

**立法會**  
**Legislative Council**

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**Panel on Security  
and  
Panel on Administration of Justice and Legal Services**

**Minutes of joint meeting held on Tuesday, 7 January 2003  
at 4:30 pm in the Chamber of the Legislative Council Building**

**Members present** : Panel on Security

- Hon LAU Kong-wah (Chairman)
- \* Hon James TO Kun-sun (Deputy Chairman)
- \* Hon Albert HO Chun-yan
- Dr Hon LUI Ming-wah, JP
- Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
- Hon CHEUNG Man-kwong
- Hon Andrew WONG Wang-fat, JP
- Hon WONG Yung-kan
- Hon Howard YOUNG, JP
- \* Hon Ambrose LAU Hon-chuen, GBS, JP
- Hon Michael MAK Kwok-fung
- \* Hon Audrey EU Yuet-mee, SC, JP

Panel on Administration of Justice and Legal Services

- ◆ Hon Margaret NG (Chairman)
- Hon Jasper TSANG Yok-sing, GBS, JP (Deputy Chairman)
- Hon Martin LEE Chu-ming, SC, JP
- Hon CHAN Kam-lam, JP
- Hon Miriam LAU Kin-ye, JP
- Hon Emily LAU Wai-hing, JP
- Hon TAM Yiu-chung, GBS, JP

**Member attending** : Dr Hon David CHU Yu-lin, JP

**Member absent** : Panel on Security  
Hon IP Kwok-him, JP

\* Also a member of Panel on Administration of Justice and Legal Services

◆ Also a member of Panel on Security

**Public Officers attending** : Mrs Regina IP, GBS, JP  
Secretary for Security

Mr Bob ALLCOCK, BBS, JP  
Solicitor General

Mr James O'NEIL  
Deputy Solicitor General

Mr Sidney CHAU  
Senior Assistant Commissioner of Police

Mr Victor LO  
Assistant Commissioner of Police

Mr Johann WONG  
Principal Assistant Secretary for Security

Miss Adeline WAN  
Senior Government Counsel

**Clerk in attendance** : Mrs Sharon TONG  
Chief Assistant Secretary (2)1

**Staff in attendance** : Mr Jimmy MA, JP  
Legal Adviser

Ms Bernice WONG  
Assistant Legal Adviser 1

Mr Raymond LAM  
Senior Assistant Secretary (2)5

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**I. Election of Chairman**

Mr LAU Kong-wah was elected Chairman of the joint meeting.

**II. Consultation Document on Proposals to implement Article 23 of the Basic Law**

(Consultation Document on Proposals to implement Article 23 of the Basic Law, LC Paper Nos. CB(2) 686/02-03(03), CB(2) 744/02-03(01), CB(2) 793/02-03(01) and (02), CB(2) 814/02-03(01), LS 6/02-03 and LS34/02-03)

2. Members noted the second batch of the Administration's response, which was tabled at the meeting, to questions raised by Hon James TO on 4 December 2002.

(*Post-meeting note* : The paper tabled at the meeting was issued to members vide LC Paper No. CB(2) 839/02-03 on 8 January 2003.)

3. Members agreed that the paper entitled "Existing legislation relevant to the Proposals to implement Article 23 of the Basic Law" prepared by the Legal Service Division of the Legislative Council Secretariat (LSD's paper) be used as a basis for discussion.

4. Legal Adviser (LA) introduced LSD's paper and drew Members' attention that after the paper was issued in October 2002, the two Panels had held a series of meetings to receive the views of the public on the proposals in the Consultation Document. Mr James TO requested LA to update the observations in the paper, having regard to the views expressed and the developments over the past few months.

5. Miss Margaret NG said that as there was already legislation implementing Article 23 of the Basic Law (BL23), the proposals in the Consultation Document involved further enactment of legislation. She considered that the Administration should explain, for each proposal in the Consultation Document, the inadequacies in existing legislation. She asked what would amount to "compel", "constraint", "intimidate" or "overawe" in the proposals relating to treason, and whether modern terms would be used in the legislative provisions instead of such archaic terms.

