1. The Chief Executive proposed in his 2001 Policy Speech a new system of appointment applicable to the Chief Secretary, the Financial Secretary, the Secretary for Justice, and most Directors of Bureaux. These officials would have clearly defined roles and responsibilities. They would each be responsible for policy areas designated by the Chief Executive and would lead the executive departments within their particular portfolios. They would be responsible for formulating, explaining, and defending government policies as well as canvassing support from the public and the Legislative Council. They would be answerable to the Chief Executive for the success or failure of their policies, and would have to shoulder political responsibility for their respective portfolios. They would also be appointed to the Executive Council.

2. It is said that this new system of appointment of principal officials would improve accountability. There would be greater incentive for principal officials under the new system to keep closely in touch with the public, to be more responsive to public sentiments and demands, to be in a better position to prioritize policy and legislative initiatives as well as the allocation of resources and coordinate decisions. Above all, the new system would become more flexible.

3. We generally embrace the policy of enhancing accountability of principal officials who are responsible for policy making. We also support the principle of maintaining neutrality of civil servants. Thus, it is an appropriate direction to separate the political role of policy secretaries from the executive role of civil servants. The problem of the existing system is that civil servants have to play a political role in formulating, explaining and defending policies and lobbying political support and have to maintain at the same time political neutrality, which sometimes become a disguise that they are not responsible for their policy decisions.

4. However, it is unclear what 'accountability' means. Neither the Policy Speech nor the paper prepared by the Constitutional Affairs Bureau dated 26 October 2001 explains this concept of accountability or the mechanism to ensure accountability. All that the paper prepared by the Constitutional Affairs Bureau said was that these principal officials *'would be answerable to the Chief Executive for the success or failure of their policies. They would have to shoulder political responsibility for their respective portfolios.'* (para 12)

5. Accountability can be achieved at various levels. At the lowest level, accountability entails periodic reports and explanations or justifications of one's decision. At a higher level, accountability envisages consultation before any decision is taken, or even approval of a

particular body before a decision can be effective. At the highest level, accountability involves the power of dismissal.

6. Under the present system, the Government has to present regular policy addresses to the Legislative Council. It shall answer questions raised by members of the Council, and have to obtain approval from the Council for taxation and public expenditure. On the whole, the Government does explain its decision and consult the public on major decisions.

7. Thus, the only main difference between the proposed new system and the existing system is that, under the existing system, the principal officials are civil servants and can only be removed pursuant to a well established mechanism. The new system enables the principal officials to be removed more easily.

8. However, according to the present proposal, the power of removal is vested in the Chief Executive alone. The proposal does not entail any power of the Legislative Council over the principal secretaries. Nor does it introduce any system under which the views of the public would affect the appointment or removal of the principal officials. In other words, the principal officials are accountable to the Chief Executive but only to him. They are appointed by the Chief Executive. They obtain their mandate from the Chief Executive, and not from the people. They can be removed by the Chief Executive, and by the Chief Executive alone. There is neither convention nor mechanism to ensure that the Chief Executive will exercise his power of removal in accordance with public sentiment. The new system strengthens the control of the Chief Executive over the principal officials, but it does not enhance any public accountability of the principal officials.

9. Article 64 of the Basic Law provides that the Government of the HKSAR must be accountable to the Legislative Council. The proposed system does not in any way enhance the accountability of the principal officials or the Government to the Legislative Council.

A Constitutional Dimension

10. The position of the Secretary for Justice requires further consideration. Under the present system, the Secretary for Justice assumes the role of the former Attorney General. She discharges both legal and political duties. In other systems, these roles may be discharged by different persons (e.g., Minister of Justice and Attorney General, or Attorney General and Solicitor General).

11. The Secretary for Justice is the principal legal advisor to the Government. She is responsible for policies relating to the administration of justice and delivery of legal services. She is, *inter alia*, a member of the Executive Council, the Chairman of the Law Reform Commission, and a member of the Judicial Officers Recommendation Commission. These roles would not be affected by converting her role into a political appointment.

12. At the other end of the spectrum, all criminal prosecutions are taken out in the name of the Secretary for Justice. She is ultimately responsible for all prosecution decisions. All decisions to prosecute are, at least in principle, determined by the Secretary for Justice. She may stop the trial of an indictable offence by entering a nolle prosequi. She can grant an amnesty or immunity to witnesses. She decides the venue of criminal trial and gives consent to the prosecution of certain offences. It is obviously important that decisions to take out criminal prosecution should not be interfered with by political consideration.

