

**Subcommittee to Study the Proposed
Accountability System for Principal Officials and Related Issues**

Agenda Items 1(4) to (6) of the Subcommittee Meeting on 3 May

Introduction

This paper discusses the following issues –

- (a) powers and functions of the Chief Executive and his accountability;
- (b) relationship between the Central People's Government and principal officials; and
- (c) constitutional relationship between the Chief Executive /principal officials /permanent secretaries /LegCo.

Powers and functions of the Chief Executive and his accountability

2. Powers and functions of the Chief Executive and his accountability have been specifically set out in the Basic Law.

3. According to Article 12 of the Basic Law, the Hong Kong Special Administrative Region (HKSAR) shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government (CPG). BL 15 and BL 45 of the Basic Law provide that the Chief Executive shall be appointed by the CPG. BL 43(1) provides that the Chief Executive shall be the head of the HKSAR and shall represent the Region. Under BL 60(1), the Chief Executive is the head of the Government of the Hong Kong Special Administrative Region (HKSARG).

4. BL 48 sets out in detail the powers and functions of the Chief Executive, including those to lead the HKSARG, to implement the Basic

Law, to decide on government policies, to sign bills, to promulgate laws, to sign budgets, to nominate and report to the CPG for appointment of principal officials, and to conduct, on behalf of the HKSARG, external affairs and other affairs as authorized by the Central Authorities.

5. Under BL 48(1), the Chief Executive shall lead the HKSARG, which shall exercise the powers and functions specified in BL 62.

6. BL 43(2) provides that the Chief Executive shall be accountable to the CPG and the HKSAR in accordance with the provisions of the Basic Law. BL 47 requires that the Chief Executive must be a person of integrity, dedicated to his or her duties. In accordance with BL 104, the Chief Executive must swear allegiance to the HKSAR of the People's Republic of China.

Relationship between the Central People's Government and principal officials

7. Under BL 48(5), the CE is to nominate and to report to the CPG for appointment the principal officials and to recommend to the CPG the removal of these officials. Principal officials are members of the HKSARG. As stated in paragraphs 3 and 5 above, according to the Basic Law, the Chief Executive is the head of HKSAR [BL 43(1)] and the head of the HKSARG [BL 60]. He leads the HKSARG [BL 48(1)] and shall be accountable to the CPG in accordance with the provisions of the Basic Law [BL 43(2)].

Constitutional relationship between the Chief Executive /Principal Officials /Permanent Secretaries /LegCo

8. BL 99(2) requires that public servants must be dedicated to their duties and be responsible to the HKSARG. According to the Basic Law, the Chief Executive shall be the head of HKSARG and shall lead the HKSARG. Principal officials under the accountability system and permanent secretaries are members of the HKSARG and come under the leadership of the Chief Executive.

9. Under the Basic Law framework, the executive authorities and the legislature shall regulate each other as well as co-ordinate their activities. The HKSARG will continue to be accountable to the Legislative Council in accordance with Article 64 of the Basic Law.

Constitutional Affairs Bureau
2 May 2002

**Subcommittee to Study the Proposed
Accountability System for Principal Officials and Related Issues**

Executive Council

Introduction

This paper sets out the functions, composition and modus operandi of the Executive Council under the Basic Law.

Functions of the Executive Council

2. BL54 provides that the Executive Council of the Hong Kong Special Administrative Region (HKSAR) shall be an organ for assisting the Chief Executive in policy-making. BL56(2) provides that the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council.

3. It is clear that the Executive Council is an organ which advises and assists the Chief Executive in policy-making.

Composition of the Executive Council

4. Composition of the Executive Council is provided for in BL55. BL55(1) provides that members of the Executive Council of the HKSAR shall be appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures. Their appointment or removal shall be decided by the Chief Executive. The term of office of members of the Executive Council shall not extend beyond the expiry of the term of office of the Chief Executive who appoints them. BL55(2) also provides that members of the Executive Council of the HKSAR shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country.

5. The Basic Law does not specify either the number of Executive Council members or the proportion of members who are principal officials, members of the Legislative Council or public figures. The Basic Law provides that the appointment of members of the Executive Council shall be decided by the Chief Executive, and the proportion of the various categories of members is a matter for the Chief Executive to decide.

