

LCQ1: Prosecution policy

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Following is a question by Dr Hon Margaret Ng and a reply by the Secretary for Justice, Mr Wong Yan Lung, SC, in the Legislative Council today (July 14):

Question:

It has been reported that on December 19 last year, a physically disabled hawker holding a valid Itinerant Hawker Licence (Frozen Confectionery) (commonly known as "ice cream vendor") was alleged to have caused obstruction when hawking in the vicinity of the Star Ferry Pier in Tsim Sha Tsui as well as engaged in selling candies named "lollipop", and he was subsequently charged with causing street obstruction and hawking a commodity not specified in the licence. The prosecutor withdrew the charge of causing street obstruction before the trial, while retaining the second charge. The magistrate stated clearly in court that the case was of a minor nature and prosecution was unnecessary. He questioned the enforcement standards of the law enforcement officers as well as the prosecution principles of the prosecutor, and imposed a light penalty of a fine of \$100 on the defendant. It has also been reported that some members of the public were dissatisfied with the authorities indiscriminately enforcing the law and instituting prosecution. In this connection, will the Government inform this Council:

(a) given that under the current prosecution policy, in deciding whether a prosecution should be instituted, the Department of Justice (DoJ) must consider if there is sufficient evidence and if the public interest requires a prosecution to be pursued, whether this policy has changed; in respect of the aforesaid case, of the public interest grounds based on which DoJ decided to institute prosecution;

(b) whether the prosecutor in the aforesaid case withdrew the charge of causing street obstruction because of insufficient

evidence; if so, whether DoJ has considered if continuing with the prosecution against the hawker for hawking a commodity not specified in the licence would give the public the impression that "if you want to condemn somebody, you can always trump up a charge", resulting in their loss of confidence in the administration of justice; and

(c) whether DoJ will conduct a comprehensive review in the light of the case, with a view to improving the current prosecution policy?

Reply:

President,

The Department of Justice is responsible for discharging the prosecution function. It is the established prosecution policy that the decision to prosecute would be based on a consideration of two matters. Firstly whether there is sufficient evidence to justify the institution or continuation of proceedings. If there is sufficient evidence then secondly whether the public interest requires a prosecution to be pursued. A determination of this second matter involves the prosecutor considering whether there is present some matter which would indicate that a prosecution is not in the public interest. These principles are enshrined in the Department's Statement of Prosecution Policy and Practice and have not been changed. While the Department of Justice conducts the majority of prosecutions, enforcement of some of the summary regulatory offences is vested with a number of Government Departments and the relevant prosecutions are conducted by the departmental prosecutors. When conducting prosecutions, departmental prosecutors are expected to apply the provisions of The Statement of Prosecution Policy and Practice. Where there are uncertainties or legal issues that require clarification, the advice of the Department of Justice is sought.

Departments responsible for the enforcement of minor regulatory offences have discretion as to how to secure compliance with the law by the persons with whom they are dealing. Since the offences involved are generally minor in nature, it may not be in the public interest to too readily prosecute them. Hence the departments will explore other means of securing compliance with the law. This may involve educating such persons as to what the law requires of them, alerting them to the fact that certain conduct may constitute an offence for which they could be prosecuted and warning them that they have committed an offence and should stop from doing so, both now and in future. The goal is always to secure compliance with the law and if that can be achieved without prosecution then the public interest is much better served. But if all these measures fail and the person ignores repeated warnings and persistently breaks the law then prosecution will be necessary and will be in the public interest.

In relation to the specific case referred to in the question, the charges were made under the Hawker Regulations (Cap. 132AI) and the enforcement and prosecution actions were undertaken by the Food and Environmental Hygiene Department (FEHD). Before issuing the summonses, FEHD sought legal advice and it was pursuant to that legal advice that the defendant was summoned for the offences of obstructing a pedestrian area and selling unauthorised items. DoJ's advice was in line with the prosecution policy set out above. Prior to the trial, FEHD decided not to proceed with the offence of obstruction. We understand from FEHD that the decision was taken after considering that the hawker was a new licensee and had probably not fully apprehended the contents of the FEHD's administrative guidelines although those guidelines had been issued to all existing licensed ice-cream vendors and also uploaded on FEHD's website for the trade's information. Although FEHD did not seek DoJ's further advice before making that decision, in executing the prosecutorial decision FEHD had acted responsibly and with sensitivity.

The summons in respect of selling of unauthorised item was heard before the magistrate on May 25, 2010. Different considerations applied to the offence of selling unauthorised items. Minor though this offence was, we understand that the FEHD had made every effort to inform the defendant that he was breaking the law and to encourage him to desist from so doing but the repeated warnings were ignored. The items that the vendor was authorised to hawk were clearly stated in his licence and there is no question of uncertainty or misunderstanding. Having considered the circumstances of the case, FEHD decided to proceed with the prosecution. I trust that upon knowing the relevant circumstances of the case, the public will not lose confidence in the administration of justice.

The Department of Justice will of course continue to make use of the meetings with and training for departments that are responsible for the enforcement of minor regulatory offences to disseminate to them the latest developments and trends in respect of prosecution policies.

Thank you President.

Ends/Wednesday, July 14, 2010