

**立法會**  
**Legislative Council**

Ref : CB4/PL/AJLS

LC Paper No. CB(4)556/14-15  
(These minutes have been  
seen by the Administration)

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

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

**Members present** : Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)  
Hon Dennis KWOK (Deputy Chairman)  
Hon Emily LAU Wai-hing, JP  
Hon TAM Yiu-chung, GBS, JP  
Hon Abraham SHEK Lai-him, GBS, JP  
Hon Starry LEE Wai-king, JP  
Hon Paul TSE Wai-chun, JP  
Hon Alan LEONG Kah-kit, SC  
Hon LEUNG Kwok-hung  
Hon NG Leung-sing, SBS, JP  
Hon Steven HO Chun-yin  
Hon MA Fung-kwok, SBS, JP  
Hon TANG Ka-piu, JP

**Members absent** : Hon Albert HO Chun-yan  
Hon James TO Kun-sun  
Hon CHAN Kam-lam, SBS, JP  
Hon Ronny TONG Ka-wah, SC  
Hon WONG Yuk-man  
Hon Alice MAK Mei-kuen, JP  
Dr Hon Elizabeth QUAT, JP  
Hon Martin LIAO Cheung-kong, SBS, JP  
Dr Hon CHIANG Lai-wan, JP  
Hon CHUNG Kwok-pan

**Public Officers : Item V**  
**attending**

Department of Justice

Mr CHEUK Wing-hing, JP  
Director of Administration & Development

Mr Benedict LAI, SBS, JP  
Law Officer (Civil Law)

Mr Simon LEE  
Deputy Law Officer (Civil Law)

**Attendance by : Item III**  
**invitation**

The Law Reform Commission of Hong Kong

Mr Edward CHAN, SC, JP  
Chairman  
Sub-committee on Adverse Possession

Mr Michael YIN  
Member  
Sub-committee on Adverse Possession

Ms Michelle AINSWORTH  
Acting Secretary

Ms Cathy WAN  
Secretary  
Sub-committee on Adverse Possession

Item IV

The Law Reform Commission of Hong Kong

Ms Michelle AINSWORTH  
Acting Secretary

Mr LEE Tin-yan  
Acting Deputy Secretary

Hong Kong Bar Association

Mr Andrew BRUCE, SC

**Clerk in attendance** : Miss Mary SO  
Chief Council Secretary (4)2

**Staff in attendance** : Mr Timothy TSO  
Assistant Legal Adviser 2

Ms Cindy CHAN  
Senior Council Secretary (4)2

Ms Rebecca LEE  
Council Secretary (4)2

Miss Vivian YUEN  
Legislative Assistant (4)2

---

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

Members noted that no information paper had been issued since the last meeting.

**II. Items for discussion at the next meeting**

LC Paper No. CB(4)264/14-15(01) -- List of outstanding items for discussion

LC Paper No. CB(4)220/14-15(01) -- Letter from Dr Hon Elizabeth QUAT dated 28 November 2014 requesting to discuss the measures for handling sexual offence cases (Chinese version only)

LC Paper No. CB(4)264/14-15(02) -- List of follow-up actions

Action

2. The Chairman said that in her letter dated 28 November 2014, Dr Elizabeth QUAT requested to discuss measures for handling sexual offences cases, including:

- (a) revising the definition of the term "witness in fear" under the Criminal Procedure Ordinance (Cap. 221) to allow such witness to give evidence in court under the provision of a screen or by live television link, and enter/leave the court building through special passageways;
- (b) revising section 154(1) of the Crimes Ordinance (Cap. 200) to stipulate the criteria for granting of leave by the judge to allow complainants in sexual offence cases to give evidence in court under the provision of a screen or by live television link; and
- (c) enhancing training for the legal sector and the Police on the handling of sexual offence cases.

The Chairman sought members' view on including the above issue in the Panel's list of outstanding items for discussion. Members raised no query.

3. Members agreed to discuss the following items at the next regular meeting to be held on 26 January 2015 at 4:30 pm:

- (a) Briefing on the Chief Executive's 2015 Policy Address; and
- (b) Draft Court Procedural Rules for the Competition Tribunal.

