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Legislative Council

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**Report of the Panel on Administration of Justice and Legal Services
for submission to the Legislative Council**

PURPOSE

This report gives an account of the work of the Panel on Administration of Justice and Legal Services during the 2008-2009 Legislative Council (LegCo) session. It will be tabled at the Council meeting on 8 July 2009 in accordance with Rule 77(14) of the Rules of Procedure of the Council.

THE PANEL

2. The Panel was formed by a resolution passed by the Council on 8 July 1998 and as amended on 20 December 2000, 9 October 2002, 11 July 2007 and 2 July 2008 for the purpose of monitoring and examining policy matters relating to the administration of justice and legal services. The terms of reference of the Panel are in **Appendix I**.

3. The Panel comprises eight members, with Dr Hon Margaret NG and Hon Albert HO elected as Chairman and Deputy Chairman respectively. The membership of the Panel is in **Appendix II**.

MAJOR WORK

Implementation of Civil Justice Reform (CJR)

Preparation of the Judiciary and the legal profession

4. The Panel had been monitoring the progress on preparation made by the Judiciary and the two legal professional bodies for the implementation of CJR. The Judiciary Administration (JA) briefed the Panel on the progress in relation to the implementation of CJR in April 2009. Both the Bar Association and the Law Society assured the Panel that the two branches of the legal profession were ready for the implementation. Members stressed that it was important to monitor rigorously the reformed civil justice system and gauge feedback from the relevant stakeholders after the implementation of CJR. The Panel noted that the Chief Justice (CJ) had established a Committee (the Monitoring Committee) to monitor the working of the

reformed civil justice system after the implementation of CJR and to make suggestions to ensure its effective operation. At the Panel's request, JA undertook to provide further information on the work of the Monitoring Committee and to brief members on the effectiveness of the reformed system in about a year's time after the implementation of CJR.

Operation of the Resource Centre for Unrepresented Litigants

5. Given the impact of the procedural changes in CJR on unrepresented litigants, the Panel received a briefing by JA on the enhancement of the services and facilities in the Resource Centre for Unrepresented Litigants for the purpose of assessing the adequacy of its services. The Panel noted that in the light of the implementation of CJR and to facilitate the provision of services to unrepresented litigants, a revamped Steering Committee on Resource Centre for Unrepresented Litigants was set up in the Judiciary which would monitor matters relating to the Resource Centre to ensure that adequate and suitable assistance was provided.

6. Members considered that the growing number of unrepresented litigants had strained judicial time and resources, and were of the unanimous view that services to unrepresented litigants should be further enhanced by providing them with legal advice service. Members noted the Judiciary's position that in view of the fundamental principle of maintaining the independence and neutrality of the Judiciary, it would be inappropriate for the Resource Centre to offer legal advice to unrepresented litigants. Members put forward a proposal to the Administration that a free legal advice scheme, similar to that under the Duty Lawyer Service, with volunteer lawyers giving free preliminary legal advice to unrepresented litigants should be implemented at an office located near the Resource Centre. The Administration undertook to examine carefully the details of the proposal and its implications in consultation with the Judiciary. The Panel had also scheduled to visit the Resource Centre during its visit to the Judiciary to be held in mid July 2009.

Development of mediation services

7. The Working Group on Mediation chaired by the Secretary for Justice (S for J) was formed in early 2008 to map out how mediation could be more effectively and extensively applied in both commercial disputes and at the community level (the Working Group). The Panel considered it important to help the ordinary people to resolve disputes by quicker and more effective ways instead of requiring them to resort to judicial process. The Panel had urged the Administration to explore ways to facilitate and encourage community mediation.

8. The Panel received a briefing by the Administration on the latest developments on the work of the Working Group. Members were informed that in the past year, the Working Group and its three Sub-groups had considered issues including the availability of suitable venues for mediation in the community, mediation courses offered by law schools, promotion of mediation to the commercial sector, a draft

Hong Kong Mediation Code, options for enforcement of the Code, standards for accrediting mediators and the need for legislation on mediation. Members also noted that a public consultation on promotion of mediation services would be conducted early next year, following the completion of the report by the Working Group in December 2009.

