立法會
Legislative Council

LC Paper No. CB(2)1254/04-05
(These minutes have been seen by the Administration)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 28 February 2005 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Hon Margaret NG (Chairman) Hon LI Kwok-ying, MH (Deputy Chairman) Hon Albert HO Chun-yan Hon Martin LEE Chu-ming, SC, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP Hon MA Lik, JP
Member absent	:	Hon KWONG Chi-kin
Public Officers attending	:	Item IV Mr Benjamin CHEUNG Director of Legal Aid Miss Eliza LEE Deputy Director of Administration Mr Harry MAK Deputy Director of Legal Aid Ms Jennie HUI Acting Deputy Director of Legal Aid Mrs Alice CHEUNG Assistant Director of Administration

		Item V
		Miss Eliza LEE Deputy Director of Administration
		Ms Lena CHI Deputy Law Officer (International Law)
		Mr David LEUNG Assistant Director of Administration
		Mr Davis HUI Deputy Director of Protocol
		Item VI
		Mr James O'Neil Deputy Solicitor General (Constitutional)
		Mr Patrick CHEUNG Senior Assistant Director of Public Prosecutions
		Miss Cathy WONG Senior Assistant Law Officer (Civil Law)
Attendance by invitation	**:**	Item IV
		The Hong Kong Bar Association
		Ms Corinne REMEDIOS
		Items V & VI
		The Hong Kong Bar Association
		Mr P Y LO
Clerk in attendance	**:**	Mrs Percy MA Chief Council Secretary (2)3
Staff in attendance	**:**	Mr Arthur CHEUNG Senior Assistant Legal Adviser 2
		Mr Paul WOO Senior Council Secretary (2)3

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I. Confirmation of minutes of meeting

(LC Paper No. CB(2)942/04-05 – Minutes of special meeting on 17 January 2005

LC Paper No. CB(2)946/04-05 – Minutes of meeting on 24 January 2005)

The minutes of the meetings held on 17 and 24 January 2005 were confirmed.

II. Information papers issued since the last meeting

(LC Paper No. CB(2)745/04-05(01) – Submission from The Hong Kong Bar Association on "Government's policy on subsidiary legislation"

LC Paper No. CB(2)783/04-05(01) – Letter dated 26 January 2005 from the Administration concerning the latest position of the development of a new juvenile justice system

LC Paper No. CB(2)827/04-05(01) – The Administration's written response on "Government's policy on subsidiary legislation"

LC Paper No. CB(2)835/04-05(01) – The Administration's written response on "Manpower position of drafting counsel in the Department of Justice")

2. Members noted that the above papers had been issued to the Panel.

III. Items for discussion at the next meeting

(LC Paper No. CB(2)941/04-05(01) – List of outstanding items for discussion

LC Paper No. CB(2)941/04-05(02) – List of follow-up actions)

3. Members agreed that the following items should be discussed at the next regular meeting on 17 March 2005 –

(a) Limited liability for professional practices;

(b) Solicitor Corporations Rules ; and

(c) Reform of the law of arbitrations.

(*Post-meeting note* : At the request of the Administration and with the agreement of the Chairman, the item "Reform of the law of arbitration" was deferred to a future meeting.)

Follow up on issues previously discussed

Subsidiary legislation on admission of notaries public

4. The Chairman said that a set of items of subsidiary legislation on admission of notaries public, including the Rules on examination for admission as notaries public,

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were expected to be gazetted soon. She asked the Clerk to write to the Hong Kong Society of Notaries on the present position of the Rules.

(*Post-meeting note* : The eight sets of Rules relating to notaries public were gazetted on 11 March 2005 and tabled in LegCo on 16 March 2005. The Hong Kong Society of Notaries' letter dated 15 March 2005 on the updated position of examination for admission as notaries public was issued to the Panel vide LC Paper No. CB(2) 1127/04-05(01) on 21 March 2005. The House Committee agreed at its meeting on 18 March 2005 that it was not necessary to form a subcommittee to scrutinise the Rules.)

Enforcement of court judgments in civil cases

5. On the problems encountered in enforcement of maintenance orders, Ms Miriam LAU pointed out that as ruled by the court in a recent case, the claimant was not entitled to enforce through the court the payment of maintenance arrears if the arrears became due more than 12 months before proceedings to enforce payment began. She suggested that clarification be sought on the existing enforcement arrangement.

