

立法會
Legislative Council

Ref : CB4/PL/AJLS

LC Paper No. CB(4)1513/16-17
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 27 February 2017, 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 Wing-hang (Deputy Chairman)
Hon Paul TSE Wai-chun, JP
Hon LEUNG Kwok-hung
Hon Steven HO Chun-yin, BBS
Hon Frankie YICK Chi-ming, JP
Hon CHAN Chi-chuen
Dr Hon Fernando CHEUNG Chiu-hung
Dr Hon Elizabeth QUAT, JP
Hon Martin LIAO Cheung-kong, SBS, JP
Hon POON Siu-ping, BBS, MH
Hon CHUNG Kwok-pan
Hon Alvin YEUNG
Hon CHU Hoi-dick
Hon Jimmy NG Wing-ka, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung

Members absent : Hon James TO Kun-sun

[According to the Judgment of the Court of First Instance of the High Court on 14 July 2017, LEUNG Kwok-hung, Nathan LAW Kwun-chung, YIU Chung-yim and LAU Siu-lai have been disqualified from assuming the office of a member of the Legislative Council, and have vacated the same since 12 October 2016, and are not entitled to act as a member of the Legislative Council.]

Action

**Public officers
attending**

: Item III

Judiciary Administration

Mrs Erika HUI, JP
Deputy Judiciary Administrator (Operations)

Mr Wilson CHIU
Assistant Judiciary Administrator (Quality & IT)

Item IV

The Law Reform Commission of Hong Kong

Mr Peter DUNCAN, SC
Chairman of Review of Sexual Offences Sub-committee

Mr Eric T M CHEUNG
Member of Review of Sexual Offences Sub-committee

Ms Michelle AINSWORTH
Secretary

Ms Sally NG
Senior Government Counsel

Item V

Department of Justice

Mr Wesley WONG, SC
Solicitor General

Mr Alan SIU, JP
Director of Administration and Development

Mrs Apollonia LIU, JP
Deputy Director (Special Duties)

Ms Carrie LEE
Principal Executive Officer (Special Duties)

Action

Architectural Services Department

Ms Winnie HO
Project Director

Ms Teresa LEUNG
Senior Project Manager

Attendance by invitation : Item III

The Law Society of Hong Kong

Mr Nicholas HUNSWORTH
Member of the Working Party on Party and Party Rates

Mr FOK Wing-kuen
Director of Practitioners Affairs

Item IV

Hong Kong Bar Association

Mr Graham A HARRIS, SC

The Law Society of Hong Kong

Mr Stephen HUNG
Council member and Member of the Criminal Law and Procedure Committee

Mr FOK Wing-kuen
Director of Practitioners Affairs

Clerk in attendance : Ms Sophie LAU
Chief Council Secretary (4)2

Staff in attendance : Mr Stephen LAM
Senior Assistant Legal Adviser 2

Action

Miss Joyce CHING
Senior Council Secretary (4)2

Ms Jacqueline LAW
Council Secretary (4)2

Miss Vivian YUEN
Legislative Assistant (4)2

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

Members noted the following papers which had been issued since the last meeting:

LC Paper No. CB(4)592/16-17(01) -- Information paper entitled "Miscellaneous Amendments to the Rules of the High Court" provided by the Judiciary Administration

LC Paper No. CB(4)508/16-17(01) -- Letter dated 25 January 2017 from Dr Hon Fernando CHEUNG Chiu-hung requesting the Panel to hold a public hearing on the Law Reform Commission's consultation paper on "Sexual offences involving children and persons with mental impairment"

2. The Chairman sought members' views on whether or not to hold a special meeting to receive public views on "Law Reform Commission's Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment" ("the Consultation Paper") as proposed by Dr Fernando CHEUNG in his letter dated 25 January 2017. Members noted that the public consultation period on the Consultation Paper was extended from 10 February 2017 to 10 March 2017.

Action

3. Mr CHAN Chi-chuen expressed his support to Dr CHEUNG's proposal so that views of different stakeholders, including parents, social workers and teachers of persons with mental impairment, on the proposed law reform could be gauged. Noting that the Administration planned to brief the Panel on measures for handling sexual offence cases and provision of screens for complainants in sexual offence cases during court proceedings as well as measures for protecting mentally incapacitated persons during court proceedings at the meeting scheduled for 27 March 2017, members agreed that the Panel would receive public views on the Consultation Paper at a special meeting to be scheduled.

(Post-meeting note: the special meeting to receive public views on the Consultation Paper was held on 8 May 2017.)

II. Items for discussion at the next meeting

LC Paper No. CB(4)591/16-17(01) -- List of outstanding items for discussion

LC Paper No. CB(4)591/16-17(02) -- List of follow-up actions

4. Members agreed to discuss the following items at the next regular meeting to be held on 27 March 2017 at 4:30 pm:

(a) Measures for handling sexual offence cases and provision of screens for complainants in sexual offence cases during court proceedings; and

(b) Measures for protecting mentally incapacitated persons during court proceedings.

