

**For discussion
on 27 June 2011**

**LegCo Panel on
Administration of Justice and Legal Services
Prosecution Policy and Practice**

Purpose

Upon the request of Members, we have prepared this paper to brief Members on our prosecution policy and practice, as well as our recent initiatives to improve the quality and efficiency of the work of the Prosecutions Division.

Role and functions of prosecution service

2. Law and order is important since it provides the community with stability, peace and prosperity. A prosecution service committed to the fair and effective administration of the system of public prosecutions is fundamental to the Criminal Justice System and the Rule of Law.

3. Public prosecutors, being servants of justice, perform an important public responsibility. A decision to prosecute or not to prosecute impacts on people's lives. A wrong prosecutorial decision has the potential to undermine the confidence of the community in the criminal justice system. It is important that great care is taken to ensure that the right decision is made in each case.

4. To maintain public confidence, prosecutors must, at all times, discharge their duties and responsibilities in a fair and impartial manner and with the utmost integrity, ensuring that all persons are equal before the law and that the law is applied equally to all persons. Prosecutors shall seek to balance the public interest, the needs and wishes of victims, the demands of fairness and the rights of the accused.

5. The role and function of a prosecutor is all the more important and onerous in this modern and information age. People are generally better informed, more aware of their rights and have high expectations from their public officials. To this end, prosecution policy shall seek to meet standards of fairness, transparency, consistency, accountability and efficiency in prosecuting offences under, and according to, the law and in meeting these standards maintain the confidence of the public that it serves.

Statement of Prosecution Policy and Practice

6. Prosecution decisions are governed by The Statement of Prosecution Policy and Practice 2009, a copy of which is at the **Annex**. As its content page shows, it covers a wide span of prosecution policy and practice. In formulating the Statement, regard has been paid to the experiences of prosecutors in recent years as well as to the interests of the community. Developments on other major jurisdictions have been examined, including Australia, Canada, Ireland, New Zealand and the United Kingdom. It is a modern code which emphasises our common law traditions.

7. The Statement is made according to law and legal criteria, and is publicly available. It has provided not only a code of conduct for prosecutors and to promote fair and consistent decision making at all stages of the prosecution process, but also a means for the public to understand the decision making process and assess the acts and decisions of prosecutors. The Statement has set out the parameters within we operate, the matters we consider when deciding whether to prosecute and the public interest factors that may be relevant to the issue of prosecution in particular situations. It explains the standards, policies and practices of a modern prosecutor. The Statement issued in 2009 has incorporated a number of new topics, such as the conduct of domestic violence cases.

Initiatives to improve the quality and efficiency of the work of the Prosecutions Division

8. Recognising the need to seek constant improvement to the quality and efficiency of our work, we commissioned, in 2010, Sir Ken

MacDonald, QC, the former Director of Public Prosecutions of Public Prosecutions of England and Wales to conduct a review of the structure of the Prosecutions Division with a view to modernising our Division. Sir Ken submitted his report in February 2010 with a range of recommendations. Arising from the review and Sir Ken's recommendations, a series of multi-pronged initiatives have been or are being implemented with a view to increase the efficiency of the Prosecutions Division and to enhance the openness and transparency of the Division. The initiatives include the following:

- (a) Restructuring of organisation: To streamline the Division's work, we carried out a major restructuring of its organization. The original sections of the division were revamped and reorganised rationally into four sub-divisions, each of which is headed by a deputy director of public prosecutions¹.
- (b) New sub-division of advocacy: A modern prosecution service must have advocacy at the centre of its mission. In order to reflect the importance of advocacy expertise, a new subdivision of advocacy (i.e. Sub-division II mentioned in footnote 1 above) was created. In addition to doing the general range of criminal advocacy, the new subdivision is providing the means for specialization as well. This process assists law enforcement and the courts and it serves the public interest.
- (c) Fast Track Advisory System: The efficiency of the Prosecutions Division has also been enhanced with the introduction of the fast track advisory system known as "FAST", which aims at reducing the time it takes for advice to be given in relatively simple cases and to reduce the workload

¹ Sub-division I is the advisory sub-division which is now responsible for providing advice on and preparing for cases for trial in the Court of First Instance, the District Court and the Magistrates Courts. Counsel in Sub-division II are our specialist trial advocates. Sub-division III is responsible for appeals and also cases concerning the Basic Law, the Bills of Rights and Judicial Review. Sub-division IV are specialist counsel responsible for cases of commercial fraud, bribery, dutiable commodities, technology crimes, securities and revenue fraud and breach of copyright and trade descriptions.

of the advisory sections so that counsel in those sections can have more opportunity to under advocacy works. FAST has proven to be a great success and has been well received by law enforcement agencies.

- (d) Case review meetings: Under the steer of the DPP, concluded cases are selected for review by the prosecutors and the relevant law enforcement agency. The purpose of the exercise is to see what lessons can be learned from the cases and how things can be improved in the future. The case review meetings have resulted in positive exchanges of views between prosecutors and officers of law enforcement agencies.

- (e) Joint Training Programme with legal professional bodies: The Prosecutions Division, the Hong Kong Bar Association and the Hong Kong Law Society have jointly organized a training programme for newly qualified lawyers with less than 5 years experience. The purpose of the programme is to equip young lawyers with the necessary knowledge and skills that are required in conducting prosecutorial work and with a view to assess their suitability to be included in the Prosecutions Division Fiat List. The programme consists of a one-day training course, followed by a two-week supervised court work in the magistracies. Participants are rewarded at a fixed fee. The first programme was held in February 2011 and was attended by about 50 young lawyers. The Joint Training Programme has been well received by the legal profession and a second training course is being organised.

- (f) Office of the DPP: At the heart of the reform proposed by Sir Ken is the creation of the Office of the DPP (“the ODPP”). Its areas of responsibility include media relations, management, policy, training, and complaints and feedback, each of these areas are handled by an experienced prosecutor under the supervision of a senior assistant director of public prosecutions and the Deputy Director in charge of Sub-division I which is designated as the Chief of Staff.

The ODPP works directly under and provides managerial and research support to the DPP so as to ensure the smooth running of the Division. The ODPP also undertakes projects with a view to modernize the work procedure within the Division.

- (g) Handling of Public Complaints and Media Enquiries: To enhance the accountability of the prosecution service, a complaints and feedback unit has been set up within the ODPP to handle complaints from the public. An experienced prosecutor, who is supported by a team of dedicated staff, is tasked to examine each of the complaints received, to review the files to see whether the complaints are substantiated and to give timely and appropriate response to the complaints. Another important initiative to enhance the openness and transparency of the Prosecutions Division is the setting up a media relations unit within the ODPP to provide prompt response to enquiries from the media.
- (h) Staff Training: Training of its counsel has always been a priority of the Prosecutions Division. Criminal Advocacy Courses are held regularly for its new recruits. Recently, an outside experienced counsel has been engaged to revamp the training material for the Criminal Advocacy Course. The updated notes will be available not only to new counsel and advocates but also can be used as a reference text by all counsel in the Division.
- (i) Continuing Legal Education Programme: It aims to provide continuing training and development for counsel at all levels. Monthly lectures/workshops over a 12 month period, purposefully designed to address current topics for the public prosecutors such as issues relating to human rights and reverse onus.
- (j) Staff morale: Promotion prospect of experienced counsel has been improved and staff morale has been boosted with the creation of the rank of Assistant Principal Government

Counsel (DL1). Seven APGC posts were created in the Prosecutions Division and five of which were created in the Sub-division II (Advocacy) to mark the great importance that the Prosecutions Division attached to its advocacy capability.

- (k) Publications: Revamping publications and materials of the Prosecutions Division such as The Statement of Prosecution Policy and Practice, the Prosecution Manual and Manual of Specimen Charges. The exercise is in progress.

Prosecution Cases involving Public Obstruction and Juvenile Offenders

9. According to the letter of 27 May 2011 from the Clerk to the Panel, Members would like the Administration to address the issue raised in a press release issued by an organisation in December 2010 on the decision to press charge in October 2010 against two juvenile demonstrators (both of whom were over 16 years old) for an event in June 2010.

10. It is not appropriate for the Prosecutions Division to comment on individual prosecution decisions. However, since the press release questioned whether the Prosecutions Division has been acting in accordance with the Statement of Prosecution Policy and Practice 2009, we would like to set out our position as follows:

- (a) It is appreciated that a demonstration is the exercise of a constitutional right. It should, however, be noted that the right to demonstrate is a right to a peaceful and lawful demonstration. As emphasized by the courts, there should be a degree of give and take when persons are exercising their right to demonstrate and action should only be taken when the conduct of persons exceeds sensible proportions or the limits of reasonableness.
- (b) When it comes to cases involving public obstruction, it is essentially a question of fact and degree as to whether the obstruction is unreasonable and if it is a person is liable to arrest and prosecution. Enforcement action is necessary to protect and ensure public safety and well-being.

- (c) In considering whether a prosecution should be instituted against a person involved in public obstruction, the foregoing principles were borne in mind. Prosecution decisions have to take into account, based on the material available, whether there was sufficient evidence establishing that the conduct of the person had caused obstruction to the public which was unreasonable in the circumstances.
- (d) We would take into account all the circumstances, including the age and personal background of the offenders and the offence, when deciding whether their conduct warranted prosecution action for public obstruction under section 4(28) of the Summary Offences Ordinance, Cap. 228. In the case of a juvenile, while the welfare of the juvenile should be fully considered, the fact that the person is a juvenile does not exempt him from prosecution for his offence.

Conclusion

11. Our prosecutorial decisions (including the one mentioned in paragraph 9 above) have been made in accordance with the established prosecution policy and practice. We will continue to give our best endeavours to deliver the important roles attached to prosecutors in our criminal justice system.

Department of Justice
June 2011

Department of Justice
Hong Kong

**The
Statement of
Prosecution Policy
and Practice**

Code for Prosecutors

2009

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INTRODUCTION

The decision of whether or not to prosecute an individual is always a crucial one. It is vital for the suspect, vital for the victim and vital for the community as a whole. Great care must always be taken by those who decide these issues, always remembering that wrong decisions may destroy lives and undermine confidence in the criminal justice system as a whole. A decision to prosecute should only be taken after the evidence and the surrounding circumstances have been fully evaluated. Those who prosecute discharge a heavy responsibility on behalf of the community. The modern prosecutor is expected to discharge his or her duties with professionalism, skill and vision, and to operate within the parameters of defined and clear prosecution policy guidelines.

High qualities are expected of the modern prosecutor. Good judgment. Complete integrity. An innate sense of fair play. An instinctive sense of what is right and what is wrong. Fearlessness is also an essential quality, for prosecution decisions are often controversial and the prosecutor must have the strength of character to resist criticism from whatever quarter, no matter how strident or painful. The judgment of the prosecutor on a case must never be overborne by political, media or public pressure. The profession of prosecutor is an honourable one, but is not for the faint-hearted. As Daniel Bellemare QC, sometime Vice President of the International Association of Prosecutors, has explained :

“It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength

and self-confidence. It requires personal integrity and a solid moral compass. It requires humility and willingness, where appropriate, to recognise mistakes and take appropriate steps to correct them. Prosecutors must be passionate about the issues, but compassionate in their approach, always guided by fairness and common sense.”

The prosecutor occupies a formidable position in the administration of criminal justice. The decisions taken may profoundly affect the lives of others. In each case, the prosecutor must carefully evaluate the evidence and apply the law and decide if a prosecution is appropriate. The prosecutorial discretion should be exercised in a manner that is consistent, fair and objective. Difficult decisions must be confronted, not side-stepped, and in deciding the way forward the prosecutor will apply professional judgment, legal competence and practical life experience.

At court, the prosecutor represents the Hong Kong Special Administrative Region, not the government or the law enforcement agency. The prosecutor is as independent as the judge, and his or her interest throughout is the just disposal of the issues joined. Rightly has it been said that the prosecutor secures no victories and sustains no defeats. This does not mean that the prosecutor should not firmly present the prosecution case, or use forensic skills to test the defence case. The prosecutor should be vigorous in presenting the evidence, but restrained and courteous. Evidence should be properly marshalled and cogently adduced. Without a fair prosecutor, there cannot be a fair trial. He or she may strike hard blows, provided they are not foul

ones. The community has a vested interest in the proper conduct of its prosecutions, and the conviction of the guilty is just as much in the public interest as is the acquittal of the innocent.

It has never been the position that those suspected of criminal offences must automatically be prosecuted. A charge is only ever appropriate if it is in the public interest to bring it. In deciding where exactly the public interest lies in a particular case the prosecutor must consider the justice of the situation and examine all the factors. These vary from case to case and the application of the prosecution discretion is not an exact science. The prosecutor does not operate as a rubber stamp, and it would not be right to prosecute every case without regard to the interests of justice. In general, the more serious the offence, the more likely is it that the public interest will require a prosecution to proceed.