9. The Administration advised that to address the concern about the lack of suitable venues for conducting mediation, in particular community mediation, a pilot scheme would be implemented in July 2009 to provide pro bono mediators with the use of venues in two community centres during specified periods free of charge. Consideration would be given to extending the pilot scheme to other community centres where necessary. Members requested the Administration to further explore ways to address the profession's concern about the availability of venues for mediation.

Mediation of building management cases in the Lands Tribunal

10. The Administration briefed the Panel on the findings of the evaluation of the one-year Pilot Scheme for Building Management Cases in the Lands Tribunal, the aims of which were to facilitate the efficient, expeditious and fair disposal of these cases and to encourage relevant parties to resolve their cases by mediation. The Panel noted that in the light of the positive outcome of the Pilot Scheme, the Lands Tribunal aimed to adopt the measures taken in the Pilot Scheme as the standard practice. With effect from 1 July 2009, more active case management through the adoption of automatic and paper directions and checklists would be applicable to cases where both parties were legally represented. Solicitors were recommended to explore mediation with their clients in all represented building management cases in the Lands Tribunal. For cases where one or both parties were unrepresented, the Lands Tribunal might, on the application of a party or on its own motion, as appropriate, give directions that the parties should follow the relevant procedure on mediation.

11. Members expressed concern that fewer parties would be willing to attempt to resolve their disputes through mediation after all the quota for pro bono mediation service provided under the Pilot Scheme had been used up. They were of the view that success in mediating settlement in the Lands Tribunal would bring about much savings in judicial resources and such savings should be allocated for encouraging more extensive use of mediation in resolving building management disputes, such as subsidizing the costs of mediation services. The Panel would take up the issue with the Administration.

Mediation in legally-aided matrimonial cases

12. Following the Panel's support for the Administration's proposal to provide funding for mediation in legally-aided matrimonial cases on a permanent basis during the last legislative session, the Administration briefed the Panel on the latest development in implementation. Taking into account members' suggestion of

introducing an interim checkpoint approach for setting the number of hours allowed for the mediation process, the number of hours allowed for the mediation process for each case would be initially capped at nine hours and be extended for another six hours subject to the approval of the Director of Legal Aid (DLA). Additional hours required for completing the mediation process beyond the ceiling of 15 hours would be subject to further approval of DLA on a case-by-case basis. The Panel was generally supportive of the proposal to extend legal aid to cover the costs of mediation in matrimonial cases which would be introduced after the relevant implementation arrangements had been worked out by the Administration.

Access to justice

13. Access to justice had all along been a major issue of concern to the Panel. Members were of the view that the existing legal aid system failed to cater for the actual demand of the society, and access to legal aid services was beyond the means of the majority of the middle class in general. The Panel discussed issues relating to the provision of legal aid services on various fronts.

Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants

14. The Administration had kept the Panel informed of the progress of the ongoing five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants since 2007, the scope of which covered the financial capacity approach in assessing the financial eligibility of legal aid applicants, methods of computing disposable income and disposable capital, financial eligibility limits and the Supplementary Legal Aid Scheme (SLAS).

15. Members reiterated their queries about the appropriateness of the existing approach of having a one-line financial limit for all types of legal aid applications without regard to the peculiarities of different types of cases. They considered that the Administration should adopt a more flexible and holistic approach in reviewing the legal aid system to ensure access to justice.

16. Members were of an unanimous view that the scope of SLAS should be expanded by raising the financial eligibility limits, increasing the types of cases to be covered and applying flexibility to the contribution rate payable by legally-aided persons, so as to provide those who could not afford the high costs of litigation with greater access to justice, while maintaining the financial viability of the Scheme at the same time.

17. The Administration advised the Panel in March 2009 that it needed more time to consider carefully the way forward and the relevant financial and other implications, and undertook to revert to the Panel on the recommendations on the five-yearly review as soon as practicable.

Criminal legal aid fees system

18. The Panel had monitored the progress of the review of the criminal legal aid fees system (i.e. the system of payment of fees to criminal legal aid lawyers engaged by the Legal Aid Department (LAD)) which aimed at achieving general compatibility with the prosecution fee regime adopted by the Department of Justice (DoJ) and providing reasonable remuneration for assigned lawyers undertaking criminal legal aid work. The Panel noted that while the Administration had reached a broad consensus with the two legal professional bodies on the adoption of a new fee structure which would operate on a marked-brief basis, the Administration was yet to resolve the divergence of views over the fee rates for solicitors with the Law Society of Hong Kong. The Panel also noted the Bar's suggestion that in view of the lack of progress of the discussion between the two parties, implementation of the revised criminal legal aid fee system for barristers should be de-linked from that for solicitors should the Administration and the Law Society fail to reach agreement on the fee rates.

