

LCQ 5: Prosecution matters involving public order events

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Following is a question by Dr the Hon Elizabeth Quat and a reply by the Secretary for Justice, Mr Rimsky Yuen, SC, in the Legislative Council today (November 5):

Question:

The Department of Justice (DoJ) added a Public Order Events section to its newly revised Prosecution Code (the new Code) released in September last year to provide guidelines and pointers to prosecutors. The section states that as there are 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" (special considerations). I have learnt that regarding this type of cases, the Police need to await DoJ's consent before they may institute prosecutions even if they have got sufficient evidence. In this connection, will the Government inform this Council:

(1) whether DoJ has issued to the prosecutors specific working guidelines on how they should make the special considerations, and what measures it has put in place to ensure that making the special considerations will not complicate and lengthen the prosecution procedures;

(2) of the total number of cases involving public order events handled by DoJ since the issuance of the new Code and, among such cases, the respective numbers of those for which prosecutions have been and have yet to be instituted; the average time taken by the authorities for making prosecution decisions for such cases, and how it compares with the time taken for other cases in which the Police may institute prosecutions directly; and

(3) given comments that despite a number of people having been arrested at the assembly venues of the recent occupation movement for alleged breaches of the law, the authorities have not, after a long time, instituted prosecutions against such people because the Police have to gather substantial evidence for such cases to enable prosecutors to make the special considerations, resulting in the public misunderstanding that persons breaching the law at the assembly venues will neither be prosecuted nor incur criminal liabilities, of DoJ's remedial measures to clear such public misunderstanding?

Reply:

President,

Article 63 of the Basic Law of the Hong Kong Special Administrative Region (HKSAR) provides that the Department of Justice (DoJ) shall control criminal prosecutions, free from any interference. The DoJ has always been controlling criminal prosecutions on behalf of the HKSAR on that basis so as to ensure that justice is done. A decision on whether to prosecute any individual or organisation is just as important for the suspect and the victim as it is for the community as a whole. Hence, with public interest in mind, prosecutors must act without fear or favour, and in accordance with the relevant law and evidence. The DoJ will treat all implicated parties equally and in accordance with the law, irrespective of their background, identity and social status.

Prosecution should only be brought when there is cogent and credible evidence in support. According to paragraph 5.3 of the current Prosecution Code, when considering whether to prosecute, prosecutors must first consider whether there is sufficient evidence. If so satisfied, prosecutors should next consider and balance all issues of public interest. A prosecution shall not be commenced or continued unless there is a reasonable prospect of conviction. A prosecution which

is not supported by evidence will not only be unfair to the defendant(s), but will also lead to a waste of court resources. Prosecutors have always acted in strict compliance with the Prosecution Code in handling prosecutions and incidental works to ensure that an effective and fair criminal justice system is maintained.

All prosecution decisions are made in accordance with the law, the Prosecution Code and the evidence, totally free from any political, media or public pressure. In considering whether or not to prosecute an alleged breach of criminal law during a public order event, the DoJ will adopt the same principles as those adopted when handling other criminal cases, i.e. to consider whether there is sufficient evidence in support of the charge, and whether it is in the public interest to prosecute.

The DoJ's reply to the three-part question raised by Dr the Hon Elizabeth Quat is as follows:

(1) Taking into account the circumstances in which prosecutors operate and operational need, the DoJ published the latest Prosecution Code in September last year. The Prosecution Code covers specific offences in the form of dedicated sections. 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.

The Prosecution Code also reminds prosecutors that offences alleged to have been committed in conjunction with the exercise of constitutionally guaranteed freedoms may give rise to special considerations. The purpose is to ensure that in handling such cases, prosecutors will 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 fact, prosecutors have all along made references to the relevant statutory provisions, judgments and principles involved when handling cases involving public order events. It should be pointed out that the Prosecution Code does not prescribe any special procedures to be followed before the prosecution of cases involving public order events can be commenced. The new Prosecution Code does not complicate or lengthen the prosecution procedures. Nor is there any need for more specific working guidelines for prosecutors in the handling of these cases.

(2) The Prosecution Code took effect on September 7, 2013. The DoJ has not, whether before or after this date, kept figures about the number of legal advices rendered in relation to public order events or the number of cases involved, or any breakdown as to the number which have recommended prosecution and the number which have yet to. We also have not maintained statistics on the average time taken for making prosecution decisions for such cases.

Based on the figures on prosecutions involving public order events maintained by the Police, for the period between September 2013 and June 2014, the number of public order events is 5,529. As at 8 September 2014, the number of public order events involving prosecutions is 12, and the number of protestors prosecuted is 16.

(3) As I have pointed out in part (1) of the reply, the section on Public Order Events added to the latest edition of the Prosecution Code only serves to remind prosecutors of the basic legal principles applicable to the handling of cases concerning public order events. Hence, there is no question of imposing new requirements on the gathering of evidence by law enforcement agencies, nor resulting in any more time spent

by the Police in gathering evidence or delaying the decision to institute prosecution. The DoJ will at all times seek to provide legal advice to law enforcement agencies including the Police as expeditiously as possible, and the actual time that it takes to provide legal advice on each case depends on various factors, including mainly the nature and complexity of the case. Among cases submitted to the DoJ for legal advice, the number of suspects and the complexity of the cases may also vary. The responsible prosecutor may require more time to go through the evidence, analyse the facts of the case, and, where necessary, advise on the appropriate manner to handle the case.

In order to achieve better efficiency in the handling of cases concerning public order events and with a view to ensuring consistency of approach as far as possible, the DoJ has set up a small dedicated team of prosecutors within the Prosecutions Division to handle such cases, so that professional legal advice can be provided to the Police as expeditiously as possible so as to enable early referral of cases which merit prosecution to the courts for adjudication.

Lastly, I hope to take this opportunity to emphasise that the DoJ will continue to maintain communication with the Police in respect of any illegal acts involved in the "Occupy Central" activities, and will handle relevant prosecution work in a timely manner.

Ends/Wednesday, November 5, 2014