The prosecutor is guided at all times by the public interest in the measured application of the rule of law. The prosecutor exercises an important discretion on behalf of the public of whether or not to institute a prosecution of a suspect, and how to conduct a prosecution once it has begun. There is a need to maintain public confidence in the administration of criminal justice, and the community has a legitimate interest in the work of its prosecution service. The purpose of *The Statement of Prosecution Policy and Practice* is therefore not only to provide a code of conduct for prosecutors and to promote fair and consistent decision making at all stages of the prosecution process, but also to make the community aware of the way in which the system of public prosecutions operates. Principled criteria are applicable at all times, and the people of Hong Kong need to be able to see for themselves what exactly these are. Transparency is essential for the modern prosecutor.

PROSECUTION POLICY AND PRACTICE

1. The Independence of the Department of Justice

- 1.1 The Department of Justice is responsible for the conduct of criminal proceedings in Hong Kong. In the discharge of that function the Department enjoys an independence which is constitutionally guaranteed. Article 63 of the Basic Law of Hong Kong stipulates that the Department ‘*shall control criminal prosecutions, free from any interference*’. That the notion of prosecutorial independence enjoys an entrenched status enables prosecutors to discharge their duties to the public within secure parameters. Prosecutors act independently without the fear of political interference or improper or undue influence. At the same time, the Secretary for Justice is accountable for their decisions and actions.

2. The Position of the Secretary for Justice

- 2.1 As Head of the Department of Justice, the Secretary for Justice stands, for all practical purposes, in the same position as did the Attorney General of Hong Kong in relation to the Government of Hong Kong prior to the resumption of the exercise of sovereignty by the People’s Republic of China in 1997. *In Re C (A Bankrupt)* [2006] 4 HKC 582, the Court of Appeal stated :

“The prosecutorial independence of the Secretary for Justice is a linchpin of the rule of law. He is in the discharge of that duty to be ‘actuated by no respect of persons whatsoever’ (Sir Robert Finlay, 1903, Parl. Debates Vol. 118, cols. 349-390) and ‘the decision whether any citizen should be prosecuted or whether

any prosecution should be discontinued, should be a matter for the prosecuting authorities to decide on the merits of the case without political or other pressure.’ ... these statements ... reflect accepted and applied fundamental principle in this jurisdiction the continuation of which is preserved by the entire theme of the Basic Law as well, specifically, as by article 63.”

2.2 The Secretary for Justice is responsible for varied duties which either involve or are related to the prosecution of offences. These include :

- (a) the application of the criminal law;
- (b) the formulation of prosecution policy;
- (c) the superintendence of the Director of Public Prosecutions and of those who prosecute in Hong Kong.

In the discharge of these and other of the prosecutorial functions, the Secretary exercises an independent discretion.

2.3 In 1959, ministerial statements were made in the Parliament of the United Kingdom that :

“it would be a very bad thing if this House or the Cabinet of the day tried to influence the semi-judicial functions of the Law Officers in the institution or dropping of prosecutions”

and an earlier statement of policy was endorsed, namely :

“The Attorney General should absolutely decline to receive orders even from the Prime

Minister or Cabinet or anyone else (as to whether) he should prosecute or not.”

The Secretary for Justice adopts a like stance.

- 2.4 The Court of Appeal has held that the powers and responsibilities of the Attorney General of Hong Kong are the same as those of the Attorney General in England (see *Cheung Sou-yat v R* [1979] HKLR 630). This constitutional doctrine was recognized by the Hong Kong Government in 1963, when it issued a guidance note stating that :

“It is the Attorney General who is responsible for all prosecutions in Hong Kong. It is for the Attorney General alone to decide whether or not prosecutions shall be instituted in any particular case or class of case, and his responsibility to control and conduct them.”

- 2.5 The responsibility of the Secretary for Justice in relation to prosecutions is identical. In exercising those responsibilities the Secretary has, like the former Attorneys General of Hong Kong, to bear in mind the public interest and the independence of the prosecution function. In 1951, Sir Hartley Shawcross KC, Attorney General of England and Wales, told the House of Commons that :

“I think the true doctrine is that it is the duty of an Attorney General, in deciding whether or not to authorize a prosecution, to acquaint himself with all the relevant facts, including for instance the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult

with any of his colleagues in the Government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not.

On the other hand the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision and does not consist, and must not consist, in telling him what that decision ought to be.

The responsibility for the eventual decision rests with the Attorney General and he is not to be put under pressure by his colleagues in the matter. Nor of course can the Attorney General shift his responsibility for making the decision onto the shoulders of his colleagues. If political considerations, which in the broad sense that I have indicated affect government in the abstract, arise, it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations

2.6 In *R v Tsui Lai-ying and Others* [1987] HKLR 857, the Court of Appeal stated :

“The office of the Attorney General in Hong Kong must be invested with the ordinary common law powers that clothe its United Kingdom counterpart The Attorney General is the senior law officer of the Crown and it falls upon his shoulders to develop and to control the administration of the criminal law in the public interest generally and in the interests of ‘public justice’.”

2.7 Those sentiments are of continuing relevance, and provide guidance to the Secretary for Justice in the conduct of public prosecutions.

3. *The Position of the Director of Public Prosecutions*

3.1 The Secretary for Justice is aided in the discharge of the prosecution function by the Director of Public Prosecutions. The Director is the Head of the Prosecutions Division of the Department of Justice. He or she is responsible to the Secretary for :

- (a) advising the Secretary on criminal matters;
- (b) directing public prosecutions;
- (c) advising the law enforcement agencies and others in government on the development, enforcement and implementation of the criminal law;
- (d) developing and promoting prosecution policy.

3.2 The Director is responsible for cases advised upon and conducted by lawyers in the Prosecutions Division, as well as for prosecutions conducted by Court Prosecutors and Departmental Prosecutors. Counsel who prosecute on fiat are subject to the Director's general direction in the exercise of their prosecutorial functions and act on his or her instructions. *The Statement of Prosecution Policy and Practice* is provided for guidance to all of those who conduct public prosecutions in Hong Kong, whether or not on fiat.

3.3 The Secretary for Justice is accountable for the decisions taken by the Director and by those who act on his or her behalf.

4. The Role and Ethics of the Prosecutor

- 4.1 The prosecutor occupies a powerful and privileged position, and has considerable resources at his or her disposal. The decisions the prosecutor takes may profoundly affect the lives of others. A prosecution must only be brought for good cause. No one should ever be prosecuted simply because he or she may have committed an offence, or even probably has.
- 4.2 The decision whether to prosecute is among the most important decisions the prosecutor has to make. Great care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute, as well as a wrong decision not to prosecute, has the potential to undermine public confidence in the criminal process. There is little margin for error.
- 4.3 When at court, the prosecutor must at all times act independently. He or she represents the Hong Kong Special Administrative Region, not the government, the police or any other agency. When he addressed the University of Hong Kong in 1987, James Findlay QC, Director of Public Prosecutions, explained :

“It is very important that the public prosecutor in Hong Kong should be recognised as a part, and an essential part, of the means by which our society maintains personal liberty. He must be seen to be the public prosecutor, not because he prosecutes the public but because he prosecutes on behalf of, and in the interests of, the people of Hong Kong.”

- 4.4 In the discharge of the prosecution function the prosecutor is as independent as the judge. The interest of the prosecutor at all times is to assist the court to achieve justice. A fair trial is one in which all relevant evidence is presented, tested and

adjudicated upon according to law. As the representative of the public interest the prosecutor must guard against the conviction of the innocent. The prosecutor should :

- (a) ensure that the prosecution case is firmly and fairly put;
- (b) vigorously test the defence case, but with courtesy, and temperately;
- (c) avoid submissions of fact or law which are not soundly based;
- (d) eschew prejudice or emotion in the conduct of the case;
- (e) reveal the existence of material that may assist the accused;
- (f) invite the court to stop the proceedings if the point is reached at which he or she concludes there is no longer a reasonable prospect of conviction;
- (g) use all legitimate means to achieve a just disposal of the issues in contention.

4.5 In a complex case, the prosecutor must fully marshal the evidence prior to trial. This makes the case both manageable and comprehensible. It is '*a fundamental necessity for the prosecutor of such cases to have prepared well in advance materials such as schedules, bundles and affirmations and draft or signed factual admissions which allow inter alia the formal production of the exhibits the subject of those schedules.*' (*HKSAR v Sin Wing-yi* [2008] 3 HKLRD 352).

4.6 Akin to a minister of justice, the prosecutor acts independently, yet in the public interest. The prosecutor will

wish to present a case on the basis of evidence which is cogent and credible. The duty of the prosecutor is not to obtain a conviction at all costs, but to place before the court the evidence relevant to the alleged crime. The prosecutor should not express a personal opinion as to the guilt or innocence of the accused, or as to the credibility of a witness.

4.7 The ethics and qualities of the prosecutor and the objectives of prosecution have been variously defined :

“Carrying out the duties of a prosecutor is difficult. It requires solid professional judgment and legal competence, a large dose of practical life experience and the capacity to work in an atmosphere of great stress.”

- Morris Rosenberg

“Independence of prosecutorial decision making is the rock on which we stand.”

- Nicholas Cowdery QC

“It is the duty of prosecuting counsel to prosecute, and he need not rise to his feet and apologise for so doing. It is not unfair to prosecute, and the defence will look after the defence. I believe in hard hitting, but with blows that are scrupulously fair.”

- Christmas Humphreys QC

“The interest of the prosecutor is confined to assisting the courts to do justice.”

- Mr Justice Bokhary PJ

“Just as the judge must scrupulously protect the rights of the accused who stands trial, so must the prosecutor determinedly safeguard the rights of the suspect who does not.”

- I Grenville Cross SC

“The prosecutor must act as a minister of justice, presenting the prosecution evidence fairly, making full disclosure of relevant material and ever conscious that prosecution must not become persecution.”

- Lord Brennan QC

“He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts.”

- CS Kenny

“It is important to observe that in a just society, the conviction of the guilty is in the public interest, as is the acquittal of the innocent.”

- Mr Justice Li CJ

“Even in a minor case, prosecution has serious implications for all involved – the victim, the defendant and others. Prosecutors must be fair, independent and just.”

– Lord Irvine of Lairg LC

“Prosecuting is the art of the possible; you can only prosecute if you have evidence.”

- Sir David Calvert-Smith QC

“No system of criminal justice could operate effectively if prosecutors pursued only those cases where there was an absolute certainty of conviction.”

- Lord Goldsmith QC

“It is better by far to allow a few guilty men to go free than to compromise the standards of a free society.”

- Lord Griffiths

Those who prosecute in Hong Kong are expected to uphold these ideals and to apply these principles in the discharge of their duties.

5. *The Impartiality of the Prosecutor*

- 5.1 The prosecutor must be fair, independent and objective. Recognised prosecutorial criteria must be applied at each stage of the decision making process. A decision of whether to prosecute must not be influenced by :

- (a) the personal feelings of the prosecutor concerning the offence, the suspect or the victim;
- (b) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct;
- (c) the race, religion, sex, national origin or political associations, activities or beliefs of the suspect or any other person involved;
- (d) possible political advantage or disadvantage to the government or any political party, group or individual.

6. *The Prosecutor and the Investigator*

- 6.1 The functions of the prosecutor and the investigator are separate and distinct. The prosecutor decides if a prosecution should be instituted and, if so, on what terms. He or she acts independently of those responsible for the investigation. Whilst the prosecutor may consider the views of the investigator where appropriate, in the end it is the responsibility of the prosecutor to decide whether or not to proceed.
- 6.2 The roles of the prosecutor and the investigator are interdependent. Whilst each has separate responsibilities in the criminal justice system, they need to work in partnership to enforce the law. The prosecutor cannot direct investigations, but he or she may request further investigation to pursue additional line of enquiries which are relevant to the decision-making process. The prosecutor also advises the investigator on the conduct of cases. This includes advice in relation to :

- (a) what criminal charges are open, including :
 - (i) whether there is sufficient evidence to support a charge;
 - (ii) the admissibility of evidence;
 - (iii) the most appropriate charge in the circumstances;
- (b) the present state of the law;
- (c) whether a case should be tried summarily or on indictment;
- (d) the institution of appeals or reviews of sentence;
- (e) the disclosure of evidence.

6.3 If the prosecutor and the investigator are not in agreement as to the conduct of a case, the issue may need to be resolved through discussion at successively more senior levels on both sides. This is provided for by the *Memorandum of Understanding*, which was signed by the Director of Public Prosecutions and the Director of Crime and Security, Hong Kong Police Force, in July 2000, and contains the agreed levels of service which prosecutors and police provide to each other. Article 2.10 of the *Memorandum* recognises that :

“The Department of Justice remains solely responsible for the taking of all prosecutorial decisions and the police remain solely responsible for the conduct of investigations.”