19. When the Panel received a report from the Administration on the latest progress of its discussion with the Law Society on fee rates for solicitors in June 2009, members were informed that the Administration had put forth a revised proposal on fee rates for the Law Society's consideration and had also offered to revisit the rates in two years' time upon the effective implementation of the new rates. Members, however, noted the Law Society's view that the revised fee rates did not properly reflect the responsibilities of and professional services rendered by solicitors in criminal legal aid work and were still far below the civil party to party taxation rates for remunerating civil legal aid cases. The Law Society had also expressed grave concern about the Administration's failure to address properly the major issues of principles it had raised, namely the disparity in the remuneration for solicitors engaged in civil and criminal legal aid work, and the yardstick for reviewing criminal legal aid fees in future review.

20. The Administration explained to the Panel that it had considered the issue of fee rates for solicitors from a budgetary point of view and with reference to the remuneration of in-house government lawyers handling criminal cases. Some members expressed the view that as the fundamental difference between the Law Society and the Administration on the basis for determining the fee increase for solicitors had yet to be resolved, the remuneration package for solicitors put forward by the Administration, though not satisfactory, should be accepted as a basis with a view to achieving further upward adjustment in the future. Members, however, reiterated their view that the Administration should have addressed the issues of principles raised by the Law Society so that there would be a mutually-acceptable basis for rate adjustments in the future. They urged the two parties to resolve their differences as far as possible for the early implementation of the revised remuneration system for lawyers undertaking criminal legal aid work.

Criminal Legal Aid in Criminal Cases

21. The Panel noted that that under rule 4(1)(h) of the Legal Aid in Criminal Cases Rules (Cap. 221D) (the Rules), only persons who had been convicted of an offence were eligible for legal aid for an appeal to the Court of Final Appeal (CFA). The Hong Kong Human Rights Monitor raised the issue with the Panel that the sub-rule was too narrowly drawn and could cause injustice. It therefore proposed that amendments be made to the Rules to allow for legal aid to be granted in cases going to CFA not involving a conviction.

22. Members in general expressed support for the HKHRM's proposal of amending the Rules as the loophole had wide implications on human rights protection. They were concerned that rule 4(1)(h) could result in denial of legal aid in cases with important constitutional or human rights implications. Members considered the sub-rule in question unconstitutional in that it was a blanket prohibition on the grant of legal aid in all cases going to CFA where no conviction was involved and such blanket prohibition had serious implications on the right of access to the court. They urged the Administration to amend the sub-rule expeditiously. The Administration undertook to consider positively members' views in examining the proposed amendments to the Rules. The Panel would follow up the issue with the Administration at the beginning of the next legislative session.

Issues relating to prosecution

Court Prosecutors system

23. In its discussion on the staff wastage in the Prosecutions Division of DoJ during the last legislative session, the Panel considered that it was opportune to review the Court Prosecutors (CPs) grade which had been established since 1976 to take over prosecution work in Magistrates' Courts. Members had all along held the view that prosecution work should be handled by legally-qualified practitioners, rather than CPs who were not required to be legally qualified.

24. The Administration reported to the Panel that in considering the issue of CPs, the guiding principle was that the bulk of prosecutions ought to be conducted by the legally qualified, if not in the short term, then in the medium to long term. However, it would be difficult to set a timeframe for achieving such goal, in the light of the difficulties in recruiting legally qualified persons as Government Counsel who had a higher starting salary. The Administration also observed that CPs had been providing high-quality prosecution services, while the same could not be said of junior barristers across the board.

25. Some members were of the view that it was important that a prosecutor could see a case from both the prosecution and defence perspectives. Compared with CPs who only performed the role of a prosecutor, lawyers in private practice had a more balanced expertise in both prosecution and defence work which was pivotal to

ensuring the independence and objectivity of the judicial system. Some members also suggested that to ensure the quality of prosecution work performed by CPs, the minimum entry qualification of the CP rank should be raised from the matriculation level to a university degree, and the Administration should stop appointing non-legally qualified persons as CPs.

