

Court Prosecutors and Government Lawyers

1. In his speech at the Opening of the Legal Year, Bar chairman Philip Dykes SC queried the Department of Justice's use of lay prosecutors. He also suggested that Government lawyers should be "wholly within the professional fold".

2. The position of the Department of Justice on the issue of lay prosecutors has been repeatedly stated. We brief out some magistracy work to newly qualified private lawyers, which enables them to acquire experience of prosecuting cases. However, our primary responsibility is to provide the community with a prosecution service of the highest quality in the magistrates' courts, and the Department's own court prosecutors deliver exactly that.

3. Court prosecutors were introduced in 1976 to replace police inspectors as prosecutors in the magistrates' court, and since then they have provided a professional, efficient and cost-effective service. Their work is highly regarded by other court users, and they now prosecute for 23 law enforcement agencies, including the Police, the Independent Commission Against Corruption, and Customs and Excise. Standards have never been higher, and 48% of our court prosecutors are either qualified barristers or holders of law degrees. In recent times, 10 former court prosecutors have been appointed as magistrates and 17 as government counsel, while 35 have entered the legal profession.

4. New court prosecutors undergo an intensive 9-month training programme. Their training is comprehensive, and includes advocacy techniques, rules of evidence, substantive law and the ethics and duties of the prosecutor. Like all our prosecutors, court prosecutors appreciate the need to be firm but fair, to make proper disclosure of relevant material to the defence, and to safeguard the interests of victims of crime and witnesses.

5. We consider that the requirement in the UN Guidelines on the Role of Prosecutors that "Persons selected as prosecutors shall be individuals

of integrity and ability with appropriate training and qualifications” is satisfied by our use of court prosecutors.

6. The same standards are expected of all our prosecutors, whatever their rank. In particular, the detailed principles set out in the department’s Statement of Prosecution Policy and Practice apply to court prosecutors in the same way as they apply to departmental lawyers. This publication is 55 pages in length, and states that the UN Guidelines on the Role of Prosecutors provides guidance to prosecutors in Hong Kong. The publication and other internal guidelines provide a code of conduct for prosecutors that is as comprehensive as either the Bar’s Code of Conduct or the Law Society’s Solicitors’ Guide, if not more so.

7. In the unlikely event that a court prosecutor acted improperly in the discharge of his or her professional duties, a full range of disciplinary sanctions exists, as with other prosecutors and private lawyers. No such situation, however, has arisen, certainly not in recent times. On the contrary, court prosecutors provide a service in which the Department takes great pride. That it comes at a reasonable cost is a bonus. If all the 13,705 court days conducted by court prosecutors in 2005 were to have been briefed out to private lawyers, it would have cost \$74.4 million, which is 116.3%, or \$40 million more than the \$34.4 million cost of court prosecutors in 2005.

8. As the Secretary for Justice emphasised in his speech at the Opening of the Legal Year, he is very conscious of the public interest in nurturing a strong and independent Bar. The Department of Justice will continue to play its part by giving young barristers opportunities to prosecute on fiat. The extent to which this should be done in future is something that we will keep under review, having regard to the comments made by Mr Dykes.

9. Another issue raised by Mr Dykes was the fact that Government lawyers do not practise as Hong Kong barristers or solicitors but as legal officers under the Legal Officers Ordinance. Mr Dykes considers that the community of lawyers would be a healthier body if government lawyers were “wholly within the professional fold”.

10. I do not think this suggestion has been raised before. It is not immediately obvious what benefits such a change would bring. Government

lawyers are already subject to the obligations and standards of professional conduct imposed by our courts on lawyers in general, in addition to being subject to civil service regulations. Moreover, the vast majority of Government lawyers are enrolled as Hong Kong solicitors or barristers and, as such, are subject to discipline by a Solicitors or Barristers Disciplinary Tribunal.

11. The two professional bodies would no doubt benefit financially if Government lawyers were required to pay an annual fee for a practising certificate. But, if Government lawyers were full members of the Bar or Law Society, would they have full voting rights? Would they be eligible to be elected as council members or head of the professional body? If so, would that undermine the independence of the two bodies? These and other important issues need to be fully explored.

12. Mr Dykes also queried the fact that lawyers from certain other common law jurisdictions are eligible to be appointed as Government lawyers and, if so appointed, have full rights of audience. However, such links with other common law jurisdictions are consistent with the Basic Law, and with the appointment of judges from other common law jurisdictions to the Court of Final Appeal. Indeed, experienced lawyers from **any** other jurisdiction can be given rights of audience by the courts on an ad hoc basis. In practice, the Department of Justice rarely appoints any lawyer who is not locally enrolled, and would only allow such a lawyer to exercise rights of audience if he or she was an experienced advocate. We therefore do not accept that there is any need for change in this respect.

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