

立法會  
*Legislative Council*

LC Paper No. CB(2)1086 /00-01  
(These minutes have been seen  
by the Administration)

Ref : CB2/PL/AJLS

**Legislative Council**  
**Panel on Administration of Justice and Legal Services**

**Minutes of meeting**  
**held on Tuesday, 16 January 2001 at 4:30 pm**  
**in Conference Room A of the Legislative Council Building**

**Members Present** : Hon Margaret NG (Chairman)  
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)  
Hon Albert HO Chun-yan  
Hon Martin LEE Chu-ming, SC, JP  
Hon James TO Kun-sun  
Hon Mrs Miriam LAU Kin-ye, JP

**Members Absent** : Hon Mr Ambrose LAU Hon-chuen, JP  
Hon Emily LAU Wai-hing, JP

**Member Attending** : Hon Audrey EU Yuet-mee, SC, JP

**Public Officers Attending** : Item IV  
  
Mr I Grenville CROSS, SC, JP  
Director of Public Prosecutions  
  
Mr John READING, SC  
Deputy Director of Public Prosecutions  
  
Mr Arthur LUK  
Deputy Director of Public Prosecutions

Ms Denise CHAN  
Assistant to Director of Public Prosecutions

Item V

Mr Stephen WONG  
Deputy Solicitor General (Advisory)

Mr Michael SCOTT  
Senior Assistant Solicitor General

Ms Agnes CHEUNG  
Senior Government Counsel,  
Legal Policy Division

Mr Peter KAM  
Government Counsel

**By Invitation** : Hong Kong Bar Association

Items IV and V

Mr Edward LASKEY

Law Society of Hong Kong

Item IV

Mr TSOI Hak-kong, Herbert  
President

Mr IP Shing-hing, Simon  
Vice President

Mr HUNG Wan-shun, Stephen

Item V

Mr Christopher KNIGHT

Mr HUNG Wan-shun, Stephen

The University of Hong Kong

Item IV

Mr Eric CHEUNG Tat-ming  
Assistant Professor

Mr Michael SANDOR  
Assistant Professor

**Clerk in Attendance** : Mrs Percy MA  
Chief Assistant Secretary (2)3

**Staff in Attendance** : Mr Jimmy MA, JP  
Legal Adviser  
  
Mr Paul WOO  
Senior Assistant Secretary (2)3

---

Action  
Column

**I. Confirmation of minutes of meeting**  
(LC Paper No. CB(2)657/00-01)

The minutes of the meeting on 28 November 2000 were confirmed.

**II. Information paper issued since last meeting**  
(LC Paper No. CB(2)561/00-01 - Replies from the Administration on issues relating to appointment of a Judge of the Court of Final Appeal and legal aid statistics)

2. Members noted that the above paper had been issued.

**III. Items for discussion at the next meeting**  
(LC Paper Nos. CB(2)656/00-01(01) and (02))

3. Members went through the list of issues to be considered and agreed that the following items should be discussed at the next regular meeting to be held on 20 February 2001 -

(a) Court's power under section 13 of Conveyancing and Property Ordinance (Cap. 219);

- (b) Proposed creation of new offence of "persistent sexual abuse of a child"; and
- (c) Progress report on a consultation exercise on competence and compellability of persons to testify against their spouses.

*(Post-meeting note - At the request of the Administration and with the agreement of the Chairman, the item "Proposal to create a permanent post of Assistant Principal Legal Aid Counsel for the Application and Processing Division of the Legal Aid Department" was included in place of item (c) above for the meeting on 20 February 2001.)*

#### **IV. "Public interest" consideration in prosecution policy**

(LC Paper Nos. CB(2)522/00-01(03); CB(2)563/00-01(01); CB(2)656/00-01(03)-(06) and CB(2)700/00-01(01) )

4. The Director of Public Prosecutions (DPP) addressed the Panel on the principles and factors which regulated general prosecution policy, with particular reference to public interest factors, and on the use of the bind over procedure where the decision was taken not to pursue a prosecution which was in train. A copy of his opening statement was tabled at the meeting and subsequently circulated to Panel members vide LC Paper No. CB(2)730/00-01(01) on 18 January 2001. He further informed members that in 1999, out of 291 914 prosecutions dealt with in the Magistrates' Courts, 1 050 cases were disposed of by way of offering no evidence on condition that the accused persons agreed to be bound over to be of good behaviour (ONE/BO). The corresponding figures for 2000 (January to November 2000) were 241 377 and 995 respectively.

