

立法會
Legislative Council

LC Paper No. CB(4)1547/20-21

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by the Administration)

Ref: CB4/PL/AJLS

Panel on Administration of Justice and Legal Services

Minutes of meeting

**held on Monday, 21 June 2021, at 4:30 pm
in Conference Room 2 of the Legislative Council Complex**

Members present : Hon CHEUNG Kwok-kwan, JP (Chairman)
Hon Martin LIAO Cheung-kong, GBS, JP (Deputy Chairman)
Hon Starry LEE Wai-king, SBS, JP
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon Elizabeth QUAT, BBS, JP
Hon CHUNG Kwok-pan
Hon Jimmy NG Wing-ka, BBS, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan, JP

Member absent : Hon Paul TSE Wai-chun, JP

**Public Officers
attending** : **Agenda item III**

Department of Justice

Ms Teresa CHENG, SC
Secretary for Justice
Chairman, The Law Reform Commission of Hong
Kong

Ms Adeline WAN
Secretary
The Law Reform Commission of Hong Kong

Mr Byron LEUNG
Deputy Secretary 1
The Law Reform Commission of Hong Kong

Mr Terence LEE
Government Counsel
The Law Reform Commission of Hong Kong

Agenda item IV

Department of Justice

Ms Teresa CHENG, SC
Secretary for Justice

Ms Gracie FOO
Director of Administration & Development

Ms Adeline WAN
Secretary
The Law Reform Commission of Hong Kong

Agenda item V

Department of Justice

Ms Teresa CHENG, SC
Secretary for Justice

Mr William LIU
Deputy Law Officer (Civil Law) (Acting)

Mr Christopher NG
Senior Government Counsel

Attendance by invitation : **Agenda items III, IV and V**

Hong Kong Bar Association

Mr Neville Leslie SARONY, SC

Mr Azan Aziz MARWAH

Clerk in attendance : Mr Lemuel WOO
Chief Council Secretary (4)6

Staff in attendance : Ms Clara TAM
Senior Assistant Legal Adviser 2

Miss Janice HO
Council Secretary (4)6

Ms Emily LIU
Legislative Assistant (4)6

Action

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

There was no information paper issued since the last meeting.

II. Date of next meeting and items for discussion

(LC Paper No. CB(4)1109/20-21(01) - List of outstanding items for discussion

LC Paper No. CB(4)1109/20-21(02) - List of follow-up actions)

2. The Chairman said that as there would be a summer break between the Legislative Council ("LegCo") meetings of 21 July and 18 August 2021, he had asked the Panel Clerk to check whether the Administration and the Judiciary Administration ("Jud Adm") had any proposed items for discussion at the regular meeting in July. Based on the results of consultation, he had decided that there would be no regular meeting in July and the next two regular meetings would be held on 23 August 2021 and 27 September 2021 respectively. Members also noted that the item "Legal education and training in Hong Kong" would be discussed at the next regular meeting to be held on 23 August 2021.

(Post-meeting note: Members were informed on 20 July 2021 vide LC Paper No. CB(4)1269/20-21 that the agenda item "Guangdong-Hong Kong-Macao Greater Bay Area ("GBA") Legal Professional Examination and other development opportunities in the GBA for the Hong Kong legal profession" would also be discussed at the next regular meeting. Subsequently, members were informed vide LC Paper No. CB(4)1368/20-21 that the regular meeting of the Panel originally scheduled for 23 August 2021 was rescheduled to 31 August 2021.)

3. The Chairman informed members that Jud Adm had indicated its plan to arrange a visit to the West Kowloon Law Courts Building for members before the end of the LegCo Term. The Secretariat would update members on details about the visit in due course. Members did not have any comments on the above arrangements.

III. Implementation of the recommendations made by the Law Reform Commission of Hong Kong

(LC Paper No. CB(4)1109/20-21(03) - Paper provided by the Administration

LC Paper No. CB(4)1109/20-21(04) - Updated background brief prepared by the Legislative Council Secretariat)

Briefing by the Law Reform Commission of Hong Kong

4. In her capacity as the ex-officio chairman of the Law Reform Commission of Hong Kong ("LRC"), Secretary for Justice ("SJ") briefed members on the progress of implementation of the recommendations made by LRC by the relevant government bureaux and departments ("B/Ds").

Views of the Hong Kong Bar Association

5. Mr Azan Aziz MARWAH of the Hong Kong Bar Association ("Bar Association") commended LRC for playing an important role in the implementation and development of the rule of law in Hong Kong. He said that the work which had been done by LRC demonstrated the need for more resources and a greater emphasis on what LRC could do, in particular on child protection and human trafficking. Mr MARWAH said that the Bar Association committed its support to LRC's work and had offered, at the recent meeting between SJ and representatives of the Bar Council of the Bar Association ("the Bar Council") in May 2021, further volunteer assistance where it was needed and could be given.

