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(Translation)

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8 September 2020

Mr Lemuel Woo
Clerk to Panel on Administration of
Justice and Legal Services
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Mr Woo,

Panel on Administration of Justice and Legal Services

Letters from Hon Elizabeth QUAT on matters relating to outside work of prosecutors of the Department of Justice and Dr Hon CHIANG Lai-wan on explaining the starting points of sentencing

I refer to your letter dated 4 June enclosing the letters from Hon Elizabeth QUAT and Dr Hon CHIANG Lai-wan dated 20 March and 27 April to the Panel Chairman regarding the captioned matters respectively. On the request of the Panel Chairman, the Department of Justice ("DoJ") replies as follows.

Professional conduct of civil servants (including DoJ's prosecutors) and mechanism of approving outside work

Article 99 of the Basic Law stipulates that public servants must be dedicated to their duties and be responsible to the Government of the Hong

Kong Special Administrative Region. Civil servants, being a key component of the public service, have a constitutional role to give their best in serving the Chief Executive and the Government of the day.

According to the Civil Service Code issued by the Civil Service Bureau, civil servants are required to uphold the core values of commitment to the rule of law, honesty and integrity, objectivity and impartiality, political neutrality, dedication, professionalism and diligence, and to ensure that no actual, perceived or potential conflict of interest shall arise between their official duties and private interests. The Secretary for Civil Service, in his letter of 1 August 2019 to all civil servants, also reminded that "when civil servants express their views, they should ensure that their views would not give rise to any conflict of interest with their official duties, or might not be seen to compromise the important principle of maintaining impartiality and political neutrality when discharging their duties.", and "political neutrality means that civil servants shall serve the Chief Executive and the Government of the day with total loyalty and to the best of their ability, no matter what their own political beliefs are. They shall not allow their own personal political beliefs to determine or influence the discharge of their official duties and responsibilities.". Moreover, civil servants shall at all times ensure that their behaviour would not impede their performance of official duties in a fair and professional manner.

The above principles are applicable to civil servants of different grades and ranks including DoJ's prosecutors.

A civil servant is required to obtain prior consent before taking up any paid outside work. According to the relevant civil service regulation, no civil servant may, without approval, publish in his own name, communicate to unauthorised persons, or make private copies of, documents or information obtained in his official capacity. Same as other civil servants, DoJ's prosecutors must obtain prior consent of his Head of Department (i.e. the Director of Public Prosecutions) before engaging on his own account in outside work (including publication) for remuneration of any sort, or accepting paid employment of any sort outside of his normal working hours.

When considering such applications, the Head of Department should take into account a number of factors, including whether the outside work proposed may (or appears to) conflict with the officer's duties as a Government servant, and whether the arrangement proposed might be a source of embarrassment to the Government. In approving the relevant applications, the Head of Department may impose conditions as he thinks fit, for example,

the applicant's outside work would generally take place outside of normal working hours, and no Government's resources would be used.

DoJ places much emphasis on the professional conduct of prosecutors. DoJ's prosecutors always abide by Article 63 of the Basic Law and shoulder the constitutional duty enshrined therein, and handle all prosecution work in a fair, impartial and highly transparent manner. When conducting prosecutions, DoJ's prosecutors are required to act professionally in strict accordance with the law and the relevant guidelines in the Prosecution Code.

The Prosecution Code sets out the role and duties of prosecutors. DoJ's prosecutors have always discharged their prosecutorial responsibilities in accordance with the relevant principles and have at all times exercised the highest standards of integrity and care in maintaining proper administration of justice. As DoJ's prosecutors, they must ensure that their duties are discharged in a professional and impartial manner without being affected by their personal views expressed. In relation to legal matters, the Government's counsel shall remain independent and impartial, especially when there is a likelihood of handling relevant cases in future.

Regarding the case referred to in Hon Elizabeth Quat's letter of 20 March about the publication of a DoJ officer, the Secretary for Justice gave a detailed written reply to a relevant LegCo question on 29 April[1]. After learning of the incident, DoJ had immediately transferred the officer concerned out of his post at the time, such that the officer would not handle cases involving public order events. At the same time, DoJ initiated the established internal procedures to handle the case, and actively followed up with any suspected non-compliance. The officer concerned has recently left the civil service. It is inappropriate for DoJ to make further comment on the specific actions taken against that officer.

