DPP's Speech at the Seminar on Constitutional Law Developments organised by the Hong Kong Bar Association and the Centre for Comparative and Public Law of the University of Hong Kong
[9 May 1998]

To prosecute or not to prosecute?
Duty and accountability

In so far as it is possible in a short speech of this nature, I will seek to touch on the issues of how the decision to prosecute is exercised, how the public prosecuting authority inter-reacts with the public, and how the Department of Justice can legitimately be held to account for its actions.

Let me say at the outset that an important aspect of accountability must be transparency. It was for that reason that last month the Department of Justice re-issued its prosecution policy document. That initiative was designed to explain to the public at large, in short form, the policy, principles and practices of the prosecuting authority. Such openness, I believe, contributes to a degree of accountability to the public though not, I accept, to the degree which is sometimes sought. It can certainly assist the public in a tangible way in its dealings with the Department and to that I will revert.

Any talk of this nature must necessarily take as its point of reference Article 63 of the Basic Law, which makes clear that the Department of Justice alone controls criminal prosecutions, free from any interference. I consider it re-assuring that this principle, long recognised in colonial times, now for the first time enjoys an entrenched status by virtue of its placement in the mini-constitution.

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must

be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute, or, conversely, a wrong decision not to prosecute both tend to undermine the confidence of the community in the criminal justice system.

Decisions whether to prosecute must be taken in accordance with recognised legal criteria. And when deciding whether or not to institute prosecutions the Secretary for Justice acts in a quasi-judicial capacity and does not take orders from the government, politicians, the law enforcement agencies or anyone else. Responsibility for this matter rests solely with the Secretary for Justice, and her counsel, and for this purpose the Secretary for Justice must be regarded as an independent official. In this there is undoubtedly a strong element of trust, such as has to exist also in relation to judicial officers. Although that may not necessarily satisfy all, mechanisms exist to ensure that the prosecuting authority can be held to account.

What then are the means of redress open to the citizen who feels aggrieved by inertia or partiality, on the part of the prosecuting authority?

First, the right of a private individual to institute a private prosecution for a breach of the law is undoubtedly a valuable constitutional safeguard. Indeed, the right of a private citizen to lay an information and the right and duty of the Secretary for Justice to supervise a criminal prosecution, may each be viewed as fundamental parts of our criminal justice system.

Second, the prosecuting authority can be held accountable if its decisions are reviewable. The prosecutor’s discretion to make a decision in the public interest carries with it the need to make that decision reviewable.

So it is that the decision not to prosecute has been held to be susceptible to judicial review. However, such a course of action will only realistically get off the ground if it can be shown that :

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

(2) the decision ignored established policy; or

(3) the decision was perverse.

[In relation to (2) above the prosecution policy document I mentioned earlier is clearly relevant as it informs citizens of what established policy is.]

[*Vide* : R v DPP, ex p C (1994) 159 JP 227; R v CPS, ex p waterworth [1996] COD 273]

It is now at least arguable that prosecutors can be held to account also for improper decisions to prosecute. True, in Keung Siu-wah v AG [1990] 2 HKLR 238, dated March 1990, it was held to be a constitutional imperative that the Court of Appeal would not interfere with the AG's decision to prosecute on a judicial review application. However, the Court indicated that the trial court retained an inherent discretion to prevent an abuse of its process by staying a prosecution. Fuad VP nonetheless added that "*In the criminal field this is still a developing and unsettled area of the law*." It is now perhaps rather less unsettled in light of R v IRC, ex parte Allen [1997] STC 1141, dated February 1997, wherein it was held that a decision to prosecute is indeed amenable to judicial review if it represents an unjustified departure from established prosecution practice, or even if, without reference to wider policies or practice, it is unfair in so far as to amount to a breach of contract or representation.

Those are two obvious means by which the private citizen can hold the prosecuting authority to account.

As regards accountability at the public level, Article 73 of the Basic Law recognises the power of LegCo to raise questions on the work of the government, to debate any issue concerning public interests and to receive and handle complaints from Hong Kong residents. That is a broad mandate. That apart, the practice of the Attorneys General has, certainly in more recent times, been to provide the legislature with explanations to demonstrate that all relevant legal and policy considerations have been given due weight in a particular case and to

describe the way in which any such case has been handled. So it was that in relation to the Alan Bond case in 1987, the Attorney General told LegCo he had considered a prosecution under the Securities Ordinance, but decided against it. He said there were good reasons why an AG did not normally explain in public a decision not to prosecute in a particular case. By that I take it he meant that the policy of not disclosing particular reasons was designed in large part out of the need to be fair to the suspect who ought not to have his identity and guilt made the subject of public debate. In like vein, on 14 July 1986 the British Attorney General told Parliament that "*I propose to continue my existing practice, as a general rule, of confining answers to the basis of the decision in a particular case, without giving details of the evidence or other considerations which have led me to a particular decision.*" And in New South Wales the DPP's prosecution policy document similarly declares "*Where there had been no prior public proceedings and a decision is made not to commence a prosecution, reasons will not normally be given. Generally, to discuss reasons in such circumstances is undesirable as it would mean publishing materials assessed as not having sufficient evidential value to justify prosecution.*" So, AG/SJ's practice accords with Commonwealth practice in this regard.

