

律政司法律政策科的信頭

圖文傳真: 852-2869 0720

Fax: 852-2869 0720

本司檔號 Our Ref.: LP 5039/20/4C IV

來函檔號 Your Ref.:

電話號碼 Tel. No.

21 January, 1999

Mrs. Percy Ma,
Clerk to Bills Committee,
Legislative Council Building,
8 Jackson Road,
Central, Hong Kong.
[Fax No.: 2509 9055]

via Mr. Michael Scott, SASG/GAU

Dear Mrs. Ma,

Bills Committee on
Adaptation of Laws (No. 4) Bill 1998

Thank you for your letter to us dated 14 January 1999.

We have the following reply in relation to the points set out in the said letter.

Legal Officers Ordinance (Cap. 87)

ss. 5 and 6

Item a

Please refer to Annex A.

Item b

Both ss 5 and 6 confer rights and powers on the former Attorney General (“former AG”) of Hong Kong by reference, respectively, to the Attorney General and the Queen’s Proctor in England. These rights and powers derive from both the common law and **statutes** in England. It is

provided in Art. 8 of the Basic Law that the laws previously in force in Hong Kong shall be maintained and subject to **any amendment by the legislature of the HKSAR**. Therefore it will be inconsistent with the Basic Law if the powers of the Secretary for Justice (“SJ”) would be dependent on a foreign legislature, namely England. Furthermore it is inconsistent with Hong Kong’s status as an SAR because the existence of the relevant references to AG and Queen’s Proctor in England is due to the fact that Hong Kong was a British colony prior to 1 July 1997.

Based on such circumstances, we consider that ss 5 and 6 need to be adapted to ensure that they are consistent with the Basic Law and in conformity with Hong Kong’s status as an SAR.

Items (c), (d), (e) and (g)

As far as statutory rights of the former AG under ss 5 and 6 are concerned, rights based on UK statutes cannot, after Reunification, be amended by the British Parliament in such a way as to affect the SJ’s rights in Hong Kong. To that extent, they are frozen. But the Hong Kong legislature can amend those rights at any time. Proposed adaptations of the sections neither purport to prevent this nor could do so, since the Hong Kong legislature cannot bind its successor (Ellen Street Estates Ltd v. Minister of Health [1934] 1 KB590). The statutory rights are **not** therefore frozen so far as Hong Kong is concerned.

With regard to common law rights of the former AG under ss 5 and 6, the fact that the SJ is empowered to exercise the rights that were enjoyed by the former AG immediately before Reunification does not prevent the courts from developing those rights in the normal way. An analogy can be drawn with Art. 8 of the Basic Law which provides that the laws previously in force in Hong Kong including the common law, shall be maintained. In the case HKSAR v. David Ma [1997] HKLRD 761, the reference to the common law means the common law that was in force in Hong Kong at midnight on 30 June 1997. However, Art. 8 of the Basic Law does not freeze the common law as at that date. It is inherent in the very concept of the common law that it is made, and can be developed, by the judges. Similarly, although the common law powers

that the SJ is to exercise under the proposed adaptations are the powers as at Reunification, this does not mean that the courts cannot continue to develop them.

Item f

Please refer to our reply to the Bar Association dated 24 December 1998 at Annex B.

Legal Practitioners Ordinance (Cap. 159)

s.3(3)

Item (h) and (j)

We are now consulting the Judiciary on the newly proposed s.3(3).

Item (i)

As set out in the previous paragraphs in relation to items (c), (d), (e) and (g), the proposed adaptation neither purports to prevent the Hong Kong legislature to make amendments nor could do so since the Hong Kong legislature cannot bind its successor. The jurisdiction of the court is **not** therefore frozen at a result of the proposed adaptation.

s.75(1)(a)

Item (k)

We are seeking information from the Judiciary on the said item.

Legal Services Legislation (Miscellaneous Amendment) Ordinance 1997

(LSLO)

Item (I)

It is proposed under section 9 of Schedule 2 to the Bill that references in LSLO (in item 28 in Schedule 1) to sections 98 and 99 of the Mental Health Act 1983 (“UK Act”) should be replaced by references to sections 10D and 11 of the Mental Health Ordinance (Cap. 136) respectively.

