

**Bills Committee on the  
Adaptation of Laws (No 2) Bill 1998**

**The Administration's response to issues raised by  
Members at the meetings on 25.11.98, 10.12.98 and 14.1.99**

Article 56 of the Basic Law (BL) - adaptation of reference to "Governor" by "Chief Executive in Council"

Members requested the Administration to provide a written response to the submission from the Hong Kong Bar Association and Professor Peter Wesley-Smith of the University of Hong Kong regarding the interpretation of BL 56.

2. The Administration has issued a separate paper on the subject for Members' consideration.

Dangerous Drugs Ordinance (Cap 134)

3. Members suggested that the Administration should consider deleting the proposed repeal of "in accordance with the requirements of the British Pharmacopoeia" in the definition of "medicinal opium" for the reason that the amendment is beyond the scope of the adaptation of laws exercise and that it should be dealt with by a separate amendment bill.

4. Having regard to Members' comments, the Administration maintains the view that the definition of "medicinal opium", as it is presently stipulated, is no longer appropriate and should be amended either by deleting "in accordance with the requirements of the British Pharmacopoeia" or by deleting the same and substituting "in accordance with the requirements of the European Pharmacopoeia or the US Pharmacopoeia".

The proposed repeal of section 41 in the Crimes Ordinance (Cap 200) with regard to the issues raised in the Bar Association's Letter of 21.11.1998

5. Members requested the Administration to provide a written response on the proposed repeal of section 41 having regards to the points raised by the Hong Kong Bar Association in its letter dated 21.11.98 and Members' comments.

6. The Administration notes the Bar Council's support to our proposal to repeal section 41 of Cap 200 on the ground that the provision is obsolete. We also agree with Bar Council's view that the right of a person to start a private prosecution is not affected by BL 63. We remain, however, of the view that section 41 is inconsistent with BL 63 and therefore should be repealed in the current adaptation exercise.

7. BL 63 provides that "[t]he Department of Justice of the HKSAR shall **control** criminal prosecutions, free from **any** interference." While it does not take away the right of private prosecution, it confers, in the view of the Administration, on the Secretary of Justice an independent power of prosecution within the limits of high degree of autonomy enjoyed by the HKSAR under BL 12.

8. Subject to the above paragraph, BL 63 encompasses the following prosecution functions and powers of the Secretary for Justice, namely,

- a) to **institute** and undertake criminal proceedings against a person in **SAR** court in respect of offences within the relevant court's jurisdiction;
- b) to **take over** and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and
- c) to **discontinue** at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by herself or another person or authority.

9. Section 41 of Cap 200 empowers a judge or a magistrate to order the prosecution of a person who in the opinion of the judge/magistrate has been guilty of perjury. It differs from private

prosecution in that unlike the latter, section 41 in effect compulsorily requires the Secretary for Justice to prosecute a person once the court so orders. As such, it encroaches on the power of the Secretary for Justice to decide independently whether to prosecute a person for the said offence. We therefore consider that, quite apart from it being obsolete, section 41 is inconsistent with BL 63 and should be repealed in the current adaptation exercise.

#### Firearms and Ammunition Ordinance (Cap 238)

10. On section 4(2), Members asked the Administration to advise whether the phrase “any person or class or description of persons” is used in other legislation; and how the then Governor(s) exercised his power in similar circumstances in the past, for example, whether the matter in respect of a person was dealt with by the Governor and a class of persons was dealt with by the Governor in Council.

11. Members may wish to note that the expression occurs in several provisions in regulations made under the United Nations Sanctions Ordinance (Cap 537) which authorise the CE to delegate his powers under those regulations. The delegation is clearly administrative in nature. There is no requirement for the delegation to be in writing or published in the Gazette. We have also set out in Annex A a list of 65 provisions having similar reference to “person(s) or class of person(s)”.

12. How the powers have been exercised depends on each of their statutory context. If the instrument is considered as having legislative effect, it will normally be published as a Legal Notice in Legal Supplement No 2. If the instrument is required to be published but it is not considered as having legislative effect, it will normally be published as a Government Notice in the Main Gazette.

#### Public Order Ordinance (Cap 245)

13. Members asked the Administration to advise the definition of “servant of the Crown” together with a list of such persons, in relation to section 31(6)(j).

