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Paper for the House Committee on 8 June 2001

Panel on Administration of Justice and Legal Services

Information paper on applicability of Ordinances to the offices set up by the Central People's Government in the Hong Kong Special Administrative Region

Purpose

This paper incorporates the information provided in the Panel's report to the House Committee meeting on 18 May 2001 (LC Paper No. CB(2)1563/00-01) and provides additional background information on various issues relating to the applicability of Ordinances to the offices set up by the Central People's Government (CPG) in the Hong Kong Special Administrative Region (HKSAR).

Introduction

- 2. Article 22 of the Basic Law provides that "All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region."
- 3. However, section 66 of the Interpretation and General Clauses Ordinance (Cap. 1) which, as at 30 June 1997, provided that "No Ordinance shall in any manner whatsoever affect the right of or be binding on the Crown unless it is therein expressly provided or unless it appears by necessary implication that the Crown is bound thereby". By way of the Adaptation of Laws (Interpretative Provisions) Bill which was passed by the Provisional Legislative Council on 7 April 1998, the reference to "Crown" in section 66 of Cap.1 was adapted to "State".

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- 4. The definition of "State" under section 66 of Cap. 1 includes -
 - (a) the President of the People's Republic of China;
 - (b) the Central People's Government;
 - (c) the Government of the Hong Kong Special Administrative Region;
 - (d) the Central Authorities of the People's Republic of China that exercise functions for which the Central People's Government has responsibility under the Basic Law;
 - (e) subordinate organs of the Central People's Government that -
 - (i) on its behalf, exercise executive functions of the Central People's Government or functions for which the Central People's Government has responsibility under the Basic Law; and
 - (ii) do not exercise commercial functions,

when acting within the scope of the delegated authority and the delegated functions of the subordinate organ concerned; and

- (f) subordinate organs of the Central Authorities of the People's Republic of China referred to in paragraph (d), that -
 - (i) on behalf of those Central Authorities, exercise executive functions of the Central People's Government or functions for which the Central People's Government has responsibility under the Basic Law; and
 - (ii) do not exercise commercial functions.

when acting within the scope of the delegated authority and the delegated functions of the subordinate organ concerned."

One effect of the definition of "State" is that an ordinance which expressly binds the Government does not thereby bind the other categories under the definition. To bind a CPG office in the HKSAR, an ordinance should be amended to include a provision to that effect.

- 5. A subordinate organ of the CPG or of relevant Central Authorities is only within the definition if it satisfies three tests -
 - (a) it carries out executive functions of the CPG, or functions for which the CPG has responsibility under the Basic Law;

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- (b) it does not exercise commercial functions; and
- (c) it is acting within the scope of the authority and functions delegated to it by the CPG or the relevant Central Authority.
- 6. There are three CPG offices in the HKSAR -
 - (a) the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the HKSAR;
 - (b) the Hong Kong Garrison of the Chinese People's Liberation Army; and
 - (c) the Liaison Office of the Central People's Government in the HKSAR.

Discussions held by the Panel

7. The subject of the applicability of Ordinances to the CPG offices was discussed by the Panel at five meetings (on 15 September 1998, 20 October 1998, 2 November 1998, 25 February 1999 and 16 May 2000) in the first term of LegCo, one of which was devoted to the discussion on the review of the applicability of the Personal Data (Privacy) Ordinance to the CPG offices. In the current term, the Panel held one meeting on 15 May 2001 to consider how to proceed with examining the outstanding issues relating to the subject. A summary of the discussions held by the Panel and the present position on the various issues relating to the subject is set out in paragraphs 8 - 23.

Section 66 of Cap. 1

- 8. Some members of the Panel were of the view that as Hong Kong was no longer a British colony but a SAR of the People's Republic of China, it was a fundamental mistake to continue to apply the statutory presumption of exclusion of the Crown to HKSAR laws by adapting the reference to "Crown" to "State" in section 66 of Cap. 1. Allowing the CPG offices not to be bound by Hong Kong legislation clearly infringed the letter and spirit of Article 22 of the Basic Law. The Hong Kong Bar Association shared this view and considered that the need for an express presumption of legislative immunity for the "State" in section 66 of Cap. 1 should be reviewed.
- 9. The Administration explained that the fundamental principle that everyone was subject to the law did not mean that it was necessary or appropriate for every ordinance to bind every person or body. Although Article 22 of the Basic Law made it clear that the stated offices and personnel must abide by the laws of the

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HKSAR, it did not provide any guidance as to whether or not any particular ordinance should be binding on them. In reality, a large number of laws did not have any relevance to the activities of the "State" and hence it was generally inappropriate for them to bind the "State". The legal presumption of exclusion of the "State" in relation to application of legislation was in accordance with common law principles applicable to other common law jurisdictions. The Administration held the view that section 66 of Cap. 1 was not inconsistent with the Basic Law.

