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(These minutes have been seen by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 23 November 2009, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Dr Hon Margaret NG (Chairman) Dr Hon Philip WONG Yu-hong, GBS Hon LAU Kong-wah, JP Hon Emily LAU Wai-hing, JP Hon Timothy FOK Tsun-ting, GBS, JP Hon TAM Yiu-chung, GBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon LEUNG Kwok-hung Hon IP Wai-ming, MH Hon Paul TSE Wai-chun
Members absent	:	Hon Albert HO Chun-yan (Deputy Chairman) Hon James TO Kun-sun Hon Miriam LAU Kin-yee, GBS, JP Dr Hon Priscilla LEUNG Mei-fun
Public Officers attending	:	Item V Administration Wing, Chief Secretary for Administration's Office Miss Jennifer MAK Director of Administration Miss Agnes WONG Deputy Director of Administration Department of Justice Mr Ian Wingfield Solicitor General

Attendance by invitation	:	Item IV The Law Reform Commission of Hong Kong Mr Anthony Neoh, SC Chairman of the Class Actions Sub-committee Mr Thomas Edward KWONG Member of the Class Actions Sub-committee Mr Byron LEUNG Secretary to the Class Actions Sub-committee Items IV and V Hong Kong Bar Association Mr Russell Coleman, SC Chairman Mr P Y LO Council Member	
Clerk in attendance	:	Miss Flora TAI Chief Council Secretary (2)3	
Staff in attendance	:	Mr KAU Kin-wah Assistant Legal Adviser 6 Mr Watson CHAN Head, Research and Library Services Division Dr Yuki HUEN Research Officer 8 Ms Amy YU Senior Council Secretary (2)3 Mrs Fonny TSANG Legislative Assistant (2)3	} For item IV only

Action

I. Confirmation of minutes of meeting
[LC Paper No. CB(2)190/09-10]

The minutes of the meeting held on 15 October 2009 were confirmed.

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II. Information papers issued since last meeting

2. Members noted that the Law Society of Hong Kong's third report on the progress of the review of the Professional Indemnity Scheme [LC Paper No. CB(2)148/09-10(01)] had been issued since the last meeting.

III. Items for discussion at the next meeting

[LC Paper Nos. CB(2)308/09-10(01) - (03)]

Work plan of the Panel

3. The Chairman informed members that she had met with the Administration to discuss the work plan of the Panel for the current session on 10 November 2009. Based on the discussion, the Secretariat had prepared a "List of items tentatively scheduled for discussion at Panel meetings in the 2009-2010 session" [LC Paper No. CB(2)308/09-10(01)].

Discussion items for the regular meeting in December 2009

4. Members agreed to discuss the following items at the next regular meeting to be held on 15 December 2009:

(a) Drafting of legislation;

(b) Limited liability partnerships for legal practice;

(c) Proposal for creation of two permanent posts of Deputy Principal Government Counsel in the Department of Justice; and

(d) Proposed construction of additional courtrooms and associated facilities in the High Court Building.

Special meeting in January 2010

5. Members agreed that a special meeting be held on 15 January 2010 at 4:30 pm to discuss the following legal aid-related items and that all other Legislative Council (LegCo) Members be invited to attend the meeting:

(a) Research report on "Legal aid systems in selected places";

(b) Independent statutory legal aid authority; and

(c) Legal Aid in Criminal Cases Rules.

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6. Regarding item (a) referred to in paragraph 5 above, members also agreed to invite the organisations which had submitted written views on the research report to join the discussion of the item.

IV. Class actions

[Consultation Paper on Class Actions published by the Class Actions Sub-committee of the Law Reform Commission of Hong Kong on 5 November 2009 (issued vide LC Paper No. CB(2)222/09-10)

Executive Summary of the Consultation Paper on Class Actions (LC Paper No. CB(2)222/09-10(01))

Research report on "Class action in selected places" (RP01/09-10)]

Briefing on the research report on "Class action in selected places"

7. Head of Research and Library Services Division of the LegCo Secretariat (RLSD) briefed the meeting on the research report on "Class action in selected places" (Research Report) by way of a power-point presentation. Members noted that the Research Report had studied the class action and group litigation schemes in the United States (US), Australia and the United Kingdom (UK), and the major issues studied included commencement of proceedings, case management, trial and judgment, settlement, assessment and distribution of monetary relief, and costs and funding of litigation.

