

**THE STATEMENT OF
PROSECUTION POLICY
FOR THE
ENVIRONMENTAL PROTECTION
DEPARTMENT**



環境保護署

Environmental Protection Department

Environmental Protection Department

Hong Kong

**The
Statement of
Prosecution Policy for the
Environmental Protection
Department**

2003

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FOREWORD

The decision to prosecute for an environmental offence is an important one. It is important not only to the alleged offender, but also to anyone potentially affected by such an act, and ultimately the paramount if we are to protect and maintain the quality of our living environment. A decision to prosecute should only be taken after the evidence and all the surrounding factors, including those that may be favourable to the offender, have been thoroughly and carefully evaluated. The departmental prosecutors of the Central Prosecution Section of the Environmental Protection Department are responsible for making this decision.

A prosecutor must show good judgement, have complete integrity, demonstrate a strong sense of fair play and ultimately be able to decide what is right and what is wrong. The prosecutors of the Environmental Protection Department are trained to conduct their prosecutorial duties with the necessary skill and determination. In performing their role they also have the support and assistance of the professional counsel and staff of the Department of Justice. It is nevertheless important that our departmental prosecutors can operate within a clearly defined and understandable departmental prosecution policy.

It has never been the case that those suspected of

environmental offences will automatically face prosecution. In coming to a decision, the prosecutor must examine all the factors and the circumstances of the case, including the sufficiency of the evidence and whether a prosecution is in the interest of the public. No two cases are ever exactly the same and so the prosecutor must exercise an important discretion, on behalf of the community, as to whether a prosecution should be instituted and decide, once the process has begun, how a prosecution will be conducted.

The purpose of *The Statement of Prosecution Policy for the Environmental Protection Department* is not only to ensure there is fair and consistent decision making amongst the departmental prosecutors responsible for environmental prosecutions, but also to make the whole process more understandable and open to the public.

A handwritten signature in black ink, appearing to read 'R.J.S. Law, JP', with a stylized flourish at the end.

R.J.S. LAW, JP
Director of Environmental Protection
September 2003

THE STATEMENT OF PROSECUTION POLICY
FOR THE ENVIRONMENTAL PROTECTION DEPARTMENT
(“EPD”)

1.0 PURPOSE

1.1 This is a directive for all prosecutors of the EPD (hereinafter referred to as “the EPD Prosecutor”) to pursue prompt and legitimate prosecutions together with the ancillary actions exercised under the following seven pieces of legislation :

- (a) Air Pollution Control Ordinance, Cap. 311
- (b) Waste Disposal Ordinance, Cap. 354
- (c) Water Pollution Control Ordinance, Cap. 358
- (d) Noise Control Ordinance, Cap. 400
- (e) Ozone Layer Protection Ordinance, Cap. 403
- (f) Dumping at Sea Ordinance, Cap. 466
- (g) Environmental Impact Assessment Ordinance, Cap. 499

1.2 By compiling this Statement of Prosecution Policy for EPD (hereinafter referred to as “the EPD Prosecution Policy”), the Director of the Environmental Protection endeavours to provide an unambiguous and consistent prosecution policy for the EPD. The objectives of this EPD Prosecution Policy are to :

- (a) ensure consistency, fairness and openness;
- (b) enhance transparency;

- (c) pursue the cause of justice;
- (d) serve the public interest;
- (e) create an effective deterrent; and
- (f) enhance respect for the law.

1.3 This EPD Prosecution Policy is modelled on the Statement of Prosecution Policy and Practice published by the Department of Justice in 2002 (hereinafter referred to as “the DoJ Statement”). It has been slightly simplified to suit the context of the EPD prosecutions. Should there be any discrepancy in the legal principles or procedures between the DoJ Statement and the EPD Prosecution Policy, the former should prevail.

