

**Resolution of the Legislative Council
made under Section 54A of the Interpretation
and General Clauses Ordinance (Cap. 1)**

This paper provides Legal Adviser's views on the following issues which relate to the application of a resolution of the Legislative Council made under section 54A of the Interpretation and General Clauses Ordinance (Cap. 1) for the implementation of the proposed system of accountability for principal officials (proposed system):

- a) whether a resolution under section 54A of Cap. 1 alone would be sufficient for the implementation of the proposed system;
- b) in view of the fact that the proposed system would result in fundamental changes to the nature of their office when compared with that of current principal officials who are bureau secretaries, would the proposed transfer of statutory functions of the current bureau secretaries to secretaries to be appointed under the proposed new system be beyond what was intended by section 54A of Cap. 1 when the provision was enacted; and
- c) whether it would be more appropriate and desirable to effect the proposed transfer of statutory functions by way of primary legislation so that the proposal could be scrutinised with the benefits of a full legislative process.

The Administration's Views

2. The Administration's written response to these issues is contained in two papers: LC Paper No. CB (2) 1822/01-02(01) dated 6 May 2002 and LC Paper No. CB (2) 2034/01-02(03) dated 21 May 2002. The first paper contains the substantive response.

3. The Administration made the following propositions in its paper:
- a) Generally speaking, re-organization of government structure does not require legislation. It can be effected administratively. (Paragraph 4 of the paper)
 - b) A resolution under section 54A of Cap. 1 is the appropriate form of legislation to achieve the purpose of transferring relevant statutory power to the principal officials in charge of the relevant reorganized policy bureaux. (Paragraph 7 of the paper)
 - c) A resolution under section 54A of Cap. 1 is sufficient for the purpose of transferring statutory functions from the existing bureau secretaries to the principal officials under the accountability system. (Paragraph 9 of the paper)

4. In support of proposition (a) above, the Administration relied on the fact that the structure of government is not provided for in either the Basic Law or any local legislation. (Paragraph 4 of the paper)

5. In support of proposition (b) above, the Administration asserted that the application of section 54A of Cap. 1 for the present purpose is consistent with past practice, making reference to the fact that there had been previous section 54A resolutions made consequential to re-organization of government structure. The Administration also explained that the use of a resolution made under section 54A of Cap. 1 in this particular case is fully in line with the Administration's established policy on legislation. That policy as stated by the Administration is that "as a matter of legal policy, it is proper to achieve a legislative amendment by subsidiary legislation rather than primary legislation if this can be lawfully done". (Paragraphs 3 to 8 of the paper)

6. As regards proposition (c) above, the Administration set out its views in paragraph 9 of the paper as follows:

"[S]ection 54A provides for the transfer of statutory function from one public officer to another public officer. There is no doubt that principal officials under the accountability system are within the meaning of "public

officer” in Cap. 1. The relevant statutory powers are vested in certain public officers. The relevant legislation does not provide for the terms on which these public officers shall be employed. Nor does it provide whether the particular public officer is to be employed on civil service terms. Therefore, the fact that relevant principal officials will not be civil servants does not affect the legality or effectiveness of the Resolution under section 54A of Cap. 1. "

The Proposed System and the Draft Proposed Resolution

7. Under the proposed system, there would be three Secretaries of Department (Chief Secretary for Administration, Financial Secretary and Secretary for Justice) and 11 Directors of Bureau. Of the titles of the 11 Directors of Bureau, four would be the same as those used for current principal officials and seven would be different as a result of an amalgamation of existing policy portfolios to be put under the charge of these seven Directors. The draft proposed resolution is to effect a transfer of statutory functions of certain secretaries who would be involved in the amalgamation of policy portfolios. It does not relate to the Chief Secretary for Administration, Financial Secretary, Secretary for Justice, Secretary for the Civil Service, Secretary for Constitutional Affairs, Secretary for Home Affairs and Secretary for Security because there would not be any change of title or redistribution of policy portfolios in respect of the new principal officials holding these titles.

Legal Adviser's views

8. There is no legal requirement that changes to the organizational structure of the government has to be achieved by way of legislation except where the changes would involve a change in anything which is being provided by legislation. For example, if the changes relate to government departments established by statute or statutory functions of persons involved in the changes, legislative amendment would be necessary. Moreover, under current constitutional and legal arrangements, conditions of service of persons employed by government to discharge governmental functions are not regulated by legislation except where approval for public expenditure is required. If it was not because of the intention to effect an amalgamation of policy portfolios with some of the new principal officials having to be given titles different from those currently used, there would not be a need to amend existing legislation.

9. Despite the overall context of seeking to introduce a new accountability system for principal officials, the Administration has portrayed the proposed legislative exercise as a transfer of statutory functions consequential to the re-organization of a number of policy bureaux which would accompany the implementation of the accountability system. And, it is on that basis that the Administration takes the view that a resolution under section 54A of Cap. 1 is the appropriate form of legislation to achieve this purpose.

