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DELEGATION OF POWERS FOR MODERN GOVERNMENT

Statutory Mechanisms, the *Carltona* Principle and Suggestions for Reform*

Delegation is a necessary part of modern government administration. The sheer volume of administrative decisions and subsidiary legislation required to be made means that it is often inevitable for a minister or a public officer who is vested with statutory powers to delegate these powers to other public officers. Although delegation and the related concept of devolution pervade all areas of government administration, these concepts are little-understood and written about in Singapore. This article explores the topic of how statutory powers are delegated and devolved in government. The first part is explanatory. It outlines and explains the four options available to government agencies when seeking to delegate or devolve a statutory power – delegation under the Interpretation Act (Cap 1, 2002 Rev Ed), delegation using specific statutory provisions, delegation using the doctrine of implied delegation, and devolution using the *Carltona* principle. The second part discusses the limitations and uncertainties of existing doctrines, as well as the possible inefficiencies that these may create in modern government. The third part suggests some reforms to help address these inefficiencies.

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I. Introduction

1 It is a principle of administrative law that when Parliament vests power in an official or authority, there is a presumption that the power must be exercised by that named official or authority, and no other person. This principle is expressed in the maxim *delegatus non potest*

* The views expressed in this article are those of the authors and are not representative of the views of the Attorney-General's Chambers.

delegare, namely, a delegate may not delegate to another person a power that has been delegated to him. A rigid application of the principle, however, would make the efficient operation of modern government an impossibility due to the sheer volume of administrative decisions and subsidiary legislation that statutory office holders are required to make. Parliament and the courts have therefore developed both statutory and common law methods for statutory powers to be delegated and devolved. While essential to the functioning of modern government, the concepts of delegation and devolution are not well understood, and little has been written about these concepts in Singapore jurisprudence.

2 The second part of this article[1] seeks to demystify the concepts of delegation and devolution by explaining the four methods available to government agencies when seeking to delegate or devolve a statutory power – (a) delegation under s 36(1) of the Interpretation Act;[2] (b) delegation using specific statutory provisions; (c) the doctrine of implied delegation; and (d) devolution using the principle developed in *Carltona Ltd v Commissioners of Works*[3] ("*Carltona*"). The third part[4] discusses the limitations and uncertainties of the existing options of delegation and devolution, and analyses how these create inefficiencies in modern government. The fourth part[5] suggests the following reforms to address these inefficiencies:

(a) amending s 36(1) of the Interpretation Act to remove the requirement for the President's approval before delegation may be effected;

(b) extending the *Carltona* principle to enable ministerial powers to be devolved to officers in statutory boards; and

(c) extending the *Carltona* principle to enable certain legislative powers to be devolved.

II. Options available to government agencies

3 As a starting point, it is important to note the conceptual difference between delegation and devolution using the *Carltona* principle. Delegation requires a distinct act by which power vested in oneself is conferred upon some person not previously competent to exercise it.[6] Once the power is conferred, the delegate exercises that

1 See paras 3–16 below.
2 Cap 1, 2002 Rev Ed.
3 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.
4 See paras 17–25 below.
5 See paras 26–61 below.
6 William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th Ed, 2014) at p 266.

power in his own name.[7] Accordingly, the exercise of that power is legally an act of the delegate and not the original holder of that power ("principal"), whether or not the principal is constitutionally responsible for acts of the delegate. On the other hand, devolution using the *Carltona* principle enables officials within the ministry and departments headed by a minister to exercise the minister's powers in the minister's name without the need for any formal delegation of authority or specific act of authorisation.[8] An official to whom the minister devolves a power ("devolvee") exercises the devolved power as the minister's *alter ego*,[9] and not in a separate legal capacity. Accordingly, the exercise of that power by the devolvee is legally and constitutionally an act of the minister, for which he continues to be responsible.[10]

A. Section 36 of the Interpretation Act

4 Section 36(1) of the Interpretation Act is the only provision of general application that enables delegation of any power or duty of a minister that is not legislative in nature. A delegation under s 36(1) requires the President's approval and must be made by notification in the *Gazette*. Any conditions, exceptions and qualifications to the delegate's exercise of the delegated power must also be determined by the President.[11] The President must act on the advice of the Cabinet or of a minister acting under the general authority of the Cabinet in giving such approval and determining such conditions, exceptions and qualifications.[12] This is because the powers in s 36(1) are not among the President's discretionary powers provided under the Constitution of the Republic of Singapore[13] ("Constitution"). Section 36(1) has often been used to delegate ministerial powers to permanent secretaries, public officers of lower grades, and even statutory board officers and other ministers.[14] Section 36(4) enables the delegating minister to continue to exercise the delegated powers or perform the delegated duties notwithstanding the delegation.[15]

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7 *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [49].

8 William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th Ed, 2014) at pp 266–267.

9 *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 at 276.

10 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563.

11 Interpretation Act (Cap 1, 2002 Rev Ed) s 36(1).

12 Constitution of the Republic of Singapore (1999 Reprint) Art 21(1).

13 1999 Reprint.

14 See, *eg*, the Interpretation (Delegation of Powers) (Ministry of Finance) (Consolidation) Notification (Cap 1, N 6, 2002 Rev Ed), under which the Minister for Finance deputes various public officers to exercise the minister's powers under s 4(2) of the Development Fund Act (Cap 80, 2013 Rev Ed) and s 17(3) of the Financial Procedure Act (Cap 109, 2012 Rev Ed).

15 Interpretation Act (Cap 1, 2002 Rev Ed) s 36(4).

5 A practical question that may arise from a delegation made under s 36(1) is whether a delegate may continue to abide by internal guidelines determined by the delegating minister in exercising his delegated power. The answer appears to be "no". A delegate may consider internal guidelines determined by the minister as a matter of administrative practice but cannot be bound by such guidelines. This is because it is a fundamental rule for the exercise of discretionary power that an administrative decision-maker must not fetter the discretion given to him.[16] While the delegate may consider such guidelines when exercising his powers, he must exercise genuine discretion and be prepared to hear out individual cases or deal with exceptional cases.

B. Specific statutory provisions

6 Legislative provisions that expressly enable delegation in the context of specific legislative schemes are frequently found in the statute books and are usually expressed using one of three methods. The first method is to expressly enable the principal to delegate his powers to specific persons, subject to restrictions specified in the provision. Such provisions are commonly found in the authorising acts for statutory boards. A recent example is s 29(1) of the Enterprise Singapore Board Act 2018,[17] which enables the board to delegate any of its functions or powers to specific persons subject to conditions or restrictions as the board thinks fit.[18] Section 29(2) requires delegation to be effected via written notice to the delegate, while s 29(3) specifies restrictions on the powers that may be delegated. Powers that may not be delegated include the power to make subsidiary legislation, the power to delegate, and any other power declared by the Act to be non-delegable.

7 The second method is to statutorily define a principal to include his deputies or assistants, who will then be able to exercise all of the principal's powers without the need for delegation. An example is s 2 of the Legal Aid and Advice Act,[19] which defines "Director" as "the Director of Legal Aid appointed under section 3 and includes a Deputy Director and an Assistant Director of Legal Aid". Another example is s 2 of the Supreme Court of Judicature Act,[20] which defines "Registrar" as "the Registrar of the Supreme Court and includes the Deputy Registrar and the Assistant Registrars".

16 *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 2 SLR(R) 52 at [78].

17 Act 10 of 2018.

18 These include a member of the board, the chief executive or an officer of the board, a committee of the board, and a company that is incorporated in Singapore and is a subsidiary of the board.

