

立法會
Legislative Council

LC Paper No. CB(4)1165/18-19
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by the Administration)

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Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 28 January 2019, at 4:30 pm
in Conference Room 1 of the Legislative Council Complex

Members present : Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)
Hon Dennis KWOK Wing-hang (Deputy Chairman)
Hon James TO Kun-sun
Hon Starry LEE Wai-king, SBS, JP
Hon CHAN Kin-por, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon CHAN Chi-chuen
Dr Hon Fernando CHEUNG Chiu-hung
Hon Martin LIAO Cheung-kong, SBS, JP
Ir Dr Hon LO Wai-kwok, SBS, MH, JP
Hon CHUNG Kwok-pan
Hon Alvin YEUNG
Hon CHU Hoi-dick
Hon Jimmy NG Wing-ka, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung

Members attending : Hon Mrs Regina IP LAU Suk-yee, GBS, JP
Hon Steven HO Chun-yin, BBS
Hon YIU Si-wing, BBS
Hon Alice MAK Mei-kuen, BBS, JP
Dr Hon KWOK Ka-ki
Hon Christopher CHEUNG Wah-fung, SBS, JP

Dr Hon Elizabeth QUAT, BBS, JP
Hon HO Kai-ming
Hon LAM Cheuk-ting
Hon CHAN Chun-ying, JP
Dr Hon CHENG Chung-tai
Hon Vincent CHENG Wing-shun, MH
Hon CHAN Hoi-yan

Member absent : Hon YUNG Hoi-yan

Public officers attending : **Agenda item III**

Department of Justice

Ms Teresa CHENG, SC
Secretary for Justice

Mr David LEUNG, SC
Director of Public Prosecutions

Mr NG Wing-kit
Public Prosecutor

Agenda item IV

Administration Wing, Chief Secretary for
Administration's Office

Ms Kitty CHOI, JP
Director of Administration

Mr Nicholas CHAN
Assistant Director of Administration 2

Legal Aid Department

Mr Thomas Edward KWONG, JP
Director of Legal Aid

Ms Juliana CHAN, JP
Deputy Director of Legal Aid (Litigation)

Department of Justice

Mr Paul HO
Senior Assistant Director of Public Prosecutions
(Office of Director of Public Prosecutions)

Working Group on Review of Duty Lawyer Fees

Mr Robert PANG, SC
Member

Agenda item V

Administration Wing, Chief Secretary for
Administration's Office

Ms Kitty CHOI, JP
Director of Administration

Mr Nicholas CHAN
Assistant Director of Administration 2

Legal Aid Department

Mr Thomas Edward KWONG, JP
Director of Legal Aid

Ms Juliana CHAN, JP
Deputy Director of Legal Aid (Litigation)

Department of Justice

Mr Paul HO
Senior Assistant Director of Public Prosecutions
(Office of Director of Public Prosecutions)

**Attendance by
invitation**

: Agenda items III, IV and V

Hong Kong Bar Association

Mr Philip John DYKES, SC

Mr Edwin WB CHOY, SC

Mr Randy SHEK

The Law Society of Hong Kong

Mr Stephen HUNG
Past President

Mr Kenneth FOK
Director of Practitioners Affairs

Clerk in attendance : Mr Lemuel WOO
Chief Council Secretary (4)6

Staff in attendance : Mr YICK Wing-kin
Senior Assistant Legal Adviser 2

Ms Macy NG
Senior Council Secretary (4)6

Miss Katherine CHAN
Council Secretary (4)6

Ms Emily LIU
Legislative Assistant (4)6

Action

- I. Information papers issued since the last meeting**
(LC Paper No. CB(4)433/18-19(01) - Information paper on Arrangement on reciprocal recognition and enforcement of judgments in civil and commercial matters by the courts of the Mainland and of the Hong Kong Special Administrative Region provided by the Department of Justice

- LC Paper No. CB(4)448/18-19(01) - Information paper on Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Cases between the Hong Kong Special Administrative Region and the Macao Special Administrative Region provided by the Chief Secretary for Administration's Office
- LC Paper No. CB(4)451/18-19(01) - Joint letter from Hon CHEUNG Kwok-kwan, Dr Hon Elizabeth QUAT and Dr Hon CHIANG Lai-wan on the problem of the Judiciary's pressure arising from non-refoulement claim cases)

Members noted the above papers issued since the last meeting.

II. Items for discussion at the next meeting

- (LC Paper No. CB(4)452/18-19(01) - List of outstanding items for discussion)

2. Members noted that the following items would be discussed at the next regular meeting to be held on 25 February 2019:

- (a) Consultation paper on archives law and that on access to information regime;
- (b) Proposed creation of judicial posts and directorate posts in the Judiciary; and
- (c) Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill.

3. Referring to the information paper on arrangement on reciprocal recognition and enforcement of judgments in civil and commercial matters by

the courts of the Mainland and of the Hong Kong Special Administrative Region provided by the Department of Justice ("DoJ") (LC Paper No. CB(4)433/18-19(01)), the Deputy Chairman said that the legal sector and members of the public were very concerned about the matter and he suggested inviting DoJ and the two legal professional bodies to a Panel meeting to discuss the matter.

