

# 立法會 *Legislative Council*

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

### **Purpose**

This report which is made in accordance with Rule 77(14) of the Rules of Procedure of the Legislative Council gives an account of the work of the Panel on Administration of Justice and Legal Services ("the Panel") during the 2018-2019 legislative session.

### **The Panel**

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

3. The Panel comprises 19 members, with Dr Hon Priscilla LEUNG Mei-fun and Hon Dennis KWOK Wing-hang elected as Chairman and Deputy Chairman respectively. The membership of the Panel is in **Appendix II**.

### **Major work**

#### Consultation on enactment/amendment of legislation

4. The Panel continued to receive briefings by the Administration and Judiciary Administration and provide views on any major legislative proposals in respect of policy matters relating to the administration of justice and legal services.

*Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill and Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Rules*

5. To implement the "Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region" ("the Matrimonial Arrangement") signed between the Hong Kong Special Administrative Region ("HKSAR") Government and the Supreme People's Court of the Mainland on 20 June 2017, the Administration produced the proposed Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill ("the Bill") and the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Rules ("the Rules"), and launched a public consultation on 8 February 2019 to seek views on the draft of the Bill and the Rules.

6. The Panel was consulted on the draft of the Bill and the Rules at its meeting on 25 February 2019. Members in general supported the Matrimonial Arrangement and the draft of the Bill and the Rules, and urged the Administration to listen to the views collected in the public consultation, in particular those from the stakeholders including the two legal professional bodies, and refine the draft of the Bill and the Rules with a view to introducing them as soon as possible with the ultimate aim of protecting the rights of the affected parties in matrimonial and family disputes cases between the Mainland and Hong Kong.

7. Pointing out the difference between the Hong Kong legal system and that in the Mainland in respect of the power of final adjudication, some members considered it important to make it clear in the legislation on the definition of a legally effective judgment made in the Mainland which would be recognized and enforceable under the Arrangement.

8. At the meeting, members noted the concern of the Hong Kong Bar Association ("the Bar Association") regarding the restriction that registration application must not seek to have the order registered if the non-compliance first occurred more than two years before the application was made ("the two-year restriction") and enquired about the rationale behind. They also noted and agreed to the suggestion of the Bar Association that consideration be given to granting discretionary power to the Court in Hong Kong to extend the two-year restriction for a care-related order (Clause 9(1) of the Bill), and requested the Administration to follow up the suggestion.

9. In reply, the Administration advised that according to the Civil Procedure Law of the People's Republic of China, an application for the enforcement of an effective judgment should be made within two years from the date for performance specified in the judgment or, if no such date was specified, within two years from the date on which the judgment became effective. Where two years had lapsed, the Mainland court would consider if the other party would have any objection to enforcement.

*Proposed legislative amendments for the implementation of the Information Technology Strategy Plan of the Judiciary*

10. At its meeting on 29 April 2019, the Judiciary Administration briefed members on the Judiciary's legislative proposals for the implementation of its Information Technology Strategy Plan ("ITSP"). Members noted that at present, while the Electronic Transactions Ordinance (Cap. 553) was generally applicable in Hong Kong, court proceedings were excluded from the operation of its material provisions (section 13 of Cap. 553). On the other hand, the legislation relating to court procedures, dispersed over a number of Ordinances/rules, did not fully envisage the possibility of electronic mode of handling. Therefore, legislative amendments were needed to implement ITSP.

11. According to the Judiciary Administration, the legislative proposals would only apply to electronic submission of documents that was currently regulated by a written law (proposed to be defined to include Practice Directions) or court's directions.

12. Members were in general supportive of the legislative amendments proposed by the Judiciary. A member opined that Hong Kong had far lagged behind other jurisdictions, such as Singapore, in enabling the perusal of documents by electronic means in court proceedings. In response, the Judiciary Administration explained that as at March 2019, various components under Phase I, Stage 1 of the implementation of ITSP were being progressively rolled out to the District Court and the Summons Courts of the Magistrates' Courts. Other components were scheduled to be rolled out by phases in 2019 and after.

13. The Panel noted that upon the full implementation of ITSP, many traditional manual modes for submission of documents to the court in hard copy would be retained. Some members were concerned that time could not be saved in the electronic environment, and they urged that the Judiciary should make good use of ITSP to improve the waiting times for hearing of cases.

14. In reply, the Judiciary Administration advised that in deciding whether to provide an electronic option for certain court procedures and submission of documents, the convenience made possible with the introduction of ITSP must not compromise the interests or rights of the parties concerned while ensuring fairness of the judicial process and integrity of the documents/processes. As regards some members' concern about information and cyber security, as well as personal data privacy protection, the Judiciary Administration advised that the Judiciary would strictly comply with relevant information technology security policies and guidelines.

*The Law Reform Commission of Hong Kong — Consultation paper on causing or allowing the death or serious harm of a child or vulnerable adult*

15. At its meeting on 27 May 2019, the Panel was briefed by the Sub-committee on Causing or Allowing the Death of a Child or Vulnerable Adult ("the Sub-committee") of the Law Reform Commission of Hong Kong ("LRC") on the consultation paper on causing or allowing the death or serious harm of a child or vulnerable adult.

