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Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 28 March 2011

An independent Director of Public Prosecutions

Purpose

This paper provides background information and summarizes the past discussions held by relevant committees of the Legislative Council ("LegCo") on issues relating to prosecutorial independence.

Background

The role of the Secretary for Justice ("SJ") and the Director of Public Prosecutions ("DPP")

2. SJ is appointed by the Central People's Government ("CPG") upon the nomination by the Chief Executive ("CE") of the Hong Kong Special Administrative Region ("HKSAR"). SJ is the principal legal adviser to CE, to the Government and to individual government bureaux, departments and agencies. SJ is also a Member of the Executive Council ("ExCo").

3. SJ is the head of the Department of Justice ("DoJ") which is responsible for the conduct of criminal proceedings in Hong Kong. Article 63 of the Basic Law ("BL") provides that "the Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference". The decision to prosecute criminal offences is the sole responsibility of SJ. SJ is also the defendant in all civil actions brought against the Government and represents both the Government and the public interest in the courts.

4. According to *The Statement of Prosecution Policy and Practice* issued by DoJ in 2009 ("the Statement"), SJ as head of DoJ 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;

and (c) the superintendence of DPP and of those who prosecute in Hong Kong. SJ is aided in the discharge of the prosecution function by DPP, the Head of the Prosecutions Division of DoJ. DPP is responsible to SJ 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; and (d) developing and promoting prosecution policy.

5. According to DoJ, DPP or other counsels in the Prosecutions Division make the vast majority of prosecution decisions in practice. SJ is accountable for the decisions taken by DPP and those who act on behalf of DPP. SJ also personally makes prosecution decisions in some of the cases that DPP brings to his or her attention.

The principles of prosecution

6. According to the Administration, before DoJ can institute a prosecution, strict criteria must be applied as stipulated respectively in paragraphs 7.1 and 8.2 of the Statement:

> *"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." (Para. 7.1)*
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> *"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." (Para. 8.2)*

7. According to the Administration, it is established policy in Hong Kong not to give detailed reasons for prosecution decisions. This policy has been formulated to protect the interests of those suspected of crime but not charged with any offence. Instead, the criteria applicable are disclosed, namely, whether there is sufficient evidence to prosecute and whether it is in the public interest to prosecute. In exceptional cases, however, it is sometimes necessary to reveal rather more about the basis of a prosecution decision, but even then there are strict limits.

Past discussions on prosecutorial independence

SJ's role under the Accountability System for Principal Officials ("POs")

8. When the Panel on Constitutional Affairs ("the CA Panel") and the former Subcommittee on the Proposed System of Accountability for Principal Officials and Related Issues discussed the new Accountability System for POs initially outlined in the CE's Policy Address in 2001 and presented by CE to LegCo on 17 April 2002, some members had expressed strong opposition to the inclusion of the post of SJ in the proposed system under which POs were held accountable to CE and would be appointed on terms different to those in the civil service.

9. In its written submission to the CA Panel in November 2001 (**Appendix I**), the Hong Kong Bar Association ("the Bar Association") had raised questions as to whether it was appropriate to include the post of SJ as a political appointee under the proposed Accountability System. The Bar Association was of the view that as SJ performed certain unique functions which were of quasi-judicial nature, particularly the function of taking prosecution decisions independently and impartially, it would not be appropriate to include SJ in the proposed Accountability System. The Bar Association had suggested that, if the post was included, the legal roles of SJ should be transferred to and discharged by another Law Officer, such as the Solicitor General or DPP.

10. While some members expressed support for the inclusion of SJ in the accountability system on the ground that a SJ who was a career civil servant would not be politically accountable, some other members shared a similar view of the Bar Association that having the post of SJ filled by a political appointee would undermine the public perception of the independence and impartiality of the post as an institutional safeguard for upholding justice. These members expressed concern that under the Accountability System, SJ would be answerable to CE alone, not to LegCo. The arrangement of SJ being a ExCo Member would also give rise to the concern as to whether SJ would be able to discharge the independent function of a guardian of public interest. They were of the view that SJ's power to make prosecution decisions should be completely transferred to DPP, if the post was to be filled by a political appointee.

