

立法會
Legislative Council

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Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 26 February 2018, at 4:30 pm
in Conference Room 2 of the Legislative Council Complex

Members present : Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)
Hon Dennis KWOK Wing-hang (Deputy Chairman)
Hon James TO Kun-sun
Hon CHAN Kin-por, GBS, JP
Hon CHAN Chi-chuen
Dr Hon Fernando CHEUNG Chiu-hung
Ir Dr Hon LO Wai-kwok, SBS, MH, JP
Hon CHUNG Kwok-pan
Hon Alvin YEUNG
Hon CHU Hoi-dick
Hon Jimmy NG Wing-ka, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung

Members absent : Hon Abraham SHEK Lai-him, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Martin LIAO Cheung-kong, SBS, JP

**Public officers
attending**

: Agenda item III

Department of Justice

Ms Christina CHEUNG
Law Officer (Civil Law)

Mr David LEUNG, SC
Director of Public Prosecutions

Mrs Apollonia LIU
Deputy Director (Special Duties)

Agenda item IV

Department of Justice

Mr Peter WONG
Deputy Solicitor General (Policy Affairs)

Mr Martin HUI, SC
Deputy Director of Public Prosecutions

Ms Diana LAM
Assistant Solicitor General (Policy Affairs) (Acting)

Mr Richard MA
Senior Government Counsel

Mr Ivan LEUNG
Senior Public Prosecutor (Acting)

**Attendance by
invitation**

: Agenda items III and IV

Hong Kong Bar Association

Mr Philip DYKES, SC

Mr Randy SHEK

Clerk in attendance : Mr Lemuel WOO
Chief Council Secretary (4)6

Staff in attendance : Mr YICK Wing-kin
Senior Assistant Legal Adviser 2

Ms Macy NG
Senior Council Secretary (4)6

Ms Emily LIU
Legislative Assistant (4)6

Action

I. Information papers issued since the last meeting

(LC Paper No. CB(4)598/17-18(01) - Paper on medical insurance allowance for judges and judicial officers provided by the Administration (information paper))

Members noted the above paper issued since the last meeting.

II. Items for discussion at the next meeting

(LC Paper No. CB(4)619/17-18(01) - List of outstanding items for discussion

LC Paper No. CB(4)619/17-18(02) - List of follow-up actions)

Regular meeting in March 2018

2. Members agreed to discuss the following items at the next regular meeting to be held on 26 March 2018 –

- (a) Future development of the legal profession under the trend of globalization, its impacts on the legal profession and legal services to the public in Hong Kong; and
- (b) Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill.

3. Members agreed that apart from the Hong Kong Bar Association ("Bar Association") and The Law Society of Hong Kong ("Law Society"), relevant organizations would be invited to give views on item (a) above.

(Post-meeting note: The list of organization invited was issued to members via LC Paper No. CB(4)694/17-18 on 6 March 2018.)

Letter from Dr Junius HO

4. The Chairman referred to a letter tabled at the meeting from Dr Junius HO who proposed to discuss the prosecution policy and the working relationship between the Department of Justice ("DoJ") and the Independent Commission Against Corruption on the prosecution of criminal cases involving corruption. She invited members' views on whether the issue should be included in the Panel on Administration of Justice and Legal Services ("Panel")'s list of outstanding items for discussion.

5. Dr Junius HO explained that he was concerned about DoJ's decision announced on 1 February 2018 of not instituting prosecution against Mr Jimmy LAI and other six people alleged to be involved in a case of suspected illegal offer and acceptance of political donations ("Donation Case"). He hoped that DoJ would be invited to the Panel to explain in details the reasons for not instituting the prosecution.

6. The Deputy Chairman agreed that DoJ should explain to the Panel in details about those non-prosecution cases of wide public interest. He said that he was particularly concerned about DoJ's prosecution decision regarding the case relating to Mr LEUNG Chun-ying and the Australian firm UGL Limited.

7. Ir Dr LO Wai-kwok considered that both of the above cases were of wide public interest and could be discussed together. While concurring that DoJ should explain to the Panel about its prosecution decision for cases of wide public interest, Mr Alvin YEUNG was concerned about whether the Panel or DoJ should take the initiative to discuss those cases, and how to define "cases of wide public interest".

