

**Applicability of Ordinances to the offices
set up by the Central People's Government in the HKSAR**

The AJLS Panel has raised a number of issues on the above subject. Before addressing those issues, it may be helpful if the Administration recaps the background.

Consequences of Reunification

2. The Reunification has necessitated the adaptation of legislative provisions to reflect the resumption of the exercise of sovereignty and the requirements of the Basic Law. With regard to the applicability of Ordinances to offices set up by the Central People's Government in the HKSAR ("CPG offices"), the adaptation programme has involved the adaptation of specific provisions referring to the 'Crown'. The purpose of these adaptations has been not to reform the law, but to ensure that the laws previously in force continue to apply appropriately in the new constitutional order.

3. As a related matter, the Administration undertook to review 17 Ordinances which expressly applied to the SARG but were otherwise silent as to their applicability to the CPG offices, to see if their application should be extended. That exercise was one of reform, rather than adaptation.

4. At no stage did the Administration undertake any wider review e.g. of the 36 Ordinances that apply to the Government in whole or in part, or of Ordinances that may be applicable to the Government or the CPG offices by necessary implication.

5. The Administration takes the view that Reunification has necessitated an adaptation exercise, but not a review of the statute book for other purposes. However, the Administration has undertaken to review any Ordinance in respect of its applicability when the need to do so has been identified.

6. We now turn to the specific issues raised in the letter of the Clerk to the Panel dated 21 April 2001.

A. Matters outstanding from previous Panel meetings

(a) Review of the 17 Ordinances which expressly apply to the Government

7. A list of the 17 Ordinances whose application was reviewed is at **annex 1**. The Administration informed the Panel in October 1998 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 two not included in this announcement were –

- (1) Social Workers Registration Ordinance; and
- (2) Personal Data (Privacy) Ordinance.

The former was found to be of no relevance to either the Government or CPG offices in the HKSAR. The latter involves complicated issues and needed to be carefully examined before the Administration could make any recommendation. We also informed the Panel that, once the Administration had worked out the necessary legislative amendments to reflect the intention and how the 15 Ordinances should be amended, the matter would be taken forward. During the process, the Administration would also examine whether the proposed amendments should include any exemptions.

8. So far as the 15 Ordinances are concerned, a proposed extension of the application of one of these Ordinances (the Arbitration Ordinance) was introduced into the Legislative Council in 1999. However, for the reasons set out in paragraphs 23 and 24 below, that extension was not enacted. As to the remaining Ordinances, the relevant Policy Bureaux will take matters forward, having regard to the legislative priorities of the relevant Policy Bureaux and the availability of an agreed formulation of a provision that extends the applicability to cover CPG offices.

9. With regard to the Personal Data (Privacy) Ordinance, the Administration has previously informed the AJLS Panel of the complexities involved in deciding whether the application of the Ordinance should be extended (see paragraphs 4 to 8 of the paper at **annex 2**). The Administration has also informed the Panel of discussions held with the Central People's Government in respect of that Ordinance. Regular progress reports have been furnished to the Panel by the Secretary for Home Affairs, the latest of which (dated 21 April 2001) is at **annex 3**.

(b) 53 Ordinances that are expressed to bind, or apply to, the ‘Crown’

10. Of the 53 Ordinances that are expressed to bind, or apply to, the ‘Crown’, relevant provisions in 18 of these Ordinances have already been either wholly or partly adapted. A list of those Ordinances is at **Annex 4**.

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

11. Before Reunification there were approximately 36 Ordinances that were applicable to the former Hong Kong Government, but were silent on their applicability to other aspects of the ‘Crown’.

12. When those Ordinances were drafted and enacted, they were intended to apply to the Hong Kong Government but not other aspects of the ‘Crown’. This intention reflected policy decisions. For example, the Surviving Spouse and Children’s Pensions Ordinance (Cap.79) was intended to make provision for granting pensions to surviving spouses and children of deceased public officers in the Hong Kong Government or Judiciary. It was not intended to provide similar benefits in respect of deceased UK Government officials.

13. The resumption of the exercise of sovereignty has not affected the scope of application of the Ordinances and does not provide a strong reason for changing the scope of their application. Nevertheless the Administration will review any Ordinance in respect of its applicability when the need to do so has been identified.

