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**By fax: 2509 9055**  
3 June 2005

Mrs Percy Ma,  
Clerk to Bills Committee,  
Legislative Council,  
Legislative Council Building,  
8 Jackson Road, Central,  
Hong Kong.

via Mr Michael Scott, SASG/GLP

Dear Mrs Ma,

**Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2005  
(the “Bill”)**

**Follow-up on issues raised at the meeting on 24 May 2005  
and next meeting on 7 June 2005**

I refer to your letter of 26 May 2005 and our recent telephone conversations regarding the issues raised by members of the LegCo in respect of the Bill. The consolidated response of the Administration (which is in the same order as that in your letter) is set out below.

**Proposed amendment to transfer to the Chief Judge of the High Court from the Chief Justice the chairmanship of the Criminal Procedure Rules Committee (Clause 9 of the Bill)**

- (a) *To advise on the scope of the Criminal Procedure Ordinance (Cap. 221) (CPO). Members have pointed out that the rules and orders made by the Criminal Procedure Rules Committee under CPO differ in nature from the rules of the High Court and the District Court, in that the former covers wide-ranging matters in criminal proceedings at different levels of court.*

Please refer to the Judiciary's response sent to you on 2 June 2005.

- (b) *to reconsider the justification for the proposed amendment having regard to the view of the Bar Association.*

Please refer to the Judiciary's response sent to you on 2 June 2005.

- (c) *To review the drafting of section 9(3) of CPO in the light of the adaptation of laws principles, as the section specifically refers to the practice and procedure being in force for cases in England.*

The CPO was largely adapted by the Adaptation of Laws (No. 17) Ordinance 1999 (39 of 1999). No amendment was proposed to be made to s. 9(3) of Cap. 221 in that exercise as it was considered that the subsection had Basic Law Article 23 implications. The Administration also took the view that it was inappropriate to repeal the subsection as it might create a lacuna in the law (a copy of the Information Note dated 11 February 1999 on Adaptation of Laws (No. 12) Bill 1998 is attached).

***Proposed amendments to empower the Court of Appeal and Court of First Instance to award costs to the defendant and the prosecutor on the other party's unsuccessful application for a certificate under the Court of Final Appeal Ordinance***

***(Clauses 37 and 38 of the Bill)***

- (d) *To consider introducing a “without merit” criterion in proposed sections 9B and 13B of the Costs in Criminal Cases Ordinance, in line with section 13 of the same Ordinance. Members have reservation about making an award of costs solely on the basis that an application for a certificate under section 32(2) of the Court of Final Appeal Ordinance is unsuccessful.*

The Administration agrees to add a “without merit” criterion in the proposed sections 9B and 13B of the Costs in Criminal Cases Ordinance (Cap. 492).

**Response to two legal professional bodies**

Copies of the replies to the Hong Kong Bar Association and the Law Society of Hong Kong are attached.

**Committee Stage Amendments.**

The draft Committee Stage Amendments are attached.

With best regards,

Yours sincerely,

(Ms Stella Chan)  
Government Counsel  
General Legal Policy/Legal Policy Division

LC Paper No. CB(2) 1314/98-99(01)

**INFORMATION NOTE**

**ADAPTATION OF LAWS (No.12) BILL 1998**

**BILLS COMMITTEE MEETING**  
**TO BE HELD ON**  
**WEDNESDAY, 24 FEBRUARY 1999**

**Indictment Rules 4 and 5 - sub. leg. of Criminal Procedure Ordinance (Cap.221)**

**Reasons for the proposed adaptation**

1. Clauses 38 and 39 of Schedule 2 of the Bill provide that the references to "imperial enactment" in Indictment Rules 4 and 5 of Cap.221 (the "Rules") are to be repealed and replaced by "national law applying in Hong Kong". The reasons for the proposed adaptation are -

- (a) One of the purposes of the Rules is to offer protection to the defendant by prescribing the information to be set out in the indictment. We are of the view that the Rules should cover any national laws applying to the HKSAR so long as they create criminal offences triable in Hong Kong courts. This will ensure that the same protection is available to all defendants regardless of whether they are charged under an Ordinance or a national law.
- (b) Art. 18 of the Basic Law provides that national laws listed in Annex III to the Basic Law shall be applied locally by way of promulgation or legislation by the HKSAR. If a national law which creates an offence is applied to the HKSAR by way of legislation, the situation will be covered by the word "Ordinance" in the Rules. However, a problem may arise if a national law is applied to the HKSAR by way of promulgation as that would not

be covered by the Rules unless adaptations as proposed above are made.

