

For discussion  
On 14 December 2004

## **LegCo Panel on Administration of Justice and Legal Services**

### **Information Paper on Statute Law (Miscellaneous Provisions) Bill 2005**

#### **INTRODUCTION**

A number of amendments to various Ordinances are proposed in the above Bill. The proposed amendments are minor, technical and largely non-controversial but are important for the purpose of updating or improving existing legislation. The object of this paper is to seek the preliminary views of members of the Panel on the proposed amendments. Subject to approval by the Executive Council, the Bill is scheduled for introduction into the Legislative Council on 9 March 2005.

#### **BACKGROUND AND ARGUMENT**

##### **General Background**

2. The Administration has adopted the use of omnibus bills in recent years as an efficient way of effecting miscellaneous improvements to existing legislation. This avoids the requirement to make bids for separate slots relating to each Ordinance, the amendments to which involve only a few clauses. The proposed amendments are described below.

#### **DETAILED PROPOSALS**

##### **A. Provisions related to the Theft Ordinance (Cap. 210)**

3. The Theft Ordinance has, since its enactment, contained a definition of “deception” in section 17(4) which covers opinions. In December 1998, the Theft (Amendment) Bill 1998 (the “Bill”) added a section 16A which creates a new statutory offence of fraud. At the request of the Bills Committee, the reference to opinions in that new

offence was deleted before enactment. The Administration was asked to consider a similar amendment to the deception offences in the Theft Ordinance.

4. The Administration now proposes to make such an amendment. The proposed amendments to the definition of deception are highlighted below:

“(4) For the purposes of this section –  
“deception” (欺騙手段) means any deception (whether deliberate or reckless) by words or conduct (**whether by any act or omission**) as to fact or as to law, including a deception relating to the past, the present or the future and a deception as to the intentions ~~or opinions~~ of the person using the deception or any other person.”

**B. Provisions related to the Firearms and Ammunition Ordinance (Cap. 238)**

5. The purpose of the proposed amendments is to make the offence of possessing an imitation firearm under section 20(1) of the Firearms and Ammunition Ordinance an indictable offence, which can be tried in the Court of First Instance or the District Court. Details of the proposed amendments are at **Annex A**.

**C. Provisions related to –**

**Pensions Ordinance (Cap. 89)**

**Widows and Orphans Pension Ordinance (Cap. 94)**

**Pension Benefits Ordinance (Cap. 99)**

6. It is proposed to amend the pensions legislation to effect the transfer of the following statutory powers to the Secretary for the Civil Service (“SCS”) –

- (a) transfer of the power to make an Established Offices Order from the Chief Executive (“CE”) to SCS;

- (b) transfer of the power to amend the Schedule to the Pension Benefits Ordinance (Cap. 99) from the Chief Secretary (“CS”) to SCS; and
- (c) transfer of the power to approve exemptions from contribution under the Widows and Orphans Pension Scheme from CS to SCS.

**D. Proposed amendments to the Chinese University of Hong Kong Ordinance (Cap. 1109)**

7. The Chinese name of the Convocation is to be changed to better reflect its composition.

8. The institution proposes to change the Chinese name of the Convocation from “評議會” to “校友評議會” to reflect more accurately that it is an organization with alumni as its members. The English name of the Convocation will remain unchanged. “評議會” under sections 2, 6, 8 and 13 and Statutes 3, 11 and 18 are to be repealed and to be substituted with “校友評議會”.

**E. Provisions related to transfer of powers under the Medical Clinics Ordinance (Cap. 343) and the Administrative Appeals Board Ordinance (Cap. 442)**

9. The statutory powers to determine appeals under the provisions of the Medical Clinics Ordinance are to be transferred from the Chief Executive in Council to the Administrative Appeals Board.

**F. Provisions related to the Intellectual Property (Miscellaneous Amendments) Ordinance (No. 2 of 2001)**

10. The proposed amendments will repeal some obsolete references to section 93(2) of the Patents (General) Rules and sections 37(2)(b) and 60(3) of the Registered Designs Rules under sections 19 and 27 respectively of the Intellectual Property (Miscellaneous Amendments) Ordinance.

**G. Proposals to amend the provisions of the Prevention of Bribery Ordinance (Cap. 201) and the Independent Commission Against Corruption Ordinance (Cap. 204) related to the surrender of travel documents**

11. It is proposed to :

- (i) amend section 17A of the Prevention of Bribery Ordinance (Cap 201) to make it clear that the subject of a section 17A(1) notice is not allowed to leave Hong Kong during the subsistence of the section 17A(1) notice; and
- (ii) amend section 10 of Independent Commission Against Corruption Ordinance (Cap 204) to empower ICAC officers to arrest individuals who fail to comply with a section 17A(1) notice or the conditions of a recognizance under section 17B(4) and (5) of Cap 201.

