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Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 27 June 2011

An independent Director of Public Prosecutions and prosecution policy and practice

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 and prosecution policy.

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)

"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 and prosecution policy

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, 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.

Prosecution policy and practices

17. Arising from public concern about the DoJ's decision to drop prosecution against the accused person in two cases (viz. *HKSAR v POON Kai-tik* and *HKSAR v Nguyen Gia-huy*), the AJLS Panel held a meeting on 16 January 2001 to discuss with the former DPP the principles and factors which regulated general prosecution policy, with particular reference to public interest factors, and on the use of the bind over procedure where the decision was taken not to pursue a prosecution which was in train. Some members as well as the legal professionals and academics who attended the meeting considered that the discretion of not pursuing with prosecution in the Nguyen case should be exercised in similar cases. They expressed concern that the lack of consistency in handling that type of cases gave rise to public

concern as to whether fairness had been maintained in prosecution decisions and whether the same factors which had been taken into account by the prosecutor in the Nguyen case had been given equal weight in other similar cases.

18. The Administration advised the AJLS Panel that while there was no set policy in respect of the procedure to dispose of the prosecution by way of offering no evidence on condition that the accused agreed to be bound over to be of good behaviour, DoJ would take into account the merits and circumstances of individual cases in determining whether the particular facts of a case warranted a departure from the existing prosecution policy and guidelines. While issuing prosecution guidelines on specific categories of cases would be a difficult task, the Administration was prepared to consider ways to achieve greater uniformity in handling prosecution cases, including those handled by Police officers and Court Prosecutors.

19. At the Council meeting of 14 July 2010, Dr Margaret Ng raised an oral question concerning the prosecution of a physically disabled hawker who held a valid Itinerant Hawker Licence and was accused of causing street obstruction when hawking in Tsim Sha Tsui on 19 December 2009. SJ advised that while DoJ conducted the majority of prosecutions, enforcement of some of the summary regulatory offences was vested with a number of Government departments and the relevant prosecutions were conducted by the departmental prosecutors. Departmental prosecutors were expected to apply the provisions of the Statement when conducting prosecutions and seek advice of DoJ where there were uncertainties or legal issues that required clarification. An extract from the relevant record of the Council proceedings is in **Appendix I**.

20. Members may also wish to note that the Hong Kong Human Rights Monitor issued a press release on 21 December 2010 expressing its view over the Government's decision to press charge against two juvenile demonstrators. The relevant press release is in **Appendix II**.

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

<u>The case of Ms AW Sian in 1998</u>

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

The case of Mr Antony LEUNG Kam-chung in 2003

26. 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.

27. 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.

28. 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 former 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.

29. According to the former 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.

30. 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

31. The AJLS Panel held two meetings on 3 February and 23 October 2006 respectively to discuss the decision of the former 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.

32. 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 former 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 former 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.

33. 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

34. 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.

35. 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.

36. 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.

37. 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

38. In his articles published on the South China Morning Post on 10 February 2011 and in the March 2011 edition of Hong Kong Lawyer respectively, Mr Grenville Cross, the former 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. These two articles are in **Appendices III** and **IV** respectively.

39. At the meeting on 28 March 2011, members agreed that the Panel should invite SJ, Mr Kevin Zervos, the newly appointed DPP, Mr Cross, the former DPP, legal profession and academics to join the future discussion of the issue relating to an independent DPP. Members further agreed to invite the newly appointed DPP to brief the Panel on prosecution policy and practice, as well as any recent initiatives to improve the quality and efficiency of the work of the Prosecutions Division.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
24 June 2011

~~The Committee had also studied issues relating to notices and agendas of~~ committee meetings. The practices and proposed arrangements agreed by the Committee have been included in the relevant handbooks as well as the relevant manuals for reference by Members and clerks to such committees.

The Committee had also discussed the need for establishing a procedure to deal with matters in relation to reports published by committees which have been dissolved, such as the ways to deal with circumstances which call for the amendment of such reports. The Secretariat was requested to conduct a study of the issues and collate relevant information to facilitate consideration of the matter by the Committee in the next session.

In addition, the Committee had also studied issues relating to curtailing of debate in committee proceedings. The Committee will also discuss the subject when the Secretariat has studied and collated the relevant information.

Finally, I would like to take this opportunity to thank Members for their support to the work of the Committee and their valuable views.

~~Thank you, President.~~

ORAL ANSWERS TO QUESTIONS

PRESIDENT (in Cantonese): Questions. First question.

