

**For discussion on
18 July 2017**

**Legislative Council Panel on
Administration of Justice and Legal Services**

The Rule of Law and the Role of the Prosecutor

Purpose

This paper seeks to brief Members on the important principle of the rule of law in Hong Kong and the role of the prosecutor in upholding this important principle. Reference will be made to the standard practice and policy of the Department of Justice (DoJ) in handling prosecution. Elaboration will also be given on how DoJ provides legal advices to law enforcement agencies after they have submitted their results of investigation to us.

The Rule of Law

2. The “rule of law” is the core value of our society. Whilst different definitions for this concept have been propounded, the one given by Lord Bingham, former Senior Lord of Appeal in Ordinary of the House of Lords (the precursor of the Supreme Court) of the United Kingdom in his book is widely accepted to be an authoritative one –

“[T]hat all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”¹

3. The criminal justice system is one of the most important aspects of our legal system. It underpins the rule of law in Hong Kong. The DoJ has made constant endeavours to put in place a robust criminal justice system that is both transparent and fair. We strive to strike the right balance between the respect

¹ Tom Bingham, *The Rule of Law* (Allen Lane 2010), page 8.

for human rights on the one hand and the protection of the public from criminal activities on the other.

Prosecutorial independence

4. Prosecutorial independence is an important element in the foundation of the rule of law. The community has a legitimate interest in seeing that offenders are properly dealt with by the courts in accordance with the law. On behalf of the community, prosecutors take on the important responsibility in ensuring that justice is dispensed with in equal measure and in an even-handed manner at all times, without fear or favour. To be able to do that, prosecutors need to have their independence safeguarded.

5. In Hong Kong, this safeguard is enshrined in Article 63 of the Basic Law, which provides that –

“The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.”

This constitutional guarantee ensures that prosecutors can act independently in accordance with the law and standard practices and policies of the department in handling prosecution, without being influenced by any other considerations. Professional, impartial and independent prosecutorial decisions are pivotal in achieving the proper administration of criminal justice and safeguarding the rule of law in Hong Kong.

The Prosecution Code

6. Prosecutors discharge their duties with professionalism, skill and integrity. They operate within the framework of defined and transparent prosecution policy guidelines as set out in our Prosecution Code (copy at **Annex**). It is the set of statements and instructions which guide prosecutors in conducting prosecutions. The importance of upholding the rule of law is a basic concept that is entrenched in the Prosecution Code.

Independence of the Prosecutor

7. Apart from emphasizing the general prosecutorial independence which Article 63 of the Basic Law enshrines, the Prosecution Code also highlights the important role of prosecutors as independent “ministers of justice”. As set out in paragraphs 1.1 and 1.2 of the Code, in making decisions and exercising

discretion, a prosecutor must act fairly and dispassionately on the basis of the law, the facts provable by the admissible evidence, other relevant information known to the prosecution and any applicable policy or guidelines. In particular, a prosecutor must not be influenced by –

- (a) any investigatory, political, media, community or individual interest or representation;
- (b) the personal feelings or beliefs of the prosecutor concerning the offence, the suspect, the accused or a victim of crime;
- (c) the possible effect of the decision on the personal or professional circumstances of those who have the conduct of the case;
- (d) the possible political effect on the government, any political party, any group or individual;
- (e) possible media or public reaction to the decision;
- (f) the race, religion, sex, ethnic or national origin, colour, language, political or other opinion, social origin, social or political affiliation, official or other position in the community, lawful activities, beliefs, property, health, disability or any other personal characteristics of the suspect or accused or any other person involved or concerned (although such considerations may need to be addressed for other reasons).

Role and Duties of the Prosecutors

8. The role and duties of the prosecutors are also set out in Prosecution Code. As a basic principle, it is pointed out in the Code (paragraph 3.1) that –

‘A prosecutor is required to comply with and promote the rule of law. A prosecutor acts on behalf of the community in an impartial manner and as a “minister of justice”. To this end, a prosecutor must fairly and objectively assist the court to arrive at the truth and to do justice between the community and the accused according to law.’

9. The Code further requires that the prosecutors must act fairly in litigation, as follows (paragraph 3.5 of the Code) –

- (a) seek to have relevant and credible evidence placed fully and intelligibly before the court;

- (b) assist the court with accurate and complete submissions of law, to enable the law properly to be applied to the facts;
- (c) refrain from using language or conduct that may inflame or bias the court against the accused and defence witnesses or seek to ridicule the accused or the defence case by sarcasm or otherwise;
- (d) refrain from expressing any personal opinion, especially as to the credibility of evidence or the guilt of the accused;
- (e) invite the court to stop the proceedings if it becomes reasonably apparent to the prosecutor that there is no longer a reasonable prospect of conviction.

10. These basic principles aside, the Code also highlights the obligation of the prosecutor to be aware of the human rights of suspects, accused, victims, witnesses and other members of the public, as well as their sources, and to respect or give effect to them as appropriate in the course of criminal proceedings. In determining whether to prosecute a case or to continue a prosecution, account should be taken of the rights of an accused, and other parties to the proceedings.

Provision of advice to law enforcement agencies

11. Law enforcement agencies are responsible for criminal investigations in Hong Kong. DoJ is responsible for giving legal advice to government bureaux and departments but has no power to (and not supposed to) conduct criminal investigations. Prosecutors may, in appropriate circumstances, request that further investigations be conducted, but cannot take charge of or direct investigations.

12. Upon receiving requests for legal advice by law enforcement agencies, DoJ gives advice in respect of the law, charges and evidence in accordance with the Prosecution Code and the applicable law, including² –

- (a) charges that may be available and appropriate;
- (b) the sufficiency of evidence to proceed;
- (c) the admissibility of evidence;
- (d) the present state of the relevant law;
- (e) the appropriate venue for trial;

² Paragraph 4.3 of the Prosecution Code

- (f) the disclosure of material;
- (g) the institution of appeals or reviews.

Decision to prosecute

13. A decision on whether to prosecute any individual or organisation is just as important for the suspect and the victim as it is for the community as a whole. Hence, with public interest in mind, prosecutors must act without fear or favour, and in accordance with the relevant law and evidence. The DoJ will treat all implicated parties equally and in accordance with the law, irrespective of their background, identity and social status.

14. Prosecution should only be brought when there is cogent and credible evidence in support. A prosecution shall not be commenced or continued unless there is a reasonable prospect of conviction. It is not about fear of “losing” a case. It is all about this fundamental concept of fairness, that a prosecution not supported by evidence will be an unfair one. Such prosecutions, together with the preparedness to initiate them, erode the rule of law. They also lead to wastage of public and court resources. Prosecutors should always act in strict compliance with the Prosecution Code in handling prosecutions and incidental work to ensure that an effective and fair criminal justice system is maintained.

15. Hence, when considering whether to prosecute, and consistent with norms in the common law world, prosecutors in Hong Kong must first consider whether there is sufficient evidence. According to paragraphs 5.3 to 5.5 of the Prosecution Code, the test is whether the totality of the admissible and reliable evidence, together with any reasonable inferences able to be drawn from it, demonstrates a reasonable prospect of conviction. To satisfy that test, a prosecutor must make prospective judgements about matters such as –

- (a) the evidence available;
- (b) any challenge that may be made to the admissibility and/or reliability of the evidence;
- (c) the availability, competence and credibility of witnesses, and their likely assessment by the court;
- (d) any contrary evidence that may reasonably be anticipated;
- (e) likely defences to be raised;
- (f) the way in which a reasonable tribunal of fact, properly instructed as to the law, will be likely to act on all of the evidence and arguments in the case.

