Legislative Council Panel on Security

Allegations of Mainland Public Security Bureau Officials Committing Offences and Enforcing the Law in Hong Kong

Purpose

This note provides, in response to Members' request, additional information in respect of the case of 16 June 2004 in which seven Mainlanders were suspected of having committed criminal offences in Hong Kong, and allegations that Mainland public security bureau officials may have enforced the law in Hong Kong. Specifically, Members have requested the Administration to provide the following information regarding the case -

(a) details of the Police's investigation into the suspected offences of the seven persons arrested together with the statements taken from the suspects and witnesses;

(b) the advice of the Department of Justice (D of J) concerning the prosecution against the seven persons and the reasons for not instituting prosecution; and

(c) whether the existing legislation could deal with Mainland public security officials taking enforcement actions in Hong Kong if there is sufficient evidence to prove that they have done so.

Background

2. On 16 June 2004, the Police received complaints that there were suspicious vehicle(s) in the vicinity of a residential building on Mt. Davis Road. In the evening of the same day, patrolling police officers found a private car with four men standing beside it at the roadside near the building and the bonnet of the vehicle was raised. Meanwhile, another private car with three men on board drove up to this location.

3. In response to police enquiries, two of the seven men said that they were Mainland public security officials. A pair of handcuffs belonging to one of these two men was found in a handbag on the back seat of one of the vehicles. The other five were Mainland visitors. The Police arrested the seven persons for suspected offences of "loitering" under section 160 of the Crimes Ordinance

(Cap. 200) and "possession of offensive weapon [or article]" under section 17 of the Summary Offences Ordinance (Cap. 228). (For details of the two provisions, please see paragraph 8 below.)

4. Pending detailed investigation of the case and in accordance with section 52 of the Police Force Ordinance (Cap. 232), the seven persons were released on bail in accordance with the established procedures. That section provides that "Whenever any person apprehended …… is brought to [an authorized police] officer, it shall be lawful for such officer to inquire into the case and unless the offence appears to such officer to be of a serious nature or unless such officer reasonably considers that the person ought to be detained, to discharge the person upon his entering into a recognizance …… but where such person is detained in custody he shall be brought before a magistrate as soon as practicable ……" The Police always seek to observe the requirements faithfully and will not detain arrested persons unnecessarily. During the whole period of the investigation, the seven persons remained on bail and reported to the Police as required.

Investigation conducted

5. The Police reflected the grave concerns of the Government and the public about the incident to the Guangdong Provincial Public Security Department (GDPSD), and requested the GDPSD to verify the identity of the seven persons as well as the purpose of their visit to Hong Kong. The GDPSD confirmed that two of the arrested persons were serving public security bureau officials, while the other five were employees of a car rental company in Shenzhen. The GDPSD also confirmed that the purpose of their visit was sightseeing and shopping, and the two public security bureau officials had not been assigned to perform any duties during their visit.

6. In addition, the GDPSD advised that the pair of handcuffs belonging to one of the two arrested public security bureau officials, was normally used by him whilst on duty. This officer had inadvertently brought the handcuffs out of the Mainland. The GDPSD indicated that it would take appropriate steps to prevent the recurrence of similar incidents.

7. Having completed their investigations, the Police consulted D of J on the sufficiency of evidence to support criminal proceedings against the seven arrested persons. After carefully considering all relevant information, D of J advised that there was insufficient evidence to justify bringing a prosecution against any of the seven persons. The Police therefore released them on 16 October 2004 and have since also completed the forfeiture of the pair of

handcuffs, in accordance with section 102 of the Criminal Procedure Ordinance (Cap. 221).

D of J's considerations

8. In considering whether there was sufficient evidence to prosecute the seven persons for any criminal offence, D of J focused on two offences in particular, namely, the offences of "loitering" and "possession of an offensive weapon [or article]". In regard to loitering, section 160 of the Crimes Ordinance (Cap. 200) provides that "(1) A person who loiters in a public place or in the common parts of any building with intent to commit an arrestable offence commits an offence and is liable to a fine of $10000 and to imprisonment for 6 months. (2) Any person who loiters in a public place or in the common parts of any building and in any way wilfully obstructs any person using that place or the common parts of that building, shall be guilty of an offence and shall be liable on conviction to imprisonment for 6 months. (3) If any person loiters in a public place or in the common parts of any building and his presence there, either alone or with others, causes any person reasonably to be concerned for his safety or well-being, he shall be guilty of an offence and shall be liable on conviction to imprisonment for 2 years." In regard to possession of an offensive weapon [or article], section 17 of the Summary Offences Ordinance (Cap. 228) provides that "any person who has in his possession any wrist restraint or other instrument or article manufactured for the purpose of physically restraining a person, any handcuffs or thumbcuffs, any offensive weapons, or any crowbar, picklock, skeleton-key or other instrument fit for unlawful purposes, with intent to use the same for any unlawful purpose, shall be liable to a fine of $5000 or to imprisonment for 2 years." Having carefully considered these provisions and the available evidence in the case, D of J concluded that there was insufficient evidence to give rise to a reasonable prospect of achieving a conviction against any of the seven persons for either of those offences; nor did the evidence support a prosecution against any of the seven persons for any other criminal offence.

