

Panel on Administration of Justice and Legal Services

List of issues suggested to be considered
(position as at 16 October 2012)

**Proposed
timing for
discussion**

1. 2012-2013 Judicial Service Pay Adjustment

The Director of Administration proposes to consult the Panel on its proposal to increase the pay for judges and judicial officers by 5.66% with effect from 1 April 2012 before seeking funding approval from the Finance Committee ("FC").

October 2012

2. Proposed creation of a supernumerary post of Deputy Principal Government Counsel in the Prosecutions Division of the Department of Justice

The Administration proposes to invite the Panel's views on the proposed creation of a supernumerary Deputy Principal Government Counsel post to meet expected increase in workload. The plan is to submit the proposal to the Establishment Subcommittee ("ESC") in November 2012 and FC in November 2012 for funding approval.

October 2012

3. Proposed creation of a supernumerary post of Deputy Principal Government Counsel in the Civil Division of the Department of Justice

The Administration proposes to invite the Panel's views on the proposed creation of a supernumerary Deputy Principal Government Counsel post to provide support to the Secretary for Justice ("SJ") to promote and facilitate the use of mediation in Hong Kong. The plan is to submit the proposal to ESC in January 2013 and FC in February 2013 for funding approval.

November 2012

4. Relocation of the Department of Justice to the Former

**Proposed
timing for
discussion**

Central Government Offices (Main and East Wings)

The Administration proposes to brief the Panel on the works project for the relocation of the Department of Justice to the Former Central Government Offices (Main and East Wings). The plan is to submit the proposal to the Public Works Subcommittee ("PWSC") and FC in early 2013 for funding approval.

November 2012

5. Law Reform Commission's Consultation Paper on Rape and Other Non-consensual Sexual Offences

On 17 September 2012, the Law Reform Commission ("LRC")'s Review of Sexual Offences Sub-committee published a Consultation Paper on Rape and Other Non-consensual Sexual Offences making preliminary proposals for the reform of the sexual offences in the Crimes Ordinance (Cap. 200). These proposals included a newly-defined offence of rape and the creation of a range of other non-consensual sexual offences.

November /
December 2012

LRC invites the views of Members of the Legislative Council ("LegCo") on the Consultation Paper. The consultation period runs till 31 December 2012.

6. Report on Mediation

The Administration proposes to report on the implementation by the Mediation Task Force of the recommendations in the Working Report on Mediation published in February 2010.

November /
December 2012

7. Information technology infrastructure for West Kowloon Law Courts Building

**Proposed
timing for
discussion**

According to the Judiciary, the new West Kowloon Law Courts Building will be equipped with information technology infrastructure to support the operation of the Magistrates' Courts, the Coroner's Court, the Obscene Articles Tribunal and the Small Claims Tribunal to be relocated there. The infrastructure for the Digital Audio Recording and Transcription Service System will also be included in this project.

December 2012/
January 2013

The Judiciary Administration proposes to consult the Panel before seeking funding approval from FC for the project.

8. Relocation of the Court of Final Appeal ("CFA") to the site of the former LegCo Building

At the Panel meeting on 10 July 2012, the Judiciary Administration briefed the Panel on the Judiciary's project to relocate the CFA to the site of the former LegCo Building.

First quarter of
2013

The Judiciary Administration plans to consult the Panel before seeking funding approval from PWSC and FC for the project.

9. Proposed amendments to the Arbitration Ordinance (Cap. 609)

The Administration consulted the Panel in February 2011 on the proposed arrangement for reciprocal enforcement of arbitral awards between the Hong Kong Special Administrative Region ("HKSAR") and the Macao Special Administrative Region ("Macao SAR") ("the proposed Arrangement"). By an information note dated July 2011, the Administration reported to the Panel on the result of the consultation on the proposed Arrangement and the commencement of discussion with the Macao SAR. The discussion of the proposed Arrangement with the Macao SAR is at its final stage. The Administration proposes to introduce a Bill to implement the proposed Arrangement. Some technical amendments to the Arbitration Ordinance as proposed by the arbitration sector will also be

First quarter of
2013

**Proposed
timing for
discussion**

included in the Bill.