11. The Administration's explanation was that –

(a) the proposed arrangements would not materially alter the position of a SJ who was recruited from outside the civil service;

(b) BL 63 provides that DoJ should control criminal prosecutions, free from any interference. SJ was required to act independently in respect of prosecutions and would continue to do so under the new system;

(c) the proposed arrangements were consistent with arrangements for similar posts in many other common law jurisdictions;

(d) it was appropriate that SJ should be politically accountable for the manner in which he or she formulated and executed policy in respect of the legal system and legal services; and

(e) in relation to certain functions (particularly the function of making prosecution decisions), SJ was constitutionally required to act independently and the proposed arrangements would not alter the position either in law or in practice.

12. The Administration further explained that the current position in Hong Kong was that, in practice, DPP or other counsel in the Prosecutions Division would make the vast majority of prosecution decisions. However, SJ, as head of DoJ, was accountable for those decisions. In addition, SJ would personally make prosecution decisions in some of the cases that DPP brought to his or her attention. This system worked well and complied with BL 63. The Administration considered that the delegation of all prosecution powers to someone who might be a career civil servant, with the effect that SJ had no control over prosecutions, would undermine the move to greater accountability.

13. Some members, however, considered that letting DPP to have a complete control on prosecution decisions was not uncommon in other jurisdictions. For instance, in the United Kingdom ("UK"), the power to make prosecution decisions was vested in DPP and the power of the Attorney General was limited to appointing DPP and determining his remuneration, and making prosecution decisions on certain types of cases. They stressed that DPP should be given the power to make prosecutions independently and free from interference. These members suggested that the Administration should adopt a generous approach to interpret BL 63 which stipulated that "DoJ" rather than "SJ" should control criminal prosecutions, and DPP should be nominated by a committee comprising members from the legal profession for appointment by CE.

14. The Administration stressed that while it was permissible for SJ to delegate his or her powers to a Law Officer whilst retaining ultimate control and responsibility, a complete transfer of the powers and responsibilities in respect of prosecution matters would amount to an abdication of his or her duties as head of department and was likely to be inconsistent with BL 63. It would also lead to a

situation of an "unaccountable" prosecutor, as DPP was a career civil servant and had security of tenure. The Administration was also not aware of any other common law jurisdictions which had the appointment of their Law Officers nominated by an outside body.

Prosecutorial independence

15. At its meeting held on 25 November 2002, the Panel on Administration of Justice and Legal Services ("the AJLS Panel") was briefed by the Administration on the Statement which included the constitutionally guaranteed notion of prosecutorial independence provided by BL 63, which enabled prosecutors to discharge their duties independently, without the fear of political interference or improper or undue interference. Some members referred to the appointment of SJ as a PO under the accountability system implemented since 1 July 2002, and raised the issue of prosecutorial independence provided under BL 63 again. They considered that exchange of views between DPP and SJ on major issues should be placed on record. These members also asked about the consequences for violation of BL 63.

16. The Administration reiterated that many common law jurisdictions, including UK, did not have a constitutionally guaranteed right of independent prosecutorial discretion. The right only existed in the form of convention. In Hong Kong, this right was enshrined in BL, which the Government, CE and POs, had to uphold. Hong Kong followed the practice in many of the common law jurisdictions, including UK, where DPP was accountable to a Minister. Such a system worked as well in Hong Kong as in other jurisdictions. It was the Administration's view that DPP's advice to SJ on public prosecutions matters should remain confidential. The Administration further explained that if a person sought to influence a prosecution decision improperly, that could amount in itself to a criminal offence of attempting to pervert the course of public justice.

Relevant incidents which had aroused public concern over SJ's decisions not to prosecute

The case of Ms AW Sian in 1998

17. In the wake of public concern over the decision of the then SJ not to prosecute Ms AW Sian after the trial of the Hong Kong Standard case in which three accused were convicted of the offence of conspiracy to defraud by, among other charges, inflating the circulation figures of the Hong Kong Standard and Sunday Standard newspapers over some three years from 1994, the AJLS Panel

held two meetings on 23 March 1998 and 4 February 1999 respectively to follow up on the matter.

18. In her statement to the Panel in respect of the decision not to prosecute Ms AW following the delivery of judgment on the case on 20 January 1999, the then SJ explained that she had reached her decision not to prosecute Ms AW on the basis of insufficient evidence. After the careful evaluation of the evidence, the advice of her advisers and the representations from Ms AW's lawyers, she concluded that there was no reasonable prospect of securing a conviction. She also considered that if Ms AW was prosecuted, it would be a serious obstacle to the restructuring of the Sing Tao Group of which Ms AW was the Chairman. Should a well-established and important media group collapse, it would send a very bad message to the international community, not to mention about the interests of about 1,900 local and overseas employees of the Group at a time when unemployment was on the rise. In light of the circumstances, it was not in the public interest to initiate a prosecution of Ms AW.

