

## **LEGISLATIVE COUNCIL BRIEF**

### **STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2001**

#### **INTRODUCTION**

At the meeting of the Executive Council on 19 June 2001, the Council ADVISED and the Chief Executive ORDERED that the Statute Law (Miscellaneous Provisions) Bill, at Annex, should be introduced into the Legislative Council. The Bill is intended to deal with obsolete, inconsistent or anomalous enactment, to effect amendments to some “non-immunity” provisions in various Ordinances to change references to the “Crown” to “Government”. There are also a number of proposed changes to improve the law that only involve relatively minor amendments to the legislation.

#### **BACKGROUND AND ARGUMENT**

##### **General Background**

2. In making minor, technical and largely non-controversial amendments to the Laws of Hong Kong, the Bill follows the pattern of previous bills which have been enacted in recent years, as an efficient way of effecting minor improvements to existing legislation. The Bill also includes some proposed amendments that reflect minor reforms to our laws. The categories of the proposed amendments are set out below.

##### **Repealed provisions of the Magistrates Ordinance**

3. Under section 40(4) of the Employees Compensation Assistance Ordinance (Cap. 365), section 37(2) of the Kowloon-Canton Railway Corporation Ordinance (Cap. 372), and section 26(4) of the Protection of Wages on Insolvency Ordinance (Cap. 380) (collectively “the Provisions”), a prosecution for any offence under the relevant Ordinance may be brought in the name of specified authorities (respectively the Employees’ Compensation Assistance Fund Board, the KCRC and the Commissioner for Labour). The sections provide that a complainant or informant acting on behalf of such

authorities in bringing the prosecution shall, for the purposes of section 8(1B) of the Magistrates Ordinance (Cap. 227) (the “MO”), be deemed to act on behalf of the Secretary for Justice.

4. However, section 8(1B)(a) and (1C) of the MO, which provided for the linkage between the complainants and the Secretary for Justice (previously entitled the Attorney General) were repealed by Ordinance No. 12 of 1992. It is therefore appropriate that amendments be made to the Provisions by way of repeal of the reference to the section 8(1B) of the MO. The authorities will continue to be deemed to act on behalf of the SJ in bringing the prosecutions, though not for the purposes of section 8(1B) of the MO (**Clauses 3 to 5**).

### **Enforcement of compensation orders**

5. Section 73 of the Criminal Procedure Ordinance (Cap. 221) confers power on the court to order a convicted person in criminal cases to pay to an aggrieved person compensation for personal injury, loss of or damage to property, or both such injury and loss or damage. Section 73(2) provides that a compensation order shall be enforced in accordance with section 72 of the Ordinance. Section 72, however, was repealed consequentially to the enactment of the Costs in Criminal Cases Ordinance (Cap. 492) in January 1997. Amendment is required to clarify the mechanism for enforcing such compensation orders (**Clauses 6, 7**).

### **Award of costs in the Court of Appeal and the Court of Final Appeal**

6. Under section 18 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), the power of the Hong Kong Court of Final Appeal to hear and determine any application for leave to appeal shall be exercised by the Appeal Committee, the decision of which is final.

7. Section 43 of the Ordinance provides that costs, including costs in the courts below or before a magistrate, shall be paid by such party or person, as the Court shall order. The Appeal Committee however has no jurisdiction to award costs as “Court” in section 43 does not include the Appeal Committee.

8. Where the Appeal Committee dismisses an application for leave to

appeal, the respondent, who successfully resisted the application, is left with no remedy as to costs as the Appeal Committee has no power to award costs. This situation would be rectified if such a power were provided for in the Ordinance (**Clause 8**).

9. The Costs in Criminal Cases Ordinance (Cap. 492) was enacted in 1997 to provide for costs in criminal cases. While the Ordinance contains provisions dealing with appeals in a criminal cause, the Court of Appeal held in *SJ v LAM Tat-ming and Another* in 1998 that the Ordinance did not cover an appeal by way of case stated to the Court of Appeal against a verdict or order of acquittal made by the District Court. Such an appeal lies at the suit of the Secretary for Justice under section 84 of the District Court Ordinance (Cap. 336) to the Court of Appeal.