16. If the above “sufficiency of evidence” test is satisfied, prosecutors should next consider and balance all issues of public interest. In this regard, section 15(1) of the Criminal Procedure Ordinance, Cap. 221 states –

“The Secretary for Justice shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.”

17. There can be no exhaustive list of the considerations to be addressed when making this assessment, but they include³ –

- (a) the nature and circumstances of the offence, including any aggravating or extenuating circumstances;
- (b) the seriousness of the offence: more serious offences, including those where a victim has suffered significant harm or loss, or where there have been multiple victims, are more likely to be prosecuted in the public interest;
- (c) the effect of a prosecution on Hong Kong law enforcement priorities;
- (d) any delay in proceeding with a prosecution and its causes;
- (e) whether or not the offence is trivial, technical in nature, obsolete or obscure;
- (f) the level of the suspect’s culpability;
- (g) the involvement of other suspects in the commission of the offence;
- (h) any cooperation from the suspect with law enforcement or demonstrated remorse: the public interest may be served by not prosecuting a suspect who has made admissions, demonstrated remorse, compensated a victim and/or cooperated with authorities in the prosecution of others;
- (i) any criminal history of the suspect;
- (j) the attitude, age, nature or physical or psychological condition of the suspect, a witness and/or a victim;
- (k) the likely disposition of the case;
- (l) the prevalence of the offence and any deterrent effect of a prosecution;
- (m) special circumstances that would affect the fairness of any

³ Paragraph 5.9 of the Prosecution Code

proceedings;

- (n) the availability and efficacy of alternatives to prosecution, such as a caution, warning or other acceptable form of diversion.

18. It is also relevant to note that as provided in paragraph 10.1 of the Prosecution Code, a prosecutor remains under a duty continually to review a prosecution that has been commenced. The prosecution must be discontinued if, following a change of circumstances, a reapplication of the prosecution test at any stage indicates that the evidence is no longer sufficient to justify a reasonable prospect of conviction or the interests of public justice no longer require the prosecution to proceed.

Application of the Prosecution Code

19. Apart from the basic principles regarding the making of prosecution decisions as set out above, the Prosecution Code also provides reference points and guidance for prosecutors in handling different stages of the prosecution process, different parties in the criminal proceedings as well as certain types of cases which merit special attention. Our prosecutors will continue to apply the law, follow the Prosecution Code and consider the available evidence in deciding whether to commence criminal prosecution in any individual case, so as to uphold the rule of law and to do justice to all parties concerned.

Department of Justice
July 2017



PROSECUTION CODE

Department of Justice
Hong Kong Special Administrative Region

Prosecution Code

2013

Department of Justice
Hong Kong Special Administrative Region

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Introduction

The *Prosecution Code* is a set of statements and instructions to guide prosecutors in conducting prosecutions. It also aims to give others a clearer understanding of the approach prosecutors take, and the considerations they employ, in handling prosecutions. It should be treated as a set of guidelines and always used subject to the issues and circumstances of the particular matter or case. The golden thread that runs through the fabric of the *Prosecution Code* is the importance of upholding the just rule of law by the just application of just laws.

The public good is a principal consideration in the conduct of prosecutions. The community has a vested interest in the proper conduct of its prosecutions and in furthering the criminal justice imperative that the guilty are convicted and the innocent are acquitted. On behalf of the community, prosecutors take on a heavy responsibility to ensure that justice is dispensed with equal measure and in an even handed manner at all times. A prosecutor is expected to discharge his or her duties with professionalism, skill and integrity, and to operate within the framework of defined and clear prosecution policy guidelines.

The decision whether or not to prosecute an individual or entity is always a crucial one. It should only be taken after a prosecutor has fully evaluated the evidence and circumstances, and answered two questions in particular. First, is the evidence sufficient to justify instituting or continuing proceedings? Second, if it is, does the public interest require a prosecution to be pursued? The prosecutor must at all times act in the public interest and be guided or directed by public interest considerations in the measured

and just application of the rule of law. In deciding where the public interest lies in a particular case, the prosecutor must consider the justice of the situation and examine all the factors. It will vary from case to case but, in general, the more serious the offence, the more likely it is that the public interest will require a prosecution to proceed.

The purpose of the *Prosecution Code* is not only to provide a code of conduct for prosecutors and to promote fair, just and consistent decision-making at all stages of the prosecution process but also to make the community aware of how the public prosecutions system operates. Openness and accountability, together with principled professionalism and independence, are the key objectives of a prosecutor in the pursuit of justice.

The Department of Justice is committed to open justice. It seeks to provide the community with a prosecution service which is fair and transparent. The public are entitled to know that principled criteria guide prosecutors throughout the course of criminal proceedings, and to see for themselves what these are.

The responsibility of prosecutors is to apply the highest of standards in their handling of criminal cases. In their dealings with others, prosecutors need to be frank and honest. They should also be considerate and sensitive when they deal with victims of crime and witnesses. Persons charged with offences are entitled to be treated fairly and with respect, and prosecutors must be scrupulous to protect the interests of anyone suspected or accused of crime. A fair trial requires a fair prosecutor.

The *Prosecution Code* seeks to:

- (a) promote consistency in prosecution practice, eliminating unwarranted disparity between cases;
- (b) promote regularity, without regimentation;
- (c) facilitate the exercise of discretion in a flexible and principled manner;
- (d) ensure the fair and effective exercise of prosecutorial responsibility;
- (e) promote confidence in the community and with accused persons that decisions will be made rationally and objectively on the merits of each case;
- (f) provide reference points and guidance for prosecutors;
- (g) assist in training prosecutors;
- (h) ensure the accountability of prosecution decision making;
- (i) enhance understanding between agencies and therefore better coordination;
- (j) inform the public of the processes and standards being applied;
- (k) demonstrate internationally the standards and principles applied in Hong Kong.

In 1990, the *Guidelines on the Role of Prosecutors* were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. They provide guidance to prosecutors in Hong Kong. The Guidelines appear at Appendix I.

The *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* were adopted

by the International Association of Prosecutors in 1999. The *Standards* were adopted in 2008 as a Resolution by the 17th United Nations Commission on Crime Prevention and Justice, and they provide guidance to prosecutors in Hong Kong. The *Standards* appear at Appendix II.

1 Independence of the Prosecutor

Independence Generally

1.1 A prosecutor is required to act in the general public interest, but independently as a “minister of justice”. In making decisions and exercising discretion a prosecutor must act fairly and dispassionately on the basis of the law, the facts provable by the admissible evidence, other relevant information known to the prosecution and any applicable policy or guidelines.

1.2 A prosecutor must not be influenced by:

- (a) any investigatory, political, media, community or individual interest or representation;
- (b) the personal feelings or beliefs of the prosecutor concerning the offence, the suspect, the accused or a victim of crime;
- (c) the possible effect of the decision on the personal or professional circumstances of those who have the conduct of the case;
- (d) the possible political effect on the government, any political party, any group or individual;
- (e) possible media or public reaction to the decision;

- (f) the race, religion, sex, ethnic or national origin, colour, language, political or other opinion, social origin, social or political affiliation, official or other position in the community, lawful activities, beliefs, property, health, disability or any other personal characteristics of the suspect or accused or any other person involved or concerned (although such considerations may need to be addressed for other reasons).

Department of Justice

1.3 Article 63 of the *Basic Law* of the Hong Kong Special Administrative Region provides that the Department of Justice “shall control criminal prosecutions, free from any interference”. That constitutional guarantee of independence ensures that prosecutors within the Department may act independently without political or other improper or undue influence.