14. There is no precise definition of “servant of the Crown”. The word “servant” is indicative of control i.e. the Government controls its employees as the employment relationship is one of master and servant. Whether some persons will be treated as “servants of the Crown” would depend on the degree of control that the Government has over these workers. That will, in turn, depend on the terms of contract. The difference between an independent contractor and a servant depends on the facts of each case.

15. On the above basis, section 31(6)(j) may cover civilian workers who are contracted or subcontracted to carry out repair or emergency work for the Government, such as workers designated to repair fences along the boundary, tow-truck operators, locksmiths, etc. Section 31(6)(j), as adapted, continues to serve a valid purpose by covering a situation which is not catered for elsewhere.

#### Organised and Serious Crimes Ordinance (Cap 445)

16. Members requested the Administration to explain the practical implications of “..... as if the proceedings were civil proceedings against the Government” after adaptation as referred to in section 28(10) and whether “Government” applies to the SAR Government only.

17. Regarding a similar adaptation proposal on section 23(10) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), Members may wish to note that the Bills Committee on the Adaptation of Laws Bill 1998 agreed at its meeting on 15 January 1999 that the reference to the “Crown” may be changed to “Government”. Section 23(10) of Cap 405 and section 28(10) of Cap 445 are at Annex B for Members’ easy reference.

18. The existing section 28(10) resembles closely section 23(10) of Cap 405 and provides that an order shall be served as if the proceedings were civil proceedings against the Crown. Under section 14 of the Crown Proceedings Ordinance (Cap 300), all documents required to be served on the Crown for any civil proceedings against the Crown shall be served on the Attorney General. Under the Declaration of Change of Title (General Adaptation) Notice (LN 362 of 1997), the reference to “Attorney General” has been adapted to “Secretary for Justice”. The proposal to adapt the reference in section 28(10) from the “Crown” to “Government” will

therefore mean the order shall be served on the “Secretary for Justice”. The amendment concerns only with service of documents under Cap 455 and does not affect the scope of application of the Crown Proceedings Ordinance.

Security Bureau  
February 1999

A list of provisions having the reference to “class of persons”

Cap. 1 s. 29 Fees and charges  
Cap. 8 s. 40 Prints from films of Government documents  
Cap. 47 s. 47 Regulations  
Cap. 57 s. 73 Regulations  
Cap. 59 s. 7 Power of Commissioner to make regulations  
Cap. 86 s. 4 Powers of Commission  
Cap. 106 s. 39 Exemption  
Cap. 113 s. 6 Delegations  
Cap. 115 s. 17C Carrying and production of proof of identity  
Cap. 132 s. 56 Regulations as to food and drugs hygiene  
Cap. 132 s. 80 Regulations in relation to markets  
Cap. 138 s. 29 Power to make regulations  
Cap. 139 s. 3 Power to make regulations  
Cap. 155 s. 2 Interpretation  
Cap. 155 s. 13 Power to grant exemptions  
Cap. 163 s. 33A General exemptions  
Cap. 218 s. 2 Interpretation and application  
Cap. 218 s. 3 Exemption  
Cap. 237 s. 16 Recovery of fixed penalty  
Cap. 237 s. 23 Distress in cases of default  
Cap. 240 s. 3A Recovery of fixed penalty  
Cap. 240 s. 10A distress in default of payment  
Cap. 245 s. 17 Police powers over meeting, processions and gatherings  
Cap. 245 s. 31 Curfew orders  
Cap. 250 s. 60A Hawking of futures contracts  
Cap. 260 s. 3 Power for the Governor to authorize any person to act as an authorized guard  
Cap. 265 s. 15 Regulations  
Cap. 303 s. 13 Regulations  
Cap. 303 s. 15 Power to exempt  
Cap. 304 s. 28 By-laws  
Cap. 320 s. 4 Requirements for registration  
Cap. 333 s. 5 Interests in securities  
Cap. 333 s. 60 Exempt dealers  
Cap. 333 s. 72 Offers by dealers  
Cap. 333 s. 73 Calls by registered dealers  
Cap. 333 s. 74 Hawking of securities  
Cap. 333 s. 87 Dealer to appoint auditor  
Cap. 333 s. 146 Regulations  
Cap. 359 s. 29 Regulations  
Cap. 372 s. 31 By-laws  
Cap. 374 s. 7 Regulation of public service vehicles  
Cap. 374 s. 12A Regulation of village vehicles