12. More details of the proposals are at **Annex B**.

**H. Provisions related to Legal Aid Services Council Ordinance (Cap. 489)**

13. The Legal Aid Services Council (“LASC”) was established in September 1996 under the Legal Aid Services Council Ordinance (Cap. 489) (“LASCO”) to supervise the provision of legal aid services by the Legal Aid Department, and to advise the Chief Executive on legal aid policy.

14. The LASC intends to enhance its powers and operational efficiency. The Administration proposes to introduce the following amendments agreed with the LASC –

- (a) to confer upon the LASC the power to appoint its own staff;
- (b) to confer upon the LASC the power to enter into contracts on its own; and
- (c) to extend the deadline for the LASC to submit its annual report.

15. The LegCo Panel on Administration of Justice and Legal Services noted the proposals on 31 March 2003.

**I. Provisions related to the Oaths and Declarations Ordinance (Cap. 11)**

16. The proposed amendment will transfer the power of administering the Oath of Secrecy made by the Clerk to ExCo from the Chief Secretary for Administration to the Director of the Chief Executive's Office.

**J. Provisions related to the Judicial Officers Recommendation Commission Ordinance (Cap. 92) (the "JORCO")**

17. The proposed amendment will amend section 3(5B) of the JORCO to extend the disclosure of interest requirement of Judicial Officers Recommendation Commission members to the selection process of any other judicial officers specified in Schedule 1 to the JORCO.

18. More details of the proposals are at **Annex C**.

**K. Provisions related to transfer of chairmanship of certain committees under the High Court Ordinance (Cap. 4), District Court Ordinance (Cap. 336), Criminal Procedure Ordinance (Cap. 221)**

19. The proposed amendments will transfer the chairmanship of certain committees from the Chief Justice to the Chief Judge of the High Court. The Committees are :

- (i) High Court Rules Committee under section 55(1) of the High Court Ordinance;
- (ii) District Court Rules Committee under section 17(1) of the District Court Ordinance; and
- (iii) Criminal Procedure Rules Committee under section 9(1) of the Criminal Procedures Ordinance.

**L. Provisions related to professional qualifications of judges and judicial officers**

20. A comprehensive review of the existing provisions for professional qualifications of Judges and Judicial Officers at different levels of court was carried out by the Judiciary. Some amendments are proposed. The detailed proposals are **Annex D**.

**M. Provisions related to the Trade Marks Ordinance (Cap. 559)**

21. The Secretary for Commerce, Industry and Technology has identified problems concerning the interpretation of the words “beginning on” and “owner’s name or address” in the Ordinance. The proposed amendments will replace the words “beginning on” with “after”, and replace “owner’s name or address” with “name or address of the owner or any previous owner” or wording to that effect.

**N. Provisions related to the Summary Offences Ordinance (Cap. 228)**

22. These will remove a discrepancy in meaning between the English and the Chinese texts of section 4(28) of the Summary Offences Ordinance. More details of the proposals are at **Annex E**.

**O. Provisions related to the Crimes Ordinance (Cap. 200)**

23. Consent is to be required for the prosecution of a conspiracy to commit an offence, if that offence is one in respect of which consent to prosecute is necessary. Details of the background, the case for change and the proposal are at **Annex F**.

**P. Provisions related to the Costs in Criminal Cases Ordinance (Cap. 492)**

24. The Court of Appeal, in its judgment on HKSAR v Wong Wah-ye, CACC 4/2000 observed that it had no power to order costs where the prosecutor or a defendant applies unsuccessfully to the Court of Appeal or the Court of First Instance for a certificate under section 32 of the Court of Final Appeal Ordinance (Cap. 484). The proposed amendments will enable the Court of Appeal or the Court of First Instance to order that costs be awarded to the other party. The detailed background and the proposed amendments are at **Annex G**.

**Q(1). Proposed amendments to empower the Law Society Council to make rules under the Legal Practitioners Ordinance (Cap. 159)**

25. The proposed amendments will empower the Law Society Council to make rules in respect of in-house solicitors relating to (i) their practice; (ii) their conduct; (iii) the tasks that can and cannot be performed by them and (iv) insurance. The detailed background to the proposals and the proposed amendments are at **Annex H**.

**Q(2). Proposed amendments for inclusion of representatives in the Standing Committee on Legal Education and Training under the Legal Practitioners Ordinance (Cap. 159)**

26. The proposed amendments will provide for the inclusion of representatives of the Chinese University of Hong Kong (“CUHK”) in the Standing Committee on Legal Education and Training established under section 74A of the Legal Practitioners Ordinance (Cap. 159). This is to reflect the fact that CUHK is about to establish a law school, and therefore

should be represented on that committee.

**R. Provisions related to the Environmental Impact Assessment Ordinance (Cap. 499)**

27. The proposed amendments will change the references of “industrial estate” (工業邨) to “industrial park” (工業園) in Schedule 1 of the Ordinance.

