

**Legislative Council  
of the  
Hong Kong Special Administrative Region**

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**Delegation of the  
Panel on Constitutional Affairs**

**Report on duty visit to study the  
systems of executive accountability  
in the United Kingdom, France  
and Germany**

**13 - 24 June 2001**

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### **References**

## **Acknowledgements**

The delegation wishes to thank all the distinguished individuals, including Members of Parliament, Ministers, senior civil servants, parliamentary staff and academics, with whom the delegation met during its visit to Edinburgh, Glasgow, London, Paris, Berlin and Heidelberg from 13 to 24 June 2001.

The delegation is most grateful that they have spared their time to exchange views and ideas with the delegation.

The delegation wishes also to thank the Consuls-General of the United Kingdom, France and Germany in the Hong Kong Special Administrative Region, and the Hong Kong Economic and Trade Offices in London and Brussels for their kind assistance in putting together the visit programme and making the logistical arrangements.

## Chapter 1 : Introduction

### Purpose of report

1.1 A delegation of the Panel of Constitutional Affairs earlier undertook a duty visit to study the systems of executive accountability in the United Kingdom (UK), France and Germany. This report presents the main findings and observations of the delegation.

### Membership of the delegation

1.2 The delegation comprised the following Members -

Hon Andrew WONG Wang-fat, JP  
(Panel Chairman and leader of delegation)  
Hon HUI Cheung-ching, JP  
Hon YEUNG Yiu-chung, BBS

1.3 Mr Paul WOO, Senior Assistant Secretary (2)3, accompanied the delegation on the visit.

### Visit programme

1.4 The delegation visited Edinburgh, Glasgow, London, Paris, Berlin and Heidelberg from 13 to 24 June 2001. The delegation met with members of the legislatures concerned, Ministers, senior civil servants, parliamentary staff as well as academics. Details of the programme of the visit are in **Appendix I**.

### Background

#### Report on "The Development of the Political System of the Hong Kong Special Administrative Region"

1.5 In the last legislative session, the Panel presented a report entitled "The Development of the Political System of the Hong Kong Special Administrative Region" to the Legislative Council (LegCo). The Panel recommended, inter alia, that the Government should explore the feasibility of developing constitutional conventions under which principal officials should voluntarily resign as a result of having committed serious mistakes in the formulation or implementation of government policies. A debate on a motion calling upon the Government to consider the views of Members on the report was held at the Council meeting on 14 June 2000. The motion was carried by the Council.

## Chief Executive's Policy Address in October 2000

1.6 In his Policy Address delivered in October 2000, the Chief Executive (CE) announced that the Government would need to examine how the accountability of principal officials for their respective policy portfolios could be enhanced. The Government would need to consider devising a compatible system of appointment for these principal officials, setting out their powers and responsibilities and at the same time defining clearly their role in formulating and implementing government policies under the new system.

1.7 The Panel is of the view that CE's announcement of a new accountability system is a positive step responding to the Panel's recommendations on the development of the political system of the Hong Kong Special Administrative Region. The Panel considers that it should deliberate the issues relating to a system of accountability for principal officials and make recommendations for the consideration of the Administration.

### Public consultation

1.8 To gauge public views on a system of accountability for principal officials, the Panel conducted a public consultation exercise in the current legislative session.

### Overseas duty visit

1.9 The Panel also decided to send a delegation to visit UK (Edinburgh, Glasgow and London), France (Paris) and Germany (Berlin and Heidelberg) to study their systems of executive accountability.

1.10 These places were chosen because UK, France and Germany feature different criteria of eligibility for appointment as executive Ministers or principal officials. The Panel would also like to obtain some information on the devolution to the Scottish Parliament. In UK, executive Ministers are all appointed from Members of Parliament. In France, the executive and legislative roles are incompatible. In the event that a Member of Parliament is appointed as an executive Minister, the Member must resign from the legislature. In Germany, executive Ministers may, but not necessarily be, members of the legislature.

## **Chapter 2 : United Kingdom**

### **Background**

2.1 The Head of State of the United Kingdom (UK) is the Monarch. In reality, the Monarch acts on the advice of her Ministers.

2.2 The Prime Minister, who is appointed by the Monarch, is the Head of Government. By convention, the Prime Minister is always a Member of the House of Commons. Ministers are appointed by the Monarch on the recommendation of the Prime Minister.

2.3 The Prime Minister presides over the Cabinet and is responsible for allocating functions among Ministers. The Cabinet may include both departmental and non-departmental Ministers. Cabinet Committees are created to assist the Cabinet in its work. Members of these Cabinet Committees include Cabinet Ministers and non-Cabinet Ministers.

2.4 A political party that wins a majority of seats in the House of Commons in a general election is called on to form the next Government.

### **Meetings in London**

2.5 Meetings were held with the following individuals during the delegation's visit to London from 16 to 18 June 2001 -

- (a) Mr Liam LAURENCE SMYTH, Deputy Principal Clerk, House of Commons;
- (b) Ms Eve SAMSON, Adviser on Parliamentary Procedure, Cabinet Office; and
- (c) Mr Tony MEDAWAR, Deputy Director, Cabinet Office Central Secretariat.

2.6 The major issues discussed are summarised in the following paragraphs.

### **Ministers**

2.7 Ministers are political appointees. The ministerial head of a department of state may be called a Secretary of State. Departmental Ministers (about 20 in number), or Secretaries of State, are usually in the Cabinet. The Minister in charge of a department alone is answerable to

Parliament for the exercise of the powers on which the administration of that department depends.

2.8 The deputy of a Departmental Minister or Secretary of State is a Minister of State. They are middle-ranking Ministers. Almost all departments now have at least one Minister of State. All Ministers of State take charge of a particular section of a department, and are given particular tasks by their ministerial chief. At the bottom of the departmental ministerial hierarchy are the Parliamentary Under-Secretaries of State or simply Parliamentary Secretaries. The number of Ministers outside the Cabinet was some 85 in 1999.

2.9 There are some non-Departmental Ministers who are holders of various traditional offices, such as the Chancellor of the Duchy of Lancaster is Minister for the Cabinet Office. The Lord Chancellor is both a Departmental Minister and the head of the judiciary.

2.10 A Minister may appoint a Parliamentary Private Secretary (PPS) from the ranks of government backbenchers. A PPS advises his Minister on the state of parliamentary opinion, acts as a two-way channel of communication between Members of Parliament and his Minister, and generally assists the Minister with whatever parliamentary work he requires. PPSs are not Ministers. They are not paid and have no official departmental status.

2.11 Since the 1970s Ministers have also taken to appointing one or two personal advisers. They may be political advisers brought in from outside Whitehall to give the Minister help with implementing that part of the government's election programme for which he has direct responsibility. Political advisers are paid from party funds and are not civil servants. Special advisers may also be engaged by a Minister to give independent, non-party political, advice. They are given terms of appointment similar to those of civil servants. All personal advisers leave the department with the Minister.

2.12 A Minister also has his Private Office. The Private Office of a Minister consists of a Principal Private Secretary and up to 10 other civil servants, including clerks; a junior Minister's Private Office contains about four officials. The senior members of the Private Office are young members of the Civil Service and high-fliers. The Principal Private Secretary, as head of the Private Office, has the key functions of keeping the Minister's diary, making appointments, controlling the flow of papers to and from the Minister's desk and accompanying him to meetings and on visits. The Private Office is the main conduit between the Minister and the rest of the officials in the department and in Whitehall.

2.13 Ministers consult the Prime Minister on the appointment of heads of non-ministerial departments. The Prime Minister will need to be informed

about the particular requirements of the posts, the essential attributes of a candidate and the extent to which the proposed candidates meet such requirements.

## **Ministerial accountability**

### Collective responsibility and individual responsibility

2.14 Ministerial responsibilities are largely regulated through constitutional conventions. One of the major constitutional conventions in UK is that Ministers are accountable to Parliament, and through Parliament to the public. Ministerial responsibility takes two forms - Ministers' collective responsibility for government policy and Ministers' individual responsibility for their own department's work. The ultimate sanction in both cases is the forced resignation of the Government as a whole or of an individual respectively.

2.15 The modern form of individual ministerial responsibility has two parts. The first addresses the Minister's political or administrative competence; the second is his personal morality.

2.16 The competence rule originally held that Ministers should be answerable to Parliament for every action undertaken by their department's civil servants. Ministers took the credit or the blame depending upon the performance of their civil servants. If an error was sufficiently serious, a Minister would be expected to resign. Individual civil servants would not face parliamentary scrutiny or public criticism for their own failures. All they had to face were managerial or disciplinary sanctions within their departments. Developments since the last two decades have redefined this rule to require a Minister to have personal knowledge of the gross errors committed by their civil servants.

2.17 Ministers might need to resign if they have done something morally unacceptable. Public opinion always associates ministerial competence with the way a Minister conducts his personal life. If he commits an immoral act, it reflects that he is unfit for office.

2.18 There are three main rules of convention governing collective ministerial responsibility. They are the confidence rule, the unanimity rule and the confidentiality rule.

2.19 The confidence rule requires a Government to resign if it cannot command majority support from the House of Commons. In UK, there used to be a convention that a Government was obliged to resign or seek a dissolution following a defeat on an important issue in the House of Commons. However, the current practice appears to require a Government to resign or seek a dissolution following a defeat on a confidence motion.

2.20 The unanimity rule requires all Cabinet Ministers to offer whole-hearted public support for all Cabinet decisions, even if a Minister opposes the policy concerned in the Cabinet. If a Minister finds a particular policy unacceptable, he will resign from the office. The convention demands collective loyalty to collective decisions.

2.21 The internal process through which a decision has been made should not be disclosed. Collective responsibility requires that the privacy of opinions expressed in, say, Cabinet Committees, should be maintained. Ministers should also take the necessary steps to ensure that they and their staff preserve the privacy of Cabinet business and protect the security of government documents.

2.22 PPSs (paragraph 2.10 above refers) are also bound by collective ministerial responsibility. The close and confidential association between PPSs and the Ministers imposes certain obligations on them. Official information given to PPSs should generally be limited to what is necessary for the discharge of their parliamentary and political duties. They should not have access to information graded secret or above, except on the personal authority of the Prime Minister. PPSs are expected to support the Government. No PPS who votes against the Government may retain his/her position. PPSs are not precluded from serving on select committees, but they should not do so in the case of inquiries into their own Ministers' departments and they should avoid associating themselves with recommendations critical of or embarrassing to the Government. They must also not associate themselves with particular groups advocating special policies.

### Ministerial Code

2.23 In 1996, the Public Service Committee of the House of Commons made an enquiry into ministerial accountability and responsibility. The enquiry was prompted by the publication of the conclusions of Sir Richard Scott's Inquiry into the Export of Defence-Related Equipment and Dual-Use Goods to Iraq and Related Prosecutions. In this inquiry, Sir Richard Scott was also asked to determine whether Ministers had acted according to the requirements of the convention of ministerial responsibility. In his report to the House of Commons, Sir Richard Scott stated that the essence of ministerial accountability lay not in the threat of resignation but in the obligation to inform Parliament.

2.24 In his report, Sir Richard Scott proposed to the House of Commons to adopt a resolution on accountability, the purpose of which would be to underline the obligation of Ministers and civil servants "to be open with the House and not to mislead it".

2.25 The Government counter-proposed a resolution which took out "civil

servants" from the resolution. The resolution was a written confirmation of the obligation of Ministers to provide accurate information to Parliament, failure of which would result in resignation of Ministers. It enabled Parliament to claim its authority over the executive.

2.26 The resolution on ministerial accountability proposed by the Government was passed by the House of Commons on 19 March 1997. A similar resolution was passed by the House of Lords on 20 March 1997. The UK Government formally incorporated the text of the resolution in a new Ministerial Code (1997) which replaced the previous ministerial rulebook entitled "Questions of Procedure for Ministers". The Ministerial Code is not legally binding.

