

立法會
Legislative Council

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by the Administration)

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Panel on Administration of Justice and Legal Services

**Minutes of special meeting
held on Monday, 12 December 2005 at 11:30 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)
Hon LI Kwok-ying, MH (Deputy Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Miriam LAU Kin-ye, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP
- Members attending** : Hon Alan LEONG Kah-kit, SC
Hon CHIM Pui-chung
- Member absent** : Hon MA Lik, GBS, JP
- Public Officers attending** : Item I
Mr WONG Yan-lung, SC, JP
Secretary for Justice

Mr Robert ALLCOCK, BBS, JP
Solicitor General

Miss Annie TAM, JP
Director of Administration & Development

Mr Harry MACLEOD, BBS
Acting Director of Public Prosecutions

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

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Miss Lolita SHEK
Senior Council Secretary (2)7

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I. Briefing by the Secretary for Justice

(LC Paper No. CB(2)29/05-06(02) – Paper provided by the Administration on "Policy Initiatives of the Department of Justice" for the special meeting on 17 October 2005

LC Paper No. CB(2)94/05-06(01) – Speech made by the former Secretary for Justice on "Presentation of the Policy Agenda of the Department of Justice for the year 2005-06" at the special meeting on 17 October 2005)

Secretary for Justice (SJ) briefed members on his following plans and priorities as SJ –

- (a) providing independent legal advice to the Government and ensuring that its policies and legislative initiatives complied with the laws of Hong Kong and the Basic Law (BL);
- (b) providing quality legal services to the Administration and the general public;
- (c) making decisions in respect of prosecutions free from any interference;
- (d) introducing further improvements to the laws of Hong Kong;
- (e) upholding the rule of law, and defending fundamental human rights and public interest;
- (f) assisting in the development of Hong Kong as a regional centre for legal services and dispute resolution; and
- (g) assisting in the development of the legal profession including providing opportunities for Hong Kong lawyers in the Mainland.

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2. SJ also highlighted the Policy Initiatives of DOJ for the period from July 2005 to June 2007. A copy of SJ's speaking note was tabled at the meeting and issued to members vide LC Paper No. CB(2)683/05-06 after the meeting.

Recovery agents

3. Ms Miriam LAU noted from paragraph 10 of SJ's speaking note that he would give priority to taking forward a number of issues relating to the legal profession, including the profession's concern over recovery agents (RAs). Ms LAU said that the two legal professional bodies had conducted research on RAs. They had concluded that activities of RAs might be illegal, and were not conducive to the provision of quality legal services to the public. She urged that the problem of RAs should be tackled as soon as possible.

4. SJ responded that the emergence of RA activities might reflect the problem that some members of the public were not eligible to apply for legal aid but at the same time could not afford to pay the high litigation costs. He said that DOJ had studied RA activities and the legality of RAs. At common law, it was both a civil wrong and a criminal offence to assist or encourage a party to litigation in circumstances that amounted to "maintenance" or "champerty". In countries such as the United Kingdom, the offences and torts of maintenance and champerty had been abolished. SJ added that DOJ would liaise closely with the two legal professional bodies and the trade, and conduct further study on the impact of RAs, and whether other illegal activities were involved.

5. The Chairman said that the subject of RAs was discussed at the last Panel meeting on 28 November 2005. The Panel would follow up the issue in about two months' time.

Mediation services

6. Ms Miriam LAU said that most members of the public could not afford the high legal costs, and mediation was considered to be an effective means to resolve disputes. Ms LAU asked how the Government would take forward the provision of mediation services in Hong Kong.

7. SJ agreed that there was a need to develop mediation services in Hong Kong. SJ informed members that the pilot scheme on mediation of legally aided matrimonial cases had been launched on 15 March 2005 and would last for one year. The effectiveness of the scheme would be evaluated afterwards.

8. Solicitor General supplemented that the provision of legal aid for cases suitable for mediation would be taken forward.

Decisions on prosecutions and appeals

9. The Chairman asked how SJ could ensure that he would make prosecution decisions free from any interference and give independent legal advice to the Government, given that he was a Principal Official under the accountability system.

10. Ms Emily LAU said that it was extremely important to uphold human rights and the rule of law in Hong Kong. She hoped that SJ would honour his promise to do so. She pointed out that past incidents relating to prosecution decisions in some cases and the interpretation by the Standing Committee of the National People's Congress (NPCSC) of some provisions of the BL had aroused grave public and international concerns. SJ should endeavour to prevent recurrence of similar cases in future. Regarding constitutional development, Ms LAU requested SJ to advise the Chief Executive (CE) to broaden the electoral base of the two elections as far as possible and implement universal suffrage in Hong Kong.

