

1. The Chief Executive proposed in his 2001 Policy Speech a new system of appointment applicable to the Chief Secretary, the Financial Secretary, the Secretary for Justice, and most Directors of Bureaux. These officials would have clearly defined roles and responsibilities. They would each be responsible for policy areas designated by the Chief Executive and would lead the executive departments within their particular portfolios. They would be responsible for formulating, explaining, and defending government policies as well as canvassing support from the public and the Legislative Council. They would be answerable to the Chief Executive for the success or failure of their policies, and would have to shoulder political responsibility for their respective portfolios. They would also be appointed to the Executive Council.
2. It is said that this new system of appointment of principal officials would improve accountability. There would be greater incentive for principal officials under the new system to keep closely in touch with the public, to be more responsive to public sentiments and demands, to be in a better position to prioritize policy and legislative initiatives as well as the allocation of resources and coordinate decisions. Above all, the new system would become more flexible.
3. We generally embrace the policy of enhancing accountability of principal officials who are responsible for policy making. We also support the principle of maintaining neutrality of civil servants. Thus, it is an appropriate direction to separate the political role of policy secretaries from the executive role of civil servants. The problem of the existing system is that civil servants have to play a political role in formulating, explaining and defending policies and lobbying political support and have to maintain at the same time political neutrality, which sometimes become a disguise that they are not responsible for their policy decisions.
4. However, it is unclear what 'accountability' means. Neither the Policy Speech nor the paper prepared by the Constitutional Affairs Bureau dated 26 October 2001 explains this concept of accountability or the mechanism to ensure accountability. All that the paper prepared by the Constitutional Affairs Bureau said was that these principal officials '*would be answerable to the Chief Executive for the success or failure of their policies. They would have to shoulder political responsibility for their respective portfolios.*' (para 12)
5. Accountability can be achieved at various levels. At the lowest level, accountability entails periodic reports and explanations or justifications of one's decision. At a higher level, accountability envisages consultation before any decision is taken, or even approval of a

particular body before a decision can be effective. At the highest level, accountability involves the power of dismissal.

6. Under the present system, the Government has to present regular policy addresses to the Legislative Council. It shall answer questions raised by members of the Council, and have to obtain approval from the Council for taxation and public expenditure. On the whole, the Government does explain its decision and consult the public on major decisions.
7. Thus, the only main difference between the proposed new system and the existing system is that, under the existing system, the principal officials are civil servants and can only be removed pursuant to a well established mechanism. The new system enables the principal officials to be removed more easily.
8. However, according to the present proposal, the power of removal is vested in the Chief Executive alone. The proposal does not entail any power of the Legislative Council over the principal secretaries. Nor does it introduce any system under which the views of the public would affect the appointment or removal of the principal officials. In other words, the principal officials are accountable to the Chief Executive but only to him. They are appointed by the Chief Executive. They obtain their mandate from the Chief Executive, and not from the people. They can be removed by the Chief Executive, and by the Chief Executive alone. There is neither convention nor mechanism to ensure that the Chief Executive will exercise his power of removal in accordance with public sentiment. The new system strengthens the control of the Chief Executive over the principal officials, but it does not enhance any public accountability of the principal officials.
9. Article 64 of the Basic Law provides that the Government of the HKSAR must be accountable to the Legislative Council. The proposed system does not in any way enhance the accountability of the principal officials or the Government to the Legislative Council.

A Constitutional Dimension

10. The position of the Secretary for Justice requires further consideration. Under the present system, the Secretary for Justice assumes the role of the former Attorney General. She discharges both legal and political duties. In other systems, these roles may be discharged by different persons (e.g., Minister of Justice and Attorney General, or Attorney General and Solicitor General).

11. The Secretary for Justice is the principal legal advisor to the Government. She is responsible for policies relating to the administration of justice and delivery of legal services. She is, *inter alia*, a member of the Executive Council, the Chairman of the Law Reform Commission, and a member of the Judicial Officers Recommendation Commission. These roles would not be affected by converting her role into a political appointment.
12. At the other end of the spectrum, all criminal prosecutions are taken out in the name of the Secretary for Justice. She is ultimately responsible for all prosecution decisions. All decisions to prosecute are, at least in principle, determined by the Secretary for Justice. She may stop the trial of an indictable offence by entering a *nolle prosequi*. She can grant an amnesty or immunity to witnesses. She decides the venue of criminal trial and gives consent to the prosecution of certain offences. It is obviously important that decisions to take out criminal prosecution should not be interfered with by political consideration.
13. In England & Wales, the Lord Chancellor is a member of the Cabinet and responsible for legal policies and legal services. The Lord Chancellor is assisted by the Lord Chancellor's Department, which has a staff of over 11,000, in discharging his duties. The Attorney General is not a member of the Cabinet and only attends Cabinet meetings when summoned.
14. Article 63 of the Basic Law provides that the Department of Justice of the HKSAR shall control criminal prosecutions, free from any interference. The Secretary for Justice stated that the independence of the Department of Justice in relation to prosecutions would be unaffected by the proposed changes because the Director of Public Prosecutions remains a civil servant. This is half accurate only. Under Article 63 of the Basic Law, the decision to prosecute is to be taken by the Department of Justice, not by the Director of Public Prosecutions, and the Secretary for Justice remains the head of the Department of Justice. Therefore, if the Secretary for Justice is to become a political appointment, it is important to ensure constitutionally that all decisions relating to criminal prosecution shall be vested in the Director of Public Prosecution or Department of Justice free from any interference (or alternatively that the Secretary for Justice under the proposed new system shall no longer be responsible for any criminal prosecution).
15. Under the existing system, the Secretary for Justice is also the guardian of public interest. Traditionally in the common law system, the Attorney General represents the interests of the Crown *qua* Sovereign and also *qua* *parens patriae*. The areas in which these jurisdictions were first invoked were public nuisance and the administration of charitable and public

trusts. As guardian of public interest, she can restrain public nuisances and prevent excess of power by public bodies. In circumstances where a plaintiff does not possess the requisite interest to bring a case in his own name, the consent of the Attorney General is necessary - known as relator action. It has been held that a citizen can only enforce public rights through the Attorney General as the guardian of public interest, and the consent of the Attorney General cannot be sidestepped or circumvented: *Gouriet v Union of Post Office Workers* [1978] AC 435. It is not uncommon in these circumstances that the subject matter in issue may be of great importance to the government (e.g., challenging planning permission by a person not directly affected by it, as in *Gregory v Camden London Borough Council* [1966] 1 WLR 899, or industrial action as in *Gouriet v Union of Post Office Workers* [1978] AC 435). What is best in the public interest may not always be best in the government interest. In exercising the jurisdiction as guardian of public interest, the Attorney General has to be able to act independently and impartially, and if necessary, act contrary to government policies or even government interest. A politically appointed Secretary for Justice who is accountable only to the Chief Executive may be hampered in discharging her role as guardian of public interest.

16. Therefore, if the position of the Secretary for Justice is to become a political appointment, it is important to ensure that the legal roles of the Secretary for Justice be transferred and discharged by another law officer, such as the Solicitor General or the Director of Public Prosecution, so that the Secretary for Justice is only responsible for legal policies.

Special Committee on Constitutional Affairs and Human Rights
Hong Kong Bar Association

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