

Secretary for Justice on Prosecution Principles and Policies

Following is the speaking note by the Secretary for Justice, Mr Wong Yan Lung, SC, on the Principles and Policies relating to Prosecution Decisions at the Legco Panel on Administration of Justice and Legal Services meeting today (February 3): (English translation)

Madam Chair,

Thank you for inviting my colleagues and me to this meeting to explain the decision not to prosecute Mr Michael Wong Kin-chow.

Before we discuss that particular case, it is important that I explain well established principles and policies relating to prosecution decisions. These principles and policies set the parameters within which the Department of Justice can properly account for any particular decision.

Constitutional role

It has been suggested that the Department of Justice is somehow usurping the role of the Court in deciding not to prosecute. This is, with respect, misguided.

Under the common law system, there are well defined and separate roles assigned to the prosecuting authority and the courts. Those roles are part of the constitutional arrangements for ensuring a separation of powers in respect of prosecutions.

The role of the prosecuting authority is to determine whether a person should or should not be prosecuted in respect of an alleged offence. If, and only if, a prosecution is brought, the courts (or the jury) determine whether or not the person is guilty.

These constitutional roles are entrenched in the Basic Law. Article 63 provides that –

'The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.'

The decision of Department of Justice whether to prosecute is quasi-judicial, and involves the making of a professional judgment based upon the prosecutor's expertise in the law.

The decision to prosecute must not be made lightly. There will be grave effects on a person's life if a charge is laid. I have seen cases where the Court eventually ruled there was no case to answer, but the accused's professional and family lives had been completely destroyed over the period of time spent in defending a prosecution.

It is a matter of huge responsibility. It will be abhorrent if my department adopts the attitude that in order to avoid possible criticism, we simply pass a weak or borderline case to the court and let the court acquit in due course.

Investigations

Another separation of functions that exists in Hong Kong is in respect of the investigation of possible offences and the making of prosecution decisions.

In some jurisdictions, the Department or Ministry of Justice is also responsible for investigations of offences. That is not the case in Hong Kong. That responsibility rests in Hong Kong with the law enforcement agencies, which do not operate under my department.

Separation of functions ensures that the prosecutor is able to bring an independent and objective eye to the case prepared by the law enforcement body. He is able to assess the evidence that has been collected by it and to decide whether a prosecution should be brought.

Threshold for prosecuting

The manner in which prosecution decisions are to be made is set out in 'The Statement of Prosecution Policy and Practice' that has been published by my department. The principles set out in that handbook are similar to those adopted in other common law jurisdictions.

Allow me to go back to fundamentals. Under our law, an individual who is charged with a criminal offence benefits from the presumption of innocence. This is

further specifically guaranteed under Article 87 of the Basic Law. Accordingly, the prosecution must prove guilt beyond reasonable doubt. If a judge or a jury harbours a reasonable doubt upon considering all the evidence, the accused is entitled to an acquittal.

Another fundamental principle of criminal justice in this jurisdiction is that a suspect should only be prosecuted if the evidence is sufficient. No one should ever be prosecuted merely because he may have committed an offence. Suspicion, no matter how great, falls well short of the required standard. The basic test for prosecution is that there must at least exist a reasonable prospect of conviction.

As stated in our published Statement of Prosecution Policy and Practice, a bare prima facie case is never enough to warrant a prosecution. A prosecution should not be brought unless the evidence is such that there is a reasonable prospect of securing a conviction. This is recognised throughout the common law world.

A reasonable prospect of securing a conviction does not mean that there must be 100 percent certainty that the accused will be convicted. The prosecutor makes his decision based on evidence presented to him. In evaluating the evidence, the prosecutor must have regard to such matters as admissibility of evidence, the credibility of witnesses, conflict of evidence, the impression witnesses are likely to make on a judge or a jury, the lines of defence which are open to the accused and so on.

Normal rule: reasons for prosecution decisions not disclosed

At paragraph 25.1 of our Prosecution Handbook, it is stated that –

'The Department of Justice is committed to as much openness in relation to the decision making process as is consistent with the due administration of justice.'

However, as is recognised throughout the common law world, the due administration of justice places constraints on the extent to which the reasons for prosecution decisions can properly be disclosed.

