

立法會
Legislative Council

Ref : CB4/PL/AJLS

LC Paper No. CB(4)679/16-17
(These minutes have been seen
by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 19 December 2016, at 5 pm
in Conference Room 1 of the Legislative Council Complex

- Members present** : Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)
Hon Dennis KWOK Wing-hang (Deputy Chairman)
Hon James TO Kun-sun
Hon Abraham SHEK Lai-him, GBS, JP
Hon LEUNG Kwok-hung
Hon Steven HO Chun-yin, BBS
Hon Frankie YICK Chi-ming, JP
Hon CHAN Chi-chuen
Dr Hon Fernando CHEUNG Chiu-hung
Dr Hon Helena WONG Pik-wan
Dr Hon Elizabeth QUAT, JP
Hon Martin LIAO Cheung-kong, SBS, JP
Hon POON Siu-ping, BBS, MH
Dr Hon CHIANG Lai-wan, JP
Hon CHUNG Kwok-pan
Hon Alvin YEUNG
Hon Jimmy NG Wing-ka, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung
- Members absent** : Hon Paul TSE Wai-chun, JP
Hon Christopher CHEUNG Wah-fung, SBS, JP
Hon CHU Hoi-dick

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**Public officers
attending**

: Item III

Home Affairs Bureau

Ms Karyn CHAN
Principal Assistant Secretary for Home
Affairs (Civic Affairs) 2

Legal Aid Department

Ms Juliana CHAN
Deputy Director of Legal Aid (Litigation) (Atg)

Ms Sherman CHEUNG
Assistant Director of Legal Aid (Litigation)

Item IV

Department of Justice

Mr Peter WONG
Deputy Solicitor General (Policy Affairs)

Ms Peggy AU-YEUNG
Senior Assistant Solicitor General (China Law) (Acting)

Ms Melissa KIANG
Senior Government Counsel (Acting)

Item V

Department of Justice

Mr Wesley WONG, SC
Solicitor General

Mr Alan SIU, JP
Director of Administration & Development

Ms Roxana CHENG
Deputy Solicitor General (Constitutional Affairs)

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Attendance by invitation

: Item III

Hong Kong Bar Association

Mr James H.M. MCGOWAN

The Law Society of Hong Kong

Mr Stephen HUNG
Immediate Past President

Mr Kevin SHE
Research Officer, Practitioners Affairs Department

Item IV

Hong Kong Bar Association

Mr Jeremy S.K. CHAN

The Law Society of Hong Kong

Mr Dennis HO
Chairman, Family Law Committee

Ms Karen LAM
Member, Family Law Committee

Ms Kally LAM
Assistant Director, Practitioners Affairs Department

Clerk in attendance : Miss Mary SO
Chief Council Secretary (4)2

Staff in attendance : Mr Stephen LAM
Senior Assistant Legal Adviser 2

Miss Joyce CHING
Senior Council Secretary (4)2

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Ms Jacqueline LAW
Council Secretary (4)2

Miss Vivian YUEN
Legislative Assistant (4)2

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

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

LC Paper No. CB(4)236/16-17(01) -- Information paper on "Allowances for Jurors and Witnesses and Fees Payable to Adjudicators" provided by the Judiciary Administration

LC Paper No. CB(4)333/16-17(01) -- Information paper on "Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region" provided by the Department of Justice

II. Items for discussion at the next meeting

LC Paper No. CB(4)303/16-17(01) -- List of outstanding items for discussion

LC Paper No. CB(4)303/16-17(02) -- List of follow-up actions

2. Members agreed that the next regular meeting scheduled for Monday, 23 January 2017, at 4:30 pm would be extended to end at 7:30 pm to discuss the following items:

- (a) Briefing on the Chief Executive's 2017 Policy Address;

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- (b) Judicial Service Pay Adjustments; and
- (c) Review of Conditions of Service for Judges and Judicial Officers.

III. Biennial Review of Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fees

LC Paper No. CB(4)303/16-17(03) -- Home Affairs Bureau's paper on "Biennial Review of Criminal Legal Aid Fees, Prosecution Fees and Duty Lawyer Fees"

LC Paper No. CB(4)303/16-17(04) -- Updated background brief on "Biennial review of criminal legal aid fees, prosecution fees and duty lawyer fees" prepared by the Legislative Council Secretariat

Briefing by the Administration

3. At the invitation of the Chairman, Principal Assistant Secretary for Home Affairs (Civic Affairs) 2 ("PASHA(CA)2") briefed the Panel on the outcome of the 2016 biennial review of the criminal legal aid fees, prosecution fees and duty lawyer fees (collectively referred to as "the Fees"), details of which were set out in the Administration's paper (LC Paper No. CB(4)303/16-17(03)). The Administration proposed to amend Rule 21 and Part 2 of the Schedule to the Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) ("LACCR") to increase criminal legal aid fees by 4% to reflect the accumulated change in the Consumer Price Index (C) ("CPI(C)") recorded between July 2014 and July 2016. Subject to members' views, the Administration would submit the proposed amendments to the Criminal Procedure Rules Committee ("Rules Committee") chaired by the Chief Judge of the High Court for approval. Subject to the Rules Committee's approval, the Administration would move a resolution in LegCo in the second quarter of 2017 to effect the legislative changes and appoint the commencement date as soon as possible upon LegCo's approval. The prosecution fees and duty lawyer fees would be adjusted administratively to reflect the 4% change in CPI(C).

