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**PUBLICATION OF PROSECUTORIAL GUIDELINES:
PUBLICATION FOR WHOM, AND PUBLICATION TO WHAT END**

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Honourable Judges

Friends and colleagues

I. Introduction

1. Thank you for inviting me to give this Lecture, which was initiated by Mr. Anandan and which is now into its fourth year. It is an opportunity for the Prosecution and the Defence Bar to interact outside of the courtroom, which is always a good thing.

2. The publication of prosecutorial guidelines is a topic which has generated much debate over the past year. Questions were asked in Parliament;¹ my Chief Prosecutor and Mr Anandan had an exchange in the Straits Times and for once were somewhat *ad idem*;² Professor Kumar recently published an article,³ and others have also contributed to the debate.⁴

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¹ See the exchange between the Minister of Law and MP Pritam Singh in the Ministry of Law's Committee of Supply debates of 2012: Singapore Parliamentary Debates, vol. 88 (6 March 2013); see also the Parliamentary Question by MP Sylvia Lim to the Minister of Law on Dr. Woffles Wu's case: Singapore Parliamentary Debates, vol. 89 (13 August 2012).

² Aedit Abdullah S.C., "Publishing prosecutorial guidelines: promise, risk and reality", *The Straits Times*, 22 May 2013; Subhas Anandan, "Inform people of reasons for prosecutor's decisions in cases that merit it", *The Straits Times*, 27 May 2013.

³ Kumaralingam Amirthalingam, "Prosecutorial Discretion and Prosecutorial Guidelines", [2013] S.J.L.S. 50.

⁴ See e.g. Andy Ho, "Balancing the Prosecution", *The Straits Times*, 6 May 2013.

In the circumstances, I thought that perhaps the person who is constitutionally responsible for the institution and conduct of criminal prosecutions should also say a few words on the subject. Hence my choice of topics for this evening's Lecture.

3. There are many types of prosecutorial guidelines. Today I will focus on the publication of guidelines which inform the decision by a prosecutor whether or not to charge a person, and what charges to prefer. I will also touch on the related issue of publishing the reasons for a prosecutor's decision in each case.

II. **Background**

4. Under our constitutional framework of powers, the Attorney-General is vested with the discretion and the responsibility for the institution, conduct and discontinuance of proceedings for any offence.⁵ In the exercise of his prosecutorial functions the Attorney-General acts independently. He does not answer to the Cabinet, nor is he accountable to Parliament. He is not concerned with whether his decisions are to the political advantage or detriment of the Government of the day. He is subject to the control or supervision of the courts only to the extent that he acts unconstitutionally or in bad faith.⁶

5. The exercise of prosecutorial discretion here, as in all common law jurisdictions, basically entails a two-stage inquiry: (a) Does the evidence disclose an offence? (b) If so, is it in the public interest to bring a prosecution? In Singapore, the exercise of discretion is informed by guidelines promulgated

⁵ Constitution of the Republic of Singapore, Article 35(8).

⁶ *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 S.L.R.(R.) 239.

within my Chambers. The guidelines, coupled with a rigorous system of internal review – including personal review by the Attorney-General in serious and sensitive cases – are meant to ensure broad consistency in the exercise of prosecutorial discretion. They do not dictate an outcome in individual cases – that would amount to an unlawful fettering of discretion. Prosecutors approach each case with an open mind, and are free to depart from guidelines and existing practice in appropriate cases where such departures are warranted on the facts. In some cases a departure would in fact be necessary and grounded on sound and not capricious reasons. Such departures would not be at the whim of individual prosecutors but would involve internal discussion, recommendation by senior officers and in most if not all cases approval by the AG. The contents of our guidelines are varied, reflecting the polycentric nature of prosecutorial discretion and the enormous variety of cases that come before us. The guidelines are regularly reviewed and updated to reflect changes in the law, the enforcement environment and priorities, and a host of other factors. Since taking office, I have initiated a major review and consolidation of the internal prosecutorial guidelines, and Professor Kumar together with a team of DPPs are assisting in the process. This is already implied in what I have said, but I want to emphasise that the exercise of prosecutorial discretion does not occur on a blank slate. The prosecutor does not deal out “get out of jail” or “go straight to jail” cards at his whim and fancy. The existence of discretion confers some degree of freedom of judgment or choice. But that freedom is not unfettered. It is an axiomatic principle of our law that there is no such thing as unfettered discretion – all powers have legal limits which are subject to the control and supervision of the courts. And even beyond the narrow confines of judicial review, the exercise of prosecutorial discretion does not take place on a blank slate. In assessing whether an offence is made out, the prosecutor is undoubtedly making a judgment but in reaching his judgment he has no discretion to ignore