26. The Panel noted from the Bar Association that with a view to enhancing the standards of junior barristers, the Bar Association had set up a task force to oversee the introduction of a training course for junior members of the Bar with special emphasis on criminal prosecution. The Administration also assured the Panel that it would continue to brief out some of its summary prosecution cases to junior barristers to provide them with exposure to prosecution work. The Administration would revisit the CP system after the effectiveness of the Bar's proposed training programme had been evaluated.

Immunity from prosecution

27. Arising from the public outcry over the incident concerning the wife of the President of the Republic of Zimbabwe, Mrs Grace Mugabe, who had allegedly committed an assault against a photojournalist during her visit to Hong Kong, the Panel invited S for J to explain to the Panel the decision of DoJ not to prosecute Mrs Mugabe. According to S for J, the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China (OCMFA) in the Hong Kong Special Administrative Region (HKSAR) had advised the HKSAR Government that Mrs Mugabe had been granted immunity and inviolability pursuant to Article 22.1(3) of the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities (the Regulations), which applied to Hong Kong by virtue of their inclusion in Annex III of the Basic Law and their promulgation by the Promulgation of National Laws Notice 1997. OCMFA had further advised that the privileges and immunities that Mrs Mugabe enjoyed included the immunity from criminal jurisdiction equivalent to that enjoyed by diplomatic agents under Article 14 of the Regulations.

28. Members expressed grave concern over the rule of law in Hong Kong if a person who had committed an assault blatantly and intentionally could enjoy immunity from prosecution. They considered that the HKSAR Government should ban the entry of Mrs Mugabe into Hong Kong and seek to have her being declared as persona on grata in HKSAR. S for J explained to the Panel that under the Basic Law and the Immigration Ordinance (Cap. 115), the HKSAR Government was empowered to apply immigration controls on, inter alia, entry into Hong Kong by persons from other countries. However, the declaration of a person as a persona non grata was a diplomatic matter the right of which resided in CPG. S for J also assured the Panel that the HKSAR Government had already conveyed to CPG the concerns of the Hong Kong public about the incident.

Limited liability partnerships for legal practice

29. During the policy briefing by S for J on the Chief Executive's 2008-2009 Policy Address, the Panel noted that DoJ was prepared to consider promoting a bill to provide for limited liability partnerships (LLPs) for solicitors and had been in discussion with the Law Society on the related policy and legislative issues. At the Panel's request, DoJ kept members informed of the developments of taking forward these issues. The Panel was advised that other than the issue of whether LLP partners should be held personally liable for ordinary debts of business such as rent and salaries, the Administration and the Law Society had agreed on all important matters of principle. The Administration's position was that LLP partners should continue to be held personally liable for ordinary business debts as they were not unforeseeable debts over which they had no control as in the case of claims incurred by negligence of other partners. The Panel also noted the position of the Consumer Council that it did not object to the adoption of LLPs as a matter of principle, provided that there were sufficient safeguards for consumers.

30. Members in general were of the view that LLPs which was in line with the global trend should be introduced as soon as possible, given that it would reduce the exposure of individual partners to financial liabilities and provide an incentive for the formation of large professional practices capable of offering a diversified range of legal services. However, adequate measures of consumer protection should be put in place in tandem with the introduction of LLPs. Members also stressed the importance of enhancing public education on the nature of LLPs to facilitate consumers in making informed choices when selecting legal representatives. The Administration advised the Panel that it also recognized the need to strike a proper balance between limiting professional liability and safeguarding consumer interests in the LLP proposal. To this end, provisions would be included in the legislation to enhance the transparency of the operation of LLPs, such as requiring that the name of each LLP must include the term LLP at its end. The Administration would also work out a public education programme to enhance public awareness of the nature and implications of LLPs upon the implementation of the new business model.

31. Noting the Law Society's proposal that the existing statutory professional indemnity limit of HK\$10 million per claim be maintained under LLPs, members considered that the Law Society should provide relevant data to help the Panel and the Administration assess the adequacy of the existing statutory professional indemnity limit in meeting the claims of ordinary consumers against solicitors. Members also urged the Law Society to address the concerns expressed by the Consumer Council about consumer protection as far as practicable.