13. In England & Wales, the Lord Chancellor is a member of the Cabinet and responsible for legal policies and legal services. The Lord Chancellor is assisted by the Lord Chancellor's Department, which has a staff of over 11,000, in discharging his duties. The Attorney General is not a member of the Cabinet and only attends Cabinet meetings when summoned.

14. Article 63 of the Basic Law provides that the Department of Justice of the HKSAR shall control criminal prosecutions, free from any interference. The Secretary for Justice stated that the independence of the Department of Justice in relation to prosecutions would be unaffected by the proposed changes because the Director of Public Prosecutions remains a civil servant. This is half accurate only. Under Article 63 of the Basic Law, the decision to prosecute is to be taken by the Department of Justice, not by the Director of Public Prosecutions, and the Secretary for Justice remains the head of the Department of Justice. Therefore, if the Secretary for Justice is to become a political appointment, it is important to ensure constitutionally that all decisions relating to criminal prosecution shall be vested in the Director of Public Prosecution or Department of Justice free from any interference (or alternatively that the Secretary for Justice under the proposed new system shall no longer be responsible for any criminal prosecution).

15. Under the existing system, the Secretary for Justice is also the guardian of public interest. Traditionally in the common law system, the Attorney General represents the interests of the Crown qua Sovereign and also qua parens patriae. The areas in which these jurisidictions were first invoked were public nuisance and the administration of charitable and public

trusts. As guardian of public interest, she can restrain public nuisances and prevent excess of power by public bodies. In circumstances where a plaintiff does not possess the requisite interest to bring a case in his own name, the consent of the Attorney General is necessary - known as relator action. It has been held that a citizen can only enforce public rights through the Attorney General as the guardian of public interest, and the consent of the Attorney General cannot be sidestepped or circumvented: ***Gouriet v Union of Post Office Workers*** [1978] AC 435. It is not uncommon in these circumstances that the subject matter in issue may be of great importance to the government (e.g., challenging planning permission by a person not directly affected by it, as in ***Gregory v Camden London Borough Council*** [1966] 1 WLR 899, or industrial action as in ***Gouriet v Union of Post Office Workers*** [1978] AC 435). What is best in the public interest may not always be best in the government interest. In exercising the jurisdiction as guardian of public interest, the Attorney General has to be able to act independently and impartiality, and if necessary, act contrary to government policies or even government interest. A politically appointed Secretary for Justice who is accountable only to the Chief Executive may be hampered in discharging her role as guardian of public interest.

16. Therefore, if the position of the Secretary for Justice is to become a political appointment, it is important to ensure that the legal roles of the Secretary for Justice be transferred and discharged by another law officer, such as the Solicitor General or the Director of Public Prosecution, so that the Secretary for Justice is only responsible for legal policies.

Special Committee on Constitutional Affairs and Human Rights
Hong Kong Bar Association

19 November 2001

LC Paper No. CB(2)1678/01-02(02)

For discussion on
17 December 2001

Enhancing the Accountability System : the post of Secretary for Justice

The Administration proposes to introduce a new system of appointing principal officials, including the Secretary for Justice. These officials would be appointed on terms different to those in the civil service, including remuneration and conditions of service. The appointment contract would clearly state their rights and obligations. Their term of office would not exceed that of the Chief Executive who nominated them.

2. Questions have been raised as to whether it is appropriate to include the post of Secretary for Justice in these proposals. The Bar Association has suggested that, if that post is included, the legal roles of the Secretary for Justice should be transferred to and discharged by another Law Officer.

3. This paper seeks to demonstrate that –

(1) the proposed arrangements would not materially alter the position of a Secretary for Justice who is recruited from outside the Civil Service;

(2) the proposed arrangements are consistent with arrangements for similar posts in many other common law jurisdictions;

(3) it is appropriate that the Secretary for Justice should be politically accountable for the manner in which he or she formulates and executes policy in respect of the legal system and legal services;

(4) in relation to certain functions (particularly the function of making prosecution decisions), the Secretary for Justice is constitutionally required to act independently and the proposed arrangements would not alter the position either in law or in practice.

