

**Extract of minutes of meeting on Constitutional Affairs Panel
held on 17 December 2001**

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IV. System of accountability for principal officials

(LC Paper Nos. CB(2)194/01-02(01); 387/01-02(01) to (03); 421/01-02(01) to (05); 441/01-02(01) to (02); 675/01-02(03); 691/01-02; and 693/01-02(01))

11. At the invitation of the Chairman, Secretary for Constitutional Affairs (SCA) gave a verbal response to the views expressed on the subject at the last meeting on 19 November 2001 as follows -

- (a) The Administration noted the views expressed at the last meeting. The proposals highlighted by the Chief Executive (CE) in his 2001 Policy Address set out the framework for the new accountability system, the details of which had yet to be fully deliberated and finalized. The Administration would continue to exchange views with all quarters, including LegCo, on the detailed proposals in due course;
- (b) The Administration was aware that some had put forward the view that some LegCo Members with political party background should be appointed as principal officials under the new accountability system so as to secure greater support from LegCo for government policies and improve the executive/legislature relationship. The Administration had not taken any decision at this stage. The Administration was aware of the importance of getting support from the legislature for policies. But appointing members of political parties as principal officials was not necessarily an essential step in achieving that goal;
- (c) Appointment of principal officials under the new accountability system would be a matter for the second term CE. In making the nominations, CE would be required to act in accordance with the requirements prescribed under the relevant Basic Law (BL) provisions; and
- (d) The Administration was of the view that civil service posts at D8 rank should remain with the implementation of the new accountability system. In view of the political and constitutional developments of Hong Kong, the work of those top civil servants

would become increasingly complex and demanding. They would continue to play a pivotal role in assisting in formulating and implementing policies, explaining relevant policies and securing support from the public and the LegCo. Such work would need to be performed by highly competent and well experienced civil servants. Moreover, the principal officials under the new accountability system would be of a limited number. They could not be expected to take up all the work of the existing Directors of Bureaux.

12. Mr Howard YOUNG asked whether the new accountability system had met with resistance from the civil servants. SCA replied that he had not heard of any objections from the civil service apart from some comments and proposals on the implementation of the new system. He said that in general, response from the civil servants was positive.

13. Mr CHEUNG Man-kwong said that the new accountability system had two major aspects which must be clearly spelt out, namely, how the principal officials were to be made personally accountable for the success or failure of policies and secondly, to whom were they accountable. The BL had no specific provisions in that regard. He said that as pointed out by the Bar Association in its submission to the Panel (LC Paper No. CB(2)441/01-02(02)), LegCo should have an important part to play, particularly in the exercise of the power of removal of the principal officials, if a truly effective system of public accountability was to be implemented. He said that if under the new accountability system the principal officials were only accountable to CE alone but not to the public and LegCo, the system could not live up to its name and the legitimate expectation of the public, and the pledge to achieve accountability would be nothing but a cheating on the people. Mr CHEUNG said that the name of "accountability system for principal officials" was deceiving because in reality it was merely a "system of appointing principal officials by the CE".

14. Dr YEUNG Sum said that it was a view widely shared by members of the public including some Members of LegCo that certain constitutional convention should be established such that in the event of a motion of no-confidence being passed by LegCo against a principal official, the latter should resign from office and the CE should approve the resignation.

15. Mr CHEUNG Man-kwong and Dr YEUNG Sum opined that the Administration should consider implementing an impeachment procedure whereby the passing of a no-confidence motion by LegCo on a particular principal official would eventually lead to removal from office of the official concerned.

16. SCA said that the BL did not provide for a mechanism for removing principal officials from office by LegCo. A vote of no-confidence passed by LegCo on a principal official would not be legally binding as to result in removal of the official concerned. He further said that there were different means to achieving the same goal of accountability. Under the BL, the Government of the Hong Kong Special Administrative Region (HKSARG) was accountable to LegCo, and the power to nominate and recommend removal of principal officials vested in the CE. The spirit and intent of the new accountability system was to enhance the degree of accountability having regard to public demand, by holding the principal officials, being political appointees, personally responsible for the success or failure of policies within their specific portfolios. With the implementation of the new accountability system, effective mechanism would be put in place whereby mistakes in policies if occurred could be detected and rectified at the earliest stage, before irreparable damages were done. Therefore, the ultimate removal or resignation of certain principal officials from office because of serious policy failures was not an end in itself. In essence, it was something which the new accountability system was aiming to avoid.

17. The Chairman said that political appointments carried the meaning that the appointees could be removed from office at any time for specific reasons. In his view, some form of constitutional convention would gradually develop concerning the removal of principal officials. He added that an alternative option, which might be more preferable, was to set out those matters clearly in statutory provisions.

18. Dr YEUNG Sum asked whether the appointment contract of the principal officials would stipulate the circumstances under which the officials could be removed from office, such as serious dereliction of duty or where a motion of no-confidence was passed by LegCo.

19. SCA replied that the contract would contain a termination clause but it might not set out the circumstances leading to removal from office in a very detailed manner.

20. The Chairman opined that it might be necessary for the Administration to define the meaning of serious misconduct or dereliction of duty which warranted termination of the contract of the principal officials.