Item 28 in Schedule 1 to LSLO amends section 26A of the Legal Practitioners Ordinance (Cap. 159) to provide for the intervention by the Law Society in relation to a solicitor corporation or foreign corporation where, inter alia, “the powers conferred by section 98 of the Mental Health Act 1983...or section 99 of that Act...has been exercised in respect of a solicitor or foreign lawyer who is a member of the corporation...”.

Prior to the passage of the Mental Health (Amendment) Ordinance 1997 (81 of 1997) (“MHAO”), the Court of First Instance (previously, the High Court) has dual jurisdiction in the management of the affairs of a person suffering from mental disorder, viz. under Part VII of the UK Act and Part II of the Mental Health Ordinance.

Part VII (sections 93 to 113) of the UK Act applies to Hong Kong by virtue of s.12(4) of the High Court Ordinance (Cap. 4). Under Part VII, the Court is empowered to appoint a receiver to manage and administer the property and affairs of a person if the Court is satisfied that that person is incapable, by reason of mental disorder, of doing the same.

Part II of the Mental Health Ordinance gives a similar power to the Court. The Court may appoint a committee of the estate of a person who is found to be of unsound mind and incapable of managing his affairs.

MHAO repeals section 12(4) of the High Court Ordinance and amends Part II of the Mental Health Ordinance to incorporate certain provisions of Part VII of the UK Act. When the repeal of s.12(4) of the High Court Ordinance comes into operation, Part VII, including sections 98 and 99, of the UK Act will no longer apply to Hong Kong.

We have confirmed with the Commissioner for Rehabilitation that the new sections 10D and 11 of the Mental Health Ordinance as amended by MHAO are intended to provide the Court (viz. The Court of First Instance) with powers corresponding to those under sections 98 and 99 of the UK Act.

Copies of the following provisions are at Annex C.

- (a) sections 94(2), 98, 99 and 107(2) of the U.K. Act;
- (b) new sections 10D, 11 and 27(4) of the Mental Health Ordinance;
- (c) old section 11 of the Mental Health Ordinance; and
- (d) section 12(4) of the High Court Ordinance.

Official Solicitors Ordinance (Cap. 416)

s.2

Item (m)

Please refer to our reply at Annex B.

Yours sincerely,

(Ms Kitty FUNG)
Government Counsel
Legal Policy Division

SINGAPORE

Background

- Singapore was incorporated with Malacca and Penang as the Strait Settlements in 1826.
- The Strait was occupied by the Japanese from 1942 to 1945.
- Singapore was constituted a separate colony with its own Governor in 1946.
- In 1958, the British Parliament passed the State of Singapore Act which transferred Singapore from a colony to a self-government state.
- Singapore joined the Federation of Malaysia in 1963.
- On 9 August 1965, Singapore's independence was proclaimed.

When Singapore was a British colony

It was provided in s.59 of Crown Suits Ordinance 1876 (Cap. 12) that "...the Attorney-General of the Colony...shall have and exercise therein the same rights, duties and powers, as the Attorney-General of England would have and exercise in England in similar cases so far as the circumstances of the Colony and the Constitution of its Government and courts admit."

After Singapore ceased to be a British colony

The Crown Suits Ordinance was repealed in 1965 (L.N. 67/65). The role of the Attorney General was redefined in the Constitution as follows:-

"Art. 35(7) It shall be the duty of the Attorney-General to advise the Government upon such legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President or the Cabinet and to discharge the functions conferred on him by or under this Constitution or any other written law

- Art. 35(8) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.
- Art. 35(9) In performance of his duties, the Attorney-General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal in Singapore."

GAMBIA

Background

- Gambia became a British colony in 1843.
- In 1964, Gambia announced its fully responsible status within the Commonwealth.

When Gambia was a British colony

It was provided in s.4 of the Law Officers Ordinance 1953 (Cap. 18) that “the Attorney-General shall be entitled in the courts in the Gambia to the same rights and privileges as are enjoyed by the Attorney-General of England in the courts of England.”