32. Members noted that the relevant bill seeking to amend the Legal Practitioners Ordinance (Cap. 159) would be introduced into LegCo in the first half of the 2009-2010 legislative session at the earliest. At the Panel's request, the Administration undertook to report to the Panel again before introduction of the bill.

Demand for and supply of legal and related services

33. Members expressed the view that the Administration should consider extending the scope of legal aid from litigation to legal advice, in order to complement the changes brought about by CJR. In addition, with the increasing number of Hong Kong people working and living on the Mainland, they should be provided with legal advice service under legal aid if involved in legal proceedings on the Mainland. They considered that the Free Legal Advice Scheme should be discussed in the broader context of the demand for and supply of legal and related services.

34. When the Panel received a progress report on the Administration's consideration of the Reports on the Consultancy Study on Demand for and Supply of Legal and Related Services published in May 2008, members expressed strong dissatisfaction about the absence of concrete proposals from the Administration to address the gaps in service availability and unmet legal needs identified in the Reports of the Consultancy Study. Members were particularly dissatisfied that the Administration had not put forth any proposal for reviewing the effectiveness and adequacy of the existing free legal advice service, notwithstanding that the Reports had clearly pointed to an unmet demand for legal advice service in the community, as evidenced by the findings on the considerable amount of difficult-to-solve problems faced by individuals who were not getting help from the legal services currently provided. At the Panel's request, the Administration undertook to work out concrete proposals for improving the existing community legal advice service in consultation with the two legal professional bodies and relevant non-governmental organizations, and report to the Panel at the beginning of the next legislative session.

Recovery agents

35. When the Administration updated the Panel on a series of public education and law enforcement measures taken to address the problems caused by recovery agents (RAs), members were informed that the Administration would consider the need for legislation with reference to the relevant case law, with a view to reviewing whether the elements of the common law offences of maintenance and champerty had posed any difficulties to the Police/DoJ in their investigation/prosecution work. While members recognized that RAs might be meeting an unsatisfied demand for legal services, they stressed that there were legal and public interest considerations for the need to combat the activities of RAs who were not professionally qualified or subject to any code of professional conduct. The Panel would continue to monitor the progress of actions taken by the Administration to counter the activities of RAs.

Appointment of judges for extra-judiciary functions

36. Members noted with concern about the growing number of appointments of judges for extra-judiciary functions. The Panel held a discussion with JA and the Administration on the overall government policy. The Panel noted that for offices

outside the Judiciary where the relevant statute provided for serving judges and other categories of persons to be eligible for appointment, the Judiciary's approach in recent years had been to request the Administration to look for a suitable person who was not a serving judge and to agree to make a serving judge available only where no other suitable candidates was available. The Administration explained to the Panel that judges would only be appointed to extra-judiciary functions where it was considered necessary and appropriate to do so. Where both serving and retired judges were eligible for appointment, consideration would be given to appointing retired judges if suitable candidates could be identified.

37. Members were primarily concerned about the extra-judiciary appointments which were not related to judicial work. They considered that such appointments would not only strain judicial resources which were valuable and limited, but also have an adverse impact on the public's perception about the independence of individual judges or the Judiciary as a whole. Members stressed that it was important not to ask judges to perform any extra-judiciary function which might be perceived as political in nature. At the Panel's request, the Administration undertook to conduct a comprehensive review on the policy and criteria for the appointment of judges to extra-judiciary functions, and to review whether as a matter of policy each of the existing non-statutory appointments of serving judges to undertake extra-judiciary functions must continue.

Review of the jurisdiction of the Office of The Ombudsman

38. The Ombudsman submitted to the Administration Part 1 on an operational review of The Ombudsman Ordinance (Cap. 397) and Part 2 on a more generalized review of the developments in ombudsmanship of the Report on Review of the jurisdiction of the Office of The Ombudsman in November 2006 and November 2007 respectively. The Panel had been following up on the Administration's responses to the recommendations made in the Report.

