Appendix I

Consultation Paper

Interpretation and General Clauses (Amendment) Bill 1999
Use of extrinsic material in the
Interpretation of Ordinances

Introduction

This paper seeks comments on the Interpretation and General Clauses (Amendment) Bill 1999 ("the Bill") regarding points critical of the Bill raised by members of the Bills Committee of the Legislative Council formed to study it. A copy of the Bill is attached at Annex A.

Background

2. The object of the Bill is to implement recommendations made in the Report on Extrinsic Materials as an Aid to Statutory Interpretation published by the Law Reform Commission of Hong Kong in March 1997 ("LRC Report"). A copy of the LRC Report has been sent to consultees with this paper.

3. The LRC Report originated from a request made in May 1987 for the Law Reform Commission to study the topic of extrinsic material as an aid to statutory interpretation. The request followed a recommendation, made in the report of a subcommittee of the Law Reform Commission on the adoption of the UNCITRAL Model Law on Arbitration, that the courts should be permitted to refer to the LRC Report on UNCITRAL Model Law as an aid to interpreting the resultant Ordinance (this recommendation was implemented by the Arbitration (Amendment) (No. 2) Ordinance 1989) (LRC Report, paras 1-5).

4. In February 1996, the Law Reform Commission issued a consultation paper to the Bar Association, the Law Society, the Judiciary, the Legal Aid Department, the Legislative Council Secretariat, and members of the Legislative Council Panel on the Administration of Justice and Legal Services.

5. The Bar Association's response to the consultation paper was that it recognised a strong case for introducing legislation similar to that proposed in the LRC Report. Regarding the use of extrinsic material other than as allowed by Pepper (Inspector of Taxes) v Hart [1993] AC 593, it believed that the trend was towards the greater use of background material in the interests of achieving a purposive construction of legislation. However, the Association also considered that it was not appropriate to implement the LRC's recommendations at the time of the then pending constitutional change in Hong Kong.

6. In September 1998, the Administration sought comments on the Bill from the Bar Association, the Law Society, a law professor of the University of Hong Kong (who had chaired the subcommittee of the Law Reform Commission responsible for the Report), and the Judiciary Administrator.

7. Of these, the Bar Association repeated its reservations about the timing of the Bill. In its view, it was too early to decide whether the principles in Pepper v Hart should be adapted for use in Hong Kong where the promoters of Bills are not accountable to the legislature. It considered that we should wait a few years to see how the new constitutional arrangements under the Basic Law work.

8. The Administration's view was that the government, as promoter of Bills, is accountable to the Legislative Council under Article 64 of the Basic Law, and that a majority vote in the legislature legitimises the intention of those who frame Bills. Under the new constitutional arrangements, the common law principles of statutory interpretation previously applied in Hong Kong – including those in Pepper v Hart – continue to apply in Hong Kong further to Articles 8, 18 and 160 of the Basic Law. Accordingly, the Administration saw no reason to delay the Bill.

9. The Bill was introduced into the Legislative Council on 10 March 1999 by the Secretary for Justice. It was subsequently referred to a Bills Committee, initially comprising four lawyer members and three lay members, which has met four times. A

scheduled fifth meeting was postponed and the Bill held in abeyance to enable the Administration to consider the points raised by the Bills Committee.

10. This paper sets out a detailed overview of the main operative provisions of the Bill and their purpose or object. Then will follow the essential points raised by the Bills Committee and the Administration's comments on them.

Overview of the Bill and its purpose

(a) Object and structure

11. The object of the Bill is to give effect to the unifying recommendation of the Law Reform Commission that the law regarding the use of extrinsic material in statutory interpretation be codified and clarified.

12. Structurally, the Bill supplements section 19 of the Interpretation and General Clauses Ordinance (Cap. 1) – which specifies a purposive approach to the interpretation of an Ordinance – by the introduction of a new section 19A of Cap. 1, which provides guidance as to the use of extrinsic material in ascertaining the purpose or object of an Ordinance.

