

**Legislative Council Bills Committee on
Adaptation of Laws (Military References) Bill 2010**

Response to the Comments of the Hong Kong Bar Association

Purpose

The Hong Kong Bar Association (“HKBA”) set out their comments on the Adaptation of Laws (Military References) Bill 2010 (“the Adaptation Bill”) in their letter of 31 December 2010 (LC Paper No. CB(2)736/10-11(01)). At the request of the Bills Committee, this paper sets out our response to their comments.

Justifications and guiding principles of adaptation of laws

2. In our December 2010 paper to the Legislative Council (“LegCo”) Bills Committee (LC Paper No. CB(2)479/10-11(02)), it clearly states that the Adaptation Bill aims to adapt certain military-related references in the laws of Hong Kong with a view to bringing them into conformity with the Basic Law and Hong Kong’s status as a Special Administrative Region (“the HKSAR”) of the People’s Republic of China (“the PRC”). One important principle is that the provisions, when adapted, should have the same legal effect after its adaptation as before. To facilitate Members’ reference, we set out the background and justifications of the adaptation of laws as follows –

- (a) On 23 February 1997, the Standing Committee of the National People’s Congress decided that except for 14 Ordinances and subsidiary legislation, and certain provisions in 10 Ordinances and subsidiary legislation which are in contravention of the Basic Law, the laws previously in force in Hong Kong are adopted as the laws of the HKSAR in accordance with Articles 8 and 160 of the Basic Law¹.

¹ Article 8 of the Basic Law: “[t]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the HKSAR.”

Article 160 of the Basic Law: “[u]pon the establishment of the HKSAR, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.”

(b) The decision of the Standing Committee of the National People's Congress also spells out the interpretative principles for provisions relating to the rights, exemptions and obligations of military forces stationed in Hong Kong by the United Kingdom and references of "Her Majesty", "the Crown", "the British Government" and "the Secretary of State", etc. The interpretative principles promulgated by the Standing Committee of the National People's Congress have been enacted as part of the laws of Hong Kong by the Hong Kong Reunification Ordinance (No. 110 of 1997) and incorporated as section 2A of and Schedule 8 to the Interpretation and General Clauses Ordinance (Cap. 1). Major interpretative principles relevant to the current laws adaptation exercise are –

(i) Section 2A(2)(c) of Cap.1: provisions relating to the rights, exemptions and obligations of the military forces stationed in Hong Kong by the United Kingdom shall, subject to the provisions of the Basic Law and the Law of the PRC on the Garrisoning of the HKSAR ("the Garrison Law"), continue to have effect and apply to the military forces stationed in HKSAR by the Central People's Government ("the CPG") of the PRC.

(ii) Section 1 of Schedule 8 to Cap.1: any reference in a provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) where the content of the provision-

(a) relates to title to land in the HKSAR;

(b) involves affairs for which the CPG of the PRC has responsibility;

(c) involves the relationship between the Central Authorities and the HKSAR,

shall be construed as a reference to the CPG or other competent authorities of the PRC.

- (iii) Section 2 of Schedule 8 to Cap.1: any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) in contexts other than those specified in paragraph (ii) above shall be construed as a reference to the Government of the HKSAR.

Military-related provisions in the laws of Hong Kong previously in force have been construed since 1 July 1997 in accordance with the interpretative principles set out in the Interpretation and General Clauses Ordinance (Cap. 1). That said, in the interest of legal certainty of the laws of Hong Kong, it is still necessary to adapt these military-related provisions.

3. Regarding the guiding principles of adaptation of laws, the Department of Justice presented to the LegCo back in 1998 the guiding principles to be applied for the adaptation of laws programme as set out in the “Guiding Principles and Guideline Glossary of Terms” (LC Paper No. CB(2)739/98-99(01)) (“the Guiding Principles”). Among others, paragraph 5 of the Guiding Principles provides that –

- (a) the provision when adapted should be consistent with the Basic Law and with Hong Kong’s status as a Special Administrative Region of the 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 Basic Law nor necessitated by Hong Kong’s new status is outside the scope of the adaptation of laws programme;
- (b) the adaptation of each provision should be made in accordance with the relevant provisions of the Interpretation and General Clauses Ordinance where applicable, but the adaptation must be considered in the context of the particular Ordinance concerned and other related Ordinances.

