

**LegCo Panel on Administration of Justice and Legal Services
Meeting on 16 January 2001**

**Opening Statement by the Director of Public Prosecutions
in respect of General Prosecution Policy
and Binding Over Orders**

Madam Chairman, Ladies and Gentlemen,

I welcome this opportunity to address the Panel on the principles and factors which regulate general prosecution policy, with particular reference to public interest factors, and on the use of the bind over procedure where the decision is taken not to pursue a prosecution which is in train.

The decision of whether or not to prosecute, or whether or not to continue a prosecution, is a vital one. Vital for the community. Vital for the suspect. Vital for the victim, if any. Great care must be taken. The public prosecutor is always conscious that a wrong decision to prosecute, or a wrong decision not to prosecute, each have the tendency to undermine the confidence of the community in the criminal justice system. That said, the public prosecutor must have the confidence of his convictions. If he concludes that a prosecution should not be initiated, or if he decides that a prosecution which has been started should be terminated, he must act accordingly. It would be a sad day indeed for the rule of law if the public prosecutor ever allowed himself to be guided not by what he felt to be right, but by concern over the criticism which his decision might attract.

Prosecutorial decisions are often controversial. The prosecutor may sometimes be criticised for prosecuting, and at other times castigated for not prosecuting. This makes it all the more important for the prosecutor to act independently. He must only make his decision to prosecute, or to continue with an existing prosecution, after the evidence and all relevant factors, have been carefully, dispassionately and professionally considered or reviewed.

It is the easiest thing in the world for the public prosecutor to seek to avoid controversy by saying simply 'let the court decide'. That approach, however, is contrary to the rule of law. No citizen should be subjected to a trial unless this is in fact appropriate. Just as the judge must protect the interests of the defendant who stands trial, so must the public prosecutor protect the interests of the suspect who does not. The public prosecutor must not be swayed by political, media or by public pressure as to who should be prosecuted or not prosecuted and for what offence. He has a duty to uphold the rule of law against any form of rule by public opinion. He is privy to all relevant factors, and he must defer to nothing but legal standards. Equality before the law demands that no citizen, whatever his background, high or low, be required to stand trial unless it is legally justified. The public prosecutor is fixed with the duty to uphold the integrity of the criminal justice system at all stages, and I would say that the independence of the prosecutorial function is the key. So whenever the public prosecutor is confronted, as he often is, with demands to '*prosecute*' or '*not prosecute*', he must assert his independence, and proclaim his adherence to prosecutorial values. If he does not resist the pressure of those who seek to influence the due operation of the prosecution process, that, I consider, would constitute an abdication of responsibility.

It has, fortunately, never been the position in the common law world that those suspected of criminal offences must automatically face prosecution. A prosecution is really only ever appropriate if the offence or the circumstances of its commission indicate that such a course is justified in the interests of public justice.

What is meant by 'public interest'? The community, through its legislature, passes its laws. The community, in the ordinary way of things, is entitled to expect that the police will investigate breaches of its laws, and that the prosecuting authority will prosecute such breaches. That, however, is not the end of the matter.

I would say that the essential question is one of whether the prosecution is required in the public interest. In so deciding, it is necessary to examine all the factors and circumstances of each case. The factors which may properly be taken into account in deciding whether the public interest requires a prosecution vary very much from case to case. In general, the more serious the offence, the more likely is it that the public interest will require that a prosecution be pursued.

In deciding whether a prosecution is really appropriate, a variety of factors will be considered. These include, most commonly, such matters as the age of the suspect, his circumstances, his record, the gravity of the offence and the circumstances of its commission, the likely penalty, the alternatives to prosecution, the view of the victim, if any, and the issue of whether the consequences of a prosecution would be out of all proportion to the seriousness of the offence.

Once a prosecution has been initiated, the public prosecutor does not then wash his hands of the matter. He has a duty to superintend the progress of all prosecutions in the courts of Hong Kong. That means that when new material comes to light, the public prosecutor must review the propriety of allowing a prosecution which has been initiated to proceed. Constant monitoring of that type is an important aspect of our work. The obligation of the prosecutor is to remain hands-on.

