

立法會
Legislative Council

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LC Paper No. CB(4)206/13-14

(These minutes have been
seen by the Administration
and the Judiciary
Administration)

Panel on Administration of Justice and Legal Services

**Minutes of meeting
held on Tuesday, 23 July 2013, at 4:30 pm
in Conference Room 1 of the Legislative Council Complex**

- Members present** : Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)
Hon Dennis KWOK (Deputy Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Hon CHAN Kin-por, BBS, JP
Hon Paul TSE Wai-chun, JP
Hon LEUNG Kwok-hung
Hon WONG Yuk-man
Hon NG Leung-sing, SBS, JP
Hon Steven HO Chun-yin
Hon YIU Si-wing
Hon MA Fung-kwok, SBS, JP
Hon Charles Peter MOK
Dr Hon Kenneth CHAN Ka-lok
Hon Martin LIAO Cheung-kong, JP
Hon TANG Ka-piu
Dr Hon CHIANG Lai-wan, JP
Hon Tony TSE Wai-chuen
- Member attending** : Hon KWOK Wai-keung
- Members absent** : Hon LEE Cheuk-yan
Hon CHAN Kam-lam, SBS, JP
Hon Abraham SHEK Lai-him, GBS, JP
Hon Starry LEE Wai-king, JP

Hon Alan LEONG Kah-kit, SC
Hon Michael TIEN Puk-sun, BBS, JP
Hon Kenneth LEUNG
Hon Alice MAK Mei-kuen, JP
Dr Hon KWOK Ka-ki
Dr Hon Elizabeth QUAT, JP
Hon CHUNG Kwok-pan

Public Officers : Agenda item II
attending

Mr Howard LEE
Assistant Director of Administration (3)

Mr Esmond LEE
Deputy Judiciary Administrator
(Development)

Miss Stella CHANG
Assistant Judiciary Administrator
(Development) (Acting)

Agenda item III

Mr Esmond LEE
Deputy Judiciary Administrator
(Development)

Mrs Angela LO
Assistant Judiciary Administrator
(Corporate Services)

Clerk in : Miss Polly YEUNG
attendance Chief Council Secretary (4)4

Staff in : Mr Timothy TSO
attendance Assistant Legal Adviser 2

Ms Rebecca LEE
Council Secretary (4)2

Ms Mandy WAN
Administrative Assistant (4)1

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I. Information paper(s) issued since the last meeting

[LC Paper Nos. CB(4)849/12-13(01), CB(4)895/12-13(01), CB(4)911/12-13(01) and CB(4)921/12-13(01)]

Members noted that the following papers had been issued since the last meeting -

LC Paper No. CB(4)849/12-13(01) -- Information paper provided by the Administration on the Biennial Review of Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fees

LC Paper No. CB(4)895/12-13(01) -- Letter from Hon Dennis KWOK dated 9 July 2013 on "Duty Lawyer Scheme for non-refoulement claims under the unified screening mechanism" (English version only)

LC Paper No. CB(4)911/12-13(01) -- Letter dated 15 July 2013 from The Law Society of Hong Kong on the issue of "Rule 4B(2) of the Solicitors' Practice Rules and Rule 8(4) of the Foreign Lawyers Practice Rules" (English version only)

LC Paper No. CB(4)921/12-13(01) -- Letter from Hon Dennis KWOK dated 18 July 2013 on "Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone" (English version only)

2. Referring to LC Paper No. CB(4)911/12-13(01), the Chairman said that The Law Society of Hong Kong had written to the Panel to invite members to comment on the proposed amendments in relation to Rule 4B(2) of the Solicitors' Practice Rules and Rule 8(4) of the Foreign Lawyers Practice Rules. However, she considered that the matter warranted discussion by the Panel at a future meeting. The Chairman suggested and members agreed that the item would be included in the Panel's list of outstanding items for discussion in the next legislative session. The Law Society of Hong Kong and the Department of Justice would be invited to take part in the discussion of the item.

