limited class of law reporters to sit-in at the hearing of Schedule 2 cases and report on the cases. These reporters could be taken from the ranks of officers of the court, including solicitors and barristers, who owed a duty to the court. Safeguards might be put in place by limiting the content of the report to the causes of the action, submissions of law arising in the proceedings, the decision of the court and the grounds and reasoning for those decisions etc. Testimony or personal particulars which would enable the individual parties to be identified would not be reported. These special law reporters, being present throughout the proceedings, could obtain an overview of the cases and hence might offer a different perspective of whether certain cases should be reported or not; and

Access by researchers to court files of cases heard in closed chambers

(c) at present, a researcher seeking access to court files relating to closed chambers hearings should first obtain the consent of the parties concerned. In cases involving a large number of files, such as divorce proceedings, seeking the consent of the parties was an overwhelmingly onerous burden on the researcher. It was suggested that an anonymised synopsis of the case as a separate appendix or addendum could be attached to the relevant case files. This would be a useful aid to assist researchers to collect data in conducting empirical legal research.

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30. At the request of the Chairman, Ms SCULLY-HILL agreed to put her views in writing for the consideration of the Panel.

(*Post-meeting note :* A letter from Ms SCULLY-HILL which summarised her views had been circulated to the Panel vide LC Paper No. CB(2)2504/04-05(01) on 30 August 2005. A copy of the letter had also been given to the Judiciary Administration for consideration and comment.)

Issues raised

31. Mr Alert HO expressed support for Ms SCULLY-HILL's suggestions. The Chairman invited JA to respond to the suggestions made by Ms Anne SCULLY-HILL in relation to limited reporting by a special class of law reporters on specific closed chambers hearings and measures for gaining access to case files to facilitate legal research. JA said that she would convey Ms SCULLY-HILL's views and suggestions for the Judiciary's consideration and respond in writing in due course. She added that the suggestion concerning access to court files of cases heard in closed chambers hearings might have to be considered in the context of the relevant rules of court.

JA

32. In response to Mr Martin LEE's enquiry, JA said that proceedings to hear ex-parte applications for leave for judicial reviews were open to the public.

(*Post-meeting note* : JA advised vide her letter dated 5 October 2005 that, pursuant to paragraph 1.6 of PDSL3, *'If leave to apply for judicial review is sought at an oral hearing, the hearing will take place in open court, unless the judge hearing the application order otherwise…'*. Accordingly, proceedings to hear ex-parte applications for leave for judicial reviews are open to the public in open court, to which PDs 25.1 and 25.2 do not apply.*)*

33. The Chairman pointed out that proceedings for applications for writ of habeas corpus, while usually open to the public, could be closed to the public under special circumstances. She asked JA to advise in writing on the impact, if any, of PDs 25.1 and 25.2 on reporting on applications for writ of habeas corpus.

JA

34. The Chairman asked whether the judgments on cases heard in chambers hearings were made available to the public. Assistant Judiciary Administrator (Development) (AJA(D)) replied that Schedule 1 to PD 25.1 specified the types of proceedings required by legislation to be not open to the public. The types of proceedings specified in Schedule 2 were usually not open to the public since by reason of their nature, the reasons laid down in Article 10 of BORO for excluding the press and the public were considered to be usually satisfied. These proceedings included, inter alia, matters relating to children and financial provisions in matrimonial proceedings. Under PD 25.2, no report should be made of any proceedings (including the judgment) held in chambers not open to the public without the authority of the master or the judge before whom the proceedings were conducted. If the master or the judge considered that proceedings should be open for reporting or

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the judgment should be released for publication, he should afford the parties an opportunity to make representations upon the matter before so declaring.

35. AJA(D) added that some judgments on cases heard in chambers hearings which had good reference value, with the personal particulars of the parties removed, had been published in law reports and on the Judiciary's website.

36. Mr Albert HO said that the practice to make the judgments open to the public where appropriate should be encouraged.

37. The Chairman suggested that the Judiciary should consider making it a normal practice for the judge to ask the parties, at the conclusion of the chambers hearings not open to the public, whether they agreed to have the judgment made public. Mr Albert HO added that the Judiciary should also consider the possibility of making certain judgments public, after a specific period of time had elapsed following conclusion of the case, even if the parties had not given agreement to the judgment being made public.