10. Further expansion of the Supplementary Legal Aid Scheme ("SLAS")

At the meeting on 10 July 2012, members agreed that the Panel should follow up with the Administration on proposals not supported for inclusion in SLAS, including the inclusion of claims against property developers by minority owners in respect of compulsory sales of building units and claims against sale of goods and provision of services; and related issues, such as raising the financial eligibility limits for SLAS as well as the Ordinary Legal Aid Scheme and the establishment of an independent legal aid authority.

To be confirmed
by the Home
Affairs Bureau

On 26 September 2012, the Bar Association issued a Statement on the Desirability of an Independent Legal Aid Authority – the current situation is an Impediment to Access to Justice for Persons of Limited Means and "the Sandwich Class".

11. Implementation of the Civil Justice Reform ("CJR")

A CJR Monitoring Committee ("Monitoring Committee") was established in April 2009 to monitor the working of the reformed civil justice system and to make suggestions to the Chief Justice to ensure its effective operation. The Monitoring Committee chaired by the Chief Judge of the High Court has endorsed a list of 32 key indicators in six broad areas for assessment of the effectiveness of CJR.

The Judiciary
suggests this
item be deleted.

At its meeting on 21 December 2010, the Judiciary briefed the Panel on the findings on the first year of implementation of CJR (i.e. from 2 April 2009 to 31 March 2010). At the Panel's request, the Judiciary has provided a paper entitled "The First Two Years' Implementation of the Civil Justice Reform from 2 April 2009 to 31 March 2011" which has been issued to Panel members vide LC Paper No. CB(2)713/11-12(01) on 3 January 2012.

12. Review of the "as of right" provision in section 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance

**Proposed
timing for
discussion**

(Cap. 484)

According to section 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance, a civil appeal lies as of right from any final judgment of the CFA where the matter in dispute amounts to or is worth \$1 million or more. In two CFA judgments (FAMV No. 20 of 2011 and FACV No. 2 of 2011), the Court had expressed the view that this "as of right" ground of appeal should be re-considered/abolished. At its meeting on 20 December 2011, the Panel agreed to take up the issue with the Administration.

The Director of Administration has consulted the Judiciary on the issue. The Judiciary is considering this matter in consultation with the Bar Association and the Law Society and would consult the Panel on this matter at an appropriate time.

13. Judicial review against a resolution of the Legislative Council

In the Report of the Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation and priority allocation of a debate slot tabled at the House Committee ("HC") on 10 February 2012, it recommends, among others, that if warranted, judicial review may be considered as a means to resolve the differences between LegCo and the Administration or settle their disputes. However, if the dispute is about a resolution with legislative effect passed by LegCo and the Administration wishes to institute judicial review proceedings against the resolution, the question of who should be the proper respondent would need to be resolved. In this regard, the Administration should thoroughly study the legal and procedural issues involved and take appropriate legislative measures, if required. HC agreed to refer the matter to the Panel for follow up.

The Administration has advised that it would bear in mind the views of the Subcommittee in this respect and would keep in view any related further development when considering the way forward.

The Administration has pointed out in its progress report dated 11 July 2012 on the motion debate on "The Report of the

**Proposed
timing for
discussion**

Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation" that for judicial review proceedings involving Members and/or President of LegCo, the question of who should be made the respondent to a judicial review application is to be decided on a case-by-case basis in light of the nature and subject matter of the dispute.

14. Drafting style of long titles of bills

During the scrutiny of the Personal Data (Privacy) (Amendment) Bill 2011, members of the Bills Committee concerned were of the view that a consistent approach should be adopted in drafting the long titles of bills in accordance with some established principles. The matter was referred to the Panel for follow up.

The Department of Justice has provided a paper about the guidelines for drafting long titles (in **Appendix I**) and the paper was issued to Panel members on 17 July 2012.

15. Extending the applicability of the Ordinances of HKSAR to the offices set up by the Central People's Government ("CPG") in HKSAR

The Panel has been monitoring the progress of extending the applicability of the Ordinances of HKSAR to CPG offices set up in the HKSAR since 2001. In April 2008, the Administration advised the Panel that it was studying and discussing with the relevant authorities of CPG on whether and how 16 Ordinances which expressly bind the Government could be made applicable to the CPG offices. Extension of applicability to five of the above Ordinances were made in 2009 and 2010. The Administration also advised that it would continue to examine how the remaining 29 Ordinances which contain express references to the "Crown" should be adapted.