6. The Chairman said that the issue of improvement of enforcement of judgments in civil cases had aroused wide concern but the matter had not been dealt with in the Final Report of the Chief Justice's Working Party on Civil Justice Reform. She considered that the Administration should be requested to –

(a) assess the problems encountered in enforcement of court judgments in civil cases in general, and in labour and matrimonial cases in particular, as well as the extent of such problems; and

(b) advise whether it intended to implement measures to improve the mechanism of enforcement of court judgments in civil cases in general, and in labour and matrimonial cases in particular, e.g. whether consideration would be given to introducing legislative measures or referral of the matter to the Law Reform Commission for consideration.

(*Post-meeting note* : The Chairman wrote to the Director of Administration on 11 March 2005 for a written response.)

Criminal legal aid fees system

7. The Chairman said that the Panel had previously discussed the subject matter and agreed to follow up relevant issues with the Administration and the two legal professional bodies, pending the completion of a study by a joint working party of the two legal professional bodies on the criminal legal aid fees system. The Chairman requested the Clerk to seek advice from the Hong Kong Bar Association and the Law Society of Hong Kong on the progress of the study.

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(*Post-meeting note* : The Clerk wrote to the two legal professional bodies on 2 March 2005 for a written response. The Law Society's reply dated 16 March 2005 was issued to the Panel on 21 March 2005 vide LC Paper No. CB(2)1127/04-05(02).)

Acceptance of advantages by judges and judicial officers

8. The Chairman said that the Panel had discussed issues relating to post-retirement employment and pension benefits of and acceptance of advantages by judges and judicial officers at a previous meeting. The issue of the investigation by the Independent Commission Against Corruption (ICAC) into an allegation that Mr Michael WONG, a retired judge, had accepted a gift of air ticket, had also been raised at the meeting. According to recent press reports, the ICAC had completed its investigation and the matter was now being considered by the Department of Justice (DOJ). The Chairman suggested and members agreed that the Secretary for Justice (S for J) be requested to advise on whether a decision had been made by DOJ to initiate prosecution or otherwise.

9. Ms Emily LAU also suggested to seek clarification from S for J on whether the opinion of outside counsel had been or would be sought in considering prosecution.

(*Post-meeting note* : The Chairman's letter to S for J and S for J's reply were issued to members for reference vide LC Paper No. CB(2)1037/04-05(01) and (02) on 9 March 2005.)

IV. Pilot Scheme on mediation of legally aided matrimonial cases

(LC Paper No. CB(2)507/04-05(01) – Paper provided by the Administration)

10. At the invitation of the Chairman, Deputy Director of Administration (DD of Adm) briefed members on the Administration's paper which set out the scope and features of a Pilot Scheme on Mediation of Legally Aided Matrimonial Cases (the Scheme) and the arrangements for the launching of the scheme.

11. In gist, the Scheme was in response to a recommendation in the Final Report of the Chief Justice's Working Party on Civil Justice Reform issued in March 2004, which examined possible reform in, inter alia, the area of alternative dispute resolution. The Working Party proposed that, to encourage greater use of mediation as a method of dispute resolution, the Legal Aid Department (LAD) should have power in suitable cases, subject to further study by the Administration and consultation on the promulgation of the detailed rules for the implementation of a scheme, to limit its initial funding of persons who qualified for legal aid to the funding of mediation, alongside its power to fund court proceedings where mediation was inappropriate or where mediation had failed. The Administration intended to launch the Scheme to evaluate the cost-effectiveness of providing mediation for legally aided matrimonial cases before deciding on the way forward. The Scheme, which would be modelled on the Judiciary's three-year Pilot Scheme on Family

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Mediation conducted from 2000, would last for one year from the first quarter of 2005, and would enable the Administration to collect data on about 120 legally aided matrimonial cases for detailed analysis. Taking into account that a matrimonial case took about two years to complete, the Administration aimed at completing the evaluation of the Scheme by the first quarter of 2007 the earliest. If the litigation process of the cases took longer time to complete, the evaluation timetable might need to be suitably adjusted accordingly. DD of Adm highlighted to members the "voluntary" nature of the Scheme, i.e. the legally aided persons were invited to join the Scheme on an entirely voluntary basis, rather than as a pre-requisite to legal aid for the litigation proceedings.