Review of the 17 Ordinances which expressly apply to the Government

- 10. In the course of scrutinising the Adaptation of Laws (Interpretative Provisions) Bill in 1997, Members expressed concern as to why certain ordinances were binding on the HKSAR Government but not on the CPG offices. The Administration then undertook to conduct a review of the 17 relevant Ordinances that expressly bound the Government, but were otherwise silent on their applicability to CPG offices. A list of the 17 Ordinances reviewed is in **Appendix I.**
- 11. On 20 October 1998, the Administration informed the Panel that the preliminary results of the review were that, as a matter of policy, 15 of the 17 Ordinances should apply to the CPG offices. The Administration would work out the necessary legislative amendments to the 15 Ordinances. The two not included in this announcement were
 - (a) Social Workers Registration Ordinance the Ordinance was found to be of no relevance to either the Government or CPG offices in the HKSAR; and
 - (b) Personal Data (Privacy) Ordinance the Ordinance involved complicated issues and needed to be carefully examined before the Administration could make any recommendation.

Personal Data (Privacy) Ordinance

- 12. The Administration explained to the Panel that the Personal Data (Privacy) Ordinance was complicated in that the six data protection principles and the key provisions were phrased in broad terms and the statutory protection of privacy in relation to person data is relatively new in Hong Kong. The Administration considered it necessary to discuss with the CPG to assess whether, and if so, how the operation of a particular CPG office would be affected by the Personal Data (Privacy) Ordinance. It would report progress to the Panel.
- 13. The Panel had closely monitored the progress of the review on the Personal Data (Privacy) Ordinance since late 1998. Noting that there had been no substantive progress made, the Panel discussed the matter with the Administration

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at the Panel meeting on 16 May 2000. Members expressed concern about the extraordinarily protracted "consultation" with CPG. Some members pointed out that whether an ordinance should or should not bind the CPG offices was not a matter for the consent of the CPG. Given that Article 22 of the Basic Law requires that the CPG offices set up in HKSAR and their personnel to be bound by the laws of HKSAR, the decision as to whether an ordinance should bind the CPG offices should be a matter of principle, regardless of its complexity.

- 14. As agreed by the Panel, the Chairman of the Panel wrote to the Chief Secretary for Administration on 31 May 2000 requesting that the review be expedited. The Administration was also requested to provide quarterly progress reports on the review to the Panel. A summary of the Administration's progress reports on the review on the Personal Data (Privacy) Ordinance for the period from March 1999 to April 2001 is in **Appendix II.**
- 15. At the meeting on 15 May 2001, the Administration reiterated that more time was required for the review of the Personal Data (Privacy) Ordinance because of its complexities and that the Administration was still awaiting information from the Hong Kong and Macau Affairs Office on the result of their consultation with the relevant authorities.

The remaining 15 Ordinances

- 16. The Arbitration Ordinance is one of the 15 Ordinances which have been identified as in need of amendment to make them binding on the CPG offices in the HKSAR. Section 47 of the Ordinance provides that the Ordinance (other than Parts III and IV) binds the Government, but is silent on its applicability to the CPG offices. Under clause 9 of the Arbitration (Amendment) Bill 1999, section 47 was proposed to be repealed and substituted by a new section: "This Ordinance applies to and in relation to any arbitration agreement, irrespective of whether a party to the agreement is an individual, public body, public authority, private body, organ or any other class of person."
- 17. Some members of the Bills Committee set up to scrutinise the Bill pointed out that under the principle of presumption of exclusion of section 66 of Cap. 1, the "State" including the HKSAR Government was not bound by statute save by express provisions. As clause 9 did not expressly provide that the Government and the CPG offices were bound, it was doubtful whether the new formulation could reflect the policy intent. In order not to delay the enactment of the Bill, it was agreed between the Administration and the Bills Committee that the amendment of section 47 would be left to a separate exercise. The Administration moved a Committee Stage amendment to replace clause 9 of the Bill with a formulation that retained the existing scope of application of the Ordinance, i.e. the Ordinance applies to the Government. The Administration undertook to come up with an appropriate formula to extend the applicability of the Ordinance to CPG offices.