10. The Court of Appeal therefore has no power to award costs, whether to the prosecution if the case stated appeal is successful, or to the defendant if that appeal is unsuccessful. It would be an improvement if such a power were provided for in the Costs in Criminal Cases Ordinance (**Clauses 9 & 10**).

### **Marital Rape**

11. In May 2000, members of the Legislative Council Panel on Administration of Justice and Legal Services expressed concern that, since it is possible that “unlawful sexual intercourse” in the offence of rape under section 118 of the Crimes Ordinance (Cap. 200) still means intercourse outside the bounds of matrimony, the Crimes Ordinance should be amended to make it clear that marital rape is an offence.

12. Although the Administration is of the view that, following the decision of the House of Lords in *Reg v R* in 1991, a husband may be guilty of rape of his wife if, in the circumstances of the case, the wife does not consent to sexual intercourse, it decided to propose legislative amendments to put the matter beyond doubt.

13. The present proposal from the Administration seeks to clarify the law on marital rape by deleting the word “unlawful” from section 118, and

clarifying the meaning of “unlawful” in “unlawful sexual act” to ensure that the term means outside marriage, or within marriage in any circumstances where the wife does not consent. **(Clauses 11 to 17)**

### **Application for bail by fugitives**

14. Section 10(5) of the Fugitive Offenders Ordinance (Cap. 503) provides that a fugitive offender shall not be granted bail by the court of committal unless there are special circumstances justifying the grant of bail.

15. Under section 9J of the Criminal Procedure Ordinance, a Judge of the Court of First Instance has jurisdiction to review a refusal of bail by a District Judge or a magistrate.

16. At common law, the courts have recognized that they should proceed with special care in hearing bail applications in fugitive offender cases. In addition to normal considerations, an added ingredient is the fact that a treaty has been made with a foreign country.

17. There have been a number of cases where the Court of First Instance has considered applications for bail and has come to differing conclusions as to the approach it should take. Amendment is required to ensure that the same test be adopted in adjudicating on bail applications in fugitive offender cases in all levels of the courts **(Clause 18)**.

### **Discretion to order refund of deposit to purchasers where a sale and purchase transaction has failed**

18. The Administration was requested in late 1999 to consider whether the court should be given discretion to order a refund of deposit to purchasers where a transaction for the sale and purchase of property has failed due to a technical or trivial breach by the purchaser. The request was prompted by comments made by Godfrey JA in the case of *Wu Wing Kuen v Leung Kwai Lin Cindy (1999)* to the effect that the court ought to have such a discretion in case where the purchaser was not at fault and it would be unfair for the vendor to retain the deposit.

19. Such a discretionary power is available in the UK under section 49(2) of the Law of Property Act, 1925. The courts in New South Wales, Australia have an identical power. The guidelines for the exercise of the discretion established by case law include the nature of the breach by the purchaser, the conduct of both the purchaser and the vendor, and all other circumstances of the case.

20. The two branches of the legal profession, the Real Estate Developers Association of Hong Kong, the Consumer Council, The Conveyancing & Property Law Association Limited of Hong Kong, the Law Faculty of the Hong Kong University and the School of Law of the City University were consulted on the proposal and responses have been mixed. The Bar Association, Real Estate Developers Association and the Conveyancing and Property Law Association were opposed to the proposed power while the Law Society, the Consumer Council and the two law schools generally support the proposal. The matter was also discussed in the Panel for Administration for Justice and Legal Services but no consensus emerged although the proposal appeared to have majority support from the Panel members.

21. It is proposed that section 12 of the Conveyancing and Property Ordinance (Cap. 219) be amended to provide for a discretionary power to the court to order refund of deposit where the justice of the case so requires (**Clause 19**).

### **Administrative Appeals Board Ordinance**

22. There is a discrepancy as to who may appeal to the Board, as between the English and Chinese texts of section 9 of the Administrative Appeals Board Ordinance (Cap. 442). It is considered undesirable simply to make the Chinese and English texts of section 9 consistent as this would either widen or narrow the category of appellants without taking into account the circumstances under the individual Ordinances which provide for appeal to the Administrative Appeals Board. The discrepancy, however, must be removed and any amendment should allow the right of appeal to the Board to be determined by the respective Ordinances which provide for such an appeal.