5. The Chairman remarked that at the request of the Administration, a new discussion item of "Handling of prosecution works before the Magistrates' Courts" had been added to the list of outstanding item for discussion. Members raised no objection to the Administration's proposal.

III. Review of Solicitors' Hourly Rates - An Update

LC Paper No. CB(4)591/16-17(03) -- Judiciary Administration's paper on "Review of Solicitors' Hourly Rates – An Update"

LC Paper No. CB(4)591/16-17(04) -- Background brief on "Review of Solicitors' Hourly Rates – An Update" prepared by the Legislative Council Secretariat

Briefing by the Judiciary Administration ("JA")

6. At the invitation of the Chairman, Deputy Judiciary Administrator (Operations) ("DJA(O)") briefed members on the latest progress of the review of the solicitors' hourly rates ("SHRs") being undertaken by the Judiciary, details of which were set out in the JA's paper (LC Paper No. CB(4)591/16-17(03)).

7. DJA(O) highlighted that the Chief Justice had in February 2017 approved the stage 1 report prepared by the Working Party on Review of SHRs for Party and Party Taxation ("the Working Party"). The Working Party had taken immediate actions to take forward a proposed market survey under the stage 2 study. It was envisaged that the Working Party would make its final recommendations to the Chief Justice by the end of 2017.

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

8. Mr Nicholas HUNSWORTH expressed disappointment about the slow progress of the review of SHRs, notwithstanding the fact that the Law Society had submitted a consultancy report to the Judiciary in 2013 ("KPMG 1st Report") and the Working Party had been established for three years. Mr HUNSWORTH said that as reflected in the JA's paper, the Working Party apparently held a different view to that of the Law Society, which considered that issues of affordability, acceptability and access to justice had little or nothing to do with the calculation of SHRs. The Law Society maintained that

Action

the recovery of costs by successful litigants should be the most important factor when determining SHRs. Mr HUNSWORTH further said that as SHRs had not been revised for 20 years, successful litigants were unable to recover even half of the costs they had actually paid, which was a significant disincentive to people who participated in the litigation process. The Law Society considered the main focus of any review of SHRs should not be about the costs of litigation and solicitors' earnings, but to ensure that successful litigants would be able to recover a fair share of the costs they paid. As such, Mr HUNSWORTH concluded that conducting a further market survey as proposed by JA could not address the fundamental issue.

9. The Chairman declared that she had been providing expert opinions to law firms relating to taxation of costs. Having noted the current level of lawyer fees, the Chairman wondered if the Law Society had any plan or strategy to convince the public that SHRs should be raised by 35% to 55% to better reflect the market conditions as proposed in the KPMG's 1st Report.

10. Mr HUNSWORTH stressed the main reason for the Law Society proposing a review of SHRs was that successful litigants who should be entitled to recover a significant part of their legal costs from the losing side and they were being penalized due to the continued delay in the review of SHRs. He added that SHRs were once regularly reviewed by taxing masters in the 1990s but were now, due to the long overdue review, no longer reflecting the prevailing market rates charged to litigants.

11. In reply to the Chairman's enquiry as to the reasonable level of SHRs, Mr HUNSWORTH advised that an increase of about 30% - 40% on the current SHRs was proposed in the KPMG 1st Report to better reflect market conditions. Mr HUNSWORTH remarked that the proposed revised SHRs were not standard flat rates and the final determination of SHRs rested with the Judiciary.

Approach and methodology for reviewing SHRs

12. Mr CHEUNG Kwok-kwan noted that linkage of adjustment of SHRs to an inflation index based on the Composite Consumer Price Index ("CCPI") was suggested as an alternative to determining SHRs, in the event the market survey failed to attain sufficient data to conduct reviews of SHRs on a regular basis due to the low response rate. He asked why the adjustment of SHRs was

Action

linked to CCPI, instead of to Consumer Price Index (A) and Consumer Price Index (B).

13. DJA(O) advised that taking into consideration the impact of a review of SHRs on the public and the views of the legal sector in this regard, the Judiciary was of the view that an objective and evidence-based approach should be adopted in identifying effective market rates for civil litigation services. DJA(O) said that it was important to bear in mind that SHRs were different from the actual costs being charged by solicitors for litigation services. A market survey would be conducted in stage 2 of the review to collect information from local solicitor practices of different sizes in respect of their effective litigation charge-out rates for fee earners with different post-qualification experience. The data collected from the market survey would be analyzed and converted to a final set of SHRs by the Judiciary. Having regard to the concern that the overall response to a market survey might be low because law firms might not be prepared to disclose rates actually charged which are considered commercially sensitive, DJA(O) advised the consultant engaged by the Judiciary to undertake the review of SHRs had proposed several alternatives in lieu of a market survey. After carefully balancing the pros and cons of different alternatives, the Judiciary took the view that linking the adjustment of SHRs to the inflation index of CCPI in case the market survey failed to attain sufficient data for analysis was the most feasible fall back option, as CCPI was a simple, readily available and easily understood inflation index well established in Hong Kong. Notwithstanding this, DJA(O) stressed that full support and cooperation from the legal profession was essential so that the proposed market survey could be conducted smoothly.