7. *The Decision to Prosecute*

- 7.1 The prosecutor must consider two issues in deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued? That policy is consistent with the policies applied by prosecution agencies throughout the common law world.
- 7.2 In Hong Kong, the position is underlined by section 15(1) of the Criminal Procedure Ordinance, Chapter 221 which states :

“The Secretary for Justice shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.”

- 7.3 In response to a question in the Legislative Council in March, 1987, Michael Thomas QC, Attorney General, emphasized that the Attorney General has a discretion whether or not to prosecute and he set out the factors to be taken into account when making a decision in these terms :

“First, there must be enough evidence to prove all the ingredients of an offence. This is not always easy to determine, especially where an offence requires proof of a state of mind or an intention of which there is often little or no direct evidence. Even if there is evidence that tends to prove the necessary ingredients of an offence, a bare prima facie case is, generally speaking, not enough to warrant a prosecution. There must be a reasonable prospect of securing a conviction because it is

not in the interests of public justice, nor indeed of the public purse, that weak, or borderline, cases should be prosecuted.

But at the same time there are other factors to be considered in order to assess where the interests of public justice lie. And among these are :

- What are the surrounding circumstances of the offence?*
- How serious was it?*
- What were its practical effects?*
- What extenuating circumstances are there?*
- What is the attitude of the suspect?*
- How would the decision to launch a prosecution affect other people?*
- How serious a view would a court take of the offence if there were a conviction?*
- Would the consequences of prosecution be out of all proportion to the seriousness of the offence or to the penalty a court would be likely to impose?*

I emphasise that this is not an exhaustive list, but sufficient I hope to indicate to Members that the decision whether to prosecute ultimately depends on a broad view of the interests of justice.”

- 7.4 It is not the rule that all offences for which there is sufficient evidence must be prosecuted. In 1951, Sir Hartley Shawcross KC, Attorney General of England and Wales, outlined to the House of Commons the following principles,

which have since been accepted as correct by prosecution agencies which have common law systems :

“It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should prosecute, amongst other cases : ‘wherever it appears that the offence or the circumstances of its commission is or are of such a character that prosecution in respect thereof is required in the public interest’. That is still the dominant consideration.”

- 7.5 That statement applies equally to the position in Hong Kong. The public interest is the paramount concern. In the same speech, Sir Hartley Shawcross quoted with approval the views expressed by a predecessor, Sir John Simon KC, in 1925 :

“There is no greater nonsense talked about the Attorney General’s duty than the suggestion that in all cases the Attorney General ought to decide to prosecute because he thinks there is what the lawyers call ‘a case’.”

- 7.6 In deciding whether to prosecute, the prosecutor is under a duty ‘to filter out unmeritorious prosecutions for offences of a technical nature’ (*HKSAR v Chan Sung-wing* [2008] 1 HKLRD 126).

8. *The Sufficiency of Evidence*

- 8.1 When considering the institution or continuation of criminal proceedings the first question to be determined 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 known to the law has been committed by an identifiable person. The Secretary for Justice does not support the proposition that a bare *prima facie* case is enough to justify a decision to prosecute. The proper test is whether there is a reasonable prospect of a conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. When reaching this decision, the prosecutor will wish as a first step to be satisfied that there is no reasonable expectation of an ordered acquittal or a successful submission of no case to answer.

8.2 A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court, as well as an evaluation of the admissibility of evidence implicating the accused. The prosecutor should also consider any defences which are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction. In a matter as vital as the liberty of the citizen the prosecutor will wish, in the event of uncertainty, to err on the side of caution.

8.3 When the prosecutor evaluates the sufficiency of evidence, regard will be had to such matters as :

- (a) *The Secretary for Security's Rules and Directions for the Questioning of Suspects and the Taking of Statements*, which contain provisions for the questioning of persons by the police and are designed to ensure the reliability of evidence derived from confessions or other statements made to a police officer. If there is material available to the prosecutor that suggests that a confession might not be voluntary or was obtained in circumstances that could affect its

admissibility or credit, that is an important consideration where the prosecution cannot proceed without that evidence;

- (b) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that he or she is either hostile or friendly to the accused, or that the witness may for some other reason be unreliable?
- (c) Has a witness a motive for telling less than the whole truth?
- (d) What sort of impression is the witness likely to make?
- (e) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad?
- (f) Where child witnesses are involved, are they likely to be able to give credible unsworn evidence?
- (g) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused? (Special attention should be given to the law on identification evidence.)
- (h) Are there substantial matters that the defence may properly use to attack the credibility of the witness?
- (i) Where there are a number of suspects the evidence against each accused must be considered separately. Is the evidence sufficiently strong so that the case can be proved against each suspect should separate trials be ordered?
- (j) Is there anything in the case to suggest that a false story may have been concocted?

8.4 By relying on his or her knowledge of the law the prosecutor is required to assess these and other factors to determine whether or not there is a reasonable prospect of conviction on the evidence that is available to the prosecution. Each case must be considered on its own particular facts and in light of the surrounding circumstances. The prosecutor must apply judgment, experience and common sense in the determination of what is the just course.

9. *The Public Interest Criteria*

9.1 Once the prosecutor is satisfied that the evidence itself can justify proceedings in the sense that there is a reasonable prospect of obtaining a conviction, he or she must then consider whether the public interest requires a prosecution. Circumstances may exist to prevent a fair trial from being conducted. Regard should also be had to the availability or efficacy of any alternatives to prosecution such as a caution or a warning.

9.2 Although the public interest will be the paramount consideration, the interests of the victim are an important factor in determining the balance of the public interest and should be taken into account. The factors which can properly lead to a decision not to prosecute will vary from case to case, but, broadly speaking, the graver the offence, the less likelihood will there be that the public interest will allow of a disposal less than prosecution, for example, a caution by the police. In assessing the gravity of the offence, it will be necessary to consider whether the victim has suffered significant harm or loss : the meaning of ‘*significant*’ may be relative to the circumstances of the victim. Where, however, an offence is not so serious as plainly to require prosecution, the prosecutor should consider whether the public interest requires a prosecution. If the case falls within any of the following categories, this may be an

indication that proceedings are not required, subject to the particular circumstances of the case :

(a) **Likely penalty**

When the circumstances of an offence are not particularly serious, and a court would be likely to impose a purely nominal penalty, the prosecutor should carefully consider whether the public interest would be better served by a prosecution or some other form of disposal such as, where appropriate, a caution or a warning. This applies particularly where the offence is triable on indictment when the prosecutor should also weigh the likely penalty with the likely length and cost of the proceedings.

(b) **Staleness**

If an offence is stale, the prosecutor should carefully consider if it is in the public interest to prosecute the case. Generally, the graver the allegation, the less the significance to be attached to the element of staleness.

(c) **Youth**

The stigma of a conviction can cause irreparable harm to the future prospects of a young adult, and careful consideration should be given to the possibility of dealing with him or her by means of a caution.

(d) **Old age and infirmity**

(i) The older or more infirm the offender, the more reluctant the prosecutor may be to prosecute unless there is a real possibility of repetition or the offence is of such gravity that a prosecution is unavoidable. In general,

proceedings should not be instituted where a court is likely to pay such regard to the age or infirmity of the offender as to induce it to impose only a nominal penalty, although there may well be circumstances, such as where the accused has held or still holds a position of some importance, when proceedings are required in the public interest regardless of the likely penalty;

- (ii) It will also be necessary to consider whether the accused is likely to be fit enough to stand his or her trial. The prosecutor should have regard to any medical reports which have been made available by the defence solicitor and may arrange for a further medical examination where this is necessary.

(e) **Mental illness or strain**

- (i) Where there is evidence to establish that an accused or a person under investigation was suffering from a mental disorder at the time the offence was committed, the prosecutor may conclude that prosecution will not be appropriate in the circumstances unless it is overridden by the wider public interest, including in particular the gravity of the offence. Other material considerations will include the circumstances of any previous offences, and such relevant information concerning the nature of the person's condition, the likelihood of further offending, and the availability of suitable alternatives to prosecution. The mental condition of the suspect may be such as to require treatment rather than prosecution;

- (ii) Where criminal proceedings are contemplated or have been instituted and the prosecutor is provided with a medical report to the effect that the strain of criminal proceedings may lead to a considerable worsening of the accused's mental health, such report should receive careful consideration. This can be problematic as in some instances the accused may have become mentally disturbed or depressed by the mere fact that his or her misconduct has been discovered and the prosecutor may be dubious about a prognosis that criminal proceedings will adversely affect his or her condition to a significant extent. Where, however, the prosecutor is satisfied that the probable effect on the accused's mental health outweighs the considerations in favour of a prosecution in that particular case, he or she should not hesitate to advise against or to discontinue proceedings. An independent medical report may be sought, but should generally be reserved for cases of such gravity as plainly require prosecution unless the examination provides clear evidence that such a course would be likely to result in a permanent worsening of the accused's condition. The accused's mental state will, of course, be relevant in considering any issue of *mens rea* or fitness to plead.

(f) **Sexual offences**

When young persons have participated in the offence and there is no element of seduction or sexual corruption, a prosecution may not be required. (Sexual assaults upon children should always be regarded seriously, as should offences against adults,

such as rape, which amount to gross personal violation. In such cases, where the prosecutor is satisfied as to the sufficiency of the evidence, there will seldom be any doubt that prosecution will be in the public interest. The position might be different if the assailant is young or the assault minor.)

(g) **Peripheral defendants**

Where an allegation involves several suspects, the prosecutor, in general, should have regard to the need to ensure that proceedings are pursued only against those whose involvement goes to the heart of the issue to be placed before the court. The inclusion of suspects on the fringe of the action and whose guilt in comparison with the principal offenders is minimal can lead to additional delay and cost, as well as to an unnecessary clouding of the essential features of the case.

(h) **Remorse**

Where a suspect has admitted the offence and shown genuine remorse and a willingness to make amends, the prosecutor should carefully evaluate this. A suspect cannot expect to avoid prosecution simply by making compensation.

(i) **Delay**

Where there has been a long delay since the offence was committed, common law and human rights considerations make it necessary to consider the consequences of that delay. Factors to be considered include :

- (i) whether any delay was caused or contributed to by the suspect;
- (ii) whether the fact of the offence or the suspect's alleged responsibility for it has recently come to light;
- (iii) where any delay was caused or contributed to by a long investigation, whether the length of the investigation was reasonable in the circumstances;
- (iv) where the victim has delayed in reporting the offence, the age of the victim both when the offence was committed and when it was reported;
- (v) whether the suspect allegedly exercised a dominant position over the victim;
- (vi) whether there was actual prejudice caused to the alleged offender by reason of any delay or lapse of time.

(j) **Mitigation**

Where there are mitigating factors present, the prosecutor should consider whether these are factors which should be taken into account by the sentencing court in the event of a conviction rather than factors which should lead to a decision not to prosecute.

(k) **Availability of a civil remedy**

Civil proceedings may sometimes offer a more appropriate method of settling the issues in a case. Depending on the circumstances, the right of a party

to seek civil redress may influence the prosecutor in favour of a disposal other than prosecution. A suspected offence may amount in reality to little more than a civil dispute between the two parties.

(l) **Counter-productiveness of prosecution**

If a prosecution would be perceived as counter-productive, for example by bringing the law into disrepute, the prosecutor must exercise caution. The law may be obsolete or obscure, and a warning to the suspect might be all that is required. A prosecution may not be desirable if it provides a person with an obsession an opportunity to air his or her views in public and to gain publicity for a particular cause. A prosecution may not be effective in stopping a person with an obsession from making a nuisance of himself or herself.

(m) **Mistake**

If the offence was committed as a result of a genuine mistake or misunderstanding, a prosecution may not be required. That it occurred through a misjudgment may also be of relevance.

(n) **Attitude of the victim**

In addition to considering the impact of the alleged offence on the victim, the prosecutor may have regard to any available information indicating the views of the alleged victim as to whether prosecution is appropriate or whether the case might appropriately be disposed of by other means. In the assessment of the public interest the views of the victim will be an important factor for consideration.

(o) **Assistance to the authorities**

Where the suspect is willing to cooperate in the investigation or prosecution of others, or if he or she has already done so, a prosecution may not be necessary.

(p) **Technicality**

If the offence is trivial or otherwise of a technical nature only, a prosecution may not be required.