13. As noted in paragraph 10 of the Explanatory Memorandum to the Bill, the new section 19A is based on section 15AB of the Acts Interpretation Act 1901 of the Commonwealth of Australia. Section 15AB was introduced in 1984 and performs the same function with respect to section 15AA of the 1901 Act (introduced in 1981, the equivalent of section 19 of Cap. 1) as is intended for the new section 19A.

14. The main difference between the new section 19A of Cap. 1 and the Australian section 15AB is that the new section 19A does not have an equivalent of section 15AB(1)(a), which provides for extrinsic material to be considered to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision. While recognising that such consideration was not unprecedented, the Law Reform Commission recommended against providing for it in the new section 19A in the

interests of restraining the use of extrinsic material and avoiding an escalation of legal costs (LRC Report, para. 11.60).

15. Section 15AB(1)(b) of the 1901 Act provides that extrinsic material may be considered to determine the meaning of a provision in two situations, namely, when –

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text is one that leads to a result that is manifestly absurd or is unreasonable.

16. While section 15AB does not place limits, other than relevance, on the kind of materials which may be considered to assist in interpreting legislation, subsection (2) sets out to identify the main categories of relevant extrinsic material (Brazil "Reform of Statutory Interpretation – the Australian Experience of Use of Extrinsic Materials: With a Postscript on Simpler Drafting" (1988) 62 ALJ 504).

17. Section 15AB(1)(b)(i) and (ii) and (2) are reflected in the new section 19A(1)(a) and (b) and (2) respectively.

18. The Australian section has been viewed as operating successfully. For example, Brazil (pp.511-512) cites commentary in [1984] Statute Law Review 187 that section 15AB represents a "coherent scheme [which] seems well poised for future developments". He notes that the section has been readily accepted and used not only by the courts but also by tribunals and other statute users. The worst apprehensions that the section might cause substantially longer proceedings and preparation of cases, resulting in significantly greater costs, seem not to have been realised. The courts have exercised due caution in the use of section 15AB, warning that extrinsic material will not necessarily redeem a failure to translate the intent of Parliament into the text of the law (R v Bolton; Ex parte Beane (1986) 61 AJLR 37).

19. Brazil also notes (p.511) that the approach of spelling out guidelines in the new section was preferred to leaving the principles to be worked out by a series of judicial decisions, and asking statute users to seek out those decisions. It may be noted in this respect that section 15AB presaged by nearly a decade the substantial changes made to the principles of the common law by the decision in Pepper v Hart (see also para. 23 below).

20. Some of the Australian States passed legislation corresponding to section 15AB (Bennion Statutory Interpretation 3rd Ed., p.516) including New South Wales, Western Australia and the Australian Capital Territory. In Victoria, section 35 of the Interpretation Act 1984 merely says that in the interpretation of an Act or subordinate instrument "consideration may be given to any matter or document that is relevant including but not limited to … reports of proceedings in any House of Parliament". In South Australia, it has been held that section 15AB should be applied by analogy to State enactments (Commonwealth Scientific and Industrial Research Organisation v Perry (No. 2) (1988) 53 SASR 538, 546).

(b) Role of the Judiciary: discretion and flexibility preserved

21. As in the case of the Australian sections 15AA and 15AB (Brazil, p.505), there is an important difference between section 19 of Cap. 1 and the new section 19A. Section 19 contains a command that an Ordinance be interpreted purposively. The new section 19A contains no command at all, except the command in subsection (5) that the importance to be attached to any extrinsic material "shall be not more than is appropriate in the circumstances". Judges and other users of Ordinances are not required by the new section 19A to refer to any extrinsic material, nor are they prohibited from referring to any material. The courts are free to develop principles regarding the exercise of their discretion whether or not to consider any extrinsic material. Further, the new section 19A(7)(a) provides that the new section is in addition to and not in derogation from the common law, in particular any rule of law relating to the use of extrinsic material in the interpretation of an Ordinance, and the new section 19A(7)(b) provides similarly in respect of any rule of law that a provision which is ambiguous or obscure shall not be

interpreted to derogate from the rights or privileges of individuals.