(*Post-meeting note*: The Chinese version of the Research Report and the power-point presentation materials provided by RLSD were tabled at the meeting and issued to members vide LC Paper Nos. CB(2)365/09-10 and CB(2)356/09-10(01) respectively on 24 November 2009.)

Briefing on the Consultation Paper on Class Actions

8. Mr Anthony Neoh, SC, Chairman of the Law Reform Commission (LRC)'s Class Actions Sub-committee (the Sub-committee), briefed members on the recommendations of the Sub-committee. Mr Neoh said that under the current law in Hong Kong, the sole machinery for dealing with multi-party proceedings in Hong Kong was a rule on representative proceedings under the Rules of the High Court (Cap. 4A). The requirement that all class members had to show identical issues of fact and law meant that few actions could be brought under the representative actions rule. In view of the restrictions and inadequacies of the existing rules in dealing with large-scale multi-party situations and after making reference to the representative proceedings and class action regimes in other jurisdictions, the Sub-committee believed that there was a convincing case for the introduction of a comprehensive regime for multi-party litigation to enhance access to justice.

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Opt-out procedure

9. Mr Neoh elaborated that a major issue in the design of a multi-party litigation regime was how the members of the class should be determined. In this regard, the Sub-committee recommended that an "opt-out" approach be adopted, as it was more efficient and helped achieve finality and closure of issues among the parties. Under the "opt-out" approach, once the court certified that a case was suitable for class action, any member of the class, as defined in the order of court, would be automatically bound by the subsequent litigation, unless he "opted out" of the class action within the time limit prescribed by the court order. To enable members of the class to decide whether to opt-out, they would be notified of the class action by means such as publication in newspapers and posting onto a dedicated class action website page.

Case management by the court

10. Mr Neoh further said that another major feature of a class action regime was the broad general management powers given to the court to deal with complex issues involved in class action proceedings. The Sub-committee proposed that features which facilitated active case management by the court, including the court encouraging the parties to seek alternative dispute resolution where appropriate, should be incorporated into the class action procedural rules.

Funding for the class actions regime

11. Mr Neoh went on to say that funding for the costs of class action litigation was a crucial issue which would determine whether the procedure would be utilised at all. He highlighted the following funding models for the proposed class action regime:

Short-term funding mechanisms

(a) Consumer Council's Consumer Legal Action Fund – On the basis of the present framework of the Fund, the Government could inject additional funds into the Fund to cover class action proceedings in consumer claims;

(b) Extension of legal aid – The existing statutory framework only allowed the granting of legal aid on an individual basis. If a legally aided person agreed to act as the representative plaintiff in a class action, the Director of Legal Aid (DLA) would only be responsible for the portion of the costs incurred by the legally aided person as if he was pursuing the action on an individual basis, i.e. DLA would not be liable for the additional costs incurred by the class action proceedings. Legislative amendments could be introduced to extend the current legal aid schemes to cover class actions proceedings;

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Long-term funding mechanism

(c) Establishment of a general class action fund - A special public fund which could make discretionary grants to all eligible class action plaintiffs and which in return the representative plaintiffs must reimburse from proceeds recovered from the defendants; and

(d) Litigation funding companies – If litigation funding companies were to be allowed in Hong Kong, legislation would be necessary to recognize and regulate them, as well as to clarify what activities were approved in commercial third party funding of litigation.

Treatment of public law cases

12. Mr Neoh advised that the Sub-committee recommended that the class action procedure be available in the context of both private and public law litigation. The Sub-committee considered that the existing system for initiating public law cases by way of judicial review under section 21K(1) of the High Court Ordinance (Cap. 4) and Order 53 of the Rules of the High Court should be maintained and that any group litigation regime should be built upon it.

