

立法會
Legislative Council

Ref : CB2/PL/AJLS

LC Paper No. CB(2)2762/11-12
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 30 January 2012, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex

Members present : Dr Hon Margaret NG (Chairman)
Dr Hon Priscilla LEUNG Mei-fun, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon LAU Kong-wah, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Paul TSE Wai-chun, JP

Members absent : Dr Hon Philip WONG Yu-hong, GBS
Hon Miriam LAU Kin-ye, GBS, JP
Hon Timothy FOK Tsun-ting, GBS, JP
Hon LEUNG Kwok-hung

Public Officers attending : Item III
Mr Russell Coleman, SC
Member of the Higher Rights Assessment Board

Mr Stephen HUNG
Member of the Higher Rights Assessment Board

Mrs Eleanor LING
Member of the Higher Rights Assessment Board

Mr Christopher NG
Senior Government Counsel
Department of Justice

Item IV

Mr CHENG Yan-chee, JP
Deputy Secretary for Home Affairs (1)

Ms Aubrey FUNG Ngar-wai
Principal Assistant Secretary for Home Affairs
(Civic Affairs) 2

Mr William CHAN Heung-ping, JP
Director of Legal Aid

Ms Alice CHUNG Yee-ling
Deputy Director of Legal Aid / Administration

Mr KWONG Thomas Edward
Deputy Director of Legal Aid / Application & Processing

Item V

Miss Elizabeth TSE, JP
Permanent Secretary for Commerce and Economic
Development (Communications and Technology)

Mr Vincent LIU, JP
Commissioner for Television and Entertainment Licensing

Miss Emma LAU
Judiciary Administrator

Mr Esmond LEE
Deputy Judiciary Administrator (Development)

**Attendance by :
invitation**

Item III

Hong Kong Bar Association

Mr Russell Coleman, SC

The Law Society of Hong Kong

Mr Peter Barnes
Chairman of the Law Society's Higher Rights of
Audience Committee

Item IV

Hong Kong Bar Association

Mr Ruy Barretto, SC

Mr Russell Coleman, SC

The Law Society of Hong Kong

Mr Peter Barnes

Chairman of the Law Society's Higher Rights of Audience Committee

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Mr KAU Kin-wah
Senior Assistant Legal Adviser 3

Miss Cindy HO
Senior Council Secretary (2)3

Miss Lettice AU YEUNG
Research Officer (2)3

Ms Wendy LO
Council Secretary (2)3

Mrs Fonny TSANG
Legislative Assistant (2)3

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I. Information papers issued since last meeting
[LC Paper No. CB(2)714/11-12(01)]

Members noted a letter from a member of the public expressing views on filling of vacancies in the Legislative Council ("LegCo") [LC Paper No. CB(2)714/11-12(01)].

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II. Items for discussion at the next meeting

[LC Paper Nos. CB(2)871/11-12(01) to (03)]

2. Members agreed to discuss the following items at the next regular meeting to be held on 27 February 2012 –

- (a) Procedure under Article 158(3) of the Basic Law ("BL") for the Court to make a reference to the Standing Committee of the National People's Congress for an interpretation of BL; and
- (b) Free legal advice service – A two-year pilot scheme to provide legal advice for litigants in person.

3. At the Chairman's suggestion, members agreed that the Panel would endorse at the next meeting the draft letter to the Chairman of the House Committee proposing the establishment of a mechanism to monitor the Government's progress in implementing the recommendations made by the Law Reform Commission which was circulated to members on 6 January 2012 vide LC Paper No. CB(2)752/11-12(01).

4. Responding to Ms Audrey EU who raised the issue relating to the procedure for amending the BL under BL 159, the Chairman said that the issue had been discussed by the Panel on Constitutional Affairs ("CA Panel"). She instructed the Clerk to circulate relevant documents to members for information.

(Post-meeting note: Documents pertaining to relevant discussions held by the CA Panel were circulated to members on 8 February 2012 vide LC Paper No. CB(2)991/11-12.)

