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Legislative Council

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**Legal Issues relating to the Provision of
Permanent Secretary Posts under the
Accountability System for Principal Officials**

At the meeting of the Subcommittee to Study the Proposed Accountability System for Principal Officials and Related Issues (the Subcommittee) held on 4 June 2002, doubts were raised on the legality of establishing the posts of Permanent Secretary by way of re-titling the 16 D8 posts from Director of Bureau to Permanent Secretary and the creation of supernumerary posts. This paper sets out Legal Adviser's views on these issues.

Background

2. One of the key features of the accountability system is the change of terms and conditions of employment of the new principal officials (the three secretaries of departments and the 11 directors of bureaux) so that a more flexible mechanism could be put in place for the new principal officials to be held accountable for their functions. For example, according to the Administration, one of the terms of the contract of employment will provide that "[s]ubject to the relevant provisions in the Basic Law, either party may terminate the contract on one month's notice or by paying one month's salary in lieu of notice or by mutual consent". Job descriptions of these 14 principal officials have been provided in the Establishment Subcommittee (the ESC) paper for its meeting to be held on 6 June 2002. (Enclosures 1 to 4 to EC (2002-03)² and attached to this paper). It does not appear to be in dispute that the job descriptions or functions applicable to the existing posts approved for establishment through the enactment of the Appropriation Ordinance are not the same as those applicable to the new principal officials. This is evidenced by the fact that the Administration is not proposing to seek funding for the new principal official posts by seeking an increase of the existing approved levels of pay to the new levels of pay being proposed.

3. Another key feature of the accountability system is that there should be senior civil servants (initially pitched at D8 rank) in the bureaux supporting their Directors of Bureau in running the relevant bureaux and departments. These civil servants are to be given the title of Permanent Secretaries. The job description which applies to them is at the Annex to the Supplementary Note for the Subcommittee tabled at its meeting on 4 June 2002. The functions of the Permanent Secretaries in conceptual terms are set out in paragraph 20 (a) to (f) of the LegCo Paper on Accountability System for Principal Officials. In paragraph 21 of the same paper, the Administration seeks to justify its view that the post of Permanent Secretaries should be pitched at the rank of D8 (which happens to be the rank of a Director of Bureau).

4. It is stated in paragraph 22 of the ESC Paper, under the heading "Consequential changes", that "[t]he existing 16 D8 civil service posts in bureaux will be retained and re-titled as Permanent Secretaries. They will assist the principal officials in formulating policies and, subject to the direction of the principal officials, to explain and defend policies in the LegCo panels and committees and in public". It is also stated that the Permanent Secretaries will continue to discharge a list of duties set out in subparagraphs (a) to (d) of the ESC Paper.

5. In response to queries raised by some members of the Subcommittee at its meeting on 31 May 2002, the Administration issued the Supplementary Note (see attached LC paper CB(2)2185/01-02(01)) at the Subcommittee's meeting on 4 June 2002.

6. According to paragraph 3 (a) of the Supplementary Note, eleven of the existing D8 civil service posts will continue to take on substantially the same functions and duties after the implementation of the accountability system though under the direction of the respective Principal Officials. The Administration states that "[n]o redeployment of post will be involved, although the post titles will be changed to reflect their new positions in the setup under the accountability system". It seems that these eleven posts are in the establishment of those bureaux which will not have any change to their policy areas upon the implementation of the accountability system. It is the Administration's plan that these posts at D8 rank will be re-titled as Permanent Secretary.

7. According to paragraph 3(b) of the Supplementary Note, there will be substantive adjustment in the functions and duties of five existing D8 civil service posts. Holders of these posts will be responsible for policy areas which are a part or combination of those under the charge of existing policy bureaux, reflecting the result of a distribution of portfolios among the new principal officials. These policy areas are education and manpower but less labour issues, health and welfare plus food safety, transport and works, environmental protection and conservation, and labour issues.

