

立法會
Legislative Council

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Panel on Administration of Justice and Legal Services

**Minutes of special meeting
held on Monday, 17 January 2005 at 9:40 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)
Hon LI Kwok-ying, MH (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon KWONG Chi-kin
- Member attending** : Hon CHIM Pui-chung
- Member absent** : Hon MA Lik, JP
- Public Officers attending** : Department of Justice
Ms Elsie LEUNG, GBM, JP
Secretary for Justice

Mr Robert ALLCOCK, BBS, JP
Solicitor General

Miss Annie TAM, JP
Director of Administration & Development

Mr John READING, SC
Deputy Director of Public Prosecutions

Administration Wing, Chief Secretary for Administration's
Office and the Central Policy Unit

Ms CHANG King-yiu
Director of Administration

Mr Albert LAI
Deputy Head, Central Policy Unit

Mrs Susan MAK
Deputy Director of Administration

Miss Eliza LEE
Deputy Director of Administration

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

Staff in attendance : Mr Paul WOO
Senior Council Secretary (2)3

**I. Briefing by the Secretary for Justice and the Director of Administration
on the Chief Executive's Policy Address 2005**

(Address by the Chief Executive at the Legislative Council meeting on 12
January 2005 – “Working together for Economic Development and Social
Harmony”)

The 2005 Policy Address – “Policy Agenda”

LC Paper No. CB(2)647/04-05(01) – Paper provided by the Administration on
"Policy Initiatives of the Administration Wing, Chief Secretary for
Administration's Office and the Central Policy Unit"

LC Paper No. CB(2)656/04-05(01) – Paper provided by the Administration on
"Policy Initiatives of the Department of Justice")

The Chairman welcomed representatives of the Administration to the meeting
to brief the Panel on the initiatives in the 2005 Policy Agenda relating to the
Department of Justice (DOJ) and the Administration Wing, Chief Secretary for
Administration's Office.

Policy initiatives of the Department of Justice

Action

2. Secretary for Justice (SJ) briefed members on the paper provided by the Administration on the policy initiatives of DOJ listed in the 2005 Policy Agenda (LC Paper No. CB(2)656/04-05(01)). She also supplemented on a number of issues specific to the work and missions of DOJ which had not been included in the paper. A copy of SJ's address was provided to members at the meeting and issued to the Panel vide LC Paper No. CB(2)694/04-05(01) after the meeting.

Mainland public security officials suspected of taking enforcement actions in Hong Kong

3. Ms Emily LAU referred to the recent decision of DOJ not to prosecute the seven persons arrested at Mount Davies Road on 16 June 2004 for suspected offences of loitering and possession of offensive article. She said that the case had aroused public concern about public security officials from the Mainland taking law enforcement actions in Hong Kong, as two of the seven persons arrested were Mainland public security officials and they were found to be in possession of handcuffs at the time of arrest. Ms LAU further pointed out that after the incident, the Chief Executive had issued a public statement confirming that Mainland public security officials were not allowed to take enforcement actions on their own in Hong Kong. She requested the Administration to explain the reasons for not prosecuting in the case.

4. The Chairman asked whether the Prosecutions Division of DOJ had given advice on the case before the decision to take no prosecution was made.

5. Deputy Director of Public Prosecutions (DDPP) informed members that two suspected offences had been considered in the particular case, i.e. the offence of loitering under the Crimes Ordinance and the offence of possession of an offensive article under the Summary Offences Ordinance. He said that the Prosecutions Division had given advice on the case at the end of September 2004. The decision not to prosecute was taken, applying the prosecution guidelines and principles having regard to the evidence available in the case. Regarding whether or not the arrested persons were undertaking law enforcement actions in Hong Kong at the time of arrest, DDPP said that it was a matter for the Police to investigate. What concerned DOJ was whether there was sufficient evidence to prove that the suspects had committed the offences in the particular case, and DOJ had found that there was insufficient evidence to bring a prosecution against the seven persons, based on the investigation of the Police and having considered all the evidence and relevant information.

6. In reply to the Chairman, DDPP said that the offence of breach of condition of stay was not specifically considered. However, according to the documentation provided by the seven persons, they were entitled to be in Hong Kong as they had complied with the proper immigration procedures. There was no evidence of breach of any provisions of the Immigration Ordinance.

Action

7. Ms Emily LAU asked whether the Mainland authorities had fully assisted the Hong Kong Government in the investigation of the case, and whether the decision not to prosecute was the result of a lack of cooperation on the part of the Mainland. The Chairman asked whether the lack of sufficient evidence was due to difficulties in carrying out a thorough investigation by the Police.