### **III. Law Reform Commission Report on Adverse Possession**

LC Paper No. CB(4)264/14-15(03) -- Executive summary on Law Reform Commission ("LRC")'s Report on "Adverse Possession"

LC Paper No. CB(4)264/14-15(04) -- Powerpoint presentation materials on "Report on Adverse Possession" provided by LRC

LC Paper No. CB(4)264/14-15(05) -- Background brief on "Law Reform Commission's Consultation Paper on Adverse Possession" prepared by the

Legislative Council ("LegCo")  
Secretariat

LC Paper No. CB(4)264/14-15(06) -- Submission from the Hong Kong Bar Association ("the Bar Association") (English version only)

### Briefing by the LRC

4. Mr Edward CHAN, Chairman of the Sub-committee on Adverse Possession of the LRC ("the Sub-committee"), briefed members on the responses to the tentative recommendations made in the Sub-committee's consultation paper issued in December 2012 and the Sub-committee's final recommendations, details of which were set out in the Executive summary on LRC Report on Adverse Possession ("the LRC Report") (LC Paper No. CB(4)264/14-15(03)). The Sub-committee's final recommendations were as follows:

#### Recommendation 1

- after careful consideration of the situation in Hong Kong, including the existing possession based un-registered land regime, the land boundary problem in the New Territories, and that the existing provisions in the Limitation Ordinance (Cap. 347) on adverse possession had been held to be consistent with the Basic Law, the existing provisions on adverse possession should be retained since they offered a practical solution to some of the land title problems;

#### Recommendation 2

- the law of adverse possession should be recast when the Land Titles Ordinance (Cap. 585) became effective and the registered land title system came into play. Registration should of itself provide a means of protection against adverse possession, though it should not be an absolute protection. This was to give effect to the objective of a registered land system - that registration alone should transfer or confer title;

#### Recommendation 3

- when a registered land title regime was in place in Hong Kong, adverse possession alone should not extinguish the title to a registered estate. The rights of the registered owner should be protected. If, for example, the registered proprietor was unable to make the required decisions because of mental disability, or was

Action

unable to communicate such decisions because of mental disability or physical impairment, then a squatter's application would not be allowed. However, such protection would not be absolute. Under the proposed scheme:

- (a) the person in adverse possession (also referred to as a "squatter") of registered title land would only have a right to apply for registration after 10 years' uninterrupted adverse possession;
- (b) the registered owner would be notified of the squatter's application and would be able to object to the application;
- (c) if the registered owner failed to file an objection within the stipulated time, then the adverse possessor would be registered;
- (d) if the registered owner objected, the adverse possessor's application would fail unless he could prove either:
  - (i) it would be unconscionable because of an equity by estoppel for the registered owner to seek to dispossess the squatter and the circumstances were such that the squatter ought to be registered as the proprietor;
  - (ii) the applicant was for some other reason entitled to be registered as the proprietor of the estate; or
  - (iii) the squatter had been in adverse possession of land adjacent to their own under the mistaken but reasonable belief that they were the owner of it; and
- (e) if the squatter was not evicted and remained in adverse possession for two more years, then the squatter would be entitled to make a second application, and the matter could be referred to the adjudicator for resolution;

Recommendation 4

- the "implied licence" principle should be abolished, and there should be in the Limitation Ordinance a provision to the effect that *"For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not*

Action

*inconsistent with the latter's present or future enjoyment of the land.";*

Recommendation 5

- notwithstanding the possible anomalous situation in which a dispossessed registered owner remained liable for the covenants in the Government Lease, devising a statutory presumption or assignment to the effect that the adverse possessor became liable under the covenants in the Government Lease was not recommended as to do so was too problematic and the anomaly was not as serious as it appeared;

Recommendation 6

- the Government should step up its efforts to address the boundary problem in the New Territories, albeit a comprehensive resurvey of the boundaries alone could not solve the problem, because persons who suffered any loss or disadvantage under the re-surveyed boundaries might not accept the new boundaries. It would appear that the land boundary problem in the New Territories was best dealt with together and in the context with the implementation of the Land Titles Ordinance;

Recommendation 7

- in relation to a mortgagee's right to take possession of a mortgaged property vis-a-vis the mortgagor, legislation should be passed to spell out clearly that the limitation period started to run from the date of default of the mortgagor's obligations;

Recommendation 8

- as adverse possession could not practically be established on "Tso" land, there was no need to change the law on this issue;

Recommendation 9

- the enactment in the Limitation Ordinance a provision to the effect that willingness to pay rent by a squatter was not inconsistent with the requisite intention to possess in order to establish adverse possession; and

### Recommendation 10

- there should be in the Limitation Ordinance a provision to the effect that *"Without prejudice to the law on the rights and obligations of landlord and tenant in relation to the land encroached upon by the tenant, the nature and extent of the estates acquired by a person who has successfully extinguished the title of another person by virtue of section 17 of the Limitation Ordinance shall not be affected by the actual or presumed intention of the person as to what estate he intends to acquire by his adverse possession."*

5. Mr Edward CHAN pointed out that 25 organizations and 92 individuals had provided their views and other useful information to the Sub-committee during the consultation exercise on adverse possession from 10 December 2012 to 15 March 2013. With the exception of Heung Yee Kuk ("HYK") which strongly opposed adverse possession, most of the respondents agreed with Recommendations 2 to 8. On retaining the existing law on adverse possession under the existing unregistered land system under Recommendation 1, most of the institutional respondents were in favour of retaining the existing law. A number of other organizations had a neutral stance on this issue. The Law Society of Hong Kong ("the Law Society"), however, suggested that the existing law on adverse possession should be altered such that the notification scheme devised for a registered land title regime should be applied to the present unregistered title regime in Hong Kong. Two organizations were against retaining adverse possession under the existing unregistered land system, and HYK was one of these organizations. Responses from individuals were, however, rather different. By and large, the responses were of the view that the law on adverse possession was unfair to property owners and mentioned that failure of the paper owner to manage his own property should not be a ground for the squatter to encroach upon the property, otherwise more people would be encouraged to trespass other people's property.