I. Background

The role of the Secretary for Justice

4. The functions of the Secretary for Justice were summarised in the following way in the Bar Association's paper on this subject.

> "*11. The Secretary for Justice is the principal legal advisor to the Government. She is responsible for policies relating to the administration of justice and delivery of legal services. She is, inter alia, a member of the Executive Council, the Chairman of the Law Reform Commission, and a member of the Judicial Officers Recommendation Commission.*
>
> *12. At the other end of the spectrum, all criminal prosecutions are taken out in the name of the Secretary for Justice. She is ultimately responsible for all prosecution decisions. All decisions to prosecute are, at least in principle, determined by the Secretary for Justice. She may stop the trial of an indictable offence by entering a nolle prosequi. She can grant an amnesty or immunity to witnesses. She decides the venue of criminal trial and gives consent to the prosecution of certain offences. It is obviously important that decisions to take out criminal prosecution should not be interfered with by political consideration.*
>
> ....
>
> *15. Under the existing system, the Secretary for Justice is also the guardian of public interest. Traditionally in the common law system, the Attorney General represents the interests of the Crown qua Sovereign and also qua parens patriae. The areas in which these jurisdictions were first invoked were public nuisance and the administration of charitable and public trusts. As guardian of public interest, she can restrain public nuisances and prevent excess of power by public bodies. In circumstances where a plaintiff does not possess the requisite interest to bring a case in his own name, the consent of the Attorney General is necessary –*

> *known as relator action. It has been held that a citizen can only enforce public rights through the Attorney General as the guardian of public interest, and the consent of the Attorney General cannot be sidestepped or circumvented :* ***Gouriet v Union of Post office Works*** *[1978] AC 435. It is not uncommon in these circumstances that the subject matter in issue may be of great importance to the government (e.g. challenging planning permission by a person not directly affected by it, as in* ***Gregory v Camden London Borough Council*** *[1966] 1 WLR 899, or industrial action as in* ***Gouriet v Union of Post Office Workers*** *[1978] AC 435). What is best in the public interest may not always be best in the government interest. In exercising the jurisdiction as guardian of public interest, the Attorney General has to be able to act independently and impartiality, and if necessary, act contrary to government policies or even government interest."*

5. In discharging both a policy-making function and a quasi-judicial function, the Secretary for Justice is like many Attorneys General or Ministers of Justice in the common law world.

Terms of service

6. At present, a person holding the post of Secretary for Justice is employed on Civil Service terms and conditions.

7. If a Secretary for Justice were recruited from outside the Civil Service, he or she would be recruited on a fixed term contract. The standard Civil Service contract provides that it is terminable on either side by giving 3 months notice or by paying one month's salary in lieu of notice.

8. If a Secretary for Justice were appointed from within the Civil Service and was already on permanent and pensionable terms, the appointee could remain on those terms.

The proposed new arrangement

9. So far as the post of Secretary for Justice is concerned, the application of the proposed arrangements to enhance the accountability system would mean that all future post-holders (whether recruited externally or internally) would be on fixed term contracts, the term of which would not exceed that of the Chief Executive who nominated them. This would not make any significant change in the current arrangements for those recruited from outside the Civil Service. However, an internal recruit would no longer be permitted to remain on permanent and pensionable terms. It should be noted that, of the three last Attorneys General before Reunification, two were appointed on contract terms and one was on permanent and pensionable terms.

10. It is emphasized, moreover, that other aspects of the post would remain unchanged.

(1) There will be no change in the constitutional arrangements governing the relationship between the Secretary for Justice, the Chief Executive, the SARG and the Legislative Council, since they are set out in Articles 43, 48(4), 60 and 64 of the Basic Law.

(2) There will be no change in the method of appointment or removal of the Secretary for Justice, since these are set out in Article 48(5) of the Basic Law.

(3) The Secretary for Justice would continue to be responsible for formulating and explaining policies in respect of the administration of justice and delivery of legal services; for defending those policies; for canvassing support from the Legislative Council and the public; for attending meetings of the Legislative Council to answer questions, move Bills and take part in motion debates.

(4) The Secretary for Justice would continue to be a member of the Executive Council.