11. Ms LAU added that there were concerns in society about the cases involving Mr Michael WONG, former Chairperson of the Equal Opportunities Commission, and the death of Madam PANG Chor-ying respectively. She trusted that SJ's decisions in these two complex and controversial cases would assure the public that justice was upheld. She also said that SJ's legal advice to the Government and decisions on prosecution should have regard to the principles of upholding human rights and the rule of law, and should not be influenced by political and other considerations.

12. SJ said that the role of SJ was very challenging and had far reaching impact on the public. However, what he needed to do was quite simple, as he was required to make decisions and give legal advice in compliance with the law. SJ assured members that he would try his best to discharge this responsibility. SJ added that it would not be appropriate for him to comment on the case involving Mr Michael WONG, as the case was being examined by an independent counsel. As regards the death of Madam PANG Chor-ying, SJ said that a death inquest would be conducted. These cases had demonstrated SJ's independent role under the law for the purpose of protecting the public interest.

13. Ms Emily LAU expressed concern whether SJ would be influenced by political considerations in giving legal advice to the Government and making prosecution decisions, as he was a political appointee and a Member of the Executive Council. SJ said that in the light of his experience as SJ in the past seven weeks, he observed that the Administration had high respect for the law, and had upheld the rule of law. This was also the fundamental principle that he and his colleagues in DOJ should observe in discharging their duties. SJ considered that there was no conflict between his role as SJ and that as a Principal Official.

14. Sharing Ms LAU's concern, Ms Audrey EU said that one of the ongoing initiatives highlighted by SJ was the promotion of transparency in the area of public prosecution. However, she considered it more important for DOJ to enhance the transparency of its decisions not to prosecute in certain cases. Ms EU pointed out

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that the former SJ's decision not to prosecute in a case involving a public figure had aroused public concern. The Director of Public Prosecutions had previously explained to Members that public figures should be treated as members of the general public, and prosecutions should not be brought against them if there was insufficient evidence. DOJ should not disclose to the public details of cases in which decisions not to prosecute were made, as it was not fair to the individuals concerned that they might be subject to "public trials" without prosecution. However, Ms EU pointed out that if DOJ failed to explain clearly their decisions in such cases, it could be accused of favouritism.

15. SJ said that he had explained DOJ's prosecution policy to Members when he replied to an oral question raised by Ms Audrey EU at the Council meeting on 9 November 2005 concerning a recent case in which the Hong Kong Disneyland had requested inspectors of the Food and Environmental Hygiene Department to remove their uniform caps and epaulettes before entering the Disneyland to perform their duties. It was important that a balance should be struck between the interests of the individuals involved in the cases in which DOJ had decided not to prosecute, and public expectation for explanations for such decisions. SJ added that DOJ would provide more details of its decisions not to prosecute in cases of wide public concern to the community in future, as DOJ had done so in the recent Hong Kong Disneyland's case.

16. SJ further said that as the Director of Public Prosecutions had explained, it was extremely important that everyone was regarded as equal in terms of public prosecution. Decisions on prosecution should not be affected by public opinions. SJ added that as the public had a higher expectation on the impartial role of the Government in sensitive cases involving public figures, DOJ might take extra steps in ensuring impartiality in such cases, including seeking independent opinion from outside legal expert. However, SJ said that he personally had reservation as to whether such an arrangement should be adopted as a standard practice, and as to whether DOJ had to rely on outside legal advice in making prosecution decisions in all such cases.

17. Mr Martin LEE said that it was his observation that after reunification, some counsel representing the Government would lodge appeals on very flimsy grounds, especially in cases involving human rights.

18. SJ informed members that he was not aware of such a situation since his appointment to the post. He agreed with Mr Martin LEE that it would not benefit the litigants for an appeal to be lodged if a sufficient case had not been made out to justify the appeal.

19. Mr LEE quoted an example that the Government was defeated in an important, controversial and politically sensitive court case, and the court ruling was considered acceptable by SJ but not some other relevant parties. He asked whether DOJ would still lodge an appeal to the higher court for political reasons, in the hope that when the

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case was eventually heard by the Court of Final Appeal, BL 158 could be invoked if necessary.

