

Adaptation of Laws Bill 2001

Introduction

This note sets out the Government's response to the issues raised at the Bills Committee meeting on 15 July 2002. At that meeting, the Government was requested –

- (a) to explain the principles of adaptation of laws and provide legal advice on how the adaptations of “Commissioner” and “Crown servant” conform with the intent and scope of adaptation of laws;
- (b) on the Administration's advice that the five offices under the definition of “prescribed officer” might not be construed to fall within the meaning of “offices of emolument under the Government”, to provide the relevant references to these offices in the respective Ordinances and explain their functions and operation;
- (c) subject to (a) and (b), to consider the alternative to deal with the adaptation of “Commissioner” and “Crown servant” by way of an amendment bill.

Guiding Principle of Adaptation

2. The Adaptation of Laws Bill 2001 (the Bill) seeks to make identified provisions of the Prevention of Bribery Ordinance (POBO) (Cap.201) and the Independent Commission Against Corruption Ordinance (ICACO) (Cap. 204) conform to the Basic Law and Hong Kong's new constitutional position. In line with the guiding principle for adaptation exercise, we confirm that if it were not for the constitutional change, the Bill would not have been required at all. The Bill is therefore pure adaptation in nature.

3. As set out in paragraph 5(a) of the “Guiding Principles and Guideline Glossary of Terms” (LC Paper No. CB(2)739/98-99(01), the guiding principle of the adaptation of laws programme is –

“that the provision when adapted should be consistent with the Basic Law and with Hong Kong's status as a Special Administrative Region of the People's Republic of China, but that

subject to this each provision should, as far as possible, be to the same legal effect after its adaptation as before. Any amendment that is neither related to the Basic Law nor necessitated by Hong Kong's new status are outside the scope of the adaptation of laws programme.”

4. As indicated by the short title of the Bill which states clearly that the Bill is an adaptation Bill, the Bill can only contain amendments on adaptation but not amendments relating to law reform. The adaptation nature of the Bill serves to limit the scope of the Bill to adaptation amendments preserving the same legal effect as before reunification. The scope of an adaptation bill is therefore tightly circumscribed. In accordance with the above principle, we have made proposals to adapt, among others, “Commissioner” and “Crown servant” appearing in the POBO and the ICACO.

Adaptation of “Commissioner”

5. Before reunification, the Commissioner of the Independent Commission Against Corruption (ICAC) is defined under section 2(1) of the POBO as “the person appointed by the Governor to be in charge of the ICAC and includes the Deputy Commissioner”. The “person appointed by the Governor to be in charge of the ICAC” also includes the Acting Commissioner, who is appointed by the Governor (now the Chief Executive (CE)) under section 7(2) of the ICACO. Therefore, the Acting Commissioner was and should continue to be included in the definition of “Commissioner” in the POBO. The proposed adapted definition of “Commissioner” in the POBO makes it clear that the Acting Commissioner, though not appointed under the Basic Law as the Commissioner, will remain to be included in that definition. Hence, it serves to preserve the legal effect of “Commissioner” in the POBO before reunification.

6. The proposed wording of the adapted definition of “Commissioner”, as set out in the table below, merely serves to ensure that the meaning of “Commissioner” will continue to cover the same persons.

	ICACO	POBO
Original Term	“Commissioner” (廉政專員) means the Commissioner of the Independent Commission Against Corruption appointed under section 5 and the Deputy Commissioner appointed under section 6	“Commissioner” (專員) means the person appointed by the Governor to be in charge of the Independent Commission Against Corruption and includes the Deputy Commissioner
Proposed Term	“Commissioner” (廉政專員) means the Commissioner of the Independent Commission Against Corruption appointed in accordance with the Basic Law and includes the Deputy Commissioner appointed under section 6	“Commissioner” (專員) means the Commissioner of the Independent Commission Against Corruption appointed in accordance with the Basic Law and includes the Deputy Commissioner appointed under section 6 of the Independent Commission Against Corruption Ordinance (Cap. 204) and the person appointed to act as the Commissioner of the Independent Commission Against Corruption under section 7(2) of that Ordinance