(5) As at present, the Secretary for Justice would, under Articles 60 and 99 of the Basic Law, be answerable to the Government of the

Hong Kong Special Administrative Region, and to Chief Executive who is the head of the Government, for the success or failure of his or her policies.

(6) In relation to prosecutions, the Secretary for Justice (as head of the Department of Justice) would continue to be subject to the constitutional requirement under Article 63 of the Basic Law to "control criminal prosecutions, free from any interference".

(7) In relation to other areas where the Secretary for Justice is required to act in the public interest, that requirement would continue to operate.

(8) As legal adviser to the Chief Executive, the Secretary for Justice would continue to be duty-bound to give unbiased and reliable legal advice.

II. The Position in other Common Law Jurisdictions

11. The Department of Justice has studied the positions in seven common law jurisdictions, namely Australia, Canada, Malaysia, New Zealand, Singapore, UK and US. A chart setting out key features of the Attorney General's position in each of these jurisdictions is annexed to this paper. In a nutshell –

(1) most Attorneys General or Ministers for Justice do not have security of tenure, the exception being Singapore where the Attorney General has security similar to that of a judge;

(2) it is common for the post-holder to combine the roles of a partisan member of the government and an independent Law Officer in relation to prosecutions and other legal decisions based on the public interest;

(3) a few jurisdictions have a separate office that has some degree of autonomy over prosecutions, for example –

(a) in Australia, the federal DPP in practice makes prosecution decisions without interference from the AG, although the latter may issue public guidance to the DPP on policy issues;

(b) in New Zealand, the SG is responsible in practice for prosecution functions that are constitutionally vested in the AG.

(4) some post-holders are normally members of the Cabinet (e.g. New Zealand) and others not (e.g. England and Wales).

Absence of security of tenure

12. The Attorney General or Minister of Justice in common law jurisdictions usually is appointed by the head of government and holds office at the latter's pleasure. For example, the English Attorney General (Lord Goldsmith) and the US Attorney General (Mr John Ashcroft) were appointed by the Prime Minister and President respectively, and can be dismissed by them at any time. Since the post-holder is responsible for policy formulation in relation to important areas of the government's work, it is considered appropriate that he or she should be someone in whom the premier has personal confidence. The power to dismiss the incumbent is a corollary of this.

Two hats

13. It is common for Attorneys General and Ministers of Justice in other common law jurisdictions to combine the roles of a partisan member of the government and an independent Law Officer in relation to prosecutions and other legal decisions based on the public interest.

(i) <u>England and Wales</u>

14. The current English Attorney General has described his role as "Part lawyer, part politician, part guardian of the public interest". According to an interview published in the Daily Telegraph on 20 November 2001, -

> "*Lord Goldsmith says he finds no difficulty in assuming the split personality required of a law officer : acting independently of the*

> *Government when deciding whether to bring prosecutions (notably for contempt of court) while at the same time advising ministers as the Government's in-house lawyer."*

The following descriptions are taken from an interview published in The Times on 20 November 2001.

> *" 'Some things I do are like any other minister,' he says. 'I've got responsibility for a department, for a budget – I must make sure we have value for money so far as the public's concerned and ensure we deliver in accordance with the policy.'*
>
> *That policy has put reform of the criminal justice system at the top of the agenda. With the Lord Chancellor and the Home Secretary, it falls to Goldsmith to implement the Auld report.*
>
> *But being a politician who answers for the Crown Prosecution Service is only one hat. He is chief legal adviser to the Government, giving advice himself or taking it from outside.*
>
> *But his hardest hat is that of 'guardian' of the public interest, accountable to Parliament – but not to Government. 'It sounds a bit pompous, but it captures the idea that prosecuting decisions – John Prescott, Jeffrey Archer – are taken without regard to short-term political circumstances. Confidence in the system depends on people being satisfied that such decisions are taken on the merits of the case and the wider public interest.'*
>
> *Such decisions are not made as a minister but quasi-judicially, with potentially huge effect : an alleged failure to do so by the AG in 1924 brought down the first Labour Government".*

(ii) Canada

15. The various roles of the Attorney General of Ontario, Canada, have been described as follows by Ian G Scott in "The role of the Attorney-General and the Canadian Charter of Rights", Commonwealth Law Bulletin, Vol 13, No 1, 252, at 254 – 257. The author has noted that similar provisions exist in the

Canadian federal legislation as well as in the legislation of most of the other Canadian provinces.

