立法會
Legislative Council

LC Paper No. CB(4) 714/13-14
(These minutes have been seen by the Administration)

Ref : CB4/PL/AJLS

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 25 March 2014, at 4:30 pm
in Conference Room 1 of the Legislative Council Complex

Members present	:	Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman) Hon Dennis KWOK (Deputy Chairman) Hon Albert HO Chun-yan Hon James TO Kun-sun Hon CHAN Kam-lam, SBS, JP Hon Emily LAU Wai-hing, JP Hon TAM Yiu-chung, GBS, JP Hon Abraham SHEK Lai-him, GBS, JP Hon Ronny TONG Ka-wah, SC Hon Starry LEE Wai-king, JP Hon CHAN Kin-por, BBS, JP Hon Paul TSE Wai-chun, JP Hon Alan LEONG Kah-kit, SC Hon LEUNG Kwok-hung Hon WONG Yuk-man Hon Michael TIEN Puk-sun, BBS, JP Hon NG Leung-sing, SBS, JP Hon YIU Si-wing Hon MA Fung-kwok, SBS, JP Hon Alice MAK Mei-kuen, JP Hon Martin LIAO Cheung-kong, JP Hon TANG Ka-piu Dr Hon CHIANG Lai-wan, JP Hon CHUNG Kwok-pan Hon Tony TSE Wai-chuen

Members Absent	:	Hon Steven HO Chun-yin Dr Hon Elizabeth QUAT, JP
Public Officers attending	:	Item III The Administration Mr Gilbert MO Deputy Law Draftsman (Bilingual Drafting & Administration) Department of Justice Ms Leonora IP Senior Assistant Law Draftsman (Laws Publication) Department of Justice Ms Karmen KWOK Senior Government Counsel Department of Justice Item IV The Administration Ms Adeline WAN Deputy Solicitor General (General) (Acting) Department of Justice Mr LEE Tin-yan Assistant Solicitor General Department of Justice Miss Phenix TSE Government Counsel Department of Justice Item V The Administration Ms Adeline WAN Deputy Solicitor General (General) (Acting) Department of Justice

Mr LEE Tin-yan
Assistant Solicitor General
Department of Justice

Attendance by invitation :

Item III

Hong Kong Bar Association

Mr LO Pui-yin

Ms Liza Jane CRUDEN

The Law Society of Hong Kong

Mr Stephen HUNG
Vice-President

Mr Kenneth FOK
Director of Practitioners Affairs Department

Ms Kally LAM
Assistant Director of Practitioners Affairs Department

Item IV

Hong Kong Bar Association

Mr Edwin CHOY

The Law Society of Hong Kong

Mr Stephen HUNG
Vice-President

Mr Junius HO
Chairman, Legal Aid Committee

Mr Amirali NASIR
Member, Legal Aid Committee

Mr Kenneth FOK
Director of Practitioners Affairs Department

		Ms Kally LAM Assistant Director of Practitioners Affairs Department
		Item V
		Hong Kong Bar Association
		Mr Edwin CHOY
		The Law Society of Hong Kong
		Mr Stephen HUNG Vice-President
		Mr Kenneth FOK Director of Practitioners Affairs Department
		Ms Kally LAM Assistant Director of Practitioners Affairs Department
Clerk in attendance	:	Miss Mary SO Chief Council Secretary (4)2
Staff in attendance	:	Mr Timothy TSO Assistant Legal Adviser 2
		Ms Cindy CHAN Senior Council Secretary (4)5
		Ms Mandy WAN Administrative Assistant (4)1

I. Information paper(s) issued since the last meeting

Members noted that the following paper had been issued since the last meeting -

(LC Paper No. CB(4)439/13-14(01) -- Judiciary Administration's paper on "Review of Court Waiting Time Targets")

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II. Items for discussion at the next meeting

(LC Paper No. CB(4)486/13-14(01) -- List of outstanding items for discussion

LC Paper No. CB(4)486/13-14(02) -- List of follow-up actions)

2. Members agreed to discuss the following issues at the next regular meeting scheduled for 22 April 2014 at 4:30 pm -

(a) Review on Family Procedure Rules; and

(b) Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone.