II. Administration of Justice (Miscellaneous Provisions) Bill [LC Paper No. CB(4)871/12-13(01)]

Briefing by the Judiciary Administration

3. Deputy Judiciary Administration (Development) ("DJA (Development)") gave a powerpoint presentation on the legislative proposals relating to court operations in the Administration of Justice (Miscellaneous Provisions) Bill ("the Bill"), details of which were set out in the joint paper of the Administration and the Judiciary Administration ("JA") ("the paper") [LC Paper No. CB(4)871/12-13(01)]. The proposed amendments covered the following areas: -

- (a) appeals in civil matters to the Court of Final Appeal ("CFA");
- (b) evidence-taking by live television links for criminal proceedings;
- (c) the mode of delivery of reasons for verdicts and sentences in criminal proceedings in the District Court;
- (d) the calculation of qualifying experience for appointment of Permanent Magistrates;
- (e) the operation of the Labour Tribunal; and
- (f) the administration of suitor's funds at various courts / tribunals.

Subject to members' view on the legislative proposals, the Judiciary aimed to finalize the Bill with a view to introducing it into the Legislative Council ("LegCo") in late 2013.

Discussion

As of right appeal mechanism

4. Mr Ronny TONG expressed objection to the proposed abolition of the as of right appeal mechanism as this would curtail the rights of litigants. He pointed out that the relatively high number of successful appeals to the CFA in Hong Kong might, to a certain extent, reflect that some judges in lower courts had erred in their judgments. Mr TONG said that he could hardly accept that the as of right appeal mechanism would lead to a waste of judicial resources as

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the number of appeals using this channel was low. He urged the Judiciary to re-consider the matter carefully.

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5. To facilitate members' consideration of the legislative proposals, Mr Dennis KWOK sought information on (a) the number of applications for leave to appeal to the CFA for civil and criminal cases in the past five years; (b) out of the information from (a), the respective number of applications which had been granted and which had been rejected; (c) the number of appeals to the CFA in which the previous decisions were overturned; and (d) the number of successful and unsuccessful appeals to the CFA on civil matters under the as of right appeal mechanism. The Chairman also agreed that the aforesaid information should be provided.

6. Mr Dennis KWOK asked whether the JA would make reference to relevant legislation in overseas jurisdictions, and consider amending local legislation to require that the reasons / considerations for rejecting an application for leave to appeal to the CFA should be clearly set out. He considered this requirement very important, especially if the as of right appeal mechanism was to be abolished.

7. DJA (Development) explained that the present as of right appeal system was objectionable as a matter of principle because linking a right of appeal to an arbitrary financial limit would mean that litigants involved in litigation beyond the threshold limit in effect had more rights than other litigants with smaller claims, regardless of the merits of their cases. Abolishing the as of right ground for civil appeals would bring such appeals in line with the criminal appeal process in which all appeals were subject to the discretionary leave of the CFA. All appeals to the CFA would henceforth be based on their respective merits. Concerning the information requested by Mr Dennis KWOK, DJA (Development) said that JA would need some time to collate the information.

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8. In response to Dr CHIANG Lai-wan's enquiry about the background for the existing as of right appeal mechanism for civil cases, DJA (Development) advised that the historical origin of appeals as of right in civil matters lay in the system of appeals to the Judicial Committee of the Privy Council ("the Privy Council") of the United Kingdom ("UK"), the highest appellate court of Hong Kong before 1 July 1997. This system applied not only to Hong Kong but also to all Commonwealth jurisdictions with rights of appeal to the Privy Council. Before 1 July 1997, appeals in civil matters lay as of right to the Privy Council where the matter in dispute amounted to \$500,000 or more. When the Hong Kong Court of Final Appeal Bill was introduced into the LegCo in 1995, the as

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of right appeal mechanism was retained so that the then prevailing appeal system would remain unchanged as far as possible, but the threshold was raised to \$1 million to take inflation into account.

9. Mr Albert HO was of the view that an automatic right of appeal to the CFA based on an arbitrary financial threshold (currently \$1 million) was objectionable in principle. He considered that all appeals in civil matters to the CFA should be subject to discretionary leave. Mr HO shared Mr Dennis KWOK's concern that reasons should be given for unsuccessful applications for leave to appeal to the CFA.

