立法會
Legislative Council

LC Paper No. CB(2)1491/05-06
(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, 23 January 2006 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 Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP Hon MA Lik, GBS, JP P
Members attending	:	Hon CHIM Pui-chung Hon KWONG Chi-kin
Member absent	:	Hon Miriam LAU Kin-yee, GBS, JP
Public Officers attending	:	Item V Ms CHANG King-yiu Director of Administration Mr Benjamin CHEUNG Director of Legal Aid Miss Eliza LEE Deputy Director of Administration Mr William CHAN Deputy Director of Legal Aid

Mrs Alice CHEUNG
Assistant Director of Administration

Item VI

Department of Justice

Mr Stephen WONG
Deputy Solicitor General

Ms Kitty FUNG
Senior Government Counsel

Attendance by invitation : Item V

The Hong Kong Bar Association

Mr Valentine YIM

The Law Society of Hong Kong

Mr Amirall B. NASIR

Item VI

The Law Society of Hong Kong

Mr Peter LO

Mr Benny YEUNG

Mr Sundaramoothy KRISHNAN

Mr Patrick MOSS

Ms Vivian LEE

Professional Indemnity Scheme Action Group

Ms Hilary CORDELL

Ms May TAM

Ms Therese CHOW

Mr Victor CHAN

Ms Polly LEE

Ms Lousana YAU

Mr Larry KO

Item VII

The Hong Kong Bar Association

Mr Andrew BRUCE, SC

Mr Martyn RICHMOND

Mr Edwin CHOY

The Law Reform Commission of Hong Kong

Hon Mr Justice STOCK, JA
Chairman of the Hearsay in Criminal Proceedings Sub-committee

Mr Peter CHAPMAN
Member of the Hearsay in Criminal Proceedings Sub-committee

Mr Alan HOO, SBS, SC, JP
Member of the Hearsay in Criminal Proceedings Sub-committee

Mr Andrew LAM
Member of the Hearsay in Criminal Proceedings Sub-committee

Mr Gerard McCOY, SBS, SC
Member of the Hearsay in Criminal Proceedings Sub-committee

Mr Anthony UPHAM
Member of the Hearsay in Criminal Proceedings Sub-committee

H H Judge WRIGHT
Member of the Hearsay in Criminal Proceedings Sub-committee

		Mr Simon YOUNG Member of the Hearsay in Criminal Proceedings Sub-committee
		Mr Stuart M I STOKER Secretary of the Law Reform Commission
		Mr Peter SIT Secretary of the Hearsay in Criminal Proceedings Sub-committee
Clerk in attendance	**:**	Mrs Percy MA Chief Council Secretary (2)3
Staff in attendance	**:**	Mr Arthur CHEUNG Senior Assistant Legal Adviser 2
		Mr Watson CHAN Head, Research and Library Services Division
		Mr CHAU Pak-kwan Research Officer 5
		Miss Lolita SHEK Senior Council Secretary (2)7

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I. Confirmation of minutes of meeting

(LC Paper No. CB(2)897/05-06 – Minutes of the meeting on 28 November 2005)

The minutes of the meeting held on 28 November 2005 were confirmed.

II. Information papers issued since last meeting

(LC Paper No. CB(2)800/05-06(01) – Interim reply from the Legal Aid Department on "Legal aid for victims in family violence cases"

LC Paper No. CB(2)801/05-06(01) – Supplementary information provided by the Judiciary Administration on "Relocation of the Labour Tribunal to South Kowloon Law Courts Building")

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

III. Items for discussion at the next meeting

(LC Paper No. CB(2)899/05-06(02) – List of outstanding items for discussion

LC Paper No. CB(2)899/05-06(03) – List of follow-up actions)

3. The Chairman said that the recent investigation report issued by the Ombudsman on the monitoring of assigned-out cases by Legal Aid Department had roused grave public concern. She referred members to her letter dated 21 January 2006 to the Clerk to Panel (LC Paper No. CB(2)959/05-06(01)) which was tabled at the meeting. She had asked the Clerk to request the Director of Legal Aid (DLA) to provide information on the matter. The Chairman suggested that the Panel should invite DLA to attend the next Panel meeting on 27 February 2006 to brief members on the matter. Members agreed.

4. The Chairman said that at the meeting on 28 November 2005, the Panel requested the Administration to respond to the concerns and suggestions raised by members and deputations on recovery agents, and liaise with the two legal professional bodies on how the problem of recovery agents should be tackled. The Panel also agreed to revisit the item in about two months' time. The Chairman suggested that the Panel should request the Administration to provide a progress report on the subject before the next Panel meeting so as to facilitate members to consider how the subject should be followed up. Members agreed.

