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FINAL REPORT ON
SOME ASPECTS OF FINAL ADJUDICATION AND THE JUDICIAL SYSTEM OF THE SAR, AND THE ROLE OF AN INDEPENDENT PROSECUTING AUTHORITY

(passed by the Executive Committee on 12 June 1987)

The Special Group on Law

and

The Special Group on
the Political Structure of the SAR

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A) INTRODUCTION:

1. With the reversion of sovereignty to China in 1997, Hong Kong will experience a new political situation under the practice of "one country, two systems". The Sino-British Joint Declaration stipulates that "except for foreign and defence affairs which are the responsibilities of the Central People's Government, the Hong Kong Special Administrative Region shall be vested with executive, Legislative and independent judicial power, including that of final adjudication" (Section I, Annex I). It can be envisaged that the judicial system previously practised in Hong Kong shall be maintained, but certain changes will occur as a result of the vesting of the power of final adjudication in the courts of the Hong Kong Special Administrative Region (HKSAR).

2. Under the present judicial system, cases dealt with in lower courts can be appealed to higher courts. When a decision is reached in the Court of Appeal, the highest court in Hong Kong, the case can be further appealed to the Judicial Committee of the Privy Council in London.

3. At present, it is the Privy Council that has power of final adjudication in cases arising in Hong Kong. However, the situation will change after the establishment of the HKSAR following of the reversion of sovereignty from the U.K. to China. The right of appeal to the Privy Council will be abolished. A Court of Final Appeal will have to be set up in the SAR, and cases will be finally adjudicated in that court.

4. It is generally envisaged that a Court of Final Appeal will and should be set up in the HKSAR even before 1997 and is a matter which the appropriate authorities should take cognisance of.

B) THE COURT OF FINAL APPEAL:

5. Provisions under the Joint Declaration on the judicial system and the Court of Final appeal of the SAR:

i) Annex I, Section I privides that "The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power including that of final adjudication".

ii) Annex I, Section III provides that "After the establishment of the Hong Kong Special Administrative Region, the judical system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of Hong Kong Special Administrative Region of the power of final adjudication."

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iii) "Judicial power in the Hong Kong Special Administrative Region shall be vested in the courts of the Hong Kong Special Administrative Region. The courts shall exercise judical power independently and free from any interference."

iv) "The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal at the the Hong Kong Special Administrative Region which may, as required, invite judges from other Common Law Jurisdictions to sit on the Court of Final Appeal."

6. Number of Judges -

In keeping with practice in other jurisdictions and practicality, the appropriate number of judges to sit in the Court of Final Appeal on any one appeal would be 5. The number of judges sitting should be an uneven number so as to cater for circumstances where the members of the court are in disagreement.

7. Appointment of Judges -

This is dealt with in Section C below, see in particular paragraphs 14 and 23. In principle, it would be undesirable to have judges from the Court of Appeal sitting in the Court of Final Appeal. To this end, therefore, appointments should be made to the Court of Final Appeal and the judges thereof should not sit in the Court of Appeal.

8. Chief Judge of the Court of Final Appeal

The Chief Justice should be the Chief Judge of the Court of Final Appeal and in keeping with the criteria that the judges of the Court of Final Appeal should not be members of the Court of Appeal or high court judges, the Chief Justice should only sit in the Court of Final Appeal.

9. Additional Permanent Judges

It is envisaged that in addition to the Chief Justice, there should be 2 permanent members of the Court of Final Appeal. This number may be increased later but the essential objective should be to have the highest judicial standards available and maintained in the Court of Final Appeal.

10. Invitation of Judges from other Common Law Jurisdictions

i) The Joint Declaration provides that the Court of Final Appeal may invite judges from other Common Law Jurisdictions to sit on Appeals. A panel of judges from other Common Law Jurisdictions should be drawn up and supplemented and revised from time to time. The Judicial Service Commission should be responsible for the drawing up of the panel.

ii) The judges to be placed on the panel would have to be asked

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for their consent.

iii) The panel should be composed of approximately 20 judges from other Common Law Jurisdictions.

iv) Judges from other Common Law Jurisdictions should not be invited on a permanent basis to the Court of Final Appeal since the Joint Declaration does not provide for that arrangement; besides, if the invitation is on a permanent basis, the opportunity for judges from other Common Law Jurisdictions to contribute to the SAR would be reduced.

