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

**Minutes of joint meeting held on Thursday, 19 December 2002
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)
- Dr Hon LUI Ming-wah, JP
- Hon CHEUNG Man-kwong
- Hon Andrew WONG Wang-fat, JP
- * Hon Ambrose LAU Hon-chuen, GBS, JP
- Hon Michael MAK Kwok-fung
- 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 Martin LEE Chu-ming, SC, JP
- Hon CHAN Kam-lam, JP
- Hon Miriam LAU Kin-ye, JP
- Hon TAM Yiu-chung, GBS, JP

Members attending : Hon Cyd HO Sau-lan
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP

Members absent : Panel on Security

- * Hon Albert HO Chun-yan
- Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
- Hon WONG Yung-kan
- Hon Howard YOUNG, JP

Panel on Administration of Justice and Legal Services

Hon Jasper TSANG Yok-sing, GBS, JP (Deputy Chairman)
Hon Emily LAU Wai-hing, JP

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

Public Officers : Mr Timothy TONG, JP
attending Permanent Secretary for Security (Acting)

Mr Bob ALLCOCK, BBS, JP
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

Mr Hubert LAW
Assistant Secretary for Security

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

Staff in : Ms Bernice WONG
attendance 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. 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) 375/02-03(01), CB(2) 686/02-03(01), (02), (03) and LS 34/02-03)

2. Members noted the Administration's response, which was tabled at the above 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) 744/02-03 on 20 December 2002.)

3. At the invitation of the Chairman, Permanent Secretary for Security (Acting) (PS for S(Atg)) briefed members on the Administration's response to issues raised at the joint meeting of the two Panels held on 21 October 2002. He added that the Administration's response to questions raised by Mr James TO on 4 December 2002 provided answers to some of the questions raised by Mr James TO on 4 December 2002. It would provide the replies to the remaining questions as soon as possible.

4. Mr CHEUNG Man-kwong said that the two Panels had held a series of meetings in the past month or so to receive the views of the public on the proposals in the Consultation Document. During the period, many people had expressed views on the Consultation Document to implement Article 23 of the Basic Law (BL23). There were reports that the Administration might issue the legislative provisions to be introduced, such as in the form of a white bill, for public consultation. He asked about the way forward and timetable regarding the Administration's proposals to implement BL23.

5. PS for S(Atg) responded that the Administration had received about 15 000 submissions on the proposals in the Consultation Document, among which 10 000 submissions had been studied by the Administration. It could be noted from the submissions studied that -

- (a) some people were in support of the enactment of legislation to implement BL23;
- (b) some people had given comments on specific proposals in the Consultation Document;
- (c) some people questioned the need for or totally opposed the enactment of legislation to implement BL23; and

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- (d) there were both views for and against the introduction of a white bill.

6. PS for S(Atg) informed Members that the Administration intended to issue, in a few weeks' time, a report setting out the pattern of views received in the public consultation exercise. The submissions received would be made public, unless requested otherwise, with the report. The Administration also hoped to make public the way forward, both in terms of the timetable and its latest position on the proposals in the Consultation Document. As the public consultation exercise was not yet completed, he was not in a position to inform Members of the way forward regarding the proposals in the Consultation Document. He said that while some people requested the issuing of a white bill and others requested the direct issuing of a blue bill after the public consultation period, the Administration considered that the major concern was whether the proposals would be made available to the public in the form of draft legislative provisions.

7. PS for S(Atg) added that it was the Administration's general practice to issue a blue bill after a public consultation exercise. The Administration considered that what could be achieved with a white bill could also be achieved with a blue bill. It was the Administration's intention that the draft legislative provisions would be supplemented by explanations in layman terms to facilitate the public's understanding of the provisions.

8. The Chairman said that different possibilities about the way forward were recently reported by the media. She asked whether the Administration was inclined to any of the following possibilities -

- (a) the issuing of a white bill for public consultation before the introduction of a blue bill;
- (b) the publication of a blue bill in the Gazette with a delayed introduction of the blue bill into the Legislative Council (LegCo);
- (c) leaving the decision of whether to introduce a white bill to the Executive Council; and
- (d) the introduction of a blue bill in the usual manner after the consultation period.

9. PS for S(Atg) said that the Administration had not decided on the way forward. However, it was inclined to make public its proposals in the form of draft legislative provisions.

10. Mr CHEUNG Man-kwong questioned why the Administration would not issue the draft legislative provisions in the form of a white bill, which would set out the draft provisions clearly while providing room for public discussion.

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11. PS for S(Atg) responded that there were both views for the issuing of a white bill and the introduction of a blue bill. He questioned whether there was anything that could be achieved by way of a white bill but not by a blue bill. He considered that the public was mainly concerned about the draft legislative provisions to be proposed by the Administration.

