立法會
Legislative Council

LC Paper No. CB(2)968/02-03
(These minutes have been
seen by the Administration)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 25 November 2002 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 CHAN Kam-lam, JP Hon Miriam LAU Kin-yee, JP Hon Emily LAU Wai-hing, JP Hon TAM Yiu-chung, GBS, JP Hon Audrey EU Yuet-mee, SC, JP
Member absent	:	Hon Mr Ambrose LAU Hon-chuen, GBS, JP
Public officers attending	:	Item II Ms Elsie LEUNG, GBM, JP Secretary for Justice Mr Robert ALLCOCK, BBS, JP Solicitor General Ms Annie TAM, JP Director of Administration & Development Department of Justice Mr Wilfred TSUI Judiciary Administrator

Mr Augustine L S CHENG
Deputy Judiciary Administrator (Operators)

Item III

Mr I Grenville CROSS, SC, JP
Director of Public Prosecutions

Mr Harry MACLEOD
Deputy Director of Public Prosecutions

Mr John READING, SC
Deputy Director of Public Prosecutions

Miss Lily WONG
Assistant to Director of Public Prosecutions

Item IV

Mr I Grenville CROSS, SC, JP
Director of Public Prosecutions

Mr John READING, SC
Deputy Director of Public Prosecutions

Ms Annie TAM, JP
Director of Administration & Development
Department of Justice

Mr Thomas LAW
Senior Assistant Director of Public Prosecutions

Attendance by invitation : Item IV

Mr Michael LUNN, SC
Hong Kong Bar Association

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

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mr Paul WOO
Senior Assistant Secretary (2)3

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I. Items for discussion at the next meeting

As the majority of members present indicated that they would not be able to attend the meeting originally scheduled for 23 December 2002, the Panel agreed to advance the next meeting to an earlier date. The Chairman requested the Clerk to notify members of the rescheduled date after the meeting.

2. Members agreed that the following items would be discussed at the next meeting -

(a) Law Amendment and Reform (Miscellaneous Provisions) Bill; and

(b) Use of official languages for conducting court proceedings.

(*Post-meeting note* - The meeting in December was rescheduled to be held on 13 December 2002 at 8:30 am)

II. Briefing by Secretary for Justice and Judiciary Administrator on policy portfolios

(LC Paper Nos. CB(2)470/02-03; 436/02-03(02) - (05))

3. At the invitation of the Chairman, Secretary for Justice (SJ) and Judiciary Administrator (JA) briefed members on the portfolios and objectives of the Department of Justice and Judiciary Administration (details were set out in LC Paper Nos. CB(2)470/02-03 and 436/02-03(05) respectively).

Issues raised by members

Implementation of Article 23 of the Basic Law (BL)

4. Referring to the current consultation on the Government's proposals (the proposals) to implement BL 23 through local legislation, Ms Emily LAU said that the proposed creation of the offences concerned had attracted widespread concern both locally and internationally. She asked how SJ and the Department of Justice (DoJ) had advised the Government on the proposals, particularly from the perspectives of safeguarding the rule of law and protection of human rights.

5. SJ replied that DoJ, being the Government's legal adviser, had offered the necessary legal advice to the Security Bureau (SB), which was the policy bureau responsible for the implementation of BL 23. However, it would not be appropriate to explain in public what specific advice had been given. She said that in formulating the proposals, the Government had carefully

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considered the implications, including whether the proposals were in accord with the Bill of Rights Ordinance as well as international standards of human rights and international human right treaties. These included the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Johannesburg Principles on national security, freedom of expression and access to information. The Government had also sought the advice of a renowned counsel in UK, who was an expert specializing in human right laws. The Government was satisfied that the proposals would not violate the standards of human rights and the fundamental rights and freedoms guaranteed by the BL. She added that the courts in Hong Kong would not enforce any legislation which violated the requirements of the BL.