In any event, DoJ will, continue to take into account actual experience, review and improve the existing mechanism to delineate the responsibilities of the approving officer(s), handle each application for outside work prudently, and impose appropriate conditions as may be necessary to the approvals so as to ensure that the relevant outside work would not and would not appear to be in conflict of interest or role with the applicant's duties, or be

[1] LCQ7: Publication of books by staff members of the Department of Justice.

a source of embarrassment to the Government. In the event of non-compliance by DoJ's officer, DoJ will duly follow up the case without tolerance.

Sentencing tariffs of offences relating to recent public order events

Principles of sentence review

In *Secretary for Justice v. Joshua Wong and two other persons* (CAAR 4/2016), the Court of Appeal ("CA") emphasised in paragraph 155 of its judgment:

> *"155. The established legal principle is that the Court of Appeal would not easily grant the application for review of sentences made by the Secretary for Justice and increase the sentences imposed by the lower courts. The reasons include (1) the sentencing court, which has the advantage of hearing the case at trial hence a full understanding of the seriousness of the case, shall be able to impose appropriate sentences on the offenders in most cases; and (2) there being a presumption in favourem libertatis in law, the Court of Appeal would not be easily persuaded that a sentence passed by a lower court is manifestly inadequate. …… Therefore, the Court of Appeal would only interfere with and increase a sentence if the Secretary for Justice is able to persuade the Court that the sentence imposed by the lower court is wrong in principle or is manifestly inadequate."*

Moreover, the Court of Final Appeal ("CFA") confirmed in *Joshua Wong* that it is not open to the CA in a review of sentence to ascribe a different weight to a factor properly taken into account by the sentencing judge in arriving at a sentence that is otherwise within the range of sentences appropriate for the offence, unless that sentence is manifestly inadequate or there is an error of principle. See the relevant principle in paragraph 62 of the CFA's judgment:

> *"62. It is also not open to the Court of Appeal in a review of sentence to ascribe a different weight to a factor properly taken into account by the sentencing judge in arriving at a sentence that is otherwise within the range of sentences appropriate for the offence. If the judge has failed to take a relevant matter into account or has taken into account*

an irrelevant factor, that is an error of principle. However, the relative weight the sentencing judge ascribes to each relevant factor is a matter within the judge's discretion and, unless that exercise results in the imposition of a sentence that is manifestly inadequate, the relative weight attributed to each individual relevant factor is a matter for the judge. Save where it concludes that the sentence is manifestly inadequate, the Court of Appeal is not entitled to ascribe more or less weight to a relevant factor than did the sentencing court."

On the other hand, in *Joshua Wong*, the CFA agreed with the CA's view that in the circumstances now prevailing in Hong Kong, it is now necessary to emphasise deterrence and punishment in large scale unlawful assembly cases involving violence. The CFA also pointed out that the CA,entitled to review the sentence imposed by the trial magistrate, would be responsible for providing guidance in sentencing matters for the future. Paragraphs 2, 83 and 120 of the CFA's judgment stated that:

"*2. In its judgment on the review application, the Court of Appeal took the opportunity to provide guidance to sentencing courts in the future regarding the sentences for unlawful assemblies, particularly emphasising the need to take a much stricter view where disorder and any degree of violence was involved. The Court of Appeal, consistent with its responsibilities for providing guidance in sentencing matters, was fully entitled to provide this guidance for the future and accordingly note should be taken of this new approach. Like the Court of Appeal, we specially draw attention to the importance of taking a much stricter view where disorder or violence is involved. Naturally, it will be incumbent on the sentencing court to take into account the extent of the participation or involvement of the convicted person but where disorder or violence is involved, these are serious aggravating features. Hong Kong is on the whole a peaceful society and these elements are to be deterred.*

...

83. In the event, although Poon JA said in the introductory paragraph of his judgment ([18]) that he was expounding on the principles on sentencing in unlawful assemblies that involve violence "to provide

guidance to the sentencing courts in the future", the Court of Appeal did not lay down any fixed starting point of sentence for this category of offence as such. Instead, as noted in paragraph [2] above, the Court of Appeal emphasised the need, when sentencing in cases of unlawful assembly, to take a much stricter view where disorder and any degree of violence was involved. This was consistent with the Court of Appeal's responsibilities for providing guidance in sentencing matters and it was fully entitled to provide this guidance for the future.

...

