

立法會
Legislative Council

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LC Paper No. CB(4)843/13-14
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Tuesday, 22 April 2014, at 4:30 pm
in Conference Room 1 of the Legislative Council Complex

Members present : Dr Hon Priscilla LEUNG Mei-fun, JP (Chairman)
Hon Dennis KWOK (Deputy Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon CHAN Kam-lam, SBS, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon LEUNG Kwok-hung
Hon Michael TIEN Puk-sun, BBS, JP
Hon Steven HO Chun-yin
Hon YIU Si-wing
Hon MA Fung-kwok, SBS, JP
Hon Alice MAK Mei-kuen, JP
Hon Martin LIAO Cheung-kong, JP
Hon TANG Ka-piu
Dr Hon CHIANG Lai-wan, JP
Hon CHUNG Kwok-pan
Hon Tony TSE Wai-chuen

Members absent : Hon Ronny TONG Ka-wah, SC
Hon Starry LEE Wai-king, JP
Hon CHAN Kin-por, BBS, JP
Hon Alan LEONG Kah-kit, SC
Hon WONG Yuk-man
Hon NG Leung-sing, SBS, JP
Dr Hon Elizabeth QUAT, JP

Public Officers : Item III
attending

Judiciary Administration

Mr Arthur NG
Deputy Judiciary Administrator (Operation)

Ms Wendy CHEUNG
Assistant Judiciary Administrator (Development)

Members of the Chief Justice's Working Party on
Family Procedure Rules

Ms Mary HO
Assistant Law Officer (Civil) (Advisory)
Department of Justice

Mr Ian WINGFIELD
Representative of the Family Law Association

Mr Jeremy CHAN
Representative of the Hong Kong Bar Association

Mr Dennis HO
Representative of The Law Society of Hong Kong

Item IV

Department of Justice

Mr Keith YEUNG, SC
Director of Public Prosecutions

Mr Wesley WONG, SC
Deputy Director of Public Prosecutions (II)

Mr William TAM
Deputy Director of Public Prosecutions (III)

Mr Peter POWER
Senior Assistant Director of Public Prosecutions I (1)

**Attendance
by invitation**

: Item III

Hong Kong Bar Association

Mr Robin EGERTON

The Law Society of Hong Kong

Mr Anthony James HUNG
Vice Chairman, Family Law Committee

Ms Winnie CHOW Weng-yee
Member, Family Law Committee

Ms Kally LAM Ka-lai
Assistant Director of Practitioners Affairs Department

Item IV

Hong Kong Bar Association

Mr Michael BLANCHFLOWER, SC

**Clerk in
attendance**

: Ms Debbie YAU
Chief Council Secretary (4)5

**Staff in
attendance**

: Mr Timothy TSO
Assistant Legal Adviser 2

Ms Anki NG
Senior Council Secretary (4)5

Ms Linda MA
Legislative Assistant (4)5

I. Information paper(s) issued since the last meeting

(LC Paper No. CB(4)567/13-14(01) -- Submission from two members of the public expressing their dissatisfaction about the appointment of a Registrar of the Court of Final Appeal (English version only) (Restricted to members only)

LC Paper No. CB(4)579/13-14(01) -- Submission from Parents for The Family Association on the adjudication of cases by the courts (Chinese version only) (Restricted to members only))

Members noted the above papers issued since the last meeting.

II. Items for discussion at the next meeting

(LC Paper No. CB (4)569/13-14(01) -- List of outstanding items for discussion

LC Paper No. CB(4)569/13-14(02) -- List of follow-up actions)

2. The Chairman informed members that the Administration had proposed to discuss the following items at the next regular meeting scheduled for 27 May 2014 at 4:30 pm –

- (a) Implementation of the recommendations made by the Law Reform Commission; and
- (b) Draft Solicitor Corporation Rules and consequential amendments to Legal Practitioners Ordinance (Cap. 159).

3. Members agreed to discuss the above items.

III. Review on Family Procedure Rules

(LC Paper No. CB(4)569/13-14(03) -- Judiciary Administration's paper on "Review of Family Procedure Rules – Interim Report and Consultative Paper"

LC Paper No. CB(4)607/13-14(01) -- Judiciary Administration's paper on "Review of Family Procedure Rules – Interim Report and Consultative Paper" (power-point presentation materials))

Other relevant papers published by the Chief Justice's Working Party on Family Procedure Rules on 17 February 2014

- Review of Family Procedure Rules Interim Report and Consultative Paper

- Executive Summary

4. The Chairman welcomed representatives of The Law Society of Hong Kong ("the Law Society"), the Hong Kong Bar Association ("the Bar Association"), the Judiciary Administration and members of the Chief Justice's Working Party on Family Procedure Rules ("the Working Party") attending the meeting.