19 Cap 160, 2014 Rev Ed.

20 Cap 322, 2007 Rev Ed.

8 The third method is for the statute to confer the principal's powers on an "authorised officer". This displaces the application of the common law principle of ostensible authority in respect of these powers, thereby ensuring that only a consciously decided class of persons may exercise the powers. No delegation is necessary where this method is used. An example is s 3 of the Government Contracts Act,[21] which provides that all contracts made outside Singapore on behalf of the Government may be made by a person generally or specially authorised by the Minister for Finance in writing to do so.[22] Compared to the second method, the third method provides more flexibility because a person does not necessarily need to hold a specific office in order to be named as an authorised officer. Instead, the person is only required to fall within a category or description (if any) specified in the statute. For example, s 38(1) of the Active Mobility Act 2017[23] enables the Land Transport Authority of Singapore ("the Authority"), in relation to any provision of the Act, to "appoint as authorised officers for the purposes of that provision from among its employees and individuals performing duties in the Authority who are suitably trained to be authorised officers".[24] This gives the Authority a wide pool of potential delegates to choose from and deploy as and when its operational needs require.

C. Doctrine of implied delegation

9 The presumption in administrative law that a principal cannot delegate discretionary powers vested in him unless expressly empowered by statute to do so is a rule of statutory construction. It may therefore be rebutted by contrary indications found in the language, scope or object of the statute.[25] This is the legal basis for the doctrine of implied delegation, which may be an option when no legislative provision exists to expressly enable delegation and s 36(1) of the Interpretation Act cannot be used. To determine whether the doctrine applies in a particular case, the court will interpret the statute and consider, among other things, the practices and needs of the official or authority in doing its work; whether the policy scheme of the statute is such that it cannot be easily realised unless the presumption is displaced; and whether Parliament had intended the official or authority to exercise the power personally.[26]

21 Cap 118, 2013 Rev Ed.
22 Government Contracts Act (Cap 118, 2013 Rev Ed) s 3.
23 Act 3 of 2017.
24 Active Mobility Act 2017 (Act 3 of 2017) s 38(1).
25 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-160.
26 John Willis, "*Delegatus Non Potest Delegare*" (1943) 41 Can Bar Rev 257 at 260–261.

10 The majority of cases on the doctrine of implied delegation are decided on their facts and do not purport to lay down a universal test for when the doctrine applies.[27] However, the following factors distilled from case law are relevant to the court's determination:

(a) the degree of control exercised by the delegating authority over the delegate, as well as control exercised by a third party in the form of an appeal or review from the delegate's decision;[28]

(b) the amplitude of the power, the impact of its exercise upon individual interests and the importance to be attached to "the efficient transaction of public business by informal delegation of responsibility";[29] and

(c) the scope of the power sought to be delegated. In particular, implied delegation is unlikely to be permissible if the power is wide and the delegating authority is unable to exercise direct control over the delegate.[30]

11 In addition to these factors, there exists a strong presumption against the implied delegation of legislative powers, which is over and above the presumption against delegation of discretionary powers mentioned above.[31] The rationale for this strong presumption is that when Parliament has specifically appointed an official or authority to discharge a legislative function, which is normally exercised by Parliament itself, it cannot be readily presumed that the delegate should be free to empower another official or authority to act in its place.[32] Although there exists a Canadian case[33] in which this presumption was displaced, the legislative power in that case was the power of the Governor General in Council to make regulations that he thinks are necessary or advisable for the defence of Canada. Commentators have therefore suggested that it is unlikely for this presumption to be rebutted except in times of "grave emergency".[34] A strong presumption also exists

27 Rory Gregson, "When Should There Be an Implied Power to Delegate?" [2017] PL 408 at 416.
28 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-173.
29 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-174.
30 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-175.
31 See para 9 above.
32 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-163.
33 *Reference Re Chemical Regulations* [1943] SCR 1.
34 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-163.

against the implied delegation of powers that are judicial or quasi-judicial in nature because judicial proceedings require the person exercising judicial powers to act personally throughout a case. The courts have shown willingness to make a limited exception when a public body entrusted with judicial power entrusts a group of its own members to investigate, hear evidence and submissions, and to make recommendations in a report. The public body must also have received a report that is sufficiently comprehensive to enable it to comply with its duty to "hear" before deciding; retain the power to make the final decision; and not be required by the context to perform the entire adjudicatory process by itself.[35]

D. Devolution using the Carltona *principle*

12 The *Carltona* principle is derived from *Carltona*, a decision by the English Court of Appeal. The issue in that case was whether a senior official in the Ministry of Works could exercise the power of the Minister of Works and Planning to requisition the appellants' factory. The court relied on two grounds in answering this question in the affirmative. The first ground was that of administrative necessity. The court recognised that because the functions given to ministers are "so multifarious that no minister could ever personally attend to them", the "duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department".[36] The second ground was the constitutional convention of ministerial responsibility, on which "the whole system of departmental organisation and administration is based". Under this convention, the relevant minister is responsible to Parliament for the discharge of functions of officials in the ministries and departments under his charge.[37] If the minister fails to fulfil this responsibility, for instance, by ensuring that important duties are committed to experienced officials, Parliament is the place where complaints must be made against the minister.[38] A devolvee who exercises ministerial powers typically signs "*for Minister*" and refers to the minister in all relevant correspondence as the deciding authority. Words that convey a similar meaning, such as "as authorised by the Minister", may also be used to show that the devolvee is exercising a

35 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-162.

36 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563.

37 United Kingdom, House of Commons, "Individual Ministerial Accountability" (by Oonagh Gay) (Research Paper 04/31, updated 8 November 2012) at para 1.

38 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563.

power as the minister's *alter ego*.[39] Whatever the language used, the minister should be informed of major decisions taken in his name to facilitate accountability to Parliament where necessary.

13 The two grounds on which *Carltona* was decided show that two criteria must be fulfilled in order for the *Carltona* principle to apply. First, a power must have been conferred in terms that enable it to be devolved. Second, there must exist persons to whom the minister can devolve his powers without parting with constitutional responsibility. For the first criterion to be fulfilled, the power must not be one that the minister is required to exercise personally. Following the principles that apply to the delegation of powers, powers that must be exercised personally include:

(a) powers that are judicial or quasi-judicial in nature, like the hearing of appeals or the review of administrative decisions;

(b) powers that are legislative in nature;

(c) powers that require the minister to be personally satisfied of certain facts or matters before being exercised;[40] and

(d) powers that are expressly stated to be exercisable by the minister personally.[41]

14 Other than these powers, commentators have suggested that there may be "some matters of such importance that the minister is legally required to address them personally".[42] A possible basis for this qualification is the characterisation of the *Carltona* principle by some courts as a principle of statutory construction, in which case its

39 See *Woollett v Minister of Agriculture and Fisheries* [1955] 1 QB 103 at 120, where Denning LJ held that the words "I am directed by the Minister" *and so forth* were "magic words" to show that a devolvee was exercising a power as the *alter ego* of the minister.

40 A possible example is s 27(2) of the Civil Law Act (Cap 43, 1999 Rev Ed), which required a claimant to "establish to the satisfaction of the Minister" that the claimant has an equitable or moral claim to the personal estate of any person who has died intestate without next of kin, before the minister may order the transfer of the personal estate to the claimant. That section has been repealed and re-enacted by the Civil Law (Amendment) Act 2012 (Act 27 of 2012) and that requirement no longer applies.

41 See, *eg*, ss 13(5), 14(3) and 15(4) of the UK Immigration Act 1971 (c 77), each of which refers to the Home Secretary taking certain action in the interest of the public good "not by a person under his authority": *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 at 276.

42 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-187.

application necessarily depends on the statutory context.[43] Case law on this qualification is, however, equivocal. While some cases that precede *Carltona* suggest that deportation orders[44] and detention orders made under wartime security regulations[45] require the minister's personal attention, the English Court of Appeal has held that the minister was not required to personally approve breath-testing equipment, despite its importance to the liberty of suspected drunk drivers.[46] In another case, the House of Lords allowed the Minister of State at the Home Office to exercise the power of the Home Secretary to decide the tariff period of a prisoner serving a life sentence.[47] In fact, the House of Lords has held that the *Carltona* principle "can be applied to decisions of the greatest importance".[48] It is therefore unlikely for the *Carltona* principle to be displaced only by reason of the importance of the decision or the rights affected.