4. The Panel agreed to include the above item in the list of outstanding items for discussion of the Panel on Administration of Justice and Legal Services ("the Panel").

5. Referring to the joint letter from Mr CHEUNG Kwok-kwan, Dr Elizabeth QUAT and Dr CHIANG Lai-wan on pressure on courts arising from non-refoulement claim cases (LC Paper No. CB(4)451/18-19(01)), the Chairman consulted members on whether the matter should also be included in the Panel's list of outstanding items for discussion. Members agreed.

6. The Chairman informed members that the Panel on Security would discuss the cooperation between Hong Kong and other places on juridical assistance in criminal matters at its meeting on 15 February 2019 and had invited the Panel to attend the meeting. As earlier agreed by the Panel, members could raise their concerns relating to mutual legal assistance and arrangement on surrender of fugitive offenders between Hong Kong and Taiwan at the above meeting. The Panel agreed to remove item 15, i.e. Mutual legal assistance and arrangement on surrender of fugitive offenders between Hong Kong and Taiwan, from the Panel's list of outstanding items for discussion.

III. Prosecution policy of the Department of Justice

(LC Paper No. CB(4)452/18-19(03) - Administration's paper on prosecution policy of the Department of Justice

LC Paper No. CB(4)452/18-19(04) - Paper on prosecution policy of the Department of Justice prepared by the Legislative Council Secretariat (background brief)

LC Paper No. CB(4)452/18-19(05) - Submission from the Hong Kong Bar Association)

7. Referring to the joint letter from the Deputy Chairman and Mr Alvin YEUNG requesting for information from DoJ relating to the present agenda item, the Chairman said that DoJ's reply had been received which was tabled at the meeting together with the joint letter.

(Post-meeting note: The joint letter and DoJ's reply were circulated to members via LC Paper Nos. CB(4)480/18-19(01) and (02) respectively on 29 January 2019.)

Briefing by the Administration

8. Secretary for Justice ("SJ") briefed members on several important aspects of the prosecution policy of DoJ as detailed in the Administration's paper (LC Paper No. CB(4)452/18-19(03)), including prosecutorial independence, separation of functions in respect of the investigation of possible offences and the making of prosecution decisions, and how prosecutorial decisions were made. She also briefed members on the briefing out of criminal cases by DoJ.

Views of the Hong Kong Bar Association and The Law Society of Hong Kong

9. Mr Philip DYKES, SC, of the Hong Kong Bar Association ("Bar Association") presented the views of the Bar Association as detailed in its submission (LC Paper No. CB(4)452/18-19(05)). Among other things, he mentioned the recent developments in the United Kingdom ("UK") in relation to the functions of the Attorney-General ("AG/UK"), in particular the publication of a "Protocol between Attorney-General and the Prosecuting Departments" in July 2009 ("the Protocol") under which AG/UK would not consider individual cases but would leave decisions to prosecute to the prosecuting departments except in a case concerning national security. Mr DYKES suggested that, to eliminate any perception of bias in future cases in order to safeguard the rule of law in Hong Kong from erosion, SJ might consider publishing a protocol along the line of the Protocol, and left prosecutorial decision-making to the Director of Public Prosecutions of DoJ ("DPP") in all cases, except those clearly identified in the protocol.

10. Mr Stephen HUNG, Past President of The Law Society of Hong Kong ("Law Society") pointed out that DoJ had, from time to time, mentioned the six circumstances set out in paragraph 29 of the Administration's paper (LC Paper No. CB(4) 452/18-19(03)) that DoJ might resort to when briefing out a criminal case. However, these criteria were not set out in the Prosecution Code. Mr HUNG suggested that, in the interest of greater transparency and

accountability, the above criteria should be included in the Prosecution Code as soon as practicable.

Briefing out of criminal cases by the Department of Justice

Seeking outside legal advice before making prosecutorial decisions on individual cases

11. Mr HUI Chi-fung said that the public was resentful about DoJ's recent decision of not instituting prosecution against Mr LEUNG Chun-ying and a LegCo Member, which was related to Mr LEUNG entering into an agreement with an Australian firm UGL Limited and receiving payments thereunder during the time when he was the Chief Executive ("CE"), and the suspected interference by Mr LEUNG and the LegCo Member concerned with the inquiry of the Select Committee to Inquire into Matters about the Agreement between Mr LEUNG Chun-ying and the Australian firm UGL Limited ("the UGL Case"). In particular, the public was dissatisfied with the press statement issued by DoJ on the above prosecutorial decision for failing to provide a detailed legal analysis which could justify its decision and remove the perception that there was bias and officials protecting officials in the decision.

12. Mr HUI Chi-fung further pointed out that in paragraph 29(d) of the Administration's paper, it was stated that in general DoJ might resort to briefing out when it was deemed appropriate to obtain independent outside counsel's advice or services so as to address possible perception of bias or issues of conflict of interests. Mr HUI queried why DoJ had not sought independent outside legal advice given there was clearly a perception of bias or issues of conflict of interests in the UGL Case.

