

Adaptation of Laws Programme

Guiding Principles and Guideline Glossary of Terms

BACKGROUND

In accordance with Articles 8 and 160 of the Basic Law, all Ordinances of Hong Kong (with the exception of 24 Ordinances or parts of Ordinances) were adopted as the laws of the Hong Kong Special Administrative Region under the *Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* adopted on 23 February 1997.

2. The Decision also sets out the principles on which the previous laws were adopted and how various expressions inconsistent with the status of Hong Kong as a Special Administrative Region of the People's Republic of China are to be construed. These principles have been enacted as part of the local law by the *Hong Kong Reunification Ordinance (Ord. No. 110 of 1997)* and are now incorporated as section 2A and Schedule 8 in the *Interpretation and General Clauses Ordinance (Cap. 1)*. In line with these general principles, more detailed principles of interpretation have been added to *Cap. 1* by the amendments made under the *Adaptation of Laws (Interpretative Provisions) Ordinance (Ord. No. 26 of 1998)*.

3. During the term of the Provisional Legislative Council, adaptations considered essential to the operation of the Special Administration Region were made under 6 Ordinances (the so-called "essential" adaptation Ordinances) each dealing with one or more subject matters.

4. The present stage of the adaptation exercise makes adaptations on an Ordinance-by-Ordinance basis and, subject to the qualification mentioned in paragraph 12 below, seeks to deal with all remaining adaptation matters.

GUIDING PRINCIPLES

5. In implementing the present stage of the adaptation of laws programme, the guiding principles to be applied are as follows-
- (a) that the provision when adapted should be consistent with the Basic Law and with Hong Kong's status as a Special Administrative Region of the People's Republic of China, but that subject to this each provision should, as far as possible, be to the same legal effect after its adaptation as before. Any amendment that is neither related to the Basic Law nor necessitated by Hong Kong's new status are outside the scope of the adaptation of laws programme;
 - (b) that the adaptation of each provision should be made in accordance with the relevant provisions of the Interpretation and General Clauses Ordinance (Cap. 1) where applicable, but the adaptation must be considered in the context of the particular Ordinance concerned and other related Ordinances.

GUIDELINE GLOSSARY OF TERMS

6. For the purposes of the present exercise, the 'new terms' shown in the table at **Annex A** are treated as the guideline adaptation of the corresponding 'original terms' shown in the table.
7. The table is neither definitive or exhaustive. However, amendments for adapting particular terms, or instances of departure from the guidelines, will be explained separately to the Bills Committee involved.

MISCELLANEOUS MATTERS

8. Change of Titles
Various titles to government agencies and post titles were changed upon reunification (e.g. "Legal Department" to "Department of Justice"). Most of the changes of titles have already been effected under the Declaration of Change of Titles (General Adaptation) Notice 1997 (L.N. 362 of 1997 - at **Annex B**) ("**Change of Titles Notice**") made on 23 June 1997 under section 55 of the Interpretation and General Clauses Ordinance (Cap. 1). The looseleaf edition and the Bilingual Laws Information System ("BLIS") version (available through the internet) of the Laws of Hong Kong will incorporate those adaptations effected by that Notice upon enactment of the Adaptation of Laws Bill for the Ordinance concerned. For the time being, the unadapted titles will continue to appear in the looseleaf edition and the BLIS version of the Ordinances.

9. Historical references

Historical references do not normally need to be adapted. For example, when referring to a notice given by the Governor or a resolution passed by the Legislative Council before reunification, the references to "Governor" and “ 豫 ” can remain unchanged. In some cases, it may be appropriate to delete an historical reference if the provision is spent or if keeping the reference presents problems for the adaption of other references.

10. Section headings

Section headings that require adaptation will be adapted editorially.

11. Short titles & Change of Titles Notice

Where the short title to an Ordinance includes mention of a title which is subject to adaptation under the Change of Title Notice (e.g. the Royal Hong Kong Auxiliary Police Force Ordinance (Cap. 233)), any reference to that short title found in another Ordinance will be adapted as a consequential amendment in the Adaptation Bill for the former Ordinance.

12. Adaptations not dealt with in the present stage of the exercise

Adaptation of the following references and provisions will not be dealt with in the Adaptation of Laws Bills for the individual Ordinances in which they are found but will instead be dealt with collectively in separate Bills for the subjects concerned -

- (a) references to "Her Majesty's forces" and other military references;
- (b) provisions relating to proceedings against the Crown that need to be considered in the context of the adaptation of the Crown Proceedings Ordinance (Cap. 300);
- (c) provisions relating to Article 23 of the Basic Law.

Adaptation of Laws Programme
Guideline Glossary of Terms

Item No.	ENGLISH		CHINESE		Remarks
	Original Term	New Term	Original Term	New Term	
1	abroad	outside Hong Kong	辦	翠	
2	appellate court	[no change]	褫 豫	藁 贖 褫 豫 晴	
3	branch	bureau	寧		BL 48(5) & BL 60
4	Chief Justice	[no change]	畊 豫 {	藁 豫 晴 畊 豫 {	Sched 8*, s.21F
5	Chief Justice of the Supreme Court	Chief Judge	程 豫 晴 畊 豫 {	单 豫 晴 畊 豫 {	Sched 8*, s.21D

* Schedule 8 of Cap. 1.