15 For the second criterion to be fulfilled, the prospective devolvee must be "under the authority of the Minister".[49] This means that the prospective devolvee must be a person for whom the minister is constitutionally responsible. The prospective devolvee must also be sufficiently senior and experienced to competently exercise the devolved powers. These are issues for the minister to decide.[50]

16 Even where both criteria are satisfied, the statutory context may still operate to exclude or limit the *Carltona* principle.[51] For example, an argument was made in *R v Secretary of State for the Home Department, ex parte Oladehinde*[52] that because an empowering statute assigned in a

43 See *Ramawad v Canada* [1978] 2 SCR 375 ("*Ramawad*"), where the Supreme Court of Canada examined the general framework of the legislation in question and held that the *Carltona* principle could not apply because of the way the legislation was framed and its subject matter. It should be noted that although the language of the *Carltona* principle was used in *Ramawad*, the court appeared to treat the *Carltona* principle as synonymous with implied delegation. Accordingly, the characterisation of the *Carltona* principle as a principle of statutory construction in *Ramawad* may arguably be understood as a characterisation of the doctrine of implied delegation instead.

44 *R v Chiswick Police Station Superintendent, ex parte Sacksteder* [1918] 1 KB 578.

45 *Liversidge v Anderson* [1942] AC 206.

46 *R v Skinner* [1968] 2 QB 700.

47 *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531.

48 *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 at 264.

49 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563.

50 *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 at 303.

51 *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [52], citing *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 at 303.

52 [1991] 1 AC 254.

detailed fashion certain functions to the Home Secretary and other less significant functions to immigration officers, the Home Secretary's powers could not be devolved to the immigration officers.[53] In particular, the Home Secretary was assigned the power to deport a person from the UK, whereas immigration officers were assigned the powers to give or refuse leave to enter the UK. This did not prevent the House of Lords from holding that the Home Secretary's power to deport could be devolved to immigration officers, which suggests that the courts are slow to infer parliamentary intent to limit devolution. However, it is conceivable that such an inference may be drawn in the presence of clear statutory language. Another example is found in *R (Forsey) v Northern Derbyshire Magistrates' Court*,[54] where it was argued that the existence of provisions enabling delegation meant that the power in question cannot be devolved.[55] The court declined to draw such an inference and held that a provision can enable both delegation and devolution.[56] However, the court also recognised that the *Carltona* principle can be displaced by certain kinds of statutory language enabling delegation.[57]

III. Limitations and uncertainties of existing options

A. Statutory mechanisms

17 The main limitation of using s 36(1) of the Interpretation Act is the longer time required to prepare a notification under that section compared to other methods of delegation or devolution that may be effected administratively. The relevant ministry needs time to set out the parameters of the power sought to be delegated, seek legal advice and drafting assistance from the Attorney-General's Chambers, and obtain the President's approval for the delegation. Because the conditions, exceptions and qualifications in respect of the delegation may only be determined by the President (acting on the advice of the Cabinet), the relevant ministry must also refer these matters to the President for her to seek the Cabinet's advice and make a determination before the delegation takes place, and whenever any change is needed. It is suggested that these processes make delegation using s 36(1) administratively inexpedient, and this partly accounts for why this

53 *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 at 302.

54 [2017] EWHC 1152.

55 *R (Forsey) v Northern Derbyshire Magistrates' Court* [2017] EWHC 1152 at [36].

56 *R (Forsey) v Northern Derbyshire Magistrates' Court* [2017] EWHC 1152 at [32] and [36].

57 *R (Forsey) v Northern Derbyshire Magistrates' Court* [2017] EWHC 1152 at [29]–[31], citing *Commissioners of Customs and Excise v Cure and Deeley Ltd* [1962] QB 340.

method has not been used frequently in recent years. In 2015 and 2016, only one notification under s 36(1) was made each year. In 2017, no notification under s 36(1) was made.

18 A possible limitation of relying on other statutory mechanisms is that they are confined to particular statutory schemes and not of general application. These mechanisms are also usually found in acts and not in subsidiary legislation, which means that any modification of the mechanism to meet evolving needs cannot be done easily or expediently. On the other hand, it may be argued that these limitations are inherent in any statutory mechanism, whether pertaining to delegation or otherwise, that is tailored to the requirements of a particular statutory scheme. Modification of a delegation mechanism is also unlikely to occur in isolation, but to support other amendments to a statutory scheme. These legislative amendments are therefore likely to be contained in the same amendment act and come into operation at or around the same time. This in turn creates a high likelihood that the modified delegation mechanism is able to support other amendments to the statutory scheme in a timely manner. An example is s 3(*a*) of the Parks and Trees (Amendment) Act 2017,[58] which deleted and substituted s 4(3) of the Parks and Trees Act[59] to enable the appointment of auxiliary police officers as "authorised officers" to assist the Commissioner of Parks and Recreation in performing his duties under the Act. This amendment was not made in isolation but in the larger context of legislative amendments to provide the National Parks Board with more effective regulatory and enforcement powers and to enable officers of the National Parks Board to apply their scientific expertise to other tasks.[60] This article suggests that although statutory mechanisms do not have the same degree of flexibility as other methods of delegation, they provide a greater degree of legal certainty and should be considered by policymakers whenever it is possible to anticipate the scenarios in which delegation may be required under a statutory scheme.

B. Doctrine of implied delegation

19 Because of the dearth of case law on the doctrine of implied delegation, there exists considerable uncertainty on the factors that are relevant to deciding when the doctrine applies, and the test for when the doctrine applies. There is therefore academic opinion that the doctrine

58 Act 9 of 2017.
59 Cap 216, 2006 Rev Ed.
60 *Parliamentary Debates, Official Report* (7 February 2017) vol 94 at pp 35 and 60 (Desmond Lee, Senior Minister of State for National Development).

of implied delegation is "largely untested" and an "obscure and unpopular relative of the *Carltona* doctrine".[61]

20 In relation to the first area of uncertainty, the factors set out above[62] have not always been applied consistently. For example, while some cases suggest that the court should be slow to permit implied delegation where important individual interests are at stake,[63] other cases suggest that this factor is irrelevant.[64] There is also no guidance from case law on the weight the court should assign to each factor, which makes it difficult for the factors to be applied in specific cases.[65]

21 In relation to the second area of uncertainty, there are at least two different tests for when the doctrine applies. In *R v Birmingham Justices*[66] ("*Birmingham Justices*"), the English High Court held that implied delegation is permitted if the delegator is "legally answerable" for the delegate, the delegation is consistent with "statutory purpose" and the delegate is "somebody suitable".[67] The court then proceeded to apply the *Carltona* principle to allow a chief constable to delegate his power to issue anti-social behaviour orders to lower-ranked police officers. It should be noted that although the court purported to apply the *Carltona* principle, the real issue at hand was about implied delegation, as evidenced by the numerous references to delegation and the interpretation of *Birmingham Justices* by the court in subsequent decisions.[68]

22 A different test was set out by the English High Court in *Director of Public Prosecutions v Haw*[69] ("*Haw*"), where the issue was whether there exists an implied power for the Commissioner of Police of the Metropolis to delegate his power to determine the conditions for a demonstration in the vicinity of Parliament. The court held that there will be an implied power to delegate "where the responsibilities of the office created by statute are such that delegation is inevitable" unless the relevant statute provides to the contrary either expressly or by implication.[70] The court held that because of the number of demonstration applications and the fact that determining the