16. Members noted that the Sub-committee recommended the introduction of a new offence of "failure to protect a child or vulnerable person where the child's or vulnerable person's death or serious harm results from an unlawful act or neglect", and that the Administration should undertake a review of the current maximum penalty applicable under section 27 of the Offences against the Person Ordinance (Cap. 212) with a view to increasing it as appropriate. Some more general observations on matters concerning the protection of children and vulnerable adults which it wished to bring to the attention of the Administration were also set out in the consultation paper.

17. Noting that it was the Sub-committee's recommendation that "child" was defined as "a person under 16 years of age", some members suggested that the definition of "child" should be reviewed as those aged 13 or above might take up certain part-time jobs and those aged 15 or over might take up full-time jobs. The Sub-committee explained that, having reviewed the definitions adopted in several jurisdictions, it decided to follow the one applicable in South Australia and the United Kingdom as explained in the consultation paper.

18. Some members were concerned whether, as the proposed new offence would impose criminal liability on those who failed to take steps to protect a child (under 16 years of age) or a vulnerable person (over 16 years of age) from death or serious harm in circumstances where the defendant owed a duty of care to the victim, domestic helpers and staff members in elderly care homes might be charged with the new offence. The Sub-committee explained that it

was the intention of the proposal that those caring for children or vulnerable persons should be held responsible for harm suffered by them if they knew or should have known the victim was suffering abuse and could have taken steps to prevent it, for example, by removing the victim or reporting the abuse to the authorities. However, it did not propose to add an express reference to, for example, "a staff member of any hospital, institution, or residence where the victim resides" as in the case of New Zealand.

19. Some members also expressed concern whether teachers and neighbours of the victims might be charged with the new offence. The Sub-committee explained that it was not the intention to capture those persons who might have infrequent or limited ongoing contact with the child or vulnerable adult, such as teachers and neighbours. The new offence only took aspects of parental responsibility and extended them to those persons who lived with or were closely connected to the child or vulnerable adult but otherwise had no direct responsibility for the care of the child or vulnerable adult.

#### Access to justice

20. The Panel has all along been calling on the Administration to review legal aid services to improve access to justice. Furthermore, members agreed that the society had long been concerned about the challenges faced by the less advantaged people in accessing assistance services and, therefore, the Panel should discuss the issue of "Community legal assistance in Hong Kong".

#### *Community legal assistance*

21. At the Panel meeting on 26 November 2018, the Administration gave members an overview of the legal aid and free legal advice services provided to the public in Hong Kong, including the legal aid services provided by the Legal Aid Department ("LAD"); free legal assistance and advice services implemented by the Duty Lawyer Service; the Legal Advice Scheme for Unrepresented Litigants on Civil Procedures operated by the Chief Secretary for Administration's Office; and other free legal advice services available to the public.

22. Some members pointed out that the lack of knowledge on community legal assistance among the grassroots and the underprivileged was one of the problems. The Administration advised that it had liaised with those non-governmental organizations ("NGOs") which referred cases to LAD from time to time, to promote an understanding about the legal aid regime in Hong Kong and to understand their needs.

23. Some members considered that the legal representation provided for the defendants in the Magistrates' Courts under the Duty Lawyer Scheme (except committal proceedings) came too late and might cause injustice. In response, the Administration advised that if the defendants needed early legal advice before they could meet their duty lawyers, they could obtain basic information on the legal aspects about criminal procedures and defendants' rights through the Tel-Law Scheme provided by the Duty Lawyer Service. At the same time, the Free Legal Advice Scheme offered by the Duty Lawyer Service was also available to them.

24. Some members were of the view that the number of cases handled under the Free Legal Advice Scheme was too small to cater to the growing needs for free legal advice, and suggested that the Administration should communicate with relevant stakeholders, such as the Owners' Corporations, to step up publicity of the Scheme.

25. In response to members' grave concerns about the long waiting time for meeting volunteer lawyers under the Free Legal Advice Scheme, the Administration advised that the Duty Lawyer Service regularly reviewed and improved the appointment arrangements for the Free Legal Advice Scheme to enhance its efficiency. For cases requiring urgent legal advice, the Duty Lawyer Service would accord priority and arrange a legal advice session as soon as practicable.

26. Regarding a member's suggestion of contracting out the free legal advice services to local law firms to cater to the growing demand for free legal service and to reduce the waiting time, the Administration advised that this might give rise to concerns about possible touting activities. Some members shared the Administration's concerns and pointed out that it would be difficult to ensure that each and every lawyer would strictly comply with the Hong Kong Solicitors' Guide to Professional Conduct against touting.

27. Noting that there might be overlap in the free legal advice services on building management issues being provided by various Government departments and organizations, some members suggested that these services should be consolidated to be provided under the Free Legal Advice Service of the Duty Lawyer Scheme. In response, the Administration explained that the free legal advice services on building management issues being provided by different departments or organizations were serving different specific purposes and hence it was appropriate for continuing their respective legal advice services.

28. Some members expressed concerns about the Administration's progress in following up the recommendations made by the Legal Aid Services Council ("LASC") in 2016 that a publicly funded scheme be made available to ensure that detainees could have access to legal advice on their rights once their liberty was restricted ("LASC's scheme"). In reply, the Administration explained that given the substantial financial and operational implications of the proposed scheme, the relevant bureaux and departments were carefully examining the feasibility and implications of LASC's scheme under various scenarios.