12. The Director of Legal Aid (DLA) informed members that the Scheme would operate using the existing services provided by the Judiciary's Mediation Coordinator's Office (MCO) established since the Judiciary's Pilot Scheme in 2000. Publicity material including information leaflets and an Explanatory Note on the Scheme as well as the relevant forms for the use of the Scheme were being prepared. A video on mediation would be made available for viewing by legal aid applicants. Details of the Scheme would also be publicized through the LAD's website. The Administration would issue a press statement to announce the Scheme on 14 March 2005.

13. DLA further informed members that LAD had written to the Hong Kong International Arbitration Centre and other relevant non-government organizations in January 2005 to invite interested mediators to participate in the Scheme. So far, LAD had received 73 applications of which 63 applicants were found suitable to act as mediators in the Scheme.

14. The Chairman requested the Administration to provide information on the number of approved mediators of the Scheme who possessed legal qualifications.

(*Post-meeting note* : The reply from the Administration was issued to the Panel vide LC Paper No. CB(2) 1212/04-05(01) dated 6 April 2005.)

Views of the Hong Kong Bar Association

15. Ms Corinne REMEDIOS said that the Bar Association supported funding of mediation to be provided for legally aided persons as an alternative means of dispute resolution. She said that if the proposed scheme had involved legal aid applicants being forced to undertake mediation as a pre-requisite for the grant of legal aid for initiating court proceedings, the Bar Association would have wished to be further consulted as there had been serious reservations expressed by members of the public on this proposal at the time when consultation on the Civil Justice Reform was conducted. However, the Bar Association had no objection to the present Scheme, provided that participation in the Scheme by legal aid applicants would be on an entirely voluntary basis and refusal to undertake mediation would not affect the person's application for legal aid to initiate court proceedings.

Issues raised by members

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16. Ms Emily LAU pointed out that as explained in the Administration's paper, the number of hours for mediation under the Scheme would be capped at 15 hours per case at a mediation fee of $600 per hour. The total costs of the 120 cases intended to be covered under the Scheme, which would be borne by the Administration, would be about $1 million. Ms LAU said that she would support the Scheme if it was a cost-effective means of resolving matrimonial disputes. She enquired about the users' satisfaction rate and agreement rate of the Judiciary's previous Pilot Scheme on Family Mediation, which funded the mediation fees for 930 matrimonial cases during the three-year period.

17. In reply, DD of Adm explained that cases covered in the Judiciary's Pilot Scheme on Family Mediation included non-legally aided matrimonial cases and incurred a cost of $6.2 million, exclusive of staff costs. The users' satisfaction rate was about 80%. The scheme achieved a full agreement rate and partial agreement rate of 68% and 10% respectively, resulting in a saving of about 200 court days.

18. Ms Emily LAU asked whether the cost of funding the mediation of the 120 cases under the Scheme would be less than the cost of providing legal aid for initiating court proceedings for such cases. DLA replied that the cost-effectiveness of the Scheme would be assessed upon its completion.

19. Ms Audrey EU agreed that mediation should not be imposed against the will of legal aid applicants as a condition for the grant of legal aid for initiating court proceedings. She asked whether it would be stated clearly in the certificate of legal aid or other documents to be signed by an applicant that participation in mediation was entirely voluntary.

20. DD of Adm responded that the Administration shared the view that mediation should not be imposed upon legal aid applicants. After considering the recommendation of the Chief Justice's Working Party, the Administration had decided that the Scheme should be launched on the basis of voluntary participation. Under the Scheme, aided persons would be advised of the availability of mediation, and it would be a matter for the parties to decide whether or not to undertake mediation through the assistance of MCO. The grant of legal aid for court proceedings would not be affected by whether the case was appropriate for mediation or whether the parties had agreed to undertake mediation.