Secretary for Justice

1.4 The Secretary for Justice is head of the Department of Justice. The Court of Appeal stated in *In Re C (A Bankrupt)* [2006] 4 HKC 582 at 590:

“The prosecutorial independence of the Secretary for Justice is a linchpin of the rule of law... ‘the decision whether any citizen should be prosecuted or whether any prosecution should be discontinued, should be a matter for the prosecuting authorities to decide on the merits of the case without political or other pressure.’ [Sir Robert Finlay, 1903] ...these statements...reflect accepted and applied fundamental principle in this

jurisdiction the continuation of which is preserved by the entire theme of the Basic Law as well, specifically, as by article 63.”

1.5 The Secretary for Justice is responsible for applying the criminal law, formulating prosecution policy, and superintending the Director of Public Prosecutions and prosecutors in the Prosecutions Division of the Department. The Secretary is accountable for decisions made by prosecutors, to whom various powers are delegated.

2 Director of Public Prosecutions

2.1 The Director of Public Prosecutions is head of the Prosecutions Division of the Department of Justice and responsible for the conduct of the Prosecutions Division.

2.2 The Director initiates and conducts the prosecution of cases on behalf of the Hong Kong Special Administrative Region. The Director is responsible to the Secretary for Justice for:

- (a) directing public prosecutions;
- (b) advising the Secretary on criminal law related matters, except in specific matters in which the Secretary has authorised the Director to determine the matter on his or her own;
- (c) advising law enforcement agencies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution;
- (d) developing and promoting prosecution policy;

- (e) advising the government on the development, enforcement and implementation of the criminal law.

3 Role and Duties of the Prosecutor

Role and Functions

3.1 A prosecutor is required to comply with and promote the rule of law. A prosecutor acts on behalf of the community in an impartial manner and as a “minister of justice”. To this end, a prosecutor must fairly and objectively assist the court to arrive at the truth and to do justice between the community and the accused according to law.

3.2 In the Supreme Court of Canada, Rand J. stated in *Boucher v The Queen* [1955] SCR 16 at 23-24:

“It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

3.3 A prosecutor works in an adversarial and accusatorial litigation system. The prosecutor's advocacy role must be conducted temperately and with restraint; nevertheless, a prosecutor is entitled to advocate firmly and courteously the prosecution's position on an issue and to test and, if necessary, attack the position adopted or evidence advanced on behalf of an accused.

3.4 Prosecutors carry out their roles as an integral part of a criminal justice process that includes investigation, prosecution, defence, adjudication and punishment. Their contribution to the criminal justice process and the outcomes achieved must be made professionally and to the highest standards reasonably achievable. Prosecutors should not seek to step beyond the proper roles of the prosecution in the criminal justice process.

3.5 In litigation, a prosecutor must fairly:

- (a) seek to have relevant and credible evidence placed fully and intelligibly before the court;
- (b) assist the court with accurate and complete submissions of law, to enable the law properly to be applied to the facts;
- (c) refrain from using language or conduct that may inflame or bias the court against the accused and defence witnesses or seek to ridicule the accused or the defence case by sarcasm or otherwise;
- (d) refrain from expressing any personal opinion, especially as to the credibility of evidence or the guilt of the accused;
- (e) invite the court to stop the proceedings if it becomes reasonably apparent to the prosecutor that there is no longer a reasonable prospect of conviction.

3.6 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to carry weight and to be capable of reasonably contributing to a decision of the court. Material put to a witness (including an accused) must be considered on reasonable grounds to be accurate and reliable and its use justified in the circumstances.

3.7 A prosecutor must not lead the court or defence to believe that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be produced from material already available to the prosecutor.

3.8 A prosecutor must at all times assist the court to avoid appealable error and must strive to correct any error of law or fact that becomes apparent in the course of the trial and sentence proceedings.

Fairness

3.9 A prosecutor should prepare and assemble all relevant evidence available to the prosecution well in advance of trial. The prosecution should, as a general rule, offer all its evidence during the presentation of its case. It should inform the court and defence of authorities, warnings and directions that may be appropriate, even if unfavourable to the prosecution case.

3.10 The prosecution must identify any relevant material available to him or her that may not be admissible evidence (including on the ground that it appears to have been obtained illegally or improperly). The prosecution may decline to adduce such material and, as part of its disclosure

obligations, inform the defence of such unused material. If the prosecution decides to lead such material as evidence, it must inform the defence. If the defence objects to its admission, the admissibility of such evidence may be determined by the court.

3.11 A prosecutor also owes a duty of fairness to the community, through carrying out the responsibilities of prosecuting in as effective and efficient a fashion as is reasonably possible.

Human Rights

3.12 A prosecutor, in carrying out his or her role, is in a position to affect substantially the human rights of suspects, accused, victims, witnesses and other members of the public. A prosecutor has an obligation to be aware of those rights, as well as their sources, and to respect or give effect to them as appropriate in the course of criminal proceedings.

3.13 The *Basic Law* ("BL") and the *Hong Kong Bill of Rights Ordinance* ("BOR"), Cap. 383 provide the fundamental rights of Hong Kong residents and others, many of which may arise for consideration in the conduct of criminal proceedings. Prosecutors must understand the impact of these instruments on their work and adhere to their requirements at all times.

3.14 BL Article 8 preserves the laws previously in force, including the common law. BL Article 39 provides that the provisions of the International Covenant on Civil and Political Rights ("ICCPR") as applied to Hong Kong shall remain in force and shall be implemented through the laws of Hong Kong. The BOR is the main instrument for implementing the ICCPR as applied to Hong Kong.

3.15 The prosecutor must be alert to the rights of an accused which are relevant to the prosecution process, including equality before the law, the rights to have confidential legal advice, to be presumed innocent, and to have a fair trial without undue delay under BL Articles 25, 35 and 87 (BOR Articles 10 and 11).

3.16 In determining whether to prosecute a case or to continue a prosecution, account should be taken of the rights of an accused, and other parties to the proceedings. The prosecutor should be aware that the Basic Law recognizes freedom of speech (Article 27; BOR Article 16(2)); inviolability of the freedom of the person (Article 28; BOR Article 5); inviolability of the home (Article 29; BOR Article 14); freedom and privacy of communication (Article 30; BOR Article 14); freedom of movement (Article 31; BOR Article 8); freedom of conscience and religion (Article 32; BOR Article 15).

4 Investigation and Prosecution

4.1 Investigators gather the evidence and other material on which prosecutors rely. In no sense are investigators “clients” of prosecutors, nor do they give “instructions” to prosecutors. It is expected, however, that there will be ongoing consultations between prosecutors and investigators in respect of cases and each should take into account the views expressed by the other.

4.2 While the functions of investigation and prosecution are separate and distinct and are carried out by specialists with different sets of skills and resources, the close cooperative relationship between investigators and prosecutors should continue to be encouraged and promoted.

Assistance by and Advice to Investigators

4.3 Prosecutors may request that further investigations be conducted, but cannot take charge of or direct investigations. Investigators may receive advice from prosecutors in respect of the law, charges and evidence, including:

- (a) charges that may be available and appropriate;
- (b) the sufficiency of evidence to proceed;
- (c) the admissibility of evidence;
- (d) the present state of the relevant law;
- (e) the appropriate venue for trial;
- (f) the disclosure of material;
- (g) the institution of appeals or reviews.

5 Decision to Prosecute

5.1 Section 15(1) of the *Criminal Procedure Ordinance*, Cap. 221 states:

“The Secretary for Justice shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.”

5.2 That provision applies such discretion equally to the Director of Public Prosecutions and to prosecutors acting on behalf of the Secretary for Justice pursuant to delegations.

