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

**Prosecution decisions in some previous cases**

At the last meeting on 19 December 2000, a member of the Panel advised that there were previous occasions on which the former Attorney General (AG), or the Secretary for Justice, appeared before the Council or its committees to respond to questions on prosecution decisions. Members agreed that the relevant records should be made available for the reference of the Panel.

2. The relevant records relating to the following cases are attached for members' reference -

(a) The case of Alan BOND

In relation to AG's decision not to prosecute Mr Alan BOND, the chairman of a public company who allegedly made a misleading statement at a press conference, a LegCo question was raised at the Council meeting on 25 March 1987.

An extract of the Hansard is in **Appendix I.**

(b) The case of H.C. HARRIS

In May 1989, AG decided not to prosecute Mr HARRIS, a former Senior Crown Counsel for alleged offences of incitement to procure a girl under the age of 21 for unlawful sex, after considering the advice of a Queen's Counsel in the private sector. As members of the legal profession expressed views on the law contrary to the advice that had been given to the AG, he decided to seek the Queen's Counsel's further opinion. That further opinion differed in its conclusion from the original. AG subsequently decided that a prosecution should be brought against Mr HARRIS.

A LegCo question was raised on the case at the Council meeting on 18 October 1989. An extract of the Hansard is in **Appendix II.**

(c) The WILKINSON case

Mr WILKINSON, a Cathay Pacific pilot, was charged with the offence of unlawful wounding his wife on Christmas Eve 1993. He pleaded not guilty to the charge and the trial was set on 18 March 1994. Having reviewed the case shortly before the hearing date, the Director of Public Prosecutions decided that the case could be properly disposed of by way of a bind over order.

A LegCo question was raised on the case at the Council meeting on 27 April 1994. An extract of the Hansard is in **Appendix III.**

(d) The Hong Kong Standard case

Following the delivery of judgment on the Hong Kong Standard fraud case on 20 January 1999, the Secretary for Justice appeared before the Panel on Administration of Justice and Legal Services on 4 February 1999 to explain her earlier decision not to prosecute Madam AW Sian, the named co-conspirator in the case.

The minutes of the Panel meeting is attached in **Appendix IV.**

Legislative Council Secretariat
11 January 2001

# Legislative Council

LC Paper No. CB(2)1508/98-99
(These minutes have been seen
by the Administration)

Ref : CB2/PL/AJLS

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

## Minutes of Special Meeting
## held on Thursday, 4 February 1999 at 2:30 pm
## in the Chamber 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 Ambrose LAU Hon-chuen, JP

**Members Absent :**

Hon James TO Kun-sun
Hon Mrs Miriam LAU Kin-yee, JP
Hon Emily LAU Wai-hing, JP

**Members Attending :**

Hon James TIEN Pei-chun, JP
Hon David CHU Yu-lin
Hon Mrs Selina CHOW LIANG Shuk-yee, JP
Hon Ronald ARCULLI, JP
Hon HUI Cheung-ching
Hon Bernard CHAN
Hon CHAN Kam-lam
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung
Hon FUNG Chi-kin

**Public Officers Attending :**

Ms Elsie LEUNG, JP
Secretary for Justice

Mr I Grenville CROSS, SC
Director of Public Prosecutions

Mr R C ALLCOCK
Deputy Law Officer

Mrs Pamela TAN KAM Mi-wah, JP
Director of Administration & Development

**Clerk in Attendance :**

Mrs Percy MA
Chief Assistant Secretary (2) 3

**Staff in Attendance :**

Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2) 3

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## I. Meeting with the Secretary for Justice concerning the Hong Kong Standard case

Declaration of interest

The Chairman declared her status as a member of the Operations Review Committee of the Independent Commission Against Corruption (ICAC). Members and the Administration had no objection to her chairing the meeting.

Powers and privileges

2. The Legal Adviser said that as the Panel was a committee of the Legislative Council, members were given the necessary protection under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382). Subject to this, he also drew members' attention to the sub judice rule as, according to information provided by the Administration, further inquiries of the case were continuing.

The meeting

(Statement/press statement by the Secretary for Justice in respect of the decision not to prosecute Madam AW Sian tabled at the meeting and issued vide LC Paper Nos. CB(2)1253/98-99(01) and 1253/98-99(02) respectively; minutes of the special meeting of the Panel on 23 March 1998 issued vide LC Paper No. CB(2)1225/98-99; Booklet on Prosecution Policy - Guidance for Government Counsel published by the Department of Justice in August 1998)

3. The Chairman welcomed the representatives of the Administration to the meeting. She informed members that a special meeting of the Panel on Administration of Justice and Legal Services of the Provisional Legislative Council was held on 23 March 1998 to discuss the Hong Kong Standard case.

The Secretary for Justice (SJ) had then indicated that she hoped that at the conclusion of the trial it would be possible for her to make a public statement on the case. Following the delivery of judgment on 20 January 1999, SJ was invited to address the Panel on the case and to explain her earlier decision not to prosecute Madam AW Sian, the named co-conspirator, in the Hong Kong Standard circulation fraud case.

Statement by the Secretary for Justice

4. At the invitation of the Chairman, SJ delivered her statement in respect of the decision not to prosecute Madam AW. The gist of SJ's statement was as follows -

1. It was a well-established policy that the Department of Justice did not disclose in detail the reasons for deciding not to prosecute someone. However, SJ was prepared to disclose the reasons for the decision on this occasion for the following reasons -

    - The allegation of bad faith on the part of SJ must be answered;

    - In fairness to Madam AW. The record of her interview with the ICAC dated 4 June 1997 had been leaked to the media. The nature of the evidence said to support her role in the conspiracy had thus entered the public domain and become the subject of public comment;

    - The allegation that SJ's decision was based upon improper considerations might have had unfortunate ramifications; it was said that it had shaken confidence in the legal system both in Hong Kong and internationally. It was incumbent upon SJ to make clear that any such concerns were not well founded.

    Due to the exceptional circumstances, this case should not be taken as a precedent for disclosure of reasons for prosecution decisions in future.

2. The decision not to prosecute Madam AW was made on the basis of insufficient evidence, although SJ had also considered the matter from the public interest angle. SJ had exercised her independent prerogative impartially in this case, having regard to Article 63 of the Basic Law which stipulated that "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference." At no point was any consideration given to the political or personal status of Madam AW.

3. The decision not to prosecute Madam AW was reviewable by the Department of Justice, as the situation could change in relation to each of the bases upon which SJ's decision was grounded. The public interest factors to which SJ attached weight were now less significant. Following the conclusion of the trial, clearance had been given for the ICAC to pursue inquiries with the three convicted defendants which might or might not yield fresh evidence. SJ would be prepared to review her decision should there be any new evidence.

Disclosure of the reasons for not prosecuting Madam AW Sian

5. The Chairman, Mr TSANG Yok-sing and Mr Martin LEE queried why SJ did not disclose the reasons for not prosecuting Madam AW when she addressed the Panel on 23 March 1998, if it had been concluded then that there was insufficient evidence to prosecute. SJ reiterated that it was a well-established policy that where a decision not to prosecute was made, the reasons in detail would not be disclosed. She further explained that her major concern at that time was that to give a simple answer of

insufficient evidence without disclosing details of the evidence available would likely to arouse undesirable public debate and speculation. In addition, it was not appropriate to discuss her prosecution decision at that time. Firstly, this would subject Madam AW to a non-judicial public enquiry without the fundamental safeguards available to a defendant in a criminal trial, such as the rules of evidence, the presumption of innocence, the right of cross-examination and the requirement of proof beyond reasonable doubt etc. This would go against the principle of a fair trial. Secondly, any discussion of the evidence of the case could affect the pending trial of the three defendants, a matter which was sub judice.

6. In supplementing, Director of Public Prosecutions (DPP) said that when the Panel discussed the matter at its meeting on 23 March 1998, there was no way of knowing what evidence would come out at the pending trial of the three accused persons. It was clearly not in the interests of justice that there should be public debate and conjecture about whether or not another person named in the case should have been charged. In addition, the Department had to guard against setting an undesirable precedent for future cases in a different scenario where public interest might warrant no prosecution despite the evidence itself justifying the initiation of such. Otherwise, the Administration would again be under pressure to explain the reasons for its prosecution decision.

