

Legislative Council

Panel on Administration of Justice and Legal Services

Meeting on 27 June 2011

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Item IV: Issues relating to prosecution – an independent Director of Public Prosecutions and prosecution policy and practice

Introduction

1. In recent times, common law jurisdictions have increasingly recognized the importance of a director of public prosecutions (DPP) who acts independently in the discharge of the prosecutorial function, and who is enabled to take the decisions which he or she believes to be just, and without the involvement or influence of a political figure.

2. In these jurisdictions, some large, some small, the attorney general or law minister has disengaged from participation in the prosecution process, either in whole or in part, and most, if not all prosecution decisions are now taken by an independent, politically neutral DPP. In particular:

3. In 2006, Canada created an independent federal prosecution agency, and the federal DPP acts independently of the attorney general. If the attorney general wishes to intervene in a particular case, this must be done in writing, and a notice must be placed in the Government Gazette.

4. In 2009, the attorney general of England and Wales issued a protocol which indicated that henceforth the attorney general would only be involved in taking prosecution decisions in exceptional cases, and the bulk of cases would be left for decision to the DPP. Exceptional cases, such as to justify the involvement of the attorney general, might arise where a case concerns the protection of national security, or where the law requires the attorney general to provide a consent to prosecution. The protocol requires the attorney general to safeguard “the independence of prosecutors taking decisions whether or not to prosecute in individual cases”.

5. In 2011, the Cayman Islands appointed a DPP who is constitutionally independent, and

who has assumed the prosecution powers previously exercised by the attorney general. She alone is responsible for instituting or discontinuing prosecutions. The DPP is not subject to the control of the attorney general or anyone else.

Advantages of an independent DPP

6. There are clear benefits to be had from making prosecution decisions the function of an independent, politically neutral DPP, rather than of a political figure, whether attorney general or law minister. In particular:

(i) An independent DPP is able to command public confidence over decisions in a way which may not always be possible if a political figure is involved in the decision making process;

(ii) An independent DPP is able to apply his or her professional judgment and accumulated experience to the prosecution process, without having to keep looking over his shoulder at a political master every time a significant decision has to be made;

(iii) Since the decision of whether or not to prosecute involves a quasi-judicial function, it enhances the criminal justice system if the DPP is seen to enjoy the same levels of independence and security as does a judge, free of political oversight;

(iv) An attorney general or law minister is invariably a political appointee, involved in the highest echelons of government and beholden to a political head, and the removal of such a person from involvement in public prosecutions preserves the separation of powers and promotes the rule of law, and is also a recognition that the fiction that a minister in the government can legitimately wear two hats, one as politician and the other as prosecutor, is no longer tenable;

(v) If prosecution decisions are the responsibility of an independent DPP, the attorney general or law minister is enabled to concentrate upon his or her primary function as legal advisor to the government and its departments;

(vi) In the Hong Kong context, recent cases, ranging from the alleged assault on the chief executive, to whom the secretary for justice answers, to the allegations that the secretary's fellow ministers allowed illegal structures on their properties, thus rendering them liable to prosecution, may cause problems of perception, given the secretary's dual role, and these could be avoided if an independent DPP were to be responsible for prosecution decisions;

(vii) The United Nations Guidelines on the Role of Prosecutors (1990) and the Standards of Responsibility of the International Association of Prosecutors (1999) recognize the importance of the impartial exercise of the prosecutorial discretion and the need for

objectivity in the prosecution process, and anything that can be done to promote the independence of the DPP and to depoliticize the prosecution process will promote conformity with international norms.

Constitutional Position

7. Prosecutions at present are the responsibility of the secretary for justice, who, as a minister in the government, is appointed by the central authorities on the recommendation of the chief executive, and the secretary's responsibility for prosecutions derives from Article 63 of the Basic Law.

8. Article 63 provides that: "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference".

9. Article 63 vests the control of prosecutions not in a particular person, but in the department of justice itself. Since the head of the department is the secretary for justice, some people consider that the control must be vested in the secretary, but a narrow construction is unnecessary and should be avoided.

10. It is logical for the DPP, as a law officer of the department, and a career prosecutor, to discharge the prosecution functions of the department, and to do so independently of the secretary for justice, who, as a political appointee, is a member of the government and answerable to the chief executive.

11. If the secretary for justice were to step back, and to cede responsibility for prosecutions to an independent DPP, operating within the department, this would be constitutionally legitimate.

Mechanism

12. A switch in the overall responsibility for the bulk of public prosecutions from the secretary for justice to an independent DPP would not require legislation. It could be achieved internally in the department, perhaps by a protocol, as in the English model. Although, as in England and Wales, exceptional cases might require an involvement of the secretary in the decision making process, the secretary's residual functions would, in general, be confined to such matters as safeguarding the independence of the DPP, ensuring that prosecution policy guidelines remain fit for purpose, and endorsing changes to codes of practice.

Conclusion

13. If the responsibility for public prosecutions were to be vested in an independent, politically neutral DPP, this would be good not only for justice, but also for the appearance of

justice. To be credible, the prosecution system must not only be impartial and free from outside interference, but be seen to be so. It is now time for those in government to promote the independence of the public prosecutor, and not to seek to fetter the free exercise of the prosecutorial discretion. Hong Kong is a mature society, and it deserves a prosecution system which is not only efficient, but also manifestly impartial and aligned to international standards. Once this has been fully achieved, it will advance the rule of law.

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