

立法會
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Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 27 May 2019, at 4:30 pm
in Conference Room 2 of the Legislative Council Complex

- Members present** : Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)
Hon Dennis KWOK Wing-hang (Deputy Chairman)
Hon James TO Kun-sun
Hon Starry LEE Wai-king, SBS, JP
Hon Paul TSE Wai-chun, JP
Hon CHAN Chi-chuen
Dr Hon Fernando CHEUNG Chiu-hung
Hon Martin LIAO Cheung-kong, SBS, JP
Ir Dr Hon LO Wai-kiwok, SBS, MH, JP
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
- Member attending** : Dr Hon Elizabeth QUAT, BBS, JP
- Member absent** : Hon CHAN Kin-por, GBS, JP

**Public officers
attending**

: Agenda item III

Department of Justice

Mr Peter WONG
Deputy Law Officer (Treaties & Law)

Ms Lorraine CHAN
Deputy Principal Government Counsel (Treaties &
Law)(Acting)

Miss Katie KWONG
Senior Government Counsel (Treaties & Law)

Agenda item IV

The Law Reform Commission of Hong Kong

Mr Byron LEUNG
Secretary (Acting)

*Causing or Allowing the Death of a Child or Vulnerable
Adult Sub-committee*

Ms Amanda WHITFORT
Chairman

Dr Philip S L BEH
Member

Mr Stephen HUNG
Member

Ms Louisa NG
Secretary

Ms Michelle AINSWORTH
Consultant Counsel

Attendance by invitation : **Agenda item III**

Hong Kong Bar Association

Ms Kim Margaret ROONEY

Agenda item IV

Hong Kong Bar Association

Ms Corinne REMEDIOS

Ms Lareina CHAN

Clerk in attendance : Mr Lemuel WOO
Chief Council Secretary (4)6

Staff in attendance : Mr YICK Wing-kin
Senior Assistant Legal Adviser 2

Ms Macy NG
Senior Council Secretary (4)6

Ms Emily LIU
Legislative Assistant (4)6

Action

I. Information papers issued since the last meeting

- (LC Paper No. CB(4)848/18-19(01) - Administration's response to the letter from Dr Hon Elizabeth QUAT on combating clandestine photo-taking and joint letter from Hon Charles MOK, Hon Alvin YEUNG and Hon Dennis KWOK on prosecutions instituted under "access to computer with criminal or dishonest intent" and enactment of legislation

against the offence of voyeurism

- LC Paper No. CB(4)859/18-19(01) - Letter from Dr Hon Elizabeth QUAT on request for arranging a joint special meeting to discuss enactment of legislation against the offences of voyeurism and clandestine photo-taking
- LC Paper No. CB(4)891/18-19(01) - Administration's response on discussing combating clandestine photo-taking, prosecutions instituted under "access to computer with criminal or dishonest intent" and enactment of legislation against the offence of voyeurism)

Members noted the above papers issued since the last meeting.

II. Items for discussion at the next meeting

- (LC Paper No. CB(4)908/18-19(01) - List of outstanding items for discussion
- LC Paper No. CB(4)908/18-19(02) - List of follow-up actions)

Meeting in June 2019

2. Members noted that the following items would be discussed at the next regular meeting to be held on 24 June 2019:

- (a) Legal education and training in Hong Kong;
- (b) Implementation of the recommendations made by the Law Reform Commission of Hong Kong ("LRC"); and
- (c) Proposed amendments to the High Court Ordinance (Cap. 4) to facilitate the more efficient handling of cases, including those relating to non-refoulement claims.

3. As regards item (a) above, members agreed that by following the past practice, deputations from relevant stakeholders including law schools, law student associations, two legal professional bodies and the Standing Committee on Legal Education and Training in Hong Kong should be invited to give views. Members also agreed that, to allow sufficient time for discussion of the above three items, the next meeting would be advanced to start at 4:00 pm.

Items for discussion suggested by Members at the meeting in April 2019

4. The Chairman recapitulated that at the meeting of the Panel on Administration of Justice and Legal Services ("AJLS Panel") held in April 2019, members noted the letter from Dr Elizabeth QUAT (LC Paper No. CB(4)768/18-19(01)) and the joint letter from Hon Charles MOK, Hon Alvin YEUNG and Hon Dennis KWOK (LC Paper No. CB(4)790/18-19(01)) requesting that a joint meeting should be held by AJLS Panel and the Panel on Security to discuss combating clandestine photo-taking and prosecutions instituted under "access to computer with criminal or dishonest intent" and enactment of legislation against the offence of voyeurism respectively.