Prosecution Policy

1. **DR MARGARET NG** (in Cantonese): *President, it has been reported that on 19 December last year, a physically disabled hawker holding a valid Itinerant Hawker Licence (Frozen Confectionery) (commonly known as "ice cream vendor") was alleged to have caused obstruction when hawking in the vicinity of the Star Ferry Pier in Tsim Sha Tsui as well as engaged in selling candies named "lollipop", and he was subsequently charged with causing street obstruction and hawking a commodity not specified in the licence. The prosecutor withdrew the*

charge of causing street obstruction before the trial, while retaining the second charge. The magistrate stated clearly in court that the case was of a minor nature and prosecution was unnecessary. He questioned the enforcement standards of the law enforcement officers as well as the prosecution principles of the prosecutor, and imposed a light penalty of a fine of $100 on the defendant. It has also been reported that some members of the public were dissatisfied with the authorities indiscriminately enforcing the law and instituting prosecution. In this connection, will the Government inform this Council:

(a) given that under the current prosecution policy, in deciding whether a prosecution should be instituted, the Department of Justice (DoJ) must consider if there is sufficient evidence and if the public interest requires a prosecution to be pursued, whether this policy has changed; in respect of the aforesaid case, of the public interest grounds based on which DoJ decided to institute prosecution;

(b) whether the prosecutor in the aforesaid case withdrew the charge of causing street obstruction because of insufficient evidence; if so, whether DoJ has considered if continuing with the prosecution against the hawker for hawking a commodity not specified in the licence would give the public the impression that "if you want to condemn somebody, you can always trump up a charge", resulting in their loss of confidence in the administration of justice; and

(c) whether DoJ will conduct a comprehensive review in the light of the case, with a view to improving the current prosecution policy?

SECRETARY FOR JUSTICE (in Cantonese): President, the DoJ is responsible for discharging the prosecution function. It is the established prosecution policy that the decision to prosecute would be based on a consideration of two matters. Firstly whether there is sufficient evidence to justify the institution or continuation of proceedings. If there is sufficient evidence then secondly whether the public interest requires a prosecution to be pursued. A determination of this second matter involves the prosecutor considering whether there is present some matter which would indicate that a prosecution is not in the public interest. These principles are enshrined in DoJ's Statement of Prosecution

Policy and Practice and have not been changed. While the DoJ conducts the majority of prosecutions, enforcement of some of the summary regulatory offences is vested with a number of Government Departments and the relevant prosecutions are conducted by the departmental prosecutors. When conducting prosecutions, departmental prosecutors are expected to apply the provisions of The Statement of Prosecution Policy and Practice. Where there are uncertainties or legal issues that require clarification, the advice of DoJ is sought.

Departments responsible for the enforcement of minor regulatory offences have discretion as to how to secure compliance with the law by the persons with whom they are dealing. Since the offences involved are generally minor in nature, it may not be in the public interest to too readily prosecute them. Hence the departments will explore other means of securing compliance with the law. This may involve educating such persons as to what the law requires of them, alerting them to the fact that certain conduct may constitute an offence for which they could be prosecuted and warning them that they have committed an offence and should stop from doing so, both now and in future. The goal is always to secure compliance with the law and if that can be achieved without prosecution then the public interest is much better served. But if all these measures fail and the person ignores repeated warnings and persistently breaks the law then prosecution will be necessary and will be in the public interest.

In relation to the specific case referred to in the question, the charges were made under the Hawker Regulation (Cap. 132AI) and the enforcement and prosecution actions were undertaken by the Food and Environmental Hygiene Department (FEHD). Before issuing the summonses, the FEHD sought legal advice and it was pursuant to that legal advice that the defendant was summoned for the offences of obstructing a pedestrian area and selling unauthorized items. DoJ's advice was in line with the prosecution policy set out above. Prior to the trial, the FEHD decided not to proceed with the offence of obstruction. We understand from the FEHD that the decision was taken after considering that the hawker was a new licensee and had probably not fully apprehended the contents of the FEHD's administrative guidelines although those guidelines had been issued to all existing licensed ice-cream vendors and also uploaded on FEHD's website for the trade's information. Although the FEHD did not seek DoJ's further advice before making that decision, in executing the prosecutorial decision the FEHD had acted responsibly and with sensitivity.