2.27 Under the new Ministerial Code (**Appendix II** refers), which is a code of conduct and also gives guidance on procedures for Ministers, Ministers are expected, among other things -

"to behave according to the highest standards of constitutional and personal conduct in the performance of their duties. In particular, they must observe the following principles of Ministerial conduct :

- (i) Ministers must uphold the principle of collective responsibility;
- (ii) Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their Departments and Next Steps Agencies;
- (iii) It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister;
- (iv) Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute and the Government's Code of Practice and Access to Government Information (Second Edition, January 1997);
- (v) Similarly, Ministers should require civil servants who give evidence before Parliamentary Committees on their behalf and under their directions to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code (January 1996);

- (vi) Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;
- (vii) Ministers should avoid accepting any gift or hospitality which might, or might reasonably appear to, compromise their judgement or place them under an improper obligation;
- (viii) Ministers in the House of Commons must keep their separate role as Minister and Constituency Member;
- (ix) Ministers must not use resources for party political purposes. They must uphold the political impartiality of the Civil Service, and not ask civil servants to act in any way which would conflict with the Civil Service Code".

2.28 The Code of Practice on Access to Government Information commits government departments, agencies and executive public bodies within the jurisdiction of the Parliamentary Commissioner for Administration to volunteer information, such as facts and analysis behind major policy decisions, and to answer requests for information.

### **Ministers' party and private interests**

2.29 The Ministerial Code provides specific guidance to Ministers on dealing with their party and private interests. For instance, it is stated in the Code that it is wrong for Ministers to use facilities provided at government expense to enable them to carry out their official duties for party or constituency work. Where Ministers have to take decisions within their departments which might have an impact on their own constituencies, they should take particular care to avoid any possible conflict of interest. Where a complaint from a constituent is against the Minister's own department, the Minister will generally investigate it personally, unless he or she, or one of the other Ministers in the department, is directly involved in the case. Where a Minister has been so involved, the Parliamentary Commissioner for Administration should be asked to investigate if the case is within his jurisdiction. There may be other circumstances in which a Minister will prefer to refer a case to the Parliamentary Commissioner for Administration straight away.

2.30 Ministers must also order their affairs so that no conflict arises or is thought to arise between their private interests (financial or otherwise) and their public duties. Ministers who are partners in professional firms or in other businesses should, on taking up office, cease to practise or to play any part in the day-to-day management of the firm's affairs. Ministers must resign any directorships they hold when they take up office. They have to file returns with the Register of Members' Interests as Members of Parliament. Also,

when taking up office, Ministers should give up any other public appointments they may hold. The Prime Minister must be consulted where it is proposed that such appointments should be retained. Furthermore, Ministers should not become associated with non-public organisations whose objectives may in any degree conflict with government policy.

2.31 Where it is proper for a Minister to retain any private interest, the rule is that he or she should declare that interest to ministerial colleagues if they have to discuss public business in any way affecting it, and that the Minister should remain entirely detached from the consideration of that business. Ministers are bound by the Criminal Justice Act 1993 in relation to the use or transmission of unpublished price-sensitive information obtained by virtue of their office.

2.32 On leaving office, Ministers should seek advice from the independent Advisory Committee on Business Appointments about any appointments they wish to take up within two years of leaving office. Normally a former Minister must wait three months. If the Advisory Committee considers that an appointment could lead to public concern that the decisions of the Minister, when in Government, have been influenced by the expectation of future employment with the organisation concerned, or that an employer could make improper use of official information to which a former Minister has had access, it may recommend a delay of up to two years before the appointment is taken up.

### **Ministers pay and conditions**

2.33 Ministers are paid a ministerial salary appropriate to the ministerial post held. Ministerial salaries are prescribed by Order in Council under the Ministerial and Other Salaries Act 1975. Under that Act (as amended) ministerial salaries are increased by the same percentage rise as that awarded to a civil servant at the mid-point in the senior civil servant pay band. The Act provides for maximum salaries, and less may be paid.

2.34 As at April 2001, the Prime Minister is entitled to an annual ministerial salary of £113,596<sup>1</sup>; Cabinet Ministers are entitled to a ministerial salary of £68,157<sup>2</sup>; Ministers of State receive a salary of £35,356<sup>3</sup> and Parliamentary Secretaries receive a ministerial salary of £26,835<sup>4</sup>. Those Ministers who are Members of Parliament (and, in practice, this is nearly all the Ministers) also

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<sup>1</sup> About HK\$1,273,411 (£1 = HK\$11.21)

<sup>2</sup> About HK\$764,040 (£1 = HK\$11.21)

<sup>3</sup> About HK\$396,341 (£1 = HK\$11.21)

<sup>4</sup> About HK\$300,820 (£1 = HK\$11.21)

receive the full parliamentary salary which is £49,822<sup>5</sup>. This means that Cabinet Ministers, for example, are entitled to a total salary of £117,979<sup>6</sup>.

2.35 Following the 1997 election, Cabinet Ministers decided to forego the increases in ministerial salaries which were due to come into effect immediately after the election. They chose instead to draw salaries at the pre-election rates which have since been uprated by cost-of-living increases. The Prime Minister, for example, currently draws only £66,517<sup>7</sup> of his ministerial salary, and Cabinet Ministers in the Commons are drawing only £49,971<sup>8</sup>. The Cabinet has yet to decide whether Ministers will accept their full salary entitlement in 2001-2002.

2.36 Various allowances covering travel, subsistence and office expenses are available to Ministers, Members of House of Commons and House of Lords.

2.37 On leaving office, Ministers are entitled to a severance payment of one quarter of final salary, providing that the individual has not reached the age of 65 and is not appointed to another paid office in either House within a period of three weeks. Under the Ministerial Code, Ministers may also participate in the Parliamentary Contributory Pension Fund.

## **Ministers and Civil Servants**

2.38 Ministers have a duty to give fair consideration and due weight to informed and impartial advice from civil servants, a duty to uphold the political impartiality of the Civil Service and not to ask civil servants to act in any way which would conflict with the Civil Service Code, and a duty to ensure that influence over appointments is not abused for partisan purposes. Ministers should not ask civil servants to attend or take part in party conferences or meetings of policy groups of any of the parliamentary parties. It is an established principle in the public service that civil servants in their official capacity should not accept invitations to conferences convened by, or under the aegis of, party political organisations.

2.39 Permanent heads of departments and the chief executives of executive agencies are appointed as Accounting Officers (AOs) (similar to the Controlling Officers in Hong Kong). The essence of the role is a personal responsibility for all matters of financial propriety and regularity, for keeping proper accounts, and for the efficient and effective use of resources. AOs answer personally to the Committee of Public Accounts on these matters,

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<sup>5</sup> About HK\$558,505 (£1 = HK\$11.21)

<sup>6</sup> About HK\$1,322,545 (£1 = HK\$11.21)

<sup>7</sup> About HK\$745,656 (£1 = HK\$11.21)

<sup>8</sup> About HK\$560,175 (£1 = HK\$11.21)

within the framework of ministerial accountability to Parliament for the policies, actions and conduct of their departments.

2.40 If a Minister in charge of a department is contemplating a course of action which the AO considers would breach the requirements of propriety or regularity, the AO will set out the objection to the proposal, the reasons for the objection and that it is his duty to inform the Comptroller and Auditor General (C&AG) should the advice be overruled. If the Minister decides nonetheless to proceed, the AO will seek a written instruction to take the action in question and send the relevant documents to the C&AG.

### **Comptroller and Auditor General**

2.41 The C&AG is an officer of the House of Commons, who is appointed by the Monarch on an address presented by the House of Commons. The C&AG heads the National Audit Office (NAO) which reports to Parliament on the spending of central government money. Reports of the NAO are investigated further by the Committee on Public Accounts. The removal of C&AG is by the Monarch on a resolution of both Houses of Parliament.

### **The Civil Service**

#### Civil servants

2.42 Civil servants are servants of the Crown; in effect this means the UK Government, the Scottish Executive and the National Assembly for Wales. The executive powers of the Crown are generally exercised by Ministers of the Crown, Scottish Ministers and Secretaries of the National Assembly for Wales, who are in turn answerable to the relevant Parliament or Assembly. As at 1 October 2000, there were about 479 000 permanent civil servants, including approximately 11 000 civil servants working in the Scottish Executive.

2.43 The responsibility for central co-ordination and management of the Civil Service lies with the Prime Minister as Minister for the Civil Service. The Prime Minister is supported by the Cabinet Office led by the Head of Home Civil Service who is the Chairman of the Civil Service Management Board.

2.44 The Prime Minister is responsible for appointments to the two most senior grades in the Home Civil Service i.e. the Permanent Secretary and Deputy Secretary, on the recommendation of the Head of Home Civil Service. In this task, the Prime Minister and the Head of Home Civil Service are supported by the Senior Appointments Selection Commission.

2.45 The Civil Service Commissioners, who are independent of the Government, produce mandatory recruitment code and are responsible for approving appointments through external recruitment to the Senior Civil Service.

2.46 Civil servants, except in the role of AOs, have no direct responsibility to Parliament. Parliament has no role to play in the appointment and removal of civil servants. Civil servants are responsible to their Ministers. However, disciplinary proceedings taken against civil servants as provided for in the Civil Service Code are not initiated by the Ministers nor Parliament, but by the relevant departments or agencies. Disputed issues, if not resolved at the departmental level, will be brought to the Head of Home Civil Service and ultimately to the Civil Service Commissioners.

### Civil Service Code

2.47 The Civil Service Code (**Appendix III**) sets out the constitutional framework within which all civil servants work and the values they are expected to uphold. It came into force on 1 January 1996, and forms part of the terms and conditions of employment of every civil servant. It was revised on 13 May 1999 to take account of devolution to Scotland and Wales. The salient features of the Code are as follows -

- (a) The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the Government of the United Kingdom, the Scottish Executive or the National Assembly for Wales in formulating their policies, carrying out decisions and in administering public services for which they are responsible. Civil servants owe their loyalty to the Administrations in which they serve;
- (b) Civil servants should serve their Administration, recognising:
  - (i) the accountability of civil servants to the Minister or, as the case may be, to the Assembly Secretaries and the National Assembly as a body or to the office holder in charge of their department;
  - (ii) the duty of all public officers to discharge public functions reasonably and according to the law;
  - (iii) the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice; and
  - (iv) ethical standards governing particular professions;

- (c) Civil servants should conduct themselves with integrity, impartiality and honesty. They should give honest and impartial advice to the Minister without fear or favour, and make available all information relevant to a decision. They should not deceive or knowingly mislead Ministers, Parliament, the National Assembly or the public;
- (d) Civil servants should endeavour to deal with the affairs of the public sympathetically, efficiently, promptly and without bias or maladministration. They should also endeavour to ensure the proper, effective and efficient use of public money;
- (e) Civil servants should not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. They should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgment or integrity;
- (f) Civil servants should comply with restrictions on their political activities. They should not without authority disclose official information which has been communicated in confidence within the Administration, or received in confidence from others. They should continue to observe their duties of confidentiality after they have left Crown employment; and
- (g) Civil servants should not seek to frustrate the policies, decisions or actions of the Administration. Where a civil servant believes he or she is required to act unlawfully, unethically, or in a way which is in breach of constitutional convention or a professional code or otherwise inconsistent with the Civil Service Code, he or she should report the matter in accordance with procedures laid down in the appropriate guidance or rules of conduct.

2.48 At present, the Civil Service Code is not legislation. However, according to Mr Tony MEDAWAR, the Deputy Director of the Cabinet Office Central Secretariat, the Prime Minister has made a commitment to introduce primary legislation on the Code in the near future.

### Senior Civil Service

2.49 The Senior Civil Service (SCS) was formed on 1 April 1996, and covers 3 000 or so most senior managers and policy advisers in the Civil Service. A new pay system was introduced at the same time whereby the old grade-related salary scales were replaced by a single pay range for Permanent Secretaries and by nine overlapping pay bands for the rest of the SCS. For instance, the pay

range of Permanent Secretaries as at 1 April 2000 was £101,254<sup>9</sup> (minimum) to £173,808<sup>10</sup> (maximum).

2.50 Permanent Secretaries' salaries are determined by the Permanent Secretaries Remuneration Committee which advises the Prime Minister. Most members of the SCS have their salaries determined by their own departments, in line with the Government's decisions in response to each year's report by the Senior Salaries Review Body (SSRB).

2.51 The SSRB no longer recommends a general pay increase for senior civil servants each year. Instead it recommends changes to the minima and maxima of the pay bands, and the range of performance-related awards that departments can make to individuals and their broad distribution.