Item No.	ENGLISH		CHINESE		Remarks
	Original Term	New Term	Original Term	New Term	
6	Colonial Regulations	Any executive order issued by the Chief Executive for the administration of the public service and any regulation or direction made under such order	崔 砵 丁	現 { 恨 贖 叭 τ 祇 沮 单 ln 璫 祇 砵 丁	BL 48(4) Executive Order No. 1 of 1997 [See Note ^[1] below]
7	Colony	Hong Kong	廐 翠	[no change]	Sched 8* s.6 [See Note ^[2] below]
8	Court of Appeal	[no change]	禔 猿 晴	禔 猿	Sched 8*, s.8 Cap. 1, s.3
9	court of first instance	[no change]	砵 猿	藥 猿 晴	to distinguish from Court of First Instance

- [1] (a) This term is drawn so as to encompass the Public Service (Administrative) Order (Executive Order No. 1 of 1997), the Public Service (Disciplinary) Regulation made under that Order and any subsequent such Order or Regulation.
- (b) For better expression, the guideline term may in certain contexts be substituted by the simple term ‘relevant executive order’, and an appropriate definition of that term introduced.

[2] References to “general revenue of the Colony” will simply be changed to “general revenue” because the latter term is defined in the Interpretation and General Clauses Ordinance (Cap.1) to mean the general revenue of the Hong Kong Special Administrative Region.

* Schedule 8 of Cap. 1.

Item No.	ENGLISH		CHINESE		Remarks
	Original Term	New Term	Original Term	New Term	
10	Crown	State/ Government/ Central People's Government	璣 {	“ 瓣產 ” 現 現	Sched 8* ss.1 & 2 Sched 9 [#] , s.7 [See Note ^[3] below]
11	Crown land	Government land	{ 滙	現	s.6 of Cap.1
12	Crown lease	Government lease	{ 却	現	s.6 of Cap.1
13	deputy judge	[no change]	既 豫 {	既 豫 {	Sched 8* s.21D
14	District Court	[no change]	豫晴	跋办豫晴	Sched 8*, s.10,
15	District Judge	[no change]	豫 { 豫晴 豫 {	跋办豫晴豫 { 跋办 豫晴豫 {	Sched 8*, s.21C
16	Executive Council	[no change]	〰現	〰現積某	Sched 8*, s.21B

[3] (a) The appropriate adaptation will depend on a proper construction of the existing provision.

(b) Specific principles in relation to the adaptation of certain references to “the Crown” are set out in LC Paper No. CB(2)532/98 - 99(01).

* Schedule 8 of Cap. 1.

Schedule 9 of Cap. 1.

Item No.	ENGLISH		CHINESE		Remarks
	Original Term	New Term	Original Term	New Term	
17	foreign country/ foreign state	country or territory other than the People's Republic of China/ place other than the Hong Kong Special Administrative Region	鑊 辦	地 辦 辦 產 翠 〇 現 跋	Sched 8*, s.19
18	Government of the United Kingdom	Central People's Government	璣 辦 現	現	Sched 8*, s.1
19	Government Secretariat	[no change]	現 竝	現 罷	
20	Governor	(a) Chief Executive (b) Chief Executive in Council	罷 服	〇 現 { 〇 現 { 積 〇 現 積 某	Sched 8*, s.11 BL56 [See Note ^[4] below]

[4] Where the reference to the Governor appears in the context of a power to make subsidiary legislation, the term 'Chief Executive in Council' is appropriate (see BL 56); in other cases the term 'Chief Executive' is appropriate. The expression "Chief Executive in Council" is defined in section 3 of Cap. 1 to mean the Chief Executive acting after consultation with the Executive Council. The terms "subordinate legislation" and "subsidiary legislation" mean any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect (s. 3 of Cap. 1). Normally, the following points are considered in ascertaining whether an instrument has legislative effect, namely whether -

- (a) there is an express provision declaring the instrument to be a piece of subsidiary legislation;
- (b) the instrument has general application to the public or a significant sector of the public as opposed to individuals;
- (c) the instrument extends or amends existing legislation;
- (d) the instrument formulates a general rule of conduct.

* Schedule 8 of Cap. 1.

Item No.	ENGLISH		CHINESE		Remarks
	Original Term	New Term	Original Term	New Term	
21	Governor in Council	Chief Executive in Council	罷服積 〰現	〰現 { 積 〰現積 某	Sched 8*, s.11
22	Her Majesty in Council/Privy Council	(a) Hong Kong Court of Final Appeal (b) Central People's Government/ Government	枷蓋晴 啊 積 枷蓋晴	(a) 翠 藪 豫 晴 (b) 現 現	(a) Sched 8*, s.3 (b) Sched 8*, s.4 [See Note ^[5] below]
23	saving the rights of Her Majesty, Her Heirs and Successors	saving the rights of the Central People's Government and the rights of the Government of the Hong Kong Special Administrative Region under the Basic Law or other laws	獮瘞 婁 苑 啊 瓊 嬾 尤 嫫	獮瘞 地 〰現 〰現 〰現 沮 勝 豫 〰現 〰現 豫 份) 〰現 〰現	Sched 8*, s.21
24	High Court	Court of First Instance	单 豫 晴	砮 豫	Sched 8*, s.9

[5] A reference to the “Hong Kong Court of Final Appeal” will be substituted where the context refers to appellate jurisdiction in relation to Hong Kong.