5. The Chairman said that as members had agreed that the requests made in the above letters should be discussed under the item on "Implementation of the recommendations made by LRC" ("the LRC item") at the June 2019 meeting, the Department of Justice ("DoJ") had been invited to respond to the letters and attend that meeting, and DoJ's responses were summarized below:

- (a) the Security Bureau ("SB") would discuss with the Panel on Security at its meeting in July 2019 the proposed introduction of two new and specific offences as recommended in LRC's report on Voyeurism and Non-consensual upskirt-photography published 30 April 2019;
- (b) for technology crimes, SB was looking into the judgment of the Court of Final Appeal handed down on 4 April 2019 with regard to section 161 of the Crimes Ordinance (Cap. 200) ("the CFA's judgment") with relevant departments and examining any legislative amendment to be made to the offence; and
- (c) since matters related to prosecution fell beyond the purview of LRC, DoJ took the view that it would not be appropriate for such matters to be discussed under the LRC item.

6. Having regard to DoJ's responses, the Chairman said that AJLS Panel members might raise their concerns regarding voyeurism and non-consensual upskirt-photography at the meeting of the Panel on Security in July 2019. However, when the LRC item was discussed at the AJLS Panel meeting in June

2019, she would allow more flexibility for Members to raise any questions related to the subject.

7. Dr Elizabeth QUAT considered that the scope of the LRC item was too broad for members to focus their discussion on her concerns. She also said that as the CFA's judgment had led to a legal vacuum in which voyeurism and clandestine photo-taking with one's own mobile phone could no longer be charged, there was a pressing need to hold a joint meeting between AJLS Panel and the Panel on Security to specifically discuss the issues. She hoped that the relevant parties would be invited to give views on the recommendations made by LRC to expedite the legislative process.

8. Mr CHAN Chi-chuen said that the Administration should listen carefully to the public views on the LRC's proposals regarding voyeurism and upskirt photo-taking, so that the relevant policy issues might be thoroughly deliberated, before drafting the legislation. Otherwise, it would repeat the mistakes of rushing the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 ("the Fugitive Offenders Bill") through LegCo without proper public consultation.

Suggestion of holding a joint meeting with the Panel on Security to discuss issues relating to the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019

9. The Deputy Chairman said that while the Panel on Security would hold a series of special meetings to discuss issues relating to the Fugitive Offenders Bill, AJLS Panel should also play a vital role in studying the Fugitive Offenders Bill. He asked whether the Chairman had discussed with the Chairman of the Panel on Security the suggestion of holding a joint meeting to discuss the Fugitive Offenders Bill. He also urged that the Secretary for Justice ("SJ") should be invited to explicate on the legal issues involved and the legal professional bodies should be invited to give their views on the Fugitive Offenders Bill at the joint meeting.

10. The Chairman said that, to her understanding, all Members would be invited to join the special meetings of the Panel on Security on the Fugitive Offenders Bill, and many members of AJLS Panel were also members of the Panel on Security. SJ might also attend the special meetings of the Panel on Security to answer members' enquiries. Nevertheless, she was open-minded to members' concerns and suggestions and undertook to discuss with the Chairman of the Panel on Security.

III. The United Nations Convention on Contracts for the International Sale of Goods and its application to the Hong Kong Special Administrative Region

(LC Paper No. CB(4)908/18-19(03) - Administration's paper on the consultation on the proposed application of the United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region)

11. Deputy Law Officer (Treaties & Law) ("DLO(T&L")) of DoJ briefed members on the background and salient features of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), the proposed application of CISG to the Hong Kong Special Administrative Region ("Hong Kong") ("the proposed application of CISG"), and its implementation in the Hong Kong law. He also briefed members on the arrangements for a three-month consultation exercise planned to be launched by DoJ in July 2019 on the proposed application of CISG.

Views of the Hong Kong Bar Association

12. Ms Kim Margaret ROONEY of the Hong Kong Bar Association ("the Bar Association") said that CISG was a Convention that regularly came up in international arbitration and Hong Kong was one of the leading international arbitration centres. As such, the Bar Association supported DoJ's intention to launch the three-month consultation exercise to give an opportunity to the public to give their views as to the pros and cons of the proposed application of CISG.

Discussion

Reasons for Hong Kong not being a party to the Convention

13. Mr CHUNG Kwok-pan asked why CISG was not applicable to Hong Kong for years, while many of its top trading partners had become the Contracting States. DLO(T&L) replied that prior to 1 July 1997, CISG was not applied to Hong Kong because the United Kingdom ("UK") was not a Contracting State. During and after the transition, China had not deposited notification with the Secretary General of the United Nations for applying CISG to Hong Kong though the former was a Contracting State.

