Opening of the Supreme Court of Queensland
Saturday 4 August
Reply to the Remarks of the Honourable Chief Justice Geoffrey Ma on "Duties owed to the court: fact, fiction and continuing relevance"

I would like to thank the Honourable Chief Justice Ma for his insightful remarks on the important role of lawyers in the administration of justice and the practical difficulties posed by the potential conflict between a lawyer's duty to the court and their duty to act in their client's best interest[1].

The Honourable Chief Justice Ma made clear that counsel's duty to the client is an obligation subsumed by and contingent upon the duty to the court. His Honour also stressed the dominance of the lawyer's duty to the court in his honour's address to the Hong Kong legal profession at the Opening of the 2011 Legal Year, where he said:

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[1] The Hon. Chief Justice Ma, "Duties Owed to the Court: Fact, Fiction and Continuing Relevance" (Speech Delivered at the Opening of the Supreme Court of Queensland, Brisbane, 4 August 2012)

It is important for all legal practitioners and law students to be reminded that the public interest demands that duties are owed by lawyers to the court, and that these are paramount. In the case of a conflict between the duties owed to the court and the duties owed to one's client, the duties to the court prevail. This is in the public interest in ensuring that justice is done[2].

The Chief Justice's remarks today have shown how this view of the overarching duty to the court is also gaining prominence in Australian and other common law jurisdictions. As Chief Justice Ma has also already very aptly highlighted the broad principles that encapsulate this duty to the court, and given time constraints, I intend to focus my remarks on an analysis of how courts in the United Kingdom, Hong Kong and Australia, have recently defined and applied the duty to the courts to the prosecution in criminal and civil enforcement

[2] The Hon. Geoffrey Ma Taoli, (Speech delivered at the Ceremonial Opening of the Legal Year, Hong Kong, 4 January 2011)

proceedings[3]. The cases illustrate that across common law jurisdictions the prosecutor's role in the proper administration of criminal justice is primarily concerned with ensuring that the defendant has access to a fair trial through proper disclosure of information to the defence and the presentation of relevant witnesses and information to the court.

AJ v The Queen[4]

I will begin with a criminal example, the recent appeal judgement of the Victorian Court of Appeal in *AJ v The Queen.*

The appeal concerned the trials of AJ for various sexual offences allegedly perpetrated against XN, for which he

[3] I delivered a more comprehensive paper on how the duty to the court is operating as a matter of law in Australia: The Hon. Chief Justice Marilyn Warren AC, 'The Duty Owed to the Court: The Overarching Purpose of Dispute Resolution in Australia' (Speech delivered at the Bar Association of Queensland Annual Conference, Gold Coast, 6 March 2011)

[4] [2010] VSCA 331

had sustained a number of convictions. XN was also the complainant in a separate criminal case, the matter of *Pollard*. The prosecutor in Pollard's trial was also the prosecutor in the second and third *AJ* trials.

In the *Pollard* case, XN was cross-examined concerning text messages of a sexually explicit nature, which she had allegedly sent to the accused. In the *AJ* trials, XN denied sending all but one of the text messages- a denial that could have been demonstrated as false if she had been cross-examined. XN was not cross-examined on the issue in the AJ trial as counsel had no grounds for doing so.

In the *Pollard* trial however, the prosecutor did not herself accept XN's denials. She conceded that the complainant had lied. In fact, defence counsel and the Crown came to an agreement about which images had been sent by XN, as it was common ground in that trial that her denials

were not to be accepted as she was not a credible witness.

The court found that in the circumstances of AJ's appeal, the prosecutor's failure to alert counsel to the circumstances of Pollard's trial and, in particular, to the fact that she (the prosecutor) did not believe XN's denials of having sent a large number of text messages to Pollard, constituted a significant breach of her duty as prosecutor. Had the Pollard file been disclosed to the defence lawyers prior to AJ's trials, it would have yielded information that could potentially have turned the case in favour of the accused. Ultimately, the court found that the conduct of the prosecution in failing to disclose that information led to a miscarriage of justice.

This case is a signal that the prosecutor's general duty is to conduct a case fairly, impartially and with a view to establishing the truth.

