

Discussion Paper for Bills Committee Meeting
on 13 January 1999
Adaptation of Laws (No.4) Bill 1998

At the meeting of the Bills Committee on 7 December 1998, the Administration was asked to prepare a discussion paper on the following issues-

- a) In sections 5 and 6 of the Legal Officers Ordinance (Cap. 87), what are the rights and duties of the Attorney General before 1 July 1997, according to the Administration's understanding?
- b) Whether any of such rights and duties are considered to be inconsistent with the Basic Law and need to be removed after 1 July 1997?
- c) Is it possible not to adapt sections 5 and 6 at this stage?
- d) Is it possible to codify the Secretary for Justice's rights and duties under these two sections, i.e. not following the common law approach.

The relevant information is set out below.

I. Introduction

2. The former Attorney General of Hong Kong (the "former AG"), like his counterpart in England and Wales, had many powers and duties. He was entrusted with a wide range of powers, especially in his role as prosecutor in criminal matters; representative of the Crown in civil matters; and as *parens patriae* in charity matters.

3. Most of the former AG's powers were conferred upon him by statute but others were derived from sections 5 and 6 of the Legal Office's Ordinance (Cap.87), which provide that:-

"s.5 The Attorney General shall be entitled in the courts of

the Colony to the same rights as are enjoyed in England by the Attorney General of England.

- s.6 The Attorney General shall exercise and discharge so far as regards any proceedings over which the courts of the Colony have jurisdiction by or by virtue of the Matrimonial Causes Ordinance (Cap.179), the rights and duties which in England are customarily exercised and discharged by the Queen's Proctor."

II. Rights in the courts of the former AG

4. The English Attorney General has various powers in the courts. By virtue of section 5 of Cap.87, the former AG enjoyed similar powers immediately before Reunification. Some prominent examples of the former AG's powers under that section are identified in paragraphs 5-8. However those examples are not exhaustive. These powers were exercised by the former AG in discharge of his duties as prosecutor; as guardian of the public interest; and as protector of charities.

Criminal Prosecution

5. The former AG had wide discretionary powers which affected every stage of a criminal prosecution. He had a discretion whether to initiate a criminal prosecution; to choose the appropriate charge depending on the evidence of each case; by offering no evidence against the defendant in a criminal prosecution. By virtue of the *nolle prosequi*, he had a discretion to bring any criminal prosecution to an end at any time before judgement was pronounced by the Court. There are specific legislative provisions concerning the power to enter *nolle prosequi* (see s.76(1) of the District Court Ordinance (Cap.336) and s.15 of the Magistrates Ordinance (Cap.227)). However, the power to enter a *nolle prosequi* in the Court of First Instance is based on section 5 of Cap.87.

Guardian of Public Interest

6. The former AG represented the Crown in the courts in all matters in which rights of a public character come into question¹. He had the power to proceed *ex officio* to represent the Crown to protect or enforce public rights. He had the power to intervene whenever a suit raised any question of public policy on which the executive had a view which it wished to bring to the notice of the court at the invitation or with the permission of the court². He also had the power to lend his name to a private citizen in a relator action which was brought to restrain interference with a public right, whether committed or threatened, or to compel the performance of a public duty or to abate a public nuisance. In this respect his discretion was absolute and the court had no power to review his decision³.

Civil Proceedings

7. He had the right to intervene in a private law suit whenever it affected the prerogatives of the Crown, including its relation with foreign states⁴.

Charity Proceedings

8. The former AG was generally a necessary party to charity proceedings, in order to represent the beneficial interest, or the objects, of the charity. Thus where proceedings were necessary to test the validity of an alleged charitable gift, even where the class to benefit is a foreign community, or to determine whether a claim to the benefit of a charity is properly founded, or to enforce the execution of a charitable purpose, or to remedy abuse or misapplication of charitable funds, or to administer a charity, the former AG was generally a necessary party, and was normally the proper plaintiff⁵ (see also s.3 of Trustee (Amendment) Ordinance 1997 (No. 79 of 1997)).