The summons in respect of selling of unauthorized item was heard before the magistrate on 25 May 2010. Different considerations applied to the offence of selling unauthorized items. Minor though this offence was, we understand that the FEHD had made every effort to inform the defendant that he was breaking the law and to encourage him to desist from so doing but the repeated warnings were ignored. The items that the vendor was authorized to hawk were clearly stated in his licence and there is no question of uncertainty or misunderstanding. Having considered the circumstances of the case, the FEHD decided to proceed with the prosecution. I trust that upon knowing the relevant circumstances of the case, the public will not lose confidence in the administration of justice.

President, DoJ will of course continue to make use of the meetings with and training for departments that are responsible for the enforcement of minor regulatory offences to disseminate to them the latest developments and trends in respect of prosecution policies.

DR MARGARET NG (in Cantonese): *President, the power of prosecution is a very important executive power. In fact, not only the defendant will be punished upon conviction, even during the prosecution period, the defendant has to endure a lot of pressure. He will also suffer losses when attending trials. Therefore, as far as public confidence is concerned, if the authorities are regarded to be abusing their power of prosecution and bullying the disadvantaged, it will deal a severe blow to the authorities.*

President, I would like to follow up the third paragraph of the Secretary for Justice's main reply. Even though he had made a detailed explanation, the result was the same: the FEHD charged a disabled hawker, who was a new licensee trying his best to become self-reliant, with a rather minor offence. One of the charges was withdrawn after the FEHD had issued the summons but shortly before the trial, and the Secretary pointed out that the FEHD had sought DoJ's legal advice. Would he please clarify whether the above scenario implies that DoJ regards both charges to be legally justified and that the prosecution is made in the interest of the public? Does it mean that even one of the charges is withdrawn and the other remains, it is still in the public interest to institute the prosecution? It is pointed out in the main reply that the FEHD did not seek DoJ's further advice before making that decision. Should the Secretary request the enforcement authorities to, under those circumstances, discuss with him once

again to see if prosecuting the defendant for a minor offence is still in the public interest?

SECRETARY FOR JUSTICE (in Cantonese): I would like to thank Dr Margaret NG for raising her further question. I absolutely agree that any prosecution would bring about considerable pressure on the defendant, so when we consider whether a prosecution should be instituted, many factors should be taken into consideration. The second important principle that I have mentioned just now is whether it is in the public interest to institute a prosecution. The relevant matters that should be considered are set out in the Statement of Prosecution Policy and Practice. As I have explained just now, initially, the defendant was summoned for two charges, namely, obstructing a pedestrian area and hawking a commodity not specified in the licence.

As set out in the main reply, before instituting the prosecution, the FEHD had sought DoJ's advice in this regard and considered that there was sufficient evidence to institute the prosecution. However, as pointed out in the main reply, after the provision of statements and further information to FEHD's staff and prior to the trial, they decided to withdraw the charge of obstructing a pedestrian area by not offering evidence for that offence in consideration of the relevant factors. As mentioned in the main reply, the FEHD decided to withdraw the charge after considering that the hawker was a new licensee and had probably not fully apprehended the relevant offences (including the offence of obstructing a pedestrian area). In respect of the decision of withdrawing the above charge but retaining the other one, the FEHD did not seek further advice from DoJ. As the FEHD has previously sought our advice, in principle, it might seek our further advice as to whether it was appropriate to proceed with the case. We will continue to remind the relevant staff to keep in touch with us. In particular, if there are any changes prior to seeking advice, they may seek our further advice.

However, in consideration of the relevant information, especially under the circumstances where the offence of obstructing a pedestrian area was withdrawn and the other offence was retained, as I have already explained, it involves a number of considerations. I would like to emphasize that the FEHD had given verbal warnings two days ago for the selling of "lollipop". As far as I understand, the FEHD has issued four verbal warnings to the defendant. In this case, as I explained earlier, this offence is different from the offence of

obstructing a pedestrian area in that all authorized items are in fact clearly set out in the licence. This is therefore different from the circumstances I mentioned earlier, that is, the defendant might not fully apprehend the offence of obstructing a pedestrian area. Furthermore, we have made every effort to ensure compliance with the law without prosecution. Prosecution was instituted only after all such efforts came to no avail. This is the situation I learn from the information provided by the FEHD, and I also believe that there is no violation of the prosecution policy.

Finally, I would like to add that, although the defendant was summoned for a minor charge, that is, selling unauthorized items, it is still an offence under the law, so it has to be enforced. Therefore, the relevant law enforcement officers have their responsibilities in this regard.

