

LP 5019/6 III

2867 2157

9 June, 1999

Mrs Sharon Tong,
Clerk to Bills Committee,
Legislative Council,
Legislative Council Building,
8 Jackson Road, Central,
Hong Kong.
(Fax No. 2877 8024)

Dear Mrs Tong,

**Bills Committee on
Interpretation and General Clauses (Amendment) Bill 1999**

I refer to your letter dated 18 May 1999. Our response in respect of the issues noted in the Appendix to your letter is attached at Appendix I to this letter. Attached at Appendix II to this letter is a supplementary paper which further explains why the proposed amendments apply only to the interpretation of Ordinances and not the Basic Law.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

c.c. D of J (Attn: Mr Geoffrey Fox, SALD
Mr Sunny Chan, SGC
Mr Thomas Leung, SGC)

**Bills Committee on
Interpretation and General Clauses (Amendment) Bill 1999**

Administration's response to issues raised at the meeting on 17 May 1999

Issue 1

The rules of interpretation of the Basic Law vis-à-vis the rules of interpretation of Ordinances in Hong Kong, and the differences, if any, between the two sets of rules

(a) The rules of interpretation of the Basic Law

1. The Basic Law does not provide rules or guidelines for application in the interpretation of its provisions. However, the courts have applied the common law principles of constitutional interpretation in cases requiring the interpretation of the Basic Law.

2. For example, in HKSAR v Ma Wai Kwan, David & Others [1997] 1 HKLRD 761, at pp.772-773, Chan CJHC said that, in its constitutional aspects, a generous and purposive approach to the Basic Law was to be adopted (AG of the Gambia v Jobe [1984] AC 689 and R v Sin Yau-ming [1992] 1 HKCLR 127). Mortimer VP, at p.803, said that, for the purpose of interpretation by the courts, the common law principles of interpretation are sufficiently wide and flexible to interpret purposively the plain language of the Basic Law.

3. In Chan Kam Nga & Others v Director of Immigration [1998] 1 HKLRD 752, at p.756, Chan CJHC said that, as a matter of construction, the court should give effect as much as possible to the plain wording of the provision in question bearing in mind the intention of the Basic Law. A generous and purposive construction should be adopted of provisions conferring fundamental rights and freedoms (Minister of Home Affairs & Another v Fisher [1980] AC 319).

4. The Court of Final Appeal further explained the rules of interpretation of the Basic Law in Ng Ka Ling & Others v Director of Immigration [1999] 1 HKLRD 315, at pp.339-340.

5. The rules of interpretation of the Basic Law to be derived from the above cases may be summarised as follows –

- (1) As is usual with a constitution, the Basic Law states general principles and purposes without particularity and definition of terms.
- (2) When resolving gaps and ambiguities in the Basic Law, the courts should give effect to the principles and purposes declared in, and to be ascertained from, the Basic Law and relevant extrinsic materials.
- (3) The courts should avoid a literal, technical, narrow or rigid approach to interpreting the language of the Basic Law and should consider the context of that language.
- (4) The context of a particular provision is to be found in –
 - other provisions of the Basic Law;
 - relevant extrinsic materials including the Joint Declaration;
 - any traditions and usages that may have given meaning to the language used.
- (5) The courts should give a generous and purposive interpretation to the provisions in Chapter III of the Basic Law which constitutionally guarantee the fundamental rights and freedoms conferred on a defined class of Hong Kong residents.
- (6) When interpreting the provisions in Chapter III defining the class of Hong Kong residents (as opposed to providing constitutional guarantees of their rights and freedoms), the courts should simply consider the language in the light of any ascertainable purpose and the context (including the International Covenant on Civil and Political Rights and any principles relevant thereto as incorporated in Article 39 of the Basic Law).
- (7) The above is not an exhaustive statement of the principles of interpretation of the Basic Law. The courts will develop principles as necessary to meet questions as and when they arise.

(b) The rules of interpretation of Ordinances in Hong Kong

6. It is convenient to set out the main modern rules of interpretation of Ordinances in the following statement adapted from Driedger The Construction of Statutes (1974), at p.81 –

- (1) The Ordinance as a whole is to be read in its entire context so as to ascertain the intention of the legislature (the law as expressly or impliedly enacted by the words), the object of the Ordinance (the ends to be achieved), and the scheme of the Ordinance (the relation between the individual provisions of the Ordinance).

