

PART 6 - REFERENCE FOR HONG KONG

Introduction

32.1 Based on the findings in this study, the followings are some issues which Members of the Panel on Constitutional Affairs may wish to consider regarding the appointment of principal officials under the proposed accountability system in the Hong Kong Special Administrative Region (HKSAR).

Qualification – The Rule of Incompatibility

32.2 Among the countries studied, there are generally no specific criteria for a person to be eligible for ministerial posts, except for requirements concerning citizenship and allegiance. In Hong Kong, similar requirements are written into the Basic Law regarding the eligibility of principal officials.¹ In a parliamentary system of government, such as the UK and Singapore, persons who hold ministerial posts are required to possess parliamentary qualification.

32.3 In Hong Kong, Article 79 of the Basic Law provides that the President of the Legislative Council (LegCo) shall declare that a Member to be disqualified, among other conditions, when he or she accepts a *government appointment* and becomes a public servant.²

32.4 Although principal officials under the proposed accountability system would be appointed on terms different from those in the civil service, the Government's position is that they should be considered as public servants based on Article 101 of the Basic Law.³

Issue to be considered

32.5 When a LegCo Member is appointed as a principal official, he or she becomes a public servant. However, since the appointment is made by the Central Government and not by the HKSAR Government, the applicability of Article 79 in that regard needs examination.⁴

¹ Please see Articles 61 and 104 of the Basic Law. To be a principal official, an individual must be (1) a Chinese citizen; (2) a permanent resident of Hong Kong; (3) no right of abode in any foreign country; and (4) ordinarily resided in Hong Kong for a continuous period of not less than 15 years.

² Article 79 of the Basic Law has been integrated into Section 15 of the *Legislative Council Ordinance*. Article 99 of the Basic Law provides that "public servants serving in all government departments of the HKSAR must be permanent residents of the Region,...."

³ Please see LegCo Paper CB(2)693/01-02(01).

⁴ There are also legal restrictions on the participation of public officers in a LegCo election. Section 39 of the *Legislative Council Ordinance* stipulates that any person holding an office, whether permanent or temporary in a Government department or bureau and employed in the

Appointment Process

32.6 In the US, appointment to a Cabinet office is undertaken only after the 'advice and consent' of the Senate have been obtained. A candidate's suitability will be severely tested by a detailed pre-checking process. In the UK and Singapore, ministerial appointment is entirely at the discretion of the Prime Minister based upon the personal and political reputation of a candidate. There is no pre-checking on a candidate's fitness for ministerial office.

32.7 In Hong Kong, the employment procedure of civil servants, including integrity checking, is applicable to principal officials. LegCo's Panel on Constitutional Affairs has expressed a concern regarding "*whether it is a matter of government policy for integrity checking of principal officials to be completed prior to the appointment by the Central Government.*"⁵

Issue to be considered

32.8 In Hong Kong, if principal officials are to be drawn from a variety of sources, Members may wish to consider whether some form of pre-appointment vetting should be introduced.

Levels of Payment

32.9 There is a big difference in ministerial salary levels among the countries covered in this study. Ministerial salaries in Singapore are at the higher end and are pegged with the private sector through a benchmark scheme. Ministerial salaries in both the UK and the US are kept at a more modest level.

32.10 There are different rationales behind the financial rewards to which Ministers are entitled in these selected countries. Singapore Government considers that ministerial salaries comparable to private sector levels⁶ are essential to attract capable persons from the private sector to become Ministers and to minimize the financial sacrifice of their joining the Government.⁷ The levels of salaries in both the UK and the US are aimed at providing a necessary barrier to possible corruption and an adequate compensation for Ministers to devote all their time to official duties without having recourse to other employment.

department or bureau, is disqualified from being nominated as a candidate at a LegCo election, and from being elected as a LegCo Member.

⁵ Please see LegCo Paper CB(2)1969/00-01.

⁶ Please refer to Table 6 regarding the salaries of Ministers.

⁷ The Prime Minister's Office, *White Paper on Competitive Salaries for Competent and Honest Government*, 1994, pp. 1-2.

Issues to be considered

32.11 Members may wish to consider whether most of the posts of principal officials should be filled by individuals from the private sector and whether salaries would be the determining factor for persons to become principal officials under the proposed accountability system. Members may also wish to consider whether a comparatively low salary package for principal officials may become an obstacle to attract capable persons from the private sector to join the HKSAR Government.

32.12 In addition, Members may wish to compare the payment schedule for principal officials under the proposed accountability system with that for the existing Secretaries of Departments and Directors of Bureaux.

Specific Legislation to Govern Principal Officials' Salaries

32.13 Both the UK and the US have used specific legislation to govern the levels of salary payable to ministerial posts. Parliamentary approval is required for changes in payment levels.

32.14 In Hong Kong, LegCo can approve salary increases of government officials through the established legal mechanisms.

Issue to be considered

32.15 Members may wish to take reference from the cases of both the UK and the US in monitoring principal officials' salaries.

