Bills Committee on the
Adaptation of Laws (No 2) Bill 1998

The Administration's response to issues raised in relation to
Article 56 of the Basic Law and Subordinate Legislation

This paper sets out the Administration's views on the interpretation of Article 56 of the Basic Law (BL) and the practical implications for the adaptation of laws exercise.

Part 1: Constitutional Obligations

BL 56 and Clause X of the Royal Instructions

2. BL 56 bears some similarity to Clause X of the Royal Instructions (Extracts of BL 56(2) and Clause X are at the Annex). For the present purpose, however, BL 56(2) and Clause X of the Royal Instructions differ in one material respect. The former applies expressly to subordinate legislation, whereas the latter only applies to "powers and authorities granted to the Governor by [the] Letters Patent". The Letters Patent give the Governor power to make laws with advice and consent of the Legislative Council (Article VII of Letters Patent) but do not refer to subordinate legislation. Hence it is doubtful whether the constitutional duty of the Governor to consult ExCo applied to subordinate legislation made under primary legislation (or ordinances).

3. In any event, prior to the Reunification, there was no practice of consulting ExCo in respect of subordinate legislation made by the Governor (unless the relevant primary legislation or ordinance provided that subordinate legislation was to be made by the "Governor in Council"). Even if the Royal Instructions did, on their true construction, impose such a requirement, it was saved by section 4 of the Colonial Laws Validity Act (applicable to Hong Kong prior to the Reunification) which provides that "no colonial law... shall be void... by reason only of disregard of any Instructions..." (see Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (1994) p 44).

4. Unlike the Letters Patent, BL 56 sets out in very clear terms the constitutional obligation of CE to consult ExCo when making

subordinate legislation. As a result of this constitutional directive, it has been the practice since the Reunification to specify in subordinate legislation made by CE (as opposed to those made by CE in Council) that such is done after consultation with ExCo.

Scope of BL 56

5. On a literal interpretation of BL 56, ExCo will need only be consulted when the relevant subordinate legislation is made personally/directly by CE himself. However, since the coming into force of the Basic Law on 1 July 1997, the SAR courts have on a number of occasions said that a purposive construction of the constitutional provisions of the Basic Law is the correct approach (e.g. the Court of Appeal's decision in *HKSAR v David Ma* [1997] HKLRD 761).

6. Adopting a purposive interpretation of BL 56, the Administration believes that the requirement to consult ExCo pursuant to BL 56 before making subordinate legislation by CE applies to the following two cases:

a) those personally/directly made by CE under an ordinance (e.g. an Established Offices Order made by the CE under s 2(1) of the Pension Benefits Ordinance (Cap 99));

b) those not personally made by CE but by another person (e.g. Secretary for Civil Service) under a delegated power conferred by CE as authorised by the relevant legislation (e.g. an Established Offices Order made by SCS under a delegated power conferred by CE pursuant to s 3A of the Pension Benefits Ordinance (Cap 99)).

7. In other words, the BL 56 requirement applies to the making of subordinate legislation by CE, either personally/directly (as in para 6(a)) or indirectly (as in para 6(b)). Except for the above limited circumstances, the BL 56 obligation does not arise in relation to other subordinate legislation. Thus, where an Ordinance confers power on a person to make subordinate legislation personally/directly (e.g. power of the Securities and Futures Commission to make regulations and rules under the Securities Ordinance), there is no constitutional obligation on the part of such persons to consult ExCo under BL 56.

Part 2: Practical Approach

8. In respect of the adaptation of laws exercise, the Administration's original approach was to identify every provision which confers a legislative function on the "Governor" and to change the reference to "Governor" to "Chief Executive in Council" so as to reflect the constitutional obligation under BL 56(2). This had the advantage of setting out clear and ready guidance in our statute books for exercising statutory powers. However, the classification of a particular instrument as subordinate legislation or otherwise may be the subject of much debate. This is because the distinguishing feature of an instrument that falls within the scope of "subordinate legislation", namely, its "legislative effect", depends on a set of criteria adopted principally by reference to court decisions in other common law jurisdictions and the scope of such criteria is subject to legal interpretation.

9. The Administration therefore considers that there are valid legal and practical reasons for adapting all references to "Governor", in respect of both making subordinate legislation and issuing administrative instruments, to "Chief Executive". The Chief Executive's obligation to consult ExCo when making subordinate legislation would be unaffected by such an approach. Where such consultation has taken place, it will be reflected in the heading of the subordinate legislation. The adoption of such an approach would help to avoid further delay in the enactment of the adaptation of laws bills and inconclusive arguments about the designation of many instrument as being subordinate legislation or otherwise. The Administration therefore proposes to adopt a more mechanical approach in adaptations whereby the expression "Governor" will be adapted to become "Chief Executive" in all cases irrespective of the character of the instruments to be made by the Chief Executive.

10. In arriving at this proposal, we have also considered another matter provided in BL 56, namely, the exceptional circumstances in which the CE is **not** bound by the requirement to consult ExCo. Under this other limb of BL 56 the CE is not bound to consult ExCo when adopting any measures in emergencies. If however the relevant provision of a HKSAR statute states expressly that a certain power is exercised by the "Chief Executive in Council", then, notwithstanding the exceptional circumstances as provided by the BL, there may be argument as to whether the CE must consult ExCo even in cases of emergencies. This is

undesirable. On reflection, therefore, it is felt that the term “Chief Executive in Council” should better be avoided.

11. If Members agree to the new approach, then the appropriate committee stage amendments will be proposed to all adaptation bills which contain amendments changing “Governor” to “Chief Executive in Council”.

Part 3: Response to other views

12. Members would note that the Bar Council shares the Administration’s views that the constitutional obligation for the CE to consult ExCo in making subordinate legislation under BL 56, not expressly provided for in the pre-reunification era, makes it necessary to distinguish whether or not a particular statutory power of the Governor is a legislative function. Under the proposed new approach, such distinction will be made as and when the power is exercised instead of in the wording of the statutory provision concerned.

13. As to Professor Wesley-Smith’s views, the Administration, based on the analysis in paragraph 2 above, doubts whether the consultation requirement applied to making of subordinate legislation before 1 July 1997.

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Annex

BL 56(2)

"Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the legislative Council, making subordinate legislation, or dissolving the Legislative Council."

Clause X of the Royal Instructions

"In the execution of the powers and authorities granted to the Governor by Our said recited Letters Patent, he shall in all cases consult with the Executive Council, excepting only in cases relating to the appointment, disciplinary control or removal from office of a public officer or in cases which may be of such a nature that, in his judgement, Our service would sustain material prejudice by consulting the Council thereupon, or when the matters to be decided shall be too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may be necessary for him to act in respect of any such matters. In all such urgent cases he shall, at the earliest practicable period, communicate to the Executive Council the measures which he may so have adopted, with the reasons therefor."