III. Establishment of an electronic database of Hong Kong legislation with legal status

(LC Paper No. CB(4)486/13-14(03) -- Department of Justice ("DoJ")'s paper on "Project to implement a verified, authenticated, searchable electronic database of Hong Kong legislation")

Briefing by the DoJ

3. With the aid of a power-point presentation, Deputy Law Draftsman (Bilingual Drafting & Administration) ("DLD(BD&A)") briefed members on the progress of the DoJ's project to implement a verified, authenticated, searchable electronic database of Hong Kong legislation ("the new Database") in the past few years. Particularly, the new Database would be implemented in two phases, with Phase 1 to be completed around mid-2015 and Phase 2 in 2016-2017 at the earliest. Phase 1 mainly concerned the implementation of a new laws compilation and publication system for Law Drafting Division's internal use. Phase 2 covered functions for use by the general public including online publication of legislation, dissemination of legislation-related information and legislation retrieval.

(*Post-meeting note*: The power-point presentation materials on the subject were circulated to members vide LC Paper No. CB(4)510/13-14(01) on 28 March 2014.)

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Views of the Hong Kong Bar Association ("the Bar Association")

4. Mr LO Pui-yin said that the Bar Association was supportive of DoJ's project to implement the new Database and would make any appropriate suggestions on the proposed layout of the bilingual verified copy of legislation through its representative sitting on the Hong Kong Legislation Database User Liaison Group ("the Liaison Group").

Views of the Law Society of Hong Kong ("the Law Society")

5. Mr Stephen HUNG said that the Law Society had suggested to the Liaison Group that more value-added services should be introduced when implementing the new Database, such as providing cross-references among different ordinances by means of hyperlinking.

Discussion

6. In anticipation of the phasing-out of the Loose-leaf Edition tentatively scheduled for 2020-2021, Mr LO Pui-yin of the Bar Association and Mr Stephen HUNG of the Law Society sought clarification as to how the Administration could in future ensure free access to Hong Kong legislation by individuals who had no access to the Internet. DLD(BD&A) responded that it was the plan of DoJ that after the Loose-leaf Edition was phased out, a verified copy of Hong Kong legislation printed directly from the new Database in a format similar to the existing Loose-leaf Edition would be placed at certain major public libraries for free access by the general public. Members of the public might also contact the Information Services Department to purchase a verified copy of a piece of Hong Kong legislation on a print-on-demand basis. Alternatively, members of the community would be able to gain free access to the new Database via the Internet by making use of the computer facilities at public libraries.

7. Mr CHUNG Kwok-pan asked why the new Database was important for Hong Kong to become the regional hub for legal services and dispute resolution. DLD(BD&A) responded that access to law was a fundamental element of a jurisdiction that upheld the rule of law. Apart from nurturing of local legal talent, enhancement of the legal framework and provision of office space for renowned legal-related organizations to build up its presence in Hong Kong, the Administration was also committed to building the necessary infrastructure to promote free online access to law by the public. In addition, with the availability of an updated, reliable and searchable online consolidated legislation database with legal status, the legal profession would be able to conveniently and efficiently locate current and historical versions of Hong Kong legislation, which in turn would enhance overall efficiency of their work and

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help bring down their operating costs.

8. Mr Dennis KWOK said that at present, court users often found the court forms on the BLIS platform cumbersome to manage. He suggested that DoJ should take the opportunity to enhance the user-friendliness of its online services, such as enabling users of the new Database to perform data entry and print out the completed court forms directly from the system. Mr KWOK noted that the Judiciary was in the process of revamping its various information technology systems. He therefore suggested that DoJ should work in tandem with the Judiciary to come up with other online services to meet the needs of court users, such as retrieval of the relevant sections of legislation in appropriate court proceedings.

9. Senior Assistant Law Draftsman (Laws Publication) ("SALD(LP)") responded that having regard to past experience with the constraints of the BLIS, appropriate measures had been taken to work with the contractor for the project before the start of the design of the new Database, with a view to improving the situation. DoJ will endeavour to make available statutory forms in improved format for viewing and printing purposes. DoJ planned to introduce user flexibility of printing out statutory court forms etc. from the new Database in various formats. DLD(BD&A) supplemented that the Judiciary was represented on the Liaison Group and its views would be gauged on particular topics concerning court users.