Briefing by the Judiciary Administration

5. At the invitation of the Chairman, Deputy Judiciary Administrator (Operation) ("DJA") and Assistant Judiciary Administrator (Development) ("AJA") briefed members on the key proposals put forward by the Working Party in its Interim Report and Consultative Paper ("the Consultation Paper") and the proposed way forward. Assistant Law Officer (Civil) (Advisory) ("ALO") and member of the Working Party then briefed members on the more detailed proposals put forward in the Consultation Paper. Details of the briefings were set out in the Judiciary Administration's papers (LC Paper Nos.: CB(4)569/13-14(03) and CB(4)607/13-14(01)).

6. AJA said that the Working Party was consulting relevant stakeholders on the proposals. The consultation period ran for four months and would end on 16 June 2014. Briefing/discussion sessions on the proposals had been/were being arranged for the legal profession, welfare agencies, government bureaux/departments and some relevant advisory committees during the

consultation period. AJA supplemented that after considering the comments received during the consultation, the Working Party would refine its recommendations as appropriate and prepare its Final Report for the Chief Justice's consideration, tentatively by the first quarter of 2015. The proposals, if implemented, would necessitate changes to both the principal and subsidiary legislation. Preparation of the relevant legislative amendments was tentatively planned to start from the second quarter of 2015, and the Legislative Council ("LegCo") would be consulted on the proposed legislative changes in due course.

Views of the legal profession

The Law Society

7. Mr Anthony James HUNG, Vice Chairman, Family Law Committee of the Law Society said that a lot of problems regarding the Family Procedure Rules ("FPR") were identified in the Consultation Paper and the Law Society welcomed the review of the FPR. The Family Law Committee of the Law Society were considering issues listed in the Consultation Paper and would provide its views and recommendations to the Working Party by 16 June 2014. In principle, the Law Society agreed to the Working Party's suggestion to introduce a stand-alone unified procedural code that comprehensively dealt with the processes and procedures for all family and matrimonial matters ("the New Code") and to adopt England's Family Procedure Rules 2010 as the New Code's broad, basic framework with the necessary amendments to cater for local situations.

8. Mr Anthony HUNG supplemented that the Law Society agreed to the setting up of a new Family Procedure Rules Committee ("FPRC") as the single rule-making authority for the New Code and agreed in principle that it was necessary to introduce consequential amendments to the relevant principal ordinances and/or subsidiary legislation to improve the FPR.

The Bar Association

9. Mr Robin EGERTON of the Bar Association said that the Bar Association recognized the importance of streamlining the procedures in all areas of family law and the objective of bringing about consistency between the Matrimonial Causes Rules and the Rules of the High Court ("HC"). The Bar Association would participate in the review and finalize their response to the consultation by 16 June 2014. Mr EGERTON added that the Bar Association hoped to see that follow-up actions subsequent to the recommendations made would be taken. The Bar Association was extremely disappointed as no action had ever been taken to implement the recommendations made by the Law Reform Commission ("LRC") in its 2005 Report on Child Custody and Access ("the 2005 Report"). The Bar Association urged the Administration to implement such recommendations as soon as practicable.

Discussion

10. Mr TANG Ka-piu expressed concern on the effects of the proposals, if implemented, on mediation of family disputes and legal representation for the parties in such mediation. He anticipated that upon implementation, frontline social workers in family service centres would be receiving large number of enquiries concerning matrimonial and related issues. As such, the Working Party should also consult the welfare sector. AJA advised that the Judiciary Administration recognized that the welfare sector was one of the important stakeholders in the implementation of the proposed changes to FPR. A briefing session open to relevant stakeholders including welfare agencies invited through the Hong Kong Council of Social Services, the Labour and Welfare Bureau ("LWB") and the Social Welfare Department had been held on 22 March 2014. In addition, briefing sessions had been/would be conducted with relevant advisory committees, such as the Women's Commission and the Family Council. All other non-Panel Members of LegCo were also invited to join the discussion of this item at the meeting.