**Section 9(3) of the Criminal Procedure Ordinance (Cap.221)**

**Reasons for not seeking to adapt or repeal section 9(3) of Cap.221**

2. In so far as section 9(3) of Cap.221 mentions trials for treason or misprison of treason, the Administration considers that it has Basic Law Article 23 implication and proposes to deal with its adaptation in a separate exercise.
3. Apart from that, the Administration takes the view that it is not appropriate to repeal section 9(3) of Cap.221 as such repeal may create a lacuna in the law.
4. The practice and procedure in criminal causes and matters are not fully set out in statute or the Practice Directions issued by the Chief Justice. Very often, it is a matter of common law and practice. *R v KWOK Moon-yan and Others* [1989] 2 H.K.L.R. 396 (is now to be read subject to the Costs in Criminal Cases Ordinance, Cap.492) is an illustration of how section 9(3) of Cap.221 works. In that case, the then Court of Appeal considered section 9(3) of Cap.221 and stated that they were enjoined to take note of and apply the English practice. The court also considered that they were entitled to take into consideration general Hong Kong circumstances in applying English practice and procedure. The court, in determining whether or not to exercise its discretion in favor of an award of costs to a successful appellant, considered that a number of English Practice Directions and Practice Notes were relevant (at p.400, A-D). These included the Practice Direction (Costs: Acquittal of Defendant) [1981] 1 WLR 1383 and Practice Note (Criminal law: Costs) [1989] 2 All ER 604. The court then awarded costs to the two appellants in that case.
5. The Administration takes the view that if national laws that apply to Hong Kong do not create offences that are triable in Hong Kong courts, section 9(3) of the Criminal Procedure Ordinance (Cap.221) and the proposed adaptation of the Indictment Rules will have no application to them. However, if a national law that applies to Hong Kong does create an offence that is triable in Hong Kong courts, section 9(3) of Cap.221 and the

Indictment Rules should (as a matter of adaptation) apply to that offence, in the same way as they previously applied to British laws that applied in Hong Kong before 1 July 1997.

Department of Justice  
11 February 1999

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2005

**COMMITTEE STAGE**

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
Part 2, Division 5	In the heading, by deleting " <b>the Matrimonial Causes Ordinance</b> " and substituting " <b>certain Ordinances</b> ".
New	By adding immediately before the subheading " <b>Matrimonial Causes Ordinance</b> " -  " <b>High Court Ordinance</b>  <b>10A. Rules concerning deposit, etc. of moneys, etc. in High Court</b>  Section 57(1) of the High Court Ordinance (Cap. 4) is amended by repealing "Chief Justice" and substituting "Chief Judge of the High Court".".
New	By adding immediately after clause 14 -  " <b>Criminal Procedure Ordinance</b>  <b>14A. Chief Judge to make rules</b>

Section 79D of the Criminal Procedure Ordinance (Cap. 221) is amended by repealing "Chief Justice" and substituting "Chief Judge".

**14B. Application for dismissal of charges contained in a notice of transfer**

Section 79G(8) is amended by repealing "Chief Justice" and substituting "Chief Judge".

**District Court Ordinance**

**14C. Suitors' Funds Rules**

Section 73(1) of the District Court Ordinance (Cap. 336) is amended by repealing "Chief Justice" and substituting "Chief Judge".

**Evidence (Miscellaneous Amendments)  
Ordinance 2003**

**14D. Part added**

Section 17 of the Evidence (Miscellaneous Amendments) Ordinance 2003 (23 of 2003) is



amended, in the new section 79L of the Criminal Procedure Ordinance (Cap. 221), by repealing "Chief Justice" and substituting "Chief Judge".