6. Mr CHAN further pointed out that Recommendations 9 and 10 were new recommendations not contained in the consultation paper on adverse possession. The reason for proposing Recommendation 9 was to overrule the Court of Final Appeal decision in *Wong Tak Yue v Kung Kwok Wai David* that a squatter's willingness to pay rent if the owner had requested it was inconsistent with the requisite intention to possess, as such decision would put Hong Kong law on adverse possession at variance with the rest of the common law world and put legal counsels in a very difficult situation (paragraphs 7.62-7.64 of the LRC Report refer). As regards Recommendation 10, the reason for proposing it was to make clear that the views expressed in paragraphs 112-114 of the judgement in the *Secretary for Justice v Chau Ka Chik Tso* (2011) 14 HKCFAR 889 did not represent the law on adverse possession (paragraphs 7.67-7.71 of the LRC



Action

Report refer).

Discussion

7. Ms Starry LEE queried whether the existing law on adverse possession should be retained, as it was unfair to owners. Ms LEE pointed out that co-owners of some old buildings were unable to claim adverse possession against squatters occupying certain common parts of their buildings, such as the roofs and passageways, because the buildings did not have owners' corporations ("OCs") or the OCs were formed after a time period which the owners could bring actions to recover the common parts of their buildings from the squatters. According to the Limitation Ordinance, except in the case of Government land for which the limitation period was 60 years, no action to recover land was allowed after 12 years from the date upon which the right of action accrued. Time started to run when the owner had been dispossessed of his land and the adverse possessor had taken possession of the land.

8. Mr Edward CHAN responded that abolishing the existing law on adverse possession was not a practicable solution to protect the interests of land owners in Hong Kong having regard to the following land title problems. First, the existing deeds registration system adopted in Hong Kong gave no guarantee of a person's title to land, as the system was a register of documents and not a proof of ownership. Even if a person was registered as the owner of a property, there might still be uncertainties or defects in his title to the property. Hence, title to land was relative and depended ultimately upon possession. Second, due to discrepancies between the boundaries as shown on the New Grant Plans or Demarcation District sheets and the physical boundaries on the ground in the New Territories, the registered land owners in the New Territories ran the risk of not owning part of the land if they could not claim adverse possession of that part of the land. Mr CHAN further said that the doctrine of adverse possession had been applied in Hong Kong since the 1930s and the provisions on adverse possession in the Limitation Ordinance had been held to be consistent with the Basic Law. To abolish the existing law on adverse possession without a solution in place to address the aforesaid land title problems would be a regression from a legal policy point of view.

9. Mr Michael YIN, member of the Sub-committee, supplemented that land owners would be better protected against adverse possession when a registered land title regime underpinned by a notification scheme was put in place upon the implementation of the Land Titles Ordinance, as requiring a squatter to give notification of adverse possession would effectively deprive the squatter of the chance to establish adverse possession.

Action

10. The Chairman said that in view of the hardship to owners caused by adverse possession and the complexity of the doctrine of adverse possession, there was a need for the Administration to raise the public's awareness and understanding of adverse possession. The Chairman further said that she supported the broad principles of the proposed notification scheme set out under Recommendation 3 of the LRC Report, as it could strike a right balance between protecting the paper owner and the squatter. Noting that the Law Society had suggested during the consultation exercise that the notification scheme originally intended for a registered title regime should be applied to the existing un-registered title regime in Hong Kong, the Chairman enquired why the Sub-committee did not adopt such a suggestion.

11. Mr Edward CHAN responded that the Sub-committee had deliberated on the feasibility of applying the notification scheme originally intended for a registered title regime to the existing un-registered title regime in Hong Kong. The Sub-committee found that the effect of such a change unsatisfactory for the following reasons. First, as the existing land registration system in Hong Kong was not a register of proof of ownership, a squatter might encounter difficulty in identifying the real owner for giving notification of adverse possession because there might be uncertainties or defects in the registered owner's title to the property. Second, requiring a squatter to give notification of adverse possession in order to establish adverse possession was at variance with the existing land law which was possession-based, as such requirement would effectively deprive the squatter of the chance to establish adverse possession. In view of the fact that a registered land title regime would eventually be put in place upon the implementation of the Land Titles Ordinance, the Sub-committee considered that the Law Society's suggestion would create more problems than it solved. Mr CHAN further said that reform of the land law should best be provided with a long transitional period to ensure smooth implementation, as had been done in the case of amending the Limitation Ordinance in 1991 to reduce the time limit which an owner could take action to recover private land from the squatter from 20 years to the existing 12 years.