the facts or the law. In assessing the appropriate prosecutorial response, the prosecutor is again making a judgment but again he does not do that on a blank slate. He must be guided by the public interest. His personal inclinations are irrelevant – he cannot decline to enforce the law because he disagrees with it; neither can he be motivated by a personal dislike of the offender. In assessing what the public interest requires, the prosecutor can consider many factors, but again that does not mean unfettered freedom of choice. If, for example, the facts disclose a serious offence, the public interest would *prima facie* militate in favour of prosecution. For the most serious offences, I trust it is not shocking news to you that the public interest in prosecution to the maximum extent permitted under the law would indeed be very compelling. In the vast majority of cases, a proper consideration of the relevant factors, with the benefit of internal guidelines and policies, would clearly point to only one appropriate outcome. In some cases reasonable prosecutors may disagree and it will be for senior prosecutors and ultimately myself to make the judgment call to the best of our ability.

6. As we debate how the prosecution should carry out its functions, including whether the prosecution should publish its guidelines or give reasons for its decisions, it is perhaps sensible to mention that no one is seriously arguing that prosecutorial discretion should be removed and replaced with the brutal consistency of automatic prosecution, even though that would certainly be one way to address concerns about the exercise of prosecutorial discretion. I think we all recognise that the exercise of prosecutorial discretion enables a calibrated response to each case, and is preferable to a system where every apprehended offender is automatically prosecuted to the maximum extent possible.⁷ The discretion allows for

⁷ In practical terms, the existence of prosecutorial discretion has enabled us to introduce guidance programmes for young children who have found themselves on the wrong side of the law, as a condition for

compassion and second chances; it enables the prosecutor to select charges that are proportionate to the culpability of the offender and harm caused; and it facilitates alternative models of resolution that result in better criminal justice outcomes.

III. To publish or not to publish

7. With that we can consider today's topic.

A. The law

8. In Singapore, as a starting point, it bears mention that the Attorney-General is not under any legal obligation to publish prosecutorial guidelines. The Court of Appeal has also declined to recognise any general duty to give reasons for a particular prosecutorial decision.⁸

9. The position here may be contrasted with that in the United Kingdom. In that jurisdiction, section 10 of the Prosecution of Offenders Act 1985⁹ requires the Director of Public Prosecutions appointed under that Act to issue a Code for Crown Prosecutors with guidance on the general principles for the institution and discontinuance of criminal proceedings. The Code is to be set out in the Director's annual report to the Attorney-General, which is to be laid before Parliament. I will say more about the U.K. Act later. For now it suffices to observe that section 10 was not in the Bill when it was first introduced. It was introduced at the Committee stage in the House of Lords, in response to very strongly expressed sentiment that the Director should, through the

not taking any further action in such cases. We have also required mentally unwell offenders in certain cases to undergo a course of treatment.

⁸ *Ramalingam Ravinthran v. A.-G.* [2012] 2 S.L.R. 49 at [74].

⁹ C. 23.

Attorney-General, be accountable to Parliament for the prosecutorial decisions made by him. In contrast under our own constitutional framework of powers, I do not think it is open to Parliament to require the Attorney-General to account to it for the prosecutorial decisions which he makes.