5.3 The effect of that provision is to endorse generally accepted and longstanding international practice under the

common law – that the decision to prosecute includes two required components. The first is that the admissible evidence available is sufficient to justify instituting or continuing proceedings. The second is that the general public interest must require that the prosecution be conducted.

Sufficiency of Evidence

5.4 There must be 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.

5.5 The test is whether the evidence demonstrates a reasonable prospect of conviction. To satisfy that test, a prosecutor must make prospective judgements about matters such as:

- (a) the evidence available;
- (b) any challenge that may be made to the admissibility and/or reliability of the evidence;
- (c) the availability, competence and credibility of witnesses, and their likely assessment by the court;
- (d) any contrary evidence that may reasonably be anticipated;
- (e) likely defences to be raised;
- (f) the way in which a reasonable tribunal of fact, properly instructed as to the law, will be likely to act on all of the evidence and arguments in the case.

5.6 A prosecutor will need to consider in relation to witnesses: the reliability of memory; any suggestion of exaggeration; any association with the accused (favourable

or unfavourable); any motive not to tell the whole truth; availability; psychological or other personal characteristics (including in the case of a child or incapacitated witness); vulnerability to attack by the defence.

5.7 The public interest is not served by proceeding with cases that do not satisfy this test. The resources required to prosecute must be responsibly applied only to proceedings that will be fair and that are likely to be effective.

Public Interest

5.8 Even where the first component of the prosecution test is satisfied, a prosecutor must consider the second component, the requirements of the public interest.

5.9 There can be no exhaustive list of the considerations to be addressed when making this assessment, but they include:

- (a) the nature and circumstances of the offence, including any aggravating or extenuating circumstances;
- (b) the seriousness of the offence: more serious offences, including those where a victim has suffered significant harm or loss, or where there have been multiple victims, are more likely to be prosecuted in the public interest;
- (c) the effect of a prosecution on Hong Kong law enforcement priorities;
- (d) any delay in proceeding with a prosecution and its causes;
- (e) whether or not the offence is trivial, technical in nature, obsolete or obscure;
- (f) the level of the suspect's culpability;

- (g) the involvement of other suspects in the commission of the offence;
- (h) any cooperation from the suspect with law enforcement or demonstrated remorse: the public interest may be served by not prosecuting a suspect who has made admissions, demonstrated remorse, compensated a victim and/or cooperated with authorities in the prosecution of others;
- (i) any criminal history of the suspect;
- (j) the attitude, age, nature or physical or psychological condition of the suspect, a witness and/or a victim;
- (k) the likely final disposition of the case;
- (l) the prevalence of the offence and any deterrent effect of a prosecution;
- (m) special circumstances that would affect the fairness of any proceedings;
- (n) the availability and efficacy of alternatives to prosecution, such as a caution, warning or other acceptable form of diversion.

Mental Health Issues

5.10 The criminal justice system operates to protect both the community and individual members of it. From time to time the prosecution may consider it appropriate to charge mentally ill persons with applicable offences principally in order to invoke the court's jurisdiction to make beneficial orders for the management of the mentally ill, their protection and the protection of the community.

6 Consent to Prosecute

6.1 The Secretary for Justice must give his or her consent before certain kinds of prosecutions can be undertaken. This is a safeguard to ensure that an appropriate level of scrutiny is exercised in particular cases. Accordingly, a prosecutor should consider if consent is required by law. The power to consent has been delegated to the Director of Public Prosecutions and senior prosecutors in some cases.

7 Private Prosecution

7.1 Under the common law a person has the right to commence a criminal prosecution in the public interest.

7.2 Section 14 of the *Magistrates Ordinance, Cap. 227* enables a complainant or informant to conduct a prosecution either in person or by counsel.

7.3 The Secretary for Justice is entitled to intervene in a private prosecution and to assume its conduct, becoming a party to the proceedings at that time and displacing the original prosecutor. The Secretary for Justice may continue proceedings privately begun or may prevent them from continuing by declining to sign the charge sheet or indictment (see sections 74 and 75 of the *District Court Ordinance, Cap. 336* and section 17 of the *Criminal Procedure Ordinance, Cap. 221*). A decision on the future course of the prosecution will be made in accordance with the *Prosecution Code* before a decision is made whether or not to intervene.

7.4 When considering whether or not to take over a private prosecution, the following factors should be included among those taken into account:

- (a) the interests of public justice;
- (b) the seriousness of the offence;
- (c) the views of any interested party;
- (d) any duplication of proceedings;
- (e) consistency with decisions of the Department of Justice;
- (f) the prospects of a fair trial.

The Secretary for Justice may also take into account the conduct of the original prosecutor.

8 Charging Practice and Procedure

Settling Charges

8.1 When choosing charges to be prosecuted, the prosecution should attempt to reflect adequately the criminality of the conduct alleged, in a manner that is both efficient and that will enable the court to do justice between the community and the accused. The number of charges should be kept as low as reasonably possible. Where a large number of offences of a similar nature is alleged, the use of representative charges should be considered. If the accused agrees, outstanding additional charges may be taken into account on sentencing.

Venue for Trial

8.2 Some offences must be tried in the Magistrates' Court, some must be tried on indictment in the District Court or the Court of First Instance and some may be tried either way. Purely summary offences may be tried with indictable offences, but not in the Court of First Instance.

8.3 Article 86 of the Basic Law provides: *“The principle of trial by jury previously practised in Hong Kong shall be maintained.”*

8.4 When deciding the venue for trial, a prosecutor should have regard to:

- (a) the maximum penalties available for offences dealt with in the Magistrates’ Court (2 years’ imprisonment in most cases), the District Court (7 years’ imprisonment) and the Court of First Instance (the prescribed maximum penalty);
- (b) the general circumstances of the case;
- (c) the gravity of the allegations;
- (d) issues likely to be in dispute;
- (e) the public importance of the proceedings;
- (f) whether or not the accused held a position of high public status, responsibility or trust;
- (g) whether or not issues arise for determination that require the application of community standards and/or values;
- (h) any aggravating and mitigating factors;
- (i) the accused’s antecedents.

After considering the above, the prosecutor should select an available venue for trial that will enable the relevant court to deal most appropriately with the matter and impose an adequate sentence to address the criminality involved in the conduct. A prosecutor should take into account the possibility of an enhanced sentence for an organized crime offence.

9 Proceeds of Crime

9.1 Restraint and confiscation orders are available under the *Organized and Serious Crimes Ordinance*, Cap. 455 and the *Drug Trafficking (Recovery of Proceeds) Ordinance*, Cap. 405.

9.2 Restraint and confiscation orders against the proceeds of criminal offending are not intended additionally to punish an offender. They are intended to prevent an offender from benefitting from the offending. Consequently, they should not be regarded as optional additions to the conduct of a prosecution or to sentence, but considered proactively in all cases on their merits. These orders are meant to serve the important public policy that no one should be allowed to benefit from the proceeds or instruments of serious crime.

9.3 From the outset of proceedings, the prosecution must consider appropriate orders in respect of property, whether used in the commission of crime or regarded as the proceeds of offending. Application for a restraint order will normally be made at the outset of criminal proceedings in order to ensure that property will not be dissipated and be available to satisfy any confiscation order made after conviction.

10 Review and Discontinuation

10.1 A prosecutor remains under a duty continually to review a prosecution that has been commenced. The prosecution must be discontinued if, following a change of circumstances, a reapplication of the prosecution test at any stage indicates that the evidence is no longer sufficient to

justify a reasonable prospect of conviction or the interests of public justice no longer require the prosecution to proceed.