附錄 II
Appendix II

香 港 人 權 監 察
HONG KONG HUMAN RIGHTS MONITOR

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新聞稿：供即時發放

嚴厲檢控爭普選示威少年　當局被指打壓有違《檢控常規》

(香港・二零一零年十二月廿一日) 香港人權監察批評，在 625 反政改示威人士衝出中環干諾道中西行線馬路和平靜坐被控阻街案件中，政府當局檢控包括少年人的四名和平示威人士，尤其未有充分照顧示威少年的福利而採取嚴厲的檢控手段，反映政府爲打壓和平示威表達活動，不惜有違檢控政策。

據律政司的《檢控政策及常規》，[1]檢控人員在決定是否爲公眾利益檢控少年時，包括 16 至 21 歲的少年，必須充分考慮其福利，[2]除非所涉及的罪行十分嚴重，非要檢控不可，否則盡可能以檢控以外的其他可行方法處理，而檢控應被視作爲嚴厲的處理方式。[3]

在 6.25 政改方案通過當日，參與反政改集會的楊匡、葉浩意、胡永勤及馬雲祺因衝出干諾道中馬路靜坐示威被控阻差辦公罪，及至十月底被落案起訴阻街罪。四名示威人士當中，馬雲祺爲 16 歲，胡永勤爲 19 歲，按兩者年齡，他們均屬律政司《檢控政策及常規》所指的少年。

人權監察認爲，當日四名示威人士因爭取普選、反對政改方案獲通過而衝出馬路靜坐，追求的是社會福祉和基本人權，行動亦屬和平，造成的阻礙影響輕微，根本不

1　律政司：《檢控政策及常規—檢控人員守則》，http://www.doj.gov.hk/chi/public/pubsoppapcon.htm

2　第 12.2 條：「[…]在決定是否爲公眾利益提出檢控時，就必須充分考慮該少年的福利，以及《刑事訴訟程序條例》(第 221 章) 第 109A 條，該條文限制法院向年齡介乎 16 至 21 歲之間的少年判處監禁刑罰[…]」

3　第 12.3 條：「如果案件涉及少年犯人，通常會有更強的理由用檢控以外的方法來處理，除非有關罪行十分嚴重，又或者基於其他特殊情況而不得不提出檢控。總之，目標應該是盡可能不檢控少年，檢控應被視作嚴厲的處理方式。」

應視作嚴重罪行，當局理應以採取比較寬容的態度去處理和平示威活動，爲表達意見及和平示威的市民多留一點空間，而非像現時如此秋後算帳，嚴厲檢控四名示威人士，尤其檢控當中兩名屬少年的示威人士。

事件顯示當局在處理示威人士案件時，漠視《檢控政策及常規》，無視少年的福利，採取被視作最嚴厲的處理方式檢控追求民主的少年，一心嚴厲對付參與政治示威的青少年，人權監察對當局這種檢控做法深表遺憾，並促請律政司撤銷檢控四名示威人士，尤其兩名少年示威人士。

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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

Let the public prosecutor decide, not the political appointee

讓公職檢控官而非受政治任命者來作決定

Grenville Cross SC reasons that prosecutions must be controlled by a Director of Public Prosecutions who is independent of government and above politics

江樂士資深大律師論述檢控工作必須由刑事檢控專員來主管，而他必須獨立於政府和置身於政治以外

In 2000, Nelson Mandela was awarded the Medal of Honour of the International Association of Prosecutors. In his acceptance speech, he said the modern prosecutor had to be a lawyer for the people, and needed to build an effective relationship with the community. He described the duty of the prosecutor as being 'to prosecute fairly and effectively, according to the rule of law, and to act in a principled way without fear, favour or prejudice'.

The profession of the prosecutor is an honourable one. At its core is the need to behave impartially, and to be guided by principle when making decisions. To succeed, the prosecutor must earn the trust of the community, and then retain it. To ensure this, the prosecutor should be empowered to act independently, and those in government must protect this independence, and not seek to fetter it. Nicholas Cowdery QC, the Past President of the International Association of Prosecutors, has said that the: 'Independence of prosecutorial decision making is the rock on which we stand.'

