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**Report of the Bills Committee on
Adaptation of Laws (No. 12) Bill 1998**

Purpose

This paper reports on the deliberations of the Bills Committee on Adaptation of Laws (No. 12) Bill 1998 (the Bill) and seeks members' support for the Bill to resume its Second Reading debate at the Council meeting on 7 July 1999.

Background

2. The purpose of the Bill is to adapt references in certain Ordinances and their subsidiary legislation to bring them into conformity with the Basic Law and the status of Hong Kong as a Special Administrative Region of the People's Republic of China. A list of the Ordinances and subsidiary legislation is at **Appendix I**.

3. The Bill, if enacted, shall deem to have come into effect on 1 July 1997.

The Bills Committee

4. At the meeting of the House Committee on 8 January 1999, Members decided to form a Bills Committee to study the Bill. The membership list of the Bills Committee is at **Appendix II**.

5. Under the chairmanship of Hon Margaret NG, the Bills Committee held three meetings with the Administration.

Deliberations of the Bills Committee

6. The Bills Committee notes that the majority of the adaptations proposed in the Bill are straightforward technical amendments, with the exception of some proposed adaptations in Schedule 2 to the Bill relating to the Criminal Procedure Ordinance (Cap.221) and its subsidiary legislation which were deliberated at some length by the Bills Committee. The deliberations of the Bills Committee are summarized below.

Adaptation of references to “Crown/Queen” as “Government” (sections 9M(1) and 102(4) of Cap. 221 and Forms II, III, XVI and XVII of the Criminal Appeal Rules - sections 5, 22 and 37(b) and (f) of Schedule 2 to the Bill)

7. Members enquire about the reasons for the following proposed adaptations -

- (a) the adaptation of the reference to “Crown” in the context of court forfeiture in sections 9M(1) and 102(4) of Cap. 221 to “Government” ; and
- (b) the adaptation of the reference to “Queen” in Forms II, III, XVI and XVII of the Criminal Appeal Rules to “Government”.

8. The Administration has explained that section 9M(1) of Cap. 221 provides that recognizance of bail or sum of money deposited be forfeited to the Crown on a person’s failure to surrender to custody, whereas section 102(4) of Cap. 221 provides that where a court orders the sale or retention of property connected with offences and no person establishes a claim to it or its sale proceeds, then the property or its sale proceeds shall become the property of the Crown. Since money being forfeited will, in practice, be paid to the Government, the reference to “Crown” in both sections is adapted to “Government” in accordance with the adaptation guidelines incorporated in section 2 of schedule 8 of the Interpretation and General Clauses Ordinance (Cap. 1), which stipulates that any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) in contexts other than title to land in the Hong Kong Special Administrative Region (HKSAR), affairs for which the Central People’s Government has responsibility or the relationship between the Central Authorities and the HKSAR, shall be construed as a reference to the Government of the HKSAR.

9. The Administration has further explained that under Forms II and XVI of the Criminal Appeals Rules, the Appellant acknowledges himself to owe to the Queen the sum of money paid in entering into recognizance of bail if he fails in the condition of recognizance. Under Forms III and XVII of the Criminal Appeals Rules, the Appellant and his sureties severally acknowledge themselves to owe to the Queen the sums of money paid in entering into recognizance of bail if the Appellant fails in the condition of recognizance. The Administration has advised that in the light of the adaptation guidelines in section 2 of schedule 8 of Cap.1 referred to in paragraph 8 above, the

reference to “Queen” in Forms II, III, XVI and XVII is therefore proposed to be adapted as “Government”.

Adaptation of references to “Crown” as “Government” (sections 56(2)(a), 59, 83S of Cap. 221, rule 64(2) of the Criminal Appeal Rules and rule 2 of the Criminal Procedure (Representation) Rules)

10. In reply to members’ enquiry, the Administration has explained that the reference to “Crown” in section 56(2)(a) of Cap. 221 is in the context of the Crown being a party at the trial of an offence and the Secretary for Justice or the Solicitor General appears for the Crown. The Secretary for Justice and the Solicitor General are both law officers of the Government (the executive authorities of the Region by virtue of Article 59 of the Basic Law) who act as the Government’s chief legal advisers and have important responsibilities in relation to the law and its enforcement. The Administration takes the view that the idea that the executive is a party to most criminal proceedings is reinforced by Article 63 of the Basic Law which provides that the Department of Justice of the HKSAR shall control criminal prosecutions, free from any interference. The Administration has also pointed out that the proposed adaptation of the reference to “Crown” as “Government” in section 56(2)(a) is in accordance with the adaptation guidelines set out in section 2 of Schedule 8 of Cap. 1.

11. The Administration has further advised that the reference to “Crown” in the following parts of Cap. 221 and its subsidiary legislation is in the context of the Crown being a party to criminal proceedings -

- (a) section 59 of Cap. 221 which provides that the Crown and the accused persons shall have the right to have evidence retaken in the presence of the jury in connection with the statement of the accused persons;
- (b) section 83S of Cap. 221 which empowers the Court of Appeal to dismiss a frivolous or vexatious notice of appeal without calling on anyone to attend the hearing or to appear for the Crown thereon;
- (c) rule 64(2) of the Criminal Appeal Rules which provides that the Crown may make application to the Court of Appeal for attendance of witness before the Court; and
- (d) rule 2 of the Criminal Procedure (Representation) Rules which provides that a solicitor who accepts instructions to represent a party other than the Crown in any proceedings in the criminal jurisdiction of the Court of Appeal or the High Court shall give notice of his appointment to the Registrar of the High Court.