8. The Chairman considered that the Panel was a suitable platform to discuss DoJ's prosecution policy and she would follow up the matter with DoJ with a view to drawing up a suitable timetable to discuss the matter. However, she suggested that members might also raise enquiries regarding DoJ's prosecution policy under other agenda items if relevant. After discussion, members agreed that the issue proposed by Dr Junius HO should be included in the Panel's list of outstanding items for discussion.

(*Post-meeting note:* The letter from Dr Junius HO (LC Paper No. CB(4)661/17-18(01)) was issued to members via LC Paper No. CB(4)661/17-18 on 27 February 2018.)

III. Briefing out of criminal and civil cases by the Department of Justice

(LC Paper No. CB(4)619/17-18(03) - Administration's paper on briefing out cases of the Department of Justice

LC Paper No. CB(4)619/17-18(04) - Paper on briefing out of criminal and civil cases by the Department of Justice prepared by the Legislative Council Secretariat (background brief))

9. The Chairman informed members that the Law Society had written to the Clerk to Panel requesting that it be provided with the Administration's paper of this agenda item earlier and suggesting the Administration to provide discussion papers in the future well in advance of the meeting, say 21 days before the meeting. The Chairman asked the Administration to take note of the Law Society's request. On the other hand, she hoped that the Law Society would understand that it might not be feasible for the Administration to provide discussion papers 21 days before the meeting given the time required for preparing the papers.

10. At the invitation of the Chairman, Law Officer (Civil Law) of DoJ ("LO(C")) briefed members on the Administration's paper which set out DoJ's briefing out policy and expenditure, and the mechanism for the selection of fiat counsel. Director of Public Prosecutions of DoJ ("DPP") then briefed members on DoJ's measures to enhance the case-handling capability of both in-house and outside counsel.

Views of the Hong Kong Bar Association

11. Mr Philip DYKES and Mr Randy SHEK presented the views of the Bar Association as follows (details of which were set out in the Bar Association's submission (LC Paper No. CB(4)797/17-18(01)) which was subsequently issued to members on 22 March 2018):

General

- (a) DoJ's proactive involvement in developing the junior barrister was welcomed. Not only would those opportunities provide practical advocacy experience, they were also a welcomed source of income as well as providing valuable insight into the role of the advocate in the criminal justice. The briefing out arrangement also tied in with the Bar Association's view that prosecution work should be conducted by legally qualified persons;
- (b) there was no feedback provided to the younger fiat counsel on their performance. Continued training or refresher programs in the first few years might be beneficial to them;
- (c) the rate of remuneration for fiat work fell far behind privately-funded work which made it unattractive for more experienced and established practitioners to take up fiat work;

Selection of briefed out counsel

- (d) there was a lack of transparency of briefing out cases to barristers and there was no criteria for selection of fiat counsel to undertake cases published on DoJ's website. Fiat counsel should be selected by DoJ to handle cases only on their legal ability and on a non-discriminatory basis;
- (e) while assignment of fiat work for criminal cases generally proceeded on a roster basis, DoJ appeared not to have followed the roster in assigning fiat work. As a result, some fiat counsel were assigned cases more frequently than that of others;
- (f) DoJ did not appear to have any clear policy on putting fiat counsel on probation after enlistment, as there had been reports of fiat counsel receiving notice of passing "probation" after having been instructed for over seven years; and
- (g) there should be clear information on requirements and the process through which a young lawyer was enlisted as fiat counsel, and the progression of fiat counsel from "B" List (which comprised outside fiat counsel who prosecuted magistracy cases in place of Court Prosecutors) to "A" List (which comprised outside fiat counsel who prosecuted magistracy cases in place of

Government Counsel), and then on to prosecuting in the higher courts.

Briefing out cases of wide public interest

12. Mr Holden CHOW indicated that he had confidence in the professionalism and independence of DoJ in carrying out its duties. He enquired whether DoJ would seek independent legal advice from outside counsel before making a prosecution decision on significant cases, and whether the Donation Case was handled by in-house or outside counsel.

13. Dr Junius HO urged DoJ to explain in detail the reasons for not instituting a prosecution against the parties alleged to be involved in the Donation Case according to the Prosecution Code. He expressed concern about the weight given by DoJ on precedent cases and other factors in deciding not to institute prosecution in the Donation Case. In his view, DoJ should not merely make reference to precedent cases as the strength and weakness of evidence of each case was different.

