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**Panel on Administration of Justice and Legal Services**

**Meeting on 28 January 2019**

**Background brief on  
prosecution policy of the Department of Justice**

**Purpose**

This paper provides background information on the prosecution policy of the Department of Justice ("DoJ"). It also summarizes the major views and concerns expressed by Members of the Legislative Council ("LegCo") regarding this and related matters during meetings of the Panel of Administration of Justice and Legal Services ("the Panel") and Council meetings.

**Background**

2. According to the Administration, the criminal justice system underpins the rule of law in Hong Kong and is one of the most important aspects of the Hong Kong legal system. DoJ has made constant endeavours to put in place a robust criminal justice system that is both transparent and fair, and strived to strike the right balance between the respect for human rights on the one hand and the protection of the public from criminal activities on the other.

Department of Justice and prosecutorial independence

3. Article 63 of the Basic Law ("BL 63") provides that "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference." The Administration emphasized that prosecutorial independence is an important element in the foundation of the rule of law and BL 63 provides the constitutional guarantee which ensures that prosecutors within DoJ can act independently in accordance with the law and

standard practices and policies of DoJ in handling prosecution, without being influenced by any other considerations.

4. The Secretary for Justice ("SJ"), as head of DoJ, is responsible for applying the criminal law, formulating prosecution policy, and superintending the Director of Public Prosecutions ("DPP") and prosecutors in the Prosecutions Division of DoJ. SJ is accountable for decisions made by prosecutors, to whom various powers are delegated. DPP is responsible to SJ for directing public prosecutions; advising SJ on criminal law related matters, except in specific matters in which SJ has authorized DPP to determine the matter on his or her own; advising law enforcement agencies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution; developing and promoting prosecution policy; and advising the Government on the development, enforcement and implementation of the criminal law.

#### Prosecution policy and the Prosecution Code

5. As advised by the Administration, prosecutors discharge their duties with professionalism, skill and integrity and operate within the framework of defined and transparent prosecution policy guidelines as set out in its Prosecution Code.<sup>1</sup> The purpose of the Prosecution Code, according to DoJ, was to provide a code of conduct for prosecutors and to promote fair, just and consistent decision-making at all stages of the prosecution process, as well as to make the community aware of how the public prosecutions system operates.

#### Decision to prosecute

6. According to the Administration, prosecution should only be brought when there was cogent and credible evidence in support and a prosecution shall not be commenced or continued unless there was a reasonable prospect of conviction. It further advised that it was not about fear of "losing" a case, it was all about the fundamental concept of fairness that a prosecution not supported by evidence would be an unfair one. Such prosecutions, together with the preparedness to initiate them, eroded the rule of law and led to wastage of public and court resources.

7. The Administration also advised that prosecutors should always act in strict compliance with the Prosecution Code in handling prosecutions and incidental work to ensure that an effective and fair criminal justice system is maintained. Hence, a prosecutor must consider two issues in deciding whether

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<sup>1</sup> The Prosecution Code was published by DoJ in September 2013 to replace The Statement of Prosecution Policy and Practice – Code for Prosecutors published in 2009. The Prosecution Code covers specific offences in the form of dedicated sections. It is available on DoJ's website: <https://www.doj.gov.hk/eng/public/pdf/2014/pdcode1314e.pdf>

to prosecute according to the Prosecution Code. First, there must be legally sufficient evidence to support a prosecution, i.e. evidence that is admissible and reliable and, together with any reasonable inference able to be drawn from it, likely to prove the offence. Second, the general public interest must require that the prosecution be conducted.

### **Major views and concerns expressed by Members**

8. Over the years, Members of LegCo have discussed various issues concerning the prosecution policy of DoJ at meetings of the Council and the Panel. The major views and concerns expressed by Members are summarized in the ensuing paragraphs.