22. Similarly to the Australian section 15AB, the aim of the new section 19A is to produce a satisfactory outcome regarding the use of extrinsic material by relying on the courts to apply the guidelines and discretions set out in such a way that the range of extrinsic material, and the way in which it is used, is reasonably defined and confined. Section 19A only gives extrinsic material the status of an aid to interpretation, but does not involve any rule of law. Brazil considers that experience in the courts bears this view out in respect of the Australian section.

23. Another commentator, Bennion [1993] Statute Law Review 149, 157, suggested that, "Although it is not so stated in Pepper v Hart, section 15AB(1) is obviously the source of the limiting conditions for the relaxation of the exclusionary rule imposed by the House of Lords in that case". The House of Lords, noting moves towards a more purposive approach to interpretation, set criteria for reference to parliamentary material according to a two-stage approach similar to that in section 15AB(1)(b). It must first be decided whether or not the legislation in its ordinary meaning is ambiguous or obscure or leads to an absurd result. If so, it is permissible to move to the second stage and refer to material consisting of one or more statements by a minister or other promoter of the Bill, provided that such statements are clear.

24. As have the Australian courts in respect of section 15AB, the English courts have also adopted a cautious approach to the extent to which reference to parliamentary material may be made. In 1993, the Practice Directions applicable to Civil Appeals of the House of Lords were amended by the Practice Direction (House of Lords: Supporting Documents) [1993] 1 WLR 303 which provides, "Supporting documents, including extracts from Hansard, will only be accepted in exceptional circumstances". Similar practice directions could, if necessary, be introduced in Hong Kong if extrinsic material were not used in a reasonably restrained manner, whether under Pepper v Hart and related cases or the new section 19A.

(c) Reasons for the Bill despite Pepper v Hart

25. The common law rules associated with Pepper v Hart (whether before or after that case) and the consideration of extrinsic material generally are disparate and complicated, and the case law is not readily accessible to the ordinary users of Ordinances. Further, the Law Reform Commission noted that, despite Pepper v Hart, a number of areas remain unclear, such as uncertainty about the extent to which reference may be made to parliamentary material other than the second reading speech. Accordingly, it would be desirable to codify and clarify the common law position, or slightly modify it where appropriate, by setting out the reasonably settled rules in a single, simple and accessible statutory document (LRC Report, paras 11.49 – 11.55).

26. Bennion Statutory Interpretation 3rd Ed., 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". It is this objective which the new section 19A largely achieves in respect of the use of extrinsic material in the interpretation of Ordinances. That is, the section provides for all users of Ordinances a useful summary of the current status of the common law while leaving complete freedom for future judicial development because of the discretionary language of section 19A(1) and (2), reinforced by the express saving of the common law under section 19A(7).

(d) Section 19A(2) and the common law rules

27. A description of how the new section 19A(2)(a) to (i) incorporates and clarifies the common law rules regarding consideration of each of the categories of extrinsic material listed in the section follows. The description also serves to illustrate the complexity of the common law rules. For reference, a copy of the passages related to enacting history in Halsbury's Laws of England 4th Ed., Vol. 44(1)(Reissue) and 1999 Supplement ("Halsbury's") is attached at Annex B.

Section 19A(2)(a) : matters not in Ordinance

28. The reference to "matters not forming part of the Ordinance" includes the long title, preambles, and guides to content, such as indexes, headings and marginal notes,

which are separate from the pronouncements of law in the Ordinance. Some earlier dicta indicated that marginal notes must be disregarded (e.g. Re Woking UDC [1914] 1 Ch 300, 332 and R v Hare [1934] 1 KB 354, 355). In R v Schildkamp [1971] AC 1, 10, however, Lord Reid said that he "would not object to taking all these matters into account, provided that we realise that they cannot have equal weight with the words of the Act". Clause 2(b) of the Bill makes a consequential amendment to section 18(2) and (3) of Cap. 1 to enable extrinsic material consisting of precedent provisions, marginal notes and section headings to be used to assist in the interpretation of an Ordinance in circumstances where the new section 19A applies to a provision of an Ordinance.