10. Mr WONG Yuk-man expressed concern as to whether the design and functions of the new Database would catch up with the rapid advancement of information technology upon the completion of the entire project in 2020-2021. In particular, he queried about the duration for project delivery of the new Database, disregarding the fact that the legislation data in the BLIS had been in use for a long time. Further, Mr WONG opined that the design and functions of the new Database should not only serve the legal sector, but should also serve other quarters of the community. He considered that opportunity should be taken of the implementation of the new Database to introduce more value-added services to members of the public, including providing a search function to facilitate users in searching judgments handed down by court or the relevant case law in appropriate precedent cases. Most importantly, all the information on previous judgments of the court or precedent cases provided therein should be made available in both Chinese and English for easy reference by the community at large.

11. DLD(BD&A) explained that as both the Chinese and English texts of legislation were to be captured in the new Database and the two texts were given equal authentic status, the nature and scope of the project was unprecedented. Indeed, there had been almost one-year delay due to the

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cancellation of the first tender and subsequent re-tendering exercise. Moreover, the project involved a large volume of legislation data and many fine details in the verification and checking of the accuracy of the legislation across the whole consolidated text. Unlike the BLIS, the legislation data in the new Database was to be given legal status and hence, greater efforts had to be put in to reduce the risk of error. DoJ noted that projects of similar scale in other common law jurisdictions, such as New Zealand, could take more than 10 years to complete.

12. Whilst indicating support for the implementation of the new Database, Mr Tony TSE was concerned that as the giving of user requirement for the functions to be developed in the new Database had commenced some time before the start of the project due to the re-tendering exercise, there might be a need for regular review and update on the technical requirements so as to catch up with the ever-changing environment. As the funding proposal was submitted to and endorsed by the Finance Committee in May 2010, Mr TSE enquired about the need for injection of additional funding to cope with any increase in project costs resulting from changing user requirements amid rapid information technology development.

13. DLD(BD&A) assured members that DoJ would keep a constant review of the project progress in this regard. As far as the technical requirements were concerned, DoJ had raised with the contractor the need to procure the latest versions of the software and hardware equipment as far as practicable for supporting the operation of the new Database. As regards the financial status, to date, DoJ saw no immediate need to seek injection of additional funding for the project, albeit DoJ did not rule out the possibility of putting up additional funding request for engaging temporary contract staff in the verification of legislation data at a later stage depending on the labour costs involved.

14. As the existing BLIS would retire when the new Database was in public use, Mr Paul TSE enquired about the serviceable period of the BLIS and the amount of total expenditure incurred for the implementation and maintenance of the BLIS. DLD(BD&A) responded that the BLIS was launched in 1997 to provide under a website maintained by DoJ a consolidated version of the laws of Hong Kong. On the amount of total expenditure incurred for the implementation and maintenance of the BLIS, DLD(BD&A) replied that he was not in a position to provide the total amount of cost incurred from the launch of BLIS in 1997 because many colleagues were involved in this period.

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15. Mr Paul TSE noted that the Hong Kong Legal Information Institute ("HKLII"), a project under a centre jointly established by the Department of Computer Science and Faculty of Law of the University of Hong Kong, had been offering a free and popular Internet facility providing the public with legal information relating to Hong Kong, as well as hyperlinks to previous judgments

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handed down by the court. Mr TSE queried about the need for a new Database under DoJ.

16. DLD(BD&A) explained that if the future database supplied features that were not within DoJ's control, that would be a practical difficulty for DoJ. DoJ found it difficult to extend the database to also incorporate the HKLII. The HKLII website was different from those for a legislation database with legal status.

17. SALD(LP) supplemented that DoJ was mindful of the wish of the public and legal practitioners for more value-added services. In fact, DoJ planned to have the new Database adopt the use of an open data format which would open up opportunities for third parties, such as legal publishers, to provide value-added services more easily.

18. The Chairman said that she had raised with the Administration on repeated occasions that the Chinese text of legislation was often quite difficult to follow. In this regard, she urged the Administration to take the opportunity to adopt measures for enhancing the readability of Chinese legislation whilst making editorial amendments to the existing legislation to ensure conformity to the new format and styles in the new Database.