Cap. 374 s. 13 Provision for the Commissioner to act and charge fees  
Cap. 390 s. 45 Powers of Registrar  
Cap. 421 s. 29 Regulations relating to rabies control areas  
Cap. 421 s. 47 Exemptions  
Cap. 421 s. 51 Regulations  
Cap. 447 s. 3 Application  
Cap. 451 s. 2 Interpretation  
Cap. 451 s. 27 Appointment of auditor  
Cap. 460 s. 3 Application  
Cap. 480 s. 88 Rules  
Cap. 485 s. 2 Interpretation  
Cap. 485 s. 15 Withdrawal of accrued benefits  
Cap. 486 s. 9 Staff of Commissioner  
Cap. 487 s. 85 Rules  
Cap. 500 s. 12 Application  
Cap. 506 s. 25 Exemptions  
Cap. 513 s. 7 Transit for transfer of sentenced persons  
Cap. 522 s. 77 Designs relevant for defence purposes  
Cap. 525 s. 2 Interpretation  
Cap. 528 s. 174 General power to make rules  
Cap. 542 s. 3 Interpretation  
Cap. 1023 s. 3 By-laws  
Cap. 1135 s. 25 By-laws

**CAP. 405**      *Drug Trafficking (Recovery of Proceeds)*

**第 405 章**      販毒（追討得益）條例

when they are in the possession of a person who is entitled to possession of them, but excluding, in any case, any communications or item held with the intention of furthering a criminal purpose;

"premises" (房產) includes any place and, in particular, includes —

- (a) any vehicle, vessel, aircraft, hovercraft or offshore structure; and
- (b) any tent or movable structure.

[cf. 1986 c. 32 s. 29 U.K.]

**23. Disclosure of information held by public bodies**

(1) Subject to subsection (4), the High Court may, on an application by the prosecutor, order any material mentioned in subsection (3) which is in the possession of a public body to be produced to the High Court within such period as the High Court may specify.

(2) The power to make an order under subsection (1) is exercisable if—

- (a) the powers conferred on the High Court by sections 10(1) and 11(1) are exercisable by virtue of section 9(1); or
- (b) those powers are exercisable by virtue of section 9(2) and the High Court has made a restraint or charging order which has not been discharged,

but where the power to make an order under subsection (1) is exercisable by virtue only of paragraph (b), section 9(3) shall apply for the purposes of this section as it applies for the purposes of sections 10 and 11.

(3) The material referred to in subsection (1) is any material which—

- (a) has been submitted to an officer of a public body by the defendant or by a person who has at any time held property which was realisable property;
- (b) has been made by an officer of a public body in relation to the defendant or such a person; or
- (c) is correspondence which passed between an officer of a public body and the defendant or such a person,

and an order under that subsection may require the production of all such material or of a particular description of such material, being material in the possession of the body concerned.

(4) An order under subsection (1) shall not require the production of any material unless it appears to the High Court that the material is likely to contain information that would facilitate the exercise of the powers conferred on the High Court by sections 10 to 12 or on a receiver appointed under section 10 or 12 or in pursuance of a charging order.

(5) The High Court may by order authorize the disclosure to such a receiver of any material produced under subsection (1) or any part of such material; but the High Court shall not make an order under this subsection

且正由有權管有它們<??>助長犯罪目的而持有<??>

“法庭” (court)指高等法院或地方法院<??>

“房產” (premises)包括任何地方，尤<??>

- (a) 任何車輛、船隻、飛行<??>
- (b) 任何帳幕或可移動的結<??>

**23. 公共機構所持有的資料的披露<??>**

(1) 除第(4)款另有規定外，高等<??>而又屬於第(3)款所述的任何物料，在<??>

(2) 根據第(1)款發出命令的權力<??>

(a) 可憑藉第 9(1)條行使第<??>

(b) 可憑藉第 9(2)條行使該<??>而該等命令未曾撤銷。

但如根據第(1)款發出命令的權力是單獨憑藉(b)段而可行使，則第 9(3)條可以為本條的目的而引用，一如它可以為第 10 及 11 條的目的而引用。

(3) 第(1)款所指的物料，是—

- (a) 由被告，或由在任何時間曾經持有可變現財產的人，交給公共機構人員的任何物料；
- (b) 由公共機構人員就被告或該人而造的任何物料；或
- (c) 屬於公共機構人員和被告或該人之間的通信的任何物料，