11. Mr Dennis KWOK noted that the present review was on FPR only and the legal profession generally supported the review in principle. Mr KWOK said that as pointed out by the Bar Association, many recommendations made by the LRC in the 2005 Report had not been implemented by the Administration. Mr KWOK pointed out that even the courts had urged the Administration to follow up on the recommendations made in the 2005 Report; he quoted the following judgment of Hon Justice LAM in paragraphs 80 and 81 of the Court of Appeal case of *PD v KWW* [2010] HKFLR 184:

"80. *Likewise, as observed by my Lord, the recommendations of our Law Reform Commission in 2005 regarding Child Custody and Access have not been taken forward. Had such recommendations been implemented, the respective rights and responsibilities of the parents towards their children would be more clearly and specifically defined. Judging from the submissions advanced by the parties in this case, I cannot help from observing that with the implementation of such reforms, appeals like the present one could have been avoided.*

"81. *Speaking for myself, I would like to take this opportunity to urge the Administration to make some progress in these directions."*

Mr KWOK expressed concern that the Administration had not taken follow-up actions for many of the reports of LRC and the 2005 Report was just one of them. He called on the Administration to ride on the present review in taking forward the recommendations in the 2005 Report.

12. AJA advised that recommendations made in the 2005 Report involved mainly changes in substantive family law and were being followed up by the

LWB. The Judiciary Administration had identified certain recommendations in the 2005 Report which were related to changes in FPR, and incorporated them into the Consultation Paper. For example, on the issue of whether a separate legal representative should be appointed in matrimonial and family proceedings, the Judiciary Administration had issued the Guidance on Separate Representation for Children in Matrimonial and Family Proceedings and was consulting the LWB and others on whether the provisions in the Guidance should be made statutory.

13. Mr Dennis KWOK enquired about the legislative timetable for taking forward the amendments of the relevant substantive law as recommended by the 2005 Report. ALO advised that as indicated in the Administration's paper (LC Paper No.: CB(2)1483/12-13(01)) submitted to the LegCo Panel on Welfare Services in July 2013, LWB had commenced the initial stage of the follow-up work of the LRC Report. The relevant proposals were being worked out in conjunction with the Department of Justice, and LWB was also considering the implementation arrangements. In the process, LWB would closely liaise with all relevant parties including the Judiciary, the Law Society and other stakeholders. Upon working out the detailed legislative and administrative proposals, LWB would further engage the stakeholders and interested parties before embarking on legislation.

14. Mr Dennis HO of the Law Society and member of the Working Party supplemented that the Consultation Paper contained a proposal to incorporate the procedure under the existing Child Dispute Resolution ("CDR") scheme (a pilot scheme commencing in 2012 to deal with all children disputes in the Family Court ("FC"), except adoptions) into the New Code and to extend the CDR procedure to HC. In his opinion, the proposal, if implemented, would help put in place the proper procedures to prepare for the relevant changes in the substantive law as recommended by the 2005 Report.

15. Mr Dennis KWOK urged the Administration to step up the review and implementation of the recommendations in the 2005 Report, as a mere reform in the procedural rules without making changes in the substantive law to reflect contemporary social changes was unsatisfactory. Judging from the experience in the Judiciary's Civil Justice Reform ("CJR") in 2009, a mere reform in civil procedures could not effectively streamline the proceedings. It was also necessary to increase the manpower and financial resources to strengthen other supporting services for the FC before any apparent improvement could be made to the efficient disposal of family and matrimonial disputes. DJA advised that the Working Party had proposed in the Consultation Paper that an assessment on the organizational and manpower implications on the Judiciary be carried out, and proposals on having Registrar(s) and Masters to help ease the workload of family judges might require additional Registrar/Master posts and extra support staff.

16. Mr Albert HO shared the views of the Bar Association and Mr Dennis KWOK on the slow progress in taking forward the recommendations of the 2005 Report. Nevertheless, he did not subscribe to the view that changes to FPR should be implemented ahead of amendments to substantive family law as recommended in the 2005 Report, as this was tantamount to putting the cart before the horse. He said that in the absence of the policy direction for introducing amendments to the substantive family law, the proposed FPR might have limitations upon implementation thus rendering it impracticable. For example, if joint custody was to be introduced, the number of social workers and social service centres assigned to deal with the relevant procedures might need to be increased to provide enhanced specific support services. Another example was the separate legal representation of children, i.e. if the court ordered that a child be separately represented in any matrimonial proceedings, necessary resource implications would follow.

17. AJA advised that as the current court procedures for the family justice system were rather fragmented with much cross-referencing to the Rules of the HC, one of the aims of the review of FPR was to formulate a single set of procedural rules, i.e. the New Code, for the family jurisdiction applicable both to the FC and the HC. She noted that to pursue the legislative route for implementing the recommendations of the 2005 Report would inevitably be a massive exercise involving changes to be made to different parts of the matrimonial and custody-related ordinances. AJA said that if the New Code was implemented before changes were made to these ordinances, the Judiciary Administration was prepared to introduce consequential amendments to FPR upon legislative changes.