* Schedule 8 of Cap. 1.

Item No.	ENGLISH		CHINESE		Remarks
	Original Term	New Term	Original Term	New Term	
25	judge	[no change]	委 獒 {	獒 {	Sched 8*, s.21D
26	judge of the High Court	judge of the Court of First Instance	单 獒 晴 獒 {	阻 獒 獒 {	Sched 8*, s.14
27	Justice of Appeal	[no change]	禔 獒 晴 獒 {	禔 獒 獒 {	Sched 8*, s.13
28	Legislative Council	[no change]	獒	獒 積	Sched 8*, ss.15, 21A
29	president (of the Court of Appeal)	[no change]	禔 獒 晴 晴	禔 獒	Sched 8*, s.8
30	Privy Council (see “Her Majesty in Council” in item 22 above)				
31	Queen	HKSAR	婁 菀	跋	
32	Queen’s Proctor	Secretary for Justice	現 禔 煙	哲 現 𠄎 𠄎 勝	
33	recorder	[no change]	獒 {	獒 {	Sched 8*, s.21D

* Schedule 8 of Cap. 1.

Item No.	ENGLISH		CHINESE		Remarks
	Original Term	New Term	Original Term	New Term	
34	Regulations of the Hong Kong Government	The administrative rules known as the Government Regulations and any other administrative rules or instruments regulating the public service	翠現 砵丁	嘿 現 砵丁 ㄨ現砵玥 砵恨 叭 砵玥 尤 ㄨ現	For better expression, the guideline term may in certain contexts be substituted by the simple term "government regulations" and an appropriate definition of that term introduced
35	Royal Hong Kong Jockey Club	The Hong Kong Jockey Club	璣 脊 翠 積	翠 積	The Jockey Club has officially changed its name to "Hong Kong Jockey Club"
36	Secretary	Director of Bureau	喟 髒	現 巖	BL 48(5) [See Note ^[6] below]
37	Secretary of State	Central People's Government	瓣叭委嫫	現	Sched 8*, s.1
38	Supreme Court	High Court	程 豫晴	单豫晴	Sched 8*, s.7

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^[6] "Secretary" when referring to the designation of a rank is adapted to "Director of Bureau" whereas post titles (e.g. Secretary for Security) will remain unchanged in English but changed from "喟" to "現" in Chinese.

* Schedule 8 of Cap. 1.

L.N. 362 of 1997

DECLARATION OF CHANGE OF TITLES (GENERAL ADAPTATION) NOTICE 1997

(Made under section 55 of the Interpretation and General Clauses Ordinance (Cap. 1))

1. Commencement

This Notice shall come into operation on 1 July 1997.

2. Change of titles

(1) The titles set out in column 2 of the Schedule are declared to be changed respectively to the titles set out opposite thereto in column 3 of the Schedule.

(2) Where any title set out in column 2 of the Schedule is a component part of the title of a public officer, public body or person, the second-mentioned title is declared to be changed correspondingly.

3. Amendment of references to titles

(1) The titles set out in column 3 of the Schedule are substituted, where the context permits, respectively for the titles set out opposite thereto in column 2 of the Schedule whenever occurring in any Ordinance, instrument, contract or legal proceedings enacted, made or commenced before 1 July 1997.

(2) Where a title is changed to another title by virtue of section 2(2), the latter is substituted, where the context permits, for the former wherever occurring in any Ordinance, instrument, contract or legal proceedings enacted, made or commenced before 1 July 1997.

SCHEDULE [ss. 2 & 3]
CHANGE OF TITLES

Item	Original title	New title
1.	Chief Secretary	Chief Secretary for Administration
2.	財政司	財政司司長
3.	Attorney General	Secretary for Justice
4.	文康廣播司	文康廣播局局長
5.	公務員事務司	公務員事務局局長

1997年第362號法律公告

1997年宣布更改職稱及名稱(一般適應)公告

(根據《釋義及通則條例》(第1章)第55條訂立)

1. 生效日期

本公告自1997年7月1日起實施。

2. 更改名稱

(1) 現宣布將列於附表第2欄的職稱及名稱分別改為列於附表第3欄中該職稱或名稱(視屬何情況而定)相對之處的職稱或名稱(視屬何情況而定)。

(2) 凡列於附表第2欄的職稱或名稱是某公職人員、公共機構或人士的職稱或名稱的一個組成部分，現宣布將該人員、機構或人士的職稱或名稱作相應更改。

3. 修訂對有關職稱及名稱的提述

(1) 所有在1997年7月1日前已制定的任何條例、已訂立的任何文書或合約或已展開的任何法律程序中出現的列於附表第2欄的職稱及名稱，如文意容許，均須分別代以列於附表第3欄中該職稱或名稱(視屬何情況而定)相對之處的職稱或名稱(視屬何情況而定)。

