

立法會
Legislative Council

LC Paper No. CB(2) 1480/98-99

(These minutes have been seen
by the Administration)

Ref : CB2/BC/5/98

**Bills Committee on
Adaptation of Laws Bill 1998**

**Minutes of meeting
held on Tuesday, 15 December 1998 at 8:30 am
in Conference Room A of the Legislative Council Building**

Members present : Hon Andrew WONG Wang-fat, JP (Chairman)
Hon Kenneth TING Woo-shou, JP
Hon Cyd HO Sau-lan
Hon Margaret NG

Members absent : Hon Ronald ARCULLI, JP
Hon James TO Kun-sun
Hon Ambrose CHEUNG Wing-sum, JP
Hon Jasper TSANG Yok-sing, JP
Hon Ambrose LAU Hon-chuen, JP

Public Officers attending : Ms Mimi LEE
Principal Assistant Secretary for Security (Narcotics)

Mrs Sarah KWOK
Principal Assistant Secretary for Security B

Miss Bonnie WONG
Assistant Commissioner for Correctional Services

Mr CHAN Hon-kit
Senior Superintendent (Ag)
Customs Drug Investigation Bureau

Mr Henrique KOO Sii-hong
Chief Superintendent
Narcotics Bureau
Hong Kong Police Force

Mr YEN Yuen-ho, Tony
Law Draftsman

Mr J L ABBOTT
Senior Assistant Law Draftsman

Mr SUEN Wai-chung
Senior Assistant Law Draftsman

Mr LEUNG Tung-wa, Byron
Government Counsel

Clerk in attendance : Mrs Sharon TONG
Chief Assistant Secretary (2)1

Staff in attendance : Miss Betty MA
Senior Assistant Secretary (2) 1

Miss Connie FUNG
Assistant Legal Adviser 3

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2) 870/98-99)

The minutes of meeting held on 4 November 1988 were confirmed.

II. Meeting with the Administration

Outstanding issues

Adaptation of references to "Crown"

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2. The Law Draftsman (LD) said that in response to members' request at the last meeting, the Administration had prepared an information paper entitled "Adaptation of Laws Programme: item 7 of Schedule 9 to Cap.1" (LC Paper No. CB(2) 858/98-99(01)) explaining the background to and the basis of formulating the principles of interpretation in item 7 of Schedule 9 to Cap.1 (the Interpretation and General Clauses Ordinance). Schedule 8 to Cap.1 was added by the Hong Kong Reunification Ordinance which reflected the principles of interpretation set out in Annex 3 of the decision of the Standing Committee of National People's Congress (NPC) on 23 February 1997. In accordance with the decision of the Standing Committee of NPC, any reference in any provision made to "Her Majesty", "the Crown", "the British Government" or "the Secretary of State", where the content of the provision (a) related to title to land or (b) involved affairs for which the Central People's Government (CPG) of the People's Republic of China (PRC) had responsibility or (c) involved the relationship between CPG and the Hong Kong Special Administrative Region (HKSAR), should be construed as a reference to CPG or other competent authorities of PRC. In other cases, the reference should be construed as the Government of HKSAR. Schedule 8 of Cap.1 was applicable to most of some 600 Ordinances prevailing in Hong Kong, with the exception of section 66 of Cap.1. It was because section 66 of Cap.1 was a provision of general application and had no specific context for the purpose of applying item 1 or item 2 of Schedule 8 to Cap.1. As to whether section 66 of Cap.1 could be interpreted so that it reflected the alternative constructions of the "Crown", and so that the relevant context for deciding which construction to apply would be the specific ordinance whose binding effect was in question. There were, however, problems with such an approach. For example, if it was stipulated in an ordinance that it bound the Crown, it could either bind CPG or HKSAR Government, but not both, in accordance with item 1 or item 2 of Schedule 8 to Cap.1. The Administration believed that this was not the legislative intent of section 66 of Cap.1. The adaptation of the word "Crown" in section 66 of Cap.1 was therefore adapted by substituting the word "State" by the addition of item 7 of Schedule 9 to Cap.1. The definition of "State" in Cap.1 included the President of PRC, CPG, the Government of HKSAR. The adaptation was defined in a way that closely approximated the meaning of "Crown" but reflected the change in sovereignty. The addition of item 7 of Schedule 9 had been passed by the Provisional Legislative Council. In the context of adaptation, where it was expressly provided in an ordinance that the ordinance was or was not binding on the Crown, that reference to the "Crown" would be construed as a reference to the "State" within the meaning of item 7 of Schedule 9.

