

立法會
Legislative Council

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

Purpose

This paper reports on the deliberations of the Bills Committee on Adaptation of Laws (No. 2) Bill 1998.

The Bill

2. The Bill seeks to adapt references in 12 ordinances and their subsidiary legislation and bring them into conformity with the status of Hong Kong as a Special Administrative Region (SAR) of the People's Republic of China and with the Basic Law. A list of these ordinances is in **Appendix I**.
3. The Bill, if enacted, shall deem to have come into effect on 1 July 1997.

The Bills Committee

4. At the House Committee meeting held on 23 October 1998, Members decided to form a bills committee to study the Bill. Under the chairmanship of Hon Andrew WONG, the Bills Committee held six meetings with the Administration, including a joint meeting with the Bills Committee on Adaptation of Laws Bill 1998 to discuss the interpretation of Article 56 of the Basic Law and its practical implications for the adaptation of laws exercise. The Bills Committee has received submissions from the Hong Kong Bar Association and Professor Peter Wesley-Smith of the University of Hong Kong.
5. The membership list of the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

6. Apart from some straight forward technical amendments, the Bills Committee has noted that some of the provisions proposed to be repealed or amended in the Bill may not be merely technical in nature. The main deliberations of the Bills Committee are summarized below.

Adaptation of reference to “Governor” by ” Chief Executive in Council“

7. Members have noted that in most cases, the reference to “Governor” will simply be replaced by “Chief Executive”. However, in some cases, e.g. sections 4 and 5 of the Firearms and Ammunition Ordinance, the reference to “Governor” is proposed to be adapted to “Chief Executive in Council”. Members question the rationale for the proposed adaptation by “Chief Executive in Council”.

8. The Administration has explained that under Article 56 of the Basic Law, the Chief Executive has to consult the Executive Council before making subordinate legislation. Where the then Governor was previously given power under any ordinance to make subsidiary legislation, that power will need to be exercised by the Chief Executive in Council. Thus, reference to “Governor” which involves his power to make subsidiary legislation will be adapted to “Chief Executive in Council” in order to comply the constitutional obligation under Article 56 of the Basic Law.

9. In the view of the Administration, an instrument will have legislative effect if it has general application to the public or a significant sector of the public as opposed to individuals. Notices made under sections 4(1) and 4(2) of the Firearms and Ammunition Ordinance exempting a class or description of persons for the exemption from the prohibition of possession of arms and ammunition without licence and under section 5(2) declaring a description of vessel as specified vessel for exclusion from such exemption have legislative effect and are therefore subsidiary legislation within the meaning of the Interpretation of and General Clauses Ordinance (Cap. 1). The references to “Governor” in these sections should be replaced by “Chief Executive in Council”. However, if notices made under these sections only in relation to an individual person or a vessel, they would not have legislative effect and hence may be made by the Chief Executive himself.

10. Regarding the existing section 4(2) of the Firearms and Ammunition Ordinance which provides that the Governor may by notice in the Gazette exempt any person or class or description of persons from the prohibition of possession of arms and ammunition without license, members have reservation about the Administration’s proposed amendments. Members are of the view an exemption granted to “any person or class or description of persons” should be treated as one class of persons because different ways of dealing with exemptions in respect of individuals are provided under existing section 4(3). Moreover, there seems to be an anomaly that the Chief Executive may grant an exemption to any person by notice in the Gazette while the Commissioner of Police may grant such exemption in writing to any person under the existing

section 4(3). Members express reservation about the literal interpretation of Article 56 adopted by the Administration. A member considers that Article 56 prescribes what the Chief Executive must do before making subordinate legislation. It does not necessarily mean that such requirement has to be stated expressly in the legislation. Members also express doubt about the Administration's rationale that an exemption notice concerning an individual does not have legislative effect and therefore it is not subsidiary legislation.

11. The Administration has then advised that on a literal interpretation of Article 56, the Executive Council will only need to be consulted when the relevant subordinate legislation is made personally/directly by the Chief Executive himself. However, since the coming into force of the Basic Law, the SAR courts have on a number of occasions indicated that a purposive construction of the constitutional provisions of the Basic Law is the correct approach. Adopting a purposive interpretation of Article 56, the requirement to consult the Executive Council applies to the making of subordinate legislation by the Chief Executive himself directly i.e., personally made by him under an ordinance or indirectly, ie, not personally made by the Chief Executive but by another person under a delegated power conferred by him as authorized by the relevant legislation. Except for the above limited circumstances, the obligation to consult the Executive Council under Article 56 does not arise in relation to other subordinate legislation.