So when psychiatric reports revealed that at the time of the shop lifting and assault offences with which he was charged the Assistant Director of the Housing Department, Poon Kai-tik, was suffering from a psychiatric disorder, and was not responsible for his actions, the prosecution was stopped on 11 December 2000 after the magistrate, who had earlier suggested this course, agreed that the defendant be bound over to keep the

peace and to be of good behaviour. Such a course was adopted in 95 other shop theft cases in 2000.

Again, on 18 December 2000, the prosecution of a student, Godfrey Nguyen, whose father happened to be prominent in the law, and who was charged with possession of two Ecstasy tablets, was likewise terminated after it was concluded, on the basis of independent legal advice from an experienced barrister of some 30 years' call, that there was force to the representations that had been made on his behalf, that the consequences of continuing with the prosecution would be out of all proportion to the seriousness of the offence, which would likely attract a fine on conviction. He considered that the justice of the situation would be met if the accused were to be bound over to be of good behaviour. In advising as he did, the barrister indicated that although the offence of possession of dangerous drugs was always serious, the facts did not reveal a particularly serious case of its type. Counsel added that although he was indeed aware of the elevated status of the father, he did not take that matter into account when advising : he wisely made the point that although the parentage of the accused should not be a factor in his favour, it should equally not act against him.

Although that case sparked controversy in some quarters, it is noteworthy that when a similar course was adopted in relation to a student named Law in April 2000, in relation to a student named Poon in November 2000, in relation to a student named Fung in November 2000, and in relation to a student named Ng on 11 December 2000, no one even batted an eyelid. One can only conclude that the parents of the other four students were not sufficiently important to justify public attention. Nor was any attention paid to the insurance agent called Kwok, or to the car worker called Tse, whose cases involving possession of dangerous drugs were likewise disposed of by ONE/BO in December 2000. Only the case of Godfrey Nguyen was singled out for publicity and comment. On the basis of that, I would make two points :

- (1) It is often said, rightly, that no one is above the law. The corollary to that, however, must be that no one is beneath the law. Although Godfrey Nguyen's father is prominent, that can be no basis for singling him out and saying he should be prosecuted despite the advice of the private barrister that a prosecution was not appropriate. Despite his father's status, he is not, as the barrister recognised, beneath the law. He is as entitled as the other four students I have mentioned, and anyone else for that matter, to have his situation impartially and objectively assessed. I fully agree with the independent barrister that Godfrey Nguyen's parentage should neither act in his favour nor operate to his detriment.

- (2) The second point I would make is that those who are found in possession of dangerous drugs must normally expect to be prosecuted. There is no question of going soft on dangerous drugs. As the barrister made plain in his advice in the Nguyen case, this is always a serious offence. There will have to exist strong reasons indeed for departing from the normal policy of prosecuting offenders. That is why, out of the thousands of prosecutions initiated for unlawful possession, in only 19 cases in the last three years was it deemed appropriate to accept an ONE/BO.

It is not right to regard the ONE/BO procedure as a let-off. It is a vital aspect of preventive justice. It operates as a rehabilitative measure in its own right, which serves to keep the defendant on the straight and narrow. It is akin to a sword of Damocles hanging over the head of the defendant - he knows that if he is guilty of further misconduct during the operational period, he will stand to lose his recognizance. Also, the ONE/BO procedure can only be used if the court itself decides, as it did in the Poon and Nguyen cases, that it is in fact an appropriate means of disposing of the matter.

In conclusion, may I take this opportunity to assure this Panel, and through the Panel the wider community, that the Poon and Nguyen cases were handled fairly and properly in accordance with established prosecution policy. That policy was applied without fear or favour. There was no special treatment. Each case was decided on its own merits, and without regard to the status or connections of either defendant.

Representations are made with some regularity by defence lawyers to the Department of Justice to stop prosecutions if the defendant agrees to be bound over. Each case is examined in the light of its own circumstances and, on average, about 20 cases a week are disposed of in this way. The bind over procedure is as old as the common law itself. It is tried and tested and has served Hong Kong well for many years.