23. It is proposed to amend the Ordinance by deleting the requirement that a person who wishes to appeal to the Board has to be aggrieved by a decision (whether or not made in respect of him), so that the right of appeal would be determined by the individual legislation providing for such appeal; and deleting the time limit within which appeals are to be made as specified in the Schedule in order to remove inconsistency between section 9 and the Schedule regarding such time limit.

24. The jurisdiction of the Appeals Board has been extended to cover appeals under additional pieces of legislation. The Schedule to the Ordinance, which lists out the decisions against which appeals may be made to the Board, is amended to reflect the extended jurisdiction of the Board (**Clauses 20, 21**).

### **Functions of the Hong Kong Examinations Authority**

25. The function of the Hong Kong Examinations Authority (the HKEA), as stated in section 7 of the Hong Kong Examinations Authority Ordinance (Cap. 261), is to be widened to cover the administration of “assessment”, a “low stakes” exercise, the primary objective of which is to facilitate student learning by providing timely feedback on an individual basis. The name of the Authority will be amended accordingly (**Clauses 22 to 34**).

### **Amendments to “non-immunity” clauses**

26. A “non-immunity” clause is normally included in Ordinances establishing a corporation or other body which is empowered to perform public or semi-public functions but which is intended to operate independently of the Government. The “non-immunity” clause in pre-Reunification Ordinances makes it clear that the body is independent and ensures that it is treated in law as an ordinary private body and not as an agent of the “Crown”.

27. In the year 1999/2000, various adaptation bills in which the adaptation of these non-immunity clauses were dealt with were introduced into LegCo. During the meetings of the Bills Committee in respect of the Adaptation of Laws (No. 16) Bill, which was under the policy purview of HWB, LegCo members considered that, in the context of non-immunity clauses,

“Government” was the appropriate term to use to replace “Crown”. As a result, the Administration undertook to amend these clauses accordingly. It has also been decided that non-immunity clauses appearing in other pieces of legislation are to be dealt with in the same manner. This will not have any implications for the CPG, since it is not arguable that these bodies are their agents.

28. The bodies in respect of which amendments are to be made are the Consumer Council; Hong Kong Examinations and Assessment Authority; Employees Compensation Assistance Board; the Kowloon-Canton Railway Corporation; Wages on Insolvency Fund Board; Ocean Park Corporation; Hong Kong Council on Smoking and Health; Occupational Safety and Health Council; Employees’ Compensation Insurance Levies Management Board; Employees Retraining Board; Estate Agents Authority; The Prince Philip Dental Hospital; Vocational Training Council; Hong Kong Sports Development Board; and Hong Kong Council for Academic Accreditation (**Clauses 35 to 49**).

### **Tertiary education institutions**

29. A number of miscellaneous amendments to The Hong Kong Institute of Education Ordinance; The Hong Kong Polytechnic University Ordinance; The Chinese University of Hong Kong Ordinance; Hong Kong Baptist University Ordinance; City University of Hong Kong Ordinance; The Hong Kong University of Science and Technology Ordinance; and The Open University of Hong Kong Ordinance are proposed by the Administration or the relevant tertiary institutions to change the nomenclature of the executive heads or officers of some institutions; streamline the appointment procedures for specified categories of Council members by transferring the appointment authority from the Chief Executive to the relevant Councils; and to ensure that certain Council members only remain in office as long as they are still members of the body that nominated them to the Councils (**Clauses 50 to 89**).

### **Repeal of legislation relating to Kai Tak Airport**

30. With the closure of Kai Tak Airport, various pieces of legislation specific to it are no longer necessary and should be repealed as a tidying up exercise. References to such specific legislation or to Kai Tak Airport in other

Ordinances should also be repealed or amended as appropriate (**Clauses 90 to 99**).