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Declaration of interest

4. Mr Dennis KWOK and Mr Jimmy NG declared that they were on the Legal Aid Panel under the Legal Aid Department. Mr Jimmy NG also declared that he was a practising solicitor. Mr Alvin Yeung and the Chairman declared that they were practising barristers.

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

5. Mr Stephen HUNG said that the process of reviewing the Fees last year was smooth as the Bar Association of Hong Kong, the Law Society and the Administration had promptly reached consensus on the revised Fees. That said, Mr HUNG considered that the increase last year was still far from satisfactory and he hoped that the Fees would be further adjusted upward in the next review.

Views of the Bar Association of Hong Kong ("Bar Association")

6. Mr James MCGOWAN presented the views of the Bar Association on the biennial review of criminal legal aid fees, as detailed in the submission tabled at the meeting (issued to members vide LC Paper No. CB(4) 339/16-17(01) on 20 December 2016). Noting that the prosecution fees and duty lawyer fees had been administratively increased since 14 November 2016, Mr MCGOWAN was of the view that the increase in criminal legal aid fees, which would be effected by moving a resolution in LegCo to amend the LACCR, should be backdated to 14 November 2016 as well, given the Administration's stated position that neither Legal Aid Department nor Department of Justice ("DoJ") would have any advantage in competing for lawyers.

7. In reply, PASHA(CA)2 clarified that the revised rates of criminal legal aid fees, prosecution fees and duty lawyer fees recommended in the previous review which were supported by the Panel in February 2016 and approved by LegCo in June 2016, came into effect on the same date, i.e. 14 November 2016.

Discussion

Review of duty lawyer fees

8. Mr Dennis KWOK noted from a correspondence between the Law Society and the Duty Lawyer Service ("DLS") that the DLS would not accede to the request of conducting a review on duty lawyer fees. Mr KWOK expressed

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grave concern on the decision of the DLS. To his understanding, the duty lawyer fees were once pegged to the criminal legal aid fees to a certain extent in the 1990s. The criminal legal aid fees had been increased by 50% for counsel and 25% for instructing solicitor as approved by LegCo in 2016. In contrast, the duty lawyer fees had not been reviewed since 1997 other than the adjustments made consequent to movements in CPI(C). As such, Mr KWOK urged the Administration to expeditiously come up with a timetable on the comprehensive review of duty lawyer fees.

9. PASHA(CA)2 responded that the criminal legal aid fees and the prosecution fees and the duty lawyer fees were all subject to review on a biennial basis. In conducting the biennial reviews, the Administration took into account changes in CPI(C) during the reference period and whether there had been difficulty in engaging the services of counsel and solicitors. As regards Mr KWOK's suggestion of conducting a comprehensive review on the duty lawyer fees, PASHA(CA)2 replied that the Administration would consider the need for such review after taking into account the views of relevant stakeholders.

10. Mr Dennis KWOK and the Chairman expressed dissatisfaction with the Administration's reply, and urged the Administration to provide a written reply on whether a comprehensive review on the duty lawyer fees would be conducted.

11. Mr Alvin YEUNG invited the Law Society and the Bar Association to express their views on whether they considered the duty lawyer fees were far below reasonable level for a long period of time. Mr Stephen HUNG was of the view that it was a suitable time to review the duty lawyer fees. Mr HUNG said that according to the DLS, the duty lawyer fees were pegged to the criminal legal aid fees and the prosecution fees to a certain extent. However, as mentioned by Mr Dennis KWOK, the duty lawyer fees had actually been delinked from the criminal legal aid fees and the prosecution fees since the upward adjustment in criminal legal aid fees approved by LegCo in 2016. As the last review of duty lawyer fees was taken place more than 10 years ago, it was not justifiable to state that the present level of duty lawyer fees was reasonable. Mr HUNG also noted that an increasing number of experienced counsel or solicitors were not willing to engage in duty lawyer work having regard to the present level of duty lawyer fees. Although the Duty Lawyer Scheme could provide opportunities for young lawyers to acquire litigation experience, it was equally important to safeguard the overall public interest in access to justice by further enhancing the legal services provided to the public. Mr James MCGOWAN shared the same view that the level of duty lawyer fees was too low and agreed that a review was needed.

