

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 fourth meeting
held on Tuesday, 7 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
Hon James TIEN Pei-chun, GBS, JP
Hon Cyd HO Sau-lan
Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, JP
Hon LEE Cheuk-yan
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
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Hon YEUNG Yiu-chung, BBS
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Hon SZETO Wah
Hon TAM Yiu-chung, GBS, JP
Dr Hon TANG Siu-tong, JP
Hon LI Fung-ying, JP
Dr Hon LO Wing-lok
Hon LEUNG Fu-wah, MH, JP
Hon Timothy FOK Tsun-ting, SBS, JP
Hon Abraham SHEK Lai-him, JP

Hon Michael MAK Kwok-fung
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Dr Hon David CHU Yu-lin, JP
Hon Eric LI Ka-cheung, JP
Dr Hon Philip WONG Yu-hong
Hon Ambrose LAU Hon-chuen, GBS, JP
Hon MA Fung-kwok

Public Officers Attending : Mr Michael M Y SUEN
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 Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mrs Justina LAM
Assistant Secretary General 2

Miss Monna LAI
Assistant Legal Adviser 7

Miss Mary SO
Senior Assistant Secretary (2)8

Action
Column

I. Matters arising from discussion on items I-III of the List of Areas for Study

At the invitation of Chairman, Solicitor General (SG) took members through the Administration's papers on "Resolution under section 54A of the Interpretation and General Clauses Ordinance (Cap. 1)" (LC Paper No. CB(2) 1822/01-02(01) and "References to the Chief Executive in Council in the Laws of Hong Kong" (LC Paper No. CB(2) 1822/01-02(02)).

Consistency with the Basic Law

2. Mr CHEUNG Man-kwong said that under the proposed accountability system, a new layer of politically appointed principal officials would be employed on contract, and existing principal officials at D8 rank in bureaux would be re-titled as Permanent Secretaries to work to the new principal officials. He queried whether the proposed arrangement was consistent with the Basic Law (BL).

3. Secretary for Constitutional Affairs (SCA) responded that although principal officials under the accountability system were not employed on civil service terms and conditions, they were principal officials as specified in BL 48(5). In order to comply with BL 48(5) and to implement the accountability system with effect from 1 July 2002, the Chief Executive (CE) would recommend to the Central People's Government (CPG) the removal of the incumbent Secretaries of Department and Directors of Bureau as principal officials, and nominate candidates for appointment by CPG as principal officials under the new system before 1 July 2002. The incumbent Directors of Bureau would remain in the civil service and retain their original rank if they were not re-appointed as principal officials under the new system. The D8 civil service posts would be retitled as Permanent Secretaries. SCA further said that the Administration planned to seek the endorsement of the Establishment Subcommittee and the approval of the Finance Committee for incurring additional expenditure of about \$42 million to meet the costs of the 14 new principal official positions in early June 2002.

4. Mr LEE Cheuk-yan said that the proposed accountability system was inconsistent with BL 103, as the terms and conditions on which the principal officials under the new system would be employed were different from those of the civil service.

5. SCA responded that BL 103 did not inhibit development and improvement to the public service system provided that such changes were for the good governance of Hong Kong. SG supplemented that even if BL103 applied to principal officials, it did not prevent the development of terms and conditions on which they were employed. There was also a view that BL 103 was not intended to apply to principal officials at all. As Professor Yash P Ghai stated in his book Hong Kong's New Constitutional Order (1999), appointments of principal officials were made by CPG after nomination by CE. BL 103 should therefore apply to other public servants. This view reinforced the conclusion that BL 103 was no impediment to the implementation of the new system.

Need for primary legislation to underpin the proposed accountability system

6. In view of the important and fundamental changes which the proposed accountability system would bring about, Mr Albert HO, Miss Margaret NG and Ms Emily LAU were of the view that primary legislation should be introduced to underpin the proposed system so that the proposal would be scrutinised with the benefits of a full legislative process.

