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7 March 2002

Ms. Bernice Wong
Assistant Legal Adviser,
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

By Fax: 2877 5029

Dear Ms. Wong,

Statute Law (Miscellaneous Provisions) Bill 2001

I refer to your letter of 22 February 2002 raising questions relating to the above Bill. Our reply is set out below.

Part III Compensation Order

(a) *Please let me have for reference the repealed section 72 of the Criminal Procedure Ordinance (Cap. 221) referred to in paragraph 5 of the LegCo Brief.*

A copy of the repealed section 72 of the Criminal Procedure Ordinance (Cap. 221) is attached at Annex A.

(b) *Please explain why section 7 is deemed to have come into operation on 17 February 1997 under Clause 2 of the Bill.*

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 the enforcement of such compensation order shall be 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 Section 72, however, was repealed consequentially to the enactment of the Costs in Criminal Cases Ordinance (Cap. 492) in January 1997.

Unless retrospective effect is provided for, there will be an anomalous situation in which those who obtained an order before the repeal of section 72 would be able to enforce the order, as would those who obtained an order after the presently proposed amendments are enacted but those who obtained an order in the interim would be unable to enforce the order. In any event, the limitation period (being six years) for enforcing orders that may have been handed down between 17 January 1997 and the enactment of the proposed amendments would not have lapsed by the time of such enactment. No one who may have been able to avoid enforcement of the orders because of the repeal of section 72 would subsequently be rendered liable again.

(c) *Consultation*

The Judiciary Administrator, who was consulted, considered the proposed amendment to be justified.

Part V **Marital rape and related sexual offences**

- (a) *Would the Administration clarify whether the law relating to those sexual offences in Part XII of the Crimes Ordinance (Cap. 200) to which no amendment has been proposed would not be affected by the introduction of the definition of “unlawful sexual intercourse” and “consent” in the proposed section 117(1B) and (1C)?*

The Administration considers that the sexual offences not expressly amended by the Bill would not be affected by the definitions of “unlawful sexual intercourse” and “consent” in section 117(1B) and (1C) respectively. The express amendments in section 117(1B) and (1C) clarify the law, first, by ensuring that non-consensual marital sexual intercourse is clearly prohibited (section 117(1B)), and secondly (section 117(1C)), by specifying the precise meaning of “consent”. The amendments have no effect on the provisions in Part XII of the Ordinance beyond these objectives.

- (b) *Under section 117, a person does an “unlawful sexual act” if that person commits buggery or act of gross indecency with a person of the opposite sex with whom that person may not have lawful sexual intercourse. What are the implications of the amendments on the law relating to non-consensual buggery within marriage and non-consensual act of gross indecency within marriage?*

The proposed amendment in section 117(1B) has no implications for the

law related to non-consensual buggery. Under section 118A (which applies within marriage), non-consensual buggery with another person, male or female, is an offence. The proposed section 117(1C) clarifies the definition of “consent”, otherwise the amendments have no effect.

Since an act of gross indecency cannot be perpetrated on a woman by a man, this offence does not apply within marriage. There are prohibitions relating to acts of gross indecency by a man with another man in sections 118H to 118K. Protection for a woman against actions which might constitute indecent acts is provided by the offence of indecent assault under section 122.

- (c) *Kindly confirm that the reference to “unlawful sexual act” in paragraph 13 of the LegCo Brief should be “unlawful sexual intercourse”.*

It is correct to refer to either “unlawful sexual act” or to “unlawful sexual intercourse” since “unlawful sexual intercourse” is incorporated in the express term “unlawful sexual act” which is defined in section 117(1A). Since section 117(1A) is the subject of amendment, paragraph 13 of the LegCo Brief referred to “unlawful sexual act” as a matter of technical precision.

- (d) *Has the Administration considered the need for consequential amendment to the Schedule of the Crimes Ordinance (conviction for offences other than charged under section 149)?*

The Administration considers that it is unnecessary to amend the Schedule to the Crimes Ordinance.

Part VII **Power of Court to order repayment of deposit**

- (a) *Whether the Administration would consider including an express provision similar to section 55(1) and (2) of the New South Wales Act where specific performance of a contract would not be enforced against the purchaser by the court by reason of a defect in the vendor's title?*

The proposed amendment would enable the court to order the return of the deposit as it thinks fit where it refuses to grant specific performance taking all the circumstances into account. To specify particular circumstances under which the return of the deposit should be allowed would tend to fetter the court's discretion. It would, therefore, be contrary to the policy intent to include provisions similar to sections 55(1) and (2) of the Conveyancing Act 1919 of New South Wales.