Modus Operandi of the Executive Council

6. BL56(1) provides that the Executive Council of the HKSAR shall be presided over by the Chief Executive. If the Chief Executive is not able to discharge his duties for a short period, such duties, including the duty to preside at meetings of the Executive Council, shall temporarily be assumed by the Chief Secretary, Financial Secretary or Secretary for Justice in this order of precedence in accordance with BL53.

7. As noted in paragraph 2 above, BL56(2) provides that except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council.

8. BL56(3) provides that if the Chief Executive does not accept a majority opinion of the Executive Council, he or she shall put the specific reasons on record. It has been argued that this provision is intended to enable the Executive Council to check and balance the powers of the Chief Executive. Such a reading of the Basic Law runs contrary to the constitutional functions of the Executive Council in assisting the Chief Executive in policy making expressly and unequivocally stated in BL54–56. As the head of the HKSAR and the HKSARG, the Chief Executive leads the HKSARG. He will no doubt consider carefully the views of members of the Executive Council, including any contrary views that may be expressed by a majority of the members. However, the Basic Law clearly provides that if the Chief Executive does not accept a majority opinion of the Executive Council, it would suffice if he puts the

specific reasons on record. There is therefore no question of the Executive Council serving to check and balance the powers of the Chief Executive. That said, this course is unlikely to be taken without specific reasons on the part of the Chief Executive. Moreover, he will be accountable to the Central People's Government and the HKSAR for the policy decisions made by him after consultation with the Executive Council.

**Subcommittee to Study the Proposed
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“Civil Servants” and “Public Servants”

Purpose

This paper sets out the applicability of the laws of Hong Kong to civil servants and principal officials under the accountability system.

Background

2. At the Subcommittee meeting on 29 April 2002, a member asked about the differences between “civil servant” and “public servant” and whether their conduct in public office is subject to the same types and extent of regulatory control under existing law, e.g. the Prevention of Bribery Ordinance. The findings of the research conducted in the time available are set out below.

“Public officer” and “Public servant”

3. Under the laws of Hong Kong, the term “civil servant” is not used. Instead, the terms “public officer”, “public servant” and “Crown servant” are used.

4. In most instances where the terms “public officer”, “public servant” are used, they have not been defined in their respective ordinances. In such cases, the definition under the Interpretation and General Clauses Ordinance (Cap 1) applies.

Under the Interpretation and General Clauses Ordinance (Cap 1)

5. Under the Interpretation and General Clauses Ordinance (Cap 1), “public servant” (公務員、公務人員) has the same meaning as “public officer”. “(P)ublic officer” (公職人員) means

“any person holding an office of emolument under the Government, whether such office be permanent or temporary”.

6. The definition of “public officer” and “public servant” in Cap 1 would include civil servants as well as principal officials under the accountability system. In other words, in those ordinances where the terms “public officer” and

“public servant” are not defined, the provisions applicable to civil servants would be equally applicable to principal officials under the accountability system.

Under other ordinances

7. Set out below are all the relevant ordinances where the terms “public officer” and “public servant” are defined.

8. Under the Legal Officers Ordinance (Cap 87), “public servant” (公務員) means

“in addition to the meaning assigned to it by the Interpretation and General Clauses Ordinance (Cap 1), any employee or member of a public body as defined in this Ordinance, whether temporary or permanent and whether paid or unpaid”.

9. Under the Prevention of Bribery Ordinance (Cap 201), “public servant” (公職人員) means

“any Crown servant and also any employee of a public body and

(a) in the case of a public body other than a body referred to in paragraph (aa), (b) or (c) of this definition, any member of the public body;

(aa) in the case of a public body specified in Schedule 2-

(i) an office holder of the public body (other than an honorary office holder);

(ii) any member of any council, board, committee or other body of the public body which is vested with any responsibility for the conduct or management of the affairs of the public body;

(b) in the case of a public body which is a club or association, any member of the public body who-

(i) is an office holder of the body (other than an honorary office holder); or

(ii) is vested with any responsibility for the conduct or management of its affairs;

(c) in the case of a public body which is an educational institution established or continued in being by an Ordinance, any officer of the

institution and, subject to subsection (3), any member of any council, board, committee or other body of the institution, which is itself a public body, or which-

- (i) is established by or under the Ordinance relating to the institution;
- (ii) is vested with any responsibility for the conduct or management of the affairs of the institution (not being affairs of a purely social, recreational or cultural nature); and
- (iii) is not excluded under subsection (3),

whether the employee, officer or member is temporary or permanent and whether paid or unpaid, but-

- (A) the holding of a share by a person in a company which is a public body; or
- (B) the entitlement of a person to vote at meetings of a club or association which is a public body, shall not of itself constitute that person a public servant”.