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12. Mr Alvin YEUNG said that the two legal professional bodies clearly pointed out that with the present level of duty lawyer fees, it was difficult to attract experienced counsel or solicitors to act as duty lawyers and to provide legal representation for defendants appearing in the Magistrates' Courts. As pointed out by the Law Society, it was important to provide high-quality and professional legal services to the general public. He urged the Administration to give due regard to the views expressed by the two legal professional bodies and furnish a written response on the request of conducting a comprehensive review on duty lawyer fees. Mr YEUNG added that around 80% to 90% of criminal cases in Hong Kong were tried in the Magistrates' Courts. In his view, the outcome of the trials in the Magistrates' Courts greatly affected the liberty and the livelihood of many Hong Kong citizens. In this connection, it was important to provide professional legal service for defendants in the Magistrates' Courts and enable the defendants to have better access to criminal justice.

13. Mr Dennis KWOK said that the proposed review of duty lawyer fees was not aimed at fully reflecting the market rate but bringing the remuneration to duty lawyers to a more reasonable level as the present rates were out of tune with the market. Moreover, it would be wrong if the Administration considered that such comprehensive review was not necessary by merely stating that DLS had not encountered any difficulty in attracting counsel and solicitors to join the panel of the Duty Lawyer Scheme. To his understanding, many legal practitioners took up duty lawyer work on a pro bono basis but this was not conducive to the healthy development of the Duty Lawyer Scheme. Mr KWOK further urged the Administration to have a clear position on whether the said review would be conducted and to furnish a written response in this regard.

14. At the invitation of the Chairman, Mr James MCGOWAN said that the Administration should initiate the next biennial review as soon as possible in view of the time taken in previous reviews and the current intended increases should be backdated; an overall review on the philosophy of the biennial review and the fee rates should be done as well. Mr Stephen HUNG stressed that the comprehensive review of duty lawyer fees was definitely needed considering that the criminal legal aid fees had been reviewed twice.

Review of criminal legal aid fees

15. Whilst expressing support for the proposal to adjust the criminal legal aid fees upward by 4%, Mr Jimmy NG opined that the proposed increase was not realistic, particularly having regard to the fact that the operating costs of running a law firm were rising at a rate far exceeding 4%. Citing the example

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that the reading fees payable for instructing solicitors engaged for District Court cases would be slightly increased from \$840 per hour to \$870 per hour, Mr NG held the view that the base for calculating the increase in criminal legal aid fees was too low. Given that the hourly rate payable to lawyers undertaking civil legal aid cases was around a few thousand dollars under the civil taxation rate scale, Mr NG expressed that the fees for criminal legal aid work should be on par with that for civil legal aid work as criminal cases required no less efforts than civil cases. He therefore urged the Administration to undertake comprehensive review on the criminal legal aid fees so as to encourage more lawyers to take up criminal legal aid work.

16. PASHA(CA)2 replied that as explained in the Administration's paper, the Administration undertook to review the revised rates of criminal legal aid fees in two years' time upon the introduction of a "marked brief system" in 2012. A working group was formed by the Home Affairs Bureau in March 2014 ("the working group") to review the rates of criminal legal aid fees as pledged. The Administration sought the support of the Panel on the proposed package of increases in criminal legal aid fees in February 2016 and the proposed package was approved by LegCo in June 2016. The new Fees came into effect on 14 November 2016. Apart from the above-mentioned review, the Administration now proposed to further adjust the Fees upward by another 4% pursuant to the outcome of 2016 biennial review.

17. In response to Mr NG's comment that the base for calculating the increase in criminal legal aid fees was too low, PASHA(CA)2 advised that as explained to the two legal professional bodies before, since the systems for civil and criminal cases were different, the Government was of the view that differences between the rates for remunerating lawyers in different practices were justifiable and should continue to be allowed. Hence, the working group focused on working out reasonable fee rates for lawyers undertaking criminal legal aid cases during the deliberation. The Administration would continue to keep in view the implementation of the new rates for criminal legal aid fees.

18. Mr Jimmy NG stressed that the average hourly effort spent by legal practitioners on preparing civil cases and criminal cases should be the same and thus he did not subscribe to the view that the rates for remunerating lawyers undertaking civil and criminal legal aid cases should be different.

19. Deputy Director of Legal Aid (Litigation) (Atg) supplemented that in setting the rates of criminal legal aid fees, the Administration would take into account the complexity of cases, including the levels of courts, to assess the time needed by the assigned-out lawyers to prepare for the case. For individual cases tried in the District Courts which were more complicated, a

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mechanism was in place to remunerate the assigned-out lawyers as appropriate if additional preparation work was required.