**S. Provisions relating to the finality of appeals in –**

**Professional Accountants Ordinance (Cap. 50)**  
**Dentists Registration Ordinance (Cap. 156)**  
**Legal Practitioners Ordinance (Cap. 159)**  
**Medial Registration Ordinance (Cap. 161)**  
**Midwives Registration Ordinance (Cap. 162)**  
**Nurses Registration Ordinance (Cap. 164)**  
**Supplementary Medical Professions Ordinance (Cap. 359)**  
**Architects Registration Ordinance (Cap. 408)**  
**Engineers Registration Ordinance (Cap. 409)**  
**Surveyors Registration Ordinance (Cap. 417)**  
**Planners Registration Ordinance (Cap. 418)**  
**Land Survey Ordinance (Cap. 473)**  
**Social Workers Registration Ordinance (Cap. 505)**  
**Landscape Architects Registration Ordinance (Cap. 516)**  
**Chinese Medicine Ordinance (Cap. 549)**  
**Housing Managers Registration Ordinance (Cap. 550)**

28. The proposed amendments will give effect to the Court of Final Appeal judgment in A Solicitor v The Law Society of Hong Kong & SJ, which held that section 13(1) of the Legal Practitioners Ordinance (Cap.159) was unconstitutional. That section provided that a decision by the Court of Appeal in respect of disciplinary proceedings concerning a solicitor shall be final. The absolute bar on any further appeal was held to be unjustifiable. There are similar provisions in the above Ordinances which need to be amended as a result of that decision. The detailed background and proposals are at **Annex I**.

## **T. Minor amendments to various Ordinances**

29. The Law Drafting Division of the Department of Justice has identified textual errors and inconsistencies, wrong cross-references, missed consequentialia and other minor irregularities in various Ordinances. These are to be corrected.

## **PUBLIC CONSULTATION AND POLICY SUPPORT**

### **Firearms and Ammunition Bill (Cap. 238)**

30. The Law Society, the Hong Kong Bar Association, the University of Hong Kong, the City University of Hong Kong and the Judiciary Administrator were consulted in March 2003. The four consultees who replied all support the proposal.

### **Costs in Criminal Cases Ordinance (Cap. 492)**

31. The Law Society, the Hong Kong Bar Association, the University of Hong Kong, the City University of Hong Kong, and the Judiciary Administrator were consulted in August 2004. The Law Society, the Judiciary Administrator and Mr. Gerard McCoy, SC support the proposal. The Hong Kong Bar Association supports the amendment to section 9, but not section 13 on the ground that –

- (a) for those whose representation is paid for by the Director of Legal Aid, it would be difficult to achieve the object of deterring unmeritorious applications;
- (b) for those who are either privately represented or represent themselves, the first thing that the court would do is to determine whether the applicant has sufficient means to meet such order, which results in leaving very few persons liable to face a costs order;
- (c) the prosecution would be unlikely to invoke this proposed power; and

- (d) a potential applicant in a meritorious case may be deterred from applying for a certificate if he does not wish to take the risk of an award costs made against him (copy of comments of the Hong Kong Bar Association is at **Annex J**).

32. We have not received any comments from the University of Hong Kong and the City University of Hong Kong.

### **Crimes Ordinance (Cap. 200)**

33. The Law Society, the Hong Kong Bar Association, the University of Hong Kong, the City University of Hong Kong and the Judiciary Administrator were consulted in August 2004. Other than the University of Hong Kong and the City University of Hong Kong, from which we have not received comments, the consultees and Mr. Gerard McCoy, SC support the proposal.

### **Theft Ordinance (Cap. 210)**

34. The amendments to section 17 of the Theft Ordinance were proposed by the LegCo Panel on Administration of Justice and Legal Services when the Theft (Amendment) Bill 1998 was introduced into the Legislative Council in December 1998.

### **Proposed amendments to empower the Law Society Council to make rules under the Legal Practitioners Ordinance (Cap. 159)**

35. Consultation was held with the Hong Kong Corporate Counsel Association which did not object to the proposed amendments.

### **Provisions relating to finality provisions in various Ordinances.**

36. The relevant professional bodies have been consulted and they have no in-principle objection to the proposed repeal of the relevant finality provisions.

### **Others**

37. No public consultation is considered necessary in respect of other proposed amendments due to their minor and uncontroversial nature.

Legal Policy Division  
Department of Justice  
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## **Proposed amendments to the Firearms and Ammunition Ordinance (Cap 238)**

### **Background**

Section 20(1) of the Firearms and Ammunition Ordinance provides that any person who is in possession of an imitation firearm commits an offence and is liable to imprisonment for 2 years. Section 20(2) of the Ordinance provides that any person who, within 10 years of being convicted of an offence specified in the Schedule or of an offence under that Ordinance, commits an offence under subsection (1) is liable to imprisonment for 7 years.

2. According to section 14(A) of the Criminal Procedure Ordinance (Cap. 221), the offence is a summary offence. It will be triable summarily before a magistrate, unless it is transferred to the District Court with another indictable offence under section 88 of the Magistrates Ordinance (Cap. 227).