9.3 The following factors, which are not exhaustive, increase the seriousness of the offence and thereby the likelihood that the public interest requires a prosecution :

- (a) where a conviction is likely to result in a significant penalty, including any confiscation or disqualification order;
- (b) where the suspect was in a position of authority or trust, which has been abused;
- (c) where the offence was premeditated;
- (d) where a weapon was used or violence was threatened during the commission of the offence;
- (e) where the suspect was a ringleader or an organizer of the offence;
- (f) where the offence was carried out by a group;
- (g) where the victim of the offence was vulnerable, was put in considerable fear, or suffered personal attack, damage or disturbance, or has suffered serious financial loss;

- (h) where there was a marked difference between the actual or mental ages of the suspect and the victim;
- (i) where there was any element of corruption;
- (j) where the suspect's previous convictions or cautions are relevant to the present offence;
- (k) where the suspect is alleged to have committed the offence whilst on bail, on probation, or subject to a suspended sentence or an order binding over the suspect to keep the peace and be of good behaviour;
- (l) where the offence, although not serious in itself, is widespread in the area in which it occurred;
- (m) where there are grounds for believing that the offence is likely to be continued or repeated, as where there is a history of recurring conduct.

10. The Consent to Prosecute

- 10.1 It is a condition precedent to the institution of some proceedings that the consent of the Secretary for Justice be first obtained. Before authorizing a prosecution, the prosecutor should consider if consent is required. In respect of some offences, the consent to prosecute is exercised personally by the Secretary. In respect of others, the Secretary has authorized the Director of Public Prosecutions and senior prosecutors to provide the necessary consents.
- 10.2 Where legislation provides for consents to prosecute to be given the basic intent is to ensure that prosecutions are only ever instituted after the appropriate level of scrutiny of a case has been exercised. This is particularly so where the

criminal law is to be deployed in a sensitive area, or where issues of public policy may arise.

11. The Private Prosecution and Intervention by the Secretary for Justice

11.1 Article 63 of the Basic Law provides :

“The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.”

11.2 Under the common law, every person has the same right to institute a criminal prosecution as the Secretary for Justice or any one else. The private citizen can prosecute in the public interest. The right to prosecute does not include a right of access to police statements, reports and photographs.

11.3 Once started, a private prosecution can be taken over by the Secretary for Justice *‘and continued or discontinued as he sees fit’* (*Re C (A Bankrupt)* [2006] 4 HKC 582). The Secretary may also stay the proceedings by the entry of a *nolle prosequi*. Access of citizens to the courts will not be impeded save in exceptional circumstances.

11.4 Section 14 of the Magistrates Ordinance, Chapter 227, provides that a complainant or informant may conduct his or her prosecution in person or by counsel. The Secretary for Justice is entitled to intervene in a private prosecution and to assume the conduct of these proceedings. From the date of such intervention the Secretary is deemed to be a party to the proceedings.

11.5 The Secretary for Justice may prevent a private prosecution from proceeding in the District Court and the Court of First Instance by refusing to sign the charge sheet or the

indictment, as required by sections 74 and 75 of the District Court Ordinance, Chapter 336, and section 17 of the Criminal Procedure Ordinance, Chapter 221. In *R v George Maxwell (Developments) Ltd* [1980] 2 All ER 99, it was held that a private prosecutor was not a litigant in person before the Crown Court and was not entitled to act as an advocate in any way in those proceedings because (a) once the indictment was signed the proceedings thereafter continued in the name of the Sovereign and (b) the public interest required that the prosecution in the Crown Court be impartial and subject to the constraints necessary to ensure a fair trial.

11.6 In considering whether to take over a prosecution the following factors are relevant :

- (a) whether the public interest will be advanced if the prosecution is taken over;
- (b) the wishes of the parties;
- (c) whether the prosecution will be taken over to be terminated. If so, regard will be had to whether :
 - (i) the proceedings are vexatious or oppressive;
 - (ii) there are reasonable prospects of success;
 - (iii) a decision already taken by the Department of Justice will be thwarted;
 - (iv) there is any duplication of proceedings involving the same incident;
 - (v) the Department of Justice should offer no evidence or enter a *nolle prosequi*;

- (d) whether there will be a fair trial;
- (e) the seriousness of the charge;
- (f) whether the proceedings are contrary to the public interest.

11.7 The public interest may at times override the individual interests or wishes of those who institute criminal proceedings. The taking over of proceedings is exceptional. A prosecution will not be taken over unless that course is approved personally by the Secretary for Justice.

12. The Position of the Juvenile Offender

12.1 The age of criminal responsibility is 10 years.

12.2 It is a long standing statutory requirement that the court shall have regard to the welfare of the juvenile appearing before it. It is accordingly necessary that, in deciding whether or not the public interest requires a prosecution, the welfare of the juvenile should be fully considered as well as section 109A of the Criminal Procedure Ordinance, Chapter 221 which restricts sentences of imprisonment of persons between 16 and 21 years of age.

12.3 There may be positive advantages for the individual and for the community in using prosecution as a last resort. In general there is, in the case of juvenile offenders, a much stronger presumption in favour of methods of disposal which fall short of prosecution unless the seriousness of the offence or other exceptional circumstances dictate otherwise. The objective should be to divert juveniles from court wherever possible. Prosecution should always be regarded as a severe step.

- 12.4 It will never be right to prosecute a juvenile solely to secure access to the welfare powers of the court. Where the prosecutor thinks that there may be grounds for care proceedings and that this might better serve the public interest and welfare of the individual, he or she should invite the police to put this possibility to the Social Welfare Department.
- 12.5 In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such factors as :
- (a) the seriousness of the alleged offence;
 - (b) the age and apparent maturity and mental capacity of the juvenile;
 - (c) the available alternatives to prosecution, particularly a Police Superintendents' Discretion Scheme power to issue a caution to juveniles, and their efficacy;
 - (d) the sentencing options available to the relevant Juvenile Court if the matter were to be prosecuted;
 - (e) the juvenile's family circumstances particularly whether the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile;
 - (f) the juvenile's antecedents, including the circumstances of any previous caution the juvenile may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate;
 - (g) whether a prosecution would be likely to be harmful to the juvenile or be inappropriate, having regard to

such matters as the personality of the juvenile and his or her family circumstances.

13. The Charging Practice and Procedure

13.1 There must be available admissible evidence which supports all the ingredients of the offence charged. The prosecutor will exercise his or her discretion on the choice of charge on the basis of the following principles :

- (a) Every effort should be made to keep the number of charges as low as possible. A multiplicity of charges imposes an unnecessary burden on the administration of the courts as well as upon the prosecution, and often tends to obscure the essential features of the case. Where the evidence discloses a large number of offences of a similar nature, the use of specimen charges should always be considered. Consideration should be given to inviting the court, if the accused agrees, to take outstanding offences into account for the purposes of sentencing. Where numerous different types of offence are disclosed, the ability to present the case in a clear, simple manner should remain a key objective;
- (b) The charges laid should adequately reflect the gravity of the accused's conduct. In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, and the probable lines of defence to a particular charge, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence;
- (c) In many cases the evidence will disclose an offence against several different laws. Care must therefore be

taken to choose a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence.

14. *The Mode of Trial*

14.1 For most offences which are triable in the Magistrates Court, the maximum sentence upon conviction is 2 years' imprisonment. In the District Court, the maximum sentence upon conviction is 7 years' imprisonment. In the Court of First Instance, the maximum sentence upon conviction is that prescribed by law, including, for some offences, life imprisonment. In the selection of venue, the sentence which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to examine. The prosecutor will also wish to consider the general circumstances of the case, the gravity of what is alleged, the antecedents of the accused and any aggravating factors. Matters such as the length of trial or the possibility of a guilty plea are not usually relevant.

14.2 Although it is the prerogative of the prosecution to select the venue for trial, *'the venue selected should be appropriate'* (*HKSAR v Tai Chi-wah and Another* CACC 497 of 2006). In *HKSAR v Kwok Chi-kwai and Another* CACC 12 of 2005, the Court of Appeal observed :

"These applicants for leave to appeal against conviction were tried in the High Court, a choice of venue that surprises us given that it was a complicated conspiracy to defraud in respect of which there was never a prospect of a sentence exceeding the maximum term that District Court judges are entitled to impose."

- 14.3 In the selection of venue, the prosecutor should have regard to those offences which must in law be tried in the Magistrates Court, as they are purely summary, and to those which must be tried on indictment, such as murder and rape, and to those which are triable either way. Purely summary offences may be tried together with indictable offences in the District Court, but not in the Court of First Instance.
- 14.4 In deciding whether a case should be tried in the Court of First Instance or the District Court, the prosecutor is entitled to consider the possibility of an enhanced sentence being imposed upon conviction in accordance with section 27 of the Organized and Serious Crimes Ordinance, Chapter 455. An enhanced sentence may be appropriate if the offence is an organized crime, but also in other circumstances, as where significant harm has been caused or where the offence is prevalent. The Magistrates Court lacks the jurisdiction to enhance a sentence in this way.

15. The Review of the Decision to Prosecute

- 15.1 Once a prosecution has been instituted, the prosecutor is under a duty to ensure that its continuation remains in the public interest. If circumstances change, or if new material comes to light, the prosecutor may have to review the prosecution. If it becomes apparent that it is no longer in the interests of justice to proceed with the case, it should be stopped. Alternatively, the prosecutor may decide that it is appropriate to proceed on amended or alternative charges.
- 15.2 On 27 April 1994, Jeremy Mathews, Attorney General, explained to the Legislative Council :

“The Director of Public Prosecutions, indeed the prosecuting authorities generally, must keep an open mind in respect of decisions to prosecute and it is not uncommon for there to

be changes to earlier decisions and I am sure that members of the community would expect the Director and the prosecuting authorities to act in that way.”

- 15.3 If the prosecutor is invited to resolve criminal proceedings by the acceptance of adjusted pleas, this may be considered provided that it is in the public interest and after a consideration of whether :
- (a) the adjusted charge is supported by the evidence;
 - (b) the adjusted charge reflects the essential criminality of the conduct;
 - (c) the plea to the adjusted charge will match the seriousness of the crime, particularly if there are aggravating features;
 - (d) the saving of expense and time is great when weighed against the likely outcome of the matter if tried;
 - (e) it will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in court.
- 15.4 Plea negotiation will not normally be instituted by the prosecution. In no circumstances should the prosecutor enter such a negotiation if the accused maintains his or her innocence in respect of a charge to which a guilty plea is offered. Nor should the prosecutor accept an alternative plea if this will produce a distortion of the facts and create an artificial basis for sentencing. If pleas are accepted to a reduced number of charges, or to less serious charges, the prosecutor should be prepared to explain the decision in open court.

- 15.5 Before the prosecutor discontinues a prosecution, or accepts an adjusted plea, he or she should, if practicable, ascertain the views of the victim and of the reporting department or agency. These views, whilst not determinative of the issue, will assist the prosecutor in reaching an informed decision. The more finely balanced the factors involved, the greater will be the assistance to be derived from the views of others.
- 15.6 The procedures that exist for consultation with interested parties and for the obtaining of appropriate clearance where issues concerning the review of the decision to prosecute arise, are designed to ensure consistency, fairness and openness in the conduct of public prosecutions.

16. The Review of the Decision Not to Prosecute

- 16.1 People should be able to rely on decisions taken by the Secretary for Justice. Normally, if a suspect or an accused is told that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special circumstances in which a prosecution will be re-started, particularly if the case is serious. These circumstances include :
- (a) rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;
 - (b) cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the accused will be told that the prosecution may well start again;

- (c) cases which are stopped because of a lack of evidence but where more significant evidence is discovered later;
- (d) cases where a witness who has been granted an immunity fails to provide truthful testimony.

17. The Nolle Prosequi

- 17.1 Proceedings on indictment in the Court of First Instance and by charge in the District Court may be stayed by the entry of a *nolle prosequi*. A *nolle prosequi* may also be used in the Magistrates Court if an accused faces trial for an indictable offence, but not otherwise. A *nolle prosequi* may only be entered on the direction of the Secretary for Justice, as the power has not been delegated.
- 17.2 The effect of a *nolle prosequi* is to stay the prosecution. It does not operate as a bar or a discharge or an acquittal. The accused remains at risk of being charged again if the prosecutor considers this to be appropriate in the interests of justice.
- 17.3 Exceptional situations may arise where a *nolle prosequi* is the best means of halting proceedings. A *nolle prosequi* may be directed to be entered in cases where the accused is unable to plead in court or stand trial owing to physical or mental incapacity which is likely to be permanent. A *nolle prosequi* may also be entered to prevent the ends of justice being thwarted, as where interference with a witness may have occurred and an adjournment of the proceedings is not an adequate remedy.

18. The Bind Over Order Procedure

- 18.1 When a person has been charged with an offence, the prosecution are sometimes asked to offer no evidence if he

or she agrees to be bound over to keep the peace and/or be of good behaviour. If such an arrangement is acceptable to the prosecution and the court, a bind over arrangement operates as a form of preventive justice. Although the bind over procedure is not on a par with a conviction, it is not to be treated as a '*let-off*'. The accused knows that if he or she is guilty of further misconduct during the operational period, the recognizance may be lost.

