

Collision of Vessels near Lamma Island on 1 October 2012 (“The Incident”)
Summary of Reasons for the Prosecutorial Decisions concerning
Marine Department officers

Summary

1. In October 2014 the Police submitted to the Department of Justice a revised report on an investigation into failings by officers of the Marine Department in connection with the construction, inspections and surveys of the vessel Lamma IV, one of the vessels involved in The Incident. The Department has considered the case in great detail, leading to the initiation of criminal proceedings in March this year against two Marine Department Officers, one for the offence of Misconduct in a Public Office, and the other for the offence of Perjury. The Department has further instructed a Senior Counsel at the Bar, Mr. Andrew Bruce SC, to provide an independent opinion and to review whether, upon the application of the law and established prosecution policy to the evidence, a prosecution in respect of the suspected failings by any officer of the Marine Department, in addition to the criminal proceedings that have been instituted against the two officers, would be appropriate and justified.

2. Mr. Bruce submitted his finalized advice to the Department of Justice in September 2015. He agrees with the views of the Department of Justice and has advised that there is no reasonable prospect of securing a conviction against any other Marine Department Officer whether for the offence of Misconduct in a Public Office or any other offence.

3. The Department of Justice, having considered the law, the available evidence, the opinion of Senior Counsel and all other relevant materials, has concluded that, in view of the stringent standards set by the only potentially viable charge against the officers (namely Misconduct in a Public Office), there is insufficient evidence in support of any charge against any other Marine Department officers.

Prosecution Criteria

4. According to the Prosecution Code, a prosecutor must consider two issues in deciding whether to prosecute. First, whether the evidence is sufficient to justify the institution or continuation of proceedings. Second, if it is, whether the public interest requires a prosecution to be pursued.

5. A prosecution should not be started or continued unless the prosecutor is satisfied that there is legally sufficient evidence to support a prosecution: that is, evidence that is admissible and reliable and, together with any reasonable inferences able to be drawn from it, likely to prove the offence. The test is whether there is a reasonable prospect of a conviction.

6. In the present case, the decision not to prosecute any other Marine Department officer is based upon insufficiency of evidence. The Department of Justice is of the view that if there were sufficient evidence to support any prosecution, in the light of the nature of this case, public interest would indeed have required prosecution to be brought.

Background

7. On the evening of 1st October 2012 a collision occurred in the waters off Lamma Island between the vessels Sea Smooth, a high speed catamaran operated by the Islands Ferry Company Limited (as it was then known) and Lamma IV a passenger launch owned and operated by Hong Kong Electric Company. As a result of the collision Lamma IV sank and 39 persons who had been passengers on board Lamma IV lost their lives.

8. The coxswain of Sea Smooth, LAI Sai-ming, and the coxswain of Lamma IV, CHOW Chi-wai, were each charged with 39 counts of Manslaughter and 2 alternative offences of “Endangering the Safety of Others at Sea”. Both were tried together in the Court of First Instance before Deputy High Court Judge Keith and a jury. LAI Sai-ming was convicted of all 39 counts of Manslaughter and a count of Endangering the Safety of Others at Sea. He was sentenced to a total of 8 years imprisonment (and is currently appealing that sentence). CHOW Chi-wai was convicted of an offence of “Endangering the Safety of Others at Sea” and has been sentenced to 9 months imprisonment.

9. After the collision, a Commission of Inquiry pursuant to the provisions of the Commissions of Inquiry Ordinance Cap 86 was on the 22nd October 2012 appointed by the Chief Executive in Council under the Chairmanship of The Honourable Mr. Justice Lunn.

10. In its report issued in April 2013, the Commission of Inquiry reports failings by officers of the Marine Department in relation to the construction, inspections and surveys of Lamma IV, and in particular:- an access opening at

the Frame1/2 bulkhead had not been fitted, as it should have been, with a watertight closing appliance; stability calculations had not taken this lack of a watertight closing appliance into account; the fixture of the seating on the upper deck of Lamma IV had proved to be inadequate when the vessel sank at an acute angle; and the vessel was not equipped with the required number of children's life jackets.

11. A full and comprehensive Police investigation has been carried out into those failings by officers of the Marine Department to determine whether any criminal offences had been committed by any officer of the Marine Department.

The Relevant Offence

12. In order to understand the decisions that have been reached in this case, it is necessary to understand first of all the law in relation to the offence of Misconduct in a Public Office. The elements of the offence are:

- (1) a public official;
- (2) in the course of or in relation to his public office;
- (3) wilfully misconducts himself; by act or omission, for example by wilfully neglecting or failing to perform his duty;
- (4) without reasonable excuse or justification; and
- (5) where such misconduct is serious not trivial having regard to the responsibilities of the office and the office holder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities

13. See *HKSAR and SIN Kam-wah* [2005] 8 HKCFAR 192 in which Court of Final Appeal further explained "the misconduct must be deliberate rather than accidental in the sense that the official either knew his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful. Wilful misconduct which is without reasonable excuse or justification is culpable".

