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20 November 2020

Mr Lemuel Woo
Clerk to Panel on Administration of
Justice and Legal Services
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Mr Woo,

**Panel on Administration of Justice and Legal Services
Issues to be considered for discussion**

I refer to your letter dated 12 November 2020 about the requests of some members, during the Panel meeting on 2 November, to discuss the following issues and for the Department of Justice (“DoJ”)’s preliminary views on such issues for members’ consideration of whether to include them in the Panel’s List of items for discussion. On the request of the Panel Chairman, DoJ replies as follows.

- (a) Whether and what mechanism is in place in DoJ to prevent conflict of interests arising from the prosecutors’ duties

We note that item no. 24 of the Panel’s List of items for discussion (“List”)¹ is relevant to the above to which DoJ responded on 8 September

¹ Position as at 30 October 2020.

2020. In fact, the Secretary for Justice (“SJ”) explained in details the relevant mechanism in her replies to a Legislative Council (“LegCo”) oral question on 4 December 2019² and a written question on 29 April 2020³, as well as responded to members’ relevant questions at the Panel meeting on 27 April 2020.

Article 99 of the Basic Law stipulates that public servants must be dedicated to their duties and be responsible to the Government of the Hong Kong Special Administrative Region (“HKSAR”). Civil servants, being a key component of the public service, have a constitutional role to give their best in serving the Chief Executive and the Government of the day.

According to the Civil Service Code issued by the Civil Service Bureau, civil servants are required to uphold the core values of commitment to the rule of law, honesty and integrity, objectivity and impartiality, political neutrality, dedication, professionalism and diligence, and to ensure that no actual, perceived or potential conflict of interest shall arise between their official duties and private interests. Moreover, civil servants shall at all times ensure that their behaviour would not impede their performance of official duties in a fair and professional manner. The above principles are applicable to civil servants of different grades and ranks including DoJ’s prosecutors.

DoJ places much emphasis on the professional conduct of prosecutors. DoJ’s prosecutors always abide by Article 63 of the Basic Law and shoulder the constitutional duty enshrined therein, and handle all prosecution work in a fair, impartial and highly transparent manner. When conducting prosecutions, DoJ’s prosecutors are required to act professionally in strict accordance with the law and the relevant guidelines in the Prosecution Code.

The Prosecution Code sets out the role and duties of prosecutors. DoJ's prosecutors have always discharged their prosecutorial responsibilities in accordance with the relevant principles and have at all times exercised the highest standards of integrity and care in maintaining proper administration of justice. As prosecutors, they must ensure that their duties are discharged in

² LCQ9: Ensuring the impartiality of prosecutors

³ LCQ7: Publication of books by staff members of the Department of Justice

a professional and impartial manner without being affected by their personal views expressed. In relation to legal matters, the Government's counsel shall remain independent and impartial, especially when there is a likelihood of handling relevant cases in future.

In relation to outside work, according to the relevant Civil Service Regulations, the Government has a prior call at all times on the abilities, energies and attention of all its staff. Any outside activity (whether paid or unpaid) which may impair an officer's performance of his duties or distract his attention from them must be avoided. A civil servant is required to obtain prior consent of his Head of Department before taking up any outside work. In considering applications for outside work, Heads of Department have to take into account various factors, such as whether the outside work proposed may conflict (or appear to conflict) with the officer's duties as a Government servant, and whether the outside work proposed may be a source of embarrassment to the Government. No civil servant may, without approval, publish in his own name, communicate to unauthorised persons, or make private copies of, documents or information obtained in his official capacity.

In any event, DoJ will, continue to take into account actual experience, review and improve the existing mechanism to delineate the responsibilities of the approving officer(s), handle each application for outside work prudently, and impose appropriate conditions as may be necessary to the approvals so as to ensure that the relevant outside work would not and would not appear to be in conflict of interest or role with the applicant's duties, or be a source of embarrassment to the Government. In the event of non-compliance by DoJ's officer, DoJ will duly follow up the case without tolerance.

(b) Setting up of a sentencing committee

The Judiciary of the HKSAR is responsible for hearing all prosecutions and make judgments in accordance with the law and admissible evidence, and imposing appropriate sentences in convicted cases. Any significant changes to the well-established criminal justice system in Hong Kong, especially the judicial function of sentencing, has to be supported with strong justifications. The Judiciary's relevant position and views are

especially pivotal.

Regarding the concept of “sentencing committee” recently raised, there appear to be diverse views in the society. As the idea involves changes to the current criminal justice system, there must be sufficient concrete details would be required for careful consideration of the changes and implications to be brought to the entire criminal justice system.

We note that the Judiciary’s letter of 25 September 2020 to the Panel encloses a statement issued by the Chief Justice of the Court of Final Appeal on 23 September 2020 (“Statement”) in response to the commentaries, opinions and criticisms in relation to recent decisions of the courts. The Statement referred to the Chief Secretary for Administration’s reply relating to sentencing at the LegCo meeting on 10 June 2020:

“According to the Judiciary, a substantial part of the courts’ work consists of the administration of criminal justice. Sentencing is an essential part of this process. It is an exercise of the courts’ independent judicial power. Where a defendant pleads guilty or is found guilty after trial in a particular case, it is the court’s duty to impose a just and appropriate sentence, applying the relevant principles to the circumstances of the crime and those of the offender. Reasons for the sentence are given. Where such sentence is regarded by a convicted person as excessive, that person may appeal. Where the Secretary for Justice considers the sentence to be manifestly inadequate or excessive, he/she may apply to the Court of Appeal for the sentence to be reviewed.