In this regard, the Bar Association would continue its support for the work of LRC.

Recommendations rejected by the Administration

Report on "Contempt of court"

6. In light of some recent court cases where contempt of court was an issue, Ms YUNG Hoi-yan enquired whether the Administration would revisit the recommendations in the LRC Report on "Contempt of Court" which it had rejected in 1994, in particular whether legislative proposal to provide for the civil and criminal liability for contempt of court (including the acts of journalists) would be introduced. In response, SJ said that over many years since 1994, there had been courts' guidance from time to time on contempt of court cases. SJ said that she would not rule out the possibility that LRC, where necessary, might consider looking into the relevant aspects of law.

Recommendations which the Administration had no plan to implement at this juncture

Report on "Adverse possession"

7. Ms YUNG Hoi-yan pointed out that, with more cases involving adverse possession coming to light, many legal practitioners considered it an opportune time to review whether the legal concept of adverse possession should be retained. She enquired whether the Administration had any plan to take forward the recommendations in the LRC Report on "Adverse Possession". Dr Priscilla LEUNG also said that from time to time, when providing pro bono legal services, she had come across cases in which elderlies had, out of goodwill, provided their owned properties to others to live in. They found only years after that their property ownership had been stripped through adverse possession by those living there. Dr LEUNG agreed that adverse possession was a subject of general interest which should be followed up.

8. SJ said that she would pass members' views to the Development Bureau ("DEVB") for consideration. After the report was released in 2014, DEVB welcomed in principle the suggestion to give certainty to private land ownership through appropriate means to complement the title registration regime under LRC's recommendation that the law of adverse possession under the registered land system should be recast upon implementation of the Land Titles Ordinance (Cap. 585) in future. DEVB would take into account the relevant recommendation when continuing to work with stakeholders on an acceptable proposal for taking forward Cap. 585.

Recommendations under consideration or in the process of being implemented

Reports on "Voyeurism and non-consensual upskirt-photography" and "Review of substantive sexual offences"

9. Ms Elizabeth QUAT welcomed the progress made after the LRC Report on "Voyeurism and non-consensual upskirt-photography" was published in April 2019 as the Crimes (Amendment) Bill 2021 had been introduced to LegCo in March 2021 to implement the recommendations. On the other hand, Ms QUAT expressed her wish that a legislative timetable for implementing other recommendations in the LRC Report on "Review of Substantive Sexual Offences" could be provided soon since the overall review of substantive sexual offences had been conducted in phases spanning over ten years.

10. In reply, SJ said that as LRC had just completed in February 2021 a consultation on the sentencing of sexual offences, which was part of the overall review of the substantive sexual offence, the Administration would consider LRC's recommendations out of the related matters in tandem.

Report on "Class actions"

11. Ms Elizabeth QUAT said that the progress of implementing the recommendations in LRC Report on Class Actions had all along been a concern of the Democratic Alliance for the Betterment and Progress of Hong Kong. She enquired when the Administration would consult LegCo on the relevant legislative proposals. In response, SJ said that the cross-sector working group to study and consider the recommendations of the report would soon commission a consultancy study on the (potential and likely) economic and other related impacts on Hong Kong if a class action regime was introduced. As the Administration was inviting expressions of interest from parties which might competently undertake the consultancy study, the study was targeted for commencement in the third or fourth quarter of 2021 and to be completed within 10 months.

12. Dr Priscilla LEUNG quoted the incident relating to the Lehman Brothers-related minibonds and structured financial products in 2008, in which a great number of victims had to join the class action in overseas jurisdictions, to demonstrate that there was a case for implementing the class action regime in Hong Kong. She was also aware that many legal practitioners were longing for the early development of the regime.

13. Dr Priscilla LEUNG said that notwithstanding the above, she had also communicated with other sectors (in particular the business sector) and noted that there were other concerns about the possible impacts of a class action

regime. As it was important to strike a proper balance between the interests of various stakeholders, Dr LEUNG suggested that the Administration should conduct a thorough consultation before it put forth a legislative proposal to implement the recommendations. Furthermore, reference might also be made to the experience of implementing class action in overseas jurisdictions.

14. SJ shared the view that balancing the interests of various stakeholders was crucial to the legislative development of a class action regime in Hong Kong. She added that, while access to justice could be facilitated by the class action regime, it was equally important to consider its potential impacts so as not to hinder further development of the regime.

