

Separate the Offices of Attorney General and Public Prosecutor Without Delay

The Coalition for Clean and Fair Elections (BERSIH 2.0) has today launched a report entitled “Reforming the Office of Attorney General and the Judicial & Legal Service in Malaysia”. The report, which has been commissioned by BERSIH 2.0 and written by Andrew Yong, highlights the lack of constitutional safeguards in the combined offices of Attorney General (AG) and Public Prosecutor, which has led to selective prosecutions and the unequal enforcement of the criminal law in Malaysia, as well as the insufficient separation between the AG’s Chambers (AGC) and the subordinate Judiciary.

The report studies the current constitutional arrangements governing the AG and the Judicial & Legal Service (JLS) in Malaysia with reference to historical and current best practice in various Commonwealth countries. It has considered the scope and functions, selection process and tenure of the combined AG & Public Prosecutor in Malaysia, as well as the relationship of the AGC with other federal institutions and the States.

The sudden dismissal of the then-AG, Tan Sri Abdul Gani bin Patail, in 2015 and the actions of

his successor, Tan Sri Apandi Ali, in clearing Najib Razak of all criminal offences in relation to the 1MDB scandal, has brought the office of AG into disrepute, and contributed to widespread public distrust in the impartiality of the criminal justice system in Malaysia. The lenient treatment of Government ministers, contrasted with swift and draconian action taken against Opposition and civil society leaders, have given rise to a general perception that the AG in Malaysia operates as the henchman of the Prime Minister instead of as an impartial quasi-judicial officer.

In July 2021, the Law Minister in the previous Perikatan National government, Takiyuddin Hassan, said the Government had no objection to considering the establishment of a Royal Commission of Inquiry (RCI) into reforming the office of AG. This has been supported by politicians and political parties including Datuk Sri Azalina Othman, Tun Mahathir Mohamad, the MCA and others.

With the fall of the PN government and manoeuvrings by politicians of the so-called “kluster Mahkamah”, who face criminal charges and convictions for corruption and other offences against the people of Malaysia, it is now essential that action is taken to remove political influence and other interference from public prosecutions and the criminal justice system in Malaysia.

BERSIH 2.0 calls upon the Government urgently to initiate and to work with other political parties in Parliament to pass the constitutional reforms detailed in the report, as summarised below:

□ ***Separation of the offices of AG and Public Prosecutor***

1. As the AG is a political appointee without security of tenure, he should cease to hold the office of Public Prosecutor and to be a member of any Service Commission. His authority should extend only to the Federal AGC and not to the rest of the Legal Service.

2.

3. The Prime Minister should have the flexibility to choose the best candidates for the office of AG and for the position of Minister of Law/Justice, and should be able to combine both positions in one individual, as he may judge appropriate. However, Parliament should have the right to require the PM to submit his nomination for the approval of a parliamentary committee.

4.

5. The AG should attend Cabinet on a regular basis, and should also have the right, like a Cabinet minister, to participate ex officio in the proceedings of both Houses of Parliament. If, however, the AG is appointed Minister of Law/Justice, then he must be a member of one or other House.

6.

7. The Public Prosecutor should be appointed by the Yang di-Pertuan Agong (YDPA) upon the recommendation of the appropriate Service Commission, which may after considering the advice of the Prime Minister be returned to the Commission once for reconsideration. Parliament should have the right to require the Prime Minister, before advising the YDPA, to submit his advice for the approval of a parliamentary committee.

8.

9. The Public Prosecutor should be appointed for a single term of eight years, subject to the

same maximum retirement age, and with the same security of tenure, as a Federal Court judge.

10.

11. Parliament should have the power to require the Public Prosecutor to consult with the AG in particular cases, but must not require the Public Prosecutor to act subject to the consent or under the direction or control of any person.

12.

13. Parliament should have the power to authorize specialist agencies such as the Malaysian Anti-Corruption Commission, the Securities Commission, etc, to initiate and conduct prosecutions for specific offences within their remit, but the Public Prosecutor should have power, with the permission of the court or of the agency concerned, to take over any prosecution.

14.

□ ***Separation of the Judicial and Legal Service***

1. The JLS should be divided into a Judicial Service and a separate Legal Service, each with its own Service Commission.

2.

3. The Judicial Service Commission should revert to being chaired by the Chief Justice as the head of the judiciary, with other judicial office-holders and the deputy chairman of the Public Services Commission as *ex officio* members. It should also regain responsibility for nominating members of tribunals for the removal of superior court judges and for proposing any suspensions pending the decisions of such tribunals.

4.

5. The Legal Service Commission should cease to have the AG as an *ex officio* member, with his place being taken by the Solicitor General and the Public Prosecutor. It should be responsible for the appointments, promotions, transfers and discipline of all members of the Legal Service. It should also have responsibility for nominating members of a tribunal for the removal of the Public Prosecutor and for proposing any suspension pending the decision of such a tribunal.

6.

7. The AG and the Solicitor General should not have authority over members of the Legal

Service appointed or seconded to serve the Public Prosecutor's Chambers, State Governments, Parliament or independent Commissions.

8.

9. Law reform should continue to be the responsibility of individual ministries, working together with the AGC. However, a Law Reform Commission consisting of legal academics and retired judges should be created, under the oversight of the Ministry of Law/Justice, to make proposals for law reform, which should be laid before Parliament.

10.

BERSIH 2.0 urges all political parties in Parliament to work together to implement these recommendations without delay, to convince the public that they have the political will and are committed to the institutional reforms promised to the public.

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Released by,

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