3. Under section 20(2) of the Firearms and Ammunition Ordinance, a magistrate therefore has the power to impose imprisonment for 7 years. It is unusual to give a magistrate power to impose imprisonment of this length.

4. Given that the jurisdiction of the District Court to impose imprisonment in criminal matters is subject to a maximum of 7 years, it appears to be an anomaly for a magistrate to be empowered to impose imprisonment of 7 years. Such a heavy sentence should appropriately be imposed by a judge rather than a magistrate.

### **Proposal**

5. It is proposed that legislative amendments be made so that the offences under section 20(1) and (2) of the Firearms and Ammunition Ordinance will be an indictable offence, which can be tried in the Court of First Instance or the District Court. By virtue of sections 91 and 92 of the Magistrates Ordinance, it will be possible for the offences to be dealt with by a magistrate summarily, ~~but the maximum~~, but the maximum term of imprisonment the magistrate can impose will be two years.

6. The effect of the amendment will be that a sentence under section 20(2) exceeding two years' imprisonment can only be imposed if the defendant is convicted on indictment by the District Court or the Court of First Instance.

7. Offences committed before the relevant legislative amendments take effect will be dealt with summarily in accordance with existing provisions. A ~~C~~ consequential amendment is needed in respect of the reference to "magistrate" under section 20(3).

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**Proposed amendments to the Prevention of Bribery Ordinance (Cap. 201) (the “POBO”) and the Independent Commission Against Corruption Ordinance (the “ICAC Ordinance”) (Cap. 204)**

**Problem**

Section 17A(1) of the POBO provides that “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 the Ordinance to surrender to the Commissioner any travel document in his possession.” Before 1987, possession of a travel document was a prerequisite for a person who wished to depart from Hong Kong; therefore a person with no travel document was unable to leave Hong Kong. However, with the introduction of the “Easy Travel Scheme” in 1987, it is possible for Hong Kong residents to leave Hong Kong for Macau on production of a Hong Kong identity card (as opposed to a travel document) at immigration control points. Since a section 17A(1) notice under the POBO does not in fact prevent a person from leaving Hong Kong, Immigration Officers have no power to prevent persons holding Hong Kong identity cards from leaving Hong Kong for Macau.

**Proposal**

2. To address this loophole, it is necessary to add a new provision to section 17A providing that the subject of a section 17A(1) notice shall not leave Hong Kong during its currency. This would enable Immigration Officers to prevent such a person from leaving Hong Kong. As a matter of policy, a person who attempts to leave Hong Kong whilst subject to a requirement not to leave Hong Kong will not be arrested or penalized as the primary objective of the proposal is to prevent him from leaving Hong Kong.

**Power of Arrest conferred by section 17A(4) and 17C(1)(a) of the POBO**

3. Currently, the power to arrest individuals who breach the provisions of a section 17A(1) notice, or who fail to comply with the conditions of a recognizance under section 17B(4) and (5) of the POBO, is conferred by section 17A(4) and 17C(1)(a) of the POBO Ordinance. The powers of arrest conferred upon ICAC officers are prescribed in section 10 of the ICAC Ordinance which does not refer to section 17A(4) and 17C(1)(a) of the POBO. Therefore, ICAC officers are not empowered to arrest individuals who breach the provisions of a section 17A(1) notice, or who fail to comply with the conditions of a recognizance under section 17B(4) and (5) of the POBO. However, it is considered reasonable and appropriate to empower ICAC officers, in addition to police officers, to arrest under section 10 of the ICAC Ordinance, as conferred by section 17A(4) and section 17C(1)(a) of the POBO, and to take any persons so arrested before a magistrate in accordance with section 17A(4). Section 10 of ICAC Ordinance should be amended accordingly.

**Legislative Amendments to the Judicial Officers Recommendation Commission Ordinance (“JORCO”)**

Declaration of interest requirement of JORC members in respect of the Appointment of CJ/HC and all other Judicial Offices in Schedule 1 to JORCO

Section 3(5B) of the Judicial Officers Recommendation Commission Ordinance (Cap 92) (“JORCO”) requires JORC members to disclose any interest in the selection process for judges of the CFA and the extension of the term of office of the CJ. Specifically, a member who is or may reasonably be regarded as a candidate for selection to fill the vacancies of judges of the CFA or the extension of the term of office of the CJ shall disclose whether or not, if he were to be selected or if the extension of his term of office were to be recommended, as the case may be, he is willing to accept the appointment or the extension, and that disclosure shall be recorded in the minutes of JORC. Should that member disclose a willingness to accept an appointment or extension, under section 3(5C) of the JORCO, he shall not take part in any deliberation of JORC with respect to that appointment or extension and shall not vote on any question concerning the same; and shall be treated as being unable to act for the purpose of section 3(6) of the JORCO.

