

**立法會**  
***Legislative Council***

LC Paper No. LS80/11-12

**Comments on the Proposed Creation of Posts of  
Deputy Chief Secretary for Administration  
and Deputy Financial Secretary**

At the House Committee meeting on 8 June 2012, Members raised concerns on the motion to be moved by the Secretary for Constitutional and Mainland Affairs on 20 June 2012 under section 54A of the Interpretation and General Clauses Ordinance (Cap. 1) (IGCO) (the Motion), in particular, in relation to the proposed creation of posts of Deputy Chief Secretary for Administration (DCS) and Deputy Financial Secretary (DFS). General advice in response to the concerns raised was given by Legal Adviser at the meeting. This paper sets out the material points of the advice and provides additional information where appropriate.

**Section 54A of IGCO**

2. Section 54A(1) of IGCO provides that 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. "Public officer", according to section 3 of IGCO, means any person holding an office of emolument under the Government, whether such office be permanent or temporary. And, according to section 54A(4) of IGCO, "functions" includes powers and duties.

3. A motion moved under section 54A of IGCO only deals with existing statutory functions of a public officer. Subject to the Administration's policy intent, statutory functions of the Chief Secretary for Administration (CS) and the Financial Secretary (FS) may be the subject of a proposed transfer in such a motion. In the Motion, there is no reference to any of these functions. They will, therefore, remain vested in CS or FS<sup>1</sup>.

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<sup>1</sup> By virtue of section 3 of IGCO, "Financial Secretary" means the Financial Secretary of the Hong Kong Special Administrative Region and the Secretary for Financial Services and the Treasury.

## **Delegation under section 43 of IGCO**

4. In law, a power vested in or a duty imposed on a public officer under any legislation belongs to that public officer alone. Except where a delegation of such power or duty is authorised by statute, that public officer may be compelled to perform the statutory powers or duties.<sup>2</sup>

5. Under section 43 of IGCO (Annex I), the statutory powers and duties of public officers, including CS and FS, may be delegated. Section 43(1) provides that where any ordinance confers powers or imposes duties upon a specified public officer, such public officer may delegate any other public officer or the person for the time being holding any office designated by the specified public officer to exercise such powers or perform such duties on his behalf. This power to delegate is available to specified public officers who are specified in a Legal Notice published in the Gazette by the Chief Executive in Council in accordance with section 43(4). Such a notice is subsidiary legislation which is subject to negative vetting by the Legislative Council.

6. Despite the specification of a public officer in a Legal Notice published under section 43(4) of IGCO, the public officer cannot delegate his power to make subsidiary legislation or to hear any appeal.

7. Specification of Public Offices (Cap. 1 sub. leg. C) (the Specification) contains the titles of public offices and correspondingly ordinances which confer powers or impose duties upon them respectively as specified in Legal Notices published pursuant to section 43(4) of IGCO. An example of a delegation under section 43 was made by L.N. 99 of 2009 by which the Commissioner for Transport and the Director of Highways were specified for the purposes of Tsing Sha Control Area Ordinance (Cap. 594) and related items of subsidiary legislation. A specification under section 43 of IGCO only identifies the specified public officer who is allowed to delegate his powers or duties but not the public officer to whom the power is delegated.

8. Under the Legal Notices mentioned in the Schedule to the Specification, CS<sup>3</sup> and FS<sup>4</sup> have already been specified for the purpose of certain Ordinances. The effect is that CS and FS may delegate their

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<sup>2</sup> See Administrative Law, by Wade and Forsyth, 10<sup>th</sup> Edition at Chapter 3 at page 39.

<sup>3</sup> For example, the power of CS under section 13 of the Air Passenger Departure Tax Ordinance (Cap. 140) to waive departure tax under certain circumstances.

<sup>4</sup> For example, the power of FS under section 128(3) of the Companies Ordinance (Cap. 32) to exclude the disclosure of certain information in the accounts of a company laid before its general meeting.

powers and duties under those ordinances to any public officer. However, we are not able to find examples in the Laws of Hong Kong as to whether CS and FS have delegated any of the powers and duties or to whom if there has been any delegation.

### **Order made under section 62 of IGCO**

9. The Administration has explained, in the LegCo Brief for a draft order to be made under section 62 (Annex II) to amend Schedule 6 to IGCO (File Ref.: CMAB F19/6/3/2), that the draft order will be made upon the passing of the motion to re-organise the structure of the Government Secretariat. DCS and DFS are among the public officers specified in the draft order.

10. Under section 62(1), where any Ordinance confers a power or imposes a duty upon the Chief Executive or the Chief Executive in Council to make, among other things, subsidiary legislation or appointment, the exercise of such power or the performance of such duty may be signified by any public officer specified in Schedule 6. Under section 62(3), the Chief Executive in Council may amend Schedule 6 by an order published in the Gazette. An example of an amendment to Schedule 6 was by L.N. 49 of 2008 by which "Under Secretary" was added.<sup>5</sup>

### **Sections 43 and 62 of IGCO**

11. The power of delegation under section 43 of IGCO is different from the power given to a public officer identified in Schedule 6 of IGCO. A public officer who has been delegated under section 43(1) of IGCO may exercise the powers or perform such duties specified in an ordinance on behalf of the specified public officer. The delegated officer is accountable as if he was the specified public officer and the exercise of power or the performance of duties are equally liable to the scrutiny of the court.

12. On the other hand, section 62 may be regarded as a provision under which certain acts of the Chief Executive may be evidenced by the signification of public officers identified in Schedule 6. An example of the operation of section 62 is where the Clerk to the Executive Council

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<sup>5</sup> Members may refer to the Report of the Subcommittee on Interpretation and General Clauses Ordinance (Amendment of Schedule 6) Order 2008 (LC Paper No. CB(2)1609/07-08) for the deliberation of the Subcommittee.

signs on the covering page of a piece of subsidiary legislation made by the Chief Executive in Council.