7. SCA responded that as a matter of legal policy, it was proper to achieve a legislative amendment by subsidiary legislation rather than primary legislation if this could be lawfully done. SCA pointed out that the reorganisation of bureaux could be effected administratively because the structure of the Government was not provided for in either BL or any local legislation. Previous reorganisations of the government structure were achieved administratively. SCA added that significant changes to government structure and system, arising from the McKinsey Report in the 1970s, were also achieved administratively.

8. Miss Margaret NG said that she remained unconvinced that the resolution under section 54A of Cap. 1 was adequate for the purpose of transferring statutory functions from the incumbent bureau secretaries to the principal officials under the proposed accountability system, given that the latter was a new category of public officers, i.e. political appointees who were not civil servants. She was of the view that the status of the principal officials under the new system should first be established by means of legislation, before resorting to the use of a resolution under section 54A of Cap. 1 to transfer the relevant statutory functions. Miss NG added that the use of the resolution would be appropriate if the statutory functions were instead transferred to the Permanent Secretaries because they were civil servants.

9. SG reiterated the Administration's view that the resolution under section 54A of Cap. 1 was appropriate, as principal officials under the accountability system were within the meaning of the term "public officer" in Cap. 1.

10. Mr Albert HO said that assuming that the resolution under section 54A of Cap. 1 was appropriate to effect the transfer of statutory functions arising from the

implementation of the accountability system, it was still questionable whether the use of resolution under section 54A of Cap. 1 alone was adequate to launch the proposed accountability system. He pointed out that Cap. 1 was primarily an interpretation ordinance. In addition, the proposed accountability system was not merely a reorganisation of government structure, but introduced a new political layer to the existing government structure.

11. SG said that Cap. 1 was not only an interpretation ordinance, as it also set out numerous substantive powers. For instance, Cap. 1 contained provisions stipulating that subsidiary legislation must be subject to the approval of the Legislative Council (LegCo) as well as provisions dealing with the powers of public officers and public contracts. SG further said that the resolution under section 54A of Cap. 1 was meant to supplement but not to provide the legal basis for the accountability system. No other legislation was required for implementation of the new system because, firstly, the duties of new principal officials would be based upon contractual arrangements namely the employment contracts entered into between the Government and its public officers, and, secondly, appointing principal officials as members of the Executive Council (ExCo) did not require legislation.

LA 12. At the request of members, Legal Adviser undertook to provide a paper, from the legal point of view, on whether the resolution under section 54A of Cap. 1 alone was adequate for the implementation of the proposed accountability system.

Powers and functions of the Chief Executive and his accountability

13. Ms Cyd HO said that the proposed accountability system would run counter to the democratic development of the Hong Kong Special Administrative Region (HKSAR) which was provided for in BL 45(2) and 68(2). Ms HO further said that the accountability of the Government would be reduced under the new system because the principal officials would defer to CE's views, as CE had the power to recommend their removal.

14. SCA responded that there was no question that principal officials under the accountability system would defer to CE's views, as they would be held responsible for the failure of matters falling within their respective portfolios, and in extreme cases, they might have to step down for serious failures in policy outcome or serious mishaps in policy implementation. SCA explained that one of the main objectives for implementing the new system was to strengthen the accountability of principal officials, as expecting principal officials who were civil servants to accept total responsibility and to step down in case of serious policy failures was incompatible with the underlying philosophy of a permanent civil service and its established appointment and removal system.

15. SCA further said that there was also no question that the accountability of the Government would be reduced under the new system, as the new system also aimed at

ensuring that the Government could better respond to the needs of the community, enhancing coordination in policy formulation, strengthening the cooperation between the Executive and the Legislature, ensuring effective implementation of policies and providing quality services to the public. SCA added that the accountability system would not run contrary to the democratic development of Hong Kong, 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 2007.

16. Ms Emily LAU said that she could not see how the proposed accountability system could strengthen the accountability of the Government and cooperation between the Executive and the Legislature. In her view, the only advantage for implementing the new system was to enable CE to have greater control on how Hong Kong should be governed as CE would only invite like-minded persons to be appointed as principal officials under the new system. The reason given by the Administration in support of the accountability system, i.e. principal officials under the proposed system would be asked to resign for serious failures in policy outcome or serious mishaps in policy implementation, was not valid, given that BL 48(5) already provided CE with the power to remove existing principal officials.