18. In response to Mr Albert HO's enquiry about the jurisdiction of the FC on the Inheritance (Provision for Family and Dependents) Ordinance (Cap.481) ("I(PFD)O"), Mr Jeremy CHAN of the Bar Association and member of the Working Party advised that past proceedings involving applications under I(PFD)O were often conducted in the District Court and the HC. However, Hon Justice LAM of the Court of First Instance (as he then was) held in *Re Estate of Chow Nai Che (Deceased)* [2010] 5 HKLRD 640 that I(PFD)O proceedings should be commenced in the FC of the District Court. Since then, such proceedings were commenced in the FC. Mr CHAN stressed that the present review was restricted to procedures only, and there would be no change to substantive law.

19. Mr CHUNG Kwok-pan enquired about the legislative process for implementing the proposals in the Consultation Paper. AJA advised that the proposed New Code was expected to include principal and subsidiary legislation. The matters to be included into the principal legislation would most likely be related to court procedural matters, including the setting up and the powers of a new FPRC as the single rule-making authority for the New Code. At present, the family and matrimonial jurisdiction mainly covered subject matters and

proceedings arising from about ten principal ordinances, and the relevant provisions in these ordinances might need to be deleted upon the making of the New Code. In addition, as the Working Party considered that FC should have its own Registrar whose duties should cover simple judicial work, the principal legislation in the New Code would need to set out the jurisdiction, powers and duties of the new Registrar.

20. Mr Paul TSE opined that in response to the prevailing economic climate, financial issues rather than child custody had become the subject of disputes in family and matrimonial disputes. He supported the review of the FPR by the Working Party and urged the Judiciary Administration to proceed with the necessary legislative changes as soon as practicable without awaiting the embarkation on legislation related to the 2005 Report. Referring to paragraph 6 of the Judiciary Administration's paper (LC Paper No.: CB(4)569/13-14(03)), Mr TSE enquired about the reasons for not extending and implementing the new measures introduced in the Judiciary's CJR in 2009 with full force for family proceedings. Mr Jeremy CHAN of the Working Party advised that measures under the CJR were by nature of general applicability and were not all directly applicable to the FC procedures. Hence, as proposed by the Working Party, the New Code should, for example, specifically stipulate that sanctioned offers should not apply in family proceedings.

21. In response to the Chairman's enquiry about the experience in introducing mediation to resolve family disputes in Hong Kong, in particular services provided to unrepresented litigants, Mr Jeremy CHAN of the Working Party, advised that under the existing procedures of the FC, Financial Dispute Resolution ("FDR") and CDR procedures were already practice directions recognized and issued by the courts to assist the parties in resolving family disputes. He noted that the two schemes had been successful in assisting about half of the family and matrimonial dispute cases to settle through mediation without resorting to matrimonial causes. The aim of the present review was to introduce FDR and CDR as subsidiary legislation. Mr Dennis HO of the Working Party supplemented that recognizing the rationale behind a pre-action protocol, the Consultation Paper invited views on whether a pre-action protocol for alternative dispute resolutions was suitable in local circumstances.

22. Mr Ian WINGFIELD of the Family Law Association and member of the Working Party clarified that Mr Dennis HO was earlier referring to a reconciliation process whereby parties were encouraged to abandon the proceedings and to reconcile. In terms of mediation and alternative dispute resolution, Mr WINGFIELD said that mediation was conducted outside the court process where an independent mediator assisted the parties to come to an agreement in respect of financial and children matters. The agreement would then be presented to the court and made an order of the court. Mr WINGFIELD added that the processes referred to by Mr Jeremy CHAN, i.e. the FDR and CDR, were processes where the parties appeared before the court with the judge

sitting as a guiding mediator to encourage the parties to reach agreements on matters that were in dispute. If the parties were unable to reach an agreement in the FDR hearing, the judge would take no further part in the proceedings and upon a trial, the case would be tried before another judge. On failure to reach agreement in a CDR, the child matters were open in any event between the parties, and the judge would continue to hear the child matters. From experience, the Working Party considered that judges conducting FDR/CDR hearings would ensure that there was an exchange of views between the parties irrespective whether they were represented or not, and litigants were treated fairly in the process.

