

**For discussion
on 27 June 2011**

**LegCo Panel on
Administration of Justice and Legal Services**

**Response to the background brief provided by the LegCo Secretariat
entitled “An independent Director of Public Prosecutions”**

The maintenance of public support and confidence in the criminal justice system is vital in upholding the Rule of Law. It is therefore essential to have a prosecution service that is fair, efficient and transparent. Ultimately, the success and effectiveness of a prosecution service will depend upon the integrity of the people that make up that service and in particular the person heading it, whether that be an Attorney General (AG), a Secretary for Justice (SJ) or a Director of Public Prosecutions (DPP).

2. The prosecution system of the Hong Kong Special Administrative Region operates within a carefully and purposefully constructed framework meeting not only key objectives to ensure independent control of prosecutions but also international requirements and standards. The system provides checks and balances that have made the prosecution service of Hong Kong respected and efficient, as well as open and transparent. The system has been working well. When comparing Hong Kong’s prosecution system with other systems, it is important to take into account the local conditions and circumstances of the systems under review. Otherwise, a simplistic and superficial comparison is liable to be misleading and unhelpful. It is equally important that when examining our system that it is put in context by addressing the constitutional, legal and administrative framework within which it exists.

3. The questions whether the post of SJ should be included in the accountability system, and whether the prosecution functions should be delegated to the DPP, have been thoroughly considered and debated by the Legislative Council in 2002.

4. The SJ as head of the prosecution service is subject to constitutional and stringent checks and accountability mechanisms, with serious consequences to him for any failure or fault by the prosecution service in discharging its duty independently and professionally. Prosecution decisions are governed by *The Statement of Prosecution Policy and Practice, 2009* (the Prosecution Statement) which are made according to law and legal criteria. The independence of the Department of Justice and the positions of the SJ and DPP are addressed in detail in the Prosecution Statement.

5. Prosecutorial independence is constitutionally guaranteed under the Basic Law. BL63 provides that the Department of Justice shall control criminal prosecutions, free from any interference. To this end, the SJ exercises his prosecutorial responsibilities bearing in mind the public interest and the independence of the prosecution function. As head of the Department of Justice under the constitution, the SJ cannot abdicate from his constitutional duty by a complete transfer of his prosecution responsibilities to the DPP or otherwise. The constitutional duty imposed on the SJ is that he must not allow any extraneous considerations, political or otherwise, to affect his judgments and actions in prosecution matters in which he has to act in an impartial way. Similarly, under the same constitutional duty to act independently, the DPP is responsible for directing public prosecutions and developing and promoting prosecution policy. Annexed to the Prosecution Statement are the UN Guidelines on the Role of Prosecutors and the IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors. The prosecution system in place in Hong Kong is intricately extensive and carefully calibrated.

6. The question whether prosecution decisions are made by a political appointee or by an office that is separate from such an appointee varies throughout the common law world. It is common for Attorneys General and Ministers of Justice in other common law jurisdictions to combine the roles of a member of the government and an independent Law Officer in relation to prosecutions and other legal decisions based on the public interest. The current position in Hong Kong is that, in practice, the DPP or other counsel in the Prosecutions Division make the vast majority of prosecution decisions. However, the SJ, as head of the Department of

Justice is accountable for those decisions. In addition, the SJ personally makes prosecution decisions in some of the cases that the DPP brings to his attention. This system works well and fully complies with BL 63. It should be noted¹ that BL 63 would not permit an independent office of the DPP. The SJ as guardian of the public interest has a legitimate interest in prosecution decisions. A DPP should not be allowed to work in a vacuum and should remain answerable through the political appointee to the Legislature. Further, in jurisdictions which have a statutory DPP, it seems the political appointee nevertheless retains some residual control.

7. The subject of an independent DPP is complex and to sound in rhetoric for an independent DPP is to ignore a whole host of critical issues and matters that need to be addressed. For instance, the wholesale delegation of prosecution powers to someone who might be a career civil servant may in fact undermine the move to greater accountability and adversely affect public support and confidence in the criminal justice system.

8. BL 63 stipulates that the Department of Justice shall control criminal prosecutions free from any interference. The SJ, being the head of the department, is under a constitutional obligation to act independently when taking decisions about prosecutions.

9. The current arrangement of having the SJ being responsible for the control of the prosecution of offences is not only legitimate but essential to the fair and effective administration of the system of public prosecutions given the legal and constitutional framework of Hong Kong.

10. First, a decision to prosecute necessitates a consideration as to whether the public interest dictates a prosecution. The SJ, who in a number of other important respects also acts as the guardian of public interests, is informed in a wide spectrum of matters affecting the public and is thus sensitive to the public interest considerations. He is particularly well-placed to address the issue of public interest in bringing or discontinuing prosecutions.