Report on "The regulation of debt collection practices"

15. Dr Junius HO noted that it had been almost 20 years since the LRC Report on "The regulation of debt collection practices" was published in 2002. He asked whether any concrete plans had been or would be formulated to regulate the relevant conduct. SJ replied that some of the recommendations in the report were rejected by the Administration on the grounds that there had already been existing legislation to regulate the operation of debt collection agencies. She suggested that, as the Security Bureau ("SB") had stated its stance on the issue, Members might express their views to SB direct or discuss with SB at a suitable forum, such as the Panel on Security, if they wished to pursue the matter further.

Report on "Charities"

16. Dr Junius HO expressed concern about the emergence of some so-called charities which in fact were operating under concocted pretext. He enquired about the progress of implementing the recommendations in the LRC Report on "Charities" published in 2013. In reply, SJ said that the Home Affairs Bureau ("HAB") had been actively coordinating inputs from relevant B/Ds with a view to formulating a response to LRC's recommendations for the overall consideration of the Administration. In this process, HAB would make reference to the related improvement measures recommended in the Director of Audit's Report No. 68 ("Audit Report") as well as in the Public Accounts Committee Reports No. 68 and 68A ("PAC Reports").

17. SJ further said that, with reference to the recommendations in the LRC Report on "Charities", the Audit Report and the PAC Reports, the Administration had introduced a series of administrative measures in two phases with a view to optimizing the monitoring and supportive work relating to charitable fund-raising activities. SJ said that she would relay members' concerns on the overall progress to HAB for follow up and response as appropriate.

18. Mr Holden CHOW noted that the Administration was still considering the recommendations in the LRC Report on "Charities". However, noting that there had been new developments in the intervening years, in particular the emergence of online crowdfunding activities which had been used for funding some alleged illegal activities related to the social events in 2019, Mr CHOW enquired whether LRC and the relevant B/Ds would study the issue again to plug such loophole.

19. In response, SJ distinguished the online crowdfunding activities from the subject matter of the LRC Report on "Charities" and pointed out that, while money laundering might be involved in certain online crowdfunding activities, they were not all illegal and some might have justifiable causes. SJ added that, in their response to two oral Council questions regarding the regulation of crowdfunding activities raised by Members in June and October 2020, the relevant bureaux had provided a coordinated response on the latest progress of the relevant work, including that there had already been relevant provisions in existing laws applicable to online crowdfunding activities with crime elements. SJ said that matters relating to the regulation of online crowdfunding activities should be carried out by the relevant B/Ds with prudence in view of the possible impact involved.

Reports on "Privacy – Part 3: Stalking", "Privacy – Part 4: Privacy and media intrusion" and "Privacy – Part 5: Civil liability for invasion of privacy"

20. Ms Elizabeth QUAT noted that several LRC Reports on various aspects of privacy including stalking, privacy and media intrusion, civil liability for invasion of privacy and regulation of covert surveillance, had been published for over ten years. She enquired about the Administration's upcoming work plans on implementation of the relevant recommendations. SJ said that the Administration would soon introduce a Bill to amend the Personal Data (Privacy) Ordinance (Cap. 486) to address some of the related issues. As regards those other issues on privacy, SJ said that the relevant bureau would follow up as appropriate.

Functions and work of LRC

21. Dr Priscilla LEUNG was concerned whether LRC had any plan to consider for reform aspects of the laws of Hong Kong relating to big data and technological development, which had bearing on the protection of personal data privacy. She recalled that she had moved a motion at a Council meeting in 2019 on keeping up with technological development and enhancing the protection of privacy at a time when there were series of blunders which involved massive loss/leakage of personal data. However, little progress was made in reforming

the relevant law since then.

22. Noting the relatively heavy penalty imposed on leakage of personal data in some overseas jurisdictions, Dr Priscilla LEUNG said that legislative amendments should be introduced so that the Privacy Commissioner for Personal Data would be vested with wider power and the level of penalty would be increased to enhance the deterrent effect of the relevant law. Dr LEUNG also took the view that Hong Kong was far lagged behind in regulating the rapid advance in technologies such as small unmanned aircraft ("SUA") and financial technologies. She enquired whether LRC had any plan to consider for reform those aspects of law concerning technology-related issues.

23. In reply, SJ said that Dr Priscilla LEUNG's concerns and suggestions were related to policy areas which should more appropriately be dealt with by the relevant B/Ds. For instance, CMAB and the Office of the Privacy Commissioner for Personal Data could take the lead in reviewing those incidents relating to the loss/leakage of personal data, while the regulation of SUA should be under the Transport and Housing Bureau's purview. SJ supplemented that, while it would rest with B/Ds to put forth legislative proposals, LRC might still consider for reform those aspects of the laws in these policy areas if in-depth legal research and/or cross-bureau coordination was considered necessary by SJ and CJ, e.g. a sub-committee to study and follow up on the topic of cybercrime had been formed under LRC.