6. Ms Emily LAU said that the proposed offences which would be codified in legislation had given rise to serious concern about infringement of human rights and freedoms. She asked whether, in view of the heated debate on various contentious issues, the target date of implementing the proposals by July 2003 would be deferred so as to allow thorough public discussions.

7. SJ said that as the Government's proposals were still undergoing consultation, it was too early at this stage to predict whether the target of July 2003 could be achieved. The Administration had made assurances that there would be ample time for public consultation. Moreover, the Legislative Council (LegCo) would have to ensure that the proposals go through the proper legislative process with full deliberations. She added that the Administration was engaging in detailed discussion with the LegCo Panel on Security and Panel on Administration of Justice and Legal Services. Whether or not the proposals should be revised would be decided by SB, after taking all the views into consideration. DoJ would continue to offer advice to SB as necessary on legal, constitutional and human rights issues.

8. Ms Emily LAU asked whether the controversies surrounding the proposals were expected by the Government. SJ responded that as implementation of BL 23 was a complicated matter by nature, diverse opinions from the society were expected. She said that the purpose of a comprehensive public consultation was to gauge the views and responses from all quarters before finalizing the proposals.

Prosecution of organisers of unauthorised assemblies

9. Mr Abert HO referred to the conviction on 25 November 2002 of three defendants who were charged under the Public Order Ordinance for holding an unlawful assembly. He said that the Chief Magistrate, in delivering the verdict, had expressed the view that the case was of a political nature and questioned whether the case should be handled by the court. Mr HO pointed out that there were more than 300 unlawful assemblies held since 1997.

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However, no prosecution had been taken by the Government until the recent case in question. He said that the conviction had aroused serious public concern about whether the case was an example of selective prosecution prompted by political considerations. He sought SJ's response on the matter.

10. The Chairman stressed that political considerations must not be a factor in deciding whether or not to prosecute a case.

11. SJ said that as Head of DoJ, she was ultimately responsible for decisions relating to criminal prosecutions. In her view, in the particular case concerned, it was appropriate to bring the case to court to decide whether an offence under the Public Order Ordinance had been committed by the three defendants. The court ultimately found the defendants guilty. She said that political considerations had never come into play. She further said that the Secretary for Security had moved a motion on "Public Order Ordinance" for debate in the Legislative Council on 20 December 2000, during which the Government had made clear its stance that the provisions of the Ordinance would be enforced.

12. Mr Albert HO asked whether prosecutorial discretion would be exercised by DoJ in dealing with similar cases in future. SJ responded that DoJ was responsible for prosecutorial decisions and the police was the enforcement agency responsible for the conduct of investigations. When a report was received from the police, DoJ would decide whether prosecution was warranted, taking into consideration the findings of the police investigation and having regard to the established prosecution policy. Factors which had to be considered included sufficiency of evidence, whether there was a reasonable prospect of securing a conviction based on the evidence, and whether it was in the interests of public justice to prosecute, etc.

13. Mr James TO said that as set out in the new issue of "The Statement of Prosecution Policy and Practice" published by DoJ, a variety of factors should be taken into consideration by the prosecution in deciding whether or not to prosecute. These factors included e.g. the gravity and practical effect of the offence and whether the consequences of prosecution would be out of proportion to the seriousness of the offence or to the penalty a court would be likely to impose. Referring to the case mentioned by Mr Albert HO earlier on, Mr TO pointed out that the Chief Magistrate only imposed a light sentence on the defendants, i.e. the defendants were bound over. He said that in view of the Chief Magistrate's comments on the case, the Administration should consider whether similar cases should more appropriately be dealt with in other ways.

14. SJ responded that DoJ would consider in detail the judgment given by the Chief Magistrate on the case. She reiterated that it was incumbent upon the Government to bring a prosecution, where necessary, against people who violated the law.

