

Adaptation of Laws Bill 2001

Introduction

This note sets out the Administration's response to the issues raised by the Bills Committee at its meeting on 17 September 2002 and the submission made by the Hong Kong Bar Association (Bar Association) dated 12 September 2002 on the Adaptation of Laws Bill 2001 (the Bill).

To Replace the Proposed Definition of "Prescribed officer" by a Descriptive Statement to Preserve the Scope of "Crown servant"

2. In the Bill, we propose to adapt the expression "Crown servant" under the Prevention of Bribery Ordinance, Cap. 201 ("POBO") by "prescribed officer", meaning –

- (a) any person holding an office of emolument, whether permanent or temporary, under the Government; and
- (b) the following persons (to the extent that they are not persons included in paragraph (a)) –
 - (i) the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap. 66) and any person appointed under section 5A(3) of that Ordinance;
 - (ii) Director of Audit;
 - (iii) Chairman of the Public Service Commission;
 - (iv) Commissioner of the Independent Commission Against Corruption (ICAC) and any member of the staff of that Commission;
 - (v) any judicial officer holding a judicial office specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap. 92) and any judicial officer appointed by the Chief Justice, and any member of the staff of the Judiciary.

3. Under the POBO, "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 Hong Kong Special Administrative Region (HKSAR)”. In the absence of 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 as to 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.

4. Members of the Bills Committee have suggested that the proposed definition of “prescribed officer” should be replaced by a general descriptive statement to achieve greater flexibility and continuity in the adapted definition. Members suggested that an alternative option along the line proposed by the Bar Association should be considered. Specifically, one suggestion was to adapt “Crown servant” to mean “any person holding a public office of emolument, whether permanent or temporary, in respect of the HKSAR”.

5. We have indeed considered similar alternative drafting as suggested by Members or the Bar Association, i.e. to devise a formula or use an “exhaustive definition” that would catch all “Crown servants” without specific listing of offices. Our considered view is that such an “exhaustive definition” would either widen the original scope of “Crown servant” by catching unintended persons, or could not address the doubt as identified in paragraph 3 above, as we cannot find a direct replacement term for the concept or description of “Crown servant”.

6. To illustrate this point, reference may be made to the specific proposals to replace the definition of “Crown servant” by (a) “any person holding a public office of emolument, whether permanent or temporary, in respect of the HKSAR”; and (b) “any person holding an office of emolument, whether permanent or temporary, under the HKSAR”. We have examined the proposals carefully and can see the following difficulties with each.

7. The meaning of the phrase “in respect of” or, for that matter, “in the right of” used in relation to the HKSAR or the HKSAR Government is less than definite as a legal term, and will introduce an undesirable element of uncertainty in the meaning and scope of the adapted definition. Also, the omission of the original reference “under” in the adapted definition may go beyond the scope of the original definition of “Crown servant” which was defined to mean “a person holding an office of emolument, whether permanent or temporary, under the Crown in right of the Government”.

8. Further, at common law¹, whether a person is a holder of an office under an institution is determined by consideration of a number of factors: (a) who has the power to appoint him; (b) who has power to exercise control over him and the degree of such control; (c) who has power to dismiss him; and the nature of his duties. It is far from clear what the expression “any person holding an office of emolument...under the HKSAR” connotes in the light of this test because the HKSAR (as opposed to the HKSAR Government) rarely, if ever, appoints, controls or dismisses persons.

9. When compared to an “exhaustive definition”, the present proposed definition of “prescribed officer” has the merit of greater certainty. Given the penal nature of the POBO, certainty of meaning in the proposed adapted definition is of utmost importance. In view of the foregoing, we remain of the view that the proposed definition of “prescribed officer” would be able to preserve the legal effect of “Crown servant” without introducing any unintended legal effect to this definition.

Whether the Chief Executive (CE) and Principal Officials (POs) are Holders of an Office of Emolument under the Government

The Constitutional Position of the CE

10. The constitutional position of the CE as reflected in the provisions of the Basic Law is as follows –

- (a) under BL 15, the CE is appointed by the Central People’s Government (CPG);
- (b) under BL 45(1), the CE is selected by local election or through consultation held locally;
- (c) under BL 60(1), the CE is the head of the Government;
- (d) under BL 43(2), the CE is accountable to the CPG and the HKSAR in accordance with the provisions of the Basic Law; and
- (e) under BL 48(8), the CE has the power and function to implement the CPG’s directives in respect of the relevant matters provided for in the Basic Law.

¹ Re Legislative Council election for the Hong Kong Island (East) Electoral College constituency held 22nd September 1988 [1989] 2 HKLR 195.

11. In view of the constitutional position of the CE as stated in paragraph 10 as well as the common law test mentioned in paragraph 8, the CE is not a holder of an office of emolument “under the Government” under the POBO because -

- (a) he is not appointed by the Government;
- (b) the Government has no power to exercise control over him. It is the CE who leads the Government;
- (c) the Government has no power to dismiss him; and
- (d) the duties of the CE are of a public nature. He is accountable to the CPG and the HKSAR, but not the Government.

12. As we have explained at meetings of the Legislative Council Panel on Constitutional Affairs (LegCo CA Panel) before, in view of his unique constitutional position, the CE does not fall within the definition of “Crown servant” or the proposed adapted definition of “prescribed officer” under the POBO. Members of the LegCo CA Panel are also aware that the provisions and control framework of the POBO are generally premised upon the common law principal-agent relationship. In this regard, the CE is not an agent of the Government within the meaning of “agent” in section 2(1) of the POBO, as we have explained to LegCo CA Panel previously. We are considering, as a separate law reform exercise, an appropriate option to extend the general standard of bribery prevention applicable to prescribed officers under the POBO for application to the CE.