19. On the screen layout of the new Database, the Chairman suggested that DoJ should consider displaying the corresponding bilingual information on the same page side-by-side for easy reference by members of the public. From her past experience in projects involving the provision of free online access to bilingual legal information, she noted that such presentation of bilingual information was technically feasible and well received by users of the facility. DLD(BD&A) replied in the positive. Indeed, as supported by the Liaison Group, DoJ would adopt measures to facilitate the corresponding bilingual texts of legislation to be displayed on the same page of the screen with a side-by-side alignment in the new Database.

20. The Chairman also pointed out that as the new Database was to be given legal status, timely maintenance of all information (including external hyperlinks) to be shown in the new Database was a must. In the event of any outdated or incorrect versions of information being shown, DoJ might run the risk of bearing any legal consequences. SALD(LP) responded that DoJ recognized the importance for timely maintenance of the legislation data in the new Database. On the design and functions of the new Database, DoJ would first consider the possibility of developing a function for hyperlinking internal cross-references among different ordinances. As the project progressed, consideration might also be given to extending cross-referencing function to other information maintained by DoJ in the website of the new Database. DoJ

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would not be able to introduce external hyperlinking (e.g. to judgments) in the new Database in this project.

IV. Abolition of the common law offence of champerty

(LC Paper No. CB(4)486/13-14(04) -- DoJ's paper on "Abolition of the common law offence of champerty"

LC Paper No. CB(4)486/13-14(05) -- Updated background brief on "Recovery agents" prepared by the Legislative Council ("LegCo") Secretariat)

Briefing by the DoJ

21. Deputy Solicitor General (General) (Acting) ("DSG(General)(Atg)") briefed members on the recent developments of the common law offences of maintenance and champerty in Hong Kong and the Administration's position in relation to such offences, details of which were set out in the DoJ's paper. Specifically, the Administration considered that the common law offences of maintenance and champerty should be preserved for the time being, in view of the following -

(a) the Court of Appeal ("CA") held in the case of *HKSAR v Mui Kwok Keung* [2014] 1 HKLRD 116 that the public policy against champertous agreements between lawyers and their clients had not changed, and the offences of maintenance and champerty were of particular application and significance in relation to legal practitioners; and

(b) abolition of the common law offences of maintenance and champerty would involve broader legal and policy concerns, including those of recovery agents and litigation funding companies.

However, the Administration would keep monitoring the development of the offences closely.

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Views of the Bar Association

22. Mr Edwin CHOY said that:

(a) although the Bar Association had not undertaken any detailed study as to whether the common law offences of maintenance and champerty should or should not be abolished in Hong Kong, what was said in the CA's judgment in *Mui Kwok Keung* in that "a lawyer's role is to advise his client with an unbiased judgment" should be emphasized. The Bar Association was very anxious to preserve the status quo whereby a lawyer should not be allowed to have an interest in the outcome of litigation; and

(b) the Bar Association broadly agreed with the Administration's position on preserving the common law offences of maintenance and champerty for the time being. The Bar Association welcomed the Law Reform Commission ("LRC") to look into this matter, especially if the Court of Final Appeal ("CFA") in judging *Mui Kwok Keung* case came to a view that the matter was suitable for detailed research and study.

Views of the Law Society

23. Mr Junius HO said that -

(a) the Law Society held a conservative and neutral stance on the abolition of the common law offences of maintenance and champerty. However, in view of the world trend of permitting conditional fee arrangements whereby the lawyer would charge no fee if the case was unsuccessful and would charge his usual fees plus a percentage "uplift" on the usual fees in the event of success, the Law Society would commence a study to re-examine the feasibility of implementing conditional fee arrangements in Hong Kong. In conducting the study, due regard would be given to the circumstances of Hong Kong, the views of the Judiciary and the level of acceptance by legal practitioners;

(b) maintenance and champerty as crimes and torts were abolished in the United Kingdom ("UK") and Australia since 1967, and conditional fee arrangements had been allowed in these two places for certain types of cases since 1995. Under the conditional fee agreements in the UK, the conditional fees were capped at 100% of the solicitor's usual fees. Such a regime was underpinned by the availability of litigation insurance policy to cover the opponent's

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legal costs if the legal action failed, i.e. the after-the-event ("ATE") insurance. Other form of "no-win, no fee" arrangement, i.e. the outcome-related fee arrangements, were also permitted on the Mainland. Under the outcome-related fee arrangements, the maximum amount chargeable should not be more than 30% of the amount specified in the fee charging contract;

