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Report of the Bills Committee on Adaptation of Laws Bill 2001

PURPOSE

This paper reports on the deliberations of the Bills Committee on Adaptation of Laws Bill 2001.

THE BILL

2. The Bill seeks to adapt identified provisions of the Prevention of Bribery Ordinance (Cap. 201) (POBO) and the Independent Commission Against Corruption Ordinance (Cap. 204) (ICACO) and other Ordinances to bring them into conformity with the Basic Law and with the status of Hong Kong as a Special Administrative Region of the People's Republic of China (PRC).

THE BILLS COMMITTEE

3. At the House Committee on 4 January 2002, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon Margaret NG, the Bills Committee has held three meetings with the Administration. It has also considered a written submission from The Hong Kong Bar Association (the Bar Association). A membership list of the Bills Committee is in **Appendix I**.

DELIBERATIONS OF THE BILLS COMMITTEE

Guiding principles of adaptation

4. The Administration has explained the guiding principles of the Adaptation of Laws Programme to the Bills Committee. According to the "Guiding Principles and Guideline Glossary of Terms" of the Adaptation of Laws Programme, the guiding principles to be applied are -

- (a) that the provision when adapted should be consistent with BL and with Hong Kong's status as a Special Administrative Region of PRC, 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 BL nor necessitated by Hong Kong's new status are outside the scope of the adaptation of laws programme; and

- (b) that the adaptation of each provision should be made in accordance with the relevant provisions of the Interpretation and General Clauses Ordinance (Cap. 1) where applicable, but the adaptation must be considered in the context of the particular Ordinance concerned and other related Ordinances.

5. In the course of its deliberation, the Bills Committee has noted a background brief prepared by the Legislative Council (LegCo) Secretariat on the concerns raised by Members during the deliberation of previous Bills Committees formed to study a number of Adaptation of Laws Bills concerning the scope of the adaptation of laws exercise, and the actions taken by the Administration to address the concerns of the Bills Committees.

6. While the Bills Committee agrees that most of the proposed amendments in the Bill are in line with the guiding principles, it has expressed concern that the proposed definition of "prescribed officer" in place of "Crown servant" in POBO and ICACO and "Commissioner" in POBO may be more than terminological changes.

Major concerns

Adaptation of "Crown servant"

Proposal in the Bill

7. "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". Under the Bill, the expression "Crown servant" is proposed to be adapted to "prescribed officer" which means -

- (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.

Adaptation of "Crown servant" to "prescribed officer"

8. The Administration has explained that the term "Crown servant" only appears in section 2 of POBO and ICACO. In accordance with item 2 of Schedule 8 of the Interpretation and General Clauses Ordinance (Cap. 1), the "Crown" shall, save for certain specified circumstances, be construed as a reference to "the Government of the Hong Kong Special Administrative Region" (HKSAR).

9. A straightforward approach would be to adapt "Crown servant" to "Government officer" with the adapted definition to mean "a person holding an office of emolument, whether permanent or temporary, under the Government". However, there is some doubt about whether the expression "under the Government" in the proposed adapted definition could cover exactly the same scope as that covered by the expression "under the Crown in right of the Government" in the original definition. In order to avoid possible doubts that could arise from simply adapting "Crown servant" to "Government officer" and to preserve the legal effect of the provision, the Administration proposes to replace "Crown servant" by "prescribed officer" and to make express reference to the five offices in the adapted definition.

Express reference to five listed offices

10. Some members have queried the need to list out the five offices under the proposed definition of "prescribed officer". The non-mechanical adaptation of the term "Crown servant" raises the question of whether the proposed amendments should be dealt with outside the adaptation of laws exercise.

11. According to the Administration, legal advice has confirmed that the five listed offices, which fall within the definition of "Crown servant" (holder of an office of emolument under the Crown in right of the Government), might not be automatically construed as "Government officer" (holder of an office of emolument under the Government) due to their specific and independent nature of operation. Holders of the five 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 -

- (a) 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
- (b) unlike other offices, the five offices do not form part of the establishment of the civil service.

12. The Administration has acknowledged that the court may accept that "prescribed officer" has the same legal effect as "Crown servant" even without the listing of the five offices. However, the Administration is 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 POBO and ICACO. Having regard to the nature of POBO and ICACO which contain important penal provisions, the Administration has adopted a prudent approach by listing the five offices that were covered in the definition of "Crown servant" in the proposed definition of "prescribed officer".

13. The Administration has also advised that it is not aware of any other office which falls within the meaning of "Crown servant" but may fall outside the proposed definition of "prescribed officer".

Five listed offices before reunification

14. The Bills Committee has asked whether holders of the five offices listed in the proposed definition of "prescribed officer" were covered in the definition of "Crown servant" before reunification.

15. The Administration has advised that it has been established in *Mutual Luck Investment Ltd [1997] HKLRD 1097* that Judicial Officers were holders of offices of emolument "under the Crown in right of the Government", even though they performed their duties independently from the Government. In the same judgement, there were passing remarks that the Director of Audit was also an office holder "under the Crown in right of the Government". The remark made in respect of the Director of Audit applies to the Commissioner of ICAC.