To be confirmed by the Constitutional and Mainland Affairs Bureau

**Proposed
timing for
discussion**

16. Inclusion of the statutory Independent Police Complaints Council ("IPCC") under the purview of The Ombudsman

During the scrutiny of the IPCC Bill introduced into LegCo in July 2007, the relevant Bills Committee discussed the question of whether the statutory IPCC to be established under the Bill should be subject to the jurisdiction of The Ombudsman. The relevant Bills Committee had sought the views of The Ombudsman on the matter, who indicated that she had no objection in principle to having the statutory IPCC under her purview though it was recognized that the decision was ultimately one of policy.

To be decided
by the Panel

At the Panel meeting held on 27 April 2009, members raised the issue of whether the statutory IPCC, to be established on 1 June 2009, should be subject to The Ombudsman's jurisdiction. Members agreed to bring up the issue after IPCC had been in operation for some time.

The Administration informed the Panel in writing on 23 September 2011 that it had consulted the Security Bureau on including the statutory IPCC under the purview of The Ombudsman. The Security Bureau advised that IPCC had discussed the proposal in May 2011. IPCC members raised unanimous concern that the proposal, if implemented, would undermine the image and public perception of IPCC being an independent oversight body established under the IPCC Ordinance (Cap. 604) if IPCC were subjected to the scrutiny of another statutory authority.

At the meeting on 28 November 2011, members agreed that the Panel should review the issue in future.

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

During the scrutiny of the Solicitors (Professional Indemnity) (Amendment) Rules 2001 which sought to increase the

To be decided
by the Panel

contributions by 150%, concern was raised by many solicitors firms, particularly the smaller firms operating with margin profits, about the marked increase in contributions to the Solicitors Professional Indemnity Scheme ("PIS"). They requested the Law Society of Hong Kong ("LS") to conduct a review of the existing PIS with a view to adjusting it or replacing it with other schemes. At the request of the Subcommittee formed to study the Amendment Rules, LS agreed to undertake a review of the insurance arrangements under the PIS.

LS commissioned Willis China (Hong Kong) Limited to review the current insurance arrangements and report on what arrangements were in the best interests of the legal profession and the public. LS presented the salient features and findings of the Willis Report to the Panel at its meeting on 18 December 2003. The Willis Report proposed two major schemes alternative to the existing PIS, i.e. a Master Policy Scheme and a Qualifying Insurers Scheme (QIS).

Although members of LS voted in favour of a QIS to replace the PIS in November 2004, the Panel was informed by LS in May 2006 that members of LS had voted by a large majority not to replace the PIS by a QIS at its Extraordinary General Meeting held on 27 April 2006. In this connection, the Council of LS at its meeting on 16 May 2006 resolved to set up a PIS Review Working Party to identify deficiencies in the existing scheme, consider how they might be remedied, and make appropriate recommendations to the Council. In the meantime, arrangements would be made to negotiate with insurers for renewal of the existing cover. LS would report further developments to the Panel in due course.

LS issued its first, second and third reports on the progress of work of the PIS Review Working Party to the Panel on 27 March 2006, 23 April 2008 and 27 October 2009 respectively.

The fourth report of the PIS Review Working Group was issued to members of the Panel on 16 July 2012 (in **Appendix II**).

**Proposed
timing for
discussion**

18. Prosecutorial independence

During the discussion on issues relating to prosecution policy and practice at the Panel meeting on 27 June 2011, some members were of the view that the existing arrangement of having SJ, a political appointee, to control prosecutions would undermine the public perception of the prosecutorial independence. They considered that the power to make prosecutions should rest with an independent Director of Public Prosecutions to ensure that prosecution decisions were free from political interference. Some other members, however, shared the Administration's view that it was SJ's constitutional responsibility to control criminal prosecutions as stipulated in Article 63 of the Basic Law and the control of prosecutions should continue to be rested with SJ.