10.2 If a decision has been taken not to prosecute in a particular instance or to discontinue a prosecution, that decision will be reversed only in justifiable circumstances which may include:

- (a) cases in which some error or oversight has resulted in a decision which, on review, is seen to have been clearly wrong;
- (b) cases where unanticipated significant evidence becomes available at a later time;
- (c) cases that are temporarily discontinued while evidence continues to be gathered (where the accused will have been warned of the possible reversal);
- (d) cases in which the discontinuance was obtained by fraud, dishonesty, or impropriety.

Judicial Review

10.3 An independently made prosecution decision of the Secretary for Justice or his or her delegate, or decisions made during criminal proceedings may be judicially reviewed only in rare and exceptional cases. This is also the case with decisions made at trial in order to avoid the fragmentation of the criminal trial process. An order of review can do no more than require the Secretary for Justice to reconsider the decision in the light of the court's findings.

Nolle Prosequi

10.4 Proceedings on indictment in the Court of First Instance, by charge in the District Court and for an indictable

offence in the Magistrates' Court may be stayed by the entry of a *nolle prosequi* but only on the direction of the Secretary for Justice.

10.5 A *nolle prosequi* does no more than stay the prosecution which may be recommenced if the interests of public justice so require. It is an exceptional procedure, to be exercised in cases such as where an accused suffers from a cognitive or physical incapacity that is likely to be permanent, or where it would prevent the interests of public justice being thwarted (for example, where interference with a witness cannot be adequately addressed by an adjournment).

Bind Over Orders

10.6 A person having admitted his or her wrongdoing without a conviction being secured against him or her may be bound over to keep the peace and/or be of good behaviour in relation to specific conditions. The court must find facts from which it could properly be inferred that there is a danger of the person committing a breach of the peace in the future. Notice of the course proposed must be given to the person. Failure to enter a recognizance or breach of its terms may result in contempt proceedings against the person.

10.7 Such a procedure is particularly appropriate in cases of first-time offenders and minor offences. An offender admits his or her wrongdoing and is admonished in open court, and then gives an undertaking to the court to be of good behaviour for up to 2 years with the added sanction that may be imposed of up to 6 months' imprisonment for breaching the undertaking (see section 61 of the *Magistrates Ordinance*, Cap. 227). Such a procedure serves the ends of preventative justice and rehabilitation of the offender. A

decision to agree to such a procedure on specific conditions requires consideration of:

- (a) whether the public interest requires the prosecution to proceed;
- (b) whether the consequences to the offender would be out of all proportion to the gravity of the offence;
- (c) the likely penalty in the event of conviction;
- (d) the age of the offender, his or her record, character, mental state (at the time of offending and presently);
- (e) the views of the victim;
- (f) the attitude of the offender to the offence.

11 Immunity from Prosecution

11.1 In principle it is desirable that the criminal justice process should operate without the need to immunise witnesses to testify to the involvement of others in criminal offending, but it is recognized that in some cases that is an appropriate course. As a general rule, an accomplice should be prosecuted, irrespective of whether or not he or she is to be called as a witness. The preferable course is for a cooperating accomplice to be dealt with after the trial, and ordinarily he or she will receive a discount on sentence to reflect the nature and extent of his or her cooperation.

11.2 In some areas of law enforcement a successful prosecution will be dependent on or greatly assisted by the evidence of an informer. An informer should be used as a prosecution witness only if the interests of justice demand it. That requires a balance to be struck between the interest of

the community in securing the conviction of an offender and the awarding of a benefit to a person who may be closely associated with the offending and perhaps criminally involved in it. Ordinarily the evidence to be given by the informer should be considered necessary to secure the conviction of others and not be available elsewhere.

11.3 In certain exceptional circumstances a witness may be granted immunity from prosecution. The decision to grant an immunity and the balancing process involved will be strongly influenced by:

- (a) the nature of the evidence the witness may be able to give and its significance to the prosecution of the case;
- (b) the antecedents of the witness;
- (c) his or her perceived credibility (including the fullness of his or her disclosure of facts and matters within his or her knowledge) and any discernible motive for not telling the whole truth (including the receipt, promise or expectation of a benefit);
- (d) his or her level of involvement in the offence being prosecuted (which should generally be lower than that of the offender being prosecuted);
- (e) the presence of any supporting evidence.

11.4 It is a requirement that a grant of an immunity is made at the directorate level. An immunity should be given to the witness in writing and copies made available to the defence before trial and the court at trial.

12 Duty of Disclosure

12.1 Article 87 of the *Basic Law* gives to any accused the right to a fair trial. One of the guarantees of fairness is the full and timely disclosure to the defence of all relevant or possibly relevant material (or material information – and not confined to admissible evidence) available or known to the prosecution, whether it assists in the proof of the prosecution case or, on a sensible appraisal by the prosecution, may reasonably be regarded as:

- (a) being relevant or possibly relevant to an issue in the case;
- (b) raising or possibly raising a new issue whose existence is not apparent from the evidence that the prosecution proposes to use; or
- (c) holding out a real (as opposed to fanciful) prospect of providing a lead to evidence which goes to (a) or (b).

12.2 The duty to disclose is a positive and continuing duty on the prosecution that begins pre-trial and carries through to the end of the criminal process before the courts.

12.3 Material to be disclosed by the prosecution includes:

- (a) all evidence sought to be relied upon by the prosecution (witness statements, certificates, documentary exhibits, electronic recordings, photographs and/or reasonable access to physical evidence);
- (b) the previous convictions of an accused, of a complainant, of a prosecution witness or of a deceased victim;

- (c) known discreditable conduct of a prosecution witness (including disciplinary records) that may reasonably affect his or her credibility where that is likely to be a significant issue in the case;
- (d) material (including witness statements) known to the prosecution that may assist the defence in the proceedings.

12.4 If relevant disclosable material known to the prosecution is in the possession of a governmental agency or public body, the prosecution should take such steps as are reasonable in the circumstances to obtain it, identify it to the defence and advise of its location if it cannot be obtained.

12.5 Public interest immunity may apply to some such material, where disclosure may harm the general public interest (such as the identity of an informer or undercover officer, information given confidentially to investigators, information that may harm the operations of government including continuing investigations). In those circumstances a balance must be struck between, on the one hand, fairness to the accused and, on the other hand, the protection of the public interest. Occasionally the court should be invited to rule on such issues.

12.6 Material may be covered by legal professional privilege, such as confidential legal advice by a prosecutor to an investigator, and is generally not to be disclosed. Internal records and materials generated by the prosecution in the preparation of the case may not be disclosable.

12.7 The prosecution is not under an obligation to disclose to the defence material that is relevant only to the credibility of a defence witness or of the accused.

12.8 Guidance may also be found in *HKSAR v Lee Ming-tee and Securities and Futures Commission* (2003) 6 HKCFAR 336, *R v Keane* (1994) 99 Cr App R 1 and *HKSAR v Lau Ngai-chu* [2002] 2 HKC 591.

13 Plea Negotiation and Agreement

13.1 The prosecution may be invited by the defence to resolve a matter by agreeing to the accused pleading guilty to fewer or lesser charges than those already laid. In rare circumstances, the prosecution may itself put this suggestion to the defence. In these circumstances three tests must be satisfied:

- (a) there is admissible evidence available to prove the charges to which pleas have been offered;
- (b) the charges adequately reflect the criminality of the conduct alleged against the accused;
- (c) the charges give to the court adequate scope to impose penalties appropriate to address that criminality.

13.2 Ordinarily, plea negotiations should be accompanied by agreement between the prosecution and defence on the statement of facts to be presented to the court as the basis for sentencing. Such statement should not distort the provable facts or provide an artificial basis for sentencing. In some cases some facts may not be able to be agreed and may need to be litigated in what is commonly known as a “Newton inquiry” where evidence is called to enable the court to resolve disputed issues for the purposes of sentencing.