23. In response to the Chairman's suggestion about the possible inclusion of a cooling-off period for the parties before separation, Mr Jeremy CHAN of the Working Party said that under the current law in force in Hong Kong, a cooling-off period was in essence present. After the petition for divorce was filed, a certain period of time was required to issue a *decree nisi*, and it took at least a further six weeks before a *decree absolute* would be issued during the period of which the marriage would still be valid. The Chairman said that in the Mainland, the parties would be assisted by an independent third party to resolve their disputes during the cooling-off period, and many cases were subsequently reconciled. She urged the Working Party to consider bringing in third-party assistance during the cooling-off period.

Motion

24. Mr Dennis KWOK proposed the following motion which was seconded by Mr Albert HO:

"That this Panel urges the Administration to immediately follow up on the recommendations made by the Law Reform Commission in its 2005 Report on Custody and Access."

(翻譯)

"本事務委員會促請政府當局立即跟進法律改革委員會在其 2005 年發表的《子女管養權及探視權報告書》中提出的各項建議。"

25. The Chairman considered that the proposed motion was directly related to the agenda item under discussion and members agreed that the motion should be dealt with at the meeting. The Chairman put the motion to vote. The Chairman announced that as all members present at the meeting voted for the motion, the motion was passed.

(*Post-meeting note*: The wording of the motion was circulated to members vide LC Paper No. CB(4)603/13-14 on 23 April 2014.)

IV. Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone

(LC Paper No. CB(4)921/12-13(01) -- Letter from Hon Dennis KWOK dated 18 July 2013 requesting to discuss the issue of "Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone" (English version only)

LC Paper No. CB(4)569/13-14(04) -- Administration's paper on "Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone")

Briefing by the Administration

26. On the Panel's request to discuss issues relating to the reform of the current system to determine whether an offence was to be tried by judge and jury or by judge alone, the Director of Public Prosecutions ("DPP") briefed members on developments regarding the subject matter. DPP highlighted that in challenges brought by defendants by way of judicial review over prosecutorial decisions made as to the choice of venue by the prosecution, the courts had confirmed in the relevant judgments that neither the Basic Law nor the Hong Kong Bill of Rights Ordinance (Cap. 383) conferred on a defendant the right to choose a trial by jury. Notwithstanding this, Prosecutions Division ("PD") of DoJ had, pursuant to the request of the Panel at its meeting on 28 June 2010, discussed with the two legal professional bodies practicable ways to improve the current arrangements for the selection of venue of trial.

27. DPP advised that the factors for deciding the venue of trial as set out in the old Statement of Prosecution Policy and Practice were consequentially expanded in the new Prosecution Code ("PC") published in September 2013, relevant extracts of which were set out at Enclosure 2 to the Administration's paper (LC Paper No. CB(4)569/13-14(04)) with the main features highlighted in paragraph 9. DPP supplemented that the new PC would assist the prosecutor to select a suitable venue for trial that would enable the case to be dealt with most appropriately and also allow an adequate sentence to be imposed to address the criminality involved in the conduct. Moreover, to enable the prosecutor and the public to better understand this aspect of the underlying principles of law, paragraph 8.3 of the new PC specifically made reference to Article 86 of the Basic Law which provided that "[t]he principle of trial by jury previously practised in Hong Kong shall be maintained." Looking ahead, DoJ would

continue to keep their dialogue with the legal profession open and maintain an open mind on views regarding the selection of venue for trial. DPP also took the opportunity to thank the Hong Kong Bar Association ("the Bar Association") and The Law Society of Hong Kong for giving their views on this subject.

Views of the legal profession

The Bar Association

28. Mr Michael BLANCHFLOWER of the Bar Association said that the matter was last discussed before the Panel on 28 June 2010. There was no written submission from the Bar Association for the present meeting as upon enquiry with the Legislative Council ("LegCo") Secretariat on whether a paper or the correspondence between the Bar Association and DPP would be required, the reply was in the negative.

(Post-meeting note: Upon investigation by the LegCo Secretariat, there was no record of the enquiry referred to by Mr BLANCHFLOWER relating to the submission by the Bar Association on the issue.)

29. Mr Michael BLANCHFLOWER remarked that as the subject under discussion was a matter of substance and not a matter of procedure, it was therefore necessary for the Panel to re-visit the subject so that the relevant parties could provide a detailed paper for members' further consideration. Issues such as the meaning of "trial by jury", the decisions of the courts and views of other jurists on the subject, the dialogue between the Bar Association and DPP and the latest developments in international law regarding the matter in the last four years should be explored by the Panel. He pointed out that the paper from the Administration had presented the view of PD only. In fact, the Bar Association had tried in the past four years to persuade DPP to review and revise the criteria for selecting venue for trials. He suggested that the matter be further discussed by the Panel in Fall 2014.

