立法會
Legislative Council

Ref : CB2/PL/AJLS

LC Paper No. CB(2)2826/07-08
(These minutes have been seen by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 23 June 2008, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Hon Margaret NG (Chairman) Hon Martin LEE Chu-ming, SC, JP (Deputy Chairman) Hon James TO Kun-sun Hon Jasper TSANG Yok-sing, GBS, JP Hon Emily LAU Wai-hing, JP Hon CHOY So-yuk, JP Hon Audrey EU Yuet-mee, SC, JP
Members absent	:	Hon Miriam LAU Kin-yee, GBS, JP Hon LI Kwok-ying, MH, JP
Public Officers attending	:	Item III The Administration Mr Thomas KWONG Deputy Director of Legal Aid Miss Christine CHOW Kam-yuk Principal Assistant Secretary for Home Affairs Miss Leonie LEE Assistant Secretary for Home Affairs Item IV The Administration Mr Benedict LAI Law Officer (Civil Law)

Mr Simon LEE
Deputy Law Officer (Civil)

Ms Adeline WAN
Senior Government Counsel

Item V

The Administration

Mr I Grenville Cross, SC
Director of Public Prosecutions

Ms Anthea PANG
Senior Assistant Director of Public Prosecutions

Ms Olivia TSANG
Senior Government Counsel (Acting)

Attendance by invitation : Item IV

Hong Kong Bar Association

Mr Rimsky YUEN, SC

Item V

Hong Kong Bar Association

Mr Derek CHAN

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

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Mrs Fonny TSANG
Legislative Assistant (2)3

Action

I. Confirmation of minutes of meeting
(LC Paper No. CB(2)2325/07-08 - Minutes of meeting on 28 April 2008)

The minutes of the meeting held on 28 April 2008 were confirmed.

II. Information papers issued since last meeting
(LC Paper No. CB(2)2090/07-08(01) - Law Society of Hong Kong's letter dated 26 May 2008 on "Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants"

LC Paper No. CB(2)2283/07-08(01) - Administration's paper on the outcome of the consultation exercise and the views of the Department of Justice on the preferred Chinese equivalents for "advocacy" and "advocate")

2. Members noted that the above papers had been issued since the last meeting.

III. Pilot Scheme on Mediation of Legally-Aided Matrimonial Cases
(LC Paper No. CB(2)2327/07-08(01) - Background Brief on "Pilot Scheme on Mediation in Legally-aided Matrimonial Cases" prepared by the Legislative Council Secretariat

LC Paper No. CB(2)2327/07-08(02) - Administration's paper on "Proposal on the Permanent Arrangement for Mediation in Legally Aided Matrimonial Cases"

LC Paper No. CB(2)2327/07-08(03) - Law Society of Hong Kong's letter dated 3 June 2008 on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases")

3. Principal Assistant Secretary for Home Affairs (PASHA) briefed members on the main features of the proposed permanent arrangement for mediation in legally-aided matrimonial cases as set out in the paper. Under the arrangement, mediation in legally-aided matrimonial cases would be funded on a statutory basis through amending the Legal Aid Ordinance (LAO) (Cap. 91).

4. The Chairman said that under the existing practice, a party losing a court case was liable to pay the full legal costs of the opposite party. She asked whether the practice was applicable to mediation costs. Deputy Director of Legal Aid (DDLA) explained that under the existing practice, both parties would pay for their own share of the mediators' fees.

5. The Chairman said that given that mediation fee was not part of litigation fees, it was doubtful whether the Legal Aid Department (LAD) had the right to recover mediators' fees from the legally-aided party. The Administration should state clearly in the legislative proposal to be presented to LegCo the arrangement for payment of

Action

mediators' fees. DDLA responded that although the court might not make an order for costs in respect of mediation fees, the legally-aided person's share of the mediation costs would nevertheless form part of the Director of Legal Aid's (DLA) net liability on the aided person's account in the legally-aided proceedings and would be recouped from the aided person where payment of contribution was required and/or where property was recovered or preserved.