120. In short, it was appropriate for the Court of Appeal to say that, in the circumstances now prevailing in Hong Kong including increasing incidents of unrest and a rising number of large scale public protests, it is now necessary to emphasise deterrence and punishment in large scale unlawful assembly cases involving violence……"

The DoJ adheres to the above principles when considering whether to apply for a review of sentence.

Sentencing principles of relevant offences

In relation to the types of cases that concerns Hon CHIANG Lai-wan in her letter of 27 April, the Court has explained the sentencing principles of some related offences in the relevant judgments, as summarised below –

Desecrating the National Flag

Further to the DoJ's application for a review of sentence, the CA restated in *Secretary for Justice v. Law Man Chung* (CAAR 4/2019) the CFA's authoritative views on the legislative intent and gravamen of the offence of desecrating the national flag in *HKSAR v. Ng Kung Siu & Another* (1999) 2 HKCFAR 442, being that the purpose of the relevant provision is to protect the national flag against desecration generally in order to safeguard the legitimate interests in protecting the unique symbol of dignity, unity and territorial integrity of the State. The Court also lays down the sentencing principles for

the offence of desecrating the national flag and the factors to be considered. Given the circumstances of that case, the starting point of sentence should be no less than four months' imprisonment. In paragraphs 32-34 and 46 of its judgment, the Court stated that[2]:

> *「32. 法庭就《國旗及國徽條例》第7條的罪行量刑時；必須緊記該條文旨在全面保護國旗免遭侮辱，以維護象徵國家尊嚴、統一及領土完整之國旗的合法利益。這利益至為重要，觸及香港特別行政區的憲制根基。法庭必須確保判刑充分反映法律維護這重大合法利益的用意,包括考慮判處具阻嚇性的刑罰。*
>
> *33. 基於第7條的上述立法目的和控訴要旨，法庭量刑時必須審視被告人的行為對國旗造成、帶來或引致的侮辱程度。被告人對國旗的侮辱愈惡劣，對第7條所保護的合法利益貶損就愈大，他要面對的判刑，包括懲處方式和刑期（若是即時監禁），就會愈嚴厲。*
>
> *34. 法庭為任何罪行量刑，都需要考慮所有的案情，並根據案發時整體的情況，以及各個相關的環節來考慮被告人的刑責。針對侮辱國旗的罪行，法庭通常會考慮的因素包括：*
>
> > *(1) 被告人的實質作為，對國旗造成、帶來或引致的侮辱，例如污蔑、輕藐、鄙視和惡意等。因為對國旗構成的侮辱程度要視乎每宗案件的實際案情而定，所以不能如答辯人所說，焚燒國旗是對國旗的唯一極終侮辱。視乎案情，把國旗燃燒淨盡，不一定比把國旗肆意損毀、塗劃、玷污、踐踏或其他侮辱行徑更具侮辱性。當然，如果在人多擠逼或空間狹小的地方焚燒國旗，甚至澆上助燃劑助燃，構成對人身和財產的實際危險，這必然會加重被告人的罪責。*
> >
> > *(2) 侮辱國旗的行為必須公開進行才構成第7*

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2 The judgment is only available in Chinese.

條的罪行。因為是公開犯案，所以辱旗行為的時間、地點、場景，以及在案發現場可能引起的反應或後果，都可能加重對國旗的侮辱。視乎案情，法庭需要考慮犯案的日期、時間、地點和場合、在場的人數、其他在場的人是否相當可能甚至實際受到鼓動而加入一同作案；如果在場的人因情緒激動起哄而干犯其他罪行、又或相當可能或實際引起對國旗懷有不同態度的人之間的衝突，這都加重了罪行的嚴重性。

(3) 被告人是否有預謀或經策劃下犯案；若是，其刑責更重。

(4) 被告人是否夥同其他人犯罪；若是，其刑責更重。就算被告人不是早有預謀或早經策劃，而只是在犯案過程中鼓動了其他人加入，但只要他在知情下繼續進行違法行為，那仍然是夥同犯罪。如果被告人是受到其他人鼓動加入一同犯案，一樣是夥同犯案。

(5) 無論是出於在場其他人的鼓動，抑或被告人的個人抉擇，他持續地以相同或不同的方式侮辱國旗，是令其罪行更加嚴重。答辯人辯稱，因辱旗事件一般在公眾集會發生，所以自然有人自發加入和互相鼓動起來，罪行持續一段時間在所難免，法庭因此不宜對這些因素給予太多比重。這個說法和第7條的控訴要旨抵觸，絕對是倒果為因，不能接受。

(6) 原則上，犯案時使用的國旗，如非法取自他人，會增加罪行的嚴重性，但也要視乎被告人的認知。如果被告人知道涉案國旗是原本掛在政府設施的公物，他的犯罪行為會相當可能被視為更具輕藐、鄙視和惡意。另一方面，如果國旗是被告人自備，甚至經過他特意改動或製作，這可顯示他有預謀甚至在計劃周詳下犯案。如果被告人不知道國旗的來源，只知道它不屬於自己，就如中途加入犯案的人，法庭不

一定視國旗是他人財物為加重罪責的因素。

...