- 18.2 The bind over procedure may be viewed as a rehabilitative measure in its own right. It serves to keep the accused on the straight and narrow. There are consequences to the accused for non-compliance with the terms of the order.
- 18.3 When a bind over arrangement is proposed, the prosecution look to see if there is material of which they were not aware, or perhaps not sufficiently aware, when the prosecution was instituted, and which may have a direct bearing on the propriety of pursuing the prosecution. In such circumstances, the prosecution reassess the case in accordance with the basic criteria applicable to the initiation of a prosecution.
- 18.4 A decision to agree to a bind over is taken after a careful consideration of the circumstances of the case and of the representations made, and after due regard has been had to whether the interests of justice require the prosecution to proceed. It may not be appropriate to pursue the prosecution if its continuation would cause consequences to the accused which are out of all proportion to the gravity of the offence. Other factors which, when taken in conjunction with others, might be relevant, will be found in the likely penalty in the event of a conviction, the age of the accused, the record and character, the mental state, the view of the victim, and the attitude of the accused to the offence.

18.5 A request to the prosecutor to accept a bind over arrangement is usually made by the defence. On occasion, the court may invite the prosecution to consider such an arrangement. The prosecution cannot be compelled to accept such a disposal if it is deemed to be inappropriate in the public interest. The more serious the offence, the less likely is it that the prosecution will feel disposed to accept this arrangement.

19. The Immunity from Prosecution

19.1 The use of informers as prosecution witnesses is always a matter which requires careful and balanced judgment. On the one hand, there is often a reluctance to trust an informer, particularly if that informer stands to gain from giving evidence. On the other hand, the evidence of informers is evidence which can be evaluated by a court and in many instances truthful testimony will be given. There are some areas of law enforcement where a prosecution will only ever be possible as a result of evidence from informers.

19.2 The Director of Public Prosecutions will in appropriate cases authorize the offering and granting of an immunity to a person who is to assist a law enforcement agency in the detection or control of criminal activity, and who by so acting may become a party to the commission of criminal offences. In general an immunity will only be offered :

- (a) where the criminal activity under investigation is of a serious kind or of a kind that poses a serious threat to law and order or public safety within Hong Kong; and
- (b) where conventional means of detection or control are unlikely to prove effective.

19.3 The prosecutor has a special responsibility to ensure that the processes of justice do not miscarry when an informer is

used. In all cases where it is proposed to use an informer as a witness, the prosecutor should ascertain whether the informer has been promised any reward for giving evidence or hopes to gain any benefit from testifying. The prosecutor should study the criminal record of the informer and look for any motive for lying. Sometimes the prosecutor may conclude that the informer is so tainted that the testimony should not be used at all, at least in the absence of corroborative material. The court and the defence should be made aware of any matter which might affect the assessment of the evidence of an informer.

19.4 In principle it is desirable that the criminal justice system should operate without the need to grant immunities to persons who participated in alleged offences in order to secure that evidence in the prosecution of others. However, in some cases this is in the interests of justice. As a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject to the usual evidentiary and public interest considerations being satisfied. Upon pleading guilty, the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a substantial discount in sentence. In general, an accomplice will only be given an immunity from prosecution if :

- (a) the evidence the accomplice can give is considered necessary to secure the conviction of the accused, and that evidence is not available from other sources; and
- (b) the accomplice can reasonably be regarded as significantly less culpable than the accused.

19.5 The central issue in deciding whether to give an accomplice an immunity is whether in the overall interests of justice the prosecution of the accomplice should be foregone in order to secure that person's testimony in the prosecution of another.

In deciding where the balance lies, these factors are relevant :

- (a) the significance to a successful prosecution of the evidence which it is hoped to obtain;
- (b) the degree of involvement of the accomplice in the criminal activity in question compared with that of the accused;
- (c) whether any inducement has been offered to the person concerned;
- (d) the likely credibility of the accomplice as a witness;
- (e) whether the accomplice has made, or is prepared to make, full disclosure of all facts and matters within his or her knowledge;
- (f) the nature and strength of any corroborative or other evidence.

19.6 An immunity should only be given if the interests of justice so require. The Director of Public Prosecutions and his Deputies are authorized to grant full or partial immunity to persons suspected or accused of offences in return for their undertakings to give truthful evidence on behalf of the prosecution. The immunity will be in writing and where necessary translated. A copy of the immunity should be provided by the prosecutor to the court and the defence at trial.

20. *The Duty of Disclosure*

20.1 In *HKSAR v Lee Ming-tee and Securities and Futures Commission* (2003) 6 HKCFAR 336, the court stated :

“A strong obligation of disclosure will preserve the criminal trial as the appropriate forum for determining the truth or falsity of criminal allegations.”

- 20.2 Every accused has a right to a fair trial, a right long embodied in our law and guaranteed under Article 87 of the Basic Law. A fair trial is the object and expectation of all of those involved in the trial process. The prosecutor must make fair disclosure to the defence as an integral part of a fair trial.
- 20.3 The duty to disclose is a positive duty placed upon the prosecution. It is also continuing. If material becomes relevant during the course of a trial it should be disclosed.
- 20.4 The prosecutor must be alert to the need to make advance disclosure of material of which he or she is aware (either from his or her own consideration of the papers or because attention has been drawn to it by the defence) and which he or she, as a responsible prosecutor, recognizes should be disclosed at an early stage. Such material includes :
- (a) previous convictions of a complainant or deceased if that information can reasonably be expected to assist the defence when applying for bail;
 - (b) material which may enable the accused to make a pre-committal application to stay the proceedings as an abuse of process;
 - (c) material which may enable the accused to submit that he or she should only be committed for trial on a lesser charge, or perhaps that there should not be a committal for trial at all;

- (d) material which will enable the accused and the legal advisers to make an informed decision as to plea, and if necessary, to make preparations for trial which may be significantly less effective if disclosure is delayed.
- 20.5 The prosecution should make known to the defence any witness whom they do not propose to call but whom they consider could give material evidence that tends either to weaken the prosecution case or strengthen the defence case. If the prosecutor possesses material which may be of relevance to the defence, whether documentary or otherwise, this should be disclosed. There is a positive duty to ascertain the existence of, and to disclose scientific evidence which might assist the defence. The task of the prosecutor is to evaluate the materiality of information which he or she possesses.
- 20.6 Not all material needs to be disclosed to the defence. The rule is that information need not be disclosed by the prosecutor if such disclosure would be prejudicial to the public interest. This may arise in various situations, as where disclosure would harm the proper functioning of the public service. The concept of ‘*public interest immunity*’ recognizes not that the prosecution have a privilege to withhold information, but that there is immunity from making disclosure when the public interest in withholding information in a particular case outweighs the normal rules requiring disclosure.
- 20.7 In *R v Keane* (1994) 99 Cr App R 1, the Court of Appeal defined ‘*materiality*’, emphasized the prosecution’s duty in judging materiality, and set out the balancing exercise to be undertaken by judges in deciding upon disclosure. The procedure to be adopted, whether it be by way of *inter partes* hearing, or exceptionally in an *ex parte* hearing, is governed by rules of practice identified both in *R v Keane* and in *R v Davis, Johnson and Rowe* (1993) 97 Cr App R 110. In *R v*

Keane, it was held that the prosecution should have notified the defence before the trial began that an *ex parte* application was to be made to the court, and such an application should have been made so that the trial judge could have seen the material and heard the prosecution's reasons for not wishing to disclose it before making a ruling. The prosecution had to identify the documents and information which were material and, having done so, such material should be disclosed unless they wished to maintain that public interest immunity or other sensitivity justified withholding some or all of it. Only that part which was both material in the estimation of the prosecution and sought to be withheld should be put before the court for its decision. The more full and specific the indication the defence lawyers gave of the defence or issues they were likely to raise, the more accurately both prosecution and judge would be able to assess the value to the defence of the material. The guidance provided in *Keane* encompasses the common law duty of disclosure which applies in Hong Kong (*HKSAR v Lau Ngai-chu* [2002] 2 HKC 591). Any order that material otherwise disclosable be withheld on the basis of public interest immunity should be no wider in scope than the public interest demands; and similarly it should not remain in force any longer than necessary (*Johnson and Others v R* [1999] EWCA Crim 885).

- 20.8 If the prosecution wish to claim public interest immunity in a criminal trial for documents which might help the defence case, they should give notice of their intention to the defence so that, if necessary, the court can be asked to rule on the question. If, in a wholly exceptional case, the prosecutor is not prepared for the issue to be decided by the court, the prosecution may need to be discontinued. Material covered by legal professional privilege, including confidential advice given on the case by the prosecutor to the investigator, is not in general subject to the rules of disclosure.

20.9 The ultimate arbiter of what must be disclosed is the court and not the prosecutor. Subject to that, the material which the prosecution are required to disclose is that what can be seen on a sensible appraisal by the prosecution :

- (a) to be relevant or possibly relevant to an issue in the case;
- (b) to raise or possibly raise a new issue whose existence is not apparent from the evidence that the prosecution proposed to use;
- (c) to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (a) or (b).

Thus any unused material in the possession of the prosecution, e.g. a statement of a witness which contains information inconsistent with the evidence that he or she is expected to give, must be disclosed.

20.10 In deciding whether to provide copies of audio and video surveillance to the defence the prosecution are entitled to take into consideration the protection of the safety of an undercover police officer (*R v Crown Prosecution Service and Another, Ex parte J and Another* [2000] 1 WLR 121).

20.11 The prosecutor's duty is to prosecute the case fairly and openly in the public interest and does not extend to conducting the case for the defence. It follows that the prosecution are under no duty to disclose to the defence material which is relevant only to the credibility of a defence witness; indeed, there is a clear distinction to be drawn between such material, and material which may assist the defence case, which is disclosable. Accordingly, where the result of checking an alibi notice is to provide the prosecution with material which undermines the credibility

of a witness who supports the alibi there is no duty on the prosecution to disclose that material to the defence.

20.12 In *R v Ch'ng Poh* [1996] 1 HKCLR 18, concern was expressed about the somewhat cavalier attitude of the prosecution to the duty of disclosure of material that was or might be relevant. The discharge of that duty is to be measured, not by the actual knowledge or difficulties of the prosecution or departments concerned, but by the potential effect upon the defence of the accused and the extent to which it may be assisted or prejudiced.

20.13 The Criminal Procedure and Investigations Act 1996 does not apply to Hong Kong but the following principles (contained in section 3 and section 9) are suggested for guidance :

- (a) The prosecutor must disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused;
- (b) Where material consists of information which has been recorded in any form the prosecutor discloses it :
 - (i) by securing that a copy is made of it and that the copy is given to the accused; or
 - (ii) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;

and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded;

- (c) Where material consists of information which has not been recorded the prosecutor discloses it by securing that it is recorded in such form as he thinks fit and
 - (i) by securing that a copy is made of it and that the copy is given to the accused; or
 - (ii) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;
- (d) Where material does not consist of information the prosecutor discloses it by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;
- (e) Material must not be disclosed to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly;
- (f) The prosecutor must keep under review the question whether at any given time there is prosecution material which :
 - (i) in his or her opinion might undermine the case for the prosecution against the accused; and
 - (ii) has not been disclosed to the accused;

and if there is such material at any time the prosecutor must disclose it to the accused as soon as is reasonably practicable.

20.14 The prosecutor should disclose to the defence the previous convictions of a prosecution witness. If discreditable conduct has previously been established against a prosecution witness which might affect the assessment to be made of him or her as a witness, that should also be disclosed. The safest course for the prosecutor is to make enquiry about a witness's record and character where his or her credibility is likely to be a crucial issue in the case.

20.15 In *HKSAR v Lee Ming-tee and Securities and Futures Commission* (2003) 6 HKCFAR 336, the court reviewed the disclosure obligations of the prosecution :

- (1) The prosecution is under a duty of disclosure to the defence which extends to material or information in the possession or control of the prosecution (which expression includes the investigating agency) which may undermine its case or advance the defence case;
- (2) The duty rests with the prosecution or the prosecutor. The duty should be considered as one imposed upon the prosecution generally and it would be unduly restrictive to say that the duty is confined to the prosecutor;
- (3) The prosecution's duty is to disclose to the defence, material (including information) in its possession or control, subject to relevance, privilege and public interest immunity. That will ordinarily include material that has been gathered by the investigating agency and it is the responsibility of the prosecution to make the investigating agency aware of the need to make available all relevant materials;
- (4) In order to ensure that all disclosable material is provided to the defence, prosecuting counsel should instruct investigating officers and, where appropriate,

witnesses to bring to counsel's attention any material that may be disclosable. In other words, disclosable material known to a witness, including an expert witness, should be channeled through prosecuting counsel who should take appropriate steps to facilitate that happening;

- (5) The prosecution's duty of disclosure extends to material in the possession or control of any other government department or agency if there are particular circumstances suggesting that it may have such material;
- (6) The duty is not limited to the disclosure of admissible evidence. Information not itself admissible may lead by a train of inquiry to evidence which is admissible. And material which is not admissible may be relevant and useful for cross-examination of a prosecution witness on credit;
- (7) The fact a prosecution witness is the subject of a disciplinary or other inquiry may or may not be disclosable. Every case must be judged according to its own particular circumstances. What has to be kept in mind is that, on credit, only significant material that a reasonable jury or tribunal of fact could regard as tending to shake confidence in the reliability of the witness is disclosable and that the answers of the witness in cross-examination on credibility alone generally cannot be rebutted by evidence;
- (8) If a dispute as to disclosable material arises, it is for the court, not the prosecutor, to decide if the withholding of disclosure of relevant material is justified.