2.52 The Advisory Committee on Business Appointments (paragraph 2.32 above refers) also considers applications from Permanent Secretaries and senior officials immediately below that level regarding acceptance of appointments or employment outside Government after leaving office, and makes recommendations to the Prime Minister. Detailed rules governing acceptance of employment after departure from the Civil Service are set out in the Civil Service Management Code.

### **Maladministration**

2.53 The Parliamentary Commissioner for Administration (or also known as the Ombudsman) was established by the Parliamentary Commissioner Act 1967 to investigate complaints of government activities made by the public. The Parliamentary Commissioner for Administration is only permitted to investigate complaints referred to by a Member of Parliament and the complaints must not be on a matter which can be pursued through legal actions.

2.54 The Parliamentary Commissioner for Administration is given extensive powers by the 1967 Act to examine government documents and ask for testimony from Ministers and civil servants. When an investigation is completed, he sends a report with the findings to the Member of Parliament who referred the complaint. When a complaint is justified, the Ombudsman normally recommends that the department or the body concerned provides redress. There is no appeal against the Ombudsman's decisions. The Commissioner is appointed by the Prime Minister and his dismissal can only be effected by consent by both Houses of Parliament.

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<sup>9</sup> About HK\$1,135,057 (£1 = HK\$11.21)

<sup>10</sup> About HK\$1,948,388 (£1 = HK\$11.21)

## **Parliamentary scrutiny**

### Purpose

2.55 Parliament has at its disposal means of parliamentary scrutiny, including investigatory committees and legislative procedure. Through these the Government is subject to scrutiny by the official opposition which offers itself as a Government-in-waiting, by other parties in opposition, and by all backbench Members of Parliament, including its own supporters.

### Select committees

2.56 Select committees have long been used by the House of Commons to investigate, judge, assess and advise. The work of select committees has increasingly focused upon the Government : the quality of its policies, the effectiveness of its administration, and expenditure of the taxpayer's money.

2.57 At present, there is broadly one committee per government department, and most committees have 11 members. Departmental select committees, which scrutinise the relevant departments and their associated public bodies as well as their programmes, and call upon outside experts and affected parties to examine evidences, make the political process more accessible and provide a vital source of parliamentary accountability. By enabling the questioning of Ministers and civil servants, and asking them to explain policies, select committees are considered an essential means of checking and calling to account the executive.

2.58 Within their powers, and subject to any instruction from the House of Commons, select committees are entirely independent. It is up to them to decide how to do the job, set their priorities, and select and run inquiries. Every committee operates in a different way, and this flexibility is a real strength of the system.

2.59 As a rule, Government's responses to select committee reports, in the form of a point-by-point reply to the issues identified, must be made within two months of the publication of a report. The responsible Minister may be asked to appear before a select committee to further explain and provide follow-up evidence on Government's reply. Debates on select committee reports are also an effective way of focusing the minds of Ministers and officials on a report, and the need to justify the Government's reply.

2.60 However, the actual performance of select committees is not without constraints and difficulties. As noted in the report published in March 2000 by the Liaison Committee established to examine the relationship between the select committees and the executive, select committees have to operate within a constitutional and political framework affected by party loyalty and

organisations. Ministers are at the same time Members of Parliament, and are sustained in office by Parliament. As select committees are bodies created by and subordinate to the House itself, the exercise of their formal powers is eventually subject to the will of the House, in which the Government of the day is likely to have a majority. In reality, select committees vary in their effectiveness, and governmental power has always outstripped parliamentary control.

2.61 The party composition of select committees reflects that in the House, so there is normally a Government majority. Nominations for membership of select committees are put to the House by the Committee of Selection. In practice, this is done on the basis of lists supplied by the Whips, which reflected the relative size and proportion of the parliamentary parties, including the governing party. If the committees were to be independent monitors of Government, their membership should not be in the hands of Government or party organisations. They should be selected to do a job on behalf of the House as a whole. Furthermore, this resulted in some Members having been kept off committees, or removed from them, because of their views. Oppositions as well as the governing party have been guilty of this. The influence of the governing party on the work of select committees therefore has caused much concern.

2.62 According to Mr Liam LAURENCE SMYTH, the Deputy Principal Clerk of the House of Commons, the Liaison Committee is in the course of reviewing the effectiveness of departmental select committees, after 20 years of practical experience, in the context of reform and modernisation of the system. A range of proposals has been proposed, including -

- (a) review of the current system of nominating Members to serve on select committees;
- (b) additional time for debates on select committee reports to take place on substantive motions, soon after the Government's reply has been received;
- (c) enhancement of the role of select committees in relation to pre-legislative scrutiny of draft bills. More time should be allowed for such scrutiny to be of maximum benefit; and
- (d) "confirmation hearings" for major public appointments. Select committees have as yet no formal role in appointments, but hearings of this sort, and the exposure they involve, are proving increasingly influential. Statutory acknowledgement of this process in new legislation will be sought.

The Liaison Committee is currently following up its recommendations with the Government.

## Legislative process

2.63 Bills go through an elaborate procedure, basically the same in both the House of Commons and the House of Lords. On introduction a Government Bill is considered, without debate, to have been read for a first time. After an interval, the Bill will receive its Second Reading, during which the general principles of the Bill are discussed. Following the Second Reading, the Bill goes through a Committee Stage in which it is debated in detail, clause by clause. The Committee Stage may be taken on the floor of the House or by a standing committee. Up to two-thirds of all Government Bills each year are referred to standing committees. The latter are miniatures of the House both in membership and procedure.

2.64 The Committee Stage is followed by the Report Stage, which is then followed by a final look of the Bill as a whole in a Third Reading.

2.65 Although debates on Bills in the House of Commons are often partisan, such debates expose Bills to detailed examination than they would otherwise receive and force Ministers to defend their legislative proposals publicly.

2.66 After passing its Third Reading in one House, the Bill will be sent to the other House, where it goes through all the stages once more. Further amendments made by the second House must be agreed to by the other House first, or a compromise reached, before the Bill can be sent to the Monarch for Royal Assent.

## **Chapter 3 : Devolution to Scotland**

### **Background**

3.1 A referendum, which was held in September 1997, endorsed the establishment of a Scottish Parliament and supported the tax-varying powers of the Parliament. The Scotland Act 1998 provided for the establishment of the Scottish Parliament and the Scottish Executive.

3.2 The Scottish Parliament is made up of 129 Members (MSPs) elected under a proportional representation system. A total of 73 MSPs are elected for a particular local area (single member constituency) and 56 MSPs are elected for eight larger geographical regions. Each region represents a group of constituencies and has seven Members. This makes the Scottish Parliament different from the United Kingdom (UK) Parliament for example, where each person is represented by only one elected Member. The key difference is that each person in Scotland is represented by eight MSPs. One of the MSPs is elected by the Parliament to serve as the Presiding Officer. The work of the Scottish Parliament is supported by its own staff headed by the Clerk known as the Chief Executive. These officials are independent of the Government and act solely on behalf of the Parliament.

3.3 There is no reference in the Scotland Act 1998 to a Scottish Cabinet as such. The Act uses the term Scottish Executive. The Scottish Executive comprises the First Minister, the Scottish Ministers appointed by the First Minister with the approval of the Parliament as well as the Lord Advocate and the Solicitor General. The Lord Advocate and the Solicitor General are also known as the Scottish Law Officers. They advise the Scottish Executive on legal matters and represent its interests in court.

### **Meetings in Scotland**

3.4 The delegation held meetings with the following individuals during the visit to Edinburgh and Glasgow on 14 and 15 June 2001 -

- (a) The Right Honourable Eric MILLIGAN, Lord Provost of the City of Edinburgh (i.e. the Mayor of the City of Edinburgh);
- (b) Mr Jim WALLACE, Deputy First Minister and Minister of Justice (who is also a member of the Scottish Executive);
- (c) Mr Paul GRICE, Chief Executive of the Scottish Parliament (who is equivalent to the Secretary General of the Legislative Council Secretariat);

- (d) Sir David STEEL, Presiding Officer of the Scottish Parliament;  
and
- (e) Professor Richard ROSE, Director, Centre for the Study of Public Policy, Strathclyde University, Glasgow.

3.5 The major issues discussed are summarised in the following paragraphs.

### **The devolution to the Scottish Parliament**

3.6 The devolution to the Scottish Parliament means that Scotland has a Parliament with "devolved" law-making powers within UK. The Scottish Parliament's responsibilities include health, education and training, local government, housing, economic development, many aspects of home affairs and civil and criminal law, transport, the environment, agriculture, fisheries and forestry, sport and the arts. In these areas, the Scottish Parliament is able to amend or repeal existing Acts of Parliament and to pass new legislation.

3.7 The Scottish Parliament operates as a self-contained and fully functional Parliament in its own right. Legislation can be passed by the Scottish Parliament without having to go through the Westminster Parliament, although decisions about "reserved matters" i.e. matters with a UK-wide or international impact are reserved and dealt with at Westminster. These matters include overseas affairs, defence and national security, overall economic and monetary policy, employment legislation and social security. The UK Parliament at Westminster retains the power to legislate on any matter, but a convention of devolution is that the UK Parliament will not normally legislate on devolved matters without the consent of the Scottish Parliament.

3.8 After devolution, Scotland continues to elect Members of Parliament to the Westminster Parliament. The position of Secretary of State for Scotland, with a seat in the Cabinet, continues and carries responsibility for representing Scottish interests within the UK Government through the Scotland Office.

3.9 The working practices of the Parliament are devised through extensive all-party discussion. In November 1997, an all-party Consultative Steering Group was set up to conduct public consultation, commission expert evidence as well as hold meetings. The results of this process were contained in a report entitled "Shaping Scotland's Parliament", which was published in January 1999. The report was used as the blueprint for the Parliament's initial set of Standing Orders. The report sets out, inter alia, the following four key principles -

- (a) Power sharing : the Scottish Parliament should embody and

reflect the sharing of power between the people of Scotland, the legislators and the Scottish Executive;

- (b) Accountability : the Scottish Executive should be accountable to the Scottish Parliament and the Parliament and the Executive should be accountable to the people of Scotland;
- (c) Access and participation : the Scottish Parliament should be accessible, open, responsive and should develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation; and
- (d) Equal opportunities : the Scottish Parliament in its operation and its appointments should recognise the need to operate equal opportunities for all.

3.10 Under a proportional representation system, the Scottish Parliament has at present four major political parties and a number of minority parties represented in it. The effect of this is that it would be difficult for one single political party to be able to command a majority of seats in Parliament, hence resulting in a coalition form of Government. The minority parties are also able to participate actively in the business of Parliament and bring their influence to bear on public policy.

3.11 In the view of Professor Richard ROSE, Director of the Centre for the Study of Public Policy, of the Strathclyde University, the coalition in the Scottish Parliament is ready to support the Government on a large number of important issues of the day. The proportional representation electoral system also brings about consensus among the political parties, and has the effect of warding off calls from the nationalists for independence.

## **Ministers and ministerial accountability**

### Appointment and resignation of Ministers

3.12 In accordance with section 45 of the Scotland Act 1998, the First Minister is nominated by the Scottish Parliament from amongst the MSPs and appointed by the Monarch. This aspect of the legislation was designed to ensure the direct accountability of the head of the executive to the Parliament. The First Minister determines the number of Scottish Ministers and their responsibilities. He can also appoint Junior Scottish Ministers to assist the Scottish Ministers with government business.

3.13 Under the Scotland Act 1998, the First Minister may, with the approval of the Monarch, appoint Scottish Ministers and Junior Scottish Ministers from

among MSPs. The First Minister shall not seek approval for any such appointments without the agreement of the Parliament. In accordance with the Standing Orders of the Scottish Parliament, the First Minister shall by motion seek the agreement of the Parliament for such appointments. It is noteworthy that the Standing Orders do not provide for, say, the holding of hearings on individual ministerial appointments, to allow the Parliament scrutiny of the ministerial team.

3.14 Under the Scotland Act 1998, a Minister may be removed from office by the First Minister. A Minister may at any time resign and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament. In accordance with the Standing Orders of the Scottish Parliament, any Member may give notice of a motion that the Scottish Executive or a member of the Scottish Executive or a Junior Scottish Minister no longer enjoys the confidence of the Parliament.