18. At the meeting on 15 May 2001, the Administration advised the Panel that once an appropriate formula to extend the applicability of the Arbitration Ordinance to CPG offices had been worked out, it could be suitably applied to the other 14 Ordinances.

Review of the remaining Ordinances

19. In response to members on why the review was confined to the 17 Ordinances and whether an overall review of the other ordinances should be conducted, the Administration provided a report to members at the Panel meeting on 15 May 2001.

53 Ordinances that are expressed to bind, or apply to, the "Crown"

20. Of the 53 Ordinances that are expressed to bind, or apply to, the "Crown", the Administration advised that the relevant provisions in 18 of these Ordinances had already been either wholly or partly adapted, a list of which is in **Appendix III.** A list of the remaining 35 Ordinances which have yet to be adapted is in **Appendix IV**.

36 Ordinances that are applicable to Government in whole or in part (but are silent on their applicability to CPG offices)

21. The Panel noted that when these Ordinances were drafted and enacted, they were intended to apply to the Hong Kong Government but not other aspects of the "Crown". This intention reflects policy decisions. The resumption of the exercise of sovereignty had not affected the scope of application of the Ordinances and did not provide a strong reason for changing the scope of their application. Nevertheless, the Administration assured members that it would review any Ordinance in respect of its applicability when the need to do so had been identified. A list of the 36 Ordinances is in **Appendix V.**

Ordinances which may be applicable to the Government or the CPG offices by necessary implication

- 22. The Administration advised that it would be extremely time-consuming and a legally difficult task to consider all sections in hundreds of Ordinances in order to form a view as to whether the "beneficial purpose of the legislation would be wholly frustrated" if the Ordinances were not applicable to the HKSAR Government or CPG offices. It was also not clear what purpose this would serve.
- 23. The Administration undertook to review any Ordinance in respect of its applicability when the need to do so had been identified. So far, no such need had been identified in respect of any Ordinance.

Panel's recommendations to the House Committee meeting on 18 May 2001

24. After receiving the updated report from the Administration on the various issues relating to the applicability of Ordinances to the CPG offices at the meeting on 15 May 2001, the Panel was dissatisfied with the progress so far made and decided that a report should be made to the House Committee on 18 May 2001. The Panel recommended that the Chairman of the House Committee should convey the views of the Panel as set out in paragraphs 25 to 27 below to the Chief Secretary for Administration.

15 Ordinances that expressly apply to the Government

25. The Panel expressed grave concern about the progress in amending the 15 Ordinances, given that the Administration confirmed in October 1998 that these Ordinances, as a matter of policy, should apply to the CPG offices. Members requested the Administration to work out an agreed formulation to extend the applicability of the Ordinances to cover the CPG offices without further delay. In addition, members considered that the relevant policy bureaux should accord priority to the proposed amendments in the legislative programme.

Personal Data (Privacy) Ordinance

26. Members were dissatisfied with the progress of the review of the Ordinance, particularly the prolonged discussions held with the CPG. Members suggested that the Administration should bring the matter to the attention of the Chief Executive in order that the matter could be resolved early with the involvement of both sides at a higher level.

53 Ordinances that are expressed to bind, or apply to, the "Crown"

27. Given that only 18 Ordinances had so far been adapted, the Panel urged the Administration to proceed with the adaptation exercise expeditiously.

Latest development

28. Subsequent to the report to the House Committee, the Administration has agreed to give a further report to the Panel on the subject at its next meeting on 26 June 2001.

Council Business Division 2
<u>Legislative Council Secretariat</u>
8 June 2001

Appendix I

17 Ordinances that expressly bind the Government (but are silent on the binding effect on the CPG Offices)

		Cap.
1.	Gas Safety Ordinance	Cap. 51
2.	Arbitration Ordinance	Cap. 341
3.	Ozone Layer Protection Ordinance	Cap. 403
4.	The Legislative Council Commission Ordinance	Cap. 443
5.	Dumping at Sea Ordinance	Cap. 466
6.	Marine Parks Ordinance	Cap. 476
7.	Sex Discrimination Ordinance	Cap. 480
8.	Mandatory Provident Fund Schemes Ordinance	Cap. 485
9.	Personal Data (Privacy) Ordinance	Cap. 486
10.	Disability Discrimination Ordinance	Cap. 487
11.	Plant Varieties Protection Ordinance	Cap. 490
12.	Environmental Impact Assessment Ordinance	Cap. 499
13.	Social Workers Registration Ordinance	Cap. 505
14.	Occupational Safety & Health Ordinance	Cap. 509
15.	Patents Ordinance	Cap. 514
16.	Registered Designs Ordinance	Cap. 522
17.	Family Status Discrimination Ordinance	Cap. 527

