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Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 18 July 2017

The rule of law and the role of the prosecutor

Purpose

This paper provides an account of the past discussions of the Council and Panel on Administration of Justice and Legal Services ("the Panel") on the rule of law and matters relating to prosecution.

Background

The rule of law

2. According to the Administration¹, the rule of law is the cornerstone of Hong Kong's success and is an essential attribute of a modern society. The Basic Law has provided a solid basis for upholding the rule of law in Hong Kong. Fundamental rights, including the rights to freedom of speech, freedom of assembly, freedom of demonstration and access to the courts are guaranteed by the relevant provisions of the Basic Law. The courts of the Hong Kong Special Administrative Region ("HKSAR") are authorized to exercise judicial power independently, free from any interference.

3. The Department of Justice ("DoJ") is committed to doing its utmost to safeguard the rule of law including judicial independence, and to enhance Hong Kong's legal system and legal infrastructure. This is achieved through, among other things, providing a modern first-class prosecution service by seeking to ensure that prosecutions are conducted fairly with professionalism and integrity,

¹ LC Paper No. CB(4)426/16-17(03)

and within the framework of the Prosecution Code, as well as in accordance with Article 63 of the Basic Law².

Prosecution Code

4. The Department of Justice ("DoJ") released the Prosecution Code³ on 7 September 2013, which replaced The Statement of Prosecution Policy and Practice – Code for Prosecutors published in 2009. In the "Introduction" of the Prosecution Code, it is stated that the golden thread that run through the fabric of the Prosecution Code was the importance of upholding the just rule of law by the just application of just laws.

5. Apart from revamping and updating information contained in the previous document, efforts were made to include new sections taking into account the prevailing circumstances in which the prosecutors operate. The new sections include Human Exploitation Cases and Public Order Event. Among others, they will helpfully remind prosecutors of the fundamental principles in accordance with which cases related to public order events should be dealt with through highlighting useful references to the Basic Law and the Hong Kong Bill of Rights as well as landmark court decisions.

The role of the Secretary for Justice ("SJ"), the Director of Public Prosecutions ("DPP") and the Prosecutor

6. According to the Prosecution Code, SJ is responsible for applying the criminal law, formulating prosecution policy, and superintending the DPP and prosecutors in the Prosecutions Division ("PD") of the Department. SJ is accountable for decisions made by prosecutors, to whom various powers are delegated.

7. DPP is responsible to SJ for: (a) directing public prosecutions; (b) advising SJ on criminal law related matters, except in specific matters in which SJ has authorized the DPP to determine the matter on his or her own; (c) advising law enforcement agencies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution; (d) developing and promoting prosecution policy; and (e) advising the government on the development, enforcement and implementation of the criminal law.

² Article 63 of the Basic Law reads: "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference."

³ The Prosecution Code is available at the DoJ's website: <http://www.doj.gov.hk/eng/public/pubsoppaptoc.html>

8. According to the Administration, prosecutor is required to comply with and promote the rule of law. A prosecutor acts on behalf of the community in an impartial manner and as a "minister of justice". To this end, a prosecutor must fairly and objectively assist the court to arrive at the truth and to do justice between the community and the accused according to law. The roles and functions of the prosecutor are set out under section 3 of the Prosecution Code.

Past discussions at the Panel and the Council

9. During the discussion of the Chief Executive's Policy Addresses in 2014, 2015, 2016 and 2017 and at the Panel meetings held on 28 January 2014, 26 January 2015, 25 January 2016 and 23 January 2017 respectively, members had raised issues and concern relating to the rule of law and prosecution matters. A number of questions had also been raised at the Council meetings since 2014 on the subjects. Deliberations on the subjects are summarized in the ensuing paragraphs.

Prosecution policy

10. During the Panel meeting held on 28 January 2014, two members urged for greater transparency in the prosecutions policy by making public the justifications for prosecution or not to prosecute.

11. The Administration advised that DoJ was committed to operating in an open and accountable fashion, with as much transparency as was consistent with the interests of public justice. The Administration further advised that section 23 of the Prosecutions Code had set out the publication of reasons to prosecute or not to prosecute. The main reason for the PD of DoJ not publicizing the reasons to prosecute was because to do so would prejudice the case. For cases which the PD decided not to prosecute, the main reason for not publicizing the reasons for the decision was because to do so would infringe the privacy of the alleged persons.

12. During the Panel meeting held on 26 January 2015, a member noted that DoJ had added a Public Order Events section, i.e. section 19, to its latest revised Prosecution Code released in September 2013. The section stated that as there were provisions in the Basic Law guaranteeing Hong Kong residents freedoms in respect of speech, association, assembly, procession and demonstration, etc., "[o]ffences alleged to have been committed in conjunction with the exercise of these constitutionally guaranteed freedoms may give rise to special considerations". The member hoped that prosecutors would not decide not to prosecute persons who had participated in the Occupy Central Movement, having regard to section 19 of the Prosecution Code.