In the Bond case the AG added that he would say a little more in view of public concern and he mentioned that he had received representations from Mr. Bond's lawyer and he was of the view that the outcome of any prosecution was far from certain and he said that the publication of an apology by Mr. Bond was a factor he had taken into account when subsequently he decided not to prosecute.

In 1989, the AG told LegCo that in the performance of his functions he was accountable to the public through that Council sitting in open session. That he said in relation to his conduct of the case of Mr. E.C. Harris. He also went so far as to reveal to LegCo the mistakes which had been made in that case. Again, in 1994, the AG attended LegCo on no less than three occasions in relation to the Wilkinson case to explain why he had decided not to pursue a prosecution, and to accept a bind over instead. That level of accountability continues and in March this year SJ faced extensive questioning on the Hong Kong Standard case. Of course, LegCo may not compel AG/SJ to resign by

expressing its lack of confidence. That said, it is certainly not a toothless tiger. As the Hong Kong Law Journal has observed in relation to such questioning by LegCo : "*This is not a very strong form of accountability but ..... given the freedom of the press and a community which cherishes the rule of law, such accountability can still be viable, important and valuable.*"

The recurrent question is how to strike a balance between the independence of the prosecuting authority and its accountability to LegCo. That is one of the most sensitive questions for any prosecuting authority funded by the state. On the one hand there is a need to protect the decision making process from improper influence or instruction; on the other, there are reasons why the prosecuting authority should be held to some form of account. A balance obviously has to be achieved and, whatever its imperfections, it is not immediately apparent how the present system of accountability can be improved upon.

That takes me directly into the issue of whether there ought to be an independent office of DPP. That question contains an element of artificiality. The reality is that Article 63 of the Basic Law leaves little scope for such an office. According to Prof. Wesley-Smith's book "The Basic Law and Hong Kong's Future" (1988) at page 190, this proposal was floated before the BLCCs special group on law and political structure of the SAR, which issued a report in 1987. The proposal as floated stated "*An independent prosecuting authority should be set up and the head of such authority would be statutory, totally independent of the AG and free from any interference.*" The report itself, however, recommended a provision which is now Article 63 of the Basic Law. For my part I cannot see how Article 63 could permit of an independent office of the DPP. If I be right, then further discussion is perhaps essentially academic. That said, I might add a few words about the relationship between the DPP and the AG in England. That may be salutary to this extent : the DPP's office there, despite being placed upon a statutory basis, enjoys not quite as much independence as is often supposed.

But a word first about the role of the AG in England, and of the SJ in Hong Kong. The DPP in each jurisdiction is solely responsible to the AG/SJ who in turn is in the unique position of being

a member of the government yet not subject to the collective decision of the government, nor required to obey the orders of the head of government in relation to those matters which involve the exercise of the prosecution role. It is by defining the relationship in that way that a proper distance has been achieved in order to protect the integrity of the decision making process. The case which enshrined that approach was that of John Ross Campbell in 1924. The important aspect of the case was that in November 1924 when Stanley Baldwin had become Prime Minister, he disclosed that in August of that year, the then Labour Government had decided that '*no public prosecutions of a political character should be undertaken without the prior sanction of the cabinet being obtained*'. The Prime Minister told Parliament that '*such an instruction, in the opinion of the government, was unconstitutional, subversive of the administration of justice, and derogatory to the office of the Attorney General. Her Majesty's Government have therefore given instructions that the instruction be excised*'. Like considerations apply in Hong Kong today.

The office of DPP was created by the Prosecution of Offences Act 1879, and that Act uses the word "superintendence" which has, since, become the parliamentary word of choice to define the relationship between the statutorily created office of the DPP, and the AG. [That was followed in 1985 by a second Prosecution of Offences Act which created the Crown Prosecution Service under the DPP - the principal rationale for that being the need to separate those who investigate from those who prosecute : the investigator had previously controlled the prosecutor. Fortunately, we have no such problem in Hong Kong.]