#### Scottish Ministerial Code

3.15 A code of conduct for Scottish Ministers, the Scottish Ministerial Code (**Appendix IV**), was adopted in July 1999. The Scottish Code, like its UK counterpart, is not a legally binding Code and there is no requirement in the Scotland Act 1998 for the adoption of such codes. The Code states that "Ministers have a duty to the Parliament to account, and be held to account, for the policies and decisions and actions taken within their field of responsibility".

3.16 The Code also recognises the "paramount importance of providing accurate and truthful information to the Parliament" and Ministers who "knowingly misled the Parliament will be expected to offer their resignation to the First Minister". Ministers should be open with the Parliament and the public and refuse to disclose information only when it is in the public interest. Ministers should also require their civil servants to be as helpful as possible in giving evidence to parliamentary committees.

3.17 The Scottish Code and the UK Code are in similar terms. However, the Scottish Code does introduce some purely Scottish elements reflecting the principles recommended by the Consultative Steering Group discussed in paragraph 3.9 above.

#### Scottish Code of Practice on Access to Information

3.18 The Scottish Executive has also adopted a Code of Practice on Access to Information. This Code is borrowed almost directly from the UK Code but tailored to Scottish needs.

3.19 Principles of openness and accessibility and the need to restrict information on the ground of public interest are currently under debate in

Scotland where a Scottish Freedom of Information Bill is proposed. Once it is passed the Freedom of Information Act will replace the Code of Practice on Access to Information.

#### Motion on "Executive accountability to Parliament"

3.20 In November 2000, the Scottish Parliament debated and passed the following motion on "Executive accountability to Parliament" moved by the First Minister -

"That the Parliament notes that the Executive is committed to a policy of openness, accessibility and accountability in all its dealings with the Parliament and its Committees; further notes both the Parliament's right and duty to hold the Executive to account including the power to invoke section 23 of the Scotland Act and the public interest in maintaining the confidentiality of exchanges between officials and Ministers concerning policy advice; observes that other Parliaments with strong freedom of information regimes do not disclose the terms of such exchanges; calls, to that end, for the Executive and the Parliament to observe the following principles:

- (i) consistent with its policy of openness, the Executive should always seek to make as much information as possible publicly available as a matter of course and should respond positively to requests for information from the Parliament and its Committees;
- (ii) officials are accountable to Ministers and Ministers in turn are accountable to the Parliament and it follows that, while officials can provide Committees with factual information, Committees should look to Ministers to account for the policy decisions they have taken;
- (iii) where, exceptionally, Committees find it necessary to scrutinise exchanges between officials and Ministers on policy issues, arrangements should be made to ensure that the confidentiality of these exchanges is respected, and commends these principles to Committees as guidelines to be followed in their dealings with the Executive."

3.21 In moving the motion, the First Minister explained that "our intention today is to stimulate a mature debate about the fundamental principles that should underpin the relationship between the Parliament and the Executive. If the Executive motion is carried, we will have taken a major step forward in setting a robust framework for effective relationships between the legislature and the executive, which will help to enhance the standing of both institutions in the eyes of the people of Scotland".

3.22 The First Minister went on to say that "Good government means open government. It also means responsible government....Our approach to this issue is founded on the belief that relations between ministers and Parliament should be characterised by mutual trust, integrity and confidence : trust between party leaders; trust between party leaders and ministers; trust between ministers and committee conveners; and trust between committee conveners and committee members. Integrity, which the public want to see, is a key characteristic of the Parliament and the Executive".

3.23 The First Minister also said in his speech that "let us be clear about who is accountable to whom. The basic principle that underpins the operation of government is that officials are accountable to ministers and ministers in turn are accountable to the Parliament....Open, accessible and accountable government depends crucially on the relationship between the Parliament and the Executive....Effective parliamentary scrutiny is the cornerstone of democracy".

### **The Civil Service**

3.24 Under the Scotland Act 1998, the holder of any office of in the Scottish Administration which is not a ministerial office shall be from the Home Civil Service. As at 1 October 2000, of the about 479 000 permanent civil servants in UK, approximately 11 000 worked in the Scottish Executive. The UK Civil Service Code was revised in May 1999 to take account of devolution.

### **The Scottish Auditor General**

3.25 The Auditor General (AG) for Scotland, supported by Audit Scotland, is responsible for auditing the expenditure of the Scottish Parliament and Executive. The Scottish Parliament has established an Audit Committee to consider reports from the AG, and to make appropriate recommendations to the Scottish Executive. The AG is appointed by the Monarch following a recommendation from the Scottish Parliament.

### **Maladministration**

3.26 Under the Scotland Act 1998, the Parliament shall make provision for the investigation of relevant complaints made to its Members in respect of any action taken by or on behalf of a member of the Scottish Executive in the exercise of functions conferred on the Scottish Ministers, or any other office-holders in the Scottish Administration.

## **Parliamentary Scrutiny**

### Committee system

3.27 The Scotland Act 1998 is largely silent on the functions and structure of committees that should be established, although it is clear that the use of committee is envisaged since the Parliament is given extensive powers to call for witness and documents under section 23.

3.28 A total of eight key or mandatory committees are required by the Standing Orders. The Parliament can establish other subject committees to deal with a particular subject or area of public policy. A committee usually has between five to 15 MSPs as members. These members are selected having regard to the balance of the various political parties in the Parliament. Generally, MSPs who are not members of a committee can participate in its proceedings, but they are unable to participate in a vote. Meetings are normally held in public, and can take place anywhere in Scotland.

3.29 The committee system enables the Parliament to hold the Scottish Executive to account. Subject committees may inquire, on its own initiative or as required by the Parliament, into issues within its remit (these are known as "competent matters"). In particular, committees may consider -

- (a) the policy, administration and financial arrangements of the Scottish Administration;
- (b) proposals for legislation in the Scottish Parliament or in the UK Parliament; and
- (c) European legislation and international conventions and agreements.

3.30 Committees can also consider the need for law reform, initiate Bills and consider any financial proposals relating to any relevant matter.

3.31 A committee can invite any person to attend a meeting as a witness. This means giving evidence or producing documents which are related to the competent business of that committee.

### Legislative process

3.32 An important aspect of the law-making process in Scotland is the provision for a recognisable pre-legislative stage in which consultation should take place with the relevant bodies or interested parties and that there should be a duty on the Executive to explain in full to the Parliament the policy goals and anticipated consequences of a particular bill. This approach has been

accepted and formalised in the Standing Orders.

3.33 This pre-legislative stage allows the Parliament and affected individuals and groups to have a significant impact on the formulation of policy, and to have an influence on the translation of policy into new laws. According to Sir David STEEL, the Presiding Officer of the Scottish Parliament, convenient channels are afforded to members of the public for them to express their views on important issues to Parliament, and interaction between the people and the MSPs is very close.

3.34 A Bill can be introduced into the Parliament by Ministers (i.e. Executive Bills), by Parliamentary committees (i.e. Committee Bills), or by MSPs (i.e. Members' Bills). Any Bill introduced by a Minister must be accompanied by five documents -

- (a) a written statement from the member of the Scottish Executive in charge of the Bill to the effect that the provisions of the Bill, in his/her view, falls within the legislative competence of the Parliament;
- (b) a written statement from the Presiding Officer of the Parliament setting out his/her view, as to whether the provisions of the Bill are within the legislative competence of the Parliament;
- (c) a Financial Memorandum setting out estimates of administrative and compliance costs distinguishing costs falling on the Scottish Administration, local authorities and other bodies, individual and businesses;
- (d) an Explanatory Note summarising what the Bill does; and
- (e) a Policy Memorandum providing information on the policy objective of the Bill, any alternative approaches that were considered, the consultation that was undertaken and the results of that consultation, an assessment of the effects of the legislation in terms of equal opportunities, human rights, island communities, sustainable development and other relevant matters.

3.35 Prior to introducing a Bill, a Minister can advise a committee on proposals for legislation and the proposed consultation exercise. The committee monitors the consultation and may take its own evidence at this stage.

3.36 The parliamentary process for examining a Bill usually involves three stages -

- (a) Stage 1 : a Bill is referred to the relevant subject committee (known as the lead committee), which can take evidence at this stage. Other subject committees with an interest may also be involved. Once the lead committee has reported on the Bill, the Parliament considers the general principles of the Bill and decides whether these principles are agreed to. The Bill may be referred back to the lead committee for a further report on the principles, and more evidence may be taken. The Bill will proceed to Stage 2 if the Parliament agrees to the general principles. Otherwise, the Bill ceases to progress at this point.
- (b) Stage 2 : the Bill receives more detailed line by line consideration, when amendments may be proposed.
- (c) Stage 3 : the amended Bill is then considered by the Parliament, which can make further amendments to its provisions. The Parliament then debates and decides whether the Bill in this final form should be passed. At least a quarter of all MSPs must vote (whether "for", "against" or "abstain").

3.37 Any MSP may initiate up to two Bills per year. A Member's Bill must attract the support of 11 other MSPs before it can proceed to Stage 1 of the legislative process; otherwise it falls and cannot be re-introduced within six months. There is no requirement for the MSP introducing the Bill to either provide a Policy Memorandum or a statement as to the legislative competence of the Parliament. It is for the Presiding Officer to form his views on the legislative competence issue and to make his views known.

3.38 A committee of the Parliament may introduce a Bill which comes under the committee's purview. A proposal for a Committee Bill must be accompanied by a report setting out the committee's recommendations as to the provisions to be included in the Bill and may also include a draft of the Bill. If Parliament agrees on the need for legislation, the committee convener may either instruct the drafting of the Bill or introduce the Bill into the Parliament, if a draft is already available. The Bill will not be considered by the lead committee, and the procedure immediately proceeds to consideration of the principles of the Bill by the whole Parliament.

3.39 According to the Standing Orders of the Scottish Parliament, where, in the view of the Presiding Officer, a Bill contains provisions which have significant "financial implications" or "charging effect", no proceedings may be taken on the Bill at any Stage after Stage 1 unless the Parliament has by resolution agreed to the expenditure or charge. A motion for such a resolution may only be moved by a member of the Scottish Executive.

## Chapter 4 : France

### Background

4.1 In France, executive power is shared between the President of the Republic and the Prime Minister. The Head of State, the President, is elected by direct universal suffrage. He is responsible for the proper functioning of public powers and the continuity of the state. His functions and powers include promulgating laws, calling for referendum, dissolving the Parliament, negotiating and ratifying treaties etc. The President appoints the president of the Constitutional Council whose functions include examining the constitutionality of Bills before promulgation and decides whether certain legislation is within the competence of Parliament or the Government.

4.2 The President also has the power to appoint the Prime Minister and, on the latter's recommendation, other Ministers. The President presides over the Council of Ministers (Cabinet). Normally, the President's official decisions have to be countersigned by the Prime Minister and the appropriate Ministers.

4.3 The Government is headed by the Prime Minister and is responsible to a bicameral Parliament, comprising the National Assembly and the Senate.

4.4 The National Assembly consists of 577 Deputies elected by direct universal suffrage. Deputies generally belong to political parties and groups. The Senate has 321 seats. Senators are elected by an electoral college.

### Meetings in Paris

4.5 Meetings were held with the following individuals during the delegation's visit to Paris on 19 June 2001 -

- (a) Mr Jacques LARCH, Chairman, and Mr Pierre FAUCHON, Deputy Chairman, Senate laws committee (Commission Des Lois, Senat);
- (b) Mr Didier MAUS, Professor in Public Law and Chairman of the International Institute of Public Administration;
- (c) Mr Michel BERNARD, State Councillor and Chairman of the Deontology Committee, Ministry of the Civil Service, Administrative Reform and Decentralisation; and
- (d) Ms Nicole FEYDT, Deputy Chairman, National Assembly laws committee (Commission Des Lois, Assemblée Nationale).

4.6 The major issues discussed are summarised in the following paragraphs.

### **The President**

4.7 The President can, after consulting with the Prime Minister and the Presidents of both Houses of Parliament, dissolve the National Assembly, unless a dissolution has taken place within the previous 12 months. There is no provision in the Constitution for the dissolution of the Senate.