6. On the issue of whether legal aid should fund both parties' mediator's fees, DDLA said that in line with the current legal aid policy which required that only persons who passed the means and merits tests would be eligible for legal aid, the LAD would only finance the legally-aided persons' share of the mediators' fees. As legally-aided persons might be required to contribute towards the costs and expenses incurred by the LAD, mediators' fees would be recovered from the contribution paid and/or money or properties recovered or preserved in the legally-aided proceedings. In other words, as with all civil legal aid cases, the DLA's first charge would apply. In the event that the legally-aided person could not recover any money or property under the proceedings, the LAD would fund the legally-aided person's share of the mediator's fees.

7. Noting that the Administration proposed to cap the mediation process at 15 hours per case, Mr Martin LEE asked whether any guideline would be provided to mediators as to when the mediation process should discontinue.

8. PASHA responded that according to the experience of the Pilot Scheme on Family Mediation administered by the Judiciary, the duration of a mediation case would depend on the complexity of the dispute which required mediation and the degree of cooperation of the participants. If the case was less complicated and the process went smoothly, it would take two to three mediation sessions, each lasting for about two hours, for reaching an agreement. The one-year Pilot Scheme on Mediation in Legally-Aided Matrimonial Cases (the Pilot Scheme) launched in March 2005 showed that a mediator would usually have an idea as to whether mediation should continue after six hours' mediation.

9. DDLA said that although the number of hours allowed for the mediation process would be initially capped at 15 hours per case, additional hours required for completing the mediation process and the additional costs incurred would be considered by the DLA on a case-by-case basis. The DLA would have regard to the advice of the mediator concerned and the Mediation Coordinator's Office (MCO) which monitored the progress of mediation cases.

10. Ms Audrey EU sought clarification as to whether the ceiling of 15 hours per case referred to the actual time spent in the mediation process or included preparatory work done by a mediator. She also asked about the consequences if a party had unreasonably prolonged the mediation process. According to her experience, it would not take long to ascertain whether a case could be mediated. In this connection, she suggested that the hours allowed for the mediation process should be capped at a low level as a start, and to be extended when there was a need to do so,

Action

e.g. initially capped at six hours which would be extended for another nine hours if required. Miss CHOY So-yuk expressed support for Ms EU's interim checkpoint approach.

11. DDLA clarified that the 15 hours referred to the actual time spent in the mediation process, and excluded preparatory work done by a mediator. A mediator would need to decide whether mediation should continue if he was aware that one party was insincere about reaching an agreement and had prolonged the mediation process unreasonably. DDLA said that the LAD would consider the interim checkpoint approach suggested by Ms Audrey EU.

LAD

12. Miss CHOY So-yuk enquired about the mediation costs. PASHA responded that as reported in the last Panel meeting in June 2007, the average fee paid to the mediators under the Pilot Scheme was $5,413 per case. The median total cost (litigation costs and mediation costs) for the 31 mediated cases which had finalized the accounts was $21,050.

13. The Chairman concluded that the Panel was in support of the proposed permanent arrangement for mediation in legally-aided matrimonial cases. In response to the Chairman, PASHA advised that the Administration was consulting the Legal Aid Services Council, the two legal professional bodies and relevant mediation bodies on the proposed arrangement. Subject to their views, the Administration would commence work on the legislative amendments with a view to introducing the amendments in the next LegCo term.

IV. Development of mediation services

(LC Paper No. CB(2)2327/07-08(04) - Administration's paper on "Development of mediation services")

14. Law Officer (Civil Law) (LO) briefed members on the recent developments of mediation services as set out in the paper. Apart from holding the mediation conference in November 2007, a cross-sector Working Group on Mediation (the Working Group) had been established to make recommendations on how mediation could be more effectively and extensively used to resolve disputes. Following the decision of the Working Group, three Sub-groups were formed in April 2008. They were the Public Education and Publicity Sub-group, the Accreditation and Training Sub-group and the Regulatory Framework Sub-group. The Sub-groups would study and make findings on specific issues for the consideration of the Working Group in the next 12 to 18 months. The Working Group would then submit its recommendations within two years' time.

