

立法會
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Legislative Council
Subcommittee to Study the Proposed
Accountability System for Principal Officials and Related Issues

Minutes of the third meeting
held on Friday, 3 May 2002 at 8:30 am
in the Chamber of the Legislative Council Building

Members Present : Hon IP Kwok-him, JP (Chairman)
Dr Hon YEUNG Sum (Deputy Chairman)
Hon Kenneth TING Woo-shou, JP
Dr Hon David CHU Yu-lin, JP
Hon Cyd HO Sau-lan
Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, JP
Hon LEE Cheuk-yan
Hon Eric LI Ka-cheung, JP
Hon NG Leung-sing, JP
Hon Margaret NG
Hon CHEUNG Man-kwong
Hon HUI Cheung-ching, JP
Hon CHAN Kam-lam
Hon Andrew WONG Wang-fat, JP
Dr Hon Philip WONG Yu-hong
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung, BBS
Hon Ambrose LAU Hon-chuen, GBS, JP
Hon CHOY So-yuk
Hon SZETO Wah
Hon TAM Yiu-chung, GBS, JP
Hon LI Fung-ying, JP
Hon LEUNG Fu-wah, MH, JP
Hon MA Fung-kwok

Hon Timothy FOK Tsun-ting, SBS, JP
Hon Abraham SHEK Lai-him, JP
Hon Michael MAK Kwok-fung

Members : Hon James TIEN Pei-chun, GBS, JP
Absent : Hon Emily LAU Wai-hing, JP
Dr Hon TANG Siu-tong, JP
Dr Hon LO Wing-lok
Hon Audrey EU Yuet-mee, SC, JP

Members : Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
Attending : Hon SIN Chung-kai

Public Officers : Mr Michael M Y SUEN
Attending : Secretary for Constitutional Affairs

Mr Clement C H MAK
Deputy Secretary for Constitutional Affairs

Mr Robin IP
Deputy Secretary for Constitutional Affairs

Mr Joseph WONG Wing-ping
Secretary for the Civil Service

Mr I G M Wingfield
Law Officer (Civil Law)

Mr R C Allcock
Solicitor General

Mr P H H WONG
Senior Assistant Solicitor General

Mrs Philomena LEUNG
Principal Assistant Secretary for Constitutional Affairs

Clerk in : Mrs Percy MA
Attendance : Chief Assistant Secretary (2)3

Staff in : Mr Jimmy MA, JP

Attendance

Legal Adviser

Mrs Justina LAM
Assistant Secretary General 2

Miss Monna LAI
Assistant Legal Adviser 7

Miss Mary SO
Senior Assistant Secretary (2)8

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I. To continue discussion on proposed accountability system for principal officials focusing on item 1 of the List of Areas for Study (issued vide LC Paper No. CB(2)1728/01-02(01))

At the invitation of the Chairman, Solicitor General (SG) took members through the Administration's paper on "The Constitutionality of the Accountability System" (LC Paper No. CB(2)1735/01-02(01)).

Consistency with the Basic Law

2. Mr Albert HO said that the Administration had changed its position from "what was not expressly provided for in the Basic Law (BL) was inconsistent with BL" to "what was not prohibited in BL was consistent with BL". For instance, a purposive approach was adopted in considering the constitutionality of the proposed accountability system for principal officials, whereas a literal and narrow approach was adopted for consideration of matters relating to the constitutional reform package put forward by former Governor Chris Patten before Reunification, and the right of abode cases. Mr HO asked the following questions -

- (a) whether it was the legislative intent of BL 48(5) that principal officials must be civil servants; and
- (b) whether the re-titling of the D8 civil service posts in bureaux as Permanent Secretaries would contravene BL 103, having regard to the fact that Permanent Secretaries would no longer be principal officials and would work to their respective new Directors of Bureau.

3. SG responded that the principle adopted by the Administration in interpreting BL was captured succinctly in the Court of Final Appeal decision in the *Ng Ka Ling & Others v. Director of Immigration* [1999] 1 HKLRD which stated that "constitutional interpretation, like other forms of interpretation, is essentially question specific. As and when questions of interpretation arise, the courts will address the challenges posed by the questions raised and develop principles as necessary to meet them". SG stressed that there was no question of double standards being adopted by the Administration in interpreting BL as the cases cited by Mr Albert HO in paragraph 2 above were different from the proposed accountability system which essentially

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involved internal changes to the government machinery. SG further said that BL did not specify any rigid government structure. It was a matter for the Chief Executive (CE) to decide how the government structure should be set up and developed so long as such changes were for the good governance of the Hong Kong Special Administrative Region (HKSAR) and consistent with BL.