5. Members agreed that the following items should be discussed at the next meeting on 27 February 2006 –

(a) Reciprocal enforcement of judgments in commercial matters between the HKSAR and the Mainland;

(b) Issues relating to the imposition of criminal liabilities on the Government; and

(c) Monitoring of assigned-out cases by Legal Aid Department.

IV. Proposed research outline on "The Jurisdiction of Ombudsman Systems in Selected Places"

(LC Paper No. CB(2)899/05-06(01) – Proposed research outline prepared by the Research and Library Services Division)

6. Head, Research and Library Services Division briefed members on the proposed outline for the research on the jurisdiction of the ombudsman system in selected places.

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7. Ms Emily LAU supported the proposed research outline. She said that upon completion of the research study, the Panel could invite views from deputations and forward its views and recommendations on the purview of the Ombudsman to the Ombudsman for reference.

8. Members endorsed the proposed research outline. Members noted that the research study would be completed by around May 2006.

V. 2005 annual review of financial eligibility limits of legal aid applicants

(LC Paper No. CB(2)904/05-06(01) – Background brief prepared by the LegCo Secretariat on "Provision of legal aid services"

LC Paper No. CB(2)904/05-06(02) – Paper provided by the Administration on "Annual review of financial eligibility limits of legal aid applicants")

Proposed adjustments to the financial eligibility limits of legal aid applicants

9. Director of Administration (D of Adm) briefed members on the outcome of the 2005 annual review of the financial eligibility limits of legal aid applicants (the limits) as detailed in the Administration's paper (LC Paper No. CB(2)904/05-06(02)). D of Adm said that pursuant to the 2005 review, the Administration proposed that an upward adjustment of 1.6% be made to the limits, taking account of the increase of 0.4% in Consumer Price Index (C) (CPI(C)) kept in the "reserve" since the 2004 review and the increase of 1.3% captured from the 2005 review. Accordingly, the limits would be increased, in dollar terms, by $2,500 to $158,300 for the Ordinary Legal Aid Scheme (OLAS), and by $6,900 to $439,800 for the Supplementary Legal Aid Scheme (SLAS).

10. D of Adm added that the Administration proposed to move a motion in the first quarter of 2006 to give effect to the proposed increase. Consequential changes to the Legal Aid (Assessment of Resources and Contributions) Regulations would follow to adjust the scale of contributions.

11. The Chairman referred members to the submission provided by Mr Valentine YIM of the Hong Kong Bar Association which was tabled at the meeting.

(*Post-meeting note* : The submission from Mr Valentine YIM was issued to members vide LC Paper No. CB(2)963/05-06(01) after the meeting.)

12. Mr Valentine YIM pointed out that the Administration's proposal was to "lump" together the increase in CPI(C) for the two periods from July 2003 to July 2004 and from July 2004 to July 2005 and proposed to adjust the limits upwards by 1.6%. However, this "lumping together approach" would distort the real value of the limits, as this approach produced different figures, in dollar terms, from the "year-on-year approach". Mr YIM explained that the revised limits produced from the "year-on-year approach" would be $158,400 for OLAS and $440,200 for SLAS,

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which were $100 and $400 higher than those produced from the "lumping together approach".

13. Mr YIM further explained that if the "lumping together approach" was adopted for calculating the adjustments to the limits for three or four consecutive years, the accumulated distortion would be quite substantial. The Government would be deemed to be taking advantage of legal aid applicants even though it did not intend to do so. He was of the view that this approach should not be adopted, as it could not produce accurate adjustment figures in principle.

14. Mr Amirall NASIR of the Law Society of Hong Kong said that he shared the views of Mr Valentine YIM. Mr NASIR considered that the limits should be adjusted upwards so that more people would become eligible for legal aid.

15. D of Adm responded that mathematically both the "year-on-year approach" and the "lumping together approach" would arrive at the same result, if not because of the rounding made to various figures in the calculation process. Hence, both approaches were feasible and reasonable methods for calculating the adjustments to the limits. D of Adm explained that while the "year-on-year approach" resulted in a higher limit for this exercise, the same might not be true in future adjustment exercises, as much would depend on the actual figures in question and hence the rounding effect. She advised that when the limits were adjusted in 2004 to take account of the cumulative reduction in CPI(C) recorded in the three annual reviews from 2000 to 2003, the adjustment was calculated according to the difference between the CPI(C) in July 2000 and that in July 2003. The adjustment to the limits proposed in the Administration's paper was calculated on the same basis.