而根據該款發出的命令，可飭令提交有關機構所管有的該等物料的全部，或是該等物料中的某一類別。

(4) 除非高等法院認為有關物料相當可能包含某些資料，而這些資料有助於高等法院行使第 10 至 12 條所賦予的權力，或有助於根據第 10 或 12 條或抵押令而委任的接管人行使所獲賦的權力，否則不得藉第(1)款下的命令飭令提交任何物料。

(5) 高等法院可藉命令批准向該接管人披露根據第(1)款提交的任何物料，或物料的任何部分；但高等法院必須先給予該公共機構的人員合理機會向高等法院申述意見，方可根據本款發出命令。

unless a reasonable opportunity has been given for an officer of the public body to make representations to the High Court.

(6) Material disclosed in pursuance of an order under subsection (5) may, subject to any conditions contained in the order, be further disclosed for the purposes to the functions under this Ordinance of the receiver of the High Court.

(7) The High Court may by order authorize the disclosure to an authorized officer of any material produced under subsection (1) or any part of such material; but the High Court shall not make an order under this subsection unless —

- (a) a reasonable opportunity has been given for an officer of the public body to make representations to the High Court; and
- (b) it appears to the High Court that the material is likely to be of substantial value in exercising functions relating to drug trafficking.

(8) Material disclosed in pursuance of an order under subsection (7) may, subject to any conditions contained in the order, be further disclosed for the purposes of functions relating to drug trafficking.

(9) Material may be produced or disclosed in pursuance of this section notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise.

(10) An order under subsection (1) and, in the case of material in the possession of a public body, an order under section 20(2) may require any officer of the public body (whether named in the order or not) who may for the time being be in possession of the material concerned to comply with it, and such an order shall be served as if the proceedings were civil proceedings against the Crown.

(11) In this section “public body” (公共機構) means —

- (a) any Government department; and
- (b) any body specified by the Governor under subsection (12).

(12) The Governor may, by notice in the Gazette, specify a body to be a public body for the purposes of this section .

[cf. 1986 c. 32s. 30 U.K.]

#### 24. Offence of prejudicing investigation

(1) Where, in relation to an investigation into drug trafficking, an order under section 20 has been made or has been applied for and has not been refused or a warrant under section 21 has been issued, a person who, knowing or suspecting that the investigation is taking place, makes any disclosure which is likely to prejudice the investigation commits an offence.

- (2) In proceedings against a person for an offence under this section, it is a defence to prove —
- (a) that he did not know or suspect that the disclosure was likely to prejudice the investigation; or

(6) 根據第(5)款下的命令而披露的物料，除命令內另有條件規限外，為接管人或高等法院履行本條例下的職能，可進一步披露。

(7) 高等法院可藉命令批准向獲授權人披露根據(1)款提交的任何物料，或物料的任何部分；但除非 —

- (a) 該公共機構的人員已經獲得合理機會向高等法院申述意見；及
- (b) 高等法院認為該物料可能對行使與販毒有關的職能有重大價值，

否則高等法院不得根據本款發出命令。

(8) 根據第(7)款下的命令而披露的資料，除命令內另有條件規限外，為與販毒有關的職能的目的，可進一步披露。

(9) 縱使法規或其他方面規定有保密責任或對資料的披露有其他限制，仍可根據本條提交或披露物料。

(10) 第(1)款下的命令及（在物料由公共機構管有的情況下）第 20(2)條下的命令，可以飭令公共機構內當時管有該有關物品的任何人員（不論該人員的姓名是否在命令內說明）履行命令；而該命令的送達方式，恰如在控告政府的民事訴訟程序所採用的，

(11) 在本條內，“公共機構” (public body)指 —

- (a) 任何政府部門；及
- (b) 任何由總督根據第(12)款指明的機構。

(12) 總督可藉憲報公告，指明任何機構為本條所指的公共機構。

[比照 1986c. 32s. 30 U.K.]