5. DPP said that it had never been the position in the common law world that those suspected of committing criminal offences must automatically face prosecution. The essential question was one of whether prosecution was required in the public interest. In so deciding, it was necessary to examine all the factors and circumstances of each case. These included, most commonly, such matters as the age of the suspect, his circumstances, his record, the gravity of the offence and the circumstances of its commission, the likely penalty, the alternatives to prosecution, the view of the victim, if any, and the issue of whether the consequences of a prosecution would be out of all proportion to the seriousness of the offence. He elaborated on two recent cases which had been widely publicized (*viz. HKSAR v Poon Kai-tik and HKSAR v Nguyen Gia-huy*) to illustrate how change in circumstances could require the prosecution to discontinue the prosecution and instead seek to dispose of the case by way of the ONE/BO procedure.

6. DPP further mentioned that there had been six other cases in 2000 involving four young students and two adults who were charged with possession of dangerous drugs and they were bound over.

Points raised at the meeting

7. In answer to a question raised by Mr James TO, DPP said that in the six cases referred to in paragraph 6 above, the four students were aged 20, 15, 17 and 18 respectively. The other two were aged 30 and 36 respectively. He added that of the 19 353 cases prosecuted for simple possession of unlawful drugs in the part three years (1998-2000), no evidence was offered against 19 defendants who were bound over. There were seven cases of offering no evidence in 2000.

8. Mr James TO said that following the Nguyen case, he had had the opportunity of discussing the case with a number of lawyers under the Duty Lawyers Scheme and front-line law enforcement officers, Court Prosecutors and social workers. The impression he got was that the way the Nguyen case was handled appeared to be unusual because, according to the people he had spoken to, most of the cases with similar circumstances (i.e. young first-time offenders charged with possession of small quantities of dangerous drugs) were prosecuted in the past. Mr TO opined that the lack of consistency in handling this type of cases gave rise to public concern as to whether fairness had been maintained in prosecution decisions. He asked whether the Department of Justice (D of J) had consulted the law enforcing agencies such as the Police in dealing with the Nguyen case, and whether a review had been conducted following the case.

9. DPP responded that the issue of consistency should be viewed in the context of the particular facts and circumstances of individual cases. The Administration had all along regarded the possession of dangerous drugs as serious offence and there was no question of a relaxation of the Administration's approach to prosecution. In normal circumstances, those offenders aged 18 or above must expect to face prosecution. This was borne out by statistics that only about one out of 1 000 such cases were disposed of by ONE/BO, and the rest had gone to trial. As far as the Nguyen case was concerned, the D of J had found it necessary to seek independent legal advice from an experienced private barrister on whether or not prosecution should proceed, due to the fact that the father of the accused was a former senior public prosecutor with prominent status in the law, in order to avoid any appearance of bias or favourable treatment. With the benefit of advice given by the private counsel who carefully considered the facts of the case and the representations made by the defence counsel, the D of J accepted the view that the imposition of ONE/BO was appropriate.

10. DPP further advised that there was no prosecution policy as such in respect of the offering of no evidence against an accused person and bind over orders. As decisions were taken on a case by case basis, the Nguyen case by no means set a precedent for other cases. He added that the decision to impose a bind over order was not one for the Police although it might have a view on the matter. Ultimately, it was for the Court, not the prosecution or the defence, to decide if a bind over order was appropriate in all the circumstances.