7. A member had asked whether the proposed adaptation of “Commissioner” in the POBO and the ICACO would be consistent with the Basic Law. It should be noted that the Basic Law does not specify the appointment of the Deputy Commissioner and the Acting Commissioner. Rather, the appointment of the Deputy Commissioner and the Acting Commissioner is provided for under the ICACO. By virtue of sections 6 and 7(2) of the ICACO, they were appointed by the Governor before 1 July 1997. According to paragraph 6 of Annex 3 to the Decision of the Standing Committee of the National People’s

Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law, any reference to “the Governor” in the laws previously in force in Hong Kong which are adopted as laws of the Hong Kong Special Administrative Region (HKSAR) shall be construed as a reference to “the CE”. This provision is reflected in item 11 of Schedule 8 to the Interpretation and General Clauses Ordinance (Cap.1). Therefore, the power of appointment lies with the CE under sections 6 and 7(2) of the ICACO.

8. The adaptation proposal for “Commissioner” aims to reflect the new appointment authority for the Commissioner as necessitated by the Basic Law on the one hand and to preserve the legal effect of the definition of Commissioner in the context of the ICACO and the POBO as before reunification on the other. The proposed definition of “Commissioner” in both ordinances is consistent with the Basic Law.

Adaptation of “Crown servant” to “prescribed officer”

9. We have given careful consideration to the adaptation of “Crown servant” to “prescribed officer”. As explained at the last Bills Committee meeting, the proposed definition of “prescribed officer” is to preserve the same legal effect the term “Crown servant” had before 1 July 1997.

10. “Crown servant” is defined as being “a person holding an office of emolument, whether permanent or temporary, under the Crown in right of the Government”. In accordance with item 2 of Schedule 8 of the Interpretation and General Clauses Ordinance (Cap.1), however, the “Crown” shall, save for certain specified circumstances, be construed as a reference to “the Government of the HKSAR”.

11. Without the Bill or the proposed adaptation to “prescribed officer”, a mechanical adaptation of “Crown servant” would be to replace it by “Government servant” to mean “a person holding an office of emolument, whether permanent or temporary, under the Government”. There is however some doubt about whether the expression “under the Government” could cover exactly the same scope as that covered by the expression “under the Crown in right of the Government”. The “adaptation definition” of “prescribed officer” thus aims to put things beyond doubt and preserve the same scope that “Crown servant” covered before 1 July 1997.

12. We consider that “prescribed officer” as proposed in the Bill is appropriate to achieve the stated adaptation objective, as we cannot have a mechanical formula for the reference “Crown servant”. Indeed, this Council and the Government have agreed on previous occasions that non-mechanical adaptations would be acceptable in certain circumstances having regard to the legal effect and context of individual pieces of legislation. Examples include the adaptation of “Crown” in Adaptation of Laws (No. 12) Bill 1998 and “Colonial Regulations” in various other Bills. Details are at Annex A.

The Five Listed Offices before Reunification

13. It is clear that the holder of any of the five offices set out in paragraph (b) of the proposed adapted definition of “prescribed officer” was a “Crown servant” before reunification. It has been established by case law that Judicial Officers were holders of offices of emolument “under the Crown in right of the Government”. In *Mutual Luck Investment Ltd* [1997] HKLRD 1097, it was held by the court that a Justice of Appeal held his office “under the Crown in right of the Government”, and the fact that a Justice of Appeal performed his duties independently of Government control did not prevent him from holding his office “under the Crown”. What is important is not that the duties of the office are performed independently of Government control, but that the duties of the office are connected with the public service, hence, establishing the office as “under the Crown in right of the Government”. In the same judgement, there were passing remarks that the Director of Audit (according to section 3(3) of the Audit Ordinance, Cap. 122) was also an office holder “under the Crown in right of the Government”, despite the fact that he enjoyed an independence not dissimilar to that which constitutional convention accords to judges. The provision quoted in respect of the Director of Audit is common to the Commissioner of the ICAC.