4.8 Article 68 of the Constitution provides that the President shall not be held accountable for official acts performed in the exercise of his official functions, except in the case of high treason, for which he may be indicted by a majority of the Members of both Chambers of Parliament and tried by the High Court of Justice.

4.9 Ms Nicole FEYDT, Deputy Chairman of the National Assembly laws committee, has informed the delegation that a parliamentary Bill relating to the issue of presidential immunity has recently been introduced. The Bill seeks to lift the immunity under certain circumstances which will allow the President to be prosecuted before the High Court of Justice. The Bill proposes a mechanism whereby individual cases would be judged as to whether there exist justifications for instituting legal action in the Court against the President. Among other things, it is proposed that a special commission, with authority to conduct inquiries into individual cases, is to be set up. The Bill is now being considered by the Senate.

### **Ministers**

4.10 The Prime Minister is appointed by the President after an election is held for the National Assembly. The Prime Minister is usually a person who has been a Member of the National Assembly. He is usually chosen on the basis that he has the support of the majority of the body.

4.11 The Prime Minister directs the operation of the Government, has responsibility for the national defence, ensures the execution of the law, and exercises regulatory and appointment powers.

4.12 One characteristic of the French Cabinet is that the Head of State, i.e. the President, chairs Cabinet meetings. However, as the Council of Ministers (about 40 members) is chosen by the President on the advice of the Prime Minister, the Prime Minister dominates the Council of Ministers. He determines the rules of conduct which the Ministers must follow, and he also resolves conflicts between individual Ministers. Deliberations of the Council are secret and involve all Ministers on the basis of the principle of collective

ministerial responsibility, that is, individual Ministers must publicly agree with the general Cabinet position on all issues.

4.13 The functions and powers of Ministers are twofold : they jointly participate in the determination and management of government policy, and they are heads of departments. Ministers cannot concurrently be Members of Parliament. If a Member of Parliament becomes a Minister, he or she shall resign as Member of Parliament. Ministers have usually been chosen both on the basis of party representation in the National Assembly and circumstances surrounding the presidential campaign. A growing number of Ministers have Civil Service background. Some Ministers have come from the Senate. The Constitution provides for the President of the Republic, on the proposal of the Prime Minister, to dismiss Ministers.

### **Ministerial accountability**

4.14 Under the Constitution, the Government is responsible to the Parliament. However, in reality, the authority of the Government is dominant. The Government sets the agenda for the Parliament, and Government Bills take priority over Members' Bills. The Government can promulgate its budget by decree if Parliament does not approve it within 70 days. The traditional executive responsibility to Parliament laid down in the Constitution is also hedged with constitutional provisions intended to protect the Government and to ensure the capacity of the Government to take certain action as it sees fit.

4.15 Under Article 34 of the Constitution, Parliament is able to pass laws concerning fundamental rights, national defence, citizenship, elections, crimes, the armed forces, the civil service, tax, the nationalisation of industries, etc. Article 37 provides that "Matters other than those which fall within the domain of legislation are regulatory in character". All matters not subject to law are subject to regulatory power, and the regulatory power is vested in the rule-making power of the Government headed by the Prime Minister.

4.16 Under Article 41, the Government can declare a Members' Bill inadmissible if the Government considers that the Bill trespasses the Government's rule-making domain provided under Article 37. To exercise this power, the Government only needs the concurrence of the President of the National Assembly or Senate which is considering the Bill in question. If the President of the Chamber disagrees with the Government, either party may convene the Constitutional Council, which is required to decide within eight days whether the Members' Bill goes beyond the legislative sphere under Article 34.

4.17 The Government can also, through the Prime Minister, invoke Article 61 to convene the Constitutional Council in order to challenge the constitutionality

of a law after it has been passed by Parliament and before it comes into effect.

4.18 Article 49 of the Constitution stipulates that -

- "(1) The Prime Minister, after deliberation by the Council of Ministers, may make the Government's programme or possibly a statement of its general policy an issue of its responsibility before the National Assembly.
- (2) The National Assembly may raise an issue of the Government's responsibility by passing a motion of censure. Such a motion shall not be admissible unless it is signed by at least one tenth of the Members of the National Assembly. Voting may not take place within 48 hours after the motion has been introduced. Only the votes in favour of the motion of censure shall be counted; the motion of censure shall not be adopted unless it is voted for by the majority of the Members of the Assembly. Except as provided in paragraph (3) below, a Deputy shall not sign more than three motions of censure during a single ordinary session and more than one during a single extraordinary session.
- (3) The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Bill an issue of the Government's responsibility before the National Assembly. In that event, the Bill shall be considered adopted unless a motion of censure, introduced within the subsequent 24 hours, is carried as provided in paragraph (2) above.
- (4) The Prime Minister may ask the Senate to approve a statement of general policy."

4.19 Article 50 provides that "where the National Assembly carries a motion of censure, or where it fails to endorse the programme or a statement of general policy of the Government, the Prime Minister must tender the resignation of the Government to the President of the Republic".

4.20 There are views that Article 49 of the Constitution enables the Government to dominate over the Parliament. For example, under Article 49(3), the Prime Minister may pledge the Government's responsibility before the National Assembly on a specific Government Bill. When the Prime Minister does this, the Bill is deemed adopted unless a motion of censure, tabled within 24 hours, is passed by the National Assembly. This means that when the Prime Minister invokes this provision, a Bill can be considered as adopted by the National Assembly without a vote. The only option available to the National Assembly is to file a motion of censure, which, if successful, would bring down the Government.

## **Ministers and the Civil Service**

### Ministers

4.21 The Ministers, as heads of their departments, decide all matters concerning their departments' internal organisation. They exercise command over the entire staff and manage their ministries' finances. Ministers also appoint Secretaries of State, who are responsible for assisting in managing an administrative department, or deputise for the Minister where necessary.

4.22 All the very top civil servants are appointed by the Council of Ministers. The French Civil Service system is a system embedded in statutes and emphasising on a unified career. Civil servants are recruited to a permanent position in the service of a public body and they enjoy security of tenure.

4.23 Acting on the authority of the Prime Minister and Ministers, the Civil Service is at the Government's disposal. The legislature has no role to play in the appointment and removal of civil servants. The Civil Service plays a key role in the management of the country's public affairs. Its sphere of action, including that of central and devolved administrative institutions, extends to the whole of France.

### Corps

4.24 There is a multitude of unique corps (unique groups with similar training and specialisation) in the French Civil Service. Historically, different corps exist to fill different types of jobs in the Civil Service. Senior civil servants are identified by their membership of specific corps.

4.25 Members of the senior corps (known as the grand corps) can be distinguished from the other corps. They are recruited through elitist professional schools and they hold key positions in the central Government and enjoy high internal and external mobility. Certain high-ranking positions are by statute or practice occupied by members of the grand corps.

4.26 The Ecole Nationale d'Administration is the top professional training school for the administrative grand corps. It trains civil servants who will occupy most senior managerial positions. Training of members of the technical grand corps, who fill many of the top technical posts, is carried out by the Ecole Polytechnique.

### Civil servants

4.27 The Prime Minister is the Head of Government and the Administration. There is a Ministry of the Civil Service, Administrative Reform and Decentralisation headed by a Minister. The President is seldom involved in matters relating to the Civil Service.

4.28 Senior civil servants in France are not expected to be completely non-partisan. They may join political parties, express their ideological preferences, and stand for election.

4.29 As pointed out by Professor Didier MAUS, Chairman of the International Institute of Public Administration, a distinctive feature of the French Civil Service system is that civil servants may be detached to other public sector jobs while retaining all their rights as civil servants, such as pension. Secondments provide an opportunity for cross-fertilisation. If the secondment is to the private sector, prior approval, which is not always given, must be sought.

4.30 Civil servants in France can launch on a political career without jeopardising their position in the Civil Service. Detachment in the form of a temporary leave enables a civil servant to be elected to Parliament, or to hold a political office. In all these cases, the civil servant is entitled to be reintegrated into the Civil Service, without loss of civil servants' benefits, after the temporary detachment.

4.31 In France, working in the Civil Service means exercising the prerogatives of state power. An elitist system in which high level officials sharing a sense of public service and adhering to the value of public service ethics is an important feature of the Civil Service. Membership of the Civil Service consequently involves a special legal regime, which overrides the normal rules of labour law and replaces them with a special set of rights and obligations.

4.32 Civil servants are subject to express provisions under the Civil Service regulation, which lay down their obligations and the duty to account. Obligations are entailed, for example, by the duty of obedience to superiors by which civil servants are bound, unless an order is manifestly illegal and liable materially and adversely to affect a public interest. Civil servants are also bound by a duty of confidentiality as possessors of information concerning individuals, of which they may be relieved only by the requirements of their official duties or legal obligations. They must also keep in confidence all facts, data and documents of which they have cognisance in the discharge of their duties.

4.33 Regarding the duty to account, civil servants are required to always express their opinions prudently and temperately. However, subject to that duty, they should respond to inquiries by the public with a view to achieving maximum transparency in dealings between the administration and the citizenry.

4.34 A civil servant may be asked to leave for various reasons including faults committed in the course of and in connection with their duty. As

pointed out by Mr Michel BERNARD, Chairman of the Deontology Committee, Ministry of the Civil Service, Administrative Reform and Decentralisation, misdemeanor by members of the Government can lead to both disciplinary and criminal sanctions, despite the commission of a substantive crime (such as corruption), may not be proved. He has cited the example of a recent case in which a Minister had been prosecuted because a colleague of his joined a company over which the Minister had control. The Minister was given a commuted sentence on conviction and was barred from standing for reappointment.

4.35 Both the law and the jurisprudence of the administrative courts, however, have established safeguards and protection against the arbitrary exercise of disciplinary power by superiors. These include the right of civil servants to review and disclosure of their personal files before subject to disciplinary measures. The law also makes consultation with disciplinary bodies, which must include staff representatives, compulsory in all disciplinary measures, apart from a warning or reprimand.

4.36 Whatever the reason for leaving, there are limitations on subsequent activities in the private sector. Restrictions on post-employment and special conditions on movement from the public sector to the private sector are contained in the Public Service Act. According to Mr Michel BERNARD, there are certain rules which can be seen as holding civil servants to account even after leaving service. For example, for five years after leaving the Civil Service, civil servants are forbidden to have any dealings with a private firm with which they have negotiated contracts when in office. Certain private sector activities are forbidden altogether. In 1993, an advisory commission of ethics was established to oversee the departure of civil servants who left the public sector to work in the private sector.

### Politicisation

4.37 One special feature of the French Civil Service system is the distinction between the grade and the post, which allows political appointments for specific senior positions. In France, there are posts "at the discretion of the Government" filled by political appointees who are not tenured (such as ministerial department directors). Many political appointees are those who share party-political sympathy with the Government, and appointments are decided by decree taken in the Council of Ministers. This system offers to senior officials a path to a political career, and reinforces a higher degree of commitment and accountability on the part of the appointed officials.

4.38 Appointments to senior positions through external recruitment, however, have attracted much criticisms, especially from among civil servants. A statute subsequently came into force in 1994 which sought to limit the risk of

abuse by requiring the consultation of a special committee in assessing the suitability of candidates.

### **Declaration of personal assets**

4.39 Civil servants are banned from any involvement in a company under the auspices of their department which would compromise their impartiality. Members of the French Government are required to make declaration of personal assets and submit it to the Commission for Financial Transparency in Politics.

### **Court of Accounts**

4.40 The Court of Accounts or Cour des comptes has responsibilities with respect to central government departments, ministries and agencies, etc, covering regularity and management audits. The Court is presided over by a *Premier président* who is appointed by a decree of the Council of Ministers and enjoys security of tenure.

### **Maladministration**

4.41 The Ombudsman is also known as the mediator system. The mediator receives complaints through the "filter" of a National Assembly Deputy or Senator rather than directly from the citizens.

4.42 The mediator's competence extends to all areas of administration. The mediator can request any information from administrative agencies which he considers pertinent and can initiate proceedings against malfeasant civil servants. He submits an annual report to the President of the Republic and Parliament which contains a summary of the cases dealt with and the recommendations for reform.

### **Parliamentary scrutiny**

#### Committee system

4.43 Permanent commissions (or standing committees) are the Parliament's basic work organs. The Constitution limits the number of permanent commissions to six in each Chamber.