1.4 Circulars, as internal guidelines, will be issued by the Central Prosecution Section of EPD (hereinafter referred to as “the CPS”) from time to time to further elaborate and amplify this EPD Prosecution Policy. Such circulars will include, inter alia, advice sought from the Department of Justice in respect of prosecutions for environmental pollution offences.

2.0 INTRODUCTION

2.1 This EPD Prosecution Policy provides an internal departmental rule and guidance for all EPD Prosecutors governing how they should exercise their duties in pursuance of any prosecution together with its associated work in the

administration of justice. If properly followed by EPD Prosecutors, this EPD Prosecution Policy not only promotes fair and consistent decision making in relation to public prosecution amongst the EPD Prosecutors themselves, but also ensures that the prosecution process will be carried out in a legitimate, professional and reasonable manner so that EPD prosecutions would be more understandable and open to the people of Hong Kong.

2.2 All powers of prosecution originate from the Secretary for Justice. The power to prosecute for environmental pollution offences has been delegated by the Secretary for Justice to officers of EPD. The authorization to lay summons, to act as an EPD Prosecutor and to conduct generally on behalf of the Secretary for Justice any prosecution before a magistrate for offences under environmental protection ordinances¹ has been made by the Director of Public Prosecutions pursuant to sections 12 and 13 of the Magistrates Ordinance, Chapter 227.

2.3 This EPD Prosecution Policy binds every EPD Prosecutor. The EPD Prosecutor is responsible for weighing the evidence, laying summonses, taking

¹ Dumping at Sea Ordinance, Chapter 466; Air Pollution Control Ordinance, Chapter 311; Ozone Layer Protection Ordinance, Chapter 403; Noise Control Ordinance, Chapter 400; Water Pollution Control Ordinance, Chapter 358; Waste Disposal Ordinance, Chapter 354; Environmental Impact Assessment Ordinance, Chapter 499

pleas and conducting trials on behalf of the Secretary for Justice. They are all under the supervision of and accountable to the Head of CPS.

- 2.4 When there are legal matters in a prosecution case with which the CPS needs assistance, the CPS shall refer such case to the Department of Justice.

3.0 THE ROLE AND ETHICS OF EPD PROSECUTOR

- 3.1 The decisions the EPD Prosecutor takes may profoundly affect the lives of others. A prosecution must only be brought for good cause. No one should ever be prosecuted simply because he or she may have committed an environmental pollution offence, or even probably has.
- 3.2 When at court, the EPD Prosecutor must at all times act independently. He or she represents the Hong Kong Special Administrative Region, not the government, the police or any other agency.
- 3.3 In the discharge of the prosecution function, the EPD Prosecutor is as independent as the judge. The interest of the EPD Prosecutor at all times is to assist the court to arrive at the truth. A fair trial is one in which all relevant evidence is presented, tested and adjudicated upon according to law. As the representative of the public interest, the EPD Prosecutor must guard against the conviction of

the innocent.

- 3.4 As a minister of justice, the EPD Prosecutor acts independently, yet in the public interest. His or her interest is not so much to win a case as to ensure that justice is done. The EPD Prosecutor will wish to obtain a conviction on the basis of evidence which is strong and credible, and not on the basis of evidence which is weak and dubious.
- 3.5 The EPD Prosecutor must be fair, independent and objective. Recognised prosecutorial criteria must be applied at each stage of the decision making process.

4.0 **THE SEPARATION OF EPD PROSECUTOR FROM EPD INVESTIGATION TEAM**

- 4.1 The functions of the EPD Prosecutor and the EPD investigation team (hereinafter referred to as “the Investigation Team”) are separate and distinct. It is the EPD Prosecutor who decides if a prosecution should be instituted and, if so, on what terms. He or she acts independently of those responsible for the investigation. Whilst the EPD Prosecutor may consider the views of the Investigation Team and the Group Heads of related divisions where appropriate, in the end it is the responsibility of the EPD Prosecutor to decide whether or not to proceed. Such decision shall be endorsed by the Head of the CPS and an Assistant Director of EPD

should be consulted whenever necessary.