12. Mr Martin LEE questioned whether whatever that could be achieved by way of a white bill could also be achieved by a blue bill. He said that if that was the case, white bills should never have been issued. He pointed out that a white bill differed from a blue bill in that the Administration did not take a stand on the proposals in a white bill, while it took a stand on the proposals in a blue bill. He said that after a blue bill was introduced into LegCo, it would be up to the Bills Committee formed to study the bill to decide how to carry out public consultation, including the scope and period of consultation.

13. PS for S(Atg) responded that the Administration did not take a stand on a white bill. However, the issuing of a blue bill did not mean that the Administration had taken a stand on the blue bill. He said that it was the Administration's general practice to introduce a blue bill after public consultation. Over the past 18 years, only 18 white bills had been introduced, among which three were subsequently withdrawn.

14. Mr Martin LEE disagreed with the view that the Administration did not take a stand on a blue bill. PS for S(Atg) responded that it depended on how one interpreted the expression "took a stand".

15. Ms Cyd HO said that a white bill differed from a blue bill in that the former could not be enacted by LegCo. She asked whether legislation to implement BL23 must be enacted by July 2003. She also asked whether the Administration would issue the draft provisions in full.

16. PS for S(Atg) responded that the Administration was inclined to make public the full draft provisions with an explanatory paper. However, this would not mean that there would be another consultation exercise after the draft provisions were published. He added that the Administration would not rule out the possibility of introducing a blue bill after issuing the report on the consultation exercise. He said that while the Administration hoped that legislation to implement BL23 would be enacted by July 2003, it was not a deadline for the enactment of such legislation.

17. Mr TAM Yiu-chung said that that the Administration could issue the draft provisions in the form of a blue bill. He said that some people had expressed the view that the Consultation Document was not detailed enough, while some people had expressed the view that the Consultation Document was too complicated and should be simplified. Thus, the Administration's plan to issue the draft provisions with an explanatory paper in layman terms was an appropriate one.

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18. Mr MAK Kwok-fung did not support the enactment of legislation to implement BL23. He said that many people had called for the issuing of a white bill. He asked about the reasons for not issuing a white bill.

19. PS for S(Atg) reiterated that what could be achieved with a white bill could also be achieved with a blue bill.

20. The Chairman said that the Administration normally carried out consultation before presenting a bill. The introduction of a blue bill meant that the Administration had completed its consultation. She asked the Administration to consider whether the public consultation process should be concluded, given that many people had requested the issuing of a white bill.

21. Mr CHAN Kam-lam hoped that the Administration would issue the draft provisions as soon as possible. He asked about the timetable for the issuing of the draft provisions.

22. PS for S(Atg) said that the Administration hoped to issue the report on the consultation exercise in January 2003 and introduce a blue bill in February 2003.

23. Mr Martin LEE asked whether the issuing of draft provisions with an explanatory paper meant the publication of a blue bill with an explanatory memorandum at the end. He asked whether a blue bill would be gazetted in the normal manner but its introduction into LegCo would be deferred to allow time for public consultation.

24. PS for S(Atg) responded that there was a requirement for a blue bill to be introduced into LegCo within a certain period of time after it was published in the Gazette.

25. Mr LAU Kong-wah asked whether the proposal in paragraph 8.6 of the Consultation Document had been replaced by the proposal in paragraph 2(b) of the Administration's paper entitled "Administration's response to issues raised at the joint meeting of the two Panels held on 21 October 2002". Principal Assistant Secretary for Security confirmed in the affirmative. Senior Assistant Commissioner of Police (SACP) added that the Administration had no intention to extend the financial investigation powers beyond the existing powers under section 67 of the Police Force Ordinance.

26. Regarding the proposed emergency investigation powers referred to in paragraph 8.5 of the Consultation Document, Mr LAU Kong-wah asked whether the Administration would consider authorising a rank of Police officer higher than a Superintendent of Police to exercise the proposed emergency powers. He said that as offences endangering national security were more serious than other offences, it should be appropriate that the proposed emergency powers be exercised by a senior Police officer at Commissioner level. SACP agreed with the view that offences endangering

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national security were more serious. He said that the Administration would review the ranking of Police officers authorised to exercise the proposed emergency powers.

27. Mr CHEUNG Man-kwong asked whether people who committed offences such as subversion, sedition or theft of state secrets in the Mainland and escaped to Hong Kong might be surrendered to the Mainland for trial, after legislation to implement BL23 was enacted and a rendition agreement was reached between the Mainland and Hong Kong.

28. PS for S(Atg) responded that it depended on whether the offence concerned was covered by the rendition agreement. However, it should be noted that there was not yet a rendition agreement between the Mainland and the Hong Kong Special Administrative Region (HKSAR).

29. Mr CHEUNG Man-kwong asked whether the Administration would take steps to ensure that the offences under legislation to implement BL23 would not be covered by the rendition agreement, if any, to be reached between the Mainland and Hong Kong.