20.16 In deciding the type of material to be disclosed, the prosecutor should err on the side of caution. Although disclosure should only be of material relevant to an ‘*issue in the case*’, this term is to be construed widely. It covers convictions and other matters, including disciplinary records, relating to the reliability of a witness (*HKSAR v Chan Kau-tai* [2006] 1 HKLRD 400).

20.17 In *HKSAR v Gao Hejia* [2003] 1 HKC 522, the scope of disclosure in the Magistrates Court was reviewed :

- (1) the common law principles relating to disclosure apply to all levels of court;
- (2) the prosecution’s duty to disclosure is pro-active, and does not depend upon the request of the defendant;
- (3) in a normal prosecution in Hong Kong the witness statement of a substantive witness should be disclosed to the defence before trial;
- (4) in relation to statements of persons not called as witnesses, these should either be served or made available for inspection;
- (5) previous convictions of prosecution witnesses should be disclosed to the defence;
- (6) the brief facts of case should be disclosed to the defence;
- (7) the form of disclosure is not important. It can be done by providing copy documents or simply allowing the defence to view the documents. Whether information has been adequately disclosed is a question of fact in each case.

- 20.18 Material which is subject to legal professional privilege is not disclosable, unless privilege is waived. Legal advice by a prosecutor to an investigator is privileged. Internal notes, memoranda, correspondence or other materials generated by the prosecution in the preparation of the case for trial may also be privileged. As a general rule, privilege attaches to matters of opinion as opposed to matters of fact.
- 20.19 The obligation relates to information that comes to the attention of or into the possession of prosecutor and continues after conviction, including after appeals have been decided or the time of appeal has elapsed.
- 20.20 Material non-disclosure may cause injustice, and in *Hampton v R* [2004] EWCA Crim 2139, the court stated :

“Those responsible for disclosure decisions must bear this in mind and must also bear in mind that a failure to disclose when disclosure should have been made may well put at risk a conviction only obtained after a great deal of emotional stress for the victim of the crime or for his or her family and friends and after the expenditure of a great deal of time and money.”

21. *The Prosecutor and the Unrepresented Accused*

- 21.1 The prosecutor should exercise particular care in dealing with an accused who is not legally represented. The duty of fairness requires the prosecutor to ensure that the accused is fully informed of the prosecution case. Relevant witness statements and materials should be provided in the usual manner, and *‘the prosecution’s duty to disclose is pro-active. It is not a duty which needs to be exercised only upon the request of the defendant’* (*HKSAR v Gao Hejia* [2003] 1 HKC 522).

- 21.2 It is not the prosecutor's function to advise the unrepresented accused on legal issues, evidence or the conduct of the defence. The prosecutor should alert the court to matters which will ensure that the accused has a fair trial, including the right to challenge the admissibility of evidence. In sentencing proceedings, the prosecutor must advise the court of relevant matters, including mitigating factors which might not otherwise be apparent.
- 21.3 The prosecutor must maintain an appropriate detachment from the unrepresented accused. Telephone contact should be avoided. Oral communications, where necessary, should be witnessed if face to face and noted in all cases. The prosecutor may, if appropriate, communicate with the accused through the court.
- 21.4 Plea negotiations with an unrepresented accused call for extreme care. The prosecutor should not initiate such negotiations. If plea negotiation cannot be conducted through counsel or in writing, the prosecutor must ensure that a third party is present during the discussion and that a full record is kept. A plea negotiation is only ever appropriate if it is clear to the prosecutor that the accused is acting voluntarily, and that he or she has been given full disclosure or has been made aware of the right to full disclosure.

22. The Prosecutor and the Victim of Crime

- 22.1 The prosecutor must be sensitive to the interests and needs of the victim of crime. If those who commit offences are to be prosecuted, victims and witnesses must be willing to report offences and to testify at court. They need to know that they will be treated with respect and understanding. The manner in which the prosecuting authority treats the victims of crime is a measure not only of its efficacy, but also of its humanity.

- 22.2 The prosecutor acts in the public interest, not just in the interests of any one individual. But he or she must always think carefully about the interests of the victim, which are an important factor in deciding where the public interest lies. Victims are entitled to have their role in the prosecution process fully explained, and are entitled, where possible, to be consulted as to the various decisions made in the process which may directly affect them and to be advised of the developments in the case as it progresses through the criminal justice system.
- 22.3 A victim of crime when called upon to testify may need to relieve the violence and physical distress suffered from the offence, and of this the prosecutor needs to be mindful. The prosecutor must protect the position of the victim at court, explain what is happening and provide comfort when necessary. The prosecutor should ensure that the court is apprised of the effects of the crime upon the victim. If significant harm has been caused, whether physical, psychological or financial, the prosecutor must consider applying, in an appropriate case, for an enhanced sentence under section 27 of the Organized and Serious Crimes Ordinance, Chapter 455. That may require the preparation of a victim impact statement.
- 22.4 The prosecutor must respect the rights of the victim. These include the rights to :
- (a) be treated with courtesy and respect;
 - (b) be kept informed of the progress of cases;
 - (c) have their views considered by prosecutors and investigators;
 - (d) be provided with proper facilities at court;

- (e) have their circumstances and views brought to the attention of the court whenever appropriate;
 - (f) respect for privacy and confidentiality.
- 22.5 The prosecutor must safeguard the position of vulnerable witnesses, namely, a child, a mentally incapacitated person or a witness in fear, as defined in the Criminal Procedure Ordinance, Chapter 221. Applications should be made to assist vulnerable witnesses to give evidence in court. Such measures may include evidence by live television link, video recorded evidence, priority listing, no postponement of trial, avoidance of delay, arrangement of support persons, removal of gowns and wigs, and appropriate security for witnesses in fear. There will also be cases where the interests of justice require a screen to be made available to shield a witness from the accused or the public, or for the public gallery to be cleared.
- 22.6 If a case concerns a vulnerable witness, the prosecutor is under a duty to remind the court that the Practice Direction (PD9.5 '*Evidence by way of live television link or video recorded testimony*') requires it to be given priority for listing purposes. If an adjournment of the case is sought to suit counsel's diary, the prosecutor should alert the court to the Practice Direction. Once started, cases involving vulnerable witnesses should run to their conclusion (*HKSAR v Lau Siu-hing* HCMA 1136 of 2007).
- 22.7 The prosecutor should take steps to ascertain if the victim wishes to claim compensation and/or restitution for the harm or loss that has been sustained. In cases where it is appropriate for the court to award compensation and/or to order restitution, the prosecutor must ensure that sufficient information is supplied to the court before the order is made. The court should be made aware of the consequences of the offence.

22.8 The prosecutor should have due regard to *The Statement on the Treatment of Victims and Witnesses*, 2004, and to *The Victims of Crime Charter*, 2007.

23. *The Conduct of Domestic Violence Cases*

23.1 The prosecution of those responsible for domestic violence involves the identification of relevant offences under the general criminal law. The Crimes Ordinance, Chapter 200, deals with sexual and related offences, including rape, incest and indecent assault, and acts resulting in psychological harm, such as criminal intimidation. The Offences against the Person Ordinance, Chapter 212, contains offences such as homicide, wounding, assault, forcible taking or detention of persons, unlawful abandonment or exposure of a child under two years, and wilful assault, ill-treatment, neglect or abandonment of a child. Once a prosecutor has identified the appropriate charges, the public interest will normally require that a prosecution be instituted in a domestic violence case if the evidence provides a reasonable prospect of conviction and the victim wishes the case to proceed and is willing to give evidence.

23.2 In selecting the appropriate charges, the prosecutor will consider those offences which reflect the seriousness and persistence of the accused's conduct, the probable intent and the severity of the injury caused. They must provide the court with the capacity to impose a sentence which adequately reflects the seriousness of the crime. If the accused offers to plead guilty to an alternative charge, this will only be accepted if it enables the court to impose an appropriate sentence. In making this decision, the prosecutor should consider the view of the victim, without treating it as determinative. In deciding whether to prosecute, the safety of the victim, the children and other persons involved must be considered. Information about the family circumstances

and the likely effect of a prosecution on the family should also be obtained.

23.3 The prosecutor recognises that domestic violence is likely to become more frequent and more serious the longer it continues. This means that a prosecution may be required even if the victim is not keen to pursue the case. In such circumstances it behoves the prosecutor to make full inquiries to ensure that the decision to prosecute is made on the basis of all available information. The prosecutor's decision must be taken within a framework that promotes the security of those at risk.

23.4 Once a decision to prosecute is taken, the prosecutor must ensure that the case proceeds expeditiously and without delay because :

- (a) the delay may distress the victim;
- (b) the longer the delay the longer the victim will be at risk;
- (c) the delay may affect the willingness of the victim to testify, or the capacity of a child to recall the events.

23.5 If the victim freely withdraws support for the prosecution, the prosecutor must consider if the case can still proceed, and if so whether this is in the public interest. The safety of the victim, the children and any other potentially vulnerable person must be considered. Relevant factors also include :

- (a) the objective seriousness of the offending behaviour;
- (b) the victim's injuries, whether they be physical or psychological;
- (c) the chance of the accused re-offending;

- (d) if the accused planned the attack;
- (e) if the accused used a weapon;
- (f) the making of threats before or after the offending behaviour;
- (g) if there were any children living in the household;
- (h) the continuing threat to the health and safety of the victim or anyone else who is, or may become, involved;
- (i) the current state of the victim's relationship with the accused;
- (j) the history of the relationship, particularly if there has been violence in the past;
- (k) the accused's criminal history, particularly any previous violence.

23.6 Any decision to compel a victim to testify against his or her will requires serious consideration. If the prosecutor concludes that the public interest in pursuing a prosecution should outweigh the victim's wishes, it has to be decided :

- (a) whether an application should be made to use the victim's statement in evidence without the victim having to testify, under section 65B of the Criminal Procedure Ordinance, Chapter 221;
- (b) whether the prosecution can proceed by helping the victim to attend court by the use of special procedures, such as closed circuit television;

- (c) whether the victim should be compelled to give evidence in person.

23.7 The prosecutor should have due regard to *The Policy for Prosecuting Cases of Domestic Violence*, 2006.

24. *The Role of the Prosecutor in the Sentencing Process*

24.1 The prosecutor should not attempt by advocacy to influence the court in regard to sentence. There is nonetheless an important role to be played in the sentencing process. The responsibility to assist the court after conviction is part of the prosecutor's general duty in the administration of criminal justice (*Attorney General v Jim Chong-shing* [1990] 1 HKLR 131).

24.2 The public interest requires the prosecutor to assist the court to have access to all relevant matters which might affect sentence. The prosecutor must seek to ensure that proceedings do not miscarry at a critical point, and to protect the court from appealable error. There are obvious ways in which the prosecutor should discharge the duty to lay before the court the facts upon which reliance is placed.

24.3 At a contested trial, the prosecutor must call the relevant evidence in order to discharge the burden of proving the case and to provide the court with a clear understanding of the offence and of the role of the accused. On a plea of guilty, the prosecutor should supply the court with a summary of the facts which substantiate the case against the accused. At the time of sentencing the prosecutor will, where appropriate, advise the court of the antecedents of the accused, and also deal with any ancillary issues. These may include costs, compensation, forfeiture, restitution and the disposal of exhibits.