14. DPP advised that DoJ had issued a press release earlier explaining the reasons for not instituting prosecution over the Donation Case. He also advised members that independent legal advice from outside counsel had not been obtained for this case and said that, in general, whether independent legal advice from outside counsel would be obtained depended on the complexity of the cases concerned and other relevant factors as set out in paragraph 3 of the Administration's paper.

15. The Chairman expressed concern about the reasons why DoJ would brief out some significant and controversial cases which were of wide public interest. She queried whether it was owing to the shortage of manpower or expertise in DoJ, or because DoJ wanted to avoid being criticized for the prosecution decision. The Chairman considered that if it was because of the former reason, DoJ should secure more resources for recruiting more in-house counsel with different expertise.

16. In response, DPP stressed that DoJ had been briefing out cases for various reasons but avoidance of criticism was not among them. He pointed out that there was indeed insufficient in-house counsel in DoJ for handling all advocacy duties, and hence briefing out of prosecution cases to fiat counsel was necessary. However, almost all appeal cases, the majority of cases in the Court of First Instance, and a considerable number of cases in the District Court were handled by in-house counsel of DoJ. DPP further said that, for some significant or controversial cases which were briefed out to local Senior Counsel and/or overseas counsel owing to the lengthy court proceedings

and/or expertise required, at least one in-house counsel would normally be assigned as junior counsel to support the leading counsel and would appear in court.

17. DPP pointed out that the workload of the Prosecutions Division ("PD") had been growing due to the increasing number of requests from law enforcement agencies seeking legal advice. On the other hand, since the modus operandi adopted in crimes had become more varied, more time was required for preparing the legal advice regarding the prosecution to be instituted. Therefore, DoJ had been reviewing its demand for manpower resources.

18. The Chairman considered that the decision of whether to institute prosecution, in particular over significant and controversial cases, should be made by DoJ rather than outside counsel. In response, DPP stressed that even if independent legal advice was sought from outside counsel on whether a prosecution should be instituted, the prosecution decision would be made by DoJ according to Article 63 of the Basic Law ("BL 63") and, depending on the circumstances of individual cases, he himself as DPP would take part in making the prosecution decision in the majority of such cases.

19. Mr Alvin YEUNG asked whether DoJ had ever not followed the legal advice obtained from independent outside counsel in making prosecution decisions for cases of wide public interest or involving important personalities. He also asked whether DoJ would consider disclosing the rationale (with sensitive information redacted if necessary) of not instituting prosecution for those cases to enhance DoJ's credibility.

20. DPP advised that the legal advice provided by outside counsel to DoJ was subjected to legal professional privilege and should not be disclosed. Furthermore, under BL 63, DoJ shall control criminal prosecutions, free from any interference. However, DoJ would normally explain the reasons for not instituting prosecution in respect of cases of wide public concerns. If legal advice from outside counsel had been obtained, DoJ would also state so. DPP added that whether more information regarding such cases could be disclosed would depend on the circumstances of individual cases, but DoJ would try its best to consider the viability of disclosing more information in the future.

21. Mr Alvin YEUNG noted that the legal representation of the opposite party was one of the reasons for DoJ to engage overseas counsel. He asked about the reason for that. DPP replied that if the opposite party had engaged several overseas counsel of high professional standing, DoJ might consider it necessary to engage a legal team of similar status to assist the court.

Number and expenditure of briefed out cases

22. Ir Dr LO Wai-kwok noted from Appendix I of the background brief prepared by the Secretariat (LC Paper No. CB(4)619/17-18(04)) that the number of court days undertaken by in-house counsel and fiat counsel in place of Government Counsel in 2016 was 3 441 and 5 418 respectively. As DoJ seemed to have briefed out a large proportion of its work to fiat counsel, Ir Dr LO asked whether this arrangement was appropriate. He also asked whether DoJ would consider setting an indicator on the number of briefed out case.

23. DPP and LO(C) both emphasized that attendance in court was only one among the wide spectrum of work for the Government Counsel working in PD and the Civil Division ("CD") of DoJ, and they had to take up a great portion of work which could not be briefed out.

24. DPP further explained that before giving legal advice to the enforcement agencies on whether criminal prosecutions should be instituted, the in-house counsel of DoJ had to study the evidence and deliberate on whether there was a case for prosecution, the offences to be charged and the level of court that the case should be tried. DPP advised that the work in the provision of advice to enforcement agencies was not suitable for briefing out save for exceptional circumstances. He added that with the strengthened manpower in PD following the creation of six additional Government Counsel posts in 2017-2018 to allow in-house counsel to handle more court work, the reliance on fiat counsel could be relieved.

