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12 October 2012

Mr. Law Yuk Kai
Hong Kong Human Rights Monitor
Room 602
Bonham Commercial Centre
44-46 Bonham Strand West
Sheung Wan
Hong Kong

Dear Mr. Law,

**Prosecution policy and practice
on offences of assaulting police officers**

Further to your letter to the Secretary of Justice dated 10 July 2012 and my interim reply to you dated 31 August 2012, I now write to address the matters that you have raised concerning our prosecution policy and practice in relation to the two offences relating to assaults on police officers, namely, section 63 of the Police Force Ordinance, Cap. 232 and section 36(b) of the Offences against the Person Ordinance, Cap. 212.

In your letter, you referred to the following prosecution figures obtained from the Security Bureau in April 2010:

Year of processions or assemblies	2002	2003	2004	2005	2006	2007	2008	2009
S.63 PFO	2	0	0	0	1	0	0	0
S.36(b) OAPO	0	0	0	0	1	19	1	4

You suggested that from 2007 to 2009, in the three years after 2006, the number of prosecutions of participants of public processions or assemblies ("participants") for assaults on police officers increased drastically to 24, all under the heavier section 36(b) charge. By looking at those prosecution figures, you raised the concern that since 2007, the Police have been targeting such participants and have chosen to prosecute them under the heavier charge. You also raised the concern that the Police have a conflict of interest in handling offences of assaulting police officers and they should not be given any discretion to decide whether to press charges or which of the two charges to lay. You also suggested that the Department of Justice may have failed to safeguard justice through its prosecution policy and practice in this area.

To answer your concerns, we have made enquiries and in particular with the Police concerning the views you have expressed. Whilst there were a total of 24 participants prosecuted from 2007 to 2009, the Police have confirmed that all of them were in fact prosecuted upon legal advice from the Prosecutions Division of the Department of Justice. In other words, the decisions to prosecute the participants were made by counsel of the Division and contrary to what you have suggested, the Police exercised no discretion at all in those prosecutions. In every case, it was counsel of the Division who decided whether to prosecute and what charge should be laid.

The Police upon extensive inquiry have also located the cases in question and have provided a breakdown of the figures for 2007 to 2009. Out of the 19 participants prosecuted under section 36(b) in 2007, 13 of them were in fact charged for "wilfully obstructing" a police officer (and not for "assaulting" a police officer). Similarly, out of the 4 participants prosecuted under section 36(b) in 2009, 2 of them were in fact charged for "wilfully obstructing". As you know, whilst section 36(b) provides for the offence of assaulting, resisting or wilfully obstructing a police officer, section 63 only creates the offence of assaulting or resisting a police officer and does not cover "wilful obstruction". Therefore, it is not right to suggest that the Police (or the Prosecution) have made a choice between the two charges and prosecuted the 13 participants in 2007 and the 2 participants in 2009 under the heavier section 36(b) for "wilful obstruction", when such conduct could simply not be prosecuted under section 63.

The Police have also revealed from their inquiry that the 13 participants were in fact charged in one case in relation to the protest against the redevelopment of Lee Tung Street (also known as the "Wedding Cards" Street incident) on 5 October 2007. It was clearly an isolated incident and no allegation of police assault was involved. As such, if you take the 13 participants in 2007 and the 2 participants in 2009 out, the prosecution figures for the section 36(b)

offence of "assaulting" a police officer were only 6 in 2007, 1 in 2008 and 2 in 2009.

As you would appreciate, demonstrations and protests are frequently held in Hong Kong and they often involve a large number of participants where sometimes confrontation or conflict with the police officer takes place. However, as can be seen from the prosecution figures, only very few participants have been prosecuted for police assault in the past. Seen against that, it is simply wrong to suggest that such small number of police assault cases provide "strong grounds" for suspecting that the Police have been targeting participants for prosecution under the heavier charge.

In your letter, you recommended that our prosecution policy and practice on the two offences of assaulting a police officer be reviewed and reformed. I should point out that the Department already has an established policy on the choice of the appropriate charge for cases of assaults on police officers. In summary, the choice depends on the particular facts and circumstances of the case and after very careful consideration with the right to demonstrate firmly in mind. I should point out that matters also considered, include the conduct constituting the offence; the apparent purpose behind the suspect's conduct; the harm that was in fact sustained by the police officer; the potential harm, danger or adverse consequences that could have flowed from the conduct; the impact on the officer's execution of his duty; and the antecedents of the suspect. The policy dictates that the section 63 charge deals with less serious offences whilst the section 36(b) charge is employed for the more serious offences when an assault is involved.