10. Since the existing principal officials are and those to be appointed under the accountability system would be public officers as defined by section 3 of Cap. 1, subject to the condition that both the transferor and the transferee of functions are both in existence for the transfer, a resolution under section 54A of Cap. 1 should be legally in order to effect the transfer. However, the question of whether a resolution under section 54A of Cap. 1 alone would be sufficient for the implementation of the proposed system may involve other considerations. These other considerations should be examined from the perspective of the overall context in which the resolution is to be proposed, bearing in mind that the same transfer could be achieved by way of a bill.

11. The legal effect of a section 54A resolution is confined to the proposed transfer and what is provided in any "incidental, consequential and supplemental provision as may be necessary or expedient for the purpose of giving full effect to the resolution" of transfer as permitted under section 54A (2).

12. Section 54A (2) authorizes the Legislative Council to effect amendments to existing ordinances which are necessary or expedient for giving full effect to the resolution of transfer. Textual amendments that relate to the title of a public officer are obviously necessary provisions in the context of section 54A(2). It is not easy to determine with certainty what other provisions (including amendments) may be classified as may be expedient for giving full effect to the transfer. It may be argued from the legal point of view that matters relating to the preservation of rights or proceedings may not be considered as for the purpose of giving full effect to the resolution of transfer although they are important issues which should be addressed. If these matters could not be included in a section 54A resolution, the alternative legislative vehicle of a bill should be seriously considered.

13. There are also matters which are desirable for clarification by legislation in the overall context of the proposed system but which may be unrelated to the resolution for the transfer of statutory functions. For example, there may be confusion over whether a new principal official could be a non-civil servant in the context of ordinances because the definition of public servant (under which, a new principal official is one) recognizes the Chinese equivalent of civil servant (公務員) as its equivalent. This confusion could only be clarified legislatively and it should be done before the new principal officials are appointed. If the transfer of statutory functions is to be done by way of a bill, such clarification provision could be included.

14. There are differences in the legislative process between that for the passing of a resolution by the Legislative Council and that for the passing of a bill. The most significant differences lie in the debate process and the procedure for bringing the respective legislative instrument into operation. A bill goes through the three-reading stages with the Committee of the whole Council discussing the bill clause by clause. Debate on a motion does not involve the same stages with Members being only entitled to speak once to the motion. If there are amendments proposed to the motion, Members may speak to them separately in the context of a motion to amend. If a joint debate is held, Members may speak once to the original motion and the motion(s) to amend. After a bill is passed by the Legislative Council, it does not come into operation until the Chief Executive has signed it and published it in the Gazette. In the case of a resolution passed by the Legislative Council, there is no requirement of signature by the Chief Executive. It comes into operation on the day when it is published in the Gazette.

Conclusion

15. The legislative amendments and provisions sought to be achieved or made by a resolution under section 54A of Cap. 1 would not be unlawful if conditions for effecting a proposed transfer of statutory functions between public officers and the making of other provisions in the proposed resolution were satisfied. There does not appear to be legal grounds for concluding that the application of section 54A of Cap. 1 under the circumstances would be unlawful. However, the question of whether provisions in paragraph (14) of the draft proposed resolution are within the scope permitted by section 54A (2) should be examined in detail when the Administration has provided its views on this issue in response to queries raised by the Legal Service Division.

16. On the question of whether it is appropriate and desirable to apply section 54A of Cap. 1, different considerations may apply. The Administration has described the situation justifying the application of section 54A of Cap. 1 as a transfer of statutory functions consequential to the re-organization of a number of policy bureaux that would accompany the implementation of the accountability system. Looking at the matter from the overall perspective, the situation may also be described as an introduction of a new system of governance for Hong Kong, which includes the implementation of an accountability system for principal officials. All these principal officials would be new principal officials. They would be given those statutory functions that existing principal officials are vested with. That being the case, the actual operation of changing the identity of the public officers referred to in legislation would not be a transfer of statutory functions as such but a two-step process. The process is to remove all principal official titles from the ordinances first, followed by filling in the blanks left by such removal by titles of the new principal officials; some of them are the same as the ones removed and some are different. On the basis of this alternative view, it may be considered not appropriate nor desirable for the Administration to invoke section 54A of Cap. 1 in the manner as proposed because the scope of debating the proposed resolution would not be extended to cover the proposed system in its entirety.

17. It seems that the Administration has only confined itself to considering the legal aspects of the transfer of statutory functions exercise rather than to take into account the significance of the overall context in which the proposed transfer is to be made when deciding to invoke section 54A of Cap. 1.

Prepared by

MA Yiu-tim, Jimmy
Legal Service Division
Legislative Council Secretariat
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