10. Ms Emily LAU enquired whether Hong Kong was the only jurisdiction which retained the financial threshold for appeals which lay to the CFA as of right. In response, DJA (Development) pointed out that the purpose of the proposed abolition of the as of right appeal would not only save resources, but also address the inadequacies of the present system in allowing unmeritorious appeals to lie as of right to the CFA. He referred to Annex A of the paper and highlighted that in common law jurisdictions such as Australia, the UK and Canada, leave was required to be obtained before an appeal could be made to the highest appellate court. Although there was in general an automatic right of appeal for civil matters in Singapore and Ireland, it should be noted that there was no equivalent intermediate court of appeal between the High Court and the highest appellate court.

11. Mr Paul TSE declared that he was a practising solicitor. He questioned whether the proposal to abolish the as of right mechanism was to discourage unmeritorious appeals, or the consequence of insufficient judicial resources. Mr TSE also urged the Judiciary to take the opportunity to thoroughly review the appeal system in its entirety. Ms Emily LAU was also concerned about the resources, if any, that could be saved if the as of right appeal mechanism was abolished.

12. The Chairman remarked that if insufficient judicial resources was part of the reason for the proposed abolition of the as of right appeal mechanism, then, the Judiciary should review and where necessary, put up requests for additional resources.

13. Noting the origin of Hong Kong's as of right appeal mechanism as explained by DJA (Development), Mr Paul TSE enquired about the current

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JA development of the appeal procedures of the Privy Council. DJA (Development) responded that JA would look up relevant information.

14. Mr Martin LIAO said that if as of right appeals were abolished as proposed, the person seeking an appeal would need to file an application for leave, thereby incurring additional legal costs. DJA (Development) remarked that if appeals would no longer lie to the CFA as of right, a person intending to seek an appeal would also need to take the possible costs incurred into consideration when considering whether to file an application for leave.

Delivery of reasons for the verdicts and sentences in criminal proceedings in the District Court

15. Mr WONG Yuk-man said that he was supportive of the proposal to amend section 80 of the District Court Ordinance (Cap. 336) to dispense with the requirement for a District Judge to orally deliver the reasons for the verdict and any sentence in criminal proceedings. Noting that the Judges would have the flexibility to hand down the reasons in writing direct in appropriate cases, Mr WONG said that savings could be achieved in terms of litigants' time and money as well as public resources. He said that consideration should be given to implementing similar arrangements in the delivery of verdicts in all other levels of courts. Referring to Annex D of the paper setting out the detailed arrangements for the delivery of verdicts/sentences and reasons for criminal cases in the District Court, Mr WONG considered that the Judiciary should specify the circumstances under which the District Judge could deliver the verdict/sentence and its reasons orally, instead of directly handing down the same in written form.

16. In response, DJA (Development) advised that the proposed amendments to section 80 of the District Court Ordinance (Cap. 336) would provide a District Judge with the flexibility to directly hand down the reasons for the verdict and any sentence in writing, instead of being required to deliver the reasons orally first. It would be for the District Judge to decide on the appropriate mode of delivery, having regard to factors such as the complexity of the case in question, the time required for preparing the reasons in written form, whether there were legal representatives for the parties concerned and the language proficiency of the litigating parties.

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17. In response to Dr CHIANG Lai-wan's enquiry about the timing for the delivery of reasons for verdicts and sentences in criminal proceedings, DJA (Development) advised that under the proposed amendments, the reasons for the verdict / sentence should always be delivered together with the verdict / sentence at the same time. When the reasons of the verdict and sentence were handed down in written form direct, the Judiciary would ensure that the defendant was given sufficient time to examine the reasons.

Calculation of qualifying experience of Permanent Magistrates

18. Mr WONG Yuk-man said that he would not object to the proposal to amend the Magistrates Ordinance (Cap. 227) to allow a person's period(s) of experience as a Special Magistrate to be combined with period(s) of other types of qualifying professional experience to fulfill the requisite minimum five-year period for appointment as a Permanent Magistrate. He was of the view that the Judiciary might consider making similar amendment to section 5AB of the Magistrates Ordinances (Cap. 227) regarding the qualifying experience for appointment as Special Magistrates.