61 Rory Gregson, "When Should There Be an Implied Power to Delegate?" [2017] PL 408 at 412.
62 See paras 10–11 above.
63 *R v Chief Constable of Greater Manchester Police* [2000] ICLR 1324.
64 *Noon v Matthews* [2014] EWHC 4330 (Admin) at [34].
65 Rory Gregson, "When Should There Be an Implied Power to Delegate?" [2017] PL 408 at 417.
66 [2002] EWHC 1087 (Admin).
67 *R v Birmingham Justices* [2002] EWHC 1087 (Admin) at [10].
68 See *Noon v Matthews* [2014] EWHC 4330 (Admin) at [30] and [31].
69 [2008] 1 WLR 379.
70 *Director of Public Prosecutions v Haw* [2008] 1 WLR 379 at [33].

appropriate conditions for a demonstration is a technical matter, Parliament could not have intended for the commissioner to determine the conditions himself. An implied power to delegate therefore existed.[71]

23 These uncertainties significantly diminish the utility of the doctrine of implied delegation. Government agencies value legal certainty and are likely to avoid delegating powers using a doctrine that makes the validity of every delegation open to legal challenge. This is especially since other more established methods of delegation and devolution are available. While there has been recent academic opinion on reforming and reinvigorating the doctrine of implied delegation,[72] widespread adoption of the doctrine appears to be unlikely until more case law develops, and in a more consistent manner.

C. Carltona *principle*

24 Although the *Carltona* principle is well established in English law, it suffers from uncertainties and gaps that limit its efficacy. The first area of uncertainty is whether public officers other than ministers can rely on the principle. In recent years, the principle has been applied to enable devolution of the powers of a chief constable in the UK,[73] the Commissioner of Taxation in Australia,[74] the Registrar-General of Citizens of the Federation of Malaysia[75] and the Director-General of the Public Service Department in Malaysia.[76] While this extension may appear to derogate from the principle of ministerial responsibility, it could arguably be justified on the basis that the relevant minister remains constitutionally responsible for the acts of both the principal and the devolvee.[77] Nevertheless, judicial clarification on whether this extension is legally sound would be welcome.

25 The second area of uncertainty is whether a minister may devolve his powers to officials outside of the traditional ministerial department, such as officials in public bodies like "next steps" agencies[78]

71 *Director of Public Prosecutions v Haw* [2008] 1 WLR 379 at [36].
72 Rory Gregson, "When Should There Be an Implied Power to Delegate?" [2017] PL 408 at 424.
73 *R v Birmingham Justices* [2002] EWHC 1087 (Admin).
74 *Dooney v Henry* (2000) 174 ALR 41 at [10]–[17].
75 *Lim Lian Geok v Minister of the Interior, Federation of Malaya* [1964] MLJ 158, cited with approval in *Balakrishnan v Government of Malaysia* [1981] 2 MLJ 259.
76 *Badrul Bin Ahmad v Government of Malaysia* [1987] 2 MLJ 178, followed in *Mohandas a/l Mukundan v Jabatan Perkhidmatan Awam* [2010] 3 MLJ 259 at [14]–[15].
77 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 5-192, citing *R v Birmingham Justices* [2002] EWHC 1087 (Admin).
78 Defined at para 32 below.

and non-departmental public bodies ("NDPBs") that emerged in the UK after *Carltona* was decided. These public bodies were created with the primary aim of making public service delivery more effective and enjoy varying degrees of independence from their sponsoring ministries. In Singapore's context, an analogous issue would be whether a minister may devolve his powers to officials in statutory boards under the minister's portfolio, for which the minister is constitutionally responsible. Although there are UK cases that have applied the *Carltona* principle to certain types of new public bodies, the applicability of the *Carltona* principle to other types of new public bodies is unclear. The extent to which the UK cases are applicable to Singapore, which has a written Constitution and therefore a very different constitutional context from the UK, is also unclear. This difference and its implications will be further explained below.[79] Clarity is therefore needed to ensure that *Carltona* can continue to be developed in a principled manner and utilised effectively, especially as the structures of modern government evolve and become more complex. Part IV offers several suggestions on the ways in which the *Carltona* principle should be extended.

IV. Suggested reforms to address inefficiencies

A. Amending s 36(1) of Interpretation Act

26 The equivalent of s 36(1) of the Interpretation Act first came into being via the Interpretation (Amendment) Ordinance 1934,[80] which inserted a new s 9 into the Interpretation Ordinance.[81] Section 9 enabled the Colonial Secretary to delegate any non-legislative powers and duties to another person, with the approval of the Governor in Council and by notification in the *Gazette*. Only the Governor in Council could determine the conditions, exceptions and qualifications of the delegation. The purpose of involving the Governor in Council in the delegation process, as stated in the first reading speech of the Interpretation (Amendment) Bill 1934, was "so that there is ample safeguard that important powers will not be heedlessly delegated".[82] Subsequently, the Interpretation Ordinance was repealed by the Interpretation and General Clauses Ordinance 1951,[83] which re-enacted s 9 as s 36(1) without any change in content. After Singapore became independent, the Interpretation and General Clauses Ordinance 1951

79 See paras 30–52 below.
80 Ordinance 29 of 1934.
81 Ordinance 131.
82 Straits Settlements, Colony of Singapore, *Proceedings of the Legislative Council* (18 May 1934) vol 43 at p 48 (J H Pedlow, Acting Attorney-General).
83 Ordinance 4 of 1951.

was repealed by the Interpretation Act,[84] which re-enacted s 36(1) with minimal changes. Most significantly, the words "Colonial Secretary" and "Governor in Council" were replaced with the words "Minister" and "President", respectively.

27 It is unclear why Parliament decided in 1965 to retain the requirement for the President to approve delegations under s 36(1) of the Interpretation Act and to determine the conditions, exceptions and qualifications of such delegations, when the office of Governor of the Straits Settlements differs vastly from the office of the President in 1965. On one hand, the governor had significant executive and legislative powers. Although he was required to consult the Executive Council when exercising his powers, he could act in opposition to the Executive Council if he deemed it right to do so in any case.[85] The governor also presided over the Legislative Council and had discretionary powers to, among other things, prorogue the Legislative Council, initiate legislation, as well as assent to or veto bills.[86] On the other hand, the office of the President in 1965 was largely ceremonial with little discretionary powers.[87] Even today, after the presidency has evolved to become an elected office with custodial functions and more discretionary powers, the President may only act "in accordance with the advice of the Cabinet or of a Minister under the general authority of the Cabinet" in exercising most of his powers.[88] These include the power to grant approval under s 36(1) of the Interpretation Act.

28 While the original purpose behind s 9 of the Interpretation Ordinance was for the delegating Colonial Secretary to be accountable to a higher authority, it is argued that this purpose cannot be served by the President. It is very likely that the minister authorised by Cabinet to advise the President on delegations under s 36(1) of the Interpretation Act is the delegating minister, who is responsible for and most familiar

84 Act 10 of 1965.

85 Roland Braddell, *The Law of the Straits Settlements: A Commentary* vol 1 (Kelly & Walsh, Limited, 2nd Ed, 1931) at p 313, para XIV.

86 Roland Braddell, *The Law of the Straits Settlements: A Commentary* vol 1 (Kelly & Walsh, Limited, 2nd Ed, 1931) at pp 107, 298, para X, and 322, para XXXV.

87 Under Art 5(1) of the Constitution of the State of Singapore set out in the Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (SI 1493/1963) (UK), as modified and applied by s 13 of the Republic of Singapore Independence Act (1985 Rev Ed), the President was generally required to act "in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet". The three significant functions that he could exercise his discretion were the appointment of the Prime Minister, the withholding of consent to a request for dissolution of Parliament, and the determination of whether the Prime Minister has ceased to command the confidence of a majority of members of Parliament.

88 Constitution of the Republic of Singapore (1999 Reprint) Art 21(1).

with the subject matter. Since the President may only act on such advice, the delegating minister effectively approves the delegation and determines the conditions, exceptions and qualifications of the delegation. The existing requirements in s 36(1) therefore fail to serve any meaningful accountability function, yet add to the administrative burden of government agencies.