11. The Chairman pointed out that in some previous cases such as the Hong Kong Standard case, it had been suggested by some that the Administration should seek independent legal advice from outside the D of J where matters relating to evidence were involved. However, in the Nguyen case, it appeared that there were no disputes whatsoever as to either the facts or the law.

12. Mr Albert HO declared interest as being the defence counsel in the *Poon Kai-tik* case. He said that comparing the case with the Nguyen case, the latter seemed to have wider implications in view of the fact that a lot of young first-time offenders with educational background similar to Mr Nguyen had been prosecuted in the past for similar offences. He also expressed the view that it was unusual for the Administration to seek independent legal advice on the propriety of allowing a prosecution which had been initiated to proceed, where the facts and evidence of the case as well as the penalty that could be imposed were clear.

13. In response to the above views, DPP said that the criteria to be applied to the briefing out of cases by D of J involved, inter alia, the existence of possible conflict of interest or any appearance of bias. In the Nguyen case, in view of the special status of the accused person's father, there would have been a furore had the D of J, without the benefit of an objective and independent legal advice, taken the decision on its own that it was not in the public interest to prosecute Mr Nguyen, even if the decision was taken impartially. Hence, the D of J considered it necessary for an experienced private barrister to be briefed to advise after the defence counsel questioned the suitability of prosecution. The private barrister eventually offered his considered opinion that a prosecution would bring consequences to the accused person which would be out of all proportion to the seriousness of the particular offence and the penalty a court would be likely to impose. DPP said that at the end, it was the prosecution's decision that justice could be met if the accused were to be bound over.

14. Ms Audrey EU said that it would appear that the same factors which had been taken into account by the prosecutor in the Nguyen case had not been given equal weight in other similar cases. She specifically cited three recent cases where the accused persons were charged with possession of small quantities of ketamine. The three accused persons had made representations to the Secretary for Justice and had agreed to be bound over. Two of these

requests were turned down, with one case convicted and the other one pending trial. She had just received information that no further prosecution would be taken against the third case. Ms EU said that consistency in prosecution actions was an important factor which weighed considerably in the public's perception of fairness and equality before the law. She asked what special consideration had prompted the prosecution to take different courses of action in those cases, and how the difference in treatment fell in line with the Government's policy to combat drug offences committed by young people.

15. DPP reiterated that the Administration would not go soft on tackling drug offences. There was no set policy in relation to the ONE/BO procedure, and the D of J had adopted an approach under which it would take account of the merits and circumstances of individual cases in determining whether the particular facts of the case warranted a departure from the existing prosecution policy and guidelines. In case representations were made to the prosecution in respect of offering no evidence on condition that the accused person agreed to be bound over, the prosecution would carefully consider all the factors which were advanced, and a decision would be made in the light of whether the public interest and justice would be served by the imposition of ONE/BO. He drew members' attention to paragraphs 8 and 9 of LC Paper No. CB(2)656/00-01(03) which explained the common factors to be considered.

16. Ms Audrey EU said that she had studied the arguments given in the paper but still failed to see how that helped explain why the cases she had referred to could have been dealt with differently by the prosecution. She asked whether there were additional factors which the prosecution had considered and whether the convicted persons could ask for reconsideration of their cases following the Nguyen case.

17. DPP said that it would not be appropriate to go into the details of specific cases of which he had not been forewarned. He asserted that representations from defendants containing mitigating factors would be given the fullest possible weight by the prosecution with a view to coming to a just disposal. He pointed out that the exercise of prosecutorial discretion was not an exact science. At the end of the day, as had repeatedly been explained by public prosecutors in the common law world, it involved trust in the prosecutors who had to bring to bear their experience, judgment and common sense in examining each and every case.

18. Deputy Director of Public Prosecutions supplemented that in relation to the taking of prosecution decisions, the factors specified in the D of J's paper which needed to be considered were by no means exhaustive. There might be other relevant factors specific to individual cases which the counsel on both sides had found it necessary to take into account.