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Government Counsel suing the Government in possible conflict of interest

15. Mr James TO referred to a current case in which proceedings were brought by a counsel in DoJ against the Government. He said that as Government Counsel offered legal advice to the Government on a wide range of issues, conflict of interest might occur if the counsel involved in the case had previously advised the Government on issues which were the subject of the litigation. He opined that DoJ should introduce appropriate safeguards to prevent Government Counsel from any potential conflict of interest.

16. Solicitor General responded that there were rules and guidelines within the Civil Service relating to the avoidance of conflict of interest in discharging public duties. The Chairman requested the Administration to provide the rules and guidelines for the Panel's information.

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(*Post-meeting note* - Relevant extract of Civil Service Bureau Circular No. 19/92 on prevention of conflict of interest provided by the Administration was circulated vide LC Paper No. CB(2)761/02-03(01) on 24 December 2002)

Review of financial limits of the civil jurisdiction of the District Court (DC)

17. Mrs Miriam LAU enquired about the impact on the workload of DC and the waiting time for cases dealt with by DC, consequent to the increase of the financial limits of the civil jurisdiction of DC since September 2000.

18. JA informed members that the number of civil cases handled by DC in year 2000 was in the range of 18 000. The number of cases increased to about 23 000 in 2001. From January to September 2002, the number of cases handled was about 12 000. The average period for a case to be handled was 82 days in 2000, 79 days in 2001 and 89 days in 2002. JA opined that the situation was acceptable from the Judiciary's point of view.

19. JA added that the Judiciary was in the process of reviewing the civil jurisdictional limits of DC. It would report to the Panel on the result of the review in due course.

Transcription charges for court documents

20. In reply to Ms Miriam LAU, JA informed members that transcription of court documents was presently charged at the rate of $85 per page. He explained that the work involved professional services provided by the contractor engaged by the Judiciary. The rate was sufficient only to achieve full cost recovery.

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21. Ms Miriam LAU opined that the charge was too high for the ordinary court users and asked whether the rate would be reviewed. JA said that the financial implications of a reduced rate would have to be considered by the Administration.

Outsourcing Information Technology Services

22. In response to Mr CHAN Kam-lam, JA said that the Judiciary Administration was satisfied with the work of the private company which was awarded a five-year contract to provide a comprehensive scope of information technology support services to the Judiciary. He added that arrangements were being made with the company to provide new and improved services, as required under the terms of the contract.

Workload of the Labour Tribunal (LT)

23. Mr CHAN Kam-lam enquired about the possibility to raise the limit of the maximum amount involved in claims handled by the Minor Employment Claims Adjudication Board (MECAB) of the Labour Department, so that a certain number of cases handled by LT could be transferred to MECAB, thereby reducing the backlog of LT.

24. JA said that the existing upper ceiling applicable to cases handled by MECAB was $8,000. He said that a similar proposal had been discussed by the Public Accounts Committee about two years ago and the matter had been followed up with the Commissioner for Labour. The parties decided that in view of the particular role of MECAB, which was an administrative body established for the purpose of resolving minor employment claims expeditiously, it was not desirable to increase the upper financial limit. Cases with claims exceeding $8,000 should continue be handled by the Judiciary.

25. JA further said that although LT handled a great number of cases, the backlog situation had improved as compared to three to four years ago. He informed members that the number of cases handled by LT was in the region of 10 000 per year. The number of cases dealt with from January to September 2002 was about 9 400. Normally, it would take about 21 days from the date of registering a claim with LT to formal filing of claim, and another 25 days for the claim to receive first hearing.

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26. The Chairman requested JA to provide a paper on the Judiciary's plan to improve LT's operation for the Panel's consideration.

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III. The Statement of Prosecution Policy and Practice
(The Statement of Prosecution Policy and Practice issued by Department of Justice in November 2002; LC Paper No. CB(2)434/02-03(01))

27. Director of Public Prosecutions (DPP) informed members that The Statement of Prosecution Policy and Practice (The Statement) had substantially revised the previous policy guidelines which DoJ issued in 1998. The opportunity had been taken to modernise and expand the guidelines in the interests of transparency and accountability, with emphasis on Hong Kong's approach to prosecutions in line with the common law rules and tradition.