29 If an accountability mechanism is necessary for delegations under s 36(1), a possible solution is to require notifications made under s 36(1) to be presented to Parliament upon publication.[89] This will draw the notification to the attention of Members of Parliament to put questions to the delegating minister, thereby ensuring accountability through scrutiny and debate in Parliament. This will also result in one less layer of approval compared to now, thereby making s 36(1) delegations easier to effect, because a requirement to present the notification to Parliament *simpliciter* does not necessitate a resolution by Parliament in order for the delegation to have legal effect.[90] Possible alternatives are to either subject notifications made under s 36(1) to a negative resolution by Parliament within a specified period, or provide that such notifications expire within a specified period unless confirmed by Parliament using a positive resolution. Although these alternatives may lead to some uncertainty before the expiry of the specified period, they are arguably more effective as accountability mechanisms because they enable Parliament to play a more direct and supervisory role over delegations made under s 36(1).

B. Extending the Carltona *principle to officers in statutory boards*

30 The legal landscape in the UK has developed since *Carltona* was decided, with the courts holding in two decisions that the *Carltona* principle can apply to the exercise of ministerial powers by officials in "next steps" agencies. This suggests a willingness to allow devolution to officials outside of traditional ministerial departments. However, a recent decision by the UK Supreme Court[91] has put this development into perspective, suggesting that whether or not ministerial powers can be devolved to such officials is highly fact-specific.

89 This accountability mechanism is found throughout Singapore's statute book. See, *eg*, s 82 of the Organised Crime Act 2015 (Act 26 of 2015), which requires all orders and regulations made under the Act to be "presented to Parliament as soon as possible after publication in the *Gazette*", and s 44 of the Public Sector (Governance) Act 2018 (Act 5 of 2018), which imposes the same requirement in respect of all subsidiary legislation made under the Act.

90 William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th Ed, 2014) at pp 757–758.

91 Discussed at paras 36–41 below.

31 Notwithstanding the lack of clarity in the UK, this article argues that a strong argument can be made for ministerial powers to be devolved to officers in statutory boards. In summary, the reason is because in Singapore, the question of who is constitutionally responsible for the exercise of power by a prospective devolvee is determined by Singapore's Constitution and directions given by the Prime Minister under the Constitution. Unlike in the UK, this issue is not determined by whether the institutional relationships and arrangements between the minister and the agency to which the prospective devolvee belongs resemble those governing the relationship between a minister and his departmental officials. This part will first describe the developments in the UK before explaining how the different constitutional contexts in Singapore and the UK necessitate a different application of the *Carltona* principle.

(1) Developments in the UK

(a) *Sherwin*

32 The issue of whether a minister's power may be devolved to an officer of a "next steps" agency was first considered in *R v Secretary of State for Social Services, ex parte Sherwin*[92] ("*Sherwin*"), a decision by the English High Court that was later upheld on appeal to the English Court of Appeal.[93] A "next steps" agency is an agency that remains part of its parent department, but has a degree of autonomy under a "framework agreement" negotiated with the parent department. Typically, a "next steps" agency is given a chief executive, a budget, designated staff and a set of performance targets of its own.

33 In *Sherwin*, the agency in question was the Benefits Agency, the parent department of which was the Department of Social Security. An employee of the Benefits Agency exercised a power of the Secretary of State to suspend a social security benefit pending an appeal of the benefit award. The applicant sought judicial review of the Benefit Agency's decision, arguing that the decision was not legally a decision by the Secretary of State and therefore invalid. The court upheld the decision, holding that the Secretary of State's power could be devolved to an employee of the Benefits Agency. In doing so, the court considered that the Benefits Agency was established in a way that the minister remains accountable to Parliament for its actions.[94] In particular, this was because the relevant framework agreement provided that the minister remained accountable to Parliament for the full range of

92 (1996) 32 BMLR 1.
93 *R v Secretary of State for Social Services, ex parte Sherwin* (1996) EWCA Civ 524.
94 *R v Secretary of State for Social Services, ex parte Sherwin* (1996) 32 BMLR 1 at 9.

responsibilities of the Benefits Agency.[95] The court therefore held that the power of the Secretary of State was validly exercised by the employee of the Benefits Agency "as a civil servant within the Department of Social Security on the authority of the Secretary of State, in circumstances where the Secretary of State was answerable to Parliament".[96]

(b) *Castle*

34 *Castle v Crown Prosecution Service*[97] ("*Castle*") involved an executive agency (as "next steps" agencies became known) called the Highways Agency, the parent department of which was the Department for Transport. In *Castle*, the appellant appealed to the English High Court against his conviction for contravening an order that imposed variable speed limits on a motorway. The empowering provision for the making of the order provided that the Secretary of State may by order restrict or prohibit temporarily the use of a road and include in such an order a provision to restrict the speed of vehicles. Among other things, the appellant argued that the order was *ultra vires* because it was made by an employee of the Highways Agency "by authority of the Secretary of State".[98]

35 Like in *Sherwin*, the court in *Castle* examined the framework document between the Highways Agency and the Department for Transport, noting that the document makes clear that the Secretary of State is accountable to Parliament for the agency.[99] The court then held that the Highways Agency:[100]

> … is the *alter ego* of the Department for Transport in the areas for which the Secretary of State accepts responsibility in Parliament, just as he does for the actions of civil servants housed under his departmental roof.

Accordingly, the *Carltona* principle applied to enable the making of the order by an employee of the Highways Agency as an *alter ego* of the Secretary of State.[101]

95 *R v Secretary of State for Social Services, ex parte Sherwin* (1996) 32 BMLR 1 at 8.
96 *R v Secretary of State for Social Services, ex parte Sherwin* (1996) 32 BMLR 1 at 9.
97 [2014] EWHC 587.
98 *Castle v Crown Prosecution Service* [2014] EWHC 587 at [6].
99 *Castle v Crown Prosecution Service* [2014] EWHC 587 at [23].
100 *Castle v Crown Prosecution Service* [2014] EWHC 587 at [24].
101 *Castle v Crown Prosecution Service* [2014] EWHC 587 at [24].

(c) *Bourgass*

36 *R (Bourgass) v Secretary of State for Justice*[102] ("*Bourgass*") was decided by the UK Supreme Court after *Sherwin* and *Castle*. The issue in *Bourgass* was whether the *Carltona* principle could be applied to enable the Secretary of State for Justice ("Justice Secretary") to devolve his power to put a prisoner in solitary confinement beyond 72 hours to a senior prison officer. The court held that the *Carltona* principle could not be applied, highlighting that the Justice Secretary had only provided the court with "minimal information about the administrative relationships between prisons … Her Majesty's Prison Service, the National Offender Management Service and the Ministry of Justice", and "no information about the governance arrangements or the arrangements in relation to accountability to Parliament".[103] This was in contrast to *Sherwin* and *Castle*, where detailed evidence was adduced as to the relationship between the Benefits Agency and the Highways Agency, respectively, and their parent departments.[104] In the absence of such evidence, it could not be assumed that there was no relevant difference between the relationship of those agency officials and their respective secretaries of state on one hand, and the relationship of prison officers and the Justice Secretary on the other hand.[105]

37 Other than the lack of evidence, the court highlighted that the relationship between prison officers and the Justice Secretary is the subject of specific legislation, which:[106]

> … points towards a different relationship from that between a departmental official and a minister, since it is not readily reconciled with the idea that prison governors and officials, and the Secretary of State, are constitutionally indistinguishable.

38 Prison officials are also the holders of an independent statutory office, with powers conferred on them by rules made by the Justice Secretary that are distinctly demarcated from the powers of Justice Secretary.[107] While prison officials may exercise some powers independently, they are required to act in accordance with or have regard to directions given by the Justice Secretary in relation to the exercise of other powers; this "demonstrates their constitutional separation from the Secretary of State and his departmental officials".[108]

102 [2016] AC 384.
103 *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [53].
104 *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [54].
105 *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [54].
106 *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [55].
107 *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [64].
108 *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [64].