4. Secretary for Constitutional Affairs (SCA) said that BL 48(5) did not require that principal officials must be employed as civil servants. He pointed out that the Commissioner of ICAC and the Director of Audit, who were principal officials, were not on the civil service establishment. SCA further said that there was no question that the re-titling of the D8 civil service posts in bureaux as Permanent Secretaries would contravene BL 103. This was because BL 103 did not inhibit development and improvement to the public service system provided that such changes were for the good governance of the HKSAR. The benefits of the accountability system were considered to satisfy the "good governance" requirement. Secretary for the Civil Service (SCS) supplemented that it was not uncommon for the roles and responsibilities of civil servants to be changed arising from changes to the government structure, say, reorganisation of departments.

5. Mr CHEUNG Man-kwong said that the reasons given by the Administration in support of the constitutionality of the proposed accountability system were unconvincing. In order to comply with BL 11, Mr CHEUNG considered it necessary for certain provisions of BL to be amended in order to implement the proposed system, as the new system would bring about fundamental changes to the existing government and political structures. Mr CHEUNG explained that the changes included the following -

- (a) a new system of employment would be introduced into the highest level of Government under CE. The principal officials under the new system would be employed on terms and conditions different from those of the civil service. The civil service recruitment, employment, assessment, promotion, disciplinary and removal mechanisms would not be applicable to them;
- (b) the existing D8 office-holders in the bureaux would no longer be principal officials and their power to formulate policies would be transferred to the new Directors of Bureau who would be political appointees and accountable to CE only; and
- (c) the nature of the Executive Council (ExCo) would be changed from a consultative to a cabinet-type of organ.

6. SCA said that under the accountability system, ExCo would continue to be an organ assisting CE in policy-making. SCA reiterated that the accountability system was consistent with BL for reasons spelt out in the Administration's paper. SG clarified that there was no question of the power to formulate policies being taken

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away from the incumbent Directors of Bureau, as such power was vested in the Government of the HKSAR as a whole rather than in any individual government officials.

7. Mr SZETO Wah asked whether the proposal to hold principal officials responsible for the failure of matters falling within their respective portfolios was inconsistent with BL 48(4) which provided for CE to decide on government policies. SCA replied in the negative. He added that principal officials would be held responsible for serious failures in policy outcome and serious mishaps in the implementation of the relevant policies. Mr SZETO considered that CE, being the sole decision-maker on government policies, should also be held responsible for policy failures.

8. Miss Margaret NG said that the Administration should adopt a generous approach to interpret BL in respect of the aspects of the accountability system, such as the appointment and removal of principal officials, in order to provide a more democratic political structure. For example, principal officials under the proposed system should be vetted by the Legislative Council (LegCo) before appointment, or directly elected, or appointed by CE with the majority support of LegCo. Constitutional conventions should be established whereby in the event that a motion of no-confidence was passed by LegCo against a principal official, the latter should resign from office, and CE should accept his resignation.

9. SCA said that the Administration would not rule out the possibility of developing some conventions, on the condition that such conventions would not contravene BL or undermine the executive-led principle. However, constitutional conventions were usually established through precedents accumulated over a period of time. SCA further said that under BL, CE and the Central People's Government (CPG) had absolute power over the nomination and appointment of principal officials respectively.

10. Mr Andrew WONG was of the view that the Administration must adopt a consistent approach in interpreting BL. Miss Margaret NG cautioned that Government's integrity would be at stake if it failed to do so. They considered that the Administration should not use different reasoning at different times to suit different needs.

11. Mr Andrew WONG and Miss Margaret NG pointed out that constitutional convention could be established by one single precedent or by mutual agreement between parties concerned without any precedent. Miss NG also requested the Administration to provide justifications in support of the view that constitutional convention could only be established over a period of time through accumulation of precedents.

12. Mr HUI Cheung-ching asked whether the posts of Deputy Secretaries of Department would be included under the proposed accountability system, as these

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office holders were principal officials under BL 48(5). SCA responded that the Administration had no intention to do so at this stage.

Post of Secretary for Justice (SJ)

13. Miss Margaret NG said that if the post of SJ was to be filled by a political appointee, the power of making prosecution decisions should be transferred from SJ to the Director of Public Prosecutions (DPP).