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(a) By adding immediately before subclause (1) -

"(1A) Notwithstanding the amendment made by section 10A to section 57(1) of the High Court Ordinance (Cap. 4), any rules made under section 57(1) of that Ordinance which are in force immediately before the date of commencement of section 10A shall on and after that date continue in force as if they were made by the Chief Judge under section 57(1) of that Ordinance as amended by section 10A."

(b) By deleting subclause (2).

(c) By adding -

"(5) Notwithstanding the amendment made by section 14A to section 79D of the Criminal Procedure Ordinance (Cap. 221) -

(a) any rules made under section 79D of that

Ordinance which are in force immediately before the date of commencement of section 14A shall on and after that date continue in force as if they were made by the Chief Judge under section 79D of that Ordinance as amended by section 14A;

- (b) any directions given under section 79D of that Ordinance which are in force immediately before the date of commencement of section 14A shall on and after that date continue in force as if they were given by the Chief Judge under section 79D of that Ordinance as amended by section 14A.

(6) Notwithstanding the amendment made by section 14B to section 79G(8) of

the Criminal Procedure Ordinance (Cap. 221) -

- (a) any rules made under section 79G(8) of that Ordinance which are in force immediately before the date of commencement of section 14B shall on and after that date continue in force as if they were made by the Chief Judge under section 79G(8) of that Ordinance as amended by section 14B;
- (b) any directions given under section 79G(8) of that Ordinance which are in force immediately before the date of commencement of section 14B shall on and after that date continue in force as if they were given by the Chief Judge under section

79G(8) of that Ordinance  
as amended by section 14B.

(7) Notwithstanding the amendment made by section 14C to section 73(1) of the District Court Ordinance (Cap. 336), any rules made under section 73(1) of that Ordinance which are in force immediately before the date of commencement of section 14C shall on and after that date continue in force as if they were made by the Chief Judge under section 73(1) of that Ordinance as amended by section 14C."

Part 3                   By deleting Division 6.

37                   In the proposed section 9B, by adding "and the Court of Appeal or the Court of First Instance, as the case may be, is satisfied that the application is without merit," after "the Hong Kong Court of Final Appeal Ordinance (Cap. 484),".

38                   In the proposed section 13B, by adding "and the Court of Appeal or the Court of First Instance, as

the case may be, is satisfied that the application is without merit," after "the Hong Kong Court of Final Appeal Ordinance (Cap. 484),".

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By adding immediately after paragraph (a) -

"(aa) in paragraph (c), by adding "或命令"  
after "決定";".

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- (a) By deleting the subheading "**Firearms and Ammunition Ordinance**" before the clause.
- (b) By deleting the clause.

PROPOSED AMENDMENTS TO DIVISION 7 OF PART 3 OF THE  
STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2005

**Prevention of Bribery Ordinance**

**17A. Surrender of travel document**

(1) A magistrate may, on the application ex parte of the Commissioner, by written notice require a person who is the subject of an investigation in respect of an offence reasonably suspected to have been committed by him under this Ordinance to surrender to the Commissioner any travel document in his possession.

(2) A notice under subsection (1) shall be served personally on the person to whom it is addressed.

(3) A person on whom a notice under subsection (1) is served shall comply with such notice forthwith.

(3A) Subject to subsection (6), a person to whom a notice under subsection (1) is addressed shall not leave Hong Kong, whether or not the notice has been served on him under subsection (2), before the expiry of a period of 6 months from the date of the notice unless -

- (a) an application made under section 17B(1) for the return of a travel document is granted; or

(b) an application made under section 17BA(1) for permission to leave Hong Kong is granted.

(4) If a person on whom a notice under subsection (1) has been served fails to comply with the notice forthwith, he may ~~thereupon~~ be arrested and taken before a magistrate by a police officer or by a person appointed in that behalf by the Commissioner.