The significance of a chief prosecutor who is independent of government and outside of politics is generally acknowledged in common law circles, not least because this preserves the separation of powers, promotes the rule of law, and advances democratic values. Independence is safeguarded if the chief prosecutor is allowed to take the decisions he or she believes to be just, if security of tenure is guaranteed, and if adequate funding is provided for prosecutorial activities. Since Art 13 of the United Nations Guidelines on the Role of Prosecutors (1990) requires the prosecutor to 'protect the public

2000年，納爾遜．曼德拉被授予了國際檢控官協會榮譽獎章。在他的接受獎項演講中，他說現代檢控官必須是人民的律師，而且需要與社會建立有效的關係。他形容檢控官的職責是「根據法律規定而公正有效地起訴，並且須無畏、無偏袒、無偏見地有原則行事」。

檢控官是一個光榮的專業。其核心是要表現公正，而且在做決策時能夠遵循原則。為了獲得成功，檢控官必須贏得公眾的信任，然後維持該份信任。為了確保這一點，檢控官應該有權獨立行事，而政府必須維護這種獨立性，而不是試圖束縛它。國際檢控官協會的前會長Nicholas Cowdery QC說過：「公訴人決策的獨立性是我們立足的基礎。」

獨立於政府並在政治之外的首席檢控官的重要性在普通法的領域中已經得到公認，尤其是因為其能維持權力分立，促進法治和民主價值。如果允許首席檢控官根據他所認為公平的情況來做出決定，如果終身職務制能夠得到保障，如果有足夠的資金提供給公訴活動，那麼其獨立性才能獲得保障。由於《聯合國的檢察官職責指引》（1990）第13條要求檢控官「保護公眾利益」和「按照客觀性原則行

interest' and to 'act with objectivity,' the chief prosecutor must be genuinely free of political interference, in whatever guise, and should not have to keep looking over his or her shoulder at a political master every time an important decision is to be made.

The fiction that a member of the government, whether attorney general, justice secretary or law minister, can legitimately wear two hats, one as politician and the other as prosecutor, is now largely discredited, and has been discarded in many places. Perceptions, as always, are important. The removal of a politician from involvement in prosecution decisions is a means of promoting confidence in the integrity of the system. In Hong Kong, it is high time for the roles of the secretary for justice and the director of public prosecutions to be reviewed in a way that promotes the independence of the prosecutor. The rule of law requires the prosecutor to be as independent as is the judge, and to enjoy the same levels of protection against interference with the exercise of the discretion in particular cases.

The old colonial arrangement, whereby the secretary controls the DPP and intervenes in prosecution decisions, is no longer tenable, and flies in the face of developments elsewhere. The community must be able to see for itself that the decisions taken by prosecutors are truly objective, and have not been influenced by outside pressures. The prosecution process should be manifestly free of political overtones, but this is not possible when it is overseen by a politician who sits on the executive council and answers to the chief executive. After all, the decision to prosecute involves a quasi-judicial function, and it must therefore be exercised by a DPP who is seen to be fully independent, as is recognised elsewhere.

In 'The Standards for Prosecutors', which the International Association of Prosecutors adopted in 1999, Art 2.1 stipulates that the prosecutorial discretion 'should be exercised independently, and be free from political interference'. In many common law jurisdictions,

事」，因此首席檢控官必須真正地做到不受任何形式的政治干預，而且每次在作重要決定時不需要小心提防其屬政治任命的上司。

有謂一位政府工作人員，不論是檢察總長、律政司司長還是法律部長，可以合法的戴上兩頂帽子，一個是政治人物而另一個是檢控官，這種看法現時已大部分被摒除，而且在許多地方已經被放棄了。認知一直以來是很重要的。不容許任何政治人物參與檢控決定是在系統完整性方面促進信心的一種手段。在香港，早該在某種程度上重新考慮律政司司長和刑事檢控專員的作用，以促進檢控官的獨立性。法治要求檢控官應該和法官一樣是獨立的，而且如果在特定案件中行使酌情權時受到干擾的話，應該享有同樣水平的保護。

由司長指揮刑事檢控專員（以下簡稱「檢控專員」）並且干預檢控決定，這種舊殖民地式的做法再也站不住腳，而且也罔顧其他地方的發展。公眾必須能夠看到檢控官所做的決定是真正客觀的，而且沒有受到外界壓力的影響。檢控程序應該完全不帶政治色彩，但假如是受到處身行政會議並向行政長官負責的政治人物所監控，這目標便將會無法實現。畢竟，決定提起公訴涉及到準司法職能，而且必須由一個被認為完全獨立的檢控官來執行。

在國際檢控官協會1999年通過的「檢控官標準」中，第2.1條規定了檢控官自由裁量權「應該獨立行使，且不受政治干預」。因此，在許多普通法司法管轄區內，均據此採取措施來減少或消除政治人物在檢控程序中的作用。在英格蘭和威爾士，這種情況近期獲得巨大進展，而且其經驗值得學習。特別是，Baroness Scotland QC，上屆工黨政府的檢察總長果敢地回避參與檢控決定，交由檢控專員來決定誰應該被起訴或不被起訴，除非是屬於她所謂的「特殊情況」。