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

14. In the paper considered by the AJLS Panel on 2 November 1998, the Administration emphasized that –

- (1) it would be an extremely time-consuming and legally difficult task to consider all sections in hundreds of Ordinances in order to form a view whether the ‘beneficial purpose of the legislation would be wholly frustrated’ if the Ordinances were not applicable to the SARG or CPG offices;
- (2) it is not clear what purpose this would serve.

15. The Administration nevertheless repeated its undertaking to review any Ordinance in respect of its applicability when the need to do so had been identified.

16. Since that time, no such need has been identified in respect of any Ordinance.

B. Outstanding issues under the Adaptation Exercise

(a) Adaptation exercise

17. The Adaptation of Laws (No.9) Bill 1999 proposed to adapt a number of transport related Ordinances, including provisions relating to tunnels. Having considered the issues raised at the Bills Committee, the Administration announced that it intended to conduct a comprehensive review of the tunnel legislation and would not resume the Second Reading debate on the Bill in that legislative session.

18. Since then, Transport Bureau has been conducting that comprehensive review of tunnel legislation with a view to removing inconsistencies. After that review has been completed, the adaptation of that legislation can be brought forward again.

19. The adaptation of two of the Ordinances included in the Adaptation of Laws (No.9) Bill 1999, namely the Road Traffic Ordinance (Cap. 374) and the Road Traffic (Driving-offence Points) Ordinance (Cap. 375), will be reintroduced into the Legislative Council in the forthcoming Road Traffic Legislation (Amendment) Bill 2001.

20. The Adaptation of Laws (No.16) Bill 1999 and nine other Adaptation Bills concerned the proper adaptation of provisions that made it clear that certain statutory corporations are not servants or agents of the 'Crown'. The Administration originally proposed to adapt the references to 'Crown' in these provisions to 'State', but the relevant Bills Committees considered that they should be adapted to references to the 'Government'. The Administration considered that, in this context, a change from 'Crown' to 'Government' would be outside the scope of the adaptation exercise and withdraw the proposed amendments.

21. The Administration now proposes to amend 15 of these provisions so that they refer to 'Government' instead of 'Crown'. The amendments will be included in the Statute Law (Miscellaneous

Provisions) Bill 2001, which is due to be introduced into the Legislative Council in July this year. Similar provisions in three other Ordinances will not be amended, since the Ordinances are soon to be repealed.

(b) Arbitration Ordinance

22. The Arbitration Ordinance is one of the 17 Ordinances whose applicability was reviewed by the Administration. The Administration considered that its application should be extended to the CPG offices in the HKSAR.

23. The Arbitration (Amendment) Bill 1999 included a provision to that effect. It was our policy intention that the application of the Arbitration Ordinance should be extended to cover all persons and organs, including the Hong Kong Special Administrative Region Government and the CPG offices. The Bill proposed a new application section to replace section 47 of the Arbitration Ordinance, so that the Ordinance would be applicable to any individual or organ as and when it enters into or becomes in any way involved in an arbitration agreement that is subject to Hong Kong law. However, we agreed with the Bills Committee's view that the drafting of the proposed new section might not be perfect, and that there may be better ways to reflect the policy intention.

24. As a result, when the Bill was enacted, the Ordinance's previous scope of application was retained. The Administration undertook to continue to work on an appropriate formula to carry out our policy intention and extend the applicability of the Ordinance. An appropriate formula will be introduced into the Legislative Council as soon as it is ready.

Annex 1

(A) 17 Ordinances that expressly bind the Government (but are silent on the binding effect on the State organs)

	<u>Title</u>	<u>Chapter</u>	<u>Section</u>
1	Gas Safety Ordinance	Cap.51	s.3
2	Arbitration Ordinance	Cap.341	s.47
3	Ozone Layer Protection Ordinance	Cap.403	s.18
4	The Legislative Council Commission Ordinance	Cap.443	s.23
5	Dumping at Sea Ordinance	Cap.466	s.3
6	Marine Parks Ordinance	Cap.476	s.28
7	Sex Discrimination Ordinance	Cap.480	s.3
8	Mandatory Provident Fund Schemes Ordinance	Cap.485	s.3
9	Personal Data (Privacy) Ordinance	Cap.486	s.3
10	Disability Discrimination Ordinance	Cap.487	s.5
11	Plant Varieties Protection Ordinance	Cap.490	s.3
12	Environmental Impact Assessment Ordinance	Cap.499	s.3
13	Social Workers Registration Ordinance	Cap.505	s.3
14	Occupational Safety & Health Ordinance	Cap.509	s.5
15	Patents Ordinance	Cap.514	s.151
16	Registered Designs Ordinance	Cap.522	s.4
17	Family Status Discrimination Ordinance	Cap.527	s.3