¹ Mr. Grenville Cross, SC, "The DPP and exercise of prosecutorial discretion" (1998) HKLJ 400.

11. Second, the government has a legitimate interest in overall prosecution policy. Under the current arrangements, the SJ is able to participate in the discussion of policy in this area and make a direct contribution to the development of criminal justice policy informed by the front-line prosecutors. Removing the SJ from any involvement in the prosecutorial decision would inevitably reduce the extent to which the role and views of the prosecutors were taken into account in the development and implementation of criminal justice policy.

12. Third, the SJ has played a significant role in securing improvement and modernization of the prosecution service.

13. It should be mentioned that the importance of the involvement of the SJ in prosecutorial decisions has long been recognized by the Legislature. Where there is a need to strike a balance between the enforcement of the criminal law and the performance of activities the legitimate ambit of which depends on a judgment on proportionality, the legislature has often entrusted the task to the SJ. To ensure that prosecution decisions take account of important public policy considerations, particularly where serious or sensitive offences are involved, the Legislature often considers there is a need for the consent of the SJ to be obtained first before lodging any prosecution. Notable examples include offences under the Prevention of Bribery Ordinance, Cap. 201, the Official Secrets Ordinance, Cap. 521, and the Legislative Council (Powers and Privileges) Ordinance Cap.382.

14. The community has a legitimate interest and stake in the work of its prosecution service. In order to improve public confidence and remove any perception of political interference in prosecutorial decisions, guidelines as set out in the Prosecution Statement have been made available to the public to (1) make the community aware of the way in which the system of public prosecution operates and (2) to provide a measure for others to assess the acts and decisions of prosecutors.

15. Apart from the publication of guidelines, there are other appropriate checks and accountability mechanisms in place to ensure that criminal prosecutions are free from any interference. They have worked well in the past and continue to do so:

- (1) Prosecution decisions are not immune from judicial review. See *Re C (A Bankrupt)* [2006] 3 HKC 582; *RV v Director of Immigration and Secretary for Justice* [2008] 2 HKC 209; *Chiang Lily v S for J* (2010) 13 HKCFAR 208.
- (2) The LegCo can ask for information and call for explanations in respect of decisions as to whether to prosecute in specific cases. See BL 64² and BL 73³.
- (3) A private individual has a right to institute a private prosecution for a breach of the law. See s 14 of Magistrates Ordinance, Cap 227.
- (4) The courts are able to exercise their powers once a prosecution has commenced. A judge can rule no case and award costs against the prosecution. Judges may openly criticize a prosecution where it is felt that a case should not have been commenced.
- (5) Private practitioners, acting for the defence or prosecuting on fiat, provide an independent check on the prosecution decision. Moreover, for cases involving a conflict of interest or particular sensitivity, independent opinions will be obtained from outside counsel.
- (6) Law enforcement agencies can seek a review of a prosecution decision.
- (7) Prosecution decisions are scrutinized by the media. Prosecutors seek to ensure the media have access to all relevant material wherever possible in accordance with the established prosecution policy and practice.

16. The current arrangements are consistent with arrangements for similar posts in many other common law jurisdictions.

² The Government must abide by the law and be accountable to the LegCo. It shall answer questions raised by members of the Council.

³ The LegCo can raise questions on the work of the government, to debate any issue concerning public interests and to receive and handle complaints from HK residents.

England and Wales

17. In England and Wales, after a detailed examination of the role of the AG carried out in 2007-2008, the government concluded that the AG should continue as the law officer and as a minister responsible to Parliament, rejecting a suggestion that the work of the AG should be carried out by an official outside party political life.

18. At present, the AG still remains as superintendent of the prosecuting authorities. In order to help to clarify and explain how the AG manages a relationship with the prosecutors which safeguards independence but also provides effective accountability, the Protocol⁴ between the AG and the prosecuting authorities, which sets out when, and in which circumstances the AG will or will not be consulted, and how they engage with each other, was published in July 2009. The Protocol serves as a reminder that the Directors of the prosecuting authorities exercise their statutory functions subject to the superintendence of the AG, who is accountable to Parliament for the Directors' functions in relation to prosecutions and for their work and the work of their departments. The AG in turn is responsible for safeguarding the independence of prosecutors in taking prosecution decisions.

19. Baroness Scotland QC, the AG of England and Wales, in giving a speech on the role of AG in the 21st century said⁵ :

“The Attorney General’s role in relation to criminal prosecutions is about upholding the rule of law, and it is the Attorney’s position as a senior law and Government minister that enables the role to be discharged effectively.”

