

Panel on Administration of Justice and Legal Services

Applicability of HKSAR laws to offices set up by the Central People's Government in the HKSAR

Background

This paper sets out the response of the Administration to a number of enquiries raised at the last Panel meeting on 19 March 2008.

Rule of law

2. Under the rule of law in Hong Kong, no person or entity is above the law. For offices set up by the Central People's Government in the HKSAR ("CPG offices"), Article 22(3) and Article 14(4) of the Basic Law are relevant:

Article 22(3)

"All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region."

Article 14(4)

"In addition to abiding by national laws, members of the garrison shall abide by the laws of the Hong Kong Special Administrative Region."

These provisions ensure that the CPG Offices must abide by the laws of HKSAR.

3. Although the above two Articles in the Basic Law make it clear that the CPG offices and their personnel must abide by the laws of the HKSAR, they should not be taken to mean a particular Ordinance must be binding on them. In this respect, section 66(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that -

"No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is herein expressly provided or unless it appears by necessary implication that the State is bound thereby."

4. The principle that legislation does not bind the sovereign power unless it expressly says so or it appears by necessary implication that this was so intended is commonly adopted by some other common law jurisdictions, including the United Kingdom and New Zealand. Under the Basic Law, Hong Kong remains a common law jurisdiction and this principle continues to apply here. Moreover, the principle is not inconsistent with Article 14 or Article 22 of the Basic Law. Section 66 of Cap 1 does not place anyone above the law.

5. In Hong Kong, the applicability of an ordinance to individuals may vary. The scope of applicability of an ordinance should reflect the policy intention. The relevant authorities should enforce the law accordingly.

Crown Proceedings Ordinance (Cap. 300)

6. At the last Panel meeting, some Members enquired about the position on the adaptation work related to the Crown Proceedings Ordinance. The Ordinance, which was modeled on the Crown Proceedings Act 1947 in the United Kingdom, provides for legal rules relating to civil proceedings by and against the Crown. It remains part of the law of the HKSAR, subject to the provisions in section 2A and Schedule 8 of the Interpretation and General Clauses Ordinance (Cap. 1) introduced by the Hong Kong Reunification Ordinance (No. 110 of 1997).

7. The Crown Proceedings Ordinance was first enacted in 1957. It contains provisions relating to old procedures which may require law reform rather than simple adaptations. Some of the provisions may have to be re-written or repealed. The work involved is, therefore, complex. The Administration will continue to study how best to adapt the Ordinance.

Progress of adaptation and timetable for further actions required

8. The Reunification had necessitated the adaptation of legislative provisions to bring the Laws of Hong Kong into conformity with the Basic Law and with Hong Kong's status as a Special Administrative Region of the People's Republic of China. Over the years, the LegCo has enacted 57 ordinances for the purposes of the adaptation of laws programme involving the adaptation of about 500 ordinances.

9. The Administration has been studying and discussing with the relevant authorities of CPG on whether and how the ordinances listed at Annex A, which expressly bind the Government but are silent on their applicability to offices set up by the CPG in the HKSAR, can be made applicable to the CPG offices. The DoJ, the relevant bureaux and departments concerned all have an input.

10. As set out in the paper provided by the Administration to the LegCo AJLS Panel in March 2008, progress has been made in respect of the arrangement for applying the relevant ordinances enacted by the HKSAR to the CPG Offices. An application formula¹ and the approach in handling the exercise have now been agreed. In accordance with the consensus reached, we intend to, as a start, introduce amendment legislation in the 2008/09 legislative session to amend four ordinances, so as to expressly provide that, aside from being applicable to the Government, they will also apply to the CPG offices. The four ordinances are The Legislative Council Commission Ordinance (Cap. 443), Plant Varieties Protection Ordinance (Cap. 490), Patents Ordinance (Cap. 514), and Registered Designs Ordinance (Cap. 522).

11. As for the remaining ordinances listed at Annex A, we need to discuss further with the CPG and the relevant bureaux and departments concerned. Upon reaching consensus, we will deal with the remaining ordinances in phases as appropriate.

12. As regards the 35 ordinances at Annex B, which are ordinances that expressly bind or apply to the “Crown”, six require no further action. For the remaining 29 ordinances, the Administration will continue to examine how these ordinances should be adapted.

Adaptation exercise involving the Hong Kong Garrison and military references

13. The Government is finalising the adaptation proposals for military references in the laws of the HKSAR and is drafting the necessary bill in consultation with the Garrison. The Government will work out a legislative timetable in due course.

¹ The provision of the application formula reads “This Ordinance applies to the Government and the Offices set up by the Central People’s Government in Hong Kong Special Administrative Region.”