14. Noting Mr HUNSWORTH's remark that successful litigants were unable to recover even half of the costs they had actually paid, Mr Jimmy NG was gravely concerned whether access to justice could be safeguarded. Mr NG suggested that apart from linking the adjustment of SHRs to the inflation index of CCPI, the Judiciary could make reference to salary adjustments for solicitors and/or judicial officers working in the Department of Justice ("DoJ") or JA over the past 20 years in determining SHRs. He further enquired if JA could provide the salary adjustment information in this regard.

15. DJA(O) responded that the Judiciary was very concerned about the progress of the review of SHRs and appealed to the legal profession to support the market survey to be conducted under the stage 2 study so as to expedite the

Action

review process. With regard to the salary adjustment information of solicitors and/or judicial officers working in DoJ or JA over the past 20 years requested by Mr Jimmy NG, DJA(O) replied that JA did not have such information on hand and that the manpower costs had been influenced by many factors. She reiterated that SHRs did not necessarily reflect costs recovered by the receiving party from the paying party. The Judiciary considered that the past practice of fixing SHRs, which involved proposals initiated by the Law Society and consultation with the Registrar of the High Court, might not adequately address all possible ramifications arising from adjustments of SHRs. A comprehensive and evidence-based review of SHRs was therefore essential to establish an objective mechanism for setting SHRs.

JA

16. Mr Paul TSE sought information on the number and frequency of meetings held by the Working Party and by the Advisory Group since their establishment. DJA(O) undertook to provide the information after the meeting. Mr TSE also noted that some members of the Working Party and the Advisory Group were duplicated, and the background of some members was very similar as well. He doubted whether the Working Party could fully grasped the views of the community since he noted that most members came from the legal sector and only one to two members represented consumer interests.

(Post-meeting note: JA's response was issued to members vide LC Paper No. CB(4)1475/16-17 on 26 July 2017.

17. In response, DJA(O) said the major role of the Advisory Group was to provide advice to the Working Group on how a comprehensive and evidence-based survey should be conducted in relation to the review of SHRs, so that representative of the Census and Statistics Department was included in the membership.

18. Mr Paul TSE further said that while the legal sector should be more cooperative in disclosing information concerning charge-out rates during the market survey, JA could obtain such information from the litigating parties themselves, hence saving the need for JA to wait for a response from law firms. He was of the view it was not appropriate to take into account increases in solicitors' salary costs in the past 20 years in any review of SHRs. Having regard to the fact that the level of SHRs would affect the costs to be paid by losing parties, any adjustments of SHRs would not only affect fee arrangements

Action

between solicitors and their clients, but would also have an impact on access to justice to litigants, in particular the sandwich class being not eligible for legal aid. Mr TSE said that he could not totally agree with the views of the Law Society that issues of affordability and access to justice should have little or nothing to do with the calculation of SHRs. He thought the interests of different parties in litigation had to be balanced in reviewing SHRs; otherwise people would be discouraged from exercising their rights to seek justice by initiating court proceedings even if they had a strong case.

19. In response, DJA(O) stressed that it was important for the Judiciary to carry out an independent review of SHRs, rather than relying solely on consultancy reports provided by the Law Society in setting SHRs. The Judiciary believed any adjustments in the level of SHRs must be made having regard to the overriding consideration of public interest, so that the right to access to justice would not be undermined by exorbitant costs. DJA(O) added that a set of provisional rates derived from the market survey would be calculated by an internal group of the Judiciary comprising judges and judicial officers, who had substantive experience in costs and taxation at all levels of the courts.

20. Responding to the Chairman's enquiry regarding the difference between SHRs and the actual costs charged by solicitors for service rendered in litigation, DJA(O) explained that SHRs were used for assessing solicitors' costs incurred by litigants during court proceedings in taxation of costs by taxing masters. It was important to note that the taxing masters were not bound by such SHRs in any taxation of costs. Taxing masters would consider all the information provided by the litigating parties, such as the experience of solicitors and the time devoted, so that each taxation application would be considered on its own merits. In this connection, SHRs did not necessarily reflect the actual costs being charged by solicitors in litigation services.

21. The Chairman noted that contingency fee arrangements would not be permitted in Hong Kong. Since it was not uncommon for a solicitor to reach an agreement with a client on the maximum amount of costs the solicitor would charge, the Chairman sought the views of the Law Society on how to balance the affordability for clients with a possible increase in solicitors' costs as a result of the proposed increase in SHRs.

Action

22. Mr HUNSWORTH opined that the issues of access to justice, affordability and contingency fees involved much wider social issues. With the current level of SHRs, Mr HUNSWORTH said that a person would be less inclined to seek justice by initiating court proceedings even if he/she had a good case, as he/she would only recover less than half of the costs he/she actually paid. He stressed that the Law Society had been pressing for a review of SHRs not for the benefit of the legal profession, but for the recovery of costs for successful litigants so that matters could return to where they were 20 years ago when some 70% to 75% of actual costs incurred were recoverable.