6. Secretary for Security (S for S) responded that the proposals relating to treason sought to prohibit those acts as set out in paragraph 2.8 of the Consultation Document. The terms "compel", "constraint" and "intimidate" were found in the common law and in the anti-terrorism legislation of many countries. The term "overawe" was a comparatively archaic one and the Administration could consider using a modern term in the legislative provisions. She stressed that it was proposed in the Consultation Document that the concept of protecting the sovereign as an individual was no longer appropriate under the constitutional situation of Hong Kong after Reunification, and should therefore be removed. This reflected that Administration had taken on board the suggestion in the submission of July 2002 from the Hong Kong Bar Association

LA

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(the Bar Association).

7. Mr James TO requested the Administration to explain the types of acts or disturbances that would amount to acts with an intent to overthrow the Government of the People's Republic of China (PRCG) or compel the PRCG by force or constraint to change its policies or measures.

8. Referring to paragraph 2.8 of the Consultation Document, S for S responded that a person would commit treason if he "levied war by joining forces with a foreigner" with one of the intents set out in the paragraph. Thus, the scope of the offence was narrow. Minor disturbances would not amount to the offence of treason. It should be noted that similar provisions were found in the relevant legislation of other countries such as the United Kingdom (UK), Canada, Australia, Germany, France and Japan. She said that the Administration was willing to consider using more modern terms in the legislative provisions. However, it would not be possible to set out all the acts amounting to treason.

9. Mr James TO said that the scope of the proposals in paragraph 2.8 of the Consultation Document was much broader than that of treasonable offences under existing legislation. He expressed concern that minor disturbances participated by foreigners might amount to joining forces with a foreigner with the intent to intimidate or overawe the PRCG. He pointed out that the Bar Association had suggested confining war to armed conflicts. He asked whether the Administration still maintained its proposals in paragraph 2.8 of the Consultation Document.

10. Referring to footnote 17 of the Consultation Document, S for S responded that under the common law, the meaning of "war" was not confined to the true "war" under international law, but included any foreseeable disturbance that was produced by a considerable number of persons and was directed at some purpose which was not of a private but of a general (廣泛) character. Thus, "war" in this context did not cover minor disturbances.

11. Solicitor General (SG) added that in examining the proposals in paragraph 2.8 of the Consultation Document, one should not only look at the treason offences set out in section 2 of the Crimes Ordinance, but also the treasonable offences set out in section 3 of the same Ordinance. He said that the scope of existing legislation on treason was very broad and the proposals in the Consultation Document sought to narrow that scope. While existing legislation provided that a person who intended to achieve any of the purposes set out in section 3 of the Crimes Ordinance and who manifested such intention would commit a treasonable offence, it was proposed in paragraph 2.8 of the Consultation Document that a person would only commit treason if he actually levied war by joining forces with a foreigner with one of the intentions referred to in the paragraph. Thus, the proposal in the Consultation Document had considerably raised the threshold. An ordinary disturbance or riot would not amount to treason.

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12. Mr James TO considered that the proposals in paragraph 2.8 of the Consultation Document should be compared with treason offences under existing legislation. He said that the offences in paragraph 2.8(b), (c) and (d) of the Consultation Document were much less serious than that in paragraph 2.8(a) of the Consultation Document. He asked whether the offences in paragraph 2.8(b), (c) and (d) could be dealt with under the ambit of ordinary criminal offences.

13. S for S responded that besides possessing an intention set out in paragraph 2.8 of the Consultation Document, the element of levying war by joining forces with foreigners was required for constituting the offence of treason. She stressed that treason offences were directed at acts that endangered national security. SG added that it would be a serious offence to use foreign armed forces to compel the national government to change its policies.