8. DDPP responded that the decision not to prosecute was made after a full and thorough investigation by the Police. He added that it was understood that the Police had obtained cooperation from the Mainland authorities in conducting investigation.

9. Ms Emily LAU asked why the decision not to prosecute was made known only recently, when the Prosecutions Division had already given advice on the case in September 2004. DDPP replied that decisions on whether or not prosecution should be taken on cases were made on a daily basis. Such decisions were usually not made public. It was also unusual for DOJ to comment on issues relating to a decision not to prosecute. In the normal course of events, the usual procedure was to inform the parties affected by the decision after the decision was made.

10. Mr Martin LEE said that the case in question had given rise to public concern that Mainland public security officials had come to Hong Kong to enforce Mainland law, and favourable treatment which was different from that available to ordinary suspects of crime in Hong Kong had been given to the persons concerned because of their special status. He said that the Administration should give a detailed explanation to remove public doubts and the impression that it was trying to sweep the matter under the carpet.

11. DDPP reiterated that it was not the policy to explain the details of individual cases. He said that as was the normal practice, DOJ had been given a full investigation report by the Police containing all the information it had obtained. On the basis of the facts and materials which had been duly considered, advice was given by DOJ that there was insufficient evidence to warrant the charging of any offence. Neither was there evidence to establish that the persons were discharging duties to enforce Mainland law in Hong Kong at the time of arrest. He added that the seven persons in question were arrested, cautioned and interviewed in the same way as any person who was suspected of committing offences. There was no question of any undue favourable treatment being given to the persons concerned.

12. SJ said that the Director of Public Prosecutions had reported to her about the case and the decision not to take prosecution. She was satisfied that the decision was made after due analysis of the law and evidence and she saw no reasons for overturning the decision.

13. In reply to the questions raised by Mr Albert HO, DDPP said that the seven persons were not in possession of any fire-arm when they were arrested. The pair of handcuffs found was within the scope of the provision dealing with offensive weapons or articles in the Summary Offences Ordinance. The seven persons were subsequently released on bail.

Action

14. Mr Albert HO said that he understood that in cases involving offences committed by two-way permit holders from the Mainland, police bail would normally not be granted and the suspected offenders would not be permitted to return to the Mainland while investigation was in progress. He enquired about the reasons for the Police to allow the persons to be released on bail and return to the Mainland pending further investigation. He also asked whether the Hong Kong Government had raised the issue of law enforcement by Mainland public security officials in Hong Kong and followed up the matter with the Mainland authorities.

15. SJ replied that DOJ had no knowledge of the reasons for the Police to allow the persons to be released on bail. She considered that the relevant Panel could follow up the matter with the Police in another forum. As regards the second question raised by Mr Albert HO, SJ said that there was in place a mechanism of cooperation between the relevant authorities of Hong Kong and the Mainland concerning assistance rendered by one party to the other in relation to law enforcement matters. While DOJ could offer advice on legal and jurisdictional issues, it had no role to play in relation to investigation matters and operational arrangements under the existing mechanism.

16. Ms Audrey EU asked whether the decision not to prosecute in the particular case was due to insufficiency of evidence, or the lack of specific law in Hong Kong for taking prosecution actions even though there was sufficient evidence such as an admission on the part of the public security officials concerned that they had undertaken law enforcement duties in Hong Kong.

17. DDPP said that irrespective of their identity, people coming to Hong Kong had to comply with the law of Hong Kong, and they would be criminally liable for prosecution for committing offences in Hong Kong. In the particular case in question, there was insufficient evidence to prove all the elements of the two offences concerned after a thorough investigation. He added that there was no specific local law which could be invoked for prosecuting Mainland public security officials for carrying out law enforcement duties in Hong Kong.

18. SJ added that in the scenario of Mainland public security officials carrying out law enforcement actions on their own in Hong Kong, for example, by exercising power of arrest, they might be liable for prosecution under Hong Kong law for committing the offence of unlawful detention.

19. The Chairman opined that arising from the incident, the Government should seriously examine the existing mechanism to ensure adequate protection of the rule of law and compliance with the standards and criteria governing jurisdictional matters between Hong Kong and the Mainland.

20. Members considered that this Panel and the Panel on Security should follow up the subject matter with the Administration at a separate forum, in particular the issue of whether the existing law was adequate to deal with cases of Mainland public security officials taking law enforcement actions in Hong Kong.

Action

(*Post-meeting note* : Subsequent to the meeting, the Chairman discussed the matter with Hon James TO, Chairman of the Panel on Security. It was agreed that the Panel on Security would follow up the matter at a future meeting, and invite members of this Panel to attend the meeting for discussion. The meeting was scheduled for 1 March 2005.)

