



LAW REFORM COMMISSION

Issue Paper

The Office of Director of Public Prosecutions [DPP] and the Constitutional Requirement for its Operational Autonomy

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About the Commission

The Commission consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (e) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (f) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (g) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (h) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission and taking the minutes of all the proceedings of the Commission.



LAW REFORM COMMISSION

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Introductory Note

1. The Commission has, time and again, asserted that its primary function is of ensuring our laws and practices are in conformity with the Constitution. We have recently examined the background to the Office of Director of Public Prosecutions and we have formed the opinion that its operational autonomy is a constitutional requirement, which must be given effect to.

Background to DPP’s Constitutional Status

2. The Office of Director of Public Prosecutions [DPP] is established in the Constitution [section 72(1)]. The Director is conferred independent powers in relation to criminal prosecutions [section 72(3) and (5)], which may be exercised by him in person or through other persons acting in accordance with his general or specific instructions [section 72(4)].
3. The Office was first established in the 1964 Constitution, as part of the second stage of constitutional developments in Mauritius (as spelled out in the *Text of Agreed Final Communiqué of the Mauritius Constitutional Review Conference of 1961*)¹. With provision being made for the post of Attorney-General to be filled by a Minister, it was felt necessary to create a new official post of Director of Public Prosecutions who would be responsible for and would exercise control over the conduct of prosecutions, and would in this respect be **independent of the Office of the Attorney-General**.

¹ Mauritius Legislative Council, Sessional Paper No. 5 of 1961 - Constitutional Development in Mauritius. It was agreed at that conference that should provision be made for the post of Attorney-General to be filled by a Minister, who would not be a public officer, “it would be necessary to create a new official post of Director of Public Prosecutions who would be solely responsible in his discretion for the initiation, conduct and discontinuance of prosecutions and would in this respect be independent of the Attorney-General”.

In his 1964 Report as Constitutional Commissioner (following his visit to Mauritius from 20 July to 10 August 1964) Professor S.A. De Smith considered the Director of Public Prosecutions should be given the judicial security of tenure which he enjoys under a number of other constitutions.²

At the 1965 Mauritius Constitutional Conference (September 1965, Lancaster House, London), where a constitutional framework for self-government and independence was devised, the parties further agreed that a person will not be qualified to be or act as Director unless he is qualified for appointment as a Supreme Court Judge; the Director would be appointed by the Judicial and Legal Service Commission; his security of tenure would be similar to that of a Judge.³ Moreover, his salary and conditions of service [as well as those of Judges of the Supreme Court, Members of Service Commissions, the Chief of Police, the Electoral Commissioner and the Ombudsman] would be protected.⁴

4. As pointed out by Professor S.A. De Smith, the independent constitutional status of the DPP stemmed from the need “**to safeguard the stream of criminal justice from being polluted by the inflow of noxious political contamination ... to segregate the process of prosecution entirely from general political considerations.**”⁵

The framers of Our Constitution adopted the best constitutional practices that had then emerged in the New Commonwealth, which consisted of providing that “in instituting, conducting taking over, continuing and discontinuing prosecutions [the DPP] is not to be subject to the direction of any person; and in the exercise of all of these functions other

² Mauritius Legislative Assembly, Sessional Paper No. 2 of 1965 – Report of the Constitutional Commissioner, Professor S.A. De Smith (November 1964).

³ Mauritius Legislative Assembly, Sessional Paper No. 6 of 1965 – Report of the Mauritius Constitutional Conference (September 1965), Annex D, para. 27.

⁴ *Ibid.*, at para. 42.