10. The U.K. has also recognised a limited duty on the prosecution to give reasons in *R. v. Director of Public Prosecutions, ex p. Manning*,¹⁰ where a prosecution was not brought in respect of a wrongful death in custody, despite an inquest where the jury returned a verdict of unlawful killing which implicated identified persons. The decision not to prosecute was set aside by the Divisional Court and the Director was asked to reconsider the matter. It was also held that the circumstances of the case were such that the Director was expected to give reasons for his decision. At the same time, the case affirmed that there was no general duty to give reasons for an exercise of prosecutorial discretion. It is not easy to say, outside of litigation, when reasons are required and when they are not. It may be that *ex parte Manning* is better rationalised as a case where the court may draw an adverse inference against the lawfulness of the prosecutor's decision-making process unless he gives an adequate explanation.

11. In any event, in the absence of any legal duty incumbent on the prosecution in Singapore to publish its guidelines or generally to give reasons for its decisions, it is a question of policy whether the Prosecution ought to do so.

B. Publication and the deterrent value of the criminal law

¹⁰ [2001] 1 Q.B. 330.

12. Perhaps I can start by explaining our present policy - why we do not publish our guidelines. Consider these hypothetical guidelines. (a) Capital charges will generally not be preferred for trafficking between say 15 and 25 grammes of diamorphine. (b) Theft of property worth less than \$50 will generally not be prosecuted. (c) Or a more general one: youth or old age is a relevant factor in deciding whether or not to prosecute an offence.

13. In each of these cases, even in the last case where the guideline is very general in nature, the inescapable impression that is conveyed is that certain areas of criminal conduct are less liable to be prosecuted than others. The more specific the guideline, the stronger the impression. The inevitable effect is that the deterrent value of criminal law as enacted by Parliament would be undermined – would-be criminals would be less concerned with what the law is than with when it is likely to be enforced. Of course, a careful and determined observer of our charging decisions may, over time, be able to deduce with a reasonable degree of confidence the factors which inform the exercise of prosecutorial discretion for different types of offences. In fact, I am positive many of these “observers” are in fact in this very hall today! But it would be quite different if we were to announce these factors to the world at large. In declining to publish our guidelines, whether general or specific, the message we wish to send is that the surest way for a person to avoid criminal sanctions is to avoid violating our criminal laws in the first place. Once a person crosses the line and commits an offence, he steps beyond the pale of the law. How he is then dealt with is no longer up to him. He can expect that the decision be reached in accordance with law, but he cannot expect that the decision will be taken in one way or another.

14. Similar concerns were voiced by the U.K. Government during the passage of the Prosecution of Offenders Act 1985 through the House of

Lords, when it was proposed to require the Director of Public Prosecutions to publish his advice or guidelines of a general nature. Lord Elton, the Minister of State for the Home Office, thought that the requirement might inhibit the Crown Prosecution Service “from giving advice of a general nature which revealed certain courses which might be pursued by defendants with greater impunity than others.”¹¹ Lord Elton was speaking of advice on loopholes in the criminal law, but I should think the principle is equally applicable to prosecution policy – publication would reveal courses of action which might be pursued by defendants, or some defendants, with greater impunity than others.

15. The fact that would-be offenders do rely on the guidelines published by the Director of Public Prosecutions is amply borne out by the assisted suicide cases litigated over the last decade. In those cases, applications for judicial review were brought to compel the Director of Public Prosecutions to promulgate guidelines on when he would or would not bring a prosecution under section 2(1) of the U.K. Suicide Act 1961, which makes it an offence to aid or abet a suicide. It suffices for me to refer to *R. v. Director of Public Prosecutions, ex p. Purdy*.¹² Ms. Purdy was terminally ill and desired to end her life while she was still able. Her husband was willing to assist her suicide by helping her travel to a country, probably Switzerland, where euthanasia was lawful. However, Ms. Purdy was fearful that if he did so he might be prosecuted in England for assisted suicide. Ms. Purdy’s position was put by Lord Hope of Craighead in the House of Lords in this way:¹³

¹¹ H.L. Debs, vol. 459, col. 14. <http://hansard.millbanksystems.com/lords/1985/jan/21/prosecution-of-offences-bill-hl>

¹² [2010] 1 A.C. 345.