13. SJ said that she would not comment or respond to questions on individual prosecutorial decisions. She pointed out that the decisions to prosecute or not, as the case might be, had to be based on an objective and professional assessment of the available evidence and the law, and be in accordance with the Prosecution Code. SJ also stressed that it was a norm of DoJ to make prosecutorial decision by members of DoJ in-house, and it was not a norm to seek outside legal advice before a prosecutorial decision was made. In the circumstances when there was perception of bias or issues of conflict of interests on the part of the prosecutor(s)/legal officer(s) handling a particular case, other prosecutor(s)/legal officer(s) without such bias or conflict could handle that case.

14. Mr Alvin YEUNG requested DPP to confirm whether it had sought outside legal advice before making the prosecutorial decisions in the cases

involving Mr Donald TSANG, Mr Rafael HUI and Mr Timothy TONG, and the reasons for seeking or not seeking outside legal advice in those cases. In response, DPP said that DoJ had sought outside legal advice before making its prosecutorial decisions regarding the charges against Mr Donald TSANG and those against Mr Timothy TONG, but he had no information in hand regarding the charges against Mr Rafael HUI.

15. Mr CHEUNG Kwok-kwan and Ms Starry LEE also asked whether DoJ had sought outside legal advice before making the decision of not instituting prosecution against Mr Jimmy LAI and some LegCo Members alleged to be involved in a case of suspected illegal offer and acceptance of political donations ("the Donation Case"). Ms Starry LEE added that many people were upset by DoJ's prosecutorial decision on the Donation Case. SJ replied that according to her memory, DoJ had not sought outside legal advice for its prosecutorial decision on the Donation Case.

16. The Chairman recalled that DoJ had confirmed with Panel members that independent legal advice from outside counsel had not been obtained for the Donation Case when at the Panel meeting on 26 February 2018. She suggested that DoJ should make reference to paragraph 14 of the minutes of the above-mentioned meeting (LC Paper No. CB(4)1599/17-18).

17. SJ said that while it was understandable why members were interested to know whether outside legal advice had been sought before prosecutorial decisions were made on individual cases, each case had its unique circumstances and involved professional judgments of different prosecutors according to available evidence, the relevant law and the Prosecution Code.

18. Mr Jimmy NG enquired whether DoJ would, just because of the social status of the suspect in a case (e.g. a senior government official) but without regard to how improbable the prospect of conviction might be, seek outside legal advice to address possible perception of bias or issues of conflict of interests. In response, SJ stressed that in making prosecutorial decision, a prosecutor must act on the basis of the law, the facts provable by the admissible evidence, and other relevant information known to the prosecution which might shed light on the reliability and admissibility of the evidence and the applicable guidelines in the Prosecution Code. She added that it had never been DoJ's practice to seek outside legal advice merely because the person involved in a case was a senior government official or of high social status.

19. Mr James TO noted that one of the circumstances which DoJ might resort to briefing out was "when it is deemed appropriate to obtain independent outside counsel's advice or services so as to address possible

perception of bias or issues of conflict of interests". He asked whose possible perception of bias or issues of conflict of interests, whether it was SJ's own or that of the public, should be addressed. Mr TO also asked how SJ would deal with the situation when the two perceptions were in conflict. SJ replied that the perception was measured by applying the legal test of apparent bias from the perspective of a reasonable, objective, fair-minded and well-informed person.

20. Ir Dr LO Wai-kwok noted from the Administration's paper that between 2016 and 2018, the number of cases which had obtained outside legal advice before making prosecutorial decisions was very few, only one case in 2017, save for those involving member(s) of DoJ. He enquired about the considerations which had been given to briefing out the only case in 2017, and the actual number of cases involving member(s) of DoJ during the past three years.

21. In response, SJ said that she could not disclose the reasons why legal advice had been sought for the case in 2017 as it involved the detail about individual cases, and she had no information in hand about the number of cases which involved member(s) of DoJ.

22. Mr LAM Cheuk-ting said that as stated in paragraph 34 of the Administration's paper, there were indeed cases involving public officers or political figures in respect of which the prosecutorial decisions were made without seeking outside legal advice. Mr LAM asked SJ to provide the number of such cases involving former or incumbent senior public officers, in particular whose appointments were approved by the Central People's Government after 1997.

23. SJ advised that she did not have the statistics requested by Mr LAM Cheuk-ting, and it was inappropriate to disclose information about persons who were suspects but not prosecuted. Mr LAM cheuk-ting disagreed and said that he was only asking for figures but not any personal particulars about the persons concerned.

24. In reply, SJ said that presumption of innocence was an important legal principle and, if a person who had been investigated by the law enforcement agency but the evidence was insufficient to demonstrate a reasonable prospect of conviction and hence not prosecuted, that person was innocent and it was inappropriate to disclose data or information about that person.