### **Funding approval by the Finance Committee**

13. In the paper prepared by the Administration for the meeting of the Finance Committee on 15 June 2012 (FCR(2012-13)44), the Administration indicates that the proposed re-organisation should take effect from the date of transfer as specified in the resolution proposed to be passed. Therefore, the funding approval will only become effective if the proposed resolution is passed by LegCo, and on the same date when that resolution takes effect, i.e. 1 July 2012.

14. Members are invited to note the above information.

Encls.

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LS/R/7A/11-12

## Annex I

Chapter: 1	Title:	<b>INTERPRETATION AND GENERAL CLAUSES ORDINANCE</b>	Gazette Number:	26 of 1998
Section: 43	Heading:	<b>Delegation by specified public officers</b>	Version Date:	01/07/1997

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### Remarks:

Adaptation amendments retroactively made - see 26 of 1998 s. 37

(1) Where any Ordinance confers powers or imposes duties upon a specified public officer, such public officer may delegate any other public officer or the person for the time being holding any office designated by him to exercise such powers or perform such duties on his behalf, and thereupon, or from the date specified by such specified public officer, the person delegated shall have and may exercise such powers and perform such duties.

(2) Nothing in subsection (1) shall authorize a specified public officer to delegate any person to make subsidiary legislation or to hear any appeal.

(3) Where any Ordinance confers any power or imposes any duty upon a specified public officer and such power is exercised or such duty is performed by any other public officer, the specified public officer shall, unless the contrary is proved, be deemed to have delegated the latter public officer under subsection (1) to exercise the power or perform the duty.

(4) In this section "specified public officer" (指明的公職人員) means the person for the time being holding any public office which has been specified, either generally or for the purposes of any particular Ordinance, under this section by the Chief Executive in Council by notice in the Gazette. (Amended 26 of 1998 s. 37)

章：	1	標題：	《釋義及通則條例》	憲報編號：	26 of 1998
條：	43	條文標題：	指明公職人員的轉授權	版本日期：	01/07/1997

附註：

具追溯力的適應化修訂一見 1998 年第 26 號第 37 條

(1) 凡條例向指明的公職人員授予權力或委以職責，該人員可轉授給其他公職人員，亦可轉授給當時擔任他所指定職位的人，代他行使這些權力或執行這些職責；由轉授時開始，或由該指明的公職人員所指明的日期開始，獲轉授的人即掌有並可行使這些權力及須執行這些職責。

(2) 第(1)款並不授權指明的公職人員轉授權力給任何人以訂立附屬法例或聆訊上訴。

(3) 凡條例向指明的公職人員授予權力或委以職責，而該權力由另一公職人員行使，或該職責由另一公職人員執行，則除非相反證明成立，該指明的公職人員須視為已根據第(1)款轉授給該另一公職人員行使該權力或執行該職責。

(4) 本條所述的“指明的公職人員”(specified public officer)即當時擔任指明公職的人，而該公職是行政長官會同行政會議為一般目的或為某一條例的施行，根據本條藉憲報公告而指明的。(由 1998 年第 26 號第 37 條修訂)

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Chapter: 1	Title:	<b>INTERPRETATION AND GENERAL CLAUSES ORDINANCE</b>	Gazette Number:	26 of 1998
Section: 62	Heading:	<b>Signification of orders of Chief Executive and Chief Executive in Council</b>	Version Date:	01/07/1997

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Remarks:

Amendments retroactively made - see 26 of 1998 ss. 21 & 37

(1) Where any Ordinance confers a power or imposes a duty upon the Chief Executive or the Chief Executive in Council to make any subsidiary legislation or appointment, give any directions, issue any order, authorize any thing or matter to be done, grant any exemption, remit any fee or penalty, or exercise any other power or perform any other duty, the exercise of such power or the performance of such duty may be signified-

(a) in the case of the Chief Executive, under the hand of any public officer specified in Schedule 6; (Amended 36 of 1972 s. 3)

(b) in the case of the Chief Executive in Council, under the hand of the Clerk to the Executive Council. (Amended 14 of 1994 s. 24)

(2) Notwithstanding the provisions of subsection (1), proclamations shall be made or issued only under the hand of the Chief Executive in Council.

(3) The Chief Executive in Council may, by order published in the Gazette, amend Schedule 6. (Added 36 of 1972 s. 3)

(Amended 26 of 1998 s. 37)

章：	1	標題：	《釋義及通則條例》	憲報編號：	26 of 1998 ss. 21 & 37
條：	62	條文標題：	行政長官及行政長官會同行政會議命令的明示	版本日期：	01/07/1997

附註：

具追溯力的修訂一見 1998 年第 26 號第 21 及 37 條

(1) 凡條例向行政長官或行政長官會同行政會議授予權力或委以職責，以訂立附屬法例、作出委任、發給指示、發出命令、授權作任何事情或事項、批給豁免、減免任何費用或刑罰，行使其他權力或執行其他職責，所授予的權力或委以的職責—

(a) 如屬由行政長官行使或執行的，可由附表 6 指定的任何公職人員簽署示明行使或執行；(由 1972 年第 36 號第 3 條修訂)

(b) 如屬由行政長官會同行政會議行使或執行的，可由行政會議秘書簽署示明行使或執行。(由 1994 年第 14 號第 24 條修訂)

(2) 訂立或發出文告須由行政長官會同行政會議簽署；本款規定不受第 (1) 款規限。

(3) 行政長官會同行政會議可藉憲報刊登的命令，修訂附表 6。(由 1972 年第 36 號第 3 條增補)

(由 1998 年第 26 號第 37 條修訂)