2. The declaration of interest requirement of JORC members has yet to be enshrined in statute in respect of the selection process of judicial offices other than judges of the CFA, although a similar arrangement has been applied administratively in the selection exercises of CJ/HC in 1997, 2000 and 2004, and selection exercises of other judges since Reunification. In brief, if a JORC member is a candidate in a particular selection exercise, the member would not receive the papers and would not take part in any deliberations and would not vote on the item in question.

3. As consideration by JORC is part of the procedures in respect of the appointment of any of the judicial offices specified in Schedule 1 to the JORCO (which include judges of the CFA) and the

above declaration of interest requirement has been administratively applied to the selection exercise of any such judicial offices other than judges of the CFA, it is proposed to amend section 3(5B) of the JORCO to the effect that the disclosure of interest requirement of JORC members would also be applicable in the selection process of any other judicial offices specified in Schedule 1 to the JORCO.

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**Proposed amendments to –**

**Hong Kong Court of Final Appeal Ordinance (Cap. 484)**

**High Court Ordinance (Cap. 4)**

**District Court Ordinance (Cap. 336)**

**Lands Tribunal Ordinance (Cap. 17)**

**Magistrates Ordinance (Cap. 227)**

**Labour Tribunal Ordinance (Cap. 25)**

**Small Claim Tribunal Ordinance (Cap. 338)**

**Coroners Ordinance (Cap. 504)**

**Interpretation and General Clauses Ordinance (Cap. 1)**

**Judicial Officers Recommendation Commission Ordinance  
(Cap. 92)**

**Omissions**

Under the existing Court of Final Appeal (“CFA”) Ordinance, a permanent judge of the CFA is not eligible to be appointed as the Chief Justice. This apparent oversight should be rectified by introducing relevant legislative amendment.

2. Having regard to the posting policy within the Judiciary, it is noted that the position of some Judges and Judicial Officers could be prejudiced if they are posted to fill certain positions that are not counted in calculating the qualifying period for appointment under existing legislation. For example, while service as a District Judge is counted towards the qualifying period for appointment as a judge of the High Court, service as a Deputy Registrar is not counted under existing provisions.

3. The qualifications for appointment to both the High Court (“HC”) and the District Court (“DC”) should be amended to take into account the prevailing posting policy of the Judiciary.

**Inconsistencies - professionals qualifications are stipulated for some, but not all, judicial posts**

4. At present, professional qualifications are stipulated for the posts of the Chief Justice, Permanent Judge of the CFA, Chief Judge of the High Court, High Court Judge, Registrar of the CFA, District Judge, Member of the Lands Tribunal, Adjudicator of the Small Claims Tribunal, and the Coroner.

5. However, there are no statutory provisions to cover the qualification for appointment as the Registrar, Senior Deputy Registrar and Deputy Registrar of the HC; Registrar and Deputy Registrar of the DC, Permanent Magistrate, presiding Officer of the Labour Tribunal, and Special Magistrate.

6. For the sake of consistency, the minimum qualifications for appointment for all the judicial posts should be set out in the relevant legislation.

**Discrepancies between statutory provisions and prevailing policies**

7. For the post of Member, Lands Tribunal, it is noted that there are some discrepancies between what has been stated in the legislation and what was practically expected of the post-holder under our prevailing policy. This is also the case for the post of Permanent Magistrate given that the Judicial Officer may fill the post of Coroner, and Adjudicator of the Small Claims Tribunal.

8. The statutory provisions should be revised to bring them in line with prevailing policies.

**Minimum post-qualification periods**

9. The present position is summarized as follows –

Statutory minimum period of practice as a barrister/solicitor	JJOs concerned
10 years	- CJ - CFA Judge - HC Judge
5 years	- District Judge

10. It is considered not desirable to re-open the issue of minimum qualification for appointment to the CFA. The existing provision was the agreement of the then Sino-British Joint Liaison Group. Moreover, there is no practical need to revise this criterion.

11. Having regard to the above, it is considered sensible and practicable to maintain two broad tiers for the minimum qualification for appointment –

- (a) to retain the minimum of 10-year post-qualification period for Judges at the level of High Court Judge and above; and
- (b) to set a minimum of 5-year post-qualification period for Judges and Judicial Officers at the level of District Judge and below.

**Proposal to amend section 4(28) of  
The Summary Offences Ordinance (Cap 228)**

**The problem**

In the case HKSAR v Lau San Ching & Others [2004] 1HKLRD 683, the Court of First Instance held that there was a clear conflict between the English and the Chinese texts of section 4(28) of the Summary Offences Ordinance (Cap. 228). The English text creates an offence “when any person does any act whereby obstruction *may* accrue to a public place or to the shore of the sea, etc.” On the other hand, the Chinese text creates an offence “when any person does any act whereby obstruction *actually* accrues to a public place or to the shore of the sea, etc.” The offence, therefore, is given a narrower meaning in the Chinese text. The Court then concluded that as the English text was the original official text, which existed since 1932, from which the Chinese text was subsequently prepared and declared authentic in 1992, the meaning borne by the original official English text, should take precedence over the Chinese authentic text.