4.2 The roles of the EPD Prosecutor and the Investigation Team are interdependent. Whilst each has separate responsibilities in the criminal justice system, they need to work in partnership to enforce the environmental law. The EPD Prosecutor cannot direct investigations, but he or she advises the investigator on the conduct of cases.

5.0 **THE DECISION TO PROSECUTE**

5.1 The EPD Prosecutor must consider two issues in deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued?

5.2 There must be enough evidence to prove all the ingredients of an offence. This is not always easy to determine, especially where an offence requires proof of a state of mind or an intention of which there is often little or no direct evidence. Most of the environmental pollution offences are however strict liability offences. Even if there is evidence that tends to prove the necessary ingredients of an offence, a bare prima facie case is, generally speaking, not enough to warrant a prosecution. There must be a reasonable prospect of securing a

conviction because it is not in the interests of public justice, nor indeed of the public purse, that weak or borderline cases should be prosecuted.²

5.3 At the same time there are other factors to be considered in order to assess where the interests of public justice lie. Among these are:

- What are the circumstances surrounding the offence?
- How serious was it?
- What were its practical effects?
- What extenuating circumstances are there?
- What is the attitude of the suspect?
- How would the decision to launch a prosecution affect other people?
- How serious a view would a court take of the offence if there were a conviction?
- Would the consequences of prosecution be out of all proportion to the seriousness of the offence or to the penalty a court would be likely to impose?

The above list is not exhaustive and really depends on the merits of each individual case.

² Michael Thomas QC, Attorney General – in response to a question in the Legislative Council in March 1987

6.0 THE SUFFICIENCY OF EVIDENCE

- 6.1 When considering the institution or continuation of criminal proceedings, the first question to be determined is the sufficiency of the evidence. A prosecution should not be started or continued unless the EPD Prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person.
- 6.2 EPD does not support the proposition that a bare prima facie case is enough to justify a decision to prosecute. The proper test is whether there is a reasonable prospect of a conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. When reaching this decision, the EPD Prosecutor will wish as a first step to be satisfied that there is no reasonable expectation of an ordered acquittal or a successful submission of no case to answer.
- 6.3 A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court, as well as an evaluation of the admissibility of evidence implicating the defendant. The EPD Prosecutor should also consider any defences which are plainly open to or have been indicated by the defendant, and any other factors which could affect the prospect of a conviction.

7.0 **THE PUBLIC INTEREST CRITERIA**

7.1 Once the EPD Prosecutor is satisfied that the evidence itself can justify proceedings, in the sense that there is a reasonable prospect of obtaining a conviction, he or she must then consider whether the public interest requires a prosecution. Regard should be had to the availability or efficacy of any alternatives to prosecution.

7.2 If the case falls within any of the following categories, this may be an indication that proceedings are not required, subject to the particular circumstances of the case:

(a) **Likely penalty**

When the circumstances of an offence are not particularly serious, and a court would be likely to impose a purely nominal penalty, the EPD Prosecutor should carefully consider whether the public interest would be better served by a prosecution or some other form of disposal such as, where appropriate, a caution.

(b) **Old age and infirmity**

The older or more infirm the offender, the more reluctant the EPD Prosecutor may be to prosecute unless there is a real possibility of repetition or the offence is of such gravity that a prosecution is unavoidable. In general,

proceedings should not be instituted where a court is likely to pay such regard to the age or infirmity of the offender as to induce it to impose only a nominal penalty.

(c) **Peripheral defendants**

Where an allegation involves several suspects, the EPD Prosecutor, in general, should have regard to the need to ensure that proceedings are pursued only against those whose involvement goes to the heart of the issue to be placed before the court. The inclusion of suspects on the fringe of the action and whose guilt in comparison with the principal offenders is minimal can lead to additional delay and cost, as well as to an unnecessary clouding of the essential features of the case.

