

立法會
Legislative Council

Ref : CB4/PL/AJLS

LC Paper No. CB(4)1309/15-16
(These minutes have been seen
by the Judiciary Administration
and the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 27 June 2016, at 4:30 pm
in Conference Room 2 of the Legislative Council Complex

Members present : Hon Martin LIAO Cheung-kong, SBS, JP (Chairman)
Hon Dennis KWOK (Deputy Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon LEUNG Kwok-hung
Hon WONG Yuk-man
Hon NG Leung-sing, SBS, JP
Hon Steven HO Chun-yin, BBS
Hon MA Fung-kwok, SBS, JP
Dr Hon Elizabeth QUAT, JP
Hon TANG Ka-piu, JP
Dr Hon CHIANG Lai-wan, JP
Hon Alvin YEUNG Ngok-kiu

Members absent : Hon Starry LEE Wai-king, JP
Hon Alan LEONG Kah-kit, SC
Hon Alice MAK Mei-kuen, BBS, JP

**Public officers
attending** : Item II

Department of Justice

Mr Keith YEUNG, SC, JP
Director of Public Prosecutions

Action

Mrs Apollonia LIU, JP
Deputy Director (Special Duty)

Ms Adeline WAN
Senior Assistant Solicitor General
(General Legal Policy)

Mr Paul HO
Senior Assistant Director of Public Prosecutions
(Office of the Director of Public Prosecutions)

Judiciary Administration

Mrs Erika HUI
Acting Judiciary Administrator

Ms Wendy CHEUNG
Assistant Judiciary Administrator
(Development)¹

Security Bureau

Mr Andrew TSANG Yue-tung
Principal Assistant Secretary (Security)^E

Hong Kong Police Force

Mr Donnie CHOY Yuk-kwong
Chief Superintendent (Crime Support) (Crime Wing)

Ms Frances LEE King-hei
Chief Inspector (Family Conflict and Sexual Violence
Policy Unit) (Crime Wing)

Item III

Department of Justice

Mr Peter WONG
Deputy Solicitor General (General)

Action

Ms Peggy AU-YEUNG
Senior Assistant Solicitor General (China Law) (Acting)

Ms Ines LEE
Senior Government Counsel

**Attendance by
invitation**

: Item II

Hong Kong Bar Association

Mr Andrew BRUCE, SC

Rainlily

Miss Tiffany NG
Centre-In-Charge

Mr Eric CHEUNG Tat-ming
Principal Lecturer
Faculty of Law, University of Hong Kong

Association Concerning Sexual Violence Against Women

Ms CHOI Suet-wah
Project Officer (Advocacy)

Item III

Hong Kong Bar Association

Mr Jeremy S.K. CHAN

The Law Society of Hong Kong

Mr Dennis HO Chi-kuen
Chairman of Family Law Committee

Mr Anthony James HUNG
Vice Chairman of Family Law Committee

Ms Winnie CHOW Weng-yee
Member of Family Law Committee

Action

Ms LAM Ka-lai
Assistant Director, Practitioners Affairs

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

Staff in attendance : Mr Stephen LAM
Senior Assistant Legal Adviser 2

Miss Joyce CHING
Senior Council Secretary (4)2

Ms Jacqueline LAW
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. Measures for handling sexual offences cases and provision of screens for complainants in sexual offence cases during court proceedings

LC	Paper	No. --	Department of Justice,
CB(4)1144/15-16(01)			Security Bureau and Hong
			Kong Police Force's paper on
			"Measures for handling sexual
			offences cases and the
			provision of screens for
			complainants in sexual
			offences cases during court
			proceedings"

Action

- | | | |
|---|--------|---|
| LC Paper
CB(4)1144/15-16(02) | No. -- | Judiciary Administration's paper on "Practice Directions relating to the Provision of Screens for Witnesses in Sexual Offence Cases during Court Proceedings" |
| LC Paper
CB(4)1144/15-16(03) | No. -- | Updated background brief on "Measures for handling sexual offence cases and provision of screens for complainants in sexual offence cases during court proceedings" prepared by Legislative Council ("LegCo") Secretariat |
| LC Paper
CB(4)1144/15-16(04)
(English version only) | No. -- | Submission from Mr Eric CHEUNG Tat-ming |
| LC Paper
CB(4)1153/15-16(01)
(English version only) | No. -- | Letter dated 21 June 2016 from The Law Society of Hong Kong |
| LC Paper
CB(4)1187/15-16(01)
(Chinese version only) | No. -- | Submission on "Measures for handling sexual offences cases and provision of screens for complainants in sexual offence cases during court proceedings" from Rainlily |
| LC Paper
CB(4)1187/15-16(02)
(Chinese version only) | No. -- | Submission on "Measures for handling sexual offences cases and provision of screens for complainants in sexual offence cases during court proceedings" from Association Concerning Sexual Violence Against Women |