16. D of Adm added that both approaches were acceptable to the Administration. However, the Administration considered that the same approach should be adopted for each annual review so as to maintain consistency.

17. The Chairman noted that the Administration had adopted different approaches in making adjustments to the limits at different times in the past. She sought clarification on the principle for the Administration to determine which approach to be adopted in calculating the adjustments to the limits. She said that it was important for the public to understand the principle adopted by the Administration.

18. D of Adm explained that the Administration's policy was to adjust the limits annually, except if the change in CPI(C) in an annual review was very small, e.g. less than 1%, as in the case of the 2004 annual review, pursuant to which the Administration decided to reserve the small increase after consulting this Panel. In accordance with such principle, even if the "lumping together approach" was adopted to calculate the adjustments to the limits, the cumulative changes in CPI(C) would be so small that the difference in the adjustments to the limits calculated under the two approaches would be very minor.

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19. Referring to the calculations of the adjustments to the limits for OLAS under the "year-on-year approach" and "lumping together approach" in the submission from Mr Valentine YIM, Mr Martin LEE pointed out that the difference between the adjustments calculated under the two approaches would be more than $100, if the adjustments to the limits pursuant to the reviews in 2004 and 2005 were not rounded down to the nearest hundred.

20. Deputy Director of Administration informed members that it was estimated that if the limits were adjusted upwards by 1.6% as proposed by the Administration, the number of applicants who would become eligible for OLAS and SLAS would increase by 13 and 4 respectively. A difference of $100 in the limit would not affect the number of applicants who were eligible for legal aid. Mr YIM's concern that the approach would produce a result less favourable to legal aid applicants was not valid.

21. The Chairman was of the view that the Administration should adopt the approach that was most advantageous to the public, as such an approach would cause little difference in the public expenditure in legal aid. Mr Martin LEE concurred with the Chairman.

22. D of Adm reiterated that the Administration did not object to adopting either one of the approaches. However, a consistent and clear calculation method should be adopted. Frequent changes in the calculation method would confuse the public.

23. The Chairman, however, was of the view that the public would not be confused as only figures of the adjusted limits would be announced. She pointed out that under the present arrangement, there was flexibility for the Administration to adopt different approaches in making adjustments to the limits subject to the outcome of the annual reviews. Similarly, there should be flexibility for the Administration to adopt an approach that could benefit the public most after each review.

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24. D of Adm said that members had put forth a third approach other than the "year-on-year approach" and "lumping together approach" for calculating the adjustments to the limits. The Administration would consider all three approaches and revert to the Panel on its final decision.

(*Post-meeting note :* The Administration's letter dated 17 March 2006 advising the Panel of its decision was issued to members vide LC Paper No. CB(2)1471/05-06(01) on 20 March 2006.)

25. Mr Valentine YIM remarked that the Administration's decision on the approach to be adopted in calculating the adjustments to the limits might have implications on other adjustments which were also based on movements in CPI(C). He suggested D of Adm to discuss the matter with the Financial Services and the Treasury Bureau.

26. Mr Martin LEE said that he was dissatisfied that the limit for SLAS was adjusted according to the movements in CPI(C). He pointed out that SLAS was set up to provide legal aid for people belonging to the middle-income group who were not

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eligible for OLAS. However, public expectation on SLAS had been rising as society progressed. Many members of the middle-income group were not eligible for SLAS as the limit for which was set at a low level. SLAS had failed to achieve the original policy objective. Mr LEE urged the Administration to adjust the limit for SLAS upwards substantially so as to meet the needs of the middle-income group.

27. D of Adm informed members that the Conditional Fees Sub-committee of the Law Reform Commission had issued a Consultation Paper on Conditional Fees in 2005. The Sub-committee had recommended that the scope of SLAS be expanded and the limit for SLAS be raised. D of Adm said that both the Administration and the Legal Aid Services Council had requested an extension of the consultation period. After considering the views of the Council which were still awaited, the Administration would provide its response to the Sub-committee before the extended deadline for submissions.

Adm

28. The Chairman requested the Administration to provide a copy of its response for members' reference, and the Panel would decide whether to follow up the matter at a future meeting.

Scope of legal aid schemes

29. Mr KWONG Chi-kin noted from paragraph 5 of the background brief on the provision of legal aid services prepared by the LegCo Secretariat (LC Paper No. 904/05-06(01)) that DLA was empowered to waive the limit in meritorious cases involving a breach of the Bill of Rights Ordinance (Cap. 383) or an inconsistency with the International Covenant on Civil and Political Rights. He pointed out that no such discretionary waiver could be exercised in respect of proceedings under the Employment Ordinance (Cap. 57) under the existing legal aid policy.

