

CONFIDENTIAL

hie

ecc



c Co-
Luce,
COO
DTI
LPSO
MOD
HMCT
Ho
LPO

10 DOWNING STREET

From the Private Secretary

25 February 1985

Hong Kong: Constitutional Development:
Amendments to Letters Patent and
Royal Instructions

The Prime Minister has seen and considered the Foreign Secretary's minute of 19 February on this subject.

Subject to the views of colleagues she agrees:

- (a) that we should not insist that reserve powers of legislation be created for the Governor;
- (b) the Governor should be pressed to agree that a power of dissolution of the legislature at any time should be provided for in the amendments to the Letters Patent and Royal Instructions.

I am copying this letter to the Private Secretaries of members of OD(K) and to Sir Robert Armstrong.

(Charles Powell)

Len Appleyard Esq
Foreign and Commonwealth Office

CONFIDENTIAL

✓



10 DOWNING STREET

Prime Minister

The Foreign Secretary is
in effect

- accepting the Governor's
recommendation that he

should not have reserve
power of legislation; but

- rejecting his
recommendation that he should
not have the power to
dissolve the legislature.

Percy Croft agrees
with the Foreign Secretary.

The power of dissolution is
not dangerous if coupled
with an obligation to hold
fresh elections within a
specified time. CDP 21/4.

PK



PM/85/16

PRIME MINISTER

Prime Minister (1)

Yes
Content, subject to OD(K) colleagues,
not with the Foreign Secretary's conclusions
in paragraph 14?

Hong Kong: Constitutional Development:
Amendments to Letters Patent and Royal Instructions

DMB
19/2

A. Gen
Content

1. Under the proposals published in a White Paper in November 1984 Hong Kong is to introduce limited elections in September 1985 to fill 24 of the 56 seats in the Legislative Council. To make this possible, the Letters Patent and Royal Instructions, which effectively form the constitution of Hong Kong, need to be amended, and an electoral bill needs to be introduced in Hong Kong. Changes to the Letters Patent and Royal Instructions are made by orders under the Royal Prerogative and do not therefore have any legislative implications for Parliament.

2. Most of the issues involved in this matter are technical, but examination of the proposals has thrown up two important questions, on which I should value your advice and that of colleagues. These are:

- (i) Whether the Governor should have reserve powers of legislation; and
- (ii) Whether he should have power to dissolve the legislature.

3. Governor's Reserved Powers of Legislation

The practice in most dependent territories, once HMG no longer have the power to direct the legislature by means of instructing an official majority, has been to give the Governor power, if he sees fit, to pass legislation over the heads of the legislature. This practice has not been universal: an exception is Bermuda. The purpose of the provision is to enable HMG, through the Governor, to continue to exercise its

.../ultimate



ultimate responsibility for the good government of the territory in the face of a hostile or uncooperative legislature.

4. In the case of Hong Kong, a theoretical official majority existed in the legislature until 1984, when for the first time the number of appointed unofficial members exceeded the total number of official members theoretically appointable. The present moment, when the first steps are being taken towards an elected legislature, is realistically the last time when it would be politically feasible to introduce reserved powers for the Governor to legislate by himself. In the absence of such powers it would remain possible for HMG to bring legislation into force in Hong Kong without the assent of the Legislative Council, but only by use of an Order-in-Council made in London under the prerogative - a right which is preserved by the Letters Patent.

5. The principal argument in favour of introducing reserved powers for the Governor is that it is conceivable that, at some stage before 1997, we might face a hostile Legislative Council in Hong Kong which refused to pass legislation which HMG considered essential, for instance in relation to defence, or our international relations. In such circumstances, to impose legislation from London would be highly undesirable. It would be akin to direct rule, and would also run counter to our general aim to make sure that Hong Kong law stands on its own, separate from UK law, by 1997.

6. The Governor has however argued strongly against the introduction of these reserved powers on the following grounds:

- (a) It would be regarded by public opinion in Hong Kong as an advance declaration of no confidence in the elected legislature which we are about to set up. (Such a view might well be reflected at Westminster.)