23. Mr Dennis KWOK agreed with the Law Society that the review of SHRs was a matter of public interest and urged JA to address the issue squarely. Mr KWOK considered it unnecessary for JA to spend considerable time in conducting a market survey to identify effective market rates for civil litigation services, as he noted members of the Working Party included a number of experienced masters who should be able to provide such information.

24. Mr Paul TSE asked whether the market survey to be conducted by the Judiciary would collect information on the charge-out rates of barristers. DJA(O) replied that the information would be collected from solicitors' practices but not from barristers.

25. Mr HUNSWORTH considered the Judiciary's decision not to include barristers' fees in the market survey rather odd and maintained his view that the market survey to be conducted by the Judiciary would be unable to achieve its aim.

26. The Chairman declared that she was a practising barrister. She said that the Panel would not only consider the review of SHRs from the legal sector's perspective, but would also take into account public interest consideration. Echoing Mr Paul TSE's view, the Chairman said that information on the fees of barristers, which might be much higher than of those solicitors, should be collected in the market survey. She also urged JA, in the course of reviewing SHRs, to pay due regard to the affordability of litigants of limited means, particularly if one of the parties in the litigation was a substantial organization with financial strength such as a big insurance company or the Government.

Action

Progress of the review

27. Whilst noting that a market survey would be conducted with different law firms, Mr HUNSWORTH said that recommendations on revised SHRs had already been included in the KPMG 1st Report produced by the Law Society with a view to better compensating successful litigants. He expressed regret that stage 2 of the study was just about to be started, given the KPMG 1st Report had been submitted to the Judiciary three and a half years ago.

28. Mr Dennis KWOK considered the progress of the review of SHRs unacceptable, and said that a week ago he had sent a strongly worded letter to JA to urge the expeditious completion of the study. Mr Paul TSE and the Chairman shared similar views. Mr Dennis KWOK expressed grave concern that stage 1 of the study was only just completed as he had called for JA to undertake a review of SHRs five years ago. Noting that the original completion date of the study was early 2016, he queried on what basis Panel members could be convinced that the study would be completed by 2018.

29. DJA(O) assured members that the Judiciary was keen to expedite every stage of the study, but had encountered difficulties beyond their control. For instance, the tender exercise for commissioning an external consultant to carry out the study had been conducted for three times due to different reasons. Having regard to different views held by the Law Society and the Working Party, DJA(O) said that it was important to carry out an objective review in a fair and independent manner.

30. In reply to Mr Dennis KWOK's query on whether the Judiciary would undertake to complete the study within one year, DJA(O) replied that the Judiciary endeavoured to complete the study within the proposed timeframe. DJA(O) further advised that in the course of the stage 1 study, the Working Party had encountered certain unexpected situations, such as the submission of a second report by the Law Society in December 2015 ("KPMG 2nd Report"). The Working Party therefore had to spend extra time in examining the KPMG 2nd Report before submitting its final recommendations to the Chief Justice.

31. Noting that the Working Party would make its final recommendations to the Chief Justice by the end of 2017, Mr Dennis KWOK requested JA to update Panel members on the progress of the review by furnishing a written report to the Panel every three months.

Action

32. DJA(O) responded that as mentioned in the JA's paper, the Judiciary noted that any adjustments of SHRs would not only affect the interests of solicitors, their clients and other parties to legal proceedings, but would also involve many other considerations. In this connection, the Judiciary held the view that it was important to impartially carry out a comprehensive and independent review on SHRs and to consider the views raised by different parties in the course of the study. DJA(O) called on the legal profession to support the study with a view to expediting the review. She added that as the Working Party had just started preparation for commissioning another consultant to carry out stage 2 of the study, there might not be any material progress in the coming three months. The Judiciary would be willing to revert to the Panel on the actual progress of the review as soon as practicable.

Conclusion

33. The Chairman urged the Judiciary to expedite the review of SHRs and to put forward its final recommendations by the end of 2017.

IV. Law Reform Commission's Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment

LC Paper No. CB(4)591/16-17(05) -- Executive Summary of the Law Reform Commission ("LRC")'s Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment

Briefing by the LRC

34. Mr Peter DUNCAN, SC, Chairman, Review of Sexual Offences Sub-committee of the LRC ("the Sub-committee") highlighted the principle points of the Consultation Paper, details of which were set out in the above Executive Summary.

Discussion

35. Mr Graham A HARRIS, SC of the Hong Kong Bar Association ("Bar Association") considered that the proposal made by the Subcommittee largely concerned with the question of sexual morality and that the Bar Association was in agreement with most of the recommendations. The Bar Association might have concern over the issues relating to absolute liability and would make representations to the Subcommittee in due course.