29. In view of the difficulties for the full-scale implementation of LASC's scheme, some members suggested implementing the proposed scheme by phases, starting with detainees at police stations charged with serious offences or the underprivileged, such as mentally incapacitated persons, as a first step. In response, the Administration advised that the suggestion had to be considered carefully as it might be perceived as discriminatory if only certain groups were provided with the services.

#### *Review of the duty lawyer fees*

30. At the meeting on 28 January 2019, the Administration announced its proposal to adjust duty lawyer fees upwards by 56.2% to catch up with the percentage increase in criminal legal aid fees for counsel (after discounting inflation adjustments in the biennial reviews which were based on the changes in Consumer Price Index (C) ("CPI(C)") ("the biennial reviews")) since 1992.

31. The Administration also proposed that the future reviews of criminal legal aid fees other than the biennial reviews would also cover the fees paid to lawyers in private practice engaged by the Department of Justice ("DoJ") to prosecute criminal cases on fiat and the duty lawyer fees (the above three fees will collectively be referred to as "the Fees") in the same exercise to ensure that neither LAD, DoJ nor the Duty Lawyer Service would have an unfair advantage in competing for the same pool of lawyers in the provision of respective services.

32. While the Panel indicated support in general for the Administration's proposals, some members considered that the duty lawyer fees had not been adjusted timely along with the increase in criminal legal aid fees in 2012 and 2016. In this connection, the duty lawyer fees could not catch up with the soaring operating costs for counsel during the period and this had discouraged many young lawyers from practising as barristers. Some members agreed with the Bar Association that future reviews of the Fees, other than the biennial reviews, should be conducted more frequently and regularly to keep them attractive to new lawyers to serve either as criminal legal aid lawyers, fiat counsel and/or participate in the Duty Lawyer Scheme.

33. According to the Administration, the Fees were currently subject to review on a biennial basis which took into account changes in CPI(C) during the reference period. The biennial reviews should therefore be able to address members' concerns that the Fees might become out of tune with inflationary changes in counsel's operating costs.

*Biennial review of criminal legal aid fees, prosecution fees and duty lawyer fees*

34. At the Panel meeting on 28 January 2019, the Administration also briefed members on the outcome of the 2018 biennial review of the Fees, proposing to adjust the Fees upwards by 4% to reflect the accumulated change in CPI(C) recorded between July 2016 and July 2018.

35. The Panel indicated support for the proposed upward adjustments to the Fees by 4%, and urged for their early implementation. Some members shared the view of the Bar Association that, in conducting the biennial review of the Fees, the Administration should not just take into account the general price movement as measured by CPI(C) during the reference period. They pointed out that major elements of counsel's overheads, such as high office rents which could rise by 30% in three years' time, had not been taken into account.

36. Some members shared The Law Society of Hong Kong ("the Law Society")'s view that criminal legal aid fees should be further adjusted to narrow the disparity between the levels of criminal and civil legal aid fees. They considered that the disparity was unreasonable and urged the Administration to improve the situation so as to encourage more lawyers to take up criminal legal aid work. In reply, the Administration explained that since the systems for criminal and civil cases were different, differences between the rates for remunerating legal practitioners in handling criminal and civil legal aid cases were understandable. Furthermore, it was a common phenomenon in overseas jurisdictions that civil legal aid fees were in general higher than criminal legal aid fees.

Policy issues relating to the administration of justice and legal services

*Prosecution policy of the Department of Justice*

37. At the Panel meeting on 28 January 2019, the Administration briefed members on several important aspects of the prosecution policy of DoJ including prosecutorial independence, separation of functions in respect of the investigation of possible offences and the making of prosecution decisions, and how prosecutorial decisions were made. Members were also briefed on the briefing out of criminal cases by DoJ.

38. Various members expressed concerns about whether DoJ had sought outside legal advice before making prosecutorial decisions, while individual members were dissatisfied with the prosecutorial decisions on specific cases. In response, the Administration pointed out that the decisions to prosecute, as the case might be, had to be based on an objective and professional assessment of the available evidence and the law, and be in accordance with the Prosecution Code. It was a norm of DoJ to make prosecutorial decision by members of DoJ in-house, and it was not a norm to seek outside legal advice before a prosecutorial decision was made. The Administration also highlighted with the relevant figures between 2016 and 2018 that the prosecutorial decisions were made by DoJ in a great majority of cases without seeking outside legal advice.

39. The Administration also stressed that it had never been DoJ's policy to seek outside legal advice merely because the person involved in a case was a senior government official or of high social status. As regards a member's questions on how to measure the perception of bias or conflict of interests in deciding whether to seek outside legal advice, the Administration replied that the perception was measured by applying the apparent bias test from the perspective of a reasonable, fair-minded and well-informed person.

40. Some members pointed out that the Secretary for Justice ("SJ") was a politically appointed official, and there was no mechanism to ensure that a criminal case involving a Mainland leader should be briefed out to address possible perception of conflict of interests. In this connection, they asked the Administration to consider the Bar Association's suggestions that, to eliminate any perception of bias in future cases in order to safeguard the rule of law in Hong Kong from erosion, SJ might consider publishing a protocol along the line that except those cases clearly identified in the protocol, all cases of prosecutorial decision-making should be left to the Director of Public Prosecutions of DoJ ("DPP").