.../(b)



- (b) It would give the Chinese good arguments for giving the same power to the Chief Executive in the SAR after 1997, thus detracting from the authority of the legislature. It would not chime well with the clause in the agreement providing that "the legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature "of the Hong Kong Special Administrative Region".
- (c) It would not be practical politics for the Governor to exercise such powers in the circumstances of Hong Kong.
- (d) It is unnecessary in that sufficient powers exist under the Letters Patent to cope with any crisis situations; in the last resort it would also be possible to amend the Letters Patent in a crisis to provide whatever powers were necessary.

7. These are powerful arguments. On balance I consider, though some risk is involved, that it would be right to accept the Governor's view and not to introduce reserve powers, relying instead on HMG's power of legislate direct from London in an emergency, or even to make constitutional amendments specifically to cope with such an emergency.

8. Power of Dissolution of the Legislature

The Governor's present proposals provide for an election of members every three years with no power to dissolve the legislature and hold new elections in between. This has two main disadvantages:

- (a) It would remove the option of seeking to break any deadlock between executive and legislature by a dissolution followed by elections.

.../(b)



- (b) It would, unless later changed, tie us to a rigid 3 yearly timetable of elections between now and 1997. This might well not fit in with the requirements of constitutional development in the period, which could require accelerated elections at any point. It would also mean an election in 1997.

9. The Governor has argued against giving himself the power to dissolve the legislature other than at 3 yearly intervals on the grounds that:

- (a) Such a power is highly unlikely to be used between now and 1988: there will have to be changes following the review of constitutional development scheduled for 1987, and the opportunity will exist then to add the power in question, if it is considered desirable, at a time when the programme for constitutional development up to 1997 should be clearer. He also argues that the timing of elections could be changed at any time by a specific legislative act.
- (b) If such a provision was made now it would provide the Chinese Government with a good argument to include similar powers in the Basic Law for the Chief Executive of the SAR. The Governor argues that a determined Chief Executive might use repeated dissolutions to frustrate the legislature, and that in the absence of a power of dissolution there would be a strong incentive to reach an acceptable compromise in any deadlock.

10. These points should not be lightly dismissed. But I have concluded that the balance of argument is against them. I believe that we shall need flexibility in the timing of elections in Hong Kong up to 1997. The Governor himself does not rule out the need for a power of dissolution to be provided later,

.../and



and in my view if such a power is not introduced at the outset when Hong Kong takes the first step towards an elected legislature, it will in practice be very difficult to do so later without appearing to impose new curbs on the legislature. Specific acts to vary the timing of elections seem to me a more dangerous and open-ended precedent than the use of powers of dissolution.

11. Nor is it clear that it would be undesirable for a future Chief Executive of the SAR to have such a power, provided that it was firmly coupled to a requirement to hold fresh elections within a specified and short period (as we envisage would be the case if the power is written into the new constitutional instruments). There is nothing abhorrent about such a power, which exists in many countries including the UK. Without it there would be no constitutional way of breaking a deadlock between the Chief Executive and the Legislature: a Chief Executive in this position would be tempted to seek to bypass the legislature in other less acceptable ways. While we cannot make constitutional provision to preclude disputes between the Executive and the Legislature, a Chief Executive reliant upon his Legislature to enact annual money bills, as he should be under the agreement, would gain nothing by seeking to frustrate the Legislature through repeated dissolutions: and if he did seek to do so, a more powerful legislature could be elected. Democracy within the SAR would thus stand to be strengthened rather than weakened.

12. I am therefore inclined to press the Governor to agree that a power of dissolution should be incorporated in the current amendments to the Letters Patent and Royal Instructions, (and reflected in the Hong Kong Electoral Bill).

.../Timing



Timing

13. In order to maintain the timetable leading to elections in Hong Kong in September 1985 it is important that the electoral bill should be published in Hong Kong on 1 March. The earliest date on which a full OD(K) could be called is 26 February, which would probably make the 1 March deadline impossible. In view of the shortness of time, I hope that if you and other colleagues agree with my recommendations we might clear the matter out of committee. If however colleagues feel that a discussion is necessary a time has been pencilled in on 26 February.

Conclusions

14. I invite my colleagues to agree that

✓ (1) We should not insist that reserve powers of legislation be created for the Governor.

✓ (2) We should press the Governor to agree that a power of dissolution of the legislature at any time (followed by elections within a specified and short period) should be provided for in the amendments to the Letters Patent and Royal Instructions.

15. I am copying this minute to our colleagues on OD(K) and to Sir Robert Armstrong.

GEOFFREY HOWE