3. In response to Miss Margaret NG, LD said that there were some 30 ordinances in which it was expressly stated that the ordinance bound or applied to the Crown.

4. Referring to the information paper, Miss Margaret NG made the

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following points -

- (a) She had no question about the application of Schedule 8 to Cap.1. Its source was very clear. Given that due consideration was given by the Standing Committee of NPC to the principles of interpretation and that Schedule 8 to Cap.1 did not state that reference to the “Crown” could be construed as a reference to the “State”, the addition of item 7 of Schedule 9 would be contradictory to Schedule 8.
- (b) She dissented from the Administration’s rationale for the addition of item 7 of Schedule 9. Any reference in any provision to the Crown, the British Government, etc. which was not covered under Schedule 8 to Cap.1 should be construed in accordance with section 2A of Cap.1.
- (c) The addition of item 7 of Schedule 9 was not the appropriate way to deal with the problem encountered in adapting section 66 of Cap.1. She pointed out that, for example, reference to the “United Kingdom” in certain provisions was obsolete, consideration should be given to repealing the reference instead of adapting it. Moreover, in the context of adaptation, should the proposed adaptation involve a change in law, the Administration should consider dealing with the adaptation by other means. The Administration should take into consideration the purpose and effect of section 66. As to whether section 66 was still applicable to Hong Kong after reunification, the Administration should make reference to the Basic Law. The problem of section 66 was beyond the scope of adaptation. It should be dealt with under a separate amendment bill so as to examine which provisions were to be retained and which were to be repealed, in particular those concerning the relationship between HKSAR Government and the United Kingdom.
- (d) She opposed the adaptation of reference to the “Crown” by the word “State”. Schedule 9 to Cap.1 should be repealed.

5. The Chairman said that the issue of adaptation of section 66 of Cap.1 had been discussed at meetings of the Panel on Administration of Justice and Legal Service as well as the Panel on Constitutional Affairs. The definition of “State” had already been enacted and come into operation. The issue had no direct correlation with this Bills Committee. Nevertheless, he invited the Administration to give a preliminary response so as to facilitate members’ understanding.

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6. LD responded that in accordance with the Decision of the Standing Committee of NPC, the laws previously in force in Hong Kong, except for those which were in contravention of the Basic Law, were adopted as the laws of HKSAR. Thus, the guiding principle to be applied in the adaptation of laws exercise, amongst others, was that the provision when adapted should be, as far as possible, having the same legal effect as before. Being the first step of the adaptation of laws exercise, amendments were proposed for adapting particular terms. Relevant amendments would be proposed to the legislation at a later stage should problems or grey areas be identified having regard to the implementation of the Basic Law. Regarding the definition of section 66 of Cap.1, LD said that the Department of Justice was studying the issue having regard to members' views. The outcome would be reported to the relevant Panel in due course. Should the need arise, the Administration might consider introducing a legislative proposal on the issue.

7. The Chairman considered that the adaptation of the word "Crown" by the word "State" involved a new concept which might be regarded as enacting a piece of legislation. It would be more appropriate to adapt the word "Crown" by "HKSAR Government".

8. LD said that although items 1 and 2 of Schedule 8 to Cap.1 were incorporated into Cap.1 in accordance with the decision of NPC, section 2 of Cap.1 provided that the application of Cap.1 to any other ordinance should have to make reference to the context of the ordinance in question. Since Schedule 8 could not be applied in construing the reference to "Crown" in section 66 in Cap.1, he reiterated that the addition of Schedule 9 to Cap.1 was the only feasible alternative.