(c) it should be noted that the LRC in its Report on Conditional Fees released in July 2007 acknowledged that conditional fees could enhance access to justice to a significant proportion of the community who were neither eligible for legal aid nor had the means to fund litigation themselves. The main reason why the LRC did not recommend the implementation of conditional fee arrangements in Hong Kong was because successful conditional fees regime required the long term availability of ATE insurance to cover the opponent's legal costs if the legal action failed. However, responses from the insurance industry suggested that this was unlikely to be the case in Hong Kong. However, it was mentioned in the same LRC's report that given the success of the Supplementary Legal Aid Scheme ("SLAS") in widening access to justice by using outcome-related fees on a self-financing basis, consideration should be given to expanding SLAS on a gradual incremental basis, by raising the financial eligibility limits and by increasing the types of cases which could be taken up by SLAS. A new fund, the Conditional Legal Aid Fund, should also be set up together with a new body to administer the Fund and to screen applications for the use of conditional fees, brief out case to private lawyers, finance the litigation, and pay the opponent's legal costs should the litigation prove unsuccessful; and

(d) the Law Society opposed the practice of recovery agents which was a criminal offence in Hong Kong and lawyers risked committing professional misconduct if they worked on cases financed by recovery agents.

Discussion

24. Mr CHAN Kin-por was strongly against abolishing the common law offences of maintenance and champerty, as this would give rise to more fraudulent claims, especially involving personal injuries, that would eventually drive up insurance premiums. Instead, the Administration should step up efforts in eradicating the activities of recovery agents in abetting the injured to exaggerate the degree of injuries sustained in order to claim for a higher amount

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of compensation or to fake an injury. Mr CHAN pointed out that in the past 10 years, the insurance industry had incurred some $2.6 billion loss, mainly arising from labour insurance claims, attributed by the illegal activities of recovery agents. In last year alone, the loss came to some $600 million. Mr CHAN further said that if the Administration should abolish the common law offences of maintenance and champerty, the insurance industry might no longer underwrite personal injuries insurance. Mr CHAN added that the fact that the UK abolished the common law offences of maintenance and champerty did not mean that Hong Kong should follow suit, having regard to the numerous problems derived from conditional fee arrangements and the ATE insurance developed in the UK.

25. Mr TANG Ka-piu urged the Administration to step up measures to stamp out rampant touting activities carried out by recovery agents at various places which accident victims would seek assistance such as the Labour Department ("LD") and the Legal Aid Department, as well as hospitals, to avoid these victims from falling prey to the unscrupulous practices of recovery agents.

26. DSG(General)(Atg) responded that the Police had taken preventive measures by stepping up patrol at black spots for recovery agent activities, and would take enforcement action where warranted. To raise accident victims' awareness of the risks of engaging recovery agents, cautionary leaflets to injured employees were distributed at offices of the LD and at public hospitals. Posters on this subject were also produced and posted conspicuously in the waiting areas of such offices and hospitals. Apart from producing a radio Announcement of Public Interest ("API") to increase public awareness of the risks of the activities of recovery agents, a television API was also produced and launched in 2010. In 2013, APIs on this subject were broadcast 1 258 and 1 110 times on radio and television respectively.

27. Mr Dennis KWOK said that litigation funding could provide greater access to justice and would not undermine the integrity of the judicial process, as explained in the reference materials prepared by a litigation funding company tabled at the meeting. Hitherto, litigation funding had been allowed to be used in Hong Kong for cases relating to insolvency claims and in arbitration. Mr KWOK urged the Administration to explore the feasibility of greater use of litigation funding in Hong Kong As mentioned in the judgment of the CFA's case of *Winnie Lo v HKSAR* [2012] 15 HKCFAE 16, Riberio PJ raised for consideration the question whether and to what extent criminal liability for maintenance should be retained in Hong Kong.

28. Mr WONG Yuk-man said that permitting conditional fee arrangements in a gradual and regulated manner to improve access to justice on the one hand and safeguard the integrity of the judicial process on the other was worth pursuing,

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having regard to the success of the SLAS and the Consumer Council's Consumer Legal Action Fund. There was no cause for concern that solicitors and barristers would abuse the court's process under the conditional fee arrangements, as the same professional codes should continue to be applied to them by the Law Society and the Bar Association respectively.