(2) 凡某職稱或名稱("前者")憑藉第2(2)條更改為另一職稱或名稱("後者")，所有在1997年7月1日前已制定的任何條例、已訂立的任何文書或合約或已展開的任何法律程序中出現的前者，均須代以後者。

附表 [第2及3條]
更改職稱或名稱

項	原有職稱/名稱	新職稱/名稱
1.	布政司	政務司司長
2.	財政司	財政司司長
3.	律政司	律政司司長
4.	文康廣播司	文康廣播局局長
5.	公務員事務司	公務員事務局局長

Item	Original title	New title
6.	憲制事務司	政制事務處處長
7.	經濟司	經濟處處長
8.	教育統籌司	教育統籌處處長
9.	庫務司	庫務處處長
10.	副庫務司	副庫務處處長
11.	衛生福利司	衛生福利處處長
12.	政務司	民政事務處處長
13.	房屋司	房屋處處長
14.	規劃環境地政司	規劃環境地政處處長
15.	保安司	保安處處長
16.	工商司	工商處處長
17.	運輸司	運輸處處長
18.	工務司	工務處處長
19.	總督特派廉政專員	廉政專員
20.	核數署署長	審計署署長
21.	Crown Solicitor	Law Officer (Civil Law)
22.	Crown Prosecutor	Director of Public Prosecutions
23.	律政專員(法律政策)	法律政策專員
24.	律政專員(國際法律)	國際法律專員
25.	海關總監	海關關長
26.	人民入境事務處處長	入境事務處處長
27.	政務總督署長	民政事務總督署長
28.	Director of the Royal Observatory	Director of the Hong Kong Observatory
29.	Chambers Manager, Legal Department	Administrator, Department of Justice
30.	Chief Secretary's Office	Chief Secretary for Administration's Office
31.	財政司辦公室	財政司司長辦公室
32.	Legal Department	Department of Justice
33.	Broadcasting, Culture and Sport Branch	Broadcasting, Culture and Sport Bureau
34.	Civil Service Branch	Civil Service Bureau
35.	Constitutional Affairs Branch	Constitutional Affairs Bureau
36.	Economic Services Branch	Economic Services Bureau
37.	Education and Manpower Branch	Education and Manpower Bureau
38.	Finance Branch	Finance Bureau
39.	Financial Services Branch	Financial Services Bureau
40.	Health and Welfare Branch	Health and Welfare Bureau
41.	Home Affairs Branch	Home Affairs Bureau
42.	Housing Branch	Housing Bureau
43.	Planning, Environment and Lands Branch	Planning, Environment and Lands Bureau

項	原有職稱/名稱	新職稱/名稱
6.	憲制事務司	政制事務處處長
7.	經濟司	經濟處處長
8.	教育統籌司	教育統籌處處長
9.	庫務司	庫務處處長
10.	副庫務司	副庫務處處長
11.	衛生福利司	衛生福利處處長
12.	政務司	民政事務處處長
13.	房屋司	房屋處處長
14.	規劃環境地政司	規劃環境地政處處長
15.	保安司	保安處處長
16.	工商司	工商處處長
17.	運輸司	運輸處處長
18.	工務司	工務處處長
19.	總督特派廉政專員	廉政專員
20.	核數署署長	審計署署長
21.	民事檢察專員	民事法律專員
22.	Crown Prosecutor	Director of Public Prosecutions
23.	律政專員(法律政策)	法律政策專員
24.	律政專員(國際法律)	國際法律專員
25.	海關總監	海關關長
26.	人民入境事務處處長	入境事務處處長
27.	政務總督署長	民政事務總督署長
28.	天文台台長	香港天文台台長
29.	律政署政務總監	律政司政務總監
30.	布政司辦公室	政務司司長辦公室
31.	財政司辦公室	財政司司長辦公室
32.	律政署	律政司
33.	文庫編譯科	文庫編譯局
34.	公務員事務科	公務員事務局
35.	憲制事務科	政制事務局
36.	經濟科	經濟局
37.	教育統籌科	教育統籌局
38.	庫務科	庫務局
39.	副庫務科	副庫務局
40.	衛生福利科	衛生福利局
41.	政務科	民政事務局
42.	房屋科	房屋局
43.	規劃環境地政科	規劃環境地政局

Item	Original title	New title
44.	Security Branch	Security Bureau
45.	Trade and Industry Branch	Trade and Industry Bureau
46.	Transport Branch	Transport Bureau
47.	Works Branch	Works Bureau
48.	總督特派廉政專員公署	廉政公署
49.	Audit Department	Audit Commission
50.	Royal Hong Kong Police Force	Hong Kong Police Force
51.	Royal Hong Kong Auxiliary Police Force	Hong Kong Auxiliary Police Force
52.	政務總署	民政事務總署
53.	人民入境事務處	入境事務處
54.	Royal Observatory	Hong Kong Observatory

Mrs. Anson CHAN,
Chief Secretary.