41. The Administration considered that the Bar Association's suggestion was not acceptable as it would have fundamental impact on the constitutional arrangement as enshrined in the Basic Law ("BL"). Some members also shared the Administration's view and pointed out that SJ, being the head of DoJ, could not abdicate from his/her constitutional duty under BL63 by transferring all his/her prosecution responsibilities to DPP, which might contravene BL63.

42. Some members were aggrieved by DoJ's slow progress in making decisions to prosecute certain cases, in particular those against participants in the Occupy Central Movement. In response, the Administration explained that it was difficult to make a general reply on the reasons for the relatively

long time taken for making prosecutorial decisions, especially when the relevant legal proceedings was underway. The Administration assured members that SJ and all prosecutors in DoJ, being professional solicitors or barristers, would act independently. Under the Prosecution Code, a prosecutor must not be influenced by, inter alia, the possible political effect on the government, any political party, any group or individual, as well as possible media or public reaction to the decision.

43. Some members queried whether it was appropriate for DoJ not providing detailed reasons for not instituting prosecution in cases which were sensitive, controversial and were possibly perceived by the public that there would be bias or issues of conflict of interests. A member also quoted a former DPP's opinion that disclosing the detailed reasons for not instituting prosecution would help the accused person to prove his/her innocence in a way that the public would understand that the prosecutorial decision had been properly taken.

44. In response, the Administration pointed out that as stated in the Prosecution Code, DoJ was committed to operating in an open and accountable fashion, with as much transparency as was consistent with the interests of public justice. However, the benefit of justice being seen to be done must not be allowed to result in justice not being done. The Administration also stressed that presumption of innocence was an important cornerstone of rule of law. If there was no sufficient evidence to demonstrate a reasonable prospect of conviction for instituting a prosecution against an accused person, that person was innocent who should not be required to prove his/her innocence despite that the media might have alleged him/her as guilty. In this connection, it was unnecessary to disclose the detailed reasons for not instituting prosecution.

45. Some members shared the Law Society's views that, in the interest of greater transparency and accountability, the Prosecution Code should include the six circumstances in general DoJ might resort to briefing out. The Prosecution Code should also include the circumstances under which SJ would delegate the prosecutorial decision-making authority to DPP.

*Proposed arrangement with the Mainland on reciprocal recognition and enforcement of judgments*

46. As of December 2017, Hong Kong has concluded five arrangements with the Mainland in various aspects of mutual legal assistance in civil and commercial matters. According to the Administration, these arrangements were not able to fully address the needs for a clear and comprehensive

reciprocal recognition and enforcement of judgments ("REJ") mechanism arising from the increasingly close interaction and cooperation between the two places in the people-to-people context as well as in terms of trade and economic activities. Against this background, DoJ commenced discussion with the Supreme People's Court with a view to establishing a more comprehensive framework for an REJ arrangement with the Mainland to cover civil and commercial judgments ("the Proposed Arrangement") outside the scope under the Choice of Court Arrangement and the Matrimonial Arrangement.

47. At the Panel meeting on 27 November 2017, the Administration briefed members on the background and key features of the Proposed Arrangement. The Panel generally supported the Proposed Arrangement. Subsequently, on 31 July 2018, DoJ launched a two-month consultation on the Proposed Arrangement. The Administration then briefed members on the results of the consultation exercise and the latest details of the Proposed Arrangement at the Panel meeting on 26 November 2018.

48. Some members considered that the Proposed Arrangement should take the four places on both sides of the Strait into consideration, i.e. the Mainland, Hong Kong, Macao and Taiwan, so that judgments on disputes which had been settled in court in one of the four places would not have to be re-litigated in the other three places owing to the lack of an REJ arrangement.

49. Some members enquired whether Administration had considered the legal sector's suggestions to develop Hong Kong into a centre for providing corporate insolvency and debt restructuring services to other jurisdictions. In response, the Administration advised that DoJ's current plan was to establish an arrangement with the Mainland for the mutual recognition and assistance in cross-border insolvency and debt restructuring, and would conduct a stand-alone consultation exercise on such an arrangement in the first quarter of 2019.

50. A member enquired why the Proposed Arrangement covered disputes between family members on division of property and disputes on property arising from engagement agreements, which were not covered by the Matrimonial Arrangement. In response, the Administration explained that disputes in the Mainland over division of property between family members and those arising from engagement agreements were usually regarded as civil or commercial disputes in Hong Kong rather than as "family or matrimonial" disputes. For this reason, the two types of disputes were covered under the Proposed Arrangement.

51. Some members reiterated their concerns about the impact that the trial supervision mechanism in the Mainland would have on the Proposed Arrangement, and enquired about the arrangement for the recognition and enforcement of a Hong Kong judgment which was under appeal.

52. In response, the Administration explained that while retrial of a case was possible under the trial supervision system in the Mainland, it was very rare. In this connection, a pragmatic approach was taken by which judgments which were legally enforceable under the law of the requesting place would be eligible for recognition and enforcement under the Proposed Arrangement.