16. The Premier and Cabinet have no power to direct whether a particular prosecution should be pursued or whether a particular appeal should be undertaken. These decisions rest solely with the Attorney General, who must be regarded for these purposes as an independent officer, exercising a function that in many ways resembles the functions of a judge. A former Attorney General of Canada Ron Basford has stated that "[t]here must be excluded any consideration based upon narrow, partisan views, or based on the political consequences to me or to others. In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by Parliament itself."

17. The advent of the Charter of Rights had dramatically added to the Attorney General's responsibility to advise the government on legislative matters. Questions arise on virtually a daily basis about whether existing statutes or proposed legislation comply with the Charter of Rights. In advising on questions of constitutionality, the Attorney General must give paramount consideration to the obligation to ensure that government action complies with the law, in this case the supreme law of Canada. The giving of constitutional advice must be carried out with the same independence and detached objectivity with which the Attorney General approaches questions of prosecution policy.

18. There is, however, a significant difference between the Attorney General's role in prosecutions and his or her role as a constitutional adviser on legislation. With respect to prosecution policy, the Attorney General has exclusive authority to make decisions. With respect to legislative policy, however, the Attorney General's role is that of an adviser. Government decisions on whether to introduce specific legislation rest with Cabinet as a whole, not with the Attorney General alone. In cases where legal and social policy is closely intertwined, as will often be the case in situations involving the Charter of Rights, the Attorney General must take care, in giving advice, to distinguish between legal opinion and policy preference.

(iii) New Zealand

19. The Attorney General of New Zealand has two roles in the Government. The first is that of a Minister of the Crown with ministerial responsibility for the Crown Law Office, the Serious Fraud Office and the Parliamentary Counsel Office. Traditionally in New Zealand the Attorney General also has policy portfolio responsibilities not connected with those of the Attorney General. The second role is that of the senior Law Officer of the Crown with principal responsibility for the government's administration of the law. The latter function is exercised together with the Solicitor-General, who is the junior Law Officer. The Attorney General thus has a unique role that combines duties of independence with the political partisanship that is otherwise properly associated with other Ministerial office.

(iv) USA

20. The Attorney General of the USA is a member of the President's Cabinet and, as head of the Department of Justice, is responsible both for an executive department of the United States and for prosecutorial decisions. Professor Daniel J. Meador, of the University of Virginia has described the office of US Attorney General in the following terms.

> *"Although the head of every executive department is heavily burdened, the Attorney General is unique. In addition to carrying a vast array of administrative responsibility, he must also perform as a lawyer. No other cabinet officer fills such a dual role, with the special professional obligations which attach to the lawyer, as an officer of the courts, as a member of the Bar, and as a representative of a client."*

Prosecuting authorities

21. The question whether prosecution decisions are made by a political appointee or by an office that is separate from such an appointee varies throughout the common law world.

22. In the United States of America, prosecution decisions in federal

cases are made by the Department of Justice, which is headed by the Attorney General, although special arrangements have from time-to-time been put in place in respect of the possible prosecution of senior government officials.

23. The Canadian Attorney General also has responsibility for prosecution decisions (see paragraph 16 above).

24. In England and Wales, the role of the Attorney General in criminal proceedings is of particular constitutional importance. In criminal proceedings he or the Solicitor General, prosecute in important cases. It is the practice for the Attorney General to lead in treason and important constitutional cases. He can select the place of trial on indictment. He can enter a *nolle prosequi* to stop any trial of an indictable offence: this incidentally allows him to grant immunity from prosecution, frequently in return for information. His leave is required before certain classes of criminal proceedings (for example, for breaches of the Official Secrets Act) can be instituted. He can institute criminal proceedings, or instruct the Director of Public Prosecutions to take over a private prosecution and offer no evidence if a *nolle prosequi* cannot be entered or if it is preferable not to go through the formality of entering a *nolle prosequi*. In performing these functions he is obliged by convention to exercise an independent discretion, not dictated by his colleagues in the Government, though he is at liberty to (and sometimes should) consult them and obtain their views in a case with political implications.