20. The Chairman said that legal aid was essential to ensure persons with limited means could gain access to justice. She expressed concern that the criminal legal aid fees were out of tune with the market despite the recent adjustments made to the fees. The Chairman further said that the importance and complexity of individual cases, particularly criminal legal aid cases, should not be determined based on the level of courts. In the light of this, the remuneration to lawyers engaged in criminal legal aid cases should not be differentiated according to the levels of courts. The Chairman opined that as the level of criminal legal aid fees was far from satisfactory, it would be difficult to attract well-qualified criminal law practitioners to take up criminal legal aid work. She was concerned that overall public interest in access to justice would be adversely affected if the defendants in legally aided criminal cases were represented by less experienced lawyers. The Chairman requested the Administration to pay heed to the concerns of the members and called on the Administration to conduct a further review on criminal legal aid fees. Mr Dennis KWOK echoed similar views. Given that members from both pro-democracy camp and pro-establishment camp as well as the two professional bodies clearly indicated their support of the comprehensive review on criminal legal aid fees and duty lawyer fees in particular, he reiterated that there was an urgent need to review these fees.

21. PASHA(CA)2 noted the comments of the members on the review of criminal legal aid fees and duty lawyer fees. The Administration would consider the need for such review after obtaining relevant information from the DLS and the two professional bodies. PASHA(CA)2 stressed that the aided person's interest was of paramount importance in the provision of legal aid services including criminal legal aid and the Duty Lawyer Scheme.

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22. At the request of the Chairman and some other members, the Administration undertook to provide a written response on: (a) conducting a comprehensive review of the criminal legal aid fees and the duty lawyer fees, including the implementation details such as timeframe and criteria to be adopted; and (b) if the answer to conducting the review in (a) was in the negative, the reasons.

Conclusion

23. In closing, the Chairman said that the Panel would continue to follow up with the Administration on the review of criminal legal aid fees and duty lawyer fees.

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IV. Reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland

LC Paper No. CB(4)303/16-17(05) -- Administration's paper on "Proposed Arrangement with the Mainland on Reciprocal Recognition and Enforcement of Judgments on Matrimonial and Related Matters"

LC Paper No. CB(4)303/16-17(06) -- Updated background brief on "Reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland" prepared by Legislative Council Secretariat

LC Paper No. CB(4)303/16-17(07) -- Submission from the Hong Kong Bar Association (English version only)

LC Paper No. CB(4)339/16-17(02) -- Submission from the Law Society of Hong Kong (English version only)

Briefing by the Administration

24. Deputy Solicitor General (Policy Affairs) ("DSG (Policy Affairs)") briefed members on the overview of the outcome of the public consultation on the proposed arrangement with the Mainland on reciprocal recognition and enforcement of judgments on matrimonial and related matters ("Proposed Arrangement"). DSG (Policy Affairs) reported that, following the public consultation on the Proposed Arrangement launched in June 2016, 21 submissions had been received from different stakeholders, including professional bodies from the Hong Kong legal and dispute resolution sectors, social welfare organisations and academics. On the whole, most respondents supported the proposed conclusion of an arrangement with the Mainland.

25. Senior Assistant Solicitor General (China Law) (Acting) briefed members on the Administration's preliminary study of the comments of the respondents and its main response to the related issues, details of which were set

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out in the Administration's paper (LC Paper No. CB(4)303/16-17(05)). Specifically, members were briefed on the following issues:

- (a) the principal types of judgments (including divorce, maintenance and custody orders) to be covered in the Proposed Arrangement;
- (b) whether "divorce certificate" obtained through the registration procedure in the Mainland should be included in the Proposed Arrangement;
- (c) whether orders for property adjustment should be included;
- (d) whether power of variation of maintenance orders by the courts in the place where the orders were sought to be enforced should be included;
- (e) whether other orders should be included in the Proposed Arrangement;
- (f) the jurisdictional basis of the parties to an application for reciprocal recognition and enforcement of judgments;
- (g) the level of courts to be covered in the Proposed Arrangement; and
- (h) the finality of judgments.

Views of the Bar Association

26. Mr Jeremy CHAN said that the views of the Bar Association on the issues under consultation were detailed in its submission (LC Paper No. CB(4)303/16-17(07)). Mr CHAN then highlighted the importance of "mutual recognition and enforcement" of relevant orders or judgments. Mr CHAN said that while Hong Kong might be amending the relevant legislation/rules to give effect to orders and/or judgments made by the Mainland courts, the Mainland should also reciprocally provide avenues to give effect to the orders and/or judgments made by the Hong Kong courts. Mr CHAN further said that most cross-border divorce cases involved transfer and division of properties and assets. However, at the moment, enforcement against properties and assets in the Mainland was difficult, if not impossible, and thus the issues in this regard should be further looked into.