Views of the Hong Kong Bar Association

13. Mr Russell Coleman, Chairman of the Bar Association, said that the problem faced by other jurisdictions in relation to cases involving numerous litigants with small claims had to some extent been mitigated in Hong Kong by the existence of the Small Claims Tribunal. In considering the need for the introduction of a class action regime in Hong Kong, it was necessary to weigh up the potential benefits to access to justice and the potential risks of bringing in the regime as identified in the Consultation Paper. An area that called for special attention was funding for class action litigation. While recognizing that the proposed class action scheme would only be effective if there was a proper method of funding, the Consultation Paper also highlighted the potential risks that came from certain types of funding. He stressed that the issue of funding for litigation went beyond merely class action cases and any step taken in relation to funding in the class action context would impact upon other aspects of the litigation system.

14. Mr P Y LO, member of the Bar Council, informed the Panel that he was a member of the subcommittee formed under the Bar Council to study the Consultation Paper. The subcommittee would submit its views to the Bar Council in due course.

15. Mr LO said that he noted the concern expressed in the Consultation Paper that the application of the class action regime to public law cases would pose a constitutional problem in relation to the interpretation of the Basic Law (BL), as it would in practical terms negate the effect of an interpretation of BL by the Standing Committee of the National People's Congress (NPCSC) under BL 158. In his view, as the difficulty concerned only constitutional cases relating to the interpretation of

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BL, it was not necessary to have a blanket exclusion of all public law cases from the class action regime, and consideration could be given to excluding only those cases involving interpretation of BL which could be dealt with by the existing case management techniques of the court.

16. Mr LO further expressed reservation about the Sub-committee's recommendation that the class action system would first apply to cases in the Court of First Instance and extend to the District Court after at least five years. He pointed out that as most of the class action cases would not involve significant amount of claims, it might be more cost-effective to hear the cases at the District Court rather than the Court of First Instance.

Discussion

17. The Chairman asked whether the disputes concerning the Lehman Brothers-related minibonds were suited to be dealt with by a class action procedure.

18. Mr Anthony Neoh explained that in a class action, a representative plaintiff sued on his own behalf and on behalf of the other persons ("the class") who had a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who had claims that shared questions of law or fact in common with those of the representative plaintiff. Hence, whether the claims of the complainants concerning Lehman Brothers investment products could be handled by class action would depend on whether the complainants shared the same questions of law or fact. By way of illustration, if the complainants shared the same cause of action of alleged misrepresentation of the investment products in the prospectus, they might be able to take class action. On the other hand, complaints against alleged mis-selling of products by individual staff of retail banks might not be suitable for a class action procedure as individual circumstances pertaining to mis-selling might differ in each case. He stressed that class action might not be the most suitable and cost-effective means of resolving disputes. Sometimes it might be in the interest of the plaintiffs to resolve the disputes by mediation and arbitration instead of court proceedings. In UK, a Financial Ombudsman Service had been set up to settle individual complaints between consumers and businesses providing financial services through alternative disputes resolution, which had proven to be a cost-effective means of resolving consumer complaints.

19. Dr Philip WONG expressed support for the introduction of a class action regime. He was, however, concerned about potential abuse of the class action procedure and enquired about measures to avoid such abuse.

20. Mr Anthony Neoh responded that the Sub-committee was well aware of the risk that a class action regime might unduly encourage litigation and considered it important that procedural safeguards be established to avoid potential abuse. One of the major procedural safeguards was the proposed certification system for class actions, under which the court would examine whether certain criteria were fulfilled before authorizing the commencement of a class proceeding. He pointed out that the

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cost rules and funding mechanism of a class action regime would have significant bearing on the issue of abuse. In US, lawyers were permitted to take on class actions on the basis of a contingency fee agreement, under which the lawyers did not receive payment of any kind unless the claim was successful. Furthermore, successful litigants were ordinarily not entitled to costs. Given the lack of costs barrier, the class action regime in US was more susceptible to abuse. The Sub-committee recommended that the "costs follow the event" rule be retained in the proposed class action regime in Hong Kong, which would help discourage unnecessary and unmeritorious litigation. To guard against potential abuse of the process of the court, the Sub-committee had also recommended that a cautious approach be adopted in implementing the class action regime, with the extension of the District Court jurisdiction to hear class actions be deferred for a period of at least five years until a body of case law of the Court of First Instance on the new procedure had been established.