(At this juncture, the voting bell of Conference Room 1 rang and the Chairman suspended the meeting for 10 minutes to facilitate some Panel members' attendance at the meeting of the Panel on Development and casting of votes on a motion. The meeting resumed after 10 minutes.)

30. Mr Michael BLANCHFLOWER said that jury trial was a very important common law right in Hong Kong up to just past the Second World War. Various levels of courts in many jurisdictions and leading jurists had emphasized about the common law right to a trial by jury, which was in his opinion the guardian of liberty, and which guaranteed the sound administration of justice. It protected individuals against oppressive laws. That right was

currently enjoyed only when DPP decided by a choice of venue that the offence in question should be tried by jury, apart from certain offences which were required to be so tried. The paper prepared by the Administration made several references to a judicial review case (*CHIANG Lily v Secretary for Justice* (HCAL 42/2008)) which, in his opinion, only said that the decision made by DPP for the case to be tried in the District Court ("DC") was not unreasonable in the usual judicial review sense. He considered that the case should not be relied on too much as it did not address the important issue of trial by jury in a wider sense.

31. Mr Michael BLANCHFLOWER supplemented that in the paper provided by the Bar Association to this Panel for its meeting in 28 June 2010, the Bar Association made some references to the importance of trial by jury. To provide some examples, he queried why the following cases were tried in DC: a recent money laundering case of some \$400 million, a recent conspiracy to defraud case of \$2 billion of which Mr BLANCHFLOWER was involved, and the Shanghai Land case involving six professionals in which the honesty and credibility of the defendants were the key issues. He said that not only the defendants but also the public were interested to see proper adjudication of the cases. Over the last four years, despite some of the discussions of the Bar Association with DPP had been taken up and reflected in the new PC, there were still a lot of inadequacies in it and these were made known to DPP in January 2014 after the publication of the new PC. Mr BLANCHFLOWER highlighted the following deficiencies in the new PC:

- (a) there was no indication of the importance of jury trials in the new PC which should provide guidance to the public as well as junior prosecutors who were relatively inexperienced about the selection of trial venues and jury trials;
- (b) paragraph 8.4 (a) to (i) of the new PC were mere statements which did not provide any guidance, indications or examples on how each should be applied and this might lead to arbitrariness and a lack of consistency in PD's decision-making on the venue for trial. A prosecutor making reference to the new PC would not be able to see how each factor should be weighed in favour of either a jury trial or a DC trial. In January 2013, a case was heard by the European Court of Human Rights which involved the Attorney General of Malta who decided which court a person should be tried in, it was held that the decision was unlawful under Article 7 of the European Convention on Human Rights which mirrored Article 12 of the Hong Kong Bill of Rights. The Court also ruled that a decision made without guidance and any indication in law in respect of the court a person should be tried in would give rise to arbitrariness;
- (c) the handling of cases which involved allegations of dishonesty were

not specifically addressed in the new PC; and

- (d) there was no mention of the issue of representations from defendants in the new PC. Reference was made in paragraph 9(4) of the Administration's paper (LC Paper No. CB(4)569/13-14(04)) which stated that such representations "have not been ignored by the prosecutors [and t]he current Code does not intend to and should not make any one feel inhibited from deciding to make such representations to the Department of Justice". Consideration should be given to including references to representations from defendants in the new PC, as in the DPP guidelines of the United Kingdom.

Mr Michael BLANCHFLOWER summarized that the Bar Association was dissatisfied with the new PC and was of the view that the matter under discussion was not taken forward substantially from where it was four years ago. He reiterated his view to re-visit the subject by the Panel in Fall 2014.

32. Addressing the Bar Association's dissatisfaction with the new PC, DPP advised that he had discussed and exchanged views in writing with the Bar Association in early 2014 on its concerns over the matter. In particular, he assured that PD would continue to take into account defendants' representations with regard to the trial venue albeit this was not provided for in the new PC. Regarding the contention that the new PC was largely a duplicate of the previous Statement of Prosecution Policy and Practice, DPP advised that four new factors (listed under paragraphs 8.4(d) to (g)) were added as a result of a serious attempt to encapsulate the various suggestions made by the legal profession over the discussions. For example, paragraph 8.4(g) had addressed the Bar Association's concern regarding the matter of dishonesty as it was stated that "the prosecution should have regard to whether or not issues arise for determination that require the application of community standards and/or values", and honesty was a community value. Regarding whether defendants who were professionals or holding positions of high public status should be tried in the Court of First Instance ("CFI"), DPP was of the view that the public or social status of the defendant should not be a factor in its own right for deciding the venue for trial.