Review of the applicability of the Personal Data (Privacy) Ordinance (PDPO) to CPG Offices

Progress of review

- (a) In March 1999, the Administration explained the complexities involved in reviewing the applicability of PDPO.
- (b) On <u>11 May 1999</u>, the Secretary for Home Affairs (SHA) advised that discussion with the CPG on PDPO was on-going. The Administration expected that it would take some time to complete the review.
- (c) On <u>9 November 1999 and 11 January 2000</u>, SHA advised that the matter was still under discussion with CPG.
- (d) In <u>May 2000</u>, SHA reiterated the complexities in interpreting the application of particular provisions of PDPO, and advised that the Administration had explained to CPG the key provisions of PDPO and how they were being interpreted and applied by the Privacy Commissioner for Personal Data.
- (e) In <u>May 2000</u>, the Administration was requested to submit quarterly progress reports on the review of PDPO commencing from October 2000, and to provide information regarding the meetings held and to be held with CPG.
- (f) On 19 June 2000, SHA advised that between January 1999 and June 2000, four meetings (January, March and May 1999 and May 2000) were held in Hong Kong and Beijing with the Hong Kong and Macau Affairs Office (HKMAO) of the State Council to discuss the applicability of PDPO to CPG offices in Hong Kong. The Administration was represented at each meeting by some or all of the following departments: the Home Affairs Bureau, Constitutional Affairs Bureau, the Administration Wing of the Chief Secretary for Administration Office and the Department of Justice.
- (g) On <u>16 October 2000</u>, SHA advised that the Administration had another meeting with HKMAO in Beijing in September 2000 to clarify and elaborate on the implications of extending the application of PDPO to CPG offices.
- (h) On <u>16 January and 21 April 2001</u>, SHA advised that HKMAO would discuss with the individual authorities concerned on the implications of extending the applicability of PDPO to CPG Offices. The Administration was awaiting information from HKMAO on the result on their consultation.

Appendix III

18 Ordinances that are expressed to bind, or apply, to the "Crown"

		Cap.
1.	Interpretation and General Clauses Ordinance	Cap. 1
2.	High Court Ordinance	Cap. 4
3.	Government Rights (Re-entry and Vesting Remedies) Ordinance	Cap. 126
4.	Foreshore and sea-bed (Reclamations) Ordinance	Cap. 127
5.	Public Health and Municipal Services Ordinance	Cap. 132
6.	Country Parks Ordinance	Cap. 208
7.	Mass Transit Railway (Land Resumption and Related Provisions) Ordinance	Cap. 276
8.	Mining Ordinance	Cap. 285
9.	Dangerous Goods Ordinance	Cap. 295
10.	Air Pollution Control Ordinance	Cap. 311
11.	Civil Aviation (Aircraft Noise) Ordinance	Cap. 312
12.	District Court Ordinance	Cap. 336
13.	Customs and Excise Service Ordinance	Cap. 342
14.	Limitation Ordinance	Cap. 347
15.	Trade Descriptions Ordinance	Cap. 362
16.	Merchant Shipping (Prevention and Control of Pollution) Ordinance	Cap. 413
17.	Merchant Shipping (Registration) Ordinance	Cap. 415
18.	Land Drainage Ordinance	Cap. 446