17. Ms LAU further said that if the Government was sincere in strengthening its accountability to the public, candidates nominated for appointment as principal officials should be vetted by LegCo, and a principal official should resign when a motion of no-confidence was passed by LegCo against him.

18. SCA responded that the accountability of the Government and cooperation between the Executive and the Legislature should improve under the accountability system. The new principal officials would have a much better grasp of the needs and aspirations of the public than the existing principal officials because one of the responsibilities of the politically appointed principal officials was to reach out to the general public to gauge and collect their opinions on government policies and services.

The function, composition and operation of the Executive Council

19. Ms Audrey EU requested the Administration to provide a copy of the report of the review of statutory appeals and objections to ExCo conducted by the then Attorney General's Chambers in 1995, and a written response to the following issues -

- (a) the 53 references to CE in Council in the Laws of Hong Kong providing for CE in Council to consider appeals or objections against decisions against principal officials, the nature of these appeals, the decisions involved, the policy secretaries under appeal, and remedies available to the aggrieved parties; and
- (b) whether consideration would be given to putting in place a mechanism to deal with appeals that went to ExCo against decisions of principal

officials under the accountability system, to ensure transparency and consistency.

20. Ms Audrey EU, Mr Howard YOUNG and Ms Emily LAU were of the view that as the membership of ExCo would be dominated by principal officials under the accountability system, the Administration should review the 53 references to CE in Council providing for appeals in particular situation, and consider whether some or all of them could be transferred to other bodies.

21. Miss Margaret NG said that it was also questionable whether ExCo, under the accountability system, should continue to be empowered to make subsidiary legislation, having regard to the fact that the subsidiary legislation made by ExCo were matters of importance.

22. SG responded that ExCo was empowered to make subsidiary legislation under various ordinances. The reason why ExCo, and not a government official, was chosen to make subsidiary legislation for certain matters indicated that the matters concerned were of such importance that advice from a group of well-informed people was required. SG further said that the Administration considered that ExCo should continue with its function to make subsidiary legislation under the new system. There should be no cause for concern that subsidiary legislation made by ExCo under the new system would not be subject to checks and balances, as LegCo had the power to approve, amend and repeal subsidiary legislation. SG added that it was common in other jurisdictions that primary legislation empowered government officials to make subsidiary legislation, subject to various controls. To his knowledge, LegCo had more power than many legislatures in vetting subsidiary legislation as the power to do so in other jurisdictions was generally limited to certain types of statutory instruments.

Post of Secretary for Justice(SJ)

23. Miss Margaret NG and Ms Emily LAU were of view that the power to make prosecution decisions should be completely transferred from SJ to the Director of Public Prosecutions (DPP), if the post of SJ was included in the accountability system. Miss NG further said that letting DPP have a complete control on prosecution decisions was not uncommon in other jurisdictions. For instance, in the United Kingdom (UK), the power to make prosecution decisions was vested in DPP and the power of the Attorney General (AG) was limited to appointing DPP and determining his remuneration, and making prosecution decisions on certain types of cases.

24. SG responded that the Administration considered it permissible for SJ to delegate the power to make prosecution decisions to another Law Officer whilst retaining ultimate control and responsibility. In practice, the vast majority of prosecution decisions were presently made by DPP. However, 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 the Department of Justice (D of J)

and would likely contravene BL 63. Moreover, such a transfer would be incompatible with the proposed accountability system, as SJ would be the one held responsible for the success or failure of matters handled by her Department, including criminal prosecution matters. SG pointed out that even in the UK where there was a separate office headed by DPP to handle all prosecution matters, AG, being a political appointee, still assumed the role of superintendent and would make prosecution decisions himself in certain cases.