11. Selection of Judges for hearings

i) The selection and invitation of judges to sit on any particular appeal should be effected by the Chief Justice in consultation with the permanent judges of the Court of Final Appeal. The selection and invitation should be on the basis of the following:-

a) The availability of the judges at any particular time.

b) The suitability of the particular judges to be assigned in any particular appeal according to the expertise of the judges.

ii) The selection of the panel for the Court of Final Appeal for each appeal should have to be settled well in advance of the hearing. The composition of the court could remain the same for a number of appeals to be heard over a short period of time.

iii) The ratio of invited judges and permanent judges should be kept flexible throughout the 50 year period.

iv) Initially, an appropriate ratio in any one appeal would be 2 judges to be selected from among from the Chief Justice and the permanent judges and 3 judges by invitation from other Common Law Jurisdictions.

v) It has also been proposed that the ratio of permanent judges to invited judges should be settled from time to time by municipal legislation of the SAR.

vi) A view has also been expressed that while it remains vital to foster and maintain a strong local judiciary of principal judges, it is also important to maintain the number of judges invited from other Common Law Jurisdictions in order to maintain the confidence in the Hong Kong legal system not only amongst the Hong Kong inhabitants but very importantly amongst the international investors and business communities. For these reasons, a minimum ratio should be fixed for invited judges to permanent judges sitting on appeals.

vii) An alternative to the selection by the Chief Justice in

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consultation with the permanent judges would be by the Chief Justice alone. The selection should however always be from a panel selected by the Judicial Service Commission.

12. Hearing in the Court of Final Appeal should be held on an ad hoc basis.

13. All cases can be appealed to the Court of Final Appeal but leave must be obtained in advance. Leave should be granted by the Court of Appeal or upon application by the Court of Final Appeal. Application for leave should be considered by not less than 2 members. A right of appeal to the Court of Final Appeal should be given in those cases that involve issues of great general or public importance and points of law of general public importance. Different views have been expressed as to whether the monetary level of the amount in dispute should give rise to an automatic right of appeal to the Court of Final Appeal. The principle of monetary levels should be maintained for a time but should be kept under review.

C) APPOINTMENT AND REMOVAL OF JUDGES

14. The outline of the future arrangement of the appointment and removal of judges is set out in Section III, Annex I of the Joint Declaration which provides as follows:

"Judges of the Hong Kong Special Administrative Region courts shall be appointed by the Chief Executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons. Judges shall be chosen by reference to their judicial qualities and may be recruited from other common law jurisdictions. A judge may only be removed for inability to discharge the functions of his office, or for misbehaviour, by the Chief Executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges. Additionally, the appointment or removal of principal judges (i.e. those of the highest rank) shall be made by the Chief Executive with the endorsement of the Hong Kong Special Administrative Region legislature and reported to the Standing Committee of the National People's Congress for the record. The system of appointment and removal of judicial officers other than judges shall be maintained."

15. Under the present practice, the function of the Judicial Service Commision is to advise the Governor regarding the filling of vacancies in judicial offices. These judicial offices range from Justices of Appeal to magistrates.

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16. The JSC Ordinance Cap. 92 provides that the Commission shall not pass a resolution except by unanimous vote. This rule of unanimity should be preserved.

17. The present JSC Ordinance should be maintained after 1997, and the present Judical Service Commission should be kept basically unchanged.

18. Members of the Commission at present comprise:

a) the Chief Justice who is the chairman;
b) the Attorney General;
c) chairman of the Public Service Commission,
d) not more than 3 members appointed by the Governor, one of whom may be a judge of the High Court.

19. It is proposed that a member of the Bar and a member of the Law Society should be nominated by the corresponding governing bodies.

20. A small number, preferable 6 but not more than 7 should be the ideal size of the Commission. The present balance should not be radically changed.

21. Members of the Judicial Service Commission, except the ex-officio members, should have a term of office from 3 to 4 years, but no one should serve more than 1 term.