4.44 All Bills must be discussed in the relevant committees before being deliberated in public sessions. Although permanent commissions do not

enjoy the same status as inquiry commissions (or investigative committees), they can hold hearings and inquiries, question members of the Government or experts, and produce reports on specific subjects.

4.45 Special committees may also be appointed, according to Article 43 of the Constitution, to consider Bills.

4.46 Inquiry commissions (or investigative committees) gather information and carry out investigation on a given issue. They are created by a vote in the Chamber concerned, and they may carry out investigation for a period of six months. A report is made public after completion of investigation. The hearings of the commissions are open to the public.

4.47 Government activities can also be monitored by means of temporary information assignments, which may involve more than one committee. Information missions can seek information, hold hearings, and publish reports prior to the consideration of a policy or a Bill. They are smaller in scale than inquiry commissions. They touch on a variety of subjects, and serve as a forum for discussion, confrontation and conciliation.

#### Legislative process

4.48 The Government and Members of Parliament (including both Deputies and Senators) have the right to initiate Bills. Before a Government Bill can be debated in Parliament, it must first be reviewed both by the Council of State and the Council of Ministers. The Council of State is the highest administrative court which also advises the Government on drafting laws and regulations.

4.49 Traditionally, the heads of the divisions of the ministries are responsible for drafting Bills. The process involves consultation with concerned parties and interested groups. A recent development in the past decade, however, is that owing to the difference in policy outlook between Ministers and senior civil servants, some Ministers have by-passed their ministry officials and used their own personal staff (known as ministerial cabinets) to prepare the initial drafting of Bills. Hence, the influence of the civil servants has been undermined to a certain extent in the policy and law-making process.

4.50 Members' Bills shall not be considered if they have the effect of reducing public revenue or increasing public expenditure. In addition, as the Constitution empowers the Government to determine the agenda of the Parliament, this can, to a significant extent, ensure that Government Bills take priority over Members' Bills.

4.51 After a Bill is introduced into the National Assembly, it would be examined by the relevant committee, or jointly by committees sharing an

interest in the Bill. A report would then be presented to the floor for the initial Reading. The ensuing debate, which provides an opportunity for introducing amendments, is followed by a vote. After passage in the National Assembly, the Bill is transmitted to the Senate. If accepted by the Senate, the Bill is sent to the Government for signature.

4.52 If Senate rejects the Bill, the following procedures may follow -

- (a) the Bill may be sent back and forth between the two Chambers for consideration until a final version is agreed; or
- (b) the Government may request the setting up of a joint committee comprising seven Members from each Chamber to work out an agreed version (this procedure has been invoked for about half of the bills); or
- (c) the Government may ask each Chamber for a Second Reading i.e. a reconsideration and new vote on the original Bill;
- (d) if disagreement persists, the Government may ask the National Assembly to determine the final version of the Bill by a majority of the votes cast.

4.53 According to Mr Jacques LARCH, Chairman of the Senate laws committee, the majority of the Bills have been dealt with through the "shuttle" and the joint committee procedures described in paragraph 4.52 (a) and (b) above respectively. These methods allow for a participatory process involving all parties concerned, i.e. Parliament, the Government and interested groups, where detailed information and views are exchanged and issues of interest are debated at length. Furthermore, Bills will not lapse at the end of a parliamentary term.

## **Chapter 5 : Germany**

### **Background**

5.1 The Head of State of the Federal Republic of Germany is the Federal President, who is separated from the Head of Government, the Federal Chancellor. The Federal President is not directly elected. He is elected by the Federal Convention, a constitutional body which convenes for this purpose. It consists of Members of the Bundestag and an equal number of Members elected by state Parliaments. The Federal President appoints and dismisses Federal judges, Federal civil servants and commissioned and non-commissioned officers of the armed forces.

5.2 The Republic of Germany has a bicameral legislature. The two Houses are the Bundestag and Bundesrat.

5.3 The Bundestag is the parliamentary assembly representing the people of the Federal Republic of Germany. Members carry out the functions assigned to them under the Basic Law (i.e. the Constitution of Germany), namely, to form a governing majority, to appoint the Government and the members of the other constitutional organs, to scrutinise the work of the executive, to pass laws, to approve the budget and to act as a unifying force in society. The Chancellor is elected by the President and elected without debate by the Bundestag.

5.4 The Bundesrat represents the 16 Federal states and participates in the legislative process and administration of the Federation. It consists of Members appointed by the state Governments. As opposed to Members of the Bundestag, Members of the Bundesrat do not enjoy parliamentary immunity or indemnity. The Bundesrat has no legislative terms. It sits permanently.

### **Meetings in Germany**

5.5 Meetings were held with the following individuals during the delegation's visit to Berlin and Heidelberg from 20 June to 23 June 2001 -

- (a) Dr Hermann Otto SOLMS, Vice President of Bundestag;
- (b) Ms Ulla JELPKE, Dr Max STADLER, and Mr Meinrad BELLE, members of Bundestag Internal Affairs Committee;
- (c) Professor Dr Wolfgang ZEH, Director of the Department of Parliamentary Services, Administration of Parliament (Bundestag);

- (d) Mr Carl-Dieter SPRANGER, Vice-Chairman, Bundestag Foreign Affairs Committee;
- (e) Ms Dr SONNTAG-WOLGAST, Parliamentary Secretary of State of Federal Ministry of the Interior;
- (f) Mr Winfried JUNG and Dr Collin DURKOP of Konrad-Adenauer-Stiftung, Mr Axel SCHMIDT-GODELITZ of Friedrich-Ebert-Stiftung and Mr Rainer FUNKE of Friedrich-Naumann-Stiftung ("Stiftung" is the German word for "Foundation". They are think-tank organisations backed by major political parties); and
- (g) Professor Dr Rudiger WOLFRUM, Director, Max Planck Institute for Foreign Public Law and International Law.

5.6 The major issues discussed are summarised in the following paragraphs.

### **The Parliament**

5.7 Elections for the Bundestag are based on a proportional representation system. The share of the votes obtained by the political parties reflects the relative strengths of the parties in the Bundestag. According to Professor Rudiger WOLFRUM, Director of Max Planck Institute for Foreign Public Law and International Law, whom the delegation met in Heidelberg, Parliament needs a mixture of groups to reflect different ideas. However, too many single-member geographical constituencies returning Members to Parliament could result in problems of governance. In his view, the existing electoral system works well in Germany.

5.8 Political parties have to gain at least five per cent of the valid vote cast or at least three constituency seats for them to be represented in the Bundestag. The purpose of this five per cent clause is to prevent tiny splinter parties from entering the legislature.

5.9 It is rare for one party to gain an absolute majority in the Bundestag. In the current electoral term, the Bundestag is composed of five parliamentary groups. Parliamentary groups play a decisive role in the work of the Bundestag. It is in the parliamentary groups that the political parties agree on their positions they present to the Bundestag and to the people.

5.10 The Rules of Procedure confer certain rights exclusively on the parliamentary groups. For instance, only parliamentary groups have the right to introduce Bills and table motions, to move amendments to Bills on Third Reading, to demand a recorded vote, to debate on a matter of topical interest, or the setting up of study commissions or committees of inquiry etc.

5.11 A parliamentary group may be formed on the following conditions -

- (a) It must comprise at least five per cent of the Members of the Bundestag. The purpose of this requirement is to prevent small groupings from gaining parliamentary group status and then making excessive use of the parliamentary powers it confers, creating undue confusion and pressure on the work of the Bundestag; and
- (b) Its members must belong to the same party or to parties which have similar political objectives, and do not, therefore, compete with one another in any of the 16 Federal states.

5.12 In the Bundesrat, state interests often override party interests. Voting thus may not reflect party strengths in the Bundesrat. Each state has its own special interests and sometimes takes sides with other states pursuing the same aim, irrespective of the party it is governed by. This produces fluctuating majorities in the Bundesrat, and compromises have often to be made between the parties.

5.13 In the legislative area, more than half of all Federal Bills require the formal consent of the Bundesrat. No proposed amendments to the Basic Law can be adopted without the two-third majority consent in both the Bundestag and the Bundesrat. The Bundesrat can institute proceedings on questions regarding constitutionality and present its standpoint on proceedings before the Federal Constitutional Court.

### **The President and the Parliament**

5.14 Both the Bundestag and the Bundesrat have the power to impeach the Federal President before the Federal Constitutional Court for wilful violation of the Basic Law or any other Federal law. The Bundestag elects half of the members of the Federal Constitutional Court, while the Bundesrat elects the other half of the members.

5.15 The Federal President may dissolve the Bundestag under two conditions -

- (a) if none of the candidates nominated for the office of Chancellor has secured a majority of the votes of the Members of the Bundestag after three ballots, the President can either appoint a candidate who obtained most of the votes cast or dissolve the Bundestag within seven days of the third ballot; or

- (b) if a motion of the Chancellor for a vote of confidence does not obtain the support of the majority of Members of the Bundestag, the President may, upon the proposal of the Chancellor, dissolve the Bundestag within 21 days.

## **The Ministers**

5.16 The Federal Chancellor, who is elected by the Bundestag, is the Head of the Government and Chairman of the Cabinet. The size of cabinets has varied from 15 to 26 members. The Federal Chancellor is not required to be a Member of Parliament. The Chancellor is nominated by the President and elected without debate by the Bundestag.

5.17 The Chancellor determines and is responsible for the general policy guidelines. Only the Chancellor can propose a vote of confidence and request the dissolution of the Bundestag.

5.18 The Chancellor determines the number of Ministers and their responsibilities. He has the power to name members of the Cabinet and can create or abolish Federal ministerial departments. The Chancellor also summons and holds Cabinet meetings. Federal Ministers are Cabinet Ministers who are appointed and dismissed by the President upon the proposal of the Chancellor. Ministers are not required to be Members of the legislature. However, Ministers are usually Members of the Bundestag.

5.19 The German Cabinet is not an institution where government policy is openly discussed, debated and finally determined. Usually, the Cabinet approves, rather than makes, decisions collectively. Most government policies are hammered out in bilateral negotiations between individual Ministers and the Chancellor. A Cabinet Minister is aided by at least two Secretaries of State. One is a career civil servant who is responsible for the administration of the ministry. The other is a Parliamentary State Secretary who assists in the political aspects of the Minister's duties.

5.20 The German Chancellorship is a powerful institution. The Federal Chancellor names members of the Cabinet and creates or abolishes ministerial departments. He also lays down the guidelines of government policy. The Federal Ministers run their departments independently and on their own responsibility but within the framework of these guidelines. The Chancellor, however, does not intervene in the day-to-day operation of the Ministers' departments.

## **Ministerial responsibility**

5.21 Article 65 of the Basic Law, which provides for the basis of ministerial responsibility in Germany, stipulates that -

"The Federal Chancellor shall determine and be responsible for general policy guidelines. Within the limits set by these guidelines each Federal Minister shall run his department independently and on his own responsibility. The Federal Government shall settle differences of opinion between Federal Ministers. The Federal Chancellor shall preside over the conduct of Federal Government business in accordance with rules of procedure adopted by it and approved by the Federal President."

5.22 The Chancellor is the only member of the Government elected by Parliament, and he alone is accountable to it. The Bundestag may express its lack of confidence in the Chancellor by electing a successor with a majority vote of its Members i.e. a "constructive vote of confidence". The President must then appoint the person elected. A mere vote of no-confidence in the Chancellor cannot be moved in the Bundestag. When the Chancellor loses office, so do Ministers. The Basic Law makes no provision for motions of no confidence in respect of individual Ministers.

5.23 The notion of collective responsibility is not well developed in Germany. In a formal sense, Federal Ministers are only accountable to the Chancellor. Very often, Ministers have openly expressed dissenting views.

5.24 Under the Basic Law, members of the Cabinet are not allowed to hold any other salaried positions. Concurrent engagement in a trade or occupation or practice of a profession is strictly prohibited.

## **Financial and other support for Members of the Bundestag**

5.25 Article 48 of the Basic Law provides that Members of Bundestag should be provided with "adequate remuneration ensuring their independence". At present, a Member receives a monthly remuneration of DEM 12,300<sup>11</sup>, as well as other allowances including an expense allowance (DEM 6,400<sup>12</sup> per month) and allowance for hiring staff (DEM 15,000<sup>13</sup> per month). A Member of Bundestag who has served for at least eight years receives a pension upon retirement.