14. The unique set-up applies similarly to the Monetary Authority and the Chairman of the Public Service Commission, who are indeed appointed to assist the Financial Secretary and the CE respectively to carry out public duties of emoluments. They were therefore “Crown servants” before reunification.

15. We have explained the doubt that the expression “under the Government” may not cover exactly the same scope as that covered by

the expression “under the Crown in right of the Government”. There were also passing remarks in the above-mentioned decision in Mutual Luck Investment Ltd that the phrase “in right of the Government of Hong Kong” is an old-fashioned phrase which simply means “in respect of Hong Kong”. It is argued therefore that the term “under the Crown in right of the Government” is wider than the term “under the Government” confers. Hence, our proposal to list out the five offices in the proposed definition of “prescribed officer” to remove any doubt as to whether they hold offices of emolument “under the Government”.

Express references to the Five Listed Offices

16. As set out in Annex B, holders of the five listed offices have certain distinguishable features that might lead to contention or argument that these officers are not holders of offices under the Government on the following grounds -

- (i) compared with other offices which perform their functions as part of and under the Government, these five offices have been performing their functions independently from the Government; and
- (ii) unlike other offices, the five offices do not form part of the establishment of the civil service.

17. We are wary of the possibility, however slight, of any such contention or argument that may be put forward before the court that these five listed offices are not offices of emolument “under the Government” and hence are outside the application of the provisions of the POBO and ICACO. We have therefore proposed a prudent approach which will provide greater certainty by listing the five offices that were covered in the definition of “Crown servant” and should remain so in the proposed definition of “prescribed officer”.

18. We are not aware of any other office which falls within the meaning of “Crown servant” but may fall outside the definition of “prescribed officer” as we now propose.

19. We acknowledge that the court may accept that “prescribed officer” has the same legal effect as “Crown servant” even without the listing of the five offices. Indeed nowhere in our proposed definition suggests that the five listed offices must not be offices of emolument “under the Government”. Nevertheless, they are listed expressly for the

avoidance of doubt. Having regard to the nature of these ordinances which contain important penal provisions, certainty of meaning is of crucial importance and we consider such prudent approach as essential and proper.

20. In conclusion, we confirm that the adaptation proposals for “Commissioner” and “Crown servant” are in line with the principle and scope of an adaptation of laws bill, and the proposals seek only to preserve the same legal effect of the terms as before reunification.

Administration Wing
Chief Secretary for Administration's Office
September 2002

Precedents of “non-mechanical” Adaptation

1. Adaptation of Laws (No. 12) Bill 1998
 - In this Bill, “Crown” was adapted to “HKSAR” instead of “Government” in section 56(2)(a) of the Criminal Procedure Ordinance, Cap. 221 following the Bills Committee’s view.
2. Adaptation of Laws Bill 1998
 - In this Bill, the reference “Colonial Regulations” was adapted to “ “Public Service (Administration) Order” which means –
 - (a) the Public Service (Administration) Order 1997 (Executive Order No.1 of 1997);
 - (b) the Public Service (Disciplinary) Regulation made under section 21 of that Order (and together with that Order published as S.S. No.5 to Gazette No. 2/97); and
 - (c) any other regulation made or any direction given under that Orderas amended from time to time.”

instead of “relevant executive order” meaning “any executive order issued by the Chief Executive for the administration of the public service and any regulation or direction made under such order” as initially proposed by the Administration.

- In the report of the Bills Committee on the Adaptation of Laws Bill 1998, it was stated “For the purpose of clarity and certainty, members suggested that the specific executive order in force be included in the definition of “relevant executive order”.” The above adapted definition was applied to a number of ordinances in relation to disciplined services.