Baroness Scotland 在2009年公佈了一份議定書，該議定書反映了新的安排，包括接受了檢察總長從今以後「不涉及絕大部分案件」。只有在法律規定需要對某項訴訟程序作出同意，或如果是在「為了包括國家安全目的」的情況下，他或她才有必要參與檢控決定。雖然為了責任承擔、上訴和資訊的目的，他仍然會與檢控專員討論敏感的案件，但是議定書也規定了檢察總長有職責保障「檢控官在個別案件中決定是否起訴的獨立性」。

在愛爾蘭，獨立的檢控專員職位是根據1974年的Prosecution of Offences Act來設立的。政府的國會政務秘書John Kelly TD在1974年6月11日提議立法設立該職位，並告訴國會此舉的目的，首先是確保檢控

therefore, steps have been taken to reduce or eliminate the role of the politician in the prosecution process. In England and Wales, the recent progress has been dramatic, and the lessons must be learned. In particular, Baroness Scotland QC, the attorney general in the last Labour government, took the brave decision to withdraw from involvement in prosecution decisions, and to leave it to the DPP to decide who should or should not be prosecuted, save in what she called 'exceptional circumstances'.

Baroness Scotland issued a protocol in 2009, which reflects the new dispensation, including an acceptance that the attorney general will henceforth have 'no involvement in the vast majority of cases'. He or she will only ever become involved in prosecution decisions if a consent is required by law to a particular case proceeding, or if this is necessary 'for the purpose of protecting national security'. Although sensitive cases will still be discussed with the DPP, for the purposes of accountability, appeal and information, the protocol imposes a duty on the attorney general to safeguard 'the independence of prosecutors taking decisions whether or not to prosecute in individual cases'.

In Ireland, the post of independent DPP was created by the Prosecution of Offences Act, 1974. When he introduced the legislation to create the post on 11 June 1974, John Kelly TD, Parliamentary Secretary to the Government, told parliament that its purpose was, first, to ensure that the prosecution system 'should not only be impartial but should be seen to be so, and that it should not only be free from outside influence but should be manifestly so', and, second, 'to enable the attorney general more effectively to discharge his primary function of giving legal advice to the government and government departments on matters of law and legal opinion'. In consequence, all the powers previously exercised by the attorney general have been transferred to the DPP, who discharges his functions as he thinks fit in the public interest. The DPP is independent of all other bodies and institutions, and decisions are arrived at free from political or other influences.

In Canada, the Law Reform Commission in 1990 called for the creation of a statutory post of DPP, in order to increase the security of public prosecutors and to ensure the independence of the prosecution service from political influences. After much debate, this call was heeded, and an independent federal prosecution agency was created by the Director of Public Prosecutions Act, 2006. In consequence, the federal DPP acts independently in the discharge of the prosecutorial function, and the scope for interference with his or her decisions is limited. 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. The notice alerts the public, and the power is not lightly invoked.

In Nova Scotia, an independent prosecution service has been established by statute. The impetus for this was a miscarriage of justice involving a wrongful conviction, which led to a royal commission that recommended a restructuring of prosecution arrangements. Responsibility for prosecutions under the Criminal Code and the

制度「應該不僅僅是公正的，而且應該被視為是公正的」，而且它應該不僅僅不受外界影響，而且應該明顯不受外界影響；第二，「讓檢察總長能夠更有效地履行其基本職能，即向政府及政府部門在法律問題上提出法律意見」。因此，檢察總長之前行使的所有權力轉移給了檢控專員，檢控專員可以在他認為符合公眾利益的情況下履行其職能。檢控專員獨立於其他所有的機關和機構，而且其決定不受政治或其他影響的干預。

As a politically neutral civil servant, the DPP 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.

刑事檢控專員作為一名政治中立的公務員，可以在某種程度上維持公眾對檢控決定的信心，而這對於需要向政治任命的上司負責的從政者而言，卻並非經常可能。

在加拿大，法律改革委員會在1990年呼籲設立一個檢控專員的法定職位，以提高公職檢控官的保障並確保檢察部門的獨立性，不受政治干預。經過反複爭論，該呼籲終被重視，並且根據Director of Public Prosecutions Act, 2006設立了獨立的聯邦檢控機構。因此，聯邦檢控專員在履行其檢控官職責時是獨立行事的，而且其決定被干預的程度是有限的。如果檢察總長在特定案件中想要進行干預，便必須以書面形式進行且必須在憲報上刊登公告。該公告提醒公眾注意，而該權力是不會被輕易調用的。