#### Decision not to prosecute

9. From time to time, Members of LegCo have raised concerns about DoJ's decisions of not instituting prosecutions on certain cases of wide public concerns for discussion at Panel meetings or through asking Council questions. Whilst by no means exhaustive, a list of such cases is provided below:<sup>2</sup>

- (a) the case of Ms AW Sian in 1998;<sup>3</sup>
- (b) the case of Mr Antony LEUNG Kam-chung in 2003;<sup>4</sup>
- (c) the case of Mr Michael WONG Kin-chow in 2006;<sup>5</sup>
- (d) two cases concerning family members of the President of the Republic of Zimbabwe in 2009;<sup>6</sup> and
- (e) the case of Mr Timothy TONG Hin-ming in 2016.<sup>7</sup>

10. While each of the above cases was unique in its contents and circumstances, some recurring concerns had been raised by members in considering the cases. One example was the two issues considered by prosecutors in deciding whether to prosecute as mentioned in paragraph 7 above, including the sufficiency of evidences and DoJ's understanding about "public

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<sup>2</sup> For more details about the cases, please refer to the relevant information through the links provided at the footnotes of respective cases

<sup>3</sup> <https://www.info.gov.hk/gia/general/199902/04/0204140.htm>

<sup>4</sup> <https://www.info.gov.hk/gia/general/200312/15/1215115.htm>

<sup>5</sup> <https://www.info.gov.hk/gia/general/200601/25/P200601250105.htm>

<sup>6</sup> <https://www.info.gov.hk/gia/general/200903/30/P200903300206.htm>

<sup>7</sup> <https://www.info.gov.hk/gia/general/201601/27/P201601270569.htm>

interest". Another regular concern was whether outside legal advice had been sought in reaching DoJ's decisions, as detailed in paragraph 14 below.

11. At the Panel meeting on 26 February 2018, a Panel member expressed concerns about DoJ's decision of not instituting prosecution against Mr Jimmy LAI and six persons alleged to be involved in a case of suspected illegal offer and acceptance of political donations ("Donation Case"). He requested that DoJ be invited to the Panel to explain in details the reasons for its decision. Other members agreed that DoJ should explain to the Panel in details about those non-prosecution cases of wide public concerns.

12. At the Panel meeting on 19 December 2018, some members expressed grave concerns about DoJ's decisions of not instituting prosecution against Mr LEUNG Chun-ying and a Member arising from 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, and suspected interference by Mr LEUNG and the 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 ("UGL Case").

13. In responding to an oral question raised at the Council meeting of 16 January 2019 regarding the making of prosecution decisions by DoJ, SJ said that decisions to prosecute or not, as the case might be, must be based on an objective and professional assessment of the available evidence and the law, and be in accordance with the Prosecution Code. The factors and the test to be considered in making a decision to prosecute were set out in the Prosecution Code, according to which the prosecution must consider whether there was sufficient evidence to institute a prosecution, and the test was whether the evidence was sufficient to demonstrate a reasonable prospect of conviction. If there was sufficient evidence to initiate a prosecution, the prosecution would then consider whether it was in the public interest to do so.

#### Seeking outside legal advice before making prosecution decisions

14. As mentioned above, a recurring theme of members' concerns regarding DoJ's decisions not to prosecute was whether DoJ had sought outside legal advice before making the decision, and the rationale if it had not done so. When the Panel discussed the briefing out of criminal and civil cases by DoJ on 26 February 2018, in response to a member's enquiry, the Administration advised that DoJ had not sought external legal advice in deciding not to prosecute in the Donation Case. It further advised that, in general, DoJ might resort to briefing out when:

- (a) there is a need for expert assistance where the requisite skill is not available in DoJ;
- (b) there is no suitable in-house counsel to appear in court for the Hong Kong Special Administrative Region;
- (c) the size, complexity, quantum and length of a case so dictate;
- (d) 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;
- (e) there is a need for continuity and economy, e.g. where a former member of DoJ who is uniquely familiar with the subject matter is in private practice at the time when legal services are required, or where it will be economical and in the interest of justice to engage the fiat trial counsel to conduct the relevant appeal; and
- (f) there is a need for advice or proceedings involving members of DoJ.