7. Mr Martin LEE opined that a simple explanation to the effect that there was insufficient evidence to justify prosecution of Madam AW, without disclosing the details of evidence, should in no way affect the trial of the three others. He noted that SJ had advised at the meeting in March 1998 that she could neither say whether her decision not to prosecute Madam AW was based on insufficiency of evidence or public interest. He opined that in saying this, SJ had unwittingly invited the public to conjecture on both limbs of the factors affecting her decision. Mr TSANG Yok-sing held the view that by not making a statement as soon as the grounds for insufficient evidence to prosecute had been established, the Administration had not succeeded in stemming public debate and conjecture on the case.

8. In response to members' concern about the policy of non-disclosure of reasons for prosecution decisions, SJ informed members that the English Crown Prosecutions Service had adopted some new practices which had the effect of relaxing the disclosure restriction under certain special circumstances. She said that the Administration was examining whether it was necessary or possible to make changes locally in the light of the new developments taking place in the U.K.

Public interest considerations

9. Mr Ronald ARCULLI referred members to paragraph 16 of the Booklet on Prosecution Policy which specified that "Having satisfied himself that the evidence itself can justify proceedings in the sense that there is a reasonable prospect of obtaining a conviction, Government Counsel must then consider whether the public interest requires a prosecution". In view of this policy, he doubted whether it was necessary for SJ to consider the public interest at all if the decision had been taken that there was insufficient evidence to secure a conviction against Madam AW. He said that the giving of further consideration to the public interest factor would cast doubt as to whether SJ was fully satisfied that there was insufficient evidence to prosecute.

10. SJ replied that the decision not to prosecute Madam AW was based ultimately on grounds of insufficient evidence. Although strictly speaking, as a matter of strict prosecution policy, it was not necessary in the circumstances of this case to consider the public interest in making the decision on whether or not to prosecute, she decided to turn her mind to such factors because of the representations that had been made to her from the lawyers acting for Madam AW. In this particular case, she considered the public interest factors of, firstly, the potential effects of a prosecution against Madam AW upon other people and, secondly, whether the possible consequences of a prosecution were

proportionate to the seriousness of the alleged offence. She bore in mind these criteria and having considered the facts of the case, came to the view that if Madam AW was to be prosecuted, there would be a serious risk that the Company (Sing Tao Holdings Ltd, a publicly listed company of which Madam AW was the Executive Chairman), which was then negotiating restructuring with banks, could collapse, and that could bring about mass redundancies at a time when unemployment was on the rise. In addition, the failure of a long-established and well-respected media group at a time shortly after the Reunification could send all the wrong signals to the international community, such as speculation relating to restrictions on freedom of speech in the territory, bearing in mind that several other newspapers had folded in late 1996, 1997 and 1998. Having taken these factors into consideration, she also concluded that it was not right, from the public interest point of view, to initiate a prosecution of Madam AW.

11. Mr Albert HO said that while he respected the general principle that the reasons for prosecution decisions should not be disclosed, he was of the view that accountability to the public should also be of great importance. He pointed out that in the past, there had been cases of serious controversy where the decision of the Attorney General not to prosecute was reversed as a result of public discussion. Furthermore, as had been advised by DPP at a recent meeting of the Panel, decisions not to prosecute had been held to be susceptible to judicial review under special circumstances and subject to certain conditions being met. He said that the Administration should not lose sight of these considerations. Referring to Madam AW's case, Mr HO was doubtful whether public interest should be interpreted in the way as explained by SJ. He said that the basis of argument as put forward by SJ carried the grave danger of misleading the public to come to the view that people of higher social status or wealthy people or large employers could escape the justice of the law. Public confidence in the integrity of the legal and judicial system would be undermined. Mr HO said that public interest should be viewed from the perspective of upholding the rule of law and the principle that no one should be above the law.

12. Mr Albert HO's views were shared by Mr Martin LEE. Mr LEE said that in deciding whether or not to prosecute, it would be irrelevant and grossly unfair to have regard to factors such as a company's financial position, its nature of business or size of employment.

13. SJ reaffirmed that her decision was not based on considerations of a person's status and financial position. She drew members' attention to paragraph 10 of the Booklet on Prosecution Policy which set out the relevant factors in the consideration of public interest, amongst them was how a decision to launch a prosecution would affect "other people". In the context of the Hong Kong Standard case, the interests of the 1,400 local and 500 overseas employees of the media group who were likely to be put out of jobs as a result of prosecuting Madam AW was considered to be a legitimate factor to be taken into account.

14. Mr Martin LEE said that he held a different view as to the interpretation of the interests of "other people". He considered that "other people" should refer to those who were either directly or indirectly connected to a crime, such as the victim in a sexual assault case who would be subjected to great trauma for being called upon to give evidence and cross-examined in the proceedings. The interests of such people were an important factor in determining the balance of the public interest. The Hong Kong Standard case was different in that one could not say with certainty the degree of adverse impact on employment in the event of instituting prosecution against Madam AW. He opined that in any case, this factor could not constitute a relevant public interest consideration.

15. The Chairman enquired whether it would become an established principle that in times of high level of unemployment, the impact on the employees of a person under investigation would be a factor for consideration in deciding whether or not to prosecute the person. Mr Albert HO asked how would this consideration fit in with any of the categories of public interest as explained in the Prosecution

Policy.

16. In response, SJ and DPP advised that the decision whether or not to prosecute ultimately depended on a broad view of the interests of public justice, subject to the particular circumstances of the case. It was not surprising that there were different views as to where the public interest lay in any particular case. The Administration was fully satisfied that in the circumstances of the Hong Kong Standard case, the consideration of the interests of the employees who might have lost their jobs had prosecution been proceeded with against Madam AW was within the broad parameters of public interest considerations specified in the Prosecution Policy.

17. In reply to a further enquiry from Mr Albert HO, SJ said that it was difficult to obtain information on similar or comparable examples of public interest considerations in prosecution decisions as it was a commonly observed principle that the reasons for prosecution decisions were not disclosed. She added that the range of public interest considerations varied among jurisdictions, and different jurisdictions applied those factors in the light of their own particular circumstances. For example, Holland had a list of at least 52 items which could be taken into account as relevant public interest factors.

18. The Chairman referred to the point made by SJ in her statement that as the position now stood, the public interest factors to which SJ attached weight on 23 March 1998 might be less significant, given the change in circumstances both of Madam AW and of the Company itself. The Chairman said that if this meant that SJ might now change her original decision not to prosecute Madam AW on the ground that Madam AW or the Company was no longer able to hire a large number of people, the Administration would likely be accused of being unfair and not righteous. In response, SJ stressed that a factor which she had taken into account in her consideration of the public interest was the consequences which a prosecution was likely to cause to the survival of the Company and to the interests of the employees. With that in mind, she needed to have regard to changes in prevailing circumstances which might affect the possible consequences of a prosecution, such as a change in Madam AW's shareholdings in the Company. She advised that as at the present point in time, she had yet to see the need to change her original decision not to prosecute Madam AW. However, should new evidence emerge, she was prepared to review her decision.

19. Mr Martin LEE said that from what SJ had described, it appeared that a finely balanced judgment of whether or not to prosecute Madam AW in the Hong Kong Standard case was a difficult decision to make. He noted that SJ had taken into consideration the representations from Madam AW's lawyers. Mr LEE asked whether SJ had also obtained legal advice from outside the Department of Justice (D of J) in arriving at the conclusion not to prosecute Madam AW. SJ replied in the negative. She said that it was normally only for cases of exceptional complexity, or for cases where the required expertise was not available within the D of J, or for cases involving members of the D of J, that outside legal advice would be sought. The Hong Kong Standard case did not fall within any of these categories. SJ said that it was her ultimate decision whether or not to prosecute in a case and she felt that she was able to make such a decision in Madam AW's case with the benefit of advice from her colleagues in the Department.