Accordingly, the purported devolution by the Justice Secretary to the senior prison official was unlawful.[109]

(2) Analysis of UK cases and application to Singapore

39 *Sherwin, Castle* and *Bourgass* may suggest that in every case where the prospective devolvee is not located within a traditional ministerial department but in a separate agency (whether internal or external to the ministerial department), it is necessary to inquire into whether the institutional relationships and arrangements between the minister and that agency resemble those governing the relationship between a minister and his departmental officials. Without evidence of such relationships and arrangements, powers cannot be devolved to the prospective devolvee using the *Carltona* principle.

40 On this view, the UK cases do not appear to support the argument that a minister's power may be devolved to officers in statutory boards. For one, a statutory board has separate legal personality and is further removed from its parent ministry compared to the relationship between a "next steps" agency and its parent department. Officers in statutory boards are also not "public officers" under Pt IX of the Constitution and cannot be considered civil servants within their parent ministry.

41 Nevertheless, this article argues that the UK cases do not prevent the devolution of ministerial powers to officials of statutory boards because the constitutional context in Singapore differs significantly from that in the UK. Unlike in the UK, it is not necessary for the relationship between a minister and an official of a statutory board to be akin to the relationship between a minister and his departmental officials in order for the minister to be constitutionally responsible for acts by the official of the statutory board. The *Carltona* principle can apply as long as constitutional responsibility is established under the Constitution read with directions given by the Prime Minister under the Constitution.

(3) Constitutional context in UK and Singapore

(a) UK

42 Because the UK does not have a written constitution, the UK's constitution only exists in the "analytical sense" and may be defined as the "body of rules that dictates and controls the structure and operation

109 *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 at [90].

of government, and the relationship between the state and its citizens".[110] Accordingly, Acts such as the Bill of Rights 1688[111] and the Human Rights Act 1998,[112] as well as documents that codify areas of governmental activity previously governed largely by convention such as the Ministerial Code,[113] the Civil Service Code[114] and the Cabinet Manual[115] all have constitutional significance.[116]

43 At present, there are no clear rules for when a minister is accountable to Parliament for acts done by the numerous types of public bodies created after *Carltona* was decided in 1943. On one hand, a Ministerial Code was published in 2000 to reflect the House of Commons resolution on ministerial accountability, which states: "Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their Departments and Next Steps Agencies."[117] On the other hand, NDPBs are not covered under the Ministerial Code. They are also not located within government departments and are not usually staffed by civil servants. Most significantly, they are "independent of ministerial control and therefore independent of full ministerial responsibility to Parliament".[118] Instead, certain NDPBs are directly accountable to Parliament. For example, Her Majesty's Revenue and Customs, which is the UK's principal revenue-collecting public agency, is ultimately accountable to the Chancellor of the Exchequer but also accountable to Parliament "primarily through the Committee of Public Accounts and the Treasury Select Committee".[119] Another example is the Charity Commission, the regulator of charities in England and Wales, which is "completely independent of ministerial influence" and "required to report on [its] performance to Parliament annually".[120]

110 *Halsbury's Laws of England* vol 20(1) (LexisNexis, 5th Ed, 2014) at para 1.
111 c 2.
112 c 42.
113 United Kingdom, Cabinet Office, *Ministerial Code* (updated January 2018).
114 UK Government website, "Statutory Guidance: The Civil Service Code" (updated 16 March 2015) https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code (accessed January 2019).
115 United Kingdom, Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (1st Ed, October 2011).
116 *Halsbury's Laws of England* vol 20(1) (LexisNexis, 5th Ed, 2014) at para 1.
117 United Kingdom, House of Commons, "Individual Ministerial Accountability" (by Oonagh Gay) (Research Paper 04/31, updated 8 December 2012) at para 1.2.
118 *Halsbury's Laws of England* vol 20(5) (LexisNexis, 5th Ed, 2014) at para 311.
119 National Audit Office, "A Short Guide to HM Revenue & Customs" (December 2017) at p 8.
120 Institute for Government, "The Strange Case of Non-ministerial Departments" (by Jill Rutter) (2013) at p 9.

44 The difficulty in determining lines of accountability to Parliament is illustrated in a report published by the House of Commons Select Committee in 2014.[121] Among other things, the committee observed that the accountability mechanisms for "arm's length bodies", which are defined as public bodies that operate to a greater or lesser extent at a distance from ministers and include NDPBs, were "confused, overlapping and neglected, with blurred boundaries and responsibilities".[122] The committee also observed that the UK parliament has made some public bodies accountable to Parliament rather than government. Because such arrangements were "variable and inconsistent", the committee recommended: "Lines of accountability need to be clarified and in some cases altered."[123]

45 This article argues that it is because lines of accountability to Parliament are often unclear in the UK that it becomes necessary to conduct inquiries, like the ones in *Sherwin* and *Bourgass*, to determine whether or not a minister is constitutionally responsible for acts done by a particular public body. It is not necessary to do likewise in Singapore, where the lines of constitutional responsibility are clearly set out in the Constitution and directions given by the Prime Minister under the Constitution.

(4) Singapore

46 Article 24(2) of the Constitution provides that Cabinet has general direction and control of the Government and is collectively responsible to Parliament.[124] The Prime Minister is empowered under Art 30(1) to charge any minister with responsibility for any "department or subject" by directions in writing.[125] Such directions are not subsidiary legislation but are published as notifications in the government *Gazette*. Under the doctrine of ministerial responsibility, the minister who is so charged under Art 30(1) is responsible to Parliament for the discharge of functions of ministries and departments under his charge, which include statutory boards. For example, the Republic of Singapore

121 United Kingdom, House of Commons, Public Administration Select Committee, *Who's Accountable? Relationships between Government and Arm's-length Bodies: First Report of Session 2014-15* (HC 110, November 2014).

122 United Kingdom, House of Commons, Public Administration Select Committee, *Who's Accountable? Relationships between Government and Arm's-length Bodies: First Report of Session 2014-15* (HC 110, November 2014) at para 13.

123 United Kingdom, House of Commons, Public Administration Select Committee, *Who's Accountable? Relationships between Government and Arm's-length Bodies: First Report of Session 2014-15* (HC 110, November 2014) at para 63.

124 Constitution of the Republic of Singapore (1999 Reprint) Art 24(2).

125 Constitution of the Republic of Singapore (1999 Reprint) Art 30(1).

(Responsibility of the Minister for Finance) Notification 2015[126] shows that the Prime Minister has charged the Minister for Finance with responsibility for a number of statutory boards that include the Accounting and Corporate Regulatory Authority ("ACRA") and the Inland Revenue Authority of Singapore ("IRAS"). Because of these, whether or not ACRA and IRAS are separate legal entities from the Ministry of Finance, and whether their employees are public officers, are not relevant to the issue of who is constitutionally responsible for their actions. While these features may have important implications in areas such as who may appoint and dismiss ACRA and IRAS officers and enter into contracts for ACRA and IRAS, the question of constitutional responsibility is determined by the Constitution and directions given by the Prime Minister under the Constitution.

47 The authors suggest that this theoretical view, while untested in the courts, is reflected in practice, with Singapore's Hansard demonstrating that ministers account to Parliament for all matters pertaining to statutory boards under their charge, including matters that are operational in nature. To illustrate using ACRA and IRAS, recent examples include:

> (a) how ACRA ensures compliance by business establishments to update their registered office address within 14 days of any change in that address, the number of business owners who have been fined for non-compliance, and measures that ACRA has in place to encourage compliance;[127]
>
> (b) actions that ACRA has taken to protect companies or businesses from being misled into paying for registration services purportedly rendered by ACRA or its related agencies;[128]
>
> (c) the number of investigations IRAS has conducted in relation to payouts from the Productivity and Innovation Credit Scheme, IRAS's success rate in obtaining clawbacks as a result of such investigations and the reasons for such clawbacks;[129]

126 Republic of Singapore (Responsibility of the Minister for Finance) Notification 2015 (S 670/2015).

127 *Parliamentary Debates, Official Report* (2 October 2017) vol 94 at p 38 (Heng Swee Keat, Minister for Finance).