29. Mr Albert HO said that given the high cost of litigation, there was a need for the Administration to study whether or not to abolish the common law offences of maintenance and champerty so as to enhance access to justice to the middle-income litigants which were neither eligible for the Ordinary Legal Aid Scheme nor SLAS. Mr CHUNG Kwok-pun shared Mr HO's views and further said that a properly structured conditional fees regime could help to eradicate the activities of claims intermediaries, such as recovery agents, some of whose activities might be of doubtful legality.

30. Dr CHIANG Lai-wan said that the Administration should examine the necessity of preserving the common law offences of maintenance and champerty. As maintenance did not involve payments, the common law offences of maintenance and champerty should be dealt with separately.

31. DSG(General)(Atg) responded as follows -

(a) the Administration would keep monitoring the development of the offences closely and listen to the views of the stakeholders and the public;

(b) the main reason why the Administration did not implement the recommendations of the LRC's Report on Conditional Fees, with the exception of raising the financial eligibility limits of SLAS and increasing the types of cases covered by SLAS, was that the two legal professional bodies did not support conditional fees arrangements on the ground that this might lead to conflict of interests of lawyers in handling their clients' cases;

(c) although maintenance and champerty were prohibited in Hong Kong, the courts had created exceptions where conduct which would otherwise constitute maintenance or champerty had been excluded from the sphere of criminal liability. One category was "common interest" category whereby persons with a legitimate interest in the outcome of the litigation were justified in supporting the litigation, such as father and son and husband and wife. Another category was cases involving "access to justice" considerations; and

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(d) not all common law jurisdictions had abolished the common law offences of maintenance and champerty. Singapore still preserved such offences.

32. Mr Ronny TONG said that the outdated common law offences of maintenance and champerty should be abolished to enable every one to have access to justice. Mr TONG further said that there was no cause for concern that recovery agents would proliferate following the abolition of the common law offences of maintenance and champerty as the illegal activities of recovery agents could be dealt with under the existing criminal law, not to mention that the illegal activities of recovery agents could still exist regardless of whether there were common law offences of maintenance and champerty.

33. Mr Paul TSE said that a more practicable approach was to explore ways which could better enable the middle-income group who needed to seek recourse from the court to finance their litigation within the present circumstances of Hong Kong. As a starting point, the Administration should re-visit the LRC's recommendations on conditional fees which it had previously rejected.

Conclusion

34. The Chairman said that members were generally of the views that the common law offences of maintenance and champerty were outdated and should be reviewed to better suit the present day circumstances. The Administration was urged to adopt a liberal approach in addressing the issue and come up with ways to enhance access to justice for the middle-income group.

V. Compensation for wrongful conviction

(LC Paper No. CB(4)486/13-14(06) -- DoJ's paper on "Compensation for wrongful conviction"

LC Paper No. CB(4)486/13-14(07) -- Background brief on "Compensation for wrongful conviction" prepared by LegCo Secretariat)

Briefing by the DoJ

35. Assistant Solicitor General ("ASG") briefed members on the current practice of the Government in awarding *ex gratia* payments (i.e. compensation not arising from any legal or statutory obligations) in certain exceptional cases

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as well as the current compensation scheme operated by the government for victims of miscarriage of justice in England and Wales, details of which were set out in the DoJ's paper. Specifically, the DoJ did not see any sufficient reason to change the current arrangement of having applications for *ex gratia* payments under the administrative scheme assessed by the Solicitor General ("SG") of the Legal Policy Division ("LPD") of the DoJ, having regard to the following -

(a) the scheme was *ex gratia* and administrative in nature;

(b) the number of applications under the scheme was small. In the past five years, the total number of applications was only nine; and

(c) development in England and Wales whereby the Secretary of State determined whether a wrongly convicted person had a right to compensation under section 133 of the Criminal Justice Act 1988 ("the 1988 Act") and the question of how much should be awarded was determined by an independent assessor. In Hong Kong, the SG was responsible for deciding whether an application for *ex gratia* payment under the administrative scheme fall within the guidelines as set out in paragraph 4 of the DoJ's paper. In circumstances where blame might attach to public authorities or in particularly large and complex cases, independent advice from outside counsel would be obtained. If it was decided that an application fell within the guidelines, the amount payable was determined by the Secretary for Financial Services and the Treasury, taking into account the views of the DoJ and any other affected department or bureau.