13. The Administration advised the considerations for whether to prosecute⁴ an alleged breach of criminal during a public order event would be the same as other criminal cases, i.e. whether there was sufficient evidence in support of the charge and whether it was in public interest to prosecute. The new section on Public Order Events⁵ only served to remind prosecutors of the basic legal principles applicable to the handling of cases concerning public order events in that prosecutors should strike an appropriate balance between the interest of society and maintaining public order on the one hand and the right of individuals to lawfully and peacefully exercise their constitutionally guaranteed freedoms on the other in handling cases involving public order events.

14. Noting the above mentioned newly added section 19, another member raised a question at the Council meeting of 5 November 2014 on whether DoJ had issued to prosecutors specific working guidelines on how they should make the special considerations, and what measures it had put in place to ensure that making the special considerations will not complicate and lengthen the prosecution procedures.

15. The Administration advised that the Prosecution Code did not prescribe any special procedures to be followed before the prosecution of cases involving public order events can be commenced. The new Prosecution Code did not complicate or lengthen the prosecution procedures. Nor was there any need for more specific working guidelines for prosecutors in the handling of these cases.

16. At the Council meeting held on 13 May 2015 a member sought clarification as to whether the Police would seek, as a general practice, the advice of the DoJ before deciding if prosecution was to be instituted against persons involved in public processions and assemblies; if they did, what were the details of the relevant guidelines and procedures.

17. The Administration advised that, according to Police's internal guidelines, generally speaking, the Police would seek legal advice from the DoJ before making prosecutions against persons arrested in relation to public order events. The Police would also follow up on DoJ's advice. Such guidelines were internal

⁴ According to paragraph 5.3 of the Prosecution Code, the decision to prosecute includes two components. The first is that the admissible evidence is sufficient to justify instituting and continuing proceedings. The second is that the general public interest must require that the prosecution be conducted.

⁵ In the section on Public Order Events, it makes references to the Basic Law, the Hong Kong Bill of Rights and landmark court decisions, including the judgment delivered by the Court of Final Appeal in *Yeung May-wan v HKSAR* (2005) 8 HKCFAR 137, so as to remind prosecutors of the well established legal principles applicable to the handling of cases related to public order events.

documents of the Police and covered how the Police investigate and handle cases and hence the Administration considered it inappropriate to disclose the guidelines.

Arrest and prosecution in relation to Occupy Central Movement

18. At the Council meeting held on 8 February 2017, a member stated that there had been public comments that the prosecution work in relation to Occupy Central Movement carried out by DoJ had been progressing slowly, and the relevant prosecution and conviction rates were also rather low. At the Panel meeting held on 23 January 2017, the member also raised the concern over the small number of prosecution processed out of the large number of the large number of persons arrested.

19. The Administration pointed out that the comparison of the number of persons who were arrested, prosecuted, convicted or bound over provided no reference value or might even lead to misunderstanding. This was because, under the legal system of Hong Kong, different standards were adopted when the Police effect arrested, when DoJ decided on whether prosecution should be commenced, and when the Court decided on the criminal responsibilities of the defendants. Police officers were entitled to effect arrest of the person concerned if they had reasonable suspicion; while DoJ made prosecution decisions in accordance with the principles set out in the Prosecution Code. Unless there was sufficient admissible evidence so that the case had a reasonable prospect of conviction, and that it was in the public interest to prosecute, no prosecution should be commenced. Judges, on the other hand, would only convict if the offence was proved beyond reasonable doubt.

Progress of the prosecution work in relation to Occupy Central Movement

20. At the Panel meetings held on 26 January 2015, 25 January 2016 and 23 January 2017 as well as the Council meeting held on 8 February 2017, a few members expressed concern about the progress of the prosecution work in relation to Occupy Central Movement. A member urged the DoJ not to let go of persons arrested for participating in the Occupy Central Movement lightly because of the large number of these persons involved and that some of them were famous personalities, legal practitioners and Members of the Legislative Council ("LegCo") at the meeting on 26 January 2015.

21. In response to the query of a member at the Panel meeting held on 23 January 2017, the Administration advised that given the scale and uniqueness of the Occupy Central Movement, the Administration had to be very cautious in making prosecution decisions and thus the time taken for the related process had been longer than that taken for a normal case. To illustrate the heavy workload of

DoJ in this case, the Administration advised that the data, information or documents that had been processed included 335 investigation reports received from the Police, 300 witness statements, 130-hour video recording and about 80 items of non-video exhibits.

22. In its reply to the Council question raised on 8 February 2017, the Administration advised that DoJ had provided further detailed written legal advice to the Police at the end of 2016, in respect of 287 other arrested⁶, after reviewing the aforesaid data information or documents. The relevant criminal procedures were still on-going.

Impact of the Occupy Central Movement on the rule of law

23. At the Council meeting held on 26 November 2014, a member pointed out that some members of the public had raised the concern that the remarks about rule of law made by some politicians with legal background who were supporters of the illegal road occupation movement had misled the public. In this connection, the member asked whether the Administration had studied the impact of the aforesaid remarks on the proper understanding of the public about the concept of the rule of law. At the Council meeting 6 May 2015, another member raised a similar question. A member opined that the Occupy Central Movement had brought blatant challenge to the rule of law.

