

For discussion
on 26 March 2012

Panel on Administration of Justice and Legal Services

Statute Law (Miscellaneous Provisions) Bill 2012

Introduction

A number of amendments to various Ordinances are proposed for inclusion in the above Bill. The proposed amendments are largely technical and 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.

General background

2. The Administration has used 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 typically involve only a few clauses.

Outline of proposed amendments

3. The proposed amendments to be included in the Bill are set out below under different headings in accordance with the relative importance of the subject matters.

Crimes Ordinance (Cap. 200)

4. Under the existing common law, there is an irrebuttable common law presumption of criminal law that a boy under 14 is incapable of sexual intercourse. After reviewing the presumption and its implications, the Law Reform Commission of Hong Kong (LRC) issued a report in December 2010 recommending that the common law presumption should be abolished. In order to implement the LRC's recommendation, it is proposed that a new provision be inserted in the Crimes Ordinance to abolish the common law presumption.

Legal Practitioners Ordinance (Cap. 159) and Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997) (the “1997 Ordinance”)

5. The new Section 7L of Part IIAA of the Legal Practitioners Ordinance as enacted by the 1997 Ordinance provides that “[n]othing in this Part affects the operation of the Companies Ordinance (Cap. 32) in relation to its application to a company that is a solicitor corporation”. In the draft Solicitor Corporation Rules (draft SCR) proposed by the Council of the Law Society, there is a provision providing that only a solicitor who is a member or employee of a solicitor corporation can be appointed as a proxy for the purpose of attending and voting at any meeting of the solicitor corporation. This proposed provision in the draft SCR is arguably in breach of the *ultra vires* principle in its purported restriction or qualification of section 114C(1) of the Companies Ordinance which provides:

“... any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of him”.

6. The Law Society maintains that the proposed provision in the draft SCR is required to achieve the policy intent that control of solicitor corporations must remain with solicitors. It is proposed that the potential *ultra vires* issue be resolved by amending the new section 7L of the Legal Practitioners Ordinance.

7. We have been informed by the Law Society that it intends to bring into operation all the relevant provisions relating to solicitor corporations in the 1997 Ordinance at the same time when the Solicitor Corporation Rules prepared by the Law Society comes into operation.

8. Since the 1997 Ordinance was enacted quite some time ago, some of the amendments in the 1997 Ordinance have been overtaken by subsequent amendments to the Legal Practitioners Ordinance made after 1997. As a result, some provisions in the Legal Practitioners Ordinance and in the 1997 Ordinance need to be further amended so as to enable the relevant provisions of the 1997 Ordinance and the Solicitor Corporation Rules to be brought into operation. The Bill will include a dedicated part to deal with these consequential amendments.

Other major proposed amendments to the Legal Practitioners Ordinance

9. The Hong Kong Bar Association takes the view that reading sections 30(3) and 31C(3) of the Legal Practitioners Ordinance together, an employed barrister is required to be insured before an employed barrister's certificate (EBC) can be issued to an employed barrister as a result of the deeming effect of section 31C(3) and that such effect in requiring an employed barrister to be insured before an EBC can be issued might have been an oversight at the time of the enactment of section 31C.

10. The Bar Association considers that there is no policy reason to justify the insurance requirement for employed barristers and proposes that an applicant for EBC should be exempted from the application of section 30(3)(b) of the Ordinance. The Bar Association explains that employed barristers only provide legal services to their respective employers, and not to the general public, and whether the employed barrister should or should not be insured is a matter between the employed barrister and the employed barrister's employer. Insofar as the solicitor branch of the legal profession is concerned, we note that an employed solicitor is generally not required to take out professional indemnity insurance.

11. In addition, it is necessary to repeal the finality provision in section 40M(1) of the Legal Practitioners Ordinance to allow an appeal to be lodged to the Court of Final Appeal (CFA) against any order made by a Notaries Public Disciplinary Tribunal. This provision is similar to the finality provision in section 13(1) of the Ordinance, which was repealed by the Statute Law (Miscellaneous Provisions) Ordinance 2005 (10 of 2005) as a result of the CFA's judgment in *A Solicitor v The Law Society of Hong Kong & Secretary for Justice* [2004] 1 HKLRD 214 where the CFA held that the finality provision in section 13(1) was inconsistent with its power of final adjudication under Article 82 of the Basic Law. A number of related and consequential amendments to sections 25(2)(c), 39(2)(c), 40P(3)(a) and 40R(2)(c) of the Ordinance will also be proposed by the Bill.

Customs and Excise Service Ordinance (Cap. 342)

12. The Civil Service Bureau and the Customs and Excise Department propose to repeal section 12(6) of the Customs and Excise Service Ordinance as this provision may not be compatible with Article 31 of the Basic Law and Article 8(2) of the Hong Kong Bill of Rights concerning freedom to travel. The section requires an officer under interdiction to seek the permission of the Commissioner of Customs and Excise before leaving Hong Kong.

High Court Ordinance (Cap. 4), Lands Tribunal Ordinance (Cap. 17), Labour Tribunal Ordinance (Cap. 25), Magistrates Ordinance (Cap. 227), District Court Ordinance (Cap. 336), Small Claims Tribunal Ordinance (Cap. 338) and Coroners Ordinance (Cap. 504)

13. As a result of the establishment of the legal office of Assistant Principal Solicitor (APS) in the Intellectual Property Department, it is proposed that APS be added to the relevant provisions in the above Ordinances so as to ensure that APSs are eligible to be appointed as certain judicial officers.

Legislation Publication Ordinance (Cap. 614) and the Laws (Loose-leaf Publication) Ordinance 1990 (51 of 1990)

14. In order to facilitate the editorial work in preparing and updating the Laws of Hong Kong, it is beneficial for the Secretary for Justice to have wider editorial powers. These include making the ambit of editorial powers for the loose-leaf edition to be in line with the new legislation database regime under section 12 of the Legislation Publication Ordinance (Cap. 614), adding the power in relation to inserting after a reference to the title of an Ordinance the chapter number given under the Laws (Loose-leaf Publication) Ordinance 1990 (51 of 1990) or under the Legislation Publication Ordinance, and adding the power to insert after a definition its Chinese/English equivalent.

Miscellaneous minor and technical amendments

15. It is also proposed that certain minor and technical amendments to various Ordinances or subsidiary legislation be made for miscellaneous purposes, for example, to correct or update references appearing in certain enactments and to achieve internal consistency in terminology and consistency between the Chinese and English texts of certain enactments.

Public consultation

Crimes Ordinance (Cap. 200)

16. The AJLS Panel was consulted on the LRC's report recommending the abolition of the common law presumption that a boy under 14 is incapable of sexual intercourse at its meeting on 28 February 2011. Members generally supported this recommendation.

Legislation Publication Ordinance (Cap. 614) and the Laws (Loose-leaf Publication) Ordinance 1990 (51 of 1990)

17. The Department of Justice has also prepared a separate paper to consult the Panel on the proposed amendments to the above Ordinances at the meeting to be held on 26 March 2012.

Others

18. We have consulted the Law Society on the proposed amendments in relation to solicitor corporations as set out in paragraphs 5 to 8 of this paper. The Hong Kong Society of Notaries expressed no comment on the proposed repeal of the finality provision in section 40M(1) of the Legal Practitioners Ordinance as referred to paragraph 11 above. Insofar as the other proposed amendments are concerned, we consider that no public consultation is necessary due to their technical and non-controversial nature.

Department of Justice
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