15. Mr Rimsky YUEN of the Hong Kong Bar Association, who was also a member of the Working Group, said that one of its members had reflected to him that due to the unavailability of venue, he could not provide pro bono mediation to disputed parties of a case. Mr YUEN urged that in order to promote mediation as an alternative dispute resolution (ADR) and to develop Hong Kong as an ADR centre in

Action

Asia, the question of venue should be addressed. In the short run, the Administration could explore how venues for community mediation such as building management disputes could be provided. In the longer term, the Administration could work out a plan to enhance the present facilities, e.g. to expand the venue used by the Hong Kong International Arbitration Centre (HKIAC), in order to develop Hong Kong as an ADR centre in Asia. He expressed concern that if action would only be taken in this respect after the Working Group had concluded its study and made its recommendations in two years' time, neighbouring cities such as Singapore by then might already gain competitive edge over Hong Kong as an ADR centre.

16. The Chairman said that mediation could be quite costly if the cost of the mediation venue was taken into account. She expressed concern that mediation could not be carried out in the absence of suitable venues.

17. LO and Deputy Law Officer (Civil) (DLO) said that some members of the Working Group had raised the same concern and the matter had been referred to the Public Education and Publicity Sub-group for consideration. The Sub-group would consider the various venues that might be available for mediation and make recommendations to the Working Group. It was noted that the types of venue required for mediation would depend on the nature of disputes. For community disputes such as building management disputes, it would not be cost-effective to rent a venue for mediation. The Administration would explore whether venues were available in Government premises (e.g. community centre) with the assistance of Government departments (e.g. Home Affairs Department), and in private premises (e.g. management office of an estate). For international or commercial disputes, the parties concerned could better afford the cost of mediation and venues in the HKIAC, conference centres or hotels might be considered. The Sub-group would consider how to resolve the problem in the short term and in the longer term, and would make recommendations to the Working Group in due course.

18. Ms Audrey EU considered it important to help the ordinary people to resolve disputes by quicker and more effective ways instead of requiring them to resort to the judicial process. In order to facilitate and encourage community mediation such as mediation of building management disputes, it would be helpful if district offices could make available some venues for conducting mediation, and the Home Affairs Department could provide administrative support for mediators working on a pro bono basis.

DoJ

LO said that he would relay Ms EU's views to the Working Group.

19. The Chairman noted that all members of the Working Group had a legal background. She said that while these members would help develop a regulatory framework for mediation, the membership should be more diversified, e.g. to include representatives from the Home Affairs Department and Consumer Council to deal with practical issues relating to mediation. She pointed out that the Reports on the Consultancy Study of the Demand for and Supply of Legal and Related Services published by the DoJ in May 2008 revealed that many people in Hong Kong had experienced difficult-to-solve problems in incidents related to consumer matters and had hoped that such disputes could be resolved by mediation, given that legal costs

Action

involved would be disproportionate to the amount of disputes. There was, however, a lack of supply of free legal or mediation services on consumer disputes.

20. LO responded that the relevant part of the Report on the Consultancy Study would be drawn to the attention of the Working Group at the next meeting and the Working Group would consider how to promote understanding and awareness of mediation services to the community. He said that although the representatives sitting on the Working Group all had legal background, the organisations they represented had a broad membership, comprising members from various fields such as social welfare and engineering. In addition, members of the three Sub-groups consisted of representatives from the Home Affairs Department and the Consumer Council. The Working Group had not ruled out the possibility of inviting experts of various fields to participate in its discussion when there was a need to do so.

21. The Chairman enquired about the work of the Accreditation and Training Sub-group and the Regulatory Framework Sub-group.

22. Mr Rimsky YUEN said that the regulatory framework for mediation was a complex issue which required in-depth study by the Regulatory Framework Sub-group. For instance, whether enforcement of mediation agreement should be regulated by law would make a big difference. As regards qualification of mediators, many overseas countries did not have an accreditation system. Australia was one of the few countries which had recently adopted an accreditation system for mediators. The Accreditation and Training Sub-group would study whether and if so how to implement such a system in Hong Kong.

23. LO said that the Sub-groups would study overseas practices and explore how practical problems could be resolved with a view to submitting their reports to the Working Group in 18 months. The Working Group would release its report in about two years.