19. The Chairman then sought the views from the parties invited to attend the meeting.

20. Mr Herbert TSOI Hak-kong informed members that the Law Society of Hong Kong had provided its comments in its submission (LC Paper No. CB(2)700/00-01(01)). In the opinion of the Law Society, D of J should -

- (a) assure that the discretion of not pursuing with prosecution in the recent case should be exercised in similar cases in the future; and
- (b) regularly publish the criteria upon which the discretion not to prosecute was exercised, illustrated by sample cases, if necessary, on an anonymous basis.

21. Mr Eric CHEUNG Tat-ming said that he personally agreed to the conclusion of not prosecuting in the Nguyen case and using the ONE/BO procedure as the appropriate means of disposal. However, he opined that DPP's insistence that the Administration would continue to take a hard line against drug offences by young people and would continue to prosecute such offenders had made it difficult for the Administration to explain to the satisfaction of the public why it had stopped prosecution in the Nguyen case as well as in some other cases. He suggested that the Administration should consider drawing up as exhaustively as possible a list of factors upon which guidelines on the use of ONE/BO procedure could be formulated. He added that in his view, the ONE/BO procedure was more effective than prosecution as a means of rehabilitation of young, first-time offenders who had committed less serious offences such as simple possession of dangerous drugs, and should be more widely used to deal with those offences.

22. Mr Stephen HUNG Wan-shun also shared the view that the decision to apply the ONE/BO procedure was appropriate in the Nguyen case. However, in the light of his experience in handling drug offence cases prosecuted in the Magistrates' Court, he failed to see how the Nguyen case differed significantly from the vast majority of cases which had been prosecuted in the past. He was concerned that in view of DPP's assertion that the Nguyen case did not set a precedent, similar cases would continue to be prosecuted in the future. Echoing the points made by Mr Eric CHEUNG, he agreed that clear guidelines on ONE/BO should be promulgated, particularly for the reference of Police officers who normally did a substantial amount of routine prosecution work in the Magistrates' Court without having to consult D of J for advice, and that the ONE/BO procedure could be applied on a wider scale in dealing with other common offences such as shop theft.

23. Mr Edward LASKEY said that Duty Lawyers with a long list of cases to be handled in the Magistrates' Court on the same day were often constrained by the limited time available for negotiation with the Court Prosecutors. Hence,

in reality, some cases which otherwise could be appropriately dealt with by bind over orders might have “slipped through the net”. With regard to the Nguyen case, he supported DPP’s view that the case should be briefed out for the benefit of independent legal advice in order to achieve perception of impartiality.

24. Mr Michael SANDOR also endorsed the decision of the Administration in the Nguyen case. Concerning the issue of consistency, he opined that whereas there could be no perfect consistency in handling each and every case, there ought to be an accumulation of decisions and internal guidelines for dealing with particular categories of cases. He added that there were discussions in other jurisdictions on how public prosecutors should review internal guidelines and whether certain prosecution guidelines should be made public or not.

25. Mr Martin LEE said that it was a right decision for the Administration to brief an independent private Bar to advise on whether or not to pursue with prosecution in the Nguyen case. He pointed out that justice had to be seen to be done. Hence, the crucial problem arising from the case was that the Administration had to satisfy members of the public that all cases would be considered fairly and equally. He added that as representations normally came from defence lawyers, accused persons who appeared in person in court and did not know how to present strong mitigating factors might be disadvantaged. To help achieve justice, there should be clear prosecution guidelines to assist front-line law enforcement officers and lay prosecutors etc. in carrying out their duties. Mr LEE also agreed that the ONE/BO measure should be used more widely to deal with young offenders with no previous conviction record.

26. Mrs Miriam LAU and Mr James TO supported the view that means should be taken to achieve consistency in decisions to prosecute. Mrs LAU enquired whether the Administration would proactively review and monitor cases to ensure that all cases were fairly handled.