Briefing out of criminal cases before a prosecutorial decision was made or after

25. Ir Dr LO Wai kwok, Mr CHEUNG Kwok-kwan and Mr Martin LIAO noted that members of the public might have confused the briefing out of criminal cases to outside counsel for appearing in court, where DoJ had already decided to prosecute, with the seeking of outside legal advice before a prosecutorial decision was made. They considered that DoJ should enhance promotion about these two types of briefing out of criminal cases to remove any misunderstanding of the public.

26. Mr CHAN Chi-chuen considered that the final decision on whether to institute prosecution would have to be made by DoJ according to Article 63 of the Basic Law ("BL63") which stated that "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference." In this connection, seeking outside legal advice would not mean that DoJ had shifted its constitutional responsibility to external counsel. He urged that DoJ should clarify this to the public to remove any misunderstanding about seeking outside legal advice.

27. In response, SJ explained that the major issue of public concern about the prosecutorial decision regarding UGL Case was whether outside legal advice had been sought before the decision was made. In that regard, SJ reiterated that it was not a norm of DoJ to seek outside legal advice before prosecutorial decision was made. She pointed out that as provided in the Administration's paper, the numbers of cases in respect of which outside legal advice had been obtained before making the prosecutorial decisions were 0, 1, and 0 respectively in 2018, 2017 and 2016, clearly showing that prosecutorial decisions were made by DoJ in a great majority of cases without seeking outside legal advice.

The necessity of briefing out criminal cases

28. Mr CHAN Kin-por said that there were two different views about the need to brief out criminal cases. Some held the view that, since DoJ's prosecutorial decisions on controversial cases were almost always criticized as biased by either one political camp or the other, seeking outside legal advice before making such decisions should become standard practice. On the other hand, he noted from the media the view expressed by Mr Tony KWOK Man-wai, former Deputy Commissioner of the Hong Kong Independent Commission Against Corruption, that briefing out of cases was unprofessional, not in line with the international practice, and a waste of time and money.

29. Mr CHAN Kin-por said that he agreed with Mr Tony KWOK Man-wai's suggestion that DoJ should use the funding for briefing out to employ more prosecutors in DoJ to handle the cases instead. This would not only provide more opportunities for handling complicated cases, train up talents, provide more career advancement opportunities to prosecutors in DoJ, but also reduce the wastage of good quality staff in DoJ.

30. In response, SJ said that she was aware of the various views and comments from the public on the briefing out practice of DoJ. DoJ would keep on reviewing its practice in briefing out cases to see what could be further improved.

31. SJ further said that BL63 provided the constitutional guarantee to ensure the prosecutorial independence of DoJ which had a constitutional duty to make prosecutorial decisions. In this connection, it was a norm of DoJ to make prosecutorial decisions by members of DoJ as far as possible. Having said that, depending on the need of the case, in general DoJ might resort to seeking outside legal advice under one or more of the circumstances set out in paragraph 29 of the Administration's paper.

Selection of fiat counsel

32. Mr CHUNG Kwok-pan asked about the criteria adopted by DoJ in selecting the counsel/chamber for seeking outside legal advice and whether there was a priority list of counsel for briefing out. SJ advised that when seeking outside legal advice, DoJ would follow its established practice to ensure that the selection of counsel would be conducted in a fair manner taking into account the specialties/expertise required by DoJ. SJ also said that there was no priority list of counsel for briefing out but DoJ had knowledge regarding the expertise or specialties of individual counsel.

Prosecutorial independence

33. Dr Fernando CHEUNG invited the Bar Association for its view on whether DoJ's decision not to prosecute in the UGL Case was in conformity with BL63. Mr Philip DYKES, SC, said that the Basic Law did not provide for how public prosecutor should act in a situation where there was a conflict of interest. In his view, to avoid accusations of bias, SJ might seek outside legal advice before coming to a decision. SJ might also consider publishing a protocol under which she left prosecutorial decision-making to DPP as suggested in the Bar Association's submission. He considered that this would be compatible with the Basic Law.

34. Mr CHU Hoi-dick pointed out that SJ was appointed by the Central People's Government upon the nomination by CE and hence SJ was a politically appointed official accountable to CE. Furthermore, there was no mechanism to ensure that a criminal case involving a Mainland leader should be briefed out to address possible perception of conflict of interests. In this connection, he questioned whether BL63 could duly safeguard prosecutorial independence and ensure that DoJ was free from interference in making the prosecutorial decision. Mr CHU asked whether the Administration would take the Bar Association's suggestion on board.

35. Dr Elizabeth QUAT said that members of the public considered rule of law the cornerstone of the society, and hoped that people who committed crimes with sufficient evidence should be brought to justice. She was concerned that in some cases, even though there was strong evidence showing that a person had committed crimes, such as a case involving a media boss, no prosecutions had been instituted. She said that the public had queried whether DoJ had been acting fairly.