Discussion

33. Noting the Bar Association's dissatisfaction about the new PC, in particular the provisions under paragraph 8 relating to the venue for trial, Mr Dennis KWOK enquired about recommendations and suggestions of the Bar Association to improve it. Mr Michael BLANCHFLOWER urged DPP to set out in the new PC the clear meaning of trial by jury and its importance in the common law system, so that junior prosecutors and the public could see the importance of trial by jury as of right.

34. DPP referred to the Bar Association's view that the judgments of judicial review cases should not be relied on too much. Regarding whether there was a right to select trial by jury in the Hong Kong context, DPP quoted the first paragraph of the judgment of the judicial review case heard by the CFI (*CHIANG Lily v Secretary for Justice* HCAL 42/2008) concerning PD's decision to seek trials in the DC rather than in CFI:

"1. There does not exist, in Hong Kong, any absolute right to trial by jury nor any mechanism by which a person to be tried of an indictable offence may elect to be so tried. The decision as to whether an indictable offence is tried in the Court of First Instance by a judge and jury or in the District Court by a judge alone is the prerogative of the Secretary for Justice."

35. DPP said that the Court of Appeal and the Court of Final Appeal ("CFA") upheld the decision of CFI and refused the applicant's application for leave to appeal to have her case tried by a jury. He quoted the first paragraph of the judgment of the case heard by Court of Appeal (*CHIANG Lily v Secretary for Justice* CACV 55/2009):

"1. ...However, I ought to make clear at the outset that these appeals are not about whether a right to a jury trial exists in Hong Kong; it is accepted there is no right or entitlement as such. It also ought to be made clear that while the Applicant wishes to have a trial by jury, it is accepted that there is no question of any unfairness were a trial to take place in the District Court."

Similar points were also made in paragraph 24 of the judgment.

36. DPP then quoted paragraph 9 of the judgment of the case heard by the Appeal Committee of CFA (*CHIANG Lily v Secretary for Justice* FAMC 64/2009), which illustrated the same stance:

"9. As is rightly accepted by the applicant, it is clear that there is no right to trial by jury in Hong Kong."

DPP supplemented that the matter of whether there existed a common law right for a trial by jury was in any event overtaken by the introduction of the Bill in 1952 to set up the DC, which had completely changed the legal system and trial mechanisms of Hong Kong. Neither the Basic Law nor the Bill of Rights Ordinance (Cap. 383) currently in force in Hong Kong conferred on a defendant the right to select trial by jury. The cases decided by the courts as quoted above had also confirmed that there was no right or entitlement for a trial by jury. DPP hence expressed reservation on the Bar Association's suggestion of including in the new PC the principles underlying the jury systems in other common law jurisdictions as they were no longer applicable to Hong Kong.

37. Mr Paul TSE opined that fair trial was the guiding principle of the administration of justice and legal services. He referred to one of the main reasons of the Administration for not introducing jury trial into the DC in 1952 when only English was used in courts, viz, there were not sufficient eligible persons to serve as jurors in the DC. With the increased use of Chinese as an official language in courts after 1997 and the enhanced education level of the general public, he considered that the extension of jury trials to the DC could be explored.

38. Mr Paul TSE opined that it did not appear to him that there was any impediment under Articles 81 and 86 of the Basic Law to introduce jury trials into the DC. He requested the Administration to give their views in this regard. On the right to elect a jury trial in Hong Kong, DPP referred to a Court of Appeal case in 1977 which ruled that there was no such right under the common law system. As regards the right to be heard by a jury, DPP pointed out that there were considerable changes to the law and the overall circumstances over the years as explained above. He remarked that Article 86 of the Basic Law provided that the principle of trial by jury previously practised in Hong Kong shall be maintained. Any change to the prevailing trial by jury system would warrant detailed and in-depth study.

39. Mr Paul TSE sought information on the conviction rates in the DC vis-à-vis CFI in the past five years, and the estimated overall resource implications (e.g. capital cost and on-going expenses) if jury trials were to be introduced in the DC for the Panel's reference.