20. Mr YEUNG Yiu-chung enquiried whether there was any mechanism within the D of J to reconcile internal differences in opinion on prosecution decisions. DPP advised that discussions and exchanges of views were common within the Department. The existing system was such that, at the end of the day, junior counsel were supervised by more senior prosecutors in the Department, and all the way up the hierarchy, and the ultimate decision would be taken in accordance with the Prosecution Policy. He supplemented that the D of J had commissioned a Working Party several years ago to review the decision-making process in the Prosecutions Division. The Report of the Working Party had then been

submitted to the Legislative Council.

21. In response to Mr Ambrose LAU's question, DPP advised that the Prosecution Policy published in April 1998 was a modernized and expanded version but there had not been any change in policy in comparison with that in force before 1 July 1997.

Leakage of a record of interview of Madam AW with the ICAC

22. Mr David CHU Yu-lin considered that it was a regrettable affair that a record of interview between Madam AW and the ICAC on 4 June 1997 had been leaked to the media. He opined that that had done damage to the independence and integrity of the legal system as the nature of the evidence had been revealed, thereby causing public comment on the case. The incident had also forced SJ to explain her prosecution decision to the public. He asked whether an investigation would be conducted into the leakage.

23. SJ replied that it was for the relevant authority, not the D of J to conduct an investigation if considered necessary, as the statement of interview in question was originally procured by the ICAC. She pointed out that it was part of the criminal procedure that the prosecution should provide whatever evidence or material information in hand which might be useful to the defence. Under the existing system, it would not be easy to trace the source of the leakage.

24. The Chairman clarified that the need to call this meeting arose from the undertaking of SJ given at the meeting on 23 March 1998 that she hoped she would be in a position to make a statement about her decision not to prosecute Madam AW after the trial of the defendants was concluded, not because of the leakage of the ICAC's record of interview.

Conclusion

25. The Chairman thanked the representatives of the Administration for attending the meeting and addressing the matters of concern raised by members. She envisaged that there would be more discussions carried out in the community following the Administration's explanation of the prosecution decision in the case.

26. There being no other business, the meeting ended at 4:30 pm.

Legislative Council Secretariat
17 March 1999

*sectors and to allocate similar resources for identical services, so that no distinctions can be made between the services provided by both government and subvented sectors?*

SECRETARY FOR HEALTH AND WELFARE: Sir, it does seem, as Dr. CHIU says, that many patients do have a preference for government hospitals. As I said in my answer, the consultants who examined the hospital system did make a number of recommendations as to how the integration, which they considered to be desirable, should be effected.

We are considering very carefully the possibility of establishing a hospital authority and if so, what form that would take but we are not yet ready to make any announcement as to the decision on this.

Dr. CHIU referred to the distinction between the way in which government hospitals and subvented hospitals are financed. It is often said that the subvented hospitals do not receive as generous financing as government hospitals. But I think it is very difficult to actually compare like with like in this situation. The financing of a hospital varies a great deal depending on the type of services provided in that hospital. Within government hospitals, the range of bed costs are between $330 a day for an infirmary, and nearly $900 a day for an acute general hospital. It is therefore very difficult to say whether the subvented hospitals are less effectively subvented than the government hospitals. There is, of course, one respect in which subvented hospitals do receive less financial assistance, and that is because of the difference in fringe benefits between staff working in government hospitals and staff working in the subvented hospitals.

DR. CHIU: *Sir, I am not trying to compare like with like. I just ask whether, as a matter of principle, similar resources should be allocated for identical services.*

SECRETARY FOR HEALTH AND WELFARE: Yes, Sir, I am sure that should be our aim, to ensure that similar resources are provided for identical services.

DR. LAM (in Cantonese): *Sir, in the second paragraph of the answer, the Secretary told us that all along members of the public who had a choice usually opted for government hospitals. Has the Government seriously considered why the public prefer to go to government hospitals instead of subvented hospitals?*

SECRETARY FOR HEALTH AND WELFARE: Sir, this seems to be quite a widespread belief. I do not think that it is something which is susceptible of absolute proof.

**Prosecution of criminal cases**

8. MR. CHEONG asked: *Will the Attorney General inform this Council whether it is his guideline that prosecution would be the normal course of action if there is a*

*prima facie case established against any individual committing a criminal offence and, if so, what were the reasons for treating so differently a recent case in which the chairman of a public company publicly declared an inflated net asset value of the properties owned by the company?*

ATTORNEY GENERAL: Sir, I am glad to have this opportunity at last to answer this question in this Council. To the extent that I can properly discuss these matters in public, this Council is the right place to do so.

The first part of the question asks whether prosecution would be the normal course if a prima facie case is established against an individual. If by 'normal course' Mr. CHEONG implies that a prosecution will almost invariably follow, the answer is 'no.' Nearly 40 years ago, a famous Attorney General of England, Sir Hartley SHAWCROSS, now Lord SHAWCROSS, said:

> 'It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution.'.

And some 60 years ago, one of his predecessors, Sir John SIMON, said in the House of Commons, again I quote:

> 'There is no greater nonsense talked about the Attorney General's duty than the suggestion that in all cases the Attorney General ought to decide to prosecute merely because he thinks there is what the lawyers call 'a case.' It is not true, and no one who has held the office has supposed it is.'.

In Hong Kong, that position is underlined by section 15(1) of the Criminal Procedure Ordinance, which provides that —

> 'The Attorney General shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.'.

So, Sir, the Attorney General thus has a discretion. What are the factors he takes into account when deciding whether or not to prosecute in any particular case?

First, there must be enough evidence to prove all the ingredients of an offence. This is not always easy to determine, especially where an offence requires proof of a state of mind or an intention of which there is often little or no direct evidence. Even if there is evidence that tends to prove the necessary ingredients of an offence, a bare prima facie case is, generally speaking, not enough to warrant a prosecution. There must be a reasonable prospect of securing a conviction because it is not in the interests of public justice, nor indeed of the public purse, that weak, or borderline, cases should be prosecuted.

But at the same time there are other factors to be considered in order to assess where the interests of public justice lie. And among these are —

— What are the surrounding circumstances of the offence?
— How serious was it?
— What were its practical effects?
— What extenuating circumstances are there?
— What is the attitude of the suspect?
— How would the decision to launch a prosecution affect other people?
— How serious a view would a court take of the offence if there were a conviction?
— Would the consequences of prosecution be out of all proportion to the seriousness of the offence or to the penalty a court would be likely to impose?

I emphasise that this is not an exhaustive list, but sufficient I hope to indicate to Members that the decision whether to prosecute ultimately depends on a broad view of the interests of justice.

There are good reasons why any Attorney General does not normally explain in public a decision not to prosecute in a particular case. It is rare for any public announcement to be made of that decision because it would reveal unfairly that someone had been under suspicion for having committed a criminal offence. And even where that fact is known, to give reasons in public for not prosecuting the suspect would lead to public debate about the case and about his guilt or his innocence. The nature of the evidence against the suspect would have to be revealed. Then some might say that that was proof enough of guilt, and the suspect would find himself condemned by public censure. Sir, in our legal system, the only proper place for questions of guilt or innocence of crime to be determined is in a court, where the accused has the right to a fair trial in accordance with the rules of criminal justice, and the opportunity to defend himself. So Members will readily appreciate that it would be quite wrong for any Attorney General, having decided that the issue should not proceed to trial in the courts, to say anything in public that might be taken to indicate a belief in the suspect's guilt, or which might lead to a public discussion of that very question.

Sir, I am none the less concerned that my decision not to prosecute Mr. Alan BOND has been viewed by some as reflecting adversely on Hong Kong's standards in the securities, field, and thus on its reputation as a financial centre. Such allegation, of course, presupposes that a prosecution should have been brought which is the very point at issue. So perhaps I should say a little more about my attitude to the matter.

For the chairman of a public company to burst into Hong Kong and to make a misleading statement at a press conference was a matter to be taken seriously, although he has consistently denied making that statement with the necessary criminal intent. The Commissioner for Securities was rightly concerned about the matter, and was in contact with members of my chambers and with the police. I requested that the police undertake an investigation of the circum-

stances, and check the records of the journalists and others present at the press conference to ascertain exactly what was said. I received representations from Mr. BOND's lawyers and I discussed the matter with my advisers in chambers.

Sir, in the end, the decision was mine alone. No one directed me what to do. Decisions of this nature are essentially matters of judgment. I was made aware that criminal liability would be keenly contested. My view was that the outcome of a prosecution was far from certain. I also looked to all other relevant factors in accordance with the approach that I have described to Members, and I concluded that in the light of those factors, a prosecution should not be brought.