25. LO(C) supplemented that even though some civil cases were briefed out to private practitioners to appear in court, all the solicitorial work, including preparation of cases for trial, was done by in-house counsel. She further said that CD's in-house counsel also handled many other duties which could not be briefed out, such as acting as the instructing solicitors in litigation cases involving the Government and providing legal advice to Government bureaux and departments, and handle tribunal and mediation work.

26. In response to Ir Dr LO's views expressed in paragraph 22 above, Mr Randy SHEK pointed out that while there was quite a great number of cases conducted by fiat counsel, most of them were Magistrates' Courts' cases which were less complicated and relatively straightforward for handling. He urged that fiat counsel who had handled Magistrates' Courts' cases should be offered more opportunities to handle cases at District Court and High Court levels. On the other hand, as the length of trials was unpredictable, the fiat counsel had no control over the number of court hearing days undertaken.

Selection of briefed out counsel for civil and criminal cases

27. The Deputy Chairman pointed out that civil litigation was one of the major sources of work for junior barristers and had provided a good training opportunity for them. He said that while he had repeatedly asked DoJ for the provision of information on the selection criteria of counsel for briefing out, and the sets of chambers to which the briefed out counsel belonged in respect of civil cases in recent years, the information was still not available.

28. Mr Randy SHEK expressed concern that while DoJ claimed that it had been briefing out some civil cases which were relatively standard in nature, such as proceedings before disciplinary boards, to junior counsel with fewer years of experience, there were barristers on the fiat counsel list for civil cases who had not been assigned any cases for several years.

Admin 29. LO(C) advised that due to the varying complexity and nature of cases, civil cases (including construction disputes) were generally briefed out to outside professionals on a non-standard basis. The selection of counsel was based on established criteria having particular regard to the expertise and skills required in each case. Under certain circumstances, such as when there was a need for continuity, the same legal team was engaged for appellate proceedings. LO(C) stressed that the chamber to which a counsel belonged was not one of the considerations of selecting a briefed out counsel. Regarding the information requested by the Deputy Chairman in paragraph 27 above, LO(C) informed members that it was being collated and would be provided to the Panel when ready.

Admin 30. Dr Junius HO asked whether DoJ would consider briefing out more cases to solicitor advocates, in particular at Magistrates' Court and District Court levels. He requested the Administration to provide information about the total number of briefed out cases in the financial year of 2016-2017, and the number of cases briefed out to solicitors or solicitor advocates.

(Post-meeting note: The supplementary information in respect of paragraphs 29 and 30 above provided by DoJ (LC Paper No. CB(4)1297/17-18(01)) was issued to members via LC Paper No. CB(4)1297/17-18 on 25 June 2018.)

31. Ms YUNG Hoi-yan declared that she was on the fiat counsel list of DoJ but she was not handling any briefed out cases at the moment. She expressed concern about DoJ's policy on putting fiat counsel on probation after enlistment, and enquired about the criteria for selection as counsel who would be conducting cases on behalf of DoJ and the criteria for assessing the fiat counsel's performance.

32. DPP replied that DoJ would continuously assess and monitor the performance of each briefed out counsel. He added that, in selecting fiat counsel for briefed out cases, the number of court hearing days undertaken by the fiat counsel and other factors such as their advocacy skills demonstrated, rather than whether the cases were won or not, would be considered.

Enhancing the case-handling capability of outside counsel acting for the Department of Justice's cases

33. The Deputy Chairman enquired about the number of counsel who, after participating in the biannual Joint Training Programme co-organized by DoJ, the Bar Association and the Law Society ("Joint Training Programme"), had subsequently been provided with fiat work for DoJ.

34. DPP advised that the biannual Joint Training Programme was organized for the junior lawyers in private practice who were interested in prosecuting cases for DoJ. The programme comprised a one-day training course and (subject to satisfactory completion of the course) a two-week supervised engagement to prosecute in the Magistrates' Courts. During the two-week attachment, participants would be assessed on their suitability for inclusion in the PD Magistrates' Courts Fiat Counsel list ("MC Fiat Counsel list"). If participants failed to meet the required standard, they could re-take the training course.