“No one seriously suggests that the Government should have no role at all in relation to prosecutions - prosecution policy is a fundamental responsibility of the Government, and we have to ensure that prosecution decisions are made properly and fairly by a service which has the capability and caliber to

⁴ Protocol between the Attorney General and the Prosecuting Departments (July 2009)

⁵ Baroness Scotland, AG, “The Role of the Attorney General in the 21st Century”, 19 January 2010.

undertake these critical functions on behalf of the public, and we have to account to Parliament and the public for the effective provision of this vital public service.”

“I believe the advantage of giving this responsibility to the Attorney General as currently configured is that, by virtue of having also a role in giving robust and independent legal advice to colleagues in Government, the Attorney is already exercising within Government an independence and legal probity, which will further enhance the protection of the independence of prosecution decisions, while at the same time being able to work closely with Cabinet colleagues to ensure that prosecution policy and the provision of an effective prosecution services retain a high priority within Government.”

Ireland

20. In Ireland, the office of the DPP was established by the Prosecution of Offences Act. Section 2(6) provides that the AG and the DPP shall consult together from time to time in relation to matters pertaining to the functions of the DPP. Whilst the AG has no power to give an instruction to the DPP, it has been noted that consultations regularly take place between AG and the DPP and there are many reasons why such consultations are required⁶. In explaining the role of the DPP in Ireland and in discussing prosecutorial independence, the DPP of Ireland, Mr. James Hamilton noted that there were a wide variety of prosecution systems in place but found that some basic rules apply. Mr. Hamilton referred to paragraph 2 of the IAP Standards that require that where prosecutorial discretion is permitted in a particular jurisdiction, it should be exercised independently and free from political interference. In Hong Kong, this is constitutionally guaranteed under BL 63. Mr. Hamilton went on to refer to the rest of the same paragraph of the IAP Standards which provides that if non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, those instructions are to be transparent, consistent with lawful authority and subject to established

⁶ James Hamilton, DPP, Ireland, “The accountability of the Director of Public Prosecutions in Ireland”, 14 November 2008.

guidelines to safeguard the authority and the perception of prosecutorial independence.

21. Mr. Hamilton noted that the whole question of how a prosecutor's office should be assessed and made accountable without undermining its independence is a difficult one. He discussed the situation in Ireland and noted that the DPP and his officers are not accountable to Parliament or to the public in respect of the reasons for prosecutorial decisions and that they employ a strict policy never to give reasons to the public, although it appears this approach is under review⁷.

22. Making comparisons has its difficulties and this highlights the need to examine fully the nature and scope of the prosecution system under review, bearing in mind the legal and constitutional framework and the conditions and circumstances within which the system exists, and the conduct and practice of prosecuting cases in that jurisdiction.

Canada

23. Canada is a federal system consisting of provinces. Each province has its own prosecution service which may vary. The federal prosecution service was established by the Director of Public Prosecutions Act 2006. Section 3(2) provides that the DPP conduct prosecution under and on behalf of the AG. Section 13 stipulates that the DPP must inform AG in a timely manner of any prosecution or intervention that the DPP intends to make, that raises important questions of general interest. Section 14 provides that when, in the opinion of the AG, proceedings raise questions of public interest, the AG may, after notifying the DPP, intervene in first instance or on appeal. Section 16 provides that the DPP shall report to the AG in respect of the activities of the office of the DPP annually.

Australia

24. Australia also has a federal system and the prosecution

⁷ James Hamilton, DPP, Ireland, "The Main Principles of the Prosecutor's Independence", March 2008

services of the states are at variance to each other but either have the Chief Law Officer as the AG or the DPP. Where the DPP is the Chief Law Officer, it appears that the AG still has some residual control. The prosecution system of the Federal Government was established by the Director of Public Prosecutions Act 1983. Section 8 provides that the DPP is subject to such directions or guidelines as the AG, after consultation with him, gives or furnishes to him by instrument in writing. Section 33 provides that the DPP shall prepare and furnish to the AG an annual report.

25. In an article by a prominent Australian jurist⁸ the role of the modern Australian AG as Chief Law Officer was discussed at length. He explained that it has been an established convention that the AG in exercising prosecutorial discretions should do so independently and made the point that the AG performs the important function of addressing issues of public interest which are essentially matters for government. He noted that the AG is the political guardian of the administration of justice and has a special responsibility for the rule of law and the integrity of the legal system.

Conclusion

26. Our prosecution system has served the people of Hong Kong extremely well and will continue to do so. Given the nature and degree of public accountability and transparency, prosecutorial independence is safeguarded in Hong Kong.

Department of Justice
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⁸ The Hon LJ King, AC, QC "The Attorney-General, Politics and the Judiciary" (2000) 74 Australian Law Journal 444