Appendix IV

35 Ordinances that are expressed to bind, or apply, to the "Crown"

		Cap.
1.	Bankruptcy Ordinance	Cap. 6
2.	Law Amendment and Reform (Consolidation) Ordinance	Cap. 23
3.	Recognition of Trusts Ordinance	Cap. 76
4.	Matrimonial Causes Ordinance	Cap. 179
5.	Traffic Accident Victims (Assistance Fund) Ordinance	Cap. 229
6.	Fixed Penalty (Traffic Contraventions) Ordinance	Cap. 237
7.	Enforcement of Rights (Extension of Time) Ordinance	Cap. 252
8.	Perpetuities and Accumulations Ordinance	Cap. 257
9.	Peak Tramway Ordinance	Cap. 265
10.	Massage Establishments Ordinance	Cap. 266
11.	Motor Vehicles Insurance (Third Party Risks) Ordinance	Cap. 272
12.	Education Ordinance	Cap. 279
13.	Merchant Shipping Ordinance	Cap. 281
14.	Employees' Compensation Ordinance	Cap. 282
15.	Misrepresentation Ordinance	Cap. 284
16.	Hong Kong Airport (Regulations) Ordinance	Cap. 292
17.	Crown Proceedings Ordinance	Cap. 300
18.	Shipping and Port Control Ordinance	Cap. 313
19.	Occupiers Liability Ordinance	Cap. 314
20.	Industrial Training (Construction Industry) Ordinance	Cap. 317

21.	Lifts and Escalators (Safety) Ordinance	Cap. 327
22.	Small Claims Tribunal Ordinance	Cap. 338
23.	Waste Disposal Ordinance	Cap. 354
24.	Water Pollution Control Ordinance	Cap. 358
25.	Pneumoconiosis (Compensation) Ordinance	Cap. 360
26.	Roads (Works, Use and Compensation) Ordinance	Cap. 370
27.	Road Traffic Ordinance	Cap. 374
28.	Civil Liability (Contribution) Ordinance	Cap. 377
29.	Hong Kong Bill of Rights Ordinance	Cap. 383
30.	Noise Control Ordinance	Cap. 400
31.	Occupational Retirement Schemes Ordinance	Cap. 426
32.	Parent and Child Ordinance	Cap. 429
33.	Merchant Shipping (Limitation of Shipowners Liability) Ordinance	Cap. 434
34.	Occupational Deafness (Compensation) Ordinance	Cap. 469
35.	Carriage by Air Ordinance	Cap. 500

36 Ordinances that are applicable to Government in whole or in part (but are silent on their applicability to the CPG Offices)

		Cap.
1.	Land Tribunal Ordinance	Cap. 17
2.	Surviving Spouses' and Children's Pensions Ordinance	Cap. 79
3.	Pensions Ordinance	Cap. 89
4.	Pensions Benefits Ordinance	Cap. 99
5.	Immigration Ordinance	Cap. 115
6.	Stamp Duty Ordinance	Cap. 117
7	Government Rights (Re-entry and Vesting Remedies) Ordinance	Cap. 126
8.	Foreshore and Sea-bed (Reclamations) Ordinance	Cap. 127
9.	Eastern Harbour Crossing Ordinance	Cap. 215
10.	Public Bus Services Ordinance	Cap. 230
11.	Loans (Asian Development Bank) Ordinance	Cap. 271
12.	Hong Kong Airport (Control of Obstructions) Ordinance	Cap. 301
13.	Pensions (Increase) Ordinance	Cap. 305
14.	Waste Disposal Ordinance	Cap. 354
15.	Tate's Cairn Tunnel Ordinance	Cap. 393
16.	Drug Trafficking (Recovery of Proceeds) Ordinance	Cap. 405
17.	Merchant Shipping (Prevention and Control of Pollution) Ordinance	Cap. 413
18.	Merchant Shipping (Registration) Ordinance	Cap. 415
19.	Western Harbour Crossing Ordinance	Cap. 436

20.	Administrative Appeals Board Ordinance	Cap. 442
21.	Layout-design (Topography) of Integrated Circuits Ordinance	Cap. 445
22.	Organized and Serious Crimes Ordinance	Cap. 455
23.	Tai Lam Tunnel and Yuen Long Approach Road Ordinance	Cap. 474
24.	Airport Authority Ordinance	Cap. 483
25.	Costs in Criminal Cases Ordinance	Cap. 492
26.	New Territories Land Exchange Entitlements (Redemption) Ordinance	Cap. 495
27.	Tsing Ma Control Area Ordinance	Cap. 498
28.	Fire Safety (Commercial Premises) Ordinance	Cap. 502
29.	Fugitive Offenders Ordinance	Cap. 503
30.	Government Rent (Assessment And Collection) Ordinance	Cap. 515
31.	Auxiliary Medical Service Ordinance	Cap. 517
32.	Civil Aid Service Ordinance	Cap. 518
33.	Railways Ordinance	Cap. 519
34.	Outer Space Ordinance	Cap. 523
35.	Mutual Legal Assistance in Criminal Matters Ordinance	Cap. 525
36.	Copyright Ordinance	Cap. 528