Section 19A(2)(b) : official reports (Hong Kong)

29. This reflects the approach in Pepper v Hart which rejected the distinction between the terms "mischief" and "intention" that had been applied to commission reports and other pre-parliamentary material. At p. 1040, Lord Browne-Wilkinson said that, "the distinction between looking at reports to identify the mischief aimed at but not to find the intention of Parliament in enacting the legislation is highly artificial".

30. Extensive case law on the use of such reports is cited in Halsbury's, para. 1423, and in the LRC Report, paras 6.26-6.38.

31. In Newcastle City Council v Gio General Ltd (1998) 72 AJLR 97, 112, the High Court of Australia said –

> "The context [to which a court is permitted to have regard] includes reference to the provision's legislative history and the relevant reports of law reform bodies which detail the perceived evil requiring reform."

Section 19A(2)(c) : official reports (other jurisdictions)

32. This is a Hong Kong innovation which is not found in the Australian section 15AB but nevertheless is consistent with the trend of the common law to make exceptions to the exclusionary rule where appropriate. As noted in paras 11.69-11.70 of

the LRC Report, it is included to make it clear that a relevant official report from another jurisdiction may be considered in the interpretation of a provision of an Ordinance where the provision was modelled on legislation in that jurisdiction which implemented the recommendations of the report. The case law noted in paras 30 and 31 above is relevant to the use of any such report.

Section 19A(2)(d) : treaties

33. Authority on the admissibility of treaties and related material is listed in Halsbury's, para. 1426, and in the LRC Report, paras 2.53-2.74. Section 19A(2)(d) removes any doubt about whether the principle in Ellerman Lines Ltd v Murray [1931] AC 126 (the court is entitled to consult a relevant treaty only where the enactment is ambiguous) or that in Salomon v Customs and Excise Commrs [1967] 2 QB 116 (if an enactment implements international obligations the court can look at the treaty) prevails in Hong Kong by effectively overruling the former (the LRC Report, para. 2.64, refers to opinion regarding the desirability of clarification of this matter by the House of Lords or by statute).

Section 19A(2)(e) : Explanatory memorandum or other relevant document

34. Halsbury's, para. 1425, states that, "Being designed to throw light on the meaning of the Bill, such memoranda are of obvious relevance to the construction of the ensuing Act, and are admissible accordingly". The same principle applies to any other relevant document explaining the Bill to members of the Legislative Council before enactment specified in section 19A(2)(e).

Section 19A(2)(f) : second reading speech

35. The leading authority for the relaxation of the rule excluding parliamentary material, with special emphasis on the second reading speech, is Pepper v Hart, p.1056. Halsbury's, para. 1421, lists updated authority. Examples of post-Pepper v Hart Hong Kong cases regarding second reading speeches include Hong Kong Racing Pigeon Association Limited v Attorney General [1995]2 HKC 201(CA)(LRC Report, para. 6.19) and Matheson PFC Limited v Jansen (1994) CA No. 72 of 1994, unreported (LRC Report,

para. 6.79).

Section 19A(2)(g) : Legislative Council committee reports

36. Pepper v Hart, p. 1056, albeit in very cautious terms, permits reference to parliamentary material other than the second reading speech subject also to the condition that it "clearly discloses" the mischief or legislative intention underlying the statutory words. In Sunderland Polytechnic v Evans [1993] ICR 392, the Employment Appeal Tribunal referred to a statement made by an Under Secretary to a Standing Committee which explained the section in question. This and other authority on the use of such material is cited in the LRC Report, paras 9.58-9.63.

Section 19A(2)(h) : document declared relevant by Ordinance

37. This is statutory and adopts the Australian section 15AB(2)(f). The Law Reform Commission considered this to be a useful provision and, as an example, recommended that it may be advisable for the draftsman to use section 19A(2)(h) to provide in an Ordinance implementing a treaty that the treaty and its travaux preparatoires are relevant documents in interpreting the Ordinance (LRC Report, paras 11.75 and 11.88). This recommendation is reflected in respect of the UNCITRAL Model Law in section 2(3) of the Arbitration Ordinance (Cap. 341).