12. In the context of the adaptation of laws exercise, the Administration's original approach was to identify every provision which confers a legislative function on the then Governor and to replace the reference to "Governor" by "Chief Executive in Council" so as to reflect the constitutional obligation under Article 56. This has the advantage of setting out clear and ready guidance in legislation for the exercise of statutory powers. However, the classification as to whether an instrument falls within the scope of subordinate legislation, namely its "legislative effect" has attracted much debate. The Administration therefore proposes to adopt a more mechanical approach in adaptations whereby all references to "Governor", in respect of making subordinate legislation and issuing administrative instruments, will be adapted to "Chief Executive". The Chief Executive's obligation to consult the Executive Council when making subordinate legislation would be unaffected by such an approach. Where consultation has taken place, it will be reflected in the heading of the subordinate legislation. Any non-compliance with the requirement to consult the Executive Council when making subordinate legislation by the Chief Executive may be subject to judicial challenge.

13. Members consider the Administration's explanation and the new approach acceptable. The new approach would avoid the need to decide in the context of adaptation the classification of a particular instrument as subordinate legislation or otherwise.

14. The Administration has agreed to move CSAs to this Bill and all other

adaptation of laws bills which contain amendments replacing “Governor” by “Chief Executive in Council” to effect the new approach, i.e. adapting references to “Governor” to “Chief Executive”.

Dangerous Drugs Ordinance (DDO) (Cap. 134) - definition of “medicinal opium”

15. The Administration proposes to delete the phrase “in accordance with the requirements of the British Pharmacopoeia” from the definition of “medicinal opium” in section 2(1) of DDO. Members consider that the proposed deletion, if enacted, would leave the standard for making medicinal opium ambiguous due to a lack of specific requirements to satisfy the processes necessary to adapt raw opium for medicinal use.

16. The Administration has explained that what differentiates “medicinal opium” from “raw opium” is its form and use. The standard of “medicinal opium” laid down in pharmacopoeia is expressed in terms of the level of the active components such as morphine, codeine of the processed raw opium for medicinal use. While the British Pharmacopoeia is used as a reference for drugs manufactured in the UK, other national or regional pharmacopoeia, e.g. the European Pharmacopoeia and the U. S. Pharmacopoeia, are also used as a reference on the standard of “medicinal opium” from other countries or territories of origins. The proposed deletion would more accurately reflect the existing practice of the Department of Health in deciding whether or not raw opium is for medicinal use.

17. Members query how the phrase “in accordance with the requirements of the British Pharmacopoeia” is inconsistent with the Basic Law and with the status of Hong Kong as a SAR. They are of the view that the proposed deletion on the ground of obsolescence would be beyond the scope of the adaptation of laws exercise.

18. The Administration has further explained that as DDO was enacted in the 1960s, the Administration is unable to trace the background for adopting the provision, but it is not unreasonable to believe that the requirements in the British Pharmacopoeia were then adopted because such requirements were internationally accepted and because of the status of Hong Kong as a British colony.

19. In response to members’ suggestion that certain standard should be incorporated in the definition of “medicinal opium” for the purpose of certainty and clarity, the Administration proposes a Committee Stage amendment (CSA) to replace the phrase in question by “in accordance with the requirements of the European Pharmacopoeia or the U. S. Pharmacopoeia”. The requirements of these two Pharmacopoeia are internationally accepted.

20. A member is of the view that the adoption of the requirements in the British Pharmacopoeia is not necessarily because of the status of Hong Kong as a British colony. While she has no objection to the CSA, she does not support the proposed amendment to be dealt with in the context of adaptation. Any

amendment to the existing legislation for the purpose of reflecting the existing practice of a government department is beyond the scope of the adaptation of laws exercise. She consider that the amendment should be dealt with by way of an amendment bill.

21. Some members consider that given the amendment is a minor one and the purpose is to reflect the existing practice, the amendment could be dealt with in the context of adaptation. Having regard to the Administration's explanation that it is not unreasonable to believe that the requirements in the British Pharmacopoeia were adopted because of the status of Hong Kong as a British colony, the majority of members support the CSA proposed by the Administration and accept it as within the scope of the adaptation of law exercise.

Item 5 of the Schedule to the Societies Ordinance (Cap. 151)

22. Members have noted the Administration's explanation that at present companies and associations in Hong Kong constituted under Royal Charter, Royal Letters Patent, any Imperial Act or any Ordinance are exempted from the Societies Ordinance. Exemption for companies or associations constituted under instruments made by the British Government is now inconsistent with the status of Hong Kong as a SAR. Given that these companies and associations would have legitimate expectation on their continued exemption from the Societies Ordinance, the Administration, therefore, proposes to add a new item 5A to the Schedule so that any such companies and associations formed and established in Hong Kong immediately before the commencement of the Bill would continue to be exempted from the Ordinance, subject to their continuous operation in Hong Kong.

Crimes Ordinance (Cap. 200)

Parts I and II

23. The Administration has explained that Parts I and II of the Crimes Ordinance concerning treason, sedition and related offences have not been included in the Bill as they are being dealt with in the context of the current study on the legislation required under Article 23 of the Basic Law. The Administration, upon members' request, will make this point clear by amending the Schedule heading for the Crimes Ordinance.