12. Mr Paul TSE suggested that prior to the implementation of the Land Titles Ordinance and the proposed notification scheme, the Administration should, as an interim measure, set up a system for applications for adverse possessions so as to enable land owners to check whether their land had been acquired by squatters by way of adverse possession.

13. Mr Edward CHAN responded that Mr Paul TSE's suggestion would also have the effect of depriving the squatter of the right to establish adverse possession, which was at variance with the existing possession-based land law.

Action

14. Mr NG Leung-sing said that it could not be ruled out that some squatters had acquired someone else's land by questionable means. In the light of this, Mr NG asked whether the Sub-committee had considered tightening the existing law on adverse possession to better protect the rights of owners and putting sufficient safeguard in the prospective registered land title system to ensure that persons applying to be the registered owners were the legal owners.

15. Mr Edward CHAN responded that the Sub-committee did not see the need to tighten the existing law on adverse possession, as what constituted adverse possession viz: proof of non-permissive use which was actual, open and notorious, exclusive, adverse, and continuous for the statutory period, was well established in Hong Kong, albeit it was up to the owner to prove that a squatter had acquired his land through fraudulent or other illegal means. As regards whether the Sub-committee had considered putting sufficient safeguard in the prospective registered land title system to ensure that persons applying to be the registered owners were the legal owners, Mr CHAN replied in the negative as formulation of the details of the registered land title system was outside the terms of reference of the Sub-committee. However, the Sub-committee believed that the Administration would put in place a very stringent mechanism to vet whether the applicants for registration of land title were the legal owners.

16. Mr NG Leung-sing noted from Recommendation 6 of the LRC Report that resurvey of the land boundaries in the New Territories alone might not solve the problem as persons who were disadvantaged might resort to litigation or other methods to recover their loss. Mr NG asked whether the Sub-committee considered that such land boundary disputes should best be dealt with in courts following the implementation of the Land Titles Ordinance.

17. Mr Edward CHAN responded that how the disputes arising from the land boundary problems in the New Territories should be dealt with was outside the terms of reference of the Sub-committee. However, the Sub-committee considered that resorting to the courts to resolve the disputes might not be the only or the best approach. If the number of such disputes was large, the Administration could consider establishing a special tribunal with special procedures to deal with the disputes.

18. Mr Paul TSE noted that although the Sub-committee was appointed in August 2006, the LRC Report was released in October 2014. Mr TSE asked whether the Sub-committee had encountered difficulties in the course of its work, and if so, what these difficulties were.

19. Mr Edward CHAN replied that the Sub-committee did not encounter any particular difficulties or outside pressure in the course of its work. The long time taken by the Sub-committee to release the LRC Report was mainly due to

Action

the complexity of the subject matter, member turnover, conduct of consultation exercise and consideration of whether certain issues related to adverse possession should be included in the LRC Report.

20. Responding to Mr Paul TSE's enquiry about the stance of the Administration on Recommendations 4, 7, 9 and 10 of the LRC Report, Acting Secretary of LRC said that the Development Bureau had advised that it was studying the recommendations made in the LRC Report in consultation with the Lands Department and the Land Registry.

21. Mr Dennis KWOK thanked the Sub-committee for its hard work in coming up with its recommendations for the reform of the law of adverse possession. Mr KWOK further said that he generally agreed with the recommendations in the LRC Report. As the introduction of the registered land title regime would only come into play upon the implementation of the Land Titles Ordinance, Mr KWOK suggested that the Administration should be invited to attend a meeting of the Panel to brief members on the progress of the implementation of the Ordinance enacted back in 2004. Mr KWOK further suggested that the Chairman and other members of the Sub-committee should also be invited to attend the discussion. Members agreed.

Conclusion

22. In closing, the Chairman said that the Panel would follow up with the Administration on the progress of the implementation of the Land Titles Ordinance.

