

立法會
Legislative Council

Ref : CB2/PL/AJLS+SE

LC Paper No. CB(2)2035/02-03
(These minutes have been seen by
the Administration)

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

**Minutes of joint meeting held on Saturday, 15 February 2003
at 9:00 am 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 WONG Yung-kan
- Hon Howard YOUNG, JP
- * Hon Ambrose LAU Hon-chuen, GBS, JP
- Hon IP Kwok-him, JP
- * 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 CHAN Kam-lam, JP
- Hon Miriam LAU Kin-ye, JP

**Members
attending**

: Dr Hon David CHU Yu-lin, JP
Hon Cyd HO Sau-lan

**Members
absent**

: Panel on Security

- Hon CHEUNG Man-kwong
- Hon Andrew WONG Wang-fat, JP
- Hon Michael MAK Kwok-fung

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Panel on Administration of Justice and Legal Services

Hon Martin LEE Chu-ming, SC, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP

- * Also a member of Panel on Administration of Justice and Legal Services
- ◆ Also a member of Panel on Security

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

Mr Timothy TONG, JP
Permanent Secretary for Security (Acting)

Mr Bob ALLCOCK, BBS, JP
Solicitor General

Mr James O'NEIL
Deputy Solicitor General

Mr Gilbert MO
Deputy Law Draftsman
Department of Justice

Mr Johann WONG
Principal Assistant Secretary for Security

Ms Winnie NG
Administrative Assistant to Secretary for Security

Mr Hubert LAW
Assistant Secretary for Security

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

Staff in : Mr Jimmy MA, JP
attendance Legal Adviser

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Ms Bernice WONG
Assistant Legal Adviser 1

Mr Raymond LAM
Senior Assistant Secretary (2)5

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I. Election of Chairman

Miss Margaret NG was elected Chairman of the joint meeting.

II. Administration's proposals to implement Article 23 of the Basic Law
(LegCo Brief Ref. SBCR 2/1162/97 and LC Paper No. CB(2) 1171/02-03(01))

2. Members noted the Administration's booklet entitled "Collection of existing statutory provisions relevant to the National Security (Legislative Provisions) Bill" tabled at the meeting.

(Post-meeting note : The booklet tabled at the meeting was issued to members vide LC Paper No. CB(2)1215/02-03 on 17 February 2003.)

3. Members noted that the National Security (Legislative Provisions) Bill had been published in the Gazette on 14 February 2003 and would be introduced into the Legislative Council (LegCo) on 26 February 2003. In anticipation that a Bills Committee would soon be formed to study the Bill, Members agreed to conclude the deliberations of the two Panels on the Administration's proposals to implement Article 23 of the Basic Law (BL23) and to receive the Administration's briefing on the Bill at this meeting.

4. At the invitation of the Chairman, Secretary for Security (S for S) briefed Members on the Bill and highlighted the following -

- (a) the Bill sought to amend the Crimes Ordinance (CO), the Official Secrets Ordinance (OSO) and the Societies Ordinance (SO) pursuant to the obligation imposed by BL23 and to provide for related, incidental and consequential amendments; and
- (b) in view of the opinion given by Mr David PANNICK, it would be explicitly provided that provisions in the three Ordinances referred to in paragraph (a) above were to be interpreted, applied and enforced in a manner consistent with BL39.

5. Solicitor General (SG) took Members through the Bill and stressed that -

- (a) minor public disturbances would not amount to subversion;

