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**Panel on Security
and
Panel on Administration of Justice and Legal Services**

**Minutes of joint meeting held on Monday, 21 October 2002
at 2:30 pm in the Chamber of the Legislative Council Building**

Members present : Panel on Security

- Hon LAU Kong-wah (Chairman)
- * Hon James TO Kun-sun (Deputy Chairman)
- * Hon Albert HO Chun-yan
- Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
- Hon CHEUNG Man-kwong
- Hon Andrew WONG Wang-fat, JP
- Hon WONG Yung-kan
- Hon Howard YOUNG, JP
- * Hon Ambrose LAU Hon-chuen, GBS, JP
- Hon Michael MAK Kwok-fung
- Hon IP Kwok-him, JP
- * Hon Audrey EU Yuet-mee, SC, JP

Panel on Administration of Justice and Legal Services

- ◆ Hon Margaret NG (Chairman)
- Hon Jasper TSANG Yok-sing, GBS, JP (Deputy Chairman)
- Hon CHAN Kam-lam, JP
- Hon Miriam LAU Kin-ye, JP
- Hon Emily LAU Wai-hing, JP
- Hon TAM Yiu-chung, GBS, JP

Members attending : Hon Cyd HO Sau-lan
Dr Hon LO Wing-lok

**Members
absent** : Panel on Security

Dr Hon LUI Ming-wah, JP

Panel on Administration of Justice and Legal Services

Hon Martin LEE Chu-ming, SC, JP

* Also a member of Panel on Administration of Justice and Legal Services

◆ Also a member of Panel on Security

Public Officers : Mrs Regina IP, GBS, JP
attending Secretary for Security

Mr Bob ALLCOCK, BBS
Solicitor General

Mr James O'NEIL
Deputy Solicitor General

Ms Roxanna CHENG
Senior Assistant Solicitor General

Mr Victor LO
Assistant Commissioner of Police

Mr Johann WONG
Principal Assistant Secretary (Security)

Mrs Wendy CHOI
Senior Superintendent of Police

Miss Adeline WAN
Senior Government Counsel

Mr Hubert LAW
Assistant Secretary (Security)

Clerk in : Mrs Sharon TONG
attendance Chief Assistant Secretary (2)1

Staff in attendance : Mr Jimmy MA
Legal Adviser, JP

Ms Bernice WONG
Assistant Legal Adviser 1

Mr Raymond LAM
Senior Assistant Secretary (2)5

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I. Election of Chairman

Miss Margaret NG and Mr LAU Kong-wah were respectively nominated by Mr CHEUNG Man-kwong and Mr TSANG Yok-sing as candidates for the Chairman of the joint meeting. A vote was taken and Mr LAU Kong-wah was elected as Chairman of the joint meeting by a majority vote of eight to seven.

II. Consultation Document on Proposals to implement Article 23 of the Basic Law

(Consultation Document on Proposals to implement Article 23 of the Basic Law, LC Paper Nos. CB(2) 86/02-03(01) to (05) and LS 6/02-03)

2. At the invitation of the Chairman, Secretary for Security (S for S), Assistant Commissioner of Police (ACP) and Solicitor General (SG) briefed Members on the Administration's papers on Police investigation powers and act of state. S for S informed Members that -

- (a) The proposed emergency powers of entry, search and seizure referred to in paragraph 8.5 of the Consultation Document on Proposals to implement Article 23 of the Basic Law (BL23) (the Consultation Document) would not be applicable to offences under the Official Secrets Ordinance (OSO) (Cap. 521);
- (b) Part XII of the Interpretation and General Clauses Ordinance (IGCO) (Cap. 1) had already set out provisions on the search and seizure of journalistic materials. Noting the media's concern about the possible impact of the proposed emergency powers on their operation, the Administration intended to set out clearly in the draft bill to be introduced that the provisions in Part XII of IGCO would also apply to BL23 offences; and
- (c) Section 67 of the Police Force Ordinance (PFO) (Cap. 232) already provided that the Commissioner of Police (CP) might, if he reasonably believed that an indictable offence had been committed, request banks and deposit-taking companies to provide information on whether any

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person under investigation had any accounts or property held in those institutions. However, the Police was still required to obtain a court warrant for obtaining details of the accounts or property of the person concerned held by those institutions. Notwithstanding the proposals in paragraph 8.6 of the Consultation Document, the Administration had no intention to extend the financial investigation powers beyond the existing powers under section 67 of PFO.