22. Strict confidentiality must be kept in the deliberation of the Commission.

23. The term "principal judges (i.e those of the highest rank)" stated in the Joint Declaration should be interpretated as judges of the Court of Final Appeal. One member expressed the view that the term also includes judges of the High Court and above.

24. The word "misbehaviour" in the provision on removal of judges under the Joint Declaration should be more stringently defined.

25. After 1997, endorsement of the legislature on appointment and removal of principal judges should be based on a simple majority.

D) THE ROLE OF AN INDEPENDENT PROSECUTING AUTHORITY

26. Present position

The present position of the Attorney General in Hong Kong is set out in the paper in Appendix 1.

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It should be noted that the Attorney General although performing some of the functions of a Minister of Justice, does not perform all such functions and his role is essentially different. A Minister of Justice potentially combines not only the roles of the Attorney General who may or may not be another official under his jurisdiction but also has responsibilities for immigration, security, the administration of the courts, prisons, perhaps the police and other matters which are related.

27. Future position

Under Section III of Annex I to the Joint Declaration, it is provided "a prosecuting authority of the HKSAR shall control criminal prosecutions free from any interference". Under the present system, the Attorney General may give general directions to the Director of Public Prosecutions, but it is the Attorney General who is in law the prosecuting authority and he must exercise his powers and perform his duties to control prosecutions free from interference. One proposal is that the present system be retained. Another proposal is that since the future Attorney General may be a political appointee, an independent prosecuting authority should be set up and that the head of such authority would be statutory, totally independent of the Attorney General and free from any interference.

The following considerations should govern whether prosecutions should be brought by the holder of the office in criminal cases:

i. There should be a prima facie case;
ii. There should be a reasonable likelihood of conviction;
iii. The above tests should be applied with the same standard in respect of all persons;
iv. The prosecuting authority may exercise a discretion not to prosecute in cases where it is in the public interest not to do so; and
v. The exercise of the prosecuting authority's powers and discretion should not be challengeable in any specific case by any person or body.

28. Contents of the Basic Law

The Basic Law should contain a provision that there will be an independent prosecuting authority which shall control criminal prosecutions free from any interference.

C) THE FUTURE ROLE OF THE ATTORNEY GENERAL

29. The role and accountability of the Attorney General should be left to domestic legislation of the future Hong Kong SAR to delineate.

30. The question of the desirability of having a Minister of Justice was discussed but it was considered that in the context of Hong Kong, the combining together of the various tasks which are at present divided amongst various secretariats would not entail any benefits. Furthermore, if the Minister of Justice were to assume a wider function, the powers at present exercised by the Attorney General either becomes fused or confused with the power of the Minister of Justice. Concern was expressed that the Minister of Justice may exercise too wide a jurisdiction. It was considered undesirable that the holder of one office should simultaneously exercise functions relating to the judiciary, law and security. If there were to be a Minister of Justice and an Attorney General, it was clear that there would have to be clear delineation of the roles, in particular the role of the Attorney General. The Attorney General's functions should therefore not be augmented into that of a Minister of Justice.

* If there is any discrepancy between the Chinese and the English versions, the Chinese version shall prevail.

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APPENDIX I

The Role of the Attorney General in Hong Kong

Introduction

The Office of the Attorney General is one of great antiquity. Its exact origin is unknown; but as the Sovereign could not appear in person in his own courts, it followed that an Attorney had to appear to plead on his behalf. This first happened in England in about 1250. The formal title first appears in 1461. Thereafter the powers and duties of the office gradually developed over the centuries under the common law. The idea of an office of Attorney General has since been adopted in many parts of the world, including in countries where there is no direct link with the common law, and adapted to suit local conditions.

The Position in Hong Kong

2. The Attorney General is appointed by the Secretary of State in consultation with the Hong Kong Government. There are no formal qualifications for appointment, which is normally made from within the ranks of the Legal Department, though the last two Attorneys have been outside appointments. The Attorney General is, ex officio, a member of both the Executive and Legislative Councils. He is head of the Legal Department which comprises five Divisions - Policy and Administration, Civil, Law Drafting, Prosecutions and Special Duties. He is the principal legal adviser to the Governor, the Government and to individual Government Departments and Agencies. He is also titular head of the Bar. In addition to these functions the Attorney has

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wide-ranging and varied powers, duties and responsibilities in relation to the conduct of criminal proceedings and as guardian of the public interest. He is the defendant in all civil actions brought against the Government and represents both the Government and the public interest in the courts. He is Chairman of the Law Reform Commission and a member of the Judicial Service Commission. He is also a member of the Police Complaints Committee and Operations Review Committee of the Independent Commission Against Corruption.

