

Our Ref.: CAB F19 Pt.4

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7 November 2001

Mrs Percy Ma
Clerk to LegCo Panel on
Constitutional Affairs
3/F Citibank Tower
3 Garden Road
Hong Kong

Dear Mrs Ma,

LegCo Panel on Constitutional Affairs

System of accountability for Principal Officials

I refer to your letter of 28 August 2001 in which you asked us to provide the Panel with “the legal advice on whether the proper approach for considering the lawfulness of any proposal made for devising a system of accountability for Principal Officials in the context of the Basic Law should be whether the proposal **contravenes the Basic Law** and not whether it **conforms with the Basic Law**”.

We have consulted our legal advisers. They have drawn our attention to Basic Law Article 11(2) which provides that “**(n)o law** enacted by the legislature of the Hong Kong Special Administrative Region **shall contravene** this Law”. In the judgement delivered in respect of the case of Ng Ka Ling & Others v Director of Immigration [1999]1HKLRD 315, at 337, the Court of Final Appeal states in very clear terms that the courts of the HKSAR have the jurisdiction to examine “whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are **consistent with the Basic Law** and, if found to be inconsistent, to hold them to be invalid”. It went on to say that the courts of the HKSAR act “as a constitutional check on the executive and legislative branches of government to ensure that they act **in accordance with the Basic Law**” and that “laws which are **inconsistent with the Basic Law** are of no effect and are invalid”.

In the light of the Court of Final Appeal's comments on the constitutional jurisdiction of SAR courts highlighted above, our legal advisers have the following observations:

- (a) The concepts of "consistency with" and "in accordance with" are simply two sides of the same coin. No legally material distinction could fairly be drawn between these concepts.
- (b) The same comments, in their view, apply to the following terms: "in contravention of", "inconsistent with", "not in accordance with" and "not in conformity with".
- (c) The key issue is whether a particular proposal (be it legislative or administrative) is constitutional under the Basic Law. If the question is one of constitutionality under the Basic Law, it would be difficult to seek to answer it in the abstract.

I would be grateful if you would convey the above to Members of the Panel.

Yours sincerely,

(Mrs Philomena Leung)
for Secretary for Constitutional Affairs

bcc Department of Justice
(Attn.: Mr Peter H H Wong, SASG/Basic Law)