(5) Where a person is taken before a magistrate under subsection (4), the magistrate shall, unless such person thereupon complies with the notice under subsection (1) or satisfies the magistrate that he does not possess a travel document, by warrant commit him to prison there to be safely kept -

- (a) until the expiry of the period of 28 days from the date of his committal to prison as aforesaid; or
- (b) until such person complies with the notice under subsection (1) and a magistrate, by order in that behalf, orders and directs the Commissioner of Correctional Services to discharge such person from prison (which order shall be sufficient warrant for the Commissioner of Correctional Services so to do),

whichever occurs first.

(5A) Subject to subsection (6), a travel document surrendered to the Commissioner in compliance with a notice under subsection (1) may be detained for a period of 6 months from the date of the

notice unless an application made under section 17B(1) for the return of the travel document is granted.

(6) ~~Subject to section 17B, a travel document which is surrendered to the Commissioner under this section may be detained for 6 months from the date on which it was surrendered and may be detained~~ The period of 6 months referred to in subsections (3A) and (5A) may be extended for a further period of 3 months if a magistrate, on application by the Commissioner, is satisfied that the investigation could not reasonably have been completed before the date of such application and authorizes such ~~further detention~~ extension :

Provided that a magistrate shall not hear an application under this subsection unless reasonable notice of the application has been given by the Commissioner to the person ~~who surrendered the document~~ to whom the relevant notice is addressed.

(6A) All proceedings before a magistrate under this section shall be conducted in chambers.

(6B) A notice under subsection (1) which has been served in accordance with subsection (2) and complied with shall not thereafter be revoked or withdrawn.

(7) In this section and in section 17B, "travel document" (旅行證件) means a passport or other document establishing the identity or nationality of a holder.

#### **17B. Return of travel documents**



(1) A person who has surrendered a travel document under section 17A may at any time make application in writing, either to the Commissioner or to a magistrate or both for its return, and every such application shall contain a statement of the grounds on which it is made.

(2) A magistrate shall not consider an application made under subsection (1) unless he is satisfied that reasonable notice in writing of it has been given to the Commissioner.

(3) The Commissioner or a magistrate shall only grant an application made under subsection (1) where the Commissioner or the magistrate, as the case may be, is satisfied that having regard to all the circumstances, including the interests of the investigation referred to in section 17A(1), a refusal to grant the application would cause unreasonable hardship to the applicant.

(4) Before an application is granted under this section -

(a) the applicant may be required to -

- (i) deposit such reasonable sum of money with such person as may be specified;
- (ii) enter into such recognizance with such sureties, if any, as may be specified; or
- (iii) deposit such a sum of money and enter into such a recognizance as may be specified;

(b) any such applicant or surety may be required to deposit such property or document of title thereto with such person as may be specified for retention

by that person until such time as any recognizance entered into under this subsection is no longer required or is forfeited.

~~(5) A recognizance referred to in subsection (4) shall be conditioned for the further surrender of the travel document and for the appearance of the applicant at such time and place as may be specified and at such other time and place thereafter as may be further specified.~~

(5) A recognizance referred to in subsection (4) shall be subject to the conditions that -

(a) the applicant shall further surrender his travel document to the Commissioner at such time as may be specified; and

(b) the applicant shall appear at such time and place in Hong Kong as may be specified and at such other time and place in Hong Kong thereafter as may be further specified.

(6) An application under this section may be granted either without conditions or ~~subject to such conditions as to the further surrender of the travel document and the appearance of the applicant at any time and place in Hong Kong as may be specified.~~  
subject to the conditions that -

(a) the applicant shall further surrender his travel document to the Commissioner at such time as may be specified; and

(b) the applicant shall appear at such time and place in Hong Kong as may be specified and at such other time and place in Hong Kong thereafter as may be further specified.

(7) Where a travel document is returned to the applicant under this section ~~is subsequently surrendered by him pursuant to a condition imposed under subsection (6)~~ subject to a condition imposed under subsection (5)(a) or (6)(a), then after the time specified under that subsection, the provisions of section 17A(3A) shall continue to apply in respect of the applicant and the provisions of section 17A(6)(5A) shall continue to apply in respect of the travel document surrendered by the applicant pursuant to the condition as if no return had been made to the applicant under this section.