23 June 1997.

Explanatory Note

This Notice declares a change in the titles of various Government officials and agencies and amends references to those titles.

項	原有職稱/名稱	新職稱/名稱
44.	保安科	保安局
45.	工商科	工商局
46.	運輸科	運輸局
47.	工務科	工務局
48.	總督特派廉政專員公署	廉政公署
49.	核數署	審計署
50.	皇家香港警務處	香港警務處
51.	皇家香港輔助警隊	香港輔助警察隊
52.	政務總署	民政事務總署
53.	人民入境事務處	入境事務處
54.	皇家香港天文台	香港天文台

陳方安生
布政司

1997年6月23日

註釋

本公告宣布更改若干政府官員的職稱及若干政府部門的名稱，並修訂對原有職稱及名稱的提述。

豫積 豫 夕叭 獺纒

letterhead of Legislative Council Secretariat Legal Service Division

Your Ref: LP 5039/19/3/1C
Our Ref: LS/B/30/98-99
Tel: 2869 9209
Fax: 2877 5029

By Fax No. 2869 0720

9 February 1999

Ms. Diana Lam
Senior Government Counsel
Legal Policy Division
Department of Justice
8/F High Block
Queensway Government Office
Hong Kong

Dear Ms. Lam,

Adaptation of Laws (No. 12) Bill 1998

Thank you for your letter dated 26 January 1999.

In the Adaptation of Laws (No. 4) Bill 1998, the Administration proposed to amend the references of the Attorney General's power and that of the Queen's Proctor in England in sections 5 and 6 of the Legal Officers Ordinance (Cap. 87). On explaining such amendment, Ms. Kitty Fung, Government Counsel of the Legal Policy Division of the Department of Justice stated in a letter dated 21 January 1999 to our Clerk to that Bills Committee that "it will be inconsistent with the Basic Law if the powers of the Secretary for Justice 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".

In light of the above statement, would the Administration re-consider the approach for adaptation of section 9(3) of the Criminal Procedure Ordinance wherein references are made to the practices and procedures of England? How did jurisdictions which formerly were colonies of the U.K. deal with provisions similar to section 9(3)? As regards our views expressed on the legal aspects of the Bill and our understanding of the proper approach in the adaptation of law exercise, they will be put to the Bills Committee in order that Members will be able to make an informed decision on the matter.

In relation to the issue on the two sections 1091 of the Criminal Procedure Ordinance, has the Administration decided how to deal with them?

I shall be grateful if you can let me have your reply in both English and Chinese so that our correspondences can be submitted to Members for their consideration in the coming Bills Committee.

Yours sincerely,

(Anita Ho)
Assistant Legal Adviser

c.c. Dept. of Justice (Attn: Mrs. Dissanayake Nilmini, Senior Asst Law Draftsman)
Dept. of Justice (Attn: Mr. Lawrence Peng Si-un, Senior Govt Counsel)
LA, (Fax No. 2868 2813)

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Our Ref.: Our ref.: LP 5039/19/3/1C Pt. II
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BY FAX (2877 5029)

26 January 1999

Miss Anita Ho,
Assistant Legal Adviser,
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8 Jackson Road, Central,
Hong Kong.
(via Ms Roxana Cheng, SASG)

Dear Miss Ho,

Adaptation of Laws (No.12) Bill 1998

Thank you for your letter of 6 January 1999.

2. I must begin by pointing out that the adaptation exercise is solely concerned with bringing our laws into line with the Basic Law and Hong Kong's new status as a special administrative region of the People's Republic of China. It is not a law reform exercise. Some of the questions raised in the penultimate paragraph of your letter concerning how PRC organs are to enforce Mainland law are irrelevant to the current adaptation exercise. It should be noted 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. 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.

3. You queried how Article 11 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone is to be enforced in Hong Kong. In my view, the said Article 11 imposes a statutory duty on all international organizations, foreign organizations and individuals to obtain approval from the Government of the PRC and to comply with the laws and regulations of the PRC before they can legally carry out scientific research, marine operations or other activities in the territorial sea of the PRC. It appears to me that the intention of Article 11 is that any international organization, foreign organization or individual entering into Hong Kong waters illegally carrying out scientific research, marine operations or other activities **in contravention of Article 11 shall be dealt with by the relevant organs of the People's Republic of China in accordance with the relevant law of the PRC (the 'Relevant PRC Law')**. We take the view that unless the Relevant PRC Law is provided for according to Article 18 and Annex III of the Basic Law, it does not apply to Hong Kong.

4. You asked how a person entering into Hong Kong waters and illegally doing marine operations is to be dealt with by the relevant organs of the PRC in accordance with the Relevant PRC Law and what will be the punishment imposed on that person. As stated in paragraph 2 above, section 9(3) and the said Indictment Rules will only be applicable to trials of criminal offences in Hong Kong by the Hong Kong courts. Therefore, I am afraid your questions fall outside the ambit of the present exercise insofar as the adaptation of section 9(3) of Cap.221 and Indictment Rules 4 and 5 is concerned.