14. DLO(T&L) further said that, given the recent trend that many close trading partners of Hong Kong had become parties to CISG, the Administration

considered that the proposed application of CISG could potentially promote Hong Kong's trade growth. In response to the Chairman's enquiry as to why UK did not join CISG, DLO(T&L) said that according to some commentaries, UK did not see a pressing need to join CISG as it had all along been conducting international trade under its common law system.

Benefits to Hong Kong

15. Dr Junius HO asked about the benefits of the proposed application of CISG. DLO(T&L) referred to paragraph 10 of the Administration's paper and said that, based on an initial assessment, the benefits of extending CISG to Hong Kong included the potential to drive Gross Domestic Product ("GDP") and trade growth, preventing Hong Kong businesses from being subject to unfamiliar foreign laws when entering into cross-boundary transactions, improving Hong Kong's competence in resolving CISG disputes and providing freedom of contract.

16. DLO(T&L) elaborated that as almost all major trading members of the World Trade Organization and nearly half of the countries participating in the Belt and Road Initiative were members of CISG, the aim of which was to reduce legal barriers that could diminish or hamper the free flow of trade, CISG would assist in driving Hong Kong's GDP and trade growth. On the other hand, given the economic strength of Hong Kong's top trading partners, Hong Kong businesses might have difficulties in ensuring that contractual balance was kept or that a governing law familiar to them was chosen and hence might derive benefit from the default application of CISG to contracts falling within its scope.

17. Dr Junius HO further enquired to what extent CISG would help reduce the number of disputes arising from the sales of goods contracts. DLO(T&L) said that given the uniform CISG rules and the relatively long history of CISG, which had entered into force in 1988, it was hoped that fewer disputes would arise between parties who had been familiar with the CISG rules. It was also hoped that, when such disputes arose, they could be resolved efficiently as the United Nations Commission on International Trade Law was maintaining a database with large number of CISG cases for reference. DLO(T&L) added that such disputes might also bring indirect benefits by improving Hong Kong's competence in resolving CISG disputes, thereby reinforcing Hong Kong's position as a dispute resolution hub.

18. Mr CHUNG Kwok-pan enquired how, as Hong Kong had been a close trading partner of the Mainland for a long time, the application of CISG could benefit Hong Kong/Mainland transactions. He also asked how the proposed application of CISG would help Hong Kong establish itself as the centre for

international legal and dispute resolution services in the Asia-Pacific region, which was supported under the "Outline Development Plan of the Guangdong-Hong Kong-Macao Greater Bay Area" promulgated in February 2019.

19. In response, DLO(T&L) advised that CISG entered into force for China in 1988 and the Mainland traders were familiar with the application of CISG to international sale of goods contracts. In that connection, the default application of CISG to Hong Kong/Mainland transactions would help make contract-making easier and more efficient and hence facilitate the trade between the two places. The proposed application of CISG would also have a positive impact on Hong Kong in establishing itself as a leading centre for international legal and dispute resolution services in the Asia-Pacific region.

Excluding the applicability of the Convention

20. The Chairman noted from paragraph 21 of the Administration's paper that CISG would be implemented in Hong Kong law by way of enacting a new stand-alone Ordinance ("New Ordinance"), and the New Ordinance would contain provisions with the effect that CISG rules would prevail to the extent there was any inconsistency between the New Ordinance or CISG and any other Hong Kong laws. In view of the above, she asked how the parties to a contract could exclude the applicability of CISG and, if one of the parties to an international sales contract wanted to exclude the applicability of CISG entirely in favour of other law but the other party did not agree, whether the applicability of CISG could be excluded.

21. In reply, DLO(T&L) said that as the autonomy of the parties to international sales contracts was a fundamental theme of the Convention, the parties could, by agreement, derogate from virtually any CISG rule (except Article 12) or exclude the applicability of CISG entirely in favour of other law. However, if mutual agreement could not be reached to exclude the applicability of CISG, CISG would be automatically applied to the relevant contract when the relevant conditions provided for in CISG were satisfied.

22. DLO(T&L) further explained that CISG was adopted by the United Nations in 1980 to provide fair and uniform rules to govern contracts for international sales of goods, and it was indeed one of the advantages of CISG to prevent businesses from being subject to unfamiliar foreign laws when entering into cross-boundary transactions, as in the situation mentioned by the Chairman.