25. The Attorney General appoints, is politically answerable for, and 'superintends' the Director of Public Prosecutions. The Director of Public Prosecutions is responsible to him for the exercise of his duties. The Director of Public Prosecutions himself instructs counsel and solicitors to conduct prosecution in cases referred to him by departments and in other serious or important cases (in some of which he alone is entitled to prosecute, or proceedings cannot be undertaken except with his leave), and can take over prosecutions from private persons.

26. In Australia, the federal DPP in practice makes prosecution decisions without interference from the AG, although the latter may issue public guidance to the DPP on policy issues.

27. In New Zealand, the SG is responsible in practice for prosecution functions that are constitutionally vested in the AG.

Membership of the Cabinet

28. The Attorney General is usually a member of the cabinet in Australia, Canada and New Zealand. In the USA, the Attorney General is a member of the President's cabinet, but he is not a member of the Congress because of the doctrine of separation of powers. In New Zealand, the Attorney General is usually a member of the cabinet. In England and Wales, the Attorney General does not normally sit in the cabinet unless invited, but it is understood that the current incumbent attends meetings of the War Cabinet.

III. The Bar Association's comments

29. The Bar Association accepts that the proposed changes would not affect the Secretary for Justice's role as principal legal adviser to the government, her responsibility for policies relating to the administration of justice and delivery of legal services, or her membership of the Executive Council, Law Reform Commission or Judicial Officers Recommendation Commission. (See paragraph 11 of the Bar's paper.)

30. Paragraph 13 of the Bar's paper refers to the position in England and Wales as follows –

> *"In England & Wales, the Lord Chancellor is a member of the Cabinet and responsible for legal policies and legal services. The Lord Chancellor is assisted by the Lord Chancellor's Department, which has a staff of over 11,000, in discharging his duties. The Attorney General is not a member of the Cabinet and only attends Cabinet meetings when summoned."*

These statements are accurate. However, it should not be thought that, in England and Wales, the political and quasi-judicial roles are neatly separated in the posts of Lord Chancellor and Attorney General. It is well-known that the Lord Chancellor is the prime example of the <u>non</u>-separation of powers – since

he is a member of the Executive, legislature and judiciary. Furthermore, as has been indicated in paragraph 14 above, the English Attorney General also has a combination of political and quasi-judicial roles.

31. In paragraph 14 of the Bar's paper, the following statement appears.

> *"The Secretary for Justice stated that the independence of the Department of Justice in relation to prosecutions would be unaffected by the proposed changes because the Director of Public Prosecutions remains a civil servant. This is half accurate only. Under Article 63 of the Basic Law, the decision to prosecute is to be taken by the Department of Justice, not by the Director of Public Prosecutions, and the Secretary for Justice remains the head of the Department of Justice."*

This statement appears to be based on a misunderstanding of a passage in the speech given by the Secretary for Justice on 19 October 2001, during the debate on the Policy Address. The passage read as follows –

> *"The independence of the Department of Justice in relation to prosecutions would be unaffected by the proposed changes. The Director of Public Prosecutions remains a civil servant."*

This must be read in the light of the following earlier passage.

> *"There is no doubt that there are features of the Secretary for Justice's constitutional position that are unique and which cannot be equated with those of other principal officials. That unique position is recognised in the Basic Law, which provides in Article 63 that the Department of Justice shall control criminal prosecutions, free from any interference. Both in law and in practice, prosecution decisions are taken by the Secretary for Justice independently and not by the Chief Executive or by any other part of the SAR Government."*

32. Reading these two passages together, it is clear that the first passage was not "half accurate" as alleged, since there was no suggestion that

the DPP, rather than the Secretary for Justice, is personally responsible for prosecution decisions. The reason why her department's independence in relation to prosecution decisions would be unaffected by the proposed changes are set out fully in this paper.

33. Paragraph 15 of the Bar's paper ends with the following comment –

> *"A politically appointed Secretary for Justice who is accountable only to the Chief Executive may be hampered in discharging her role as guardian of public interest."*

If, by "politically appointed", the Bar Association is referring to someone who is appointed upon the nomination of the head of the government and who does not have security of tenure, the experience in other common law jurisdictions indicates that such an appointee is <u>not</u> hampered in discharging his or her role as guardian of the public interest.