Issues raised by members

Prosecution of organisers of unlawful assemblies

28. Mr James TO and Ms Emily LAU declared interest on this item. They said that they had participated in unlawful assemblies in the past.

29. Mr Albert HO asked whether the police had the discretion not to refer all cases of unlawful assembly to DoJ for consideration of prosecution.

30. DPP replied that there was no obligation on the police to refer all cases to DoJ, if the police took the view that there was not enough evidence to take out prosecution. Cases which required legal advice and cases which were considered by the police to have strong evidence for prosecution would be referred to DoJ for a decision.

31. Mr Albert HO asked whether there had been a change in prosecution policy as no person had ever been prosecuted for the offence of unlawful assembly under the Public Order Ordinance until the recent convicted case. DPP replied in the negative. He said that with the passage of the motion on Public Order Ordinance by the Legislative Council on 20 December 2000, members of the public were alerted to the fact that they would be liable to prosecution if they violated the law. The policy of the Government had not changed.

32. Mr CHAN Kam-lam said that after the reunification, there had been a large number of cases where participants of unlawful assemblies openly defied the law. He doubted whether it was proper for the Government not to take prosecution action in the vast majority of the cases. He opined that this would give rise to a perception of selective prosecution and threaten public confidence in the rule of law.

33. Mr TAM Yiu-chung pointed out that for the convicted case in question, the offence of unlawful assembly took place in February 2002 and the three defendants were arrested in May 2002. They were convicted on 25

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November 2002. He expressed the view that the time which the Government had taken in prosecuting the case and the timing of the recent visit of Premier ZHU Rongji to Hong Kong might have contributed to speculation that the prosecution was an act of political suppression against political activists.

34. In response, DPP said that the DoJ did not prosecute in all cases. In some cases, it might be considered that a caution or warning would suffice. Cautions and warnings were very often used, and they were found to be an effective alternative to prosecution, particularly in dealing with young offenders. However, if the offenders kept defying the law and ignoring warnings, prosecution would be taken against them. He further said that the visit of leaders from the Mainland played no part in the decision to prosecute, and political considerations were irrelevant. He added that so far as possible, the prosecution would try to keep the time between the commission of an offence and any prosecution action as short as possible. But there were factors which might affect the process such as the need to examine the evidence in detail and to obtain new evidence.

Prosecutorial independence

35. Ms Emily LAU pointed out that The Statement had included the constitutionally guaranteed notion of prosecutorial independence provided under BL 63, which enabled prosecutors to discharge their duties independently, without the fear of political interference or improper or undue interference. She said that with the proposal to implement BL 23 by local legislation, people were worried that prosecutorial independence relating to prosecution of offences under BL 23 could be subject to political interference. She further said that in the course of discussing the accountability system principal officials, there were views expressed that SJ, being a politically appointed principal official, should delegate her responsibility for and authority to control criminal prosecutions to DPP or to an independent prosecution authority. She sought DPP's views on the matter.

36. In response, DPP said that many common law jurisdictions, including England and Wales, did not have a constitutionally guaranteed right of independent prosecutorial discretion. The right existed only in the form of convention. In Hong Kong, this guarantee was enshrined in the Basic Law, which the Government, including the Chief Executive and the principal officials, had to uphold. This was in some way a considerable improvement on the position before the reunification. On the issue of delegation of SJ's responsibility for criminal prosecutions to an independent authority, DPP said that the Administration's stance had been explained to Members at previous discussions and set out in detail in the papers provided to the Panel. He added that Hong Kong followed the practice in many of the common law jurisdictions, including England and Wales, where the DPP was accountable to a Minister. Such a system worked as well in Hong Kong as in other jurisdictions.