Comparison of regimes for governing international sale of goods contracts

23. The Chairman noted that there were various differences between CISG and the relevant existing Hong Kong law in governing contracts for international sales of goods. She asked the Administration to elaborate on the major differences between CISG and the Hong Kong common law system in that respect.

24. DLO(T&L) explained that, among other things, CISG was relatively more pro-contract than existing Hong Kong laws in the sense that its policy was to keep the contract alive, even in the case of breach, rather than allow for easy termination. For example, under Article 37 of CISG, if the seller had delivered goods before the date for delivery, he might, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of that right did not cause the buyer unreasonable inconvenience or unreasonable expense.

25. DLO(T&L) also pointed out that, at least as regards two important areas, namely, obligations concerning the fitness and quality of goods sold, and remedies (e.g. the right to cure, the easy ability to vary the contract, and the remedy of price reduction), CISG appeared to be more in line with modern commercial expectations and commercial practice.

26. The Chairman noted from paragraph 7(a)(ii) of the Administration's paper that CISG applied to contracts for sale of goods between parties whose places of business were in different States when the rules of private international law led to the application of the law of a Contracting State, but several Contracting States (e.g. China, Singapore and the USA) had declared under Article 95 of CISG that they were not bound by this ground as permitted by CISG. She asked the Administration to explicate in detail about such declarations.

27. DLO(T&L) explained that under Article 1(1)(b) of CISG, CISG applied to a contract when one of the parties or both were not Contracting States but had chosen the law of a Contracting State, say Canada, to govern the contract. However, in respect of China, since China had made a declaration pursuant to Article 95 of CISG that it was not bound by Article 1(1)(b) of CISG, CISG would not apply automatically to the contract.

28. DLO(T&L) added that, in order to prevent potential confusion in applying CISG to Hong Kong-related disputes, DoJ's initial view was that China's declaration under Article 95 of CISG should also apply in respect of

Hong Kong if CISG was extended to Hong Kong. However, DoJ would listen to more views in that regard before making the final decision.

Reciprocal arrangement between Hong Kong and Mainland China

29. Mr CHUNG Kwok-pan noted that the Administration considered it might be an opportune time to consider the possibility of having a reciprocal arrangement in place between Hong Kong and the Mainland such that a sale of goods contract between businesses in the two places would be treated by both jurisdictions as if it were a contract between businesses in different contracting parties to CISG ("the reciprocal arrangement"). He asked the Administration to elaborate on the details.

30. DLO(T&L) explained that since transactions between a business in Hong Kong and a business in Mainland China were within the same country, CISG (as an international treaty) did not automatically apply. However, in view of the close economic ties between the Mainland and Hong Kong and to facilitate sale of goods between businesses in the two places, the Administration proposed that, initially on a unilateral basis, the New Ordinance would contain provisions which would in effect apply the CISG rules also to Hong Kong/Mainland transactions. In the longer term, however, DoJ might explore and discuss with the Mainland the possibility to establish the reciprocal arrangement so that the CISG rules could be implemented comprehensively and systematically in respect of Hong Kong/Mainland transactions.

31. Mr CHUNG Kwok-pan wished to confirm whether, even if CISG was applicable to Hong Kong/Mainland transactions, the parties to a contract could opt out of CISG and choose either the Mainland laws or Hong Kong laws to govern the contract concerned. DLO(T&L) answered in the affirmative and added that the contractual parties could also choose the laws of other countries, e.g. UK, as the governing law of the contract. Nevertheless, he considered that CISG should be able to provide an additional choice which was fair, uniform and internationally recognized, and was flexible as its provisions allowed freedom for modification.

Public consultation on legislative proposals

32. The Deputy Chairman indicated support for developing Hong Kong as an international arbitration centre and agreed to the need for extending the application of CISG to Hong Kong. However, he considered the benefits that CISG might bring would be offset by the Fugitive Offenders Bill which would tarnish Hong Kong's reputation as international financial and arbitration centres. He also expressed his strong view against the 20-day's consultation period for the Fugitive Offenders Bill without any consultation paper by the

Administration, and considered the consultation period extremely short in comparison to the normal practice of the Administration of conducting three-month public consultation on legislative proposals.

33. Dr Fernando CHEUNG considered that the proposed application of CISG to Hong Kong was following the trend and hence there should be little controversy. He hoped that the Administration would listen to the views of the public and the relevant sectors on the proposed application of CISG. However, he agreed with the Deputy Chairman's view that the Fugitive Offenders Bill would threaten Hong Kong's status as an international trading centre and urged the Administration to take heed of the strong public views regarding the Fugitive Offenders Bill.