Section 19A(2)(i) : relevant material in official record of debates

38. Authority regarding this subsection is noted in the LRC Report, paras 11.76-11.81. The LRC considered that it would be too restrictive to allow reference only to the second reading speech. A policy secretary, for example, might make statements at the committee stage which met the Pepper v Hart criteria. In Pepper v Hart, questions put to the minister in Parliament were allowed in. Lord Browne-Wilkinson, p. 1058G, observed, "What is persuasive in this case is a consistent series of answers given by a minister, after opportunities for taking advice from his officials, all of which point the same way and which were not withdrawn or varied prior to the enactment of the Bill".

(e) <u>The Bill as codification and as law reform</u>

39. As effectively noted in para. 11.49 of the LRC Report, the new section 19A represents codification of common law principles and limited legislative reform consistent with those principles. For ease of reference, para. 11.49 is set out in full –

> "11.49 The Commission identified a number of reasons supporting legislative reform :
>
> (1) Despite *Pepper v Hart*, there remain unresolved areas, such as uncertainty as to the "other parliamentary materials" which may be used.
>
> (2) Incremental clarifications of the law [by the courts] would be piecemeal, slow, and incomplete, whereas legislation would provide a code which would be clear and comprehensive.
>
> (3) *Pepper v Hart*, by placing emphasis on the second reading speech of the Bill's promoter, is limited in scope, yet the trend in common law jurisdictions is towards further relaxation of the exclusionary rules. By expanding the scope, legislation would give the courts the discretion to consult a wider ranger of materials relating to the legislative history of an ordinance, including explanatory memoranda.
>
> (4) Legislation would publicise the relaxation of the exclusionary rules and its benefits.
>
> (5) Legislation can set out extrinsic materials that are prima facie reliable and omit generally unreliable extrinsic materials.
>
> (6) Legislation could clarify the use of extrinsic materials in the interpretation of treaties and deal with other matters left unresolved, such as the problems of *per incuriam* and its application to prior legislation. [Note that, at para 12.39 of the LRC Report, the Law Reform Commission concluded that *per incuriam* was a matter which should be left to the courts to determine.]

(7) Legislation could reinforce the use of a purposive approach as mandated by section 19 of the Interpretation and General Clauses Ordinance (Cap. 1), since the purpose can often be discovered only by consulting extrinsic materials.

(8) A bilingual statute clearly explaining the use of extrinsic materials would be preferable to reliance on a number of judgments, many of which would come from overseas."

40. It is worth emphasising that section 19A(2) does not purport to be a complete code. It sets out for convenience (avoiding the time and cost that would otherwise be required to refer to case law to justify admissibility) a non-exhaustive list of the more important extrinsic material that may be considered relevant as an aid to interpretation. For example, extrinsic material such as other statutes, textbooks, other court decisions and dictionaries is not listed. Such material, however, is covered by the generality of section 19A(1), and by section 19A(7) which saves the applicable common law.

41. On the assumption that all of section 19A(2) is a code, conveniently setting out reasonably settled existing rules, an analysis of how each paragraph of the subsection represents law reform (by way of removing minor areas of doubt and achieving better clarity and, particularly, public accessibility of the law) is set out below –

- Section 19A(2)(a) makes it clear that the principles in R v Schildkamp apply to the use of material printed with the Ordinance such as headings and marginal notes (see para. 28 above).
- Section 19A(2)(b) makes it clear that official reports may be used as an aid to find the legislative intention, not merely the mischief aimed at (see paras 29-31 above).
- Section 19A(2)(c) is a Hong Kong innovation which clarifies the entitlement of the court to refer to official reports from other jurisdictions (see para. 32 above).