Pending
submission from
the Bar
Association

Members noted that in the United Kingdom, a protocol between the Attorney General and the prosecuting departments was drawn up setting out when, and in which circumstances that the Attorney General would or would not be consulted on prosecution decisions and how the Attorney General and the Directors of the prosecuting departments would exercise their functions in relation to each other. The Administration was requested to consider whether a similar protocol should be adopted in Hong Kong. The Panel Chairman suggested that the Panel of the Fifth LegCo should be invited to consider as to how the issue should be followed up when the written submission of the Bar Association was available.

Response to Members' suggestion of "developing guidelines on the drafting of the long titles of bills"

The purpose of this paper is to inform the AJLS Panel about the guidelines followed by the Law Drafting Division ("LDD") of the Department of Justice when drafting long titles, in response to Members' suggestion raised at the AJLS Panel meeting held on 15 December 2009, and to explain the background against which they have been formulated.

Basic guidelines followed by LDD

2. LDD follows the basic rules and guidelines set out below when drafting long titles¹—

- (a) The long title has to accord with Rule 50(3) of the Rules of Procedure of the Legislative Council ("RoP").²
- (b) It must be wide enough to encompass the contents of the Bill.
- (c) It should generally be specific enough to give notice of subject matter.

3. The conventions for drafting long titles are essentially cast in broad and general terms. It is not a matter on which rigid rules can be developed. Particularly, how the third guideline is given expression in an individual Bill will depend entirely on the purpose and provisions of the Bill.

Benefits of informative long titles

4. It is trite knowledge that the modern approach to law drafting aims to respond to user needs, attitudes and expectations. In this context, it is considered important that the long title should contain sufficient information to give a clear idea of the purpose of the Bill. The long title can serve the same function as a purpose clause, the aim of which is to aid the public understanding of the legislation. It can serve as a guide to the purpose of an

¹ Paragraph 2.1.7 of recent LDD publication "Drafting Legislation in Hong Kong" ("the Guide") is based on these.

² "(3) The bill shall be given a long title setting out the purposes of the bill in general terms."

Ordinance, particularly if the purpose is not expressly referred to elsewhere.

Extra significance in amending Bills

5. Even for a person with training and experience in reading legislation, it can be a challenging task to understand the purpose of an amending instrument (with textual amendments) on a general reading of the individual provisions. The amending legislation may have a common theme, but the amendments may not occur in sequence. If the amendments are unconnected, the difficulty will be enhanced. In this scenario a long title that gives a short description of individual provisions would be an invaluable aid to a reader and will give an immediate picture of the purposes of the legislation. This being so, unsurprisingly, the long titles of amending Bills generally tend to be more detailed and descriptive than long titles of new principal Bills.

6. Informative long titles are more common now than a long title that simply states "A Bill to amend the XYZ Ordinance".³ As noted above, this trend reflects a more user-friendly approach to the drafting of legislation and to give effect to Rule 50(3). In a new Bill, a long title that says "A Bill to establish ABC corporation." would not be helpful to a reader who wishes to understand the general purpose of the legislation without reading laboriously through the legislation. Similarly, a long title that says "A Bill to amend the XYZ Ordinance" would not be useful from a reader's view point. A brief description of each significant clause is an effective way of giving an overview of the purpose and subject matter of a Bill.

Other common law jurisdictions

7. The conventions on long titles in most other common law jurisdictions also appear to be expressed in general terms. A common feature is that the long title must encompass the contents of the Bill. The connecting factor would be legislative practices and procedures rooted in parliamentary traditions of the United Kingdom.

8. The "Guide to Making Legislation" issued by the Cabinet Office of the United Kingdom says that the long title "must cover all the provisions of the Bill". The "House of Commons Practice and Procedure" of the Parliament of Canada states that the long title "must accurately reflect its [the Bill's]

³ This has been noted in paragraph 14.4.3 of the Guide.

contents". The Guide to Procedures of the House of Representatives of the Commonwealth of Australia requires that "every clause must come within scope of the title".⁴

Long titles of Bills implementing international conventions

9. At the meeting held on 15 December 2009, the AJLS Panel also raised the question of long titles of Bills that implement international conventions. There are no special guidelines for drafting the long titles of these Bills and the approach is in line with that for long titles of other Bills. The method of implementation and the extent of implementation of the convention concerned will be considered in drafting the long title.