What then does 'superintendence' encompass? It must surely include the effectiveness of the decision making process and the quality of judgment used in reviewing, discontinuing and prosecuting cases. It must also apply to the overall thrust of policy which the DPP decides to adopt. To that extent, the AG is consulted about various public interest factors which are found in the CPS Code, and which, incidentally, is drawn in terms similar to those to be found in the Hong Kong prosecution policy document I mentioned earlier. Issues of general importance are matters upon which the AG as guardian of the public interest has a legitimate right to comment. The views of the AG

are therefore sought before a decision is taken on whether the general thrust of CPS policy is correct. That system seems to work well : while the DPP and, through her, the CPS, has the right to exercise discretion without fear or favour, malice or ill-will, the relationship between the AG and the DPP provides the constitutional safeguard that legal officials who are taking decisions that may ultimately affect an individual's liberty do not adopt policies which Parliament considers to be improper. However, it would be wrong to conclude that the AG has cut himself loose somehow from accountability for prosecution decisions. On 14 July 1986 the AG told Parliament "*I shall remain answerable in Parliament for decisions or actions that I or the DPP and his headquarters staff take on prosecution matters and also for the policy that is applied by the CPS in the handling of particular cases*." On 22 February 1992, the AG told Parliament he had the power to discontinue any prosecution brought by any prosecuting authority. He had the overriding responsibility for the conduct of prosecutions.

It is interesting also to see how the balance is struck between the role of the AG and that of the DPP in England. In his evidence to the Royal Commission on Criminal Procedure [1978-81], Sir Thomas Hetherington, DPP, stated "*It is my practice to consult the Attorney General in cases of special importance or difficulty even where there is no legal requirement for the Attorney to be involved. It is, for example, customary for me to consult the Attorney General in cases involving possible contraventions of Rhodesia sanctions. Cases in which the Attorney's fiat is required are considered by me, and the Attorney General takes his decision only after my advice has been received. If the Attorney General gives his consent to criminal proceedings, I have conduct of the case. This position has two practical results. On the one hand, the Attorney's "superintendence" does not require him to exercise control in detail over my work. On the other hand, I and my department have to be perceptive enough to identify the type of case about which the Attorney General is likely to be concerned in the public interest.*"

So there, may be, we see the essence of the matter: "**it all depends**". And, perhaps, despite the structure of the English system, with its statutory DPP, it is not so different from the Hong Kong system. Perhaps, after all, the differences are more apparent than real :

the DPP in England cannot be allowed to work in a vacuum : the DPP remains answerable through the AG to Parliament, just as the DPP in Hong Kong is answerable to the SJ who is in turn accountable to LegCo. Even in those Australian States which have statutory DPPs, it seems that the AG retains some residual control.

The systems in England and Hong Kong each provide the advantage of two independent and impartial legal minds and it can be of benefit to each to be able to turn to the other and seek to confer objectively, particularly so when the pressures, public or otherwise, are at their height. Mutual trust is essential. Moreover it is possible and has happened, that the British Attorney General has agreed that the Director should take sole responsibility for a case. One such case involved Jeremy Thorpe, the former leader of the Liberal Party. In Hong Kong, the SJ has likewise left to me the decision as to whether to initiate a prosecution against a person suspected of an offence in relation to her own medical records, and I, in turn, sought the advice of private counsel.

Is there then a distinction between informing and consulting? In practice there is. Sir Thomas Hetherington, when asked for examples of cases where he initiated consultation with the Attorney General, gave this reply : "*Some of the City Fraud cases - involving Lloyds and Johnson Mathey Bankers - because there is so much legitimate public interest in what is going to happen. Cases involving public figures such as Derek Hatton, the Deputy Leader of Liverpool Council, where we decided not to prosecute: that was one where we kept the Attorney informed rather than asking him to take a decision.*"

To sum up : In Hong Kong, as in England and Wales, there is a DPP who takes most decisions by himself or through his staff, but who consults the SJ in a small number of difficult, sensitive and complex cases. There is an SJ in Hong Kong, just as there is an AG in England, who makes up her own mind on those selected cases following advice from the DPP. The SJ, like the AG, asserts her independence from government because other people must not tell her what to do. A compromise? Perhaps. But the relationship works. The development of the respective roles of the AG/SJ and the DPP means

they have to work closely together. That willingness is necessary to make the system work.

May I conclude my remarks with this quote from the communique issued after the Commonwealth Law Ministers Conference in Canada in August 1977 : "*In recent years, both outside and within the Commonwealth, public attention has frequently focused on the function of law enforcement. Ministers endorsed the principles already observed in their jurisdictions that the discretion in these matters should always be exercised in accordance with wide considerations of the public interest, and without regard to considerations of a party political nature, and that it should be free from any direction or control whatsoever. They considered, however, that the maintenance of these principles depended ultimately upon the unimpeachable integrity of the holder of the office whatever the precise constitutional arrangements in the State concerned*."

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