30. Mr KWONG said that the labour sector had expressed concern that the existing legal aid schemes could not help resolve their problems, and the Administration had placed more importance on the political rights than economic rights of the people in Hong Kong. Mr KWONG quoted a case in which an employee of the Cathay Pacific Airlines claimed compensation from her employer for the public holidays on which she was required to work. Although there were justifiable grounds for taking legal action and the court ruling in the case would have significant impact on similar cases in future, the employee was compelled to settle the dispute with her employer because she was not eligible for legal aid, and she could not afford the high costs of private litigation.

31. Mr KWONG further informed members that Mr CHAN Kwok-keung, former LegCo Member, had submitted a Members' Bill in 2000 seeking to amend the Legal Aid Ordinance (Cap. 91) to empower DLA to grant legal aid to a person involving in litigations pertaining to the provisions in the Employment Ordinance or cases concerning employment contracts, even though the person's financial capacity exceeded the limit for the standard legal aid scheme. However, Mr CHAN was not allowed to introduce the Bill because the then President had ruled that the Bill related

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to government expenditure and policies within the meaning of Rule 51(3) and (4) of the Rules of Procedure. Mr KWONG urged the Administration to extend DLA's exemption power to cover cases pertaining to the provisions in the Employment Ordinance.

32. The Chairman said that the request made by Mr KWONG Chi-kin involved a review of the existing legal aid policy and was outside the scope of discussion under the present agenda item. Nevertheless, she agreed with Mr KWONG that if the legal proceedings of the case quoted by him had been proceeded with, the court ruling could be an important reference for similar cases in future, and would have helped save a lot of litigation costs in those cases. The Chairman asked whether the Administration would consider reviewing the legal aid policy.

33. D of Adm explained that the proposed extension of DLA's exemption power involved a significant policy change and had to be examined carefully.

34. The Chairman suggested that the Panel could discuss issues related to legal aid, including Mr KWONG Chi-kin's proposed extension of DLA's exemption power, when it considered the Administration's response to the Consultation Paper on Conditional Fees at a future meeting. Members agreed.

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

(LC Paper No. CB(2)899/05-06(04) – Background brief prepared by the LegCo Secretariat on "Professional Indemnity Scheme of the Law Society of Hong Kong"

LC Paper No. CB(2)899/05-06(05) – Letter dated 13 January 2006 from the Administration on "Professional Indemnity Scheme of the Law Society of Hong Kong"

LC Paper No. CB(2)935/05-06(01) – The Law Society's response dated 13 January 2006 to the issues raised by the Administration

LC Paper No. CB(2)935/05-06(02) – the Administration's comments in respect of the Law Society's response dated 13 January 2006

LC Paper No. CB(2)950/05-06(01) – The Law Society's progress report on the Qualifying Insurers Scheme (QIS))

35. Mr Peter LO of the Law Society of Hong Kong informed members that the Law Society had tried to resolve a number of external and domestic issues in implementing the QIS, and the Administration's support was required for the proposed QIS. Mr LO said that the Administration had raised several external issues in its paper (LC Paper No. CB(2)935/05-06(02)). The Law Society's response was as follows –

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System for ensuring that only reliable insurers were approved as qualifying insurers

(a) while qualifying insurers were not required to be local insurance companies, they must be authorised by the Office of the Commissioner of Insurance to conduct business in Hong Kong;

(b) qualifying insurers should comply with the minimum terms and conditions required for them to be qualifying insurers under the proposed QIS Rules (the Rules). They should also have experience in writing solicitors' professional indemnity insurance;

(c) the Law Society hoped that as many insurers as possible would participate in the proposed QIS. Any insurers who met the criteria could become qualifying insurers. However, they would be required to enter into qualifying insurance agreements to ensure that they complied with the minimum terms and conditions;

Reinsurance against the insolvency of a qualifying insurer

(d) the Working Party on QIS of the Law Society considered that a possible solution was to provide for "cut-through" provisions in the qualifying insurance agreements whereby the insured solicitors might claim directly from reinsurers in the event the qualifying insurers became insolvent. However, seven out of the ten insurers and reinsurers who had expressed an interest in participating in a QIS had indicated that they would not agree to a "cut-through" clause. One had indicated that it could accept a cut-through clause provided it received a premium from the insured. Apart from the legal technical issues surrounding cut-through clauses, it seemed doubtful whether they would be effective in practice in that insurers normally maintained treaty reinsurance, which protected an insurer for losses arising from all books of business indemnity insurance, in a particular year. As such, it was difficult in practice to include a cut-through clause in a treaty reinsurance contract but only with respect to one account, i.e. QIS, and not others. Under such circumstances, the Law Society did not consider reinsurance to be a requirement that could reasonably be imposed on qualifying insurers or its members;