Law Drafting Division
Department of Justice
June 2012

⁴ Drafting direction No. 1.1 of the Office or Parliamentary Counsel says that "The title of a Bill must encompass all the matters included in the Bill."



**4th Report on the Progress of the
Review of the
Professional Indemnity Scheme**

**A report by the Law Society of Hong Kong
to the Legislative Council Panel on the
Administration of Justice and Legal Services**

1. Introduction

- 1.1 The Panel may recall the present review of the Professional Indemnity Scheme ("Scheme") emanated from a decision by the general membership of the Law Society ("Society") to vote against the Qualifying Insurers Scheme ("QIS") in the Extraordinary General Meeting of the Society in April 2006.
- 1.2 The Society subsequently set up the PIS Review Working Party ("Working Party") with the following terms of reference:
 - (i) To review the structure and operation of the Scheme;
 - (ii) To invite and consider the views of the Members of the Society;
 - (iii) To make recommendations to the Council in connection therewith.
- 1.3 The Society reports regularly to the Panel on the progress of the review; the last report was submitted on 27 October 2009.
- 1.4 In this progress report, the Society advises on the developments since October 2009.

2. Contributions

- 2.1 Under paragraph 2(1)(a)(i) of Schedule 1 to the Solicitors (Professional Indemnity) Rules Cap. 159M ("the Rules"), the contribution payable by a law firm is calculated by reference to the following rating factors: (i) the number of principals, (ii) assistant solicitors and consultants and (iii) gross fee income.
- 2.2 The Society conducted an actuarial analysis in July 1996 on the fairness of the contribution formula by looking into the following questions:
 - (i) Is it fair to rate differently between partners and assistant solicitors?
 - (ii) Is it fair to distribute the contributions amongst firms by reference to their gross fee income only?
 - (iii) Is there inequality between the rates paid by small and large firms?
 - (iv) What is the correlation between the claims experience and the number and ratio of unqualified staff to solicitors?
 - (v) Is there any correlation between the size of firm and claims experience?
 - (vi) Is the type of practice relevant?

2.3 At the conclusion of the 1996 review, no changes were made to the formula. However, the formula was amended once in 2001 to reflect the increase in reinsurance premia and claims.

2.4 The Working Party has commissioned Towers Watson Risk Consulting Ltd. (previously known as Watson Wyatt Insurance Consulting Limited) ("Towers Watson") in 2009 to conduct an updated review.

2.5 Towers Watson's scope of review is as follows:

- (i) to assess the appropriateness of the contribution formula given that it was first established more than 20 years ago;
- (ii) whether the contributions are too expensive for some member firms;
- (iii) whether cross subsidization exists between law firms; and
- (iv) whether the formula appropriately reflect the risks and claims profiles of firms.

2.6 Towers Watson's findings were presented in 2010, as follows:

(a) Appropriateness of the contribution formula

Adequacy analysis shows that the current formula is sufficient to cover the total claims and expenses of administering the Scheme.

The total cost and total contribution for the indemnity years from 1995/96 to 2007/08 were HK\$1.8 billion and HK\$2.2 billion respectively, meaning the total contribution collected based on the current formula over the 13-year period was adequate to cover the total cost of the Scheme.

There were bound to be fluctuations from year to year where cost exceeded contribution and vice versa.

(b) Correlation between rating factors currently used and cost of the Scheme

The 3 rating factors currently used in the formula, namely the (i) average number of principals, (ii) average number of assistants solicitors and consultants and (iii) gross fee income are all positively correlated with the net incurred costs and the number of reported claims.

(c) Cross subsidization

Cross subsidization exists in the current formula structure but some cross subsidization will inevitably exist regardless of which formula structure is chosen. In particular:

- (i) large firms were found to clearly contribute more than the cost attributable to them;
- (ii) small firms contributed less than or equal to their share of the cost;
- (iii) medium size firms showed mixed results.

Switching to a Qualifying Insurers Scheme (QIS) where firms need to obtain cover from the open market may therefore not be beneficial to small firms.