46. 本庭認為，考慮到與案有關的一切因素，以本案的情況，量刑基準不應少於4個月。……」

<u>Riot</u>

The CA has recently in *HKSAR v. Leung Tin Kei & Others* (CACC 164/2018) restated the principles applicable to sentencing on the offence of riot. The Court pointed out in paragraphs 69-71 and 73-80 of its judgment:

> "*69.…… this court must emphasise that riot involves a breach of, or threat to breach, public order and peace by corporate use of violence, and has the effect of causing immediate and extremely serious impact on the rule of law.*
>
> *70. Rule of law has been implemented and respected in Hong Kong, which is a place widely recognised to be an advanced region governed by rule of law. Rule of law is the cornerstone of the success in Hong Kong, which protects its citizens so that they can completely and fully enjoy various freedoms and rights under the law and confirming the status of Hong Kong as an advanced and civilized region as well as an international financial centre. If the civilization and freedom possessed by Hong Kong is to be protected to ensure continuous development and advancement, rule of law, as the core value, must be indispensable.*
>
> *71. Rule of law is extremely rich in its contents, involving inter-relating legal concepts of various aspects. One of an integral element of rule of law is that citizens must abide by the law and exercise various freedoms and rights within the ambit of the law……*
>
> ...
>
> *73. In order to protect public order from being harmed by violence and the rule of law from being damaged as a result, the court*

in imposing sentence for the offence of riot must reflect the determination of the law in protecting public order, and to convey a clear message to society and the public that the law does not condone any unlawful damage or disruption of public order by violence ...... As Yeung VP have stressed in Yeung Ka Lun:

> *"60. We agree with the trial judge in that the offence in question calls for a deterrent sentence to give a definite clear warning to the offender and prevent the occurrence of similar incidents, or otherwise, the community will have to pay painfully which would be against the interests of the public and those who enforce the law.*
>
> *61. Imposing a long term of imprisonment on a well-educated young man having a good family background is tragic to him, his family and even to the community, however, the court must be determined in combatting the criminal behaviour demonstrated in the present case: ignoring the law and disregarding public order and safety of law enforcement officers."*

74. In Wong Chi Fung, the Court of Final Appeal in para 120 specifically pointed out that in view of the circumstances now prevailing in Hong Kong including increasing incidents of protests involving violence, it is now necessary for the court to emphasise deterrence and punishment in sentencing in unlawful assembly involving violence. In this context, the Court of Final Appeal finds that the comments expressed by Starke J in the Court of Criminal Appeal in Victoria in R v Dixon-Jenkins (1985) 14 A Crim R 372 at p 379 are apposite:

> *"There are large groups in present-day society of sincere, earnest but wrong-headed people who, because their convictions are so strong, or because they pretend their convictions are so strong, will stop at nothing in order to impose those views on the community, and this, in my opinion, just like hijacking, is calculated to become contagious, and if at the first step, the courts do not show that such conduct, however well intended, will not be tolerated in this community, then it is unlikely that such behavior*

will be stopped in its tracks. I therefore am of opinion that this is just the case where general deterrence has an overriding effect on the resulting sentence."

The view of the Court of Final Appeal and Starke J's comment are both applicable to the offence of riot which is similar to but more serious than unlawful assembly.

75. According to the principles established in the applicable precedents, the court would impose punitive and sufficiently deterrent sentence on people who commit riot, and an immediate custodial sentence is in general the inevitable choice of sentence.