24. Dr Priscilla LEUNG pointed out that B/Ds were usually occupied by current problems at hand and lack of foresight in considering reform aspects of the laws under respective policy purview needed in the long run. It was usually the case that, when the Administration was faced with novel situations or pressing policy issues where legislative proposals were called for, B/Ds would rush for making new or amended legislation hastily. Dr LEUNG said that LRC and its legal experts were more visionary and forward looking than B/Ds in identifying law reform proposals which were of longer term benefits to the community. She urged B/Ds to maintain constant interaction and mutual cooperation with LRC and its legal experts to keep the laws of Hong Kong up-to-date in tandem with the trend of socio-economic developments.

Article 23 of the Basic Law

25. Dr Junius HO questioned about the sluggish progress of legislation to implement Article 23 of the Basic Law ("BL 23"). In response, SJ said that the Administration had been taking active steps to carry out its duties as required under Article 8, 9 and 10 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, under which the criminal acts of secession and subversion were also

covered in BL23. In response to Dr HO's further enquiry, SJ said that while she was not aware if SB had a concrete legislative timetable for implementing BL23, she would convey Dr HO's views to SB for consideration.

IV. Proposed upgrading of one permanent directorate post of Principal Government Counsel to Law Officer in the Law Reform Commission Secretariat of the Department of Justice
(LC Paper No. CB(4)1135/20-21(01) - Paper provided by the Administration)

Briefing by the Administration

26. SJ briefed members on the proposed upgrading of the Secretary to LRC ("S/LRC") from the permanent directorate post of Principal Government Counsel (DL3) to Law Officer (DL6) ("the Proposal"), to strengthen the legal support to LRC Chairman and to lead a new project of "Systematic Review of the Statutory Laws of Hong Kong" ("Systematic Review"). In gist, the Systematic Review consisted of work mainly in the areas of adaptation of laws, consolidation of laws and repeal of obsolete laws as detailed in the Administration's paper.

27. SJ also highlighted that, in December 2020, LRC Secretariat had been reorganized under the SJ's Office to better reflect the nature of LRC as an independent body chaired by SJ supported by a Secretariat reporting directly to SJ. Given the massive scale and complexity of the Systematic Review as well as the heavy duties for S/LRC at present, SJ considered it appropriate and necessary for the LRC Secretariat to be led by a senior directorate officer at DL6 level.

Views of the Hong Kong Bar Association

28. Mr Azan Aziz MARWAH said that when meeting SJ in May 2021, representatives of the Bar Council had expressed concern on LRC's lagging behind in dealing with the important issues of law reform. He said that the Bar Association fully supported the Proposal as there was a clear need for additional resources to support the work of LRC.

Discussion

Systematic Review of the Statutory Laws of Hong Kong

29. Mr Holden CHOW considered it ludicrous that so many obsolete references such as "Her Majesty" still remained in various provisions in the

statutory laws after the HKSAR had established for over 24 years. Therefore, he supported the Systematic Review, in particular the work on adaptation of laws to eradicate these references, and urged that it should be carried out expeditiously. Mrs Regina IP also pointed out that since 1997, quite a large number of legislation on the adaptation of laws had been enacted, and the Interpretation and General Clauses Ordinance (Cap. 1) had provided for the principles for interpretation of provisions and references not yet adapted. She enquired why so many provisions or references in the statutory laws had yet to be adapted and how the Systematic Review would further the work relating to the adaption of laws.

30. In response to members' views, SJ explained that while section 2A of, and Schedule 8 to, Cap. 1 had provided for how provisions or references that had yet to be adapted were to be construed pending adaptation, the remaining provisions requiring adaptation might not simply be adapted by following those principles. She said that section 22 of Schedule 8 to Cap. 1 expressly provided that the interpretation principles did not apply if the context required otherwise.

31. SJ quoted section 38(1) of the High Court Ordinance (Cap. 4) as example which provided that "*[t]he Registrar shall have and may exercise and perform... the same jurisdiction, powers and duties as the Masters, Registrars and like officers of the Supreme Court of England and Wales*". SJ said that, in this example, as there was no straightforward substitute for the reference to the officers mentioned in section 38(1) of Cap. 4 given *the* different legal systems of the People's Republic of China and the United Kingdom, the policy intent for the provision must first be ascertained before the reference could be adapted. SJ further said that some statutory provisions might have across-the-board implications that could only be properly resolved with a broad perspective of the laws holistically and in consultation with more than one B/D, which called for the cross-bureau coordination in the Systematic Review.