¹³ *Ibid*, at para. 31.

she wants to be able to make an informed decision as to whether or not to ask for her husband's assistance. She is not willing to expose him to the risk of being prosecuted if he assists her. But the Director has declined to say what factors he will take into consideration in deciding whether or not it is in the public interest to prosecute those who assist people to end their lives in countries where assisted suicide is lawful. This presents her with a dilemma. If the risk of prosecution is sufficiently low, she can wait until the very last moment before she makes the journey. If the risk is too high she will have to make the journey unaided to end her life before she would otherwise wish to do so.

16. Ms. Purdy's application was dismissed by the Divisional Court and her appeal was dismissed by the Court of Appeal. The Court of Appeal held, quite correctly in my view, that "the DPP cannot dispense with or suspend the operation of section 2(1) of the 1961 Act, and he cannot promulgate a case-specific policy in the kind of certain terms sought by Ms Purdy which would, in effect, recognise exceptional defences to this offence which Parliament has not chosen to enact."¹⁴ The Court of Appeal was, however, reversed when the case went up to the House of Lords. The House of Lords held that Ms. Purdy's right to respect for her private life under Article 8(1) of the European Convention on Human Rights was engaged as that right extended to how a person chooses to end her life. The Code of Crown Prosecutors was held to be part of the law by which an interference with Ms. Purdy's rights could conceivably be justified, but how the Code applied to assisted suicide was not sufficiently accessible or foreseeable. In the circumstances, the House of Lords ordered the Director of Public Prosecutions "to promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy's case

¹⁴ [2009] 1 Cr. App. R. 455 at para. 79.

exemplifies, whether or not to consent to a prosecution under section 2(1) of the 1961 Act.”¹⁵

17. The *Purdy* decision raises difficult constitutional issues about the propriety of the prosecution publicly announcing, in a very specific way, when it is more or less likely to prosecute an offence enacted by Parliament. For present purposes it illustrates how would-be offenders may rely on published prosecutorial guidelines. There is no doubt that euthanasia and assisted suicide raise many difficult moral and social issues, and one cannot but feel, as the House of Lords did, considerable sympathy for Ms. Purdy’s situation. But the enormity of Ms. Purdy’s case should not be lost. Plainly put, she was in essence asking the court to compel the Director of Public Prosecutions to promulgate guidelines so that she could make an informed decision on whether her husband should commit a crime. Once guidelines are issued, it will only lead to public clamour for even more refinements. This slippery slope is best illustrated in the sequel to *Purdy i.e., R. v. Ministry of Justice, ex p. Nicklinson*,¹⁶ where one of the claimants successfully persuaded a majority of the Court of Appeal that the policy promulgated by the Director of Public Prosecutions following *Purdy* did not afford sufficient certainty to what was referred to as “class 2 helpers” – *i.e.* persons, such as healthcare professionals, who assist the suicide of someone with whom they have no emotional ties. When will the slide down this slippery slope of ever-more specific guidelines end, if ever? I do not know, and such uncertainty is, I imagine, entirely unhelpful for prosecutors who have to make numerous decisions every day.

¹⁵ [2010] 1 A.C. 345 at para. 56 *per* Lord Hope of Craighead.

¹⁶ [2013] EWCA Civ 961.

18. The examples are not confined to the assisted suicide context. The Crown Prosecution Service has, on its own initiative following the trend in the UK, consulted on and published guidelines relating to offences committed in the course of investigative journalism. The stated purpose was to afford more certainty to investigative journalists. It is not for me to say whether such an approach is appropriate for the U.K. But I certainly do not see the role of the Public Prosecutor in Singapore as encompassing the issuing of guidance for the benefit of would-be offenders, whatever their motivations might be, telling them when and how they can break the law with impunity.