27. The Chairman invited DPP to respond to the above comments made by members and attendees of the meeting. DPP’s responses were summarized below –

- (a) Under existing policy, simple possession of dangerous drugs was regarded as a serious offence. Prosecutors were required to give due deference to the legislative view of the seriousness of the offence. Therefore, it was not surprising that the ONE/BO procedure was rarely invoked. However, if there were strong reasons to show that prosecution was not desirable in a particular case and a bind over order was appropriate, the Administration was prepared to enter into such an arrangement.

- (b) There was no reason to think that the interests of the defendants who could not afford to retain the services of a Senior Counsel would be prejudiced. He had earlier referred to six cases which were disposed of by ONE/BO. Defendants nowadays benefited from the Duty Lawyers Scheme under which they were entitled to legal representation in the Magistrates' Court.
- (c) D of J was aware of the need where possible to achieve consistency in prosecution matters and would examine, in conjunction with other departments, whether there was scope for improvement to ensure that the existing system could operate more satisfactorily.
- (d) There being no policy as such in respect of the ONE/BO procedure, it followed that there had been no change of policy in this regard. The approach to the use of such orders had likewise not changed. Each case would be dealt with in the light of its own circumstances.
- (e) The D of J was appreciative of the concern about fair and equal treatment of all. Any representations made about the consequences of prosecution, irrespective of whether they came from defence counsel or the accused persons themselves, would be given due consideration.
- (f) Issuing prosecution guidelines on specific categories of cases would be a difficult task because each case very much turned on its own facts. D of J however was prepared to consider ways to achieve greater uniformity in handling prosecution cases including those handled by Police officers and Court Prosecutors.
- (g) Front-line Court Prosecutors in the Magistrates' Court made decisions on a day to day basis in relation to bind over requests. If a case required particular attention, they could refer the case up the line. On the other hand, in the event of the defence lawyer not agreeing to a decision made by a Court Prosecutor, he was entitled to seek adjournment for the purpose of making further representations to DPP.
- (h) Concerning due diligence in monitoring cases, there were bound to be matters which it was not always possible for the prosecution to be aware of. While prosecutors should discover the circumstances and the antecedents of the accused persons, they did have to rely on defence lawyers to bring to light matters which otherwise might have escaped their attention, in particular matters which could lead the prosecutors to the conclusion that it was not in the public

interest to pursue a prosecution.

The way forward

28. Members agreed that the issue of whether the ONE/BO procedure be more widely used to deal with less serious offences committed by young, first-time offenders could be further discussed at a future meeting. Mr Martin LEE considered that the scope of discussion should also cover issues relating to spent convictions under the Rehabilitation of Offenders Ordinance (Cap. 297).

Panel

29. Mr James TO suggested that members of the Panel on Security should be involved in the future discussion of the subject.

**V. Marital rape under section 118 of the Crimes Ordinance (Cap. 200)**  
(LC Paper Nos. CB(2)656/00-01(07) and (08))

30. Deputy Solicitor General (Advisory) (DSG(A)) briefed members on the Administration's paper (LC Paper No. CB(2)656/00-01(07)) which summarized the comments from the respondents to the consultation paper on whether the Crimes Ordinance should be amended in respect of non-consensual marital intercourse, and the Administration's response to the views held by some of the consultees. The said consultation exercise was conducted in response to members' view that "unlawful sexual intercourse" in the offence of rape under section 118 of the Crimes Ordinance might still mean intercourse outside the bounds of matrimony, and that the Ordinance should be amended to make it clear that marital rape was an offence.

31. DSG(A) advised that the consultation paper set out three options, namely -

Option 1: Retain the status quo and rely on Reg v R and HKSAR v Chan Wing Hung [1997] 3 HKC 472 as authority for the proposition that a man can be guilty of rape of his wife since "unlawful" is mere surplusage in section 118.

Option 2: Make it clear in section 118 that marital rape is an offence, and delete "unlawful" from the section.