MR. LI: *Sir, while accepting that in the normal case, the Attorney General should not be required to give reasons for declining the prosecute, is the Attorney General aware that his action has raised suspicion in both local and international financial communities that either he has been pressurised into his decision, or he is favouring foreign investors over local investors; and a full and reasoned explanation from him would dispel these suspicions and hence enhance the standing of the office of the Attorney General?*

ATTORNEY GENERAL: Sir, I greatly regret that there has been widespread misunderstanding, speculation and unfair distortion of any reasons for my decision. I have given to this Council my account of my position. I ask the Council to accept it and to reject any other speculation or report which stands inconsistent with it.

MR. CHEONG: *Sir, I have two questions actually. The first one is very simple. Is it usual that the Attorney General receive representations directly from the attorneys of the suspect under investigation? The second one is: in paragraph 5 of the Attorney General's answer, it seems to me that he does take other factors into account and, whereas I certainly do not wish to challenge the Attorney General's decision in matters of law, would he be good enough to share a bit more with us, the public interest angle that precipitated his decisions? For example, how would the decision to launch a prosecution affect other people, which was one of the factors listed in paragraph 5?*

ATTORNEY GENERAL: Sir, as to the first, it is quite usual for lawyers for persons who are known to be facing the possibility of criminal charges to make representations not only to me, but to others in my chambers who are dealing with their particular cases. That is not unusual.

As to the second, Sir, I have indicated in my original answer what the relevant factors were that I took into account and I do not think I will find it appropriate or proper to give a more detailed account to any particular matter. The choice that I have made is to take the stand that I am advised to take, as a proper stand for any Attorney General. Attorney General must operate as a quasi judicial

officer within the administration of justice and he ought not to be under political pressures of any kind in taking his decisions. I have been as forthcoming with this Council as I think it appropriate to be. I have indicated the kind of factors which I took into account. Other Members can consider how they themselves would have applied those factors if they had been in my shoes.

MR. SOHMEN: *Sir, as a member of the Securities Commission which under-standably was, and is, very interested in the decision made by the Attorney General in this particular case, may I ask the Attorney General to explain to this Council why he did not consider it appropriate or necessary to consult with those persons or bodies who are charged by statute with the supervision and regulation of the financial and securities markets, as to what possible effects of a decision <u>not</u> to prosecute could have on the need to 'safeguard the interests of public justice', in the context of the enforcement of the laws that apply to these markets?*

ATTORNEY GENERAL: Sir, the Securities Commission does indeed have certain duties to advise on matters relating to securities and to ensure that the provisions of the Securities Ordinance are complied with. But that is a duty to advise the Financial Secretary. The way that the duty is expressed in the Ordinance is clearly without prejudice to duties imposed, or powers conferred on others, with regard to the enforcement of the law relating to securities. So clearly the powers and duties of the Attorney General in relation to bringing a prosecution, even in the areas affecting securities, is outside the scope of their particular role. So I do not accept that I was under any duty to consult the Securities Commission about these matters.

But, as I have said, my staff and I were in quite regular contact with the Commissioner for Securities and his staff. In so far as my chambers needed assistance on the case, on matters of fact in relation to the securities market, the commissioner and his staff were able to provide it and gave us the help that we sought. In particular, for example, there was an investigation as to whether there was any relationship between Mr. BOND's statement and share price movements. And they gave us advice on that matter, as reported to me, that no such relationship could be established. And I would like to take the opportunity of thanking the Commissioner for Securities and his staff for the work they did for us.

In addition, I met with the Commissioner for Securities to discuss the case and some of the difficulties that it presented. Indeed, I was also in touch with him shortly before I reached my decision. But he made it clear to me, and he was quite right to do so, that it was my responsibility to decide whether or not to prosecute; and so I did.

MR. MARTIN LEE: *Was there any agreement, arrangement or understanding, made between the Attorney General's Chambers and Mr. BOND's lawyers that Mr. BOND must publish an open apology in consideration of the Attorney*

*General's decision not to prosecute Mr. BOND? Second, what particular criminal offences had the Attorney General taken into account in the BOND case? And what ingredients of these offences had he found difficulty in proving?*

ATTORNEY GENERAL: Sir, as to the question of the apology, I was made aware that Mr. BOND was anxious to make a public apology and its publication, ultimately, was a factor I took into account when subsequently I decided not to prosecute.

I certainly did not come to any agreement with his lawyers that I would not prosecute if an apology were published.

As to the offence which we had in mind, it was, of course, section 138 of the Securities Ordinance which was under consideration. As to the reasons why particular factors of that offence were or were not supported by evidence, that goes into precisely the area of discussing the guilt or the innocence of Mr. BOND which Mr. LEE knows perfectly well, as a lawyer, is not a matter which he would expect any Attorney General to particularise in a public debate.

MR. CHEONG: *Sir, I do not wish to engage in any public debate. I just wish to seek clarification according to section 138 of the Securities Ordinance. Could the Attorney General advise me as a layman to the law on section 138(a) which says anybody 'making any statement which is, at the time and in the light of circumstances in which it was made, false or misleading is with respect to any material fact ...' So the operative word is 'material fact'. Should we consider that as relevant 'material fact' not 'intent'?*

ATTORNEY GENERAL: I am always happy to assist Mr. Stephen CHEONG to read the section, but what he has read is part of it; he has not read the earlier part of the section, because the offence turns on earlier words: 'for the purposes of inducing the sale of the securities of any corporation'. And that is why I said that Mr. BOND consistently denied having the necessary criminal intent.

MR. CHEONG: *Of course I did read the earlier part of the section, and as far as inducing the sale of securities, I am just wondering as a commoner, whether the Attorney General would advise, in terms of law, whether I am correct in saying that, any company which has intention of arranging rights issues to finance its tremendous expansion plans is tantamount to laying the groundwork for the success of the rights issues, thereby inducing the sale of those shares?*

ATTORNEY GENERAL: As I understand it, that question relates to some other company doing some other thing. And I respectfully draw your attention, Sir, to the Standing Orders 18(*h*) which says:

> 'A question shall not be asked for the purpose of obtaining an expression of opinion, solution of an abstract legal question, or the answer to a hypothetical proposition.'.

MR. LI: *Sir, does the Attorney General accept that it is desirable that the Securities Commission and he should have a consistent policy with regard to their respective functions in the enforcement of the law concerning dealings in securities or at least, that they should respectively be aware of the other's policy?*

ATTORNEY GENERAL: The answer to that is plainly, yes. And let me also add that I have always supported the efforts of the commission to regulate the securities market in Hong Kong. There has been close co-operation between my office and the office of the commission on many matters. Indeed, many of our major prosecutions in the field of commercial crime have arisen out of the initiatives of the Securities Commission and the assistance that we have had from them.

But let me also say that since there clearly have been some misunderstandings between members of the commission and my own office as to their respective roles in matters such as the one I have been referred to, I have been in communication with the Chairman of the Securities Commission to discuss those misunderstandings, and I have told him that I intend to do my best to resolve those for the future. Because it is, of course, very important that there should be a good working relationship between our offices and that there are no misunderstandings in the future.

DR. LAM: *Sir, did the Attorney General recevie any representations from any persons who might have had a commercial interest in Mr. BOND not being prosecuted? If so, who and when?*

ATTORNEY GENERAL: Sir, as I have indicated in my original answer, the only representations I received were from Mr. BOND's lawyers and from the Commissioner for Securities. No one else approached me or made any representation to me as to whether I should prosecute or not prosecute.

There was no contact, for example, between me and between any bank in this territory, except early on when there was a request for information as to whether there was truth in a market rumour that a prosecution might be brought. On that occasion I made it clear that there was indeed truth in that rumour that a prosecution might be brought. Nobody else made any approach to me from any quarter to put any pressure on me, and let me just add, had they done so, it would have been to no avail.