19. I should also make a point which I feel has not been sufficiently appreciated in the public discourse. The two areas which I have referred to – assisted suicide and investigative journalism – are obviously controversial areas of law in the U.K., and in Singapore we too have debates on what the law should be. This is perfectly legitimate and healthy. But it is unhelpful, and illegitimate, to conflate debate about *what* the law ought to be and *how* it should be enforced. As the Court of Appeal recognised in the *Purdy* case, it is open for prosecutorial discretion to be exercised in a way which in effect creates defences to criminal conduct which Parliament has not chosen to enact. This undermines the will of Parliament as embodied in the law, and is plainly unconstitutional for violating the separation of powers. Lord Denning M.R. puts it pithily: “Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law.”¹⁷ It is therefore not possible to argue that certain spheres of criminal conduct or certain types of offenders should never be prosecuted. That is ultimately an argument that the law ought to be reformed, and ought to be presented as such. Returning to the topic, I

¹⁷ *R. v. Commissioner of Police of the Metropolis, ex p. Blackburn* [1968] 2 Q.B. 118 at 136.

am not saying that, if we publish our guidelines, every would-be offender would carefully analyse his risk of prosecution before embarking on his criminal enterprise. But, as the experience of the U.K. demonstrates, would-be offenders do look to prosecutorial guidelines, and I think that the risk of gaming the system is the greatest when syndicated and premeditated crime is concerned – and it is these very types of crimes that are likely to result in serious consequences to society as a whole. The same applies to giving reasons – with a sufficient body of reasons, would-be offenders would be able to game the decision-making process.

20. For me, therefore, the starting point is against the publication of guidelines or the giving of reasons. We do not announce our guidelines, just as law enforcement agencies do not announce their operational strategies. The question, therefore, is whether there are any countervailing arguments in favour of publication. Publication for who? And publication to what end? I can think of three possible arguments though ultimately I am not persuaded by them. Let me explain.

C. Publication and judicial review

21. One possible argument is that more transparency in the exercise of prosecutorial discretion would enable more effective judicial review of unlawful decisions by the Prosecution.

22. Who is interested in judicial review of prosecutorial discretion? It is not likely to be the innocent accused person – it would be far easier for him to put the prosecution to strict proof in a trial than to bring proceedings for judicial review which places the burden on him to prove unconstitutionality or bad faith in the exercise of prosecutorial discretion. From the cases that have emerged

over the years, the likely applicant in judicial review proceedings is typically the guilty accused person – and often one who has already been convicted by the court. Seeing that there is no realistic prospect of avoiding a conviction, he chooses to delay or avoid the consequences of his conviction by bringing an application for judicial review. I must say that I am not particularly sympathetic to such applications. Having said that, this is their right but I don't think I should assist them in discharging their burden.

23. I am also doubtful that judicial review really assists such claimants. First, it is axiomatic that judicial review is generally not concerned with the merits of an impugned decision. When a decision is set aside, it is generally open to the decision maker, properly directed, to come back to the same decision. I imagine that that would not be very helpful to an accused person seeking to avoid prosecution. Secondly, in the context of Article 12(1) of the Constitution, which has provided fertile ground for challenges, an accused person may not be able to avoid a charge even if he successfully claims that another person in similar circumstances was unjustifiably treated more leniently. Provided that *autrefois convict* does not apply, it remains open to the prosecutor to “equalise” the treatment of the two persons by preferring the more serious charges against both of them. Thirdly, the Court of Appeal has recognised that a successful challenge to a charge does not undermine the validity of the conviction, if the conviction was otherwise sustainable in law.¹⁸ In the circumstances, my view is that many of the applications for judicial review of the exercise of prosecutorial discretion are unhelpful satellite litigation, brought in vain to prevent the law from taking its course. Would-be applicants would also do well to remember that, under Order 53, rule 1(6) of the Rules of Court, leave to apply for a quashing order may be refused if the application is dilatory. I believe that the criminal bar generally appreciates the

¹⁸ *Yong Vui Kong v. P.P.* [2012] 2 S.L.R. 872.

