

立法會
Legislative Council

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Special House Committee Meeting on 19 April 2002
Background Paper prepared by Legislative Council Secretariat
Government's Policy on Legislation and Administrative Measures

Purpose

This paper provides a summary of recent discussions in the House Committee and the response of the Chief Secretary for Administration (CS) in respect of Government's policy on legislation and policy on administrative measures.

Legislative Programme for 2001-02 and views raised by Members at the House Committee meeting on 9 November 2001

2. At the House Committee meeting on 9 November 2001, Members noted that far fewer bills (only 32) would be introduced in the 2001-02 session than in previous sessions (detailed figures in Appendix I). Some Members pointed out that it was reported in the press that the Administration would consider using executive orders instead of legislating so as to "bypass" the Legislative Council (LegCo), and that the Chairman had requested the Administration to introduce fewer bills.
3. The Chairman stressed that she had never requested the Administration to introduce fewer bills, and CS had never said anything to her about using executive orders instead of legislating. Some Members expressed concern that if the Administration resorted to using executive orders instead of legislating, it would undermine the power of LegCo in making laws and monitoring the work of the Government. Another Member considered that it was the need for legislating and not Members' workload which should determine whether a legislative proposal should be introduced.
4. Members agreed that the matter should be raised by the Chairman with CS.

CS's response on 13 November 2001

5. At the Chairman's meeting with CS on 13 November 2001, CS made the following points in response to Members' concerns -

- (a) The objective and spirit of some bills in the past were not sufficiently clear. He considered quantity and quality equally important, and the latter should not be sacrificed in favour of the former. In some instances, problems arose after some bills had become law. Great care must therefore be exercised during the drafting stage;
- (b) Legislation should not impose a financial burden on the community unnecessarily, and that there should not be enforcement problems. Other considerations were the administrative costs involved and the importance of not damaging the Administration's credibility. Moreover, as the Bills Committee slots were limited, it was unrealistic and impractical to introduce a large number of bills in a session;
- (c) CS stressed that he had applied stringent standards in approving items for the Legislative Programme. For example, if an existing general legislative provision was adequate, it would not be necessary to introduce a more specific provision;
- (d) CS felt aggrieved at the accusation that the Administration's aim was to avoid legislating and to employ administrative measures instead. He pointed out that when something could only be done legally by enacting legislation, using any other means would be illegal; and
- (e) CS confirmed that the Chairman had never complained to him about the Council having too many bills to consider.

Further views raised by Members at the House Committee meeting on 16 November 2001

6. The points made by CS (as detailed in paragraph 5 above) were conveyed to Members at the House Committee meeting on 16 November 2001. In response, Hon Margaret NG, Chairman of the Panel on Administration of Justice and Legal Services (AJLS Panel), sought clarification on what CS meant by -

- (a) The importance of introducing legislation which would not damage the Administration's credibility; and
- (b) When an existing general legislative provision was adequate, it would not be necessary to introduce a more specific provision.

7. Hon Margaret NG also pointed out that there were cases where the Administration had claimed that a particular legislative proposal was introduced simply to make clear certain provisions in an existing piece of legislation, but in actual fact the legislative proposal sought to make substantial changes to the legislation concerned. Miss NG also expressed concern that a Policy Bureau or government department might have introduced administrative measures without realising that it did not have the legal basis or authority to do so.

8. Hon Margaret NG informed Members that the AJLS Panel would follow up these issues, and CS would be invited to attend the discussion of the Panel on these issues.

Acting CS's response on 19 November 2001

9. The Chairman conveyed the further views raised by Members at the House Committee meeting on 16 November 2001 to Acting CS, Mr Michael SUEN, on 19 November 2001. In response, Acting CS made the following points -

- (a) The Administration carried out its work in accordance with the Basic Law. The principle was to legislate if necessary instead of resorting to administrative measures;
- (b) If there was already sufficient legal basis in existing law to implement a policy, the Administration would make use of the available authority and refrain from making new legislative provisions which were in fact unnecessary;
- (c) The provision of "executive order" had so far been used only once : in 1997, the Executive issued an executive order in accordance with Basic Law 48(4) i.e. the Public Service (Administration) Order 1997, which provided for the appointment, dismissal, suspension and disciplinary procedures in the Civil Service;
- (d) An executive order was only applicable to the Administration's internal affairs, e.g. the Civil Service, and did not relate to matters affecting the community as a whole. It was different

from the Common Law and laws passed by LegCo. Moreover, it was not an independent source of law under the existing legal system of the Hong Kong Special Administrative Region. It could not therefore replace legislation or anything which carried the effect of law.