76. In Wong Chi Fung [& 2 Others], after discussing the relevant precedents, the Court of Appeal emphasised in paras 131 and 132 that the offender's rationale behind in a case of unlawful assembly involving violence is not a mitigating factor:

"131. When an offender used violence or, worse, engaged himself in wanton and vicious violence, even if he claimed he committed the offence out of deeply held moral or political convictions, that would not constitute a mitigating factor in favour of a lenient sentence. The major factor for the court to consider is the degree of violence, and the extent to which public peace was affected: Caird, per Sachs LJ at p.506. The rationale behind this is that, in a civilized society where the rule of law prevails, there must exist some lawful ways or means by which people can promote their idea or advocate their cause; hence the pursuit of their idea or cause must not be used as an excuse for resorting to unlawful violence. Likewise, it is not open to offenders to use the excuse of "being compelled by circumstances" to resort to violence. This so-called compulsion does not amount to a mitigating factor in favour of a lenient sentence. If these two excuses were to be accepted as mitigating factors or reasons for a lenient sentence, self-righteous individuals would feel free to do whatever they want, since they would need to bear insignificant or, in their eyes, even negligible legal consequences. In that case, public order is prone to collapse.

132. In addition, what the offenders think of people holding different views is no excuse for using violence on those people. As Sachs LJ emphasised:

"Any suggestion that a section of the community strongly holding one set of views is justified in banding together to disrupt the lawful activities of a section that does not hold the same views so strongly or which holds different views cannot be tolerated and must unhesitatingly be rejected by the courts."

And then, the Court of Appeal reiterated in para 134:

"134. ... for cases of unlawful assembly involving violence, the main consideration in sentencing is for the offenders to be punished, and for others to be deterred from violating the law by breaking and disrupting public order in like manner. As to the offender's personal circumstances, regardless of how honourable he perceives his motive or reason for committing the crime to be, or whether he thinks the other offenders are more culpable than he is, they will, generally speaking, not be regarded as a strong mitigating factor in favour of imposing a lenient sentence."

77. The view of the Court of Appeal in Wong Chi Fung is also applicable to the offence of riot.

78. The gravamen of the offence of riot is the participants acting in large numbers use their numbers to achieve their common purpose with violence……

79. Generally speaking, the factors to be taken into account when passing sentence on the offence of riot include:

(1) whether the riot was spontaneous or premediated; if it was the latter, how detailed and precise the plan was;
(2) the number of people engaged in the riot;
(3) the degree of violence used by the rioters, including whether weapons were used and, if so, what kind and quantity of weapons;

(4) the scale of the riot, including the time, location, the number of places and the area in which the riot took place;
(5) the duration of the riot, including whether the riot was prolonged; and whether it still went on despite repeated warnings by the police or public officers;
(6) the harm caused by the riot: for example, whether there was any loss or damage to properties and, if so, to what extent; whether anyone was injured and, if so, the number of injured persons and the degree of injury;
(7) the imminence and gravity of threat that was caused by the riot;
(8) the nature and extent of nuisance caused to the public by the riot;
(9) the impact caused by the riot on the relationship among community groups;
(10) burden caused to public expenditure by the riot;
(11) the offender's role and degree of participation; for instance, apart from taking part in the riot, whether he had arranged, led, summoned, incited or advocated others to take part in the riot; and
(12) whether the offender committed any other crimes during the course of the riot……

80. Since the background and facts involved in each case of riot are different, each case has to be considered separately, so the sentencing in other cases do not provide much guidance; the court in sentencing should apply appropriate principles and pay regard to the actual circumstances of individual cases, and then impose the proper sentence ……"

Moreover, in view of the recent riot cases, the Court in *HKSAR v Sin Ka Ho* (DCCC 783/2019)[3] quoted *Leung Tin Kei* aforementioned, and adopted six years' imprisonment as the starting point for the offence of riot. The Court pointed out in paragraphs 47 and 65 of its judgment:

"47. The Court of Appeal in Leung Tin Kei set out various factors to be taken into account when passing sentence on the offence of riot. Courts

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[3] The Defendant pleaded guilty to taking part in a riot on 12 June 2019 outside the Legislative Council Complex.

must consider these factors and principles to arrive at a sentence according to the facts of each individual case ……

…

65. Having considered all the relevant factors against the circumstances, I am of the view that the appropriate starting point for taking part in this riot is 6 years' imprisonment after trial. The defendant pleaded guilty at the earliest opportunity and is therefore entitled to the usual full discount of one third. Accordingly, I reduce the starting point by two years and sentence the defendant to 4 years' imprisonment."