- Section 19A(2)(d) makes it clear that the principle in Salomon v Customs and Excise Comrs applies to the interpretation of enactments implementing treaties and that Ellerman Lines Ltd v Murray is overruled (see para. 33 above).
- Section 19A(2)(e) clarifies the entitlement of the court to refer to the explanatory memorandum or any other relevant document explaining the Bill to members of the Legislative Council prior to enactment specified in the subsection (see para. 34 above). This was not dealt with in Pepper v Hart.
- Section 19A(2)(f) reflects the decision in Pepper v Hart regarding references to the second reading speech and as such represents codification rather than law reform or clarification (see para. 35 above).
- Section 19A(2)(g) clarifies the entitlement of the court to refer to Legislative Council committee reports despite the emphasis in Pepper v Hart on the second reading speech (see para. 36 above).
- Section 19A(2)(h) is a utility provision which acts as a guide to the draftsman, where appropriate, to declare a document such as an official report or a treaty implemented by an Ordinance to be relevant to the interpretation of that Ordinance (see para. 37 above).
- Section 19A(2)(i), similarly to subsection (2)(g), clarifies the entitlement of the court to refer to relevant material in the official record of debates besides the second reading speech (see para. 38 above).

(f) The Bill is expected to save legal costs

42. It is noteworthy that the authority to refer to extrinsic material, especially as an exception to the exclusionary rule in respect of legislative history, has already been largely established by Pepper v Hart and related decisions. Therefore, if any additional costs were incurred by such reference, that would have resulted from the existing common law, regardless of the Bill.

43. To the contrary, it is expected that, under the "Vagliano principle", the Bill would save legal costs by clarifying some areas of doubt which remain in the common law despite Pepper v Hart (as noted above in respect of the new section 19A(2)(a) – (i)),

and, more importantly, by providing a coherent code or guide, in one publicly accessible, bilingual document, as to what may constitute relevant extrinsic material. The value of a code in saving legal costs is that it greatly reduces the need to expend time and resources to ascertain the law by researching cases and spending time canvassing and arguing them in the courts. Legislation is cheaper than litigation. Reference may be had to the codifying statute "instead of, as before, by roaming over a vast number of authorities" (Bank of England v Vagliano Bros [1891] AC 107, 144, per Lord Herschell LC).

(g) The Bill does not apply to the Basic Law

44. The new section 19A would not apply to the Basic Law because of its own terms and the provisions of Cap. 1. The main provisions of section 19A, in subsections (1) and (2), each refer to material that may be considered "in the interpretation of an Ordinance". This is consistent with the existing provisions for the scope of Cap. 1, particularly section 2(1) which provides that "the provisions of this Ordinance shall apply to this Ordinance and to any other Ordinance … and to any instrument made or issued under or by virtue of any such Ordinance" unless "the contrary intention appears either from" Cap. 1 "or from the context of any other Ordinance or instrument".

45. 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.

46. 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" and "[provisions of Ordinances] which are inconsistent with the Basic Law are of no effect and invalid" (Ng Ka Ling & Others v Director of Immigration [1999] 1 HKLRD 315, 339I-J). Since 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 consider whether or not subsidiary legislation is consistent with an

Ordinance.

47. The court would 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. 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 any relevant provisions of the Basic Law which it purports to implement.

Points critical of the Bill raised in the Bills Committee

48. Up to the time that the Administration requested the Bills Committee to hold the Bill in abeyance pending consideration of the points raised by members, the four lawyer members of the Committee had indicated that they were not presently inclined to support the Bill. The discussion in the Bills Committee has concerned the detailed issues of legal principle noted above. One lay member indicated an inclination to agree with the lawyer members. Another lay member indicated positive support for the Bill, based on the clarity which it would bring to this area of the law, but resigned from the Bills Committee after its first meeting. The third lay member has not yet expressed a view one way or the other.

49. The essential criticisms of the Bill made by the lawyer members of the Bills Committee are summarised below, followed by the Administration's response.

(1) The Bill is neither necessary nor desirable since the scope of section 19A(1) is very wide and section 19A(2) provides only a non-exhaustive list. Counsel would still have to look for other materials that might be useful and the lay client would wonder what had been left out.