DoJ

24. The Chairman requested the Administration to make an interim report to the Panel in the next legislative session.

V. Pre-trial interviewing of witnesses by prosecutors

(LC Paper No. CB(2)1762/07-08(02) - Letter dated 28 April 2008 from Secretary for Justice on "Pre-trial interviewing of witnesses by prosecutors"

LC Paper No. CB(2)2327/07-08(05) - Administration's paper on "Pre-trial Interviewing of Witnesses by Prosecutors")

25. The Chairman said that it had come to the attention of the Panel that the Director of Public Prosecutions (DPP) had established a working group in 2007, chaired by the Senior Assistant Director of Public Prosecutions (SADPP), to examine the feasibility of introducing a scheme of pre-trial witness interviews by prosecutors (PTWI) in Hong Kong. The working group had recommended and DPP had

Action

accepted that before any decisions were taken, a nine-month monitoring exercise would be conducted to collect relevant statistics and information with effect from 1 April 2008. In response to the Panel, the Administration had provided a paper on the existing policy and practice on PTWI, the objectives of the monitoring scheme, and the experience of, and the schemes adopted in, other major common law jurisdictions.

26. At the invitation of the Chairman, DPP gave an opening statement in respect of PTWI as set out in the Appendix (English version only).

27. The Chairman said that under the existing practice, prosecutors were not allowed to interview witnesses before trial. Given that the PTWI scheme departed from the present practice, she asked whether the Hong Kong Bar Association had been consulted on the matter, whether it was aware of the revision made to the Prosecutors' Case Report Form, and about its initial view on the scheme.

28. Mr Derek CHAN of the Bar Association said that the Bar Association had not been consulted on the PTWI scheme, nor was it notified of the revision made to the Prosecutors' Case Report Form. As the Bar Association did not have the opportunity to discuss the matter, he could only give his personal view. He raised two major concerns -

(a) the purpose of PTWI was to give the prosecutor an opportunity to form a view about the reliability of a witness's evidence, thereby weeding out weak cases at an early stage. He queried whether the court or the prosecutor should be the one to assess the credibility and reliability of witnesses' evidence. He cited an example that under the present arrangement, the court might find a witness's evidence credible whereas under PTWI, prosecution might have stopped because the prosecutor formed the view that the witness's evidence was unreliable; and

(b) for complex commercial cases, the evidence given by witnesses could be very long. Problems would arise when the evidence given by a witness to a prosecutor was different from that given in the court. Under the circumstances, the prosecutor concerned might be asked to give evidence in court as a witness. However, the problem might be overcome if the interview was tape recorded, as suggested by DPP in his opening statement.

Mr Derek CHAN said that the Bar Association would fully consider the recommendations of the working group when they were available. At this stage, the Bar Association was not in a position to give its view on the matter.

29. DPP responded with the following points -

(a) Mr Derek CHAN had raised the point that it should be left to the court rather than the prosecutor to decide on the credibility and reliability of

Action

witnesses' evidence. From the view of the prosecution, one sought where possible to make sure that the case was a strong one before taking it to court. If a weak case could be identified at the early stage, the suspect would not have to face the ordeal of trial. Jurisdictions adopting PTWI took the view that PTWI was designed to avoid injustice by ensuring that people would not be wrongly placed on trial; and

(b) the working group had yet to study the procedure for prosecutors to interview witnesses. After the consultation exercise conducted on PTWI at the direction of the Attorney General of England and Wales in 2003, the Attorney General concluded in his report that the appropriate way was to formulate a code of practice to give guidance to prosecutors on how they should conduct interviews. One of the matters emphasised was that recordings should be kept for PTWI proceedings. Thereafter, a pre-trial pilot on PTWI was conducted in northern England between January 2006 and February 2007 and recordings had been kept throughout the pilot period. The pre-trial pilot was adjudged a success.

30. Mr Martin LEE expressed concern about the potential risk of coaching or contaminating the evidence of the witness in the course of PTWI. He was not assured by the view of the Attorney General of England and Wales that the risk was more apparent than real and there was no basis to suggest that prosecutors would be more likely than law enforcers to coach the witness.

31. DPP responded that the working group was alert to the concern and would examine the issue of coaching carefully. In England, the Attorney General had concluded that proper training, and the adoption of a code of practice, would sufficiently address the concern.

32. Mr Martin LEE asked about the number of cases involved in the pre-trial pilot in northern England, and the number of weak cases weeded out because of the conduct of PTWI.

33. SADPP said that a total of 93 cases had been considered for conducting PTWI during the pre-trial pilot and at the end 47 interviews were conducted. She did not have information on how many cases had been weeded out as a result of the conduct of PTWI.

