

**For information
On 25.11.02**

LegCo Panel on Administration of Justice and Legal Services

The Statement of Prosecution Policy and Practice

Introduction

The preparation of *The Statement of Prosecution Policy and Practice* ('*The Statement*') was a major project of the Department of Justice in 2001/2002. Its completion fulfils a policy objective entered into in October 2001 at the time of the Policy Address. *The Statement* substantially revises the previous policy guidelines which the Department issued in 1998. The opportunity has been taken to modernise and to develop the guidelines in the interests of transparency and accountability.

Formulation of *The Statement*

2. *The Statement* explains the standards, policies and practices of the public prosecutor in the 21st century and provides guidance to prosecutors at all levels in the proper discharge of their functions. In formulating *The Statement*, regard has been had to our experiences since 1997, and to the concerns and interests of our community. The Department has liaised with major common law jurisdictions, and tapped into the latest thinking of the International Association of Prosecutors. New items have been included where we consider that these will be of interest to the people of Hong Kong.

3. *The Statement* has been issued to Government Counsel, Counsel who prosecute on fiat, Court Prosecutors and Departmental Prosecutors. It is available to the general public in hard copy and on the Department's homepage (<http://www.info.gov.hk/justice/new/depart/dojpublic11.htm>).

Revision of *The Statement*

4. *The Statement* has generally developed the prosecution policy guidelines issued in 1998. Particular mention may be made of these areas :

- (i) *The Statement* expands the **public interest criteria** component of the 1998 version in order to heighten public awareness of the sort of factors which common law jurisdictions such as ours apply to decisions of whether or not to prosecute. In addition to the specific factors mentioned in the 1998 version, *The Statement* indicates that, if there is sufficient evidence to prosecute, a prosecution may nonetheless not be necessary in the public interest if there is genuine remorse on the part of the suspect, if there has been a long delay since the offence occurred, if there are mitigating factors present, if a civil remedy is more appropriate, if the offence occurred as a result of a mistake or a misunderstanding, if the offence is no more than a technicality, if the victim does not wish to pursue the matter, if the suspect has assisted the authorities, or if a prosecution could be counter-productive. The list does not purport to be exhaustive.

The Statement indicates, alternatively, that the public interest may require a prosecution if the sentence upon conviction is likely to be significant, if the suspect has abused a position of authority, if the offence was premeditated, if a weapon was used or violence was threatened, if the suspect was an organiser of the offence, if the offence was carried out by a group, if the victim of the offence was vulnerable, if there is a marked difference between the actual or mental ages of the suspect and the victim, if there is any element of corruption, if the suspect's previous convictions or cautions are relevant to the offence committed, if the suspect is alleged to have committed the offence in breach of a suspended sentence or a court order, if the offence is prevalent, or if there are grounds for believing that the offence will be repeated. Again, the list does not purport to be exhaustive.

- (ii) *The Statement* expands the component concerning **the giving of immunities from prosecution** to those involved in crime. *The Statement* explains that the use of those who inform on others as prosecution witnesses is a matter requiring careful judgment. Although there is often a reluctance to trust informers, particularly if they stand to benefit from assisting the prosecution, there are some occasions when a prosecution will only ever be possible with their assistance. The central issue to be decided is whether the interests of justice require that an immunity be given. In that exercise, various factors are relevant, including the significance of the potential evidence, the degree of involvement of the accomplice in the offence, whether any inducement has been offered to the person, the likely credibility of the accomplice as a witness, whether the accomplice has made, or is prepared to make, full disclosure of all facts, and the nature and strength of any corroborative or other evidence.
- (iii) *The Statement* expands the component concerning **the prosecution's duty of disclosure** of relevant material to the defence as part of its obligation to ensure a fair trial of the accused. *The Statement* explains that the duty to disclose is a positive one which is also continuing. Material which is disclosable includes previous convictions of witnesses, names of witnesses, unused statements of witnesses, contradictory material, scientific evidence which may assist the defence, and any other material which may weaken the prosecution case or strengthen the defence case, or both. *The Statement* indicates that the prosecution need not disclose information to the defence if that would be prejudicial to the public interest. The ultimate arbiter of what must be disclosed is the court and not the prosecutor.
- (iv) *The Statement* expands the component concerning **the prosecutor and the victim of crime**. *The Statement* explains that the interests of the victim are an important factor in deciding where the public interest lies in any particular case. The rights of the victim must be respected by the prosecutor.