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- (b) protesting against the exercise of the power of interpretation by the Standing Committee of the National People's Congress would not amount to secession; and
 - (c) the proscription of a local organization did not involve criminal proceedings but was an administrative decision similar to the revocation of a licence.
6. Referring to clause 4 of the Bill, Mr Howard YOUNG asked about the meaning of the expression "war has been publicly declared" in the proposed section 2(4)(c)(ii) of CO.
7. SG responded that the term "war" was proposed to be limited to a war in the international law sense. In the context of provisions relating to treason, it referred to a war with foreign armed forces.
8. Mr James TO asked whether calling for foreign armed forces to protect Taiwan when there were armed conflicts in Taiwan waters would amount to an offence under the proposed section 2(1)(b) of CO.
9. S for S responded that mere expression of opinion would not amount to the proposed offence, which was directed at acts. The Administration had no intention to restrict freedom of expression. SG added that the term "invade" referred to entry into a country with a hostile intent, which was different from entering an area upon invitation to help people in the area.
10. S for S pointed out that it was an offence under the existing section 2(1)(d) of CO to instigate any foreigner with force to invade the United Kingdom or any British territory. The term "foreigner" had already been narrowed to "foreign armed forces" in view of comments received during the consultation period. SG added that the reference to "United Kingdom or any British territory" had been adapted to the People's Republic of China (PRC).
11. Ms Audrey EU asked about the progress of updating the Compendium of Submissions on the Consultation Document on Proposals to Implement Article 23 of the Basic Law. She also asked whether the CD-ROM on the Compendium would be made available to the public. She requested the Administration to provide a classification of organizations and individuals who had expressed their views on the issuance of a blue bill or a white bill. She added that the Article 23 Concern Group would inform the Security Bureau (SB) in writing that its submission should be classified under Category B.
12. S for S responded that some submissions were difficult to categorize. The Administration had called on organizations/individuals who considered their submissions not correctly categorized in the Compendium to inform SB in writing by

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20 February 2003. The Administration had so far received 10 odd requests of such a nature. She said that an addendum would be issued and a CD-ROM covering all parts of the updated Compendium would be produced and made available to the public. She recalled that about 80% of the submissions did not indicate any preference for a blue bill or a white bill. Among those who had indicated preference, the respective percentages in support of a blue bill and a white bill were approximately the same. She undertook to provide the classification requested by Ms Audrey EU.

13. Ms Audrey EU requested the Administration -

- (a) to provide a comparison of the mechanism for the specification of terrorists under the United Nations (Anti-Terrorism Measures) Ordinance and that for the proscription of local organizations under the Bill, including the powers, procedures and appeals concerned;
- (b) in relation to the rules for appeals against proscription under the new section 8E(3) of SO -
 - (i) to provide justifications for the Court of First Instance to hold proceedings in the absence of the appellant;
 - (ii) to provide information on similar practices in overseas jurisdictions and explain why they should be adopted in Hong Kong; and
- (c) to explain the inadequacies of the existing provisions in SO in terms of proscription of local organization and why additional proscription power was needed.

14. Ms Audrey EU requested the Administration to provide a written response on why a public interest defence was not provided for the offence of unauthorized disclosure of protected information. She also requested the Administration to advise whether there was any information, document or other article falling within the scope of information related to Hong Kong affairs which, under the Basic Law, were within the responsibility of the Central Authorities in the proposed section 16A(1)(a) of OSO, other than information relating to defence and foreign affairs.

15. S for S undertook to provide a written response. She said that the Administration had considered the suggestion of providing a public interest defence for unauthorized disclosure. The provision of a public interest defence had been mainly suggested in relation to the unlawful disclosure of information relating to relations between the Central Authorities of the PRC and the HKSAR. However, the proposal was already narrowed to information on matters concerning the HKSAR that were within the responsibility of the Central Authorities under BL. The disclosure of such information would only be an offence if it was damaging to national security, which was narrowly defined as the safeguarding of territorial integrity and independence of the PRC. Thus, it would be unnecessary and inappropriate to introduce a public

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interest defence. She added that such a defence was also not found in the relevant legislation of other common law jurisdictions.

16. SG added that both offences and defences relating to unauthorized disclosure should be clear and precise. The introduction of a public interest defence would make it unclear to members of the public as to whether a document could be disclosed.

17. Ms Audrey EU requested the Administration to provide a comparison of the existing provisions in OSO and the proposed amendments to OSO, and explain the inadequacies of the existing OSO in dealing with theft of state secrets. SG responded that the Administration's booklet entitled "Collection of existing statutory provisions relevant to the National Security (Legislative Provisions) Bill" contained a comparison of the existing provisions in OSO and the Administration's proposed amendments. Ms EU said that the comparison she requested was mainly on the policy aspects.

18. Mr Albert HO asked whether the Administration had dropped the proposal of defining an organization as an organized effort by two or more people to achieving a common objective.