Introduction of practice standards for solicitors by qualifying insurers

(e) the Law Society agreed that it was in the interest of the insured and insurer that risk management guidelines were introduced to help reduce future claims. Qualifying insurers had an interest in preventing claims and would take action to ensure compliance with the guidelines. However, the Law Society did not feel that it could compel or require qualifying insurers to impose risk management guidelines for the insured;

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Solicitors with bad claims records

(f) it was a fact of life that solicitors with bad claims records might face difficulties in obtaining qualifying insurance. Those firms might need to enter the Assigned Risk Pool. The calculation of the premium for firms in the Assigned Risk Pool had not been finalised, but it was likely that the premium would be prohibitively high.

36. Mr Peter LO added that there were still some domestic issues for the Law Society to resolve in implementing the proposed QIS. Meanwhile, the Law Society was awaiting response from the Administration on whether it was willing to support a QIS in the absence of any reinsurance requirement being imposed on qualifying insurers, so as to decide how the Law Society should take forward the Scheme.

37. Mr Benny YEUNG of the Law Society briefed members on the domestic issues to be resolved by the Law Society. Mr YEUNG said that the legal profession had expressed grave concern about the fairness in the qualifying insurers' contributions towards the Assigned Risk Pool and the calculation of rates of premium applicable for those solicitors firms required to obtain cover through the Assigned Risk Pool.

38. Mr YEUNG explained that it was reasonable that contributions by a qualifying insurer to the Assigned Risk Pool would be calculated with reference to the premium it earned. However, international law firms could easily ask global insurers to cover the primary layer. Some big firms could also negotiate lower premium with insurers by agreeing to a big policy excess or by providing counter indemnity. As a result, these big firms would only be required to make very small contributions to the Assigned Risk Pool which would then be solely supported by medium and small-sized firms.

39. Mr YEUNG said that such an arrangement was not fair but this was not easy to overcome unless there was a restriction against a large policy excess or the provision of counter-indemnities but this might be regarded as being against the spirit of the QIS which was supposed to allow members of the Law Society the freedom of choice. He considered that alternative methods such as head count of solicitors in a law firm should be considered in the calculation of premium. Mr YEUNG pointed out that although the insurers, and not the insured firms, were required to make contributions to the Assigned Risk Pool, the costs would eventually be transferred to these firms through the premium. He expressed grave concern about these issues and considered that they should be discussed thoroughly so as to identify a fair and acceptable solution.

40. The Chairman asked whether this problem could be prevented if only local insurance companies would be qualified to participate in the QIS. Mr YEUNG explained that the large firms' insurers had a local licence and so could participate in the QIS. The Law Society should allow all insurers who were authorised by the Office of the Commissioner of Insurance to participate in the Scheme.

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41. Mr YEUNG urged the Administration to reconsider the practicability for including reinsurance cover as one of the major selection criteria for qualifying insurers. He pointed out that even if reinsurance could be obtained, the cost would be prohibitively high, and would eventually be transferred to consumers.

42. Ms Hilary CORDELL of the Professional Indemnity Scheme Action Group said that members of the Action Group had not been kept posted of the dialogue between the Law Society and the Administration since the Panel meeting on 27 June 2005. She asked for information on the meetings and discussions held between the Law Society and the Administration since then.

43. Deputy Solicitor General (DSG) responded that the Administration had written to the Law Society on the issues raised on the proposed QIS after each Panel meeting. The Administration had also called the Law Society to remind them of the stringent timetable of the implementation of the QIS. DSG added that the Administration had received the response from the Law Society on the issues raised only on 13 January 2006. Some additional information was provided by the Law Society in its progress report to the Panel for this meeting, as well as the Law Society's verbal report made earlier at the meeting.

44. Mr Peter LO said that since the Panel meeting on 27 June 2005, the Law Society had continued to work on the proposed QIS and liaise with the insurance industry to take forward the implementation of the Scheme. Nine insurers had been identified to have interest in participating in the Scheme. Many internal meetings had been held to discuss the QIS. Mr LO added that regarding the issue of reinsurance, the best arrangement the Law Society could possibly make with the potential qualifying insurers was the inclusion of "cut-through" provisions in the qualifying insurance agreements. The Law Society was still awaiting formal replies from the insurers. However, it was unlikely that reinsurance cover could be obtained.