- (b) *Whether the court has any power to order repayment of deposit with interest thereon (similar to section 55(2A) of the NSW Act)?*

Section 12(1) of the Conveyancing and Property Ordinance (Cap. 219) provides that –

“A vendor or purchaser of land may apply by petition or by originating summons to the court in respect of any question arising out of or connected with any contract for the sale or exchange of land (not being a question affecting the existence or validity of the contract or relating to compensation payable by the Government or a public body), *and the court may make such order upon the petition or originating summons and as to costs as to the court appears just* [emphasis added].”

The court will have the discretion to order the return of a deposit with interest if it considers it just to do so. The proposed section 12(1A) of Cap. 219, which permits the court to order the repayment of any deposit, needs to be read in conjunction with the existing section 12(1). The inclusion of an express provision that the court may award interest is therefore not considered necessary.

- (c) *Whether the Administration would consider including a provision similar to section 55(3) of the NSW Act where the court has the power to declare and enforce a lien on the property in respect of the payment ordered?*

Since, as noted in the answer to (b) above, the court will have the discretion to make such order as it thinks just, the inclusion of an express provision similar to section 55(3) of the NSW Act is not considered to be necessary.

- (d) *Whether there is any need for a transitional provision in relation to applications made to the court under section 12 of the Conveyancing and Property Ordinance (Cap. 219) prior to the commencement of the amendment?*

The Administration considers that there is no need for such transitional provision to be included in the Bill. The court will have the power to order the return of a deposit in current proceedings as soon as the amendment commences.

Part IX **The Hong Kong Examinations Authority**

- (a) *Clause 32 is a transitional provision for the Secretary of the Hong Kong Examinations Authority in relation to any instrument, contract, legal proceeding in force or pending before the commencement date. Has the Administration considered the need for a similar transitional provision for the Authority itself?*

A change of name of the Authority will not affect its subsisting rights and obligations. Hence no transitional provision is required.

- (b) *Consultation*

It is unlikely that members of the public will have an interest in the amendments. No public consultation is considered necessary.

Part X **“Non-immunity” clauses**

- (a) *Please clarify whether section 2 of Schedule 1 of the Occupational Deafness (Compensation) Ordinance (Cap. 469) needs to be amended.*

The amendment of section 2 of Schedule 1 to the Occupational Deafness (Compensation) Ordinance will be dealt with later in a separate exercise when that Ordinance is reviewed as a whole. The suggested amendment is considered unnecessary at this stage.

- (b) *Under the present Bill, the proposed amendments under Part X would come into operation on the day on which the Bill is published in the Gazette as an Ordinance. In the previous adaptation bills, the amendments proposed would be deemed to have come into operation on 1 July 1997, subject to Article 12 of the Hong Kong Bill of Rights set out in Part II of the Hong Kong Bill of Rights Ordinance (Cap. 383). Would the Administration consider a similar commencement date for Part X, or would the Administration prefer to rely on section 2 of Schedule 8 to the Interpretation and General Clauses Ordinance (Cap. 1) for construction of the word “Crown” on and after 1 July 1997?*

The proposed amendments are not part of the adaptation exercise. The amendments do not have retrospective effect.

- c) *Consultation*

It is unlikely that members of the public will have an interest in the amendments. No public consultation is considered necessary.

Part XI Tertiary Institutions

- (a) *Clause 53 of the Bill proposes to amend section 8(1)(e) of The Hong Kong Institute of Education Ordinance (Cap. 444) by adding “from among their member” after “elected”. Would it be more accurate to add the phrase “from among their number” instead? Please refer to Clause 77(a)(v) of the Bill as well as section 10(1)(c) of Cap. 1075, section 1(1) of Statute 11 of Cap. 1109 and section 15(1)(D) of Cap. 1126.*

The word “member” is a typing error and should be “number” instead.

- (b) *Consultation*

It is unlikely that members of the public will have an interest in the amendments. No public consultation is considered necessary.

Part XIV **Legal Practitioners**

(a) *Clause 107 of the Bill proposes to amend section 9(4) of the Legal Practitioners Ordinance (Cap. 159) by repealing “one of the solicitors on the Panel” and substituting “a solicitor”. Please clarify whether it is the policy intent for the Chief Justice to appoint a solicitor as the Tribunal Convenor, regardless of whether he is on the Solicitors Disciplinary Tribunal Panel.*

It is the policy intent that the choice of the Tribunal Convenor shall not be restricted to the solicitors on the Solicitors Disciplinary Tribunal Panel to allow flexibility to decide the nature of the appointment in due course.

(b) *Clause 126 of the Bill proposes to amend section 3 of the Legal Practitioners (Amendment) Ordinance 1998 by repealing “Chief Justice” and substituting “Chief Judge” in the new section 40A(1) and (2) of the Legal Practitioners Ordinance. Is there any need to amend the new section 40A(4) as well?*

We propose to replace the term “Chief Justice” with ‘Chief Judge’ in the new section 40A(4) by way of a CSA.