Presentation by deputations

Association Concerning Sexual Violence Against Women
(LC Paper No. CB(4)1187/15-16(02) - Submission (Chinese version only))

Action

2. Ms CHOI Suet-wah of Association Concerning Sexual Violence Against Women presented the views of her organization as detailed in its submission.

Mr Eric CHEUNG Tat-ming

(LC Paper No. CB(4)1144/15-16(04) - Submission (English version only))

3. Mr Eric CHEUNG presented the views as detailed in his submission. While welcoming the new and amended Practice Directions issued by the Judiciary, Mr CHEUNG said that the settings of many existing courts buildings might render the provision of screens and arrangement of special passageways ineffective in preventing the complainants from being seen by the public or media. The draft Criminal Procedure Ordinance (Amendment) Bill 2016 ("the Bill"), as detailed in the Appendix of his submission, which sought to give the court a power and discretion to permit complainants to give evidence by way of a live television ("TV") link in proceedings in respect of a specified sexual offence within the meaning of section 117(1) Crimes Ordinance (Cap. 200), by way of simple legislative amendment to the Criminal Procedure Ordinance (Cap. 221), could enhance protection to such complainants when testifying in court.

Rainlily

(LC Paper No. CB(4)1187/15-16(01) - Submission (Chinese version only))

4. Ms Tiffany NG of Rainlily presented the views of her organization as detailed in its submission.

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

5. Mr Andrew BRUCE said that the Bar Association had long supported measures to make sure that screens would be available for all appropriate cases of sexual offence during court proceedings. The Bar Association also welcomed the new and amended Practice Directions which would take effect on 1 August 2016. Regarding the Bill drafted by Mr Eric CHEUNG, Mr BRUCE said that the Bar Association saw no fundamental difficulty in permitting the giving of evidence by live TV link by sexual violence victims in appropriate cases. Regarding the leaflet produced by the Hong Kong Police Force ("the Police") to inform adult complainants of sexual offences of the protection measure during court proceedings, Mr BRUCE considered that substantial improvement could be made in this regard, for instance, providing explanations on the measures available for the potential complainants of sexual offences. Among others, he urged the Police to explain to readers the implications of using the witness protection facilities as set out in the leaflet.

Action

Presentation by the Administration

6. Director of Public Prosecutions ("DPP") briefed members on the measures for handling of sexual offence cases by DoJ, details of which were set out in the Administration's paper (LC Paper No. CB(4)1144/15-16(01)). DPP also presented DoJ's stance, as set out in paragraph 20-21 of the Administration's paper, on the legislative amendment proposed by Mr Eric CHEUNG.

7. Principal Assistant Secretary (Security) E said that the provision of training in handling sexual offence cases by the Police had been set out in the Administration's paper and that he had nothing to add.

8. In response to Mr Andrew BRUCE's suggestion regarding the leaflet, Chief Superintendent (Crime Support) (Crime Wing) explained that frontline police officers would explain the content of the leaflet to complainants in addition to furnishing them with a copy of the leaflet. They would also ascertain from the complainants whether or not they would request the use of protective measures during court proceedings.

Presentation by the Judiciary

9. Acting Judiciary Administrator ("Atg JA") briefed members on the Practice Directions relating to the provision of screens for witnesses in sexual offence cases during court proceedings, details of which were set out in the Judiciary Administration's paper (LC Paper No. CB(4)1144/15-16(02)). After the new and amended Practice Directions coming into effect on 1 August 2016, the consideration of the need for screen would become a standing procedure in every sexual offence case that was brought before the court. The Judiciary would closely monitor the new arrangements to see if there would be any further room for improvement. With regard to some responding organizations' suggestion that besides screens, a special passageway should be included at the same time for the witness to enter and leave the courtroom, Atg JA said that currently the provision of special passageway was governed by common law. Given the physical constraints of individual court buildings, turning the provision of a special passageway to a standing arrangement might not always be operationally feasible. The proposal required further careful consideration.