¹ *Halsbury's Laws of England*, Vol. 5(2):Charities paras. 473-480.

² *Adams v. Adams (A-G intervening)* [1970] 3 All ER 572 at 576, 577-8 per Sir Jocelyn Simon.

³ *Halsbury's Laws of England*, Vol 37:Practice and Procedure, para. 230, *Gouriet v Union of Post*

Office Workers [1978] AC 435, [1977] 3 All ER 70, HL.

⁴ *Halsbury's Laws of England*, Vol. 13:Divorce, para. 1001.

⁵ *Halsbury's Laws of England*, Vol. 5(2):Charities para. 473.

III. Rights and Duties of the former AG as a Queen's Proctor

9. The Queen's Proctor in England represents the Crown in matrimonial causes. A list of the rights and duties of the Queen's Proctor is set out in Annex A (which is not exhaustive).

10. The former AG performed the function as a Queen's Proctor (referred to in s.6 of the Legal Officers Ordinance) whose main function was to intervene or show cause why a decree nisi should not be made absolute because material facts had not been disclosed in divorce proceedings. His assistance could be invoked by the court itself or by any person at any time during the progress of the proceedings or before the decree nisi was made absolute⁶.

IV. Rights and Duties Inconsistent with the Basic Law

11. Article 18 of the Basic Law provides that the laws in force in the Hong Kong Special Administrative Region shall be this (Basic) Law, **the laws previously in force in Hong Kong** as provided for in Article 8 of this (Basic) Law, and the laws enacted by the legislature of the Region. Under Article 8, the common law is included amongst the laws previously in force in Hong Kong and shall be maintained unless inconsistent with the Basic Law.

12. The wide discretionary powers enjoyed by the former AG at every stage of criminal prosecutions are preserved by Article 63 of the Basic Law which provides that "the Department of Justice of the Hong Kong Special Administrative Region shall **control** criminal prosecutions, free from any interference."

13. The Administration is not aware of any relevant rights that are inconsistent with the Basic Law. If any such rights were inconsistent with the Basic Law, they would not need to be removed from our laws, since they would not form part of the law of the HKSAR. The Decision of the Standing Committee of the National People's Congress concerning the handling of the laws previously in force in Hong Kong in accordance with Art.160 of the Basic Law of the HKSAR of the PRC of 23 February

⁶ See s.16 of the Matrimonial Causes Ordinance (Cap.179).

1997 adopted the laws previously in force in Hong Kong “except for any that contravene the Basic Law”.

V. Not to adapt ss. 5 and 6 of the Legal Officers Ordinance (Cap. 87) at this stage?

14. Given that the purpose of the adaptation exercise is to bring the laws into conformity with the Basic Law and the status of Hong Kong as an SAR, it is the view of the Administration that ss. 5 and 6 should be properly adapted. The replacement provision is intended to preserve the rights previously exercised by the former AG and to ensure conformity with the Basic Law and Hong Kong’s status as an SAR.

15. Furthermore, it is not helpful to users of the Laws of Hong Kong to leave sections 5 and 6 of Cap.87 in the current form. Uncertainty as to the current powers of the Secretary for Justice could also increase the cost of litigation. It is the view of the Administration that the responsible thing to do is to effect the adaptation as soon as possible.

16. S.24 of the Hong Kong Reunification Ordinance (Cap.1556) provides that:-
“(1)Subject to subsection (2), all common law powers and statutory powers under Ordinances adopted as laws of the HKSAR which were vested in public officers, and extant immediately before 1 July 1997 (except for those that are inconsistent with the Basic Law), shall on and after that date continue in existence and vest in the corresponding public officers in the HKSAR.

(2)Those prerogative powers (including rights, privileges and immunities) exercisable by a public officer immediately before 1 July 1997, except for those that are inconsistent with the Basic Law, shall on and after that date continue in existence, vest in the Chief Executive and be exercisable by the corresponding public officer in the HKSAR.”