Views of the Bar Association

36. Mr Edwin CHOY said that the Bar Association had not undertaken any detailed study on the mechanism of how the *ex gratia* payments for wrongly convicted persons should be paid out. Nevertheless, the Bar Association broadly agreed with the DoJ's position on maintaining the existing practice in awarding *ex gratia* payments, having regard to the small number of applications for the payment of *ex gratia* compensation and the fact that the SG would seek the advice of outside counsel if there was perceived/potential conflict of interest on the part of the Secretary for Justice and relevant government departments.

Views of the Law Society

37. Mr Stephen HUNG said that the Law Society considered that there was a need for the DoJ to review the existing practice in awarding *ex gratia* payments

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for wrongly convicted persons, having regard to the following -

(a) only nine applications for *ex gratia* compensation were made to the DoJ in the past five years was a testament that the administrative scheme on *ex gratia* payments was not well publicized; and

(b) despite the fact that the DoJ would seek the advice of outside counsel in certain circumstances, concern about conflict of interest still remained as prosecution against the applicants for *ex gratia* payments was carried out by the DoJ. Such concern could be supported by the fact that of the nine applications for *ex gratia* payments in the past five years, seven of them were rejected on the ground that they did not fall within the guidelines such as "compensation may be refused where there is serious doubt about the claimant's innocence". To rectify the situation, consideration should be given to establishing a body similar to the Criminal Injuries Compensation Board in the UK for awarding *ex gratia* payments to victims of miscarriage of justice.

Mr HUNG further said that the Law Society had reservation about the suggestion of referring the review of the Government's practice in awarding *ex gratia* payments to the LRC. As the review by the LRC would take some time to complete, the Law Society was concerned that some victims of miscarriage of justice who could benefit from the outcome of the review would then be time barred for seeking *ex gratia* payments from the Government.

Discussion

38. Mr Dennis KWOK shared the views of the Law Society that the existing practice of awarding *ex gratia* compensation to victims of miscarriage of justice should be reviewed to address the issue of conflict of interest, not to mention the unclear and overly stringent guidelines for processing of applications for *ex gratia* payments under the administrative scheme. Mr KWOK expressed disappointment that the DoJ did not see any sufficient reason to change the current arrangement of having applications for *ex gratia* compensation assessed by the SG.

39. ASG responded as follows -

(a) there were clear delineation of duties within the DoJ to avoid conflict of interest in the processing of applications for *ex gratia* compensation under the administrative scheme. The final decision on whether or not to prosecute rested entirely on the Director of Public Prosecutions. On the other hand, the final

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decision on whether or not to approve an application for *ex gratia* compensation under the administrative scheme rested entirely on the SG with the assistance of counsel within LPD of the DoJ. LPD counsel was not involved in the prosecution of the applicants in the criminal justice system. Where necessary, outside independent counsel's advice would also be sought on the merits of the applications for *ex gratia* compensation under the administrative scheme. The SJ was not involved in the consideration or determination process; and

(b) the existing *ex gratia* administrative scheme was modelled on the discretionary compensation scheme operated by the England and Wales government until April 2006. In determining whether or not to approve an application for *ex gratia* payment under the administrative scheme, reference was made to similar cases handled by the England and Wales government under the discretionary compensation scheme which revealed that not all applications were eligible for compensation despite the fact that the applicants' conviction was quashed on appeal.

40. Mr WONG Yuk-man strongly urged the Administration to remove the term "*ex gratia*" from the administrative *ex gratia* compensation scheme. Mr WONG was also of the view that compensation to victims of miscarriage of justice and the amount payable should be determined by the court, instead of relying on guidelines, procedure and practice. Mr WONG pointed out that the existing administrative guidelines for determining whether a compensation should be paid were too abstract and left too much room for the SG to interpret the guidelines as he deemed fit, and the process of determining the amount payable was too cumbersome in that the Secretary for Financial Services and the Treasury had to take into account the views of the DoJ and any other affected department or bureau in determining the amount payable, not to mention about the lack of criteria for the Secretary for Financial Services and the Treasury to determine compensation which included non-pecuniary losses such as loss of liberty or damage to character and reputation.

