

**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 addresses 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, not 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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