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<sup>11</sup> About HK\$43,419 (1 DEM = HK\$3.53)

<sup>12</sup> About HK\$22,592 (1 DEM = HK\$3.53)

<sup>13</sup> About HK\$52,950 (1 DEM = HK\$3.53)

5.26 Members are also provided with office space by the Bundestag Administration for the purpose of their parliamentary business.

5.27 The parliamentary groups also require staff and technical equipment for their work. They employ staff whom they pay using grants from the Federal Budget.

5.28 The major organisation providing support services for the Bundestag is the Bundestag Administration. Parliamentary services provided include, in the main, those related to plenary sittings, the work of the committees and other steering bodies of the Bundestag, preparation for meetings and follow-up on items of business.

5.29 Members can also request the Specialised Research Services of the Bundestag Administration to provide information or conduct studies on any issue relevant to federal policy in which they might be interested. Some 2 000 studies have been produced each year. Individual research sections also provide a range of information services on their own initiative, including studies on topics of general interest, explanatory notes and background information on new issues, and summary of important judicial decisions etc.

5.30 The Bundestag Administration, however, is not involved in work relating to the preparation and drafting of legislation.

### **The Civil Service**

5.31 Decentralisation has been a key principle of political and administrative organisation in Germany. Decentralised administration, whereby Federal legislation is implemented by the Federal states, leads to two special consequences for the Civil Service. First, there is no national Civil Service. Rather, the civil services of the Federation, individual Federal states and local governments have retained their institutional independence, and geographical mobility of officials is restricted. Secondly, the majority of civil servants are employed by individual Federal states and local government rather than by the Federal Government.

5.32 At the central level, the Federal Ministry of the Interior is responsible for the general policy concerning the Civil Service. There is no central civil service recruitment in Germany. Each Federal ministry takes its own responsibility for staffing and recruitment matters. Civil servants are in principle appointed for life. Their terms and conditions of service are laid down in laws. Retirement terminates the active employment of civil servants, but allows the basic relationship with the employer to be retained. Retired civil servants retain rights and duties, so that they are for instance still under a duty of confidentiality with regard to their office and may not accept rewards

and presents in connection with their previous office.

5.33 Another marked feature of the German Civil Service is the concept of the rule of law and hence the emphasis placed on express legal regulation. Civil servants function within a tightly-knit network of public and administrative law. Civil service law itself is a specialised branch of administrative law. It covers such major aspects as job security, job definition, deployment rules, wage rules and structures etc. Detailed legal regulations help to guard against unrestrained control of civil servants by political principals.

5.34 Political civil servants, as opposed to other civil servants, are senior officials who are appointed to their office for the exercise of which they must be in agreement with the fundamental political aims of the Government of the day. The office can be created or cancelled at any time without stating the reasons. The number of political civil servants is relatively small. Only about 400 of the 130 000 civil servants in the Federal Administration are political civil servants. They include the higher ranks of the Federal ministerial bureaucracy such as Secretaries and Under-Secretaries of State in the ministries, senior civil servants in the Foreign Office and in the security services and the President of the Federal Criminal Police Office.

5.35 Political civil servants in a ministry can be removed, transferred or retired by a corresponding Minister. If they are not retained by a Minister, they may be transferred to another position of comparable status.

5.36 According to Ms Dr SONNTAG-WOLGAST, Parliamentary Secretary of State of the Federal Ministry of the Interior, who is also a Member of Parliament, in the event of a serious policy failure, the relevant Minister or Ministers should, by convention, be ultimately responsible and resign. Cases of civil servants being forced out of office are rare.

### **Audit institution**

5.37 The audit institution of Germany, the Bundesrechnungshof, is a supreme Federal authority. It examines the financial management of the Federation, its separate property funds and Federal undertakings. Upon the proposal of the Federal Government, the Bundestag and the Bundesrat elect the President and Vice-President of the Bundesrechnungshof without debate. The Federal President shall appoint those chosen. They are appointed as temporary civil servants for official terms of 12 years and shall retire after their tenure of office. They must not be re-elected.

## **Parliamentary scrutiny**

### The committee system

5.38 In each electoral term, the German Bundestag sets up a number of permanent committees. For each ministry, the Bundestag establishes a specialised committee. The composition of members of the committees reflects the relative strengths of the various parliamentary groups under the proportional method of representation in the Bundestag. There is no restriction on the number of committees a Member of Bundestag may join.

5.39 The committees facilitate parliamentary scrutiny of government activities. The committees discuss matters within their sphere of competence. They may request representatives of the relevant ministries to attend meetings, provide information, report and answer questions on planned legislation and other topical questions relating to the departments. The committees may also recommend that the relevant ministries take certain specific measures. The right of committees to take up matters on their own initiative has become an important tool for monitoring the work of the ministries and holding them to account for their actions.

5.40 In principle, committee meetings are not open to the public. In practice, committees also seldom admit the public to their meetings. It is believed that without the presence of the public and the media committees are better able to engage in more objective discussions. However, in order to obtain important information on a subject under debate, the committees may hold public hearings attended by experts in the given field. Such public hearings are an effective means not only to gather useful information but also to enable the community to be adequately informed on a wide range of issues of public concern. They also give interest groups an opportunity to state their divergent positions in the Bundestag on specific issues.

5.41 Article 17 of the Basic Law states that every person has the right to address petitions to the Bundestag. Petitions include complaints directed against the acts or omissions or injustices of administrative authorities. The Petitions Committee considers all the complaints and requests made to the Bundestag. When processing petitions, the Committee has the power to summon members of the Federal Government to attend meetings and to provide information. It also has the power to demand that the Federal Government and any public-law corporations and institutions submit files and allow access to their premises. It may also hear petitioners, witnesses and experts, and request the assistance of courts and other public authorities.

5.42 The Budget Committee is regarded as the most powerful committee since it decides *de facto* on the apportionment of budget funds. The Committee also has the right to scrutinise and to be consulted on all laws

involving expenditure (finance Bills). It assesses whether the Bill and the measures proposed are compatible with the overall budgetary situations. If the Committee objects to the Bill and its decision is endorsed by the Bundestag, the Bill has to be dropped.

5.43 In accordance with Article 44 of the Basic Law, the Bundestag can set up committees of inquiry to investigate specific matters. It is obliged to do so upon the motion of one quarter of its Members. This important minority right is used in particular by the opposition to ensure investigation of cases of alleged misgovernment, maladministration or misconduct on the part of individual politicians. Committees of inquiry have the authority to summon and swear in witnesses, as well as to demand submission of files from the Federal Government and permission for civil servants to give evidence. The Federal Government may only refuse if to do so would harm the interests of the Federation or its constituent states, or seriously jeopardise the performance of public functions. In principle, committees of inquiry must hear evidence in public.

#### Legislative process

5.44 The Federal Government, the Bundesrat and the Members of Bundestag have the right to introduce Bills to be deliberated by the Bundestag. Bills tabled by Members must be signed by at least five per cent of Members or by a parliamentary group. The vast majority of Bills are introduced by the Federal Government. The duty of drawing up a draft law rests with the ministry responsible for the specific subject matter.

5.45 A draft Bill is first considered by the parliamentary groups, to be followed by a debate in the First Reading if the public need to be made aware of the issues involved at that stage. The Bill is then referred to one or more committees of the Bundestag. If the subject matter of a Bill is very complex, or politically controversial, then a public hearing of experts and representatives of interest groups is held. The deliberations of the committee conclude with the submission of a report containing recommendations to the plenary, on the basis of which the Bill is given a Second Reading.

5.46 Each clause of the Bill is debated at the Second Reading. Thereafter, amendments may be moved by the parliamentary groups and individual Members of the Bundestag, and voted on. If a Bill is adopted during the Second Reading, the Third Reading can begin. A debate in the Third Reading is only held if a parliamentary group or at least five per cent of Members so demand. Moreover, amendments during the Third Reading may only be moved by the parliamentary groups or groupings comprising at least five per cent of Members. During the Third Reading, the final vote is taken.

5.47 Where specifically provided for in the Basic Law, a Bill may require the consent of the Bundesrat to become law. More than half of all Bills require the formal approval of the Bundesrat for them to become law. A Bill requires the consent of the Bundesrat if it concerns the vital interests of the states, for instance, their financial affairs or their administrative powers. In such cases, if the Bundesrat refuses to give its consent, then the Bill will fail.

5.48 In other cases, the Bundesrat only has a right of objection, but this can be overruled by the Bundestag. It would be a matter for the Federal Constitutional Court to decide, in case of a disagreement between the two, whether a Bill requires the consent of the Bundesrat. A mediation procedure involving the intervention of the Mediation Committee may be used, the purpose of which is to amend the Bill in question in such a way that the Bundestag and Bundesrat are satisfied with the final outcome.

5.49 Under certain circumstances, a law may be referred to the Federal Constitutional Court for judicial review. This is to ensure that each stage of the legislative process has been carried out in keeping with the law, otherwise the legislation in question would be declared invalid.

5.50 The legislative process in the Federal Republic of Germany is relatively complex. As pointed out by Professor Dr Wolfgang ZEH, Director of the Department of Parliamentary Services, Administration of Parliament (Bundestag), the complexity reflects the purposes behind the various legislative stages -

- (a) Bills are drawn up by the specialised divisions in the ministries, the subject matter being then examined carefully with explanation from the Federal Administration as well as input from affected or interested groups taken into account even at the very early stage before the Bill is referred to a committee or committees for scrutiny;
- (b) The detailed discussion of a Bill during the Committee Stage and at public hearings make it possible for political viewpoints of the parliamentary groups and additional expert opinions to be taken into account and incorporated in the Bill. This also provides for adequate opportunities for the Government to explain fully to the legislature the policy and legislative intent of the Bill; and
- (c) The mediation procedure serves to ensure that conflicts are resolved by way of compromise.

## **Chapter 6 : Summary of Findings and Observations**

6.1 Given their different political development and government structure, UK, France and Germany have their own unique ministerial and Civil Service systems. Some of the key features and characteristics of their systems are summarised below.

### **Appointment of Ministers and role of the Parliament**

6.2 In UK, Ministers are appointed by the Monarch on the recommendation of the Prime Minister. The Parliament has no role to play in the appointment of Ministers. Ministers are, however, Members of Parliament. The Prime Minister's unique position of authority derives from majority support in the House of Commons and the power to make recommendations to the Monarch to appoint or dismiss Ministers.

6.3 In Scotland, the First Minister, under the Scotland Act 1998, is nominated by the Scottish Parliament and appointed by the Monarch. The choice of Ministers of the First Minister must be agreed to by the Parliament, before seeking the Monarch's approval for appointment.

6.4 The President of France appoints the Prime Minister and the Ministers. The Parliament has no role to play. However, the Prime Minister is usually a person who has been a Member of the National Assembly and who has the support of the majority of the body. In France, the executive and legislative roles are incompatible. In the event that a Member of Parliament is appointed as an executive Minister, the Member must resign from Parliament. The Constitution provides for the President, on the proposal of the Prime Minister, to dismiss Ministers.

6.5 The Federal Chancellor of Germany is nominated by the President and elected by the Bundestag without debate. Cabinet or Federal Ministers are appointed and dismissed by the President upon the proposal of the Chancellor. The Parliament has no role to play. Ministers are not required to be Members of Parliament. However, they are usually Members of the Bundestag.

### **Executive accountability**

6.6 In UK, accountability of Ministers to Parliament is defined in parliamentary conventions and practices. Ministerial responsibility takes two forms - collective responsibility for government policy and individual responsibility for their own department's work. The Government is obliged to resign or seek a dissolution following a defeat on a confidence motion. The

ultimate sanction in the case of individual responsibility is the resignation or dismissal of the Minister concerned.

6.7 In Scotland, the Scotland Act 1998 requires Ministers to resign if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament. The Act can be regarded as the formalisation of recognised parliamentary conventions and practices.