19. Some members queried whether it was necessary for SJ to consider public interest at all in the case if it had been decided that there was insufficient evidence to bring a prosecution against Ms AW. They did not agree with the SJ's understanding of public interest, and pointed out that in deciding whether or not to prosecute a person, it would be irrelevant and grossly unfair to have regard to factors such as the person's financial position, the nature of his/her business or the number of people under his/her employment. The then SJ explained that her decision was not based on consideration of a person's status and financial position. The consideration of the interests of the employees concerned was within the broad parameters of public interest considerations specified in the Prosecution Policy of DoJ. She further assured members that she had acted in good faith at all times and no pressure of any sort was brought to bear upon her to take the decision. Her decision was not based on considerations of any personal connections or political status.

20. Some members also asked whether SJ had sought legal advice outside DoJ in the case. SJ replied in the negative explaining that it was normally only for cases of exceptional complexity, or for cases where the required expertise was not available within DoJ, or for cases involving members of DoJ, that outside legal advice would be sought.

21. Following the conclusion of the Hong Kong Standard case, Dr Margaret NG moved a motion on vote of no confidence in the then SJ at the Council meeting of 10 March 1999. The motion was negatived.

<u>The case of Mr Antony LEUNG Kam-chung in 2003</u>

22. A special meeting of the AJLS Panel was held in response to the formal announcement made by the then SJ on 15 December 2003 of the decision not to prosecute Mr Antony LEUNG Kam-chung, the former Financial Secretary, for his conduct in respect of a car purchase by him in January 2003, several weeks before an increase in Motor Vehicles First Registration Tax in the 2003-2004 Budget.

23. The Administration briefed the AJLS Panel on the facts of the case and the legal reasoning behind the decision not to prosecute Mr LEUNG for the criminal offence of misconduct in public office. According to the Administration, the decision was made after consideration of the reports of the Independent Commission Against Corruption ("ICAC"), the evidence, the law, the prosecution policy and the legal advice provided by two leading counsel at the private Bar.

24. Some members opined that there was prima facie evidence in Mr LEUNG's case, and for cases with prima facie evidence, it would be preferable to let the court decide whether or not criminality was involved. They opined that the Administration, in accepting the view of the advising counsel that it was necessary to prove the existence of a single compelling motive in order to establish the offence of misconduct in public office had in fact raised the threshold for prosecution of the offence. The then DPP stressed that on the totality of the evidence, a prosecution could not be justified as it could not be proved that Mr LEUNG deliberately sought to evade tax on the car purchase. The conduct of Mr LEUNG, however reprehensible it might have been, did not amount to misconduct of a criminal nature.

25. According to the then DPP, the handling of the case was of unprecedented transparency and the case was extremely exceptional where the identities of the two outside counsel and their advice were revealed to the public. In view of the sensitivity of the case and that Mr LEUNG was a former colleague of SJ, SJ had delegated to him the full authority of deciding whether or not to prosecute Mr LEUNG so as to avoid any possible perception of bias.

26. Members welcomed the SJ's decision to explain openly the approach and the process that had been adopted in handling the case and in deciding not to prosecute Mr LEUNG. They also supported her decision to delegate to DPP the authority of deciding whether or not to prosecute Mr LEUNG and to seek independent legal advice on the case from outside counsel.

The case of Mr Michael WONG Kin-chow in 2006

27. The AJLS Panel held two meetings on 3 February and 23 October 2006 respectively to discuss the decision of the then DPP not to prosecute Mr Michael WONG Kin-chow, a retired judge of the Court of Appeal of the High Court. The investigation of Mr WONG by ICAC centred on the issue of whether Mr WONG had, on three occasions, deliberately made improper applications to the Government for reimbursement of Leave Passage Allowance ("LPA"), in respect of air-trips which he and his family had made between 1998 and 2001.