19. S for S responded that the proposed definition had not been adopted. As defined in the proposed section 8A of SO, "organization" meant any society which was registered, registrable or exempted from registration under SO or any body of persons listed in the Schedule of SO.

20. Referring to page 88 of the booklet entitled "Collection of existing statutory provisions relevant to the National Security (Legislative Provisions) Bill", Mr LAU Kong-wah asked why the Chinese counterpart of the term "society" was still defined, among others, as "一人以上的合夥或組織".

21. The Chairman said that there seemed to be a discrepancy between the English and Chinese versions of the definition for the term "society". She requested the Administration to review the definition having regard to the English and Chinese versions.

22. Mr Albert HO expressed concern that under the proposed mechanism for appeals against proscription, the Chief Justice (CJ) might make rules enabling proceedings to take place without the appellant being given full particulars of the reasons for the proscription in question, and rules enabling proceedings to be held in the absence of any person including the appellant and his legal representative. He questioned whether such an arrangement, which was not proposed in the Consultation Document, could ensure that an appeal was dealt with fairly. He expressed concern that the proposed arrangement would become a dangerous precedent.

23. S for S said that the proposed section 8E of SO was only an empowering provision providing that CJ might make rules to provide for the arrangements stated in the section. Even where such rules were made by CJ, it would be up to the judge

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concerned to decide whether such rules should apply. She said that before proscribing an organization under the proposed section 8A, S for S must afford the organization an opportunity to be heard or to make representations in writing as to why it should not be proscribed. The proposed section 8E of SO also provided that where rules made under the section enabled the Court of First Instance to hold proceedings in the absence of the appellant and his legal representative, the rules should make provision for a power to appoint a legal practitioner to act in the interests of the appellant.

24. SG said that the Administration had always maintained the position referred to in chapter 7 of the Consultation Document that "Given that sensitive information or intelligence may be involved, the rules of procedures of appeal should protect confidential material and sources from disclosure while ensuring procedural fairness". He said that under the International Covenant on Civil and Political Rights and the Hong Kong Bill of Rights, everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of his rights and obligations in a suit at law. Thus, any proposed rule-making power must be consistent with this requirement.

25. SG added that the proposed section 8E(2) of SO also provided that, in making rules under the section, CJ should have regard to the requirements in subsections (a) and (b). Besides making provision enabling proceedings to take place without the appellant being given full particulars of the reasons for the proscription in question, the rules might also make provision enabling the Court of First Instance to give the appellant a summary of any evidence taken in his absence.

26. SG further said that similar appeals relating to immigration matters affecting national security were previously dealt with in the UK by an advisory committee and not the court. Such a procedure was struck down in 1996 by the European Court of Human Rights, which commended that Canadian legislation dealing with immigration appeals had struck a balance between the two conflicting interests. New immigration appeals laws with rule making power basically the same as the one proposed in the Bill were then enacted in UK. He stressed that any rule-making power could not contravene Article 10 of the Hong Kong Bill of Rights.

27. Mr Albert HO said it was a general rule that a defendant and his legal representative had a right to attend legal proceedings and the court had no power to exclude the defendant or his legal representative from the proceedings. He questioned whether the Administration's proposal was in contravention of the principle of natural justice.

28. SG responded that it was a well established common law principle that the court could, in certain cases, hear evidence in the absence of the defendant or his legal representative under the public interest immunity defence. The proposed mechanism had incorporated an improvement by making provision for the appellant to appoint a legal practitioner to act in his interests. The Chairman requested the Administration

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to explain the common law principle and provide the relevant case law regarding the exclusion of the appellant and any legal representative appointed by him from any part of the hearing.

29. The Chairman asked whether CJ had been consulted on the proposal. S for S responded that the Judiciary had been consulted both on the proposed mechanism and contents of the relevant draft provisions. The Administration was consulting the Judiciary on the implementation details.

30. Referring to the proposed section 8A of SO, Mr LAU Kong-wah asked why the requirement that the local organization endangered national security was not a condition for proscription of the local organization. He asked whether a local organization subordinate to a Mainland organization prohibited in the Mainland by open decree on national security grounds would be proscribed under the proposed section, if it was only involved in recreational and cultural activities in Hong Kong.