The above points were conveyed to Members at the House Committee meeting on 23 November 2001.

Report of the AJLS Panel to the House Committee meeting on 1 March 2002 and CS's letter of 7 February 2002

10. The AJLS Panel reported to the House Committee meeting on 1 March 2002 that although CS initially agreed to attend a meeting of the Panel on a date to be fixed, he subsequently wrote to the Chairman of the Panel on 7 February 2002 suggesting that it was more appropriate to have an exchange of views with Members at his next regular meeting with the House Committee as Members other than members of the Panel may also be interested in the Administration's view on the subject. The Panel and the House Committee agreed to CS's suggestion.

11. In his letter (Appendix II), CS reiterated that it had never been the Government's intention to substitute administrative measures for legislation or to bypass LegCo. If there was a genuine need to legislate in order to implement a new policy proposal, there was no question of the Government resorting to administrative measures to achieve that objective. If existing legislation already provided sufficient basis for the Government to implement a new policy proposal, the Government would use the powers already enshrined in existing laws. The underlying principle in making new legislation was that the Government would legislate only if there was a genuine need to do so.

12. CS again pointed out that in considering whether to introduce new or amend existing legislation, the Bureau Secretary would critically examine the legislative proposal by asking the following three sets of questions -

- (a) Whether the legislation was necessary in the public interest, what the appropriate form was and whether there were other options which could achieve the same policy intent;
- (b) What were the full implications of the policy proposal and what was its social, political and economic impact on the community and the Government; and
- (c) Would the Government be able to enforce the new legislation fully and effectively.

13. CS further pointed out that he personally chaired an internal Committee which determined Government's legislative programme and priorities. In screening a bid for legislation to ensure that only the most essential bills were introduced into LegCo, the Committee took into account, among other things, the current legislative commitments of LegCo, how urgent the proposed legislation was, and whether undesirable consequences might ensue if it was not enacted within the current legislative session.

Council Business Division 2
Legislative Council Secretariat
14 March 2002
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**Statistics on Government Bills introduced/to be introduced
into the Legislative Council**
(as at 11 March 2002)

Term	Bills to be introduced	Bills introduced	Passage through LegCo
Provisional LegCo		63	63
First term of LegCo		171	157
1998-99 session		(122)	(65)
1999-00 session		(49)	(92) ^{Note 1}
Second term of LegCo		69	35
2000-01 session		(54) ^{Note 2}	(26)
2001-02 session	18 ^{Note 3}	(15) ^{Note 3}	(9) ^{Note 4}

Notes

- 1 Including 52 bills introduced in the 1998-99 session.
- 2 Of the 54 bills introduced in the 2000-01 session :
 - 33 were passed;
 - 14 are being studied by Bills Committees;
 - 1 is on the waiting list;
 - 3 are awaiting resumption of Second Reading debate;
 - 2 are being held in abeyance; and
 - 1 is pending the decision of the House Committee.
- 3 Of the 32 bills listed in the Legislative Programme for the 2001-02 session provided by the Director of Administration on 3 November 2001, 14 bills have been introduced (the Appropriation Bill 2002 introduced on 6 March 2002 is not included in the Legislative Programme) and 1 more bill will be introduced on 13 March 2002. No introduction dates have been provided for the remaining 17 bills.
- 4 7 bills were introduced in the 2000-01 session.