In England, the rationale for the policy of not disclosing reasons was expressed in these terms by the Director of Public Prosecutions, Barbara Mills, QC, in a letter to the Chairman of the Bar Council, Anthony Scrivener QC, dated May 29, 1992 :

'The public are entitled to know the principles with which the Crown Prosecution Service approaches its cases, and to be given a broad indication of the reasoning which underlies our decisions ... it would be wrong to go further and provide details of individual cases ... I cannot publicly discuss a decision not to prosecute. This would amount to a trial of the suspect without the safeguards which criminal proceedings are designed to provide. It would be absurd and unfair to embark upon a public discussion as to why that person had been suspected in the first place.'

In the light of these considerations, the established policy in Hong Kong is that detailed reasons for prosecution decisions will not be disclosed. Instead, the relevant criteria are disclosed, namely whether there is sufficient evidence to prosecute and, if so, whether it is in the public interest to prosecute.

This policy is not designed to suit the Department of Justice. It exists to safeguard the integrity of the criminal justice system and to protect the legitimate interests of those caught up in that system; to ensure that the fundamental safeguards provided for a defendant in a criminal trial are not swept away in the course of a non-judicial enquiry, where there are no rules of evidence, no presumption of innocence, no right of cross-examination and no requirement of proof beyond reasonable doubt. The only proper forum for the determination of questions of guilt or innocence of crime is the court, where the suspect has the right to a fair trial in accordance with the rules of criminal justice.

Exceptional cases

There are, however, exceptional situations in which it is appropriate to depart from the policy of not giving detailed reasons. As the Director of Public Prosecutions explained in the statement he released last week, the case of Mr Michael Wong Kin-chow is such an exceptional situation. It is exceptional since both the nature of the complaints against Mr Wong, and the explanation he had given in denial of impropriety, are already in the public domain. In these circumstances, the Director of Public Prosecutions has given more information than normal on the reasons for the decision not to prosecute.

I wish to emphasise that the general policy I have referred to remains firmly in place. The exceptional explanation given in this case is not to be regarded as a precedent for other cases in the future.

Limits to the exception

Moreover, even in this exceptional case, there are limits to the explanations that may properly be given. As the quotation I have given from Barbara Mills, QC, emphasises –

'It would be absurd and unfair to embark upon a public discussion as to why [a] person had been suspected in the first place.'

Similarly, in 1992 the then English Attorney General in February, Sir Patrick Mayhew, QC, stated that –

'It is extremely important that where somebody has not been prosecuted or where a prosecution has been discontinued against someone, the evidence that would have been available had that prosecution continued should not be paraded in public.'

I intend to observe these statements of principle even in this case. There will be no parading in public of all the evidence that was gathered during the investigation. This means that, consistently with past practice, the legal opinions obtained in this case from Mr Macleod and from Mr Martin Wilson, QC, will not be disclosed. Those opinions gave detailed consideration to all relevant evidence. Their disclosure would therefore be wrong in principle, since it would facilitate a public trial of the case without the protections afforded by the criminal justice process.

Others involved

As I said, the explanation of the decision not to prosecute Mr Wong is an exceptional case. No exception applies to individuals other than Mr Wong. Moreover, it is not appropriate to reveal whether any particular individual has been investigated. As the former Attorney General, Mr Michael Thomas, QC, told the Legislative Council in 1987, it would be unfair to reveal that someone has been under suspicion for having committed an offence if a decision is made not to prosecute him or her.

The Process

Although there are limitations on the details that may be revealed in this case, I trust that members will be persuaded that the decision was reached after a thorough, professional and independent consideration of all the available evidence. That consideration was undertaken not only within my department – by Mr Macleod and the Director of Public Prosecutions – but also by a leading outside expert in criminal law, Mr Martin Wilson, QC.

Without Fear or Favour

Last but not least, I would like to reiterate the important principle of 'Equality before the law'. We apply the same principles and decide whether to prosecute irrespective of the status or position of the accused.

We will certainly not treat a public figure more favourably. Equally, we will not treat a public figure less favourably. The same yardstick is applied. Mr Wong is treated exactly in the same manner as any member of the public would be in a similar situation.

We are not here to defend our decision. We are here to explain and assure the panel members and the public that this decision was made objectively, competently and with full integrity. In doing so, we are going beyond what our role under Article 63 of the Basic Law demands. As I have said at the Opening of the Legal Year, we are not seeking "popularity" when making these important decisions. If we did so, it would be a very sad day for the rule of law in Hong Kong.

DPP's statement

Madam Chair, with your permission, I will now ask the Director of Public Prosecutions, Mr Grenville Cross, SC, to deal more specifically with the case of Mr Michael Wong Kin-chow.

Ends/Friday, February 3, 2006

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