16. The Administration has further confirmed that the Monetary Authority and the Chairman of the Public Service Commission are appointed to assist the Financial Secretary and the Chief Executive (CE) respectively to carry out public duties of emoluments. They were "Crown servants" before reunification.

Alternative proposals

17. Members have expressed concern whether the proposed definition of "prescribed officer" would be able to preserve the legal effect of "Crown servant". Some members consider that the proposed definition of "prescribed officer" might need to be revised in future to include new offices which fall within the meaning of "Crown servant" but outside the definition of "prescribed officer". Hence, compared to "Crown servant", the definition of "prescribed officer" lacks flexibility and continuity.

18. After discussion and considering the written submission from the Bar Association, the Bills Committee has invited the Administration to consider replacing the proposed definition of "prescribed officer" by -

- (a) a general descriptive statement to achieve greater flexibility and continuity in the adapted definition, as proposed by some members; or
- (b) the reference to "any person holding a public office of emolument, whether permanent or temporary, in respect of the HKSAR", as proposed by a member; or
- (c) the reference to "any person holding an office of emolument, whether permanent or temporary, under the HKSAR", as proposed by the Bar Association.

19. On the option in paragraph 18(a) above, the Administration advises the Bills Committee that it has considered to devise a formula or use an "exhaustive definition" that would catch all "Crown servants" without specific listing of offices. However, the Administration's 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 12 above, as a direct replacement term cannot be found for the concept or description of "Crown servant".

20. Regarding the proposal set out in paragraph 18(b) above, the Administration is of the view that 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".

21. As regards the proposal made by the Bar Association detailed in paragraph 18(c) above, the Administration has pointed out that at common law, whether a person is a holder of an office under an institution is determined by consideration

of a number of factors, namely, who has the power to appoint him, who has power to exercise control over him and the degree of such control, 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.

22. The Administration has accepted that there are limitations of the proposed definition of "prescribed officer" in capturing future new offices that would have fallen within the scope of "Crown servant". However, the Administration is of the view that the definition of "prescribed officer" could be amended to include new offices if considered necessary.

General Concept of "Government"

23. The Bills Committee has invited the comment of the Administration on the Bar Association's view that the present meaning of "Government" is appreciably narrower than the expression under the laws previously in force. According to the Bar Association, Article 59 of the Basic Law (BL 59) provides that "the Government of the HKSAR shall be the executive authorities of the Region". However, the expression "Government" under the laws previously in force was not confined to the executive authorities.

24. The Administration does not agree that the scope of the "Government" under the laws previously in force before reunification has been narrowed by BL. It has explained that 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 HKSAR". In both cases, it refers to the executive authorities.

Views of the Bills Committee

25. The Bills Committee agrees that there is no simple and straightforward replacement term and definition for "Crown servant". While the Bills Committee supports the Administration's proposal to replace "Crown servant" by "prescribed officer", it is of the view that the proposal is not adaptation in nature. The scope of adaptation of laws should be narrow and restrictive. The proposed definition of "prescribed officer" is not straightforward and mechanical terminological changes and would have the effect of interpreting and improving upon the existing expression of "Crown servant", thus falling outside the scope of the adaptation exercise. The Bills Committee considers that the proposed amendment should be introduced by way of an amendment bill.

26. Having regard to the views of the Bills Committee, the Administration has agreed to pursue the proposed amendments to replace "Crown servant" with "prescribed officer" in the Law Amendment and Reform (Miscellaneous

Provisions) Bill, an omnibus bill scheduled for introduction into LegCo in the current session. The Administration will move Committee Stage amendments to delete all clauses relating to "Crown servant" in the Bill accordingly.

Whether Chief Executive (CE) and principal officials (POs) are "prescribed officer"

27. Members have enquired whether CE and POs specified in BL 48(5), in particular, POs under the accountability system implemented on 1 July 2002, would be covered under paragraph (a) of the proposed definition of "prescribed officer", i.e. holders of an office of emolument under the Government. Members have also requested the Administration to respond to the proposal of the Bar Association that POs referred to in BL 48(5) should be separately categorised under the definition of "prescribed officer". The Bar Association has queried whether they would be covered under paragraph (a) of the definition of "prescribed officer" as they are appointed by the Central People's Government (CPG).

The position of CE

28. The Administration has explained that the constitutional position of CE is reflected in the provisions of BL as follows -

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

29. In view of the constitutional position of CE as well as the common law test mentioned in paragraph 21 above, CE is not a holder of an office of emolument "under the Government" under POBO because -

- (a) he is not appointed by the Government;
- (b) the Government has no power to exercise control over him. It is CE who leads the Government;
- (c) the Government has no power to dismiss him; and

- (d) the duties of CE are of a public nature. He is accountable to CPG and HKSAR, but not the Government.