limited utility of bringing judicial review against prosecutorial discretion. Mr. Anandan, with his characteristic candour, has acknowledged that “*lawyers worth their salt will not bother with frivolous attempts, and those who do will see the consequences of their actions.*”

24. In any event, I am doubtful that judicial review is seriously impaired by the absence of guidelines or reasons. Certainly the courts in Singapore have not taken this view. An applicant who has a colourable case can present it to the court. If he makes out a *prima facie* case of illegality, the Court of Appeal has held that the prosecution will be required to explain itself, and may I add that we will undoubtedly do so. If the applicant has no *prima facie* case to begin with, I am not inclined to assist him in a fishing expedition to identify one. Theoretical arguments can of course be made about the possibility of the prosecution operating under some unconstitutional guidelines which can never be challenged unless they are published. But is there any reason, looking at the prosecutions that we bring, to say that this is in fact the case? If not, I am disinclined to allow prosecutorial policy to be shaped by theoretical concerns and for the benefit of a small minority.

25. The argument for transparency in aid of judicial review also does not seem to have found purchase in the United States or in Canada, even though both jurisdictions publish their prosecutorial guidelines. The Principles of Federal Prosecution in the United States is prefaced with a disclaimer: “The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation

with the United States.”¹⁹ The Federal Prosecution Service Deskbook in Canada contains a similar disclaimer.²⁰ The courts in both jurisdictions have accepted that the published guidelines have no legal effect.²¹

26. The experience of the U.K. and Hong Kong, on the other hand, suggests that the publication of guidelines may have some troubling consequences in the development of judicial review principles. In the U.K., the exercise of prosecutorial discretion can now be challenged on the basis that such exercise was not in accordance with the settled policy of the Director of Public Prosecutions as set out in the Code for Crown Prosecutors.²² In Hong Kong, the Court of Appeal in *Iqbal Shahid v. Secretary of Justice*²³ took it upon itself to interpret and apply “temporary immunity” provisions in prosecutorial guidelines. Finding that the provisions did apply, the Court remitted the case for the prosecution to consider whether to withdraw the charges or adjourn the case. The effect of the U.K. and Hong Kong case law is to assert a significant role for the court in the interpretation and application of prosecutorial guidelines, and a corresponding reduction of the prosecution’s discretion to apply and depart from its own guidelines. Under this approach, the guidelines would seem to have a quasi-legal status. I am not sure that this is the right approach. The formulation and application of prosecutorial guidelines, and any decision to depart from them, would seem to be eminently a matter of policy for the prosecutor to decide. The prosecutor should not be required to apply

¹⁹ United States Attorney Manual, 9-27.150, para. A.

http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm

²⁰ “This deskbook deals with matters of prosecution policy, and does not have the status of law. It does not in any way override the Criminal Code or any applicable federal legislation. It is not intended to provide legal advice to members of the public, nor does it replace the specialized advice of lawyers or other experts. It is not intended to create any rights enforceable at law in any legal proceeding.”

²¹ *U.S. v. Montoya*, 45 F.3d 1286 at 1295 (9th Circuit, 1995); *R. v. Atomic Energy of Canada Limited* [2000] OJ No. 1589 (QL) (Ont SCJ) per Kealy J.

²² *R v DPP, ex p. Chaudhary* [1995] 1 Cr. App. R. 136.

²³ [2010] 4 H.K.L.R.D. 12.

them inflexibly, or treat them as if they were law. To do so would severely undermine the essence of prosecutorial discretion.

D. Publication and representations

27. Another possible argument in favour of publishing guidelines is that they would enable more effective representations to be made by the defence on the appropriate course to be taken in each case.

28. The representation process is certainly an important part of the criminal justice system. It assists the prosecution in reaching a more informed and better decision in each case, although it may not always be the decision sought by the accused person. Most of you would know that the prosecution does not play a passive role in the process. For example, it is very common for a prosecutor to indicate that he will proceed on a reduced number of charges, or less serious charges, if the accused person elects to plead guilty at the pre-trial stage.