31. S for S responded that the expression "necessary in the interests of national security and is proportionate for such purpose" in the proposed section had already embodied the requirement that the local organization endangered national security. She added that a local organization subordinate to a Mainland organization prohibited in the Mainland by open decree on national security grounds would not be proscribed under the proposed section, if it only organized recreational activities in Hong Kong.

32. Referring to the proposed section 8A of SO, Mr Howard YOUNG asked why it was the Administration but not the court which proscribed a local organization. Referring to the proposed section 8E of SO, he asked whether a similar mechanism adopted in Canada and the UK was applicable to all appeals or specific categories of appeals. He also asked how a legal practitioner could act in the interests of the appellant, if the court could hold proceedings in the absence of the appellant and his legal representative.

33. S for S responded that the proposed proscription mechanism was in line with the existing arrangement under SO where S for S was empowered to prohibit the operation or continued operation of a society on national security grounds. She added that any office-bearer or member of a proscribed local organization could appeal against the proscription to the Court of First Instance within 30 days after the proscription took effect.

34. SG added that the Administration was examining whether a similar appeal mechanism relating to proscription was found in the legislation of other countries. He said that appeal mechanisms relating to immigration and proscription were similar in the sense that the court had to properly review a decision while not endangering national security by revealing secrets. He added that in Canada and UK, the legal practitioner who acted in the interests of the appellant when proceedings were held in the absence of the appellant or his legal representative could cross-examine witnesses to ensure that evidence had been properly tested by the court in the interest of the

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appellant.

35. Mr Howard YOUNG asked why similar mechanisms were provided for immigration-related appeals in Canada and UK. SG responded that such a mechanism would be applicable in Canada and UK in immigration-related cases where a matter of public interest was involved, such as cases where a person was deported on national security grounds. The Chairman requested the Administration to advise whether similar proceedings in Canada and UK were confined to immigration-related cases.

36. Referring to the proposed section 2A(4)(b)(vii) of CO, Mr CHAN Kam-lam asked whether an act done in a place outside Hong Kong would not fall within the meaning of "serious criminal means", if it was an offence under the law of Hong Kong but not an offence under the law of that place. He also asked whether such a requirement would be too lax.

37. S for S responded that under the common law principle of double criminality, an act would amount to serious criminal means only if it was an offence both in this jurisdiction and the place where the act was committed. She said that as an act falling within the meaning of serious criminal means would amount to an offence in most jurisdictions, the requirement would not be too lax while providing sufficient protection to a defendant. SG added that if an act did not amount to an offence in the jurisdiction where it was committed, it would be inappropriate to regard it as criminal means.

38. Ms Audrey EU requested the Administration -

- (a) to explain why the Administration considered that proscription of local organization was an administrative procedure bearing in mind that the appeal proceedings are judicial proceedings;
- (b) to confirm whether Article 10 of the Hong Kong Bill of Rights set out in the Bill of Rights Ordinance (BORO), which concerned equality before courts and right to fair and public hearing, was applicable to the procedure for appeal against proscription;
- (c) to explain whether and how the proposed mechanism for appeal against proscription complied with the provisions in the Basic Law, BORO and the principles of natural justice under the common law in terms of human rights protection;
- (d) to confirm whether the rules made under the new section 8E of SO applied only to appeal against proscription under the new section 8D; and

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- (e) to explain the basis for empowering S for S to proscribe any local organization if she reasonably believed that the proscription was necessary in the interests of national security and was proportionate for such purpose, without a requirement for the organization to commit an offence.

39. S for S undertook to provide a written response. She said that a decision by S for S to refuse or cancel the registration of a society under SO was an administrative decision. As many people had opposed the proposal in the Consultation Document that appeals regarding points of facts would be heard by an independent tribunal, it was proposed in the Bill that appeals against proscription would be heard by the court. She added that the rules made under the new section 8E of SO applied only to appeal against proscription under the new section 8D.

40. SG said that there were many administrative decisions which were subject to judicial review or express statutory appeals. He added that an organization could endanger national security without actually committing treason, secession or subversion. For example, a local organization could train people to conduct terrorist acts that endangered national security.