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View of the Law Society

27. Mr Dennis HO said that the Law Society was basically in support of the Proposed Arrangement and that its views on the issues under consultation were detailed in its submission. The Law Society was particularly concerned about "custody orders for the purpose of return of children in parental abduction cases". Referring to paragraph 39(b) of the updated background brief on the power of variation of maintenance orders (LC Paper No. CB(4)303/16-17(06)), Mr HO clarified that the view of the Law Society was that "Any variation where appropriate should be determined by the court which made the original order." Mr HO then raised question and concern on the following:

- (a) the latest progress of the discussion with the Mainland counterparts on the Proposed Arrangement; and
- (b) regarding the service of petitions for divorce, Mr HO noted that from a recent Hong Kong Court of Appeal case holding that the requirement under the legal regime of the Mainland as to service of petitions for divorce from Hong Kong to the spouses and/or parties involved in the Mainland had to be satisfied. He also noted that, due to issues with service of petitions for divorce in the Mainland, many divorce cases were dragged on for a very long time. In view of the problems arising out of the procedural differences in relation to the service of petitions for divorce in Hong Kong and the Mainland, Mr HO urged the Administration to discuss this issue with the Mainland counterparts with a view to exploring a mutually recognized way of service. Alternatively, Mr HO suggested the Administration to consider making legislative amendment to our regime to give legal effect to petitions for divorce delivered in person or by post to the spouse and/or parties in the Mainland.

(Post Meeting Note: The Law Society's submission was issued to members vide LC Paper No. CB(4)339/16-17 on 20 December 2016.)

Discussion

28. Mr Dennis KWOK said that the legal sector generally supported the Proposed Arrangement and that he was also concerned about the progress of the discussion with the Mainland counterparts on the Proposed Arrangement. Mr KWOK asked whether a timetable had been set for the implementation of the Proposed Arrangement, including the timetable for signing an arrangement

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with the Mainland and enactment of local legislation, if any. Moreover, Mr KWOK was also concerned about the issues relating to the service of petitions for divorce and asked whether the Administration would consider making any relevant legislative amendments and/or explore a mutually recognized way of service with the Mainland counterparts.

29. With regard to the signing an arrangement, DSG (Policy Affairs) responded that the Administration would continue to maintain a close dialogue with the Mainland and that the target timetable for signing an arrangement would be 2017. DSG (Policy Affairs) said that the Administration would consider taking the approach of "resolving the simpler issues before the more difficult ones". DSG (Policy Affairs) further gave the example that issues on which consensus had been reached, such as divorce decrees and maintenance orders, would first be resolved; and that issues with more controversies, such as custody orders, would be resolved at a later stage. DSG (Policy Affairs) also mentioned that the concept of "wrongful removal", as suggested by the Law Society, might serve as a reference for considering matters in relation to mutual assistance between the two places for the return of children "wrongfully removed or retained". Moreover, in proposing any mechanism, DSG (Policy Affairs) said that the Administration would bear in mind the Bar Association's concern on "mutual recognition and enforcement". As to the legislative timetable, DSG (Policy Affairs) said that the Administration would consider commencing the work for a draft bill in good time and would aim at finalizing the bill as soon as practicable after the arrangement had been signed. As to the issues relating to service of petitions for divorce, DSG (Policy Affairs) said the Administration would take note of the concerns mentioned above and would further consider the matter with a view to initiating a discussion with the Mainland.

30. In response to Mr Dennis KWOK's query of whether the legislative proposal would be introduced into the Legislative Council in October 2017, DSG (Policy Affairs) said that the Administration would strive to introduce the legislative proposal by the end of 2017. The Chairman and Dr Elizabeth QUAT also pressed for an early conclusion of an arrangement between Hong Kong and the Mainland, hopefully, by the first half of 2017.

31. Dr Elizabeth QUAT said that the Democratic Alliance for the Betterment and Progress of Hong Kong supported the Proposed Arrangement. While she was keen to see an early conclusion of an arrangement between Hong Kong and the Mainland, Dr QUAT was concerned about the practical problems relating to enforcement of judgments on matrimonial and related matters. Given the differences in legal principles and civil procedures between Hong Kong and the Mainland, Dr QUAT enquired on how the Administration was

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going to reconcile the differences and tackle the problems arising out the differences. Dr QUAT further asked whether the Administration would set up any mechanism to facilitate on-going discussion between Hong Kong and the Mainland so as to ensure that timely solutions would be worked out in response to any problems.

32. DSG (Policy Affairs) responded that, in working out the Proposed Arrangement with the Mainland counterparts, the Administration would ensure that a close dialogue would be maintained between both sides when problems arise in relation to the implementation of the arrangement. DSG (Policy Affairs) indicated that the Department of Justice and the Supreme People's Court had been working on good terms and would strive to explore ways to reconcile the differences in the legal framework within which the two legal systems operated.

33. The Chairman also expressed concern as to the problems arising out of the differences between Hong Kong's common law system and the legal system in the Mainland in relation to civil and commercial matters, especially difficulties in enforcing custody orders and orders for transfer and division of properties and assets. The Chairman said that, from her experience in handling cross-border divorce cases, it was not uncommon for the courts to issue orders granting a child's care and residence to each parent and as a result splitting up siblings and even twins. Moreover, orders for transfer and division of properties and assets were difficult to enforce against for most of the cases. In view of her concerns, the Chairman urged the Administration to ensure arrangements would be worked out to ensure reciprocal enforcement of custody orders. In exploring ways to reconcile the above mentioned differences between the two legal systems, the Chairman considered it important for the Administration to make clear to the Mainland counterparts our legal principles under the common law system and highlight the mutual benefits for the communities of both sides in widening the current regime on reciprocal enforcement of judgments.