14. SG said that the Administration remained of the view that SJ should retain her role in respect of prosecution decisions and certain other quasi-judicial decisions under the accountability system. The reasons were as follows -

- a) BL 63 provided that the Department of Justice (D of J) should control criminal prosecutions, free from any interference. SJ was required to act independently in respect of prosecutions and would continue to do so under the new system;
- b) the proposed arrangements were consistent with arrangements for similar posts in many other common law jurisdictions. In fact, it was common practice in other common law jurisdictions for the post-holders of Attorney General (AG) or Minister for Justice to exercise a dual function which was partly political and partly quasi-judicial, in accordance with constitutional proprieties;
- c) it was appropriate that SJ should be politically accountable for the manner in which he or she formulated and executed policy in respect of the legal system and legal services;
- d) in relation to certain functions (particularly the function of making prosecution decisions), SJ was required to act independently and the proposed arrangements would not alter the position either in law or in practice; and
- e) a complete transfer of powers and responsibilities in respect of prosecution matters from SJ to DPP would amount to an abdication of SJ's duties as head of D of J and would contravene BL 63.

15. SG further said that the proposed accountability system would not undermine the independence of the judiciary which was guaranteed under BL 2 and BL 80 to BL 96.

16. Miss Margaret NG said that she remained unconvinced that SJ should retain her role in respect of prosecution decisions and certain quasi-judicial decisions under the accountability system. Miss NG pointed out that transferring the power to make prosecution decisions from SJ to DPP would not contravene BL because BL 63

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stipulated that the "Department of Justice" rather than "Secretary for Justice" should control criminal prosecutions. In her view, it was SJ's role to safeguard the independence of DPP in making prosecution decisions.

17. Mr Albert HO said that such transfer of power would reinforce the legislative intent of BL 63 that criminal prosecutions must be free from any interference. Mr HO added that it was not uncommon for a head to abdicate his duties to a subordinate. For example, BL 57 and BL 58 provided for the independent operation of the Independent Commission Against Corruption and the Commission of Audit.

18. SG reiterated that it was the Administration's view that it was permissible for SJ to delegate the power to make prosecution decisions to another Law Officer whilst retaining ultimate control and responsibility. However, a complete transfer of those powers and responsibilities would amount to an abdication of SJ's duties as head of D of J and would contravene BL 63. It would also lead to a situation of an "unaccountable" prosecutor, as DPP was a career civil servant and had security of tenure.

19. SG further pointed out that SJ did delegate prosecution decisions to DPP and the vast majority of those decisions were made personally by DPP or his subordinates. However, this should not detract from the fact that SJ could, if she wished, call for files and make the decision personally. The Administration considered the existing arrangements would allow SJ to fulfill her duties as head of D of J effectively and comply with BL 63. SG added that the delegation of duties from SJ to DPP and the delegation of duties from CE to an organisation were not the same. While SJ as head of an operational department had to bear responsibility for the work of the department, CE clearly could not be expected to be operationally in charge of all working bodies within the Government.

20. Miss Margaret NG said that the question of a complete transfer of power to make prosecution decisions from SJ to DPP would lead to a situation of an "unaccountable" prosecutor should not arise, as an accountability system for DPP could be drawn up if necessary. Moreover, DPP could be asked to come to LegCo to answer questions from Members, and decisions made by DPP were subject to judicial review.

21. Dr YEUNG Sum said that it was of paramount importance that the role of SJ should be perceived by the public to be independent and impartial. The handling of the Sally AW case by the Administration had cast a huge shadow over the minds of the public as to whether SJ's decision of not prosecuting in that case was a fair and independent decision not influenced by favouritism or cronyism or other considerations. To make the office of SJ a political appointment would further undermine people's confidence in the rule of law in Hong Kong as the public might worry that similar controversies would occur again in the future.

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22. SG said that it was fairly common for there to be controversies with regard to prosecution decisions due to the inherently complicated nature of prosecution matters. D of J had set out clearly in a publication for public information what principles were adhered to by the Department in taking prosecution decisions, how such decisions were taken independently, and what proper procedures had to be followed, etc. If in some cases there were misconceptions that prosecution decisions had not been made independently, the Administration would do its best to correct the misconceptions. For instance, SJ had come to LegCo on several occasions to explain D of J's decision regarding the Sally AW case.

23. Mr Andrew WONG said that the post of SJ could be included in the proposed accountability system, provided that the post of DPP was pitched at D8 rank and the appointment of DPP was nominated by an independent body such as the Judicial Officers Recommendation Commission, for approval by SJ. SG said that he could not see the rationale for the proposal. Moreover, according to his knowledge, no other common law jurisdictions had the appointment of their DPP nominated by an outside body which was responsible for judicial appointments.