24. The Administration pointed out that since the Occupy Central Movement had begun, different members of the community have made remarks concerning the rule of law, some of which have distorted the spirit of the rule of law and might have a negative impact on the citizens, including young people. The Administration further pointed out that on 10 November 2014, the Honourable Mr Justice Au of the Court of First Instance of the High Court ruled on the applications for interim injunction concerning the Occupy Central Movement. The relevant judgment contained a clear exposition of the concept of the rule of law⁷. The Administration welcomed the courts' exposition of the

⁶ From around December 2014, the PD started to communicate or have work meetings with the Police. During the Occupy Central Movement in 2014, a total of 955 persons were arrested by the Police for various alleged offences, and another 48 persons were arrested by the Police after the incident. As at January 31, 2017, a total of 216 arrestees had undergone or were undergoing judicial proceedings. Amongst them, 123 persons have to bear legal consequences (i.e. 81 who were convicted and 42 who were bound over). The data information and/or documents in respect of 287 other arrested persons were submitted by the Police as at August 2016.

⁷ The key points of the judgment are set out in the Administration's replies to the questions raised at the meetings held on 26 November 2014 and 6 May 2015:
<http://www.info.gov.hk/gia/general/201411/26/P201411260507.htm>
<http://www.info.gov.hk/gia/general/201505/06/P201505060344.htm>

concept of the rule of law. While respecting citizens' rights of peaceful expression of views, the Administration had been advising citizens to abide by the laws of Hong Kong and court orders and respect others' rights when expressing their aspirations. They were also advised to express their views in a rational, peaceful and law abiding manner, or else there would be profound negative impact on Hong Kong.

Rule of law and judicial independence

25. At the Panel meeting held on 23 January 2017, a member expressed that "equality before the law" was an important foundation for preserving rule of law and that judges at all levels of courts in Hong Kong, in making their decisions, should ensure that the law was equally applied. In this regard, the member enquired whether the DoJ would review the sentences handed down by the court of the recent violent public disturbance cases which were seen to be light or inadequate punishments.

26. The Administration pointed out that one should not simply judge the outcome of a judicial decision against one's political belief. It was also not appropriate to criticize a judge's ruling merely based on the magnitudes of penalties. Instead, the focus should be on the reasons as set out in the judgments, such as the supporting evidence and the precedents. The Administration stressed that judges would only consider the legal questions before them, and the court had made it clear that any attempt to advance one's political cause through violence or any other illegal means would not be tolerated.

Interpretation and promotion of the Basic Law

27. At the Panel meeting held on 23 January 2017, some members opined that recent interpretation of the Basic law by the Standing Committee of the National People's Congress ("NPCSC") was contrary to the rule of law and that this act had a negative impact on judicial independence of the HKSAR. The member also opined that the recent case, involving the examination of the LegCo President's decision, was unprecedented and had intervened the "internal business" of LegCo according to the doctrine of separation of power.

28. The Administration stressed that under the Basic Law, the NPCSC was vested with power to interpret legislation, including the provisions of Basic Law. Under the constitutional framework of Hong Kong, the Basic Law was supreme and the principle of non-intervention as applied in Hong Kong was necessarily subject to the constitutional requirements of the Basic Law. The Administration supplemented that public interest was one of the important considerations for putting up a judicial review proceeding.

Latest position

29. At the Panel meeting scheduled for 18 July 2017, DoJ will explain to members its standard practice and policy in handling prosecution after a case is submitted to DoJ by the law enforcement agencies after investigation.

Relevant papers

30. A list of the relevant papers is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
12 July 2017

Background brief on the rule of law and the role of prosecutor

List of relevant papers

Meeting	Date	References
Panel on Administration of Justice and Legal Services	28 January 2014 (Item III)	<u>Agenda</u> <u>Minutes</u>
	26 January 2015 (Item III)	<u>Agenda</u> <u>Minutes</u>
	25 January 2016 (Item III)	<u>Agenda</u> <u>Minutes</u>
	23 January 2017 (Item III)	<u>Agenda</u> <u>Minutes</u>
Council meeting	5 November 2014	<u>Administration's reply to an oral question raised by Hon Dr Elizabeth QUAT (Question 5)</u>
	26 November 2014	<u>Administration's reply to an oral question raised by Hon TAM Yiu-chung (Question 4)</u>
	6 May 2015	<u>Administration's reply to an oral question raised by Hon WONG Ting-kwong (Question 8)</u>
	13 May 2015	<u>Administration's reply to an oral question raised by Hon Kenneth LEUNG (Question 5)</u>

Meeting	Date	References
	16 December 2015	<u>Administration's reply to an oral question raised by Hon LEUNG Yiu-chung (Question 3)</u>
	8 February 2017	<u>Administration's reply to an oral question raised by Hon Dr Junius HO (Question 4)</u>

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