(d) **Remorse**

Where a suspect has admitted the offence and shown genuine remorse and a willingness to make amends, the EPD Prosecutor should carefully evaluate this. A suspect cannot expect to avoid prosecution simply by making compensation.

(e) **Mitigation**

Where there are mitigating factors present, the EPD Prosecutor should consider whether these are factors which should be taken into account by the sentencing court in the event

of a conviction rather than factors which should lead to a decision not to prosecute.

(f) **Availability of a civil remedy**

Civil proceedings may sometimes offer a more appropriate method of settling the issues in a case. Depending on the circumstances, the right of a party to seek civil redress may influence the EPD Prosecutor in favour of a disposal other than prosecution. A suspected offence may amount in reality to little more than a civil dispute between the two parties.

(g) **Counter-productiveness of prosecution**

If a prosecution would be perceived as counter-productive, for example by bringing the law into disrepute, the EPD Prosecutor must exercise caution. The law may be obsolete or obscure, and a warning to the suspect might be all that is required. A prosecution may not be desirable if it provides a person with an obsession an opportunity to air his or her views in public and to gain publicity for a particular cause. A prosecution may not be effective in stopping a person with an obsession from making a nuisance of himself or herself.

(h) **Mistake**

If the offence was committed as a result of a genuine mistake or misunderstanding, or is no more than a mere technicality, a prosecution

may not be required. That it occurred through a misjudgment may also be of relevance.

(i) **Attitude of the victim**

In addition to considering the impact of the alleged offence on the victim, the EPD Prosecutor may have regard to any available information indicating the views of the alleged victim as to whether prosecution is appropriate or whether the case might appropriately be disposed of by other means. In the assessment of the public interest, the views of the victim will be an important factor for consideration.

(j) **Assistance to the authorities**

Where the suspect is willing to cooperate in the investigation or prosecution of others, or if he or she has already done so, a prosecution of that suspect may not be necessary.

The above list is not exhaustive and really depends on the merits of each individual case.

- 7.3 In pursuance of any environmental pollution prosecution, one of the primary considerations for the EPD prosecutor is the seriousness of the environmental damage caused. In addition, the following factors, which are not exhaustive, increase the seriousness of the offence and thereby the likelihood that the public interest requires a prosecution:

- (a) where a conviction is likely to result in a significant penalty;
- (b) where the suspect was in a position of authority or trust, which has been abused;
- (c) where the offence was premeditated;
- (d) where the suspect was a ringleader or an organizer of the offence;
- (e) where the offence was carried out by a group;
- (f) where there is any element of corruption;
- (g) where the suspect's previous convictions or cautions are relevant to the present offence;
- (h) where the offence, although not serious in itself, is widespread in the area in which it occurred;
- (i) where there are grounds for believing that the offence is likely to be continued or repeated, as where there is a history of recurring conduct.

8.0 **THE CHOICE OF SUMMONSES**

8.1 There must be available admissible evidence which supports all the ingredients of the offence or offences summonsed. The EPD Prosecutor will exercise his or her discretion on the choice of summons on the basis of the following principles:

- (a) Every effort should be made to keep the number of summonses as low as possible. A multiplicity of summonses imposes an unnecessary burden on the administration of the courts as well as upon the prosecution, and often tends to obscure the essential features of the case. Where the evidence discloses a large number of offences of a similar nature, the use of specimen summonses should always be considered. Where numerous different types of offences are disclosed, the ability to present the case in a clear, simple manner should remain a key objective;
- (b) The summonses laid should adequately reflect the gravity of the accused's conduct and will normally be the most serious revealed by the evidence. Provided, however, that the offence summonsed is not inappropriate to the nature of the facts alleged and the court's sentencing powers are adequate, the EPD Prosecutor should take into account matters such as speed of trial, mode of trial and sufficiency of proof which may properly lead to a decision not to prefer or continue with the gravest possible summons. The EPD Prosecutor should also take into account probable lines of defence when exercising his or her discretion;

- (c) In many cases, the evidence will disclose an offence against several different laws. Care must therefore be taken to choose a summons or summonses which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence;
- (d) In the ordinary course, the summons or summonses laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, and the probable lines of defence to a particular summons, it may be appropriate to lay or proceed with a summons which is not the most serious revealed by the evidence.