- (2) The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of the legislature embodied in the Ordinance, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.
- (3) If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of the legislature, the object of the Ordinance and the scheme of the Ordinance, but one that the words are reasonably capable of bearing, is to be given them.

7. The court may also refer to relevant extrinsic materials in the interpretation of Ordinances including clear statements in the legislative history, with particular (and, in the view of the Law Reform Commission and the Administration, undue) emphasis on the Second Reading Speech (Pepper v Hart [1993] AC 593).

(c) The differences, if any, between the two sets of rules

8. The rules of interpretation of the Basic Law and of Ordinances respectively are broadly similar to the extent that the language of both documents should be interpreted according to its context and purpose.

9. The differences between the two sets of rules arise essentially from the differences in the character and status of each document. “The Basic Law is an entrenched constitutional instrument” (Ng Ka Ling, at p.339I) and “[provisions of Ordinances] which are inconsistent with the Basic Law are of no effect and are invalid” (Ng Ka Ling, at p.337J). Therefore the important difference between the two sets of rules is that, because an Ordinance is subordinate to the Basic Law, it should be interpreted to determine whether or not it is consistent with the Basic Law in much the same way as, at a lower tier of legislation, it is necessary to determine whether or not subsidiary legislation is consistent with an Ordinance.

10. It is also relevant to consider an issue raised by one member and the representative of the Bar Association at the Bills Committee meeting of 17 May 1999. Namely, in connection with the recent right of abode cases, there was a view that statements made by bodies involved in the drafting of the Basic Law after its enactment were relevant to the interpretation of the Basic Law. It was suggested that the proposed new section 19A of the Interpretation and General Clauses Ordinance (Cap. 1) would affect the interpretation of the Basic Law in respect of an Ordinance enacted by the legislature to implement the Basic Law, and that ambiguities might arise if post-enactment material forms part of the legislative history. The Administration disagrees with those suggestions for the following reasons –

- The view argued in the right of abode cases was not based on any alleged general principle that post-enactment extrinsic material could form part of

the legislative history, but, specifically, on Article 31 of the Vienna Convention on the Law of Treaties which requires a treaty to be interpreted taking into account, inter alia, any subsequent agreement between the parties regarding the interpretation of the treaty and the application of its provisions. The Court of Final Appeal rejected submissions that there had been a subsequent agreement between the parties in the Joint Liaison Group within Article 31 of the Vienna Convention regarding the right of abode provisions of the Joint Declaration as implemented in the Basic Law, and, in any event, the court was only obliged to take such agreement, if any, into account and could reach a different view (Ng Ka Ling, at pp.353H-354H).

- The court would, as it does now, interpret an Ordinance which purports to implement the Basic Law by applying to the relevant provisions of the Basic Law the principles, not of Cap. 1, but of constitutional interpretation (noted above).
- Those provisions of the Basic Law would be extrinsic material which the courts should, constitutionally, consider as a matter of course in the interpretation of the Ordinance irrespective of anything in Cap. 1.
- Included in the court's consideration under constitutional law would be the question whether or not the Ordinance was consistent with the Basic Law further to Articles 8, 11, 39 and 160 of that Law.
- If the Ordinance were inconsistent with the Basic Law, it would be held to be unconstitutional and void to the extent found. If it were consistent with the Basic Law, the Ordinance would be interpreted according to its object, including as evinced in the relevant provisions of the Basic Law which it implements.

Issue 2

The Administration's position on whether the legislature is constitutionally competent to enact a provision concerning the rules of interpretation of the Basic Law

11. In the Administration's view, the legislature of the Hong Kong Special Administrative Region cannot, constitutionally, enact a provision governing the interpretation of the Basic Law.

12. In Ng Ka Ling, at p.342D, the Court of Final Appeal said that, "The language of art. 158(2) [of the Basic Law] emphasises the power of all courts of the Region to interpret "on their own" provisions [of the Basic Law] which are within the limits of the Region's autonomy". Accordingly, a law enacted by the HKSAR legislature purporting to set out rules of interpretation of the Basic Law would be inconsistent with the provisions of Article 158 and, therefore, of no effect and invalid.

HKSAR legislation providing such rules would also be inconsistent with the power to amend the Basic Law vested in the National People's Congress by Article 159.