45. Referring members to paragraph 28 of the background brief prepared by the LegCo Secretariat, Ms Hilary CORDELL said that at the Panel meeting on 27 June 2005, the Action Group had requested the Law Society to –

(a) provide all relevant information on the QIS including the terms and conditions under the QIS and the likely costs of the QIS to different types of solicitors firms to members of the Law Society as soon as possible to enable them to consider the viability of the QIS; and

(b) provide regular progress reports on the timetable and work plan for the implementation of the QIS. The Law Society should also expand the membership of the working committee and arrange forums to which representatives of the insurance industry, the Administration and solicitors would be invited to discuss the QIS and the stakeholders' concerns.

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46. Ms CORDELL informed members that the Law Society had not taken the requested follow-up action. The Action Group therefore put forth the same requests again to the Law Society in order to enable members of the Action Group and the profession as a whole to participate in the preparation work for the implementation of the QIS.

47. In response to the Chairman's enquiry on the Administration's position on the QIS, DSG reiterated that the Administration had cooperated and would continue to cooperate with the Law Society in working out a mutually agreeable solution in the provision of indemnity insurance for solicitors. The Administration would deliberate the issues raised by the Law Society. DSG clarified that the Administration had suggested in paragraph 4 of its paper that the Law Society should consider including reinsurance as one of the major selection criteria for qualifying insurers because the Administration, in considering the risk of insolvency of insurance companies, was concerned about not just the interest of the public but also that of the solicitors.

48. The Chairman said that the issue of reinsurance had been discussed time and again at previous Panel meetings. Referring to paragraph 27 of the background brief prepared by the LegCo Secretariat, she pointed out that while the Administration had once indicated that it would not support the QIS unless the Scheme was backed by reinsurance, it had only demanded at the Panel meeting on 27 June 2005 that the new scheme should provide sufficient safeguards for solicitors' clients in the event of insurer insolvency. She therefore expressed concern that while the Law Society and other parties concerned had endeavoured to tackle problems in the implementation of the QIS, the Administration had now reversed its position and insisted on the provision of reinsurance cover in the QIS, even though the Law Society had reiterated that there were practical and legal difficulties in obtaining reinsurance cover, and even if such insurance cover could be obtained, the cost would be prohibitively high.

49. The Chairman was of the view that the new scheme to be adopted by the Law Society should be required to provide reasonable and not maximum protection to consumers. As the QIS was a reasonable solution, the Administration should not object to the implementation of the Scheme. If the Administration insisted on reinsurance, it was likely that the Law Society would not be able to implement the QIS, and had to continue to adopt the existing professional indemnity scheme. Each solicitor firm would then continue to suffer from the risks of mutual liability.

50. The Chairman pointed out that if the Administration did not support the QIS, the Chief Justice would not approve the proposed QIS Rules. Members would be very disappointed if the QIS could not be implemented. She added that the QIS had its own advantages. Under the QIS, solicitors firms had to review their practice, work conscientiously, and select good insurers to take out insurance. She considered that the Scheme could provide the best protection to the consumers.

51. Mr Martin LEE said that if a perfect professional indemnity scheme which provided maximum protection to the consumers did not exist, a second best insurance

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scheme which offered reasonable protection to the consumers should be adopted. Mr LEE urged the Administration to be more proactive in its discussion with the Law Society on the implementation of the QIS.

52. DSG clarified that the Administration had not changed its position on the matter. He stressed that the Administration had all along maintained the view that the new scheme should provide maximum protection to consumers against insurer insolvency. There was a need for the Administration to be prudent and by so doing all ways for providing such protection to the consumers should be exhausted. As regards the issue of reinsurance, DSG pointed out that in its letter dated 13 January 2006 to the Administration, the Law Society had advised that there might be a possibility of providing for "cut-through" provisions in the qualifying insurance agreements, and that the Law Society would endeavour to negotiate with qualifying insurers to provide for those provisions. It would appear from its letter that it was possible for reinsurance cover to be provided in the QIS.

53. DSG stressed that the Administration did not say it did not support the QIS. However, it would need time to study the information provided by the Law Society in its letter dated 13 January 2006 to the Administration, its progress report to the Panel, and the additional information it provided verbally at this meeting. He added that the Administration had to examine the whole package of QIS, including the draft agreements and the practical difficulties in implementing the Scheme in order to ascertain the details of the protection provided under the scheme. DSG requested the Law Society to provide a written response to the issues raised by the Administration in its paper to the Panel (LC Paper No. CB(2)935/05-06(02)) as soon as possible. The Administration would revert to the Law Society in one week's time upon receipt of its response.