28. Some members expressed concern whether a third party had paid for the air tickets referred to in Mr WONG's claims for reimbursement of LPA. They also queried whether Mr WONG had actually made reimbursements to his daughter despite he had submitted claims to the Government for payment of LPA in 1998, 2000 and 2001 respectively. The then DPP explained that the materials made available to the prosecution by Mr WONG showed that Mr WONG had duly reimbursed his daughter in kind for the expenses after he had received reimbursement from the Government. Two senior lawyers in the area of commercial crime and corruption had also advised not to prosecute Mr WONG. After considering the evidence and the opinions of independent legal advisers, the then DPP had decided that a prosecution of Mr WONG for an offence under the Prevention of Bribery Ordinance (Cap. 201) could not be justified on the ground that it could not be proved that Mr WONG had acted dishonestly in relation to the air tickets or in relation to his claims for reimbursement of LPA.

29. In his statement on the principles and policies relating to prosecution decisions, the incumbent SJ stressed that DoJ had made its decision in the case objectively, competently and with full integrity. DoJ had complied fully with the prosecution policy and principles in handling the case, and favorable treatment had not been given to any persons.

Two cases concerning families of the President of the Republic of Zimbabwe in 2009

30. Arising from the public concern about the incident concerning the wife of the President of the Republic of Zimbabwe, Mrs Grace Mugabe, who had allegedly committed an assault against a photojournalist during her visit to Hong Kong on 15 January 2009, the AJLS Panel invited the incumbent SJ to explain to the Panel the decision of DoJ not to prosecute Mrs Mugabe at its meeting held on 30 March 2009. According to SJ, the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China ("OCMFA") in HKSAR had advised the HKSAR Government that Mrs Mugabe had been granted immunity and inviolability pursuant to Article 22.1(3) of the Regulations of the People's Republic

of China Concerning Diplomatic Privileges and Immunities, which applied to Hong Kong by virtue of their inclusion in Annex III to BL and their promulgation by the Promulgation of National Laws Notice 1997. OCMFA had further advised that the privileges and immunities that Mrs Mugabe enjoyed included the immunity from criminal jurisdiction equivalent to that enjoyed by diplomatic agents under Article 14 of the Regulations.

31. Members expressed concern over the rule of law in Hong Kong if a person who had committed an assault blatantly and intentionally could enjoy immunity from prosecution. They considered that the HKSAR Government should ban the entry of Mrs Mugabe into Hong Kong and seek to have her being declared as persona on grata in HKSAR. The incumbent SJ explained to the Panel that under BL and the Immigration Ordinance (Cap. 115), the HKSAR Government was empowered to apply immigration controls on, inter alia, entry into Hong Kong by persons from other countries. However, the declaration of a person as a persona non grata was a diplomatic matter the right of which resided in CPG. He also assured members that the HKSAR Government had already conveyed to CPG the concerns of the Hong Kong public about the incident.

32. The AJLS Panel held another meeting on 15 July 2009 to discuss SJ's decision not to institute a prosecution of the bodyguards of Miss Bona Mugabe, the daughter of the President of the Republic of Zimbabwe, in relation to an alleged assault of two journalists on 13 February 2009 outside a house in Tai Po occupied by Miss Mugabe. Members expressed concern that the incident raised the question as to whether bodyguards, in particular those protecting well-known personalities and the rich, had special privileges that they could use force against journalists and ordinary citizens without being prosecuted. Members also noted that the Hong Kong Journalists Association had expressed concern that the alleged assault was against journalists who were performing no more than their ordinary journalistic duties.

33. The incumbent SJ explained that the crux of the matter was whether the bodyguards had a genuine concern for the safety of Miss Mugabe and considered it necessary to take actions to minimize the danger posed. If the evidence showed that the bodyguards had genuine concern for Miss Mugabe's safety, a potential defense of justification would be open to them. He stressed that the decision not to prosecute was reached after full consideration of all the evidence and circumstances of the case, including the fact that the complainants were journalists.

Recent developments

34. In his article published on the South China Morning Post on 10 February 2011, Mr Grenville Cross, the then DPP, suggested that control of prosecutions should rest with an independent DPP and SJ should step back from the prosecution process in order to promote prosecutorial independence. The article and a press report on an related interview with Mr Cross published on Ming Pao Daily News on 28 February 2011 are in **Appendices II and III respectively**.

35. At the meeting of the AJLS Panel on 28 February 2011, the LegCo Secretariat was requested to prepare a background brief to facilitate the Panel's further consideration of the issue.