3. The Atorney General has overall authority for the initiation of criminal poroceedings. His specific consent is required under a number of statutes. He has power to lay ex officio criminal informations, to take over the conduct of privately initiated prosecutions and to enter nolles prosequi. He has responsibility for initiating appeals and has power to refer questions of law to the Court of Appeal. It is effectively within his power to grant immunity from prosecution.

4. As guardian of the public interest in a wider sense, the Attorney General has a formal but important role in the initiation of relator actions to enforce public legal rights. He has a right to intervene in any case where the prerogatives of the Crown may be affected. He represents the public interest as counsel to Tribunals of Inquiry. He must be joined as a party in all actions to enforce charitable or public trusts. The Attorney also has a more general public interest role as amicus curiae, the most important example of which is the bringing of alleged contempts to the notice of the courts.

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5. The Attorney is not subject to the direction or control of any person or body when exercising the powers associated with his quasi-judicial and public interest duties and responsibilities. He is completely independent.

6. As a senior member of the Executive Council the Attorney is closely involved in the formulation of policy at the highest level. He is also chairman of the Chief Secretary's Legal Affairs Policy Group, which advises the Administration on matters of legal policy.

7. Within the time constraints imposed upon him by his many and varied responsibilities the Attorney personally represents the Government (and occasionally foreign Governments) in the courts in those cases involving serious constitutional and public interest considerations.

<u>The Position in Other Jurisdictions</u>

8. In his standard textbook <u>The Attorney General, Politics and the Public Interest</u>, Professor Edwards notes that, "different solutions have been resorted to by different countries in assigning responsibility for the inter-related areas that are usually identified under the general heading of the administration of justice. These principal areas include: (1) police and law enforcement, (2) the initiation and conduct of prosecutions, (3) the courts, including judicial appointments and the legal profession, (4) representation of the government and the State before the courts and tribunals, (5) the penal system, (6) legal advice to the government and governmental agencies, and (7) the drafting of legislation and law reform". He goes on to

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pose the question "whether, in practical terms or as a matter of principle, it is desirable that these variegated responsibilities should come under one portfolio or be shared among separate ministries".[1] Professor Edwards discusses some of the issues relating to the office of Attorney General which flow from the question be poses in a Memorandum prepared in 1977 for a Meeting of Commonwealth Law Ministers. A copy of the Memorandum is attached.

1. J.LL.J. Edwards, LL.D. Sweet & Maxwell 1984 (see also The Law Officers of the Crown: J.LL.J. Edwards. Sweet & Maxwell 1964).

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有關特區終審權、司法制度
的幾個問題及獨立檢察機關的職責
最後報告

(1987年6月12日經執行委員會通過)

中華人民共和國香港特別行政區基本法諮詢委員會
政制專責小組

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(甲)　前言

1.　一九九七年香港主權回歸中國後，香港在「一國兩制」之下會出現新的政治局面。《中英聯合聲明》規定「除外交和國防事務屬中央人民政府管理外，香港特別行政區享有行政管理權、立法權、獨立的司法權和終審權。」(附件一第一節)。我們可以設想原在香港實行的司法制度雖予以保留，但因為香港特別行政區法院享有終審權，一定會產生某些變化。

2.　在現有的司法制度下，經低層法院審理的案件可上訴至高層法院。當香港最高法院上訴庭已作出判決後，案件仍可向倫敦樞密院的司法委員會繼續上訴。

3.　目前，樞密院就香港發生的案件享有終審權，但香港特別行政區成立後，情況則會由於主權回歸中國而有所改變。向樞密院上訴的權利將被廢除。香港特別行政區需在本地成立終審法院，香港的案件將由該法院作出終審。