54. Mr LI Kwok-ying said that the Administration should be given some time to study the response from the Law Society. He urged all parties concerned to adhere to the stringent timetable for the implementation of the QIS.

55. The Chairman reminded the Law Society and the Administration that the QIS Rules had to be gazetted by May 2006 if the QIS was to be implemented in October 2006. Mr Peter LO responded that the Law Society was aware of the stringent timetable. He urged the Administration to indicate its position on the matter as soon as possible.

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56. The Chairman requested the Administration to revert to the Law Society in one week's time upon receipt of the Law Society's written response to the issues raised by the Administration.

(*Post-meeting note* : The Law Society's written response to the Administration and the Administration's reply were issued to members vide LC Paper No. CB(2)1204/05-06(01) to (03) on 16 February 2006.)

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VII. Consultation Paper on Hearsay in Criminal Proceedings published by the Hearsay in Criminal Proceedings Sub-committee of the Law Reform Commission

(Consultation Paper on Hearsay in Criminal Proceedings published by the Hearsay in Criminal Proceedings Sub-committee

LC Paper No. CB(2)891/05-06(01) – Executive Summary of Consultation Paper on Hearsay in Criminal Proceedings

LC Paper No. CB(2)891/05-06(02) – Press release issued by the Law Reform Commission on 30 November 2005 concerning the publication of the Consultation Paper)

57. Mr Justice STOCK, Chairman of the Hearsay in Criminal Proceedings Sub-committee of the Law Reform Commission of Hong Kong, briefed members on the Core Scheme which was the Sub-committee's proposed model of reform of the law of hearsay in criminal proceedings in Hong Kong. The 16 proposals in the Core Scheme were detailed in pages 108 to 111 of the Consultation Paper on Hearsay in Criminal Proceedings published by the Sub-committee.

58. Mr Justice STOCK said that the Sub-committee noted the following concerns about the proposed Core Scheme –

(a) the Core Scheme would undermine the rule of law;

(b) it was not necessary to reform the law of hearsay in criminal proceedings in Hong Kong; and

(c) only the prosecutors and not the defendants could benefit from the implementation of the Core Scheme.

59. Mr Justice STOCK further said that the response from the Sub-committee to the above concerns was as follows –

(a) the existing hearsay law, which had been developed a long time ago, had become very complex and irrational. Reform of the law was therefore necessary. The Sub-committee had not proposed anything new but had only tried to rationalise the existing law;

(b) the Sub-committee had examined the existing hearsay law in Hong Kong and identified shortcomings of the existing hearsay rule. The problems encountered by other common law jurisdictions with the hearsay rule also prevailed in Hong Kong. Details of the analysis were given in Chapter 4 of the Consultation Paper. The Sub-committee had concluded that the law was in need of reform; and

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(c) Mr Gerard McCOY, Member of the Sub-committee, had prepared a summary of six cases to illustrate that the admission of hearsay evidence could assist both the prosecutors and defendants in criminal proceedings.

60. Mr Gerard McCOY briefed members on the six cases which illustrated that the admission of hearsay evidence could facilitate the upholding of justice. Mr McCOY explained that in three of those cases, the prosecutors would have benefited from the admission of hearsay evidence while in the other three cases, the innocence of the defendants could have been proved with the admission of the hearsay evidence. A summary of the cases was tabled at the meeting.

(*Post-meeting note* : The summary of the cases was issued to members vide LC Paper CB(2)980/05-06(01) after the meeting.)

Issues raised

61. Mr Andrew BRUCE of the Hong Kong Bar Association informed members that the Bar Association was still formulating its views on the Consultation Paper, and would provide its submission to the Sub-committee before the end of the consultation period. Mr BRUCE said that while the Bar Association agreed that there were good reasons to improve the existing hearsay law, it had the following concerns –

(a) the unavailability of a hearsay declarant for cross-examination, which was the right of the other party to the proceedings to challenge the accuracy of evidence;

(b) the issue of uncertainty and the risk of inconsistency in the application of the principles of admitting hearsay evidence by different courts and judges, since admission of hearsay evidence was to be determined by the court under its discretionary power; and

(c) the standard of proof imposed on parties to establish the right in producing hearsay evidence.

62. The Chairman requested the Bar Association to provide a copy of its submission to the Sub-committee for the Panel's reference in due course.

63. The Chairman said that the reform recommended by the Sub-committee was a major change to an important part of the law. While people might agree that there was a need for reform, there was concern that uncertainty and abuse might be introduced to the law on hearsay, if the rigid hearsay rule was to be removed and the court was to be given discretion to admit hearsay evidence.