36. In response, SJ assured members that she and all prosecutors in DoJ, being professional solicitors or barristers, would act independently. When making prosecutorial decisions, they would act in accordance with the law and the Prosecution Code taking into account the sufficiency of evidence, grounds of defence, etc. All implicated parties would be treated equally in accordance with the law irrespective of their background, identity and social status. She further said that as stated in paragraph 1.2 of the Prosecution Code, a prosecutor must not be influenced by, inter alia, the possible political effect on the government, any political party, any group or individual, as well as possible media or public reaction to the decision.

37. Regarding the Bar Association's suggestion in paragraph 25 of its submission which was referred to in paragraph 33 above, SJ said that the suggestion would have fundamental impact on the constitutional arrangement as enshrined in the Basic Law.

38. Mr Paul TSE said that while the Bar Association's suggestion might have reference value, one should bear in mind the different situations between Hong Kong and UK. A major difference was that there was no written constitution in UK but, in Hong Kong, there was the Basic Law. In his view, leaving the prosecutorial decision-making of all general cases to DPP might contravene BL63.

39. The Chairman disagreed with the Bar Association's suggestion since SJ, being the head of DoJ, could not abdicate his/her constitutional duty under

BL63 by transferring all his/her prosecution responsibilities to DPP. SJ said that she agreed with the Chairman's view.

Slow progress in the making of prosecutorial decisions

40. Ms Starry LEE indicated that the Democratic Alliance for the Betterment and Progress of Hong Kong had all along supported DoJ's prosecutorial independence provided under the Basic Law. However, she noted that many people were dissatisfied with DoJ's slow progress in making decisions to prosecute against participants in the Occupy Central Movement.

41. SJ explained that it was difficult to make a general reply on the reasons for the relatively long time taken for making prosecutorial decisions. Furthermore, as legal proceedings of the case was underway, it was inappropriate for her to disclose more details.

42. Dr Junius HO said that he was also unhappy about DoJ's slow progress in making decision of whether to prosecute a well-known media boss over alleged intimidation of a reporter whilst reporting news, which was long overdue as the case had taken place in 2017 and DoJ had not disclosed whether it had sought outside legal advice for the case. Nevertheless, he respected DoJ's prosecutorial independence as enshrined in BL63 and supported that DoJ should be free from any interference.

Publication of reasons for prosecutorial decisions

43. Dr Fernando CHEUNG expressed concern whether it was appropriate for SJ not providing detailed reasons for not instituting prosecution in cases which were sensitive, controversial or possibly perceived by the public that there would be bias or issues of conflict of interests, such as UGL Case. Mr HUI Chi-fung shared Dr CHEUNG's concern.

44. SJ stressed that she would not respond to or comment on DoJ's prosecutorial decisions on individual cases. She pointed out that as stated in paragraph 23.1 of the Prosecution Code, "*DoJ is committed to operating in an open and accountable fashion, with as much transparency as is consistent with the interests of public justice. However, the benefit of justice being seen to be done must not be allowed to result in justice not being done.*" Furthermore, according to Paragraph 23.4 of the Prosecution Code, "*there are circumstances in which the giving of reasons may be contrary to the public interest or otherwise inappropriate, including where to do so: ... (c) may adversely affect the administration of justice (especially in the case of a decision not to prosecute where public discussion may amount to a public trial without the safeguards of criminal justice process);...*".

45. Mr Alvin YEUNG recalled that DoJ had issued a press release in several pages to explain the reasons of not instituting prosecution against Mr Timothy TONG. He asked DPP whether he considered this might amount to a public trial to Mr TONG given the relevant Prosecution Code mentioned by SJ above. DPP replied that he was not in a position to answer the above question, and that the case of Mr Timothy TONG was not an item for discussion at today's meeting.

46. Mr CHAN Chi-chuen said that while it was DoJ's view that the giving of detailed reasons for individual prosecutorial decisions might be contrary to the public interest, not giving such reasons might also be against the public interest. He then referred to the opinion of Mr Grenville CROSS, the former DPP who considered that disclosing the detailed reasons for not instituting prosecution would help the accused person to prove his/her innocence in a way that the public would understand that the prosecutorial decision had been properly taken, and asked SJ for her response.

47. SJ reiterated that presumption of innocence was an important cornerstone of rule of law in Hong Kong. If there was no sufficient evidence to demonstrate a reasonable prospect of conviction for instituting a prosecution against an accused person, that person was innocent and should not be required to prove his/her innocence despite what the media might have said alleging him/her as "guilty". In this connection, it was unnecessary to disclose the detailed reasons for not instituting prosecution. Mr Paul TSE concurred with SJ's views.

Prosecution Code

Updating of the Prosecution Code

48. Mr Paul TSE shared the Law Society's views that the Prosecution Code should include the six circumstances which DoJ might resort to briefing out. He was also concerned that the Prosecution Code had not mentioned under what circumstances SJ would delegate the prosecutorial decision-making authority to DPP, such as in making prosecutorial decision regarding the charges against Mr Rafael HUI. Mr TSE requested that the above information would be included in the next update of the Prosecution Code.