14. Miss Margaret NG expressed concern about the meaning of war as set out in footnote 17 of the Consultation Document and the proposal regarding non-violent attacks in paragraph 2.12 of the Consultation Document. She considered that the Administration should explain the scope of "levying war" and "joining forces with a foreigner".

15. S for S responded that there was much jurisprudence under the common law on the interpretation of "levying war". Referring to paragraph 2.9 of the Consultation Document, she said that "foreigner" was proposed to be defined along the lines of "armed forces which are under the direction and control of a foreign government or which are not based in the PRC".

16. SG added that there were large number of cases providing guidance on the interpretation of the expression "levying war" and the court would have regard to such jurisprudence under the common law in its interpretation of the expression, if it was used in the legislation to be enacted. He added that the terms "force", "constraint", "intimidate" and "overawe" were ordinary words in the English language which would be construed by the court, in the absence of any relevant case law, in accordance with their ordinary definitions in the dictionary.

17. Miss Margaret NG considered that the Administration should explain the types of acts that would constitute "levying war" instead of asking the public to study the massive jurisprudence that might cast light on the interpretation of the expression. She asked whether treason offences could be confined to assisting a public enemy in a formally declared war or a public enemy in armed conflicts with the State to which sufficient publicity had been given.

18. S for S responded that an examination of modern history revealed that many wars had not been formally declared. Narrowing the meaning of "war" to publicly declared war, as suggested by the Bar Association, was not appropriate in the present-day circumstances. SG added that the proposals relating to treason were intended for dealing with serious activities involving the levying of war to prevent the PRCG from

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exercising its lawful authority. Thus, ordinary demonstrations and processions would not fall within the meaning of "levying war".

19. Miss Margaret NG questioned how the Administration could request the Legislative Council to enact its proposals on treason, if it could not fully explain the meaning of "levying war by joining forces with a foreigner".

20. S for S responded that the Administration might revise its proposals after considering views received in the consultation process. Thus, the expressions and terms used in the Consultation Document might be changed. She stressed that the Administration was willing to consider views expressed on the proposals in the Consultation Document. SG added that it would be difficult to go into the details of the Administration's proposals before the draft legislation was introduced. Miss Margaret NG stressed that one had to understand a proposal before considering whether it should be supported or not. Mr Martin LEE considered that the main issue was the absence of a white bill setting out the draft legislative provisions.

21. Mr CHEUNG Man-kwong said that while "foreigner" was in comparison clearly defined, many people had expressed concern that the proposed definition of "levying war" was too broad and inappropriate. He considered that the Administration should consider the suggestion of the Law Society of Hong Kong that war should be defined in the sense in which it was generally understood, such as along the lines of "when differences between states reach a point at which both parties resort to force, or one of them does an act of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant".

22. S for S responded that the Administration considered that war referred to armed conflicts of a large scale rather than ordinary disturbances. It should not be confined to wars that were formally declared. She reiterated that there was much jurisprudence under the common law on the interpretation of "levying war".

23. SG added that although there had been one or two law reform reports in some countries that suggested confining treason to acts during periods of war, such a suggestion had not been implemented in these countries. It was the general practice in other common law jurisdictions that the offence of treason covered levying of war to overthrow the government at any time. Thus, the Administration's proposals regarding treason were in line with the practice of other common law jurisdictions. He added that foreign armed forces could attack a country without formally declaring war or actually launching an invasion. It would be a serious offence for a person to instigate foreign armed forces to invade the country regardless of whether a war was formally declared.

24. Referring to paragraph 2.7 of the Consultation Document, Mr Martin LEE said that a lawyer would interpret the term "held" as "held by a court". He questioned why

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there was not any reference to a judgment in footnote 17 of the Consultation Document.

25. SG responded that the materials in footnote 17 of the Consultation Document were quoted from the report of the English Law Commission, which considered the description in *Kenny's Outlines of Criminal Law (19<sup>th</sup> ed., 1966)* the best description of "levying war" drawn from case laws.