64. Mr Justice STOCK responded that some members of the Sub-committee had raised similar concerns among which the right of cross-examination was the key issue. To address all these concerns, the Sub-committee had insisted that established and

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identified effective safeguards be devised against potentially undesirable consequences arising from admissibility of hearsay evidence.

65. Regarding the question of cross-examination, Mr Justice STOCK pointed out that exceptions could be made to the hearsay rule under the existing hearsay law. Hearsay evidence could be admitted if the court was satisfied that the evidence was reliable in the absence of cross-examination and would not affect the fairness of the proceedings. The courts in New Zealand applied tests on the admission of hearsay evidence in this respect in their model of reform. Mr Justice STOCK clarified that the Sub-committee did not intend to demean the importance of the right of cross-examination. The Sub-committee agreed that hearsay evidence should not be admitted if its admission might cause injustice to the accused.

66. Regarding the question of the court's discretionary power to admit hearsay evidence, Mr Justice STOCK said that the Sub-committee had examined a lot of options. He explained that a body of case laws would be built up so that the use of discretion would eventually be reduced.

67. Mr Alan HOO, Member of the Sub-committee, supplemented that the Sub-committee considered the right to cross-examine opposing witnesses and the right to confront one's accuser the most important rights of the defendants. The Sub-committee had insisted on the introduction of safeguards to ensure that these rights would not be impinged on by the admission of hearsay evidence. Referring to paragraph 7 of the terms of the Core Scheme in page 109 of the Consultation Paper, Mr HOO explained that hearsay evidence would only be admissible where, among other things, the conditions of necessity and threshold reliability were satisfied, and the court was satisfied that any prejudicial effect it might have on any party to the proceedings was not out of proportion to its probative value. According to paragraph 12 in page 110 of the Consultation Paper, in determining whether the threshold reliability condition had been fulfilled, the court should have regard to all circumstances relevant to the evidence's apparent reliability, including the absence of cross-examination of the declarant at trial.

68. Mr Martin LEE noted that the proposed Core Scheme was a product of the ideas and practices from different common law jurisdictions that had applied the hearsay rule in criminal proceedings. He expressed concern whether there would be inconsistency among the proposals in the Core Scheme as they were adopted from different overseas models, and whether the whole Core Scheme would function effectively.

69. Mr Simon YOUNG, Member of the Sub-committee, explained that most of the proposals in the Core Scheme were formulated based on the New Zealand model of reform which in turn followed the approach of the Canadian courts. New Zealand was in the process of enacting the proposals for reform made by the New Zealand Law Commission. Mr YOUNG added that the Sub-committee had also made reference to other common law jurisdictions in formulating some of the proposals in the Core Scheme.

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70. Mr Justice STOCK added that the Sub-committee had examined the strengths and weaknesses of the reform models in other jurisdictions thoroughly before formulating its recommendations on the model to be adopted in Hong Kong. He stressed that the Core Scheme was a package of proposals rather than a series of individual proposals. It was intended to be read and understood holistically.

71. Mr Martin LEE pointed out that in a lot of common law jurisdictions where Christianity was a prominent religion, people believed that to make a false oath was a sin. However, the people in Hong Kong might not take an oath so seriously, since most of them were not Christians. He expressed concern that the difference in culture might affect the effective operation of the proposed Core Scheme in Hong Kong. He also considered it more difficult to apply the principles of the admission of hearsay evidence proposed by the Sub-committee in criminal cases than in civil cases, because defendants in criminal cases were presumed to be innocent unless convicted in a court of law.

72. Referring to paragraph 2.4 in page 8 of the Consultation Paper, Mr Justice STOCK said that the Sub-committee had considered the reasons for excluding hearsay evidence, including the lack of cross-examination and the absence of an oath. He further explained that in the exceptions to the hearsay rule described in pages 19 to 22 of the Consultation Paper, hearsay evidence was admitted in the absence of cross-examination, because it was believed that the evidence was intrinsically reliable. Mr Justice STOCK reiterated that hearsay evidence would not be admissible, if witnesses were available to give evidence at trials, or unless the conditions of necessity and threshold reliability were satisfied.

73. The Chairman said that consultation on the Consultation Paper was still in progress. The Law Reform Commission would publish the final report on the outcome of the consultation exercise. The Chairman added that since the proposed reform was an important issue, it was necessary to consult the public and examine the proposals carefully.

VIII. Any other business

74. There being no other business, the meeting ended at 7:05 pm.

Council Business Division 2
Legislative Council Secretariat
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