13.3 Considerable time and expense can be saved by accepting pleas to appropriate charges. Victims and witnesses can be spared the stress and inconvenience of testifying. The criminal justice process operates more efficiently with such a resolution, without compromising its effectiveness and public support.

13.4 Negotiated pleas must not be accepted if the accused maintains his or her innocence of the charges.

13.5 In all cases where negotiations are under way, the prosecutor should consult where appropriate with the investigator in charge of the case and any victim of crime, so as to inform them of the action being contemplated and of the reasons for it. The prosecutor must receive their views and take them reasonably into account when decisions are being made – not by way of instructions but as another means of informing such decisions.

14 Victims of Crime and Vulnerable Witnesses

14.1 Prosecutors should have regard to *Guidelines on the Treatment of Victims and Witnesses* of the Prosecutions Division and *The Victims of Crime Charter, 2007*.

14.2 Victims of crime and vulnerable witnesses (because of age or psychological or physical condition) have special interests in the proceedings and special needs, which may affect their ability to give effective evidence if left unattended.

14.3 There is a public interest in facilitating the reporting of crime and in its effective prosecution. This may be promoted by treating such persons with respect and

understanding and supporting them through the criminal justice process.

14.4 Victims are entitled to have their role in the proceedings fully explained and to be consulted during the course of proceedings about actions being taken and their effect on their rights. All attempts should be made to minimise the distress inherent in reliving and telling of traumatic personal events in interviews and in court.

14.5 Victims of crime have the rights to:

- (a) be treated with courtesy and respect;
- (b) be kept informed of the progress of the case;
- (c) have their views considered by prosecutors and investigators;
- (d) be provided with proper facilities at court;
- (e) have their circumstances and views brought to the attention of the court where appropriate;
- (f) be given respect for privacy and confidentiality.

14.6 A victim impact statement may need to be presented and updated medical reports may need to be obtained and tendered at first instance and on appeal.

14.7 Vulnerable witnesses who may or may not be victims of crime should be treated with similar respect for their rights, expectations and personal circumstances. They include children, persons with mental disabilities and witnesses in fear. It may be appropriate for protection to be provided to vulnerable witnesses or victims of crime by way of:

- (a) giving evidence by live television link;
- (b) playing electronically pre-recorded video evidence;
- (c) a screen;
- (d) a closed hearing;
- (e) an expedited hearing;
- (f) a continuous hearing;
- (g) support persons;
- (h) informality in court conduct;
- (i) special security measures.

14.8 In cases where it is appropriate for the court to award compensation and/or restitution for harm or loss, the prosecutor should ensure that the court is fully and appropriately informed of all relevant circumstances.

15 Juvenile Offenders

15.1 It is a longstanding legal requirement that in prosecuting juveniles the court must give priority to their welfare. Special procedural provisions apply to persons under the age of 16 years and, so far as possible, the hearing of such cases should be expedited and prosecuted in the Juvenile Court.

15.2 Consequently, the prosecution often prefers to deal with allegations against juveniles by alternative methods to criminal prosecution, unless the seriousness of the offence or other circumstances require a prosecution in the public interest.

15.3 It would be an abuse of process to prosecute a juvenile solely for the purpose of securing access to the welfare powers of the court. If there appear to be grounds for care proceedings and that course may better serve the general public interest, the prosecutor should invite investigators to consider appropriate referral.

15.4 In deciding if the public interest warrants the prosecution of a juvenile, emphasis should be placed on the following considerations:

- (a) the seriousness of the alleged offence;
- (b) the juvenile's antecedents;
- (c) the age, capacity and apparent mental and physical maturity of the juvenile;
- (d) the support of family and others available to the juvenile;
- (e) the schooling or employment arrangements in place at the time;
- (f) the sentencing options available to the court;
- (g) the availability and efficacy of alternatives to prosecution, such as cautioning.

16 Unrepresented Accused

16.1 Care must be exercised by a prosecutor dealing with an unrepresented accused. This may involve striking a balance between inconsistent imperatives. The duty of fairness requires a prosecutor to ensure that the accused is appropriately informed of the prosecution case and the course it will take. The court has an overriding duty to ensure

that the proceedings are fairly conducted, and the prosecutor should assist the court to do so by acting and responding appropriately during the course of the proceedings. While a prosecutor is not obliged to provide advice of any sort to an unrepresented accused, it is in the interests of justice to ensure that an unrepresented accused seeks or applies for legal representation or assistance.

16.2 In communications with an unrepresented accused a prosecutor should maintain a degree of detachment. Written communication is preferable and communication may be made through the agency of the court. Telephone communications should be avoided by prosecutors and where required should be made by law enforcement officers. Personal contacts should be in the presence of a reliable person who should compile a note in writing of any communications made.

16.3 Plea negotiations with an unrepresented accused should not be initiated by the prosecution and should be conducted with care, and where possible, in the presence of a reliable person and appropriately recorded.

17 Domestic Violence Cases

17.1 Prosecutors should have regard to *Guidelines for Prosecuting Domestic Violence Cases* of the Prosecutions Division.

17.2 In prosecuting domestic violence cases, the prosecution must consider the safety of the victim, any children and other persons involved, the situation of the family and the likely effect of any prosecution on its members.

17.3 Domestic violence may become more frequent and serious the longer it continues. Accordingly, a prosecution may be required, according to the standard criteria, even if a victim does not wish it to proceed. In making such decisions the prosecution is obliged to take into account the security of the persons at risk and the public interest.

17.4 The prosecution should take into account, when deciding on the course to be taken:

- (a) the objective seriousness of the alleged offending behaviour, including any use of a weapon, and the use of alcohol or drugs;
- (b) the victim's injuries (physical and/or psychological);
- (c) the risk of the accused reoffending;
- (d) any planning of the alleged offence;
- (e) any threats made before or after the alleged offence;
- (f) the presence of children during the alleged offending;
- (g) any continuing threat to the health and safety of the victim or anyone else involved;
- (h) the current state of the relationship between the accused and the victim;
- (i) the history of the relationship, especially concerning any past violence;
- (j) the accused's criminal history, especially in connection with offences of violence.

17.5 If a victim is unwilling to testify, a decision to compel testimony requires serious consideration, and where the victim is the spouse of the accused, reference will need to be made to sections 57 and 57A of the *Criminal Procedure Ordinance*, Cap. 221. The prosecutor may by consent use the victim's

statement in evidence without requiring the victim to testify, under section 65B of the *Criminal Procedure Ordinance*, Cap. 221 and should consider whether any special procedures should be used.

18 Human Exploitation Cases

18.1 Under Article 1 of the *Universal Declaration of Human Rights* all human beings are born free and equal in dignity and rights. The exploitation of persons and the trafficking of them for that purpose are both serious crimes and violations of fundamental human rights and freedoms. The trafficking of a person involves the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation by means of:

- (a) threat or use of force or other forms of coercion;
- (b) abduction;
- (c) fraud;
- (d) deception;
- (e) the abuse of power or of a position of vulnerability; or
- (f) the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

The trafficking of a child involves these elements except for the requirement of the means.

18.2 Human exploitation includes activities that demean the value of human life such as sexual exploitation, enforced labour, domestic servitude, debt bondage and

organ harvesting. Human exploitation is a domestic and international concern which should be handled by prosecutors with an appropriate level of understanding, skill and sensitivity. In appropriate cases, a prosecutor should consider a credible claim that a defendant or intended defendant is a victim of trafficking. If such a claim is found, a prosecutor should appropriately deal with the case bearing in mind that the person is a victim of trafficking. In this regard, reference can be made to applicable international standards and practices concerning victims of trafficking.