5. In light of the above, with respect, I cannot agree with your assertion that “through this adaptation exercise, the Administration is providing that the trial of criminal offences under future national laws to be applied to Hong Kong shall adopt English practice and procedure, irrespective of whether they are applicable or not”. It is clear from the above that the English practice and procedure referred to in section 9(3) of Cap.221 and the proposed amendments to the Indictment Rules will only apply -

- (i) if a relevant national law creates an offence in Hong Kong; and
- (ii) proceedings are brought in Hong Kong in respect of that offence.

Obviously, the English practice and procedure and the proposed amendments to the Indictment Rules are not applicable if the above criteria are not satisfied.

Yours sincerely,

(Ms Diana Lam)
Senior Government Counsel

Internal:

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letterhead of Legislative Council Secretariat Legal Service Division

By Fax No. 2869 0720
6 January 1999

Ms. Diana Lam
Senior Government Counsel
Legal Policy Division
Department of Justice
8/F High Block
Queensway Government Office
Hong Kong

Dear Ms. Lam,

Adaptation of Laws (No. 12) Bill 1998

Thank you for your letter dated 4 January 1999. I would like to first point out that I had not said that "Hong Kong courts do not have jurisdiction over cases concerning offences created by national laws applying in Hong Kong". During our telephone conversation, I did mention that there are procedures provided for Hong Kong courts to deal with such offences in the latter part of Article 19 of the Basic Law. My main concern is to seek your clarification on how the national laws applying in Hong Kong are to be enforced, bearing in mind the following:

- (1) Arts. 13 and 14 of the Basic Law specify that the Central People's Government shall be responsible for the foreign affairs and defence of the Hong Kong Special Administrative Region.
- (2) Art. 18 states that Laws listed in Annex III (National laws applying to Hong Kong) shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.
- (3) So far, the national laws promulgated to be applied to Hong Kong broadly include those on:
 - (a) the Capital, Calendar, National Anthem and National Flag;
 - (b) National Day;
 - (c) National Emblem;
 - (d) the Territorial Sea and the Contiguous Zone;
 - (e) Nationality Law;
 - (f) Diplomatic Privileges and Immunities;
 - (g) Consular Privileges and Immunities;
 - (h) Garrison; and
 - (i) Exclusive Economic Zone and the Continental Shelf.

At a glance, the current national laws applying to Hong Kong relate mainly to sovereignty matters. You stated in your reply (para. 5(b)) that “at present the national laws applying to Hong Kong by way of promulgation pursuant to Art. 18 of the Basic Law do not create any criminal offences”. However, say, as I had pointed out in our telephone conversation, in Article 11 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, it is stated that

“All international organizations, foreign organizations or individuals shall obtain approval from the Government of the People’s Republic of China for carrying out scientific research, marine operations or other activities in the territorial sea of the Peoples's Republic of China and shall comply with the laws and regulations of the People’s Republic of China.

All illegal entries into the territorial sea of the People’s Republic of China for carrying out scientific research, marine operations or other activities in contravention of the provisions of the preceding paragraph of this Article, shall be dealt with by the relevant organs of the People's Republic of China in accordance with the law.“

My query is that how is this Article going to be enforced in Hong Kong? If Hong Kong police catches a person entering into Hong Kong waters illegally doing marine operations, is HKSAR going to prosecute such person for contravening this national law? How is this person to be dealt with “by the relevant organs of the PRC(?)” “in accordance with the law” (PRC or HKSAR law)? Will there be a difference if this person (or an international organization) is caught by Hong Kong Garrison and not Hong Kong police? Is this person going to be fined or imprisoned? What is the punishment? If any person is be tried in Hong Kong, are Hong Kong courts going to apply the practice and procedure from time to time in force and for the time being in force for similar cases in England for years to come? It seems that through this adaptation exercise, the Administration is providing that the trial of criminal offences under future national laws to be applied to Hong Kong shall adopt English practice and procedure, irrespective of whether they are applicable or not.

I shall be grateful if you can let me have your reply in both English and Chinese.

Yours sincerely,

(Anita Ho)
Assistant Legal Adviser

c.c. Dept. of Justice (Attn: Mrs. Dissanayake Nilmini, Senior Asst Law Draftsman)
 Dept. of Justice (Attn: Mr. Lawrence Peng Si-un, Senior Govt Counsel)

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letterhead of DEPARTMENT OF JUSTICE

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URGENT

BY FAX (2877 5029)

Miss Anita Ho,
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(via Ms Roxana Cheng, DSG (Ag))

4 January 1999

Dear Miss Ho,

Adaptation of Laws (No.12) Bill 1998

Thank you for your letter of 18 December 1998. I set out below the clarifications sought by you in your letter relating to the Adaptation of Laws (No.12) Bill 1998 ("Bill").

Criminal Procedure Ordinance (Cap.221)

2. I note the queries raised in paragraph 1 of your letter regarding section 109I, section 109J and Schedule 8 of Cap.221. Please note that we will revert to you separately on this issue in due course.