21. The Chairman said that the Consultation Paper had highlighted some of the potential risks of adopting a class action regime in Hong Kong. One such risk was the considerably higher litigation costs for class action proceedings than individual proceedings, which might wipe out the amount of any compensation and expose the plaintiffs to the potential liability for large amount of costs. There was also the risk that the successful defendant would not be able to recover his costs from an impecunious plaintiff acting as the class representative. She enquired how the Sub-committee proposed to tackle such problems.

22. Mr Anthony Neoh responded that under the proposed system, the court would play a major role in filtering out cases which were not suitable for class action. A certification process would be incorporated whereby the court would be granted the power to decide if a class action should proceed. To minimise potential abuse of the process, the representative plaintiff would have to satisfy the court of five major certification criteria before the class action could proceed, including the criterion that the representative plaintiff should have adequate standing and ability to represent the interests of the class of claimants and the so called “superiority” criterion that the class action was the most appropriate legal vehicle to resolve the issues in dispute.

23. The Chairman said that costs of litigation was a crucial issue in class action proceedings. Little could be achieved by a class action regime unless suitable means could be found to fund plaintiffs of limited means. In this regard, it was suggested in the Consultation Paper that the Consumer Legal Action Fund be extended to cover class action litigation in consumer claims. She sought elaboration on the proposal.

24. Mr Anthony Neoh said that the Sub-committee was of the view that consumer claims were peculiarly suitable for class action litigation and priority should be given to funding class action litigation in this area. As an established mechanism was already in place under the Consumer Legal Action Fund to provide financial support and legal assistance for aggrieved consumers to obtain legal remedies, the Sub-committee proposed that, in the short term, consideration be given to expanding the scope of the Fund to provide legal assistance in class actions proceedings in

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consumer claims, with additional resources to the Fund to be provided by the Administration. As he had mentioned earlier at the meeting, the existing legal aid regime could also provide a viable source of funding for class action in the short term in cases where the representative plaintiff was eligible for legal aid; but DLA would only be responsible for the costs attributable to the legally aided plaintiff.

25. Mr TAM Yiu-chung said that the introduction of a class action regime would allow consumers and small investors of similar background to take collective action against a large multinational corporation or a governmental body. To expedite the introduction of a class action regime, he considered that, as a first step, sectorial funds should be set up to fund class actions in different sectors. Mr Anthony Neoh responded that it was viable to do so. The Administration could set up funds in certain sectors first to test out the operation of class actions.

26. The Chairman said that the Sub-committee seemed to have reservation about including public law cases in the proposed class actions regime having regard to the special constitutional position of the Hong Kong Special Administrative Region (HKSAR) in relation to the interpretation of BL. According to her understanding, if NPCSC had issued an interpretation of the relevant provisions of BL which had the effect of reversing an earlier decision of the Court of Final Appeal (CFA), judgments previously rendered would not be affected by the interpretation. However, the principle that judgments previously rendered were not affected by an interpretation of NPCSC only applied to the actual parties to concluded litigation. She enquired how the introduction of a class action regime to public law cases would impact on the current constitutional position in relation to the interpretation of BL.