MR. LEE YU-TAI: *Sir, in arriving at his decision not to prosecute Mr. Alan BOND, has the Attorney General taken account of section 31(1)(a) of the Protection of Investors Ordinance, which reads:*

> *'Any person who, by any fraudulent or reckless mis-representation, induces another person to enter into any agreement for or with a view to acquiring, disposing of, subscribing for, or underwriting securities, shall be guilty of an offence'?*

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ATTORNEY GENERAL: The answer is, yes. That section was considered at an early stage but it was discarded. The prospects of getting any prosecution on its feet in relation to that section were quickly put on one side.

**Law and order in country parks**

9. MR. PETER C. WONG: *Will Government make a short statement on the reported incident on 1 March 1987 in which a group of picknickers were robbed by an armed gang near the Shing Mun Reservoir, and also the measures taken to maintain law and order and protect picknickers in country parks and surrounding areas?*

SECRETARY FOR SECURITY: Sir, the incident which my hon. Friend refers occurred in the early hours of 1 March 1987 at the Shek Lei Pui Reservoir in the Kam Sham country park. A party of five young people were going home after a barbecue. A gang of about 12 young men, some armed with knives, tied them up and robbed them. The gang also tied up and robbed three other picknickers who happened to be passing by. The culprits then ran off, taking the victims' personal property, valued at $2,760. Thankfully, nobody was injured in this incident. So far, the police have not been able to make any arrests.

To answer the second part of my hon. Friend's question, responsibility for policing country parks lies with the police district in which the parks are located. Patrols are regular and, depending on the terrain, may be by car or motorcycle or on foot. Police dogs and plain clothes detectives are also deployed. Any sign that crime is on the increase in a particular area will be met with an increased allocation of police resources.

Also, the Agriculture and Fisheries Department has 29 management centres and 20 park warden posts at strategic points in the parks. These serve as bases for the department's own management teams and as centres where the public may seek assistance and report crime. There are 115 uniformed park wardens to patrol country parks daily throughout the year, either on foot or on motorcycles. The department organises special patrols at weekends and public holidays, concentrating on the most popular country parks. Park wardens will report crimes to the police. Since they know their area well and are in radio contact with management centres, they can also help the police to look for the criminals involved.

Finally, Sir, a Working Group on Countryside Fires and Security meets every two months. Represented on it are the police, the Agriculture and Fisheries Department, the Fire Services Department and the Civil Aid Services. This working group is a useful forum for the exchange of information and ideas to promote security in our country parks.

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*vocational training and providing more on-the-job training for working people to the effect that their professional standards will be raised and their sense of belonging enhanced?*

SECRETARY FOR EDUCATION AND MANPOWER: The short answer to the first part of the question, Sir, is yes. In the proposals announced by the Governor last week on the expansion of tertiary education, one component of the plans for expanding tertiary education will be the transfer of sub-degree work from the polytechnics to the Vocational Training Council. Subject to further and more detailed examination this could result in the level of vocational training being raised. What is contemplated at the moment is the creation of, perhaps, several junior polytechnics or technical colleges. In his address to this Council last week, Sir, the Governor also referred to proposals for the creation of a training loan fund which we, within the Administration, propose to call the "New Technologies Training Fund". This scheme will make it possible for those employers who wish to see their managers trained in the application of new technologies to receive appropriate training.

DR. TSE (in Cantonese): *Sir, does the Government have any reliable ways to find out exactly which sectors will suffer most in the brain drain during the next few years, so that appropriate replenishment can be effected by means of education?*

SECRETARY FOR EDUCATION AND MANPOWER: Sir, the plans announced by the Governor for the expansion of tertiary education, particularly for the expansion of first-year first-degree places, involve a doubling of such places between 1989-90 and 1994-95. This year we have some 6 800 first-year first-degree places in our tertiary institutions meeting about 8% of the relevant age-group. By 1994-95 our target is to achieve something of the order of 15 000 places, or over 18% of the age-group. The order of increase involved is nearly 120% representing an average annual growth rate of 17%.

MR. McGREGOR: *Sir, will the Government confirm that according to government figures less than 10% of the emigrants from Hong Kong return here?*

FINANCIAL SECRETARY: I do not have an accurate figure to enable me to answer that question. I have heard the figure of 10% and I believe it to be reasonably accurate.

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**The case of E.C. HARRIS**

5. MRS. TU asked: *Will the Attorney General inform this Council how he came to the decision not to prosecute a former Senior Crown Counsel for alleged incitement*

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*to procure young girls for sexual offences and whether during his deliberation, took full account of the interests of the public, particularly those of possible victims*

ATTORNEY GENERAL: Sir, I am grateful to have, at last, the opportunity to answer in this Council the concerns that have been expressed over this case. As I have said elsewhere, in the performance of my functions I am accountable to the public through this Council sitting in open session.

On 26 April 1989, the police submitted to the Acting Director of Public Prosecutions, Mr. A.P. DUCKETT, papers containing allegations against Mr. E.C. HARRIS, a Senior Crown Counsel then serving in the Prosecutions Division of my Chambers. On that same day, Mr. DUCKETT brought those allegations to my attention. I immediately directed that advice be sought from an eminent Queen's Counsel in the private sector. This direction accords with the practice adopted when allegations of criminal conduct fall to be considered in relation to any professional officer within my Chambers.

At this point, let me make it quite clear that leading counsel was sent the complete police file delivered to Mr. DUCKETT on 26 April 1989. That file comprised statements of witnesses, transcripts of tape recordings of telephone conversations and of a conversation with an undercover police agent, and a detailed police covering report. This material was delivered to leading counsel with instructions to advise whether or not there was any criminal offence with which Mr. HARRIS could be charged.

The Queen's Counsel delivered his written opinion on Monday, 1 May 1989. He was unequivocal in his advice. That advice was that there was no crime with which Mr. HARRIS could be charged. In the light of that advice, I decided that there was no basis for a prosecution. Mrs. TU asks whether in arriving at my decision I took into account the interests of the public and of possible victims. Since I was advised that there was no crime with which Mr. HARRIS could be charged, these questions did not, in the event, arise.

Certain suggestions have been made that the police investigations into this case were improperly terminated by me or by Mr. DUCKETT. These suggestions are untrue. The papers presented to Mr. DUCKETT revealed that, prior to that date, the police had intended to take certain steps on 27 April. But by the time the papers were delivered to him, the police had already decided to discontinue the operation planned for 27 April. I did not cause the police action to be stopped and, in any event, I should emphasize that in the final analysis operational decisions are for the police, and not for me.

Following my decision not to prosecute, I nevertheless formed the view that, in the light of the matters before me, it would not be appropriate for Mr. HARRIS to continue to perform his duties as a Senior Crown Counsel. I conveyed my views to the Secretary for the Civil Service as the Secretary responsible for civil service

contracts of employment. He decided that Mr. HARRIS should leave the Government's service, and advised that this would best be achieved by terminating his contract of employment by mutual agreement. On 3 May 1989, I informed Mr. HARRIS of the decision made and he left my Chambers that evening. He has not performed any duties since then.

There remained then the question of his position as a member of the Hong Kong Bar. As a matter of law it is open to me as well as to the Bar to apply to the Chief Justice to appoint a committee of inquiry to inquire into a complaint against a barrister. It has been suggested that I should have taken this course. That was indeed one available avenue. Another was for me to refer the matter to the Bar Committee. I had decided upon that latter course. As it happened, the Chairman of the Bar spoke to me shortly after the events I have described. At his request I made available all papers necessary for his purpose; that is the transcripts and the statements but not communications privileged in law. These privileged documents were the Queen's Counsel's opinion and communications between the police and my Chambers. Members of this Council will be aware that disciplinary proceedings have now been instituted.

There has been criticism of the way in which Mr. HARRIS obtained a practising certificate shortly after leaving government service. It is suggested that I should have made representations to prevent him from entering practice. The short answer is that I have no such power in law. He was admitted to the Hong Kong Bar in April 1986, long before these events took place. Any objection to an admission is to be taken at the stage of admission and not later upon the issue of the annual practising certificate.