32. Mr CHUNG Kwok-pan said that he fully appreciated the importance of the Systematic Review. However, LRC should accord higher priority to reviewing those aspects of the *laws* of Hong Kong which could address the more imminent problems or facilitate the development of new industries in Hong Kong such as information technology, financial technology and big data, etc. In response, SJ said she agreed that it would be necessary for the upgraded S/LRC to set priority when mapping out the overall plan for the Systematic Review and for other law reform projects of LRC. She trusted that the Administration would prioritize the relevant legislative proposals having regard to its prevalent policy focus.

33. Mr CHUNG Kwok-pan pointed out that, notwithstanding SJ's view expressed, there might be more pressing challenges faced by Hong Kong which

required the introduction of *legislation* more urgently than conducting the Systematic Review. A case in point was the recent announcement made by Group of Seven ("G7") about its proposed global minimum corporate tax with the minimum tax rate set at 15%. As G7's plan would have significant impact on Hong Kong's status as an international trade and financial centre and urgent legislation might be called for, Mr CHUNG considered that LRC should accord higher priority to this than the Systematic Review.

34. SJ said that Mr CHUNG Kwok-pan's example had rightly showed that B/Ds also *played* an important role in introducing legislative changes. As the example touched upon a specific issue which fell squarely within specific B/Ds' purview (Financial Services and Treasury Bureau and the Inland Revenue Department in this case), it would be more efficient and appropriate for the B/Ds concerned to work out a legislative proposal if necessary. On the contrary, as the work of LRC on law reform proposals as well as the Systematic Review would normally require in-depth legal research and cross-bureau coordination, a much longer time for completion might be required.

Expectations for the post of Secretary to LRC after upgrading

35. Mr Holden CHOW said that while he supported the Proposal, he would like to know how the upgrading could *bring* a qualitative improvement in the leadership of LRC Secretariat, in particular on how it could facilitate the Systematic Review. Ms YUNG Hoi-yan also enquired about when the S/LRC would provide a detailed work plan and timetable for completing the Systematic Review.

36. In response, SJ advised that as the Chairman of LRC, she expected that the post holder of the *upgraded* S/LRC post would possess in-depth and broad knowledge about the statutory laws of Hong Kong and their correlation and mutual effects, and to demonstrate his/her ability and strategic leadership in planning and prioritizing the various tasks for LRC, including the Systematic Review. He/She would also maintain high-level communications with heads of B/Ds to foster their understanding of and collaboration in the Systematic Review, which was important for adapting and consolidating interrelated laws appropriately and avoiding conflicts in existing laws. SJ said that in light of the above, she was confident that the upgrading would certainly bring qualitative improvement to the leadership of LRC Secretariat.

37. SJ further said that after the Proposal was approved, the incumbent of the upgraded S/LRC would formulate a holistic plan with detailed timetable and milestones on conducting the three facets of the Systematic Review, i.e. adaptation of laws, consolidation of laws and repeal of obsolete laws, as soon as possible. This was important for facilitating an orderly implementation of the

relevant work in order to meet the expectations of LegCo Members and the general public.

38. Dr Priscilla LEUNG said that she had no doubt LRC was fully capable of carrying out the Systematic Review successfully given its track records in producing various law reform reports over the years. However, as she had pointed out earlier, LRC and its legal experts were usually more visionary and forward-looking in identifying law reform proposals than B/Ds, Dr LEUNG hoped that S/LRC would put this strength of LRC to the best use and consider reform aspects of the laws which would help Hong Kong to meet challenges brought about by future trends such as big data and technological development.

39. In response, SJ said that given the depth and breadth of knowledge which the future S/LRC was expected to possess about Hong Kong statutory laws, she believed that an upgraded S/LRC should have a broader perspective and acuity to consider law reforms that would be beneficial to the development of Hong Kong.

Ranking and appointment arrangement of the post

40. Mrs Regina IP enquired about the normal organization structure of the various Divisions in DoJ and whether the Proposal would be consistent with the normal practice. She also enquired whether external recruitment exercise was necessary to fill the upgraded post. In response, SJ advised that according to the existing structure of the functional divisions in DoJ (the heads of divisions were normally an LO (DL6) who was supported by deputies who were PGC (DL3) post. For the Government Counsel Grade, LO was the immediate promotion rank for PGC.

41. Director of Administration and Development of DoJ ("D/AD") also explained that in line with the prevailing civil service policies, internal posting or promotion of a suitable legal officer from within DoJ, or from the legal group of departments or the Judiciary (if they applied), with a substantive rank equivalent to PGC with the requisite requirements would first be considered for filling the LO vacancy. If DoJ failed to identify a suitable internal candidate to fill the LO vacancy, DoJ might launch an open recruitment exercise to identify suitable candidates from outside after consultation with the Public Service Commission and securing the approval of the Civil Service Bureau.