(c) *Clause 126 also proposes to amend the new section 40E of the Legal Practitioners Ordinance in relation to the issue of practising certificates to notaries public. Has the Administration considered the need to introduce amendments to the new section 40E(6) along the same line as Clause 105 (amending section 6(5) of the Legal Practitioners Ordinance) to transfer the power of the Chief Justice to the Society of Notaries?*

We are considering amending the new section 40E(6) along the lines of Clause 105 so that the power of the Chief Justice would be transferred to the Society of Notaries under the subsection.

(d) *Consultation*

The Law Society has conducted informal consultations concerning the proposed amendment to provide for intermediate sanctions, and has received no adverse comments. It is unlikely that members of the public will have an interest in the amendments relating to the Legal Practitioners Ordinance as proposed in the Bill. No public consultation is considered necessary.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

Encl.

c.c. Miss Monica Law, SALD
Mr Gavin Shiu, SGC
Miss Doris Lo, GC

Annex A

1988 Ed.]

Criminal Procedure

[CAP. 221

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Abolition of attainder

69. No confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat.

[*cf. U.K. 1870 c. 23, s. 1*]

Limitation on imposition of death penalty

70. (1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court at the time the offence was committed he was under the age of 18 years; but the court shall direct the finding of the jury to be recorded, and thereupon the court shall order such person to be detained in safe custody in such place and manner as the court thinks fit, until Her Majesty's pleasure shall be known.

(2) The judge shall immediately report the finding of the jury and the detention of such person to the Governor who shall order such person to be detained in such place and under such conditions as he may direct.

(3) The Governor at any time may order that a person so detained shall be released on licence, in such form and subject to such conditions as the Governor may direct and a licence so issued may be revoked at any time and on such revocation, the person may be arrested without warrant.

(*Added, 29 of 1952, s. 2. Replaced, 52 of 1956, s. 2*)
[*cf. U.K. 1948 c. 58, s. 16*]

Calling upon the accused after verdict declared unnecessary

71. It shall not be necessary in any case whatsoever when a verdict of guilty has been returned by the jury to ask the accused whether he has anything to say why judgment should not be given against him, but upon a verdict of guilty being returned by the jury in any case it shall be lawful for the judge, failing any motion in arrest of judgment, forthwith to pass sentence upon the accused.

(*10 of 1921, s. 3, incorporated. Amended, 5 of 1924, s. 26*)

Costs and compensation**Court may award costs against person convicted of indictable offence**

72. (1) It shall be lawful for the court, on the conviction of any person for an indictable offence, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted.

(2) The payment of such costs and expenses or any part thereof may be ordered by the court to be made out of any moneys taken from such person on his apprehension, or may be enforced at the instance of any person liable to pay or who may have paid the same in such and the same manner as the payment of any costs ordered to be paid by judgment or order of the High Court in any civil action or proceeding may be enforced:

Provided that in the meantime and until the recovery of such costs and expenses from the person so convicted as aforesaid or from his estate, the same shall be paid and provided for in the same manner as if this Ordinance had not been passed; and any money which may be recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses may have been paid or defrayed.

(Amended, 50 of 1911 and 1 of 1912, Schedule)
[cf. U.K. 1870 c. 23, s. 3]

Power to award compensation

73. (1) Where a person is convicted of an offence, the court may, in addition to passing such sentence as may otherwise by law be passed or making an order under section 107(1), order the person so convicted to pay to any aggrieved person such compensation for—

- (a) personal injury;
- (b) loss of or damage to property; or
- (c) both such injury and loss or damage,

as it thinks reasonable.

(2) The amount ordered as compensation under subsection (1) shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of compensation may be enforced in such and the same manner as in the case of any costs or expenses ordered by the court to be paid under section 72.

(Replaced, 48 of 1972, s. 4)

Power to award costs in case of acquittal

73A. (1) Where after trial in the court a person is acquitted, the court may order the payment out of the public revenue of the costs of the defence, including the costs of any proceedings before a magistrate.

(2) The costs payable to any person under this section shall be such sums as appear to the court reasonably sufficient to compensate that person for any expenses properly incurred by him in or about the defence.

(3) The amount of costs ordered to be paid under this section shall, except where the amount is fixed by the court, be ascertained by the Registrar.

(4) In this section, "court" means the High Court and the District Court.

(Added, 2 of 1978, s. 2)
[cf. U.K. 1973 c. 14, ss. 3 & 4]

Arraignment and trial of insane person

Acquittal on grounds of insanity

74. Where in an indictment any act or omission is charged against any person as an offence, and it is given in evidence on trial of such person for that offence that he was insane, so as not to be responsible according to law for his actions at the time when the act was done or the omission made, then, if it