Private prosecution

49. Referring to Chapter 7 of the Prosecution Code on "Private Prosecution", Dr CHENG Chung-tai asked, if DoJ had decided not to prosecute in a case but there was a private prosecution on the same matter

thereafter, whether SJ would take over the private prosecution and disallow its continuation due to its inconsistency with DoJ's decisions.

50. SJ advised that paragraph 7.4 of the Prosecution Code had stated the six factors which SJ might consider whether or not to take over a private prosecution. Besides, DoJ would also make reference to some decided cases in making the decision. She added that how DoJ would proceed with the case after taking over a private prosecution depended on the circumstances of individual cases.

Appointment of the Director of Public Prosecutions of the Department of Justice

51. The Deputy Chairman expressed concern about the long time taken for the approval of the promotion of Mr David LEUNG, SC, as DPP. He said that the appointment of Mr LEUNG as DPP was announced and gazetted in December 2017, but the Administration approved in late December 2018 Mr LEUNG's promotion with effect from 29 June 2018. He asked why the approval was given after more than one year, whether it was due to SJ's decision, and whether it was relating to the performance of Mr LEUNG. SJ said that as DoJ was preparing a reply to the written question to be raised by the Deputy Chairman on the above matter at the Council meeting of 30 January 2019, she would provide a detailed response to him in that reply.

Motions

52. The Chairman said that she had received two motions proposed by members. The first one was proposed by the Deputy Chairman and seconded by Mr Alvin YEUNG, and the second one was proposed by Ms Starry LEE and seconded by Mr Martin LIAO. The Chairman considered that all of the proposed motions were directly related to the agenda item under discussion. Members agreed that these motions be proceeded with at the meeting.

53. The Deputy Chairman read out his proposed motion:

本委員會不信任律政司司長鄭若驊資深大律師。

(Translation)

This Panel has no confidence in the Secretary for Justice, Ms Teresa CHENG, SC.

54. The Chairman put the motion to vote. At the request of the Deputy Chairman, the Chairman ordered a division and that the voting bell be rung for five minutes. Seven members voted for the motion, 11 voted against it and none abstained from voting (details of division were in **Appendix I**). The Chairman declared that the motion was negatived.

55. Ms Starry LEE then read out her proposed motion:

法治是本港賴以成功的基石，亦是本港社會極為重視的核心價值之一，而《基本法》第六十三條對律政司主管刑事檢察工作，不受任何干涉的規定，對捍衛本港法治，保障律政司的檢控人員獨立行事，不受任何政治或不恰當壓力的干預，至為重要；就此，本委員會呼籲各界共同遵守《基本法》第六十三條的規定，避免及不應對律政司在制訂《檢控守則》，以及如何行使檢控政策時，作出任何不恰當的施壓，從而損害律政司獨立行使檢控決定的權力及責任，以及抵觸《基本法》第六十三條的規定；同時，本會支持律政司繼續獨立及專業地根據《檢控政策》行事。

(Translation)

The rule of law constitutes the cornerstone of Hong Kong's success and is one of the highly regarded core values of the Hong Kong community, and the provision of Article 63 of the Basic Law ("BL63") that the Department of Justice ("DoJ") shall control criminal prosecutions free from any interference is of utmost importance to safeguarding the rule of law in Hong Kong and ensuring that prosecutors within DoJ may act independently without any political or improper interference; in this connection, this Panel urges various sectors to make a concerted effort to abide by BL63, avoid and refrain from imposing improper pressure on DoJ in its formulation of the Prosecution Code and enforcement of the prosecution policy hence undermining DoJ's rights and responsibilities in exercising its prosecution decisions independently and violating BL63; at the same time, this Panel supports DoJ's continued effort to act independently and professionally in accordance with the Prosecution Policy.

56. The Chairman put the motion to vote. At the request of Ir Dr LO Wai-kwok, the Chairman ordered a division. Eleven members voted for the motion, seven voted against it and none abstained from voting (details of division were in **Appendix II**). The Chairman declared that the motion was carried.

(*Post-meeting note:* The Administration's response to the motion carried was issued to members on 25 February 2019 via LC Paper No. CB(4)582/18-19 (01).)

IV. Review of duty lawyer fees

(LC Paper No. CB(4)452/18-19(06) - Administration's paper on review of duty lawyer fees

LC Paper No. CB(4)452/18-19(07) - Paper on reviews of criminal legal aid fees, prosecution fees and duty lawyer fees prepared by the Legislative Council Secretariat (background brief))

Briefing by the Administration

57. Director of Administration ("DoA") briefed members on the outcome of the review of duty lawyer fees, details of which were set out in the Administration's paper (LC Paper No. CB(4)452/18-19(06)). In gist, the Administration proposed to adjust duty lawyer fees upwards by 56.2% to catch up with the percentage increase in criminal legal aid fees for counsel, after discounting inflation adjustments in the biennial reviews of criminal legal aid fees, prosecution fees and duty lawyer fees (collectively referred to as "the Fees") which were based on the changes in Consumer Price Index (C) ("CPI(C)") ("the biennial reviews") since 1992.