2. In view of the court’s decision, the Chinese text of the provision in its present form does not reflect the current state of law.

**Proposal**

3. We propose to amend the Chinese text of section 4(28) of the Ordinance to remove the discrepancy in meaning between the two texts.

**Proposal to amend  
the Crimes Ordinance (Cap 200)**

**Background**

The offence of conspiracy was codified in sections 159A to 159F of the Crimes Ordinance by the Crimes (Amendment) Ordinance 1996 (Ord. No. 46 of 1996).

2. Before the offence was codified, section 101C(1)(b)(iii) of the Criminal Procedure Ordinance (Cap 221) provided (amongst other things) that, where a reference is otherwise made in any Ordinance to an offence, that reference shall be deemed to include a reference to a conspiracy to commit that offence. As a result, where a statutory offence required a consent to prosecute, that consent was needed before a person could be prosecuted for conspiracy to commit that offence.

3. Section 101C(1)(b)(iii) of Cap 221 was, however, repealed by Ord. No. 49 of 1996. Under the current law, there is no provision requiring consent to prosecute a person for conspiracy to commit an offence, even though consent would be needed to prosecute him for committing that offence. It does not appear that the absence of such a provision was the result of a considered policy decision. It merely resulted from the repeal of section 101C(1)(b)(iii) of Cap 221.

**The case for change**

4. Where an offence requires consent to prosecute, such consent is also needed if a person is charged with –

- (1) attempting to commit that offence (section 159H(2)(a) of the Crimes Ordinance);
- (2) aiding, abetting, counselling or procuring that offence (section 101C(1)(b)(ii) of the Criminal Procedure Ordinance); or

- (3) an incitement to commit that offence (section 101C(1)(b)(iv) of the Criminal Procedure Ordinance).

5. There appears to be no good policy reason for not requiring consent to prosecute where a person is charged with conspiracy to commit an offence in respect of which consent to prosecute is required.

## **Proposal**

6. We propose to amend section 159D of the Crimes Ordinance (Cap. 200) to require consent for prosecution of conspiracies to commit offences regarding which consent to prosecute is necessary.

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**Proposal to amend  
the Costs in Criminal Cases Ordinance (Cap 492)  
(the “CCC Ordinance”)**

**The Background**

Under s. 32 of the Hong Kong Court of Final Appeal Ordinance (Chapter 484) (the “CFA Ordinance”), no appeal shall be admitted unless leave to appeal has been granted by the Court. Leave to appeal shall not be granted unless it is certified by the Court of Appeal or the Court of First Instance, as the case may be, that a point of law of great and general importance is involved in the decision. Where the Court of Appeal or the Court of First Instance declines to certify, the Court of Final Appeal may so certify and grant leave to appeal.

2. When an appeal is dismissed by the Court of Appeal or the Court of First Instance, the appellant can apply for a certificate under s. 32 immediately. No questions of costs will arise in such cases. However, appellants very often do not apply for the certificate at the conclusion of the appeal but make applications later by way of a motion. The respondent would then incur costs.

3. There is no provision for an award of costs in those circumstances. In its judgment delivered on the 13<sup>th</sup> June 2001 on HKSAR v WONG Wah-ye, CACC 40/2000 the Court of Appeal confirmed that they had no power inferentially nor does a Judge of the Court of First Instance – and that this lacuna is regrettable and should be addressed.

**Proposal**

4. We propose to amend sections 9 and 13 of the CCC Ordinance so that where the prosecutor or a defendant unsuccessfully applies to the Court of Appeal or the Court of First Instance for a certificate under s. 32 of the Hong Kong CFA Ordinance, the Court of Appeal or the Court of First Instance may order that costs be awarded to the prosecutor or the defendant.

**Proposal to amend  
the Legal Practitioners Ordinance (Cap. 159)**

**Introduction**

The purpose of the proposed amendments to the Legal Practitioners Ordinance is to empower the Law Society Council (“the Council”) to make rules in respect of in-house solicitors relating to (i) their practice; (ii) their conduct; (iii) the tasks that can and cannot be performed by them and (iv) insurance.

**Background**

2. The Chief Justice’s approval in principle was granted in 1997 for amendments to the Solicitors’ Practice Rules to implement the proposed Employed Solicitors’ Code. In the intervening period, the Law Drafting Division has been working on the drafting of the proposed Code.

3. The practice of the Law Society has been to grant exemption to in-house solicitors from compliance with the Solicitors (Professional Indemnity) Rules (“PI Rules”) for certain types of work undertaken as a solicitor, on the basis of section 7(d) of the Ordinance. The Employed Solicitors’ Code (“the Code”) was drafted so as to grant exemptions to in-house solicitors from the PI Rules. However, vires issues were raised regarding the operation of section 7 of the Ordinance.