34. DLO(T&L) said that his other colleagues in DoJ were assisting SB on legal issues relating to the Fugitive Offenders Bill and he would relay members' views to that team. To his understanding, the Administration including SB and DoJ had been actively explaining the rationales for introducing the Fugitive Offenders Bill to the public. He assured members that DoJ would continue to do its best to enhance Hong Kong's status as an international arbitration centre and the development of commercial laws.

Conclusion

35. The Chairman concluded that AJLS Panel in general supported the approach of the proposed application of CISG. She hoped that the Administration would listen to more views in this regard during the public consultation.

IV. The Law Reform Commission of Hong Kong — Consultation Paper on Causing or Allowing the Death or Serious Harm of a Child or Vulnerable Adult

(LC Paper Nos. CB(4)903/18-19(01) - Consultation paper and executive summary of consultation paper on causing or allowing the death or serious harm of a child or vulnerable adult published by the Causing or Allowing the Death of a Child or Vulnerable Adult Sub-committee of the Law Reform Commission of Hong Kong)

Briefing by the Law Reform Commission of Hong Kong

36. Ms Amanda WHITFORT, Chairman of the Causing or Allowing the Death of a Child or Vulnerable Adult Sub-committee of LRC ("the Sub-committee") briefed members on the consultation paper on causing or allowing the death or serious harm of a child or vulnerable adult ("the Consultation Paper"), the details of which were set out in LC Paper No. CB(4)903/18-19(01).

37. Ms Amanda WHITFORT elaborated on the following issues: the incidence of family violence against children and vulnerable persons which resulted in death and serious harm; the difficulties for the prosecution in establishing "who did it" in these cases; and the concerns of the defence in ensuring that there was no miscarriage of justice against the parents or carers who were accused. She then went on to detail the Sub-committee's recommendations relating to the introduction of a new offence of "failure to protect a child or vulnerable person where the child's or vulnerable person's death or serious harm resulted from an unlawful act or neglect" ("the proposed New Offence"), including the high maximum penalties of 20 years' imprisonment where the victim died and 15 years' imprisonment where the victim suffered serious harm.

38. Ms Amanda WHITFORT further said that the Consultation Paper had also set out some more general observations on matters concerning the protection of children and vulnerable persons which it wished to bring to the attention of the Administration, and the Sub-committee's recommendations to review the maximum penalty applicable under section 27 of the Offences against the Person Ordinance (Cap. 212) with a view to increasing it as appropriate.

Views of the Hong Kong Bar Association

39. Ms Corinne REMEDIOS of the Bar Association said that the Bar Association supported protecting children and vulnerable persons as proposed in the Consultation Paper. However, the Bar Association would need more time to go through the Consultation Paper in detail so that it could give comments from multiple angles, in particular from the criminal legal point of view. Having said that, she made the following provisional comments:

- (a) since owing a duty of care to the victim or being a "member of the same household" who had "frequent contact" with the victim would be used as alternative bases for liability under the proposed New Offence's provisions, it would be difficult to advise at what stage the victim's relatives who did not actually live with the child or

domestic helpers who lived in the same household with the victim would become potentially liable for a criminal offence as culpable bystanders;

- (b) in view of (a), the Sub-committee might consider whether domestic helpers' organizations or concern groups would like to know more about this to be able to make their own representations as appropriate, and listen to their views;
- (c) while the Sub-committee recommended that no minimum age for the defendant would be stipulated in the proposed New Offence, defences were available to young defendants in appropriate cases which would be subject to the law on the minimum age of criminal responsibility in Hong Kong which was specified to be 10 years of age. The Bar Association considered that this recommendation should be read in conjunction with Practice Direction SL 10.1 ("PDSL 10.1") issued by the Judiciary which provided guidance applicable to all cases concerning a child's arrangement commenced or pending in the Family Court or the High Court, where there was an issue raised in relation to domestic violence, to ensure that they interfaced at the right levels;
- (d) the Bar Association considered that having regard to PDSL 10.1 mentioned above, the number of child abuse cases reported might increase substantially with the proposed New Offence coming into force and hence a lot more fact-finding hearings might need to be conducted, thereby lengthening the case processing time in the Family Court; and
- (e) consideration should be given to aligning the definition of "child" to that as set out in the United Nations Convention on the Rights of the Child, i.e. every human being below the age of 18 years.

