

## PROSECUTORIAL INDEPENDENCE

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Discussion of the subject of prosecutorial independence is perennial, fascinating to the media and politics, fundamental to prosecutors, DPPs and prosecuting agencies and vital to governments and the communities they serve.

### NATURE OF INDEPENDENCE

[John Donne, C17: “No man is an island entire of itself, every man is a piece of the continent, a part of the main...”. So it is with a prosecution agency, which sits within the criminal justice system of the agencies of investigation, prosecution, defence, adjudication and punishment.]

1 Independence is a relative concept, not an absolute (the degree of independence can range from complete to partial or selective independence in only some areas/respects: including the three broad areas of administrative matters, financial matters, operational decision making).

2 Independence varies according to governmental institutional arrangements in place. At one end of the scale the Office of the DPP and its prosecutors may have complete autonomy. At the other end of the scale it may be part of the Attorney General’s Department (in Hong Kong, the Secretary for Justice). This raises issues of the rule of law and separation of powers, especially where the superintendent is also part of the Legislature. In Hong Kong the Secretary for Justice is more closely tied with the Executive than the Legislature.

In Hong Kong Article 63 of the Basic Law provides that the Department of Justice “shall control criminal prosecutions, free from any interference”. The Secretary for Justice is head of the DoJ and accountable for prosecution decisions. The DPP is head of the Prosecutions Division and he and the prosecutors are superintended by the Secretary for Justice.

## IMPORTANCE OF INDEPENDENCE

Appropriate independence – at least operational or functional independence – is important because of the exercise of discretion in decision making by prosecutors in English common law systems. This is not so significant, i.e., in European systems or in other systems where the legality principle applies – as opposed to the common law opportunity principle – and the discretion available is not so broad.

When discretion falls to be exercised, the overriding test is the general public interest. That really requires wise political judgment, which is what interests politicians.

Politicians do not like to see power exercised that they cannot control, or at least influence. So it becomes important for prosecutors to have independent decision making powers where it is guaranteed that, at least in operational/prosecutorial decisions, they have:

- \* Political independence;
- \* Independence from media;
- \* Independence from individual or sectional community interests (including police and victims).

The criminal justice process depends for its effective operation upon general or broad community acceptance and support. The community therefore needs to have confidence that decisions made in the process will be made for the right – and not extraneous – reasons.

The other side of independence is transparency and accountability – see below.

## OPERATIONAL INDEPENDENCE

The minimum requirements for operational independence are:

- \* Security of tenure;
- \* Legislative prescription of the functions and accountabilities of the prosecutor;
- \* Publicly available policy, setting benchmarks for prosecution conduct;
- \* Unfettered decision making (in all areas or none);
- \* Control over conduct of cases (including finances and expenditure);
- \* Working relationship between DPP and Minister;
- \* Freedoms of expression and association;
- \* Appropriate resources to enable the work to be done effectively and efficiently;
- \* Leadership, training and support.

## DECISION MAKING IN PROSECUTIONS

Three aspects of decision making are discussed by academic commentators:

1. Generally, decisions must be made on the basis of the relevant constitutional and legal requirements, the evidence available and any policy or guidelines in place and must be made impartially, fairly and in the general public interest;
2. Where there are serious implications for: the public interest; national security; international relations; peace; or security (eg the UK BAE Systems case) – those implications should be fully and adequately taken into account by someone with the necessary understanding and competence;
3. Decision makers and those influencing them must eventually be fully and effectively accountable to the public.

In practice, issues arise of:

\*Must v may consult with others, including the AG or SJ (duty v right)

\*Accountability after the event (versus control before the event). Issues may arise where the person to whom the prosecutor is accountable is not an elected Minister or is not in turn responsible to the legislature. Accountability is served by:

- Formal accountability of the chief prosecutor via the Minister to Parliament;
- Minister is able to inquire and is entitled to be informed about matters;
- Regular reporting of activities (i.e. via Annual Report or Review);
- Publicly available Policy;
- Giving of reasons for decisions in appropriate circumstances;
- Media reporting of events;
- Published court judgments and public hearings.

\*Superintendence (the term used in the UK and Hong Kong)

\*The extent of delegations given from Minister to DPP

\*The availability of judicial review. [In Australia prosecution decisions are not judicially reviewable, but remedies may be available on an application for a stay of proceedings if to proceed would be an abuse of the process of the court or would create irreparable unfairness: *Maxwell v The Queen* [1996] HCA 46. But cf French CJ's comments in *Likiardopoulos v The Queen* [2012] HCA 37 as maybe a hint that this could change? The situation varies in other jurisdictions and it must be asked whether a court is in a good position to review a prosecution decision?]

## INDEPENDENCE IN PRACTICE

How does it work in practice?

- \* Generally well
- \* But it needs to be constantly defended

In Hong Kong: see the DPP's opinion piece in the SCMP on 6 November 2012 and a former DPP's piece in response on 3 December 2012.

In NSW the then Opposition (now parties in Government) attempted to legislate for a Parliamentary Oversight Committee over the Office of the DPP in 1995, 1997, 2000, 2001, 2002, 2003, 2005 and 2007 – unsuccessfully.

Since the creation of the DPP in 1987 the AG in NSW has never overruled the DPP (although there is statutory power to do so – with the decision and reasons required to be tabled in Parliament); but twice the AG took on appeals that the DPP refused to conduct and both times the AG's opponent was not called upon by the court. There is also an issue about immunities, which the AG alone in NSW has the power to grant (the situation varying in other jurisdictions).

In Victoria, DPP Bernard Bongiorno QC resigned rather than become subject to a committee within the Office of Prosecutions.

At the Australian Commonwealth level AG Bowen overruled DPP Rozenes once.

### See:

Independence and Accountability of the Director of Public Prosecutions: A Comparative Survey, Rowena Johns; NSW Parliamentary Library Research Service.

([http://www.parliament.nsw.gov.au/WEB\\_FEED/PHWebContent.nsf/PHPages/LibraryPublications](http://www.parliament.nsw.gov.au/WEB_FEED/PHWebContent.nsf/PHPages/LibraryPublications))

Directors of Public Prosecutions: Independent and Accountable, John McKechnie QC; Sixth International Criminal Law Congress, Melbourne, 10 October 1996.