42. The Deputy Chairman enquired whether the existing post holder of S/LRC would continue to assume the upgraded post to take up the Systematic Review. In response, SJ said that for the fairness of the recruitment/promotion exercise, she would not openly comment on whether a particular staff member would be suitable or not at this juncture.

Manpower provision for LRC

43. Ms YUNG Hoi-yan and the Deputy Chairman supported the Proposal but expressed worries that the Proposal alone could not provide sufficient manpower resources for LRC Secretariat, which had already been fully occupied by various law reform projects, to take on the additional tasks arising from the Systematic Review.

44. Dr Junius HO said that, while he had insisted on scrutinizing every staffing proposal submitted by the Administration very carefully, he agreed that the Proposal was justified in view of the scope and scale of the tasks to be taken up by S/LRC. However, noting that the Proposal was not accompanied by an increase in other staffing provisions in the LRC Secretariat (13 in total at present), Dr HO queried whether the Proposal alone could facilitate the Systematic Review to be taken up by LRC Secretariat without additional manpower.

45. In response to members' views, SJ advised that the Administration would submit the Proposal for consideration by the Establishment Subcommittee ("ESC") and the Finance Committee as soon as practicable after consulting the Panel. After the funding for the Proposal had been approved, the upgraded S/LRC post holder would expeditiously commence a review on the manpower provision of LRC, and would seek additional resources as necessary. In this regard, the Administration would be mindful of the need to use public resources prudently.

Conclusion

46. The Chairman concluded that the Panel supported the submission of the Proposal for ESC's consideration.

V. Professional development for legal profession
(LC Paper No. CB(4)1109/20-21(05) - Paper provided by the Administration)

Briefing by the Administration

47. SJ briefed members on the latest initiatives of DoJ in promoting professional development for local legal profession, including the solicitors and barristers in private practice and the legal officers in the Government, as detailed in the Administration's paper (LC Paper No. CB(4)1109/20-21(05) with highlights of the following two initiatives.

International organisation secondment programmes

48. SJ said that with the efforts made in recent years and the strong support from the Central People's Government, DoJ had successfully put in place programmes for the secondment of local legal practitioners from both the public and private sectors to three renowned international organisations on private international law (namely, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law and the United Nations Commission on International Trade Law) whilst, in the past, secondment programmes to international organisations were confined to government officials. SJ added that DoJ would continue to explore and discuss with other international organisations (e.g. The Asian Infrastructure Investment Bank) for more valuable secondment opportunities to Hong Kong legal professionals.

Legislative proposal to amend section 31A of the Legal Practitioners Ordinance

49. SJ said that DoJ had all along been attaching great importance to the professional development of DoJ's legal officers. Legal officers (including lawyers in DoJ and legal professionals in some other departments) shoulder important public functions, and wish to be recognized by judicial and legal sectors. She pointed out that according to section 31A(1) of the Legal Practitioners Ordinance (Cap. 159), only barristers are eligible to be appointed as Senior Counsel ("SC"). The Chief Justice of the Court of Final Appeal ("CJ") might, after consultation with the chairman of the Bar Council and the president of The Law Society of Hong Kong ("Law Society"), appoint as SC barristers who satisfy the series of eligibility requirements of section 31A(2) of Cap. 159 ("eligibility requirements"), including: (1) sufficient ability and standing, sufficient knowledge of law; and (2) requisite experience. Under the current regime, legal officers who were not admitted as barristers ("legal officers (non-barrister)") were not eligible for appointment as SC even if they took up the same amount of advocacy work as those who were barristers, and satisfied the substantive eligibility requirements stipulated in the relevant laws.

50. SJ further said that as it was considered that the limitations under the current regime had caused unfairness to legal officers (non-barrister). Therefore, DoJ proposed to amend section 31A of Cap. 159 to include "legal officers" such that all legal officers could enjoy the same treatment and rights, including that legal officers irrespective of whether they were barristers or not should be equally eligible for consideration to be appointed as SC upon satisfying the substantive eligibility requirements under section 31A. Key justifications of the proposal were detailed in the Administration's paper.

51. SJ added that DoJ had since late May 2021 begun introducing the legislative proposal to 30 legal bodies (including the Bar Association and the Law Society), as well as elaborating the proposal through her blog and in the LegCo meeting earlier that month. She understood that some discussions and concerns were based on incomplete understanding of DoJ's proposal. Therefore, in response to the circular issued by the Bar Association to consult its members, she had also made clarifications in a reply on 11 June 2021 to the Bar Association and emphasised three points in particular.