5. Referring to the publication entitled "Drafting Legislation in Hong Kong – A Guide to Styles and Practices" newly published by the Law Draftsman ("LD"), Ms Audrey EU suggested that the issues relating to drafting of legislation be discussed. Mr Albert HO considered that it might be appropriate to conduct a seminar by inviting LD to facilitate an exchange of views with members. The Chairman undertook to relate the views of members to LD including the use of reader aids and adoption of some new drafting techniques in the context of scrutinizing individual bills.

(Post-meeting note: The Chairman wrote to LD on the relevant issues on 10 February 2012. LD was invited by the LegCo Secretariat to conduct a seminar on the Drafting Guide on 28 February 2012.)

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6. The Chairman updated members on the upcoming visit to the Judiciary scheduled to be held in the morning of 27 February 2012, the programme of which was circulated to members vide LC Paper No. CB(2)776/11-12 on 9 January 2012.

III. Implementation of the scheme for granting higher rights of audience to solicitors

[LC Paper Nos. CB(2)871/11-12(04) and (05)]

Briefing of the Higher Rights Assessment Board

7. Mr Russell Coleman, SC, in his capacity as member of the Higher Rights Assessment Board, gave a briefing on the progress of the implementation of the scheme for granting higher rights of audience to solicitors and the main contents of the proposed Higher Rights of Audience Rules ("the Rules") as detailed in its paper [LC Paper No. CB(2)871/11-12(04)]. Mr Coleman highlighted that the Higher Rights Assessment Board ("the Board") intended to gazette the Rules in February 2012. The Rules were to be made under the new Part IIIB of the Legal Practitioners (Amendment) Ordinance 2010 and were expected to come into operation in early May 2012. It was envisaged that the Board would invite and assess the applications in the autumn of 2012. Subject to the number of applications, examining panels would be set up to conduct assessment twice a year in March and September respectively. It was likely that at least two examining panels would be set up in September 2012 to process the applications.

8. Members also noted the background brief prepared by the LegCo on the subject matter [LC Paper No. CB(2)871/11-12(05)].

Views of the deputations

The Hong Kong Bar Association ("the Bar Association")

9. Mr Russell Coleman, SC said that the Bar Association was in full support of the Rules.

The Law Society of Hong Kong ("the Law Society")

10. Mr Peter Barnes said that the Law Society had recently made some recommendations in respect of the Rules and it was pleasing to know that these recommendations would be taken into consideration by the Board and the Rules were likely to be promulgated in a form that was acceptable to the Law Society. He said that the Law Society was willing to assist in respect of the composition

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and the establishment of the examining panel. The Hong Kong Academy of Law was also ready and able to provide assistance in respect of the training of candidates.

Discussion

Estimated number of applications and operation of the examining panel

11. Ms Audrey EU asked the Bar Association and the Law Society how soon in their estimation that the first batch of solicitors would gain higher rights of audience if the Rules were gazetted in February 2012 and LegCo did not form a subcommittee to scrutinize the Rules. She also enquired the estimated number of solicitors to be qualified for the higher rights of audience in the next three years.

12. Mr Russell Coleman, SC replied that assessment of applications would commence in September 2012 following the enforcement of the Rules in May 2012. Each examining panel would be able to deal with 24 applications in one sitting. He expected that twice of that number of applications could be dealt with by the end of 2012. It was expected that the first batch of certificated solicitors could exercise higher rights of audience in the High Court by the end of 2012. Mr Coleman further said that according to a previous survey conducted by the Law Society, about 300 solicitors had indicated their interest to make application for higher rights of audience in the coming two to three years. Mr Peter Barnes advised that a recent survey had indicated a few hundred solicitors would likely be applying for higher rights, in the first batch.

13. Ms Audrey EU expressed concern that there would be a high number of outstanding applications after the first year of the scheme due to the large number of applications received in the first few years and the limited applications that could be processed each year. Mr Russell Coleman, SC assured members that the Board was empowered by the law to set up the required number of examining panels to handle the applications. As there might be repeated applications from time to time, it was difficult to anticipate the number of applications. However, the problem might be eased when applicants built up more experience and applied for exemption of full assessment of professional competence.