(8) Proceedings before a magistrate under this section -

(a) shall be conducted in chambers; and

(b) shall be deemed to be proceedings which a magistrate has power to determine in a summary way within the meaning of sections 105 and 113(3) of the Magistrates Ordinance (Cap. 227) and, accordingly, Part VII of that Ordinance (which relates to appeals) shall apply, with the necessary modifications, to appeals against an order of a magistrate under this section.

(9) Anything to be specified in respect of an applicant under this section shall be specified by notice in writing served personally on the applicant.

**17BA. Permission to leave Hong Kong**

(1) Without prejudice to section 17B, a person on whom a notice under section 17A(1) is served may at any time make application in writing to the Commissioner or to a magistrate or both for permission to leave Hong Kong, and every such application shall contain a statement of the grounds on which it is made.

(2) A magistrate shall not consider an application made under subsection (1) unless he is satisfied that reasonable notice in writing of it has been given to the Commissioner.

(3) The Commissioner or a magistrate shall only grant an application made under subsection (1) where the Commissioner or the magistrate, as the case may be, is satisfied that having regard to all the circumstances, including the interests of the investigation referred to in section 17A(1), a refusal to grant the application would cause unreasonable hardship to the applicant.

(4) Before an application is granted under this section -

(a) the applicant may be required to -

(i) deposit such reasonable sum of money with such person as may be specified;

(ii) enter into such recognizance with such sureties, if any, as may be specified; or

(iii) deposit such a sum of money and enter into such a recognizance as may be specified;

(b) any such applicant or surety may be required to deposit such property or document of title thereto with such person as may be specified for retention by that person until such time as any recognizance entered into under this subsection is no longer required or is forfeited.

(5) A recognizance referred to in subsection (4) shall be subject to a condition that the applicant shall appear at such time and place in Hong Kong as may be specified and at such other time or place in Hong Kong thereafter as may be further specified.

(6) An application under this section may be granted either without condition or subject to a condition that the applicant shall appear at such time and place in Hong Kong as may be specified and at such other time or place in Hong Kong thereafter as may be further specified.

(7) Where a person is permitted to leave Hong Kong under this section subject to a condition imposed under subsection (5) or (6), then after the time specified under that subsection or (if applicable) after the last of such times, the provisions of section 17A(3A) shall continue to apply in respect of the person as if the person had not been permitted to leave Hong Kong under this section.

(8) Proceedings before a magistrate under this section -

(a) shall be conducted in chambers; and

(b) shall be deemed to be proceedings which a magistrate has power to determine in a summary way within the meaning of sections 105 and 113(3) of the Magistrates Ordinance (Cap. 227) and, accordingly, Part VII of that Ordinance (which relates to appeals) shall apply, with the necessary modifications, to appeals against an order of a magistrate under this section.

(9) Anything to be specified in respect of an applicant under this section shall be specified by notice in writing served personally on the applicant.

**17C. Further provisions relating to security, appearance, etc.**

(1) Where a person granted an application under section 17B fails to comply with the requirement of any condition imposed under that section -

(a) he may be arrested and dealt with in the same manner that a person who fails to comply with a notice under section 17A(1) may be arrested and dealt with under section 17A(4) and (5); and

(b) any deposit made or recognizance entered into under section 17B may be forfeited by a magistrate on application by the Commissioner or under section 65

(which relates to the enforcement of recognizances)  
of the Magistrates Ordinance (Cap. 227).

(1A) Where a person granted an application under section 17BA fails to comply with the requirement of any condition imposed under that section, any deposit made or recognizance entered into under that section may be forfeited by a magistrate on application by the Commissioner or under section 65 of the Magistrates Ordinance (Cap. 227).

(2) Without prejudice to section 65 of the Magistrates Ordinance (Cap. 227), where a magistrate declares or orders the forfeiture of a recognizance under this section, such declaration or order may, on the application of the Commissioner, be registered in the Court of First Instance, and thereupon the provisions of sections 110, 111, 112, 113 and 114 (which relate to the enforcement of recognizances) of the Criminal Procedure Ordinance (Cap. 221) shall apply to and in relation to that recognizance.

(3) *(Repealed 44 of 1992 s.4)*