The main objectives of sentencing are retribution, deterrence, prevention and rehabilitation. All of them serve the public interest. Sometimes, seeking to attain one objective may lead to a more severe sentence whilst seeking to achieve another may tend towards a more lenient sentence. The judge has to consider all the circumstances of each case and decide on the appropriate degree of significance that should be given to each objective in that case. When setting sentencing levels, the courts take into account all relevant factors. These include the

prevalence of certain types of offences and public concern over such prevalence.

For certain types of crime, the Court of Appeal has laid down guidelines for sentencing for the purpose of promoting broad consistency. For example, for the offence of trafficking in dangerous drugs, guidelines have been laid down depending on the type of drug and the quantity involved. They provide guidance to judges in the exercise of their sentencing power. In the past three years (2017-2019), the court has given sentencing guidelines to the lower levels of courts once.

From time to time, views have been expressed in the public arena that a “sentencing committee” be established to set binding sentencing standards for all criminal cases. The Judiciary emphasises that sentencing is a judicial function to be exercised by the courts independently and exclusively. The courts make sentencing decisions day in and day out in a very large number of different cases. The circumstances which arise in the cases are of an infinite variety. Deciding on a just and appropriate sentence in each case is a challenging and difficult task for the courts and is a matter for balanced judicial judgment.

It is important that sentencing decisions by the courts command the respect and confidence of the community. Further, in a society which values freedom of speech as a fundamental right, all court decisions, including sentencing decisions, are open to public discussion. Such discussion is most meaningful when it is well informed and well considered, taking into account the circumstances of the case in question and the reasons of the sentencing judge. Where sentences are regarded as being inconsistent, excessive or inadequate, as stated above, the parties (which include the Secretary for Justice) can appeal or apply for a review of sentence.”

The Statement emphasises that “sentencing is a legal question to be determined in accordance with legal principles. It is part of the judicial

function and process. It is not a political question. The fundamental principles identified earlier apply as much to sentencing as they do to any other exercise of judicial power.”.

As a party to criminal proceedings, DoJ, in accordance with Article 63 of the Basic Law, controls prosecutions on behalf of HKSAR and assists the Court to impose the appropriate penalty and to avoid appealable error. The current criminal justice system already has in place an established mechanism, which has all along been effective, in handling appeals and applications for review of sentence. DoJ explained in our reply of 8 September 2020 to Panel our relevant principles in review of sentence.

As always, DoJ will, in accordance with the relevant legal principles, continue to consider whether to apply for a review of sentence in each case, taking into account the actual circumstances of each case and different factors, including whether the sentence was proceeded on an error of law or that it is manifestly inadequate or excessive.

(c) policy on instituting prosecution of animal cruelty cases

As the policy bureau responsible for animal welfare, the Food and Health Bureau (“FHB”) referred in their replies to relevant LegCo written questions of 21 October⁴, 28 October⁵ and 4 November 2020⁶ the proposed amendments to the Prevention of Cruelty to Animals Ordinance (Cap. 169) to further safeguard animal welfare. Proposed amendments include introducing a positive "duty of care" on persons responsible for animals to provide for their welfare needs, as well as to enhance the provisions for prevention of animal cruelty and enforcement powers to prevent and protect animals from suffering, including the introduction of an indictable offence for severe cases of cruelty. FHB conducted a public consultation on the above proposals last year and reported the results of the consultation to the LegCo Food Safety and Environmental Hygiene Panel in April this year. FHB has already indicated that they will draft the legislation expeditiously and introduce the bill to LegCo as soon as possible to address the public’s concerns and expectations towards the legislative amendments.

⁴ LCQ7: Prevention of cruelty to animals

⁵ LCQ7: Prevention of cruelty to animals

⁶ LCQ20: Prevention of cruelty to animals

As explained by DoJ on various occasions, in making a decision of whether or not to prosecute in each case (regardless of the type of case), prosecutors must make an objective and professional assessment of the available evidence and applicable law, and act in accordance with the Prosecution Code. If there is no reasonable prospect of conviction, the prosecuting department will not commence a prosecution. The above principles are also applicable to animal cruelty cases.

(d) legal education and training in Hong Kong

DoJ proposes to discuss the item on “legal education and training in Hong Kong” at a meeting at an appropriate timing in 2021. The specific timing will be further advised by DoJ.

(e) qualifications for Hong Kong legal practitioners to practice law in the Greater Bay Area

DoJ plans to discuss item 7 of the List: “Recent developments on Hong Kong's legal and dispute resolution services in the Greater Bay Area” at the Panel meeting in the first quarter of 2021, which will cover the above issue.

Yours sincerely,

(Hinz Chiu)
Administrative Assistant
to Secretary for Justice