

LETTERHEAD OF THE UNIVERSITY OF HONG KONG

23 December 1998

Mrs. Sharon Tong
Clerk to Bills Committee
Legislative Council
8 Jackson Road
Central
Hong Kong

Dear Mrs. Tong,

Adaptation of Laws (No. 2) Bill 1998

In response to your letter of 14 December to Professor Albert Chen, I wish to comment on whether it is the Chief Executive or the Chief Executive in Council which has the authority to make subsidiary legislation in Hong Kong.

In my view the Chief Executive has such authority acting independently of the Executive Council.

Although the Chief Executive is given no express power in BL48 to make subordinate legislation, the assumption of BL56, which requires the Chief Executive to consult ExCo before making subordinate legislation, appears to be that the Chief Executive makes such laws. Normally he would do so 'in Council', but in emergency situations he is not required to consult ExCo before making subsidiary legislation. In these circumstances it could be awkward if the Chief Executive in Council were granted the power under ordinance.

The position under the pre-1997 Royal Instructions was much the same. Admittedly the Governor could decline to consult ExCo if the matter was too unimportant, which might have included some subsidiary legislation, whereas the Chief Executive must normally consult ExCo whenever making such legislation, but the exception in urgent cases is much the same in both constitutions and has the same consequence: that some subordinate legislation could be made by the Governor/Chief Executive alone, not 'in Council'.

Where the Chief Executive declines to accept a majority opinion of ExCo he could still make subsidiary legislation, another situation where it would seem odd to describe the law as made by the Chief Executive in Council.

BL62 states that the powers and functions of the Government of the HKSAR include 'To draft and introduce bills, motions and subordinate legislation'. The 'introduction' of bills and motions is to LegCo, but presumably subordinate legislation is to be introduced to ExCo. That indeed would be the regular procedure, but I do not think BL62 contradicts my view that it remains the Chief Executive (though he normally consults ExCo) who makes subsidiary legislation, not the Chief Executive in Council.

Sincerely,

Peter Wesley-Smith
Professor of Constitutional Law

cc. AC, YG