30. Solicitor General (SG) responded that none of the extradition agreements entered into by Hong Kong and other countries covered such offences. A person could be extradited only if the offence concerned fell within the list under the agreement and that it was an offence in both jurisdictions. He added that it was not a practice at the international level to extradite individuals for offences endangering national security.

31. Mr James TO asked whether the Mainland or the HKSAR courts would decide whether a document issued by the Ministry of State Security fell within the meaning of security or intelligence. If it was within the jurisdiction of the HKSAR courts, what kinds of evidence would the prosecution introduce to prove that a document issued by the Central Authorities fell within the definition of security or intelligence. He also asked whether the Administration could confirm that it would never resort to a certificate under BL19 in prosecutions under OSO.

32. Senior Government Counsel responded that whether certain information fell within the meaning of security or intelligence was to be determined by the court in accordance with the Official Secrets Ordinance (OSO) (Cap. 521). She said that there had not been any prosecution under the OSO since its enactment in 1997.

33. SG said that section 18 of OSO only made it an offence if a person knew or had reasonable cause to believe that the information was protected against disclosure by the relevant sections of OSO. He stressed that BL19 was irrelevant to the classification of information for the purposes of OSO. The reference to defence and foreign affairs in BL19 did not mean that anything relating to defence and foreign affairs was an act of State. Whether certain information fell within the protected categories should be determined by the HKSAR courts in accordance with the provisions in OSO. He

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added that under the proposals in the Consultation Document, there was no plan for any formal certification as to the nature of official information. He further said that under the general laws of evidence, one would need to introduce matters of fact rather than producing certificates. Certificates issued without any statutory or Basic Law backing were not binding on HKSAR courts.

34. Mr James TO asked whether the court would, in the determination of whether a document of the Central Authorities fell within the meaning of official secret, have regard to the classification of official secrets in the Mainland. He said that if that was the case, it might lead to the introduction of the Mainland system of classification of official secrets into Hong Kong.

35. SG stressed that the Administration did not consider that the Mainland laws or Mainland system of classification was totally relevant. The term "official secret" did not appear in the laws of Hong Kong. He stressed that the major issue to be determined was not whether certain information was classified in any jurisdiction, but whether the information fell within the definition of protected information in OSO.

36. Referring to paragraph 12 of the opinion of Mr David PANNICK QC on the proposals in the Consultation Document, Mr Martin LEE said that it seemed that Mr PANNICK had not considered whether the proposed proscription of a local organisation affiliated to a Mainland organisation proscribed in the Mainland was necessary and proportionate to the requirements relating to foreign political organisations in BL23. The Chairman asked whether Mr PANNICK's opinion had addressed the question of whether the proposed proscription mechanism was necessary for the purpose of national security.

37. SG responded that the Administration considered that the proscription of a local organisation was directed at activities endangering national security and therefore within the ambit of BL23. He said that the proposal on the proscription of an organisation was related to BL23 generally. As Mr David PANNICK was an expert in human rights, he would not have overlooked whether the proposals were justified as necessary and proportionate. He added that the proposal could be justified because it was limited in application to situations where proscription was necessary and proportionate. He further said that paragraph 12 of the opinion was an addendum to the main part of the opinion, which dealt with the provisions generally and indicated Mr PANNICK's view that all the provisions were consistent with fundamental human rights.

38. Referring to Annex C to the Administration's response to issues raised at the joint meeting of the two Panels on 21 October 2002, Mr MAK Kwok-fung asked how the Police would determine whether an emergency situation had arisen. He also asked about the number of cases where requests for judicial warrant were refused by magistrates, and whether the Police had resorted to its emergency power in cases where application for judicial warrants were rejected by magistrates.

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39. SACP stressed that the Police was empowered to exercise emergency powers under certain circumstances because evidence of substantial value might be lost if immediate action was not taken. While he did not have information on hand about the number of cases where requests for judicial warrants were refused by magistrates, such cases should be very rare.

40. Mr MAK Kwok-fung asked why a Police officer was required to swear or affirm information in a request when obtaining a court warrant during office hours but not when obtaining a court warrant outside office hours.

41. Assistant Commissioner of Police responded that a Police officer had to swear or affirm the information in an application for a court warrant, both within and outside office hours. It was not set out in detail because the focus of Annex C was on the typical time required for obtaining a court warrant.

42. The Chairman asked about the number of judicial warrants issued to the Police. SACP responded that 43 court warrants were issued between January and November in 2002. The Chairman requested the Administration to provide information on the number of cases where the Police did not obtain a court warrant but had exercised its emergency powers provided under existing legislation.

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43. The Chairman asked why there was a substantial difference in the typical time required for obtaining a court warrant during and outside office hours. SACP responded that the time needed for obtaining a court warrant depended, among others, on the travelling time needed to reach a magistrate and whether the magistrate was engaged in a trial at that time.