39. Regarding the extension of The Ombudsman's jurisdiction recommended in Part 1 of the Review Report, the Administration informed the Panel that after consulting the relevant bureaux and public bodies, it was agreed that the Auxiliary Medical Service, Civil Aid Service, Consumer Council and Estate Agents Authority should come under The Ombudsman's jurisdiction, but considered it inappropriate to include the Board of Management of Chinese Permanent Cemeteries and Chinese Temples Committee. The Administration would proceed to work on the legislative amendments to bring these four public bodies under The Ombudsman's jurisdiction. The Panel noted that the issue of whether the statutory Independent Police Complaints Council (IPCC) to be established on 1 June 2009 should be subject to The Ombudsman's jurisdiction had been considered during the scrutiny of the IPCC Bill. While the Administration's view then was that the statutory IPCC should not be brought under The Ombudsman's ambit for the time being, The Ombudsman saw no objection in principle to do so. The Panel would bring up the issue with the Administration after the statutory IPCC had been in operation for some time.

40. Part 2 of the Review Report examined possible developments of the ombudsman system for Hong Kong in four areas, namely protection and promotion of human rights, access to government information, protection of whistleblowers and establishment of specialized ombudsmen such as a medical ombudsman office. The Panel was advised that having consulted the relevant policy bureaux, the Administration had come to the view that there was no justified need for introducing changes to the existing mechanisms and practices in the four areas.

Other issues

41. The Panel was consulted on or informed of the following legislative proposals before their introduction into LegCo -

- (a) Legal Practitioners (Amendment) Bill 2009 which sought to grant higher rights of audience to solicitors;
- (b) Hong Kong Court of Final Appeal Fees (Amendment) Rules 2009, District Court Civil Procedure (Fees) (Amendment) Rules 2009 and Civil Justice (Miscellaneous Amendments) Ordinance 2008 (Commencement) Notice which related to the implementation of CJR;
- (c) Arbitration Bill which proposed the creation of a unitary regime of arbitration on the basis of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law for all types of arbitrations;
- (d) proposed resolution to Amend the Judicial Officers Recommendation Commission Ordinance (Cap. 92) which sought to create the judicial office of "Principal Family Court Judge";
- (e) proposed resolution under the Legal Aid Ordinance (Cap. 91) for an upward adjustment of the financial eligibility limits for legal aid for Ordinary Legal Aid Scheme and criminal legal aid, and for SLAS, taking account of movements in Consumer Price Index (C);
- (f) subsidiary legislation relating to privileges and immunities conferred on consular posts; and
- (g) proposed amendment to the Legal Aid in Criminal Cases Rules for an upward adjustments of the criminal legal aid fees by 8.3% in accordance with the movement in Consumer Price Index (C) as a result of the 2008 biennial review.

42. The Panel also received a draft Code of Conduct for Solicitor-Advocates from the Law Society in connection with the Legal Practitioners (Amendment) Bill 2009.

PANEL MEETINGS

43. From October 2008 to June 2009, the Panel held a total of 11 meetings including a joint meeting with the Panel on Development.

Council Business Division 2
Legislative Council Secretariat
3 July 2009

Legislative Council

Panel on Administration of Justice and Legal Services

Terms of Reference

1. To monitor and examine, consistent with maintaining the independence of the Judiciary and the rule of law, policy matters relating to the administration of justice and legal services, including the effectiveness of their implementation by relevant officials and departments.
2. To provide a forum for the exchange and dissemination of views on the above policy matters.
3. To receive briefings and to formulate views on any major legislative or financial proposals in respect of the above policy areas prior to their formal introduction to the Council or Finance Committee.
4. To monitor and examine, to the extent it considers necessary, the above policy matters referred to it by a member of the Panel or by the House Committee.
5. To make reports to the Council or to the House Committee as required by the Rules of Procedure.

Panel on Administration of Justice and Legal Services

Membership list

Chairman	Dr Hon Margaret NG
Deputy Chairman	Hon Albert HO Chun-yan
Members	Hon James TO Kun-sun Hon LAU Kong-wah, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Audrey EU Yuet-mee, SC, JP Dr Hon Priscilla LEUNG Mei-fun Hon Paul TSE Wai-chun (Total : 8 members)
Clerk	Miss Flora TAI
Legal Adviser	Mr KAU Kin-wah
Date	14 October 2008