#### 24. 妨害偵查罪行

(1) 對有關販毒的偵查來說，凡法庭已發出第 20 條下的命令，或檢控官已提出申請第 20 條下的命令而申請沒有被拒絕，或法庭已簽發第 21 條下的令狀，任何人知道或懷疑偵查正在進行而作出可能妨害偵查的任何披露，即屬犯罪。

(2) 在檢控任何人犯本條下的罪行的訴訟中，被告可證明以下事情作為免辯護 —

- (a) 他不知道亦沒有懷疑該項披露可能妨害偵查；或

(12) If an application has been made for a confiscation order under section 8, the court shall not have regard for the purpose of subsection (11) to any proceeds of a specified offence or organized crime to which the application for the confiscation order relates.

(13) A sentence passed pursuant to subsection (11) shall not exceed the maximum penalty permitted by law for the offence.

(14) This section operates without prejudice to any other information that may be furnished to a court before a person is sentenced, or to any other information to which a court shall or may have regard when sentencing a person for any offence.

(15) This section does not apply to a person who is convicted of a specified offence committed before the commencement of this section.

## 28. Disclosure of information held by public bodies

(1) Subject to subsection (4), the High Court may, on an application by the prosecutor, order any material mentioned in subsection (3) which is in the possession of a public body to be produced to the High Court within such period as the High Court may specify.

(2) The power to make an order under subsection (1) is exercisable if—

(a) the powers conferred on the High Court by sections 15(1) and 16(1) are exercisable by virtue of section 14(1); or

(b) those powers are exercisable by virtue of section 14(2) and the High Court has made a restraint or charging order which has not been discharged,

but where the power to make an order under subsection (1) is exercisable by virtue only of paragraph (b), section 14(3) shall apply for the purposes of this section as it applies for the purposes of sections 15 and 16.

(3) The material referred to in subsection (1) is any material which—

(a) has been submitted to an officer of a public body by the defendant or by a person who has at any time held property which was realisable property;

(b) has been made by an officer of a public body in relation to the defendant or such a person; or

(c) is correspondence which passed between an officer of a public body and the defendant or such a person,

and an order under that subsection may require the production of all such material or of a particular description of such material, being material in the possession of the body concerned.

(4) An order under subsection (1) shall not require the production of any material unless it appears to the High Court that the material is likely to contain information that would facilitate the exercise of the powers conferred on the High Court by sections 15 to 17 or on a receiver appointed under section 15 or 17 or in pursuance of a charging order.