Proposed repeal of section 41

24. Existing section 41 of the Crimes Ordinance provides for a judge's power to direct a prosecution for perjury committed by any person in the course of proceeding before him. The Administration considers that section 41 is obsolete and not consistent with Article 63 of the Basic Law in that it confers power to direct prosecution for perjury on a judge rather than on the Secretary for Justice. Therefore, section 41 should be repealed.

25. A member supports the proposed repeal of section 41 on the ground that it is obsolete but not on the ground that it is inconsistent with Article 63 of the Basic Law. She is of the view Article 63 does not give the Secretary for Justice a monopoly over all prosecutions. The right of a person to start a private prosecution is not affected by Article 63. She believes that the power of the Secretary for Justice to take over and bring to an end a private prosecution is the way to exercise "control" within the meaning of Article 63. She questions why section 41 contravenes Article 63 given that the power exercised by the Secretary for Justice and the then Attorney General would be the same as stipulated in the Hong Kong Reunification Ordinance.

26. The Administration has responded that Article 63 provides that the Department of Justice of 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 for Justice an independent power of prosecution within the limits of high degree of autonomy enjoyed by HKSAR. Section 41 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 compels 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. The Administration, therefore, considers that apart from its being obsolete, section 41 is inconsistent with Article 63 and should be repealed in the adaptation of laws exercise.

27. The majority of members accept the Administration's explanation that section 41 should be repealed in the adaptation of laws exercise. A member remains of the view that section 41 should be repealed on the ground of its obsolescence but not on the ground that it is inconsistent with Article 63 of the

Basic Law. She does not support the proposed repeal in the context of adaptation.

Section 6 of the Offences Against the Person Ordinance (OAPO) (Cap. 212) -
Petit treason to be murder

28. The Administration proposes to repeal section 6 of OAPO which deals with petit treason which was an archaic offence committed when one subject of the Crown killed another who was his superior.

29. Members express concern that the concept of committing an offence in which one subject killed another who was his superior would be restored if section 6 is repealed. Members suggest that the proposed repeal of section 6 of OAPO should be dealt with when Parts I and II of the Crimes Ordinance concerning treason, sedition and related offences are dealt with.

30. The Administration has pointed out that petit treason is a common law offence committed when one subject of the Crown killed another who was his superior. It is different from the offence of treason under Article 23 of the Basic Law, which is an offence against the State. The repeal of section 6 does not have any substantive effect because the offence of petit treason was abolished in 1828 in the UK and therefore does not exist as part of the laws of Hong Kong. Under section 23 of the Interpretation of General Clauses Ordinance (Cap. 1), the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect.

Committee Stage amendments

31. The draft CSAs to be move by the Administration, which have the support of the Bills Committee, are in **Appendix III**.

Consultation with House Committee

32. The Bills Committee consulted the House Committee on 19 March 1999 and sought the latter's agreement that, subject to the Committee Stage amendments to be moved by the Secretary for Security, the Second Reading debate on the Bill be resumed at the Legislative Council meeting on 31 March 1999.

Legislative Council Secretariat

22 March 1999

Appendix I

List of Ordinances affected by the Adaptation of Laws (No. 2) Bill 1998

1. Dangerous Drugs Ordinance (Cap. 134)
2. Societies Ordinance (Cap. 151)
3. Crimes Ordinance (Cap. 200) (Parts III to XIII)
4. Offences against the Person Ordinance (Cap. 212)
5. Weapons Ordinance (Cap. 217)
6. Summary Offences Ordinance (Cap. 228)
7. Firearms and Ammunition Ordinance (Cap. 238)
8. Public Order Ordinance (Cap. 245)
9. Administration of Justice (Felonies and Misdemeanors) Ordinance (Cap. 328)
10. Complex Commercial crimes Ordinance (Cap. 394)
11. Crimes (Torture) Ordinance (Cap. 427)
12. Organized and Serious Crimes Ordinance (Cap. 455)

《1998 年法律適應化修改(第 2 號)條例草案》

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

Membership List

黃宏發議員(主席)	Hon Andrew WONG Wang-fat, JP (Chairman)
何秀蘭議員	Hon Cyd HO Sau-lan
吳靄儀議員	Hon Margaret NG
涂謹申議員	Hon James TO Kun-sun
陸恭蕙議員	Hon Christine LOH
曾鈺成議員	Hon Jasper TSANG Yok-sing, JP
劉健儀議員	Hon Mrs Miriam LAU Kin-yee, JP
劉漢銓議員	Hon Ambrose LAU Hon-chuen, JP

合共 : 8 位議員
Total : 8 Members

日期 : 1998 年 12 月 17 日
Date : 17 December 1998