(d) Conveyancing claims

Out of the total net liabilities of HK\$728 million for the indemnity years from 1995/96 to 2007/08, HK\$518 million were from conveyancing claims (71%) and HK\$102 million were from litigation-related claims.

Towers Watson was asked to propose a list of potential rating factors that may be considered to be collected from members and incorporated in the contribution formula. These factors include those used by other jurisdictions, as follows:

- Area of Practice
- Court work/ Non Court work
- Attendance at accredited risk management programs, CPD requirements, peer review
- Internal control systems
- No. of years in practice

It was noted any additional information to be collected from law firms must be verifiable and not cause excessive burden on the firms in providing the data. It would also be necessary to devise some means of ensuring that firms which claim they do no conveyancing work do not in fact do so.

It may be difficult to provide a fair allocation of the burden of contribution between different areas of practice when the claims numbers vary from year to year. For instance in 2010/11, the number of claims received on litigation (67) outnumbered those received on conveyancing (37).

Members' approval and amendments of the Rules will also be required to empower the Society to collect the suggested additional information from law firms and to make changes to the contribution formula.

QIS would theoretically allow commercial insurers to individually assess the risk profile of each firm but members already voted against a QIS in 2005 by an overwhelming majority.

(e) Alternative formula for calculating contributions as suggested by Towers Watson

The alternative formula suggested by Towers Watson has the same structure and factors as the current formula but only charges a slightly lower rate on each principal and assistant solicitors and consultants. The suggestion was noted but not adopted.

3. Master Policy Scheme ("MPS")

3.1 As mentioned in the last report Lockton Companies (Hong Kong) Ltd. ("Lockton"), an insurance broker, was appointed to compare the cost of insurance to law firms under a MPS and the Scheme.

3.2 The cost comparison exercise involves 5 stages:

- (i) First stage - Review of the Scheme's claims statistics, reinsurance arrangement and the management structure and claims handling arrangement of the Scheme.
- (ii) Second stage - Risk profiling by combining the demographics of the Society's Members (number of firms; number of solicitors; fee income; type of work etc.) with historical claims data.
- (iii) Third stage – Preparation of proposals on MPS for the Society and marketing the proposals to prospective MPS insurers to solicit underwriting submissions. This stage involves identifying qualified and interested prospective insurers; negotiating terms; and producing multiple proposals.
- (iv) Fourth stage – Evaluation of the underwriting submissions from MPS insurers and advising on the cost of MPS for the whole profession compared with the cost under the Scheme.

- (v) Final stage - Reporting to the Working Party on the qualitative advantages and disadvantages of the Scheme moving to an MPS, together with any protective measures which could be taken to insulate the MPS against price volatility in order to reduce the total cost of insurable risk.

3.3 Lockton has reached stage 3 but the preliminary coverage obtained from the commercial insurance market is less comprehensive than the Scheme. It provides an aggregate limit of HK\$10 million only for the policy year (the Scheme provides unlimited aggregate cover) and excludes all loss related in any way to the depreciation in value of any investments. Lockton will revert to the Working Party again when terms comparable to the Scheme become available from the commercial markets.

4. Reinsurance of the Scheme

4.1 The reinsurance contract of the Scheme runs from 1 October 2009 to 30 September 2013, with an option to terminate in 2011 in case the Scheme is replaced by an alternative form of indemnity arrangement. The option was not exercised.

5. Conclusion

5.1 As of 30 April 2012, the unaudited accumulated surplus of the Hong Kong Solicitors Indemnity Fund is approximately HK\$1.3 billion. The Scheme has consistently maintained a surplus of over HK\$1 billion in the past 2 years where contribution reductions of 33½% have been provided to member firms in both indemnity year 2010/11 and 2011/12. In view of the volatile global economy, it has been resolved that a prudent approach be taken and no contribution reduction will be provided in indemnity year 2012/13.

5.2 In light of the findings of the Towers Watson actuarial study on the contribution formula, the absence of comparable coverage available from the commercial insurance market and the strong financial position of the current Scheme, cover will continue to be provided to members under the Scheme.

The Law Society of Hong Kong
13 July 2012