V. Review of sexual offences in Part XII of the Crimes Ordinance

(LC Paper No. CB(2)2234/04-05(04) – Review of sexual offences in Part XII of the Crimes Ordinance

LC Paper No. CB(2)1608/04-05(01) – Paper dated May 2005 provided by the Administration on "Review of sexual offences in Part XII of the Crimes Ordinance")

38. Deputy Solicitor General (DSG) briefed members on the paper provided by DOJ on the review of sexual offences in Part XII of the Crimes Ordinance (Cap. 200), which had been conducted in the context of protection of married women against sexual abuse. The conclusion of the review was summarised as follows –

(a) the provisions concerning unlawful sexual intercourse and unlawful sexual act in sections 123, 124, 125, 127, 128, 130, 132, 133, 134, 135, 141 and 142 in the Crimes Ordinance were not related to unlawful sexual intercourse or unlawful sexual act within the bond of marriage. It was not necessary to amend them to give any greater protection to married women; and

(b) the amendments contained in the Statute Law (Miscellaneous Provisions) Ordinance 2002 (Ord No 23 of 2002), enacted in 2002, had already dealt with the sexual offences under sections 118 (rape), 119 (procurement by threats), 120 (procurement by false pretences) and 121 (administering drugs to obtain or facilitate unlawful sexual act) which could be committed by a man against his wife, and provided sufficient criminal sanctions in respect of such offences within the bond of marriage. Therefore, the Administration did not see any need to legislate further.

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Issues raised

39. The Chairman invited Senior Assistant Legal Adviser 2 / Assistant Legal Adviser 1 (ALA 1) to comment on the Administration's paper.

40. Referring to the offence under section 124 (unlawful sexual intercourse with a girl under the age of 16) of the Crimes Ordinance, ALA 1 pointed out that a marital defence for an accused person was provided under section 124(2), which stated –

> "*Where a marriage is invalid under section 27(2) of the Marriage Ordinance (Cap. 181) by reason of the wife being under the age of 16, the invalidity shall not make the husband guilty of an offence under this section because he has sexual intercourse with her, if he believes her to be his wife and has reasonable cause for the belief.*"

ALA1 considered that in view of the defence provision in section 124(2), the Administration should clarify the following issues for the Panel's consideration –

(a) whether the marital defence in section 124(2) required proof of consent on the part of the wife;

(b) whether there was any contradiction in the Crimes Ordinance if a girl under the age of 16 was incapable of giving consent under section 124 but was capable of doing so where a man was charged with rape under section 118; and

(c) the Administration's policy with regard to similar marital defence provisions in sections 118E (buggery with mentally incapacitated persons), 122 (indecent assault) and 146 (indecent conduct towards child under 16).

Admin

41. At the request of the Chairman, DSG agreed to provide a written response to the issues raised by ALA1.

42. Mr Martin LEE asked whether jurisprudence developed in other jurisdictions could assist the Administration in removing the confusion in existing legislation relating to unlawful sexual offences within marriage. DSG replied that the Administration had made reference to law reforms undertaken in other countries, including a comprehensive review examining a wide range of issues conducted in the United Kingdom in 2000. The Administration was keeping a close watch on the developments and would report to the Panel if necessary. He said that the present position of the Administration was that there was not a pressing need for further amending the legislation as explained in the Administration's paper.

43. Ms Emily LAU said that considerable concerns had been expressed by individuals and interested groups and organisations when issues relating to better protection of women were discussed some years ago. In her view, many problems

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which had been identified still existed today. She asked whether the Administration had conducted comprehensive consultations before concluding that there was no urgent need for amending the legislation. Senior Assistant Solicitor General (SASG) replied that no public consultation had been conducted specifically for the purpose of this review as the scope of the review was limited only to provisions concerned with unlawful sexual intercourse or act within the bond of marriage. Also, issues relating to marital sexual offences had been considered in detail by the Panel and the Bills Committee formed to scrutinise the Statute Law (Miscellaneous Provisions) Bill 2001.

44. The Chairman said that as explained in the background brief prepared by the Secretariat, various issues relating to protection of women had been raised in the Concluding Comments of the United Nations Committee on the Elimination of Discrimination against Women on the Initial Report submitted by the Hong Kong Special Administrative Region under the Convention on the Elimination of All Forms of Discrimination Against Women. This Panel had specifically followed up the issue of marital rape to see if legislative amendments were necessary to remove any anomaly in the legislation. The Statute Law (Miscellaneous Provisions) Bill 2001 introduced amendment proposals relating to the offence of marital rape and other sexual offences which might also apply within a marital relationship. After detailed deliberation, the Bills Committee and the Administration agreed that owing to the large number of legislative provisions involved, a "minimalist" approach dealing only with marital rape and three other offences of which a person charged with rape might be convicted would suffice at that stage. The other sexual offences should be further reviewed afterwards. The present review was conducted by the Administration pursuant to the Bills Committee's decision.

45. DSG supplemented that issues relating to tackling of family violence, which had a bearing on better protection of married women, were being separately considered by a LegCo subcommittee.