27. Mr Anthony Neoh clarified that the Sub-committee did not object to the adoption of the class action procedure in public law litigation. In the light of the special constitutional position in Hong Kong, there were arguments for and against the exclusion of public law cases from the class action regime. It had been suggested that a class action regime adopting an opt-out model would effectively deprive an interpretation of NPCSC of any particular effect, as all potential claimants would automatically be parties to the judgment previously rendered unless they opted out. This would amount to a radical constitutional change. On the other hand, it might be argued that a class action regime with an opt-out model would not affect the constitutional status or validity of an interpretation by NPCSC, which would apply to future litigation and was binding on the HKSAR courts. In order to deal with the special constitutional situation in Hong Kong, the Sub-committee had put forth in the Consultation Paper four options for the treatment of public law cases in a class action regime: (a) public law cases should be excluded from the general class action regime; (b) the court should be given the discretion in a public law case to adopt either the opt-in or the opt-out procedure; (c) public law cases should follow the same opt-out model recommended by the Sub-committee for general application; and (d) public law cases should adopt an opt-in model, so that only those persons who had expressly consented to be bound by a decision in a class action would be treated as parties to that judgment. He stressed that the Sub-committee was open minded on the four options.

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28. The Chairman said that there were both pros and cons for using a class action procedure. In the right of abode cases, individuals with similar claims but who were not parties to the CFA proceedings would have benefited from the CFA judgment and would have been unaffected by the subsequent interpretation of NPCSC had the class action procedure rather than the "test cases" approach been used. However, in other cases, it might be more beneficial to use individual proceedings. She sought clarification on whether individuals could choose between class action or individual proceedings under the proposed class action regime.

29. Mr Anthony Neoh responded in the affirmative. He elaborated that under the "opt-out" approach recommended by the Sub-committee, once the court certified that a case was suitable for a class action, any member of the class could opt out of the class action within the time limit prescribed by the court order. He stressed that class action was only one of the vehicles for resolving disputes involving numerous people with the same cause of action. In response to the Chairman, he advised that the court would make a decision on whether a class action procedure should be adopted only upon the application of the relevant parties.

30. In reply to the Chairman's enquiry, Mr Anthony Neoh said that after the close of the consultation period on 4 February 2010, the Sub-committee would discuss the views received during the consultation period and prepare a report for submission to LRC.

31. Ms Emily LAU said that many recommendations of LRC were not acted upon by the Administration. She asked whether the Sub-committee was confident that the Administration would seriously consider implementing the recommendations of the Sub-committee to introduce a class action regime in Hong Kong.

32. Mr Anthony Neoh said that the Subcommittee was appointed in November 2006 to study the subject of multi-party proceedings and make proposals to LRC for reform, in response to the recommendation in the final report of the Chief Justice (CJ)'s Working Party on Civil Justice Reform (CJR), published in 2004, that a scheme for multi-party litigation should be adopted in Hong Kong. According to his understanding, as the subject was referred to LRC by CJ, LRC's recommendations would be submitted to CJ for consideration. He was confident that CJ would seriously consider implementing LRC's recommendations on class action, which was part and parcel of CJR. Should the recommendations be accepted by CJ, the Administration would be invited to introduce legislation to take forward the recommendations.

33. The Chairman asked whether the Sub-committee would complete its report before the incumbent CJ left office in end of August 2010. Mr Anthony Neoh said that the Sub-committee would strive to do so.

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V. Procedures and working timetable to fill the anticipated vacancy of the Chief Justice of the Court of Final Appeal

[LC Paper Nos. CB(2)217/09-10(01), CB(2)308/09-10(04) and CB(2)2448/08-09(01)]

Briefing by the Administration

34. Director of Administration (D of Admin) briefed members on the procedure and working timetable to fill the anticipated vacancy of the Chief Justice of the Court of Final Appeal (CJ), details of which were set out in the Administration's paper [LC Paper No. CB(2)217/09-10(01)].

35. Members noted the background brief prepared by the LegCo Secretariat which provided information on the procedure for making the appointment of CJ and the appointment of the incumbent CJ in 1997 (Background Brief) [LC Paper No. CB(2)308/09-10(04)].