Criminal Appeal Rules - sub. leg. of Criminal Procedure Ordinance (Cap.221)

3. Thank you for drawing our attention to the reference to “Crown” in rule 71 of the Criminal Appeal Rules. It appears that this reference has been omitted from the Bill due to an oversight. It is proposed to adapt “Crown” in rule 71 to “Government”. This will be in line with the proposed adaptation of “Crown” in rule 61 of the same Rules and other similar procedural provisions in the Criminal Procedure Ordinance and its subsidiary legislation. If you agree, one way to correct the omission is for the Administration to move a committee stage amendment to change “Crown” to “Government” in rule 71. I should be grateful if you would, when reporting on the Bill to the Members, bring the omission and the Administration's proposal to their attention.

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

4. I refer to point no.3 of your letter. It may be of assistance if I begin by explaining the reasons for the proposed adaptations.

5. Clause 38 of Schedule 2 of the Bill provides 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) 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. No problem will arise if a future national law which creates an offence is applied to the HKSAR by way of legislation as the situation will be covered by the word “Ordinance” in the Rules. However, a problem may arise if a future 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.
- (b) Although at present the national laws applying to Hong Kong **by way of promulgation** pursuant to Art.18 of the Basic Law do not create any criminal offences, the present list of national laws in Annex III of the Basic Law is not

exhaustive. The Standing Committee of the National People's Congress may add to or delete from the list in accordance with the provisions of Art. 18 of the Basic Law. Art.18 of the Basic Law does not provide that national law creating a criminal offence must be applied locally by way of legislation. Furthermore, there is no legal basis to construe Art.18 in this restrictive sense. It is therefore possible that a national law creating criminal offence may be incorporated into Annex III in the future and applies to Hong Kong by way of promulgation.

- (c) One of the purposes of the Rules is to offer protection to the defendant by prescribing the information to be given in the indictment. We are therefore of the view that the Rules should also cover those future national laws applying to the HKSAR so long as they create criminal offences.
- (d) It may be argued that since at present no national laws applying in Hong Kong create criminal offence then why not adapt the Rules only if and when a national law applying in Hong Kong creates criminal offence(s). However, we do not think that it is appropriate to defer the proposed adaptation. We take the view that if the Rules are so adapted now, it has the advantage of avoiding the time gap between the coming into force of a future national law and the amendment to be made to these procedural rules.

6. The Bill does not seek to repeal section 9(3) of Cap.221 as such repeal may create a lacuna in the law. The practice and procedure in criminal causes and matters are not laid down in statute and are a matter of common law and practice. Section 2 of the Administration of Justice (Felonies and Misdemeanours) Ordinance (Cap.328) provides that on all matters on which a distinction has previously been made between felony and misdemeanour, including mode of trial, the law and practice in relation to all offences shall be the law and practice in relation to misdemeanour. However, the law and practice applicable in relation to misdemeanour are not set out. It would be unsafe to repeal section 9(3) of Cap.221 at this stage.

7. You queried whether when a person is charged with an offence under a national law applying in Hong Kong, the practice and procedure for the time being in force in England for similar cases are to be applied. Under the proposed adaptation described above, if a person is to be charged with an offence under a national law applying in Hong Kong, the provisions in section 9(3) will apply (i.e. subject to the provisions of Cap.221 and to such rules and orders and any other enactment applicable thereto, the applicable practice and procedure shall be, as nearly as possible, the same as those from time to time and for the time being in force for similar cases in England). Your query seems to be based on a concern that English practice and procedure might be inappropriate for offences created in the Mainland. However, we do not think that this will create any problem. On the other hand, we are of the view that this will ensure that trials are conducted fairly in accordance with common law principles. An illustration of how section 9(3) of Cap.221 works can be found in *R v KWOK Moon-yan and Others* [1989] 2 H.K.L.R. 396 (now subject to the Costs in Criminal Cases Ordinance, Cap.492). It applies the English Practice Directions to Hong Kong. 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 procedures. 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 include 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. We cannot see any reason why, in principle or in practice, the English practice and procedures cannot be applied to offences created under a national law applying in Hong Kong. In fact, this will demonstrate that under the “one country, two systems” principle, Hong Kong can have a legal system different from that in the People's Republic of China.

8. I refer to our recent telephone conversation during which you expressed concerns over the compatibility of the proposed adaptation with Arts. 18 and 19 of the Basic Law. Art.18(3) of the Basic Law provides that the national laws applying to the HKSAR are limited to those relating to

defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified in the Basic Law. Art.19(3) provides that the HKSAR courts shall have no jurisdiction over acts of state such as defence and foreign affairs; the courts shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases; this certificate shall be binding on the courts. Your concern seem to be that pursuant to Arts. 18 and 19 of the Basic Law, Hong Kong courts do not have jurisdiction over cases concerning offences created by national laws applying in Hong Kong. We have the following observations

-

- (a) The primary meaning of the term “act of state” is -

“an Act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown” (*Wade and Bradley, Constitutional and Administration Law, at p.330*).