52. First, the legislative proposal would not affect any rights of the legal practitioners in private practice including the opportunities for barristers to be appointed as SC, nor disturb the professional demarcation between the barristers' and solicitors' branches. Second, the legislative proposal aligned with the merit-based selection principle and was in the public interest. It would not alter the selection mechanism or the criteria of appointment of SC and, same as barristers in private practice, legal officers (non-barrister) would be equally required to satisfy the same eligibility requirements. Third, DoJ had all along been respecting the self-regulatory regime of the legal profession, and that the legislative proposal simply reflected the fact that there was no practical distinction between the duties of legal officers who were solicitors or barristers.

53. SJ also said that the legislative proposal would also enable those legal officers having outstanding performance to gain recognition from the Judiciary and the legal sector, which would encourage them to continue providing legal services and promoting the rule of law in the Government in the public interest.

Views of the Hong Kong Bar Association

54. Mr Azan Aziz MARWAH expressed gratitude for the Administration's initiatives to facilitate professional development for legal profession. On the legislative proposal, Mr MARWAH said that the Bar Association had only started consultation of its members shortly but so far some of its members had already raised grave concerns. Some of them had suggested that a more thorough consultation should be conducted before DoJ carried forward the legislative proposal. Mr Neville Leslie SARONY, SC, of the Bar Association also expressed the Bar Association's request for more time to consider the legislative proposal.

55. Mr Neville Leslie SARONY, SC noted that under the legislative proposal, a legal officer (non-barrister) appointed as SC would only be entitled to use the title of SC when holding office as a legal officer. Therefore, the "temporary" nature of the SC title bestowed on legal officers (non-barrister) would differentiate it from the SC title which was hitherto bestowed for life. Mr SARONY, SC opined that, if the legislative proposal was carried through, it

would result in an "artificial" or "secondary" category of SC which would diminish the international perception of Hong Kong's SC, and would not elevate the status of legal officers (non-barrister) which the legislative proposal intended to.

56. Mr Neville Leslie SARONY, SC further said that SC was a rank which the junior counsel aspired to. Whilst an appointment as SC was formally made by CJ, the Bar Association's recommendation made when the chairman of the Bar Council was consulted represented the peer recognition of the appointee's years of experience gained. The experience tested included the wealth of experience to represent both sides of the argument (to prosecute, to defend, for the plaintiff and for the defendant) inside the court, as well as the commitment to the rule of law, interest of justice for the furthering of the public interest demonstrated outside the court. In this connection, Mr SARONY, SC considered that to maintain the status quo would be in the best interest of the public.

57. Mr Neville Leslie SARONY, SC also stressed that legal officers (non-barrister) were not barred from becoming eligible for appointment as SC under the existing regime. As long as these legal officers took the necessary change over to the Bar by serving a short period of pupillage, about three months, those who satisfied the eligibility requirements would be fully eligible to be considered for appointment as SC. Mr SARONY, SC said that SC was, first of all, a counsel who did not simply acquire their position by advocating, but also by observing all the code of conduct and conventions which were not written and could only be learnt and earned on the job. Therefore, the pupillage experience for the legal officers (non-barrister) applying for appointment as SC would be of immense value to the Government.

Discussion

58. Mrs Regina IP enquired whether it was one of the objectives of the legislative proposal to ensure a fair treatment to legal officers and to encourage more legal professionals to join the Government. SJ said that legal officers (non-barrister), even if they were taking up a comparable amount of advocacy work as those who were barristers in private practice or the Government and satisfied the eligibility requirements, they would not be eligible for the appointment as SC under the current regime. She emphasized that there was no practical distinction between the roles and duties of legal officers in the Government who were barristers and those who were solicitors since, in respect of any of the matters mentioned in section 4(1) of the Legal Officers Ordinance (Cap. 87), legal officers shall have all the rights of barristers and solicitors duly admitted under the provisions of Cap. 159 including a right of audience before any court or tribunal.

59. In view of the above, SJ considered that legal officers (non-barrister) were unfairly treated under the current regime and the legislative proposal could rectify the situation. She also took strong exception to the view that the status of SC bestowed on legal officers (non-barrister) under the legislative proposal would be of a "secondary" category and stressed that the legislative proposal only sought to remove the artificial eligibility barrier which unfairly prevented legal officers (non-barrister) from being appointed as SC. It would also encourage legal officers who shouldered important public functions to pursue excellence in serving the public.

60. Noting that there were over 420 legal officers in DoJ and there were also legal officers working in other government departments, Mrs Regina IP expressed her concerns whether the legislative proposal might give rise to more junior legal officers being recommended for appointment as SC prematurely, hence devaluating the title of SC. SJ categorically rejected such a possibility and said that legal officers (non-barrister) would be equally required to satisfy the same eligibility requirements for appointment as SC, including possessing sufficient ability and standing as considered by CJ.