46. Ms Emily LAU asked whether any person had been charged with the offence of marital rape before and after the enactment of the Statute Law (Miscellaneous Provisions) Ordinance 2002. SASG replied that he was not aware of any such prosecution.

VI. Review of legislative provisions containing the drafting formula "to the satisfaction" of an enforcement agency

(LC Paper No. CB(2)2224/04-05(01) – Paper provided by the Department of Justice

(LC Paper No. CB(2)2224/04-05(02) – Extract from the minutes of the Panel meeting on 18 December 2003)

47. DSG briefed members on DOJ's paper. The gist of the issues highlighted was as follows –

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(a) DOJ accepted the judgment of the Court of First Instance in the Lam Geotechnics case in 2000 that the elements of offence purportedly set out in regulation 44 of the Construction Sites (Safety) Regulations (Cap. 59I) as in force at the time were incompletely defined because of the uncertainty in the phrase "to the satisfaction of the Commissioner for Labour", which failed to prescribe with sufficient particularity the elements of the offence and was ultra vires the enabling provision i.e. section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59) under which Cap. 59I was made;

(b) the Administration had identified 86 provisions in subsidiary legislation and 10 provisions in principal legislation containing drafting formulas similar to the phrase "to the satisfaction of". It appeared that the elements of offence under those provisions were not clearly set out. The Administration was therefore inclined to conduct a review of the legislative provisions to decide whether they would be amended.

Issues raised

48. The Chairman and Mr Martin LEE said that as the ambiguity in the law resulting from the drafting formula had led to problems in prosecution, a comprehensive review and law amendment exercise should be undertaken as soon as possible.

49. SASG informed members of a court case in New Zealand, where a piece of safety regulation required that towing of an aircraft was prohibited except with the permission of the Director of Civil Aviation and on such conditions as the Director might specify. The regulation was challenged on the grounds that, among other things, the requirements were uncertain and imprecise as to how they could be satisfied. The case was heard and it was held by the court that the regulation was valid. The court took the view that it was not possible to foresee what conditions should apply in allowing towing of an aircraft because practically the Director had to base his decision on a thorough investigation conducted for that purpose, and the result of investigation would vary in different circumstances. SASG said that for some of the existing legislative provisions, the use of the drafting formula might be satisfactory. Hence, in taking forward a review exercise, the provisions had to be assessed individually to determine if amendment was really necessary.

50. Mr Martin LEE said that he appreciated the complexity of the review but nevertheless the review should be conducted without delay. He said that the Administration could not afford to take the risk of mass legal challenge, as many of the legislative provisions involved public health and safety matters. He expressed concern that because the identified legislative loophole, some people might be prepared to flout the law.

51. The Chairman urged that the Administration should set a timetable for reviewing the provisions and introducing the legislative amendments. She also

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suggested that a special working team within the Administration might be formed for the early completion of the task.

52. DSG said that he would convey members' views to the relevant bureaux/departments. He explained that in the meantime, the Director of Public Prosecutions had alerted all prosecutors of the ruling in the Lam Geotechnics case. If there was evidence of an offence under a provision containing the formula (or a similar formula), the provision would be examined to decide whether or not prosecution would proceed and, where prosecution would not proceed because of concerns about the validity of the provision in question, a recommendation would be made to the bureau/department concerned to amend the provision.

Admin

53. DSG added that the Administration would undertake an internal consultation on the matter and would report to the Panel on the approach to be taken.

54. The Chairman said that the Panel should follow up the issue in due course.

VII. Any other business

Legal professional privilege

55. The Chairman referred to the recent court rulings which touched upon the admissibility of evidence against the defendants in the form of recordings obtained by the Independent Commission Against Corruption (ICAC) in the course of carrying out surveillance activities. She pointed out that the Bar Association had expressed deep concern about covert tapping of conversations between lawyers and their clients by law enforcement agencies, which could be seen as a violation of legal professional privilege (LPP). The Chairman said that while matters relating to surveillance by law enforcement agencies would be followed up by the Panel on Security, the issue of whether and how LPP was protected under the existing legislative and operational framework could be considered by this Panel. She suggested that this Panel request the Chief Secretary for Administration to provide a response in writing on the matter.

(*Post-meeting note* : A paper provided by the Security Bureau on "Surveillance by Law Enforcement Agencies" to the Panel on Security was circulated to all Members for information vide LC Paper No. CB(2)2315/04-05 on 18 July 2005. The paper, which covered issues including LPP, was considered by the Panel on Security at its special meeting held on 22 July 2005. Concerns about safeguarding of LPP, among other things, were raised at the meeting. The Panel on Security would follow up the relevant issues in due course.)

56. The meeting ended at 6:40 pm.

Council Business Division 2
Legislative Council Secretariat
22 September 2005