3. Regarding theft of state secrets, Mr CHEUNG Man-kwong asked -

- (a) Whether certain information fell within the meaning of state secret was to be determined solely by Hong Kong or could also be determined by the Mainland; and
- (b) Whether a Hong Kong court could determine that certain information was not state secret, if the Mainland had already determined that the information was state secret.

4. S for S responded that whether certain information was state secret had to be determined in accordance with the laws of Hong Kong. Under sections 13 to 17 of OSO, four types of information were protected. The meaning of official secret as defined in the legislation of Hong Kong was determined by the Legislative Council through the legislative process.

5. Mr CHEUNG Man-kwong asked whether the disclosure in Hong Kong of Mainland economic information regarded as state secret by the Mainland would be an offence under the proposals relating to theft of state secrets.

6. S for S stressed that cases that occurred in the Mainland were dealt with in accordance with Mainland laws, while cases that occurred in Hong Kong were dealt with in accordance with the laws of Hong Kong. Economic and technological information did not fall within the four types of protected information as set out in OSO. OSO further required the disclosure to be damaging and provided the meaning of a damaging disclosure. Thus, the disclosure of such kind of information in Hong Kong would not be an offence under OSO.

7. Referring to the situation where certain information had been certified by the Mainland as state secret and that the disclosure of such information would endanger the State, Mr CHEUNG Man-kwong asked whether the court would determine on its own whether such information was state secret.

8. S for S responded that whether a person had made an unlawful disclosure of protected information was to be determined by a Hong Kong court in accordance with the laws of Hong Kong. Even where a person in Hong Kong was accused of theft of state secret in the Mainland, it should be noted that there was not yet an agreement between the Hong Kong Special Administrative Region (HKSAR) and the Mainland

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on the surrender of fugitive offenders.

9. SG said that the determination of whether certain information fell within the meaning of protected information and whether a disclosure was damaging was to be determined by the court in accordance with the laws of Hong Kong. He did not believe that a certification by the Mainland that certain information was state secret would have any bearing on the decision of the court.

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10. Mr James TO requested the Administration to provide Members with any updated information relating to the proposals in the Consultation Document. He asked whether Hong Kong would determine solely whether certain information fell within the meaning of information relating to relations between the Central Authorities of the People's Republic of China (PRC) and the HKSAR.

11. S for S said that the proposed emergency investigating powers would not be applicable to offences under OSO. Prior to Reunification, information relating to the relationship between Hong Kong and the Mainland was protected as "information relating to international relations". After Reunification, it would no longer be appropriate to protect such information under the rubric of "international relations". The protection of information relating to relations between the Central Authorities of the PRC and the HKSAR was proposed only as an adaptation of laws. She stressed that a number of requirements, including the requirement that the disclosure had to be damaging, would have to be satisfied before a disclosure relating to relations between the Central Authorities of the PRC and the HKSAR could be classified as unlawful.

12. Mr James TO asked whether a Hong Kong court would consider a certification by the Mainland that certain information was related to relations between the Central Authorities of the PRC and the HKSAR.

13. S for S responded that all relevant information, including a certification by the Mainland and the view of the Administration, would be considered before a decision was made on whether to prosecute a person. Where the Central People's Government (CPG) had expressed its view about whether certain information was protected information, the HKSAR Government would certainly consider such a view. However, it was eventually the HKSAR Government which instituted the prosecution and the Hong Kong court which determined whether certain information was related to relations between the Central Authorities of the PRC and the HKSAR, and whether the disclosure was damaging. SG added that whether certain information fell within the definition of protected information under OSO was a question of law. The HKSAR Government and any other person could make submissions to the court. He stressed that the final decision rested with the court.