4.　根據一般構想，一終審法院將在並應在一九九七年前在香港特區設立，以確保司法制度的順利過渡，而這問題應交由適當的部門考慮。

(乙)　終審法院：

5.　在《中英聯合聲明》中，有關特區司法制度及終審法院的條文如下：

i.　附件一第一節規定：「香港特別行政區享有行政管理權、立法權、獨立的司法權和終審權」。

ii.　附件一第三節規定：「香港特別行政區成立後，除因香港特別行政區法院享有終審權而產生的變化外，原有香港實行的司法體制予以保留」。

iii.　「香港特別行政區的審判權屬於香港特別行政區法院。法院獨立進行審判，不受任何干涉」。

iv.　「香港特別行政區的終審權屬於香港特別行政區終審法院。終審法院可根據需要邀請其他普通法適用地區的法官參加審判」。

6.　法官人數

為配合其他司法管轄區的做法及確保實際可行，終審法院審理任何一宗上訴案件時，庭上應有五名法官。參加審判的法官人數應是單數，以便在法官意見不一時，也易於解決。

7.　法官的任命

此問題在本文丙項，特別是第14及23段，有所詳述。原則上，上訴法院的法官不應同時擔任終審法院的法官，所以應指定是終審法院法官的任命，而該法院的法官不得參加上訴法院的審判工作。

8.　終審法院的首席法官

首席按察司應擔任終審法院的首席法官，由於終審法院的法官不得兼任上訴庭按察司或原訟庭按察司，首席按察司只能參加終審法院的審判工作。

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9. 增加常設法官

預料除首席法官外，終審法院還包括兩名常設法官。常設法官的人數可繼續增加，但基本目的是希望終審法院能達到並維持最高司法標準。

10. 邀請其他普通法適用地區的法官

i. 《中英聯合聲明》規定終審法院可邀請其他普通法適用地區的法官參加審判。香港特別行政區應擬定一份其他普通法適用地區的法官的名單，而且名單要經常增補修訂。司法人員叙用委員會應負責擬定此法官名單。

ii. 在把任何法官列入名單之前，應先徵得該法官本人同意。

iii. 名單應包括大約二十名其他普通法適用地區的法官。

iv. 從其他普通法適用地區邀請的法官，不應是終審法院的常設法官，因為《中英聯合聲明》並無此規定；況且，常設性的邀任會減少其他普通法適用地區法官在特區貢獻的機會。

11. 選用負責審訊的法官

i. 正按察司與終審法院常設法官協商後，可選用及邀請法官參加審判任何上訴案件。選用及邀請法官時可考慮以下因素：

a. 在該段時間內，有多少名法官可參加審判工作。

b. 根據該法官的專長，選用適合審判該上訴案件的法官。

ii. 應遠在審訊前好一段時間，選定將在終審法院審判該案件的法官。終審法院在一短時期內審判的多宗案件，不必每次更換法官。

iii. 在九七年後的五十年內，常設法官與外聘法官的比例應可靈活改變。

iv. 初期的適當比例：負責審判任何一宗上訴案件的法官應包括從首席按察司及常設法官中選任的法官兩名、及從其他普通法適用地區邀請的法官三名。

v. 有建議認為常設法官對外聘法官的比例應不時由特區的本地法例確定。

vi. 有意見認為，促進及維持一個由常設立法官組成的穩固的本地司法架構是非常重要，而從其他普通法適用地區邀請的法官人數亦應維持不變，以鞏固各界人士對香港法律制度的信心，各界人士不但指香港居民，更包括國際上的投資者及貿易國家。因此，必須定出終審法院外聘法官對常設法官的最低比例。

vii. 選任法官的方法，除了由首席按察司與常設法官協商後決定外，還可以由首席按察司單獨選任，但他須從司法人員叙用委員會所擬定的法官人選名單中選任。

12. 終審法院的審訊應是非常設性的。

13. 所有案件都可向終審法院上訴，但事前必須獲得許可：應由上訴法院發出許可，或經向終審法院申請獲得許可。有關許可的申請應由不少於兩名法官審議。可獲終審法院上訴權的案件，必須涉及對一般人或公衆極為重要的事件，或涉及對一般公衆十分重要的法律要點。至於是否涉及某金額以上的糾紛即自動獲得終審法院上訴權，則意見不一。以金額為標準的做法應保留一段時間，但必須經常檢討。