14. In response to the Chairman, Mr Russell Coleman, SC affirmed that there was no ceiling set on the number of examining panels. Subject to the number of applicants, more examining panels could be established to work in parallel to handle the applications. The Board had indeed considered that more than one or two examining panels would be needed to process the applications.

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15. Referring to Rule 17(2)(c)(ii) of the Proposed Rules about the composition of examining panels, Ms Audrey EU enquired whether the fourth member forming the examining panel would be a lay person. Mr Russell Coleman, SC clarified that the fourth member would not be a lay person. That member could either be a solicitor, a barrister or a former or retired judge of any higher court as specified under Rule 17(2)(a), (b) and (c).

16. Ms Audrey EU further enquired who would determine the criteria for exemptions from assessment of professional competence. Referring members to Rule 13 under Part 4 of the Rules, Mr Coleman explained that the Board would determine the criteria for exemptions but members of the Board would not deal with the examination matter at the same time. The Board would assess whether the applicant had possessed the necessary professional competence to exercise higher rights of audience in respect of the class of proceedings for which the application was made. The applicant would be certificated if he or she was not required to pass portion of full assessment of professional competence.

Nature of applications

17. The Chairman enquired whether the Board or the Law Society had estimated the respective number of applications to be made by way of the exemption route and by way of examination. Mr Peter Barnes replied that he believed that a substantial proportion of applications (dozens of applications in his estimation) would be made under the exemption route because some solicitors had participated in arbitration work in recent years and had acquired relevant experience to apply for exemptions. The Law Society would conduct some research to find out the number of respective kind of applications.

18. Mr Russell Coleman, SC replied that the Board did not make such estimation. He agreed with the view of Mr Barnes that a high proportion of applications would be made under the exemption route as many applicants had already acquired relevant practice experience. He anticipated that some solicitors, such as family lawyers, might not be interested in making applications as they already had the rights of audience in chambers hearings in the Court of First Instance and the Court of Appeal.

Conclusion

19. Mr Russell Coleman, SC said that it was hoped that the scheme for granting higher rights of audience to solicitors could be implemented as soon as possible. The Chairman said that she would report to the House Committee that the Panel had discussed the Rules which were technical in nature and did not consider it necessary to form a subcommittee to study the Rules. Members agreed.

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IV. Issues relating to the provision of legal aid for judicial review cases

[LC Paper Nos. CB(2)863/11-12(01), CB(2)871/11-12(06) and CB(2)918/11-12(01)]

20. The Chairman declared interest that she had been engaged by the Legal Aid Department ("LAD") to handle legal aid cases and asked if there was any objection from members for her to continue to chair the meeting. Members had raised no objection.

Briefing by the Administration

21. Deputy Secretary for Home Affairs ("DSHA") briefed members on the Administration's paper [LC Paper No. CB(2)863/11-12(01)] setting out the assessment criteria in processing civil legal aid applications in respect of judicial review ("JR") cases, the policy/criteria of assigning lawyers to handle legal aid cases in general and the relevant statistics of assignment of counsel in private practice.

22. Director of Legal Aid ("DLA") elaborated that as transpired in the case of *R v. Legal Aid Board, ex p. Hughes 24 (1992) H.L.R. 698*, it was held by the English Court of Appeal that if the court granted leave, it was likely that the legal merits test would be satisfied. He went on to explain assignment of legal aid cases to lawyers in private practice was based on the policy and criteria endorsed by the Legal Aid Services Council ("LASC"). He highlighted the view of the LAD that the aided person's nominations should be given due weight and should not be rejected unless there were compelling reasons to do so.

23. Members noted the background brief entitled "Issues relating to the provision of legal aid for JR cases" [LC Paper No CB(2)871/11-12(06)] prepared by the LegCo Secretariat.