34. DSG (Policy Affairs) said that the concerns of members on enforcement issues were noted. DSG (Policy Affairs) acknowledged that reciprocal enforcement of judgments would be a key issue to be addressed and assured that the Administration would strive to work out a mechanism to ensure effective implementation. For instance, DSG (Policy Affairs) said that reference could be made to the approach adopted in the arrangement concerning mutual enforcement of arbitral awards, which had been working well.

35. Dr Hon Fernando CHEUNG said that the social welfare sector basically supported the Proposed Arrangement. Dr CHEUNG also expressed

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similar concern as to the enforcement issues, in particular, issues relating to maintenance orders, child access, guardianship and abduction.

36. Regarding maintenance orders, DSG (Policy Affairs) said that widening the scope of the current regime to facilitate reciprocal enforcement of maintenance orders would be one of the main focuses under the Proposed Arrangement. DSG (Policy Affairs) further supplemented that the current regime, stipulated under the MOREO (Cap. 188) was not applicable to matrimonial orders made in the Mainland, and thus a payee could not rely on Cap. 188 to seek enforcement of maintenance orders made by the Mainland courts in Hong Kong. Regarding child access and guardianship, DSG (Policy Affairs) said that the focus of the consultation paper was on issues relating to "abduction", i.e. children being "wrongfully removed or retained". DSG (Policy Affairs) further said that the above mentioned issues boiled down to the question of "mutual recognition" as discussed earlier. DSG (Policy Affairs) reiterated that the Administration would strive to work out an effective mechanism with the Mainland counterparts to address the issues concerned.

37. In response to Dr Fernando CHEUNG's query of whether any channels would be available for the parties in need to seek assistance and/or advice on enforcement issues, DSG (Policy Affairs) said that considerations would be given to the idea of setting up a "central authority" similar to those set up under the Hague Convention.

38. In conclusion, the Chairman pressed for an early conclusion of the Proposed Arrangement. The Chairman urged the Administration to maintain a close dialogue with the Mainland counterparts to address, among others, the issues relating to enforcement and the service of petitions for divorce.

V. Proposed Permanent Retention of one Post of Deputy Principal Government Counsel in the Legal Policy Division of the Department of Justice

LC Paper No. CB(4)303/16-17(08) -- Administration's paper on "Proposed Creation of a Permanent Post of Deputy Principal Government Counsel in the Legal Policy Division of the Department of Justice

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Briefing by the Administration

39. Director of Administration and Development briefed members on the proposal to create one permanent post of Deputy Principal Government Counsel ("DPGC")(DL2) in the Legal Policy Division of the Department of Justice ("DoJ") with effect from 13 April 2017, or with immediate effect upon approval of the Finance Committee of the Legislative Council ("LegCo"), whichever the later, to head the Constitutional Development and Elections Unit ("CD&EU") and undertake essential duties in respect of constitutional and electoral matters, details of which were set out in the Administration's paper (LC Paper No. CB(4)303/16-17(08)). Subject to members' views, the Administration would seek the recommendation of the LegCo Establishment Subcommittee ("ESC") and approval from the LegCo Finance Committee.

Discussion

40. Mr Dennis KWOK agreed that the proposed permanent DPGC post had to deal with a lot of controversial legal issues relating to electoral matters. Noting that the Chairman of the Electoral Affairs Commission ("EAC") had sought DoJ's opinion in respect of the requirement of completing a Confirmation Form as part of the nomination procedure in the 2016 LegCo Election, Mr KWOK expressed grave concern that the LegCo Panel on Constitutional Affairs had not been consulted on this important legal issue and yet EAC had hastily decided to take forward this requirement solely based on the legal advice provided by DoJ. As some members of the public questioned whether the legal advice given by DoJ was professional and impartial, Mr KWOK requested DoJ to provide the legal advice given to EAC relating to the introduction of the Confirmation Form, and asked whether DoJ provided such legal advice at the request of EAC; or DoJ indeed considered that the Confirmation Form was necessary and therefore proposed such requirement.

41. Solicitor General ("SG") advised that it was the responsibility of DoJ to provide legal advice whenever required relating to electoral affairs, including the requirement of completing the Confirmation Form as part of the nomination procedure in the 2016 LegCo Election. As regards the election petition relating to the Confirmation Form, SG said that it was not appropriate for him to comment on the case currently under judicial review proceedings. Notwithstanding this, SG stressed that the legal advice provided by DoJ in relation to electoral or any other matters had to be impartial, accurate and on sound legal basis without any political consideration. DoJ would render such legal advice to the relevant authority whenever necessary. This was not a question of whether it was DoJ or EAC who had initiated the provision of the legal advice regarding the introduction of the Confirmation Form.