21. DLA said that whether or not an aided person opted for mediation would not affect the legal aid funding for that person to initiate court proceedings. A certificate of legal aid already issued to an applicant would not be withdrawn by LAD on the ground that the applicant had refused mediation. He added that the information leaflet on the Scheme would clearly explain that participation in the mediation was voluntary. He undertook to consider other channels through which the message could be widely publicized.

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22. Ms Miriam LAU said that experience in both Hong Kong and places elsewhere provided evidential support that mediation was an effective and desirable means of dispute resolution, which enabled amicable settlement to be reached by the dispute parties. Compared with litigation, mediation was a less confrontational approach for resolving disputes. As the settlement was reached by mutual consensus with the assistance of a mediator, the agreement was more likely to be complied with than in a situation where a settlement was forced upon the parties by the court. Ms Miriam LAU opined that while the Administration should remove any perception that mediation was an additional hurdle for the grant of legal aid, it should also explain the advantages of mediation and encourage the use of it as a preferred method of dispute resolution.

23. Ms Miriam LAU and Ms Emily LAU expressed concern whether the assigned solicitors would take proactive steps to advise their clients on the availability of mediation and encourage them to undertake mediation as willingness of aided persons to attempt mediation might result in less work for the solicitors. Ms Miriam LAU considered that the availability of assistance under the Scheme should be explained to an aided person before assigning a solicitor to him.

24. DD of Adm and DLA responded that the assigned solicitors would be provided with an Explanatory Note on details of the Scheme and the role played by them in the Scheme. The solicitors were required to advise the legal aid applicants of the availability of mediation in accordance with the court's Practice Directions as well as the particulars of the Scheme. The Administration would also make use of the video produced by the Judiciary on mediation and the information leaflets to publicize the features and details of the Scheme. DD of Adm said that it was not possible at this stage to assess the impact of the Scheme on the work of the assigned solicitors, but she pointed out that even if the mediation succeeded, the assigned solicitor would still need to represent the aided person in the divorce proceedings.

25. The Chairman said that she had confidence in the assigned solicitors in fulfilling their duties and to advise the legally aided persons in accordance with the Practice Directions issued by the Judiciary.

26. Ms Miriam LAU opined that the Administration should publicize the evaluation results of the Judiciary's Pilot Scheme on Family Mediation to enhance the public's understanding of mediation as an effective method for resolving disputes. The Chairman called upon the Administration to take proactive measures to promote the Scheme through various channels.

27. Mr Albert HO asked whether mediation could be provided to the dispute parties before a divorce petition was filed with the court. Deputy Director of Legal Aid replied that the assistance of MCO could be sought at any stage by the parties.

28. The Chairman said that under existing legislation, legal aid could not be provided for mediation. She hoped that the pilot schemes conducted by the Judiciary and the Administration could provide valuable reference for the

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Administration in deciding whether funding of mediation to resolve disputes should become a standing feature of the legal aid system. She commented that apart from the financial implications, the degree of users' satisfaction with the service was an important factor which should be taken into account.

29. On the cases handled under both the pilot schemes of the Judiciary and the Administration, the Chairman requested the Administration to assess the rate of compliance with the agreements reached and hence the effectiveness of the schemes.

Adm

V. Subsidiary legislation relating to consular matters

(LC Paper No. CB(2)916/04-05(01) – Paper provided by the Administration)

30. At the invitation of the Chairman, DD of Adm briefed members on the Administration's paper, which explained –

(a) the grant of privileges and immunities in the context of the establishment of consular relations between sovereign States; and

(b) the Administration's programme of preparing subsidiary legislation relating to the privileges and immunities conferred by the Central People's Government (CPG) on the consular posts and their personnel of Australia, the United Kingdom, the United States of America and Vietnam in the Hong Kong Special Administrative Region (HKSAR).

31. DD of Adm informed members that the 1963 Vienna Convention on Consular Relations (VCCR) was a multilateral international convention which codified the relevant international laws on consular relations, matters relating to the establishment and maintenance of consular posts, and consular privileges and immunities. The People's Republic of China was a party to the VCCR. Under the provisions of the VCCR, a State might conclude bilateral international agreements with other States regarding the establishment of or facilitation for consular posts to deal with matters not covered in the VCCR, including the grant of consular privileges and immunities and functions exceeding those provided for in the VCCR. Aside from the VCCR, the CPG had so far applied to the HKSAR eight bilateral agreements with separate sovereign States, providing for matters not covered in the VCCR including, inter alia, additional privileges and immunities accorded to consular posts and personnel, which were broadly comparable to those provided for diplomatic agents in the Vienna Convention on Diplomatic Relations.