19. Noting that some Special Magistrates had not practised as lawyers prior to their judicial appointments, Mr Albert HO expressed his concern about the level of professional experience and quality of these Special Magistrates.

Improving the operation of the Labour Tribunal

20. Mr KWOK Wai-keung noted from paragraph 50 of the paper that a party to the proceedings might be reluctant or might even refuse to provide copies of documents for the other party for fear that the documents might be misused by the latter. To address this concern, JA had proposed that the receiving party should be imposed a general statutory duty not to use the documents and information disclosed for any purpose other than for the purpose of the Tribunal proceedings, unless the document had been put into the public domain. Mr KWOK sought clarification on whether the representatives of the trade union assisting its member who was a party to the proceedings could have the right to access the documents received by the member and whether the union representatives could further disclose such documents or the information contained in these documents to another party.

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21. DJA (Development) explained that the purpose of the relevant legislative amendments was to protect the documents and information which had been disclosed to the parties to the tribunal proceedings. The key issue for consideration was whether the further disclosure of such documents and information to trade union representatives could be considered as "for the purpose of the tribunal proceedings in question". In this connection, the Chairman suggested that the Judiciary should consider issuing guidelines on this matter, in particular the role, if any, of trade unions in tribunal proceedings. DJA (Development) took note of the Chairman's suggestion for consideration.

22. Mr TANG Ka-piu enquired whether JA had consulted the Labour Advisory Board on the proposed amendments relating to early disclosure of information by the parties as outlined in paragraphs 49 and 50 of the paper; and if JA had done so, the views of Labour Advisory Board. In response, DJA (Development) confirmed that the Labour Advisory Board had been consulted but had not raised any special comments.

23. Mr TANG Ka-piu said that according to the experience of the Hong Kong Federation of Trade Unions many years ago in assisting its members at the Labour Tribunal, an authorized trade union representative could speak on behalf of the claimant during the hearing of a claim. However, under the prevailing practice of the Labour Tribunal, this would be subject to the discretion of the Presiding Officer. He sought clarification on the authorized trade union representative's right to speak on behalf of the employee during the tribunal proceedings. In response, DJA (Development) said that the Judiciary would revert to the Panel.

24. Pending further clarification from the Judiciary, Mr TANG Ka-piu asked whether the Judiciary would withhold the proposed legislative amendments relating to early disclosure of information. In response, DJA (Development) said that for the time being, the Judiciary had no intention to exclude the relevant amendments from the legislative exercise. It nevertheless took note of Members' views for consideration.

25. Mr LEUNG Kwok-hung opined that the Judiciary should conduct a comprehensive review on the operation of the Labour Tribunal with a view to facilitating trade union representatives' access to documents and information received by their union members who were parties to the tribunal proceedings.

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26. In this connection, the Chairman remarked that some Members might have allowed their Personal Assistants to peruse confidential documents of certain committees, such as those exercising the summoning powers under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382), after they had signed a confidentiality undertaking.

27. Ms Cyd HO expressed strong support that, in the absence of legal representation, authorized trade union representatives acting on behalf of the union member in the tribunal proceedings should be given access to the documents and information received by the latter. However, she cast doubt on the propriety of allowing Members' Personal Assistants to have access to confidential documents of committees after they had signed a confidentiality undertaking as mentioned by the Chairman. The Chairman said that Ms HO's concern might be further considered on other occasions.

28. Mr Albert HO drew the Judiciary's attention to the prolonged absence or death of one of the parties to the claim, notably the employer, and considered that the Judiciary should review the tribunal procedures in handling such cases.

Consultation with stakeholders and other issues

29. Noting from paragraph 64 of the paper that some stakeholders had raised minor and technical comments on the Bill, Mr KWOK Wai-keung sought further information on such minor and technical comments. In reply, DJA (Development) said that the comments were mainly related to the drafting aspect and whether or not legal representation should be allowed for proceedings in the Labour Tribunal.