錯誤! 尙未定義書籤。 . Noting from para. 11 of the information paper that item 7 of Schedule 9 to Cap.1 was a temporary provision, Miss Margaret NG requested for further clarification. LD responded that some 50 adaptation of laws bills were to be introduced into the Legislative Council. Upon completion of the adaptation of laws exercise, all the references to the "Crown" would be adapted by the appropriate terms, such as "Government" or "State". Once all relevant provisions had been adapted, item 7 of Schedule 9 to Cap.1 could be repealed.

Adaptation of reference to "saving the rights of Her Majesty, Her Heirs and Successors"

9. LD said that prior to reunification, a section of "saving the rights of Her Majesty, Her Heirs and Successors" was required to be contained in each private bill under the Royal Instructions. The Royal Instructions ceased to apply to HKSAR after reunification. The Standing Committee of NPC in its decision on the Treatment of the Laws Previously in Force in Hong Kong (adopted on 23 February 1997) adopted ordinances which contained this savings provision. The

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Standing Committee's Decision was enacted in the Hong Kong Reunification Ordinance and incorporated Cap.1 that this savings provision in private bills was a constitutional requirement so that private bills were not to impinge on any rights of Her Majesty. Notwithstanding that the obsolescence of this savings provision, it was considered inappropriate to amend such provision in the context of adaptation. As to whether there was a need to retain such savings provision in the relevant ordinances, the Department of Justice would examine the issue in due course.

10. Miss Margaret NG opined that notwithstanding that such savings provision was adopted by NPC, consideration should be given to the nature of the rights of Her Majesty and whether the savings provision needed to be retained having regard to a change in the constitutional structure after reunification.

11. At the invitation of Miss Margaret NG, Assistant Legal Adviser 3 (ALA3) gave her views as follows -

- (a) According to the Chinese text of the Decision of the NPC Standing Committee, the rights of “中央” were to be saved. However, the English version read saving the rights of the “Central People's Government”. According to the Constitution of PRC, the State Council of PRC was CPG. It appeared that CPG did not include NPC and its Standing Committee;
- (b) Members might consider whether similar savings provision, e.g. saving the rights of the Government or CPG, was required to be included in private bills in future. There appeared to be a lack of legal basis for the requirement on reunification given that the Royal Instructions ceased to apply on reunification.
- (c) Most of the ordinances containing the savings provision provided for the incorporation of religious, voluntary, educational and professional bodies; the establishment of charitable trusts; the vesting of certain property in commercial undertakings, etc; and
- (d) The rights saved to Her Majesty, might include, but not limited to, the right to incorporate companies by royal charter; the right of protecting charitable trusts through the Attorney General acting for and on behalf of the Crown in legal proceedings; the legal power to overrule the local legislature in the colonies on the advice of the Secretary of State.

12. Miss Margaret NG requested and ALA3 agreed to provide the advice in writing.

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(Post-meeting note : The requested information was circulated to members vide LC Paper No. LS 93/98-99.)

13. Miss Margaret NG said that given bills might be introduced either by the Administration or by a Member, she wondered why the inclusion of such savings provision was needed only if the bill was introduced by a Member. LD said that the savings provision was to ensure that no private bill impinged in any way on any right that Her Majesty and Her Heirs and Successors might enjoy. Otherwise, the private bill in question might be disallowed by Her Majesty.

14. The Chairman asked whether similar savings provision was required to be included in private bills presented in the United Kingdom Parliament. LD agreed to provide the requested information.

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(Post-meeting note : The required information was circulated to Members vide LC Paper No. CB(2) 1034/98-99 (01).)

15. The Chairman opined that he inclined to accept the adaptation of reference to “Her Majesty” by “HKSAR Government” in respect of the savings provision. Otherwise, it might involve the relationship between HKSAR Government and CPG.