26. Ms Emily LAU asked how the Administration would study and analyse the more than 90 000 submissions received on the proposals in the Consultation Document.

27. S for S responded that a majority of the submissions received merely contained an indication of stance rather than comments on specific proposals in the Consultation Document. Specific views or comments were mainly submitted by professional bodies and sectors which were concerned that they might be affected by the proposals in the Consultation Document. Over the past three months, the Administration had been analysing submissions received and examining how to address the concerns raised. It hoped to complete studying and analysing all the submissions received and publish a report within January 2003.

28. Ms Emily LAU expressed concern that the scope of treason offences, which covered assisting a public enemy at war and non-violent threats, was very broad. She asked whether acts not involving the use of force could be excluded from the offence of treason.

29. S for S responded that the Administration had not proposed the inclusion of non-violent acts under "levying war". Paragraph 2.12 of the Consultation Document only pointed out that in so far as a non-violent attack such as an electronic sabotage was part of a larger planned operation by which foreign forces levied war or invaded the territory of the State, it would be caught by the offences proposed in paragraphs 2.8 and 2.9 of the Consultation Document.

30. SG added that the proposed treason offences could be classified into three main categories, namely, levying war against the State, instigating a foreigner to invade the country and assisting a public enemy at war. He informed Members that levying war involved violence. An act instigating a foreigner to invade the country involved the instigation of an act of violence. Although assisting a public enemy at war might not involve violence, it involved assisting the enemy to invade the country. Thus, the proposed offences of treason were related to violence either directly or indirectly.

31. Mr Albert HO expressed concern about the combined effect of the proposal in the last sentence of paragraph 2.10 of the Consultation Document which read "Any act done to strengthen the enemy or weaken one's country to resist the enemy counts as assistance", the proposed extra-territorial application of treason offences and the proposal that treason offences would apply to all persons who were voluntarily in the

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Hong Kong Special Administrative Region (HKSAR). He said that a non-Chinese national who was a HKSAR permanent resident and whose country was at war with the State might commit the offence of performing an act to strengthen the enemy when fulfilling his obligations as a citizen of his own country, such as payment of tax.

32. S for S responded that the concept of "assisting a public enemy at war" was generally found in legislation relating to treason in other jurisdictions. She said that treason as defined in the relevant legislation of Australia contained the element of "assist by any means whatever with intent to assist an enemy". Relevant legislation of the United States also contained the expression "aid or comfort". Mr Albert HO said that reference to overseas examples might not be appropriate, as there were much checks and balances in these places.

33. S for S said that the proposal in the Consultation Document that treason offences would apply to all persons who were voluntarily in the HKSAR only referred to acts within the HKSAR. The proposed extra-territorial application of treason offences would be applicable to HKSAR permanent residents only.

34. Mr Albert HO said that many HKSAR permanent residents residing overseas were not aware that they would be affected by the proposed extra-territorial application of treason offences. He considered that such persons should also be consulted. S for S responded that the proposed extra-territorial application of treason offences sought to deal with the situation where a Hong Kong resident went to another place, such as Macau, to commit an act of treason such as assisting a public enemy. Considering that the application of such a provision to all Hong Kong residents might be too broad, the Administration therefore proposed confining the extra-territorial application to HKSAR permanent residents.

35. Mr Albert HO said that it was questionable whether foreign nationals residing in Hong Kong should be prosecuted under laws on treason or other local legislation. S for S responded that the Administration was aware of such concerns and would examine the issue.

36. Mr James TO asked whether "war" could be confined to international armed hostilities.

37. S for S stressed that it was the Administration's intention that "war" only referred to acts falling under the concept of "war" under international law. It did not refer to public order events which could be dealt with under the Public Order Ordinance. The Administration would have regard to Members' views in the law drafting process.