8. The Administration informs the Subcommittee that in relation to eleven out of the existing sixteen D8 posts in question, no approval is required for re-titling them to Permanent Secretary. As regards five of these sixteen Permanent Secretary posts required under the accountability system, the Financial Secretary will exercise delegated authority to create them as supernumerary directorate posts for a period not exceeding 12 months. These supernumerary posts are to be held against existing posts being held by Directors of Bureau which will be vacant upon the creation of the new principal officials posts. (see paragraphs 7 and 8 of the Supplementary Note)

Analysis

Retention and Re-titling of existing D8 civil service posts as Permanent Secretaries

9. It is clear from the context of this present exercise that the D8 civil service posts for re-titling are posts held by Directors of Bureau. Expenditure of public funds for these posts are authorized by the Appropriation Ordinance. The legal question here is whether by creating the 11 Director of Bureau posts for the new principal officials under the accountability system, the posts held by the existing Directors of Bureau have to cease to exist. There is no legal requirement that that has to be the case. If the Administration's proposal to create the 11 new Director of Bureau posts were to offset the cost of these new posts by the deletion of the existing Director of Bureau posts, that would have the effect of removing the legal authorization for these deleted posts. However, that is not what is being proposed. Funding for these existing posts will, therefore, remain authorized by the Appropriation Ordinance. There is no legal requirement for the Administration to have inferred in paragraph 22 of the ESC paper that there is a need to initiate action to retain these posts since inaction will effectively preserve their existence. However, whether it would be appropriate for the Administration to use the approved fund for supporting the Permanent Secretary posts would be a matter for the Administration to justify from the perspective of good public finance management and accountability to the Legislature.

10. As regards the Administration's indication that it is going to re-title the existing Director of Bureau posts (at D8 level) to Permanent Secretary, it does not appear that approval of the Finance Committee is required for the re-titling. No such approval is required because the re-titling would not result in any change to the approved estimates of expenditure as information on the establishment of posts as provided in the estimates only relates to the overall number of posts and the total amount of personal emolument involved in respect of each head of expenditure rather than a detailed breakdown of grading and ranking of posts and their respective costs. However, it would remain a matter for Members to consider whether they are satisfied with the Administration's argument that the re-titling is justified because the eleven new Permanent Secretaries to be posted to the relevant bureaux will continue to take on substantially the same functions and duties after the implementation of the accountability system though under the direction of the respective principal officials.

Creation of supernumerary directorate posts

11. According to the approval given by the Finance Committee on 9 March 1983 to delegate financial powers, the Financial Secretary has been delegated the power to create supernumerary directorate posts for periods of up to 12 months, provided that they are required to replace officers on no-pay leave, on pre-retirement leave or leave prior to termination of agreement, or are held against vacant permanent posts in ranks with the same or a higher pay scale. This appears to be the delegated authority referred to in paragraphs 7 and 8 of the Supplementary Note.

12. The question for consideration is whether the proposed exercise of delegated authority would be within the scope of the delegation. If it is accepted that there is no legal requirement that the existing Director of Bureau posts, which are permanent posts, have to be deleted as a result of the implementation of the accountability system, it appears that the question posed for consideration should be answered yes.

13. Since the delegated authority only allows the creation of supernumerary directorate posts for a maximum of 12 months, the Administration will have to seek the approval of the Finance Committee before that period ends if it is proposed that the supernumerary posts should become permanent ones.

Conclusion

14. In view of the manner and form the establishment of posts in respect of each head of expenditure is shown in the approved estimates of expenditure, and having considered the terms of the Financial Secretary's delegated authority to create supernumerary directorate posts for up to 12 months, the proposed measures to be taken by the Administration for achieving the policy objective of providing Permanent Secretary posts for the bureaux under the accountability system are permissible from the legal point of view. However, whether these measures are the most appropriate means for achieving the same would be a matter for Members.

Prepared by

MA Yiu-tim, Jimmy
Legal Adviser
Legislative Council Secretariat
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**Supplementary Note for
Subcommittee to Study the Proposed
Accountability System for Principal Officials and Related Issues**

**Permanent Secretary Posts
under the Accountability System for Principal Officials**

Introduction

This paper provides supplementary information on the arrangements for the Permanent Secretary posts under the Accountability System for Principal Officials.

Present Position

2. At present, there are 16 civil service posts ranked at D8 of the Directorate Pay Scale (DPS) heading 16 bureaux in the Government Secretariat.