Permanent Secretaries

24. Mr HUI Cheung-ching asked whether consideration would be given to lowering the rank of Permanent Secretaries, having regard to the fact that Permanent Secretaries had less responsibilities than the Directors of Bureau and were no longer principal officials. Mr Howard YOUNG shared the view that Permanent Secretaries needed not be ranked at D8. Mr YOUNG also enquired whether the reason for pitching Permanent Secretaries at D8 rank was to be consistent with BL 100.

25. SCS responded that pitching Permanent Secretaries at D8 rank was not for complying with BL 100, as BL 100 only sought to ensure that the terms and conditions of civil servants would not be less favourable after Reunification. However, BL 100 would not apply to a situation where the terms and conditions of a civil servant would become less favourable than before as a result of him being demoted. As to the reasons for pitching Permanent Secretaries at D8 rank, SCS referred members to paragraphs 20 and 21 of the Legislative Council Paper on Accountability System for Principal Officials issued by the Constitutional Affairs Bureau on 17 April 2002. SCS said that, notwithstanding the reasons given in the paper, the Administration agreed that there was a case to review the staffing and structure of the policy bureaux including the number of D8 civil service posts in bureaux. The Administration considered it best to entrust the new principal officials to conduct the review which should take about a year to complete.

26. Mr Howard YOUNG hoped that the Administration, in its review of the staffing and structure of the policy bureaux, would make reference to the practice in the private sector. Mr YOUNG pointed out that it was not uncommon to offer less remuneration to an employee who subsequently took up a post with less responsibilities after reorganisation of a company.

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Secretary for the Civil Service and the Civil Service

27. Mr Andrew WONG said that a Permanent Secretary at D9 or D10 rank should be appointed as head of the civil service.

28. SCS clarified that there was no such a post as head of the civil service. The reason why the Chief Secretary for Administration was regarded as head of the civil service was because he was the highest ranking civil servant. SCS did not consider that there was a need to create a D9 or D10 civil service Permanent Secretary post, as SCS under the new system would be selected from the civil service. He would have a good understanding of the system and operation of the civil service. As a member of ExCo, he would be well placed to ensure that the interests and concerns of the civil service would be fully represented and taken into account before any major decision would be taken by the Government.

29. Miss Margaret NG opined that the independence of the civil service, the judiciary, particularly the judges, and ExCo must be upheld under the proposed accountability system.

30. SCS said that CE had publicly stated that the civil service would continue to be permanent, meritocratic and politically neutral under the accountability system. To this end, one of the tasks of the new SCS was to uphold these values of the civil service system. Moreover, there were established civil service regulations and guidelines within the civil service to ensure the integrity and probity of civil servants in their discharge of official duties. For instance, the Public Service Commission, a statutory body that monitored the appointment and promotion of civil servants, would ensure that the established mechanism would not be undermined by the accountability system. In addition, the principal officials would be required as a condition of their contract to uphold the principle of maintaining a permanent, meritocratic and politically neutral civil service system. More specifically, the contract would provide that principal officials should observe a code which would, amongst other things, set out their relationship with civil servants. The Administration would provide a paper on preserving the integrity and probity of the civil service to the Subcommittee shortly.

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31. Mr NG Leung-sing asked how BL 99(2), which required that public servants must be dedicated to their duties and be responsible to the Government of the HKSAR, would be implemented under the proposed accountability system. SCA responded that all public servants, regardless of whether they were appointed on civil service or non-civil service terms, were accountable to the Government of the HKSAR and would continue to be so under the new system.

32. Mr NG Leung-sing expressed concern whether civil servants could continue to remain politically neutral under the accountability system. SCS responded that as in the past, civil servants would to their best abilities, put forward clear and honest

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advice on policy options. Once decisions had been taken by their superiors, civil servants would support and fully and faithfully implement the decisions without question regardless of their own personal conviction. The civil service would continue to abide by this principle of political neutrality.

Need for primary legislation to underpin the proposed accountability system

33. Ms Cyd HO and Miss Margaret NG were of the view that given the important and fundamental changes which the new system would bring about, primary legislation should be introduced to underpin the proposed accountability system so that the proposal would be scrutinised with the benefits of a full legislative process.