34. Paragraph 16 of the Bar's paper reads as follows.

> *"Therefore, if the position of the Secretary for Justice is to become a political appointment, it is important to ensure that the legal roles of the Secretary for Justice be transferred and discharged by another law officer, such as the Solicitor General or the Director of Public Prosecutions, so that the Secretary for Justice is only responsible for legal policies." [See also the end of paragraph 14.]*

In so far as this relates to prosecution decisions, such a development would be unconstitutional. Article 63 of the Basic Law gives the Department of Justice control over criminal prosecutions, and the Secretary for Justice is the head of the Department. Moreover, the discussion of the position in other common law jurisdictions indicates that a senior Law Officer is capable of combining political and quasi-judicial functions in a proper manner. In our case, the Basic Law requires that control over criminal prosecutions shall be free from interference. Experience has shown that any Attorney General or Secretary for Justice will have a political price to pay if an important prosecution decision is

made improperly. Moreover, the relevant government will have a political price to pay if it fails to address any such circumstances.

Comment

35. The leading work on this area of the law is The Attorney General, Politics and the Public Interest by Edwards. At page 67 of this work, the author makes the following comment.

> *"Based on my examination of the administration of justice in a broad sample of Commonwealth countries, conducted between 1966 and 1968, I am convinced that, no matter how entrenched constitutional safeguards may be, in the final analysis it is the strength of character, personal integrity and depth of commitment to the principles of independence and the impartial representation of the public interest, on the part of holders of the office of Attorney General which is of supreme importance. Such qualities are by no means associated exclusively with either the political or non-political nature of the office of Attorney General."*

36. If the SARG is to move to a system under which principal officials are no longer Civil Servants and have to shoulder political responsibility for their policies and actions, it would be entirely logical to include the post of Secretary for Justice in that system. This paper has demonstrated that this would be consistent with the practices in many common law jurisdictions and would not undermine those aspects of the post that require independence and impartiality.

Legal Policy Division
Department of Justice
December 2001

Ref. : LP 5010/26C [#44768 v 2]

Annex -

Comparative Table on the Position of the Attorney General in Selected Common Law Jurisdictions

Countries	Appointing Authority	Security of Tenure	Discharge of Prosecutions Functions	Membership of Parliament & Cabinet
Australia	Governor General	No	The federal Director of Public Prosecutions in practice makes prosecution without interference from the Attorney General, although the latter may issue public guidance to the Director of Public Prosecutions on policy issues.	A member of Parliament; usually also a member of Cabinet.
Canada	The Minister of Justice is appointed by the Governor General on the advice of the Prime Minister and is *ex officio* Attorney General.	No	The Federal Department of Justice has a separate prosecution entity called the Federal Prosecution Service, which makes prosecution decisions according to policies of the Attorney General.	A member of Parliament; usually also a member of Cabinet.

Countries	Appointing Authority	Security of Tenure	Discharge of Prosecutions Functions	Membership of Parliament & Cabinet
Malaysia	Yang di-Pertuan Agong on the advice of the Prime Minister	No	Under s.376 of the Criminal Procedure Code, the Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the Code.	May be a member of Parliament or Cabinet (if he is a member of Parliament).
New Zealand	Governor General on the advice of the Prime Minister	No	The Solicitor General is responsible in practice for prosecution functions that are constitutionally vested in the Attorney General.	A member of Parliament; usually also a member of the Cabinet.
Singapore	President, if he, acting in his discretion, concurs with the advice of the Prime Minister	Yes	The Attorney General has sole discretion in deciding whether or not to institute, conduct or discontinue any proceedings under the criminal law under Art 35(8) of the Constitution.	Not a political appointee; responsible to the Minister for Law who is in turn responsible to the Parliament.

Countries	Appointing Authority	Security of Tenure	Discharge of Prosecutions Functions	Membership of Parliament & Cabinet
England and Wales	Crown (on the advice of the Prime Minister)	No	The Attorney General appoints, is politically answerable for, and 'superintends' the Director of Public Prosecutions. The Director of Public Prosecutions is responsible to him for the exercise of his duties. The Director of Public Prosecutions himself instructs counsel and solicitors to conduct prosecution in cases referred to him by departments and in other serious or important cases, and can take over prosecutions from private person.	A member of the Parliament, but not normally a member of the Cabinet.
USA	President with the advice and consent of the Senate	No	The Attorney General is authorised to appoint a Director of the Federal Bureau of Investigation, who is the head of that bureau, and to appoint officials to detect and prosecute crimes against the US, to assist in the protection of the person of the President, and to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.	A member of the President's cabinet, but not a member of the US Congress.