34. The Chairman raised the following concerns -

(a) the present practice was for law enforcers to interview the witnesses involved in a criminal investigation, and for prosecutors, when assessing the strength of the case for prosecution, relied on the written witness statements and other relevant documents provided by the law enforcers. The practice would prevent the risk of coaching or contamination of a witness's evidence by a prosecutor before trial. As the introduction of PTWI represented a drastic departure from the existing practice of

Action

interviewing witnesses, the Chairman expressed concern that there was no prior consultation by the Administration with the two legal professional bodies before the launch of the monitoring scheme; and

(b) in order to monitor cases with a view to assessing the need to introduce the PTWI scheme in Hong Kong, the Prosecutors' Case Report Form had been revised requiring trial counsel and prosecutors to answer two additional questions. The two questions were -

"(i) if the case resulted in an acquittal, was that because the evidence of the main civilian witness(es), including the victim, was not considered credible?

(ii) If so, do you consider that it would have been beneficial for a prosecutor to have interviewed the witness(es) in question prior to trial, in order to make an assessment of the witness's evidence, and thereby to seek to identify potential problems at an early stage?"

The Chairman enquired how the two questions could help the prosecution decide whether the PTWI scheme should be proceeded with.

35. DPP assured members that during the monitoring period, no change was made to the existing practice whereby law enforcers interviewed and obtained written statements from witnesses involved in criminal investigation. The working group would make recommendations in 2009 and all interested bodies would be consulted if it was decided that the PTWI scheme should be taken forward.

36. SADPP supplemented that the Administration had made reference to the practice in England and Wales in designing the two questions. In a survey conducted in England and Wales, it was revealed that about 22% of the cases resulted in acquittal because of the discrepancies between evidence collected in court and written witness statements provided by law enforcers, and 9.8% of the cases resulted in acquittal because the court called into question the credibility and reliability of witnesses' evidence. Based on their findings, the Administration had designed and added the two questions to the Prosecutors' Case Report Form.

37. Members noted that according to paragraph 4 of the Administration's paper, the overall conviction rates in 2007 were 76.6% at the Magistrates Court, 90.5% at the District Court, and 93.4% at the Court of First Instance. The Chairman held the view that there was no relationship between the conviction rates and the PTWI scheme. Mr Martin LEE sought clarification on whether the conviction rates referred to cases which had pleaded guilty or which were found guilty, and asked about similar conviction rates in jurisdictions which had adopted PTWI.

Action

38. DPP said that the conviction rates were provided to the Panel on request. He agreed that the conviction rates could not be the sole test in an exercise of this type. He clarified that the conviction rates set out in paragraph 4 of the Administration's paper included cases where defendants had pleaded guilty and were found guilty. In 2007, the conviction rates after trial in the Magistrates Court, the District Court and the Court of First Instance were 58%, 69% and 72.4% respectively. As the conduct of PTWI was a standard practice in Canada, New South Wales of Australia and Scotland for many years, it was difficult to set the cut off point to ascertain whether their implementation had resulted in higher conviction rates.

39. Mr Martin LEE asked whether the Administration had considered asking the law enforcement agencies to beef up their investigation and to ask more questions when taking witness statements, with a view to reducing the number of acquitted cases.

40. The Chairman said that if the conviction rates improved after the implementation of PTWI, the public might have a perception that this was the result of witness coaching or selective prosecution.

41. DPP said that the Administration had not formed any view on whether to adopt PTWI in Hong Kong. In his view, witness coaching was a real concern and he would not authorise the scheme to go ahead unless he was satisfied that it was fully addressed in the consultation process. He did not accept that the Police had any problem in taking witness statements at this stage. The Police had been investing a lot of time and effort in training new police officers to conduct thorough interviews with witnesses. In the pre-trial pilot conducted in northern England, all the interviews were recorded. If new issues came up in the course of the PTWI proceedings, they would be referred to the Police for further investigation if required. DPP stressed that the purpose of PTWI was to produce a higher quality of criminal justice and not to achieve a higher conviction rate. It was not in the interests of justice to take people to court if it was apparent that the person should not be placed on trial in the first place. It must be noted that common law jurisdictions which adopted PTWI regarded the practice as an essential safeguard to prevent unmeritorious cases proceeding to trial.