在新斯科細亞省，獨立的檢察部門已經依法成立。此事的推動力是一宗涉及錯誤定罪的誤判，該誤判導致皇家專門調查委員會建議重組起訴的安排。根據刑法和省級法規，檢控的責任已經從檢察總長轉移給了獨立的檢控專員。檢控專員每年須向議會彙報，而且雖然他或她必須遵守檢察總長在憲報上公佈的指示和指引，但是檢控專員和檢察總長始終會事先協商，所以任何非正式的建議是不具有約束力的。

在澳大利亞，聯邦檢控專員管理一個依法成立的獨立的檢控機構。雖然該機構被列入聯邦檢察總長職責的範圍，但是檢控專員職能獨立於檢察總長和

provincial statutes has been transferred from the attorney general to the independent DPP. The DPP reports annually to the House of Assembly, and although he or she must comply with the instructions and guidelines that the attorney general publishes in the Gazette, there must always be prior consultation between the two officers, and any less formal advice is of no binding effect.

In Australia, the Commonwealth DPP operates an independent prosecution agency, established by statute. Although the agency falls within the portfolio of the Commonwealth attorney general, the DPP functions independently of the attorney general and of the political process. Whilst the attorney general can issue guidelines and directions to the DPP after full consultation with him or her, these must be published in the Government Gazette and tabled in parliament. In New South Wales, the day to day control of prosecutions has been passed from the attorney general to the DPP, who heads an independent office, and the independence of the DPP is seen as a safeguard against any interference in the proper functioning of criminal justice at the state level.

As I found from experience, the community is far more ready to accept decisions that are taken personally by the DPP, without the involvement of the political appointee. In 2003, for example, after the former secretary for justice correctly withdrew from the case to avoid any possible perception of conflict of interest, I alone took the decision not to prosecute former financial secretary Antony Leung Kam-chung for an alleged offence of misconduct in public office. Although not everyone agreed with my reasoning, most people accepted that I had acted in good faith, and this is vital for the credibility of the prosecutor in a free society. Again, in 2001, when I alone decided to prosecute former legislative councillor Gary Cheng Kai-nam, for false accounting and other offences, the decision was not seriously questioned.

By contrast, when the decision not to prosecute people associated with Zimbabwean President Robert Mugabe and his family for alleged offences of assaults on journalists was taken by me in conjunction with the present secretary for justice 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, perhaps along the lines of the English model. Earlier, in 2006, problems of perception had also arisen when it was decided not to prosecute former judge Michael Wong Kin-chow, after allegations surfaced of misuse of allowances. If the political will exists, a procedural change can now be achieved under the Basic Law, and the secretary, given his governmental functions, should take decisive steps to disengage 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'. Although it has not been interpreted in this way, control is vested not in the person of the secretary, but in the department itself, and the distinction, though fine, is crucial. A switch in the responsibility for the control of prosecutions from the secretary to the DPP could be implemented internally in the department, perhaps by a protocol, as in England and Wales, and without recourse to legislation. Such a change would not be incompatible with the Basic Law, and there is a clear public interest that this be done.

政治程序。雖然，檢察總長可以在與檢控專員全面磋商後向檢控專員發佈指引和指示，但都必須刊登在憲報上並且提交議會。在新南威爾士，日常的起訴控制職能已經從檢察總長轉移給主管一個獨立辦公室的檢控專員，而檢控專員的獨立性，乃被視為令刑事司法正常運作而免受干預的一項保障。

根據我的經驗，公眾更願意接受由檢控專員親自做的而沒有政治任命者參與的決定。例如，在2003年，在前任律政司司長正確地回避案件以免有任何利益衝突的可能性之後，我獨自決定不起訴前財政司司長梁錦松就公職人員行為不當的罪行指控。雖然不是每個人都同意我的理由，但是大多數人接受了我是真誠行事的這個事實，而在自由社會中這對檢控官的信譽是非常重要的。同樣，在2001年，當我單獨決定起訴前立法會議員程介南偽造帳目以及其他罪行時，該決定也沒有受到嚴重質疑。

與此相反，在我和律政司司長在2009年決定不起訴與辛巴威總統穆加貝及其家人對記者的襲擊罪時，社會人士廣泛關注所作的決定是否受政治因素影響。儘管並非如此，但是許多人感到不安，而該情況突顯了徹底變革的需要，也許可以沿用英國的模式。此前，在2006年，當前法官王見秋濫用津貼的指控浮現後並決定不予起訴時，這時也出現了認知的問題。倘有如此的政治意願，現時可以根據《基本法》達到程序變更的目的，而司長基於其在政府的職能，應採取果斷措施使其自身與檢控程序分離。