30. In view of the unique constitutional position of CE, he does not fall within the definition of "Crown servant" or the proposed adapted definition of "prescribed officer" under POBO. The Administration has advised the Bills Committee that it will work out, as a separate law reform exercise, an appropriate option to extend the general standard of bribery prevention applicable to prescribed officers under POBO to CE. The Bills Committee has noted that the matter has been discussed by the Panel on Constitutional Affairs since early 1999 and urges the Administration to accord priority to the law reform exercise.

The position of POs

31. Taking into account the common law test discussed in paragraph 21 above, the Administration is of the view that POs are holders of office of emolument "under the Government" because-

- (a) CE as head of the Government has the power to nominate POs for appointment, although the power of appointment is vested in CPG as an expression of the PRC's sovereignty over HKSAR under the principle of "one country, two systems";
- (b) 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 BL 57 and 58, the Commissioner of ICAC and the Director of Audit shall function independently but they are accountable to CE as head of the Government;
- (c) 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 BL 99(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 BL.

32. The Administration has confirmed that as POs fall within the meaning of paragraph (a) of the proposed definition of "prescribed officer", they would be subject to the same standard of control as civil servants under POBO. There is

no need to expressly list out POs in the proposed definition of "prescribed officer". The Administration has also explained that 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".

33. The Bills Committee has pointed out that the situation of POs who are civil servants and POs under the accountability system may be different. Although both categories of POs are appointed by CPG, the POs under the accountability system are not civil servants. Members have requested the Administration to reconsider, for the avoidance of doubt, whether POs should also be separately listed under the proposed definition of "prescribed officer", as in the case of the five listed offices.

34. After consideration, the Administration has agreed to set out "principal officials" expressly in the "prescribed officer" definition to put beyond doubt that they will continue to be subject to the most stringent framework of control as applicable to civil servants under POBO and ICACO. The revised proposed definition of "prescribed officer" in **Appendix II** will be incorporated into the Law Amendment and Reform (Miscellaneous Provisions) Bill.

Adaptation of "Commissioner" in POBO

35. Under the Bill, the definition of "Commissioner" in POBO and ICACO is defined to include the Deputy Commissioner. A member has asked whether the Bill is consistent with BL 48(5) which states that the Commissioner Against Corruption should be nominated by CE for appointment by CPG. BL 48(5) does not refer to the "Commissioner" as including other persons.

36. The Administration has explained that before reunification, the Commissioner of ICAC is defined under section 2(1) of 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 POBO makes it clear that the Acting Commissioner, though not appointed under BL as the Commissioner, will remain to be included in that definition. Hence, it serves to preserve the legal effect of "Commissioner" in POBO before reunification.

37. As regards consistency of the Bill with BL, the Administration has advised that BL does not specify the appointment of the Deputy Commissioner and the Acting Commissioner. The appointment of the Deputy Commissioner and the

Acting Commissioner is provided for under ICACO. By virtue of sections 6 and 7(2) of 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 BL 160, any reference to "the Governor" in the laws previously in force in Hong Kong which are adopted as laws of 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 CE under sections 6 and 7(2) of ICACO.

38. The Administration has assured the Bills Committee that the adaptation proposal for "Commissioner" aims to reflect the new appointment authority for the Commissioner as necessitated by BL on the one hand and to preserve the legal effect of the definition of Commissioner in the context of POBO and ICACO as before reunification on the other. The proposed definition of "Commissioner" in both ordinances is consistent with BL.

FOLLOW UP ACTIONS REQUIRED OF THE ADMINISTRATION

39. The Administration has agreed to pursue the following proposals in the Law Amendment and Reform (Miscellaneous Provisions) Bill to be introduced into LegCo in the current session -

- (a) to replace "Crown servant" with "prescribed officer" (paragraph 26 above refers); and
- (b) to set out "principal officials" expressly in the definition of "prescribed officer" (paragraph 34 above refers).

40. The Administration has agreed to accord priority to the separate law reform exercise to extend the general standard of bribery prevention under POBO to CE (paragraph 30 above refers).

CONSULTATION WITH THE HOUSE COMMITTEE

41. The Bills Committee consulted the House Committee on 13 December 2002 and sought the latter's support that the Second Reading debate on the Bill be resumed at a future Council meeting.

Bills Committee on Adaptation of Laws Bill 2001

Membership list

Chairman Hon Margaret NG

Members Hon James TO Kun-sun
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Howard YOUNG, JP
Hon Ambrose LAU Hon-chuen, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP

(Total : 7 Members)

Clerk Mrs Percy MA

Legal Adviser Mr KAU Kin-wah

Date 15 July 2002

Adaptation of “Crown servant” to “prescribed officer”

To repeal the definition of “Crown servant” in the Prevention of Bribery Ordinance and the Independent Commission Against Corruption Ordinance and substituting –

“prescribed officer” (訂明人員) means –

- (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) any principal official of the Government appointed in accordance with the Basic Law;
 - (ii) 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;
 - (iii) Chairman of the Public Service Commission;
 - (iv) any member of the staff of the Independent Commission Against Corruption;
 - (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.