- (b) The reference to “other matters outside the limits of the autonomy of the Region as specified by [the Basic] Law” in Art.18(3) of the Basic Law does not necessarily involve “act of state”.
- (c) Offences created by national laws relating to defence and foreign affairs or matters outside the limits of the autonomy of HKSAR, if any, may not involve any questions of acts of state. The Laws of the National Flag and the Laws of the National Emblem in Annex III of the Basic Law are good examples. As you know, these two laws create the offence of defacement of national flag and emblem. It is unlikely that questions of “acts of state” will arise in proceedings against a person who defaces the national flag.
- (d) The question of whether an act is or is not an act of state is a question of law which the courts must decide and nothing in Art.19 of the Basic Law precludes the courts

from determining whether an act of state is involved and whether a certificate from the Chief Executive is necessary or considering cases involving acts of state. Profession Yash Ghai has made the following observations -

“Article 19 does not preclude the courts from considering cases which involve acts of state; it merely says that they would have no jurisdiction over acts of state, in other words they are non justiciable, which is the common law position. Nor does an executive certificate oust the jurisdiction of the courts, for the certificate is conclusive only on points of facts relevant to the act of state ... a position quite consistent with the common law practice - leaving it to the courts to determine whether on the basis of these facts there is indeed an act of state.” (*Yash Ghai, Hong Kong's New Constitutional Order - The Resumption of Chinese Sovereignty and the Basic Law (1999), at pp.318-319*)

In short, whether an act is an act of state and whether a Chief Executive's certificate shall be obtained when Art.19 of the Basic Law are questions for the courts to decide. Nothing in Art.19 precludes the courts from exercising these powers under the common law which have been preserved under Arts. 8 and 19 of the Basic Law.

- (e) In light of para 8(d) above, even if an offence created by a national law applying in Hong Kong appears to involve acts of state, it is for the HKSAR courts to determine whether an act of state is involved and, where appropriate, whether a Chief Executive's certificate is required for the proceedings.
- (f) In our view, the adaptation of the reference to “imperial enactment” to “national law applying in Hong Kong” in the Rules is consistent with Arts. 18 and 19 of the Basic Law. In the event, which we believe is unlikely to

happen, that the Standing Committee of the National People's Congress, after consulting the Committee for the Basic Law of the HKSAR under it, considers that the said adaptation is not in conformity with the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the HKSAR, it is for the Standing Committee to return the law pursuant to Art.17 of the Basic Law. Before then, there is no reason for us to suspect that the proposed adaptation will not be acceptable to the Standing Committee of the National People's Congress.

9. You queried whether the practice and procedures applicable pursuant to section 9(3) of Cap.221 are to be applied to Hong Kong for an indefinite time. It appears that these practice and procedures will continue to apply until all the practice and procedures in criminal causes and matters are laid down in the statute of the HKSAR.

10. I hope the above adequately answers the queries raised in your letter. Please do let me know if you need further clarifications on the above.

Yours sincerely,

(Ms Diana Lam)
Senior Government Counsel

c.c. Mr R Allcock, SJO/DLO
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18 December 1998

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Dear Ms. Lam,

Adaptation of Laws (No. 12) Bill 1998

I am scrutinizing the legal and drafting aspects of the above Bill with a view to advising Members. I have observed the following points and shall be grateful if you can clarify the following:

1. Criminal Procedure Ordinance (Cap 221)

In this Ordinance, there is a section 109I- Power to bind over to keep the peace (added 47 of 1997 s. 10). However, it is noted that there is already a section 109I as added by 44 of 1973. Apparently, there are two s.109I. This amendment provision in 1973 together with s.109J and a Schedule 8 have never been put into effect for the last 25 years but the Chinese version can be found in the Loose-leaf edition of the Laws of Hong Kong. Has the Administration considered how to deal with the the amendment Ordinance in 1973 and if it is to put into effect, should terms such as “the Supreme Court” in the definition of the “court” be adapted?

2. Criminal Appeal Rules - sub. leg. of Criminal Procedure Ordinance(Cap 221)

In rule 71, the word “Crown” still appears.

3. Indictment Rules - sub. leg. of Criminal Procedure Ordinance(Cap 221)

After adaptation, rule 4 of the Indictment Rules reads as follows:

“Where the specific offence with which an accused person is charged in an indictment is one created by or under an Ordinance or a national law applying in Hong Kong, then, without prejudice to the generality of rule 3 -

- (a) the statement of offence shall contain a reference to the provision in the Ordinance or national law applying in Hong Kong creating an offence;“.

The Indictment Rules are made under section 9 of the Ordinance. In section 9(3), it is stated that:

“Subject to the provisions of this Ordinance and to such rules and orders and any other enactment (including any enactment relating to juries) applicable thereto, the practice and procedure in all criminal causes and matters (including trials for treason or misprison of treason) shall be, as nearly as possible, the same as the practice and procedure from time to time and for the time being in force for similar cases in England.”.

Does it mean that when a person is charged with an offence under a national law applying in Hong Kong, the practice and procedure for the time being in force in England for similar cases are to be applied? At present, are there any criminal offences stipulated in the national laws applying in Hong Kong? Please illustrate how this is going to operate. Are these practices and procedures to be applied to Hong Kong for an indefinite time?

Your early reply is most appreciated.

Yours sincerely,

(Anita Ho)
Assistant Legal Adviser

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