30. Mr Albert HO said that concerns had been raised by legal professionals about the sale of a lot under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545). He urged the Judiciary to examine the feasibility of sale of a lot by public auction or by other forms of sale under this Ordinance. He indicated that if the Judiciary would not follow up his suggestion, he would pursue the matter by way of a Members' bill.

(Post-meeting note: As advised by JA, this item fell within the Administration's purview and should be referred to the Development Bureau for consideration and follow-up.)

The way forward

31. Ms Emily LAU noted that the proposed Bill straddled different policy areas, some of which were outside the Panel's terms of reference. Whilst noting that in line with the usual practice, the Panel had invited all other LegCo Members to take part in the discussion on this agenda item, Ms Emily LAU opined that further opportunities should be provided for Members to consider and deliberate on the legislative proposals.

32. Members considered that the Panel should re-visit the subject after receipt of the Judiciary's responses. The Chairman suggested and members agreed that the item would be included in the Panel's list of outstanding items for discussion in the next legislative session.

(Post-meeting note: A list of issues arising from the meeting on 23 July 2013 had been prepared and sent by email to JA for follow-up on 6 August 2013.)

III. Mechanism for handling complaints against judicial conduct [LC Paper Nos. CB(4)871/12-13(02) and CB(4)670/12-13(01)]

33. DJA (Development) briefed members on the current mechanism for handling complaints against judicial conduct, details of which were set out in the Judiciary's paper [LC Paper No. CB(4)871/12-13(02)]. DJA (Development) highlighted that the Judiciary attached great importance to ensuring that judges and judicial officers maintained a high standard of professional competence and integrity, and would deal with legitimate complaints against judges in a fair and proper manner.

34. Mr TAM Yiu-chung asked whether JA would conduct a preliminary screening of the complaints received so as to screen out frivolous complaints and those unrelated to judicial conduct. In response, DJA (Development) confirmed that all complaints received were referred to the Chief Justice ("CJ") and/or the relevant Court Leaders as appropriate, having regard to the level of judges being complained against. The Court Leader would send a written reply to the complainant after investigation.

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35. Mr TAM Yiu-chung enquired on the courses of action that would be taken if the complaint was substantiated. In explaining the different disciplinary actions that might be taken against judges, DJA (Development) said that under Article 89 of the Basic Law ("BL"), a Judge at District Court level and above might only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive ("CE") on the recommendation of a tribunal of at least three local judges appointed by CJ. He further said that for judicial officers, Article 91 of the BL and the Judicial Officers (Tenure of Office) Ordinance (Cap. 433) were relevant. Cap. 433 provided for a procedure for a tribunal to be appointed by CJ to investigate the matter and report findings.

36. Mr TAM Yiu-chung was of the view that members would be put in a better perspective if details of disciplinary actions as explained by DJA (Development) had been clearly set out in writing in the paper provided by JA for the meeting.

37. Mr Albert HO enquired about the number of complaints against judicial conduct in the past three years and the number of apologies given to the complainants. DJA (Development) said that a total of 126 complaints had been received by the Judiciary in 2012. Of these complaints, 74 were related to judiciary decisions, 31 were related to judicial conduct, and 21 concerned both. He said that the number of complaints was small when compared to the 524 905 court cases disposed of by Judges and Judicial Officers in 2012. Concerning the number of apologies given to the complainants, DJA (Development) said that JA did not keep a separate record on apologies.

38. Mr Paul TSE said that not many people had found themselves in a position to lodge a complaint against a judge, in particular when they were not legally represented. Mr TSE was therefore concerned that the actual number of complaints (i.e. 126 cases) received by the Judiciary last year was only a small proportion of all potential complaints that might be harboured by litigants or other parties.

39. Given the professional standing and social status of judges, Mr Ronny TONG considered that it was rare for judges to make an apology to complainants. He was of the view that the transparency of the existing mechanism for handling complaints against judicial conduct should be enhanced. Measures should also be taken to make members of the public aware of how and where to lodge a complaint against judicial conduct and the

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channels, if any, to raise views or objection to the outcome of the investigation of the complaint. In this regard, DJA (Development) advised that information on the existing mechanism for handling complaints against judicial conduct was posted on the website of the Judiciary. Noting members' concern about the need to enhance transparency, he said that the Judiciary would consider making available additional information, such as related statistics, in the Judiciary's website and annual reports.