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37. Ms Emily LAU enquired about whether the advice given by DPP to SJ could be recorded, and at some stage be made known to the public where appropriate, so that a greater degree of transparency could be injected into the system. DPP replied that he considered that his advice to SJ on public prosecutions matters should remain confidential. The Chairman and Ms Emily LAU opined that exchanges of views between SJ and DPP on major issues, while not divulged to the public, should be placed on record. DPP responded that he would consider the proposal.

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38. The Chairman and Ms Emily LAU asked what would be the consequences of and penalty for violation of BL 63. DPP advised that there was no specific criminal offence to deal with such violation. He reiterated that prosecutors felt much more secure to have the guarantee of prosecutorial independence laid down in the Basic Law, and which the Government as a whole was bound to uphold. He further said that if a person sought to influence a prosecution decision improperly, that could amount in itself to a criminal offence of attempting to pervert the course of public justice.

39. The Chairman noted that The Statement had expanded on the public interest criterion and provided a list of factors to be considered by prosecutors in deciding whether or not to prosecute in a particular case. She asked whether this would create the impression that prosecution was an uncertain matter and hence affect public confidence in the fairness of prosecution decisions. DPP responded that on the contrary, the setting out of the public interest factors in The Statement was to dispel any notion of arbitrariness on the part of the prosecutors.

IV. Court Prosecutor grade

(LC Paper Nos. CB(2)435/02-03(01) to (04); 454/02-03(01))

40. The Chairman declared interest on this item as she was currently prosecuting a case as counsel for the Government.

41. DPP briefed members on the Administration's paper on "Recruitment of Court Prosecutors" (LC Paper No. CB(2)435/02-03(04)).

42. At the invitation of the Chairman, Mr Michael LUNN introduced the submission of the Bar Association (LC Paper No. CB(2)454/02-03(01)). In gist, the Bar Association expressed concern that DoJ appeared to be committed to a system of prosecution in the Magistrates' Courts by non-professionally qualified persons. This was not a desirable situation in view of the fact that the sentencing jurisdiction of the Magistrates' Courts in Hong Kong was much wider than that in the United Kingdom. The Bar Association considered that greater use ought to be made of professionally qualified prosecutors instead of

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Court Prosecutors (CPs), particularly in cases in which the likely consequence of conviction was a sentence of imprisonment. In the view of the Bar Association, there was a pool of well qualified young barristers who were produced at great expense of taxpayers' money and who were ready and willing to take on the job.

43. Mr Michael LUNN further pointed out that under the Duty Lawyer Scheme operated by the two legal professional bodies, defendants in cases tried at the Magistrates' Courts could be legally represented by qualified practitioners. It was therefore an anomalous situation that prosecution in the Magistrates' Courts was undertaken by non-legally qualified people.

Issues raised by members

Cost-effectiveness of the CP system

44. The Chairman noted that as stated in the Administration's paper, based on the relevant figures in 2001, the average cost of a CP grade officer conducting prosecutions was $3,045 per court day. This compared with $5,670 per court day for counsel prosecuting on general fiat. The Chairman asked about the practice experience of fiat counsel. She also enquired about the cost for the 19 CP grade officers referred to in paragraph 15 of the Administration's paper, who provided administrative and supervisory duties for the grade and the cases prosecuted.

45. DPP informed members that fiat counsel were practitioners on the "B list" of the Magistrates' Courts and normally had two to three years of practice experience. After these counsel had undertaken prosecution work for two years or so, they could move up to the "A list". Counsel on "A list" could undertake work carried out by Government Counsel. The rate for briefing counsel on the "A list" was $8,530 per court day.

46. The Chairman requested the Administration to provide information on the experience of counsel placed on both A and B lists in the past three years for the Panel's reference.

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(*Post-meeting note* - The information provided by the Administration was circulated vide LC Paper No. CB(2)761/02-03(02) on 24 December 2002)

47. Regarding the 19 CP grade officers undertaking administrative and supervisory work, Director of Administration & Development advised that the cost for them in 2001 was about $19 million, or $1,285 per court day.