Views of the Bar Association

36. Mr Russell Coleman said that in 2002 the Bar Association had given its views on the three options for the procedure for LegCo to endorse judicial appointments under BL 73(7) as set out in the Consultation Paper on Process of Appointment of Judges published by the Panel. The Bar Association had pointed out then that LegCo was not given the power to make recommendations as to appointment and that it should as a matter of convention accept the recommendation of the Judicial Officers Recommendation Commission (JORC). It was not intended that LegCo should duplicate the selection process undertaken by JORC. The Bar Association considered it important that there should not be any step in the procedure which would tend to politicise the appointment of any senior judges including CJ.

Issus raised by members

Membership of the Secretary for Justice on JORC

37. Referring to paragraphs 13 and 14 of the Background Brief, Ms Emily LAU said that during the Panel's review of the process of appointment of judges in 2002 (the 2002 review), both the Bar Association and the Law Society of Hong Kong had expressed the view that it was not appropriate for the Secretary for Justice (SJ), being one of the Principal Officials under the Accountability System, to be a member of JORC. Some Panel members expressed a similar view at that time in view of the inherent conflict of interest. The Administration, however, considered the arrangement appropriate. She cautioned that in the event that the candidate proposed by JORC was highly controversial, the membership of SJ on JORC might further complicate the matter.

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38. Solicitor General (SG) referred members to paragraph 13 of the Background Brief where there was a reference to the Bar's view that instead of SJ, a representative chosen amongst government lawyers could represent the views of government lawyers of the Department of Justice (DoJ) on JORC. It was considered necessary for a representative of DoJ to be a member of JORC as DoJ was one of the three major court users. SG pointed out that the membership of SJ went beyond merely serving as a representative of DoJ as a major court user. Apart from being the principal adviser on legal matters to the Government, SJ was also endowed with the constitutional role of being the guardian of public interest in the administration of justice and the upholder of the rule of law. The other Law Officers each had their own role within DoJ and did not have the overall responsibility for the Department as SJ did. He stressed that it was essential that SJ remained a member of JORC to fulfil his important roles in these various respects.

39. Mr TAM Yiu-chung did not consider that there was any problem with SJ's membership on JORC. Noting from the Background Brief that when moving the motion for the appointment of the incumbent CJ in 1997, the then SJ had indicated that to prevent any possible suggestion of interference in the process of judicial appointments, she had decided not to, and in fact did not, exercise her right to nominate any candidate at any stage of the proceedings, Mr TAM asked whether the same practice would be followed in the upcoming exercise for the appointment of CJ.

40. SG said that the approach taken by the then SJ was a reflection of the special circumstances at the time when the motion for the appointment of the incumbent CJ was moved in the Provisional Legislative Council in 1997. At that time, the then SJ designate had not yet taken up office. The incumbent SJ had, however, been in office for quite some time and was in a position to participate in the appointment process himself, including, if he thinks fit, suggesting names for JORC's consideration.

Procedure for endorsement of judicial appointments by LegCo

41. Ms Emily LAU noted from the Background Brief that during the 2002 review, the two legal professional bodies had expressed the view that it was inappropriate to adopt the procedure used in US where open hearings were held to question nominees for judicial appointments. The US system was not adopted in the procedure for endorsement of appointment of judges by LegCo endorsed by the House Committee (HC) in May 2003. She noted that after CJ had announced that he would leave office after August 2010, some Members had expressed the view that given the importance of the post of CJ, they should have the chance to meet with the candidate recommended for appointment as the next CJ before deciding whether to endorse the appointment. She sought clarification on whether any changes could be made to the procedure for LegCo's endorsement of judicial appointments.

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42. The Chairman said that the procedure as recommended by the Panel and agreed by HC in 2003 should be followed in the upcoming appointment exercise for CJ, unless Members considered it necessary to make changes to the established procedure. She had proposed to discuss the subject matter at this Panel meeting to provide Members with an early opportunity to raise issues relating to the procedure for appointment of CJ before the recommended appointment was expected to be submitted to LegCo for endorsement in the second quarter of 2010.

