

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

References to the Chief Executive in Council in the Laws of Hong Kong

Introduction

At the meeting of the Subcommittee on 29 April 2002, a member pointed out that there were 689 references to the Chief Executive (CE) in Council in the laws of Hong Kong and requested the Administration to explain how appeals against decisions of principal officials presently dealt with by CE in Council would in future be handled when principal officials under the accountability system would also be appointed as members of Executive Council. This paper sets out the Administration's response.

References to the CE in Council

2. We have examined the 689 references to the CE in Council in the laws of Hong Kong. We have found 53 references providing for appeals in particular situations. There are also 32 references relating to the approval of plans etc. by the CE in Council which may involve the consideration of public objections. The rest relate to the making of subsidiary legislation, amendment of schedules of primary legislation and miscellaneous matters such as giving directions, making appointments, etc.

Whether it is appropriate for CE in Council to consider appeals

3. Executive Council (ExCo) is now and always has been, part of the

administrative machinery of government. It does not purport to be an independent judicial or quasi-judicial body. This is recognized in s.64(4) of Cap. 1, which provides that, when considering any appeal or objection to him, the CE in Council shall act in an administrative or executive capacity and not in a judicial or quasi-judicial capacity. The fact that under the accountability system there will be more principal officials in ExCo does not change the nature of ExCo in this respect.

4. The question whether it is appropriate for ExCo to hear particular appeals or objections has been the subject of ongoing consideration for the past ten years or so. In 1993, when the Administrative Appeals Board was created, 28 types of appeals to the then Governor-in-Council were transferred to the Administrative Appeals Board. In 1995, the then Attorney General's Chambers reviewed all statutory appeals and objections to ExCo and, as a result of its recommendations, many more types of appeals were transferred to other bodies.

5. In deciding appropriateness, two guiding principles are applied-

(a) the need to relieve ExCo of minor decision-making e.g. granting of licences; and

(b) the need to comply with Bill of Rights Ordinance, Art 10.

Article 10 of the Bill of Rights Ordinance requires, among other things, that all persons shall be equal before the courts and tribunals. In the determination of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Such appeals should not be heard by

ExCo. However, not all appeals against administrative decisions involve determination of rights and obligations in a suit at law For example:

- (i) objections to draft plans under the Town Planning Ordinance etc;
- (ii) administrative decisions with high policy content such as approval of road works proposal; and
- (iii) appeals in respect of the exercise of a statutory discretion relating to immigration matters

do not involve such a determination. It is therefore lawful for such appeals to be heard by CE in Council both now and under the accountability system. The fact that, under the accountability system, there will be more principal officials in ExCo does not make any material difference to the criteria for appropriateness already applied.

Principal officials connected with an appeal

6 It has been suggested that problems may arise when an appeal goes to ExCo from the decision of a bureau or department, since the principal official who heads that bureau or department will now be a member of ExCo. We believe that the situation can be resolved by the current arrangement that legal advice is given to the principal official concerned as to whether he/she should stand down from the particular appeal.