Criminalization of consensual sexual activity between persons who were between 13 and 16 years of age (recommendation 8)

36. Mr Stephen HUNG of the Law Society of Hong Kong ("Law Society") raised concern on the issues relating to recommendation 8¹ of the Consultation Paper. Mr HUNG said that, under the current prosecutorial policy, if two persons between 13 and 16 years of age were found to have sexual activity, invariably, the boy would be prosecuted and even if ultimately he was given probation, he would still have a criminal record. The girl, on the other hand, would likely to be only placed on a care and protection order. Mr HUNG opined that the prosecutorial discretion, as referred in the above recommendation, should be exercised very cautiously and in a gender-neutral way.

37. Mr Peter DUNCAN said that the issue relating to puppy love situation was a difficult area and that there could be different approaches to deal with the situation. Firstly, there could be some indications on the legislation as to the special circumstances where prosecution should be instituted. Secondly, there could be a provision whereby there could be prosecution of those who were involved in puppy love situation with the specific consent of the Secretary for Justice, whom should set out the sort of circumstances which might lead to prosecution, such as exploitation of one of the parties by the other. Taking note of the concerns raised above, the Subcommittee would further look into the issues in this regard.

38. Mr Eric CHEUNG, member of the Sub-committee, responded that the "differential treatment" to boys and girls mentioned by Mr Stephen HUNG above was not due to prosecution policy but rather the position of the current legislation. Mr CHEUNG pointed out that under the current legislation², a

¹ Recommendation 8 under the executive summary of the Consultation Paper read as "Consensual sexual activity between persons who are between 13 and 16 be criminalized but with prosecutorial discretion to bring a change in appropriate cases".

² Section 124 of Crime Ordinance (Cap. 200)

Action

man who had unlawful sexual intercourse with a girl under the age of 16 shall be guilty of an offence but no relevant provision was applicable to a male victim. He said that in the current reform on sexual offences, it was hoped that all the offences which were inconsistent with the principles of gender neutrality would be reviewed and abolished as appropriate.

39. Mr Eric CHEUNG further said that, as a guiding principle, normally no prosecution would be instituted for consensual sexual activity which took place in puppy love situations. Mr CHEUNG supplemented that one of the factors for consideration for recommendation 8 mentioned above was that legalizing consensual sexual activity between children and/or young persons would make it difficult for the police, social workers and/or their parents to deal with the problems arising from premature sexual activities.

40. The Chairman sought clarification as to the approach recommended by the Sub-committee in taking forward the proposal of criminalization of consensual sexual activity between children. In particular, the Chairman asked whether the method of dealing with children or young persons charged with sexual offence would be left to the discretion of the judge/magistrate, including the decision of whether a criminal record would be kept.

41. Mr Eric CHEUNG clarified that, as proposed under recommendation 8, consensual sexual activities between persons who were between the age of 13 and 16 years of age, if charged, would still be under the purview of criminal offence. Nevertheless, Mr CHEUNG remarked that those cases normally would not be brought to the court unless they involved special circumstance, such as, sexual exploitation. Mr CHEUNG supplemented that, as far as he understood, the magistrates at juvenile court were conferred with the power to decide whether a criminal record should be kept in respect of a juvenile offender.

Reform of legislation in respect of mentally incapacitated persons ("MIPs") / persons with mental impairment ("PMIs")

42. Mr Stephen HUNG said that his previous understanding on the current legal position of sexual offences in respect of MIPs was that MIPs did not have the capacity to consent to sexual act. In this regard, the Law Society considered that there might be the situation where a genuine relationship had developed between an adult and a MIP and thus query was raised as to whether consensual sexual activity took place in the this situation should attract criminal liability.

Action

43. Referring to recommendation 24 (which proposed a new offence of causing a PMI to engage in or agree to engage in sexual activity by inducement, threat or deception), Mr Stephen HUNG raised further questions as to how genuine relationship could be recognized and issues on sexual autonomy of PMI could be addressed. If the above relationship was of love and care, with the full support and endorsement by parents/guardians, Mr HUNG asked whether "parental consent" could be raised as a defence should any prosecution relating to the offence under recommendation 24 had been instituted.

44. The Chairman suggested the Sub-committee to further look into the situation where the relationship between a person in the care of a PMI (including a carer and/or volunteer in a specified institution) and the PMI had full support and endorsement by parents.

45. Mr Eric CHEUNG said a defence relating to "parental consent" had not considered by the Sub-committee and that the above suggestion was noted. Mr CHEUNG supplemented that the Consultation Paper had set out an exception where the care provider and the PMI were married or in pre-existing relationship.

46. Mr CHAN Chi-chuen also echoed the view that consideration should be given to respecting the sexual autonomy of PMIs, especially those persons who were capable of consenting to sexual activities.

47. Dr Fernando CHEUNG noted that the definition of MIP was discussed in the Consultation Paper. Instead of using MIP (as defined in section 117(1) of the Crimes Ordinance (Cap 200)), PMI was used, as a general term, in the Consultation Paper. Dr CHEUNG considered that the word "impairment" was a medical term and suggested the Sub-committee to use the term "persons with mental disability" because he considered "disability" was a more neutral description.