38. Mr James TO asked about the meaning of footnote 17 of the Consultation Document. SG responded that the meaning of "levying war" under the common law was not limited to the true "war" of international law. He added that there were previous examples where a government was overthrown by foreign military forces

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without a "war" under international law.

39. Miss Margaret NG said that many organisations and individuals opposed the proposed offence of misprision of treason. She asked whether the Administration would consider withdrawing the proposal to create such an offence. The Chairman suggested that the issue be dealt with later when the relevant part of LSD's paper was discussed.

40. Mr James TO asked whether the term "foreigner" in paragraph 2.9 of the Consultation Document included armed forces based in Taiwan.

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41. S for S responded that as Taiwan was a part of China, the term did not cover such armed forces. In response to Mr James TO's question on the part of the Consultation Document that dealt with joining forces with Taiwan, S for S said that she would need some time to examine the issue.

42. Mr James TO asked whether it was the Administration's intention that the "state organs" referred to in footnote 18 of the Consultation Document were the state organs established under the Constitution of the PRC, as set out in items (a) to (g) in the preliminary observations on the first page of LSD's paper.

43. S for S responded that it was the Administration's original intention that "state organs" included the National People's Congress, the State Council, the Supreme People's Court and the Supreme People's Procuratorate. However, the Administration had not taken a view on the matter and Members were welcome to express their views.

44. Mr CHEUNG Man-kwong asked whether the term "state organs" included the President of the PRC, as referred to in item (b) in the preliminary observations of LSD's paper. S for S responded that the Administration had no intention to do so, as the protection of the President of the PRC could be dealt with under existing legislation.

45. Mr CHEUNG Man-kwong asked whether it was permissible to provide in local legislation a definition of "state organs" different from that in the Constitution of the PRC. S for S responded that it was not "state organs" but "PRCG" that was referred to in the proposals on treason offences.

46. Mr CHEUNG Man-kwong asked whether it was permissible for a local government to provide in local legislation its own definition of "PRCG".

47. SG responded that as BL23 did not require the HKSAR to enact legislation to protect all the organs set out in items (a) to (g) in the preliminary observations of LSD's paper, there would not be a problem if the Administration's proposal did not cover all these organs.

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48. S for S said that the objective of legislation to implement BL23 was not to define "state organs", but to protect national security. The Administration's proposals should be adequate for protection of the most important state organs and hence national security. There was no question of enacting legislation to redefine "state organs" in the Constitution of the PRC.

49. Mr CHEUNG Man-kwong asked about the meaning of "PRCG" referred to in paragraph 2.8 of the Consultation Document. Referring to the paper entitled "Administration's response to the issues raised at the joint meeting held on 21 October 2002", S for S responded that the term "PRCG" represented collectively the Central People's Government and other organs established under the PRC Constitution. The meaning of "Government" should be taken in a collective sense instead of construed as a particular person or group of persons.

50. Ms Audrey EU asked whether the Supreme People's Court and the Supreme People's Procuratorate referred to persons such as judges or the buildings only.

51. S for S responded that the Supreme People's Court and the Supreme People's Procuratorate referred to the organisations concerned. It covered persons in their official capacity.

52. Ms Audrey EU said that apart from true "war" of international law, existing local legislation was adequate for dealing with disturbances. She asked why there was a need for separate provisions on "levying war".

53. S for S responded that the proposals regarding treason were not directed at disturbances that could be dealt with under the Public Order Ordinance, but disturbances of a very serious and widespread nature. SG added that most of the activities proposed to be prohibited under treason also amount to other offences. The question was how one classified an offence as one endangering national security. The Administration's proposal to use "levying war" as a basis for classifying such an offence was an appropriate one widely adopted throughout other common law jurisdictions.

### **III. Date of next meeting**

54. Members noted that the next joint meeting had been scheduled for Friday, 17 January 2003 at 8:30 am.

55. The meeting ended at 6:35 pm.