

LCQ1: The making of prosecution decisions by Department of Justice

Following is a question by the Hon Chu Hoi-dick and a reply by the Secretary for Justice, Ms Teresa Cheng, SC, in the Legislative Council today (January 16):

Question:

Earlier on, the Independent Commission Against Corruption completed an investigation into the case concerning Mr Leung Chun-ying, the Chief Executive of the last term, entering into an agreement with UGL Limited and receiving payments from the company during his term of office. The Department of Justice (DoJ) issued a statement last month, stating that after having carefully considered the investigation reports and relevant materials, it considered that there was insufficient evidence to institute prosecution against Mr Leung. Before making the decision, the DoJ had not sought legal advice from outside counsel, which was at variance with the practices previously adopted by the DoJ for handling the cases concerning the then or former senior public officers such as Mr Antony Leung, Mr Rafael Hui, Mr Franklin Lam, Mr Donald Tsang and Mr Timothy Tong. This has aroused criticisms from some members of the public. In this connection, will the Government inform this Council:

(1) as the DoJ pointed out in the aforesaid statement that "... Mr Leung's acts in negotiating the takeover with UGL were congruent with the interests of DTZ", whether the facts based on which the DoJ arrived at such conclusion included DTZ's written advice stating that its interests had not been undermined;

(2) as the DoJ pointed out in three statements it issued in 2012 and 2013 that if there were sensitivities with regard to

a particular case, legal advice from outside counsel would be sought before making a prosecution decision, whether the incumbent Secretary for Justice (SJ) has revised such practice since she took office; if so, of the details and reasons for that; if not, why SJ, when responding to media enquiries, remarked that "we shall not brief out any case unless it involves a member of the DoJ"; and

(3) given that "the decision not to prosecute" made by the DoJ has aroused criticisms and queries from some members of the public (including whether the decision was related to Mr Leung's position as a state leader), whether the DoJ will expeditiously seek legal advice from outside counsel and then review "the decision not to prosecute"?

Reply:

President,

Article 63 of the Basic Law provides that the Department of Justice (DoJ) of the Hong Kong Special Administrative Region (HKSAR) Government "shall control criminal prosecutions, free from any interference".

That Basic Law's guarantee of independence ensures that prosecutors within the Department may act independently without political or other improper or undue influence. As the head of the DoJ, I have a constitutional duty and responsibility to make decisions and supervise the conduct of criminal prosecutions.

The Prosecution Code published by the DoJ elaborates on the independence and role of the prosecutor.

Paragraph 1.1 stipulates that "a prosecutor is required to act in the general public interest, but independently as a 'minister of justice'. In making decisions and exercising discretion, a prosecutor must act fairly and dispassionately

on the basis of the law, the facts provable by the admissible evidence, other relevant information known to the prosecution and any applicable policy or guidelines."

Paragraph 1.2 stipulates that "a prosecutor must not be influenced by:

- (a) any investigatory, political, media, community or individual interest or representation;
- (d) the possible political effect on the government, any political party, any group or individual; and
- (e) possible media or public reaction to the decision."

The legal discussions within the DoJ are always conducted with professionalism, without fear or favour, absolutely free from political or other irrelevant considerations, and the details of the discussions needs to be kept in confidence.

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 Prosecution Code. The factors and the test to be considered in making a decision to prosecute are set out in Chapter 5 of the Prosecution Code. According to paragraphs 5.3 to 5.5 of the Prosecution Code, the prosecution must consider whether there is sufficient evidence to institute a prosecution, and the test is whether the evidence is sufficient to demonstrate a reasonable prospect of conviction; if there is sufficient evidence to initiate a prosecution, the prosecution will then consider whether it is in the public interest to do so.

Concerning the case raised in the question, the DoJ issued a statement on December 12, 2018, stating that there was insufficient evidence to institute prosecution after careful consideration of the investigation reports and the relevant materials submitted by the Independent

Commission Against Corruption. Similarly, the decision was made according to the above principle and free from the influence of the identity of the persons involved or political factors.

(1) The question touches upon the details of the case. I cannot talk about the case. Also, considering that the case is now under judicial review proceedings, I shall not and cannot comment on or add anything regarding the details of such decision. I would like to emphasise that according to paragraph 23.4 of the Prosecution Code, there are circumstances (e.g. due to legal professional privilege or personal privacy concern etc.) in which the giving of reasons may be contrary to the public interest or otherwise inappropriate. Particular note should be taken of sub-paragraph (c), which stipulates that the giving of reasons "may adversely affect the administration of justice (especially in the case of a decision not to prosecute where public discussion may amount to a public trial without the safeguards of the criminal justice process)".

(2) The briefing out of criminal cases has two parts, which are before prosecutorial decision is made and after prosecution. Regarding the former one, it is a norm of the DoJ to make prosecutorial decision by members of the DoJ. When a case involves member(s) of the DoJ, it is appropriate to brief out the case for legal advice. Further, depending on the need of the case, the DoJ, as it previously mentioned to this Council, may resort to briefing out when:

(a) there is a need for expert assistance where the requisite skill is not available in the DoJ;

(b) there is no suitable in-house counsel to appear in court for the HKSAR;

(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; and
(f) there is a need for advice or proceedings involving
members of the DoJ.

The question refers to three statements issued by the DoJ in 2012 and 2013 regarding cases with sensitivities. According to our record, prosecutorial decisions were made in respect of two of the cases without seeking outside legal advice. It can therefore be seen that whether it is a case with sensitivity or not is never a guideline for mandatory briefing out.

It is not a norm of the DoJ to brief out cases for legal advice. Over the past three years, the Prosecutions Division of the DoJ provided an average of over 13 000 items of legal advice per year. Save for those involving member(s) of the DoJ, the numbers of 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. It is evident that the DoJ has made prosecutorial decisions without seeking outside legal advice in a great majority of cases.

(3) The DoJ bases its prosecutorial decision entirely on evidence, the Prosecution Code as well as applicable laws. The prosecutorial decision has been made. If there is reason such as the law enforcement agency discovers new evidence and considers that it is necessary to seek the DoJ's legal advice again, we will handle the case.

Thank you, President.

Ends/Wednesday, January 16, 2019