

**Subcommittee to Study the Proposed Legislative Amendments  
Relating to the Re-organisation of the Government Secretariat**

**Follow up on the issue of creating Deputy Secretary of Department posts  
raised in the morning session of the meeting on 5 June 2012**

This paper provides responses to the issues raised by Members at the meeting on 5 June 2012 concerning the constitutionality and legality of creating the rank and post of Deputy Secretary of Department (“DSoD”), transfer of functions, and the Interpretation and General Clauses Ordinance (Substitution of Schedule 6) Order 2012.

**Constitutionality and legality of creating DSoD rank and post**

2. In accordance with Article 48(5) of the Basic Law, principal officials of the Hong Kong Special Administrative Region (“HKSAR”) Government include Secretaries and Deputy Secretaries of Departments, and Directors of Bureaux (“DoBs”). Article 101 of the Basic Law also includes a reference to the rank of DSoD. Article 48(2) of the Basic Law provides that the Chief Executive (“CE”) is responsible for the implementation of the Basic Law and other laws which, in accordance with the Basic Law, apply in the HKSAR. The CE is empowered to nominate and to report to the Central People’s Government (“CPG”) for appointment the principal officials including DSoDs. As such, the creation of the rank and post of DSoD is in conformity with the Basic Law.

3. Section 8 of the Public Finance Ordinance (Cap. 2) provides that the Finance Committee (“FC”) of the Legislative Council (“LegCo”) may approve changes to the estimates of expenditure upon a proposal of the Financial Secretary (“FS”). The Establishment Subcommittee (“ESC”) under the FC examines and makes recommendations to the FC on the Administration’s proposals for creating new ranks and/or posts. We have, in accordance with the above procedures, put forth proposals for establishment changes arising from the re-organisation of Government Secretariat to the ESC, including the creation of DSoD rank and posts. Upon approval by the FC, the rank and posts of DSoD created are the public offices specified in the Interpretation and General Clauses Ordinance (Cap. 1).

4. The proposed creation of DSoD rank and posts is therefore in conformity with the Basic Law and local laws.

## **Transfer of functions**

5. To implement the new organisational structure of the Government Secretariat, the current term Government has served a notice for moving a resolution on 20 June to effect the transfer of statutory functions of public officers concerned. Under Section 54A of Cap. 1, the LegCo may by resolution provide for the transfer to any public officer of any functions exercisable by virtue of any Ordinance by another public officer.

6. The existing resolution involves only the transfer of statutory functions among relevant DoBs and among various Permanent Secretaries, as well as changes to some outdated post titles, and is not related to Secretaries of Departments (“SoDs”) or DSoDs. This is due to the fact that the two DSoDs will mainly be tasked to assist the CE and the SoDs in formulating long-term plans, to co-ordinate the formulation and implementation of policy, as well as to assist in supervising the relevant policy bureaux. The performance of such duties basically does not involve the exercise of statutory powers, and thus there is no need to transfer the statutory powers of the SoDs to the two DSoDs. In case there is a genuine need for the DSoDs to exercise statutory powers in co-ordinating the formulation and implementation of policy, such powers may be exercised by the public officers vested with the powers, or such powers or duties may be conferred or imposed upon the DSoDs by virtue of section 43(1) of Cap. 1<sup>1</sup>.

7. It is also worth noting that under the existing arrangements, any powers conferred or duties imposed by any Ordinance are generally conferred or imposed upon the head of the organisation concerned who may delegate certain powers to his/her subordinates by virtue of section 43(1) of Cap. 1 for performing the duties. During the absence of the head, his/her deputy who assumes the duties on his/her behalf performs the statutory functions of the head. The existing arrangements with regard to the statutory powers of two DSoDs are in line with current practice.

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<sup>1</sup> Pursuant to section 3 of Cap. 1, “public officer” means any person who holds an office of emolument in the HKSAR Government. As such, when the FC has approved the creation of the DSoD posts and the CPG has appointed the persons concerned as DSoDs pursuant to the Basic Law and on nominations made by the CE, those persons who have taken up the posts of DSoD are “public officers”. Under section 43(1) of the Cap. 1, a specified public officer may delegate any other public officer to exercise such powers conferred or duties imposed upon by any Ordinance when the need arises.

8. The organisational structure of the Government (including the hierarchy and relations between the SoDs/Bureaux/Departments) is not provided for in the legislation. Instead, the structure is adjusted by the Government from time to time in the light of the actual needs. Under the established mechanism, the Government will put forth the staffing proposals and financial implications in relation to the proposed adjustment to the FC for approval. As in the case of current proposed re-organisation of the Government Secretariat, the Administration has put forth proposals to the ESC and FC.

### **Interpretation and General Clauses Ordinance (Substitution of Schedule 6) Order 2012 (“the Order”)**

9. Section 62(1) of Cap. 1 provides that where any Ordinance confers a power or imposes a duty upon the CE, the exercise of such power or the performance of such duty may be signified under the hand of any public officer specified in Schedule 6 to Cap. 1. After the resolution has been passed, the CE-in-Council will make an order to amend the list of public officers set out in Schedule 6 to Cap. 1 to include the post titles of the two DSoDs and the post titles of the relevant public officers after the re-organisation of the policy bureaux.

10. It can therefore be seen that different procedures are involved in making the Order and moving the resolution on 20 June of which notice has been served by the Constitutional and Mainland Affairs Bureau, and the Order and the resolution serve different purposes. The resolution aims at effecting the transfer of statutory functions of the DoBs and Permanent Secretaries concerned, while the Order aims at amending the Schedule concerned to include the post titles of the two DSoDs and update the post titles of the public officers concerned. The resolution will only come into force after it has been passed by the LegCo. We intend to move the resolution at the LegCo meeting on 20 June 2012. The Order will be submitted to the LegCo for negative vetting after the resolution has been passed.

**Constitutional and Mainland Affairs Bureau  
Department of Justice  
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