21. In response to Mr IP Kwok-him, SCA said that the new accountability system provided the flexibility of filling the positions of principal officials with suitable candidates within or outside the civil service. Where a principal official was appointed from within the civil service, the appointee would have to give up his status as a civil servant.

22. Mr IP Kwok-him expressed the view that there must be a satisfactory linkage and operational relationship between the principal officials and the civil servants working under them to ensure that policies could be implemented effectively and that the principal officials would be genuinely held accountable for the policies.

23. The Chairman pointed out that in the United Kingdom (UK), the Civil Service Code specified that civil servants, although not politically appointed, were duty bound to implement policies formulated by the Ministers. Otherwise, they could face sanctions or disciplinary actions.

24. Mr HUI Cheung-ching said that there were reports saying that there would be a total of 11 principal officials under the new accountability system, comprising the three top Secretaries (the Chief Secretary for Administration, the Financial Secretary, the Secretary for Justice), six appointed Directors of Bureaux and two other members appointed from political parties. SCA responded that he had not heard of decisions of that sort himself. He added that the number of principal officials under the new system was not yet decided, though it was not likely that the number added would exceed 10.

25. The Chairman said that to limit the number of the principal officials, certain Secretaries or Directors of Bureaux might be responsible for more than one policy area. He pointed out that the UK Prime Minister, for instance, was also responsible for all civil service matters. SCA said that the Administration would take the view into consideration.

The post of Secretary for Justice (SJ)

26. The Chairman said that the Bar Association had raised in its written submission questions as to whether it was appropriate to include the post of SJ as a political appointee under the new accountability system. The Bar Association was of the view that as SJ performed certain unique functions which were of quasi-judicial nature, particularly the function of taking prosecution decisions independently and impartially, it would not be appropriate to include SJ in the proposed accountability system. The Bar Association had suggested that, if the post was included, the legal roles of SJ should be transferred to and discharged by another Law Officer.

27. At the invitation of the Chairman, the Solicitor General (SG) briefed members on the Administration's responses to the issues as detailed in the Administration's paper (LC Paper No. CB(2)675/01-02(03)). The gist of the responses was as follows -

- (a) The proposed arrangements would not alter the constitutional fundamentals as prescribed under the BL. For example, the

method of appointment and removal as provided for in BL 48(5) would remain unchanged. There would be no change to the requirement under BL 63 that the Department of Justice should control criminal prosecutions, free from interference. The proposed arrangements would also not materially alter the current position, under which a SJ who was recruited from outside the civil service was employed on a contract term basis;

- (b) 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; and
- (c) 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.

28. SG also quoted the current English AG (Lord Goldsmith), in a recent interview published in the Daily Telegraph on 20 November 2001, as saying that he "*finds no difficulty in assuming the split personality required of a law officer : acting independently of the Government when deciding whether to bring prosecutions while at the same time advising ministers as the Government's in-house lawyer*".

29. Miss Margaret NG said that it was not a question of whether the new arrangements would change the constitutional position of SJ under the BL. The issue at stake was whether the new arrangements would adversely affect the fulfillment of the impartial role of SJ. Referring to other descriptions taken from the interview of Lord Goldsmith, she pointed out that Lord Goldsmith had also made the statements that "*his hardest hat is that of 'guardian' of public interest, accountable to the Parliament but not to Government. ... Confidence in the system depends on people being satisfied that [prosecution] decisions are taken on the merits of the case and the wider public interest*". Miss NG said that the situation in Hong Kong was different because under the new accountability system, the principal officials would be answerable to the CE alone, not to LegCo. Furthermore, in England and Wales, the AG was not normally a member of the cabinet, whereas SJ under the new accountability system would be a Member of the Executive Council (ExCo). The proposed accountability arrangements would give rise to concern as to whether a politically appointed SJ would be able to discharge the independent function of a guardian of public interest. Miss NG said that in her view, the new accountability system should not include SJ in order not to undermine the independence and detachment of SJ from the executive.

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30. Dr YEUNG Sum said that in many common law jurisdictions, the AGs or Ministers for Justice exercising a dual (political and quasi-judicial) role were accountable to a legislature which was fully and directly elected under a democratic system.

31. SG said that the proposal of the Bar Association that all decisions relating to criminal prosecution should be vested in another Law Officer instead of SJ had been discussed by other jurisdictions including the UK. He said that there were two aspects involved in prosecution decisions. First, it was accepted that quasi-judicial decisions must be taken independently. Secondly, there should be accountability for those decisions after the decisions were made. The view generally reached in other jurisdictions was that in the interest of political accountability the AG must have some sort of control over the prosecution decisions in order to be answerable for the decisions made and to take up personal responsibility for those decisions. The inclusion of the post of SJ in the accountability system should have the effect of enhancing, rather than undermining, accountability.

32. SG further said that whereas the AG in England and Wales was not a member of the cabinet, the AGs in some other common law jurisdictions such as Canada, Australia and New Zealand were. One of the main advantages of having AGs as members of the cabinet was that they could be fully informed of, and not divorced from, all current public interest matters and the relevant background to those matters. This facilitated AGs in the discharge of their duties. He added that there had been some discussions in UK in recent years and at least one former AG was of the view that UK should be moving in that direction.