Adaptation of reference to “Colonial Regulations”

16. LD said that the Administration had given due consideration to members’ views on alternatives to an executive order made under Article 48(4) of the Basic Law. Given the legality of an executive order made under Article 48(4) of the Basic Law was confirmed by the Court in a recent judicial review case, the Administration was of the view that an executive order made under Article 48(4) was to be retained. The Executive Order in question (i.e. the Public Service (Administration) Order 1997 (PS(A)O) (Executive Order No.1 of 1997)) was confined to the administration of public service in relation to the appointment, dismissal and discipline of public servants. An executive order issued by the Chief Executive did not constitute a departure from the previous system adopted by the Administration prior to reunification in which any administrative order made by the then Governor was not subject to the approval by the Legislative Council.

錯誤! 找不到參照來源。 Miss Margaret NG said that she had reservation about an executive order issued by the Chief Executive from the angle of adaptation. She pointed out that the Court only ruled on the legality of the executive order issued by the Chief Executive and whether it had complied with the Basic Law. The Court did not rule on whether an executive order issued under Article 48(4) was equivalent to the status of the Colonial Regulations.

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17. Referring to the Administration's response to the views put forward by the Hong Kong Bar Association (LC Paper No. CB(2) 753/98-99(01)), Miss Margaret NG further said that two major areas of concern should be noted. Firstly, whether the term "relevant executive order" was an appropriate adaptation for the term "Colonial Regulations" and whether the proposal exceeded the scope of adaptation. Once an executive order issued by the Chief Executive under Article 48(4) had legislative effect, it constituted another set of legislation which was not subject to the approval by the Legislative Council. However, no definition of an executive order was provided in the existing legislation. Secondly, whether adapting the term "Regulations of the Hong Kong Government" by "government regulations" would result in numerous administrative regulations or rules to be made in future and whether such regulations and rules had legal backing.

18. LD stressed that to replace references to "Colonial Regulations" by "relevant executive orders" was to retain the provisions in the Colonial Regulations pertaining to the administrative details of the management of the public service. The term "relevant executive order" referred to the specific executive order published in the Gazette, i.e. PS(A)O. Its application was confined to the administration of public service. Should any party consider an executive order issued by the Chief Executive as improper, they might resort to judicial review. He assured members that any executive orders issued by the Chief Executive could not go beyond the law.

19. Regarding the interpretation of Article 48(4), the Chairman considered that it should be interpreted by the local court. Miss Margaret NG enquired about the scope of, the restrictions and the procedures for dealing with Article 48(4). ALA3 said that no definition of an executive order nor its scope was provided under Article 48(4). According to some literature on the issue, an executive order was regarded as an order for internal administration. Nevertheless, there was no precedent case regarding its interpretation. On the legality of an executive order, ALA3 said that an executive order issued by the Chief Executive under Article 48(4) had legal effect because the Basic Law was part of the Laws of Hong Kong. Moreover, the Executive Order in question had been published in the Gazette. She further said that it was uncertain about the scope of an executive order and whether there were any restrictions imposed on the Chief Executive regarding the issuing of an executive order.

錯誤！找不到參照來源。 Miss Margaret NG said that the nature and ambit of an executive order as well as the procedures for its promulgation were constitutional issues, she would follow up the matter in the relevant Panel.

20. In response to the Chairman's enquiry, LD said that the Chief Executive had already issued an executive order before the Administration proposed to adapt the term "Colonial Regulations" by "relevant executive orders". The

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Chairman said that, under the circumstances, members were presented with no other alternatives for adapting the term “Colonial Regulations”. He considered that the Administration might consider adopting other approaches, e.g. making regulations for the administration of public service which spelt out clearly that the approval by the Legislative Council was not required.

21. Miss Margaret NG opined that clarity and certainty of a piece of legislation were of utmost importance. She suggested that the Administration might consider including the specific executive order in force in the definition of “relevant executive order”.

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22. Principal Assistant Secretary for Security (Narcotics) (PAS/S(N)) said that the Administration would consider the suggestion to replace the reference to “Colonial Regulations” by reference to the existing executive order.

23. The Chairman asked whether the Executive Order in question would be incorporated into the Laws of Hong Kong given that its legality had been confirmed by the Court. LD said that the Executive Order in question was not a piece of legislation enacted by the Legislative Council. Its application was confined to a group of persons. Thus, there was no need to incorporate it into the Laws of Hong Kong. Its promulgation in the Gazette was considered adequate.