24.4 The prosecutor has other important responsibilities:

- (a) It is the duty of the prosecutor, where the accused has pleaded guilty, to ensure that the facts which are then placed before the court support each and every ingredient of the charges laid, and that they provide a sufficiently comprehensive factual basis for sentencing;
- (b) Where there is a major difference between the factual basis upon which an accused pleads guilty and the case contended for by the prosecution, there is an adversarial role for the prosecutor in establishing the facts upon which the court should base its sentence (*R v Newton* (1982) 4 Cr App R(S) 388);
- (c) The prosecutor must be aware of any legal limitations on sentence, including the maximum sentence, and whether the court has jurisdiction to impose any particular sentence. This assists the court to avoid appealable error;
- (d) The duty of the prosecutor is to draw the attention of the court to any facts which may affect the assessment of sentence, and this applies equally whether it involves a mitigating or an aggravating factor. The former consideration bulks large when the accused is not represented;
- (e) The prosecutor should be familiar with the relevant ‘*tariff*’ or ‘*guideline*’ cases prior to sentencing. In the Court of First Instance, he or she is permitted to bring decisions of the Court of Appeal to the attention of the trial judge if it is felt that they will help the court to arrive at a just and proper sentence. This should be done before the address in mitigation, and the prosecutor has no right of reply. Judgments which do

not provide guidelines, but instead turn solely on the facts of the particular case, should not be cited. The prosecutor should be careful not to suggest any particular sentence or type of sentence, or to say anything that could be taken as advocating severity. These same principles also apply in the District Court and the Magistrates Court, and in the latter it is permissible also for the prosecutor to draw attention to relevant appellate judgments of the Court of First Instance. Where the accused is represented, the cases intended to be cited should be made known to the defence lawyer. If the accused is not represented, the cases intended to be cited should be supplied to him or her. If an unrepresented accused requires an adjournment for legal advice, or requests that the cases be explained or translated, this will be a matter for the court;

- (f) When matters are advanced in mitigation of sentence which the prosecution can prove to be wrong, the duty of the prosecutor is first to inform the defence that the mitigation is not accepted. If the defence persists in the matter it becomes the duty of the prosecutor to invite the court to put the defence to proof of the disputed material and if necessary to hear any rebutting evidence. The prosecutor must then decide whether the inaccuracies are of such a nature as to require his or her intervention to prevent the court from proceeding on a wrong basis;
- (g) The prosecutor should not volunteer information about the prevalence of particular offences but should be ready to assist the court if he or she has reliable material which is called for by the court. Statistics which are accurate and up to date can properly be tendered if requested;

- (h) The prosecutor should not volunteer information as to the broad range of sentences being passed for a particular offence, but can provide such if requested by the court;
- (i) The prosecutor should be familiar with the provisions of section 27 of the Organized and Serious Crimes Ordinance, Chapter 455, which supplements the traditional role of the prosecutor. Section 27 entitles the prosecutor to place certain material before the Court of First Instance or the District Court at the sentencing stage. It also entitles the prosecutor to invite the court to conclude that a specified offence is an organized crime. If reliance is to be placed upon section 27, the prosecutor must ensure that only evidence which is admissible is adduced, and that proper notification and other procedures are adhered to. Section 27 enables the court to impose a more severe sentence in light of the stance adopted by the prosecutor thereunder;
- (j) The prosecutor should bring to the attention of the court the victim's circumstances and views whenever this is appropriate;
- (k) If the accused has assisted the authorities, the prime responsibility for ensuring that the sensitive material to be advanced in mitigation reaches the judge in circumstances of strict security lies with the prosecutor.

25. The Prosecutor and the Recovery of Costs

25.1 Once an accused has been convicted of an offence, the prosecutor must decide if it is appropriate to seek an order for the payment of the costs of the prosecution. Costs are intended to compensate the prosecution, not punish the

accused, and regard will be had to means. Before costs are awarded, there needs to be *'some feature of the trial indicating that as a consequence of the way in which the defendant conducted his defence, unnecessary or additional expenditure has had to be incurred by the prosecution or that the defendant has wilfully wasted the court's time'* (*HKSAR v Cheng Tak-wai* [2002] 4 HKC 458).

25.2 The exercise by the court of its discretion to award costs to the prosecution is closely related to the conduct of the trial. If the accused has pleaded guilty, an order for costs will not generally be made. In deciding whether special circumstances exist which have caused the prosecution extra expense, factors for consideration include :

- (a) the behaviour of the accused throughout the trial;
- (b) the intentional delaying of the case;
- (c) the strength of the prosecution case;
- (d) the fact that the truth must have been known to the accused;
- (e) a defence that everybody is lying and the prosecution case is virtually a concocted one;
- (f) an insistence by the accused upon the proof of undeniable or unimportant facts (*HKSAR v Chan Kwok-wah* [1999] 1 HKC 697).

25.3 If an accused appeals against a conviction, sentence or other order of a trial court, or applies for leave to appeal, the prosecutor may apply for costs if the case is dismissed and the appeal or application is without merit.

25.4 If an accused is acquitted at trial or if the proceedings are stayed, he or she will normally be entitled to be compensated for the costs reasonably incurred. The prosecutor may resist an application for costs if there are positive reasons for a costs order not to be made. Examples include :

- (a) if the accused by his conduct has brought suspicion on himself;
- (b) if the accused has misled the prosecution into thinking that the case against him or her is stronger than it is;
- (c) if there is ample evidence against the accused but an acquittal arose on a technicality, provided this does not violate the presumption of innocence (*Tsang Wai-ping v HKSAR* (2005) 8 HKCFAR 80).

25.5 The costs of the prosecution are recoverable as a civil debt. There is no jurisdiction in the court to order imprisonment in default of payment.

26. *The Prosecutor and the Proceeds of Crime*

26.1 The prosecutor seeks to ensure that the offender does not profit from his or her criminal conduct. The confiscation of the proceeds of crime is an issue to be considered from the outset of all cases where profit is or may be involved. Confiscation should not be viewed as a mere optional addition to sentence proceedings or to the conduct of a prosecution.

26.2 If it is necessary to prevent the dissipation of profits which might be required to satisfy a confiscation order, the prosecutor should apply at an early stage for a restraint order. After conviction, the prosecutor must apply, where appropriate, for a confiscation order. Restraint and confiscation orders are available under the provisions of the

Organized and Serious Crimes Ordinance, Chapter 455 and the Drug Trafficking (Recovery of Proceeds) Ordinance, Chapter 405.

27. The Prosecutor and Conviction Appeals

- 27.1 When there is an appeal against conviction to the Court of Appeal or to the Court of First Instance, the duty of the prosecutor is to assist the court as required to achieve a just disposal of the appeal.
- 27.2 The prosecutor should be familiar with, and observe the relevant practice directions.
- 27.3 Once the perfected grounds of appeal are received, together with the appellant's authorities, the prosecutor should decide upon, and serve such additional authorities as will assist the court in determining the issues raised by the appeal. The invariable duty of the prosecutor to assist the court through the preparation of a written submission applies irrespective of whether the appellant is represented.
- 27.4 When an appellant is not represented, the prosecutor should scrutinise the papers with special care to determine whether there is any legitimate ground of appeal which has not hitherto been noticed. If he or she discovers such, the court should be informed.
- 27.5 Although the prosecutor will generally seek to uphold a conviction, if the view is formed that the appeal should succeed the prosecutor should acquaint the court of that view and explain the reasons for it. If the court disagrees, the prosecutor is entitled to adhere to his or her view and is not obliged to conduct the appeal in any way which conflicts with his or her own judgment. At the same time it remains the prosecutor's duty to give assistance to the court if requested to do so.

27.6 When a conviction is quashed, the prosecutor should consider whether or not a retrial is required. It is incumbent upon the prosecutor to apply for a retrial if this is appropriate. In deciding whether or not to make an application, regard should be had to the following :

- (a) the basis on which the appeal was allowed ;
- (b) the seriousness of the offence;
- (c) the strength of the case against the accused, including the availability of witnesses;
- (d) the lapse of time since the alleged offence and since the trial;
- (e) the extent to which the sentence has been served;
- (f) the attitude of the victim and his or her family, and of the law enforcement agency.

28. *The Prosecutor and Sentence Appeals or Reviews*

28.1 Where an accused appeals against sentence to the Court of Appeal or the Court of First Instance, the prosecutor should be in a position to assist the court as required. This may involve drawing its attention to the relevant ‘*guideline*’ or ‘*tariff*’ cases. The prosecutor should not seek to place before the court ‘*comparables*’, that is, judgments which might bear some similarity to the case under consideration, but which ultimately turn on their own facts. He or she should also, if required, be in a position to address the court on the prevalence of the offence, on the customary range of sentences for a particular offence, and to provide accurate statistics.

28.2 It is no part of the prosecutor’s function on appeal to seek to uphold a sentence which he or she considers to be manifestly excessive, wrong in principle or not authorized in law. Equally, the prosecutor should, if required, indicate why it is

felt that the sentencer has achieved a fair and just result in all the circumstances. The prosecutor must be in a position to assist the court as to its powers in disposing of the appeal.

28.3 When the prosecutor represents the Secretary for Justice on an application for review of sentence, it must be remembered that he or she is, as at first instance, a minister of justice. When the application is based upon an error of principle or of law, it is incumbent on the prosecutor to identify the nature of the error alleged, and authority can properly be cited to establish the error. Where it is alleged that a sentence is manifestly inadequate or manifestly excessive, the prosecutor must provide the reasons. This will generally involve identifying mistakes made by the sentencer, and reference to authority. It is also permissible for the prosecutor to indicate what he or she considers the correct approach ought to have been. The prosecutor may properly draw attention to any matter appearing on the record, but may not adduce new evidence in order to secure an enhanced sentence. The right of reply is limited to answering any mis-statements of fact or any mis-statements of legal principle made on behalf of the respondent.

28.4 The power of review of sentence was conferred to correct errors in what the Court of Appeal has called ‘*exceptional cases*’ (*Attorney General v Lau Chiu-tak* [1984] HKLR 23). An application for review of sentence will only usually be instituted where it is clear that the sentencer has fallen into serious error and the public interest requires that this be rectified. Applications for review of sentence must be signed by either the Secretary for Justice or the Director of Public Prosecutions. No other prosecutor is authorized to make any decision in relation to sentence or to give undertakings about the Department’s attitude. The Secretary will not be bound by any such decision or undertaking, unless it is authorized by the Director.

29. *The Publication of Reasons for Prosecution Decisions*

- 29.1 The Department of Justice is committed to as much openness in relation to the decision making process as is consistent with the due administration of justice. Reasons for decisions made in the course of prosecutions or of giving advice may be given where practicable. This may be done orally or in writing. Reasons for particular decisions may be given to a court in the course of criminal proceedings for which it is responsible. Detailed reasons will not normally be given for the decision to institute or not to institute either an appeal against an acquittal or a review of a sentence.
- 29.2 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. A legitimate interest includes :
- (a) the interest of the court in knowing why a particular course of action is deemed to be appropriate;
 - (b) the interest of the victim in knowing how the case is being handled and disposed of;
 - (c) the interest of the reporting department or agency in knowing on what basis advice is given;
 - (d) the interest of the media in the open dispensing of justice where previous proceedings have been public.
- 29.3 If the way in which prosecutorial decisions are taken can be explained, public education as to how the prosecution process works will be furthered. However, the public interest is the guiding consideration, and the nature and extent of information made available to the public must be closely monitored by the prosecutor to ensure that ongoing investigations or prosecutions are not prejudiced. Care must

be taken to ensure that the desire for justice to be seen to be done does not result in justice not being done.

- 29.4 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 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, Attorney General of England and Wales, explained to 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.”

- 29.5 The public are entitled to know the general principles which the prosecution apply to the decision-making process. It will not, however, usually be in the interests of justice for the prosecution to go further and to give details in individual cases. No distinction exists in this regard between decisions to prosecute and decisions not to prosecute. This policy is rooted in fairness to the suspect. In 1987 Michael Thomas QC, Attorney General, told the Legislative Council :

“There are good reasons why the Attorney General does not normally explain in public a decision not to prosecute in a particular case. It is rare for any public announcement to be made of that decision because it would reveal unfairly that someone had been under suspicion for having committed a criminal offence. And even where that fact is known, to

give reasons in public for not prosecuting the suspect would lead to public debate about the case and about his guilt or innocence. The nature of the evidence against the suspect would have to be revealed. Then some might say that that was proof enough of guilt, and the suspect would find himself condemned by public censure. Sir, in our legal system, the only 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.”

- 29.6 If the prosecutor receives confidential information from a party to the proceedings, such as material as to the medical state of a suspect or witness, confidentiality must be respected. Those who supply confidential or sensitive material which is relevant to a case are entitled to rely upon the discretion of the prosecutor. The Personal Data (Privacy) Ordinance, Chapter 486, places limits upon the information which the prosecutor, as a data user, can properly disclose in the absence of consent from the data subject.
- 29.7 Legal advice to a reporting department or agency is subject to legal professional privilege. The prosecutor should not disclose a legal opinion unless privilege has been waived. Whether or not privilege attaches depends on the nature of the relationship, the contents of the advice and the circumstances in which it is sought (*R v Stinchcombe* (1991) 68 CCC (3d) 1, 9-10).

30. *The Prosecutor and the Media*

- 30.1 The prosecution have an interest in the fair and accurate reporting of criminal cases by the media, and basic levels of assistance should be provided. The reporting of criminal

proceedings is important as it lets the community know who is being prosecuted and for what, and the sentences which are being imposed. A policy of transparency ensures that the media have access to relevant material wherever possible, and at the appropriate time. The media help the public to understand how the legal system works and public confidence in the administration of justice depends on access to accurate information on criminal cases.