Conflicts of Interest

32.16 As regards the ways to avoid conflicts of interest, there is a fundamental difference among the countries covered in this study owing to the different systems of government adopted. The parliamentary system of government in both the UK and Singapore relies on codes of conduct to regulate Ministers' conflicts of interest. The presidential system of government in the US relies on statutory regulations.

32.17 Despite this difference, the two systems share a common pattern, which is, a detailed and open set of rules is formulated so as to provide clear guidelines to avoid possible conflicts of interest.

32.18 In both the UK and the US, the declaration of interests made by the Cabinet Ministers/Secretaries covers not only their own personal interests, but also those of their spouses and children.

32.19 In Hong Kong, there is a declaration of interests system for senior civil servants. In addition, there are separate rules and guidelines in the *Civil Service Regulations* governing civil servants' possible conflicts of interest.⁸ Principal officials who are appointed on civil service agreement terms are required to seek prior approval from the Government within one year after completion of their agreements, before taking up any outside employment or engaging in any business the principal part of which is carried out in Hong Kong.

Issues to be considered

32.20 Under the proposed accountability system, principal officials would be appointed in terms different from those in the civil service.⁹ Members may wish to consider whether a new system should be devised to monitor the possible conflicts of interest of principal officials appointed under the proposed accountability system, especially if some principal officials may be appointed from outside the civil service.

32.21 Members may also wish to consider whether the declaration of interests for principal officials under the proposed accountability system should cover not only their own personal interests, but also those of their spouses and children.

Terms of Appointment

32.22 In the UK, the US and Singapore, ministerial positions are different from civil service posts. Therefore, unlike civil servants, holders of ministerial posts do not have employment contracts. The relationship between the head of government and political appointees is political rather than contractual.

32.23 However, the Hong Kong Government has maintained that principal officials under the proposed accountability system will be appointed on specific terms. Their appointment contracts would clearly state their rights and obligations.¹⁰ In particular, their term of office would not exceed that of the Chief Executive (CE) who nominates them.

32.24 The term of office of principal officials under the proposed accountability system is another important issue. The Basic Law has no provision on this aspect. While principal officials may be appointed by CE to be Members of the Executive Council, there is a provision in the Basic Law that the term of office of

⁸ For more detailed information, please refer to, "Declaration of Interests by Senior Civil Servants in Some Overseas Countries" Research and Library Division, Legislative Council Secretariat, March 2000 and LegCo paper CB(1)816/00-01(04).

⁹ *The 2001 Policy Address*, HK: the Printing Department, 2001, para. 134.

¹⁰ *Ibid.*

Members of the Executive Council does not exceed that of CE who appointed them.¹¹

¹¹ Article 55 of the Basic Law.

Issues to be considered

32.25 In view of the overseas practice, Members may wish to consider whether a contractual arrangement is appropriate for the relationship between CE and principal officials under the proposed accountability system.

32.26 If there will be appointment contracts for principal officials under the new accountability system, Members may wish to know whether those contracts represent agreements between CE and the principal officials or between the Central Government and the principal officials.

32.27 In addition, Members may wish to consider whether those rights and obligations in the appointment contracts should be publicized.

32.28 Since principal officials are appointed by the Central Government, Member may wish to consider whether employment contracts between CE and the principal officials can be used to define their term of office.

Removal of Principal Officials

32.29 In the UK, the US and Singapore, ministerial positions are held by politicians and can be removed for political reasons. Conditions of removal are regulated either by constitutional conventions as in the UK or by legal means as in the US. All legislatures in the three countries have played certain roles in the process of removal. Both the UK and Singapore rely on the vote of confidence, while the US relies on the impeachment mechanism.

32.30 In Hong Kong, Article 48(5) of the Basic Law stipulates that CE has the power to recommend to the Central People's Government the removal of the principal officials. The Basic Law has no provision for the legislature to remove a principal official through a vote of no confidence. Although LegCo is provided with the power to impeach CE¹², principal officials are not accounted for. At the same time, the HKSAR Government is required to be accountable to LegCo.¹³

32.31 In 2000, LegCo's Panel on Constitutional Affairs published a report entitled "The Development of the Political System of Hong Kong Special Administrative Region." In the report, the Panel recommended, inter alia, the Government should

"Explore the feasibility of developing constitutional conventions under which principal officials shall voluntary resign as a result of having committed serious mistakes in the formulation or

¹² Article 73(9) of the Basic Law.

¹³ Article 64 of the Basic Law.

implementation of government policies.”

Issues to be considered

32.32 Under the proposed accountability system, principal officials are accountable to CE and take orders from him. CE alone has the power to recommend the removal of principal officials. Members may wish to consider what courses of actions can be taken if a principal official commits a serious policy mistake but CE refuses to recommend his removal.

32.33 Members may wish to consider whether LegCo should play a role in the process of removal of a principal official under the proposed accountability system.