53. The Administration further advised that even if a legally enforceable Hong Kong judgment was under appeal, it could be enforced in the Mainland though the relevant Mainland court would have the discretion to suspend the enforcement of a Hong Kong judgment in the Mainland until the relevant appeal proceedings in Hong Kong had been completed.

54. As regards a member's question on whether public interest would be one of the grounds for refusal to recognize and enforce a judgment, the Administration highlighted that it was one of the grounds for refusal under the Proposed Arrangement that recognition and enforcement must be refused if the requested Hong Kong court considered that the recognition and enforcement of the Mainland judgment was manifestly contrary to the basic legal principles of Hong Kong law or the public policy of Hong Kong.

55. The Panel noted the Bar Association's views that the details of certain areas under the Proposed Arrangement such as types of relief, level of court for dealing with the registration application and the arrangements for specific areas of law, had to be further studied.

*Proposed development of an online dispute resolution and deal making platform by non-governmental organization*

56. In the 2018 Policy Address, the Chief Executive indicated support for funding the cost of non-governmental development of an e-arbitration and e-mediation platform so that Hong Kong will be able to provide efficient and cost-effective online dispute resolution ("ODR") services.

57. The Administration briefed the Panel on 25 March 2019 the proposal to provide one-off funding support of HK\$150 million for the development of an Electronic Business Related Arbitration and Mediation ("eBRAM") Platform by the non-governmental eBRAM Centre. According to the Administration, HKSAR would be able to provide efficient and cost-effective ODR and deal

making services through the eBRAM platform, which would also provide business opportunities for professionals and Micro, Small and Medium-sized Enterprises ("MSMEs") both locally as well as under the Belt and Road and the Greater Bay Area Initiatives.

58. Some members enquire why funding support was provided to the eBRAM Centre to develop an ODR and deal making platform rather than other NGOs. In response, the Administration explained that, with its founding members from the Bar Association, the Law Society, Asian Academy of International as well as the innovation and technology sector (i.e. the Logistics and Supply Chain MultiTech R&D Centre), the eBRAM Centre was the only local NGO taking active steps to develop and promote a full spectrum of ODR services at the present moment.

59. The Administration further advised that eBRAM Centre was the only local ODR services provider invited by the Asia-Pacific Economic Cooperation (APEC) workshop organizers to participate in their meetings and workshops. Having regard to its wide representation, expertise, competency, practical experience and strong commitment in developing ODR services, the eBRAM Centre was considered the most suitable local NGO to take forward the development and implementation of the eBRAM platform in line with the government policy.

60. The Panel was concerned about the monitoring of the development of the eBRAM platform and its initial operation. In response, the Administration advised that it would closely monitor the operation of the eBRAM Centre and its development of the eBRAM platform, and evaluate its effectiveness after it was launched. Government representatives would be appointed to the Board of Directors of the eBRAM Centre to enhance its governance and the eBRAM Centre would be required to report its implementation progress and relevant issues to the Administration from time to time.

61. In response to some members' enquiry as to how the eBRAM platform could address the needs for simplified procedures for claims under the value of US\$500,000 as reflected in a recent international arbitration survey, the Administration advised that as the eBRAM platform would provide a low-cost platform which allowed cross-border dispute resolution to be conducted, it would bring significant benefits to MSMEs which accounted for about 98% of the businesses in Hong Kong.

62. Some members were wary about the actual benefits that eBRAM platform could bring to local professionals, especially if the services were mainly used by overseas parties in the future. They were also concerned

whether the eBRAM platform would adversely affect the job opportunities of local professionals and competed with the existing arbitral institutions in Hong Kong.

63. The eBRAM Centre responded that currently, without a well-recognized ODR platform that provided the possibility of cost-effective ODR services, some local professionals were missing out opportunities to handle arbitration and mediation cases for MSMEs where the disputed sum was relatively low. With the launch of the eBRAM platform, more job opportunities would be created for local professionals. It would also provide a valuable opportunity for Hong Kong to showcase its excellent legal foundation in the Asia-Pacific region.

64. The eBRAM Centre further advised that arbitral institutions in Hong Kong, including the Hong Kong International Arbitration Centre ("HKIAC"), welcomed the development of eBRAM platform. The eBRAM Centre maintained close liaison and collaboration with existing arbitral institutions, including HKIAC and Hong Kong Maritime Arbitration Group, and would allow them utilize the eBRAM platform. This arrangement would enhance the synergy between the existing arbitral institutions and the eBRAM Centre, and elevate the dispute resolution services in Hong Kong to scale new height.

65. Some members expressed concerns about the affordability of the eBRAM platform fees for local MSMEs. The Administration advised that MSMEs might consider the estimated average fee for the arbitration service to be provided through the eBRAM platform, i.e. HK\$38,000 reasonable when compared to the average value of dispute at US\$50,000. The eBRAM Centre also explained that with the application of modern technology and strong leadership of the eBRAM Centre, it was believed that the eBRAM platform would be able to provide efficient and cost-effective ODR services to local MSMEs.

66. Some members suggested that the eBRAM Centre might encourage MSMEs to specify using the eBRAM platform for cross-border dispute resolution in their contracts. The eBRAM Centre advised that as the eBRAM platform was also developed to facilitate deal making, MSMEs would be encouraged to do so when entering into agreements with other parties.