Views of the Bar Association

24. Mr Ruy Barretto, SC highlighted the following points made in the Bar Association's submission for the meeting [LC Paper No. CB(2)918/11-12(01)] –

- (a) due to the lack of institutional independence, LAD had to rely on its operational independence by appointing outside counsel independent of LAD and the Government;
- (b) barristers were bounded by their professional rules and had to take on cases which were unpopular but had the necessary legal and factual merits;

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- (c) JR cases were subject to scrutiny of judges to ensure that only meritorious cases would proceed to litigation;
- (d) LAD should not abdicate its responsibility under section 9 of the Legal Aid Ordinance (Cap. 91) by requiring an applicant to self-fund an initial application for JR while DLA would only grant legal aid if the court granted leave;
- (e) the legal aid system should be improved to enable access to justice in case of public interest litigation by way of group or class litigation; and
- (f) in situations where involvement of claims recovery agent was suspected in some personal injuries cases where the same solicitors firm was nominated in many cases by the aided persons, LAD should simply request the aided person or the applicant to provide reasons for nominating that particular firm to ease the concerns.

Discussion

Possible abuse of the legal aid system

25. Referring to the Hong Kong-Zhuhai-Macao Bridge case in which a political party was alleged to be involved in the manipulation of a member of the public to apply for legal aid and hire a lawyer of that political party for the conduct of JR, Mr TAM Yiu-chung enquired what measures were in place to prevent such abuse of the legal aid system.

26. DLA explained that as JR proceedings were not to seek compensation, the activities referred to did not amount to maintenance and champerty which would otherwise constitute a criminal offence. Referring to paragraph 13 of the Administration's paper, DLA said that in the absence of any compelling reasons as stated in paragraph 12 of the same paper, LAD did not have any valid ground under the existing legal framework to decline or question the nomination of the aided person. It would be a slur on the character and professional integrity of the nominated lawyer for LAD to enquire if the nomination was prompted by some kind of questionable conduct on the part of the lawyer concerned. DLA suggested that professional integrity would rather be subject to regulation of the legal professional bodies.

27. Mr TAM Yiu-chung considered that LAD had a role to play by improving its legal aid processing and monitoring systems to safeguard against abuse of the

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legal aid system. DLA assured the meeting that if LAD had come across any suspicious activities in the nomination process or in the course of the proceedings, LAD would look into the issue and refer them to the relevant legal professional bodies for follow-up. Responding to the Chairman and Mr TAM on whether LAD could direct an investigation based on the remark of the aided person in the Hong Kong-Zhuhai-Macao Bridge case, DLA said that LAD was not in a position to make a follow-up enquiry with the aided person upon conclusion of the case, and there was also a personal data privacy concern if the aided person was subsequently approached for such enquiry. DLA said that he was not aware of any follow up action taken by the legal professional bodies on the alleged improper conduct or a breach of professional conduct. Mr TAM Yiu-chung considered, however, that the remark of the aided person should have provided sufficiently valid ground for LAD to take up the matter with the aided person.

28. Mr TAM Yiu-chung and the Chairman enquired if there was any impropriety if some lawyers would persuade eligible persons to apply for legal aid for JR and nominate the lawyers to act for them; and whether the present nomination arrangement should be revised to safeguard against abuse of legal aid service. DLA replied that an aided person was allowed under the existing legislation to nominate his own counsel or solicitor to represent him in the case. Unless the lawyer had provided misleading information to the aided person affecting his choice of lawyer in the application for legal aid, DLA saw no impropriety for a lawyer to advise a person to seek JR in respect of his case, and he noted that some lawyers providing pro bono service might also advise an aggrieved person to seek JR in respect of his case where appropriate.

29. Mr TAM-Yiu-chung proposed that LAD might consider putting in place a "declaration system" to require an aided person, before approval should be granted, to declare interests that his choice of lawyer had not been affected by touting or other improper conduct on the part of the lawyers nominated. DLA should figure out whether and how the relationship between the aided person and the lawyer should be explicitly spelt out.

Granting approval for legal aid for judicial review

30. Ms Emily LAU referred to the criticism made in the submission of the Bar Association that LAD would withhold its scrutiny action and grant approval for legal aid for JR only until the court granted leave to the applicant's initial application for JR. She invited DLA's response to the criticism. DLA clarified that it was a misconception that LAD would only grant legal aid after leave from the court was granted to bring an application for JR. Deputy Director of Legal Aid/Application & Processing explained that LAD had not and would not advise an applicant to seek leave for judicial review from the court as a pre-condition for

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the grant of legal aid. He emphasized a merits test would be independently conducted by LAD on each JR related application for legal aid. Independent counsel's opinion would be obtained where appropriate before a decision was made. An applicant who was refused legal aid might appeal against the DLA's decision to the Registrar of the High Court.