15. In its reply to an oral question at the Council meeting of 16 January 2019, the Administration advised that the briefing out of criminal cases had two parts, which were before prosecutorial decision was made and after prosecution. Regarding the former one, it was a norm of DoJ to make prosecutorial decision by members of DoJ. However, when a case involved member(s) of DoJ, it was appropriate to brief out the case for legal advice. It recapitulated that, depending on the need of the case, DoJ might resort to briefing out when the circumstances in paragraph 14 (a) to (f) applied.

16. The Administration also highlighted in its reply that, of the 13 000 items of legal advice provided by the Prosecutions Division of DoJ per year, the numbers of prosecution 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 (save for those involving member(s) of DoJ). On that basis, it was not a norm of DoJ to brief out cases for legal advice, and DoJ had made prosecutorial decisions without seeking outside legal advice in a great majority of cases. The Administration also stressed that whether it was a case with sensitivity or not was never a guideline for mandatory briefing out.

17. On the other hand, some members considered that the decision of whether to institute prosecution, in particular over significant and controversial cases, should be made by DoJ rather than outside counsel. In response, DPP stressed that even if outside legal advice was sought, the prosecution decision would be made by DoJ according to BL 63.

### Prosecutorial independence

18. Some members relayed the worries expressed by members of the public that the decision of initiating criminal prosecutions was subject to political considerations. They asked whether the Administration would consider reviewing the practice of making the prosecution decisions by SJ on his or her own and transferring all or part of this power to DPP, who was not a politically appointed official. However, some members were opposed to the above suggestion as they considered that SJ, being the head of DoJ, could not abdicate from his/her constitutional duty by transferring all his/her prosecution responsibilities to DPP.

19. According to the Administration, that the prosecution decision-making process was subject to political considerations was a matter of perception which could be dealt with by putting in place some objective measures. While the Administration would keep an open mind to reviewing the present arrangement for making the prosecution decision, any review or reform had to comply with the Basic Law, including BL 63. Furthermore, all prosecutors within DoJ would remain conscious of the importance of prosecutorial independence, a cardinal principle emphasized in the Prosecution Code, and all prosecutorial decisions would continue to be made independently without political or other improper or undue influence.

20. At the Council meeting of 24 January 2018, a Member enquired about the respective mechanisms currently in place for ensuring that the work of DoJ relating to criminal prosecutions would be free from any interference, and for handling the situation that role conflicts had arisen between the exercise of criminal prosecution function by SJ and his/her exercise of other functions or his/her personal affairs.

21. In its reply, the Administration advised that there were appropriate checks and accountability mechanisms in place to ensure free and independent control of prosecutions in Hong Kong. In general, in circumstances where there was any actual or potential conflict of interest on his or her part, SJ, after satisfying himself or herself that DPP had no connection with any of the persons or events concerned, would delegate to DPP the authority to handle the matter (including the consideration of and decision as to whether any prosecution action was warranted). Moreover, should it transpire subsequently that the handling of any such legal proceedings or prosecutorial matters might 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 would be reviewed. Depending upon the facts of each individual case, independent outside legal advice might also be sought.

### Slow progress in making decisions to prosecute

22. From time to time, Members of LegCo raised concerns about the slow progress of DoJ in deciding whether or not to prosecute cases of wide public concerns, such as the cases relating to the individual participants in the Occupy Central Movement ("OCM") arrested by the Police, the seven Police Officers alleged to have assaulted an OCM activist,<sup>8</sup> etc.

23. In response to members' concerns, the Administration advised that the time required to process a case from commencement of investigation to institution of prosecution depended on a number of factors, including the nature and complexity of the case, the quantity of evidence to be handled, duration for seeking legal advice and whether further follow-up was necessary pursuant to the legal advice, etc. Since the evidence and the law involved in and the level of complexity of each case differed, the processing time each required might also vary.