**IV. Law Reform Commission Report on Excepted Offences under Schedule 3 to the Criminal Procedure Ordinance (Cap. 221)**

LC Paper No. CB(4)264/14-15(07) -- Executive summary on LRC's Report on "Excepted Offences under Schedule 3 of the Criminal Procedure Ordinance (Cap. 221)"

Briefing by the LRC

23. Acting Secretary of LRC briefed members on the background for the reform of the excepted offences under Schedule 3 of the Criminal Procedure Ordinance (Cap. 221) (i.e. no suspended sentences for excepted offences). There were two provisions relating to the "excepted offences" in the Criminal Procedure Ordinance (Cap 221). Section 109B(1) provided that, "A court

Action

which passes a sentence of imprisonment for a term of not more than 2 years for an offence, other than an excepted offence, may order that the sentence shall not take effect unless, under a period specified in the order, being not less than 1 year nor more than 3 years from the date of the order, the offender commits in Hong Kong another offence punishable with imprisonment and thereafter a court having power to do so orders under section 109C that the original sentence shall take effect." Section 109A(1) provided that, "No court shall sentence a person of or over 16 and under 21 years of age to imprisonment unless the court is of opinion that no other method of dealing with such person is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to the character of such person and his physical and mental condition." Section 109A(1A) further provided that, "This section shall not apply to a person who has been convicted of any offence which is declared to be an excepted offence by Schedule 3." Acting Secretary of LRC referred members to the arguments for and against the reform, responses from the public and the LRC's recommendations, details of which were set out in the Executive Summary on the LRC Report on "Excepted Offences under Schedule 3 of the Criminal Procedure Ordinance (Cap. 221)" (LC Paper No. CB(4)264/14-15(07)). Specifically, Acting Secretary of LRC said that:

- (a) the effect of the statutory restriction imposed by Schedule 3 of Cap. 221 was that the court's sentencing options in relation to excepted offences were constrained. If an offender was convicted of an excepted offence, the option of a suspended sentence was not available, even where the court was of the opinion that a suspended sentence was appropriate in all the circumstances of the case and for the benefit of the offender's rehabilitation;
- (b) on the other hand, the statutory restriction regime could also give rise to possible injustice in that given the lack of a suspended sentence option, the sentence might be too harsh (imprisonment) or too lenient (probation);
- (c) another reason for the need of a reform of the current law was that there were anomalies in the list of excepted offences. Under the present system some serious offences were not on the list whilst some less serious ones were. For instance, an offender convicted of unlawful intercourse with a girl under 13 years (which was currently not listed as an excepted offence) might be sentenced to a term of imprisonment but suspended. In contrast, where a non-custodial sentence was not appropriate the court had no

Action

discretion but to impose a term of immediate imprisonment for an offender convicted of attempted indecent assault because it was listed as an excepted offence;

- (d) the vast majority of judges and judicial officers ("JJOs") who mainly or exclusively heard criminal cases (about 80%) as well as the vast majority of the respondents to the consultation exercise on whether or not to remove the excepted offences (28 out of 39 respondents) supported the removal of excepted offences; and
- (e) after carefully considered the views and comments of the JJOs and of the respondents in the public consultation for the removal of the list of excepted offences and having regard to the fact that the public sentiments behind the creation of the excepted offences some 40 years ago when violent crime in Hong Kong was prevalent had long gone, the LRC recommended:
  - (i) to repeal the excepted offences as listed in Schedule 3 to Cap. 221 in relation to section 109B of Cap. 221, so that the court would have full discretion to impose any sentence appropriately, including suspended sentence, having regard to the facts of the case; and
  - (ii) to repeal section 109A(1A) of Cap. 221, so that the court would have full discretion to sentence a person between 16 and 21 years of age to imprisonment unless the court was of opinion that no other method of dealing with such person was appropriate.

Views of the Hong Kong Bar Association ("the Bar Association")

24. Mr Andrew BRUCE said that the Bar Association strongly supported the LRC's recommendation to repeal the excepted offences in Schedule 3 of Cap. 221, as judges and magistrates were well equipped to make appropriate judgements having regard to the facts of the cases and the circumstances of the offenders. The Bar Association considered that the proposed repealing of the excepted offences in Schedule 3 of Cap. 221 should not give rise to an increase in serious and violent crimes for the following reasons. First, a suspended sentence could only be passed for a sentence of imprisonment of less than two years under section 109B of Cap. 221. Second, it was unlikely that a court would impose a suspended sentence for a serious offence, and most of the excepted offences in Schedule 3 of Cap. 221, such as manslaughter and rape, were inherently serious. Third, the prosecutions could apply for a review of a sentence if it considered the sentence inappropriate for the offence committed.

Action

Fourth, according to the current law, suspended sentence could only be imposed under exceptional circumstances and the person given the suspended sentence would be sent to prison if he/she committed in Hong Kong another offence punishable with imprisonment within the suspension period. Mr BRUCE further said that with the abolition of the list of exceptions, a court would have greater flexibility to, say, order a probation, where justified for the benefit of the young offenders' rehabilitation. At present, under section 109A of Cap. 221, a court had to impose an imprisonment sentence on a person aged between 16 and 21 years if he/she was convicted of one of the excepted offences.