41. Ms Audrey EU said that if the appeal procedures were judicial procedures, the usual judicial protection such as natural justice should be applicable. She asked whether the appeal procedures referred to in the proposed sections 8D and 8E of SO were judicial procedures. The Chairman asked whether the procedures were judicial review or administrative review.

42. SG responded that the proceedings referred to in the proposed sections 8D and 8E were judicial proceedings where special rules of procedure might be needed. Such rules had to be made and applied in a manner that was consistent with human rights protection. He reiterated that there was well established common law principle that the court could, in certain cases, hear evidence in the absence of the defendant or his legal representative, under a public interest immunity claim. He said that the procedures were not judicial review but appeal proceedings where all evidence could be examined by the Court of First Instance.

43. The Chairman considered that the ambit of the proposed new section 8D(3) of SO was no more than a judicial review. She requested the Administration to explain the difference between an appeal against proscription under the proposed section and a judicial review.

44. Ms Audrey EU requested the Administration to explain the meaning of the term "substantial" in the new section 8A(5)(h)(i) of SO. S for S undertook to provide a response. She said that the term was also found in many local Ordinances.

45. Mr LAU Kong-wah commented that the proposed definition of "local organization" might be too narrow in that it did not cover organizations not registered

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under SO. He said that many societies had chosen to register under the Companies Ordinance instead of SO. He asked how the proposed legislation could deal with acts endangering national security of such organizations.

46. S for S responded that there were anti-circumvention provisions in SO to deal with such situations. A society which should be registered under SO but chose to register under the Companies Ordinance would be caught by provisions in SO.

47. Mr LAU Kong-wah asked whether such a society would only be caught by offence provisions in SO, but not the proposed legislation which was directed at offences endangering national security. SG responded that the proposed definition of a "local organization" covered not only societies registered or exempted from registration under SO, but also societies registrable under SO. The Chairman requested the Administration to explain whether the proposed provisions relating to proscription would be applicable to any body of persons falling within the definition of "society".

48. Mr LAU Kong-wah asked whether the proposed definition of a "local organization" in the Bill covered the meaning of "an organized effort by two or more people to achieving a common objective, irrespective of whether there was a formal organization structure" referred to in paragraph 7.15(c) of the Consultation Document. S for S replied in the affirmative.

49. Referring to the proposed section 2C of CO, Mr CHAN Kam-lam asked whether the provisions were applicable to conspiracies or attempts within Hong Kong but not conspiracies or attempts in the Mainland and other places. S for S responded that the proposed section sought to deal with conspiracies or attempts within Hong Kong to do acts outside Hong Kong that endangered national security. Conspiracies or attempts in the Mainland and other places would be dealt with in accordance with the applicable laws of the respective place concerned.

50. The Chairman and Ms Audrey EU expressed concern that while the existing provisions in section 18 of OSO was confined to information disclosed without lawful authority by a public servant or contractor, the proposed section 18(2)(d) of OSO would widen the coverage of the section to persons other than a public servant or government contractor.

51. SG responded that the proposed section 18(2)(d) of OSO sought to plug a loophole in existing legislation regarding information obtained by persons other than a public servant or contractor by illegal access. He added that "illegal access" was narrowly defined in new section 18(5A). S for S said that criminalizing the disclosure of information without lawful authority by civil servants and government contractors but not the disclosure of information obtained by illegal access would only encourage people to access protected information by illegal means.

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52. The Chairman requested the Administration to provide categorization of views of organizations and individuals on -

- (a) the proscription mechanism proposed in paragraph 7.15(c) of the Consultation Document; and
- (b) the proposed offence of unauthorized disclosure of protected information obtained by unauthorized access to it.

53. Ms Audrey EU requested the Administration to also provide categorization of views of organizations and individuals on the provision of a public interest defence for offences relating to unauthorized disclosure of protected information.

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54. The Chairman requested the Administration to provide a response to issues raised and information sought by Members.

III. Any other business

55. Members agreed that the meetings originally scheduled for 20 and 27 February 2003 at 8:30 am would be cancelled.

56. The meeting ended at 12:00 noon.

Council Business Division 2
Legislative Council Secretariat
16 May 2003