35. DPP added that in 2016, 98 and 54 participants attended the one-day training course and the two-week magistracy engagement respectively, and 41 participants were eventually included in MC Fiat Counsel list. In 2017, 89 and 45 participants attended the one-day training course and the two-week magistracy engagement respectively, but the number of participants who were eventually included in MC Fiat Counsel list was not available for the time being. He explained that due to the participants' own choice or the failure of some participants in meeting the performance standard under the Joint Training Programme, the number of participants being included in MC Fiat Counsel list was relatively small.

36. Ms YUNG Hoi-yan noted that DoJ sometimes gave written feedback on the performance of fiat counsel after the fiat work. She requested DoJ to provide such feedback with suggestions on areas of improvement more frequently. DPP undertook to actively consider Ms YUNG's suggestion.

37. Ms YUNG Hoi-yan also noted that in order to equip junior counsel with the experience and the skills in prosecuting cases, counsel with less than 10 years' experience were engaged to act as an understudy to Senior Counsel

who was briefed to prosecute a complex and sensitive case for PD ("Understudy Programme"). She asked about the number of such junior counsel who had been engaged. She considered that apart from complex and sensitive cases, more other cases could be included in the Programme.

38. DPP advised that in 2016 and 2017, a total of 41 junior counsel took part in the Understudy Programme. DoJ would actively consider expanding the Programme to cover a wider range of criminal cases.

Remuneration for fiat work

39. The Chairman expressed grave concern that junior counsel engaged in the Understudy Programme would only be engaged at a token daily rate of \$1,000, which she considered to be too low. She said that the level of remuneration should be set reasonably.

40. DPP said that strengthening the advocacy capability of prosecutors, especially the junior ones, had been a priority of PD. He advised that the level of remuneration payable to junior counsel engaged in the Understudy Programme was set in 2011. He undertook that DoJ would actively consider reviewing the above remuneration level.

41. Dr Junius HO shared the concern of the Bar Association that the standard rate of remuneration for fiat work fell far behind privately-funded work which made it unattractive for more experienced practitioners. He urged DoJ to review the above rate. The Chairman shared that fiat counsel should be remunerated reasonably to ensure the quality of prosecution.

42. In response, DPP said that the approved criminal legal aid fees of the Legal Aid Department was adopted by DoJ as the scale of fees for standard briefing out cases under PD to maintain the equality of publicly-funded prosecution work and defence work. Hence, DoJ had to adjust the fee following the adjustment in the criminal legal aid fees accordingly.

43. Dr Junius HO further asked about the amount of payment for the most expensive non-standard briefing out case in the financial year of 2016-2017. LO(C) replied that DoJ had been providing annual reports to the Finance Committee indicating the fees for engaging barristers in private practice which were not covered by the approved scale of fees. Brief description of case/matter had been provided for civil or criminal cases which incurred \$1 million or above.

Provision of papers to fiat counsel before the trial day

44. Ms YUNG Hoi-yan expressed concern that the case papers were often provided to fiat counsel just one or two days before the trial day. Given that a fiat counsel might have to handle multiple cases on a given day and have to prepare case summaries, she hoped that DoJ would liaise with the law enforcement agencies with a view to providing case papers to fiat counsel well ahead of trial day to allow sufficient time for case preparation and legal research. DPP agreed that there was room for improvement in this respect and said that DoJ had been following up the matter with the law enforcement agencies.

IV. Implementation of the Law Reform Commission of Hong Kong Report on Hearsay in Criminal Proceedings — Evidence (Amendment) Bill 2018

(LC Paper No. CB(4)619/17-18(05) - Administration's paper on implementation of the Law Reform Commission of Hong Kong Report on Hearsay in Criminal Proceedings — Evidence (Amendment) Bill 2018

LC Paper No. CB(4)619/17-18(06) - Paper on implementation of the Law Reform Commission of Hong Kong Report on Hearsay in Criminal Proceedings — Evidence (Amendment) Bill 2018 prepared by the Legislative Council Secretariat (background brief))

Briefing by the Administration

45. Deputy Solicitor General (Policy Affairs) of DoJ ("DSG(P)") recapped the Administration's proposals to implement the recommendations of the Report on Hearsay in Criminal Proceedings ("the Report") published by the Law Reform Commission of Hong Kong in November 2009, which were introduced to the Panel at its meeting on 27 March 2017. He then briefed members on the outcome of the consultation exercise conducted from

21 April to 31 July 2017 ("the Consultation Exercise") which sought the views from various stakeholders on the consultation draft of the Evidence (Amendment) Bill ("the Consultation Bill") to implement the above proposals.