“(P)ublic body” means

“the Government; the Executive Council; the Legislative Council; any District Council; any board, commission, committee or other body, whether paid or unpaid, appointed by or on behalf of the Governor or the Governor in Council; and any board, commission, committee or other body specified in Schedule 1”.

“Crown servant” (官方僱員) means

“a person holding an office of emolument, whether permanent or temporary, under the Crown in right of the Government”¹

The definitions of “public servant” and “Crown servant” would include principal officials under the accountability system even though they are not civil servants.

10. Under the Independent Commission Against Corruption Ordinance (Cap 204), “public servant” (公職人員) and “Crown servant” (官方僱員) have the same meanings as in the Prevention of Bribery Ordinance.

11. Under the Official Secrets Ordinance (Cap 521), “public servant” (公務人員) means

¹ Under the Adaptation of Laws Bill 2001, “Crown servant” will be amended as “prescribed officer”. Principal officials under the accountability system will remain within the definition.

- “(a) any person who holds an office of emolument under the Crown in right of the Government of Hong Kong, whether such office is permanent or temporary;
- (b) any person employed in the civil service of the Crown in right of the United Kingdom, including Her Majesty's Diplomatic Service and Her Majesty's Overseas Civil Service;
- (c) any member of the armed forces;
- (d) any person who is a member or employee of a prescribed body or a body of a prescribed class and either is prescribed for the purposes of this paragraph or belongs to a prescribed class of members or employees of any such body;
- (e) any person who holds a prescribed office or who is an employee of such a person and either is prescribed for the purposes of this paragraph or belongs to a prescribed class of such employees”.

12. Under the Summary Offences Ordinance (Cap 228), “public officer” (公職人員) or “public department” (公共機關)

“extends to and includes the Chief Executive and every officer or department invested with or performing duties of a public nature, whether under the immediate control of the Chief Executive or not”.

13. Under the Hong Kong Reunification Ordinance, “public officer” (公職人員)

“in relation to the period before 1 July 1997, includes the Governor, the Governor in Council and any employee of the Government of Hong Kong, and in relation to the period after 30 June 1997, includes the Chief Executive, the Chief Executive in Council and any employee of the Government of the HKSAR”.

14. Under the Surviving Spouses’ and Children’s Pensions Ordinance (Cap 79), “public officer” (公職人員) means

- “(a) at any time before the appointed day, a person who is appointed to or reappointed to an established office on terms which attract pension, gratuity or other benefits under the Pensions Ordinance

(Cap 89), the Pension Benefits Ordinance (Cap 99) or the Pension Benefits (Judicial Officers) Ordinance (Cap 401), whether on probation or not; and

- (b) at any time on or before the appointed day,-
 - (i) an officer who is appointed to or reappointed to an established office on terms which attract pension, gratuity or other benefits under the Pensions Ordinance (Cap 89), the Pension Benefits Ordinance (Cap 99) or the Pension Benefits (Judicial Officers) Ordinance (Cap 401), whether on probation or not;
 - (ii) an officer who is in service under the Government and who is appointed or reappointed to a non-established office otherwise than on agreement”.

15. Under the Hospital Authority Ordinance (Cap 113), “public officer” (公務員) means

“a person employed in the Civil Service of the Government”.

16. The definitions of “public officer”, “public servant” and “Crown servant” in the six ordinances set out in paragraphs 8 to 13 above would include both civil servants as well as principal officials under the accountability system. In other words, the provisions applicable to civil servants would be equally applicable to principal officials under the accountability system.

17. As regards the two ordinances set out in paragraphs 14 and 15 above, the Surviving Spouses’ and Children’s Pensions Ordinance (Cap 79) makes provisions for granting pensions to surviving spouses and children of deceased public officers (as defined). It is not relevant to the principal officials under the accountability system. The definition of “public officer” in the Hospital Authority Ordinance (Cap 113) does not include principal officials under the accountability system. The relevant provisions do not apply to them.