Appendix II

Our Ref: CSO/ADM CR 6/3221/93(02) Pt 21

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7 February 2002

The Hon Margaret Ng
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Hong Kong

LegCo Panel on Administration of Justice and Legal Services (AJLS Panel)

Thank you for your note of 25 January 2002, and your invitation for me to attend an AJLS Panel meeting to discuss the Administration's policy on legislation and related matters.

I am sorry to hear that we have yet to agree on a meeting date. It is through no fault of my Administrative Assistant that a date has not been fixed. He is in parallel arranging a number of overseas duty trips which the CS is required to undertake in the first part of the year. As the situation with those trips remains fluid, it would be remiss of him to seek to commit you and Panel members to a date that I might just not be able to make eventually.

Allow me to make up for this by outlining here the Administration's thoughts on the issues that are of interest to the Panel in this regard, viz. our policy on legislation and our policy on administrative measures. The two matters are intertwined. I would deal with them together.

The Basic Law sets out the powers and functions of the executive and legislature in respect of law-making in Hong Kong. It stipulates that it is the executive which drafts and introduces bills and implements laws passed by the legislature; and the legislature which enacts, amends or repeals laws. My colleagues, the Bureau Secretaries, and I accept without question the constitutional role of the legislature on law-making. We also take our constitutional responsibility of preparing bills seriously.

Contrary to some earlier media reports, it has never been our intention in this regard to substitute administrative measures for legislation, or to bypass LegCo. No one is above the law in Hong Kong. The Administration cannot be an exception. That we must abide by the law is clearly stipulated in the Basic Law. If there is a genuine need to legislate in order to implement a new policy proposal, there is no question of our resorting to administrative measures to achieve that objective. If existing legislation already provides sufficient basis for us to implement a new policy proposal, we will use the powers already enshrined in existing laws.

I believe I have impressed upon the Chairman of the LegCo House Committee, the Honourable Mrs Selina Chow, these very important considerations on various occasions. I will not hesitate to restate them here again, to put to bed any lingering doubts some might still harbour on the matter.

So, what is the principle we follow in making new legislation? The answer is this. We believe that law-making is a sacred and serious responsibility. It imposes new duties, requires compliance and enforcement. And, in almost all circumstances, it imposes additional costs on society. Our underlying principle is that we will legislate only if there is a genuine need to do so. During this process, the Administration will take into account the views of the community, including those expressed by the relevant Panels of the Legislative Council.

On that premise, in considering whether to introduce new or amend existing legislation, a Bureau Secretary, guided by the advice of the Department of Justice where appropriate, critically examines her proposal by asking herself three sets of questions.

First, is legislation necessary in the public interest, and what is the appropriate form? Are there other options, such as voluntary agreements, non-statutory schemes or codes of practices that can achieve the same policy intent?

Second, what are the full implications of the policy proposal? This should include a comprehensive analysis of the social, political and economic impact of the proposal on the community and the Government. As much as possible, these costs and impact should be identified, quantified and properly balanced. Would the assessed impact become more onerous or more palatable to the public, if the policy were underpinned by legislation?

Third, the question on enforcement. Are we satisfied that we are able to enforce the new legislation fully and effectively? Put simply, we should not be putting a bill to LegCo that we are not able to enforce.

An internal Committee I chair, with the Secretary for Justice as a member, determines our legislative programme and priorities. The Committee adopts these very same criteria when we vet legislative proposals to formulate our annual Legislative Programme. In screening a bid for legislation, the Committee also takes into account the current legislative commitments of LegCo, how urgent the proposed legislation is, and whether undesirable consequences may ensue if it is not enacted within the current legislative session. These considerations enable us to prioritise better our legislative work by introducing only the most essential bills into LegCo.

I hope you would find the foregoing useful. On reflection, I believe that Members, as well as those on the AJLS Panel, may also be interested in the Administration's view on this subject. I therefore suggest that instead of appearing before the AJLS Panel, it is probably more appropriate to have an exchange of views with Members at my next regular meeting with the House Committee. For this reason, I am copying this letter to the Chairman of the House Committee.

(Donald Tsang)
Chief Secretary for Administration

c.c. Hon Mrs Selina Chow Liang Shuk-yee, JP