Discussion

10. Whilst welcoming the new and amended Practice Directions, Mr Dennis KWOK said that the amended procedure introduced under the

Action

Practice Directions could not solve all the problems. Mr KWOK considered that the Bill should be put forward and discussed in the Legislative Council as soon as practicable. Mr KWOK asked whether DoJ had any timetable with regard to the legislative amendment proposed by Mr Eric CHEUNG and the main considerations or problems identified in this regard.

11. DPP responded that currently there was no timetable with regard to the legislative amendment and that matters relating to legislation could not be determined by DoJ alone. The main considerations on the proposed legislative amendment included the following:

- (a) any protection offered to the complainants in sexual offence cases would have to meet the requirements with regard to the right to a fair trial as set out in the Basic Law and pass the tests of rationality and proportionality;
- (b) whether the applicability of the additional protection should only be confined to the specified types of sexual offences under section 117(1) of Cap. 200, namely, rape, non-consensual buggery and indecent assault;
- (c) the correlation between additional protection proposed under the legislative amendment and other related measures/ arrangements.

Regarding the correlation between the additional protection in connection with other related arrangements, DPP said that relevant overseas experience where complainants of sexual offences were allowed to give evidence via TV link could serve as reference. Given the physical constraints of individual courtrooms, the TV screen for live TV link was placed in a position where all the people in the courtroom could see. In such cases, to protect victims from the embarrassment of being exposed to public sight, special arrangement had to be made by placing screens to shield the TV screen.

12. With regard to the need to make special arrangement for shielding the TV screen to protect the victims giving evidence via TV link from the embarrassment of being exposed to public sight, Mr Eric CHEUNG said that the need for such arrangement did not arise from his proposed legislative amendment. Mr CHEUNG further said that "witness in fear" who was allowed to give evidence in court by live TV link might also need the above mentioned special arrangement where necessary. He hoped that the need to adopt other related measures/ arrangements would not be a hindrance to his proposed legislative amendment.

Action

13. Noting that the TV screen for live TV link might be placed at positions facing the public gallery given the physical constraints of some old courtrooms, Mr Alvin YEUNG asked whether arrangement could be made for the use of screens, placing between the public gallery and the counsel table, to hide the TV screen from the public.

14. DPP clarified that the use of screens to shield the TV screen was just an example to illustrate the situation where related measures and/or arrangements had to be adopted along with live TV link and highlight the technical issues concerned. DPP stressed that DoJ would, in consultation with all relevant stakeholders, strive their best to solve any technical issue and make available resources to facilitate necessary protection measures for the victims. In considering the legislative proposal with regard to allowing complainants of sexual offences to give evidence by way of live TV link, DoJ would take a holistic approach, including the adoption of other related measures/arrangements that might be needed.

15. Mr WONG Yuk-man also urged the Administration to work out a timetable as soon as practicable and advise on the roadmap setting out the procedures of the legislative amendment. Dr Elizabeth QUAT also urged for a target date for the legislative amendment.

16. Regarding the steps in taking forward the legislative amendment, DPP responded that after internal research and study, the stakeholders (including relevant non-government organizations, the legal profession and relevant law enforcement agencies / government departments) would be consulted thereon. DPP said that practically, he was not able to advise on a target date for the actual legislative amendment, but assured Members that DoJ would adopt a proactive approach in taking forward the matter.

17. Ms Emily LAU questioned whether the new and amended Practice Directions could offer enough protection to the complainants of sexual offence and queried that the legislative amendment might take a very long time. Ms LAU asked about number of applications for provision of screen during court proceedings and the number of applications granted and refused respectively, with reasons for the refused cases.

18. Atg JA responded that from June 2013 to May 2016, a total of 48 applications for provision of screen during court proceedings were received. Among those cases, 44 applications were granted and 4 applications were refused. Atg JA said that the applications were considered by the court carefully having regard to the circumstances and nature of each case as well as

Action

the needs of the complainants and that it would be difficult to generalize the reasons for the refused cases.

19. Ms Emily LAU further asked whether those refused cases were supported by DoJ and whether DoJ could furnish further details on the reasons for refusal.