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42. Dr Fernando CHEUNG was concerned that many disputes arising from the 2016 LegCo Election had never happened before, such as the nominations of individual candidates who failed to submit the duly signed Confirmation Form were rendered invalid, and the attempts to disqualify a number of LegCo Members from office by commencing legal proceedings against them. Dr CHEUNG asked the Administration to explain the role and responsibility of the DPGC in these disputes. Furthermore, Dr CHEUNG was of the view that the current term Government or even the next term Government would not reactivate the constitutional reform shortly, the workload of CD&EU in this regard should be limited. He also cast doubt on the workload of CD&EU in respect of its legal work on electoral affairs for the years ahead. In this connection, Dr CHEUNG asked the Administration to further explain why the creation of this permanent post was essential.

43. SG replied that as regards the constitutional development in Hong Kong, the relevant policy bureau was responsible to lead the policy directives while the implementation details were to be carried out by both EAC and the Registration and Electoral Office. DoJ would be involved in providing legal advice in both policy-making and implementation levels as and when necessary.

44. SG added that as explained in the Administration's paper, it was envisaged that the workload of CD&EU would continue to increase and the legal issues that might arise from the forthcoming elections would become more and more complicated. However, past experience suggested that references might not always be drawn from precedent cases in both Hong Kong and other overseas jurisdictions. It was therefore essential to have a dedicated legal team in DoJ with professional expertise and capability in this specialized area of the law to meet the challenges ahead.

45. Mr CHEUNG Kwok-kwan said that there was no doubt that the legal issues and disputes arising from election-related and constitutional work in Hong Kong in the past 10 years were highly controversial and complicated; and it was envisaged that the situation would persist in the future. He also agreed with SG that precedent cases in other overseas jurisdictions were not applicable to the situation, particularly the constitutional reform, in Hong Kong under "one country, two systems". As such, Mr CHEUNG considered it appropriate and essential for DoJ to have a dedicated legal team to handle these complex and sensitive legal issues and disputes.

46. Mr CHEUNG further said that today's discussion should be focused on whether the anticipated demand for advisory service in relation to constitutional and electoral affairs would be increased in order to justify the

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proposed creation of a permanent post at DPGC level, rather than whether EAC had initiated to seek legal advice from DoJ regarding the requirement of completing the Confirmation Form. In his view, it should be a good thing for society if the Government could make its political decisions based on the unbiased legal advice provided by DoJ. Members, regardless of their political background, should therefore support the proposed creation of this permanent post if they agreed that CD&EU's duties concerning the constitutional and electoral matters were important and its workload would continue to increase. With regards to the workload of CD&EU in relation to constitutional matters, Mr CHEUNG said that many Hong Kong people would like to reactivate constitutional reform as soon as practicable. If and when any constitutional reform package was to be introduced in future, he hoped that DoJ would have completed necessary preparatory and research work and be able to render advice with sound legal basis. To conclude, Mr CHEUNG supported the proposed creation of a permanent DPGC post in CD&EU so that DoJ could continue to impartially provide legal advice to the Government in relation to electoral and constitutional matters.

47. SG pointed out that the arrangements for constitutional development in Hong Kong had been clearly stipulated in the Basic Law ("BL"). To deal with this highly controversial issue, it was essential to have a dedicated legal team in DoJ to provide professional legal advice on this subject matter.

48. Mr Holden CHOW criticized that the pan-democratic members could not see the staffing proposal in a holistic way, but only concentrated the discussion on what legal advice DoJ had given in respect of the judicial review proceedings regarding the oath-taking of individual LegCo Members and the introduction of the Confirmation Form. Mr CHOW noted that many examples were cited in the Administration's paper to explain that numerous requests for legal advice in relation to various public elections were sought from CD&EU, and that the counsel had to render advice to relevant bureaux/departments ("B/Ds") promptly and the entire Unit was thus put under substantial manpower stress. For instance, paragraph 12 mentioned that prior to the November 2015 District Council Election, there was a record high of over 1 500 cases of claims and objects arising from voter registration entitlement, and 24 counsel were recruited to act as Assistant Returning Officer (Legal) so as to assist in the determination of questionable ballot papers during the counting of votes. He said that to ensure an election could be conducted in a fair, just and effective manner, timely legal advice provided by DoJ was essential. He expressed regret that the members belonging to the pro-democracy camp failed to notice that the post holder had to undertake wide range of duties with substantial workload. In view of the marked increase in workload and the increasing complexity of legal issues that were likely to be involved in the coming

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elections, Mr CHOW expressed his support to the proposed creation of the permanent DPGC post.

49. SG supplemented that apart from giving legal support throughout the election cycles including pre-election preparation, provision of legal advice on polling day, post-election litigation, etc., DoJ had received a large number of requests for legal advice at regular voter registration exercises. CD&EU had to render legal advice promptly on the claims and objections received on electoral registers and the counsel of the Unit also had to attend court hearings arising therefrom. Having regard to the urgency in handling necessary advice and appearance before the Revising Officers, manpower resources had been redeployed from other units to deal with these cases as well.