42. The Chairman asked why the Administration had not consulted the two legal professional bodies.

43. DPP explained that the working group had to collect statistics for the purpose of analysing the situation in Hong Kong and ascertaining whether there was any problem. The statistics in England and Wales quoted by SADPP earlier on indicated that about 30% of the cases could be unmeritorious. Depending on the results of the monitoring scheme, the working group might or might not recommend that PTWI should be adopted in Hong Kong. If it was considered beneficial to put in place the PTWI scheme, and if the recommendation was accepted by DPP and Secretary for Justice, there would be full discussion with the legal sector and other concerned parties, before a decision was made on the way forward.

Action

44. Ms Emily LAU held the view that a scheme which could weed out weak cases at an early stage was worth pursuing, given that a criminal offence was a serious matter and a person should not face the ordeal of trial if he was innocent in the first place. However, it was important for wide public consultation to be conducted on the PTWI scheme. She asked about the work plan of the working group.

45. DPP and SADPP responded as follows -

(a) the monitoring scheme ran from 1 April to 31 December 2008. The working group would gauge views and comments in relation to the questions raised in the Prosecutors' Case Report Form. At the same time, it would collect more information from other jurisdictions on their PTWI practices. Based on the statistics and the information collected, the working group would assess whether it was desirable to adopt the scheme in Hong Kong; and

(b) in England and Wales, a questionnaire containing a series of questions relating to PTWI was prepared and sent to the legal professional bodies and human rights groups for their views. At present, the working group did not have empirical data and sufficient information to prepare a questionnaire. As the monitoring scheme would end in December 2008, the working group might adopt the line of England and Wales and send a questionnaire to the two legal professional bodies, victims groups, and other relevant parties to gauge their views in early 2009.

46. The Chairman concluded the discussion of the Panel as follows -

(a) members supported the view that in the interest of criminal justice, prosecution should not be instituted if there was insufficient evidence;

(b) as the subject of PTWI involved many sensitive and important issues, consultation by the Administration with the two legal professional bodies should be conducted now. Given that the Law Society was seeking an understanding of the overseas experience of PTWI from their counterparts in other jurisdictions, it would be useful for the Administration to exchange views with the two legal professional bodies during the information collection stage;

(c) it was easy to overstep the line between collecting credible evidence and coaching or contaminating the evidence of the witness in the course of PTWI. Given that members remained concerned about the risk involved, the Administration should prepare a comprehensive plan on PTWI and explain how members' concern would be addressed; and

DoJ (d) the Administration should report progress to the Panel in due course.

Action

47. There being no other business, the meeting ended at 6:35 pm.

Council Business Division 2
Legislative Council Secretariat
29 September 2008

LegCo Panel on Administration of Justice and Legal Services
Meeting on 23 June 2008

Opening Statement by the Director of Public Prosecutions in respect of Pre-trial Interviewing of Witnesses by Prosecutors

Madam Chairman, Ladies and Gentlemen,

I welcome this opportunity to address the Panel on the pre-trial interviewing of witnesses by prosecutors ('PTWI').

2. The working group which will be examining this issue in 2009 is chaired by Ms. Anthea Pang, SADPP, who accompanies me today, together with Ms. Olivia Tsang, SGC.

3. The working group has yet to begin its deliberations. Once its report is finalised, its recommendations will be carefully considered. If the view is reached that the PTWI makes good sense, there will be full discussion with all interested parties before any decisions are taken to implement the PTWI.

4. What can be said at this early stage, is that major common law jurisdictions have adopted the PTWI, and its use is regarded as basic good practice. It is viewed in those jurisdictions as an additional safeguard against the prosecution of those who might otherwise have to stand trial as weak cases in which the reliability of key prosecution witnesses is questionable are weeded out at an early stage. Indeed, the preliminary researches of the working group have identified no common law jurisdiction in which the PTWI having been examined, has subsequently been rejected. Two months ago, England and Wales adopted the PTWI, and the example of that jurisdiction may prove instructive for the working group.