32. DD of Adm further explained that at present, the relevant provisions of these international agreements concerning additional consular privileges and immunities were given legal effect in the HKSAR generally by the Regulation of the People's Republic of China concerning Consular Privileges and Immunities. In line with the established practice under common law, provisions of international agreements applicable to the HKSAR would be underpinned by way of local legislation, should they affect private rights and obligations or required exceptions to be made to the

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existing laws of HKSAR. In this regard, with the Consular Relations Ordinance (Cap. 557) enacted in 2000 to provide a flexible legislative framework, the Administration had embarked on a programme of preparing the necessary subsidiary legislation in the form of Orders to underpin the relevant provisions in the international agreements signed by the CPG. The Orders relating to the additional consular functions conferred on the consular post of Canada in the HKSAR were enacted in November 2003. The Administration would shortly submit to the Legislative Council (LegCo) the Orders relating to the privileges and immunities conferred on the consular posts of the United Kingdom, the United States of America, Vietnam and Australia. The Orders for the remaining agreements would be submitted in batches, as soon as the drafting and consultation with the signatories of the agreements had been completed.

33. The Chairman said that the relevant subsidiary legislation would be subject to the negative vetting procedure of LegCo and a subcommittee might be formed to scrutinize the provisions. She suggested that the Administration should provide the relevant provisions of the VCCR and the international agreements to the subcommittee in due course to facilitate its deliberation.

34. Mr Albert HO asked whether privileges and immunities similar to those accorded to consular posts and personnel applied to offices set up by the CPG in the HKSAR. The Chairman requested the Administration to coordinate a written reply to Mr HO's enquiry.

Adm

VI. Appointment of Special Advocates

(LC Paper No. CB(2)917/04-05(01) – Paper provided by the Administration

LC Paper No. CB(2)917/04-05(02) – Extract from Report of the Bills Committee on National Security (Legislative Provisions) Bill on discussion relating to the appointment of a special advocate in appeals against proscription

LC Paper No. CB(2)917/04-05(03) – Judgment of the Court of First Instance on PV and Director of Immigration, HCAL 45/2004

LC Paper No. CB(2)917/04-05(04) – Documents provided by the Hong Kong Bar Association)

35. Deputy Solicitor General (Constitutional) (DSG(C)) took members through the Administration's paper which set out the rationale and functions, procedure for appointment, and principles and criteria for selection of Special Advocates (SAs). He explained that the background was that in a judicial review heard in June and July 2004 before the Court of First Instance in *PV and Director of Immigration, HCAL 45/2004* (the PV case), the judge ruled that certain documents relied on by the Director of Immigration in opposing an application for bail were protected by public interest immunity (PII) and should not therefore be disclosed to the applicant. This

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rendered the applicant's counsel unable to advocate the applicant's case with any knowledge of the material which had caused the applicant to be detained. Upon the application of the applicant's counsel, citing an English decision of the House of Lords in *R v H and Others [2004] 2 WLR 335, HL* (the R v H case) in support, the judge made a request to S for J for the appointment of an SA to protect the interests of the applicant who could not be fully informed of all the materials relied on against him and to assist the court. An SA was subsequently appointed, for the first time in Hong Kong, and the judge granted bail after hearing submissions from the SA.

36. DSG(C) said that the arrangements for the appointment of SAs were extraordinary and should only be resorted to in exceptional circumstances. The appointment of SAs provided an additional means to protect the interests of the affected persons to meet the requirement of fairness in appropriate cases.

37. The Chairman supplemented that the issue of appointment of SA to act in the interests of an appellant against proscription had been discussed by Members in the course of scrutinizing of the National Security (Legislative Provisions) Bill. She referred members to the extract from the Report of the Bills Committee on National Security (Legislative Provisions) Bill (LC Paper No. CB(2)917/04-05(02)).