Option 3: Clarify the meaning of "unlawful" in "unlawful sexual intercourse" and "unlawful sexual act" to ensure that the term means outside marriage, or within marriage in any circumstances where the wife does not consent. This would overcome any suggestion that, by deleting "unlawful" from section 118, the legislature intended that the term should take

its traditional common law meaning in other related sexual offence sections where the term "unlawful" also appears.

32. DSG(A) said that the Administration, having considered the arguments of the consultees, was of the view that it was desirable to adopt what was effectively a combination of Options 2 and 3 above to the effect that rape and other sexual offences should be clarified by -

- (a) deleting "unlawful" from section 118 and adding an express provision that a marital relationship was immaterial to the offence of rape (Option 2); and
- (b) in respect of other sexual offence sections, defining "unlawful" non-exhaustively under section 117 to include non-consensual marital intercourse (Option 3).

Points raised at the meeting

33. In response to the Chairman, Mr Edward LASKEY said that to date the Bar Association still held the view that Option 2 above was the simplest method to address the concern in question. The deletion of the term "unlawful" from section 118 to make it clear that marital rape was an offence, together with the common law as defined in Reg v R and Chan Wing Hung was considered adequate to achieve the intended purpose. He added that the Bar Association would need more time to consider the Administration's preferred approach in detail before it could give a firm view on the issue.

34. Mr Christopher KNIGHT said that the Law Society of Hong Kong had studied the three options and agreed that there should be some explicit provisions in the legislation which specified that marital rape was an offence. The Law Society, however, considered that there were problems with defining the term "unlawful" non-exhaustively as suggested under Option 3, such as uncertainty of the definition and inconsistency with the common law position etc.

35. The Administration explained that the suggestion to define "unlawful" to include non-consensual marital intercourse would make it clear that the court could continue to apply the common law meaning defined in Reg v R and Chan Wing Hung in any of the other sexual offence sections of the Crimes Ordinance, according to the context of the case. Without such amendment, and with deletion of the word "unlawful" in section 118 alone, the court would be confronted with a strong argument, based on the expressio unius rule (namely, the presumption of statutory interpretation that the inclusion of the one was the exclusion of the other) that, because "unlawful" was deleted only from section 118, the legislature intended to exclude the Reg v R and Chan Wing Hung meaning of "unlawful" from the other sexual offence sections. In other words,

as regards the meaning of "unlawful", there would be the risk of reinstating in the other sexual offence sections the old, out-dated common law meaning of "outside marriage", contrary to that developed in *Reg v R*. Those sections, therefore, would no longer provide the prosecution with charging options, in addition to section 118, in respect of married parties involved in the offences.

36. In reply to the Chairman, Senior Assistant Solicitor General advised that the proposal to delete "unlawful" from section 118 was to address the concern expressed by the United Nations Committee on the Elimination of Discrimination Against Women that the term was ambiguous.

37. Mr Martin LEE expressed the view that if Option 3 was adopted, i.e. defining "unlawful" under section 117 to include non-consensual marital intercourse, a similar approach could also be taken in respect of defining the meaning of "unlawful" under section 118, without having to remove the term from the section. Mrs Miriam LAU suggested that the Administration should work out a proposal after detailed consultation with the two legal professional bodies.

38. Legal Adviser said that previous discussions of the matter originated from concern expressed about how section 118 should be interpreted. As the scope of the review had now expanded to cover other sexual offence sections, the legislature and other interested parties would need more time to consider the issues involved. He added that as the present exercise touched very much on technical law drafting matters, it might be difficult for interested parties to offer any constructive views until they had the chance to see the actual proposed legislative amendments.

39. DSG(A) responded that the Administration and the legal profession held no divergent views on the legal policy principle that marital rape was an offence in Hong Kong and that the law should be amended to clarify that beyond doubt. He said that the Administration would consult Members and the legal professional bodies when working out a legislative framework capable to reflect the policy intent.

40. The Chairman requested the Administration to provide details of the implementation programme for the amendment exercise and the proposed legislative amendments for the consideration of members in due course.

Adm

41. There being no other business, the meeting ended at 6:35 pm.