⁵ S.A. De Smith, *The New Commonwealth and its Constitutions* (London: Stevens & Sons, 1964), at pp. 144-145.

than that of instituting prosecutions his responsibilities are to be exclusive.”⁶ Constitutionalism in the New Commonwealth was grounded, inter alia, on the need to establish politically neutral zones so that sensitive areas of public activity – the delimitation of electoral constituencies, the conduct of elections, the administration of justice, the process of prosecution, the civil service and the police, the audit of public accounts - would be insulated from direct political influence.⁷

Operational Autonomy of the Office of DPP: A Constitutional Requirement

5. It is abundantly clear from the requirements of the Constitution that the Office of the DPP must operate independently of the Office of the Attorney-General.
6. The current practice since independence of law officers working at Attorney-General’s Office appearing for or advising DPP falls foul of the principles underlying the setting-up in the Constitution of distinct offices of Attorney-General and DPP. This arrangement is unconstitutional and should be brought to an end.

It is not astonishing, therefore, that ‘Presidential Commission set up to Examine and Report upon the Structure and Operation of the Judicial System and Legal professions of Mauritius’ did recognize in its 1998 Report [known as Mackay Report] there is a need for the Office of DPP to be manned by staff not working at the same time for the Office of the Attorney-General, and having the Director of Public Prosecutions as Responsible Officer. This is what the Presidential Commission had to say on the matter:

“The powers of that office are extremely important in the proper functioning of the Republic and we recommend that the importance of it should be clearly recognized by the public and that the office holder should enjoy the confidence of the public. We have heard it said that the legal system in Mauritius is apt to catch

⁶ Loc. Cit.

⁷ S.A. De Smith, op. cit. note 5, at pp. 136-161.

the flies and miss the hornet. We regard as an important aspect of the function of the Director of Public Prosecutions that where there is sufficient evidence and it is appropriate in the public interest to do so, a prosecution will be taken whoever the person against whom the criminal allegations have been made may be, and whatever his or her connections or rank may be. We consider that this further requires that the Director should be supported lawyers of high quality with experience of the law and developed judgment. We therefore recommend that those who support the Director of Public Prosecutions in the State Law Office should constitute a separate department reporting to and managed by the Director of Public Prosecutions and with no responsibilities except those relating to prosecution. We do not consider it satisfactory that the prosecuting function should be discharged by people who at the same time have other functions to discharge such as advising other departments or drafting Bills, and are not under the management of the Director of Public Prosecutions.”⁸

7. Lord Mackay, in his updated Report submitted to the Government of Mauritius in September 2006, was of the opinion that, in the light of the judgment of *Jeewan Mohit v The Director of Public Prosecutions* (Privy Council Appeal No 31 of 2005), the DPP’s Office should be established as a separate office, distinct from the Attorney-General’s Office (contrary to the recommendation made at paragraph 5.23 of the 1998 Report), the more so since the Attorney-General in Mauritius is a member of Cabinet and it was not appropriate therefore that the DPP (or his officers) should be part of his Office.⁹
8. Civil Establishment Orders, adopted in accordance with section 74 of the Constitution and the Civil Establishment Act, must give effect to this constitutional imperative of the independence of the Office of the DPP: posts for law officers involved in criminal prosecutions must be established under the Office of the DPP. Such has not been the case so far and it is high time that this unconstitutional practice be put to an end. **We recommend that this is a matter for the Pay and Research Bureau [PRB] to address urgently as an error/omission so that henceforth in civil establishment orders law**

⁸ At para. 5.24.

⁹ CAB(2006) 789.

officers working for the Office of the DPP do so under the establishment of the DPP’s Office and not that of the Attorney General’s Office.

9. Since independence, the salary and other allowances of the DPP appear in Appropriation Acts as a vote item under the Attorney-General’s Office. This practice also is unconstitutional and must cease. **We therefore recommend that henceforth in Appropriation Acts the budget of the Office of the DPP should appear as a vote item for an independent body, as is that of the Judiciary.**

Concluding Remarks

10. We firmly believe that the arrangements proposed should be implemented so that the Office of DPP should be perceived as independent, in line with the requirements of the Constitution. We hasten to add, however, that law officers who until now appear for the DPP whilst holding their post under the establishment of the Attorney General’s Office have been doing so in all independence, in line with the best traditions of the Bar in the Commonwealth.