

SUBMISSION OF THE BAR COUNCIL OF HONG KONG

ON

THE ROLE OF STAFF OF LAW ENFORCEMENT DEPARTMENTS IN

PROSECUTIONS

The Bar Council is in principle opposed to prosecutions being conducted by unqualified persons whether lay prosecutors or staff employed by various government agencies. However for the purpose of this submission we confine ourselves to commenting on the staff of law enforcement departments.

The role of the prosecutor in the decision making process as to whether or not to prosecute or continue a prosecution cannot be overstated. The prosecution lawyer is the first defence of the citizen against oppression. It is the prosecutor who has to decide whether or not to prosecute or continue a prosecution. It is vitally necessary for the health of society that those who conduct prosecutions are independent minded. They must have the strength of mind and character to resist over-enthusiastic officers from their own or other government departments. It is for this reason that the constitutional principle exists throughout the Common Law system that the Attorney General alone (or in Hong Kong the Secretary for Justice) decides whether to prosecute and is not subject to direction even from the Chief Executive. One of the

foundations of the Rule of Law begins with this principle and its conscientious practice.

The Bar Council's complaint about the principle of having law enforcement officers conducting their own prosecutions is basically two fold.

First of all they inevitably lack the essential independence which is characteristic of the prosecutor. In a disciplined force, it is realistically not possible for the person who has been given charge of the prosecution to exercise an independent judgment. He is certainly in no position to override directions from his superiors.

The staff of law enforcement departments do not of course have any professional body to regulate their ethics, against which their actions can be gauged. Nor is there any disciplinary body of a professional nature, to impose ethical constraints on the prosecutor.

The second objection is the lack of professional training of these persons. No doubt they do receive some kind of rudimentary training from the Department of Justice but this can hardly measure up against the three or four-year qualifications of the professional lawyer. Anecdotal evidence indicates that the standard of prosecution

by law enforcement officers is woeful. Justice simply cannot be done in these circumstances.

Another related objection is the lack of any discretion given to the prosecutor. All decisions have to go through a tedious bureaucratic jungle before any decisions can be made. As a result, many hopeless cases simply go on and on until the inevitable acquittal, thus wasting court time and defendants' costs, and prolonging unnecessarily the anxiety to the defendant. Any legal argument beyond the most basic has to be referred to the Department of Justice, thus necessitating an adjournment for someone else to come and argue the matter on another day. More wasted time.

The Bar Council wishes to emphasize that the criticism is not of the individual prosecutors who by and large are honest and do their best, but rather of the system.

The Bar Council takes the view that prosecutions should be removed from the hands of the law enforcement departments and put in the hands of properly qualified lawyers.

Hong Kong Bar Council

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