

**The Hong Kong Bar Association's Views on the
Adaptation of Laws Bill 2001**

1. The Legislative Council Bills Committee on the Adaptation of Laws Bill 2001 asks the Bar for its views on the provisions of that Bill.
2. The Adaptation of Laws Bill 2001 ("the Bill") is said to propose adaptational and consequential changes to the Prevention of Bribery Ordinance (Cap 201) and the Independent Commission Against Corruption Ordinance (Cap 204).
3. Having considered the provisions of the Bill and the report of the LegCo Legal Service Division on the Bill, the Bar would confine its views to one aspect of the Bill, namely the proposed substitution of the expression "Crown servant" with "prescribed officer".

The Concern of the Bills Committee

4. It appears that members of the Bills Committee are concerned that the proposed substitution of the expression "Crown servant" with "prescribed officer" is not an adaptational change.
5. Paragraph 5 of the paper entitled "Adaptation of Laws Programme: Guiding Principles and Guideline Glossary of Terms" sets out the principles for the adaptation of laws programme. The Bar takes the view that if an amendment to an Ordinance is necessitated by the change in the status of Hong Kong to become a Special Administration Region of the People's Republic of China and the need to ensure consistency with the Basic Law of the HKSAR, and provide that the legal effect of the pre-amendment provision and the post-amendment provision are the same, then that amendment is an adaptational change.
6. The Bar's concern is therefore the legal effect and in particular whether the categories of persons subject to ss 3 and 10 of the Prevention of Bribery Ordinance remains the same after the amendment.

Rationale for Drafting of "Prescribed Officer"

7. The drafting of the definition of "prescribed officer" indicates that the Administration takes the view that purely terminological changes may not achieve the intended adaptation in terms of legal effect. It also shows that the Administration considers that the categories of persons listed under

paragraph (b) to the definition may well be persons “holding an office of emolument, whether permanent or temporary, under the Government” but cannot be sure about it.

8. The Bar understands the Administration’s rationale for taking this ambivalent stance. “Crown servant” is defined in the Prevention of Bribery Ordinance as “a person holding an office of emolument, whether permanent or temporary, under the Crown in right of the Government”. “Government” is defined prior to 1st July 1997 to mean the Hong Kong Government in the Interpretation and General Clauses Ordinance (Cap 1) s 3.
9. “Crown servants” are also included in the larger class of “public servants” as defined in the Prevention of Bribery Ordinance but Crown servants are subject to stricter control under the Prevention of Bribery Ordinance, such as prohibition of soliciting or accepting advantage without general or special permission of the Governor (s 3) and prohibition of having a standard of living or property disproportionate to official emoluments in the absence of a satisfactory explanation (s 10).
10. The Hong Kong Reunification Ordinance (110 of 1997) amended the Interpretation and General Clauses Ordinance to require certain words and expressions in all laws previously in force to be construed in accordance to Sch 8 thereof. Paragraphs 1 and 2 of Sch 8 deals with references in any provision to “Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions)”.
11. The expression “Crown in right of the Government” appears to be an expression covered by Sch 8 of the Interpretation and General Clauses Ordinance. And it appears that the initial consideration of the Administration was to equate the expression with simply the Government of the HKSAR. See Legislative Council Brief, para 8 (6th December 2001). However, legal advice given to the Administration expressed doubt as to the scope of the expression as adapted and directed specific concern to five classes of officers, including the Monetary Authority, the Director of Audit, the Chairman of the Public Service Commission, the ICAC Commissioner and members of that commission and members and staff of the Judiciary. It was considered that those five classes of officers “might not be automatically construed as holders of an office of emolument under the Government” due to their specific and independent nature of operation and, in the case of judicial officers, to considerations of the appearance of separation of powers: *ibid* paras 12-14.
12. Art 59 of the Basic Law of the HKSAR prescribes that the Government of the HKSAR shall be the executive authorities of the Region. Arts 57 and 58 establish the Commission Against Corruption and the Commission of Audit and stipulate those two commissions to function independently and be accountable to the Chief Executive. Although the expression “Government” existed in the

previous laws in force (and particularly Interpretation and General Clauses Ordinance s 3), that expression was not then confined to the executive authorities of the colony. In Sue v Hill (1999) 199 CLR 462, the majority of the High Court of Australia (Gleeson CJ, Gummow and Hayne JJ) had the occasion to consider various senses of the expression “Crown” and indicated that one sense of the expression was to identify the paramount powers of the United Kingdom, the parent state, in relation to its dependencies. In the course of colonial administration, some of those prerogative powers had been converted to the use of the colonial executive and so brought under the control of the local legislature and such prerogatives of the Crown were said to become vested “in the Crown in right of the colony”. Later, with the establishment of the Australian federation, the expression “the Crown in right of ...” the government in question was used to identify the Australian States, the newly created and evolving units (pp 499-501).