50. While the Law Reform Commission recognised that there might not be a pressing need for legislative reform in this area, it considered that it would be desirable to

clarify the common law (LRC Report, para. 11.52). Nor did the Commission consider that law reform should occur only where there is a pressing need. There may be no pressing need for most legislation (in the sense, for example, of a need to combat drug trafficking or to impose taxation). However, legislation which, for example, codifies, clarifies or consolidates existing law is nevertheless socially convenient and desirable under the Vagliano principle (noted in para. 43 above) in order to improve the certainty or accessibility of the law and to save costs in litigation.

51. As noted in para. 40 above, section 19A(2) does not purport to be a complete code but sets out a non-exhaustive list of the more important extrinsic material. Any other extrinsic material which might be relevant in the circumstances of the case may, at the discretion of the court, be admitted under the generality of section 19A(1), and under section 19A(7) which saves the applicable common law and its future development.

(2) Section 19A(2) does not indicate how the listed material would provide assistance in the interpretation of a provision. Each item in the list would have to be argued as to how it would assist the court. The list would widen the scope of the material which legal practitioners would research and examine.

52. In the Administration's view, section 19A(2) would not widen the scope of research any more than has the common law as it has developed before and since Pepper v Hart. For example, Halsbury's, para. 1422, cites a series of cases evincing the principle that the court, as master of its own procedure, has a residuary inherent jurisdiction to allow citation of materials which are otherwise precluded by the exclusionary rule and are not permitted by the rule in Pepper v Hart, where the need to carry out the legislator's intention appears to the court so to require. The court, if it thinks fit, will disregard the exclusionary rule since it is a rule of practice rather than law.

53. The Law Reform Commission noted that the courts have found the list

under the Australian section 15AB(2) to be helpful and have placed clear and appropriate limits on the use of such material (LRC Report, paras 8.45 and 11.63). Appropriate orders as to costs wasted would be made "if attempts are made to widen the category of materials that can be looked at" (Melluish (Inspector of Taxes) v BMI (No. 3) Ltd [1995] 3 WLR 631, 645, per Lord Browne-Wilkinson, as cited in the LRC Report, para. 11.79). Counsel will be aware that under Pepper v Hart extrinsic material must "clearly disclose" the legislative intention before the court will allow reference to it to be made, if at all.

54. Such authority is an established constraint against abuse which could, if necessary, be supplemented by appropriate practice directions (LRC Report, paras 11.130-11.131). In respect of any litigation, counsel are obliged to ascertain only such evidence as is legally relevant to their client's case, and the system of active judicial case management is an additional safeguard against attempts to use material regardless of its relevance or substance. Section 19A(2) does not add to the list of extrinsic materials which are either established or strongly arguable as admissible under the common law, it merely identifies them for the convenience of the legal and lay public, and the judiciary. The court is then able to bypass argument about whether any such material is admissible and proceed directly to the issue of relevance (including whether the material clearly discloses the legislative intention) and whether or not the court, in the exercise of its discretion, would permit reference to the material to be made in the circumstances of the case. (See also paras 21-24 above regarding the role of the judiciary.)

(3) Regarding particular items in section 19A(2), section 19A(2)(c) (official reports from other jurisdictions on which a provision was modelled) would involve lengthy argument if the material were to be presented as evidence. Section 19A(2)(g) (relevant pre-enactment reports of a committee of the Legislative Council) and (i) (relevant material in the Official Record of proceedings in the Legislative Council and in the committee of the whole Legislative Council) are undesirable since such material may be confusing and, even if it could provide assistance, usually tended to favour the promoter of the Bill.

55. As noted above, all of the items of extrinsic material listed in section 19A(2) are either established or, at minimum, strongly arguable as admissible as an exception to the exclusionary rule under the common law. Accordingly, if items such as those listed in section 19A(2)(c), (g) and (i) may, in a particular case, be relevant to the interpretation of an Ordinance then, even under the existing law, counsel would have grounds to argue that they are both admissible and relevant. Again, if such items are listed in section 19A(2), counsel and the court would be able to bypass argument about admissibility and proceed directly to the issue of relevance and whether or not the court, in its discretion, would permit reference to the extrinsic material to be made.