The adaptation bill covers straight forward adaptation proposals only

4. The Adaptation Bill makes adaptation proposals to military-related references only. As such, proposals that may involve –

- (i) law reform, or
- (ii) non-military-related references (such as the Crown immunity under the common law and references to any part of the Commonwealth outside Hong Kong),

will not be included in the Adaptation Bill. In fact, proposals in the Adaptation Bill are straight forward and are prepared in accordance with the aforementioned Guiding Principles. The adaptation proposals can be regarded as technical amendments. The adaptation proposals have no impact on the legal effect of the existing provisions and are consistent with the Guiding Principles adopted in other adaptation of laws exercises. As set out in paragraph 7 of our July 2010 submission of LegCo Brief on the Adaptation Bill –

‘Broadly speaking, general references to “Her Majesty’s forces”, for example, will be adapted as “the Chinese People’s Liberation Army” since “Her Majesty’s forces” covered the British Forces garrisoned in Hong Kong and other members of the British Forces before 1 July 1997. References specific to the British armed forces stationed in Hong Kong will be adapted as “the Hong Kong Garrison”... When formulating the actual adaptation proposals, we have also taken into account the context and the legislative intent of the relevant provisions.’

5. The adaptation proposals mentioned in paragraphs 17(a), (c), (j), (k), (l), (m), (p), (q) and (s) of the letter from HKBA² are all military-related references. The adaptation proposals are straight forward adaptations and are prepared in accordance with the Guiding Principles as applied in the adaptation of laws programme. For example, “Her

² Relating to Defamation Ordinance, Antiquities and Monuments Ordinance, Employment Ordinance, Pilotage Ordinance, Inland Revenue Ordinance, Summary Offences Ordinance and Public Order Ordinance.

Majesty's forces" is proposed to be adapted as "the Chinese People's Liberation Army" or "the Hong Kong Garrison" (if related to the utilisation of land by the former British Forces stationed in Hong Kong), and "Her Majesty's Government in the United Kingdom" as "the Central People's Government", etc.

Adaptations proposals are prepared in accordance with the Guiding Principles, the Basic Law and the Garrison Law

6. As stated in paragraph 2(b) above, the proposed adaptations are prepared in accordance with the interpretative principles incorporated in the Interpretation and General Clauses Ordinance (Cap. 1) –

provisions relating to the rights, exemptions and obligations of the military forces stationed in Hong Kong by the United Kingdom shall, subject to the provisions of the Basic Law and the Garrison Law, continue to have effect and apply to the military forces stationed in the HKSAR by the CPG of the PRC.

Generally speaking, each adaptation proposal is drawn up in accordance with the provisions of the Basic Law, the Garrison Law and Cap. 1 to conform to Hong Kong's status as a Special Administrative Region of the PRC.

7. As such, the references mentioned in paragraphs 17(b), (f), (g), (h), (i), (n), (o), (r) and (t) of the letter from HKBA³ are drawn up in accordance with the decisions of the Standing Committee of the National People's Congress, and will not (and should not) add nor take away the relevant rights, exemptions and obligations of the military forces stationed in Hong Kong after the reunification.

³ Relating to Jury Ordinance, Defamation Ordinance, "Star" Ferry Company, Limited By-laws, Immigration Ordinance, Dangerous Drugs Ordinance, Air Passenger Departure Tax Ordinance, Dentists Registration Ordinance, Medical Registration Ordinance, Wild Animals Protection Ordinance, Crimes Ordinance, Firearms and Ammunition Ordinance and the Traffic Accident Victims (Assistance Fund) Ordinance.

Other background information related to the Hong Kong Garrison

8. Paragraphs 17 (d) and (e) of HKBA's letter concerns additional information relating to the former British Forces stationed in Hong Kong and the Hong Kong Garrison. The relevant information (including the status and composition of the former British Forces stationed in Hong Kong and the Hong Kong Garrison, etc.) have been provided to the Bills Committee on 12 January 2011.

9. Further, in accordance with Article 10 of the Garrison Law, "...the HKSAR shall consult the Hong Kong Garrison when formulating any policy or drafting any legislation which concerns the Hong Kong Garrison.", we have already consulted the Hong Kong Garrison on the adaptation proposals included in the Adaptation Bill, and the Hong Kong Garrison agrees with our proposals.

Security Bureau

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