Legal effect of legislation pending adaptation

14. For ordinances or provisions with references pending adaptation, such references are to be construed in accordance with the relevant provisions of section 2A and Schedule 8 of the Interpretation and General Clauses Ordinance (Cap.1). In accordance with those provisions, the word "Crown", for example, is to be construed as the "Government of the Hong Kong Special Administrative Region" or "the CPG or other competent authorities of the People's Republic of China", depending on the circumstances. The latter includes the CPG offices in Hong Kong. Although these Ordinances or provisions have yet to be adapted, the legal effect of these Ordinances or provisions has not been compromised.

Constitutional and Mainland Affairs Bureau
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Annex A

List of relevant ordinances that expressly bind the Government but are silent on their applicability to offices set up by the CPG in the HKSAR

(1)	The Legislative Council Commission Ordinance	Cap. 443	*
(2)	Plant Varieties Protection Ordinance	Cap. 490	*
(3)	Patents Ordinance	Cap. 514	*
(4)	Registered Designs Ordinance	Cap. 522	*
(5)	Gas Safety Ordinance	Cap. 51	
(6)	Arbitration Ordinance	Cap. 341	
(7)	Ozone Layer Protection Ordinance	Cap. 403	
(8)	Dumping at Sea Ordinance	Cap. 466	
(9)	Marine Parks Ordinance	Cap. 476	
(10)	Sex Discrimination Ordinance	Cap. 480	
(11)	Mandatory Provident Fund Schemes Ordinance	Cap. 485	
(12)	Personal Data (Privacy) Ordinance	Cap. 486	
(13)	Disability Discrimination Ordinance	Cap. 487	
(14)	Environmental Impact Assessment Ordinance	Cap. 499	
(15)	Occupational Safety and Health Ordinance	Cap. 509	
(16)	Family Status Discrimination Ordinance	Cap. 527	

* We intend to introduce legislative amendments in the 2008/09 legislative session to amend these four ordinances, so as to expressly provide that they will apply to the Government, as well as the offices set up by CPG in the HKSAR.

Annex B

List of the 35 ordinances that expressly bind or apply to the “Crown”

(1)	Bankruptcy Ordinance	Cap. 6	
(2)	Law Amendment and Reform (Consolidation) Ordinance	Cap. 23	
(3)	Recognition of Trusts Ordinance	Cap. 76	
(4)	Matrimonial Causes Ordinance	Cap. 179	
(5)	Traffic Accident Victims (Assistance Fund) Ordinance	Cap. 229	
(6)	Fixed Penalty (Traffic Contraventions) Ordinance	Cap. 237	
(7)	Enforcement of Rights (Extension of Time) Ordinance	Cap. 252	
(8)	Perpetuities and Accumulations Ordinance	Cap. 257	
(9)	Peak Tramway Ordinance	Cap. 265	
(10)	Massage Establishments Ordinance	Cap. 266	
(11)	Motor Vehicles Insurance (Third Party Risks) Ordinance	Cap. 272	
(12)	Education Ordinance	Cap. 279	#
(13)	Merchant Shipping Ordinance	Cap. 281	
(14)	Employees’ Compensation Ordinance	Cap. 282	
(15)	Misrepresentation Ordinance	Cap. 284	
(16)	Hong Kong Airport (Regulations) Ordinance	Cap. 292	(Repealed in 2002)
(17)	Crown Proceedings Ordinance	Cap. 300	
(18)	Shipping and Port Control Ordinance	Cap. 313	
(19)	Occupiers Liability Ordinance	Cap. 314	

(20)	Industrial Training (Construction Industry) Ordinance	Cap. 317	(Repealed in 2008)
(21)	Lifts and Escalators (Safety) Ordinance	Cap. 327	#
(22)	Small Claims Tribunal Ordinance	Cap. 338	
(23)	Waste Disposal Ordinance	Cap. 354	
(24)	Water Pollution Control Ordinance	Cap. 358	
(25)	Pneumoconiosis (Compensation) Ordinance	Cap. 360	
(26)	Roads (Works, Use and Compensation) Ordinance	Cap. 370	
(27)	Road Traffic Ordinance	Cap. 374	#
(28)	Civil Liability (Contribution) Ordinance	Cap. 377	
(29)	Hong Kong Bill of Rights Ordinance	Cap. 383	(No need for adaptation*)
(30)	Noise Control Ordinance	Cap. 400	
(31)	Occupational Retirement Schemes Ordinance	Cap. 426	
(32)	Parent and Child Ordinance	Cap. 429	
(33)	Merchant Shipping (Limitation of Shipowners Liability) Ordinance	Cap. 434	
(34)	Occupational Deafness (Compensation) Ordinance	Cap. 469	
(35)	Carriage by Air Ordinance	Cap. 500	

The provisions regarding the scope of their application have been adapted.

* On further examination, the Hong Kong Bill of Rights Ordinance does not have any references to “Crown”. Thus, there is no need for adaptation.