Discussion

25. Mr Dennis KWOK said that the Civil Party supported the LRC's recommendation to abolish the list of excepted offences in Schedule 3 of Cap. 221 for the following reasons. First, the public sentiments behind the creation of excepted offences some 40 years ago when violent crime was prevalent in Hong Kong had long gone. Second, judges and magistrates could be trusted for exercising their sentencing discretion without restrictions cautiously after taking into account all the circumstances of the case. Third, about 80% of all JJOs who responded to the views sought by LRC in mid-2012 as to whether in their experiences there was any unease or feeling of injustice arising from the statutory restriction imposed by Schedule 3 of Cap. 221 (i.e. no suspended sentences for excepted offences) expressed support for the complete removal of the statutory restriction or at least the restriction in respect of certain offences (namely, indecent assault and wounding). Mr LEUNG Kwok-hung expressed similar views for supporting the removal of the list of excepted offences.

26. Responding to the Chairman's enquiry about the reasons given by those JJOs who did not support the LRC's recommendation, Acting Secretary of LRC said that the reasons were set out in paragraph 5.4(4) of the LRC Report on "Excepted Offences under Schedule 3 of the Criminal Procedure Ordinance (Cap. 221)" ("the LRC Report") as follows:

- (a) indecent assault cases were becoming prevalent;
- (b) the offence of possession of offensive weapon in public place under section 33 of the Public Order Ordinance (Cap. 245) was serious;
- (c) removing the restriction might send a wrong message to the public; and
- (d) removal needed community consultation.

Action

27. Mr NG Leung-sing noted that the LRC published a consultation paper on 24 June 2013 proposing the repealing of excepted offences listed in Schedule 3 of Cap 221. During the consultation exercise which lasted until 23 September 2013, responses were received from 39 respondents. Of these 39 respondents, 28 were in favour of the recommendation whilst five were against it. The remaining six were neutral or chose not to express views. Those in favor of the LRC's recommendation were mainly from the legal profession and law-related government departments. Further noting that the Commissioner of Police were amongst the five respondents who opposed the recommendation to remove the list of excepted offences. Mr NG enquired about the reason(s) given by the Commissioner for opposing the recommendation.

28. Acting Secretary of LRC responded that the reasons given by the Commissioner of Police for opposing the removal of the excepted offences were set out in paragraphs 5.6(1) and 5.8 of the LRC Report. In gist, the Commissioner opined that removing Schedule 3 would play down the seriousness of the offences presently listed in the Schedule and would undermine its deterrent effect. As Schedule 3 was introduced to combat serious and violent crimes and as such crimes were still committed today, the retention of the Schedule remained justifiable. Acting Secretary of LRC reiterated that the LRC had carefully considered the views and comments of all respondents to the consultation exercise before coming up with the recommendation to repeal the excepted offences, details of which were set out in paragraphs 5.13 to 5.19 of the LRC Report.

29. Mr NG Leung-sing enquired whether consideration could be given to revising Schedule 3 in lieu of replacing it in entirety.

30. Acting Secretary of LRC responded that as explained in paragraph 5.19 of the LRC Report, the LRC considered that the "pick and choose" process might be regarded as arbitrary. In addition, it was not easy to figure out all the eventualities as to whether or not a suspended sentence was warranted in respect of a given offence. The LRC therefore considered that it was neater to allow the court full discretion in respect of all offences in Schedule 3.

31. Ms Emily LAU asked whether the LRC, in formulating its final recommendation to remove excepted offences, had given due consideration to the concerns of the two women's groups, namely, the Association Concerning Sexual Violence Against Women and Rain Lily, that such removal would send a wrong message to society that rape and indecent assault were no longer serious offences as suspended sentences for these excepted offences would be an option for the court. Ms LAU urged the Administration to be more sensitive to the concerns of the women's groups in its consideration of the



Action

LRC's recommendation to remove excepted offences, having regard to the fact that the long-standing request of the women's groups for the Judiciary to automatically shield victims of sexual offence cases behind screens during court proceedings had yet to be implemented.

32. Acting Secretary of LRC responded that the concerns of the women's groups had been carefully taken into account by the LRC in formulating its final recommendation to remove the list of excepted offences. The LRC considered that repealing Schedule 3 of Cap. 221 would not increase the risk of harm to the community, as the LRC believed that the court would only impose suspended sentences in very rare cases where the circumstances of the defendants to excepted offences were such that imposition of a mandatory imprisonment would not be appropriate, such as indecent assault involving intimate acts between underage lovers. The LRC had confidence that judges and magistrates would exercise their full sentencing discretion cautiously after taking into account all the circumstances of the case. Acting Secretary of LRC agreed that the concerns of the women's groups about the removal of the list of excepted offences were one of the areas which the Administration would take into account when considering the LRC's recommendation to repeal Schedule 3 of Cap. 221.