41. Dr CHIANG Lai-wan urged for the setting up of an independent mechanism to consider applications for compensation by persons who had spent time in custody following a wrongful conviction or charge. Noting that the total number of applications for *ex gratia* payments under the administrative scheme in the past five years was only nine, Dr CHIANG enquired about the number of wrongful convictions resulting in the persons concerned spending time in custody during the same time period. DSG(General)(Atg) undertook

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to provide a written response after the meeting. Responding to Dr CHIANG's further enquiry about whether compensation had been paid under the

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administrative scheme to persons who had suffered non-pecuniary losses as a result of being wrongfully convicted, ASG said that it was not appropriate for the DoJ to openly discuss specific applications for *ex gratia* payments under the administrative scheme because without prejudice negotiations between lawyers were involved. He however pointed out that if the SG decided that an application fell within the guidelines as set out in paragraph 4 of the DoJ's paper, compensation would be paid to the applicant. Reference would also be made to relevant court cases before determining whether the application warranted compensation.

42. Mr Albert HO said that the term "*ex gratia*" should be replaced by "*non-statutory*" to better reflect the nature of the compensation under the administrative scheme. Mr HO further said that he shared the views of the Law Society that consideration should be given to the setting up of an independent body to consider applications for compensation by persons who had spent time in custody following a wrongful conviction or charge, to avoid potential conflict of interest. Clearer and fair guidelines should also be formulated in determining whether compensation should be paid to the applicants.

43. Mr Paul TSE said that it was unclear which one of the two compensation schemes operated by the Government in respect of wrongful conviction, i.e. one under a statutory provision payable according to Article 11(5) of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO") and the other under the administrative scheme on *ex gratia* payments, that victims of miscarriage of justice should best take to seek compensation from the Government and at what stage. Mr TSE urged the DoJ to conduct a study in this regard. Mr TSE also urged the Administration to step up publicity to raise public awareness of the two compensation schemes.

44. The Chairman expressed support for the setting up of an independent body similar to the Criminal Injuries Compensation Board in the UK for awarding *ex gratia* payments to victims of miscarriage of justice. The Chairman also shared the views that the term "*ex gratia*" should be removed from the administrative *ex gratia* scheme for wrongful conviction.

45. DSG(General)(Atg) responded that whilst members thought that the small number of applications for *ex gratia* compensation under the administrative scheme in the past five years was due to lack of publicity by the Administration, she took the view that the more probable cause was that the number of cases which could fall within the guidelines as set out in paragraph 4 of the DoJ's paper was small as the administrative scheme was meant to cater for very exceptional cases. The mere fact that a conviction against the claimant had been quashed by an upper court did not necessarily mean that the claimant was

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innocent, as the conviction could be quashed on a technical ground. Taking the guideline set out in paragraph 4(a) of the DoJ's paper as an example, for an application to be eligible for compensation, it must be shown that the applicant's case fell within one of the following three categories: (a) he received a free pardon from the Chief Executive who exercised his power under Article 48(12) of the Basic Law; (b) his conviction was quashed following a reference to the Court of Appeal by the Chief Executive; or (c) his conviction was quashed following an appeal out of time. DSG(General)(Atg) pointed out that as compensation payable to claimants were funded by public money, it was incumbent upon the Administration to spend the public money in a prudent manner.

46. DSG(General)(Atg) further said that unlike Hong Kong, the English and Wales government abolished their discretionary compensation scheme on *ex gratia* payments for wrongful conviction in 2006 after they had set up their statutory compensation scheme under section 133 of the 1988 Act. The English statutory scheme under section 133 of the 1988 Act was similar to the statutory compensation scheme Hong Kong put in place under Article 11(5) of the HKBORO in 1991. Members might wish to take into account these background facts in their consideration of the issue.

47. Mr Edwin CHOY of the Bar Association said that in view of the small number of applications for *ex gratia* payments under the administrative scheme, it was up to the Administration and the Legislative Council to decide whether resources should be set aside for the setting up of an independent body to consider and award compensation under the administrative scheme.

48. Mr Stephen HUNG of the Law Society enquired about the amount of money set aside for the payment of *ex gratia* compensation under the administrative scheme each year in the past five years. DSG(General)(Ag) undertook to provide the information after the meeting.

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VI. Any other business

49. There being no other business, the meeting ended at 7:00 pm.

Council Business Division 4
Legislative Council Secretariat
23 May 2014