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(丙) 司法人員的任免

14. 有關將來法官的任命的罷免，在聯合聲明附件一第三節中有以下規定：

「香港特別行政區法院的法官，根據當地法官和法律界及其他方面知名人士組成的獨立委員會的推薦，由行政長官予以任命。法官應根據本人的司法才能選用，並可從其他普通法適用地區聘用。法官只有在無力履行職責或行為不檢的情況下，才能由行政長官根據終審法院首席法官任命的不少於三名當地法官組成的審議庭的建議，予以免職。主要法官(即最高一級法官)的任命和免職，還須由行政長官徵得香港特別行政區立法機關的同意並報全國人民代表大會常務委員會備案。法官以外的其他司法人員的任免制度繼續保持」。

15. 根據現時情況，司法人員叙用委員會的功能是負責就填補司法職位空缺的事宜，向港督提供意見。此類空缺包括由上訴法院法官至裁判司的職位。

16. 司法人員叙用委員會條例第九十二條規定該委員會的所有決議，均須得到成員一致贊成，否則不能通過。此項規例應予以保留。

17. 現時的司法人員叙用委員會條例應在一九九七年後繼續保留，而現時的司法人員叙用委員會應基本保持不變。

18. 目前該委員會的成員包括：

a. 正按察司(為委員會主席)；

b. 律政司

c. 公務員叙用委員會主席；

d. 由港督委任不多於三名委員，其中一名可以是高等法院的法官。

19. 有委員提議大律師公會及律師會理事會應各提名一名成員。

20. 最理想的委員會成員數目為六名或不超過七名。現時的平衡情況不應有任何急劇變動。

21. 除當然委員外，委員會的委員應有三年至四年的任期，但不能連任。

22. 委員會所討論的內容，應高度保密。

23. 《中英聯合聲明》中所指的「主要法官(即最高一級法官)」應被解釋為終審法院的法官。一位委員則認為「主要法官」一辭應指高等法院及以上的法官。

24. 《中英聯合聲明》中有關罷免法官所提到的「行為不檢」一辭，應有明確的界定及解釋。

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25. 在九七年後，立法機關對任命及罷免法官事宜，應根據簡單大多數的投票方式決定。

(丁) 獨立的檢察機關的職責

26. 現時的地位

現時在香港律政司的地位已在本文附件一中詳述。

雖然律政司的某些職責與司法部長相同，但兩者的職責不盡相同，兩者的角色亦有基本上的分別。司法部長的職責除了包括律政司的職務外（律政司可以是他管轄權之下的一名官員），亦需負責有關入境、治安、法院行政、監獄、或警察等事務。

27. 將來的地位：

《中英聯合聲明》附件一第三節指出，「香港特別行政區的檢察機關主管刑事檢察工作，不受任何干涉。」按現時的制度，律政司可以給予刑事檢察專員一般指示。但根據法例，律政司是掌管檢察工作的，而他運用他的權力和履行任務以令檢察工作不受任何干涉。有建議認為應保持現有制度，亦有建議指出，將來的律政司可能是政治任命，故應設立一獨立的檢察機關，該機關的主管是法定的，完全獨立於律政司，不受任何干涉。

擔任該職位的人士可按以下情況，決定是否對某刑事案件提出檢控：

i.有表面証據的案件；

ii.有合理的定罪可能性；

iii.以上兩點應以同樣標準適用於任何人士；

iv.若檢察機關認為不對某件案件提出起訴是對公衆有利時，檢察機關有權決定不提出檢控。

v.檢察機關的權力及其對任何案件的決定，都不應受到任何人士或機關的質詢。

28. 基本法的內容

基本法內應有條文規定特區將有一獨立檢察機關，主管刑事檢察工作，不受任何干涉。

(戊) 將來律政司的職責

29. 律政司的職責和責任應由將來特區本地的法律規劃。

30. 本小組曾就應否設立司法部長問題進行討論，討論結果認為在香港的情況下如把現時由各司級官員擔任的職務合併一起，將不會導致任何好處。再者，倘若司法部長享有更大權力，現時律政司的權力將會與之混淆或重複。有人擔心司法部長權力過大。委員認為一名官員不應同時擁有有關司法、法律及治安的權力。如果將來特區同時設有司法部長及律政司的職位，兩者的職責應明確劃分，尤其是律政司的職責。因此，律政司的職權不應擴及司法部長的職權範圍。