9. The offence of possession of an offensive weapon under section 33[1] of the Public Order Ordinance (Cap. 245) was not considered because that provision only applies to the possession of weapons *per se* or the possession of

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[1] Section 33 of the Public Order Ordinance (Cap. 245) provides that "Any person who, without lawful authority or reasonable excuse, has with him in any public place any offensive weapon shall be guilty of an offence and shall be sentenced, on summary conviction or conviction on indictment, in the manner specified in subsection (2)." Section 2 of Cap. 245 defines "offensive weapon" as "any article made, or adapted for use, or suitable for causing injury to the person, or intended by the person having it in his possession or under his control for such use by him or by some other person."

articles or things which are fit and intended for use as a weapon. The provision is therefore not applicable to the handcuffs found in the case in question. Also, there was no evidence of any of the seven arrested persons having committed the offence of breach of condition of stay or any other immigration offence.

Disclosure of statements taken from suspects and witnesses, and D of J's advice

10. Regarding Members' request for copies of the statements taken from the suspects and witnesses, our view is that disclosure of such documents is inappropriate. First, the suspects and witnesses had provided information, including information on their personal data, in the statements. Disclosing the statements containing such data without their consent may contravene the requirements on protection of personal data under the Personal Data (Privacy) Ordinance (Cap. 486). Second, it is important to criminal investigations that persons providing information to the Police are frank and open. Such persons do not expect what they provide to the Police to be released to the public, other than to a court. Otherwise, their confidence and willingness to assist police investigation could be undermined. This could hamper criminal investigations.

11. As regards D of J's detailed advice on the case, the statements and other relevant documents forwarded by the Police to D of J as well as D of J's advice itself constitute confidential communications between a client and his legal representative for the purpose of obtaining legal advice. They are covered by legal professional privilege. It is not appropriate for these confidential communications to be disclosed.

12. More importantly, Article 63 of the Basic Law stipulates that the D of J shall control criminal prosecutions, free from any interference. Reasons for decisions on whether to prosecute will not be given in any case where to do so would adversely affect the interests of a victim, a witness, a suspect or an accused, or would prejudice the investigation of a case or the administration of justice. In particular, public discussion of a decision not to prosecute might amount to the trial of the suspect without the safeguards which criminal proceedings are designed to provide. As Sir Patrick Mayhew QC, the then Attorney General of England and Wales, explained to the English Parliament in 1992 :

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

13. We appreciate that the public are entitled to know the general principles which the prosecution applies in considering whether or not to initiate a prosecution. These principles are set out in "The Statement of Prosecution Policy and Practice" published by D of J. A key factor that must be taken into account is the sufficiency of evidence. A prosecution should not be started or continued unless the prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence has been committed by an identifiable person.

14. In the interests of justice the prosecution will not usually provide the details of reasons for decisions not to prosecute in individual cases. This is out of fairness to the suspect. As Mr. Michael Thomas QC, a former Attorney General, told the Legislative Council, in 1987, it is rare for any public announcement to be made of a decision not to prosecute in a particular case because it would reveal unfairly that someone had been under suspicion for having committed a criminal offence. Giving reasons in public for not prosecuting the suspect would lead to a public debate about the case and about his guilt or innocence. In our legal system, the proper place for questions of guilt or innocence to be determined is in a court, where the accused has the right to a fair trial in accordance with the rules of criminal justice, and the opportunity to defend himself.

Legislation dealing with Mainland public security officials taking enforcement actions in Hong Kong

15. Both before and after the Reunification, the police authorities of Hong Kong and the Mainland have cooperated in accordance with Interpol practice. To ensure consistent implementation, the basis and mode of operation are further regulated through regular high level meetings between the police authorities of both sides. When cooperation is undertaken, both sides are required to strictly abide by the provisions of the relevant laws and to respect the jurisdiction of each other. Such cooperation may involve visits of police officers of one jurisdiction to another for the purposes of case investigation. Any law enforcement action under such circumstances must only be taken by the local law enforcement agency in accordance with local laws. Under no circumstances can police officers of one jurisdiction take enforcement actions in the other jurisdiction. This cooperation mechanism has been operating smoothly and effectively, and is important to criminal investigation and bringing offenders to justice.

16. Only statutorily authorized persons can take law enforcement actions in Hong Kong, even if the alleged offence was committed outside Hong Kong. Any other person (including law enforcement officials of other jurisdictions) attempting to take similar actions in Hong Kong may contravene the local legislation and may be prosecuted accordingly. Any suspected contravention will be treated seriously, and explanations will be demanded and rectification sought from the relevant authorities.

17. We consider that the arrangements in paragraphs 15 and 16 are adequate and have proved effective. The number of visits made by Mainland public security officials to Hong Kong under the arrangements from 2001 to 2004 should be indicative -

	2001	**2002**	**2003**	**2004**
Number of visits made by Mainland public security officials	82	48	53	50
Number of Mainland public security officials involved	205	120	132	146

We therefore do not consider that there is a need to draft legislation to specifically deal with law enforcement officials of the Mainland or, for that matter, of other jurisdictions taking law enforcement action in Hong Kong. Indeed we are not aware of any other jurisdiction that has enacted legislation of this nature.

Security Bureau
Department of Justice
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