17. The former AG was a public officer defined by Cap. 1 and hence, by virtue of section 24 of the Hong Kong Reunification Ordinance, all

common law powers and statutory powers under the Ordinance adopted shall continue and be vested in the Secretary for Justice, except for those that are inconsistent with the Basic Law. Moreover, those prerogative powers previously exercisable by the former AG are now vested in the Chief Executive and exercisable by the SJ, except for those that are inconsistent with the Basic Law.

18. Accordingly, the Administration considers it appropriate to adapt sections 5 and 6 Cap. 87 along the lines of the formula in section 24 of the Hong Kong Reunification Ordinance so that they would appear in an adapted form as,

“5. Rights of Secretary for Justice

All rights which were enjoyed by the then Attorney General immediately before 1 July 1997 in the courts of Hong Kong, except for those that are inconsistent with the Basic Law, shall on and after that date be exercisable by the Secretary for Justice.

6. Rights and duties of Secretary for Justice in proceedings under Matrimonial Causes Ordinance

All rights and duties which were exercisable or dischargeable by the then Attorney General immediately before 1 July 1997 so far as regards any proceedings over which the courts of Hong Kong had jurisdiction by or by virtue of the Matrimonial Causes Ordinance (Cap.179), except for those that are inconsistent with the Basic Law, shall on and after that date be exercisable or dischargeable by the Secretary for Justice.”

VI. Codification of the rights and duties of the Secretary for Justice

19. The question whether or not the rights and duties of the Secretary for Justice should be codified falls outside the scope of the adaptation exercise. It is the view of the Administration that it is inappropriate at this stage to consider matters beyond the scope of the adaptation exercise. It is noted by the Administration that members of the Bills Committee have raised the issue of codification. However the possible codification of common law principles is an extremely broad

and complex question that has serious implications for major areas of our law (e.g. contract and tort). Although it is not appropriate to consider this question in the context of the adaptation exercise, the Administration may revert to it after the adaptation exercise is completed. By that time, members may have identified other areas where they feel that the common law needs to be clarified. It would be better to get an overview of the areas of concern and to decide on priorities, rather than to adopt an ad hoc approach under which our resources may not be utilised in the best way.

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Rights and Duties of the Queen's Proctor in England

1. In every case of a petition for divorce, nullity proceedings or a petition for presumption of death and dissolution of marriage, the court may, if it thinks fit, direct all necessary papers in the matter to be sent to the Queen's Proctor, who is required, to instruct counsel to argue before the court any question in relation to the matter which the court considers it necessary or expedient to have fully argued¹. (see Matrimonial Causes Ordinance (Cap.179) s.16(1)(a))

2. At any time during the progress of the proceedings or before the decree is made absolute, any person not a party to the suit², or the trial judge³, may give information to the Queen's Proctor on any matter material to the due decision of the case, and the Queen's Proctor may then take such steps as the Attorney General considers necessary or expedient. (see Matrimonial Causes Ordinance (Cap.179) s.16(1)(b))

3. Under the directions of the Attorney General and by leave of the court, the Queen's Proctor has power to intervene in a cause before the decree nisi has been pronounced, in which case the court gives directions that the Queen's Proctor be represented at the hearing and as to the part to be taken by him in the proceedings.

4. After the pronouncement of a decree nisi but before the decree is made absolute the Queen's Proctor may also, under the Attorney General's direction, show cause why the decree should not be made absolute by reason of material facts not having been brought before the court⁴. (see Matrimonial Causes Ordinance (Cap.179) s.17(1))

¹ Matrimonial Causes Act 1973 ss 8(1)(a), 15, 19(4); and see *Halsbury's Laws of England*, Vol 13: Divorce para. 1001.

² Squires v Squires [1959] 2 All ER 85, [1959] 1 WLR 483.

³ Middlebrook v Middlebrook [1965] 1 All ER 404.

⁴ Matrimonial Causes Act 1973 ss 9(1), 15, 19(4).