14. Consistent with fundamental criminal law principles, the standard for culpability for the offence of Misconduct in a Public Office is an elevated one. Mistakes or negligence do not suffice; nor do errors of judgment – see *Borron* 1820 3 B & Ald 432; *R v Boulanger* [2006] 2 SCR 49, *R v Chapman and others* [2015] 2 Cr App R 10 and *A-G's Reference (No.3 of 2003)* [2004] EWCA Crim 868.

15. The main areas which the Department of Justice and Senior Counsel have considered are set out below.

Approval of the Plans

16. The plans for Lamma IV were approved by the Marine Department despite the fact there was an inconsistency contained within the drawings as to the descriptions of the access opening in the Frame 1/2 Bulkhead. The Commission of Inquiry and indeed Senior Counsel were of the view that the plans ought not to have been approved without a requirement for revision. The evidence may suggest negligence on the part of the approving officers. However, both the Department of Justice and Senior Counsel have seen no evidence that there had been "wilful misconduct" (as explained by the Court of Final Appeal) and therefore insufficient evidence to establish criminal behavior of the nature which can found a charge of Misconduct in a Public Office against the approvers of the plans.

The Initial Inspections of Lamma IV

17. Prior to receiving a Certificate of Survey which was required to enable the vessel to sail in Hong Kong waters, the vessel was inspected during the later stages of its construction in Hong Kong. During those inspections and in particular the initial one which was carried out on 13 November 1995, the officer involved made no mention of any access opening at the Frame 1/2 bulkhead. If it had been present then this should have been noted and the lack of a watertight closing appliance dealt with. There exists now no contemporaneous documentation as to when the access opening at the Frame 1/2 bulkhead was made. There is no admissible evidence that it was present at the time when the initial inspection took place on the 13 November 1995. Senior Counsel has concluded and the Department of Justice agrees that without some direct evidence of when the access opening was made, there was insufficient evidence to establish that the inspecting officer had been aware of it and therefore the need to deal with the lack of a watertight closing appliance to that access opening. There was therefore insufficient evidence to support any reasonable prospect of conviction that the inspecting officer had wilfully misconducted himself and a charge of Misconduct in a Public Office cannot be made out.

Stability Damage Booklets

18. On three separate occasions, namely (1) at the time of the initial final certification in 1996; (2) when the 8.25 tons of lead ballast were added to the vessel in 1998; and (3) when the ballast was raised some 10 inches in 2005, Stability Damage Booklets were prepared by the shipyard and were presented to the Marine Department. In all of them the figures were based on the fact that the Frame1/2 Bulkhead was watertight when it was not. During the Inclining Experiments held, none of the attending officers from the Marine Department had with them the plans of the vessel which was the practice at the time and none of the officers were aware of the errors in the Booklets. However there was no evidence that these officers had been “wilfully” negligent as opposed to being negligent per se. In Senior Counsel’s view, which view the Department of Justice agrees, there is not a reasonable prospect of conviction, based on the evidence, of a charge of Misconduct in a Public Office in respect of these officers.

19. The supervising officers had in each case endorsed the Booklets but their behavior when doing so does not in the opinion of Senior Counsel fit within the kind of misconduct contemplated by the offence of Misconduct in a Public Office.

The Inspections of Lamma IV

20. There have been a number of inspections of Lamma IV made by a number of officers over the years. Senior Counsel is of the view that while the evidence suggests that some of the works were sloppy and myopic, he does not consider that their conduct could be characterized as a deliberate breach of their duty or a deliberate breach of the trust reposed in them so as to amount to Misconduct in a Public Office. The Department of Justice is of the same view.

The seating on the upper deck of Lamma IV

21. While it was beyond doubt that the failure of the seating on the upper deck of Lamma IV was a critical contributor to The Incident, Senior Counsel has found no evidence that any of the officers responsible for the checking of the seats did so in a manner which ignored obvious problems. There was no evidence that any of these officers appreciated the problems that were proved to exist did exist at the time of their examination.

Children's Lifejackets

22. As one Marine Department officer has been charged in respect of events relevant to the issue of Lifejackets, the Department of Justice will not comment on this topic.

Conclusion

23. This has been a most difficult and complicated investigation. The tasks undertaken by the Department of Justice in the analysis of the results of the investigation and the consideration the relevant legal principles have not been less so. A major difficulty has been the lapse of time since the most relevant events had taken place, and the problems which flow from that, including the lack of contemporaneous documentation relating to the construction of the access opening and faded memories.

24. A prosecution can only ever be instituted on the basis of sufficiency of evidence. It should never be commenced unless there is admissible and reliable evidence to justify placing a person on trial. From the provable facts of a case, there must be a reasonable prospect of securing a conviction before a prosecution may be brought. In this case, other than the two officers against whom proceedings have commenced, there was not.

25. The Department of Justice appreciates that the case has attracted substantial and understandable public concern. The decisions taken in this case have been explained so that the public can be more fully and properly informed about this case.

Department of Justice
30 September 2015