After Gambia ceased to be a British colony

The Attorney-General retains the same rights and privileges as before the independence.

s.4 of the Law Officers Act (Cap. 105) provides that “The Attorney-General shall be entitled in the courts in The Gambia to the same rights and privileges as are enjoyed by the Attorney-General of England in the courts in England.”

TRINIDAD & TOBAGO

Background

- Trinidad was ceded to British in 1802 by the Treaty of Amiens.
- Tobago was ceded to British in 1803.
- In 1889, Trinidad & Tobago were amalgamated under one Governor with the title Trinidad and Tobago.
- Trinidad and Tobago became independent in 1962.

Before Independence

S.36(b) of the Judicature Ordinance provides that “...Any rules and regulations for the time being of the High Court of Justice in England with respect to the King’s Proctor shall, subject to the rules of court, apply to the Attorney-General.”

After Independence

The Judicature Ordinance was repealed in 1962 after independence. The power of the Attorney-General to intervene in matrimonial cases was provided in s.18 of the Matrimonial Proceedings and Property Act.

Annex B

律政司法律政策科的信頭

圖文傳真 : 852-2869 0720

Fax: 852-2869 0720

本司檔號 Our Ref: LP 5004/4/12C III

來函檔號 Your Ref:

電話號碼 Tel. No.: 2867 4226

24 December 1998

BY FAX

Ms. Audrey Eu, SC
Chairman
The Hong Kong Bar Association
LG2 Floor, High Court
38 Queensway
Hong Kong

[via Mr. Michael Scott, DSG(Ag)]

Dear Ms. Eu,

Bills Committee on Adaptation of Laws (No. 4) Bill 1998

I refer to your letter to the Clerk to the Bills Committee dated 4 December 1998 which was referred to us for our attention.

We have duly considered your comments on the Bill and our response is as follows:-

Sch. 1, sections 3 and 4

The reason for your suggestion to insert a footnote near the new ss. 5 and 6 is well appreciated. We shall consider the practicability of such an arrangement in consultation with the Editor of the loose-leaf Edition of the Laws of Hong Kong.

Sch. 2, section 2

The proposed repeal of s.3(3) of Cap. 159 is made on the basis that the inherent jurisdiction of the Court remains even after the repeal takes effect. However, we are now considering an alternative approach for the

introduction of a replacement provision. Such alternative approach will be discussed at the Bills Committee meeting in due course.

Sch. 3, section 1(b), (e)

The adaptation of the term “Colonial Regulations” is to be further amended in accordance with the general principles of adaptation from time to time in place and in any event with any latest decisions made in respect of an earlier adaptation bill, which also contains the same term, now being examined by the Legislative Council.

Yours sincerely,

(Ms Kitty FUNG)
Government Counsel
Legal Policy Division

c.c. Ms Sherman Chan, SALD
Mr Clement Luk, SGC/Civil

Mental Health Act 1983

94. (2) The functions of the judge under this Part of this Act shall be exercisable where, after considering medical evidence, he is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs; and a person as to whom the judge is so satisfied is referred to in this Part of this Act as a patient.

98. Where it is represented to the judge, and he has reason to believe, that a person may be incapable, by reason of mental disorder, of managing and administering his property and affairs, and the judge is of the opinion that it is necessary to make immediate provision for any of the matters referred to in section 95 above, then pending the determination of the question whether that person is so incapable the judge may exercise in relation to the property and affairs of that person any of the powers conferred on him in relation to the property and affairs of a patient by this Part of this Act so far as is requisite for enabling that provision to be made.

99.—(1) The judge may by order appoint as receiver for a patient a person specified in the order or the holder for the time being of an office so specified.

(2) A person appointed as receiver for a patient shall do all such things in relation to the property and affairs of the patient as the judge, in the exercise of the powers conferred on him by sections 95 and 96 above, orders or directs him to do and may do any such thing in relation to the property and affairs of the patient as the judge, in the exercise of those powers, authorises him to do.

(3) A receiver appointed for any person shall be discharged by order of the judge on the judge being satisfied that that person has become capable of managing and administering his property and affairs, and may be discharged by order of the judge at any time if the judge considers it expedient to do so; and a receiver shall be discharged (without any order) on the death of the patient.