13. Given Art 59 of the Basic Law and the present definition of “Government” in the Interpretation and General Clauses Ordinance s 3, the Bar is of the view that the present meaning of “Government” is appreciably narrower than that expression was under the previous laws in force.

Whether Persons Listed in Paragraph (b) were “Crown Servants”

14. The consideration as to legal effect requires one to address the question of whether those listed in paragraph (b) of the definition of “prescribed officer” were Crown servants. This turns on the criteria adopted for including persons to be Crown servants. The learned contributor of Halsbury’s Laws of Hong Kong, Vol 3, Bribery, Corruption and Organized Crime title considers the extent of control and the nature of the duties at [60.025]. Those that exercise functions that have inherently assumed the mantle of the Crown on a regular or routine basis ipso facto do so in the service of the Crown. See Lai Hing v Cater & A-G [1976] HKLR 1022 where Cons J held that the ICAC Commissioner was a Crown servant.
15. The criteria adopted by Cons J and then by the learned contributor of the title on Bribery, Corruption and Organized Crime of Halsbury’s Laws of Hong Kong justify the inclusion of judges, magistrates and the ICAC Commissioner to be Crown servants. The same may not, however, be said of the Director of Audit. The Audit Ordinance (Cap 122) stipulates that the appointment and dismissal of the director requires prior approval of the Secretary of State and therefore “the Crown in right of the Hong Kong Government” as personified by the Governor did not have complete and ultimate control. Nor did the functions performed by the director those inherently assumed by the Crown.

16. Therefore, the Bar is of the view that the inclusion of the Director of Audit in the definition of “prescribed officer” results in an expansion of the categories of officers covered by ss 3 and 10 of the Prevention of Bribery Ordinance and the proposed substitution of “Crown servant” with “prescribed officer” cannot be an adaptational change and the inclusion of the Director of Audit in the latter definition would be a substantive amendment to the law.

“Principal Officials”

17. The Bar wishes to raise the issue that the Administration might have assumed that paragraph (a) of the proposed definition of “prescribed officer” include the principal officials referred to in Art 48(5) of the Basic Law (including the Secretaries, the directors of Bureaux, the Commissioner Against Corruption, the Director of Audit, the Commissioner of Police, the Director of Immigration and the Commissioner of Customs and Excise). The Bar queries and has serious reservations as to whether they can now be described as “holding an office of emolument under the Government [of the HKSAR]” since they are now appointed by the Central People’s Government under Art 15 and Chapter IV of the Basic Law. Previously, the officials now grouped as principal officials were appointed by the Governor (Letters Patent 1917-1993, Art XIV). In order to avoid doubt, they should be separately categorized as prescribed officers.

(NB: The Bar notes the discussion between 1999 and 2002 before the LegCo Constitutional Affairs Panel on the application of bribery prevention provisions to the Chief Executive and in particular, the Administration’s views that the Chief Executive is not a Government employee nor is he employed by a public body and therefore since he is neither “government servant” nor a “public servant”, the relevant provisions of the Prevention of Bribery Ordinance concerning “government servants” and “public servants” do not apply to him.)

Alternative Drafting

18. If the expression “Crown in right of the Government” means the colonial administration under the British Crown under the previous law in force, the Bar is of the view that the equivalent expression under the constitutional framework prescribed in the Basic Law should be the Hong Kong Special Administrative Region, the political entity established by the Decision of the National People’s Congress on the Establishment of the Hong Kong Special Administrative Region (adopted at the Third Session of the Seventh National People’s Congress on April 4, 1990). And it is not disputed that the HKSAR encompasses its executive authorities, namely the HKSAR Government. See Sue v Hill (supra).

19. The Bar therefore suggests that the Bills Committee may wish to ask the Administration to consider, in the substantive amendment Bill introducing the substitution of “Crown servant” with “prescribed officer”, the drafting of “any person holding an office of emolument, whether permanent or temporary, under the Hong Kong Special Administrative Region”. This drafting is wide enough to include the Judiciary, the ICAC (excluding the Commissioner) and the Chairman of the Public Service Commission but the “principal officials” would require separate listing for reasons set out above.

Summary

20. In sum, the Bar expresses the following views —

(a) The proposal to amend the expression of “Crown servant” in both the Prevention of Bribery Ordinance and the Independent Commission Against Corruption Ordinance by replacing it with the expression of “prescribed officer” as defined in the Bill is not an adaptational change. The procedure for the passage of this proposed amendment should not be the procedure for the passage of Bills introduced under the adaptation of laws programme.

(b) The Bills Committee may wish to ask the Administration to consider drafting the definition of “prescribed officer” to mean: “(a) any person holding an office of emolument, whether permanent or temporary, under the Hong Kong Special Administrative Region; and (b) [a list setting out the “principal officials referred to in Art 48(5) of the Basic Law]”.

Dated 12th September 2002.