Proposed Position

3. Under the Accountability System for Principal Officials to be implemented on 1 July 2002, the arrangements for these sixteen existing D8 civil service posts will be as follows –

(a) **Re-titling of posts:** Eleven of the existing D8 civil service posts will continue to take on substantially the same functions and duties after the implementation of the accountability system though under the direction of the respective Principal officials. No redeployment of post will be involved, although the post titles will be changed to reflect their new positions in the setup under the accountability system. These eleven posts are those in the following bureaux –

- (i) Civil Service Bureau
- (ii) Commerce and Industry Bureau

- (iii) Constitutional Affairs Bureau
- (iv) Economic Services Bureau
- (v) Finance Bureau
- (vi) Financial Services Bureau
- (vii) Home Affairs Bureau
- (viii) Housing Bureau
- (ix) Information Technology and Broadcasting Bureau
- (x) Planning and Lands Bureau
- (xi) Security Bureau

(b) **Re-titling of posts and substantive adjustment in their duties:**

There will be substantive adjustments in the functions and duties under the accountability system for the remaining five existing D8 civil service posts. Under the direction of the respective Principal Officials –

- (i) One existing D8 post will take up matters relating to education and manpower but will be relieved of the responsibility for labour issues.
- (ii) One existing D8 post will take up matters relating to health and welfare as well as food safety.
- (iii) One existing D8 post will take up matters relating to transport and works.
- (iv) One existing D8 post will take up matters relating to environmental protection and conservation.
- (v) One existing D8 post will take up matters relating to labour issues.

Job description

4. The existing 16 D8 civil servants in bureaux will assist the Principal Officials in formulating policies and, subject to the direction of the Principal Officials, to assist in explaining and defending policies in LegCo panels and committees and in public. Their job description, set out at **Annex**,

remains largely the same.

5. These Permanent Secretaries will be the most senior civil servants in the bureaux underpinning the respective Principal Officials. In addition to providing reliable and professional input to the Principal Officials under the accountability system on policy formulation, they will continue to play a pivotal role in promoting support for agreed policy, in steering and co-ordinating the implementation of agreed policies and programmes by executive departments, in resource and staff management and upholding the reliability and professional standards of public services. These duties are broadly similar to the existing duties of these D8 civil service posts and justify retention of the ranking, pending the outcome of the organizational review by the future Principal Officials.

The Number of Permanent Secretaries

6. We note questions were raised as to whether the number of Permanent Secretaries should be reduced to eleven to tally with the number of the bureaux under the accountability system. To ensure the Principal Officials are given the maximum support in the bureaux when they assume office, we consider it appropriate to retain all the sixteen D8 civil service posts in accordance with the arrangement as in paragraph 3 above.

Authority

7.. Under delegated authority from the Finance Committee, Financial Secretary can create supernumerary directorate posts provided that, among other things, the post is created for period not exceeding 12 months on each occasion and is held against a vacant permanent post in a rank with the same or a higher notional annual mid-point salary value.

8. Eleven out of the existing sixteen D8 posts in question will only involve re-titling after the implementation of the accountability system. No separate approval is required for this. As regards the other five D8 posts, we will effect the temporary redeployment for twelve months using the delegated authority as in paragraph 7 above for twelve months.

Long-term Arrangements

9. As set out in the paper presented to the Legislative Council on the accountability system for Principal Officials on 17 April 2002, we expect the Principal Officials will review the working relationship between their bureaux and departments as well as the staffing and structure of their policy bureaux, including the number of D8 civil service posts, upon their assumption of duties. In the process, consultation with the concerned parties, including the staff, will be undertaken.

10. The outcome of the review will be reported to the relevant committees of Legislative Council as appropriate. Proposals for changes to these D8 posts will be submitted where appropriate to ESC/FC for approval.

Civil Service Bureau

3 June 2002

Job Description of the Permanent Secretaries

- (a) to assist the principal officials in formulating, explaining and defending policies; to assist the principal officials in securing support of the public and LegCo; and to assist the principal officials in answering LegCo questions, moving bills and taking part in motion debates;
- (b) subject to the direction of the relevant principal officials, to assist in explaining and defending policies in public including at meetings of LegCo panels and committees;
- (c) to steer and coordinate with the executive departments falling within the respective portfolios of the principal officials and liaise with other concerned bureaux to achieve smooth, timely and effective implementation of the agreed policies and programmes;
- (d) to assist the principal officials in acquiring and deploying resources to support the implementation of policies and delivery of services;
- (e) to monitor the needs and aspirations of the community and having regard to the findings, to undertake timely review and to generate proposals to the principal officials for necessary changes to the established policies and services;
- (f) to uphold the reliability and professional standards in the delivery of services by the executive departments and agencies;
- (g) to be the controlling officer for the relevant heads and subheads of expenditure and to ensure proper use of financial resources within the bureau; and
- (h) to manage civil servants and other staff in the bureaux.