Views of the Hong Kong Bar Association

58. Mr Randy SHEK of the Bar Association informed members that he had been one of the members of the working group set up by the Administration to conduct the review of duty lawyer fees since January 2018. He said that the Bar Association welcomed the Administration's proposal to adjust duty lawyer fees upwards by 56.2% but considered it a late arrival having regard to the fact that the criminal legal aid fees had been increased twice following the reviews in 2012 and 2016.

59. Mr Randy SHEK said that the Bar Association also supported the Administration's proposal that future reviews of criminal legal aid fees other than the biennial reviews would also cover the prosecution fees and the duty lawyer fees in the same exercise as it would ensure that neither the Legal Aid Department ("LAD"), DoJ nor the Duty Lawyer Service would have an

unfair advantage in competing for the same pool of lawyers in the provision of their services. However, such reviews should be conducted more frequently according to a fixed schedule so that the Fees would be broadly in line with the changes in operating costs faced by counsel.

Views of The Law Society of Hong Kong

60. Mr Stephen HUNG said that the Law Society welcomed the Administration's proposal on the adjustments to duty lawyer fees. The Law Society also commended that the process of reviewing the duty lawyer fees had been smooth since the Administration was able to promptly reach consensus with the relevant stakeholders, including the two legal professional bodies, on the revised fees.

Discussion

Future reviews of duty lawyer fees

61. Mr Alvin YEUNG declared that he was a duty lawyer on the panel of the Duty Lawyer Scheme. He indicated support for the proposed increase in duty lawyer fees upwards by 56.2% but considered that, as the fees were not adjusted timely along with the increase in criminal legal aid fees in 2012 and 2016, the duty lawyer fees could not catch up with the soaring operating costs for lawyers during the period. Mr YEUNG said that this had discouraged many young lawyers from practising as barristers and, therefore, he agreed with the Bar Association that future reviews of the Fees, other than the biennial reviews, should be conducted more frequently.

62. DoA explained that currently, the Fees were subject to the biennial reviews which took into account changes in CPI(C) during the reference periods. The biennial reviews should therefore be able to address members' concerns that the Fees might become out of tune with inflationary changes in counsel's operating costs. She further said that, as the criminal legal aid fees were last reviewed only in 2016 and the present proposal would increase the duty lawyer fees by 56.2%, the Administration would, together with the two legal professional bodies, monitor the implementation of the new fees closely to see whether and when future reviews would be necessary.

63. The Chairman declared that she was teaching law at the City University of Hong Kong and said that, over the years, she observed that many talented young lawyers who aspired to be barristers were thwarted by various obstacles from entering the field, in particular the meagre income and intense competition. Therefore, she welcomed the proposed increase in the duty lawyer fees and agreed that future reviews of the Fees should be

conducted more regularly to keep them attractive to new lawyers to serve either as criminal legal aid lawyers, fiat counsel and/or duty lawyers.

64. Mr Holden CHOW indicated support for the proposed increase in duty lawyer fees and considered that it would be more in tune with general legal fees in the market. Mr CHOW also suggested putting in place a regular review mechanism to ensure that the level of duty lawyer fees would be on a par with that of criminal legal aid fees, thereby avoiding an unfair advantage in competing for the same pool of lawyers in the provision of their services. DoA took note of the Chairman's and Mr CHOW's views.

(At 6:25 pm, members raised no objection to the Chairman's proposal to extend the meeting for 30 minutes to 7:00 pm.)

Expansion of the scope of the Duty Lawyer Scheme

65. The Deputy Chairman said that having strived for the adjustment to duty lawyer fees for years, the legal professional sector would certainly welcome the notable increase in the fees as proposed by the Administration. He also reflected the legal professional sector's views that the scope of the Duty Lawyer Scheme should be expanded to provide legal advice services in more areas, such as for persons detained at police stations.

66. In reply, DoA explained that the Administration was studying the recommendations made by the Legal Aid Services Council that a publicly funded scheme ("LASC's proposed scheme") be made available to ensure that detainees could have access to legal advice on their rights once their liberty was restricted. Given that LASC's proposed scheme would entail substantial operational implications, the relevant government bureaux and departments were carefully examining the feasibility and implications of LASC's proposed scheme under various scenarios (e.g. in cases of mass arrest) as well as drawing reference to the experience of overseas jurisdictions. DoA added that if such legal advice services for detainees on their rights were to be implemented, the Administration considered it might be a reasonable approach to engage Duty Lawyer Service which was an organization subvented by the Government and jointly managed and administered by the Bar Association and the Law Society.

67. In view of the difficulties mentioned by DoA for the full-scale implementation of LASC's proposed scheme, Mr James TO suggested implementing the proposed scheme by phases. As detainees at police stations charged with serious offences could face heavy penalties and hence in need of timely legal advice services, and the number of such cases was relatively small, he suggested that the Administration should consider

providing legal assistance to this group of detainees under LASC's proposed scheme as a first step.