14. Mr IP Kwok-him said that since emergency investigating powers were provided under existing local legislation and those of other jurisdictions, he considered it appropriate to provide the Police with the proposed emergency investigating powers. However, the emergency powers should be exercised by a Police officer more senior

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than a Police superintendent. He asked whether there would be a mechanism for monitoring the exercising of such powers and whether similar monitoring mechanisms were found in other jurisdictions.

15. S for S responded that the Administration was willing to consider suggestions regarding the rank of Police officers that should be authorised to exercise the proposed emergency powers. She said that monitoring procedures, such as requiring the submission of a written report to CP or S for S, could be drawn up through administrative arrangements.

16. Mr IP Kwok-him asked whether the submission of a report to CP or S for S was required after the emergency powers provided under existing local legislation were exercised. He also asked whether a similar mechanism was adopted in other jurisdictions.

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17. S for S agreed to provide a written response on the local and overseas monitoring mechanisms on the exercising of emergency investigating powers. She said that the Administration was willing to consider requiring the submission of a written report to CP or S for S whenever such an emergency investigating power was exercised. ACP added that where the Police had exercised its emergency powers in searching a vice establishment, a report on the search would be kept at the Police district concerned. However, there was currently no requirement of the submission of a report to CP.

18. Referring to paragraph 3(b) of the Administration's paper on act of state, Mr IP Kwok-him asked about the three pre-conditions under which the discretionary procedure could commence. SG responded that the three pre-conditions were set out in paragraph 7.15 of the Consultation Document. Before S for S could exercise her power of proscription, she had to be satisfied that it was necessary in the interests of national security, public safety or public order to do so. In applying the tests, she had to comply with the provisions in the International Covenant on Civil and Political Rights. The proscription would be subject to appeal and judicial review.

19. Mr IP Kwok-him asked whether a local organisation would be automatically proscribed, once any of the three pre-conditions was satisfied. S for S responded that the proscription was not automatic. SG added that if S for S proscribed a local organisation merely on the basis of one of the three pre-conditions without examining whether the local organisation was a threat to national security as defined in the laws of Hong Kong, the decision might be struck down by the court.

20. Miss Margaret NG said that whether the Police should be provided with the proposed emergency investigating powers should not merely be based on whether such a power was provided under existing legislation or overseas practice. As legislation to implement BL23 could become a means of political prosecution, the issue should be examined prudently. She considered that attention should be focussed on the prevention of abuse rather than the remedies available after an abuse of power had occurred. She asked -

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- (a) Why additional emergency investigating powers were proposed when such powers had already been provided in existing local legislation; and
- (b) Whether the time needed for the court to issue a warrant was substantially longer than the issuing of a written order by a Police superintendent.

21. S for S stressed that the emergency powers of entry, search and seizure as provided under existing legislation were not exercised by Police officers, but also by other law enforcement officers such as immigration officers and officers of the Independent Commission Against Corruption (ICAC). She said that the Administration would examine whether the proposed ranking of senior Police officer authorised to exercise emergency investigating powers was appropriate and the safeguards on the exercising of such a power. She further said that while the issuing of a warrant by the court might take two to four hours, the authorisation by a senior Police officer might only take five to ten minutes. This difference in time was substantial from an operational point of view, as evidence of substantial value might be lost if immediate action was not taken.

22. Miss Margaret NG said that while S for S had said that the proposed emergency powers would not apply to offences under OSO and the media need not be worried, it was noted from the Consultation Document that the proposed emergency powers would apply to the possession of seditious publications. In view of this, she questioned why the Administration could state that the media would not be affected.

23. S for S responded that the Administration had only stated that the proposed emergency entry and search powers would not be applicable to offences under OSO. It had not stated that the media would not be affected by the proposals in the Consultation Document. She said that the Administration was aware of the concerns of the media and was arranging a meeting with representatives of the media. To address the media's concerns, the Administration intended to set out clearly in the draft bill to be introduced that the provisions in Part XII of IGCO would also apply to BL23 offences.

24. Miss Margaret NG said that a warrant issued by the court differed from an authorisation by a senior Police officer in that the court was an independent body and would thus form a more objective view while an authorisation by a senior Police officer was only an internal authorisation within a law enforcement agency.