12. The Administration is therefore of the view that the reference to “Crown” in paragraph 11 (a), (b), (c) and (d) should be adapted as “Government” for the same reason as given in paragraph 10 above.

13. A member however points out that there is no express provision in either Article 59 or 63 of the Basic Law which states that the Department of Justice should represent the Government to prosecute an accused person. The member also points out that prosecutors have never represented the Government in the conduct of criminal cases in the past. The member considers that to adapt the reference to “Crown” as “Government” will have the effect of changing the substance of the existing provisions, which is contrary to the principle of the adaptation exercise. The member is also of the view that such adaptation will give a wrong connotation that prosecutors only act in the interest of the Government rather than the public. The member’s views are shared by other members. The Assistant Legal Adviser to the Bills Committee advises that in the context of section 56(2)(a) of Cap. 221 and other provisions on criminal procedure where the role of the Secretary for Justice in the prosecution of criminal proceedings is referred to, the term “Crown” should be adapted to “HKSAR” and not “Government” to reflect the constitutional reality. The Assistant Legal Adviser considers that such adaptation would be in conformity with past convention under British rule and the provisions in the Basic Law and the Hong Kong Reunification Ordinance, as well as consistent with other Ordinances and other proposed adaptations in the Bill. The Bills Committee accepts the Assistance Legal Adviser’s advice.

14. The Administration accepts the views put forward by the Bills Committee and has agreed to propose Committee Stage amendments to change the proposed adaptation of the reference to “Crown” to “HKSAR” instead of “Government”.

Adaptation of the references to “imperial enactment” to “national law applying in Hong Kong” (Rules 4 and 5 of Indictment Rules, Cap. 221)

15. Members note that sections 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”. Members have asked the Administration to explain the reasons for the proposed adaptation.

16. The Administration has explained that the Rules, one of the purposes of which is to offer protection to the defendant by prescribing the information to be set out in the indictment, 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. The Administration has pointed out that Article 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 will not be covered by the Rules unless the reference to “imperial enactment” in the Rules is adapted to “national law applying in Hong Kong”.

17. The Administration has further explained that although at present the national laws applying to Hong Kong by way of promulgation pursuant to Article 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 Article 18 of the Basic Law. 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. The Administration therefore takes the view that it is appropriate to adapt the Rules as proposed in order to avoid the time gap between the coming into force of a future national law and the amendment to be made to these procedural rules.

18. The Administration has also explained that section 9(3) of Cap. 221 relating to trials for treason or misprision of treason has Basic Law Article 23 implications and its adaptation will be dealt with in a separate exercise. The Administration considers that it is not appropriate to repeal section 9(3) as such repeal may create a lacuna in law. In the Administration’s view, if a national law that applies to Hong Kong does create an offence that is triable in Hong Kong courts, section 9(3) and the Indictment Rules (as a matter of adaptation) should apply to that offence, in the same way as they previously applied to British laws that applied in Hong Kong before 1 July 1997.

Adaptation of section 19 of Cap. 221 (section 6 of Schedule 2 to the Bill)

19. Members question the rationale for repealing the reference to “in the peace of the Queen” in section 19 of Cap. 221 and substituting it by “within the jurisdiction of the Hong Kong courts”.

20. The Administration has explained that the expression “in the peace of the Queen” was formerly used to allege jurisdiction of the court in an indictment by the victim of an offence committed on the high seas or in any place outside Hong Kong. The Administration has pointed out that according to Halsbury’s Laws of England, Vol. 11(1) : Criminal Law, Evidence and Procedure, para 428, on a charge of murder or manslaughter it must be shown that the person killed was under the Queen’s peace (which has the same meaning of “in the peace of the Queen”). The Queen’s peace extends to all persons in Her Majesty’s territories, whether British subjects or aliens, except rebels and alien enemies who were at the time actually engaged in hostile operations against the Crown.

21. The Administration has further pointed out that jurisdiction of Hong Kong courts to try offences committed on the high seas and in foreign parts is conferred by section 23B of the Crimes Ordinance (Cap. 200). The term “in the peace of the Queen” is wider than “within the jurisdiction of Hong Kong courts”. Section 19 of Cap. 221 does not

confer a wider jurisdiction than section 23B of Cap. 200 but must be read subject to it. Therefore, to adapt the term “in the peace of the Queen” in section 19 of Cap. 221 to “within the jurisdiction of the Hong Kong courts” will not narrow the jurisdiction which is already in section 23B of Cap. 200 which will remain unchanged.

22. Members note the precedent case cited by the Administration in which the Court of Appeal had stated that section 19 of Cap. 221 was intended to apply to those cases where jurisdiction had already been conferred by statute on Hong Kong courts to try cases outside Hong Kong, if the Queen’s subjects were involved, e.g. the Offences at Sea Act 1799. Members accept the Administration’s explanation and support the proposed adaptation of the reference to “in the peace of the Queen” in section 19 of Cap. 221 to “within the jurisdiction of the Hong Kong courts”.

Committee Stage Amendments

23. The Committee Stage Amendments to be moved by the Administration as highlighted in paragraph 14 are at **Appendix III**.

Recommendation

24. The Bills Committee supports the Bill and recommends that, subject to the amendments at Appendix III to be moved by the Administration, the Second Reading debate on the Bill be resumed on 7 July 1999.

Consultation with House Committee

25. The Bills Committee consulted the House Committee on 25 June 1999 and sought the latter’s agreement that, subject to the Committee Stage amendments to be moved by the Secretary for Justice, the Second Reading debate on the Bill be resumed at the Legislative Council meeting on 7 July 1999.

Legislative Council Secretariat

30 June 1999