48. With regard to the Bar Association's question about the cost of training the eight CPs who were last recruited in April 2002, DPP advised that the cost

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of providing trainers was $1,088,267. The training programme covered 25 weeks of lectures by one Government Counsel, six weeks of supervised mock trials and eight weeks of supervised attendance at the courts. He considered that the money was well spent, particularly taking into consideration that the last recruitment was the first since 1997. He further said that the newly recruited CPs had performed well in both academic and practical training.

Recruitment of CPs

49. In response to Ms Emily LAU, Senior Assistant Director of Public Prosecutions informed members that more than 2 300 persons applied for appointment in the recent recruitment exercise of CPs. There was keen competition as only eight vacancies were available. One barrister and two solicitors were interviewed but not selected for appointment. One trainee solicitor who was selected had subsequently turned down the offer of appointment.

50. Referring to the recruitment exercise, DPP said that he was quite disappointed to find that very few barristers and solicitors had applied. He said that the response was indicative of the reluctance of junior barristers and solicitors to take up the job at an initial monthly salary of $14,300.

Work performed by CPs and qualified legal professionals

51. Mr Albert HO expressed the view that it was indisputable that legally qualified practitioners were better able to handle prosecution work than unqualified persons. He said that the Administration should seriously consider the proposal of the Bar Association. Ms Emily LAU invited DPP to respond to the Bar Association's comment that the Administration should use more professionally qualified persons to undertake prosecution work at the Magistrates' Courts.

52. DPP said that as explained in the Administration's paper, if all the 14,537 court days conducted by CPs in 2001 were briefed out to private counsel, it would cost $38 million more than the $44 million spent on the CPs. He said that the ultimate test was whether CPs had been doing a good job. In this regard, the Administration was extremely satisfied with their performance. Feedback from the Magistrates' Courts and the enforcement agencies also showed that CPs produced high quality work. He further said that the qualifications of CPs were high and improving. The majority of them were degree holders, some had acquired legal qualifications and some were studying law with a view to getting themselves qualified. DPP said that it was the view of the Administration that the system of CP had operated well for the past 25 years and would continue to function effectively.

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53. DPP further informed members that in England, it had been recognized that there were too many lawyers from the Crown Prosecution Service being tied up in routine cases which did not strictly require their attention. The amendment to the Prosecution of Offences Act 1985, passed in 1998, had introduced a category of designated case workers under the Crown Prosecution Service to undertake the work of the lawyers in less complicated prosecutorial matters. That scheme, akin in nature to the CP system in Hong Kong, was first introduced as a pilot measure and subsequently made permanent in UK.

54. Mr TAM Yiu-chung said that he did not support the view that the work of CPs should be taken over by barristers and solicitors because of an abundant supply of qualified legal practitioners. He considered that there was no need to change the present system if CPs were proved to have been doing a satisfactory job.

Briefing out cases to private practitioners

55. Ms Miriam LAU asked about the policy on briefing out cases to private legal practitioners.

56. DPP said that DoJ had a policy of briefing out some of its prosecutions at the Magistrates' Courts to junior barristers and solicitors thus providing them with exposure to prosecution work at an early stage in their careers. These included e.g. traffic cases, summons cases and other cases which could be disposed of at the summary level. He advised that in England, the practice was that public prosecution cases would not be briefed out to private practitioners with less than three years' experience. In Hong Kong, a more lenient approach, as he had earlier explained to the Panel (paragraph 45 above refers), was adopted.

57. In concluding the discussion, the Chairman made reference to the Administration's position that the operational needs of the CP grade would be kept under regular review as indicated in paragraph 19 of its paper, and said that the item might be followed up in future by the Panel if necessary.

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

Council Business Division 2
Legislative Council Secretariat
20 January 2003