48. In respect of the approaches that might be adopted for reform of legislation in respect of MIPs, Dr Fernando CHEUNG noted that the presumption that a PMI was incapable of consenting to sexual activity was proposed to be removed. Instead, questions in respect of a PMI's ability to perform three acts ("the Three Questions")³ had to be asked in order to

³ In paragraph 131 of the executive summary of the Consultation Paper, the Subcommittee recommended that the new legislation should contain a provision to the effect that a person was incapable of consenting to sexual activity where, by reason of mental condition, intoxication, or age (as the case may be), the person is unable to do one or more of the following: (a) understand what the conduct is; (b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place); or (c) communicate any such decision.

Action

ascertain the PMI's capacity to consent. Quoting the "Bridge of Rehabilitation Company" incident as a case on point, Dr CHEUNG raised the concern over the ability of PMIs to testify during trial. Dr CHEUNG further pointed out there might be gray areas in ascertaining the PMI's capacity to consent, particularly for mildly mentally handicapped persons, and thus he was concerned about the potential difficulties in obtaining evidence as to whether the alleged victim had consented to the sexual activity. Mr Alvin YEUNG raised a similar concern.

49. In response to the concern raised by Mr Stephen HUNG and Dr Fernando CHEUNG, Mr Peter DUNCAN acknowledged that the sexual offences involving PMIs was a difficult area and clarified that the current reform aimed at distinguishing two categories of offences, firstly, offences reflecting an absolute bar to sexual activity with certain types of PMIs (basically those who are unable to consent) and secondly, offences reflecting potential exploitation of PMIs (basically those who were able to consent).

50. Mr Eric CHEUNG supplemented that the current legislation already covered the first category of offences mentioned by Mr Peter DUNCAN above and thus no new offences had been proposed in this regard. As for the second category, the new offences proposed would mostly apply to sexual offence involving mildly mentally handicapped persons. New offences had been proposed to address situations of (a) exploitation of PMIs by perpetrators using particular means to obtain PMI's consent; (b) exploitation involved in the care of PMIs both in and outside specified institutions and (c) exploitation arising from abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI.

51. Mr Eric CHEUNG further said that both the views of Mr HUNG and Dr CHEUNG were noted and the new offences were proposed with a view to striking a proper balance between respecting the sexual autonomy of those persons whose extent of mental impairment was not so severe that they lacked the capacity to consent and the need to protect them from sexual exploitation.

52. Mr Alvin YEUNG sought further elaboration from Mr Eric CHEUNG in respect of the balance which the Sub-committee hoped to strike in proposing the reform of legislation with regard to sexual activity with PMIs.

53. Mr Eric CHEUNG clarified that the current legislation did not stipulate that all sexual offences with MIPs/PMIs would attract criminal liability. The specific offences in respect of MIPs currently were confined to certain situations, for instance, sexual activity involved in specified institution and that there was absolute bar to sexual activity with PMIs who were incapable to give consent. As to the current proposed reform, the above mentioned

Action

protection of those involved in specified institution and PMIs who were incapable to give consent would remain intact. As for PMIs whose extent of mental impairment was not so severe that they lacked the capacity to consent, protection for situations where the sexual activity was procured through inducement, threat or deception was proposed. Mr CHEUNG clarified that the giving of evidence on issues relating to consent was only necessary for some cases, but not all cases.

54. In response to Mr Alvin YEUNG's enquiry about whether there would be further room to reform the current regime of hearsay evidence in criminal proceedings relating to protection of vulnerable witnesses, Mr Peter DUNCAN said that the Sub-committee only dealt with the substantive content of the offences and that the procedures pertaining to evidence was outside the scope of its terms of reference.

The word "unlawful" be removed from all offences involving sexual intercourse or sexual act (recommendation 4)

55. Dr Elizabeth QUAT said that the Democratic Alliance for the Betterment and Progress of Hong Kong ("DAB") was largely in agreement with the recommendations proposed by the Subcommittee. Dr QUAT further said that DAB also shared the concerns raised by the Law Society in respect of the two issues, i.e. the puppy love situation and sexual offences involving PMIs mentioned above. With regard to recommendation 4, Dr QUAT queried whether there might be adverse effect, by deleting the word "unlawful", that it might create the general impression of "lawfulness" by ordinary citizens. In light of the above, Dr QUAT asked the Sub-committee to reconsider whether the proposed deletion was appropriate.

56. Mr Eric CHEUNG explained that the proposed deletion of the word "unlawful" would not make any change in the substantive meaning of the relevant provisions. In considering the proposed deletion, considerations on the relevant judicial and legislative developments had been taken into account and it was difficult to see the purpose of the retention of the anachronistic term "unlawful" which was redundant. Mr CHEUNG also believed that, if the proposed amendments were passed, education and/or publicity programmes would be launched in this regard.