Legal cooperation with the Mainland

21. In response to Ms Miriam LAU's enquiry, SJ informed members that to date, agreements on legal services cooperation had been signed between the Hong Kong Government and the Mainland Justice Bureau as well as seven provinces and cities, namely Qingdao, Chongqing, Beijing, Nanjing, Shanghai, Zhejiang and Shenzhen. These agreements enabled, inter alia, procedural matters arising from the implementation of The Mainland and Hong Kong Closer Economic Partnership Agreement in the relevant provinces and cities to be resolved at the local level.

22. SJ further informed members that to enhance legal services cooperation, there had been communications and exchanges of information and expertise between DOJ, the legal profession in Hong Kong and the Mainland counterparts through delegations, conferences, symposia and other forums. The Government had also organized practical training courses for participation by legal personnel from the Mainland.

23. Ms Miriam LAU enquired about the developments regarding the Panel's proposal made at a previous meeting on designating certain more advanced cities in the Mainland as "trial points" for implementation of the arrangements for reciprocal enforcements of judgments in commercial matters between Hong Kong and the Mainland (REJ), upon conclusion of such arrangements. SJ replied that the proposal, together with other issues relating to the REJ arrangements, would be taken up at the next round of discussion with the Mainland authorities scheduled for the end of January 2005. The Administration would revert to the Panel on the latest progress in due course.

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Judgment of the court on legality of legislation

24. Mr CHIM Pui-chung referred to the recent judgment of the High Court which ruled that the civil service pay reduction which sought to restore the civil service pay scales to the levels they were as at 30 June 1997 was contrary to the relevant provisions of the Basic Law. He asked whether the courts had power to override the decision of the Legislative Council (LegCo) and the Standing Committee of the National People's Congress (NPCSC), pointing out that the legislation empowering the pay reduction was enacted by LegCo, and the legislation, like other laws enacted by LegCo, had been reported to the NPCSC in compliance with the procedure prescribed under Article 17 of the Basic Law.

Action

25. In reply, SJ said that Article 17 of the Basic Law specified inter alia the requirement that laws enacted by LegCo must be reported to the NPCSC for the record. Laws enacted by LegCo which were not returned by NPCSC would come into force. Regarding the issue of lawfulness of legislation enacted by LegCo, the overriding principle was set out in Article 11 of the Basic Law, which stated that no law enacted by the legislature of the Hong Kong Special Administrative Region should contravene the Basic Law. To ensure fulfilment of the requirement, the court had the judicial authority to determine whether certain legislative provision complied with the Basic Law, in case legal challenge was brought to the court. In the absence of any other interpretation by the NPCSC, the decision of the court of Hong Kong should stand. SJ added that relevant issues raised in the civil service pay reduction case would be dealt with in the appeal brought by the Government to the Court of Final Appeal.

Disqualification of Members of the Legislative Council

26. Mr CHIM Pui-chung referred to Article 79(6) of the Basic Law, which stated that the President of LegCo should declare that a Member of the Council was no longer qualified for the office if, inter alia, the Member was convicted and sentenced to imprisonment for one month or more for a criminal offence committed within or outside Hong Kong and was relieved of his or her duties by a motion passed by two-thirds of the Members of LegCo present. He pointed out that the Article was invoked in the past, and questioned whether the decision of the Council accorded with the spirit of the appellate system under common law adopted in Hong Kong which allowed defendants the right of appeal. Mr CHIM further asked whether the Administration would consider introducing legislative amendments in order to bring the relevant local law to be consistent with the provisions of Article 79 of the Basic Law.

27. SJ replied that the circumstances under which the President of LegCo should declare a Members of LegCo disqualified for the office were stipulated in Article 79 of the Basic Law. She said that the court had previously held that a declaration made by the President of LegCo under Article 79 of the Basic Law could take effect while an appeal in relation to the criminal offence which led to the declaration was still in progress.

Recruitment of Government Counsel

28. In response to Ms Audrey EU, Director of Administration & Development informed members that as a result of the general civil service recruitment freeze policy, DOJ had not recruited during the past three years. The Department was addressing the issue and had recently obtained special approval from the Panel co-chaired by the Chief Secretary of Administration and the Financial Secretary to proceed with the open recruitment of 12 Government Counsel in 2005-06. The recruitment procedure was expected to commence in the latter half of 2005 and the vacancies to be filled in early 2006. The exact number of new recruits to be posted to the different Divisions of DOJ would be finalised subject to a review of the

Action

operational needs of the Department as a whole before the recruitment process began. She added that the Administration would explain the manpower position of the Law Drafting Division of DOJ and measures to cope with the demand for legislative drafting services to this Panel at its next meeting on 24 January 2005.