50. Mr HUI Chi-fung considered that "the current overall atmosphere" mentioned in paragraph 14 of the Administration's paper was actually referred to the political atmosphere and confrontation in the society. In his view, the huge volume of work facing by CD&EU came from various judicial review proceedings commenced by the Government to disqualify some of the LegCo Members and also the political considerations of the Government B/Ds or the Chief Executive. Mr HUI queried whether the proposed permanent post was created to handle the increasing number of election-related legal disputes and judicial reviews initiated by the Government having regard to the overall political atmosphere of the society.

51. In reply, SG said that legal advice from DoJ would be sought in order to facilitate the making of decisions by those responsible in both the policy and implementation levels whenever they were confronted with incidents giving rise to legal issues and disputes which must be addressed properly. With the rising number of election-related disputes in recent years, requests for legal advice from DoJ and the complexity and sensitivity of the legal issues involved increased significantly. It was the responsibility of DoJ to provide legal advice to those concerned when legal issues relating to the implementation of legal requirements were encountered. Political considerations did not come into the equation.

52. Mr HUI Chi-fung further queried how many manpower resources of the Unit were deployed to handle the legal proceedings regarding the oath-taking of individual LegCo Members and the Confirmation Form. He also expressed doubt as to whether it was worthwhile to support the creation of this permanent post which incurred an additional full annual average staff cost, including salaries and staff on-cost, of nearly \$13 million. SG advised that it would not be appropriate for him to comment on individual cases, particularly those cases pending the Court's adjudication.

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53. Mr LEUNG Kwok-hung expressed grave concern that there was no longer rule of law in Hong Kong but only rule by law, and the law had become a tool used by the Government for oppression. Mr LEUNG opined that the decisions made by the Returning Officers that the nominations of individual candidates running in the LegCo Election were invalid, and the interpretation of BL104 made by the Standing Committee of the National People's Congress in relation to the oath-taking of individual LegCo Members had no legal basis. He considered it unacceptable for the Administration to judge the validity of a nomination by the candidate's speech made earlier. Although BL158 stipulated that the power of interpretation of BL vested in the Standing Committee of the National People's Congress, it did not prescribe when the Standing Committee could exercise this power. According to BL158(3), if the courts needed to interpret the provisions of BL concerning affairs which were the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and Hong Kong, and if such interpretation would affect the judgments on the cases, the courts shall, before making their final judgments which were not appealable, seek an interpretation of the relevant provisions from the Standing Committee through the Court of Final Appeal. In the light of this, Mr LEUNG opined that the Standing Committee had abused its power of interpretation of BL.

54. With reference to paragraphs 14 and 19 of the Administration's paper, Mr CHAN Chi-chuen was of the view that the election-related disputes were in fact initiated by the Government and the resultant legal issues which were increasingly complex and sensitive had provided an excuse for the Administration to justify the creation of this permanent post. Noting that there were a number of election petitions concerning the requirement of completing the Confirmation Form, and later the Government also clarified that such requirement was not a mandatory requirement, Mr CHAN queried what legal advice the DPGC had provided in this regard, and whether all these legal disputes were created by the DPGC in order to justify the replacement of the supernumerary post by a permanent post.

55. SG replied that DoJ had the responsibility to render its professional and sound legal advice, whenever sought, to the relevant authorities with a view to ensuring that their election-related decisions were made in accordance with the law. Thereafter, if the legality of the decisions made was impugned, DoJ also had the responsibility to provide necessary legal support to deal with those post-election complaints and legal challenges, if any. In this connection, there was no question of creating legal issues/disputes by the colleagues of CD&EU to justify the creation of the permanent DPGC post.

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56. In reply to Mr CHAN Chi-chuen's enquiry as to the legal advice provided by the DPGC in relation to the introduction of the Confirmation Form and the judicial review proceedings regarding the oath-taking of individual LegCo Members, SG advised that the legal advice provided by counsel to the B/Ds concerned was protected by legal professional privilege and normally not disclosed. Nevertheless, SG said that CD&EU was the unit responsible for rendering legal advice on electoral and constitutional matters.

57. The Chairman hoped that with the creation of this permanent post, more election-related litigation could be handled by the in-house counsel of DoJ instead of engaging barristers in private practice, so that the legal costs on these briefing out cases could be minimized.

Conclusion

58. The Chairman enquired whether members supported that the staffing proposal be submitted to ESC for consideration. The Chairman declared that seven members voted for the proposal and one members voted against the proposal, and no member abstained from voting. The Chairman concluded that majority of the Panel members were supportive of the Administration's submission of the staffing proposal to ESC for consideration.

VI. Any other business

59. There being no other business, the meeting ended at 7:10 pm.