December 2001

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LC Paper No. CB(2)1678/01-02(03)

For discussion on
21 January 2002

Enhancing the Accountability System : the post of Secretary for Justice

This paper is supplementary to the paper on this subject discussed in the Panel on Constitutional Affairs on 17 December 2001, and addressees three issues.

Members' views

2. The Administration intends to include the post of Secretary for Justice in the proposed accountability system. However, it agreed to consider members' views expressed at the meeting on 17 December 2001.

3. The views expressed by members were divided. Some members considered that there was no advantage in including the Secretary for Justice in the proposed accountability system, whilst others said that the exclusion of the Secretary for Justice from that system would cause problems, since a Secretary for Justice who was a career Civil Servant would not be fully accountable. Some members emphasized that the position of the British Attorney General differs in some respects from that of the Secretary for Justice and should not be relied on as a precedent. Other members compared the Secretary for Justice's position with that of Attorneys General in other common law jurisdictions, or said that comparisons with other places were not helpful.

The Administration's views

4. The Administration has carefully considered members' views but remains of the view that the key issue is whether or not the inclusion of the Secretary for Justice in the proposed accountability system would undermine her independent role in respect of prosecution decisions and certain other quasi-judicial decisions. It continues to believe that –

(1) the proposed arrangements would not materially alter the position of a Secretary for Justice who is recruited from outside the Civil Service;

(2) the proposed arrangements are consistent with arrangements for similar posts in many other common law jurisdictions;

(3) it is appropriate that the Secretary for Justice should be politically accountable for the manner in which he or she formulates and executes policy in respect of the legal system and legal services;

(4) in relation to certain functions (particularly the function of making prosecution decisions), the Secretary for Justice is required to act independently and the proposed arrangements would not alter the position either in law or in practice.

Systems in Australia and New Zealand

5. The Administration has considered whether a system similar to that in Australia or New Zealand should be introduced in respect of the Secretary for Justice.

6. In Australia, the federal DPP in practice makes prosecution decisions without interference from the Attorney General, although the latter may issue public guidance to the DPP on policy issues.

7. In New Zealand, the Attorney General is a member of Parliament and is usually also a member of the Cabinet. The Solicitor General is responsible in practice for prosecution functions that are constitutionally vested in the Attorney General.

8. The current position in Hong Kong is that, in practice, the DPP or other counsel in Prosecutions Division make the vast majority of prosecution decisions. However, the Secretary for Justice, as head of the Department of

Justice is accountable for those decisions. In addition, the Secretary for Justice personally makes prosecution decisions in some of the cases that the DPP brings to her attention. This system works well and complies with Article 63 of the Basic Law. Moreover, the delegation of prosecution powers to someone who might be a career civil servant would undermine the move to greater accountability. It is therefore not proposed to follow the approaches in Australia or New Zealand.

Article 63 of the Basic Law

9. The Administration has also considered whether either the Administration's proposal, or the Bar Association's proposal, would contravene Article 63 of the Basic Law.

10. Under the Administration's proposal, the Department of Justice would continue to control criminal prosecutions, free from interference, as required by Article 63 of the Basic Law. The fact that the head of that department would continue to be a member of the Executive Council would not be inconsistent with that position. Prosecution decisions would continue to be made by the Department of Justice, <u>not</u> the Executive Council. Since the Executive Council would not make such decisions, there would be no question of collective responsibility for those decisions. The proposal is therefore consistent with Article 63 of the Basic Law.

11. The proposal contained in paragraph 16 of the Bar Association's paper of 19 November 2001 is that, if the post of Secretary for Justice is to be included in the proposed accountability system, "the legal roles of the Secretary for Justice be transferred and discharged by another Law Officer, such as the Solicitor General or the Director of Public Prosecutions, so that the Secretary for Justice is only responsible for legal policies".

12. The Administration considers that it is permissible for the Secretary for Justice to delegate her powers to a Law Officer whilst retaining

ultimate control and responsibility. However, a complete transfer of her powers and responsibilities in respect of prosecution matters would amount to an abdication of her duties as head of department and is likely to be inconsistent with Article 63 of the Basic Law.

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