43. In response to Ms Emily LAU, the Chairman explained that under the existing procedure agreed by HC in 2003, recommended judicial appointments would be referred to a subcommittee under the House Committee, and not the Panel, having regard to the fact that proposals for the appointment of judges were not policy matters that could be referred to the Panel for discussion.

44. Ms Audrey EU agreed that the procedure for judicial appointments should not be politicised. She sought clarification on whether the Bar Association objected to any arrangement for Members to meet with the candidate recommended for appointment as CJ, or it considered that such arrangement could be made so long as it would not undermine judicial dignity.

45. Mr Russell Coleman said that it was the Bar Association's firm view, as it was in 2002, that no arrangement should be made for recommended judicial appointees to be questioned by Members as to their suitability for appointment. Mr P Y LO stressed that LegCo was given the role of endorsing judicial appointments recommended by JORC, i.e. it could endorse or not endorse a recommended appointment, and it was not intended that LegCo should duplicate the elaborate process JORC had gone through in coming up with the recommendation. Hence, LegCo should as a matter of convention accept the recommendation of JORC.

46. SG expressed concurrence with the Bar's view that an adoption of the US system was inappropriate for Hong Kong as the constitutional arrangements in the two places were very different.

47. Ms Audrey EU invited the Bar Association's views on the considerations which might lead to LegCo not endorsing a judicial appointment. Mr Russell Coleman said that LegCo might not endorse an appointment only if, notwithstanding the recommendation made by JORC, it nevertheless considered that the relevant information provided by the Administration had failed to identify the nominee as an appropriate candidate for appointment.

48. The Chairman considered it most important that the process of judicial appointments should not be politicised as it would violate the fundamental principle of separation of powers. In her view, the established procedure for LegCo's endorsement of judicial appointments was appropriate. She considered it improper for Members to question recommended judicial appointees at a meeting as it would tend to politicise the process. She agreed with the view that LegCo should exercise its power of endorsement prudently and that judicial appointments should best be left

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to JORC, a body with legal professionals as members best equipped to consider the judicial qualities of a candidate. LegCo's power to endorse judicial appointments was substantive in that it could act as the final gatekeeper to stop a judicial appointment which was manifestly contrary to public interest. However, such power should only be exercised in exceptional circumstances, and it should be a constitutional convention for LegCo to accept nominations made by JORC. The Executive Authority should likewise refrain from interfering in the appointment process of judges as a matter of constitutional convention to ensure the independence of the Judiciary. She agreed with the Bar's view that SJ, a political appointee under the Accountability System, should not participate in the appointment process of judges.

Information to be provided by the Administration

49. Ms Emily LAU stressed that, to facilitate LegCo's consideration of the recommended appointments, the Administration should provide as much information on the recommended appointees as possible to LegCo, such as the items contained in the questionnaire set by the US Senate Judiciary Committee and the application form for appointment as Justice of the High Court in UK as recommended by the Panel in 2002. She sought clarification on the types of information which might be sought by Members on a recommended appointee.

50. The Chairman explained that under the agreed procedure for LegCo's endorsement of judicial appointments, when the Administration advised HC of the acceptance by the Chief Executive (CE) of the recommendation of JORC, it would provide LegCo with sufficient information on the recommended appointees to facilitate LegCo's consideration. The Administration had accepted the Panel's recommendation that as much information on the appointees as possible should be provided to LegCo. If considered necessary, Members might seek additional information on the appointments from the Administration. The information sought by Members should be relevant to their consideration of the appointments. If the Administration considered it inappropriate or was unable to provide the requisite information, it had to inform LegCo accordingly and it would be for Members to decide whether to accept the Administration's response. She recalled that in a previous appointment exercise, in considering the recommended appointment of Lord Woolf as a non-permanent common law judge of Court of Final Appeal, the relevant Subcommittee under HC had requested for copies of major publications of Lord Woolf. The Administration was not able to provide all the major publications requested by the Subcommittee as it did not have any copy of some of these publications.