40. DPP advised that at the DC level, the conviction rates for defendants pleaded not guilty from 2009 to 2013 were 69.2%, 75.3%, 68.6%, 60.2% and 79.8% respectively, giving an average rate of 70.62% over the five years. At CFI level involving trial by jury, the conviction rates for defendants pleaded not guilty over the same five years were 65.3%, 71.7%, 72.0%, 69.6% and 67.3% respectively, giving an average rate of 69.18% over the period. For the overall conviction statistics (which also counted defendants convicted on own plea), the average rates at the DC and CFI levels over the same five years were 93.1% and 92.88% respectively. Notwithstanding the different nature of the cases handled by the two levels of courts, the small difference in conviction rates for the two levels of courts (involving a little more than one percentage point for defendants pleaded not guilty and less than one percentage point for all defendants) was a fact reflecting the performance of the criminal justice system and the ability of PD to identify appropriate cases for prosecution and to bring them to a successful conclusion. On the resource and operational implications of introducing jury trials into the DC, DPP agreed to provide the requested information after the meeting.

DoJ

41. Dr CHIANG Lai-wan declared that Ms CHIANG Lily, an applicant in

the case references quoted by the Administration, was her relative but she herself did not have any interests involved in the case. She enquired about the jury systems which had been introduced by other developed countries in their trials. DPP advised that despite many developed countries had introduced jury trials in their judicial systems, the mode of operation for such trials varied among the different countries, and even among different parts of the same country in some cases, for example, Australia. There were various considerations such as the type of offences that could/should be tried by juries, the authority (among the prosecution, the defendant and the court) to determine whether the offences should be tried by juries, and whether the defendant had an overriding right in electing the mode of trial. DPP said that changes to the system in Hong Kong would need to be carefully considered as fundamental changes would be involved.

42. Dr CHIANG Lai-wan highlighted the judgment of a CFA case involving Article 86 of the Basic Law:

"The article in question, Article 86, speaks of the principle of trial by jury being maintained as previously practised in Hong Kong. But of course "as it was previously practised in Hong Kong" was according to specific factual circumstances then and those circumstances have changed. "As previously practised", of course, goes to something more fundamental than the exigencies of any particular situation in history; for example, how many jurors there were in 1977 as opposed to how many jurors there are now."

Dr CHIANG said that the circumstances under which the principle of trial by jury previously practised in Hong Kong might have changed. For example, the number of jurors had already increased from some 20,000 in 1977 to more than 600,000 in 2014. She considered that the supply now could meet the increase in demand for eligible jurors to service trials in the DC if necessary.

43. The Chairman said that Article 86 of the Basic Law provided that the principle of trial by jury previously practised in Hong Kong shall be maintained, but it should not be understood as impeding any improvements to be made to the system previously practised. She said that on the choice of venue for trials by PD, discretionary or inconsistent decisions were sometimes made. The Chairman added that she had previously read a doctoral thesis prepared by a student in the City University of Hong Kong on the jury systems in different parts of the world, including a new concept of cyber jury. She said that Hong Kong should draw references from different countries/jurisdictions, in particular those under the common law system, to assess the pros and cons of having the jury system. She called on the Administration to adopt a more open attitude in studying the matter and improving the jury system. She suggested inviting parties well-versed on the subject to attend the meeting of the Panel when it next discussed the item.

(At this juncture, the Chairman extended the meeting for 15 minutes beyond the appointed ending time to deal with unfinished business on the agenda.)

44. Mr Abraham SHEK sought clarification on the interpretation of Article 86 of the Basic Law. DPP quoted paragraphs 16, 19 and 20 of the judgment of the judicial review case heard by CFI (*CHIANG Lily v Secretary for Justice* HCAL 42/2008) about the principle of jury trials before the Basic Law:

"16. The Article is clear and unambiguous. All that it is saying is that whatever principle applied in relation to jury trials prior to the Basic Law coming into effect would continue to apply thereafter. The applicants cannot be in any better position now than they would have been prior to the Basic Law coming into effect: they will be in the same position."

"19. Consequently, the principle of trial by jury that applied prior to the Basic Law coming into effect was clear: an indictable offence was triable either by judge and jury, in the High Court, or by judge alone, in the District Court, at the discretion of the Attorney General. The order of the magistrate transferring the trial to the District Court is one which is not subject to appeal....."

"20. The Attorney General's discretion was, and hence the respondent's discretion is, unfettered, although not necessarily entirely free of judicial supervision."

DPP said that the Administration would continue to adopt an open attitude in interpreting Article 86 of the Basic Law.

45. Summing up, the Chairman concluded that the Panel would further discuss the issue, preferably in late 2014, when the parties concerned had prepared detailed submissions on the subject for discussion. She instructed that the item be included in the list of outstanding items for discussion by the Panel.

V. Any other business

46. There being no other business, the meeting ended at 6:45 pm.