5. On 20 December 2004, Lord Goldsmith QC, then Her Majesty's Attorney General for England and Wales, issued his report on the use of the PTWI. In his introduction, Lord Goldsmith said :

> *Many members of the public would be surprised to learn that in England and Wales prosecutors are not entitled to interview witnesses before trial, even when they are key witnesses whose credibility may be critical to whether a prosecution should go ahead or not. The decision whether to go ahead is for the prosecutor. Yet he is not presently allowed, himself, to assess the reliability or credibility of that witness's evidence. Prosecutors in other countries would be similarly surprised.*
>
> *For it is striking that it is only in England and Wales that prosecutors do not have direct access to witnesses even in order to assess their credibility and reliability – even though there is no reason why an impartial public prosecution service should not undertake this role. If my vision of the CPS as a world class prosecuting service, admired and respected, and seen by all as a champion for victims and justice is to be realised, this must change.*
>
> *The prosecutor is in charge of the prosecution; it is for the prosecutor alone to decide which evidential issues are significant and which require further exploration. The responsibility for this is, rightly, placed in the hands of a qualified lawyer because it is recognised that they are skilled in assessing evidence. However, at present, prosecutors are required to reach fully informed decisions about whether there is sufficient evidence to proceed in a case – without it seems one essential element – the option of speaking to a witness to assess their credibility and reliability, where it is considered necessary to do so.*
>
> *The public rightly expects prosecutors to prosecute criminal offences, robustly, promptly and fairly and to bring to trial only those against whom there is an adequate and properly prepared case (and whose prosecution is justified in the public interest) and that prosecutors have confidence in the reliability of the evidence. Logic dictates that this*

> *expectation can only be met if prosecutors are able to interview witnesses about their evidence before trial.*
>
> *I have therefore concluded, for the reasons set out in this paper, that the position ought to change so that prosecutors should have the ability in the future to interview witnesses.*

6. Thereafter, a pre-trial witness pilot was conducted in northern England, and this was adjudged a success. On 27 November 2007, Baroness Scotland QC, Lord Goldsmith's successor as Attorney General for England and Wales, announced that henceforth prosecutors would have the opportunity to interview key witnesses about their evidence. She explained that the interview itself was designed to address three key purposes :

- To assess the reliability of the witness's evidence
- To assist the prosecutor in understanding complex evidence
- To explain court process and procedures.

Baroness Scotland said :

> *I am pleased to be announcing the national roll out of something that I truly believe will make a difference to strengthening cases, and play its part in improving witness support throughout the trial process. We have already made great progress across the criminal justice system since 2002 but this roll out, following the successful pilot, represents yet another step in our journey towards making the trial process the best it can be. I am particularly confident that this change in policy will be extremely valuable in cases where there are vulnerable witnesses.*

7. In consequence, the PTWI was adopted throughout England and Wales from April 2008.

8. The introduction of the PTWI represents an important change in the prosecution service in England and Wales. Like their counterparts in other common law jurisdictions, prosecutors in that jurisdiction can now ask witnesses about evidential issues. Before the PTWI was adopted, the issue of the possibility of coaching or otherwise contaminating the evidence of the witness in the course of the PTWI was

carefully considered. In the event, the experience of the pre-trial witness pilot showed that this risk was minimal with training and guidance. The message to emerge from the pilot was that the PTWI is a valuable tool which should be used where necessary.

9. The attraction of the PTWI is said to lie in the opportunity it gives to prosecutors to assess for themselves, and not at second-hand, the reliability of the witness's evidence at an early stage in the proceedings and to make better informed decisions about cases. At the same time, everything is tape recorded, and this is regarded as a means of protecting the integrity of the interview.

10. In 2009, we will know what recommendations the working group will make, and the debate can begin. All interested bodies will be consulted if it is decided to take the PTWI scheme forward. As things stand, our minds are open, and the working group will carefully consider the pros and cons of the PTWI, as well as its relevance in Hong Kong.

11. If the PTWI is shown to be a scheme which has positive advantages for criminal justice, there can be no good reason why we should not be prepared to think outside the box in order to improve our system. It may seem incredible to some people that a prosecutor has to decide if a witness's evidence is capable of belief without having any direct contact with the witness to inform that decision. At the same time, there may be cogent arguments that if prosecutors interview witnesses before trial there may be risks. All such issues would need to be fully addressed in any consultation process. But that is still a long way off. For our part, we have open minds on the issue, and we await with interest the submission of the report by the working group in 2009.

I. Grenville Cross, SC
Director of Public Prosecutions
23 June 2008