25. S for S said that the Administration provided in its paper many examples under existing legislation where the emergency powers were authorised by senior officers of law enforcement agencies. Thus, the Administration disagreed with the view that an authorisation by a senior officer within a law enforcement agency was inadequate.

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26. Referring to page 15 of the paper entitled "Existing legislation relevant to the proposals to implement Article 23 of the Basic Law" prepared by the Legal Service Division, Miss Margaret NG said that the preliminary observation indicated that the protection under IGCO would not apply to BL23 offences. She questioned why S for S had said that the provisions in Part XII of IGCO would also apply to BL23 offences.

27. Legal Adviser (LA) explained that page 15 of the paper prepared by the Legal Service Division provided supplementary information on section 5 of the Organized and Serious Crimes Ordinance (Cap. 455) referred to in paragraph 8.7 of the Consultation Document.

28. SG responded that the preliminary observation in the paper prepared by the Legal Service Division referred to existing laws, while the extension of the application of Part XII of IGCO to BL23 offences was a proposal of the Administration.

29. Referring to paragraph 8.6 of the Consultation Document, Miss Margaret NG said that it was proposed in the Consultation Document that the financial investigation power should enable CP to require a bank or a deposit-taking company to disclose to him information relevant to the investigation. However, the Administration had said at the earlier part of the meeting that in respect of the proposed financial investigation power, it only proposed that CP might request banks and deposit-taking companies to provide information on whether any person under investigation had any accounts or property held in those institutions. She protested that there was a discrepancy between the proposals in the Consultation Document and the Administration's actual proposals.

30. S for S responded that in the process of public consultation, the Administration might consider it appropriate to revise some of its proposals after considering the views received. She added that the Administration would not rule out making further revisions to the proposals in the Consultation Document after considering views expressed. At Members' request, S for S agreed to provide a paper setting out its revised proposals on financial investigation power and the extension of the protection provided under Part XII of IGCO to BL23 offences. She said that the final proposals would be set out in the bill to be introduced. Even after the bill had been introduced, the Bills Committee formed to scrutinise the bill could propose amendments to the bill.

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31. Ms Audrey EU asked whether the defence and security-related information proposed to be protected under OSO was information relating to defence and foreign affairs referred to in BL19, in which Hong Kong had no jurisdiction. She also asked whether the Mainland could issue a certification stating that certain information was defence information, security information or information relating to international relations. She further asked about the extent to which such certification would affect the decision of the court.

32. SG responded that there was a provision in BL19 for certification in relation to questions of fact concerning act of state such as defence and foreign affairs. It was

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the Administration's view that the term "act of state" in BL19 had a very limited scope and could be interpreted in accordance with the common law to deal with the activities referred to in paragraph 5 of the Administration's paper on act of state. A certificate of fact would have to be related to these types of acts of state. After coming into effect for about five years, as far as he was aware, BL19 had only been referred to by the court or relied on in two cases where certification was received as to whether a certain individual was a diplomat and therefore qualified for diplomatic immunity. This was different from the suggestion that a certification procedure would apply whenever an issue relating to defence or foreign affairs arose. Defence and international relations were defined in OSO, which had to be applied on its own terms. In most unusual circumstances would there be a certification under BL19.

33. SG said that the relationship between Hong Kong and the PRC fell within international relations before Reunification. After Reunification, it would no longer be appropriate to protect such information under "information relating to international relations". The protection of information relating to relations between the Central Authorities of the PRC and the HKSAR was proposed only as an adaptation of laws.

34. Ms Audrey EU asked about the circumstances under which a certification under BL19 would be needed in relation to OSO. SG responded that, if it were alleged that a disclosure of defence information was damaging at a time when the PRC was at war with a certain country, it would be permissible under BL19 for the CPG to certify that the PRC was at war with that country. Ms EU requested the Administration to provide a paper explaining how a certification under BL19 would work in relation to OSO.

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35. Referring to paragraph 7.15 of the Consultation Document, Ms Audrey EU questioned why the proposal in paragraph 7.15(c) was needed and asked whether the proposals in paragraph 7.15(a) and (b) would already be adequate in relation to the power to proscribe a local organisation.