6.8 The UK and Scottish Ministerial Codes set out codes of conduct and guidance on procedures for Ministers.

6.9 In France, the President is elected by direct universal suffrage. The Constitution provides that the President shall not be held accountable for official acts performed in the exercise of his official functions, except in the case of high treason, for which he may be indicted and tried.

6.10 The Government of France is headed by the Prime Minister and, under the Constitution, is responsible to the Parliament. Article 50 of the Constitution provides that "where the National Assembly carries a motion of censure, or where it fails to endorse the programme or a statement of general policy of the Government, the Prime Minister must tender the resignation of the Government to the President of the Republic". Distinct procedures are also available in the Constitution for ousting a Government. The Constitution also provides for the President, on the proposal of the Prime Minister, to dismiss Ministers.

6.11 In Germany, the Federal President is not directly elected. Both the Bundestag and the Bundesrat have the power to impeach the Federal President for wilful violation of the Basic Law (i.e. the Constitution) or any other Federal law.

6.12 The President may dissolve the Bundestag under certain circumstances: if none of the candidates nominated for the office of Chancellor has secured a majority of votes of the Bundestag; or if a motion of the Chancellor for a vote of confidence does not obtain the support of the majority of Members of the Bundestag.

6.13 The Chancellor is nominated by the President and elected without debate by the Bundestag. The Chancellor alone is accountable to the Bundestag. This accountability is manifested in the provision of a constructive vote of confidence to bring down a Chancellor who loses the support of the Bundestag. Federal Ministers are only accountable to the Chancellor. Cabinet or Federal Ministers are appointed and dismissed by the President upon the proposal of the Chancellor. When the Chancellor loses office, so do Ministers. The Basic Law makes no provision for motions of no confidence in respect of individual Ministers.

## Civil servants

6.14 The Civil Service in the UK serves both the UK Government and the Scottish Executive. Ministers in both governments have a duty to uphold the impartiality of the Civil Service and not ask civil servants to act in any way which would conflict with the Civil Service Code. The Civil Service Code sets out the constitutional framework within which all civil servants work and the values they are expected to uphold. The Code came into force on 1 January 1996 and was revised on 13 May 1999 to take account of devolution to Scotland and Wales.

6.15 There are also detailed rules governing the acceptance of employment after departure from the Civil Service.

6.16 Senior civil servants in France are not expected to be completely non-partisan. They may join political parties, express their ideological preferences and stand for election. Detachment in the form of a temporary leave enables a civil servant to be elected to the Parliament, hold a political office, join a public body or work in the private sector. The civil servant is entitled to be reintegrated into the Civil Service, without loss of civil servants' benefits, after the temporary detachment.

6.17 French Civil servants are subject to express provisions under the Civil Service regulation which laid down their obligations and the duty to account. A civil servant may be asked to leave for various reasons, including faults committed in the course of and in connection with their duty. Whatever the reason for leaving, there are limitations on subsequent activities in the private sector. An advisory commission of ethics was formed in 1993 to monitor departures to the private sector.

6.18 There is no national Civil Service in Germany. The majority of the civil servants are employed by individual Federal states. Civil servants function within a tightly-knit network of public and administrative law. Detailed legal regulation helps to guard against unrestrained control of civil servants by political principals. There are also political civil servants who are appointed to their office for the exercise of which they must be in agreement with the fundamental political aims of the Government of the day. These political civil servants can be removed, transferred or retired by a corresponding Minister.

6.19 In Germany, retired civil servants retain rights and duties, so that they are for instance still under a duty of confidentiality with regard to their office and may not accept rewards and presents in connection with their previous office.

## **Parliamentary control and scrutiny**

6.20 The ultimate form of a legislature "enforcing" executive accountability is bringing down a Government. In the day-to-day context, the legislature has at its disposal tools of parliamentary scrutiny to call the executive to account, including requesting the executive to publicly explain its actions and policies and also to provide information. Investigatory committees and legislative procedure, the two major means of parliamentary scrutiny, were also subjects of study of the delegation during the visit.

6.21 In UK, select committees have long been used by the House of Commons to investigate, and there is broadly one committee per government department. In Scotland, committees are given powers to call for witness and documents. In France, inquiry commissions are created by a vote in the Chamber concerned to carry out investigations on a given issue. In Germany, the Bundestag can set up committees of inquiry to investigate specific matters.

6.22 In UK, Scotland, France and Germany, a Bill goes through an elaborate procedure involving several stages which subject the Bill to detailed examination. Scrutiny by committee is a main feature of the legislative process in these four places. In UK, following the Second Reading, a Bill proceeds to the Committee Stage which may be taken on the floor of the House or by a standing committee. In Scotland, a Bill is referred to the relevant committee before the Parliament considers the general principles of the Bill. In France, after a Bill is introduced into the National Assembly, it will be examined by the relevant committee(s) before the Bill is presented to the floor for the initial Reading. In Germany, a Bill is referred to a committee after it is given a First Reading. The deliberations of the committee conclude with the submission of a report on the basis of which the Bill is given a Second Reading.

## **Views of Professor Rudiger WOLFRUM on Hong Kong**

6.23 When meeting with the delegation, Professor Rudiger WOLFRUM, Director of Max Planck Institute for Foreign Public Law and International Law, opined that if a system of political appointment was to be implemented in the Hong Kong Special Administrative Region, political appointees should be detached from the Civil Service. There should be a distinction between the two as regards accountability. In principle, the Legislative Council should be holding the political appointees, and not the civil servants, accountable. He also considered that in the long term, political appointees should form the Executive Council.

## **Conclusion**

6.24 Overall, the delegation's visit has been useful in enabling Members concerned to obtain first-hand information on the executive accountability systems in the United Kingdom (UK), France and Germany. The visit also provided valuable opportunities for the delegation to exchange views on the subject matter and related issues with members of the legislatures concerned, Ministers, senior civil servants, parliamentary staff and academics.

## **Appendices**

Appendix I	Programme of the visit
Appendix II	United Kingdom Ministerial Code
Appendix III	United Kingdom Civil Service Code
Appendix IV	Scottish Ministerial Code

**Programme of the Visit**

13 June 2001 (Wednesday)

11:15 pm Depart Hong Kong for Edinburgh via London

14 June 2001 (Thursday)

8:15 am Arrive Edinburgh

10:20 am **Courtesy call on the Right Hon Eric MILLIGAN,  
Lord Provost of the City of Edinburgh**  
(Lord Provost is the Mayor of the City of Edinburgh)

11:00 am **Courtesy call on Mr Jim WALLACE,  
Deputy First Minister and Minister of Justice** (who is also  
a member of the Scottish Executive)

12:00 noon **Tour of Edinburgh Castle, Castlehill**

1:20 pm **Working lunch with**  
- **Mr Paul GRICE, Chief Executive, Scottish Parliament**  
- **Ms Carol DEVON, Director of Clerking**  
- **Mr Bill THOMSON, Head of Chamber Office**  
- **Ms Margaret McDONALD, Legal Office**

3:00 pm **Observe Question Time and First Minister's Question  
Time**

3:30 pm **Courtesy call on Sir David STEEL, KBE,  
Presiding Officer, Scottish Parliament**

4:00 pm **Tour of the new Scottish Parliament building**

15 June 2001 (Friday)

- 9:00 am Depart hotel for Glasgow
- 10:30 am **Meeting with Professor Richard ROSE, Director, Centre for the Study of Public Policy, Strathclyde University, Glasgow**
- 12:00 noon Depart for Glasgow Airport
- 3:30 pm Depart Glasgow for London
- 4:35 pm Arrive London
- 7:00 pm **Dinner hosted by Mr Andrew LEUNG, Director General, Hong Kong Economic and Trade Office, London**

16 June 2001 (Saturday)

- 9:15 am Meet at Royal Horseguards Hotel before proceeding to the Royal Horseguard Parade  
**(Mr Kenneth ROBBIE, Head of Hong Kong Section, China Hong Kong Department, Foreign and Commonwealth Office, Mr Stephen TAYLOR, Hong Kong Section, and staff members of the Hong Kong Economic and Trade Office, London)**

18 June 2001 (Monday)

- 10:00 am **Meeting with Mr Liam LAURENCE SMYTH, Deputy Principal Clerk, House of Commons**
- 11:00 am **Meeting with Ms Eve SAMSON, Adviser on Parliamentary Procedure, Cabinet Office**
- 12:00 noon **Meeting with Mr Tony MEDAWAR, Deputy Director, Cabinet Office Central Secretariat**

- 12:40 pm      **Lunch hosted by Ms Rosalind MARSDEN, Director Asia Pacific and Mr Andrew SEATON, Head, China Hong Kong Department, Foreign and Commonwealth Office**
- 2:15 pm      Depart for London Heathrow Airport
- 4:15 pm      Depart London for Paris
- 6:25 pm      Arrive Paris
- 8:00 pm      **Briefing Dinner with staff members of the Hong Kong Economic and Trade Office, Brussels**

19 June 2001 (Tuesday)

- 11:00 am      **Meeting with Mr Jacques LARCH, Chairman, and Mr Pierre FAUCHON, Deputy Chairman, Senate laws committee (Commission Des Lois, Senat)**
- 12:00 noon    **Meeting with Mr Didier MAUS, Professor in Public Law and Chairman of the International Institute of Public Administration**
- 4:00 pm      **Meeting with Mr Michel BERNARD, State Councillor and Chairman of the Deontology Committee, Ministry of the Civil Service, Administrative Reform and Decentralisation**
- 5:00 pm      **Meeting with Ms Nicole FEYDT, Deputy Chairman, National Assembly laws committee (Commission Des Lois, Assemblée Nationale)**
- 7:30 pm      **Dinner hosted by Mr Christopher JACKSON, Special Representative for the Hong Kong Economic and Trade Affairs to the European Communities, and attended by other guests including academics and government officials**

20 June 2001 (Wednesday)

- 9:50 am Depart Paris for Berlin
- 11:35 am Arrive Berlin
- 3:00 pm **Meeting with Mr Winfried JUNG and Dr Collin DURKOP, Director of Department of International Co-operation of Konrad-Adenauer-Stiftung**
- 4:30 pm **Meeting with Dr Hermann Otto SOLMS, Vice President of German Bundestag**
- 6:00 pm **Meeting with the Bundestag Internal Affairs Committee**  
**- Ms Ulla JELPKE,**  
**- Dr Max STADLER,**  
**- Mr Meinrad BELLE**
- 7:30 pm **Dinner hosted by the Bundestag German-Chinese Parliamentary Group**  
**(headed by Vice Chairman Mr Volker NEUMANN)**

21 June 2001 (Thursday)

- 9:00 am **Meeting with Professor Dr Wolfgang ZEH, Director of the Department of Parliamentary Services, Administration of Parliament (Bundestag)**
- 11:00 am **Meeting with Mr Axel SCHMIDT-GODELITZ, Head of Berlin Office, Friedrich-Ebert-Stiftung**
- 2:00 pm **Tour of Reichstag**
- 3:00 pm **Meeting with Mr Carl-Dieter SPRANGER, Vice-Chairman, Bundestag Foreign Affairs Committee**
- 4:15 pm **Meeting with Ms Dr SONNTAG-WOLGAST, Parliamentary Secretary of State of the Federal Ministry of the Interior**

7:00 pm           **Dinner with members of the Asia-Pacific-Forum**

22 June 2001 (Friday)

11:00 am           **Meeting and lunch with Mr Rainer FUNKE,  
Friedrich-Naumann-Stiftung**

2:55 pm           Depart Berlin for Heidelberg via Frankfurt

4:05 pm           Arrive Frankfurt Airport and transfer to Heidelberg by bus

7:00 pm           **Dinner with Professor Dr Susanne WEIGELIN-  
SCHWIEDRZIK of Centre of Chinese Studies of the  
University of Heidelberg and Vice-President for the  
International Affairs of University of Heidelberg**

23 June 2001 (Saturday)

9:00 am           **Meeting with Professor Dr Rudiger WOLFRUM,  
Director, Max Planck Institute for Foreign Public Law  
and International Law**

11:30 am           Depart Heidelberg for Frankfurt Airport

3:30 pm           Depart Frankfurt Airport for London Heathrow Airport

5:55 pm           Depart London for Hong Kong

24 June 2001 (Sunday)

12:55 pm           Arrive Hong Kong

- END -

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