30.2 There is no objection to a prosecutor confirming facts already in the public domain. Subject to any court order, it is proper to provide details upon request of matters presented in open court, such as a charge sheet or a summary of facts. Information about when a trial will start, when a particular witness will testify, and if there is to be pre-trial argument can properly be disclosed. Subject to any court order, the media may be advised what a case is about, what the charges are, who the accused is, who the witnesses are, but not the identity of any protected complainant or witness.

30.3 Matters which should not be discussed with the media include :

- (a) the likely outcome of proceedings;
- (b) the intended approach of the prosecution;
- (c) the correctness or otherwise of a judicial decision;
- (d) any part of the trial conducted in the absence of the jury or not in open court;
- (e) the name or identifying particulars of a protected person, including a complainant in a sexual offence, a blackmail victim, or a juvenile offender, unless authorised;

- (f) the contact details of any victim or witness;
- (g) any information which might lead to the identification of a protected informant;
- (h) any privileged information, including legal advice and internal case discussions with colleagues or law enforcement officials;
- (i) the existence of any plea negotiations or possibility of a plea of guilty or other disposition.

30.4 The prosecutor is expected to exercise appropriate discretion in relation to sensitive material. Care must be taken to ensure that the identities of witnesses who are giving evidence at some personal risk are kept confidential and are not disclosed to the media. There should be no discussion of policy issues or personalities. The assistance the prosecutor provides to the media will relate to factual matters, and personal opinions on cases should not be given.

30.5 There is no general obligation on the prosecution to provide information to the media. The media should not be given copies of or access to tapes of any recorded interviews, re-enactments, demonstrations or identifications. The media should not be provided with any medical, psychological or psychiatric reports on offenders or victims. Appropriate weight should be given to privacy considerations in the handling of personal data.

30.6 It is no part of the prosecutor's role to comment to the media on a verdict or sentence or the prospect of appeal or review proceedings being instituted. These are matters for the Director of Public Prosecutions, and nothing should be said which might affect subsequent consideration of the case. If the prosecution are to appeal or seek a review of sentence,

the practice is not to release details to the media until the appeal has been filed and served on the respondent.

30.7 Questions from the media should be referred to the Director of Public Prosecutions when they concern :

- (a) appeals against decisions of the courts;
- (b) reviews of sentences;
- (c) general prosecution policy;
- (d) decisions to terminate prosecutions.

30.8 When in doubt about a media inquiry, a prosecutor should seek the advice of the Director of Public Prosecutions. Additionally, a prosecutor may wish to refer the inquiry to the Public Relations and Information Unit of the Department of Justice, which should be notified in any event. Such action will be advisable where :

- (a) the case is controversial;
- (b) a designated spokesperson already has responsibility for handling inquiries on the case; or
- (c) there is a particular sensitivity to the case.

31. The Judicial Review of a Prosecution Decision

31.1 The prosecutorial independence of the Secretary for Justice is fundamental to criminal justice. In *Re C (A Bankrupt)* [2006] 4 HKC 582, it was held that the power of the Secretary under Article 63 of the Basic Law to control criminal prosecutions free from any interference enshrined the established principle that the Secretary must be free to decide on the merits of a prosecution without political

pressure or judicial encroachment. That is subject only to issues of abuse of the court's process and judicial review of decisions taken in bad faith.

31.2 In *RV v Director of Immigration and Another* [2008] 2 HKC 209, it was decided that the power to control criminal prosecutions must be exercised within constitutional limits. The means for determining whether the Secretary for Justice has acted within the limits of the constitutional power is judicial review. This remedy '*will only be granted in the rarest of cases*'. Into that category fall cases involving a rigid fettering of the prosecutorial discretion, and decisions reached dishonestly or in bad faith.

31.3 The judicial review of a prosecution decision is highly exceptional. As *Halsbury's Laws of Hong Kong* explains :

"The decision not to prosecute is susceptible, in very narrow circumstances, to judicial review but such intervention would only be considered where it was demonstrated that :

(a) *the decision was the result of an unlawful prosecution policy;*

(b) *the decision ignored established policy;*
or

(c) *the decision was perverse."*

31.4 The process of judicial review can do no more than require the Secretary for Justice to reconsider the decision. It cannot require a change of view (*R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326).

32. *The Basic Law and the Bill of Rights*

- 32.1 The principal sources of the rights of members of the Hong Kong community are the Basic Law ('*BL*'), the Hong Kong Bill of Rights Ordinance, Chapter 383 ('*BOR*'), and the common law.
- 32.2 BL Article 8 preserves the laws previously in force, including the common law. BL Article 39 provides that the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of Hong Kong.
- 32.3 The prosecutor must be alert to the rights of an accused which are relevant to the prosecution process, including equality before the law, the rights to have confidential legal advice, to be presumed innocent, and to have a fair trial without undue delay under BL Articles 25, 35 and 87 (*BOR* Articles 10 and 11).
- 32.4 In determining whether to prosecute a case or to continue a prosecution, account should be taken of the rights of an accused, and other parties to the proceedings. The prosecutor should be aware that the Basic Law recognizes freedom of speech (Article 27; *BOR* Article 16(2)); inviolability of the freedom of the person (Article 28; *BOR* Article 5); inviolability of the home (Article 29; *BOR* Article 14); freedom and privacy of communication (Article 30; *BOR* Article 14); freedom of movement (Article 31; *BOR* Article 8); freedom of conscience and religion (Article 32; *BOR* Article 15).

33. *Statement of Principle*

33.1 The *Statement of Principle* was adopted by the Prosecutions Division of the Department of Justice in 2007, as a vision statement. Its purpose is to supply prosecutors with a ready reminder of the high standards to be expected of all those engaged in the exercise of the prosecutorial function. It provides guidance to those who conduct public prosecutions at all tiers of court. The *Statement of Principle* appears at Appendix I.

34. *United Nations Guidelines*

34.1 In 1990, the *Guidelines on The Role of Prosecutors* were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. They provide guidance to prosecutors in Hong Kong. The *Guidelines* appear at Appendix II.

35. *International Association of Prosecutors*

35.1 The *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* were adopted by the International Association of Prosecutors, of which the Prosecutions Division of the Department of Justice is an organisational member, in 1999. The *Standards* were adopted in 2008 as a Resolution by the 17th United Nations Commission on Crime Prevention and Justice, and they provide guidance to prosecutors in Hong Kong. The *Standards* appear at Appendix III.

CONCLUSION

The Department of Justice is committed to open justice. It seeks to provide the community with a prosecution service which is transparent and fair. The public are entitled to know that principled criteria guide prosecutors throughout the course of criminal proceedings, and to see for themselves what these are. The responsibility of prosecutors is to apply the highest of standards in their handling of criminal cases.

In their dealings with others, prosecutors need to be frank and honest. They should also be considerate and sensitive when they deal with victims of crime and witnesses. Persons charged with offences are entitled to be treated fairly and with respect, and prosecutors must be scrupulous to protect the interests of those suspected or accused of crime. A fair trial requires a fair prosecutor.

Through *The Statement of Prosecution Policy and Practice*, the parameters within which prosecutors operate is defined, and the code they observe is placed in the public domain. The ways in which decisions are taken and cases are conducted are explained for all to see. Through the measured and consistent application of prosecution policy and practice, prosecutors seek to advance the rule of law and to contribute to a successful system of criminal justice in Hong Kong.

LIST OF APPENDICES

Appendix I *Statement of Principle*

Appendix II *Guidelines on The Role of Prosecutors*

Appendix III *Standards of Professional Responsibility and
Statement of the Essential Duties and Rights of
Prosecutors*

STATEMENT OF PRINCIPLE

Adopted by the Prosecutions Division in 2007

The Director of Public Prosecutions and his staff are committed to the fair and effective administration of the system of public prosecutions and to excellence in service to the people of Hong Kong.

Public prosecutors are essential to the administration of justice and the welfare of our community. Together with the law enforcement agencies and the courts, they ensure that the laws enacted to protect all members of society are respected and enforced. They also safeguard the interests of all of those involved in criminal proceedings, in whatever capacity. To maintain public confidence, public prosecutors must at all times uphold their professional integrity and act without fear or favour.

In discharging their duties, public prosecutors should constantly exercise professional judgment in all areas. These include whether and how to proceed in a particular case, what evidence to present at court, and whether to seek an appeal or a review of sentence after proceedings conclude, to name but a few. In making these decisions, public prosecutors must balance the public interest, the views and wishes of victims, the demands of fairness and the rights of the accused. They must moreover consider the need to press firmly ahead on the basis of the available evidence, while at the same time respecting the rights of the accused to a fair trial and to disclosure of relevant material.

Public prosecutors must often act without delay, and take decisions based on their professional assessment of the strength of the evidence, the credibility of witnesses and other nuances that can colour each case. Decisions taken in good faith and on the

basis of established prosecutorial criteria are to be supported. The absolute independence of the prosecutorial function is to be asserted whenever necessary.

Public prosecutors should be as transparent as possible in their dealings with others, always remembering the need to protect the interests of victims of crime and crime suspects. It is necessary to anticipate and to respond to the needs of victims and witnesses. Public prosecutors should enhance the levels of service provided to the community through the diligent and professional application of performance pledges.

GUIDELINES ON THE ROLE OF PROSECUTORS

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts undertaken to translate them fully into reality,

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,

Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Whereas in resolution 16 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Committee on Crime Prevention and Control was called upon to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, subsequently endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas, in resolution 7 of the Seventh Congress, the Committee was called upon to consider the need for guidelines relating, *inter alia*, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice

system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses,

The Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an *ad hoc* basis.

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that :
 - (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
 - (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of

their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.
6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.
7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

Freedom of expression and association

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of

matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional disadvantage by reason of their lawful action of their membership in a lawful organisation. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status.

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.
11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
13. In the performance of their duties, prosecutors shall :

- (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
 - (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
 - (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
 - (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.
16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights,

they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

Alternatives to prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.
19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.
22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.
24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

***STANDARDS OF PROFESSIONAL RESPONSIBILITY
AND STATEMENT OF THE ESSENTIAL DUTIES
AND RIGHTS OF PROSECUTORS***

*Adopted by The International Association Of
Prosecutors On The Twenty Third Day Of April 1999*

WHEREAS the objects of the International Association of Prosecutors are set out in Article 2.3 of its Constitution and include the promotion of fair, effective, impartial and efficient prosecution of criminal offences, and the promotion of high standards and principles in the administration of criminal justice;

WHEREAS the United Nations, at its Eighth Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba in 1990, adopted Guidelines on the Role of Prosecutors;

WHEREAS the community of nations has declared the rights and freedoms of all persons in the United Nations Universal Declaration of Human Rights and subsequent international covenants, conventions and other instruments;

WHEREAS the public need to have confidence in the integrity of the criminal justice system;

WHEREAS all prosecutors play a crucial role in the administration of criminal justice;

WHEREAS the degree of involvement, if any, of prosecutors at the investigative stage varies from one jurisdiction to another;

WHEREAS the exercise of prosecutorial discretion is a grave and serious responsibility;

AND WHEREAS such exercise should be as open as possible consistent with personal rights, sensitive to the need not to re-victimise victims and should be conducted in an objective and impartial manner;

THEREFORE the International Association of Prosecutors adopts the following as a statement of standards of professional conduct for all prosecutors and of their essential duties and rights:

1. PROFESSIONAL CONDUCT

1.1 Prosecutors shall :

- at all times maintain the honour and dignity of their profession;
- always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;
- at all times exercise the highest standards of integrity and care;
- keep themselves well-informed and abreast of relevant legal developments;
- strive to be, and to be seen to be, consistent, independent and impartial;
- always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;

- always serve and protect the public interest;
- respect, protect and uphold the universal concept of human dignity and human rights.

2. INDEPENDENCE

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be :

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. IMPARTIALITY

3.1 Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall :

- carry out their functions impartially;

- remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- act with objectivity;
- have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

4. ROLE IN CRIMINAL PROCEEDINGS

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows :

- where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;

- when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;
- when giving advice, they will take care to remain impartial and objective;
- in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;
- throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;
- when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore :

- preserve professional confidentiality;
- in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- safeguard the rights of the accused in co-operation with the court and other relevant agencies;

- disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- seek to ensure that appropriate action is taken against those responsible for using such methods;
- in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. CO-OPERATION

5.1 In order to ensure the fairness and effectiveness of prosecutions, prosecutors :

- shall co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and

- shall render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

6. EMPOWERMENT

6.1 In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled :

- to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;
- together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;
- to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;
- to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;
- to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and

decided upon in accordance with fair and impartial procedures;

- to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;
- to objective evaluation and decisions in disciplinary hearings;
- to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and
- to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.