Relevant papers

36. A list of the relevant papers available on the LegCo website (http://www.legco.gov.hk) is in **Appendix IV**.

Council Business Division 2
Legislative Council Secretariat
24 March 2011

Appendix I

1. The Chief Executive proposed in his 2001 Policy Speech a new system of appointment applicable to the Chief Secretary, the Financial Secretary, the Secretary for Justice, and most Directors of Bureaux. These officials would have clearly defined roles and responsibilities. They would each be responsible for policy areas designated by the Chief Executive and would lead the executive departments within their particular portfolios. They would be responsible for formulating, explaining, and defending government policies as well as canvassing support from the public and the Legislative Council. They would be answerable to the Chief Executive for the success or failure of their policies, and would have to shoulder political responsibility for their respective portfolios. They would also be appointed to the Executive Council.

2. It is said that this new system of appointment of principal officials would improve accountability. There would be greater incentive for principal officials under the new system to keep closely in touch with the public, to be more responsive to public sentiments and demands, to be in a better position to prioritize policy and legislative initiatives as well as the allocation of resources and coordinate decisions. Above all, the new system would become more flexible.

3. We generally embrace the policy of enhancing accountability of principal officials who are responsible for policy making. We also support the principle of maintaining neutrality of civil servants. Thus, it is an appropriate direction to separate the political role of policy secretaries from the executive role of civil servants. The problem of the existing system is that civil servants have to play a political role in formulating, explaining and defending policies and lobbying political support and have to maintain at the same time political neutrality, which sometimes become a disguise that they are not responsible for their policy decisions.

4. However, it is unclear what 'accountability' means. Neither the Policy Speech nor the paper prepared by the Constitutional Affairs Bureau dated 26 October 2001 explains this concept of accountability or the mechanism to ensure accountability. All that the paper prepared by the Constitutional Affairs Bureau said was that these principal officials *'would be answerable to the Chief Executive for the success or failure of their policies. They would have to shoulder political responsibility for their respective portfolios.'* (para 12)

5. Accountability can be achieved at various levels. At the lowest level, accountability entails periodic reports and explanations or justifications of one's decision. At a higher level, accountability envisages consultation before any decision is taken, or

even approval of a particular body before a decision can be effective. At the highest level, accountability involves the power of dismissal.

6. Under the present system, the Government has to present regular policy addresses to the Legislative Council. It shall answer questions raised by members of the Council, and have to obtain approval from the Council for taxation and public expenditure. On the whole, the Government does explain its decision and consult the public on major decisions.

7. Thus, the only main difference between the proposed new system and the existing system is that, under the existing system, the principal officials are civil servants and can only be removed pursuant to a well established mechanism. The new system enables the principal officials to be removed more easily.

8. However, according to the present proposal, the power of removal is vested in the Chief Executive alone. The proposal does not entail any power of the Legislative Council over the principal secretaries. Nor does it introduce any system under which the views of the public would affect the appointment or removal of the principal officials. In other words, the principal officials are accountable to the Chief Executive but only to him. They are appointed by the Chief Executive. They obtain their mandate from the Chief Executive, and not from the people. They can be removed by the Chief Executive, and by the Chief Executive alone. There is neither convention nor mechanism to ensure that the Chief Executive will exercise his power of removal in accordance with public sentiment. The new system strengthens the control of the Chief Executive over the principal officials, but it does not enhance any public accountability of the principal officials.

9. Article 64 of the Basic Law provides that the Government of the HKSAR must be accountable to the Legislative Council. The proposed system does not in any way enhance the accountability of the principal officials or the Government to the Legislative Council.

A Constitutional Dimension

10. The position of the Secretary for Justice requires further consideration. Under the present system, the Secretary for Justice assumes the role of the former Attorney General. She discharges both legal and political duties. In other systems, these roles may be discharged by different persons (e.g., Minister of Justice and Attorney General, or Attorney General and Solicitor General).

11. The Secretary for Justice is the principal legal advisor to the Government. She is responsible for policies relating to the administration of justice and delivery of legal services. She is, *inter alia*, a member of the Executive Council, the Chairman of the Law Reform Commission, and a member of the Judicial Officers Recommendation Commission. These roles would not be affected by converting her role into a political appointment.

12. At the other end of the spectrum, all criminal prosecutions are taken out in the name of the Secretary for Justice. She is ultimately responsible for all prosecution decisions. All decisions to prosecute are, at least in principle, determined by the Secretary for Justice. She may stop the trial of an indictable offence by entering a nolle prosequi. She can grant an amnesty or immunity to witnesses. She decides the venue of criminal trial and gives consent to the prosecution of certain offences. It is obviously important that decisions to take out criminal prosecution should not be interfered with by political consideration.