<u>*Unlawful assemblies involving violence*</u>

In *Secretary for Justice v. Joshua Wong and two other persons* (CAAR 4/2016), the CA illustrated the sentencing principle for offences of unlawful assemblies involving violence. The Court pointed out in paragraphs 152-153 of its judgment:

"*152. Generally speaking, although the facts of minor cases are not that serious, the court is still required to ensure that the public order is effectively maintained. So there remains a need for sentences to be suitably deterrent. If all the six factors set out in Brown are present, or the facts of the case are suitable, a community service order can be an appropriate sentencing option. It is because the punitive factor in a community service order can be regarded as having a sufficient deterrent effect while its rehabilitative factor can help offenders, especially young offenders, turn over a new leaf.*

153. For serious cases, the main purpose of the sentence is to punish and deter. So the overall consideration of the court should be inclined towards imposing an immediate custodial sentence. Unless there are very exceptional circumstances, and these circumstances should by definition be rare, sentences other than an immediate custodial sentence, including suspended sentences and community service orders, are not appropriate."

The CFA also pointed out in paragraphs 68-69, 75 and 120 of its

judgment of *Wong Chi Fung*:

> *"68. ...... as Ribeiro PJ stated in HKSAR v Chow Nok Hang (2013) 16 HKCFAR 837 at [39]:*
>
> > *"Once a demonstrator becomes involved in violence or the threat of violence – somewhat archaically referred to as a 'breach of the peace' – that demonstrator crosses the line separating constitutionally protected peaceful demonstration from unlawful activity which is subject to legal sanctions and constraints. The same applies where the demonstrator crosses the line by unlawfully interfering with the rights and freedoms of others."*
>
> *69. For this simple reason, a submission in mitigation of the offence of unlawful assembly (and certainly in the case of incitement) that the act was committed in the exercise of the constitutional rights to freedom of expression and freedom of assembly will be unlikely to carry any significant weight. The fact of a conviction of the offence will necessarily mean that the offender has crossed the line separating the lawful exercise of his constitutional rights from unlawful activity subject to sanctions and constraints. In such a case, there is little merit in a plea for leniency on the basis that the offender was merely exercising constitutional rights since, by definition, he was not doing so at the time when the offence was committed. This is all the more so when the facts of the offending involve violence, in particular on the part of the offender himself, since there is no constitutional justification for violent unlawful behaviour. In such a case involving violence, a deterrent sentence may be called for and will not be objectionable on the ground that it creates a "chilling effect" on the exercise of a constitutional right, since there is no right to be violent. Quite simply the line of acceptability has been crossed.*
>
> ...
>
> *75. ...... the court will not enter into an evaluation of the worthiness of the cause espoused. ...... It is not ...... the task of the courts to take sides on issues that are political or to prefer one set of*

social or other values over another.

...

120. …… in the circumstances now prevailing in Hong Kong including increasing incidents of unrest and a rising number of large scale public protests, it is now necessary to emphasise deterrence and punishment in large scale unlawful assembly cases involving violence. In this context, the sentiments expressed by Starke J in the Court of Criminal Appeal in Victoria in R v Dixon-Jenkins (1985) 14 A Crim R 372 at p.379 are apposite:

> *"There are large groups in present-day society of sincere, earnest but wrong-headed people who, because their convictions are so strong, or because they pretend their convictions are so strong, will stop at nothing in order to impose those views on the community, and this, in my opinion, just like hijacking, is calculated to become contagious, and if at the first step the courts do not show that such conduct, however well intended, will not be tolerated in this community, then it is unlikely that such behaviour will be stopped in its tracks. I therefore am of opinion that this is just the case where general deterrence has an overriding effect on the resulting sentence."*

Assault on police officer

No sentencing tariff is currently set down by the Court regarding the offence of assault on police officers. There were past cases where defendants were sentenced to serve 10 to 12 months' imprisonment for the offence of assault on police officers. In respect of sentences of this type of cases, DoJ has previously in some cases applied to the magistrates for reviews of sentence in accordance with section 104 of the Magistrates Ordinance (Cap. 227). In the recent judgment of *HKSAR v. Lai Yun Long* (STCC 3290/2019), the Magistrates' Courts pointed out that the Court has the responsibility to protect police officers in the execution of their duties; the sentence shall have deterrent effect to demonstrate a clear message to public; this type of cases is serious, and imprisonment is in general an appropriate sentence even if the defendant is a first offender.

