

THE HONG KONG BAR ASSOCIATION

The Bar Council's Views on Adaptation of Laws (No 2) Bill 1998

1. The Bar Association was asked by the Bills Committee of the Legislative Council for its views on the interpretation of Article 56 of the Basic Law and the proposed amendments to sections 4 and 5 of the Firearms and Ammunition Ordinance to delete “Governor” and to substitute with “Chief Executive in Council”.
2. In paragraph 2 of the Administration’s Response to comments raised by Members of the Bills Committee on 6 November 1998 (“the Administration’s Response”), it was pointed out that “Where the Governor was previously given power under any Ordinance to make subsidiary legislation, that power will need to be exercised by ‘the Chief Executive in Council’.”
3. We do not believe that before 30 June 1997 there was any requirement that the Governor had to consult the Executive Council before making subordinate legislation if the power to make subordinate legislation was vested in the Governor, and not, as was usually the case, the Governor in Council. Nor are we aware of any provision, which require the Governor to consult the Executive Council before making subsidiary legislation. If the input of the Executive Council was needed then the law-making power would have been expressed to be the responsibility of the Governor in Council.
4. Art 56 of the Basic Law now requires the Chief Executive to consult the Executive Council when making subordinate legislation. “Subordinate legislation” and “subsidiary legislation” are defined in section 3 of the Interpretation and General Clauses Ordinance as “any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect.”
5. In this connection it is important to distinguish between the exercise of delegated legislative powers and the exercise of executive powers under primary or subsidiary legislation. If the Chief Executive makes an executive decision under an ordinance he is not required to consult the Executive Council unless the relevant legislation requires him to do so, On the other hand, if the Chief Executive exercises a legislative power but mistakes it for an executive power and does not consult the Executive Council, then the power totally miscarries.

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6. It is for the legal advisors of the Chief Executive to advise him whether a statutory power is legislative or executive in nature. This decision can only be made on a case by case basis, giving due regard to the nature of power in question. In this regard the criteria set out in paragraph 3 of the Administration's Response should not be applied rigidly. We also have reservation on the appropriateness of the criteria set out in paragraphs 3(b) and (d) as indicia of legislative effect. For instance, the power to make town plans which is generally applied to the public or a significant sector of the public and which formulates general rules of conduct were held by the court to be powers of an executive nature.
7. If the power concerned is a legislative power, the Legislative Council can vet the relevant provision because of the requirement to table subordinate legislation in the Legislative Council under section 34 of the Interpretation and General Clauses Ordinance (Cap 1).
8. Insofar as the statutory powers in the Firearms and Ammunition Ordinance are concerned, we are of the view that the powers concerned are executive powers and their exercise is the responsibility of the Chief Executive alone. It is a power to grant exemptions of persons or class or descriptions of persons (s 4) or of vessels (s 5) from certain statutory prohibition. The power is conferred upon a public officer, the Chief Executive in this case. The mere fact that the decision must be made public by way of notice in the Gazette does not detract from the administrative nature of the power or cloth the form of the exemption with legislative character. Indeed, the most telling point is that the power under section 4(2) can be varied at "any time". If the notice of exemption were meant to be a legislative instrument there would be serious problems with the time requirements in Cap 1 for the publication of subsidiary legislation and its laying before the Legislative Council.

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