31. Mr Barretto, SC said that he was pleased to note the prevailing practice and the assurance given by LAD. The Bar Association considered that there were sufficient safeguards in the present legal aid regime to ensure the efficient use of public funds for JR.

Legal cost incurred for initial application for judicial review

32. The Chairman asked whether legal aid would also cover the legal cost incurred by the aided person during his initial application for JR prior to granting legal aid since the cost involved could be quite substantial. In response, DLA advised that any cost incurred prior to the grant of legal aid for JR cases would not be covered by legal aid, and he assured the meeting that such cases would be processed in an urgent manner subject to availability of all relevant information.

Assignment of legal aid cases

33. Ms Emily LAU enquired about the number of in-house lawyers of LAD and whether cases being handled by LAD in-house lawyers could all be assigned out in order to maintain the independence of LAD. DLA replied that there were about 73 solicitors on the establishment of LAD; and in general LAD had handled up to one third of all matrimonial and personal injury related cases as solicitors for the aided persons; while insolvency and seaman's wages claims and majority of the enforcement cases were handled by in-house lawyers to achieve cost effectiveness. He so far had not heard of anything adverse from the aided persons who queried the independence of LAD in-house lawyers.

34. In response to Ms Emily LAU's enquiry on the number of applications for JR received by LAD since 2000, DLA replied that there were 20 cases with legal aid granted out of 147 applications for JR in 2001, 17 cases were approved out of 144 applications in 2002, and 200 cases were approved out of 552 applications in 2009.

35. Ms Emily LAU consulted the Bar Association in respect of those cases being handled by in-house lawyers of LAD, including insolvency and matrimonial cases. Mr Barretto, SC emphasized that each case would have to be considered on a case-by-case basis, and relevant considerations would include whether LAD had the necessary manpower resources and expertise to handle

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those cases, and whether the insolvency cases involved employees of government departments etc. Ms Emily LAU suggested that the Administration should establish a policy that whenever there were cases involving the Administration, these cases should always be briefed out. DLA took note of the concern and said that cases involving government departments, government employees should not normally be handled by in-house lawyers.

Way forward

DLA 36. The Chairman concluded the discussion by requesting DLA to consider the suggestion of Mr TAM Yiu-chung on putting in place a declaration system in the nomination of lawyers. DLA undertook to work out the proposed "declaration system". The Chairman suggested that other situations regarding the personal injuries cases involving the same solicitors firm being nominated by the aided persons should warrant more proactive action on the part of LAD in consultation with LASC to look for any impropriety and guard against any possible abuse of the legal aid system.

DLA

V. The role of the Judiciary in the adjudication system under the Control of Obscene and Indecent Articles Ordinance

[LC Paper Nos. CB(2)863/11-12(02) to (03), IN04/11-12 and CB(2)895/11-12(01)]

37. Members noted the information note on "Composition and operation of the Obscene Articles Tribunal ("OAT")" prepared by the Research Division of the LegCo Secretariat [LC Paper No. IN04/11-12].

38. The meeting noted the submission of the Bar Association on the subject [LC Paper No. CB(2)895/11-12(01)].

Briefing by the Administration

39. At the invitation of the Chairman, the Permanent Secretary for Commerce and Economic Development (Communications and Technology) ("PSCED(CT)") briefed members on the latest progress of the review of the Control of Obscene and Indecent Articles Ordinance (Cap. 390) ("COIAO") as detailed in the Administration's paper [LC Paper No. CB(2)863/11-12(02)]. PSCED(CT) said that the Administration commenced a comprehensive review of COIAO in 2008 and proposed two rounds of public consultation. The first round of public consultation completed in 2009 confirmed general support for retaining the COIAO regulatory regime but could not forge consensus on some issues, including the institutional set-up of OAT. At that time, members of the public

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did not have much discussion on the fundamental issue raised by the Judiciary and the legal sector; and public views on whether and how the existing adjudication system should be reformed were diverse. Meanwhile, the Administration was preparing for the second round public consultation to solicit public feedback, including the institutional set-up of the OAT and proposed options to reform the OAT.