* 本報告的討論過程以英語進行，故可參考英文本。

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附件一

香港律政司的角色
(翻譯本)

前言

1. 律政司一職歷史悠久，但起源不詳。據說由於君主不能親自在其法庭中出現，故需有一名律政司作為君主的代表。此類安排始於一二五零年。律政司的正式職銜則產生於一四六一年。自此以後，律政司的權力及職責在普通法律體系下逐漸發展，世界多個國家（包括一些與普通法沒有直接關係的國家）陸續採納律政司這概念，並根據本地情況作出修訂。

香港現況

2. 律政司是由外交及聯邦事務大臣與港督商議後委任的；律政司的任命並無正式的資格要求，律政司通常都是由律政署的官員擔任，但前兩任的律政司却是署外人士。律政司是行政局及立法局的當然官守議員，亦是律政署的最高負責人。律政署包括五個部門：政策及行政科、民事檢察科、法律草擬科、刑事檢控科、律政專員（專責事務）。律政司是港督、政府及個別政府部門和機構的主要法律顧問、大律師公會的名義會長。此外，律政司還擁有與刑事訴訟有關及作為公眾利益守護者所需的廣泛權力、義務和責任。律政司在起訴香港政府的民事案件中擔任被告的角色，並在法庭上代表政府及公眾。他亦是法律改革委員會的主席及司法人員叙用委員會的成員、警察投訴委員會及廉政公署屬下之行動審查委員會的成員。

3. 律政司享有提出刑事訴訟的全面權力。不少成文法均指定需徵得律政司的同意及批准。他有權提出當然的刑事起訴、接手處理由私人提出的訴訟、及撤回訴訟。他亦有權提出上訴，及把法律問題提交上訴法院處理。除此之外，他亦有權令任何人士免於公訴。

4. 廣義來看，作為公眾利益的守護者，律政司擔任一正式而重要的角色 -- 為維持公眾的法律權利，以原告身份提出控訴。當案件涉及皇室的特權時，律政司有權干預。他擔任多個調查法庭的法律顧問，代表公眾利益。所有為維護慈善及公眾信託財產的訴訟，都必須得到律政司的參與。律政司另一個更廣泛代表公眾利益的角色，是所謂「法庭之友」 -- 協助法庭解決問題的人。其中主要的例子就是令法庭注意到藐視法庭的情況。

5. 當律政司執行準司法及有關公眾利益的職責及任務時，不得受任何人士或團體的指示或控制。他是完全獨立的。

6. 作為行政局的主要成員，律政司參與最高層的政策制定。他亦是布政司屬下法律事務政策組的主席，該小組負責就法律政策問題向政府提供意見。

7. 律政司須負責多種不同的職務，但在時間許可下，他亦會就有關憲法及公衆重大利益的案件，在法庭上親自代表香港政府(或偶然代表外國政府)。

律政司在其他法律地區的地位

8. 愛德華茲教授在他的權威教科書《律政司：政治及公衆利益》 (The Attorney General, Politics and the Public Interest) 中，指出「司法行政這大題目可劃分成多個相關的範圍，不同國家對這些範圍採用不同的責任分配方法。主要的範圍包括：(1)警察及執法；(2)提出及處理起訴；(3)法院(包括司法人員的任命及律師行業)；(4)在法庭或審裁處的政府及國家代表；(5)刑罰制度；(6)向政府及政府機構提供的法律諮詢；(7)法例草擬及法律改革。」愛德華茲教授繼而提出以下問題：「究竟這些多樣化的職務應該集於一身，還是由不同部門分擔?」★

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★ J. LL. J. Edwards, LL. D. Sweet & Maxwell 1984 (see also The Law Officers of the Crown: J. LL. J. Edwards. Sweet & Maxwell 1964).