General remarks

40. Dr Fernando CHEUNG appreciated the Sub-committee's efforts in preparing the Consultation Paper and indicated support for the recommendations therein. He hoped that the proposed New Offence would come into force as soon as practicable to prevent recurrence of a tragic child abuse case in 2018 in which a five-year-old girl died. However, he acknowledged that the proposals might have impacts on key doctrines of the criminal law and the law of evidence including the presumption of innocence, the accused's right to silence and the privilege against self-incrimination.

41. Dr Junius HO indicated support for the recommendations made in the Consultation Paper in general and hoped that they could be implemented as soon as practicable to prevent further abuses of children and vulnerable persons from occurring. Dr Elizabeth QUAT also said that in principle, the Democratic Alliance for the Betterment and Progress of Hong Kong welcomed the proposed New Offence in view of the increasing number of serious child abuse cases and the evidential problem that could arise for the prosecution trying to prove beyond reasonable doubt who committed the "unlawful act" which caused the victim's death or serious harm. She also agreed that increasing the maximum penalty applicable under section 27 of Cap. 212 would strengthen the deterrent effect.

The substantive offences

42. The Chairman noted that currently, depending on the evidence available, there were a range of possible charges which the prosecution might seek to bring against those implicated in a child's or vulnerable adult's death or serious harms including, in the case of a child, the statutory offence of ill-treatment or neglect of a child under section 27 of Cap. 212 and some other offences. There were also other offences under Cap. 212 which might be considered in certain circumstances in relation to cases of child abuse or abuse of vulnerable adults, such as abuse of the elderly. She enquired whether the above charges would continue to be laid after the proposed New Offence had come into effect.

43. In reply, Ms Amanda WHITFORT explained that the proposed New Offence was not about criminalizing a person for their unlawful act of abuse, but about criminalizing a person for failure to protect a child from another's act of abuse. The offences mentioned by the Chairman would remain to be the front-line offences for charging the abuser(s) if identified, with the proposed New Offence used as a catch-up offence in case "who did it" could not be established.

44. Ms Amanda WHITFORT further advised that the proposed New Offence was comprised of several elements, each of which must be proved beyond reasonable doubt before a person could be held liable. This represented a high evidential threshold for the prosecution. The offence was not targeted at accidents, but was indeed targeted at cases where serious harm had been inflicted on the victim in circumstances where preventive steps should have been taken, and the failure to have taken such steps warranted criminal sanction.

45. Dr Junius HO indicated that in the traditional Chinese society, some parents might administer corporal punishment to their children to manage their behaviours. He was worried that the practice of corporal punishment at home, no matter the degree, would be regarded as physical abuse against children.

Dr HO enquired if any guideline would be prescribed to distinguish acceptable level of corporal punishment, so that parents' administration of acceptable level of corporal punishment would not constitute an offence of child abuse.

46. Dr Philip BEH, member of the Sub-committee replied that while certain forms of corporal punishment at home might be acceptable in the old days, attitudes towards corporal punishment had changed. He also said that after due deliberation, the Sub-committee considered it inappropriate to define "serious harm". Therefore, whether parents' administration of corporal punishment to children was acceptable should be decided by the society, and whether a particular act would constitute serious harm under the proposed New Offence would be determined by the court.

Scope of the offence of failure to protect

Definition of "child"

47. Dr Elizabeth QUAT noted that the proposed New Offence would impose liability on those who failed to take steps to protect a child (under 16 years of age) or a vulnerable person (over 16 years of age) from death or serious harm in circumstances where the defendant owed a duty of care to the victim, or was a member of the victim's household and had frequent contact with the victim; the defendant was, or ought to have been, aware of the risk of serious harm to the victim; or the defendant's failure to take steps to protect the victim from harm was, in consequences, so serious that a criminal penalty was warranted. Dr QUAT expressed concern about the definition of "child" adopted under the proposed New Offence.

48. Dr Elizabeth QUAT asked the Sub-committee to consider reviewing the definition of "child" and explore whether it could be lowered to 13. She pointed out that the definitions of "child" were inconsistent among various ordinances in Hong Kong. Those aged 13 or above might have taken up part-time jobs in certain circumstances and those aged 15 or above might even have already taken up full-time jobs. Dr QUAT considered it ludicrous that while persons of 13 years old and above could capably take care of themselves, their working parents would still be held criminally liable for leaving them alone at home.

49. In response, Ms Amanda WHITFORT advised that not every child under the age of 16 years was able to protect himself or herself from harm in all situations and, therefore, the Sub-committee proposed to define "child" as a person under 16 years of age after due consideration. Given the various elements which had to be proven before the proposed New Offence could be

established, Ms WHITFORT considered that working parents should not be over-worried about being caught by the proposed New Offence.