4. The Council obtained the opinion of a Queen’s Counsel as to, among other things, whether in-house solicitors fall within the existing regulatory framework of the Ordinance and its subsidiary legislation to enable the promulgation of an Employed Solicitors’ Code, and if not, to advise what amendments would be required to bring them within that framework.

5. The Law Society was advised by the Queen’s Counsel that:

- (a) the Council has the power to make rules under section 73(1)(a)(i) of the Ordinance to regulate the practice of all kinds of solicitors including those practising in private practice and those practising in-house and that it has the power to make rules relating to both the tasks that can and cannot be done by in-house solicitors; and
- (b) the Council also has the power to make rules under section

73A(1)(a) of the Ordinance to make rules relating to the conduct of in-house solicitors and the insurance of in-house solicitors.

6. The Council has endorsed the view of the Queen's Counsel and considered that amendments to the Ordinance should be made in order to avoid any ambiguity over the interpretation of the scope of the rule making power. The Law Society proposed that the term "professional practice" appearing in section 73(1)(a)(i) and the term "practice" appearing in section 73A(1)(a) and (b) of the Ordinance be specifically defined for the purpose of those sections, insofar as they relate to solicitors.

7. The proposed amendments would enable the Council to proceed with the promulgation of the Code which regulate solicitors practising in-house and to provide for their exemption from the application of the PI Rules.

### **Detailed Proposals**

8. The proposed amendments will enable the Council to proceed with the promulgation of the Employed Solicitors' Code which regulate solicitors practising in-house and exempt them from the application of the PI Rules. These provisions will come into effect on gazettal of the amendments.

9. A new section 73(4) should be added to provide that "for the purpose of this section, 'professional practice' in subsection (1)(a)(i), insofar as it relates to solicitors, shall mean acting as a solicitor or the business of acting as a solicitor, whether as a partner, sole practitioner, assistant solicitor or consultant in a Hong Kong firm or as an employee of a non-solicitor employer."

10. A new section 73A(8) should be added to provide that "for the purpose of this section, 'practice' in subsection (1)(a) and (b), insofar as it relates to solicitors, shall mean acting as a solicitor or the business of acting as a solicitor, whether as a partner, sole practitioner, assistant solicitor or consultant in a Hong Kong firm or as an employee of a non-solicitor employer."

**Proposed amendments to the -**

**Professional Accountants Ordinance (Cap. 50)**  
**Dentists Registration Ordinance (Cap. 156)**  
**Legal Practitioners Ordinance (Cap. 159)**  
**Medial Registration Ordinance (Cap. 161)**  
**Midwives Registration Ordinance (Cap. 162)**  
**Nurses Registration Ordinance (Cap. 164)**  
**Supplementary Medical Professions Ordinance (Cap. 359)**  
**Architects Registration Ordinance (Cap. 408)**  
**Engineers Registration Ordinance (Cap. 409)**  
**Surveyors Registration Ordinance (Cap. 417)**  
**Planners Registration Ordinance (Cap. 418)**  
**Land Survey Ordinance (Cap. 473)**  
**Social Workers Registration Ordinance (Cap. 505)**  
**Landscape Architects Registration Ordinance (Cap. 516)**  
**Chinese Medicine Ordinance (Cap. 549)**  
**Housing Managers Registration Ordinance (Cap. 550)**

**General Statement**

It is proposed to amend various Ordinances to give effect to the Court of Final Appeal judgment in A Solicitor v The Law Society of Hong Kong & SJ by repealing certain finality provisions and by making consequential amendments.

**Background**

2. In December 2003, the Court of Final Appeal (“CFA”) decided that the finality provision in section 13(1) of the Legal Practitioners Ordinance (Cap 159) (“LPO”) was invalid. Section 13(1) of the LPO provides that an appeal shall lie to the Court of Appeal (“CA”) against any order of a Solicitors Disciplinary Tribunal. It also provides that “the decision of the Court of Appeal on any such appeal shall be final” (the “Finality Provision”). The grounds of the CFA’s decision were that (a) the Finality Provision was void under the Colonial Laws Validity Act 1865 before Reunification; and (b) the Finality Provision was inconsistent with the Basic Law after Reunification.

3. Sixteen Ordinances have been identified as containing provisions which are identical to the Finality Provision in all material respects. The following table sets out the relevant sections (including section 13(1) of the LPO) of the sixteen Ordinances which contain such finality provisions.