In fact, in August 2010, we had already advised the Police on that policy and more relevant to your concern, we specifically advised the Police that section 36(b) offences should only be charged after legal advice has been given to do so. In October 2010, a legal circular was issued within the Prosecutions Division to keep all counsel and court prosecutors of the Division informed of the policy. To further ensure that section 36(b) charge is only employed in appropriate cases, in April 2011, all counsel were directed that when handling cases of assaults on police officers, they should first obtain the approval of the supervising Deputy Director of Public Prosecutions. Hence, a clearly established policy and practice and stringent safeguards have already been put in place to ensure that due consideration is given to the choice of charge in cases of assaulting police officers.

Latest figures on prosecution of participants of public processions or assemblies in 2010 and 2011 have also been obtained from the Police. All the

figures for 2002 to 2011 (revised for the years 2007 and 2009 to exclude the cases of "wilful obstruction") are now set out below.

Year of processions or assemblies	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
S.63 PFO	2	0	0	0	1	0	0	0	4	1
S.36(b), OAPO Assault	0	0	0	0	1	6 (revised)	1	2 (revised)	0	2

As can be seen, in 2010 4 participants were charged with the less serious offence of section 63; and in 2011 1 participant was charged with the section 63 offence and 2 with section 36(b). These figures again show that only a few participants were charged in the two years and most of them were in fact prosecuted under the less serious section. Again, the Police have confirmed that all such participants were charged pursuant to legal advice provided by counsel of the Department.

You also raised the concern that if the Police choose to prosecute the less serious charge under section 63, they would be able to avoid seeking legal advice and could still abuse the prosecution process. As is apparent, your concern is again unfounded. In practice, the prosecution of cases in the Magistrates' Courts is controlled by the Department of Justice. In particular, it is our court prosecutors who appear before the court to deal with the police cases. They are officers of the Prosecutions Division. On a daily basis, they carefully vet the papers from the Police (including the proposed brief facts and charges) before the cases are brought before the court. They do that to ensure that only the appropriate charges are presented and that there is sufficient evidence to support them. They make sure that prosecutions are brought before the court only when they are in line with our policy and practice. When there is doubt, legal advice is obtained before the prosecution is to proceed further. If the matter is urgent, instructions are sought from a senior legal officer of the Prosecutions Division. There are therefore proper checks and balances in place within the prosecution process to ensure that only appropriate charges are proceeded with. There is thus no substance in your suggestion that the Police could undermine the established prosecution policy and practice given the checks and balances that are in place.

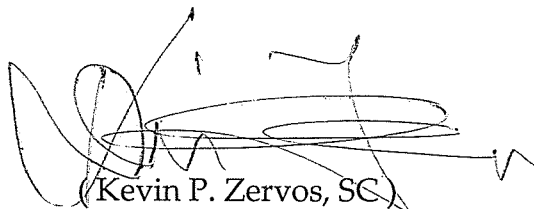
To conclude, the Department of Justice has well established policy and practice on the choice of charge for cases of assaulting police officers and

there are stringent safeguards in place to ensure that due consideration is given to the question of appropriateness of the charge in such cases. Indeed, looking at the revised prosecution figures above, it can be said that only a very small number of participants were charged for police assaults each year in the period from 2002 to 2011. In any event, the Prosecutions Division has consistently maintained an appropriate control over the prosecution of such cases. There is simply no substance to the suggestion that there is room for the Police to abuse the choice of charge in such cases.

Given what is in place and as explained to you, we do not see that our established policy and practice in this area require any change or reform. Nonetheless, we are grateful to you for sending us your letter and letting us have your views on this subject and providing us an opportunity to comment. I trust this provides you with a full and more accurate picture of the situation and gives you a better understanding with respect to these offences.

I should also add that if any of your members have any concerns, I am available to discuss them with you at any time. We as a prosecuting authority greatly respect human rights but it is important that when comments are made that they are informed and accurate and made in the interests of the community.

Yours sincerely,



(Kevin P. Zervos, SC)
Director of Public Prosecutions

c.c. LegCo Panel on Security
Secretary for Security
Independent Police Complaints Council
Commissioner of Police