9.0 **THE MODE OF TRIAL**

9.1 Where a case is considered too serious for trial in the Magistrates Court, where for most offences the maximum sentence is a fine of HK\$100,000 and 2 years' imprisonment,³ the head of the CPS should consider carefully whether, instead of a summons, an indictment should be issued. The trial of an

³ Section 92 of the Magistrates Ordinance Chapter 227 – Indictable offences which may be dealt with by permanent magistrate summarily. Section 57 of the Magistrates Ordinance Chapter 227 – Where the permanent magistrate imposes two or more imprisonment terms to run consecutively in whole or in part, the total of the said terms shall not exceed 3 years.

offence on indictment shall properly take place in the District Court or High Court, and if so such case shall be referred to the Department of Justice.

10.0 **THE REVIEW OF THE DECISION TO PROSECUTE**

- 10.1 Once a prosecution has been instituted, the EPD Prosecutor is under a duty to ensure that its continuation remains in the public interest. If circumstances change, or if new material comes to light, the EPD Prosecutor may have to review the prosecution. If it becomes apparent that it is no longer in the interests of justice to proceed with the case, with the endorsement of the Assistant Director, it should be stopped. Alternatively, the EPD Prosecutor, with the endorsement of the Head of the CPS, may decide that it is appropriate to proceed on amended or alternative summonses.
- 10.2 Plea negotiation will not normally be instituted by the prosecution. In no circumstances should the EPD Prosecutor enter such a negotiation if the defendant maintains his or her innocence in respect of a summons to which a guilty plea is offered. Nor should the EPD Prosecutor accept an alternative plea, if this will produce a distortion of the facts and create an artificial basis for sentencing. If pleas are accepted to a reduced number of summonses, or to less serious summonses, the EPD Prosecutor should be prepared to explain the decision in open court.

- 10.3 Before the EPD Prosecutor discontinues a prosecution, or accepts an adjusted plea, he or she should, if practicable, ascertain the views of the victim and of the Group Heads of related divisions. These views, whilst not determinative of the issue, will assist the Head of CPS in reaching an informed decision. The more finely balanced the factors involved, the greater will be the assistance to be derived from the views of others.
- 10.4 The procedures that exist for consultation with interested parties and for the obtaining of appropriate clearance, where issues concerning the review of the decision to prosecute arise, are designed to ensure consistency, fairness and openness in the conduct of public prosecutions.

11.0 **THE DUTY OF DISCLOSURE**

- 11.1 Every defendant has a right to a fair trial, a right long embodied in our law and guaranteed under Article 87 of the Basic Law. A fair trial is the object and expectation of all of those involved in the trial process. The EPD Prosecutor must make fair disclosure to the defence as an integral part of a fair trial.
- 11.2 The duty to disclose is a positive duty placed upon the prosecution. It is also a continuing one. If material becomes relevant during the course of a trial, it should be disclosed.

11.3 The EPD Prosecutor must be alert to the need to make advance disclosure of material of which he or she is aware (either from his or her own consideration of the papers or because attention has been drawn to it by the defence) and which he or she, as a responsible prosecutor, recognizes should be disclosed at an earlier stage. Such material includes, inter alia: ⁴

- (a) previous convictions of a prosecution witness if that information can reasonably be expected to assist the defence;
- (b) material which may enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process;
- (c) material which may enable a defendant to submit that he or she should only be committed for trial on a lesser charge, or perhaps that there should not be a committal for trial at all;
- (d) material which will enable the defendant and the legal advisers to make preparations for trial which may be significantly less effective if disclosure is delayed (e.g. names of eye witnesses who the prosecution do not intend to use).