Children and vulnerable persons in human trafficking

50. The Deputy Chairman said that the United Nations had called on Hong Kong and other nations and jurisdictions to do more to combat modern slavery and human trafficking, which were also his concerns, and he had proposed the Modern Slavery Bill (a Member's Bill) with a view to criminalizing all forms of human trafficking in Hong Kong. Noting that according to paragraph 1.37 of the Consultation Paper, among other things, it was possible that adults might be rendered vulnerable through their potential for exploitation (e.g. persons imported from overseas and subjected to forced or compulsory labour, slavery or servitude), the Deputy Chairman enquired what specific recommendations the Sub-committee would make on the protection of such vulnerable persons.

51. Ms Amanda WHITFORT replied that the definition of "vulnerable person" was deliberately wide to cover a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect was significantly impaired for any reason, including but not limited to, physical or mental disability, illness or infirmity. Furthermore, as the Sub-committee did not recommend a statutory definition for "serious harm", and the question of what constituted "serious harm" for the purpose of the failure to protect offence would be left to the judge and jury to determine in any particular case, persons subjected to forced or compulsory labour, slavery or servitude who died or suffered serious harm (not limited to grievous bodily harm) resulting from an unlawful act should also be covered by the proposed New Offence.

52. Ms Amanda WHITFORT then cited the case involving a severely abused Indonesian domestic worker, Ms Erwiana Sulistyarningsih, as an example, and pointed out that as domestic helpers in some cases might not freely remove themselves from the situation by reason of their circumstances, they might be considered as vulnerable persons. The proposed New Offence would also cover situations in which children suffered serious harm from abuse in trafficking cases, where persons who had a duty of care or who resided and had frequent contact with them ought to have been aware of the abuse and yet failed to protect them.

The range of those potentially liable for the offence of failure to protect

Domestic helpers and staff members in elderly care homes

53. Dr Fernando CHEUNG said that he agreed in general to the range of persons who were potentially liable for the proposed New Offence. However,

he expressed concerns about the possible impacts on domestic helpers and staff members working in elderly care homes in particular. He said that, for a domestic helper taking care of his/her employer's child, he/she had a duty of care to the child and was a member of the same household as the child with whom he/she had frequent contact. In a case where the child died or suffered serious harm resulting from an unlawful act or neglect, the helper would be liable for the proposed New Offence. Similarly, a staff member in an elderly care home might be charged with the same offence if an elderly person under his/her care died or suffered serious harm which resulted from an unlawful act or neglect not inflicted by him/her.

54. Dr Fernando CHEUNG pointed out that in either situation mentioned above, while the domestic helper or the staff member concerned might be aware that there were risks that serious harm would be caused to the victims by the unlawful act or neglect, it might not be easy or possible for them to take steps to protect the victims owing to the unique circumstances faced by them. It was particularly so if they were in an inferior position in a power relationship, e.g. being an employee and the serious harm was inflicted by the employer. In this regard, Dr CHEUNG enquired whether they would have a sufficient defence to avert criminal liability.

55. Ms Amanda WHITFORT advised that the recommendations in the Consultation Paper were to require people to do what was reasonable but not to require what was not reasonable. The proposed New Offence required those having a duty of care to the victim, and those in the same household as the victim and with whom they had frequent contact, to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm. A list of elements of the proposed New Offence must be proven before the domestic helper or the staff member mentioned above could be charged for committing the offence. They included whether an "unlawful act" or neglect was involved in the victim's death or serious harm, whether the defendant was reasonably expected to be aware of the risks that serious harm would be caused to the victim; and whether the failure to take steps, or steps that had been taken, could be considered reasonable in the circumstances.

56. The Chairman noted that under the proposed New Offence, the key elements which needed to be established included, among other things, whether the defendant had a duty of care, whether he/she was reasonably expected to be aware that there was a risk that serious harm would be caused to the victim by an unlawful act or neglect, and whether there was a failure to take reasonable steps to protect the victim from serious harm. She asked if the key elements were to be determined by the judge and jury, or would be provided in the statute law.

57. Ms Amanda WHITFORT explained that the jury would need to be satisfied that there was a grossly negligent failure to take reasonable steps to protect the victim from harm. What constituted "reasonable steps" would be a matter for the jury to determine, having regard to the circumstances of each case, through applying the objective reasonable man test. She also stressed that while it would not be necessary for the prosecution to prove whether the defendant was a culpable bystander or the perpetrator of the harm under the proposed New Offence, the list of elements which must be proven before the offence applied in a particular case still presented a high evidential threshold for the prosecution to achieve. For example, she said that the Sub-committee did not define what steps should be taken, e.g. calling the Police or the Social Welfare Department ("SWD"), and the reasonableness was to be determined by the judge and jury depending on the particular circumstances that the defendants were in.