LegCo Panel on the Administration of Justice and Legal Services

The applicability of the Personal Data (Privacy) Ordinance to the
"State" organs in Hong Kong

At the 25 February meeting of the LegCo Panel on the Administration of Justice and Legal Services, members requested that on the review of the applicability of the Personal Data (Privacy) Ordinance to the "State" organs in the SAR, the Government should -

- (i) explain the reasons for commencing discussions with the Central People's Government only a few weeks ago but not earlier, bearing in mind that the item was discussed by the Panel as early as September 1998;
- (ii) elaborate on the Administration's advice that this Ordinance is more complicated, e.g. in what aspects; and
- (iii) advise the expected timing for completing the review.

2. This paper sets out the Administration's response to the above points.

Discussions with the Central People's Government and timing for the completion of the review

3. The Government provided information on the Personal Data (Privacy) Ordinance (PDPO) to the Central People's Government mid last year. Subsequently, the Administration further elaborated and explained to the Central People's Government the major provisions of the Ordinance. We have already started discussing the applicability of the Ordinance with the Central People's Government. When we have completed our discussions and worked out our recommendations, we will report back to the Panel on the Administration of Justice and Legal Services.

Complexity of the Personal Data (Privacy) Ordinance

4. Unlike other Ordinances which contain specific rules on what are or are not permitted, at the heart of the PDPO are six data protection principles phrased in broad terms, i.e. the six principles in Schedule 1 of the PDPO.

5. These principles leave considerable room for interpretation. For example, they contain expressions such as "fair in the circumstances of the case" (principle 1(2)), "all practicable steps shall be taken" (principles 1(3), 2(1), 4 and 5) and "personal data shall not be kept longer than is necessary" (principle 2(2)). Therefore, in order to determine how the Ordinance affects a particular data user and whether his existing practices comply with the Ordinance, it is necessary to consider questions such as the nature of the personal data he has to hold, for what purposes he has to collect and hold the personal data, how he collects and safeguards the data, what are the practical constraints to take into consideration, etc.

6. Apart from the six data protection principles, the exemption provisions in Part VIII of the PDPO are also phrased in broad terms. These exemption provisions seek to strike a balance between the privacy rights of the individual in relation to personal data and various other public interests. One has to consider questions similar to those mentioned in the preceding paragraph in determining whether the exemptions apply to particular types of personal data held by a particular data user.

7. In order to provide guidance on how to comply with the Ordinance in general and the data protection principles in particular, the Ordinance empowers the Privacy Commissioner for Personal Data to issue codes of practice. So far, the PC has issued two such codes -

(a) *Code of Practice on the Identity Card Number and other Personal Identifiers;*
and

(b) *Code of Practice on Consumer Credit Data.*

8. The former Code has impact on all data users, who will have to consider what changes, if any, are necessary to their existing practices in order to comply with the Code.

9. The statutory protection of privacy in relation to personal data is relatively new in Hong Kong and given the complexity of the PDPO as explained above, it is understandable that it takes more time to assess whether - and if so, how - a particular organisation's operation will be affected by the Ordinance.

Home Affairs Bureau

March 1999

Letterhead of GOVERNMENT SECRETARIAT HOME AFFAIRS BUREAU

Annex 3

OUR REF. : HAB/CR/7/22/31 Pt.5
YOUR REF :
TEL NO. : 2835 1383
FAXLINE : 2573 8461

21 April 2001

Mrs Percy Ma
Clerk to LegCo Panel on
Administration of Justice and Legal Services
Legislative Council Building
3 Jackson Road
Hong Kong

Dear Mrs Ma,

**Applicability of
the Personal Data (Privacy) Ordinance
to CPG offices in Hong Kong**

I refer to my letter dated 16 January 2001 and your subsequent request for another progress report to be provided to the Panel in April 2001.

As stated in my earlier letters, we understand that Hong Kong and Macau Affairs Office would discuss with the individual authorities concerned on the implications of extending the applicability of the Personal Data (Privacy) Ordinance to CPG offices in Hong Kong. We are still awaiting information from HKMAO on the result of their consultation with the relevant authorities.

Yours sincerely,

(NG Hon-wah)
for Secretary for Home Affairs

Annex 4

	Ordinance	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