36. S for S responded that existing provisions in the Societies Ordinance (SO) (Cap. 151) provided for the Societies Officer to recommend to S for S the making of an order prohibiting the operation or continued operation of a society on the grounds of national security, public safety or public order (*ordre public*). In the event that there was serious social instability in the Mainland, which had not occurred in the past 53 years, the HKSAR, as a part of the PRC, had a responsibility to consider whether it was necessary to take actions for national security reasons against a local organisation affiliated to a Mainland organisation which had been proscribed in the Mainland.

37. Ms Audrey EU said that many people in the Mainland had been pressurised in the past for counter-revolution, which was equivalent to endangering national security.

38. S for S responded that the State Security Law of the PRC was promulgated in 1993. The term "counter-revolution" in the Criminal Laws of the PRC was revised as "endangering the State security of the PRC" in 1997. While some individuals had

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been prosecuted in the Mainland for counter-revolution offences before 1997, no organisation had been proscribed for such an offence in the Mainland in the past. She informed Members that the prohibition of the operation of the Association of Falun Dafa in the Mainland was not made on national security ground. It was made in accordance with the provisions in Article 300 of the Criminal Law of the PRC concerning penalty on forming or using superstitious sects to undermine the implementation of laws and administrative rules of the State.

39. Referring to the proposal in paragraph 7.15 of the Consultation Document that an organisation should be defined as an organised effort by two or more people to achieving a common objective, Ms Audrey EU questioned whether there would be any material difference between an individual and an organisation under such a definition.

40. S for S responded that the definition of an organisation referred to in paragraph 7.15 of the Consultation Document was different from the meaning of an organisation referred to in paragraph 38 above. She said that a similar concept was also adopted in the legislation on seditious conspiracy in the United States.

41. Mr Albert HO said that even if no organisation had been proscribed as counter-revolutionary by a Mainland court in the past, many organisations had certainly been branded as a counter-revolutionary organisations by the Community Party. He asked whether the proposed certification by the CPG would only be confined to the proscription of a Mainland organisation in the Mainland on national security grounds.

42. S for S responded that the proposed certification by the CPG would only be confined to the proscription of a Mainland organisation in the Mainland on national security grounds. SG shared the same view.

43. Mr Albert HO said that according to note 18 of the Consultation Document, the term "PRC Government" represented collectively the CPG and other state organs. According to the paper prepared by the Legal Service Division, it included Local People's Congresses, Local People's Government at various levels and the organs of Self-Government Ethnic Autonomous Areas. This would mean that any Local People's Government could issue a certificate setting out that a certain Mainland organisation had been proscribed in the Mainland.

44. S for S responded that the definition of "State" referred to in section 3 of IGCO included, among others, the Central Authorities of the PRC that exercised functions for which the CPG had responsibility under BL. Under the same principle, Central Authorities would not include Local People's Government and organs of Self-Government of Ethnic Autonomous Areas.

45. LA explained that the state organs established under the Constitution set out in page 1 of the paper prepared by the Legal Service Division were related to the term "PRC Government" referred to in note 18 of the Consultation Document. The note was related to the use of force to overthrow, intimidate or overpower the PRC

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Government as set out in paragraph 2.8 of the Consultation Document.

46. S for S said that the "PRC Government" referred to in paragraphs 2.8 and 5.5 of the Consultation Document was different from the "Central Authorities" referred to in paragraph 7.15 of the Consultation Document. She said that the term "Central Authorities", which was frequently referred to in the BL, referred to the authorities at state level but not the authorities at provincial, autonomous region or municipal level. Mr Albert HO requested the Administration to provide a written response on the issue.

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47. Ms Emily LAU said that the provision in existing legislation for law enforcement agencies to exercise emergency investigating powers reflected that legislative amendments should have been introduced to remove such powers since the enactment of the Hong Kong Bill of Rights Ordinance. She considered that the Police should not be given emergency investigating powers merely because of a few hours' difference in obtaining a court warrant. She believed that the time needed by the court could be shortened in urgent cases, if prior arrangements were made with the court.