Proposed new offences: sexual assault of a child and causing or inciting a child to engage in sexual activity (Recommendation 11 & 12)

Action

57. Noting that a new offence of sexual assault of a child, which included the act of sexual touching by the offender was proposed under recommendation 11, Dr Elizabeth QUAT asked whether this new proposed offence would also cover the act of causing or inciting the child to touch the offender, where the act was sexual. Mr Eric CHEUNG responded that the act of "causing or inciting a child to engage in sexual activity" (which included the act of sexual touching) was already covered under recommendation 12.

Abduction of an unmarried girl (Recommendation 21)

58. Referring to recommendation 21 which proposed to abolish the offences relating to abduction of an unmarried girl, Dr Elizabeth QUAT opined that it might be better to extend/ refine the scope of the relevant section of Cap. 200, by adopting the principle of gender neutrality, instead of simply abolishing the abduction offence.

59. Mr Eric CHEUNG responded that the Sub-committee was not aware of any charge of the two abduction offences⁴, at least in the past decade. There appeared to be no practical reason for retaining the two offences. Moreover, the removal of the two offences would not derogate from the protection of young girls since a whole new range of gender-neutral offences involving children and young persons had been proposed under the current reform of sexual offences.

Proposed new offences: Engaging in sexual activity in the presence of a child/ a person with mental impairment (recommendation 13 & 29)

60. Dr Elizabeth QUAT raised questions on recommendations 13 and 29 which proposed the new offences of "engaging in sexual activity in presence a child and a PMI" respectively. Dr Elizabeth QUAT said that in view of the crowded living environment in Hong Kong, it would not be rare that a child/ PMI might be "in presence" during the course of a sexual activity (unknown to the people who were engaging in the sexual activity). Dr QUAT queried whether the situation which she mentioned above would still attract criminal liability.

61. Mr Peter DUNCAN explained that, in order to constitute the new offences mentioned above, it must be shown that the accused's act should be for

⁴ Under recommendation 21, the offences of abduction of an unmarried girl under 16 (section 126 of Cap. 200) and abduction of an unmarried girl under 18 for sexual intercourse (section 127 of Cap. 200) were recommended to be abolished.

Action

the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI / child, or an combination of these purposes.

The age of consent and gender issues (recommendation 1 and 2)

62. Mr CHAN Chi-chuen said that he agreed to recommendation 1 which proposed to unify the uniform age consent, irrespective of gender and sexual orientation. Whilst he also agreed to recommendation 2 which proposed that offences involving children and young persons should be gender-neutral, he opined that the Administration should also take this opportunity to abolish any offences which reflected inequal treatment between heterosexual and homosexual offenders.

63. Mr Eric CHEUNG responded that, despite "sexual orientation" was not mentioned explicitly in recommendation 2, elimination of discrimination on the basis of sexual orientation was the direction of the current reform on sexual offences and that one of the areas of reform under the first and second consultation papers was to get rid of separate sets of offences based on the sexual orientation of the offenders.

64. Mr CHAN Chi-chuen further urged the Sub-committee to work with the Administration on the legislative amendments for all relevant provisions which reflected discrimination on the basis of sexual orientation at this stage.

Proposed new offence: sexual grooming (recommendation 22)

65. Whilst understanding the legislative intent of the proposed new offence of sexual grooming under recommendation 22 as a preventive measure to enhance protection of children against exploitation, Mr CHAN Chi-chuen expressed concern that it might criminalize acts which were too remote from harmful act or even induce the offence of blackmail. Mr CHAN said that it might be possible that a person might be asked to pay money for the return of "records", such as, online communication record which might be alleged as evidence of "grooming" a child to engage in sexual activities.

66. Mr Eric CHEUNG responded that in order to substantiate the above mentioned new offence, the proof as to both "meeting twice or above" and "the intention of meeting the child with a view to having sexual act" had to be shown and thus Mr CHEUNG considered that there would be slim chance of criminalizing acts which were too remote from the harmful acts.

Action

The age of offender (recommendation 5)

67. On recommendation 5 which specified that offences involving children and young persons be capable of being committed by either an adult or a child offender and thus rendering it unnecessary to specify the age of the offender in the relevant legislation, the Chairman asked whether the minimum age of criminal responsibility under the common law, say the age of 10 for serious criminal offences in some jurisdictions, would still be applicable.

68. Mr Eric CHEUNG responded that the current law in Hong Kong which stipulated that no child under the age of 10 years could be guilty of an offence would remain intact.

Others

69. Dr Fernando CHEUNG opined that the proposed distinction as to penile penetrative and non-penile penetrative offences was unnecessary and that the crux should be the damages and impact of the incident to the victim. Dr CHEUNG also opined that the issues covered in the Consultation Paper was too complicated and suggested the Sub-committee to prepare a simplified version to facilitate easy understanding of ordinary citizens. The Chairman echoed with this suggestion.

70. Mr Stephen HUNG of the Law Society opined that any use of discretionary power on prosecutorial matter should be avoided in the current proposed reform. Mr Peter DUNCAN said that the comment was taken note of and that the matter would be further considered.