Neighbours and passers-by

58. The Chairman enquired whether a neighbour to the victim would be required to take steps to protect the victim from serious harm if the former was aware that there were risks that serious harm would be caused to the victim by an unlawful act or neglect; and whether the neighbour would be liable for the proposed New Offence for failure to do so. She also asked if a child or vulnerable person was left unattended in a public place, e.g. in a park, whether a passer-by who failed to take steps to protect the victim who subsequently died or was seriously harmed as a result of an unlawful act committed the offence.

59. In reply, Ms Amanda WHITFORT reiterated that as the neighbour living next door had no duty of care to the victim, and was not a member of the same household having frequent contact with the victim, he/she would not be liable for the offence. She added that the defendant had a duty of care to the victim only if the defendant was a parent or guardian of the victim or had assumed responsibility for the victim's care. Ms WHITFORT also said that, for the child or vulnerable person left unattended in a public place as mentioned by the Chairman, the situation was not covered by the proposed New Offence and she was not aware of any other jurisdictions which had legislation to hold the passers-by liable to criminal offences.

(At 6:28 pm, the Chairman proposed and members agreed to extend the meeting for 15 minutes to 6:45 pm. At 6:42 pm, members raised no objection to the Chairman's proposal to further extend the meeting for 15 minutes to 7:00 pm.)

Designated professionals

60. Dr Elizabeth QUAT enquired whether, under the proposed New Offence, failure of a teacher in identifying suspected child abuse cases involving his/her students and taking appropriate actions, such as reporting to the Police, would mean he/she would be liable for the proposed New Offence.

61. Dr Philip BEH replied that the Sub-committee had no intention to hold those having only infrequent or limited ongoing contact with the victims, such as their teachers in schools, liable for the offence of failure to protect the victims. Notwithstanding this, the Sub-committee observed that detailed guidelines for voluntary reporting of child abuse and elder abuse cases were contained in procedural guides published by SWD, and there was currently no mandatory reporting system for child abuse and abuse of vulnerable persons in Hong Kong. Dr BEH said that issues concerning the reporting of abuse were discussed in the Consultation Paper and the Sub-committee would like to bring them to the Administration's attention.

62. Mr Stephen HUNG, member of the Sub-committee also advised that designated professionals including teachers, social workers and healthcare professionals were not intended to be targeted by the proposed New Offence. The proposed New Offence mainly targeted at overcoming the evidential problems which might arise in relation to prosecuting child abuse and vulnerable person abuse cases. It was hoped that the proposed New Offence would deter those living with and/or caring for children and vulnerable persons from failing to protect them from risks of harm.

63. Dr Fernando CHEUNG considered it necessary to introduce mandatory reporting system in Hong Kong. With a view to better protecting children and vulnerable persons, certain designated professionals (such as teachers, social workers and healthcare professionals) who worked frequently with children should be obliged to report cases of suspected child abuse and vulnerable person abuse cases to the authorities. Dr CHEUNG also said that he would propose a Member's Bill on this subject, seeking to introduce a mandatory reporting system under the Protection of Children and Juveniles Ordinance (Cap. 213).

Defendants who were children

64. Dr Fernando CHEUNG noted that while no minimum age for the defendant would be stipulated in the proposed New Offence, this would still be subject to the minimum age of criminal responsibility in Hong Kong, which was ten years of age. While he supported this in principle, he was concerned that a person who had assumed a duty of care to a child under 16 might be the latter's sibling, who was also a child, and who might be in circumstances that made it

difficult or impossible to protect the victim. The Chairman pointed out that the children in Dr CHEUNG's example might be subjected to extreme domestic violence, or that the other subject was an adult who exerted authority over both siblings, and asked whether these were possible defences under the proposed New Offence.

65. In response, Mr Stephen HUNG advised that establishing a duty of care to the victim was only the first step in establishing liability while the court would also take into account other elements of the offence. If there was evidence showing that the victim and the defendant (the victim's sibling who was a child) were both under duress, such as being subjected to extreme domestic violence, or where the defendant was a child and the other suspect was an adult who exerted authority over the defendant, it might be a possible defence to argue that the child's failure to take steps, or the steps that he/she did take, could be considered reasonable in the circumstances.

V. Any other business

66. There being no other business, the meeting ended at 6:53 pm.