Issue 3

The drawbacks of not passing the Bill

13. If the Bill were not passed, the advantages of achieving clarity and certainty in the area of law covered by the Bill, and the consequential savings in the costs of litigation, would be lost. Legislation is cheaper than litigation. The Parliamentary Constitutional and Legal Affairs Committee of Victoria noted "the possibility of decrease in time, delay and costs in certain cases, through recourse to extrinsic aids" ("Report on Interpretation Bill 1982" (1983), para. 20.84).

14. This view is supported by the paper dated 29 April 1999, prepared for the Bills Committee by the Law Society's Constitutional Affairs Committee, which noted that –

“the common law rules based on *Pepper v Hart* are complicated and may not be clear to users. Broad clear guidelines set out in legislation will put the rules concerning the use of extrinsic materials on a more systematic basis. This is particularly relevant where most of the population is non-English speaking thus it is preferable to have a bilingual statute which clearly explains the relevant rules governing the use of extrinsic aids in the interpretation of statutes than referring to a number of lengthy judgments in the English language.”

15. As noted in our letter of 5 May 1999 to the Bills Committee, the Administrations' view – consistently with that of the Law Society – is that although the need for the proposed legislation is not pressing (for example, to combat drug trafficking or to meet some emergency) there is nevertheless no valid justification for postponing its passage. Further, there may be no pressing need for most legislation, but it is nevertheless desirable because it effects social or economic improvements which benefit the community. The present Bill is of this type and therefore should be permitted to pass.

16. In Bank of England v Vagliano [1891] AC 107, at p.144, Lord Herschell LC said of a codifying statute –

“The purpose of such a statute surely was that in any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities ...”

17. With respect to codes for the interpretation of statutes, Bennion Statutory Interpretation 3rd Ed., at p.521, notes that –

“an Interpretation Act, in order to be of maximum utility, ought to codify all clearly worked out judicial rules regarding the construction of enactments.”

18. As indicated in para. 8 of its Report, the Law Reform Commission conducted a long and thorough study of this subject. It took into account the views of all sectors of the legal community and its consultation paper was made publicly available. The Commission then made detailed recommendations for the law regarding the use of extrinsic materials as an aid to statutory interpretation to be codified and clarified in a new section 19A of the Interpretation and General Clauses Ordinance (LRC Report, paras 12.43-12.44 and Annex II), and those recommendations are reflected in the Bill without any major changes.

19. The utility of the proposed new section 19A would be to –

- (a) establish in a single, simple, accessible document that relevance and reliability are the tests for the admissibility or use of extrinsic materials as an aid to statutory interpretation; and
- (b) specify the main items of relevant extrinsic material.

20. This utility would avoid the need to provide case law in support and to take court time to argue that such extrinsic material is admissible. The costs of both providing the case law and the time taken in argument, which would otherwise have to be paid for by the litigants, would be saved if the Bill were passed.

Issue 4

Information on the operation of the Australian legislation regarding the use of extrinsic materials as an aid to statutory interpretation

21. Brazil “Reform of Statutory Interpretation – the Australian Experience of Use of Extrinsic Materials: With a Postscript on Simpler Drafting” (1988) ALJ 503, reached the following conclusions regarding the operation of the Australian legislation –

- It is noteworthy, having regard to the many misgivings expressed, that these reforms have been readily accepted and used. They are now regularly used, not only by the courts but also by tribunals such as the Administrative Appeals Tribunal and by other statute users.
- The worst apprehensions that the ability to rely on extrinsic materials might cause substantially longer proceedings, as well as significantly greater costs, seem not to have been realised.
- Although lawmakers are conscious of the use now made by the courts of extrinsic materials and greater care is now taken with the preparation of

Second Reading Speeches and Explanatory Memoranda, the High Court of Australia (in R v Bolton; Ex parte Beane (1987) 61 AJLR 190, at pp.197-198) has emphasised that extrinsic materials are only an aid and not determinative: “the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law”.

22. Brazil’s conclusions are reinforced and supplemented by Pearce and Geddes Statutory Interpretation in Australia 4th Ed. (1996). For example –

- Another governing principle under the Australian legislation which has been identified by the High Court is that extrinsic materials should not be taken into account where they merely indicate a view as to the meaning of legislation which is already in existence at the time when the view is expressed (Hunter Resources Ltd v Melville (1988) 77 ALR 8, at p.11).
- The language of the Australian legislation only permits, and does not oblige, a court to refer to extrinsic materials which counsel seek to place before it (Brennan v Comcare (1994) 122 ALR 615, at p.634).