Conclusion

71. The Chairman concluded that the Panel would continue to keep in view of the progress of the review of sexual offences.

(To allow sufficient time for discussion, the Chairman advised that the meeting would be extended by 15 minutes.)

V. Conversion of the former French Mission Building for accommodation use by law-related organization(s) and related purposes

LC Paper No. CB(4)591/16-17(06) -- Administration's paper on "Conversion of the former

Action

French Mission Building for accommodation use by law-related organisations and related purposes"

72. At the invitation of the Chairman, the Director of Administration and Development ("D of AD") of the Department of Justice ("DoJ") briefed members on the works project for conversion of the former French Mission Building ("FMB") for accommodation use by law-related organizations ("LROs") and related purposes, details of which were set out in the Administration's paper. D of AD remarked that the former FMB together with the DoJ offices in the Main Wing, the East Wing and part of the West Wing of the former Central Government Offices ("CGO") would form a "legal hub", which aimed at achieving the policy objective of enhancing Hong Kong's position as a hub for international legal and dispute resolution services in the Asia-Pacific region. The estimated cost of the project was about \$234.2 million in money-of-the-day ("MOD") prices. Subject to members' views, DoJ planned to submit the proposal to the Public Works Subcommittee ("PWSC") of the Legislative Council ("LegCo") for consideration and the Finance Committee ("FC") of LegCo in the second quarter of 2017 for approval. Subject to funding approval, the renovation works would commence in the fourth quarter of 2017 for completion by the first quarter of 2020.

Discussion

73. Mr Dennis KWOK said that the legal sector was supportive of the proposed conversion works for the former FMB, which was conducive to enhancing Hong Kong's status as a leading center for international legal and dispute resolution services in the Asia-Pacific region. He enquired whether the estimated project cost of \$234.2 million in MOD prices included the basic refurbishment works for office spaces in the former FMB which was to be used by LROs as well as the renovation works for hearing rooms for holding arbitration hearings in the West Wing of the former CGO.

74. D of AD advised that the above estimate did not cover the renovation works for the West Wing of the former CGO. Since the FMB was a declared monument, the proposed conversion works were relatively complicated and subject to a number of constraints. Hence, refurbishment works to meet operational needs would also be carried out under this project for areas to be occupied by LROs, thereby minimizing the finishing and fitting-out works needed to be carried out by the prospective tenants.

Action

75. In response to Mr Dennis KWOK's enquiry on the progress and project costs of the renovation works for the West Wing of the former CGO, D of AD said that with LegCo's funding approval in July 2016, the renovation works concerned had commenced and would be completed by the end of 2018. The estimated cost of the project was about \$1,078.9 million in MOD prices.

76. Mr Holden CHOW expressed support for the proposed conversion works. Noting the Administration's plan to open up some designated areas in the FMB for public access and interpretation on scheduled days in future, Mr CHOW hoped that the Administration would make the best use of this valuable monument with a view to enhancing the public's understanding of the historical significance of the building and its relation to the legal regime in Hong Kong. D of AD responded that DoJ would liaise with the Antiquities and Monuments Office ("AMO") regarding the appropriate mode and arrangement for guided tours on scheduled days to be conducted in future.

77. Indicating support for the proposed project, the Chairman enquired whether a classical and elegant style would be adopted for the interior design of the FMB, so that members of the public could appreciate the tradition of the legal regime in Hong Kong when they visited the building.

78. D of AD responded that one of the key objectives of the proposed works was to restore the building to the French Mission era dating back to 1919. Hence, a classical design was to be adopted in principle to preserve the heritage value of the building. Project Director of Architectural Services Department ("ArchSD") added that ArchSD placed much emphasis on the conservation of the proposed conversion works for the FMB. It had also spent considerable time in discussing with AMO on the plan to restore the original features of both the façade and interior design of the FMB. Notwithstanding this, necessary conversion works would be carried out in order to comply with the prevailing statutory requirements for fire safety and barrier-free access, bearing in mind that alteration to the original building should be minimized. In addition, research on some of the materials used in the FMB was conducted by the heritage consultant engaged by ArchSD, with a view to achieving the best results of the heritage preservation work at the FMB.

79. The Chairman enquired whether the Administration would display heritage items relating to the legal profession in Hong Kong such as wigs of judges so that participants of the guided tours could appreciate not only the architectural and design features of the FMB, but also items relevant to the legal profession showcased in the FMB. The Chairman also suggested displaying information concerning the development of legal system in Hong Kong, say information on the first Chinese Judge or barrister in Hong Kong.

Action

80. D of AD responded that the history of the FMB as the former Court of Final Appeal would be displayed by means of public interpretation so as to enhance the understanding of the historical and cultural significance of the building. D of AD further said that AMO would be consulted on the suggestions on the display of heritage items.

Conclusion

81. The Chairman concluded that members of the Panel supported the submission of the funding application to PWSC of the FC for consideration.

VI. Any other business

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

Council Business Division 4
Legislative Council Secretariat
11 August 2017