Distinguishable Features of the Five Listed Offices

In view of the following features of the five listed offices, there is doubt as to whether they hold offices of emolument under the Government -

	Judicial officers	Director of Audit	Commissioner, Independent Commission Against Corruption (ICAC)	Monetary Authority	Chairman, Public Service Commission (PSC)
Management and Control of Operations	Basic Law Article 85 provides that the court of the HKSAR shall exercise judicial power independently.	Basic Law Article 58 provides that a Commission of Audit shall function independently and be accountable to the Chief Executive (CE).	Basic Law Article 57 provides that a Commission Against Corruption shall function independently and be accountable to the CE.	Section 5A of the Exchange Fund Ordinance, Cap. 66 provides that the Monetary Authority assists the Financial Secretary (FS) in the performance of his functions under Cap. 66 and performs such functions as the FS may direct.	The PSC is established under section 3(1) of the Public Commission Ordinance, Cap. 93. The Chairman of PSC is not subject to the direction and control of the CE or any person.
Civil Service Establishment	All of the five offices are <u>not</u> on the civil service establishment.				

	Judicial officers	Director of Audit	Commissioner, Independent Commission Against Corruption (ICAC)	Monetary Authority	Chairman, Public Service Commission (PSC)
Staff	Staff appointed by the Judiciary are <u>not</u> on the civil service establishment.	Staff of the Director of Audit are on the civil service establishment.	Staff appointed by the Commissioner under section 8 of the ICAC Ordinance, Cap. 204 are <u>not</u> on the civil service establishment.	Staff appointed to assist the Monetary Authority under section 5A(3) of the Exchange Fund Ordinance, Cap. 66 are <u>not</u> on the civil service establishment.	Supporting staff of the PSC are civil servants.

2. Notwithstanding the above, the five offices were clearly “Crown servant” holding offices of emolument under the Crown in right of the Government and should remain so after reunification through the adaptation amendments. Relevant provisions are set out below -

	Judicial officers	Director of Audit	Commissioner, Independent Commission Against Corruption (ICAC)	Monetary Authority	Chairman, Public Service Commission (PSC)
Appointment and Dismissal Authority	By the CE on recommendation (see Basic Law Articles 88, 89 and 90); or by the Chief Justice under various Ordinances.	By the Central People’s Government (CPG) on the nomination or recommendation of the CE (see Basic Law Articles 15 and 48(5)).	By the CPG on the nomination or recommendation of the CE (see Basic Law Articles 15 and 48(5)).	By the FS (see section 5A(1) of the Exchange Fund Ordinance, Cap. 66).	By the CE (see section 3 of the PSC Ordinance, Cap. 93).

	Judicial officers	Director of Audit	Commissioner, Independent Commission Against Corruption (ICAC)	Monetary Authority	Chairman, Public Service Commission (PSC)
Emolument	Direct emolument from the general revenue of the Government. Judiciary Administrator is the controlling officer.	Direct emolument from the general revenue of the Government. Director of Audit is the controlling officer.	Direct emolument from the general revenue of the Government. ICAC is the controlling officer.	Direct emolument are charged to the Exchange Fund of the Government (see section 6 of the Exchange Fund Ordinance, Cap. 66).	Direct emolument from the general revenue of the Government. Chairman, PSC is the controlling officer.
Public Nature of Duties	To perform judicial functions and exercise powers of judicial officers as provided for under various Ordinances.	To examine, inquire into and audit the accounts of all accounting officers in respect of public moneys, stamps, securities, stores and any other Government property, etc.	To perform duties and exercise powers under the Prevention of Bribery Ordinance, Cap. 201 and the ICAC Ordinance, Cap. 204.	Assist the FS in the performance of his functions according to the Exchange Fund Ordinance, Cap. 66.	To advise the CE on the filling of vacancies, promotions and disciplinary cases in the public service, according to the PSC Ordinance, Cap. 93.