

LCQ22: Prosecution decisions

Following is a question by the Hon Ho Kai-ming and a written reply by the Solicitor General, Mr Wesley Wong, SC (in the absence of the Secretary for Justice), in the Legislative Council today (July 11):

Question:

In June last year, a well-known person was suspected of having intimidated a reporter while the latter was reporting news. The Department of Justice (DoJ) has so far not decided whether or not to institute prosecution against that person. In this connection, will the Government inform this Council:

(1) whether, in handling criminal cases that involve well-known persons, the DoJ needs longer time to examine the particulars of the cases in order to make prosecution decisions; if so, of the reasons for that; if not, why the DoJ has so far not yet made any prosecution decision in respect of the aforesaid case;

(2) of the DoJ's considerations in making a prosecution decision in respect of the case, and whether such considerations include the possible impacts of instituting prosecution on the community and public interests;

(3) whether the DoJ has assessed if the fact that it has so far not made any prosecution decision in respect of the case has any social repercussion, such as undermining the morale of the journalists; if it has assessed and the outcome is in the affirmative, whether the DoJ will expedite its handling of the case;

(4) as the Victims of Crime Charter stipulates that "[s]o far as can be done without prejudicing the progress or outcome, victims of crime shall be kept fully informed of the progress of the case", of the number of enquiries received by the DoJ in each of the past two years from reporters as victims about the progress of the cases concerned, the number of occasions on which the DoJ failed to make a reply within the pledged time (i.e. 14 working days) and the reasons for that, as well as the improvement measures to be put in place; and

(5) whether the DoJ will compile statistics on a regular basis in respect of cases involving the threatening of freedom of news coverage, and make prosecution decisions expeditiously so as to demonstrate its determination to safeguard freedom of news coverage?

Reply:

President,

Prosecutors within the Department of Justice (DoJ) always uphold the constitutional duty under Article 63 of the Basic Law in handling all prosecution work in a fair, impartial and open manner. Article 63 of the

Basic Law provides that "the DoJ of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference".

The independence of the prosecutor is elaborated in the Prosecution Code of the DoJ. According to paragraphs 1.1 and 1.2 of the Code, 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. Specifically, a prosecutor must not be influenced by:

- (a) any investigatory, political, media, community or individual interest or representation;
- (b) the personal feelings or beliefs of the prosecutor concerning the offence, the suspect, the accused or a victim of crime;
- (c) the possible effect of the decision on the personal or professional circumstances of those who have the conduct of the case;
- (d) the possible political effect on the government, any political party, any group or individual;
- (e) possible media or public reaction to the decision;
- (f) the race, religion, sex, ethnic or national origin, colour, language, political or other opinion, social origin, social or political affiliation, official or other position in the community, lawful activities, beliefs, property, health, disability or any other personal characteristics of the suspect or accused or any other person involved or concerned (although such considerations may need to be addressed for other reasons).

A prosecutor must act in accordance with the guidelines set out in the Prosecution Code in making a decision to prosecute or not to prosecute. The fundamental principle is that unless there is sufficient admissible evidence so that the case has a reasonable prospect of conviction, and that it is in the public interest to prosecute, no prosecution should be commenced.

The said principles relating to prosecutorial independence and prosecutorial decisions apply to each and every case. The DoJ handles all cases in the same way regardless of whether public figures or the media are involved.

In respect of parts (1) to (5) of the Hon Ho Kai-ming's question, the DoJ's response is as follows:

(1) and (3) The time required to process a case from commencement of investigation to institution of prosecution depends 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 is necessary pursuant to the legal advice, etc. Since the evidence and the law involved in and the level of complexity of each case differ, the processing time each requires may also vary.

Take the prosecution work relating to the "Occupy Movement" as an example. Since the number of arrested persons is large and the volume of evidence involved is substantial, colleagues of the Prosecutions Division have to spend substantial time to study and examine the relevant materials and possible legal or technical issues. For instance, colleagues concerned have to take a long time to go through the video evidence, consider admissibility and other questions relevant under the law of evidence, analyse the specific circumstances of each and every incident, and provide legal advice on the appropriate manner to handle each relevant person. Moreover, unless the relevant incidents could be handled on their own, the numerous incidents involved in the "Occupy Movement" are often inter-connected, rendering it impossible to handle individual arrestees separately. Quite the contrary, it is necessary for the DoJ to consider the cases of numerous arrestees in a comprehensive and holistic manner. In respect of the 48 persons who were arrested after the "Occupy Movement" (including some of those suspected to have performed a leading role), after seeking the advice of the DoJ, the Police on March 27, 2017 charged nine of them with the offences of conspiracy to commit public nuisance, incitement to commit public nuisance, and incitement to incite public nuisance. The pre-trial review of the case has been fixed for September 17, 2018 and the trial for November 19, 2018. Therefore, contrary to what was suggested in the question, the prosecution work is not such that no prosecutorial decision had been made in respect of any of the organisers concerned.

I wish to reiterate that the DoJ will strive to ensure that all prosecutorial decisions are made in a timely manner, but the progress of individual cases (including those involving celebrities and/or with journalists being the targets of alleged offences) may be affected by the factors mentioned above. Hence, save for cases involving vulnerable witnesses, we are in general unable (nor is it desirable for us) to expedite the handling of cases on account of the identity of the persons involved.

(2) As stated above, a prosecutor will consider only the applicable law, the relevant evidence, the Prosecution Code and any applicable policy or guidelines in deciding whether or not to prosecute a case. According to the Code, prosecution should be instituted only if there is sufficient admissible evidence and where it is in the public interest to do so. Any political or media interest or representation, the possible political effect of the decision to prosecute or otherwise on any group or individual, and the position of the person involved in the community are by no means relevant considerations.

(4) It is the performance pledge of the DoJ's Prosecutions Division to reply to enquiries on matters related to prosecution policy or decision within 14 working days of receipt of such enquiries, and to issue an interim reply if a substantive reply is not available within this period. On the other hand, in order not to prejudice the criminal proceedings that may arise, it is not appropriate for the DoJ to comment on the specific progress and handling approach of a case when law enforcement agencies are seeking legal advice from the DoJ on the same.

The DoJ does not maintain information on the number of enquiries about

the progress of cases involving journalists as victims or the number of delayed replies to such enquiries. Nevertheless, the DoJ will continue its endeavour to handle enquiries on matters related to prosecution policy or decision in compliance with the abovementioned performance pledge and in accordance with the principle not to prejudice criminal proceedings.

(5) Freedom of the press is protected under Article 27 of the Basic Law and other Hong Kong laws. The Special Administrative Region Government, including law enforcement agencies and the DoJ, respects and strives to safeguard freedom of the press. The DoJ takes a serious view of alleged illegal acts targeting at journalists, and will ensure that prosecutorial decisions are made timely.