Views of the Hong Kong Bar Association

38. Mr P Y LO briefed members on the papers provided by the Bar Association and summarized the views of the Bar Association as follows –

(a) the appointment of an SA in the PV case gave rise to concern about protection of constitutional and fundamental human rights of litigants. In the PV case, while the SA appointed to represent the interests of the affected person was given the relevant documents and information, the material was withheld from disclosure to the person and his lawyer. Such a course was not underpinned by any legislative provision and materially deviated from the procedure normally taken in legal proceedings where a claim of PII was made in respect of certain documents. In an ordinary case, if a claim for PII was sustained, the related documents and information would be withheld from disclosure by all parties and would not be used;

(b) the right to choose a lawyer of one's choice under Article 35 of the Basic Law should be fully protected. In the PV case, while DOJ appeared for the respondent, the SA acting for the applicant was appointed by DOJ. This gave rise to the perception of a role conflict of DOJ;

(c) the Bar Association was concerned that the procedure for appointment of an SA in the PV case would become a precedent and make it easier not only for similar procedure to be adopted in future cases involving PII claims even though the affected parties did not agree to the appointment of an SA to represent their interests, but also for the court to accede to PII claims; and

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(d) the Bar Association considered that the course of action for appointing SAs should not be adopted in the future.

39. Mr P Y LO further informed members that the merit of a comparable system of appointment of SAs in the United Kingdom (UK) was called into question, as recently two SAs had resigned from the Special Immigration Appeals Commission (SIAC) in protest of the government's "odious" terror laws. SIAC was the court that heard appeals from terrorist suspects facing deportation from the UK on national security grounds, where the case against them was considered too security-sensitive to be disclosed. The operation of SIAC was currently the subject of an inquiry by the UK Parliament.

Issues raised by members

40. The Chairman asked Mr P Y LO whether it was common for the court to accept certain documents or information submitted to it as evidence but withhold the documents or information from disclosure to the affected party, even though with the latter's consent. Mr LO replied that such cases were rare in civil trials but a few examples could be found in the UK case laws on criminal trials involving claims for immunity from disclosure. He said that in the vast majority of cases, a defendant should be fully informed of all the material relied on against him, and documents provided to the court as evidence should be disclosed to the affected person.

41. In response to Mr Albert HO, Mr P Y LO pointed out that –

(a) Canada also adopted a procedure for the appointment of SA to represent an affected party in litigation involving immigration and anti-terrorist matters;

(b) in the judgment of the European Court of Human Rights (ECHR) in *Edwards and Lewis v United Kingdom*, the ECHR ruled that the PII hearing held in the absence of the defendants and their legal representatives did not meet the requirement of a fair trial;

(c) in the PV case, the leading counsel for the applicant submitted to the court that it might be appropriate to adopt the procedure for the appointment of an SA to represent the interests of the applicant. The appointment was subsequently made on consent of both the applicant and the respondent. If the applicant did not agree to the appointment of an SA, it was uncertain whether Article 35 of the Basic Law would be sufficient to guarantee that the applicant could instruct a lawyer of his choice, because the right under Article 35 was not an absolute right. The decision would vest ultimately in the court; and

(d) the role of S for J, who took overall responsibility for prosecution, in the selection and appointment of SA for a defendant would put S for J and DOJ in an embarrassing position of conflict of interest.

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42. Mr Albert HO commented that the arrangement for the appointment of SAs might also be an infringement of the rule of natural justice.

43. DSG(C) advised members that the doctrine of PII had been developed over a long time. As pointed out by the judge in the PV case, PII had been described as a general rule of law founded on public policy that any document might be withheld or an answer to any question refused on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest. He said that in appropriate cases, the judge would undertake a balancing exercise and decide whether certain information was the subject of immunity and whether an order should be made for its non-disclosure to an affected party. He reiterated the Administration's position that situations which warranted the appointment of SA must be extraordinary and exceptional, and any derogation from the rights under Article 35 of the Basic Law should be the minimum possible.

44. DSG(C) further pointed out that UK appeared to be the only jurisdiction that had enacted legislation to provide for the appointment of SAs in respect of special types of proceedings. However, systems were also in place in Canada and other jurisdictions concerning appointment of SAs. At the Chairman's request, DSG(C) undertook to provide a paper on the systems in other jurisdictions for the Panel's reference.

