

INFORMATION NOTE

ADAPTATION OF LAWS (No.12) BILL 1998

BILLS COMMITTEE MEETING
TO BE HELD ON
WEDNESDAY, 24 FEBRUARY 1999

Indictment Rules 4 and 5 - sub. leg. of Criminal Procedure Ordinance (Cap.221)

Reasons for the proposed adaptation

1. Clauses 38 and 39 of Schedule 2 of the Bill provide that the references to “imperial enactment” in Indictment Rules 4 and 5 of Cap.221 (the “Rules”) are to be repealed and replaced by “national law applying in Hong Kong”. The reasons for the proposed adaptation are -

- (a) One of the purposes of the Rules is to offer protection to the defendant by prescribing the information to be set out in the indictment. We are of the view that the Rules should cover any national laws applying to the HKSAR so long as they create criminal offences triable in Hong Kong courts. This will ensure that the same protection is available to all defendants regardless of whether they are charged under an Ordinance or a national law.
- (b) Art. 18 of the Basic Law provides that national laws listed in Annex III to the Basic Law shall be applied locally by way of promulgation or legislation by the HKSAR. If a national law which creates an offence is applied to the HKSAR by way of legislation, the situation will be covered by the word “Ordinance” in the Rules. However, a problem may arise if a national law is applied to the HKSAR by way of promulgation as that would not

be covered by the Rules unless adaptations as proposed above are made.

Section 9(3) of the Criminal Procedure Ordinance (Cap.221)

Reasons for not seeking to adapt or repeal section 9(3) of Cap.221

2. In so far as section 9(3) of Cap.221 mentions trials for treason or misprison of treason, the Administration considers that it has Basic Law Article 23 implication and proposes to deal with its adaptation in a separate exercise.

3. Apart from that, the Administration takes the view that it is not appropriate to repeal section 9(3) of Cap.221 as such repeal may create a lacuna in the law.

4. The practice and procedure in criminal causes and matters are not fully set out in statute or the Practice Directions issued by the Chief Justice. Very often, it is a matter of common law and practice. *R v KWOK Moon-yan and Others* [1989] 2 H.K.L.R. 396 (is now to be read subject to the Costs in Criminal Cases Ordinance, Cap.492) is an illustration of how section 9(3) of Cap.221 works. In that case, the then Court of Appeal considered section 9(3) of Cap.221 and stated that they were enjoined to take note of and apply the English practice. The court also considered that they were entitled to take into consideration general Hong Kong circumstances in applying English practice and procedure. The court, in determining whether or not to exercise its discretion in favor of an award of costs to a successful appellant, considered that a number of English Practice Directions and Practice Notes were relevant (at p.400, A-D). These included the Practice Direction (Costs: Acquittal of Defendant) [1981] 1 WLR 1383 and Practice Note (Criminal law: Costs) [1989] 2 All ER 604. The court then awarded costs to the two appellants in that case.

5. The Administration takes the view that if national laws that apply to Hong Kong do not create offences that are triable in Hong Kong courts, section 9(3) of the Criminal Procedure Ordinance (Cap.221) and the proposed adaptation of the Indictment Rules will have no application to them. However, if a national law that applies to Hong Kong does create an offence that is triable in Hong Kong courts, section 9(3) of Cap.221 and the

Indictment Rules should (as a matter of adaptation) apply to that offence, in the same way as they previously applied to British laws that applied in Hong Kong before 1 July 1997.

Department of Justice
11 February 1999