40. Judiciary Administrator ("JA") briefed members on the Judiciary's position on its role in the adjudication system under the COIAO as detailed in the Judiciary's paper [LC Paper No. CB(2)863/11-12(03)]. In the past on numerous occasions, the Judiciary had consistently reflected to the Administration its firm position that the present institutional set-up of the OAT under the COIAO was highly unsatisfactory as the OAT was required by law to perform both administrative classification and judicial determination functions. As a matter of principle, the Judiciary regarded the exercise of an administrative function by a judicial body as undermining the fundamental principle of judicial independence. The Judiciary firmly considered that the problems with the existing set-up should be addressed by removing the administrative classification function of the OAT, leaving the OAT to deal only with judicial determination. She noted that the separation of the administrative and judicial functions of the OAT was strongly supported by the Bar Association and the Law Society.

Issues raised by members

41. The Chairman expressed concern that at the Ceremonial Opening of the Legal Year 2009, the former Chief Justice had raised the Judiciary's principled concern on the matter and called for a fundamental reform of the OAT. However, the Administration had not taken any action for such a long time despite the strong view expressed by the Judiciary.

42. In response, PSCED(CT) said that the Administration respected the views of the Judiciary that the present institutional set-up of the OAT was highly unsatisfactory, and had been exploring different proposals for reform with the Judiciary. PSCED(CT) noted that earlier propositions to revamp the OAT by replacing the OAT with a government-appointed classification system had met with strong objection from some political parties in 2000. The Administration was currently working out concrete and viable proposals for reform of the OAT for the upcoming consultation.

43. Responding to the enquiry of Ms Emily LAU, PSCED(CT) clarified that the Administration might not have elaborated in details the views of the Judiciary in the consultation paper in 2000 and there had been allegations that the proposed

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establishment of a government-appointed classification system might be perceived as undermining the freedom of speech and the press. Ms Emily LAU suggested that the Administration might consider LegCo papers on the relevant discussion of the institutional set-up of other independent boards to explore ways to enhance the credibility, independence and representativeness of the appointment system and composition of adjudicators and requested that proposals relating to the appointment system should be brought to the LegCo for discussion.

44. Mr TAM Yiu-chung enquired whether there were similar institutional set-ups performing both administrative and judicial functions. PSCED(CT) replied that in Australia, New Zealand and Germany, there were separate government-appointed statutory bodies responsible for the administrative classification of articles and the judicial body for the judicial determination function. On the other hand, in United Kingdom, United States and Canada, there was no administrative classification function and the classification of articles was performed solely by the judicial body.

45. Responding to Mr TAM's request for the Administration to also address the issue of the inconsistency in OAT's rulings in classifying submitted articles in the upcoming consultation, Commissioner for Television and Entertainment Licensing noted that the incident on different classification of photos of the same subject published in different newspapers referred to by Mr TAM had been due to the difference of photos and texts used by the two newspapers. PSCED(CT) remarked that the essence of an appeal mechanism in the classification system was that a different classification result might arise upon reconsideration of the submitted article under appeal.

46. JA also pointed out that the situation often arose when the same article was submitted to the OAT for administrative classification and later was also referred by a court to the OAT for judicial determination. Its dual role had attracted criticisms that OAT was making inconsistent rulings, though the OAT was in fact performing two distinct functions under different rules and procedures involving different panels of adjudicators. It was therefore not appropriate for the OAT, which was a judicial body, to perform administrative duties in respect of the control of obscene and indecent articles under Part III of the COIAO.

47. The Chairman urged the Administration to work out a timetable to take the matter further. PSCED(CT) assured the meeting that the Administration would be launching the second round public consultation shortly. The Chairman requested the Administration to report progress of the issue before July 2012.

(Post-meeting Note: Commerce and Economic Development Bureau's response on the latest progress of the second-round public consultation was

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circulated to members vide LC Paper No. CB(2)2003/11-12(01) on 14 May 2012.)

VI. Any other business

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

Council Business Division 2
Legislative Council Secretariat
10 September 2012