13. In England & Wales, the Lord Chancellor is a member of the Cabinet and responsible for legal policies and legal services. The Lord Chancellor is assisted by the Lord Chancellor's Department, which has a staff of over 11,000, in discharging his duties. The Attorney General is not a member of the Cabinet and only attends Cabinet meetings when summoned.

14. Article 63 of the Basic Law provides that the Department of Justice of the HKSAR shall control criminal prosecutions, free from any interference. The Secretary for Justice stated that the independence of the Department of Justice in relation to prosecutions would be unaffected by the proposed changes because the Director of Public Prosecutions remains a civil servant. This is half accurate only. Under Article 63 of the Basic Law, the decision to prosecute is to be taken by the Department of Justice, not by the Director of Public Prosecutions, and the Secretary for Justice remains the head of the Department of Justice. Therefore, if the Secretary for Justice is to become a political appointment, it is important to ensure constitutionally that all decisions relating to criminal prosecution shall be vested in the Director of Public Prosecution or Department of Justice free from any interference (or alternatively that the Secretary for Justice under the proposed new system shall no longer be responsible for any criminal prosecution).

15. Under the existing system, the Secretary for Justice is also the guardian of public interest. Traditionally in the common law system, the Attorney General represents the interests of the Crown qua Sovereign and also qua parens patriae. The areas in which these jurisidictions were first invoked were public nuisance and the administration of charitable and public trusts. As guardian of public interest, she can restrain public nuisances and prevent excess of power by public bodies. In

circumstances where a plaintiff does not possess the requisite interest to bring a case in his own name, the consent of the Attorney General is necessary - known as relator action. It has been held that a citizen can only enforce public rights through the Attorney General as the guardian of public interest, and the consent of the Attorney General cannot be sidestepped or circumvented: ***Gouriet v Union of Post Office Workers*** [1978] AC 435. It is not uncommon in these circumstances that the subject matter in issue may be of great importance to the government (e.g., challenging planning permission by a person not directly affected by it, as in ***Gregory v Camden London Borough Council*** [1966] 1 WLR 899, or industrial action as in ***Gouriet v Union of Post Office Workers*** [1978] AC 435). What is best in the public interest may not always be best in the government interest. In exercising the jurisdiction as guardian of public interest, the Attorney General has to be able to act independently and impartiality, and if necessary, act contrary to government policies or even government interest. A politically appointed Secretary for Justice who is accountable only to the Chief Executive may be hampered in discharging her role as guardian of public interest.

16. Therefore, if the position of the Secretary for Justice is to become a political appointment, it is important to ensure that the legal roles of the Secretary for Justice be transferred and discharged by another law officer, such as the Solicitor General or the Director of Public Prosecution, so that the Secretary for Justice is only responsible for legal policies.

Special Committee on Constitutional Affairs and Human Rights
Hong Kong Bar Association

19 November 2001

Control of prosecutions should rest with an independent DPP and not a political appointee, writes **Grenville Cross**

Free to decide

As the secretary for justice prepares to oversee his third director of public prosecutions in less than 18 months, the time has come for the roles of the secretary and the DPP to be redefined in a way that promotes prosecutorial independence.

The old colonial arrangement, whereby the secretary controls the DPP and intervenes in prosecution decisions, is no longer tenable. The secretary is a politically appointed minister who sits on the Executive Council and answers to the chief executive, and yet the prosecution process must be manifestly free of the political overtones associated with this situation.

Perceptions are important, and the fiction that a minister in a government can legitimately wear two hats, one as politician and one as prosecutor, has been largely discredited and discarded in many jurisdictions, including England and Wales. Removing a politician from involvement in prosecution decisions would promote confidence in the integrity of the system and align Hong Kong with developments in the common law world.

> The secretary for justice, given his governmental functions, should now step back from the prosecution process

The recent trend has been for politicians either to disengage altogether from the prosecution process, as in Ireland, or else to keep their involvement to an absolute minimum, as in Australia, and the lessons must be learned.