### Transparency in making public the details about prosecution decisions

24. Some members urged the Administration to consider disclosing detailed rationale (with sensitive information redacted if necessary) of not instituting prosecution of cases of wide public concerns or involving important personalities. Some members, however, considered that the established policy in Hong Kong that detailed reasons for prosecution decisions not being disclosed (but the relevant criteria, namely whether there was sufficient evidence to prosecute and, if so, whether it was in the public interest to prosecute) was working well and should be maintained.

25. The Administration advised that section 23 of the Prosecution Code had set out guidelines on publication of reasons to prosecute or not to prosecute. DoJ was committed to operating in an open and accountable fashion, with as much transparency as was consistent with the interests of public justice. In this regard, DoJ would normally explain the reasons for not instituting prosecution in respect of cases of wide public concerns. If outside legal advice had been obtained, DoJ would also state so. The main reason for DoJ not publicizing the reasons for such cases was because to do so would infringe the privacy of the alleged persons. The Administration added that whether more information regarding cases of wide public interest could be disclosed would depend on the circumstances of individual cases, but DoJ would try its best to consider the viability of disclosing more information in the future.

26. In reply to the question raised at the Council meeting of 16 January 2019 regarding the evidence on which DoJ's decision not to prosecute Mr LEUNG

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<sup>8</sup> <https://www.info.gov.hk/gia/general/201510/15/P201510150854.htm>

Chun-ying was based in the case as mentioned in paragraph 12 above, the Administration emphasized that according to the Prosecution Code, there were circumstances (e.g. due to legal professional privilege or personal privacy concern, etc.) in which the giving of reasons might be contrary to the public interest or otherwise inappropriate. It pointed out that particular note should be taken of the situation in which the giving of reasons "may adversely affect the administration of justice (especially in the case of a decision of not to prosecute where public discussion may amount to a public trial without the safeguards of the criminal justice process).

### **Relevant questions raised at Council meetings**

27. During the Sixth Legislative Council, Members raised a total of five questions relating to the prosecution policy. The hyperlinks to these questions and the Administration's response, together with other relevant papers, are given in the **Appendix**.

### **Latest position**

28. Pursuant to members' views expressed at the Panel meeting on 19 December 2018 regarding the joint letter from Hon James TO, Hon LAM Cheuk-ting and Hon HUI Chi-fung on DoJ's decision of the UGL Case (LC Paper No. CB(4)337/18-19(01)) as well as members' views on prosecution policy expressed at other Panel meetings, in particular the meeting on 26 February 2018 regarding the letter from Dr Hon Junius HO (LC Paper No. CB(4)661/17-18(01)) on the Donation Case, SJ and DPP have been invited to brief members on the prosecution policy of DoJ at the Panel meeting scheduled for 28 January 2019.



**Background brief on  
prosecution policy of the Department of Justice**

**List of relevant papers**

Meeting	Date	References
Panel on Administration of Justice and Legal Services	27 June 2011 (Item III)	<a href="#">Agenda</a>  <a href="#">Minutes</a>
	23 January 2017 (Item III)	<a href="#">Agenda</a>  <a href="#">Minutes</a>
	18 July 2017 (Item V)	<a href="#">Agenda</a>  <a href="#">Minutes</a>
	30 October 2017 (Item IV)	<a href="#">Agenda</a>  <a href="#">Minutes</a>
	26 February 2018 (Item III)	<a href="#">Agenda</a>  <a href="#">Minutes</a>
Council meeting	8 February 2017	<a href="#">Administration's reply to a question raised by Hon Dr Junius HO (Question 4)</a>
	24 January 2018	<a href="#">Administration's reply to a question raised by Hon Kenneth LEUNG (Question 6)</a>

Meeting	Date	References
	7 February 2018	<a href="#"><u>Administration's reply to a question raised by Hon WONG Ting-kwong (Question 3)</u></a>
	11 July 2018	<a href="#"><u>Administration's reply to a question raised by Hon HO Kai-ming (Question 22)</u></a>
	16 January 2019	<a href="#"><u>Administration's reply to a question raised by Hon CHU Hoi-dick (Question 1)</u></a>

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