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45. Regarding the concern about conflict of role of S for J in the appointment of SAs, DSG(C) said that separately from the question of an SA being acceptable to the applicant, the SA had to be acceptable to the respondent. It was agreed that S for J, fulfilling her role, in Lord Bingham's phrase in the R v H case as "an independent, unpartisan guardian of the public interest in the administration of justice", should be asked to assume the responsibility of appointing the SA.

46. Mr Martin LEE said that he felt troubled by the fact that in the PV case, DOJ played a dual role of acting on behalf of the respondent and instructing the appointed SA representing the applicant. Mr LEE remarked that although he had nothing against the present incumbent of the office of S for J personally, who was a person of integrity, he was a little reluctant to put implicit trust in S for J to take on the responsibility of proposing a list of Senior Counsel for consideration of appointment as SA. He pointed out that S for J, who was a member of the Constitutional Development Task Force responsible for looking into the democratic development of Hong Kong, was holding a political office. In the case of UK, the major premise on which the selection of SAs was based was that the Attorney General, who was the equivalent of S for J in the HKSAR, would act in the selection process as an independent, unpartisan guardian of public interest in the administration of justice. A great difference between UK and Hong Kong, however, was that the government of UK was fully elected and the ministers could be removed from office if the government failed in an election. However, the principal officials of Hong Kong, including S for J, could not be so removed. In his view, it was difficult to reconcile the position of UK and Hong Kong regarding the impartial role of the Attorney General and S for J in the selection of SAs.

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47. Regarding the PV case, Ms Audrey EU said that the leading counsel for the applicant might have proposed the exceptional course of appointing an SA out of an anxiety to help the applicant. She expressed concern that this unusual procedure might be invoked in every other case involving PII and non-disclosure of evidence. In her view, the procedure also created far-reaching and complicated implications, such as the duties of an SA who was privy to some special evidence not disclosed to the affected party he represented, how and to whom an SA was answerable, whether there were rules and code of conduct applicable to the SAs and how SAs might be disciplined in relation to their conduct, as well as how appeal cases should be dealt with. Ms EU opined that to address the relevant concerns, it might be necessary to consider the need for enacting legislation to provide a statutory backing for this exceptional arrangement which represented a fundamental departure from the normal rules and procedures of legal proceedings. She invited the Administration and the Bar Association to give serious thoughts to the matter.

48. Ms Emily LAU said that she shared the concerns expressed on the procedure for appointment of SAs and urged the Administration to proceed with any appointment with extreme caution. She considered that providing a legislative framework for the procedure could be a possible way forward, and the legislative framework should only be decided after careful formulation of a policy with wide and thorough public debate and passage of a relevant bill on the matter by the LegCo.

49. Mr P Y LO said that in the Bar Association's view, the system of appointment of SA should not become a standing feature or a fall-back measure for the administration of justice. He said that he had great reservation about enacting legislation for the appointment system as it would make an exceptionally unusual procedure less exceptional.

50. Ms Emily LAU noted that the Chairman of the Bar Association had written to S for J on 29 June 2004 to express concern about the appointment of SAs and objection to the appointment of an SA in the PV case (Document 1 in LC Paper No. CB(2)917/04-05(04)). The Chairman requested the Administration to provide the S for J's reply to the Bar Association Chairman for the Panel's reference.

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51. The Chairman and Ms Audrey EU pointed out that the Administration had stated in its paper that in appropriate cases, it would consider following the guidelines set out by the Judiciary in the PV case and any subsequent cases for the appointment of SAs. However, there was no specific explanation of the guidelines, other than saying the appointment was required in the interests of justice. The Chairman further said that in the PV case, the applicant had consented to the appointment of SA. However, in other cases, the affected party might not agree to the appointment. The Chairman requested the Administration to explain in writing the conditions which had to be satisfied and the guidelines which the Administration should follow in future in relation to the procedure for appointments of SAs.

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Bar Assn

52. The Chairman said that the Panel might follow up the subject matter after consideration of the Administration's response. She also requested Mr P Y LO to take the matter back to the Bar Association for further considered views and comments.

53. The meeting ended at 6:50 pm.

Council Business Division 2
Legislative Council Secretariat
11 April 2005