**Bills Committee on
Interpretation and General Clauses (Amendment) Bill 1999**

Why the Bill does not apply to the interpretation of the Basic Law

1. The proposed new section 19A of the Interpretation and General Clauses Ordinance (Cap. 1) would not apply to the Basic Law because of its own terms and the provisions of both Cap. 1 and the Basic Law, and the jurisprudence on Basic Law interpretation.

The proposed new section 19A

2. The main provisions of the proposed new section 19A are contained in subsections (1) and (2) of that section. They each refer expressly to material that may be used “in the interpretation of an Ordinance”. As noted below, this is consistent with the existing provisions for the scope of Cap. 1.

The provisions of Cap. 1

3. The Long Title to Cap. 1 states that the object of the Ordinance, inter alia, is –

“To consolidate and amend the law relating to the construction, application and interpretation of laws ...”

4. Prima facie, the phrase “construction, application and interpretation of laws” is of wide scope and indicates that Cap. 1 applies to the interpretation of all laws, including the Basic Law. However, the context of the substantive provisions of Cap. 1 shows that the Ordinance does not apply to the Basic Law.

5. The most important such provision is section 2(1), which provides for the scope of Cap. 1 as follows –

“Save where the contrary intention appears either from this Ordinance or from the context of any other Ordinance or instrument, the provisions of this Ordinance shall apply to this Ordinance and to any other Ordinance in force, whether such other Ordinance came or comes into operation before or after the commencement of this Ordinance, and to any instrument made or issued under or by virtue of any such Ordinance.”

6. The crucial point about section 2(1) is that it narrows the potential class of “laws” to which Cap. 1 might have applied to an “Ordinance or instrument”. This follows from the rule of statutory interpretation *expressio unius est exclusio alterius* (the inclusion of the one is the exclusion of the other) by which, when a list of specific items is not followed by general words, it is to be taken as exhaustive.

7. In the case of section 2(1) of Cap. 1, the specific items “Ordinance” and “instrument”, applying the *expressio unius* rule, are not followed by general words. Therefore the application of Cap. 1 to other laws, such as the Basic Law, is excluded.

8. This point is reinforced by the definitions of “Ordinance” and “subsidiary legislation” in section 3 of Cap. 1 –

“Ordinance” means –

- (a) any Ordinance enacted by the Legislative Council;
- (b) any Ordinance adopted by virtue of Article 160 of the Basic Law of the Hong Kong Special Administrative Region;
- (c) any subsidiary legislation made under any such Ordinance except any such subsidiary legislation which has pursuant to Article 160 of the Basic Law been declared to be in contravention of the Basic Law; and
- (d) any provision or provisions of any such Ordinance or subsidiary legislation;

“subsidiary legislation” and “subordinate 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.

9. The context of the above definitions separates Ordinances and subsidiary legislation from the Basic Law. For example, an “Ordinance” is enacted by the Legislative Council whereas the Basic Law was enacted by the National People’s Congress. An “Ordinance” or “subsidiary legislation” is a law which is adopted under Article 160 of the Basic Law rather than being a law which can control the Basic Law or its interpretation.

The provisions of the Basic Law

10. The Basic Law does not specify the principles to be applied in the interpretation of its provisions. The Basic Law, however, imposes limits on the competence of the legislature and executive of the Hong Kong Special Administrative Region. Article 11 of the Basic Law in particular provides that no law enacted by the legislature of the HKSAR shall contravene the Basic Law. Accordingly, the legislature of the HKSAR is not competent to enact a law (for example, by amendment of Cap. 1)

which would govern the interpretation of the Basic Law, a law enacted by the NPC. (See further, Issue 2, Appendix I.)

Basic Law jurisprudence

11. Consistently with the terms of the proposed new section 19A, and the provisions of Cap. 1 and the Basic Law noted above, the courts have not applied Cap. 1 in cases requiring the interpretation of the Basic Law. Instead, the common law principles of constitutional interpretation have been applied. (See further, Issue 1, Appendix I.)

Department of Justice
June 1999

Department of Justice
June 1999