Arson

Arson is a very serious criminal offence. According to sections 60 and 63 of the Crimes Ordinance (Cap. 200), a person who committed an offence relating to arson shall be liable, upon conviction, to imprisonment for life. In *HKSAR v Chong Yam Miu, Lucas* (DCCC 890/2019), the Defendant admitted throwing petrol bombs outside the Police Headquarters and Happy Valley Police Station respectively. The Court has adopted starting points of 5.5 years' imprisonment and four years' imprisonment respectively for two charges of arson being reckless as to whether lives would be endangered.[4] The Court pointed out in paragraphs 23-28 and 36-37 of its judgment:

> *"23. There is no question that the gravamen of the charges is the arson offences. Arson is a very serious offence which carries a maximum sentence of life imprisonment. While there is no tariff for the offence, arson has always been regarded by courts as an offence of particular gravity because of the inherent danger to life and property in an uncontrolled fire ……*
>
> *24. …… arson has always been regarded by courts as a very serious offence for which a deterrent sentence is called for. I would only repeat what the Court of Appeal said in The Queen v Li Mun Tong CACC 309/1994 (unreported).... The Court of Appeal stated "Arson, because of the inherent danger in any uncontrolled fire, is always regarded as an offence of particular gravity. Arsonists exhibit reckless disregard for life and property."*
>
> *25. In determining the proper sentence, the courts looked at both the culpability of the defendant and the harm caused or at risk.*
>
> *26. As said, there is no tariff sentencing guideline case for the offence of arson. The sentence is very much case specific.*

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[4] The Defendant also pleaded guilty to charges of "driving a vehicle without a valid vehicle licence", "using motor vehicle on which the registration mark assigned to the vehicle is not displayed", "resisting police officer in the execution of his duty", "possession of dangerous drugs", and "possession of poison included in Part 1 of the Poisons List", etc.

27. The Court of Appeal in Chau Yuk Kuen v The Queen (CACC 402/1980) said "We feel that the tariff sentence for this type of appeal should be at least 4 to 5 years." The learned authors of Sentencing in Hong Kong, eighth edition, comment at page 721 that the customary sentences of arson tend to start at about 5 years' imprisonment, although they may be very much higher when life and property is seriously endangered by the actions of the arsonist. The learned authors of Archbold Hong Kong 2020 at paragraph 24-24 suggest if no actual injury to other persons is involved, a customary range of between 4 to 6 years of imprisonment should be used as a starting point.

28. In my view, an attack by petrol bomb is a very serious crime indeed, as it gives rise to a very substantial risk of serious harm to the public. Petrol bombs are well known that they can potentially cause horrific injuries. A fire bomb with petrol as its accelerant is a most dangerous weapon. Once ignited and thrown, the fire ablaze by petrol will be unstable and uncontrollable when the bottle breaks. It harms indiscriminately. Using such weapon will have to receive condign punishment. The behavior of arson by throwing petrol bomb cannot be tolerated and in all circumstances must result in a long custodial sentence.

...

36. ...... Whatever the reason, arson by using petrol bomb remains a very serious crime which will be followed by a long custodial sentence.

37. In all the circumstances, the starting point for Charge 1 [Arson outside the Police Headquarters] to be taken will be 5½ years' imprisonment. I would adopt 4 years' imprisonment as the starting point for Charge 4 [Arson outside Happy Valley Police Station]."

In respect of this type of cases, DoJ has recently applied to the CA for a review of sentence. In *Secretary for Justice v. SWS* (CAAR 1/2020), the defendant pleaded guilty to offences of arson and possessing anything with intent to destroy or damage property, and a probation order was imposed for 18 months with a requirement for the defendant to reside in juvenile home for

nine months by the juvenile court of Tuen Mun Magistrates' Courts. The CA, in its recent judgment of DoJ's application for a review of sentence, pointed out that the trial magistrate was wrong in principle and the sentence is manifestly inadequate, which will be substituted with a custodial sentence. The relevant legal proceedings are still ongoing.

When conducting prosecutions, DoJ's prosecutors will continue to handle all criminal cases professionally and in strict accordance with the law and the relevant guidelines in the Prosecution Code, and exercise the highest standard in maintaining proper administration of justice. DoJ will, in accordance with the relevant legal principles, continue to consider whether to apply for a review of sentence in each case, taking into account the actual circumstances of each case and different factors, including whether the sentence was proceeded on an error of law or that it is manifestly inadequate or excessive.

Yours sincerely,

(Hinz Chiu)
Administrative Assistant to Secretary for Justice