20. The Chairman said that there were concerns whether DOJ should represent the Government in the same way as a lawyer representing his client, e.g. by lodging appeals to prolong legal proceedings for the benefit of its clients. She asked whether DOJ should consider its role from a wider and constitutional perspective, e.g. to advise the Government against lodging further appeals in certain cases and to address grey areas in the law by introducing new policies or initiatives.

21. SJ explained that in cases which involved important and controversial issues, the court ruling might not be agreed by all the parties concerned, and decisions on appeals had to be considered and examined thoroughly. A second independent opinion from outside legal expert might be sought, if necessary. SJ agreed in principle that if the court had delivered a precise ruling against the case, the Government should not seek an appeal but should consider alternative approaches, such as law reform or introducing other appropriate measures. SJ added that the decision to appeal on cases involving policy matters, however, was not his alone.

22. SJ reiterated the importance of his role to give independent legal advice to the Government, and to ensure that the Government was always acting in accordance with the law. He was conscious of his role and would endeavour to give unbiased and reliable legal advice.

Legislation on interception of communications and covert surveillance

23. Ms Audrey EU pointed out that the freedom and privacy of communication was protected by BL. If relevant enforcement authorities had to carry out interception of communications or covert surveillance to meet the needs of public security or of investigation into criminal offences, they had to comply with “legal procedures” as stipulated under BL 30. The Administration was of the view that the Law Enforcement (Covert Surveillance Procedures) Order (the Order) made by CE could constitute legal procedures for the purpose of BL 30. Ms EU enquired about the latest progress of drafting of legislation to govern covert surveillance.

24. SJ responded that Mr LEUNG Kwok-hung had sought judicial review on whether the Order was lawful and in compliance with the BL. As the legal proceedings were still in progress, it would not be appropriate for him to discuss the case at the meeting. SJ said that the Administration had explained the legal basis of the Order to the court, and would respect the ruling of the court.

25. SJ said that DOJ considered that legislation was necessary for the regulation of interception of communications and covert surveillance. The Administration had discussions with Members at meetings of the relevant Panel. The legislative work had been proceeded with expeditiously. In further response to Ms Audrey EU about the timetable, SJ informed members that it was hoped that the legislative preparation work would be completed by early 2006.

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26. The Chairman and Ms Audrey EU asked SJ to clarify whether a consultation document or a bill would be presented to the Legislative Council by early 2006. SJ responded that as the subject fell within the policy purview of the Security Bureau, he did not have all the information on hand. It was therefore not appropriate for him to make further clarification on this issue at the meeting. He assured members that the legislative work was progressing at full steam ahead.

Term of office of CE

27. Mr CHIM Pui-chung said that BL 158 stipulated clearly that the power to interpret the provisions in the BL vested with NPCSC. In the Fifth Report published by the Constitutional Development Task Force, the Administration had come to the view that the term of office of the incumbent CE was seven years. This amounted to an interpretation of the relevant provisions in the BL regarding CE's term of office. Mr CHIM expressed concern that the Administration's view was a challenge to the power of NPCSC, and contravened the provisions in the BL. He asked for SJ's view as he was the principal legal adviser to the Government.

28. SJ replied that the Secretary for Constitutional Affairs had already explained the Administration's view on the issue to Members on numerous occasions. SJ stressed that DOJ had thoroughly examined the issue, and there was legal basis for the Administration's position.

Opportunities for the legal profession in the Mainland

29. Mr LI Kwok-ying said that the legal profession had expressed concern about the impact of the Closer Economic Partnership Arrangement (CEPA) on the development of the legal profession in the Mainland. He asked whether actual work had been done in opening up the legal services market in the Mainland.

30. SJ informed members that CEPA had achieved some breakthrough in liberalising legal services in the Mainland to the legal profession in Hong Kong. However, CEPA was an arrangement based on reciprocity. The Administration had to take into consideration the views of the legal profession in the Mainland on CEPA, and explore opportunities for the local legal profession to have greater access to the Mainland market. SJ said that he had relayed the wishes of the legal profession in Hong Kong in developing their business in the Mainland to the Ministry of Justice, which was also highlighted in his speech at the Fifth China Lawyers' Forum in Tianjin in November 2005.

31. SJ added that he had planned to visit Beijing in the near future to discuss with the Ministry of Justice and other relevant departments directly the steps to be taken to further the development of the legal profession in the Mainland.

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II. Any other business

32. There being no other business, the meeting ended at 12:35 pm.

Council Business Division 2
Legislative Council Secretariat
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