V. Biennial review of criminal legal aid fees, prosecution fees and duty lawyer fees

(LC Paper No. CB(4)452/18-19(08) - Administration's paper on biennial review of criminal legal aid fees, prosecution fees and duty lawyer fees

LC Paper No. CB(4)452/18-19(07) - Paper on reviews of criminal legal aid fees, prosecution fees and duty lawyer fees prepared by the Legislative Council Secretariat (background brief))

Briefing by the Administration

68. DoA briefed members on the outcome of the 2018 biennial review of the Fees, details of which were set out in the Administration's paper (LC Paper No. CB(4)452/18-19(08)). She said that the Administration proposed to adjust the Fees upwards by 4% to reflect the accumulated change in CPI(C) recorded between July 2016 and July 2018.

Views of the Hong Kong Bar Association

69. Mr Randy SHEK said that the Bar Association supported the proposed increase of the Fees by 4% in accordance with the biennial review mechanism. However, he reiterated the Bar Association's concerns whether CPI(C) adopted in the biennial reviews was an appropriate reference for measuring the inflationary impacts on legal practitioners. He pointed out that the increase in overhead for running a counsel's office, such as office rents which might be increased by up to 30% in three years' time, was way higher than the increase in CPI(C).

70. Mr Philip DYKES, SC said that according to a recent review conducted by the Young Barristers' Committee of the Bar Association, about 15% of young barristers were operating at a net loss. He urged the Administration to conduct a comprehensive review of the biennial review mechanism so that the Fees would be maintained at a more reasonable level.

Views of The Law Society of Hong Kong

71. Mr Stephen HUNG said that the process of reviewing the Fees under the biennial review mechanism was smooth. However, the Law Society was not fully satisfied with the outcome since it had been of the view that criminal legal aid fees should be further adjusted to narrow the disparity between the levels of criminal and civil legal aid fees. Mr HUNG also urged the Administration to shorten the time between a biennial review and its implementation, which could be longer than one year.

Discussion

72. The Deputy Chairman supported the proposed upward adjustments to the Fees by 4%, and urged for their early implementation. He said that according to the Policy Agenda of CE's 2018 Policy Address, the Administration had undertaken that it would strive to enhance legal aid services to benefit more people who could not afford private legal fees. Therefore, the Administration should listen to the views of the two legal professional bodies and make appropriate responses. He also expressed his appreciation of LAD's efforts and contributions in providing professional legal aid services to the community over the years.

73. Mr James TO agreed with the Bar Association that, in conducting the biennial reviews, the Administration should not just take into account the general price movement as measured by CPI(C) during the reference period since major elements of counsel's overheads, such as high office rents, had not been taken into account. He then invited Director of Legal Aid ("DLA") to give his view on the Law Society's comments about the difference between the levels of criminal and civil legal aid fees.

74. In reply, DLA explained that since the systems for computation of legal costs for criminal and civil cases were different, differences between the rates for remunerating legal practitioners in handling criminal and civil legal aid cases were understandable. Furthermore, he said that in general civil legal aid fees were higher than criminal legal aid fees, which was also a common phenomenon in overseas jurisdictions.

75. Mr James TO considered that the disparity between civil and criminal legal aid fees was unreasonable given that the preparation of criminal cases required no less effort. In this regard, he urged the Administration to improve the situation so as to encourage more lawyers to take up criminal legal aid work.

76. The Chairman declared that she had handled legal aid cases. She highlighted the importance of legal aid in ensuring that people would not be denied access to justice due to a lack of means. She also pointed out that the unbearably high legal costs had thwarted many, even the middle class, in defending their legitimate interest and rights through legal proceedings. In this connection, the Chairman supported the proposed increase in the Fees, in particular the criminal legal aid fees and duty lawyer fees, and considered that improvements to the legal aid regime should be made.

77. The Chairman further pointed out that, owing to the increasing number of Hong Kong permanent residents being involved in legal proceedings in the Mainland, the Administration should consider providing cross-boundary legal aid to these residents for legal representation in the Mainland courts. Mr James TO said that legal assistance should also be provided to those who were embroiled in legal proceedings in overseas jurisdictions such as the Philippines.

78. DLA replied that in accordance with the Legal Aid Ordinance (Cap. 91), the scope of legal aid was confined to legal proceedings taking place in the courts of Hong Kong. Therefore, the existing legal aid services did not cover litigations in the Mainland or overseas jurisdictions involving Hong Kong permanent residents.

79. The Chairman considered it totally unacceptable that it took years for LAD to settle the full payments of legal aid fees or costs of legal aid cases, which might adversely affect the business of some law firms. In this connection, she urged the Administration to conduct a review of the existing payment system and take necessary actions to address the problem. Sharing the Chairman's views, Mr James TO suggested making interim payments to legal aid practitioners.

80. In reply, DLA explained that there were various factors which might lengthen the time needed for settling the payment of legal aid fees or costs of legal aid cases, including the statutory requirement that the balance of payment could only be made at the end of the legal proceedings. To improve the situation, LAD had explored ways to expedite payments to legal practitioners.

VI. Any other business

81. There being no other business, the meeting ended at 7:00 pm.

Council Business Division 4
Legislative Council Secretariat
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