128 *Parliamentary Debates, Official Report* (29 February 2016) vol 94 at p 30 (Heng Swee Keat, Minister for Finance).

129 *Parliamentary Debates, Official Report* (1 March 2016) vol 94 at p 16A (Indranee Rajah, Senior Minister of State for Finance).

> (d) the amount of unpaid income tax from deceased persons that is owed to IRAS;[130] and
>
> (e) whether IRAS has a timeline to put in place arrangements with ride-hailing firms on the automatic filing of tax returns of their drivers, and the process to consider tax deductibles so as to ensure fair treatment for the drivers.[131]

48 Further, it is a constitutional convention in Singapore for ministers to be constitutionally responsible for the acts of statutory boards. Constitutional conventions are defined as "customs, practices, maxims, or precepts, recognised and accepted as obligatory by those working in government".[132] Although they are not recognised by the courts as law, they are "not less effective in regulating the government than the rules of law strictly so called".[133] Based on a well-known passage by Sir Ivor Jennings, the preconditions for the existence of any constitutional convention are, first, whether there are precedents; second, whether actors in the precedents believe that they were bound by a rule; and third, whether there is a reason for the rule.[134] In the present case, the practice in Parliament highlighted above indicates that the first two preconditions are satisfied. Another indicator of this, which also indicates that the third precondition is satisfied, can be found in the second reading speech of the Public Sector (Governance) Bill.[135] In that speech, the minister moving the bill said the following about the purpose of statutory boards, their accountability relationships and the reason for such relationships:[136]

> Each Statutory Board has a constituting Act which spells out its powers and functions and the key governance requirements. These Acts provide for the Statutory Boards to be separate legal entities from Ministries, and to be governed by their own Board of Directors. This allows them greater autonomy over day-to-day running of operations, and ensure greater responsiveness, efficiency and effectiveness. To illustrate, Statutory Boards have broad discretion over operational

130 *Parliamentary Debates, Official Report* (4 July 2017) vol 94 at p 21A (Heng Swee Keat, Minister for Finance).

131 *Parliamentary Debates, Official Report* (2 October 2017) vol 94 at p 39 (Heng Swee Keat, Minister for Finance).

132 *Halsbury's Laws of England* vol 20(1) (LexisNexis, 5th Ed, 2014) at para 1.

133 Kenneth C Wheare, *Modern Constitutions* (London: Oxford University Press, 1951) at p 1.

134 Joseph Jaconelli, "Do Constitutional Conventions Bind?" (2005) 64(1) Camb LJ 149, citing Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th Ed, 1959) at p 136.

135 Bill 45 of 2017.

136 *Parliamentary Debates, Official Report* (8 January 2018) vol 94 at p 35 (Ong Ye Kung, Minister for Education (Higher Education and Skills) and Second Minister for Defence).

> issues; can exercise some flexibility over terms and conditions to hire employees; can own land, and raise capital by issuing bonds.
>
> At the same time, Statutory Boards are part of Government and cannot be totally independent either, and Ministers are ultimately accountable for their performance in Parliament. How Statutory Boards operate must therefore be in line with the policy directions set by Ministers and their Ministries …
>
> In short, Statutory Boards are part of the government, to be governed centrally, but deliberately constituted as separate entities for operational flexibility. Legislation must reflect that intent, and that balance.

49 For these reasons, this article argues that ministers are constitutionally responsible for the acts of statutory boards under their charge as a matter of law, practice and constitutional convention. This should be the starting point to determine whether or not devolution to an official in a statutory board is permissible in any particular case.

(5) Whether Carltona *requires policy control*

50 A potential obstacle to the proposed reform is the argument that the *Carltona* principle requires the minister to have some control over the statutory board to which the prospective devolvee belongs, in addition to being constitutionally responsible for acts of that statutory board. Although *Carltona* does not impose such a requirement, it may be argued that the requirement is implied from the fact that *Carltona* was originally confined to ministerial departments in which the minister has some control over the activities of officials within the department. This argument finds support in an academic opinion that the function and status of a public body should be examined to ascertain whether an official of that public body may act as the minister's *alter ego*, with the question in each case being whether that public body is "intended to carry out the policy of the minister or to direct its own affairs independently".[137] If so, policy control in addition to constitutional responsibility appears to be relevant in ascertaining whether the *Carltona* principle applies in respect of each statutory board.

51 Whether or not a minister has policy control over a statutory is determined by the Public Sector (Governance) Act 2018,[138] which enables the minister charged with responsibility for a Group 1A or 1B public body to "give to the public body directions as to the performance

137 Ann Chaplin, "*Carltona* Revisited: Accountability and the Devolution of Statutory Powers" (2007–2008) 39 Ottawa L Rev 495 at 513.

138 Act 5 of 2018.

by the public body of its functions".[139] Once a direction is given, the functions of the public body under written law are to be regarded as including compliance with the direction.[140] The vast majority of statutory boards in Singapore are Group 1A or 1B public bodies. The exceptions are statutory boards that have the main function of regulating the practice and standards of a profession,[141] and public bodies that have the main function of representing particular community interests or the volunteer movement.[142] It is unlikely that ministerial powers will need to be devolved to officers in these public bodies because their functions are not directly connected to the day-to-day operations of their respective ministries, which are most likely to require devolution.

52 It is therefore argued that requiring a minister to have policy control over a statutory board before he may devolve powers to an official of that statutory board is unlikely to make a practical difference. More importantly, neither *Carltona* nor any subsequent case law specifies policy control as a prerequisite for the *Carltona* principle to apply. While ministers often have policy control over public bodies that they are constitutionally responsible for (like in *Sherwin* and *Castle*), this is arguably a result of policy decisions to combine governance and accountability arrangements, and should not be interpreted as a legal requirement for the *Carltona* principle to apply.

C. Extending the Carltona *principle to devolution of certain legislative powers*

53 It is trite that the exercise of legislative powers, for example, the power to make subsidiary legislation, cannot be delegated. As highlighted above, this is justified on the basis that Parliament has specifically appointed an official or authority to discharge a legislative function, which is normally exercised by Parliament itself. The minister, having been conferred a delegated power, cannot then further delegate that power to another official or authority to act in his place. This is encapsulated in s 36(3) of the Interpretation Act, which makes clear that s 36(1) does not authorise a minister to depute any person to make subsidiary legislation under the power in that behalf conferred upon the minister by any act.

139 Public Sector Governance Act 2018 (Act 5 of 2018) s 5(1).

140 Public Sector Governance Act 2018 (Act 5 of 2018) s 10(2).

141 These public bodies are known as "Group 2 Public Bodies" and include public bodies like the Board of Architects, the Professional Engineers Board and the Singapore Medical Council.

142 These public bodies are known as "Group 3 Public Bodies" and comprise the Majlis Ugama Islam Singapura and the National Council of Social Service.

54 This principle applies with great force as a rule against delegation, but it is not useful in determining whether certain legislative powers can be devolved by virtue of the *Carltona* principle. This article argues that, even though the *Carltona* decision itself was concerned with an administrative rather than a legislative decision, there is nothing to prevent the extension of the *Carltona* principle to the devolution of legislative powers in certain circumstances. The rule against sub-delegation of a legislative power is not infringed, as the power is exercised by the *alter ego* of the minister and is therefore not delegated at all.