Sir, there have, since the events which I have just related, been further developments. Members of the legal profession expressed views as to the law contrary to the advice I had received. In the light of those views, I thought it right to re-submit the same papers to the Queen's Counsel who had previously advised, inviting him to consider certain aspects of the law and seeking his further opinion. This I did on 14 September this year. That further opinion differed in its conclusion from the original. As a result, and with the benefit of the views of Mr. C. W. REID, when recently acting as Director of Public Prosecutions, I have decided that a prosecution should be brought against Mr. HARRIS for alleged offences of incitement to procure a girl under the age of 21 for unlawful sexual intercourse. It would, Sir, be quite improper for me to enter upon a debate now on the merits of the case or on the issues of law. As has often been stated in this Council, questions of guilt or innocence are questions to be determined in a court of law, where an accused has the right to put his side of the case in accordance with established procedure.

Sir, I have now explained at some length the steps taken by me and in particular, I have addressed those areas which have been the subject of specific concern. Outside counsel was consulted and all the papers were submitted to him. There was no interference in the police investigation. Any suggestion that Mr. HARRIS was not prosecuted because of the position he held within my Chambers is entirely without foundation.

The original decision not to prosecute has not only given rise to much public concern. It also had a bearing on subsequent actions and decisions. It is therefore regrettable that the decision not to prosecute was based on legal advice which, in the event, has proved to be inconsistent with that more recently received. I wish to make it quite clear to this Council that I bear full responsibility for the views of the law taken and for all consequent decisions.

MRS. TU: *Sir, in paragraph 6 of his reply the Attorney General said that in the light of the matters before him, it would not be appropriate for Mr. HARRIS to perform his duties and Mr. HARRIS had to resign immediately. Since the Attorney General had these doubts and danger to young girls appeared to exist, did the Attorney General not consider immediately obtaining further opinion from other counsel? Did he consider immediate action by calling in the Bar Association, or did he question the police as to why they discontinued the operation?*

ATTORNEY GENERAL: I have already made clear, Sir, that at that point, based upon the original advice, there was no question of criminality. I have been advised that there was no crime with which Mr. HARRIS could be charged. As for calling in the Bar, I have already made clear in my main answer that I had already formed the view that certain matters should be communicated to the Bar and indeed that was done. I did not call for a second opinion. I saw no cause to do so. Nor did I contact the police to ask why they had discontinued the investigation. The papers were sent to me for advice upon the completion of the police operation.

MR. MARTIN LEE: *Sir, may I first congratulate the Attorney General for having the courage to accept full responsibility for this incident. But may I ask him whether he and members of the Prosecution Unit of his Chambers agreed with the first opinion given by the Queen's Counsel concerned that there was no crime with which Mr. E. C. HARRIS could be charged, and whether leading counsel concerned was asked in the brief for the first opinion to consider specifically whether there was evidence to substantiate any alleged offence or offences of incitement to procure an under-age girl for unlawful sexual intercourse, and if not, why not?*

ATTORNEY GENERAL: Sir, I had no reason to question or to disagree with the original opinion from leading counsel. That was also the view of the Director of Public Prosecutions. As to the second part of Mr. LEE's question I have made clear that when the papers were sent to leading counsel for his opinion, he was asked in the broadest possible terms whether on those papers there was any crime with which Mr. HARRIS could be charged. He was not asked to turn his mind to any specific area of the law. I thought it right that counsel should be given all the papers that we had and that he should take his view untrammelled by any views that we might have formed.

MR. MICHAEL CHENG (in Cantonese): *Sir, to safeguard justice and protect interests of the public and possible victims, will Government consider setting up an independent committee with members from the legal sector who are not civil servants to inspect and monitor the Attorney General's performance in making decisions to prosecute or not in special cases like the one in question?*

ATTORNEY GENERAL: I hardly think it is for me, Sir, to advise this Council whether a committee of inquiry should be set up to monitor my performance in the performance of my duties. But let me say this. The decisions that have been made in this case were made for the right reasons, based on the best possible advice and information available to the decision-makers at the time. There is absolutely no question of decisions being made otherwise than in good faith. There is no question of impropriety.

DR. LEONG: *Sir, I refer to paragraph 4 of the Attorney General's reply: "That advice was that there was no crime with which Mr. HARRIS could be charged". Could the Administration inform this Council whether the fact that there was no crime to charge was due to lack of actual evidence as collection of solid evidence was stopped, apparently at the eleventh hour? If so, could this Council be informed why the collection of such evidence was suddenly terminated?*

ATTORNEY GENERAL: I have already made clear, Sir, that leading counsel based his opinion upon all the evidence that was sent to us by the police. It is not for me to answer questions as to why the police decided to terminate their investigation when they did.

SECRETARY FOR SECURITY: Sir, let me answer the latter part of that question. The police decided not to proceed with the scheduled second meeting because they believed that a case already existed against HARRIS and that a second meeting would not have materially affected the circumstances of that case. At the time they sent their papers to the Attorney General they believed that evidence existed to show that he had already incited the procurement of a girl under the age of 21 for unlawful sexual intercourse.

MR. PETER WONG: *Sir, could the Attorney General tell this Council whether there is any precedent whereby popular opinion can force him to reconsider his opinion and obtain a second opinion?*

ATTORNEY GENERAL: I called, Sir, for a review of the original advice in the light of suggestions made by members of the legal profession that called into question the legal position. Having received that further advice, and with the benefit of the views

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of senior colleagues within my Chambers, I then proceeded to exercise my discretion as to whether or not prosecution should, after all, be brought. In reaching the decision, I took into account all the many factors that are necessary for the formulation of the decision to prosecute or not to prosecute, factors that Members of this Council will recall having been laid before them on previous occasions. I should add that the decision to prosecute is never brought simply to satisfy public opinion.

MRS. CHOW: *Sir, according to press reports there seems to be a gap of some two to three months between the point when Mr. HARRIS was advised to leave the Government and the point at which the Bar was notified of the case. Can the Attorney General please explain why there is such a long gap from the point when the first incident happened, since he has already decided that he should refer the matter to the Bar Committee?*

ATTORNEY GENERAL: Sir, I wrote to the chairman of the Bar on 15 May, advising him of certain matters and informing him of the circumstances under which Mr. HARRIS had left my Chambers. On 22 May the chairman of the Bar replied to me asking whether I would be prepared to supply certain evidence to him to enable the Bar Committee to form a view as to whether or not disciplinary proceedings should be brought against Mr. HARRIS. Evidence was supplied on 4 August, some two and a half months later, and I have described in my main answer what that evidence consisted of. It consisted of transcripts and statements. The gap of two and a half months was caused firstly by the necessity to obtain legal advice as to whether there were documents that would be privileged by law from production. It was also necessary to obtain consents both from the police and from a witness to the release of the material to the Bar. That said, I would accept that a delay of two and a half months was an overlong time with which to comply with the Bar's request.

MR. CHEONG: *Sir, in paragraph 9 of his reply the Attorney General said that it was right to re-submit the same papers to leading counsel inviting him to consider certain aspects of the law. Could I ask whether that aspect of the law was the result of the Attorney General's Chambers' own research or that of an outside legal adviser's or comments that he has heard?*

ATTORNEY GENERAL: Sir, it is the latter. As I have said in my main answer, members of the legal profession expressed views on the law contrary to the advice that I had already received. It was in the light of those suggestions that I thought it prudent to put the matter back to leading counsel for his further advice.

MR. ANDREW WONG: *Sir, I wish to ask two general questions in connection with the first question raised by Mrs. TU and the second question raised by Mr. Martin*

*LEE and the replies given by the Attorney General and by the Secretary for Security. Does the Attorney General always act in accordance with counsel's advice and how is counsel chosen?*

ATTORNEY GENERAL: In the very rare cases, Sir, where there are allegations of criminal conduct against members of my Chambers, the invariable practice is to take the advice of counsel at the private Bar for obvious reasons. It is to avoid any suggestion that any view taken could smack of favouritism. In this case, having regard to the nature of the allegations, and the position held, I considered it right to go to an eminent Queen's Counsel. He was chosen by reason of his long years of practice, his experience, his standing in the Bar, and his undoubted integrity.

MR. HUI: *Sir, referring to paragraph 9 of his reply, does the Attorney General intend to take steps to have Mr. HARRIS brought back to Hong Kong for trial?*

ATTORNEY GENERAL: Sir, if necessary Mr. HARRIS' extradition will be sought.