33. Whilst expressing support for the removal of the list of excepted offences, the Chairman urged the Administration to carry out education and publicity work to make clear to the public that the implementation of such removal did not mean that the repealed excepted offences were no longer serious offences and offenders of such offences would be imprisoned where justified.

34. Mr Paul TSE said that he agreed with the views of the Bar Association, the Law Society of Hong Kong and JJOs on the need for removing the list of excepted offences, so as to enable the court to have full discretion to give appropriate sentences in respect of all offences as listed in Schedule 3 of Cap. 221. Responding to Mr TSE's enquiry on when such removal would be implemented, Acting Secretary of LRC said that she was not in a position to answer the question. Acting Secretary of LRC however pointed out that the Administration was presently studying the LRC Report which was published in February 2014.

Conclusion

35. In closing, the Chairman said that members generally supported the removal of the list of excepted offences in Schedule 3 of Cap. 221. Prior to implementing such removal, the Administration should carry out education and publicity work to make clear to the public that the implementation did not mean that the repealed excepted offences were no longer serious offences and

Action

offenders of the repealed excepted offences would be imprisoned where justified. Acting Secretary of LRC undertook to convey members' views to the Administration.

**V. Proposed creation of one Permanent Post of Deputy Principal Government Counsel in the Civil Division of the Department of Justice**

LC Paper No. CB(4)264/14-15(08) -- Administration's paper entitled "Proposed creation of one Permanent Post of Deputy Principal Government Counsel in the Civil Division of the Department of Justice"

LC Paper No. CB(4)264/14-15(09) -- Background brief on "Proposed creation of one supernumerary post of Deputy Principal Government Counsel in the Civil Division of the Department of Justice" prepared by the LegCo Secretariat

Briefing by the Administration

36. Director of Administration & Development ("D of AD") briefed members on the proposal to create a permanent post of Deputy Principal Government Counsel ("DPGC") in the Civil Division ("CD") of the Department of Justice ("DoJ") for taking forward the work required in sustaining the promotion and development of the wider use of mediation in Hong Kong, details of which were set out in the DoJ's paper (LC Paper No. CB(4)264/14-15(08)).

Discussion

37. Ms Emily LAU said that she in principle supported the proposed creation of a permanent DPGC post in CD. Noting from DoJ's paper that much efforts were needed to build up a mediation culture in Hong Kong, Ms LAU asked whether there had been an increase in the number of parties to dispute using mediation to settle their disputes in Hong Kong.

38. D of AD responded that DoJ did not have the total number of mediation cases handled in Hong Kong, as there was no legal obligation for a party to

Action

report a mediation case with any authority given that mediation was private and consensual and mediation communication was confidential. However, under Practice Direction 31 ("PD 31") issued by the Judiciary which came into operation on 1 January 2010, a party to a litigation was obliged to consider mediation and provide information to the Judiciary pursuant to the aforesaid Practice Direction. According to the statistics released by the Judiciary, there had been an increase in the number of mediation cases in relation to civil cases commenced in the District Court ("DC") and the Court of First Instance ("CFI") of the High Court. The figures captured through the Judiciary's system also revealed that on average, it took some five to six hours and around \$17,000 to \$18,000 for such a mediation case to reach a full agreement. As a result of mediation training provided to government departments, some 90 dispute cases involving government matters were resolved by means of mediation in the past few years. D of AD further said that DoJ was presently exploring ways to collect, outside the Judiciary's system, figures and statistics on the use of mediation by disputing parties in Hong Kong.

39. Ms Emily LAU said that despite the fact that using mediation over litigation to resolve disputes was often simpler, faster and less expensive, mediation had yet to become a common means to resolve disputes in Hong Kong. Ms LAU asked why this was the case.

40. D of AD responded that whilst mediation was taking root in Hong Kong, much work was still needed to make the public consider using mediation to resolve disputes first before resorting to litigation. To this end, a "Mediation Week" with a two-day mediation conference themed "Mediate First for a Win-Win Solution" plus 24 mediation talks was held in March 2014; a new Announcement in the Public Interest with both video and audio clips to enhance the public's awareness and understanding of mediation as a means of dispute resolution was produced and broadcast in March 2014; and mediation training and seminars for DoJ counsel and other civil servants, such as those in the Food and Environmental Hygiene Department to resolve water seepage-related disputes, were organised to promote and develop the more extensive use of mediation by the Government.