(4) The law regarding the admissibility of extrinsic material in statutory interpretation is not very confusing. Without the proposed codification, legal practitioners could still easily refer to cases such as cited in Halsbury's and the Administration's submissions to the Bills Committee.

56. Paras 27-38 above help to show that the case law in this field – as it was, for example, in respect of the law of the sale of goods before it was codified – is wide, disparate and sometimes unclear, notwithstanding that it may be ascertainable. The benefit of codification is that it would remove the requirement for counsel to research and cite the cases pertinent to the admissibility of the extrinsic material in question with consequential savings in time and costs.

(5) There is a developing trend to make more exceptions to the exclusionary rule. If Hong Kong were to follow Australia in codifying the applicable rules of interpretation it would not be able to benefit from the development of the common law in other jurisdictions.

57. It is noted in para. 21 above that the discretion and flexibility of the judiciary is preserved under the Bill. The Hong Kong courts would therefore be free to adopt any developments in other common law jurisdictions as they saw fit. The new

section 19A is discretionary and the applicable common law rules are expressly saved under section 19A(7).

(6) Notwithstanding that section 19A does not include an equivalent of the Australian section 15AB(1)(a) (which provides that extrinsic material may be used to confirm the ordinary meaning of a statutory provision), one counsel might argue that the ordinary meaning conveyed by the text of a provision led to a result which was absurd or unreasonable while the other side might say that that there were extrinsic materials in support of the ordinary meaning. There should be no reference to extrinsic material when a provision has a plain meaning.

58. Since one of the conditions for reference to extrinsic material established under Pepper v Hart is that the legislation in its ordinary meaning must be ambiguous or obscure or lead to an absurd result, argument of this nature would not arise because of the Bill but from the common law. Whether or not argument regarding the ordinary meaning of a provision would be permitted by way of reference to extrinsic material – whether under the common law or the Bill – is entirely a matter for the discretion of the court in the circumstances of the case. However, neither the common law nor the Bill permit the possibility of departure from the ordinary meaning except in cases of ambiguity, obscurity, absurdity or unreasonableness. In Executors of the Estate of Ball v Commissioner of Taxation (Cth) (1984) 59 ALJR 149, 150, the High Court of Australia held that reference to the explanatory memorandum or the second reading speech could not alter the meaning of a plainly expressed provision. Further, in R v Bolton; Ex parte Beane (1987) 61 ALJR 190, 191, the Court emphasised that extrinsic material such as a second reading speech, while deserving serious consideration, cannot be determinative and is only available as an aid to interpretation. The function of the Court remains to give effect to the will of Parliament as expressed in the law.

(7) The Bill could result in an increase in costs if its scope is wider than Pepper v Hart. The information provided to the Bills Committee by

the Administration showed that following the enactment of the Australian section 15AB counsel and legal representatives in Australia had spent more time on cases until the courts found it necessary to put clear and appropriate limits on the use of extrinsic material. The new section 19A(2) would result in an escalation of costs since widespread research would have to be conducted outside the hearing by counsel or legal representatives.

59. Essentially the same considerations noted in paras 52-55 above in respect of the Bills Committee's points **(2)** and **(3)** apply to this point. The new section 19A is not wider in scope than the common law as it has developed since Pepper v Hart. Nor are counsel or legal representatives required to conduct any wider research than under the common law. Instead, it is expected that the new section 19A would save costs under the Vagliano principle (see paras 43 and 50 above) since it identifies from the many disparate cases the more important and accepted extrinsic material in a simple publicly accessible document, obviating the requirement and the costs of counsel or legal representatives seeking out and canvassing those cases in court.

Conclusion and comments sought

60. For the reasons discussed in this paper, the Administration has concluded that there are good reasons for enacting the Bill, without any offsetting disadvantages, on the grounds of providing a clear and publicly accessible guide to this area of the law and saving the costs of litigants. Comments on this conclusion by 20 April 2000 would be greatly appreciated.

Legal Policy Division
Department of Justice
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