67. Other concerns raised by members included the enforceability of the arbitral awards made through the eBRAM platform, measures to promote the eBRAM platform so as to ensure its smooth running when launched, and the security and privacy protection features of the eBRAM platform, which the Administration and eBRAM Centre had addressed at the meeting. The Panel

supported the Administration's submission of the Proposal to the Finance Committee for consideration.

### Manpower and other support for the Judiciary

#### *2018-2019 judicial service pay adjustment*

68. At the meeting on 29 October 2018, the Panel was briefed on the judicial service pay adjustment for 2018-2019. Members noted that the Chief Executive in Council had, on the recommendation of the Standing Committee on Judicial Salaries and Conditions of Service, decided that the pay for Judges and Judicial Officers ("JJOs") for 2018-2019 should be increased by 4.69%. The Panel supported the Administration's submission of the funding proposal to the Finance Committee for consideration.

69. Some members found it difficult to accept that, with the judicial service pay adjusted upward and the conditions of service for JJOs enhanced to attract outside talents to join the Bench, there were still eight vacancies of judges in the Court of First Instance ("CFI") level. They also considered that engaging temporary judicial resources, such as internal/external deputy and temporary or acting JJOs, was only short-term palliative and the Judiciary should fill all the available vacancies at the CFI level as soon as practicable to solve the manpower shortage in the long run.

70. In response, the Administration advised that the Judiciary had launched the recruitment exercise for the CFI Judges in June 2018, and was planning to conduct the next round of recruitment exercises for District Judges and Permanent Magistrates by end 2018 and in the first half of 2019 respectively. Members were assured that the Administration and the Judiciary Administration would monitor the results of the recruitment exercises at various court levels and assess the effectiveness of the upward pay adjustments following the 2015 Benchmark Study as well as the enhanced package of benefits and allowances introduced since April 2017.

71. With a view to alleviating judicial manpower shortage, a member suggested relaxing or lifting the prohibition against judges' return to private practice, and considered that it should help attract more legal practitioners in the private practice to join the Bench. The Administration replied that this would have a significant impact on a long established practice to maintain judicial independence, and should be considered with due care and prudence.

*Employment opportunities and system in the Judiciary for law students and legal practitioners*

72. At the invitation of the Panel, the Judiciary Administration briefed members at its meeting on 19 December 2018 on the employment opportunities and system in the Judiciary for legal practitioners and law students.

73. Members noted that, apart from engaging members of the legal profession for substantive appointments as JJOs and for judicial duties on a temporary basis (i.e. deputy JJOs), the Judiciary also employed legal practitioners and legally qualified assistants to provide legal and professional support to JJOs for their discharge of judicial duties through the Scheme on Judicial Assistants ("JDAs") for the Court of Final Appeal, the Scheme on Judicial Associates ("JudAs") for the High Court ("HC"); and as professional staff for the Executive Body of the Judicial Institute.

74. The Judiciary Administration briefed members on the entry requirements and remuneration for JDAs and JudAs, the recruitment procedures, terms of appointments and their normal duties. Some members commended the Scheme on JDAs and the Scheme on JudAs as they provided valuable working experience in the Judiciary for law graduates and legal practitioners respectively. With their valuable experience gained from these schemes, JDAs and JudAs should be good sources of judicial manpower for appointment as JJOs in the future. They hoped that the schemes would be expanded with more JDAs and JudAs recruited.

75. In reply, the Judiciary Administration advised that the Scheme on JDAs and the Scheme on JDAs had been expanding in recent years and the Judiciary would actively consider the possibility of recruiting more JDAs and JudAs.

76. Some members were interested in the operation and functions of the Judicial Institute, and the roles of the legally qualified professionals other than JJOs in the Judicial Institute. In response, the Judiciary Administration advised that legally qualified professionals with relevant experience in legal profession training were recruited as the Directors and Counsel of the Executive Body of the Judicial Institute. They provided dedicated legal and research support to JJOs and assisted in the planning and provision of judicial training in various areas, but did not conduct training themselves.

Issues of concerns to the legal profession

*Cooperation between the Hong Kong Special Administrative Region and the Mainland on arbitration-related matters*

77. At its meeting on 29 April 2019, the Administration briefed members on the latest development of co-operation between HKSAR and the Mainland on arbitration-related matters. The Panel noted that DoJ had signed the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR* with the Supreme People's Court, such that parties to arbitral proceedings administered by Hong Kong's arbitral institutions would be able to apply to the Mainland courts for interim measures. Some members considered that this would enhance Hong Kong's competitiveness in international arbitration services.

78. A member expressed concern whether, under the Mainland laws, wholly owned Hong Kong enterprises and joint ventures set up by Hong Kong investors in the Mainland were not allowed to submit a dispute to an arbitral institution outside the Mainland (e.g. an arbitral institution in Hong Kong) for arbitration owing to the absence of foreign-related elements.

79. Pointing out that the three law schools had been offering programmes on arbitration for years, some members expressed concern that many people who had obtained the qualification as an arbitrator were not practising as arbitrators. They urged the Administration to provide opportunities for those people to handle arbitration work and involve them in the development of Hong Kong's arbitration services.

