

## LCQ5: Provision of legal services and legal aid to unlawful societies and their members

Following is a question by the Hon Au Nok-hin and a reply by the Acting Chief Secretary for Administration, Mr Wong Kam-sing, in the Legislative Council today (November 28):

Question:

Under Section 8 of the Societies Ordinance, the Secretary for Security may, on the recommendation by the Societies Officer, prohibit the operation or continued operation of any society in Hong Kong (prohibited society) by order published in the Gazette. A prohibited society and its office-bearer(s) or member(s) may appeal to the Chief Executive in Council against the making of the order and may also lodge a judicial review with the court against the outcome of the appeal. In this connection, will the Government inform this Council:

(1) as Section 20(1) of the Societies Ordinance stipulates that any person who gives any aid to an unlawful society shall be guilty of an offence, whether the Government has assessed if a legal practitioner who renders legal service to a prohibited society or its office-bearer(s) or member(s) in respect of an appeal or judicial review lodged by the latter contravenes the said provision; if it has assessed and the outcome is in the affirmative, whether it has assessed if the said provision is in conflict with Article 35 of the Basic Law, which stipulates that Hong Kong residents have the right to access to legal advice and choice of lawyers for representation in the courts, etc; and

(2) whether the Legal Aid Department will, upon receipt of a legal aid application in respect of a judicial review case involving a prohibited society, consider factors other than the "means test" and "merits test"; whether it has assessed if the Director of Legal Aid will contravene Section 20(1) of the Societies Ordinance by granting of legal aid to such type of cases?

Reply:

President,

On September 24, 2018, the Secretary for Security made an order in accordance with Section 8(2) of the Societies Ordinance to prohibit the operation or continued operation of the Hong Kong National Party in Hong Kong. The decision was necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others. The society lodged an appeal to the Chief Executive in Council on October 24. As the appeal proceedings are on-going, the HKSAR Government will

not comment further on the case. I am going to respond to general questions only, and the reply should not be regarded as response to individual cases.

In response to the various questions raised by the Honourable Member, our consolidated reply is as follows.

(1) Section 20(1) of the Societies Ordinance states that "any person who is or acts as a member of an unlawful society or attends a meeting of an unlawful society or who pays money or gives any aid to or for the purposes of an unlawful society shall be guilty of an offence".

The question of the Honourable Member concerns if a lawyer provides legal services to an unlawful society in relation to the statutory appeal process or a judicial review (JR), whether this will be regarded as giving aid for the purposes of an unlawful society, thereby contravening the Societies Ordinance.

Article 35 of the Basic Law stipulates that "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies". Article 10 of the Hong Kong Bill of Rights also stipulates that "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

When a society becomes an unlawful society by virtue of an order made by the Secretary for Security in accordance with Section 8 of the Ordinance, it may appeal to the Chief Executive in Council in accordance with Section 8(7) of the same Ordinance. Section 8(7) provides a statutory channel for appeal. Besides, the society also has the right to seek JR. The society's seeking of legal advice or legal representation in the process of the appeal or JR in principle does not conflict with what is stated in Section 20(1) of the Societies Ordinance.

Furthermore, Article 63 of the Basic Law states that "the Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference". Prosecutors within the Department of Justice always uphold the constitutional duty under the Basic Law in handling all prosecution work in a fair, impartial and open manner. If anyone is suspected of committing a criminal offence, including the criminal offences under the Societies Ordinance, the law enforcement agency will commence investigation of the case and will pass the evidence and information gathered to the Department of Justice. The Department of Justice will, with regard to what has taken place and the case facts and in accordance with the applicable laws, Prosecution Code and evidence, consider whether to make a criminal prosecution. A prosecutor must act in accordance with the guidelines set out in the Prosecution Code in making a decision to prosecute or not to prosecute. The fundamental principle is that unless there is sufficient admissible evidence so that the case has a reasonable prospect of conviction, and that it is in the public interest to prosecute, no prosecution should be

commenced or continued. In the process of discharging its duties, the Department of Justice will ensure that Hong Kong residents enjoy the various rights protected under the Basic Law.

As regards whether individual cases contravene the law, the circumstances of each case are different and cannot be generalised.

(2) The policy objective of legal aid is to ensure that all those who meet the criteria set out in the Legal Aid Ordinance (LAO) (Cap. 91) and have reasonable grounds for pursuing or defending a legal action in the courts of Hong Kong will not be denied access to justice due to a lack of means. To qualify for legal aid, a person, irrespective of residence and nationality, is required to satisfy both the means test and merits test as provided by the LAO.

At present, a person whose financial resources do not exceed \$307,130 is financially eligible for legal aid under the Ordinary Legal Aid Scheme (OLAS), which covers committal proceedings in the Magistrates' Courts, as well as civil and criminal proceedings in the District Court or higher courts. Those with financial resources exceeding the statutory limit of OLAS but are below \$1,535,650 may apply for legal aid under the self-financing Supplementary Legal Aid Scheme.

In conducting the merits test, the Legal Aid Department (LAD) will consider the background, evidence available and legal principles applicable to the case so as to determine whether legal aid should be granted. Before issuing a legal aid certificate, LAD must, in assessing the merits, be satisfied that there are reasonable grounds or points of law involved for which it is desirable to grant legal aid. The criteria for conducting the merits test for legal aid applications involving JR are the same as those for other civil legal aid applications. That is, according to section 10(3) of the LAO, legal aid would only be granted to applicants who can show that their cases have reasonable grounds for conducting JR proceedings.

According to section 26 of the LAO, if an application for legal aid is refused, the applicant may appeal to the Registrar of the High Court whose decision is final.

Regarding the question on whether the Government has assessed if the Director of Legal Aid will contravene section 20(1) of the Societies Ordinance by granting legal aid to an application relating to JR involving a prohibited society, we do not comment on hypothetical questions.