19 Public Order Events

19.1 Article 27 of the *Basic Law* guarantees Hong Kong residents “*freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration...*”. Articles 16, 17 and 18 of the *Hong Kong Bill of Rights* give the same protections to other persons who are in Hong Kong.

19.2 Offences alleged to have been committed in conjunction with the exercise of these constitutionally guaranteed freedoms may give rise to special considerations. On the one hand, there is a positive duty on the authorities to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully; on the other hand, there is a need to protect persons and property by maintaining public order according to law.

19.3 Criminal prosecution should only be pursued when the relevant conduct exceeds sensible proportions or the bounds of reasonableness (*Yeung May-wan v HKSAR* (2005) 8 HKCFAR 137). Cases in relation to public order events

require the striking of a balance between the interest of society in maintaining public order and the right of a person lawfully and peacefully to exercise his or her rights.

20 Expert Witnesses

20.1 A court may receive the evidence of an expert that provides it with information that is likely to be outside its experience and knowledge. Expert evidence can only be given by a person with the requisite qualifications, knowledge and experience in the relevant field of expertise. An expert witness has an overriding duty to assist the court and should provide it with independent evidence in the form of objective unbiased opinion on matters within his or her expertise. In the interests of justice, a prosecutor should ensure that these requirements are always met.

20.2 Prosecutors should have regard to *Guidelines for Expert Witnesses* of the Prosecutions Division.

21 Post-conviction

Sentence

21.1 A prosecutor has an active role to play in the sentencing process by assisting the court to impose the appropriate penalty and to avoid appealable error; but a prosecutor should not attempt by advocacy to influence the court in relation to the quantum of sentence. A prosecutor should:

- (a) adequately (fully and accurately) present the relevant facts;
- (b) assist the court to avoid proceeding on any error of fact or law;
- (c) respond helpfully to any request by the court for relevant information;
- (d) fairly evaluate and, if necessary, test the opposing case and correct any apparent legal or factual error made by the defence in submissions;
- (e) provide information from previous relevant court decisions and official statistics;
- (f) where appropriate, make submissions on the type of sentence, but not quantum beyond providing a range supported by previous cases.

21.2 On sentencing, a prosecutor must not make representations about the Department's attitude to a sentence or act in any way to fetter the discretion of the Secretary for Justice or the Director of Public Prosecutions in a possible review of sentence.

Costs

21.3 In limited circumstances the court has discretion to award costs against a convicted offender, but usually not where a plea of guilty was entered.

21.4 There needs to be *"some feature of the trial indicating that as a consequence of the way in which the defendant conducted his defence, unnecessary or additional expenditure has had to be incurred by the prosecution or that the defendant has wilfully wasted the court's time"*: *HKSAR v Cheng Tak-wai* [2002] 4HKC 458. Such features may include:

- (a) the conduct of the accused throughout the trial proceedings;
- (b) the strength of the prosecution case at the commencement of the trial;
- (c) the accused's state of knowledge of the truth and the availability of any defence;
- (d) apparent intentional delay of the proceedings by the accused;
- (e) insistence by the accused on the proof of undeniable, unimportant or uncontested facts.

21.5 An award of costs is not intended to punish the accused, but to compensate the prosecution for needless expenses. The means of the accused will be taken into account when an order is being considered.

21.6 If an accused is acquitted or proceedings against him or her are stayed, he or she will normally be entitled to be compensated for the costs reasonably incurred. Positive reasons for not making such an order may include:

- (a) the accused has brought suspicion upon himself or herself by his or her conduct;
- (b) the accused's conduct has led the prosecution to assess the case as being stronger than it is;
- (c) the acquittal of the accused arose from a technicality (unless to refuse an order would violate the presumption of innocence in the accused's favour);
- (d) the accused failed to reveal at an early and appropriate time a good and valid explanation for his or her conduct, being either a non-evidential matter or an obvious explanation known only to the accused.

21.7 The prosecution may apply for costs if an appeal or application for leave to appeal by a convicted offender is dismissed, especially if it was without merit.

21.8 Costs awarded to the prosecution are recoverable as a civil debt. The criminal court has no jurisdiction to order imprisonment in default of payment.

Other Orders

21.9 Prosecutors should give due consideration to apply for other relevant orders from the court, for example, an order for compensation or restitution, an order of disqualification from driving, an order of disqualification as a director of a company, an order of confiscation or forfeiture, an order of criminal bankruptcy, and any other order that may be appropriate to the case.

22 Appeals and Reviews

Conviction

22.1 In an appeal against conviction, a prosecutor's duty is to assist the court to achieve a just and proper disposal of the appeal. It requires the prosecutor to readily and promptly seek to remedy any error or injustice and with equal commitment seek to support a correct and proper decision of the trial court.

22.2 If an appellant is unrepresented, a prosecutor should examine the case to see if any unidentified ground of appeal might also be available.

22.3 Ordinarily a prosecutor will seek to have the conviction upheld; but if it becomes apparent that there is a proper basis for conceding an appeal, that should be explained to the court. Such a concession should be made with the consent of the Director of Public Prosecutions in appropriate cases.

22.4 If a conviction is quashed on appeal, consideration must be given to the question of a retrial. Such an assessment may be influenced by:

- (a) the basis on which the appeal was allowed;
- (b) the seriousness of the offence;
- (c) the strength of the case against the accused, including the availability of witnesses;
- (d) the lapse of time between the offending and any retrial;
- (e) the extent to which the sentence has been served;
- (f) the views of any victim and of law enforcement agencies.

22.5 A third or subsequent trial should be held only in exceptional circumstances.

Sentence

22.6 On an appeal against sentence a prosecutor must assist the court by drawing its attention to the law and relevant decided cases in the area of sentencing for the offence in question. Cases in which sentencing guidelines or tariffs have been laid down are more helpful than cases of similar offences that are distinguishable on their own facts. Official sentencing statistics should also be provided where required. A prosecutor should address the court on relevant sentencing principles that may affect the determination of the appeal.

22.7 If a prosecutor is of the view that the sentence appealed is not authorised by law, is wrong in principle or is manifestly excessive, such a concession should be made with the consent of the Director of Public Prosecutions in appropriate cases.

Review of Sentence

22.8 The Secretary for Justice may apply to the court in exceptional cases for the review of a sentence on the basis that it has proceeded on an error of law or of principle or that it is manifestly inadequate or excessive.

22.9 The prosecutor must:

- (a) identify the errors and the principles that apply;
- (b) identify the authorities supporting that position;
- (c) make submissions on the correct resolution of the issues.

22.10 New evidence led on a sentence appeal or review cannot operate to enable the sentence to be increased.

Case Stated

22.11 Section 84 of the *District Court Ordinance*, Cap 336 and section 105 of the *Magistrates Ordinance*, Cap 227 enable the Secretary for Justice to appeal to the Court of Appeal and the Court of First Instance respectively by way of Case Stated from a decision of the trial judge or magistrate. This is an exceptional course and will only be undertaken when the determination or verdict or order of acquittal was erroneous in point of law.

23 Publication of Reasons

23.1 The Department of Justice is committed to operating in an open and accountable fashion, with as much transparency as is consistent with the interests of public justice. However, the benefit of justice being seen to be done must not be allowed to result in justice not being done.

23.2 Reasons for decisions made in the course of prosecutions or of giving advice may be given where practicable, orally or in writing, to those with a legitimate interest in the matter or where it is otherwise appropriate. A legitimate interest includes:

- (a) the interest of a court in knowing why a particular course of action has been taken;
- (b) the interest of a victim of crime in the conduct of a case;
- (c) the interest of an agency of government or an entity with a proper interest in knowing the basis of advice given;
- (d) the interest of the community and the media in the open dispensation of justice where previous proceedings have been public.