HKSAR v Lee Ming Tee[5]

The jurisdiction of Hong Kong has also dealt with the duty of the prosecutor to disclose relevant information to the accused in the case of the *Hong Kong SAR v Lee Ming Tee*. In this case, the accused was charged with publicly issuing shares to independent investors who were actually nominee companies controlled by the accused. The prosecution also alleged that the prosecution had hidden these facts with complex accounting entries. The accused applied for a permanent stay of prosecution on the grounds that the prosecution had failed to disclose that one of their expert witnesses verifying the accounting concealment, Mr Li, was himself a disgraced company

[5] [2003] HKCFA 34; (2003) 6 HKCFAR 336; [2004] 1 HKLRD 513

director who had been under investigation by the financial authorities. The permanent stay was granted by the court of first instance not because the defendants had been deprived of a fair trial, but because the prosecutor's actions amounted to a serious abuse of power.

The Court of Final Appeal overturned the permanent stay and ordered a retrial. In deciding whether the prosecution had breached their duty to disclose, the court weighed up the public interest in the detection and punishment of serious crime on the one hand and the public interest in preserving the integrity of the criminal justice system on the other. As a fair trial for the accused was still possible and because the prosecution, being unaware of the credibility issues surrounding Mr Li, had not acted in bad faith, the court decided public confidence in the judicial system was more likely to be disturbed if this serious crime was not brought to a retrial.

The court in this case considered that a fair trial for the accused was vital to the preservation of the public's confidence in the judicial system. It follows that the prosecutor's role in the proper administration of criminal justice is grounded in upholding this fundamental right.

Her Majesty's Advocate v Murtagh (The High Court of the Justiciary of Scotland)[6]

A similar approach regarding the extent to which the prosecution must disclose the criminal history of their witnesses has been followed in the United Kingdom (UK). In the 2009 UK advisory opinion of *Her Majesty's Advocate v Murtagh*, the court emphasised that the prosecution's duty of disclosure has its foundation in the right of a defendant to a fair trial. In particular, the right to a fair trial requires that the defendant have adequate

[6] [2009] UKPC 36 (3 August 2009)

knowledge of the case to be made by the prosecution. However, the prosecutor need not disclose all the information known to them, whether or not it is probative of the guilt of the accused. The court concluded that the prosecutor's duty to the court required the disclosure of only the previous conviction, charges or investigations that could materially weaken the Crown's case or materially strengthen the case for the defence. Such disclosure would satisfy the accused's right to a fair trial

ASIC v Hellicar & Others[7]

We also find this overarching concern for how a prosecutor's actions affect the defendant's right to a fair trial in Australian cases on duties owed to court, the most recent of which was the High Court case of *ASIC v Hellicar & Others,* handed down in May this year.

[7] [2012] HCA 17

In this case, ASIC had commenced proceedings against seven non-executive directors of James Hardie Industries. Proceedings were brought after it was discovered that the foundation established by James Hardie to manage and pay out asbestos claims had insufficient funds to meet all legitimate compensation claims. ASIC argued that the directors had failed to exercise due care and diligence to ensure funds were available before authorising an announcement to that affect on the ASX.

The New South Wales Court of Appeal found that ASIC had failed to prove that the directors had approved the draft ASX announcement at a board meeting. It also found that ASIC had breached its duty of fairness by not calling one of James Hardie's external solicitors (who attended the board meeting) as a witness to testify that the directors had in fact approved the announcement. The High Court rejected both of these findings.

The High Court did re-affirm that ASIC, as a model litigant, was under a duty to conduct litigation fairly. However, the content of that duty did not require ASIC to call the solicitor in this case as the solicitor's evidence was unlikely to confirm what actually happened at the board meeting in question. It follows that ASIC's failure to call the solicitor "worked no unfairness to either party" and certainly did not disadvantage the case of the defendant.

Conclusion

It is clear from these cases that, across common law jurisdictions, the prosecutor's paramount duty is to the courts; not to their client, the accused or even the public. In the criminal context, this duty is focused on ensuring that the defendant has access to a fair trial. The cases I have discussed make clear that the protection of this fundamental right is an integral part of the courts ability

to maintain public confidence in the criminal justice system.

This really is at the heart of the matter. Public confidence in the judiciary and the courts, and the threat of losing it, is an important consideration for the administration of justice. It is the courts who enforce rights and protect the citizen against the state and who resolve disputes between citizens, and between citizens and the state. It is the lawyers, through the duty owed to the court, who form the legal profession and who underpin the third arm of the government, the judiciary.