29. I am, however, somewhat doubtful that disclosing our guidelines would enable more effective representations to be made. Unlike other jurisdictions, the Criminal Bar in Singapore is a close-knit community which has good insights into prosecutorial decision-making through interactions in and out of court. Defence counsel are well positioned to make representations on their clients' culpability or guilt, and let me assure all of you that, judging from the representations which I have reviewed, you are doing an effective job in highlighting the relevant factors for consideration. It also has not escaped my attention that many of these representations are authored by members of the AGC alumni who have now become the leading lights of the criminal bar. Even unrepresented persons are able to say, often quite articulately, why they

think they should not be charged. When the prosecutor feels that there is something more than meets the eye, he may direct the investigative officer to follow up, and sometimes facts are uncovered which affect the decision whether or not to prosecute. Of course, the exercise of prosecutorial discretion is informed by more than just the personal culpability of the offender, as there are also systemic considerations, such as enforcement priorities. But representations will not necessarily assist in the evaluation of those considerations.

E. Publication and public confidence / accountability

30. Finally, there is the argument that publication would foster public confidence that prosecutorial decisions are taken in a consistent and fair way.

31. The need to maintain or restore public confidence in the exercise of prosecutorial discretion has been an impetus for the publication of guidelines in other jurisdictions. When U.S. Attorney-General Benjamin R. Civiletti introduced the Principles of Federal Prosecution in 1980,²⁴ one of his stated aims was to bolster public confidence in the administration of criminal justice in the federal courts. To him, “[o]ne of the most corrosive influences that now affects the system is the notion that criminal cases are brought and disposed of at least in part on the basis of the defendant’s race, economic circumstances, or other factors extraneous to guilt or innocence.”

32. In the U.K., the establishment of a centralised Crown Prosecution Service under the Prosecution of Offenders Act 1985, which also required the Director of Public Prosecutions to promulgate his guidelines, was meant to

²⁴ U.S. Department of Justice, “Remarks of Benjamin R. Civiletti, Attorney-General of the United States, at the Ninth Circuit Judicial Conference”, 14 July 1980. <http://www.justice.gov/ag/aghistorical/civiletti/1980/07-14-1980.pdf>

increase consistency in prosecutorial policy, among other things. The Act followed the report of the Royal Commission on Criminal Procedure,²⁵ which highlighted among other things different standards used by the police forces around the U.K. in deciding whether or not to prosecute, and the high number of prosecuted cases where the evidence was too weak even to reach the jury. In his Second Reading speech in the House of Commons, the Home Secretary remarked that, “It cannot be right, for example, that an offender has between twice and three times as much chance of being cautioned rather than prosecuted in some police areas as others. It is not as if all the forces making a high use of cautioning are rural, and all the low ones urban. There is no clear pattern.”²⁶

33. I will be the first to agree that it is vital for the public to have confidence and trust in the administration of criminal justice. This includes the exercise of prosecutorial discretion – the public must be confident that prosecutorial discretion is exercised in a way which protects the interests of society and victims of criminal behaviour, and that offenders are dealt with fairly, impartially and consistently. To this end, my predecessors and I have put in place a number of measures: the proper training of prosecutors, a strict insistence on prosecutorial ethics, sound knowledge management, the dissemination of information and policies through internal guidelines and circulars, and proper processes to vet and review decisions. I have also embarked on a programme to embed prosecutors within enforcement agencies, to provide immediate legal input to investigative officers. The aim is to raise the efficacy and quality of the investigative process, which is in the interests of both the accused person and the victim, as well as their families

²⁵ *Report of the Royal Commission on Criminal Procedure* (Chairman: Sir Cyril Philips) (London: Her Majesty's Stationery Office, 1981).

²⁶ H.C. Debs, vol. 77, col. 149 (The Secretary of State for the Home Department, Mr. Leon Brittan) (16 April 1985). http://hansard.millbanksystems.com/commons/1985/apr/16/prosecution-of-offences-bill-lords#S6CV0077P0_19850416_HOC_243

and the wider community. In addition to all these measures, we are also increasing our public engagement efforts. Just a fortnight ago, I launched the Public Prosecution Outreach Programme. Through a series of exhibitions, talks, school visits and attachments to Chambers, we sought to explain and demystify the work of prosecutors. I believe the programme was well-received and we hope to make it an annual affair.