《基本法》第63條規定「香港特別行政區律政司主管刑事檢察工作」。雖然它並未以如此的方式解釋，但主管的權力並不屬於司長個人而是屬於部門本身，這樣的區別，雖然很細微，但卻是至關重要。主管檢控的責任從司長轉移給檢控專員可以在部門內部實施，也許是通過一份議定書的形式，如英格蘭和威爾士般，而且無需訴諸立法。這樣的變更不會與《基本法》相抵觸，並且存在明顯的公共利益。

由於檢控專員是一名隸屬於律政司的法律人員，他或她可以根據第63條規定，以合憲的方式來承擔主管檢控的責任。檢控專員作為一名政治中立的公務員，可以在某種程度上維持公眾對檢控決定的信心，而這對於需要向政治任命的上司負責的從政者而言，卻並非經常可能。如果所須承擔的相關責任僅止於檢控專員，這不僅有助秉行公義，亦有助對秉行公義的展示。同樣，這亦將有利於律政司司長，使其能夠專注於發揮其向政府提供法律意見的主要職能。

Since the DPP is a law officer operating under the umbrella of the Department of Justice, he or she could assume the control of prosecutions in a manner which, in terms of Article 63, is constitutionally legitimate. As a politically neutral civil servant, the DPP 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. It would likewise be good for the secretary, who would be able to concentrate on his primary role of giving legal advice to the government.

In this scenario, the secretary would, however, retain some residual functions in relation to the prosecution process, as has happened in England and Wales. He or she would still, for example, be entitled to know how particular decisions had been reached, so that this could be explained to interested parties. The secretary would, as now, ensure that proper guidelines were in place to regulate prosecutorial activities, and would be consulted over changes to codes of practice. The secretary would be responsible to safeguard the independence of the DPP, but would not, crucially, save perhaps in exceptional circumstances, play any role in the actual decision making process. Such circumstances might arise if, as in the English precedent, a consent is required in law to a particular prosecution proceeding, but even then a strong case must exist for transferring the power of consent from the secretary to the DPP. A switch in the overall responsibility for prosecutions would require a fundamental change of mindset within the department, as well as courage, but where there is a will there is undoubtedly a way.

If there were to be an independent DPP, this would not only reassure the local community, but would also send out a powerful signal that Hong Kong is committed to a prosecution service which is aligned to international standards. Other jurisdictions have recognised in recent times that prosecutions are far too important to be left in the hands of the politicians, and the reform of local arrangements is long overdue. If Hong Kong can finally have a DPP who is not subject to the control or influence of a political appointee this will be good for criminal justice, and will also strengthen the rule of law. This is a noble aspiration, which will hopefully become a reality, sooner rather than later.

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在這種情況下，司長將會保留一些與檢控過程有關的剩餘職能，正如英格蘭和威爾士的情況一般。例如，他或她仍然有權知道某個決定是如何達至的，從而可以向各利益相關方作出解釋。正如在目前的情況般，司長將會確保已制定了適當的指引來規範檢控活動，並且當實務守則有需要作出更改時會被諮詢。司長負責保障檢控專員的獨立性，但除非是屬於特殊情況，否則司長不會在實際決策過程中扮演任何角色。如果法律規定需要對某項檢控程序作出同意的話（正如在該英國判例中），這樣的情況便可能會發生。但即使那樣，將作出同意的權力從司長轉移給檢控專員必須存在一個強而有力的理據。要將檢控的整體責任轉移，部門內部的思維方式需要有根本的改變，同時亦需要有勇氣，但是有志者事竟成。

如果香港真的擁有一位獨立的檢控專員，這不僅能再次向社會人士作出保證，而且也發出了一個強而有力的信號，顯示香港乃致力於建立與國際標準相一致的檢察部門。其他司法管轄區近年也認識到，檢控權萬萬不可被政治人物掌握，是以對此作出改革已是刻不容緩的事情。香港如最終可以擁有不受屬政治任命人士所指揮或施加影響的檢控專員，這將會有利於刑事司法，並有助加強法治。這是一個崇高的理想，並期望它能早日成為事實。

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Appendix V

Relevant papers on an independent Director of Public Prosecutions and prosecution policy and practice

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)
	16.1.2001 (Item IV)	Agenda Minutes
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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