48. Ms Emily LAU said that besides the media, there were many people involved in gathering information in their work, including analysts and university researchers, who had expressed concerns about the proposals in the Consultation Document. Many people had also informed her of their opposition to the proposal of including information relating to relations between the Central Authorities of the PRC and the HKSAR as protected information. She considered that the Administration should disclose to the public information about its communications with the CPG instead of classifying such information as protected information.

49. S for S disagreed with the view that the emergency investigating powers provided to law enforcement agencies under the existing legislation should be removed. She stressed that the classification of information relating to relations between the Central Authorities of the PRC and the HKSAR only involved adaptation of existing legislation. Although the HKSAR Government was more open than the former Hong Kong Government, there was a need to protect information communicated between the CPG and the HKSAR. The Administration was aware that besides the media, some other people had expressed concerns about the proposals in the Consultation Document. For example, some librarians had expressed concerns about the proposals relating to possession of seditious publications. The Administration considered that the maintenance of publications by libraries should not amount to possession of seditious publications. Nevertheless, it was arranging a meeting with the representatives of librarians. She welcomed Ms LAU to inform the Administration of any sectors of the community which had expressed concerns so that the Administration could contact these sectors.

50. Ms Emily LAU said that it was inappropriate to compare the colonial government before Reunification with the HKSAR Government. She reiterated that the Administration should disclose its communication with the CPG rather than

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classifying the information communicated as protected information.

51. S for S said that information relating to relations between the UK and Hong Kong was protected before Reunification under OSO. Under the adaptation of laws, the UK Government would be adapted as the PRC Government.

52. Mr MAK Kwok-fung asked about the detailed arrangements for the exercising of emergency investigating powers by the Police. He also asked whether there were independent mechanisms in place for monitoring the existing emergency powers and information about complaint cases against the exercising of such a power by law enforcement agencies. He added that there should be a more stringent requirement for the exercising of the proposed emergency investigating powers in respect of BL23 offences. He requested the Administration to provide examples where it was necessary to exercise the proposed emergency investigating powers.

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53. S for S responded that it could be noted from existing legislation that, depending on the respective nature of the offences, different levels of senior law enforcement officers were authorised to exercise emergency investigating powers. She undertook to provide a written response on the issue. ACP added that there were two to four complaints per year against the exercising of emergency powers of entry and search by Police officers against gambling-related offences between 1998 and 2001, while that related to drugs ranged from two to eleven cases in the same period. He informed Members that there were about four cases of compensation per year arising from the exercising of emergency powers of entry and search by the Police and the compensation amount ranged from about \$6,000 to about \$40,000.

54. Mr MAK Kwok-fung asked about the amount of force allowed in the exercising of the proposed emergency investigating powers. S for S responded that it was not possible to set out all possible circumstances in legislation. However, law enforcement officers would, as a general rule, use the minimum force as necessary in exercising their powers.

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55. At Members' request, S for S agreed to provide a paper on the procedures and time needed for processing an urgent application for a court warrant, the roster system for magistrates responsible for issuing warrants, and the range of time needed in previous cases.

56. Ms Cyd HO said that the extra-territorial effect of the proposals in the Consultation Document on HKSAR permanent residents of a foreign nationality when the foreign nation concerned was at war with the PRC should be discussed at a future meeting.

III. Dates of subsequent meetings

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57. The Chairman informed Members that besides the meeting scheduled for 7 November 2002 to receive the views of interested parties on the proposals in the Consultation Document, another meeting had been scheduled for 15 November 2002 to continue receiving the views of interested parties. Since a number of organisations and individuals had indicated interest in expressing their views on the proposals in the Consultation Document, Members agreed that the following joint meetings be scheduled to continue receiving the views of interested parties -

- (a) Thursday, 21 November 2002 from 9:00 am to 12:00 noon;
- (b) Thursday, 28 November 2002 from 2:30 pm to 5:30 pm; and
- (c) Friday, 29 November 2002 from 9:00 am to 12:00 noon.

58. The meeting ended at 5:00 pm.

Council Business Division 2
Legislative Council Secretariat
10 December 2002