MR. SIT: *Sir, could the Attorney General advise this Council under what circumstances a second legal opinion from leading counsel in private practice had to be sought before deciding to prosecute or not to prosecute in respect of cases which might have caused public concern, or in the interest of the public?*

ATTORNEY GENERAL: Sir, I have already answered that question in relation to this specific case.

MR. MARTIN LEE: *Sir, bearing in mind that the police had already believed that there was sufficient evidence to charge Mr. HARRIS of incitement for the procurement of an under-age girl for unlawful sexual intercourse, would it not be in accordance with the normal practice in drawing up instructions to counsel for advice to draw the Queen's Counsel's attention specifically to that suspected offence, and then ask him to advise generally on other possible offences disclosed by the alleged facts?*

ATTORNEY GENERAL: Sir, I can only repeat what happened in this actual case. All the papers were put to the Queen's Counsel, including the covering police report, and counsel was invited to advise generally as to whether there was any crime with which Mr. HARRIS could be charged.

organizations would be able to meet the basic requirement and of the parents and students' expectations.

**Wilkinson case**

4. MRS SELINA CHOW asked: *Regarding the Attorney General's decision to seek only to have the defendant bound over in the WILKINSON case, bearing in mind the seriousness of the original offence charged, will the Attorney General inform this Council:*

*(a) on what basis was this decision made;*

*(b) what principles are used in guiding such decisions generally; and*

*(c) in how many cases of domestic violence in the past three years has he made such a decision?*

ATTORNEY GENERAL: Mr President, in answer to the first part of the question,

(a) The facts read in court in Fanling Magistracy on 18 March 1994 in support of the order of bind over were these:

> "The Defendant that is Mr WILKINSON and the victim were married in 1980. They came to Hong Kong in 1985 and lived in Hong Lok Yuen. From 1989 onwards, their relationship deteriorated, until 31 December 1992 when the Defendant left the matrimonial home.
>
> On the evening of the 31 December 1992, a heated argument took place, during which physical blows were traded and the Defendant hit the victim, that is, Mrs WILKINSON, around the head. In the course of the fight, the Defendant lost control and picked up a small knife, which caused a cut to the victim's left hand. He also used his hands to apply pressure to her throat. At this juncture, the Defendant regained control of himself and phoned a consultant psychologist whom the parties had been using for counselling. This man, a Mr WHYTE, came to the house with his wife; he calmed the victim, and suggested to the Defendant that he should leave, which he did.
>
> The victim reported the assault to the police some six months later."

Mr WILKINSON was bound over in the sum of $20,000 for a period of 12 months.

Mr President, as has been explained to this Council in the past, it is not appropriate for me to give reasons for decisions made in relation to any particular prosecution. I can nonetheless confirm that in this case the Director of Public Prosecutions reached his decision only after an exhaustive examination of the case file, of the witness statements of Mrs WILKINSON, of Mr WILKINSON, and of others. Any such decision is not, of course, taken lightly. The Director of Public Prosecutions, in reaching his decision, was aware of all relevant factors. He considered the events leading to the incident, the incident itself, and the circumstances subsequent to the incident. In that exercise, regard was likewise had to the interests of the victim, to those of the accused, and to the wider public interest.

(b) A decision to apply for a bind over is taken after a careful consideration of the facts of the individual case, the circumstances of the parties, and after due regard has been had to the public interest. It must, put simply, be appropriate to all the circumstances of the case. Regard is also had to the element of preventive justice contained in an order of bind over. The basic requirements when magistrates make such orders are: (1) there should be material before the court justifying the conclusion that there is a risk of a breach of the peace unless action is taken to prevent it; (2) they should make clear to the accused their intention to bind him over and the reasons for it; (3) they should obtain consent to the bind over from the accused; (4) before fixing the amount of the recognizance they should enquire as to the accused's means; (5) the binding over should be for a fixed period.

(c) Turning to the third part of the question, the number of binding over orders known to have been issued in relation to cases of domestic violence recorded in the police database are as follows. I should add that these figures include bind overs imposed by a court in respect of persons who have been convicted of an offence.

| *Year* | *Persons charged* | *Bind overs* |
|---|---|---|
| 1991 | 149 | 27 (18.1%) |
| 1992 | 120 | 17 (14.2%) |
| 1993 | 193 | 27 (14.0%) |

Mr President, I must emphasize that we do not take offences associated with domestic violence lightly. The case in question turned on its own facts and circumstances and should not be

regarded as setting any sort of precedent. There is no question of us going soft on domestic violence.

MRS SELINA CHOW: *Mr President, on page three of his reply, the Attorney General said that the Director of Public Prosecutions reached his decision only after an exhaustive examination of the case file, of the witness statements of Mrs WILKINSON, of Mr WILKINSON and of others. Now as there are two decisions in question, one of charging Mr WILKINSON taken in late 1993, and a subsequent U-turn of offering no evidence when the case came to court finally on 18 March, this year, can the Attorney General pinpoint when the exhaustive examination by the DPP took place and what factors caused the change of heart in between the two decisions?*

ATTORNEY GENERAL: Mr President, could I perhaps just clarify one point on a preliminary issue. The prosecution did not offer no evidence in this case. Offering no evidence would not be consistent with agreed facts, so it is not the case that the prosecution offered no evidence.

Could I just, Mr President, run through the chronology. The incident occurred on 31 December 1992. It was first reported to the police on 6 July 1993. Mr WILKINSON was charged with the offence of unlawful wounding on Christmas Eve 1993. That same day he pleaded not guilty to the charge and the trial was set on 18 March 1994. The review of all the circumstances was undertaken by the Director of Public Prosecutions shortly before the hearing date, in the course of March, and this led to the conclusion that as things stood at that stage the case could properly be disposed of by way of a bind over. This review in no way and no sense reflected upon the earlier decision to prosecute which was taken in the light of the circumstances as they then stood. The decision taken in March, shortly before the hearing, simply reflected the view of the Director of Public Prosecutions, an experienced and distinguished criminal lawyer, at a later date when additional factors had come to light which could not with reasonable diligence have been discovered when the original decision to prosecute was made.

Mr President, the Director of Public Prosecutions, indeed the prosecuting authorities generally, must keep an open mind in respect of decisions to prosecute and it is not uncommon for there to be changes to earlier decisions and I am sure that members of the community would expect the Director and the prosecuting authorities to act in that way.

MRS SELINA CHOW: *Mr President, I think that the Attorney General did not answer the second part of my supplementary question which was: What factors brought about the change of heart? He did mention additional factors in his answer. So could he elaborate on them?*

ATTORNEY GENERAL: Mr President, as I said in my main answer and consistent with the policy that I have discussed with this Council and my predecessors before me on many occasions, it is not appropriate for me to go into the questions of evidence concerning decisions to prosecute or not to prosecute. I have explained before that that is not consistent with public policy and I regret that I am not prepared to compromise that rule.

MR MOSES CHENG: *Would the Attorney General be able to explain, why the fact sheet presented to the Court showed that blows had been traded and the victim was only cut in her left hand when the victim has claimed in a written statement that she was beaten for three hours, threatened and cut with a knife and strangled until she lost consciousness and a doctor has certified that she has sustained heavy bruising to both eyes, bruising to her face, back, body and limbs, cut to her hand and throat, split lips, swollen neck due to strangulation and laceration to her face?*

ATTORNEY GENERAL: Mr President, the Director of Public Prosecutions was aware of the injuries sustained by Mrs WILKINSON. He had her statements for she made more than one, and he had photographs taken of her injuries. He was aware of the injuries sustained by Mrs WILKINSON. He was also, as I have said, aware of all the circumstances surrounding this case and took all factors into account. Can I repeat, Mr President, this was not a decision taken lightly. It was taken after the most exhaustive and anxious consideration of the case file and the decision reached to offer a bind over was one that was thought, in all the circumstances, to be appropriate to the circumstances of the case.

PRESIDENT: Not answered, Mr CHENG?

MR MOSES CHENG: *Mr President, with respect, I do not think that my question has been answered. I was asking the Attorney General to explain why there was a discrepancy between the facts contained in the fact sheet presented to the Court and those shown in the witness statement? I do not think that the Attorney General has answered that question.*

ATTORNEY GENERAL: The agreed facts read in the Court were drawn on the basis of the material contained in the case file and all the circumstances, Mr President.