Victims are entitled to have their role in the prosecution process explained, and they are entitled, where possible, to be consulted as to the various decisions made which may affect them and to be advised of developments in the case. *The Statement* recognises that the prosecutor must protect the interests of victims both at court and pre-court.

Additions to *The Statement*:

5. The development of *The Statement* has involved the inclusion of additional items :

- (i) **The Independence of the Department of Justice** – this highlights how the constitutionally guaranteed notion of prosecutorial independence enables prosecutors to discharge their duties to the public independently, without the fear of political interference or of improper or undue influence.
- (ii) **The Position of the Secretary for Justice** – this explains how the duties of the Secretary include the application of the criminal law, the formulation of prosecution policy, and the superintendence of the Director of Public Prosecutions and of those who prosecute in Hong Kong.
- (iii) **The Position of the Director of Public Prosecutions** – this explains how the Director advises the Secretary on all criminal matters, directs public prosecutions, advises law enforcement agencies and develops and promotes prosecution policy.
- (iv) **The Role and Ethics of the Prosecutor** – this explains how the prosecutor must act independently, yet in the public interest. His or her interest is not so much to win a case as to ensure that justice is done. The decision whether to prosecute is among the most important the prosecutor has to make. Great care must be taken to ensure that in each case the right decision is reached. At court the prosecutor will wish to obtain a conviction on the basis of evidence which is strong and credible, and not on the basis of evidence which is weak and dubious.

- (v) **The Impartiality of the Prosecutor** – this explains how the prosecutor must be fair, independent and objective. Decisions of whether to prosecute must not be influenced by the personal feelings of the prosecutor concerning the offence, the suspect or the victim; or by the possible effect of the decision on his or her personal or professional circumstances; or by the race, religion, sex, national origin or political associations, activities or beliefs of the suspect; or by possible political advantage or disadvantage to the government or any political party, group or individual.
- (vi) **The Prosecutor and the Investigator** – this explains how the functions of the prosecutor and the investigator are separate. The prosecutor decides if a prosecution should be instituted, and acts independently of the investigator. At the same time, the prosecutor and the investigator need to work in partnership to enforce the law.
- (vii) **The Review of the Decision to Prosecute** – this explains the duty of the prosecutor to ensure that a prosecution once instituted remains in the public interest. If a change of circumstances indicates that it is no longer in the interests of justice to proceed with a prosecution, it should be stopped. Alternatively, the prosecutor may decide that it is appropriate to proceed on amended or alternative charges.
- (viii) **The Bind Over Order Procedure** – this explains that if an accused agrees to be bound over to keep the peace and to be of good behaviour, it may be acceptable to enter into a bind over arrangement as an alternative to prosecution. A bind over is a form of preventive justice, which provides the accused with an incentive to behave. The more serious the offence, the less likely is it that the prosecution will feel disposed to accept this arrangement.
- (ix) **The Publication of Reasons for Prosecution Decisions** – this explains that as prosecutors we are committed to as much

openness in relation to the decision making process as is consistent with the due administration of justice. Reasons for decisions will usually only be given to those with a legitimate interest in the matter and where it is appropriate to do so, and these may be in general terms. If the way in which decisions are taken can be explained, public education as to how the prosecution process works will be furthered. But the public interest is the guiding consideration, and reasons for decisions may 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 interests of justice. Although the public are entitled to know the general principles which the prosecution apply to cases, it will not usually be in the interests of justice for the prosecution to go further and to give details in particular cases.

- (x) **The United Nations Guidelines** – the ‘*Guidelines on The Role of Prosecutors*’ were adopted by the United Nations in 1990, and they are included in *The Statement* as they provide guidance to prosecutors in Hong Kong.
- (xi) **The International Association of Prosecutors Standards** – the ‘*Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*’ were adopted by the International Association of Prosecutors in 1999, and they are included in *The Statement* as they provide guidance to prosecutors in Hong Kong.

Conclusion

6. The Department of Justice believes in openness and candour in its dealings with the public. We believe in as much transparency as is consistent with our duty to protect the rights and interests of those who are suspected or accused of crime. Although we cannot usually enter into detailed discussions about the reasons for particular decisions, what we can do is to indicate the parameters within which we operate, and the sort of matters we take into account in deciding whether or not to prosecute, and where exactly the public interest may be said to lie in particular situations.

7. The Department of Justice considers that if the criteria that are applied to the decision making process in respect of public prosecutions are understood more clearly by the people of Hong Kong, this will help to advance the rule of law.

Department of Justice
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