34. SG responded that as a matter of legal policy, no primary legislation would be introduced if it was not needed and/or where the desired legal effect could be achieved by way of subsidiary legislation. SG explained that the implementation of the accountability system would involve reorganisation of only a number of policy bureaux. The reorganisation of policy bureaux could be effected administratively because as a general rule the structure of the Government was not provided for in either the BL or any local legislation. The transfer of statutory functions was consequent to the reorganisation and could be effected by way of a resolution under section 54A of Interpretation and General Clauses Ordinance (Cap. 1), and did not require the introduction of a bill.

35. Miss NG enquired whether the resolution under section 54A of Cap. 1 was adequate for the purpose of transferring statutory functions from the incumbent policy secretaries to the principal officials under the proposed accountability system, having regard to the fact that the latter was a new category of public officers, i.e. political appointees who were not civil servants. SG replied that the use of a resolution was appropriate as principal officials under the accountability system were within the meaning of the term "public officer" in Cap. 1.

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36. At the request of Miss Margaret NG, SG undertook to provide more information as to why the resolution under section 54A of Cap. 1 was the appropriate legislative means for effecting the necessary transfer of statutory functions arising from the reorganisation of bureaux introduced at the same time as the implementation of the accountability system.

Powers and functions of the Chief Executive and his accountability

37. Ms Cyd HO said that the powers of CE would be increased under the accountability system, as the principal officials would be accountable to CE and CE had the power to remove them. Ms HO further said that this was detrimental to the democratic development of the HKSAR which was provided for in BL.

38. SCA responded that the powers of CE would not be increased as a result of implementing the accountability system, as the powers of CE had been specifically

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provided for in BL. SCA further said that the new system would not hamper the democratic development of the HKSAR, as BL had already provided for a mechanism for a decision to be taken on the method for forming LegCo and selecting CE for their respective terms subsequent to the year 2007.

39. Ms Cyd HO considered it necessary for a check and balance mechanism to be put in place to prevent CE from abolishing the accountability system and restoring it as he so wished. SCA reiterated that the accountability of CE had been specifically set out in BL. SG supplemented that the powers of CE were constrained by BL and local legislation in which major policy matters were embedded.

The function, composition and operation of the Executive Council

40. Mr Jasper TSANG asked whether the arrangement of principal officials under the accountability system automatically becoming members of ExCo would be contrary to the legislative intent of BL 55 and restricted CE's power in appointing ExCo members. SCA responded that the decision to appoint principal officials to ExCo under the new system was made by CE. SG supplemented that as BL 55 did not specify the number and proportion of various types of members of ExCo, which was different from the arrangement before the Reunification whereby the Letters Patent did specify that the Chief Secretary, Financial Secretary and AG should be ex-officio members of ExCo, it was clear that the purpose of BL 55 was to give CE the flexibility in deciding the proportion of the various categories of members.

41. Referring to BL 56(3) which provided that if CE did not accept a majority opinion of ExCo, he should put the specific reasons on record, Mr CHEUNG Man-kwong opined that the legislative intent of BL 56(3) was to enable ExCo to check and balance the powers of CE. Mr CHEUNG considered that this provision would be rendered redundant or ineffective as the majority of ExCo members under the new system, being principal officials accountable to CE, would defer to CE's views.

42. SCA responded that it was unlikely that principal officials would not give their views and advice to CE as they had to accept total responsibility for serious failures in policy outcome or serious mishaps in policy implementation under their respective portfolios. SCA disagreed with Mr CHEUNG Man-kwong's view that the legislative intent of BL 56(3) was to enable ExCo to check and balance the powers of CE, as this ran contrary to the constitutional functions of ExCo in assisting CE in policy making as provided expressly and unequivocally in BL 54. SCA said that as the head of the HKSAR and the Government of HKSAR, CE led the Government of the HKSAR. CE would no doubt carefully consider the views of the members of ExCo, including any contrary views that might be expressed by a majority of the members. If CE did not accept a majority opinion of ExCo, it would suffice if he put the specific reasons on record as required under BL 56(3). SCA further said that there was a suggestion during the drafting stage of BL that if CE did not accept a majority opinion of ExCo, he should put the specific reasons on record and report the same to CPG for the record. The fact that BL 56(3) did not incorporate this suggestion reaffirmed that it was not

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the legislative intent of BL 56(3) for members of ExCo to check and balance the powers of CE.

43. The Chairman requested the Administration to provide written responses to issues raised by members at this and previous meetings before the next meeting.

44. There being no other business, the meeting ended at 12:40 pm.

Council Business Division 2
Legislative Council Secretariat
26 June 2002