In England and Wales, Baroness Patricia Scotland QC, the attorney general in the last Labour government, issued a protocol in 2009 that reformed the relationship between the attorney general and the DPP. All prosecution decisions are now taken independently by the DPP, save in exceptional circumstances. The attorney general will only ever become involved in a particular case if he or she is required by law to give a specific consent to the case proceeding, or if, as the protocol puts it, "it is necessary to do so for the purpose of safeguarding national security".

In Australia, the federal DPP now operates an independent office. He or she acts independently of both the attorney general and the political process. Although the attorney general can issue guidelines and directives to the DPP, this can only occur after he has fully consulted the DPP. In New South Wales, the independence of the state DPP is seen as a safeguard against corruption and interference in the criminal justice system.

In Canada, an independent federal prosecution service was created in 2006. By law, the DPP acts independently in the discharge of the prosecution function. Although the attorney general has a residual power to intervene in a particular case, he or she must do so in writing and a notice must be published in the *Government Gazette*. The notice alerts the public, and the power is not lightly invoked. In Nova Scotia, following a miscarriage of justice and a royal commission, responsibility for provincial prosecutions was transferred from the attorney general to an independent DPP.

In my own experience, the community is far more prepared to accept decisions that are taken personally by the DPP, without the involvement of the political appointee. In 2003, for example, after the secretary for justice withdrew from the case to avoid the perception of conflict of interest, I alone took the decision not to prosecute former financial secretary Antony Leung Kam-chung for alleged misconduct in public office. Although not everyone agreed with my reasoning, most people accepted I had acted impartially, and in good faith.

In contrast, when the decision not to prosecute people associated with Zimbabwean President Robert Mugabe and his family for alleged assaults on journalists was taken jointly by me and the secretary in 2009, there was widespread concern that political factors could have influenced the decision. Although they had not, many people felt uneasy, and the situation highlighted the need for radical change. This is achievable under the Basic Law, and the secretary, given his governmental functions, should now step back from the prosecution process.

Article 63 of the Basic Law provides that "the Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions". Control, crucially, is vested in the department and not the secretary, although that is not how it has been interpreted, perhaps for historical reasons. A switch in responsibility for the control of prosecutions from the secretary to the DPP could come into effect internally, without legislation, and there is a clear public interest that this be done.

Such an arrangement would also be constitutionally legitimate, as the DPP is a law officer operating under the umbrella of the Department of Justice. As a politically neutral civil servant, he or she would be able to command public confidence over prosecution decisions in a way that is not always possible with a political figure, who must answer to a political master. If the buck stopped with the DPP, this would be good not only for justice, but also for the appearance of justice.

The decision whether to prosecute a suspect is a quasi-judicial function. This responsibility must therefore be exercised by a public prosecutor who is truly independent of government and is seen to be above politics.

Hong Kong's present arrangements are antiquated, and no longer pass muster by international standards. Prosecutions, after all, are too important to be left to the politicians.

Grenville Cross SC, the former director of public prosecutions, is an honorary professor of law at the University of Hong Kong, and represents Hong Kong in the senate of the International Association of Prosecutors

江樂士籲律政司長卸檢控權

指屬問責官員 難證政治中立

專訪

Amina 襲警、警隊雷射槍偵超速、津巴布韋總統女兒保鏢涉打記者等案件，公眾均對起訴與否、或以什麼罪名起訴有所爭議。兩年前退休的前刑事檢控專員江樂士認爲，爲確保刑事檢控政治中立，屬政治問責團隊的律政司長應迴避參與刑事檢控決定。

明報記者 **陳穎鏇**

對於江樂士建議，律師會會長黃桂壩表示會交律師會刑事法委員會研究，他認爲若可加強公眾對刑事檢控決定的信心，建議值得研究。

江樂士自回歸起出任刑事檢控專員一職達12年，至2009年退任。早前他發表文章，指香港「是時候」跟從其他普通法地區的做法，向特區政府問責的律政司長應避免過問刑事檢控決定，以給外界更獨立的感覺。他日前接受本報訪問，解釋司長作爲政府的法律顧問，向特首問責，但當檢控事件與政府有關時，司長的身分難免有衝突，他該站在政府律師角度，還是公義的角度，值得關注，因此他認爲司長若避席檢控決定，專注爲政府當法律顧問會更加恰當；至於檢控決定則可留待公務員團隊出身、身分獨立的刑事檢控專員決定，這樣可令外界更加信服。