80. Some members pointed out that, owing to the restriction under article 11.2 of the HKIAC Administered Arbitration Rules ("the HKIAC Rules") that a sole or presiding arbitrator should not have the same nationality as any party to an arbitration where the parties were of different nationalities, arbitrators holding an HKSAR Passport were not allowed to handle arbitration cases if one party to an arbitration was from the Mainland. The above restriction had made it difficult for the Administration to develop Hong Kong's arbitration services on the Mainland.

81. The Administration informed member that it had already liaised with HKIAC on the above concern. HKIAC was going to attach in the new version of the HKIAC Rules effective in 2019 the Practice Note on Appointment of Arbitrators which would specify that Hong Kong had a legal system separate from that of Mainland China, and in cases in which at least one party was from

Mainland China, the holder of an HKSAR Passport might be appointed as sole or presiding arbitrator, provided that none of the parties objected within a time limit set by HKIAC. The Administration also undertook to review with HKIAC on whether the above measure was effective to address the concern.

82. Some members were concerned that although a sole or presiding arbitrator could have the same nationality as any party with mutual agreement by all parties under the new version of the HKIAC Rules, such mutual agreement would be difficult to obtain from parties who had little incentive in engaging Hong Kong's arbitrators. The Administration advised that there should be incentives for engaging Hong Kong's arbitrators as they were biliterate. The Chairman also pointed out that the common law system adopted in Hong Kong was strength for choosing Hong Kong as the seat for arbitration, which should be promoted by the Administration.

*Opportunities for Hong Kong's legal and dispute resolution services in the Greater Bay Area*

83. At its meeting on 25 March 2019, the Administration briefed members on how Hong Kong's legal and dispute resolution professionals might leverage opportunities in the development of the Guangdong-Hong Kong-Macao Greater Bay Area and the capacity building work carried out by DoJ and the legal sector. Members also listened to the views of representatives of the Bar Association and the Law Society.

84. The Panel indicated support for developing Hong Kong's legal services in the Greater Bay Area. Some members noted that the Mainland laws did not expressly allow wholly owned Hong Kong enterprises or joint ventures set up by Hong Kong investors on the Mainland to apply Hong Kong law for dispute resolution. They asked how Hong Kong law could be applied in the Mainland courts in the Greater Bay Area given the different jurisdictions and legal proceedings between Hong Kong and the Mainland courts.

85. Pointing out that "jurisdiction of the court" and "choice of law" were two different concepts, the Administration explained that Hong Kong courts could handle dispute cases under a foreign contract which specified Hong Kong law as the governing law of the contract whilst, under the current Mainland laws, the relevant parties in a foreign-related case might expressly choose laws applicable to the case.

86. Some members noted with concern that only 11 out of the more than 900 local law firms, the majority of which were medium and small-sized, had formed associations with Mainland law firms in the form of partnership. They

urged that the Administration should provide more information about the opportunities in the Greater Bay Area to facilitate the setting up of associations in the form of partnership between local and Mainland law firms of similar scale.

87. Some members hoped that the Administration would actively explore with the Mainland ways to allow more Hong Kong solicitors and barristers with training in common law to participate in appropriate cases concerning Hong Kong (e.g. cases where Hong Kong law was applicable) as advocates in the courts of the Greater Bay Area. They shared the view with the Bar Association and the Law Society that a simplified accreditation standard could be established for Hong Kong solicitors and barristers who would like to practise in the Greater Bay Area.

88. In this connection, the Panel noted the Law Society's suggestion that Hong Kong solicitors who had more than 15 years' experience in specialized field, e.g. cross-boundary investment cases, should be exempted from taking any Mainland examination or be allowed to take a special examination with less stringent standard than that of the National Judicial Examination, so as to be qualified to practise in the Greater Bay Area in specified field(s).

89. The Panel noted the Bar Association's views that, whilst the number of Hong Kong legal practitioners who had acquired Mainland legal professional qualification was increasing, the scope of practice for them was not on par with that of Mainland lawyers, e.g. they could not appear in Mainland courts as advocates. The Bar Association considered that such restriction on the scope of practice should be reduced as far as possible, and a list should be provided to qualified Hong Kong practitioners setting out those areas which they could not practise in.

90. Members also noted the additional measures suggested by the Law Society to encourage the formation of more partnership associations between Hong Kong and Mainland law firms. They included lowering the current threshold of total capital injection required for the formation of partnership association, relaxing the capital injection ratio of Hong Kong partner firm and allowing the ratio to be determined by mutual agreement between Hong Kong and Mainland partner firms, and allowing individual lawyers of the two places to set up associations in the form of partnership.

91. The Law Society also suggested that tax concessions/incentives should also be provided to encourage the formation of more partnership associations between Hong Kong law firms and Mainland law firms. The Administration should also attract the legal departments of state-owned and private enterprises

on the Mainland to set up their branch offices in Hong Kong. In this way, the enterprises would be more inclined to choose Hong Kong law as the governing law of the contracts and use Hong Kong as the place of arbitration and mediation. Furthermore, the Administration should also render support to the arbitration and mediation services in Hong Kong, such as providing financial support for the training of arbitration talents and accommodation of arbitration institutes.