Clause-by-clause examination

Schedule 2 - Juvenile Offenders Ordinance (Cap.226)

Section 17 - Provisions as to the custody of children and young persons in places of detention

24. Referring to the information paper (LC Paper No. CB(2) 877/98-99(01)), PAS/S(N) said that the Administration was of the view that the two parts of section 17(3) stood independently of each other.

25. In response to Miss Margaret NG, SALD said that section 17(3) comprised two parts, viz. the first part of the provision read as “the Governor shall cause places of detention to be inspected” (which imposed a responsibility on the Governor) while the second part of the provision read as “the Governor may make rules as to the places to be used as places of detention, and as to their inspection”.

26. Miss Margaret NG considered that the language and structure of existing section 17(3) suggested that the rule-making power under the second part of the provision should necessarily be exercised by the same person as was charged with the duty under the first part of the provision. She enquired whether the then Governor had ever caused places of detention to be inspected other than by

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making rules so that causing places of detention to be inspected and making rules were in fact the same thing.

27. SALD responded that should the duty conferred under the first part and the rule-making power under the second part of section 17(3) be discharged by the same person, the Administration should also have to confer the responsibility under the first part on the Chief Executive in Council if the second part on the rule-making power was adapted by conferring power on the Chief Executive in Council. He added that in the course of adaptation, the Administration would first understand the provisions in question, analyse the provision and then propose appropriate adaptation for members' consideration.

錯誤! 尙未定義書籤。 . The Chairman opined that the crux of the matter was due to the fact that the Administration was adopting a rigid interpretation of Article 56 of the Basic Law. He suggested the Administration to consider adapting the references to "Governor" and "Governor in Council" by "Chief Executive" and "Chief Executive in Council" respectively.

28. LD said that the Department of Justice was considering members' views on the interpretation of Article 56 expressed in this Bills Committee as well as the Bills Committee on Adaptation of Laws (No.2) Bill 1998. An information paper from the Administration on the interpretation of Article 56 was being prepared for the discussion by the latter Bills Committee. He suggested and members agreed that the discussion on the issue would continue pending the information paper from the Administration.

29. In response to Miss Margaret NG, Principal Assistant Secretary for Security (B) (PAS/S(B)) said that arrangements for places of detention to be inspected were effected by administrative means. Apart from places of detention run by the Correctional Services Department (CSD), the Social Welfare Department (SWD) also held responsibility for places of detention for children and young offenders. She undertook to provide further information on whether rules on causing places of detention to be inspected were made in the case of SWD and how this provision applied in the case of SWD.

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30. Miss Margaret NG enquired about the legal basis for causing places of detention to be inspected by administrative arrangements. PAS/S(B) said that section 23 of the Prisons Ordinance (Cap.234) provided for the appointing of visiting Justices of Peace (JPs). Assistant Commissioner of Correctional Services added that section 23 of Cap.234 applied to all institutions run by CSD. The schedule of visiting JPs was arranged and co-ordinated by the Director of Administration.

31. In response to the Chairman's enquiry about any rules had been made

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under section 17(3), SALD said that two sets of rules had been made under section 17(3) of Cap.226, namely, the Juvenile Offenders (Visitation of Places of Detention) Rules and the Remand Home Rules. Regarding the duty imposed on the then Governor under section 17(3) to cause places of detention to be inspected, SALD said that it was a general duty. The then Governor was not expected to inspect the places of detention himself. Miss Margaret NG requested for copies of the two sets of rules.

(Post-meeting note : Copies of the rules were circulated to members vide LC Paper No. CB(2) 1051/98-99(01).)

32. Miss Margaret NG was of the view that it was not a separate duty imposed on the then Governor to cause places of detention to be inspected other than by making rules. SALD said that the rule-making power of the then Governor was discretionary.

III. Date of next meeting

33. The next meeting was scheduled for 15 January 1999 at 8:30 am.

(Post-meeting note : The next meeting was re-scheduled for 15 January 1999 at 10:45 am.)

34. The meeting ended at 10:45 am.

Legislative Council Secretariat
9 March 1999