MR RONALD ARCULLI: *Thank you, Mr President. In the third page of his answer, the Attorney General has said that in the exercise, regard was likewise had to the interests of the victim, to those of the accused and to those of the wider public interest. I can understand from the point of view of the accused*

*why a bind over order would be in his interest but what I cannot understand is why it is in the interest of the victim or indeed in the wider public interest. Could he elaborate?*

ATTORNEY GENERAL: I am afraid, Mr President, I am really not able to go beyond what I have already said in my main answer and that is that the Director of Public Prosecutions did indeed take into account the interests of the victim, those of the accused and the wider public interest. As I have explained this was not an easy decision. It was taken after anxious and careful consideration and not taken lightly. Of course, Mr ARCULLI is quite right, the interests of the victim is a factor to be taken into account in reaching a decision but the paramount factor is of course the public interest.

DR LAM KUI-CHUN: *Mr President, was this WILKINSON case accepted in the Attorney General's Chambers as a psychiatric problem or one of simple domestic violence? And in cases of violence similar to this one, what preventive measures does the Administration generally provide to protect the victims against another attack as mentioned in part (b) of the answer?*

ATTORNEY GENERAL: Mr President, the case was dealt with in the way in which I described. Mr WILKINSON was originally charged with unlawful wounding contrary to Section 19 of the Offences Against the Person Ordinance. You will see from the agreed statement of facts read in court that a consultant psychologist was involved. I repeat that all the relevant facts and circumstances were present before the Director when he made his decision.

Could Dr LAM please repeat the second part of his supplementary?

DR LAM KUI-CHUN: *Mr President, the second part of the question is, in cases of violence similar to this one, what preventive measures does the Administration generally provide to protect the victims against another attack?*

ATTORNEY GENERAL: Mr President, as I said in my main answer, a bind over order is, of course, preventive justice. The effect of the bind over is to require the defendant to keep the peace for 12 months on penalty of being punished by the loss of his recognizance.

MR MARTIN LEE: *Mr President, will the Attorney General please tell this Council whether Mrs WILKINSON was consulted before the decision was made by the DPP? It is because by that decision he has made it impossible, I believe, for Mrs WILKINSON to bring a private prosecution against Mr WILKINSON. And if she was not consulted beforehand, why not?*

ATTORNEY GENERAL: Mr President, it would be unusual for a victim to be consulted prior to a prosecution decision is made. There are no hard and fast rules but it would be unusual, certainly not the standard practice, for a victim to be consulted over prosecution decisions. After the Director of Public Prosecutions made his decision, but before the hearing, Mrs WILKINSON who was legally represented through her solicitors made oral and written representations to the Director which the Director considered before the case went to trial on 18 March. But having carefully considered those representations he was minded not to change his decision.

MR HENRY TANG: *Mr President, can the Attorney General justify and perhaps rectify how public interest is served by his decision when there is such widespread belief that justice has not been done in this case?*

ATTORNEY GENERAL: Mr President, an Attorney General is placed in an impossible position, as we have always recognized, by the constraints of public policy which I have already outlined balanced with the natural concern of Members of this Council and the community as to the contents of the prosecution file, but it has been my consistent policy that public interest dictates that the contents and evidence of a prosecution file should not be made available.

I am sorry, if I can take up a couple of minutes of the Council's time with your indulgence, Mr President, just to rehearse why that is so. Could I first refer to a letter which I wrote to the Chairman of the House Committee in May of last year dealing with the policy. I can go to the relevant passage dealing with the reasons why decisions to prosecute or not to prosecute or prosecution decisions should not be discussed. I said the reasons are these:

(a) If the defendant has been prosecuted but acquitted, it cannot be in the interests of justice and fairness for that acquittal or its reasons to be debated in public.

(b) If the defendant has been prosecuted and convicted, it would hardly be proper to discuss whether the conviction was correct or not. If the defendant felt he should not be convicted, he would appeal.

(c) If criminal proceedings were not taken it would not be fair or just to discuss why the accused were suspected and the reasons for not prosecuting. To embark on such a course would be tantamount to a trial but it would not be in accordance with court procedures and it would not be confined to evidence admissible in court.

Mr President, at the risk of taking up more time, could I refer Members to what my predecessor, Mr Michael THOMAS, said in this Council on 25 March 1987, in relation to a not wholly dissimilar type of case. He said, "There are good reasons why any Attorney General does not normally explain

in public a decision not to prosecute in a particular case. It is rare for any public announcement to be made of that decision because it would reveal unfairly that someone had been under suspicion for having committed a criminal offence. And even where that fact is known, to give reasons in public for not prosecuting a suspect would lead to a public debate about the case and about his guilt or his innocence. The nature of the evidence against the suspect would have to be revealed. Then some might say that was proof enough of guilt and the suspect would find himself condemned by public censure. Mr President, in our legal system the only proper place for questions of guilt or innocence of crime to be determined is in a court where the accused has the right to a fair trial in accordance with the rules of criminal justice and the opportunity to defend himself. So Members will readily appreciate that it would be quite wrong for any Attorney General having decided that the issue should not proceed to trial in the courts to say anything in public that might be taken to indicate a belief in the suspect's guilt which might lead to a public discussion of that very question."

PRESIDENT: Not answered, Mr Henry TANG?

MR HENRY TANG: *Mr President, would you care to clarify or confirm what the Attorney General has said is consistent with Standing Orders in respect of public officers' accountability?*

PRESIDENT: I am not sure I understand your point. Is it a point of order, Mr TANG?

MR HENRY TANG: *Yes, Mr President.*

PRESIDENT: Sorry, what is the point of order?

MR HENRY TANG: *According to Standing Orders, I understand that public officers, when they come here to answer questions, wish to justify their accountability of certain issues. Can they then in this case, as it is already closed, seek to hide behind the veil of public interest and do not disclose certain details that we seek?*

PRESIDENT: There is no point of order here, Mr Henry TANG, because I have no powers, as I have said on a prior occasion, to direct an answer to a question. I can simply rule on whether a question conforms with Standing Orders but I have no powers of direction as regards the giving of answers. What I can and have done is to give Members an opportunity to repeat their

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questions where they think that through inadvertence a question has not been answered but once that opportunity has been given that exhausts my powers.

**Noise nuisance associated with the use of Hong Kong Stadium**

5. MR FRED LI asked (in Cantonese): *Since the opening of the redeveloped Hong Kong Stadium, a total of over 180 complaints about noise nuisance to nearby residents have been received by the Environmental Protection Department (EPD) and the police. EPD said that before the opening of the redeveloped Stadium it had already pointed out to the Urban Services Department (USD) and Wembley International (HK) Ltd that it would not be suitable to hold large-scale concerts in the Stadium, but the advice was not heeded. Will the Government inform this Council why the EPD and USD did not inform Urban Councillors and the general public of such advice at an early stage?*

SECRETARY FOR PLANNING, ENVIRONMENT AND LANDS: Mr President, throughout the period of conception, design and construction of the stadium, its intended use as a multi-purpose venue caused consideration to be given to the noise problems associated with amplified music concerts. The Environmental Protection Department (EPD) were asked for advice on several occasions. The department advised that the use of the stadium for such a purpose would breach the Noise Control Ordinance. For example, when commenting on a 1991 Environmental Noise Assessment commissioned by the Royal Hong Kong Jockey Club, EPD advised the Urban Services Department, the Architectural Services Department, and the consultant, in May 1992, that the report was over optimistic about the noise impact. EPD therefore objected to the holding of amplified music concerts in the stadium.

The Urban Council decided to take up the management of the new stadium in July 1992 and appointed Wembley International to manage the stadium. Wembley International subsequently held a series of meetings with EPD to discuss the noise problem. An acoustics consultant firm was also commissioned by Wembley International to carry out a further Environmental Noise Assessment. This report, completed in December 1993, identified the same problems as the previous one.

EPD again advised the stadium management, in early February 1994, that noise from amplified music concerts would cause severe disturbance to nearby residents and that the management should therefore implement additional control measures to reduce noise levels to acceptable levels.

I understand that Wembley International reported the noise problem to the Urban Council Board of Governors responsible for policy and management of the stadium on 22 February 1994.