Bilingual legal information website

29. Referring to the bilingual legal information website which DOJ had commissioned experts at the University of Hong Kong (HKU) to establish in three years' time, Ms Emily LAU asked whether members of the public would be able to obtain detailed information from the website which could assist them in finding legal advisers appropriate to handle specific legal problems, other than just a list of lawyers providing legal services.

30. Solicitor General replied that the website which was being developed by HKU aimed at providing updated information about legal services available in Hong Kong. However, it was not envisaged that individualised advice would be given to the public as to who to turn to for legal advice. There would be, for example, links to the lists of legal practitioners of the two legal professional bodies. Under the existing professional rules of conduct, lawyers were permitted to state, to some extent, their particular areas of expertise, and such information would be available from the website being developed. Hence, if a member of the public was looking for legal advice in a particular area, the website might be able to assist.

Policy initiatives of the Administration Wing, Chief Secretary for Administration's Office and the Central Policy Unit

31. Director of Administration (D of Adm) briefed members on the new and on-going Policy Agenda initiatives of the Administration Wing and the Central Policy Unit over the next two and a half years (LC Paper No. CB(2)647/04-05(01)).

Legal Aid

32. The Chairman asked why the Administration Wing had not followed its previous practice of providing an update on review of the administration of legal aid services in its paper. D of Adm replied that the paper was intended to elaborate on the specific initiatives set out in the 2005 Policy Agenda pertinent to the Administration Wing and the Central Policy Unit. Regarding the subject matter of legal aid, she said that the Administration had kept the Panel closely informed of findings of various reviews. The Administration consulted the Panel in July 2003 on outcome of the five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants. The Administration also discussed with the Panel at its meeting on 14 December 2004 on the 2004 annual and biennial reviews of financial eligibility limits of legal aid as well as other issues relating to review of the legal aid system. The Administration would report to the Panel on the latest developments at appropriate juncture.

Action

33. Mr KWONG Chi-kin reiterated the views and concerns of the labour sector that the eligibility criteria for grant of legal aid should be relaxed to assist employees in dispute cases who failed to receive their wages and other entitled benefits. He said that many employees were forced to drop their claims because their applications for legal aid were refused on grounds of means, or due to the amount of the claims which in the view of the Legal Aid Department was too small to justify the grant of legal aid. Mr KWONG further pointed out that some of the cases which the employees had decided not to pursue because of their failure to obtain legal aid involved important points of law which needed to be clarified by the Tribunal. He opined that in order to provide better protection to the employees, the existing discretionary power of the Director of Legal Aid to waive the upper financial eligibility limit for legal aid, as in cases involving human right issues, should be expanded to cover deserving employment dispute cases.

34. In response, D of Adm said that the Administration was preparing the relevant legislative amendments to implement the proposals arising from the last five-yearly review of the criteria for assessing financial eligibility of legal aid applicants. There would be forums for Members to advise on the amendments or raise related issues in due course.

Public policy research

35. Referring to the Government's new initiative of allocating \$20 million a year for three years to the University Grants Committee (UGC) to promote public policy research in higher education institutions, Mr KWONG Chi-kin said that it was doubtful whether academics had keen interests in undertaking research work in the area of public policy in Hong Kong. He opined that the Government should consider extending the new initiative to institutions other than higher education institutions, such as non-government think-tanks. D of Adm replied that Mr KWONG's suggestion would be considered.

36. Deputy Head, Central Policy Unit explained that the funding to undertake public policy research would be allocated for a period of three years, during which the progress of the research work and the way forward would be reviewed in the light of prevailing circumstances. He added that at present, there was no direct funding for research undertaken by community think-tank organizations through research grants administered by the Research Grants Council of the UGC. However, such organizations could participate in relevant research work through cooperation with the higher education institutions.

Sustainable development strategy for Hong Kong

37. The Chairman asked which aspects of the sustainable development strategy for Hong Kong fell within the remit of this Panel. D of Adm said that in line with past practice, the Administration Wing would brief this Panel on its policy initiatives on different areas including sustainable development. As Panel meetings to receive briefing by the Administration on Policy Address were open to all Members, the

Action

opportunity was taken to brief this Panel on the various initiatives of the Administration Wing, thereby obviating duplications in the briefings for different Panels.

38. The Chairman said that having regard to the terms of reference of this Panel, further discussion on the current arrangement for briefing of the Panel on policy initiatives on a separate occasion might be necessary. Ms Emily LAU opined that issues relating to sustainable development strategy should be followed up by the Panel on Environmental Affairs.

39. The meeting ended at 10:50 am.

Council Business Division 2
Legislative Council Secretariat
24 February 2004