### **Subsidiary legislation deemed laid before Legislative Council**

31. A form of warrant prescribed under section 12(6) of the Legislative Council (Powers and Privileges) Ordinance was published as G.N. 5975 in 1996. The form has never been used since then. It has later on been agreed that the form constitutes subsidiary legislation and should have been placed before the Legislative Council for negative-vetting in accordance with section 34 of Cap. 1. It is therefore proposed that the form should be deemed to have been so laid (**Clauses 100 to 103**).

### **Minor amendments to the Legal Practitioners Ordinance**

32. Under the present law, there is no mechanism for dealing with minor breaches by legal practitioners. Either full scale Solicitors Disciplinary Tribunal hearings, which are time consuming and costly for all parties, must be convened and completed, or the Law Society Council may issue a sanction-less letter of censure, which in practice has had very little deterrent effect.

33. It is proposed that a system be introduced under which fines may be imposed upon solicitors who plead guilty to certain disciplinary offences, without the necessity to proceed to a full hearing. It is in the public interest that lawyers should be discouraged from committing minor breaches that hitherto have only attracted censure letters. The proposed mechanism provides a system of censure that is both time and cost effective.

34. Under section 6(5)(b) of the Ordinance, the Law Society may issue a practising certificate subject to such conditions as may be prescribed by the Chief Justice. To date, the Chief Justice has not prescribed any conditions for the issue of a practising certificate. This created a loophole that has been exploited by some solicitors. If the Law Society is empowered under section 6(5)(a) (b) and (e) to make appropriate rules, it would be able to react swiftly to counteract any undesirable developments in legal practice and to impose restrictions upon the practice of solicitors for the protection of the public interest and the reputation of the profession. The Chief Justice has agreed to

transfer his powers under section 6(5)(a), (b) and (e) of the Ordinance to the Council of the Law Society. Such rule-making power would be subject to the Chief Justice's prior approval under section 73(2) of the Ordinance.

35. In a court case in 1999, the Chief Justice observed that some appeals against decisions of the Law Society, which now lie to the Chief Justice, should instead go to the Chief Judge of the High Court. The Chief Justice also suggested that it would be useful to give the appellate judge the power to remit a matter under appeal to the Law Society, in addition to the present powers of affirming its decision or directing it to issue a practising certificate. The Bill provides for this.

36. It is proposed that the Chief Justice, as the head of the Judiciary, should retain his power as a rule-making body and as a source of authority for appointments. However, under the Bill, the day to day administration of regulating admission or de-registration, however, will be transferred to the Chief Judge (**Clauses 104 to 126**).

### **Miscellaneous Amendments**

37. Part XV of the Bill makes minor amendments to numerous Ordinances to ensure consistency in terminology, to ensure consistency between the Chinese and English texts, to reflect changes in titles, and to reflect transfer in responsibility between bureaux (**Clauses 127 to 131**).

### **LEGISLATIVE TIMETABLE**

38. The legislative timetable will be –

Publication in Gazette	22 June 2001
First Reading and Commencement Of Second Reading debate	4 July 2001
Resumption of Second Reading debate, Committee Stage and Third Reading	to be notified

## **BASIC LAW IMPLICATIONS**

39. The Department of Justice advises that the proposed Bill does not conflict with the provisions of the Basic Law carrying no human rights implications.

## **HUMAN RIGHTS IMPLICATIONS**

40. The Department of Justice advises that the proposed Bill is consistent with the human rights provisions of the Basic Law.

## **BINDING EFFECT**

41. The provisions of the Bill do not affect the current binding effect of the respective Ordinances to which the Bill relates.

## **FINANCIAL AND STAFFING IMPLICATIONS**

42. The proposal to empower the Court of Appeal to award costs in case stated appeal may entail additional expenditure on costs to be incurred by the Department of Justice. Nevertheless, as the number of such appeal is small, the costs which is resulted from the Department's applications being dismissed should be relatively small. The Department of Justice will absorb any additional court costs from within its existing resources. The other proposals have no additional financial or staffing implications.

## **PUBLICITY**

43. A press release will be issued. A spokesman will be available to answer press enquiries which might arise from the proposed amendments.

**Department of Justice**  
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