46. DSG(P) explained that the Consultation Bill provided for a comprehensive and principled approach to admissibility of hearsay by way of specifying when hearsay would be admissible. Save for the statutory exceptions and common law rule exceptions preserved by the Consultation Bill or when the relevant parties agreed (or did not oppose) to the admission of hearsay evidence, the court had a discretionary power to admit hearsay evidence if, among others, the conditions of (a) necessity and (b) threshold reliability were satisfied. As a built-in safeguard to protect the integrity of the proceeding, the court was further required to direct a verdict of acquittal of the accused where it considered that it would be unsafe to convict.

47. Assistant Solicitor General (Policy Affairs) (Acting) of DoJ informed members that in the Consultation Exercise, the respondents in general supported the Administration's proposals. Having carefully considered all the comments and suggestions received, DoJ proposed a number of refinements for incorporation into the revised draft of the Evidence (Amendment) Bill ("the Bill"), the major ones were as follows:

- (a) as regards admissibility of evidence, DoJ would review sections 55E and 55G in the Consultation Bill with a view to avoiding any duplication and enhancing conciseness;
- (b) concerning admission of hearsay evidence with leave of court provided in Division 4 of the Consultation Bill, DoJ would replace the word "leave" by "permission";
- (c) in connection with application for leave to admit hearsay evidence, DoJ would review the wording of section 55N(3)(a) in the Consultation Bill and, if necessary, revise the provision to make it clear that the award of costs in this regard did not depend on the outcome of the trial;
- (d) on the subject of condition of threshold reliability, DoJ would revise the wording of section 55P(2) in the Consultation Bill relating to the use of the word "including" as appropriate to clarify the factors to be taken into consideration by the court in deciding whether the condition of threshold reliability was satisfied; and

- (e) DoJ would revise the wording of section 55Q(4) in the Consultation Bill to the effect that the prejudice to the accused which might be caused by the admission of the hearsay evidence would include the inability to cross-examine the declarant.

Views of the Hong Kong Bar Association

48. The Chairman invited Mr Randy SHEK to present the views of the Bar Association. In gist, the Bar Association's main concern was about whether the Bill would incorporate sufficient safeguards to protect the accused's right to fair trial, such as whether all relevant or possibly relevant material available or known to the prosecution, including the admissibility of hearsay evidence, would be fully and timely disclosed to the defence; and whether sufficient notice would be given to all relevant parties to the proceedings when rules of court required the party applying to admit hearsay evidence under the discretionary power. Mr SHEK said that the Bar Association's comments on the Consultation Bill were detailed in its submission to DoJ during the Consultation Exercise.¹

49. In response, DSG(P) advised that for the sake of fairness and justice, the Bill would provide that the party applying to admit hearsay evidence had the burden of proving the condition of necessity according to the required standard of proof, which would be beyond reasonable doubt if the applicant was the prosecution and on the balance of probabilities if the applicant was the accused. Deputy Director of Public Prosecutions supplemented that DoJ would ensure the compliance with the Prosecution Code and would continue to uphold the prosecution's duty of disclosure in each and every case, as the DoJ colleagues had all along been doing. He assured members that DoJ would continue to fulfil its obligation of disclosure to the defence in a full and timely manner, including both used and unused materials that were relevant to the cases.

50. The Deputy Chairman indicated support for the Bill and was pleased to note that DoJ planned to introduce it into the Legislative Council within the current legislative session. He said that the Bar Association representatives had expressed their reservations about the proposed reform in relation to hearsay evidence in criminal proceedings at the previous Panel meetings. He asked whether DoJ's proposed refinements were able to address the Bar Association's concerns raised. If not, he hoped that the Bar Association would submit its views to the Panel and DoJ for consideration as early as practicable so as to facilitate the legislative process for the Bill.

¹ Hyperlink of the Bar Association's comments on the Consultation Bill:
<http://www.hkba.org/sites/default/files/Evidence%20%28Amendment%29%20Bill%202017%20-%20Hearsay%20evidence%20%28webpage%29.pdf> [Accessed October 2018].

51. The Chairman also recalled that the Bar Association representatives had expressed concerns that admission of hearsay evidence might complicate and create uncertainties for the criminal proceedings and thereby put the unprepared defendants at a disadvantaged position, and would undermine the defence counsel's ability to defend the case. Noting that DoJ had carefully considered all the comments and suggestions on various aspects of the Bill provided by the Bar Association and other respondents, she expressed concern if the Bar Association had further comment to make.