#### Other issues

92. During the session, the Panel also discussed legal education and training in Hong Kong; implementation of the recommendations made by LRC; LRC's consultation papers on archives law and access to information; the United Nations Convention on Contracts for the International Sale of Goods and its application to HKSAR; and the proposed amendments to the High Court Ordinance (Cap. 4) to facilitate the more efficient handling of cases, including those relating to non-refoulement claims.

93. The Panel was also consulted on the following staffing proposals in DoJ and the Judiciary:

#### Department of Justice

- (a) creation of one permanent post of Principal Government Counsel (DL3) in SJ's Office to strengthen support in enhancing Hong Kong's role as an ideal hub for deal making and a leading centre for international legal and dispute resolution services in the Asia-Pacific Region;
- (b) creation of one permanent post of Deputy Principal Government Counsel (DL2) ("DPGC") in the LRC Secretariat of the Legal Policy Division ("LPD") to strengthen the legal support provided to LRC to expedite its work in making and implementing recommendations on reform of the law;
- (c) upgrading of one Assistant Principal Government Counsel (DL1) post to DPGC in the Policy Affairs ("PA") Sub-division of LPD to cope with the increased level of variety, breadth, depth, and complexity of the existing and additional workload; and

- (d) creation of one supernumerary post of DPGC for a period of five years in the PA Sub-division of LPD to cope with the upsurge in workload arising from new and existing projects;

#### The Judiciary

- (a) creation of three judicial posts of Judge of the District Court (JSPS 13) to cope with the increased workload in the Family Court; and
- (b) creation of one Administrative Officer Staff Grade ("AOSG") B1 post (D4) and one AOSGC post (D2) to strengthen the directorate structure of the Judiciary Administration.

94. The Panel supported their submissions to the Establishment Subcommittee for consideration and the Finance Committee for approval.

#### **Meetings held and visit conducted**

95. From October 2018 to July 2019, the Panel held a total of ten meetings. The Panel conducted a visit to the Judiciary on 21 May 2019 and exchanged views with the Chief Justice of the Court of Final Appeal, Hon Chief Justice Geoffrey MA Tao-li; the Permanent Judge of the Court of Final Appeal, Hon Justice Andrew CHEUNG Kui-nung; the Acting Chief Judge of HC, Hon Justice Wally YEUNG Chun-kuen; and the Judiciary Administrator, Miss Emma LAU Yin-wah, at the HC Building. They exchanged views on issues of mutual concern, including extension of the retirement ages and terms of office of JJOs; problems encountered by the Judiciary in recruiting JJOs and its solutions; measures to protect the safety of court building users; latest progress of the two projects to construct the new HC and the new District Court; and issues faced by the courts in handling more controversial cases.

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

**Terms of Reference**

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

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

**Membership list for the 2018-2019 session**

**Chairman** Dr Hon Priscilla LEUNG Mei-fun, SBS, JP

**Deputy Chairman** Hon Dennis KWOK Wing-hang

**Members** Hon James TO Kun-sun  
Hon Starry LEE Wai-king, SBS, JP  
Hon CHAN Kin-por, GBS, JP  
Hon Paul TSE Wai-chun, JP  
Hon CHAN Chi-chuen  
Dr Hon Fernando CHEUNG Chiu-hung  
Hon Martin LIAO Cheung-kong, GBS, JP  
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, BBS, JP  
Dr Hon Junius HO Kwan-yiu, JP  
Hon Holden CHOW Ho-ding  
Hon YUNG Hoi-yan, JP  
Hon CHEUNG Kwok-kwan, JP  
Hon HUI Chi-fung

(Total : 19 members)

**Clerk** Mr Lemuel WOO

**Legal adviser** Mr YICK Wing-kin

\* Changes in membership are set out in Annex to Appendix II.

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

**Changes in membership**

<b>Member</b>	<b>Relevant date</b>
Hon CHAN Chun-ying, JP	Up to 14 October 2018
Hon Wilson OR Chong-shing, MH	Up to 14 October 2018
Hon Vincent CHENG Wing-shun, MH, JP	Up to 14 October 2018
Hon Tommy CHEUNG Yu-yan, GBS, JP	Up to 15 October 2018
Hon Steven HO Chun-yin, BBS	Up to 15 October 2018
Hon Jeffrey LAM Kin-fung, GBS, JP	Up to 15 October 2018
Hon LEUNG Che-cheung, SBS, MH, JP	Up to 15 October 2018
Hon Tony TSE Wai-chuen, BBS	Up to 15 October 2018
Hon Abraham SHEK Lai-him, GBS, JP	Up to 17 October 2018
Hon Kenneth LAU Ip-keung, BBS, MH, JP	Up to 17 October 2018
Hon CHAN Han-pan, BBS, JP	Up to 17 October 2018
Hon Frankie YICK Chi-ming, SBS, JP	Up to 18 October 2018
Hon YIU Si-wing, BBS	Up to 18 October 2018
Hon Alice MAK Mei-kuen, BBS, JP	Up to 18 October 2018
Hon KWOK Wai-keung, JP	Up to 18 October 2018
Hon HO Kai-ming	Up to 18 October 2018
Hon LUK Chung-hung, JP	Up to 18 October 2018