DoJ 20. DPP responded that all the applications for provision of screen during court proceedings were made by DoJ. As to the reasons for the refusal, DPP did not have information on hand and he undertook to look into those cases and provide written response after the meeting.

21. Dr Elizabeth QUAT said that repetitive taking of witness' statement from victims of sexual offence cases had long been a problem. Dr QUAT asked Rainlily whether the situation had been improved in recent years.

22. Ms Tiffany NG of Rainlily said that repetitive statements were still being taken by from victims of sexual offence by different officers, including forensic pathologists and police officers. Ms NG urged the Administration to enhance the "one-stop" service so that repetitive taking of witness' statement of sexual offence cases could be avoided.

23. DPP said that "one-stop" service was available at all public hospitals with emergency services. However, he said that the Police might have practical difficulties in implementing the "one-stop" service in some cases. DPP stressed that DoJ had already joined hands with the Judiciary and the Police in an effort to further enhance the protection for victims of sexual offence cases.

24. Chief Superintendent (Crime Support) (Crime Wing) responded that the internal guideline of the Police had clearly set out that repetitive taking of statement from the same victim should be avoided as far as practicable. Nevertheless, there would be circumstances where obtaining a further statement was necessary. For instance, where new information emerged as investigations progressed, a further statement from the victim would be required. With regard to the "one-stop" service, Chief Superintendent (Crime Support) (Crime Wing) pointed out that not all victims would choose to receive medical services provided at public hospitals. A survey conducted in March 2016 demonstrated that among 20 rape cases, victims in 13 cases did not have immediate need for medical services, rendering the "one-stop" service not applicable. Among the remaining seven cases, only victims of three cases had opted for going through medical treatment, forensic examination and interview with police within the same public hospital under the "one-stop service model".

Action

25. Mr Alvin YEUNG noted that the prosecution might need to seek further information from the victims after a statement had been taken and thus repetitive taking of statement was sometimes unavoidable. In this case, Mr YEUNG urged the Administration to arrange the same officer to take the statement as far as practicable to avoid adding trauma by repeating the ordeal to different officers on different occasions.

26. Taking note of the situation mentioned by Chief Superintendent (Crime Support) (Crime Wing), Dr Elizabeth QUAT invited the deputations to express their views on how the "one-stop" service could be enhanced so as to help the victims of sexual offences, say, making available the "one-stop" service at the police stations, when the victims did not need to use the services at the public hospitals.

27. Ms CHOI Suet-wah of Association Concerning Sexual Violence Against Women said "one-stop" services provided at the public hospitals would be applicable for most of the cases. Ms CHOI explained that even if the victims did not have immediate need to receive forensic examination after reporting the sexual offence case, say, if the incident had happened more than 72 hours when the Police report was made, they would still need other medical services at the hospitals, for instance, post-coital contraception and check-up for sexually transmitted infections.

28. Ms Tiffany NG of Rainlily said that treatment for psychological difficulties of the victims was equally important as medical treatment. Ms NG considered the police station was not an appropriate place for taking statement from victims of sexual offence owing to its cold atmosphere. She urged the Administration to take care of the psychological needs of the victims.

29. Referring to the Bill drafted by Mr Eric CHEUNG, Mr Albert HO considered that the proposal would not impose restriction on the right of the accused to a fair trial. Mr HO asked whether the protection to prevent the identification of the complainant of sexual offence cases should also be set out in the Bill.

30. Mr Eric CHEUNG responded that currently Section 156 of Cap. 200 provided protection to prevent the identification of the complainant of a specified sexual offence (i.e. any of the specified sexual offences under section 117(1)). What the draft Bill sought to achieve was a stopgap measure to expand the definition of vulnerable witness under section 79B of Cap. 221 to cover those sexual crime complainants who had long been recognized under section 156 of Cap. 200 as a special category of complainants who deserved

Action

special protection against publicity. Mr CHEUNG considered the main attraction of this proposed stopgap measure was that it could be done by simple legislative amendment and was built upon well-established mechanism with judicial control. As the feedback which he had received from the Bar Association, the Law Society of Hong Kong and DoJ as well as legislators from different political parties was on the whole positive, Mr CHEUNG hoped that the Bill could be passed within the current term Government. In this connection, responding to DPP's consideration as to whether the applicability of the additional protection should only be confined to the specified types of sexual offences under section 117(1) of Cap. 200, Mr CHEUNG said that comprehensive review on whether the coverage should be expanded would still be required at a later stage, after the passing of the Bill.