POs are holders of office of emolument “under the Government”

13. The application of laws to POs was discussed at the Legislative Council Subcommittee to study the proposed accountability system for principal officials and related issues. We have confirmed that POs would fall within the meaning of the proposed definition “prescribed officer”, hence would be subject to the same standard of control as civil servants under the POBO.

14. Under BL 48(5), POs are nominated or recommended by the CE for appointment or removal by the CPG. Whilst they are appointed by the CPG, unlike the CE, they are not accountable to the CPG. Further, they are members of the Government. The Public Service (Administration) Order and the Public Service (Disciplinary) Regulation issued by the CE under BL 48(4) are applicable to POs. BL 101(1) empowers the Government to employ POs (only Chinese citizens who are permanent residents of the HKSAR with no right of abode in any foreign country may be employed as POs). Moreover, POs have entered into employment contracts with the Government.

15. Taking into account the common law test mentioned in paragraph 8, it is clear that POs are holders of office of emolument “under the Government” under the POBO because –

- (a) the CE as head of the Government has the power to nominate POs for appointment, although the power of appointment is vested in the CPG as an expression of the People’s Republic of China’s sovereignty over the HKSAR under the principle of “one country, two systems”;
- (b) the CE as head of the Government has the power to exercise control over POs in accordance with the employment contracts and the executive orders. In particular, by virtue of BL57 and 58, the Commissioner of ICAC and the Director of Audit shall function independently but they are accountable to the CE as head of the Government;
- (c) the CE as head of the Government has the power to recommend for the removal of POs;
- (d) the duties of POs are of a public nature. POs as public servants responsible to the Government under BL99(2) are accountable to the Government under the employment contracts (and in the case of the Commissioner of ICAC and the Director of Audit also under BL 57 and 58); and
- (e) their status as salaried employees of the Government is recognised by the Basic Law.

16. The answers to all the questions relevant to the common law test are “the Government”. Therefore, POs are holders of office of emolument “under the Government” and there is no need to expressly list out POs in the proposed definition of “prescribed officer”. For the sake of prudence, the offices of the Commissioner of ICAC and the Director of Audit are listed in paragraph (b) of the proposed definition of “prescribed officer” to avoid any possible argument that, by reason of their independent operation, they are not holders of office of emolument “under the Government”.

General Concept of “Government”

17. Members requested our comment on the view of the Bar Association that the present meaning of “Government”, pursuant to BL 59, is appreciably narrower than that expression was under the previous laws in force.

18. BL 59 provides that “the Government of Hong Kong Special Administrative Region shall be the executive authorities of the Region”. It is contended that the scope of the “Government” under the laws previously in force before reunification has therefore been narrowed by the Basic Law. We do not agree with such argument. The term “Government” is statutorily defined under section 3 of Cap.1. Before reunification, it was defined to mean “the Government of Hong Kong” and after reunification, it means “the Government of the HKSAR”. In both cases, it refers to the executive authorities.

19. In terms of legal application, there would be a clear anomaly if the term “Government” appearing in legislation (e.g. debt due to the Government, exercise of power by the Government, etc.) were to be interpreted as also including the legislature and the judiciary. For example, under section 8 of the Air Passenger Departure Tax Ordinance (Cap. 140), the tax payable by a passenger under the Ordinance shall be recoverable from the passenger as a debt due to the Government, and under section 36 of the Government Rent (Assessment and Collection) Ordinance (Cap. 515), the Government has a right of re-entry of a lot if the lessee or owner fails to pay Government rent for the lot, it is clear that neither the legislature nor the judiciary plays any part in the carrying out of executive functions.

20. Accordingly, it is clear that the term “Government” means at all times (both before and after reunification) the executive authorities and its meaning has not been narrowed down by BL 59.

Director of Audit

21. Finally, we would like to respond briefly to the point made by the Bar Association in respect of the Director of Audit. In its submission dated 12 September, the Bar Association has raised doubt on whether the Director of Audit was a “Crown servant” under the POBO before reunification, and argued that its inclusion in paragraph (b) of the proposed definition of “prescribed officer” would amount to substantive amendment to the law.

22. We have explained why the Bill is within the purpose and scope of an adaptation of laws bill in our paper dated 12 September 2002. The position of the Director of Audit has been dealt with in paragraph 13 therein. In the case of *Mutual Luck*², there were passing remarks that the Director of Audit held “an office of emolument under the Crown in right of the Government”, as

² Mutual Luck Investment v AG [1997] HKLRD 1097.

supported by section 3(3) of the Audit Ordinance (Cap. 122), which states that “No person who is appointed... as the Director of Audit shall, while he holds that office, hold any other office of emolument under the Crown in right of the Government of Hong Kong”. [pages 7 to 8 of the judgment] Indeed, the court decided in that case that control was not the sole determining factor and held that a judicial officer, and the Director of Audit similarly, held an office of emolument under the Crown in right of the Government, notwithstanding their independent operation. There is therefore little doubt that the Director of Audit was a “Crown servant” within the meaning of the POBO and its inclusion in paragraph (b) of the proposed definition of “prescribed officer” is within the ambit of an adaptation of laws bill.

Administration Wing
Chief Secretary for Administration’s Office
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