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30 April 2002

Mrs Percy Ma
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

By Fax: 2509 9055

Dear Mrs Ma,

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001

Thank you for your letter of 23 April 2002 raising questions in connection with the above. Our replies are set out below.

Part I of the Bill (Commencement)

Clause 2

- (a) *to explain why the amendments in Part X of the Bill should not take effect from 1 July 1997, and in view of the absence of retrospective effect of the amendments, how the word “Crown” in the relevant Ordinances should be construed on and after 1 July 1997;*

The amendment proposals under Part X of the Bill are to give effect to the suggestions made by the Bills Committee on the Adaptation of Laws (No. 16) Bill 1999 to replace “Crown” by “Government” by way of a law reform exercise. Before the amendment proposals are enacted, “Crown” would be construed as “State”. The Administration noted in its paper to the Bills Committee on the Adaptation of Laws (No. 16) Bill 1999 (Paper

No. CB(2) 1453/99-00(01)) that the proposals to replace “Crown” by “State” would best give effect to the principles set out in the Adaptation of Laws Programme : Guiding Principles and Guideline Glossary of Terms that each provision should, as far as possible, be given the same legal effect as before after its adaptation. The term “Crown” has a broad meaning and it should be replaced by a term that is roughly equivalent in meaning. The most suitable term in the context is “State”. The paper was discussed at the meeting of the Bills Committee on Adaptation of Laws (No. 16) Bill 1999 held on 28 March 2000 (see minutes of meeting – LC Paper No. CB(2)1867/99-00).

Part III of the Bill (Enforcement of Compensation Order)

Clause 7

- (b) *to consider the proposal to substitute “liable to pay” in the proposed section 73(5) of the Criminal Procedure Ordinance with “entitled to be paid”;*

The proposed section 73(5) will be amended by way of a CSA.

- (c) *to advise on the justifications for clause 7 to take retrospective effect from 17 January 1997 (e.g. whether there are evidence to substantiate that in the absence of retrospective effect some aggrieved persons would be unable to enforce an order for payment of compensation);*

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 enforcement of such compensation order shall be done 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, those who obtained an order after the presently proposed amendments are enacted would be able to enforce the order, and those who obtained an order in the interim would be unable to enforce the order. In any event, the limitation period (being 6 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.

The Administration does not have evidence that by not allowing the clause to have retrospective effect some aggrieved persons would be unable to enforce orders for payments of compensation. The proposal for the clause to take retrospective effect is for the sake of those who might be unable to enforce compensation orders because of the repeal of section 72 of the Criminal Procedure Ordinance (Cap. 221). In the above circumstances, since the proposed amendment is procedural, the Administration considers that it is consistent with the principles regarding retrospectivity. In Yew Bon Tew v Kenderaan Bas Mara [1982] 3 A11 ER 833 Lord Brightman said –

“There is an exception to this principle in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.”

In Maxwell v Murphy (1957) 86 CLR 261, the court said –

“Statutes of limitation are often classed as procedural statutes. ... If time is enlarged or abridged whilst a person is still within time under the existing law to institute a cause of action might well be classed as procedural.”

Part IV of the Bill (Power of Court of Appeal and Appeal Committee to Award Costs)

Clause 9

- (d) *to provide information on the number of appeals brought by the prosecution under section 84 of the District Court Ordinance and dismissed by the Court of Appeal, say, in the past three years;*

According to the records kept by the Prosecutions Division of the Department of Justice, one appeal was brought under section 84 of the District Court Ordinance in 1999 and the appeal was dismissed. Another case was brought under the Ordinance in 2001 and the appeal was allowed.

Part V of the Bill (Marital Rape and Related Sexual Offences)

Clauses 11 and 12

- (e) *to reconsider the newly proposed amendments to deal with marital rape, having regard to the views of members and legal adviser to the Bills Committee;*

The Administration is continuing its consideration of the newly proposed amendments taking into account the views of members and the legal adviser to the Bills Committee.

Part VI of the Bill (Consideration of Bail Applications)

Clause 18

- (f) *to consider revising the drafting by substituting “neither the court of committal nor any other court shall remand on bail the person ...” with “the court of committal or any other court shall not grant bail to the person ...”;*

The Administration has reconsidered the drafting of Clause 18 of the Bill in consultation with the Law Drafting Division. It is considered that the existing wording does not require change for the following reasons –

- (a) Section 10(3) of the Fugitive Offenders Ordinance provides that the court of committal shall have the “power to remand in custody or on bail”. Clause 18 amends section 10(5)

which restricts the exercise of the power to remand persons on bail. It provides that the court shall not remand on bail the person arrested unless it is satisfied that there are special circumstances. It is desirable to use consistent language (i.e. remand on bail rather than to grant bail) when dealing with the same subject matter.

- (b) Although there is no difference in legal effect between “neither the court of committal nor any other court shall” and “the court of committal or any other court shall not”, it is considered that the former is clearer in terms of expressing the idea that both parties are not allowed to do the specified act. It may also be helpful to note that the main reason for amendment is that, when exercising its power under section 9J of the Criminal Procedure Ordinance to review refusal of bail by the court of committal in fugitive offender cases, the Court of First Instance has not been consistent in its approach. The purpose of the amendment is to ensure that the higher court will consider the same matters that a court of committal is required to consider under section 10(5). Given this background, the present wording emphasizes that the restriction imposed by section 10(5) also binds the higher court.

Part XIV of the Bill (Amendments to Legal Practitioners Ordinance)

Clause 108

- (g) *to revise the drafting of the proposed subsections 9A(1A) and (1B) to clarify that the alleged breaches of the matters prescribed in rules made by the Council of the Law Society which are suitable for disposal by the Tribunal Convenor under the proposed section 9AB would be confined to minor breaches involving no dishonesty. Some members have pointed out that the scope prescribed in subsection (1A)(a), (b), (c) was too wide, and also requested the Administration to review the use of the word “may” in subsection (1B).*

The proposed subsections 9A(1A) and (1B), which have to be read

together, serve to define the scope of the matters that may be submitted to the Tribunal Convenor under the fixed penalty procedures. Section 9A(1B)(b) specifically refers to “the gravity of the alleged breach” as a matter to be taken into consideration.

The clause “whether the alleged breach is deliberate” in section 9A(1B)(a) covers an element of dishonesty. If an alleged breach includes an element of dishonesty on the part of the respondent, it is considered that this must include an element of deliberation.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General