31. Mr Albert HO asked, in case the victim was permitted to give evidence via TV link in a separate room, whether there would be practical problem if the victim was also required to physically identify the offender, who was present in court room.

32. Mr Andrew Bruce of the Bar Association said that often identity was not an issue. For the situation mentioned by Mr Albert HO, Mr BRUCE responded that he had never seen a problem with respect to that as there were many ways to deal with.

33. Ms CHOI Suet-wah of Association Concerning Sexual Violence Against Women said that besides non-disclosure of the name/identity of the victims, their personal data should also be protected. She had come across cases where the victims' personal data, such as mobile number and address, were disclosed during the hearing and no one stopped that from happening. Moreover, Ms CHOI said that questioning about previous sexual experience of the victims and the way which they were questioned would also seriously affect their psychological condition and even affect whether the victims were willing to appear in court to give evidence.

34. With regard to protection of personal data of the victims, Mr Albert HO said that the judge should make an order to prohibit such information from being disclosed and/or published. Mr HO further pointed out, to ensure the right of the accused to a fair hearing, the questioning about the previous sexual experience of the victim was unavoidable if such information was relevant to the case being heard.

35. Whilst acknowledging the right of the accused to a fair trial should not be undermined, Ms CHOI Suet-wah of Association Concerning Sexual Violence Against Women considered that the judicial system should be improved to

Action

protect victims from being questioned about their sexual experience which was unnecessary and irrelevant to the case being heard. Ms CHOI said that her organization would undertake a study to look into relevant precedent cases with a view to explore on the ways to enhance the protection for victims in this regard.

36. The Chairman asked if a judge had made an order to prohibit the disclosure of the name of the witness/victim, whether a person would be held in contempt of court if he/she disclosed the identity of such witness/ victim, even he/she was not aware of such an order.

37. Mr Eric CHEUNG said that if any matter was published or broadcast, with regard a specified sexual offence, in contravention of section 156(1), Cap. 200, the persons concerned would be guilty of an offence and liable on conviction the penalty and sentence as set out under section 157, Cap. 200. For non-compliance of court order, the judge could charge the persons with contempt of court.

38. Mr Alvin YEUNG suggested the Police to include the information on the complainants' right to seek protection for preventing their identity from being identified in the leaflet.

39. Noting that the arrangement of special passageways and TV link might not always be operationally possible given the physical constraints of individual court buildings, Mr Alvin YEUNG asked whether the Judiciary, in consultation with the DoJ, had the discretion to transfer a case to be heard at another court with the necessary facilities available for the special arrangement required.

40. Atg JA responded in affirmative. Atg JA supplemented that currently TV link was available in most court buildings and other special arrangement could be made where necessary. With regard to arrangement of special passageways, where the judge considered necessary, special measures could be adopted to cater for the need of the complainants, for instance allowing them to use the passageways for the judge and/or staff or arranging them to enter/leave the court room earlier/later with staff accompanying them.

41. DPP supplemented that there was a precedent case where arrangement was made for the victim to wait at a waiting room outside the court before the hearing and a 'special passageway' was made up by lining up screens between the waiting room and the courtroom.

Action

42. Mr Alvin YEUNG asked if a victim/witness was in fear to go to the court building on his/her own, whether the Police would make arrangement for their staff to escort the victim/witness to the court.

43. Chief Superintendent (Crime Support) (Crime Wing) responded in the affirmative and supplemented that the Police would provide escorting arrangements where necessary.

44. To help ascertain whether the new and amended Practice Directions could really enhance the application procedures for provision of protective screens for witnesses in sexual offence cases during court proceedings, Mr Dennis KWOK, on behalf of Rainlily, tabled a form (Chinese version only), in the **Appendix**, during the meeting, requesting the Judiciary Administration ("JA") to provide the following data:

- (a) The number of applications received from the victims of sexual offences, via the prosecution, for TV link, the use of screen and special passageways respectively during 2014 to 2016, indicating the number of applications that had been granted, with breakdown for victims who were mentally incapacitated persons, of age 17 or below and able-bodied adults;
- (b) The number of sexual offence cases handled by the courts during 2014 to 2016, with breakdown for rape, indecent assault, and other types of cases.

JA

JA undertook to consider providing the information after the meeting after taking into account its availability and other considerations.