107. (2) It shall be the duty of a receiver to render accounts in accordance with the requirements of rules under this Part of this Act, as well after his discharge as during his receivership; and rules under this Part of this Act may make provision for the rendering of accounts by persons other than receivers who are ordered, directed or authorised under this Part of this Act to carry out any transaction.

Mental Health Ordinance
(Cap. 136)

New Version

10D. Court's powers in cases of emergency

Where—

- (a) it is represented to the Court, and the Court has reason to believe, that a mentally incapacitated person may be incapable by reason of mental incapacity of managing and administering his property and affairs; and
- (b) the Court is of the opinion that it is necessary to make immediate provision for any of the matters referred to in section 10A(1),

then pending the determination of the question as to whether that person is so incapable, the Court may exercise in relation to the property and affairs of that person any of the powers conferred on the Court by this Part in relation to the property and affairs of a mentally incapacitated person so far as is requisite for enabling that provision to be made.

11. Appointment of committee

(1) If the Court is satisfied that the person who is alleged to be mentally incapacitated is incapable, by reason of mental incapacity, of managing and administering his property and affairs, the Court may, if it shall think fit, appoint a committee of the estate, and for this purpose, the Official Solicitor may be so appointed of such person and may make such order, if any, as to the remuneration of the committee out of such person's estate, and as to the giving of security by the committee, as to the Court may seem fit.

(2) A committee of the estate appointed under this Part shall do all such things in relation to the property and affairs of the mentally incapacitated person as the Court, in the exercise of the powers conferred on the Court under sections 10A and 10B, orders or directs the committee of the estate to do and may do any such thing in relation to the property and affairs of the mentally incapacitated person as the Court, in the exercise of those powers, authorizes the committee of the estate to do.

(3) The provisions of Order 30, rules 5, 6 and 7 of the Rules of the Supreme Court (Cap. 4 sub. leg.) which apply to receivers shall apply to a committee of the estate as if the references to "receiver" in those rules were substituted by references to "committee of the estate".

27. (4) A committee of the estate appointed under this Part for any mentally incapacitated person shall be discharged by order of the Court on the Court being satisfied that that person has become capable of managing and administering his property and affairs, and may be discharged by order of the Court at any time if the Court considers it expedient to do so, and such a committee of the estate shall be discharged (without any order) on the death of the mentally incapacitated person.

Mental Health Ordinance
(Cap. 136)

Old Version

11. Appointment of committees

(1) If the Court finds that the person who is alleged to be a mentally disordered person is of unsound mind and incapable of managing himself and his affairs, the Court may, if it shall think fit, appoint a committee of the person and estate of such person and may make such order, if any, as to the remuneration of the committee out of such person's estate, and as to the giving of security by the committee, as to the Court may seem fit.

(2) If the Court finds that the person who is alleged to be a mentally disordered person is incapable of managing his affairs, but is not dangerous to himself or to others, the Court may appoint a committee of his estate, without appointing a committee of his person.

High Court Ordinance (Cap. 4)

PART III

JURISDICTION, LAW, PRACTICE AND POWERS

12. Jurisdiction of Court of First Instance

- (1) The Court of First Instance shall be a superior court of record.
- (2) The civil jurisdiction of the Court of First Instance shall consist of—
 - (a) original jurisdiction and authority of a like nature and extent as that held and exercised by the Chancery, Family and Queen's Bench Divisions of the High Court of Justice in England; and
 - (b) any other jurisdiction, whether original or appellate jurisdiction, conferred on it by any law.
- (3) The criminal jurisdiction of the Court of First Instance shall consist of—
 - (a) original jurisdiction of a like nature and extent as that held and exercised in criminal matters by the High Court of Justice and the Crown Court in England respectively; and
 - (b) any other jurisdiction, whether original or appellate jurisdiction, conferred on it by any law.
- (4) The Court of First Instance shall have in addition such jurisdiction as may be exercised in England and Wales by the Lord Chancellor and nominated judges of the Supreme Court of England and Wales under Part VII of the Mental Health Act 1983 (1983 c. 20 U.K.) and in relation to such jurisdiction the rules of procedure made under that Part shall apply. (*Amended 52 of 1987 s. 8*)

(Amended 25 of 1998 s. 2)