51. Mr TAM Yiu-chung agreed that the Administration should provide as much information on a recommended candidate as possible to LegCo to facilitate its consideration of an appointment. He also considered it reasonable for Members to seek additional relevant information on the personal and professional background of the candidate to enable LegCo to consider the appointment on an informed basis.

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52. D of Admin said that the Administration agreed with the Panel's recommendation made in the 2002 review that more information on the recommended appointee should be provided to LegCo to facilitate its consideration. In the appointment exercises conducted after the 2002 review, the curriculum vitae of the recommended appointees provided by the Administration had covered more information, including personal background, education, legal experience, judicial experience, services and activities, awards, and publications. Mr Russell Coleman considered such information relevant to LegCo's consideration on whether to endorse the appointment.

Membership and voting requirements of JORC

53. Mr LEUNG Kwok-hung expressed concern that under the existing composition of LegCo whereby only half of its Members were returned by geographical constituencies through direct elections, it was possible for LegCo to vote down a recommended CJ appointment notwithstanding that the nominee had eminent standing and wide public support. He also expressed concern about the voting power of SJ on JORC and sought clarification on the membership and voting requirements of JORC.

54. The Chairman referred members to Appendix I to the Background Brief for the current membership of JORC. She said that SJ was only one of the members of JORC and had one vote within JORC.

55. SG said that according to the voting requirements of JORC as laid down in section 3(3A) of the JORC Ordinance (Cap. 92), a resolution at a meeting of JORC was effective if (a) where seven members were present, at least five voted in favour; (b) where eight members were present, at least six voted in favour; and (c) where nine members were present, at least seven voted in favour. In other words, more than two dissenting votes were required to vote down a resolution of JORC on a recommended appointment.

56. Ms Emily LAU enquired whether LegCo would be informed of the details of the voting results of JORC's resolution on a recommended appointment, such as the respective number of votes for and against the recommended appointee, and how each member had voted. The Chairman said that according to her understanding, the deliberations of JORC were confidential and details of its voting results would not be disclosed. D of Admin confirmed that the Chairman's understanding was correct. D of Admin further said that CE had to be satisfied that the resolution of JORC on the recommended appointment was effective according with the voting requirements set out in section 3(3A) of the JORC Ordinance before accepting the recommendation of JORC. D of Admin added that each member of JORC had equal voting power.

57. Mr LEUNG Kwok-hung queried the need for having three persons not connected with the practice of law sitting on JORC. He was concerned that the membership of these three persons, who were appointed by CE and had sufficient votes to block a recommended appointment, had the potential to undermine the independence of JORC by the Executive Authority. The Chairman clarified that as a matter of fact all members of JORC were appointed by CE.

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58. D of Admin said that the composition of JORC was prescribed in BL. According to BL 88, judges of the courts of the Hong Kong Special Administrative Region should be appointed by CE on the recommendation of an independent commission (i.e. JORC) composed of local judges, persons from the legal profession and eminent persons from other sectors. The objective of having persons not connected with the practice of law was to ensure that apart from the interests of the legal profession, the interests of the wider community were also taken into account in the deliberations of JORC.

59. Mr LEUNG Kwok-hung expressed objection to having members of JORC appointed by CE, as it would politicise the appointment process of judges. In his view, the JORC members who were "eminent persons from other sectors" should be elected by the legal profession rather than appointed by CE.

Timetable for the procedures to fill the anticipated vacancy of CJ

60. In reply to Ms Emily LAU's enquiry on the timetable for the procedures to fill the anticipated vacancy of CJ, D of Admin said that according to the Judiciary, JORC aimed to make a recommendation to CE as soon as practicable within the first quarter of 2010. Upon CE's acceptance of JORC's recommendation, the Administration would seek LegCo's endorsement of the appointment as early as possible, tentatively around the second quarter of 2010.

VI. Any other business

61. There being no other business, the meeting ended at 6:25 pm.

Council Business Division 2
Legislative Council Secretariat
21 January 2010