25. Mr Andrew WONG said that he failed to see why SJ could not delegate to DPP the power to make prosecution decisions. He pointed out that other principal officials under the accountability system would delegate certain powers to their subordinates. SG responded that it was not appropriate to compare the position of SJ with that of a policy secretary. As head of D of J, SJ was required by BL 63 to control criminal prosecutions, in addition to having administrative and political responsibilities.

26. Miss Margaret NG said that the Administration should, for the good governance of Hong Kong, refrain from adopting a literal and narrow approach in interpreting BL 63, as BL 63 stipulated that the "Department of Justice" rather than "Secretary for Justice" should control criminal prosecutions. SG responded that it was precisely for the good governance of Hong Kong that the Administration considered it necessary for SJ, as head of D of J, to be both accountable and responsible for prosecution decisions.

Civil Service

27. Mr SZETO Wah asked the following questions -

- (a) why public servants were responsible to the Government of the HKSAR under BL 99(2), whereas the Commission Against Corruption and the Commission of Audit were accountable to CE under BL 57 and 58;
- (b) whether principal officials under the accountability system would be accountable to CE or to the Government of the HKSAR; and
- (c) whether the Permanent Secretaries would be accountable to their respective new Directors of Bureau, and whether the new Directors of Bureau would have free rein to direct and deploy staff of the policy bureaux and the executive departments falling within their respective portfolios.

28. Regarding Mr SZETO's first question, SG explained that the provisions of BL 57 and BL 58 were meant to emphasise that the work of the Commission Against Corruption and the Commission of Audit was independent of the Government, while BL 99(2) was of general application requiring that all public servants must be responsible to the Government of the HKSAR. On the second question, SCA said that

the fact that principal officials under the accountability system would be responsible to CE should not detract from the fact that they would also be responsible to the Government of the HKSAR, and CE was head of the Government of the HKSAR. As regards Mr SZETO's third question, SCA said that it was necessary for principal officials under the new system to have a certain say in the assignment of personnel working under them given that they would be held accountable for failure of matters falling within their respective portfolios.

29. In response to the concern expressed by Mr SZETO Wah about preserving the political neutrality of the civil service, SCA said that as in the past, civil servants would to their best abilities, put forward clear and honest 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.

30. Mr SZETO Wah said that as principal officials under the accountability system would be held responsible for policy failure, the same should apply to CE who was vested with the power to decide on government policies under BL 48(4). SCA responded that ExCo would continue to function on the basis of collective responsibility under the new system. However, principal officials under the new system would be held individually responsible for policy failure as they were responsible for the formulation and implementation of policies within their respective portfolios.

31. Mr Andrew WONG asked whether, in order to uphold the core values of integrity, efficiency, professionalism and meritocracy of the civil service, the Secretary for the Civil Service (SCS) under the new system would delegate more powers to his Permanent Secretary, particularly in matters relating to promotion. Mr WONG added that alternatively, a Permanent Secretary at D9 or D10 rank should be appointed as head of the civil service.

32. SCA responded that delegation of powers from policy secretaries to their respective subordinates was common, and similar practice would continue under the accountability system. SCA further said that there had never been a post of the 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. The Administration believed that SCS under the new system would be able to uphold the core values of the civil service system as he would be selected from the civil service, and would have a good understanding of the system and operation of the civil service.

33. At the request of Ms Cyd HO, SCA undertook to provide to the Subcommittee copies of the Code to be drawn up for principal officials under the accountability system, and a composite circular for civil servants to be issued by the Administration.

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The Administration would also provide information on the terms and conditions of service for principal officials under the new system, and how these terms and conditions of services would differ from those applicable to existing principal officials.

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Permanent Secretaries

34. As the posts of Permanent Secretaries were new, Mr Albert HO requested the Administration to provide a written response on whether the legal status of Permanent Secretaries would be established by legislative means or through administrative measures, and whether Permanent Secretaries would be acting as principal officials and performing the functions of principal officials during the leave absence of the latter.

Adm

35. There being no other business, the meeting ended at 12:10 pm.

Council Business Division 2
Legislative Council Secretariat
9 July 2002