(12) 如有人根據第 8 條提出沒收令的申請，就第 (11) 款而言，法庭不得顧及該令的申請所涉及的指明的罪行或有組織罪行的任何得益。

(13) 依據第 (11) 款所判處的刑罰不得超過法律所容許的對該罪行的最高刑罰。

(14) 本條的實施並不影響在任何人被判刑前，可向法庭提供的任何其他資料。法庭在對任何人的罪行判刑時，法庭須顧及或可顧及的任何其他資料。

(15) 對任何就本條生效日期前所犯的指明的罪行被定罪的人，本條並不適用。

## 28. 公共機構所持有的資料的披露

(1) 除第 (4) 款另有規定外，高等法院可應檢控官的申請，命令將公共機構所持有而又屬於第 (3) 款所述的任何物料，在高等法院指明的限期內，提交高等法院。

(2) 根據第 (1) 款發出命令的權力，可在以下情況下行使——

(a) 可憑藉第 14(1) 條行使第 15(1) 及 16(1) 條賦予高等法院的權力；或

(b) 可憑藉第 14(2) 條行使該等權力，及高等法院已經發出限制令或押記令而該等命令未曾撤銷，

但如根據第 (1) 款發出命令的權力是單獨憑藉 (b) 段而可行使，則第 14(3) 條可為施行條而予以引用，一如它可為施行第 15 及 16 條而予以引用。

(3) 第 (1) 款所指的物料，是——

(a) 由被告人，或由在任何時間曾經持有可變現財產的人，呈交公共機構員的任何物料；

(b) 由公共機構人員就被告人或該人而造的任何物料；或

(c) 屬於公共機構人員和被告人或該人之間的通信的任何物料，

而根據該款發出的命令，可飭令提交有關機構所管有的該等物料的全部，或是該等物料中的某一類別。

(4) 除非高等法院覺得有關物料相當可能包含某些資料，而這些資料有助於高等法院行使第 15 至 17 條所賦予的權力，或有助於根據第 15 或 17 條或押記令而委任的管人行使所獲賦予的權力，否則不得藉根據第 (1) 款發出的命令飭令提交任何物料。

(5) The High Court may by order authorize the disclosure to such a receiver of any material produced under subsection (1) or any part of such material; but the High Court shall not make an order under this subsection unless a reasonable opportunity has been given for an officer of the public body to make representations to the High Court.

(6) Material disclosed in pursuance of an order under subsection (5) may, subject to any conditions contained in the order, be further disclosed for the purposes of the functions under this Ordinance of the receiver or the High Court.

(7) The High Court may by order authorize the disclosure to an authorized officer of any material produced under subsection (1) or any part of such material; but the High Court shall not make an order under this subsection unless—

(a) a reasonable opportunity has been given for an officer of the public body to make representations to the High Court; and

(b) it appears to the High Court that the material is likely to be relevant in exercising functions relating to the investigation of specified offences.

(8) Material disclosed in pursuance of an order under subsection (7) may, subject to any conditions contained in the order, be further disclosed for the purposes of functions relating to the investigation of specified offences.

(9) Material may be produced or disclosed in pursuance of this section notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise.

(10) An order under subsection (1) and, in the case of material in the possession of a public body, an order under section 4(2) may require any officer of the public body (whether named in the order or not) who may for the time being be in possession of the material concerned to comply with it, and such an order shall be served as if the proceedings were civil proceedings against the Crown.

(11) In this section, "public body" (公共機構) means—

(a) any Government department; and

(b) any body specified by the Governor under subsection (12).

(12) The Governor may, by notice in the Gazette, specify a body to be a public body for the purposes of this section.

[cf. 1986 c. 32 s. 30 U.K.]

## 29. Compensation

(1) If an investigation is begun against a person for a specified offence or offences and any of the following circumstances occur, namely—

(a) no proceedings are instituted against that person;

(5) 高等法院可藉命令批准向該接管人披露根據第(1)款提交的任何物料，或物料的任何部分；但高等法院必須先給予該公共機構的人員合理機會向高等法院申述意見，方可根據本款發出命令。

(6) 依據第(5)款發出的命令而披露的物料，除命令內另有條件規限外，為接管人或高等法院履行本條例賦予的職能，可進一步披露。

(7) 高等法院可藉命令批准向獲授權人披露根據第(1)款提交的任何物料，或物料的任何部分；但除非——

(a) 該公共機構的人員已經獲得合理機會向高等法院申述意見；及

(b) 高等法院覺得該物料相當可能與行使關於偵查指明的罪行的職能有關係的，

否則高等法院不得根據本款發出命令。

(8) 依據第(7)款發出的命令而披露的物料，除命令內另有條件規限外，為了與偵查指明的罪行有關的職能，可進一步披露。

(9) 縱使法規或其他方面規定有保密責任或對資料的披露有其他限制，仍可依據本條提交或披露物料。

(10) 根據第(1)款發出的命令及(在物料由公共機構管有的情況下)根據第4(2)條發出的命令，可以飭令公共機構內當其時管有該有關物料的任何人員(不論該人員的姓名是否在命令內說明)履行命令；而該命令的送達方式，恰如在控告政府的民事法律程序所採用的。

(11) 在本條中，“公共機構”(public body)指——

(a) 任何政府部門；及

(b) 任何由總督根據第(12)款指明的機構。

(12) 總督可藉憲報公告，指明任何機構為本條所指的公共機構。

(比照 1986 c. 32 s. 30 U.K.)

## 29. 賠償

(1) 如在對任何人就一項或更多指明的罪行展開偵查之後，有以下任何一種情形出現——

(a) 沒有起訴該人；