	<u>Ordinances</u>	<u>Sections</u>
(a)	Professional Accountants Ordinance (Cap. 50)	41(2)
(b)	Dentists Registration Ordinance (Cap. 156)	23(2)
(c)	Legal Practitioners Ordinance (Cap. 159)	13(1), 37B(1)
(d)	Medical Registration Ordinance (Ca. 161)	26(2)
(e)	Midwives Registration Ordinance (Cap. 162)	15(2)
(f)	Nurses Registration Ordinance (Cap. 164)	22(1)
(g)	Supplementary Medical Professions Ordinance (Cap. 359)	25(2)
(h)	Architects Registration Ordinance (Cap. 408)	29(5)
(i)	Engineers Registration Ordinance (Cap. 409)	28(5)
(j)	Surveyors Registration Ordinance (Cap. 417)	28(5)
(k)	Planners Registration Ordinance (Cap. 418)	28(5)
(l)	Land Survey Ordinance (Cap. 473)	18(1), 27(1)
(m)	Social Workers Registration Ordinance (Cap. 505)	33(5)
(n)	Landscape Architects Registration Ordinance (Cap. 516)	28(5)
(o)	Chinese Medicine Ordinance (Cap. 549)	103(3)

(p)	Housing Managers Registration Ordinance (Cap 550)	28(5)
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### **The Proposal**

4. In order to give effect to the CFA's judgment, it is proposed that :
- (a) the Finality Provisions should be repealed; and
  - (b) consequential amendments should be made to provide that, in respect of a certain action (e.g., the publication of a disciplinary order in the Gazette) or a certain order, the time at which such action is to be carried out or, as the case may be, such order is to take effect, is to be determined by reference to an appeal to the CFA (in addition to an appeal to the CA).



## HONG KONG BAR ASSOCIATION

Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong  
 DX-180053 Queensway I E-mail: info@hkba.org Website: www.hkba.org  
 Telephone: 2869 0210 Fax: 2869 0189

13 August 2004

Ms. Stella Chan  
 Government Counsel  
 Department of Justice  
 Legal Policy Division  
 1/F, High Block  
 Queensway Government Office  
 66 Queensway  
 Hong Kong

Dear Ms. Chan,

### Proposal to amend sections 9 & 13 of the Costs in Criminal Cases Ordinance, Cap 492

I refer to your letter dated 3 August 2004 concerning a consultation paper prepared by the Department of Justice which proposes amendments to sections 9 and 13 of the Costs in Criminal Cases Ordinance.

The proposal is to amend these two sections so as to permit the Court of Appeal to award costs in relation to an application under section 32 of the Hong Kong Court of Final Appeal Ordinance, Cap 484 for a certificate from the Court of Appeal that there exists in a decision of the Court of Appeal and a point of law of great and general importance. In relation to section 9, the proposal is that it be amended so that a successful applicant for a section 32 certificate may be awarded his costs. The proposal in relation to section 13 is that where the application for a section 32 certificate is determined to be unmeritorious that the Court of Appeal have power to award costs in favour of the prosecution.

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### 香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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劉健能

吳銘樞

It is difficult to find very much to be said in favour of the proposal to make an appellant liable for the costs of the prosecution on an unsuccessful and unmeritorious application for a section 32 certificate. The first point to be made is that if the object is to deter unmeritorious applications then it is very difficult to see how it would have any real effect except in a very few cases. Those whose representation is paid for by the Director of Legal Aid would be immune. The next group of people who are to be considered would be those who are either privately represented or represent themselves. In that class of persons, the first thing that the court would be required to do is determine whether the applicant had sufficient means to meet such an order. This would leave very few persons potentially liable to face a costs order.

Given how the prosecution usually conducts itself in relation to existing powers in relation to costs on appeal, the prosecution would be unlikely to invoke this proposed power in any event. The current practice of restraint is a proper one.

Even to the extent that the limited class of applicants for a section 32 certificate might be deterred, the paper does not address the issue as to whether this form of deterrence will actually advance the interests of justice. However, it might be said to be a bad thing to deter applications for a certificate if there is a real risk that possibly a meritorious case did not proceed because a potential applicant did not wish to take the risk of an award of costs being made against him. Your paper assumes that those who will be deterred from making an application for a section 32 certificate are applicants whose case has no merit. Unless you have solid evidence which suggests a clear relationship between those who might be deterred from proceeding are only those whose applications were unmeritorious your proposal creates the risk that a good case might be deterred.

The proposal in relation to section 9 would permit costs to be awarded against the prosecution and in favour of the applicant where the application for a section 32 certificate is successful. This is fair and reasonable upon the basis that an individual receives recompense for a successful application for a certificate. It is difficult to imagine circumstances where the prosecution would ever be deterred from resisting such an application by the threat of a possible costs order.

In short, the proposal to amend section 9 has merit. The proposal to amend section 13 is unlikely to have any real benefit. In any event, there are a number of real defects in the Costs in Criminal Cases Ordinance which have a good deal more priority than this proposal. Presently there are no provisions for the payment of costs in the following circumstances:

- stay of proceedings of proceedings upon the basis that the continuation of those proceedings are an abuse of the process of the court;
- indictment quashed;
- entry of a *nolle prosequi* ;
- where proceedings before a magistrate terminated by the withdrawal of a summons or information;
- where criminal proceedings are brought in excess of jurisdiction or in the wrong court.

There must be other examples.

Yours sincerely,



Edward Chan, SC  
Chairman