44. The Chairman asked whether the court had explored the possibility of issuing a court warrant by telephone or facsimile. SACP responded that to his knowledge, the court did not have such an arrangement. Nevertheless, the Administration would look into the issue. The Chairman asked the Clerk to seek the views of the Judiciary on further shortening the time required for the issue of a search warrant, especially the possibility of issuing a warrant by facsimile, telephone or electronic means.

Clerk

45. Referring to the proposals in the Consultation Document about the possession of seditious publications, Mr LAU Kong-wah said that there were concerns about the possession of seditious publications by libraries or by individuals for personal use. He asked whether the possession of seditious publications by such parties would not be an offence.

46. PS for S(Atg) responded that there were various suggestions on the proposals regarding the possession of seditious publications. These included the addition of a defence provision, making it an offence only for the possession of a large number of the same seditious publication, and repealing the offence of possession of seditious publications. He stressed that the Administration had not reached a conclusion in respect of possession of seditious publications.

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47. Mr LAU Kong-wah said that the main issue was whether the possession of a large quantity of seditious publications was for distribution. PS for S(Atg) responded that it would be difficult to convince others that the possession of a seditious publication was for personal use if the quantity was large.

48. Mr CHEUNG Man-kwong questioned whether it was logical to provide that the possession of a copy of a seditious publication would not be an offence, while the possession of a large quantity of the same seditious publication for distribution to others would be an offence. Ms Cyd HO asked whether it was an offence to convey thoughts to others and whether it was a new restriction on rights and freedoms.

49. PS for S(Atg) referred to Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), which stipulated that while a person had an absolute right to hold an opinion, the right to express opinion was not absolute, but carried special duties and responsibilities. He added that the proposal of using quantity as a criterion for whether there was an offence was also found in existing legislation, such as that against drug trafficking.

50. Mr LAU Kong-wah said that if the proscription of an organisation was mainly based on whether the organisation endangered national security and had to be made in accordance with the laws of Hong Kong, the determination of whether an organisation was affiliated to a Mainland organisation proscribed in the Mainland might be unnecessary.

51. PS for S(Atg) responded that the proposal in paragraph 7.15(c) of the Consultation Document was necessary as a pre-condition for considering the proscription of a local organisation which had not yet endangered national security but where there were clear indications that it would do so.

52. Referring to section 14(1) and 14(2) of OSO, Mr James TO asked in the case where Mainland information was disclosed, whether the Mainland authorities could determine that such information related to security or intelligence and whether the disclosure was damaging. SG responded that there was no plan to provide for any formal certification that would be binding on the court. Evidence would have to be presented as usual to prove either that the disclosure was damaging or was likely to be damaging.

53. Referring to page 4 of the summary of concerns and queries raised by Members at the joint meetings on 26 September and 21 October 2002, Mr IP Kwok-him asked why the proscription of a local organisation only involved prohibiting the operation of an organisation but not the arrest of persons. Referring to paragraph 7.14 of the Consultation Document, SG responded that after the proscription of an organisation had come into force, it would be an offence to organise or support activities of the proscribed organisation. The concept of "support" included, for example, being a member of, providing financial assistance, other property or facilitation to, and

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carrying out the policies and directives of the proscribed organisation.

54. Mr IP Kwok-him asked about the Administration's position regarding the opinion of some people that the proposed establishment of an independent tribunal to consider points of fact while the court would consider points of law implied disrespect for the court. PS for S(Atg) responded that the proposed establishment of a tribunal would provide a mechanism for handling appeals on points of fact in a fast and simple manner. SG added that the proposal would not imply any disrespect for the court or undermine the power of the court. Under the current laws, there was normally no appeal to the court on facts for an administrative decision. The proposal only involved the creation of an additional channel for handling appeals on matters of fact. He informed Members that the Administration was considering the suggestion of providing for appeals on points of fact to go to the court.

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55. Mr TAM Yiu-chung requested the Administration to consider making it a standard requirement for the exercise of an emergency power by a Superintendent of Police to be reviewed afterwards by the court.

56. Mr Martin LEE said that the last sentence of paragraph 1.11 of the Consultation Document indicated that the proposals would impose restrictions on human rights and freedoms. He asked whether this indicated that the rights and freedoms enjoyed by the people of Hong Kong would be infringed. SG responded that the rights enshrined in ICCPR could be restricted in certain circumstances, such as for the purpose of national security. The proposals in the Consultation Document were therefore not infringing ICCPR or human rights.

III. Dates of subsequent meetings

57. Members agreed that the following joint meetings be scheduled to continue discussion with the Administration -

- (a) Tuesday, 7 January 2003 at 4:30 pm; and
- (b) Friday, 17 January 2003 at 8:30 am.

58. The meeting ended at 6:45 pm.