34. Coming back to the publication of guidelines, is this necessary to maintain public confidence in the exercise of prosecutorial discretion? I appreciate the force in the argument, but we should see it in perspective. It is true that several common law jurisdictions have published prosecutorial guidelines. However it is crucial to understand the background which led to such publication. It should be borne in mind that the U.K., U.S., Australia and Canada are big countries with large populations. Prosecutorial functions were decentralised and in the US, Australia and Canada were further complicated by multiple State and Federal jurisdictions. In the U.S. and U.K. at least, inconsistent decisions were not uncommon, leading to an erosion of public confidence. In the U.S. there was also the perception that prosecutors were actuated by race and other irrelevant factors. In that context, the publication of guidelines was largely a reaction to regain the public trust.

35. Singapore, on the other hand, is a small jurisdiction both geographically and demographically. Unlike the UK before 1985, our prosecutorial functions are highly centralised with the Attorney-General personally involved in decisions in serious and sensitive criminal cases. I believe no one is saying, or can credibly say, that the exercise of prosecutorial discretion in Singapore is systemically flawed, or that there is a widespread crisis of confidence in how prosecutorial decisions are reached. Unlike in the U.S. in 1980 and perhaps even now, there is no perception that we are biased against any racial or

socio-economic class. If you followed the news in the past years, you would know that we do not shield the rich or the powerful. Neither do we oppress the poor or the disadvantaged. Where we take a robust approach, as we do with drugs offences, unlicensed moneylending, crimes of violence, vice and other areas, it is because in our assessment, the public interest so requires. There has been the occasional challenge in the courts, but none has come close to succeeding, and we are determined to keep it that way. So we are not operating in a situation where there is a loss of public confidence in the prosecution or where there is a need to reassure the public even in relation to very basic principles such as the irrelevance of race and other extraneous factors in the exercise of prosecutorial discretion. To the extent that the publication of guidelines will encourage challenges against the exercise of prosecutorial discretion, I am not sure that the public would be very impressed by a criminal justice system where significant time and expense is spent on arguments about whether prosecutions should be brought against accused persons, rather than on bringing them to justice.

36. Having said all this, I do acknowledge that, from time to time, there will be controversies or misunderstandings about the exercise of prosecutorial discretion in individual cases. To some extent this is to be expected – the exercise of prosecutorial discretion is after all a matter of judgment and sometimes reasonable people can disagree on what is the right decision. In other cases, however, there is a regrettable element of mischief and misrepresentation in the controversies that are being generated. Whatever the reason, we take a serious view of any public misconception about how individual decisions are reached, especially if impropriety is alleged or implied, and we will and must respond appropriately. The appropriate response will vary in each case but generally we will strive to dispel any doubts about how individual decisions are reached, without going into generalities and without

binding ourselves to any policy position in the future. In some cases we will go further and take a proactive approach, to forestall any misunderstanding from arising. As some of you may have noticed, I have established a media relations unit, to enable AGC to respond more effectively and promptly to issues of public concern. We are also open to engaging stakeholders in individual cases, on a case-by-case basis. We will be carefully monitoring how our engagement efforts work out. As I mentioned, and I stress again, I do not want to convey the impression or create any expectation that the exercise of prosecutorial discretion operates to exempt anyone from laws enacted by Parliament. Those who violate the law should not be surprised if they are prosecuted to the maximum permissible extent based on the unique facts of each case.

IV. CONCLUSION

37. In conclusion, I believe our position today strikes the right balance between the competing interests. Of course, as society evolves and matures and the administration of criminal justice becomes even more sophisticated, we may have to review our position and we are prepared to do so. In the meantime, for those of you who are keen to find out more about how prosecutorial discretion is exercised in practice, you are welcome to apply for a position in my Chambers.