33. Referring to the view that principal officials were only accountable to the CE and not to LegCo, SG said that the BL provided that the HKSARG as a whole was accountable to LegCo. Furthermore, in reality, former AGs and the current SJ did give accounts of controversial issues and decisions of great public importance to LegCo.

34. Miss Margaret NG said that the situation in UK was the most pertinent example for comparison because in law SJ was a continuity of the former AG before July 1997, and the former AG in Hong Kong reflected the position of the AG in the UK. In UK, the AG was not a member of the cabinet.

35. SG said that AGs of Hong Kong were members of ExCo throughout the colonial era. Hence, it was a continuity for the post of SJ to be a member of ExCo.

36. Mr James TIEN said that while Hong Kong could make reference to other overseas systems, there could be no ideal system which Hong Kong could

copy directly from other jurisdictions. In his view, if the office of SJ was excluded from the new accountability system and assumed by a career civil servant, that might give rise to even more serious problems of accountability because civil servants were not politically accountable for their decisions. He added that he had confidence in Hong Kong's legal and judicial systems in achieving justice, as shown by the fact that the Government had actually lost in nearly half of all the litigation cases in which the Government was a party. He said that the Liberal Party had no objection to including the three top Secretaries in the new accountability system.

37. Miss Margaret NG said that she remained unconvinced that there were benefits derived from including SJ in the new political appointment system, which aimed at removing the element of political neutrality from the principal officials. She opined that as the new system would enable CE to exercise more control over the appointed principal officials, who would be people of like mind nominated by CE, it would cast doubt on whether SJ would be able to exercise the quasi-judicial functions independently and free from interference. It would also make it difficult for SJ to be seen to be performing those functions impartially. She said that the importance of safeguarding the independent and impartial role of SJ under the new accountability system and the possible impact on the rule of law in Hong Kong were matters of great concern to the legal profession.

38. Miss Margaret NG further said that the judicial system could not be relied upon as the ultimate safeguard against injustice. She pointed out that while the courts could acquit an accused party in the interest of justice and fairness, the courts could do nothing in cases where the Department of Justice had decided not to take prosecution as such decision was its sole prerogative. She opined that by including the office of SJ in the new accountability system and hence politicizing the role of SJ, it might undermine public perception of the independence and impartiality in the discharge of the duty under BL 63.

39. SG said that there was a difference between making quasi-judicial decisions and accountability for the decisions afterwards. In his view, it would be a more satisfactory situation to place the ultimate duty to account on SJ, rather than on a career civil servant. He pointed out that there were concerns expressed in UK in recent years that if the Director of Public Prosecutions (DPP) was not subject to the control and direction of the AG, that would lead to a situation of an unaccountable prosecutor. In the end, it was decided that that the AG had power to direct the DPP.

40. Dr YEUNG Sum said that in the common law jurisdictions where the equivalent of AG was a member of the cabinet, the cabinet was accountable to a fully representative and directly elected legislature. However, in Hong Kong, the principal officials appointed under the new accountability system

would in practice be only accountable to CE. Judging from past instances, CE was unlikely to yield to public demand to remove a senior government official from office even when serious policy blunders occurred. Furthermore, ExCo Members, including the politically appointed principal officials in future, were bound to adhere to the principles of collective responsibility and confidentiality. Dr YEUNG said that in his view, the Bar Association had raised a genuine cause for concern as regards the safeguarding of the independence and impartiality of SJ under the new accountability system.

41. SG responded that a distinction should be drawn between two different roles of SJ. One was in relation to formulation and implementation of policies concerning the administration of justice and legislative policy in respect of the legal system and legal services etc. The other was in relation to taking of prosecution and other quasi-judicial decisions. He opined that it seemed entirely appropriate that in relation to pure policy matters, SJ should be accountable in the same way as all other principal officials. So far as the quasi-judicial role was concerned, that should be the personal responsibility of the SJ acting without interference, not a matter of collective responsibility.

42. SCA reiterated that the role of SJ should be viewed in the light of the specific requirements stipulated under BL 63.

43. The Chairman expressed the view that empowering SJ to delegate authority to take prosecution decisions to an independent DPP, similar to the system adopted in other jurisdictions such as Australia and New Zealand, would not be in contravention of BL 63.

44. Mr IP Kwok-him said that the Administration should clarify whether the proposal to include the office of SJ under the new accountability system was in conformity with BL 63.

45. The Chairman concluded that the Panel should continue discussion on the item of system of accountability for principal officials at the next meeting on 21 January 2002. Concerning the proposal to include the post of SJ under the new accountability system, the Administration was requested -

- (a) to reconsider the proposal in the light of members' views expressed in the meeting;
- (b) to consider whether a system similar to that in Australia and New Zealand relating to prosecution decisions should be introduced; and
- (c) to provide legal advice on whether the Administration's proposal or that of the Bar Association as outlined in its written submission would contravene BL 63.

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46. There being no other business, the meeting ended at 4:35 pm.

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