23.3 The prosecution has an obligation to assist, where appropriate, in public education about the conduct of the prosecution process. Reasons should ordinarily be expressed in terms of the general principles applied, rather than the details of individual cases.

23.4 There are circumstances in which the giving of reasons may be contrary to the public interest or otherwise inappropriate, including where to do so:

- (a) may prejudice ongoing investigations or the integrity of law enforcement;
- (b) may adversely affect the interests of a victim of crime, a witness, a suspect or an accused;
- (c) may adversely affect the administration of justice (especially in the case of a decision not to prosecute where public discussion may amount to a public trial without the safeguards of the criminal justice process);
- (d) may expose information given confidentially or sensitive information, the exposure of which may give rise to legitimate concern to individuals;
- (e) may be contrary to protections given by the *Personal Data (Privacy) Ordinance, Cap. 486*;
- (f) may be contrary to legal professional privilege (unless waived) or public interest immunity.

23.5 It will generally be unnecessary to give reasons for a decision to prosecute or to institute an appeal or review as the reasons will become apparent in the course of the proceedings themselves.

24 Media

24.1 The effective operation of the criminal justice system depends on its general acceptance by the community as a whole. That acceptance can only be maintained if the community is educated about the criminal justice process and receives fair and accurate information about criminal cases. The community depends on the media to provide most of the information it receives. The prosecution is well placed to assist the media by providing information about relevant matters

when appropriate. It should be accurate and complete information provided in a timely manner.

24.2 In communications with representatives of the media, a prosecutor may confirm facts that are already in the public domain upon request, including matters presented in open court (subject to any court order), the settled future course of events (e.g. trial date, pre-trial argument, when a particular witness may testify) and general open information about a case. However, a prosecutor is not obliged to provide information to the media.

24.3 Discretion must be used in relation to any sensitive material and steps should be taken to protect the personal privacy of individuals from unjustified interference.

24.4 The governing principles for the provision of information to the media are:

- (a) avoiding prejudice to fair trial interests including the presumption of innocence;
- (b) supporting the administration of justice and the integrity of the criminal justice system;
- (c) respecting the principle of open justice;
- (d) recognising the public interest in receiving accurate and timely information about the criminal justice system and criminal prosecutions;
- (e) treating victims of crime and witnesses with courtesy and compassion, and respecting their dignity and privacy.

24.5 In general, a prosecutor should not discuss with the media matters such as the following:

- (a) expressions of a prosecutor's personal opinion (for example, but not limited to, views about: the likely outcome of proceedings, the correctness or otherwise of a judicial decision, the credit of a witness, the admissibility of evidence, the correctness of a verdict, the adequacy of a sentence, the prospects of any appeal, the judge or members of the jury);
- (b) policy issues or personalities;
- (c) the intended approach of the prosecution in relation to a case;
- (d) any part of the proceedings not conducted at an open hearing;
- (e) personal particulars of a victim, a witness or a juvenile offender;
- (f) information that may lead to the identification of a protected person including an informer;
- (g) any privileged information (including internal Departmental communications and discussions with other agencies);
- (h) the existence of any plea negotiations or the possibility of a plea of guilty or other disposition;
- (i) evidence excluded at trial or not adduced in court proceedings.

24.6 Prosecutors may provide copies of public documents to the media to assist accurate reporting – documents such as an indictment or charge sheet, a statement of facts already admitted in open court. The media should not be provided with or given access to any video-recorded material (including tapes or discs of recorded interviews, re-enactments, demonstrations or identifications).

24.7 The media should not be provided with any witness statements, medical, psychiatric, psychological, or pre-sentence report on any offender, victim or witness.

24.8 Media questions should be referred to appropriate personnel within the Department of Justice:

- (a) in relation to controversial cases;
- (b) in relation to cases of particular sensitivity;
- (c) in relation to appeals;
- (d) in relation to reviews of sentences;
- (e) in relation to decisions to discontinue prosecutions;
- (f) in respect of prosecution policy.

24.9 The Director of Public Prosecutions should be consulted in relation to difficult enquiries.

GUIDELINES ON THE ROLE OF PROSECUTORS

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts undertaken to translate them fully into reality,

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,

Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Whereas in resolution 16 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Committee on Crime Prevention and Control was called upon to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, subsequently endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas, in resolution 7 of the Seventh Congress, the Committee was called upon to consider the need for guidelines relating, *inter alia*, to the selection, professional training and status of prosecutors,

their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses,

The Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:
 - a. Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned

- b. Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.
6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.
7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

Freedom of expression and association

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.
9. Prosecutors shall be free to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status.

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.
11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
13. In the performance of their duties, prosecutors shall :
 - a. Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
 - b. Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
 - c. Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
 - d. Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human

rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.
17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

Alternatives to prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.
22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.
24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

***STANDARDS OF PROFESSIONAL RESPONSIBILITY
AND STATEMENT OF THE ESSENTIAL DUTIES
AND RIGHTS OF PROSECUTORS***

*Adopted by The International Association Of
Prosecutors On The Twenty Third Day Of April 1999*

WHEREAS the objects of the International Association of Prosecutors are set out in Article 2.3 of its Constitution and include the promotion of fair, effective, impartial and efficient prosecution of criminal offences, and the promotion of high standards and principles in the administration of criminal justice;

WHEREAS the United Nations, at its Eighth Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba in 1990, adopted Guidelines on the Role of Prosecutors;

WHEREAS the community of nations has declared the rights and freedoms of all persons in the United Nations Universal Declaration of Human Rights and subsequent international covenants, conventions and other instruments;

WHEREAS the public need to have confidence in the integrity of the criminal justice system;

WHEREAS all prosecutors play a crucial role in the administration of criminal justice;

WHEREAS the degree of involvement, if any, of prosecutors at the investigative stage varies from one jurisdiction to another;

WHEREAS the exercise of prosecutorial discretion is a grave and serious responsibility;

AND WHEREAS such exercise should be as open as possible consistent with personal rights, sensitive to the need not to revictimise victims and should be conducted in an objective and impartial manner;

THEREFORE the International Association of Prosecutors adopts the following as a statement of standards of professional conduct for all prosecutors and of their essential duties and rights:

1. PROFESSIONAL CONDUCT

1.1 Prosecutors shall :

- at all times maintain the honour and dignity of their profession;
- always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;
- at all times exercise the highest standards of integrity and care;
- keep themselves well-informed and abreast of relevant legal developments;
- strive to be, and to be seen to be, consistent, independent and impartial;
- always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;
- always serve and protect the public interest;

- respect, protect and uphold the universal concept of human dignity and human rights.

2. INDEPENDENCE

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. IMPARTIALITY

3.1 Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

- carry out their functions impartially;
- remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- act with objectivity;

- have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

4. ROLE IN CRIMINAL PROCEEDINGS

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows :

- where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;
- when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;
- when giving advice, they will take care to remain impartial and objective;
- in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;

- throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;
- when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore:

- preserve professional confidentiality;
- in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- safeguard the rights of the accused in co-operation with the court and other relevant agencies;
- disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- seek to ensure that appropriate action is taken against those responsible for using such methods;

- in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. CO-OPERATION

5.1 In order to ensure the fairness and effectiveness of prosecutions, prosecutors :

- shall co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and
- shall render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

6. EMPOWERMENT

6.1 In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

- to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;

- together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;
- to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;
- to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;
- to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;
- to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;
- to objective evaluation and decisions in disciplinary hearings;
- to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and
- to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.



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