52. Mr Randy SHEK replied that after submitting its comments to DoJ during the Consultation Exercise, the Bar Association did not have the opportunity to discuss the issues relating to the Bill again owing to the preparation for the new term of the Bar Association. He said that the Bar Association would further consider the subject and revert to the Panel shortly.

(Post-meeting note: The Bar Association's submission was issued to members on 22 March 2018 via LC Paper No. CB(4)797/17-18(02).)

Protection for mentally incapacitated persons in criminal proceedings

53. Given the withdrawal of prosecution against the defendant in a sexual offence case occurred at a residential care home for persons with disabilities, the Chairman expressed concern whether the passage of the Bill would better protect victims who were mentally incapacitated in similar sexual offence cases in future. She asked DoJ to clearly explain how the Bill would facilitate the course of justice to address public concerns.

54. In reply, DSG(P) advised that the hearsay rule at present might exclude hearsay evidence even if it was cogent and reliable. The inadmissibility of hearsay evidence that was otherwise cogent and relevant to the determination of the guilt or innocence of an accused sometimes resulted in the exclusion of evidence which by standards of ordinary life would be regarded as accurate and reliable. This could result in absurdity and also in injustice. Once the Bill was passed, the situation would be improved as the court had a discretionary power to admit hearsay evidence if the conditions of necessity and threshold reliability were satisfied (i.e. the Core Scheme). As such, hearsay evidence from declarants (such as mentally incapacitated persons ("MIPs"), child victims of sexual violence, witnesses who were dead after giving statements to the police, etc.) who were genuinely unable to provide testimony, might also be admitted. DSG(P) further explained that there were some cases illustrating that hearsay evidence would not only help the prosecution, but also the defence. Indeed, the Bill would be able to strike a fair balance between the fair trial right of the accused and other legitimate interests.

55. Dr Fernando CHEUNG welcomed the implementation of the recommendations set out in the Report as it would enhance protection for MIPs in criminal proceedings. He noted that under the current legislation, the court should grant leave to admit as evidence a video recording made of an interview between a MIP and a police officer, or a social worker or clinical psychologist who was employed by the Government. If the Bill was passed, he enquired whether video recorded interviews conducted between a MIP and persons other than police officers, social workers and Government's clinical psychologists might also be admitted as evidence.

56. DSG(P) responded in positive as a video-recorded interview of a complainant would be a statement that might be admitted under the Bill. Generally speaking, the prosecution would arrange for the complainant, if necessary, to be video interviewed in accordance with the Criminal Procedure Ordinance (Cap. 221), and apply to the court for leave to admit the recording as evidence in accordance with the Live Television Link and Video Recorded Evidence Rules (Cap. 221J). Nonetheless, if the complainant was dead or unfit to be a witness because of his physical or mental condition (i.e. the admission of hearsay evidence became necessary), the Bill would give the court discretion to admit the hearsay evidence of the complainant, on the additional condition that the court was satisfied with the reliability of the evidence.

(At 6:22 pm, the Chairman suggested and members supported extending the meeting for 15 minutes to 6:45 pm.)

Condition of necessity

57. Mr Holden CHOW expressed concern that there might be loopholes for the condition of necessity. Hearsay evidence might be admitted if the declarant was outside Hong Kong and it was not reasonably practicable to secure his attendance, or to make him available for examination and cross-examination in any other competent manner. He was worried that the declarant might hide himself as he was unwilling, but not unable, to give evidence, resulting in depriving defendant of a fair trial.

58. In reply, DSG(P) advised that if the declarant was outside Hong Kong, the prosecution would firstly consider taking evidence by live television link for the purposes of criminal proceedings in Hong Kong under Cap. 221. If not possible, the Bill provided that if the condition of necessity (such as where the declarant could not be found and it was shown that all reasonable steps had been taken to find him) would be satisfied, hearsay evidence might be admitted by the court. DSG(P) further explained that if the declarant was deliberately hiding himself in circumstances which had implication on his

truthfulness, this might be a factor to be taken into account by the court in determining whether condition of threshold reliability was satisfied.

59. The Chairman concluded that the Panel generally supported DoJ to introduce the Bill into the Legislative Council.

V. Any other business

60. There being no other business, the meeting ended at 6:38 pm.

Council Business Division 4
Legislative Council Secretariat
10 October 2018