41. Law Officer (Civil Law) ("LO(C)") supplemented that future healthy promotion and development of mediation in Hong Kong rested on the joint efforts of all the stakeholders and the community. At the Government level, the Mediation Team of CD would continue to provide support to the Steering Committee on Mediation ("the Steering Committee") in promoting and developing the wider use of mediation to resolve disputes in Hong Kong. For instance, in the next one to two years, the Mediation Team would focus on supporting the Steering Committee in implementing various initiatives to promote and develop the use of mediation in the business, community

Action

(essentially building management) and medical sectors, with particular attention to SMEs as the use of mediation to resolve disputes would be in line with their way of conducting business, and also continue to facilitate the development of mediation in other sectors, including but not limited to construction, education, family, financial, insurance and legal. The Steering Committee, chaired by the Secretary for Secretary, was established in November 2012 as Government's long term commitment to promoting and developing the wider use of mediation for dispute resolution. At the Judiciary level, PD 31 required most parties to civil proceedings in DC and CFI to use mediation to resolve their disputes before resorting to litigation. The court was empowered to make any adverse costs order against a party on the grounds of unreasonable failure to engage in mediation. At the community level, the Hong Kong Mediation Accreditation Association Limited and other private mediation organisations would continue to implement various initiatives to raise the public's awareness and understanding of the use of mediation to resolve disputes.

42. Ms Emily LAU enquired whether feedback from persons who had used mediation to resolve their disputes was positive. Deputy Law Officer (Civil Law) ("DLO(C)") responded that according to participants of the "Mediate First for a Win-Win Solution" conference held in March 2014, their experience on using mediation to resolve disputes was positive. DLO(C) further said that similar to the experience of other jurisdictions, a longer period was also needed to build up a mediation culture in Hong Kong. In addition to the aforesaid measures, much work had been done to develop a regulatory framework for mediation to instill public confidence in the use of mediation. More experience sharing sessions on the use of mediation to resolve disputes would also be organised.

43. Mr NG Leung-sing queried whether the reason why some lawyers refrained from advising their clients to use mediation to resolve disputes in appropriate cases was that mediation's fees were lower than litigation fees. In view of this and having regard to the growing number of disputes relating to building works and management, Mr NG asked whether consideration would be given to enlisting representatives from the legal and engineering and building sectors to serve on the Public Education and Publicity Sub-committee of the Steering Committee.

44. LO(C) responded that as a result of the promotion to the legal sector on the use of mediation to resolve disputes, an increasing number of lawyers was practising as mediators. D of AD pointed out that with the implementation of PD 31 on 1 January 2010, lawyers had a professional duty to advise their clients to consider first using mediation to resolve disputes, before resorting to litigation. There were also costs consequence of unreasonably not using mediation.

Action

45. On the suggestion of enlisting representatives from the legal and engineering and building sectors to serve on the Public Education and Publicity Sub-committee, LO(C) said that this had been done.

46. Responding to Mr NG Leung-sing's enquiry as to whether legal aid would fund the entire costs of mediation, LO(C) said that legally aided persons involved in civil proceedings, including matrimonial proceedings, would be given funding support for mediation as an alternative means of resolving the disputes for which they were given legal aid.

47. The Chairman said that she had all along been advocating the use of mediation to resolve disputes, particularly in family and building management-related disputes. Whilst expressing support for the proposed creation of a permanent DPGC post in the CD of DoJ, the Chairman urged the Administration to use more actual mediation cases to enhance the public's understanding of the advantages of using mediation to resolve disputes and to step up promoting mediation to the legal sector. The Chairman further said that she welcomed that the Regulatory Framework Sub-committee of the Steering Committee was conducting a study on the need for introducing an Apology Legislation in Hong Kong, and looked forward to the recommendations of the Sub-committee in this regard.

*Promoting Hong Kong's legal and arbitration services in other countries*

48. Suggesting that Hong Kong was lagging behind Singapore as the preferred place for the provision of legal and arbitration services, Mr Dennis KWOK asked whether consideration would be given to enhancing manpower support in DoJ to promote Hong Kong's legal and arbitration services in other countries.

49. D of AD responded that it was DoJ's plan to conduct a study on how best to consolidate its efforts in promoting and developing the wider use of mediation in Hong Kong and in promoting Hong Kong's legal and arbitration services in other countries, so as to achieve synergy and efficiency gains. Pending the outcome of the study, additional manpower might be allocated to take forward the promotion work. D of AD assured members that DoJ attached great importance to promoting Hong Kong as a legal and arbitration services centre in the Asia Pacific region. For instance, to create a favourable environment for more world class international legal and dispute resolution institutions to set up offices in Hong Kong, Government decided in December 2012 to allocate part of the space in the West Wing of the former Central Government Office ("CGO") and the entire former French Mission Building ("FMB") to house law-related non-government institutions (including

Action

arbitration and mediation institutions). Invitation for applications for use of the space in the former CGO and FMB was announced on 19 December 2014.

Conclusion

50. In closing, the Chairman said that members generally supported the submission of the staffing proposal by DoJ to the Establishment Subcommittee of the Finance Committee of the Legislative Council.

**VI. Any other business**

51. There being no other business, the meeting ended at 6:40 pm.

Council Business Division 4  
Legislative Council Secretariat  
23 February 2015