Conclusion

45. The Chairman concluded that the Administration and JA should take into account the views expressed by members and deputations at the meeting today.

III. Reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland

LC Paper
CB(4)1144/15-16(05)

No. -- Administration's paper on
"Proposed Arrangement with
the Mainland on Reciprocal
Recognition and Enforcement

Action

of Judgments on Matrimonial
and Related Matters"

LC	Paper	No. --	Background brief on
CB(4)1144/15-16(06)			"Reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland" prepared by Legislative Council Secretariat

Briefing by the Administration

46. At the invitation of the Chairman, Deputy Solicitor General (General) ("DSG(G)") briefed members on the Administration's consultation concerning a possible arrangement with the Mainland on reciprocal recognition and enforcement of judgments on matrimonial and related matters ("Proposed Arrangement"), details of which were set out in the Administration's paper (LC Paper No. CB(4)1144/15-16(05)). DSG(G) said that the Administration had published a consultation paper on the day of this meeting to seek the views of the legal community, relevant stakeholders and other interested parties on the Proposed Arrangement. The Administration would further consult Panel members after it had considered the views received during the consultation and before finalizing its recommendations.

Views of the Hong Kong Bar Association

47. Mr Jeremy CHAN said that the Hong Kong Bar Association ("the Bar Association") was in support of making arrangements with the Mainland on reciprocal recognition and enforcement of judgments on matrimonial and related matters as these arrangements were necessary and long overdue. The Bar Association would provide more detailed response upon receipt of the Administration's consultation paper on the Proposed Arrangement. Mr CHAN then presented the views of the Bar Association from the following three aspects and urged the Administration to look into these issues when working out the Proposed Arrangement:

- (a) from the divorce aspect, under Part IX of the Matrimonial Causes Ordinance (Cap. 179), divorces granted by the courts of the Mainland, including court divorces and administrative divorces, were generally recognized in Hong Kong. However, according to the understanding of some members of the legal profession who were working in the Mainland, divorces granted

Action

by the courts of Hong Kong were not generally recognized in the Mainland. The provisions of the law of the Mainland which enabled the recognition of foreign divorces did not apply to Hong Kong;

- (b) on financial provision aspect, under Part IIA of the Matrimonial Proceedings and Property Ordinance (Cap. 192), Hong Kong could give effect to the financial awards in divorce cases obtained in the Mainland. However, financial awards in divorce cases obtained in Hong Kong could not be enforced in the Mainland. In addition, the Administration had to work out whether the financial awards in divorce cases obtained in the Mainland should be automatically recognized in Hong Kong by way of registration, or the party concerned had to use the judgement as the basis for making applications under Part IIA of the Matrimonial Proceedings and Property Ordinance in order to make the award enforceable in Hong Kong or request for other awards in Hong Kong; and
- (c) as regards child welfare, while the courts of Hong Kong might take into account a custody order made in the Mainland, and *vice versa*, the recognitions were not direct and mutual. He further pointed out that different practices were adopted in Hong Kong and the Mainland in handling custodial matters. For example, while it was unusual for the courts of Hong Kong to issue custody orders that would split up siblings, it was not necessarily the case for the courts in the Mainland. In addition, the Hague Convention on the Civil Aspects for International Child Abduction ("Hague Abduction Convention") was only applicable to Hong Kong but not the Mainland, and the Mainland did not have the concept of habitual residence, which was adopted in the Hague Abduction Convention in dealing with parental child abduction cases. As such, the Administration had to work out how to address the issues arising out of these differences in the Proposed Arrangement.

Views of the Law Society of Hong Kong

48. Mr Dennis HO said that the Law Society of Hong Kong ("the Law Society") welcomed the Proposed Arrangement as cross-border marriage made up 37% of Hong Kong's total marriages in 2014 and about 20 to 30 % of divorces filed in Hong Kong were marriages which took place in the Mainland. He then presented the Law Society's views as follows:

Action

- (a) for parental child abduction cases, the Law Society suggested that the Administration could make reference to the Hague Abduction Convention which adopted the concept of habitual residence, instead of the custodial right of the parents, as the sole connecting factor in dealing with these cases. The objective of the Hague Abduction Convention was to ensure that children who had been wrongfully removed from the country of their habitual residence, were returned to that country for the courts there to make substantive decisions concerning their welfare. In this connection, according to his understanding, both divorced parents in the Mainland would enjoy direct or indirect form of custody and guardianship of their child(ren) in the Mainland. As such, parental child abduction (擄拐) was not recognized from the Mainland law perspective and the Administration should avoid using the word “abduction” instead it may consider to adopt some other wordings in the Proposed Arrangement;
- (b) regarding the Administration's provisional views that orders for property adjustment and the power of variation of maintenance orders would not be covered under the Proposed Arrangement due to the complexity involved, since the Family Court in Hong Kong often dealt with matrimonial cases involving Mainland properties, it was therefore important for the Administration to undertake in-depth study on orders for property adjustment and work out how reciprocal enforcement of such orders might be implemented in practice. He further said that the Law Society hoped that the Administration would consider introducing a mechanism to provide for a power of variation of maintenance orders in the Proposed Arrangement to facilitate the effective enforcement of maintenance orders by the courts in the place where the orders were sought to be enforced; and
- (c) the Law Society would provide a detailed response upon receipt of the Administration's consultation paper on the Proposed Arrangement.

Discussion

49. Mr Albert HO expressed concern that as Hong Kong and the Mainland had very different legal principles, concepts, administrative or civil procedures in dealing with matrimonial matters, it would be difficult to establish a mechanism for reciprocal recognition and enforcement of matrimonial

Action

judgments. For example, assets held in trusts might be treated as matrimonial assets subject to divorce proceedings in Hong Kong. However, this was not the case in the Mainland. As such, he asked under what circumstances could the orders for division of matrimonial assets obtained in the Mainland which involved assets in Hong Kong be challenged by the courts of Hong Kong. Mr HO also said that in Hong Kong, the Social Welfare Department would assist in ascertaining the best welfare of the children. He concurred with the suggestion of adopting the concept of habitual residence in dealing with parental child abduction cases, and that the children concerned should return to their place of habitual residence for the courts there to make substantive decisions concerning their welfare. He then invited the views of the Bar Association and the Law Society on the aforesaid issues.

50. Mr Jeremy CHAN shared the views of Mr Albert HO that Hong Kong and the Mainland had very different principles, concepts, administrative or civil procedures in dealing with matrimonial matters. He pointed out that, by way of an example, for matrimonial cases in Hong Kong, full and frank disclosure of each party's assets must be made to the court, but for matrimonial cases in the Mainland, if one party questioned the sufficiency of financial disclosure of the other party, the burden was on that party to prove to the court that the other party had been untruthful. It was therefore necessary for the Administration to work out how to address the issues arising out of these differences in the Proposed Arrangement.

51. Regarding the orders for division of matrimonial assets obtained in the Mainland which involved assets in Hong Kong, Mr Dennis HO said that under Part IIA of the Matrimonial Proceedings and Property Ordinance, either party could apply to the Family Court of Hong Kong for a ruling regarding assets in Hong Kong that had not been dealt with in the orders for division of matrimonial assets obtained by other jurisdictions.

52. In response to Mr Dennis KWOK's enquiry on the Administration's views on the issues raised by the Bar Association in paragraph 48(a) to (c) above, DSG(G) said that:

- (a) the Administration agreed to explore the suggestion of adopting the concept of habitual residence in dealing with parental child abduction cases involving Hong Kong and the Mainland. Noting the academic views that parental child abduction was not recognized from the Mainland law perspective, the Administration would try its best to reach agreement with the Mainland on this issue;

Action

- (b) regarding the proposal of using the financial awards in divorce cases obtained in the Mainland as a basis to make applications under Part IIA of the Matrimonial Proceedings and Property Ordinance in order to make it enforceable in Hong Kong or request for other awards in Hong Kong, the Administration would look into this issue upon receiving this proposal in detail; and
- (c) although under the Matrimonial Causes Ordinance, divorces granted by the courts of the Mainland would be recognized in Hong Kong and that in 2011, the Zhuhai Intermediate People's Court recognized a divorce decree pronounced by a court of Hong Kong, the inclusion of reciprocal recognition and enforcement of divorce decrees in the Proposed Arrangement would bring certainty to the public that divorce decrees obtained in the Mainland were expected to be recognized and enforced in Hong Kong, and *vice versa*.

IV. Any other business

53. There being no other business, the meeting ended at 6:26 pm.

Council Business Division 4
Legislative Council Secretariat
7 September 2016