40. Mr Dennis KWOK remarked that the conduct and performance of some judges, especially those in the lower levels of courts such as Magistrate's Courts and Lands Tribunal, might not up to the acceptable standard. He highlighted the importance of training for judges. He was concerned that unacceptable judicial conduct of judges might lead to the adverse perception that justice had not been done in court. Mr KWOK also requested the Judiciary to provide the Panel with a breakdown of complaints cases against judicial conduct in the past three years by the level of courts involved and the rank of judges being complained against, as well as how the aforesaid complaints had been dealt with.

41. Mr LEUNG Kwok-hung suggested that the Panel should hold a meeting to receive views from deputations and stakeholders, including legal professionals and court users, on the existing system for handling complaints against judicial conduct, how the system could be improved and the role of the media in covering news reports concerning judges' conduct. The Chairman said that she would need to take into consideration members' views before deciding whether to arrange a meeting as proposed by Mr LEUNG.

42. Mr Paul TSE sought information on the existing arrangements for handling complaints against judicial conduct in other jurisdictions, and whether it was possible to establish an independent body to handle complaints against judicial conduct, similar to the Travel Industry Authority expected to be established in 2014 to regulate the tourism sector. He also urged the Judiciary to consider allowing complainants to access the audio recording of the court proceedings in connection with their complaints against judges.

43. Dr CHIANG Lai-wan was concerned about the potential conflict of interest that might arise if all complaints against judicial conduct were handled in-house by CJ and/or the Court Leader. To enhance transparency and the accountability of the Judiciary, she considered that an independent body should be set up to receive and investigate into complaints against judicial conduct, or to monitor and review the Judiciary's handling of complaints against judicial conduct.

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44. In this connection, DJA (Development) informed members that CJ objected to any proposals that a body outside the Judiciary be set up to investigate complaints against judicial conduct as any such proposals would run the high risk of undermining the principle of judicial independence.

45. Noting DJA (Development)'s response, Dr CHIANG Lai-wan nevertheless suggested that the Chairman should convey members' concerns about the handling of complaints against judicial conduct to CJ on a suitable occasion.

46. Ms Emily LAU recalled that Panel members had the opportunity to meet with CJ on an informal basis each year during which views could be exchanged on issues of concern. DJA (Development) also agreed to convey to CJ members' views and concerns raised at the meeting. In this regard, Ms Emily LAU cautioned that when members considered issues related to the handling of complaints against judicial conduct, it was necessary to strike a balance between upholding the integrity of the court and enhancing the transparency of the complaint-handling mechanism.

JA 47. At Dr CHIANG Lai-wan's request, DJA (Development) agreed to provide after the meeting the number and the corresponding percentage of judges and magistrates who had not taken professional practice prior to taking up their judicial appointments.

JA 48. The Chairman enquired about the number of complaint cases that had been brought to the attention of the Judicial Officers Recommendation Commission in the past three years and the subsequent actions taken on these cases. She also sought explanation on what constituted "misbehaviour" of a judge as stated in Article 89 of the BL for which the judge might be removed by the CE in accordance with the relevant proceedings prescribed in the BL.

49. Summing up, the Chairman advised that in view of the concerns and views raised by members at the meeting, she would consider arranging another meeting in the next legislative session to re-visit the subject. She requested DJA (Development) to provide an early response to the enquiries and issues raised by members at the meeting. The Chairman also asked the Secretariat to include the matter in the Panel's "List of outstanding items for discussion".

(Post-meeting note: A list of issues arising from the meeting on 23 July 2013 had been prepared and sent by email to JA for follow-up on 6 August 2013.)

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IV. Any other business

50. There being no other business, the meeting ended at 6:45 pm.

Council Business Division 4
Legislative Council Secretariat
5 December 2013