61. SJ also clarified that every application for appointment as SC was initiated by the individual barrister or legal officer, and not out of the recommendation of any parties, though in considering the applications, CJ may consult the chairman of the Bar Council and the president of the Law Society. She said that it was reasonable to expect that, before making an application, the legal officer concerned should have gone through strenuous training and development, risen through the ranks and conducted a self-evaluation to ensure that his/her ability and standing could satisfy the eligibility requirements.

62. Ms YUNG Hoi-yan expressed support for the legislative proposal. She agreed to the arrangement that a legal officer (non-barrister) appointed as SC should only be entitled to use the title of SC when holding office, which would strike a proper balance between the interests of upholding a self-regulatory legal profession and of retaining legal talents in the Government. Ms YUNG considered that, as only those legal officers who had rich experience and outstanding performance in advocacy would be appointed as SC under the legislative proposal and the appointment would be made by CJ, she as a practising barrister could not see any issues of unfairness or any denigration of the status of barristers or SC.

63. Mr CHUNG Kwok-pan objected to the view that those legal officers appointed as SC under the legislative proposal would be of an inferior class. He trusted that, despite their different work nature to that of barristers in private practice, these legal officers (non-barrister) making application for appointment

as SC would have to demonstrate a high level of quality and experience in advocacy. Noting that the chairman of the Bar Council would be consulted by CJ before appointing SC, Mr CHUNG questioned whether there might be potential conflict of interest if an application for appointment as SC was initiated by a legal officer (non-barrister). In response, SJ reiterated that the legislative proposal did not alter the selection mechanism and criteria of appointment of SC and she trusted that the chairman of the Bar Council and the president of the Law Society, when they were consulted by CJ on an SC appointment, would provide fair and objective views to CJ by focusing on whether the eligibility requirements were satisfied rather than whether the potential appointee was a barrister or not.

64. Mr CHUNG Kwok-pan enquired whether there were similar practices in overseas jurisdictions to appoint legal professionals working in the public sector as SC. In response, SJ said that while she had no such information in hand, the situation in Hong Kong might be quite special where legal officers (non-barrister) took up advocacy work same as those who were barristers.

65. Mrs Regina IP enquired about the requisite years of experience for a barrister to be considered for appointment as SC under the current regime, and whether legal officers (non-barrister) could satisfy that requirement if the legislative proposal was implemented. In reply, SJ said that according to section 31A(3) of Cap. 159, a barrister would have the requisite experience for appointment as SC if he had, for not less than 10 years in aggregate, practised at the bar in Hong Kong or practised as an advocate while he held office as a legal officer within the meaning of Cap. 87.

66. Notwithstanding the above, SJ pointed out that the key consideration was a person's ability and standing rather than a simple counting of years of experience, as illustrated by a recent example in DoJ. In the example quoted, a senior legal officer who was formerly a non-barrister with more than 20 years' experience of advocacy was appointed as SC, notwithstanding the fact that the application for appointment as SC was made just one year after the legal officer had gone through a three months' pupillage and was admitted as a barrister. SJ said that the example clearly showed that it was not the one year of working experience as a barrister, but the over 20 years' experience of advocacy in DoJ that was taken into account by CJ when deciding on the appointment of the legal officer concerned.

67. Mr Holden CHOW considered that, given the unique nature of the duty of a legal officer and based on the merit-based selection principle, a legal officer (non-barrister) having over 10 years of advocacy experience with outstanding performance should not be deprived of the chance to be appointed as SC. On the other hand, if the title of SC was a well-established recognition of one's

competence and achievements, the best talents might be encouraged to continue to serve in DoJ if he/she wished to retain the title under the legislative proposal.

68. SJ concurred with members' views that the legislative proposal might provide incentive which helped retain talents in the Government. SJ also emphasized that the self-regulatory regime for dealing with matters relating to the legal profession was duly respected. To maintain a proper balance, it was proposed that legal officers (non-barrister) being appointed as SC under the legislative proposal shall no longer be entitled to retain the title of SC after they cease to be legal officers. If these legal officers joined private practice after leaving the government as, say, solicitors, they would continue to be subject to the professional regulatory regime of the Law Society.

69. Indicating support for the legislative proposal, Dr Junius HO considered that, after making the first step to enable legal officers (non-barrister) to receive this fair treatment, it was worthwhile to consider extending it to solicitor advocates as they also advocated in court. Besides, referring to the concern expressed by the Bar Association that the creation of an extra category of SC might be undesirable and confusing, Dr HO pointed out that currently, there was also a category of "honorary SC" as stated in section 31A of Cap. 159 and he was not aware of any significant problem in this regard.

70. In conclusion, the Chairman said that members expressed support for the legislative proposal in general, and invited the Administration to take note of the views expressed by members and the representatives of the Bar Association

VI. Any other business

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