⁴ Please refer to CPS circular No. 20/2003 – The Disclosure of Material to Defence in Legal Proceedings

11.4 The ultimate arbiter of what must be disclosed is the court and not the prosecutor. Subject to that, the material which the prosecution is required to disclose is that which can be seen on a sensible appraisal by the prosecution :

- (a) to be relevant or possibly relevant to an issue in the case;
- (b) to raise or possibly raise a new issue whose existence is not apparent from the evidence that the prosecution proposed to use; and
- (c) to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which go to (a) or (b).

11.5 The prosecution should make available to the defence any witness whom they do not propose to call but whom they know could give material evidence that tends either to weaken the prosecution case or strengthen the defence case. If the EPD Prosecutor is possessed of material which may be of relevance to the defence, whether documentary or otherwise, this should be disclosed. There is a positive duty to ascertain the existence of, and to disclose, scientific evidence which might assist the defence. The task of the EPD Prosecutor is to evaluate the materiality of information which he or she possesses.

11.6 Not all material needs to be disclosed to the defence. The rule is that information need not be

disclosed by the EPD Prosecutor if such disclosure would be prejudicial to the public interest.⁵ This may arise in various situations, as where disclosure would harm the proper functioning of the public service. The concept of 'public interest immunity' recognizes not that the prosecution have a privilege to withhold information, but that there is immunity from making disclosure when the public interest in withholding information in a particular case outweighs the normal rules requiring disclosure.

- 11.7 The EPD Prosecutor should disclose to the defence the previous convictions of a prosecution witness. If discreditable conduct has previously been established against a prosecution witness which might affect the assessment to be made of him or her as a witness, that should also be disclosed. The safest course for the EPD prosecutor is to make enquiry about a witness's record and character where his or her credibility is likely to be a crucial issue in the case.
- 11.8 Material which is subject to legal professional privilege is not disclosable, unless privilege is waived. Legal advice by the Head of CPS to the Investigation Team of EPD may be privileged.⁶ Internal notes, memoranda, correspondence or other materials generated by the prosecution in the

⁵ Please refer to CPS circular No. 21/2003 - Public Interest Immunity

⁶ Please refer to CPS circular No. 22/2003 – Legal Advice Privilege and Litigation Privilege

preparation of the case for trial may also be privileged. As a general rule, privilege attaches to matters of opinion as opposed to matters of fact.

12.0 **THE ROLE OF THE EPD PROSECUTOR IN THE SENTENCING PROCESS**

- 12.1 It has been said that the prosecutor is a minister of justice, and that the prosecution have no vested interest in securing a more severe sentence. The EPD Prosecutor should not attempt by advocacy to influence the court in regard to sentence. The prosecutor nonetheless plays an important role in the sentencing process. The duty to assist the court is part of the EPD Prosecutor's general duty in the administration of justice.
- 12.2 The public interest requires no more of the EPD Prosecutor than that he or she assists the court to have access to all available and relevant matters which may affect sentence and protects the court from any errors which may have to be remedied on appeal or review.
- 12.3 There are obvious ways in which the EPD Prosecutor discharges his or her duty to lay before the court fairly and impartially the whole of the facts which comprise the case for the prosecution. At a contested trial, the prosecution calls all the relevant evidence in order to discharge the burden of proving the case and thereby provides the

sentencer with the factual material which may aggravate or mitigate the sentence.

- 12.4 On a plea of guilty, the EPD Prosecutor will address the court to provide a proper presentation of the facts of the case. On conviction, the EPD Prosecutor tells the court of the accused's antecedents, and must ensure that these are up to date. He or she also has a duty to deal with ancillary matters such as costs, compensation, forfeiture, restitution and the disposal of exhibits.

***** END *****