

LCQ6: Possible role conflicts arising from exercise of various functions by Secretary for Justice

Following is a question by the Hon Kenneth Leung and a reply by the Secretary for Justice, Ms Teresa Cheng, SC, in the Legislative Council today (January 24):

Question:

The Secretary for Justice (SJ) is a principal official under the Political Appointment System of the Hong Kong Special Administrative Region Government. The functions of SJ include controlling law drafting and criminal prosecutions, soliciting support from this Council and the public for government policies and proposals, etc. In this connection, will the Government inform this Council:

(1) of the respective mechanisms currently in place for ensuring that the work of the Department of Justice (DoJ) relating to criminal prosecutions is free from any interference and for handling the situation that role conflicts have arisen between the exercise of criminal prosecution function by SJ and her exercise of other functions or her personal affairs;

(2) of the number of times, in each of the past five years, for which the exercise of a function of SJ was transferred to the Solicitor General, the Director of Public Prosecutions or other law officers of DoJ in order to avoid any perceived or real role conflicts; among them, the number of times for which the work relating to criminal prosecutions was involved; and

(3) given that the Special Committee on Constitutional Affairs and Human Rights of the Hong Kong Bar Association and a former Executive Council Member have separately proposed earlier on that SJ shall vest all decisions relating to criminal prosecutions in the Director of Public

Prosecutions, to be made independently and free from any interference, to avoid the public perception that certain criminal prosecution decisions might have been affected by SJ's exercise of other functions, whether the Government will consider that proposal; if not, of the justifications for that?

Reply:

President,

The maintenance of public support and confidence in the criminal justice system is crucial for upholding the rule of law. To achieve this, it is important that prosecutorial independence should be ensured. In this regard, it is enshrined under Article 63 of the Basic Law that the Department of Justice (DoJ) of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference. As head of DoJ, the Secretary for Justice (SJ) has a constitutional duty and responsibility to make decisions and supervise conduct of criminal prosecutions.

Decisions to prosecute or not, as the case may be, must be based on an objective and professional assessment of the available evidence and the law and be in accordance with the published Prosecution Code. The prosecution will consider whether there is sufficient evidence to prosecute, and the test is whether the evidence is sufficient to demonstrate a reasonable prospect of conviction; if there is sufficient evidence to prosecute, the prosecution will then consider whether it is in the public interest to do so. The legal discussions within DoJ are always conducted with professionalism, free from political considerations, and, most importantly, in confidence. Some decisions are hard to make, but DoJ is duty bound to make decisions that are legally correct and free from any interference, difficult or unpalatable though they may be.

In respect of the Hon Kenneth Leung's three questions regarding how to ensure the independence of the work of DoJ relating to criminal prosecution, the consolidated response of DoJ is as follows:

There are appropriate checks and accountability mechanisms in place to ensure free and independent control of prosecutions in Hong Kong. In general, in circumstances where there is any actual or potential conflict of interest on his or her part, the SJ, after satisfying himself or herself that the Director of Public Prosecutions (DPP) has no connection with any of the persons or events concerned, will delegate to the DPP the authority to handle the matter (including the consideration of and decision as to whether any prosecution action is warranted). Moreover, should it transpire subsequently that the handling of any such legal proceedings or prosecutorial matters may give rise to any conflict of interest, actual or potential on the part of the legal officers who had been so delegated, the delegation given will be reviewed. Depending upon the facts of each individual case, independent advice from outside counsel may also be sought. This practice has been consistently applied.

In a number of cases in recent years where there was such delegation (or a withdrawal of such delegation), the Administration would, as appropriate in the circumstances of the case, issue statements as to the arrangement at appropriate juncture. According to our records, in the 5-year period from 2013 to 2017, the number of occasions on which the former SJ delegated the exercise of certain functions to other legal officers within DoJ regarding cases with actual or potential conflict of interest, are 10 times, 11 times, four times, five times and nine times respectively. Apart from one occasion each in 2013, 2015 and 2016, and two occasions in 2017 involving civil proceedings, all other delegations related to criminal prosecution work.

The abovementioned system has worked well in the past and will continue to do so. The making of prosecutorial decisions is governed by the Prosecution Code, free from influence from any actual or potential conflict of interest, and where charges are laid, the cases are considered by the Courts. DoJ would continue to review and enhance the declaration and delegation systems in DoJ in respect of actual or potential conflict of interest.

Notwithstanding the above, we are aware that there are suggestions that the SJ should delegate all prosecutorial decisions to the DPP, so as to ensure the independence of such decisions. As I have pointed out just now, decisions to prosecute or not, as the case may be, must be based on an objective and professional assessment of the available evidence and the law and be in accordance with the published Prosecution Code. In making the decisions, it must be free from any political considerations. Currently, the independence of prosecutorial decisions is sufficiently safeguarded by Article 63 of the Basic Law.

Currently no review has been conducted, nor is there any timetable, on the issue of SJ vesting all decisions relating to criminal prosecutions in the DPP. However, DoJ is willing to listen to views that this Council, the legal professional bodies and the public may have. Any future consideration of the matter will be subject to the key principles set out above. In any event, all colleagues within DoJ (including the DPP, officers of the Prosecutions Division and myself) will remain conscious of the importance of prosecutorial independence, a cardinal principle that is stressed in the Prosecution Code. All prosecutorial decisions will continue to be made independently without political or other improper or undue influence.

Thank you, President.

Ends/Wednesday, January 24, 2018