兩任司長從未就檢控施壓

惟江樂士澄清，並非因過去擔任專員時受到政治壓力而有今次建議：「過去12年我與兩任律政司長討論檢控決定時，從沒有感到任何壓力，更遑論雙方各執一詞令我被迫讓步的情況，我與司長討論後，全部均可達到一致結論。但即使如此，外界仍不時對部分決定感到不中立，爲減少這種觀感，司長應訂明只在例外情況，如涉及外交、國防時才干預檢控決定，除此以外則讓專員獨立處理。」

不涉外交國防檢控全交專員

江樂士舉出兩例說明情況，他指2003年梁錦松偷步買車、2009年津巴布韋總統女兒保鏢涉打記者案，兩案最後未有起訴任何人，而兩案也同樣惹來爭議，但前案中時任律政司長梁愛詩未有參與決定，他認爲社會普遍較接納前案的檢控決定，而質疑後者是政治原因「放生」當事人。

對於在任12年間未有提出這個看法，江樂士解釋：「回歸初期普通法地區根本仍未出現這個大趨勢，而且現時香港司法系統已在仲裁及調解等方面得到良好發展，因此現在是考慮這問題的好時機，否則香港或會跟不上國際標準。」

英澳加檢控趨獨立 改革程序簡單

要律政司長將檢控決定權下放予刑事檢控專員，看上去似乎涉及巨大改變或法例問題，但江樂士引用外國情況，指實行上其實毫不困難，律政司長只需簽署協定即可。

2009年，英國及威爾斯曾檢討檢控權，就當地律政司長及刑事檢控專員的關係發出協定指引，要求除了法律上規定要司長親自決定、或案件涉及國防情況外，其餘案件均交予專員決定。

另外，澳洲聯邦刑事檢控專員也獨立於律政部門；加拿大更自2006年起成立獨立的聯邦檢控部門，司長只在個別情況下參與刑事檢控決定，並須在意報中書面宣布。江樂士以這些外國例子，說明事件毋須交立法會審議，只需律政司長簽署協定，下放權力即可，實行上並不複雜。

議員：律政司長不應納問責制

雖然江樂士指刑事檢控專員獨立運作「無難度」，但有學者認爲這或有違《基本法》；立法會議員兼資深大律師余若薇更指出，江樂士的看法忽視了律政司長不應該政治問責的根本問題。

學者指江樂士建議或違憲

香港大學法律專業學系助理教授張達明指出，以往亦有人質疑律政司長進入問責團隊後，是否仍能保持中立檢控；但由於司長責任源自《基本法》第63條，當中指「香港特別行政區律政司主管刑事檢察工作，不受任何干涉」，故即使條文中沒說明律政司是指部門還是司長本人，張認爲要司長完全撒手不管檢控工作會有難度。

為政府辯護捍衛公義 角色陷兩難

立法會議員兼資深大律師、公民黨余若薇直言，江樂士在任期間未有提出問題，且其建議根本無法對症下藥。她指2002年問責制推出時，已反對律政司長加入問責制度，以免其在保障政府利益及捍衛公義上出現矛盾。她解釋司長的角色多面，除了操檢控大權外，還會爲政府當法律顧問，或在政府被控告時代爲辯護。她舉例指當立法會認爲政府不守法時，司長應該爲政府辯護，還是以保障公義爲由中立處理？她認爲江樂士只要求將刑事檢控權抽出來獨立處理，並不能解決司長角色衝突的整體問題，反之將司長抽離到問責制外，才能根本上解決所有問題。

Appendix IV

Relevant papers on an independent Director of Public Prosecutions

Committee	Date of meeting	Paper
Panel on Administration of Justice and Legal Services ("AJLS Panel")	23.3.1998 (Item II)	Agenda Minutes
	4.2.1999 (Item I)	Agenda Minutes CB(2)1253/98-99(01) and (02)
Panel on Constitutional Affairs	17.12.2001 (Item IV)	Agenda Minutes
	21.1.2002 (Item IV)	Agenda Minutes
AJLS Panel	25.11.2002 (Item III)	Agenda Minutes
	16.12.2003 (Item I)	Agenda Minutes
	3.2.2006 (Item I)	Agenda Minutes CB(2)1245/05-06(01) and (02)
	23.10.2006 (Item IV)	Agenda Minutes
	30.3.2009 (Item VI)	Agenda Minutes CB(2)1215/08-09(02)
	15.7.2009 (Item I)	Agenda Minutes

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