55 Moreover, the distinction between administrative and legislative powers is notoriously difficult to pin down and does not provide a principled basis for when the *Carltona* principle should be disapplied. In general, the exercise of a legislative power would be to create an instrument which has legislative effect, whereas the exercise of an administrative power would not have such a general effect and would instead only impact the parties directly involved in the exercise of that power. The *locus classicus* in this area is the *dicta* of Latham CJ in *Commonwealth v Grunseit*[143] as affirmed by the Singapore High Court in *Cheong Seok Leng v Public Prosecutor*:[144]

> The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct, or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

56 This distinction, while neatly articulated in theory, is ill-equipped to cater for the wide range of soft, quasi-legal regulatory tools that have proliferated in the administrative state of today. Australian jurisprudence in particular has demonstrated that the courts must examine in quite a lot of detail the regulatory instrument in question in order to determine whether it was made in exercise of legislative powers and has legislative effect. The trend that has taken root in Australia, Hong Kong and Canada is to examine a wide range of indicia to determine whether the instrument in question has characteristics or qualities which are of a legislative nature. The determination is imprecise and, in difficult cases, can require detailed judicial scrutiny. Relevant indicia include the following:[145]

143 (1943) 67 CLR 58 at 82–83.

144 [1988] 1 SLR(R) 530 at [44].

145 See *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573 at [43]–[77] and *Sea Shepherd Australia Ltd v The State of Western Australia* [2014] WASC 66 at [87]–[97].

(a) whether the instrument determines or alters rules of conduct that are of general application, rather than only applying general rules to particular facts;

(b) the nature and impact of the instrument;

(c) the extent of parliamentary control over the power to make or vary the instrument;

(d) the range of considerations that the person empowered to make the instrument is permitted to take into account; and

(e) whether wide public consultation is required.

57 Given these uncertainties, it is not compelling to state as an immutable principle that legislative powers cannot be devolved under the *Carltona* principle. This article proposes that the usual principles of statutory interpretation should be applied instead to determine whether Parliament intended legislative powers to be exercised by the minister personally.

58 The authors' proposal finds support in two recent UK cases where the *Carltona* principle was indeed extended to the exercise of legislative powers. The first is *Castle*,[146] wherein the appellant had also argued that the *Carltona* principle applies only to the executive performance of administrative functions and not to the legislative function of making an order by means of a statutory instrument.[147] In dismissing the argument, the court stated that the observations in *Carltona* in 1943 of the realities of departmental government would be even more pertinent to "modern conditions in which administrative decisions and secondary legislation occur every second of the working day".[148] The court also held that the voluminous number of orders (over 700) would make it unrealistic to expect that the person specified in the statute as making an order could give his personal attention to the orders.[149]

59 The second case is *McCann's Application for Judicial Review*[150] ("*McCann*"), which arose from an application by a group of solicitors of the Criminal Bar Association to challenge the lawfulness of a number of statutory rules made by a minister in the Department of Constitutional Affairs as the *alter ego* of the Lord Chancellor. The Lord Chancellor was the head of the department whereas the minister was an official in that department. The High Court of Northern Ireland, citing academic

146 See para 34 above.
147 *Castle v Crown Prosecution Service* [2014] EWHC 587 (Admin) at [13].
148 *Castle v Crown Prosecution Service* [2014] EWHC 587 (Admin) at [17].
149 *Castle v Crown Prosecution Service* [2014] EWHC 587 (Admin) at [28].
150 [2004] NIQB 47.

authority, held that the statutory rules were validly made by the minister because the *Carltona* principle applied to the devolution of both legislative and administrative powers.[151] The authors would observe that the court's holding in *McCann* is not novel and finds support in the earlier case of *Lewisham Borough v Roberts*,[152] where the majority of the English Court of Appeal expressed the same view in *obiter*. This view also continues to receive academic support[153] and reflects the practice of several ministries in the UK.[154] On the other hand, it should be noted that neither *Castle* nor *McCann* are from superior courts in the UK. Because of the difficulty in distinguishing between administrative and legislative instruments, doubt may also be cast on whether the orders in *Castle* and the rules in *McCann* are inherently legislative in nature. Nevertheless, these cases show that extending the *Carltona* principle to the exercise of legislative powers is not without precedent and support the authors' argument that applying a blanket restriction against the application of the *Carltona* principle is unwarranted.

60 To implement the authors' proposal, this article suggests the following guidelines to determine whether the *Carltona* principle applies to enable devolution of each legislative power. As a starting point, the primary rationale and governing principle of *Carltona* lie in the need for devolution to promote administrative efficiency in circumstances where Parliament could not have intended for the minister to deal with the issue personally. While it is unlikely that this would be relevant to the majority of legislative powers, there are circumstances where the instruments involved are so voluminous or routine that Parliament could not have had such intent. A finely calibrated and multi-factorial approach would therefore assist in addressing the practical demands of modern government and give greater effect to Parliament's intent in respect of many legislative powers that are routinely exercised.

61 For example, factors that could be considered in determining whether Parliament intended for the minister to exercise each legislative power personally include the volume and frequency of the legislative instruments to be issued, the frequency with which such instruments

151 *McCann's Application for Judicial Review* [2004] NIQB 47 at [13], citing William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 8th Ed, 2000) at p 865.

152 *Lewisham Borough v Roberts* [1949] 2 KB 608 at 619 and 629–630. In this case, Bucknill and Jenkins LJJ held that the power in question was administrative in nature but could be devolved using the *Carltona* principle even if it were legislative in nature.

153 William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th Ed, 2014) at p 266.

154 William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th Ed, 2014) at p 266, fn 58.

require amendment, and the complexity and impact of the law or conduct which is being created or impacted. The last consideration is particularly important. In circumstances where the instrument seeks to create or affect rights, confer significant powers or impose duties, or vary obligations, it is more likely than not that Parliament had intended for the minister to exercise the legislative power personally. In such circumstances, it may also be argued (apart from the question of what Parliament had intended) that allowing the legislative power to be devolved to an unelected official, such as a permanent secretary, would result in a democratic deficit. If, on the other hand, the instrument is routine in content, highly technical or administrative, or does not significantly affect rights and obligations, considerations of administrative efficiency should take centre stage in determining whether Parliament had such intent. The democratic deficit that may result from devolving the legislative power, if any, is also likely to be negligible.

V. Conclusion

62 The behemoth that is modern-day government necessitates that the law evolves flexibly to facilitate day-to-day operations of the State, even while ensuring that there are sufficient lines of accountability to Parliament as the constitution requires. The legal principles of delegation and devolution, as framed by both legislation and the common law, are tools that ensure efficient administration, and the advancement of the public interest is a delicate issue that requires a finely calibrated approach in the area of the exercise of statutory powers conferred upon the minister. It is with this lens that the maxim *delegatus non potest delegare* must be understood today. More importantly, the twin issues of delegation and devolution, and foreign cases that have discussed these concepts in tentative terms, must be evaluated in the Singapore context with its unique brand of constitutional accountability.

63 Having demystified the concepts of delegation and devolution, this article has sought to recommend three possible areas of reform in order to address the inefficiencies and limitations of the options currently available to government. In particular, this article recommends legislative amendment to s 36 of the Interpretation Act to streamline the process of effecting delegation. Proposals have also been put forward on the judicial expansion of the *Carltona* principle to allow powers conferred upon the minister to be devolved to officers from statutory boards in the appropriate circumstances, as well as the devolution of certain legislative powers. It is worth noting that each of these recommendations, while moving away from the vice-like grip of the no-delegation maxim, does not detract from the ability of Parliament to hold the minister constitutionally accountable for the actions and

decisions made by his delegates. This careful balance holds true to Lord Greene's original comments in *Carltona*, presciently made in 1943, that:[155]

> … [t]he duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the minister by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is of course the decision of the minister. The minister is responsible.

This must be in the public interest.

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155 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563.