

Views of the Hong Kong Bar Association

The Role of the Secretary for Justice in Decisions to Prosecute

1. The discussions in the press and elsewhere about the decision of the Secretary for Justice (SJ) not to prosecute in what is popularly known as the ‘UGL case’ has caused concern that the decision of the SJ may have been influenced by considerations other than purely legal ones.
2. The Hong Kong Bar Association (“HKBA”) does not wish to inquire into the specifics of the UGL case but it considers that the time is right for the SJ to explain in some detail how, apart from this case, she makes decisions to prosecute and, where a decision to prosecute has been made, decisions to discontinue.
3. A clear explanation of the decision-making process will go some way to restoring public confidence in the office of SJ, in particular the circumstances when external legal advice will be sought over a decision to prosecute. It appears that a long-standing practice of seeking external advice has not been followed in the UGL case and that this is of widespread concern.
4. The HKBA also believes that there is merit in SJ establishing protocols with the Director of Public Prosecutions (D.P.P.) to ensure that the SJ is concerned in decision-making in only the most exceptional of cases.

Prosecution Functions of SJ and pre-1997 Attorney General

5. The office of SJ is mentioned only in Article 53 Basic Law in the context of the chief officers of the HKSARG deputising for the CE. The functions of the office are not described in the BL.
6. Other ordinances require SJ’s consent before a prosecution can begin. These can be delegated under the Legal Officers Ordinance, Cap 87 (LOO).
7. Inasmuch as the SJ is the head of the Department of Justice, decisions to prosecute made by legal officers must be made ‘free from any interference’. See BL 63.
8. Section 5 LOO provides that:

All rights which were enjoyed by the then Attorney General immediately before 1 July 1997 in the courts of Hong Kong, except for those that are inconsistent with the Basic Law, shall on and after that date be exercisable by the Secretary for Justice.

The office of Attorney General in a Crown Colony was analogous to the office of the English Attorney General (AG).

9. A function of the AG has been to superintend public prosecutions carried out by prosecuting authorities. Another has been to provide consents to prosecutions where legislation requires the AG's consent.
10. The AG, who is not a member of Cabinet, has regarded himself as bound to act independently when making decisions to prosecute by unwritten constitutional convention.
11. This convention avoids the possibility a decision to prosecute (or not to prosecute) will be subject to judicial review because there has been a direction by a third party. See *HKSAR v Director of Immigration* [2008] 4 HKLRD 529 at [71].

The Shawcross Doctrine

12. In 1951 the then AG, Sir Hartley Shawcross, explained the way in which decisions to prosecute were taken by him:

I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.

In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations, which might affect his own decision, and does not consist, and must not consist in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.

Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.

[UK, H.C. Debates, vol 483, cols 683-84, (29 January 1951)]

13. In 1990 the Court of Appeal accepted that the Shawcross doctrine applied to the HK AG: *R v Edward Christopher Harris* [1991] 1 HKLR 389.
14. Nothing in the BL is inconsistent with the Shawcross doctrine and requires the SJ not to act independently.

Recent Developments in UK to Enhance Transparency

15. The AG's functions were reviewed in a report presented to Parliament in 2008. In *'The Governance of Britain-Constitutional Renewal'* (Cm 7432-1)-the UK Government accepted that there was a case to reform the basis on which decisions to prosecute were made so that the AG would not normally be concerned with individual cases. See paragraphs 70-83.
16. The 2008 report referred to a 2007 House of Commons Report *'The Constitutional Role of the Attorney General'* (HC 306) which had reviewed occasions when a former AG, Lord Goldsmith, had appeared to intervene in politically sensitive prosecution cases. The report contained this recommendation at [83].

The present situation where the Attorney General has both ministerial functions and is responsible for making decisions with regard to prosecutions results in a potential conflict of interest. While separating these two functions would not make difficult decisions any easier to make, it would remove the potential for the allegations of lack of independence and political impropriety. We recommend that the Government separate the policy functions and the prosecutorial functions of the Attorney General. The 'ministerial' functions would be more appropriately carried out by a minister within the new Ministry of Justice. This would also allow the Attorney General to be a truly independent superintendent of the prosecution services, responsible for deciding on prosecutions and exercising a propriety and public interest role, except in those cases where he or she was instructed by ministers, in a process which would have to be transparent, that on national security or public interest grounds a prosecution should not proceed.

17. The recommendations in the 2008 report resulted in the publication of a *'Protocol between the Attorney General and the Prosecuting Departments'* in July 2009. The Protocol defines a new relationship between the AG and the Crown Prosecution Service, the Serious Fraud Office and Revenue and Customs Prosecutions.
18. Under the Protocol, the AG will not consider individual cases but will leave decisions to prosecute to the prosecuting departments. There is one exception. In a case concerning national security issues, the AG may intervene and direct that a prosecution goes ahead or be discontinued. When this happens, the AG will make a report to Parliament, so far as is compatible with national security interests.
19. The Protocol states expressly that the AG will not, save for circumstances that are expressly defined, get involved in prosecution decisions relating to M.P.'s or Ministers or in relation to political parties and elections.

The Situation in Hong Kong

20. The SJ, unlike the AG, is a member of a political body, the Executive Council, with responsibilities for assisting the Chief Executive in policy-making (BL54).¹ The office is more politically exposed than that of the AG.
21. No matter what the SJ might say about the propriety of her decision-making in an individual case, the fact is that what matters to the public are appearances.
22. The question that will always be asked in such cases is: does the SJ's decision leave a doubt in the public mind that it was made with only legal considerations uppermost or whether it was politically expedient to make the decision?
23. The HKBA has understood that other SJ's have been concerned about the appearance of bias in particular cases and they have taken the precaution of seeking external advice before coming to a decision to forestall accusations of bias.
24. The HKBA is concerned that the current SJ believes that she is only constrained to seek external advice in cases where there is a possibility of a prosecution of a member of the Department of Justice. Limiting the opportunity to seek external advice to this class of case would only lead to more accusations that prosecution decisions have not been made in conformity with BL 63 and that there may have been 'interference'.
25. Another way of avoiding accusations of bias is for the SJ to publish a protocol under which she leaves prosecutorial decision-making to the D.P.P. in all cases save ones clearly identified in the protocol along the lines of the protocol that currently guides the AG. This would be without prejudice to the D.P.P. seeking external advice if he or she thought that the circumstances made such advice necessary or was desirable.

Conclusion

26. The observations in the 2007 House of Commons Report on the potential conflict of interests arising from the AG's ministerial functions and role in making prosecution decisions are more acute in Hong Kong in light of the SJ's political role as a member of the Executive Council. This dual-function has contributed significantly to the public concern and perception of bias as a result of the SJ's decision in the 'UGL case'.
27. Given that the perception of bias cast upon the SJ in making prosecution decisions can have a profound and insidious impact on the Rule of Law in Hong Kong, the SJ ought to provide a clear explanation to the public if there

¹ No AG has been a Cabinet member since 1928, just four years after the UK's first Labour Government fell as a result of a no-confidence vote arising from the then AG's involvement in a decision to drop a prosecution against the editor of a political newspaper ('the Campbell Affair').

have been any changes to the Department of Justice's policy in seeking external advice. More importantly the SJ ought to establish and publish a protocol that would eliminate any perception of bias in future cases in order to safeguard the Rule of Law in Hong Kong from erosion.

Hong Kong Bar Association

Dated: 21 January 2019