

**Legislative Council Panel on  
Administration of Justice and Legal Services**

**Imposition of Criminal Liability on the  
Government or Public Officers**

**Background**

The working group set up under the Legislative Council (LegCo) Panel on Administration of Justice and Legal Services (AJLS) to study issues relating to imposition of criminal liability on the Government or public officers completed its study and issued a report in June 2004. The recommendations of the working group, which were subsequently endorsed by the AJLS Panel, are as follows—

- (a) in respect of regulatory offences, the Administration should consider that Crown immunity should be removed as a matter of policy on a case-by-case basis and when legislative opportunities arise; and
- (b) consideration should be given to the development of alternative approaches taken in the United Kingdom and New Zealand in removing Crown immunity.

2. This paper briefs Members on the Administration's position on the recommendations of the working group.

**Present position in Hong Kong and reporting mechanism for  
contravention of regulatory offences**

3. At present, our statutes contain a number of ordinances, mainly environment-related, which expressly provide that the Government shall abide by the relevant regulatory provisions but the Government or any public officers shall not be held criminally liable for contravention of the regulatory provisions while performing public duties. Instead, the ordinances impose a reporting obligation to ensure that any contravention by a governmental body is brought to the attention of a senior official who can require compliance.

4. Under the seven environment-related ordinances which adopt this approach<sup>1</sup>, any contravention of the relevant regulatory provisions is required to be reported to the Chief Secretary for Administration (CS) who shall ensure that the best practicable steps are taken to terminate contravention or avoid recurrence. In practice, the Environment, Transport and Works Bureau would make regular submissions to CS reporting contraventions and the progress of rectification measures. CS will then decide on the need for further remedial measures which may include disciplinary action against the public officer who is found to have committed misconduct. The most recent piece of legislation following the approach adopted by the environment-related ordinances is the amended Lands (Miscellaneous Provisions) Ordinance (LMPO) enacted in 2003.

5. In relation to the enforcement of the above seven environment-related ordinances, a total of 156 cases had been reported to CS between January 1999 and September 2003. Most of the contraventions were related to the Water Pollution Control Ordinance (Cap. 358), in relation to improper wastewater discharges, sub-standard treatment facilities or lack of sewerage facilities. As at end 2004, all the required rectification works had been completed. No new contravention has been recorded since October 2003. In the case of the amended LMPO, one contravention has been recorded so far. Measures had been taken to avoid a recurrence of contravention shortly after the case was reported.

### **Alternative approaches adopted in the United Kingdom and New Zealand**

6. Most common law jurisdictions which the Administration studied, including Australia, Canada and the United Kingdom (UK), have retained Crown immunity in respect of criminal liability. In the case of UK which has been studied by the working group as having adopted changes in this regard, a new approach has been adopted since 1990 in a small number of Acts of Parliament whereby the Government is required

---

<sup>1</sup> The seven ordinances are: (a) Air Pollution Control Ordinance (Cap. 311, section 44); (b) Waste Disposal Ordinance (Cap. 354, section 36); (c) Water Pollution Control Ordinance (Cap 358, section 47); (d) Noise Control Ordinance (Cap. 400, section 38); (e) Dumping at Sea Ordinance (Cap. 466, section 3); (f) Marine Parks Ordinance (Cap. 476, section 28); and (g) Environmental Impact Assessment Ordinance (Cap. 499, section 3).

to comply with statutory standards. Failure to do so will open it to court proceedings for a declaration of non-compliance (rather than criminal prosecution). We understand that as at late 2004, there was no UK court case in which the court made such a declaration.

7. In New Zealand (NZ), the Crown Organisations (Criminal Liability) Act (COCLA) was enacted in October 2002 to implement the recommendations of an inquiry into the collapse of a viewing platform. COCLA enables, inter alia, legal proceedings against Crown organisations (which includes a government department) for safety and health related breaches in two Acts. Under the relevant enactment, a Crown organisation may be liable to be ordered to make reparation to a victim or may be liable to a remedial order. The application of the COCLA has been very limited — so far, only two prosecutions were brought under the legislation, with a university and a tertiary institution named as the defendants in the cases.

### **Factors considered by the Administration**

#### ***Limited experience in overseas common law jurisdictions***

8. As illustrated in paragraphs 6 to 7 above, even in the two pioneering jurisdictions (i.e. UK and NZ), changes have been introduced on a very restrictive basis. A declaration of non-compliance by UK courts stops short of imposing criminal liability. The adoption of such a “half-way house” approach perhaps indicates UK’s reservation in adopting radical changes in imposing criminal liability on the Government. The NZ approach is narrow and restrictive in application. The courts may hand down an order to Crown organisations to make reparation to a victim or a remedial order, but the NZ approach also stops short of imposing criminal liability on Crown organisations.

9. In both jurisdictions, there has been little actual experience on the operation of the respective regimes. Given that changes have only been introduced by the two countries for a limited period of time, it would not be prudent for Hong Kong to adopt the UK or NZ approach now without a clear idea of the full impact of the changes arising from the proposal.

#### ***Effectiveness of existing reporting mechanism***

10. Furthermore, we consider that the existing reporting system has been working satisfactorily in the open setting of our community. In relation to the seven environment-related ordinances, all the required

rectification measures have been completed within a reasonable period of time, and no new contravention has been recorded since October 2003.

11. In the case of non-compliance with statutory requirements, public officers may, depending on the circumstances of the case, face disciplinary actions according to established civil service regulations. Where applicable, cases of professional misconduct may also be referred to the relevant professional bodies for action. We consider that the existing reporting mechanism, backed by the possibility of disciplinary action, has been effective in terms of rectifying the contraventions in a timely manner. We consider that in societies as open and transparent as Hong Kong, the real, and a more powerful, sanction rests with revelation of the wrongdoing, which will be swiftly followed by public censure through the news media and scrutiny by LegCo.

### **Conclusion**

12. Having considered the factors set out in paragraphs 8 to 11 above, we consider that the existing legal policy of not imposing criminal liability on the Government or public officers should be retained. We also do not think that it will be prudent to adopt the UK or NZ approach now. The effectiveness of the UK approach over our reporting mechanism has yet to be demonstrated. Given the limited experience of its operation, it would not be advisable for us to follow the NZ approach, which in any case has not been adopted in other common law jurisdictions outside NZ. However, we will keep the overall situation under review, having regard to the latest developments in the UK, NZ and other common law jurisdictions.

Constitutional Affairs Bureau  
November 2005