

Letterhead of Hong Kong Bar Association

4th November, 1998

Mr. Geoffrey Fox
Senior Assistant Law Draftsman
Legislative Counsel
Department of Justice
8/F-9/F, High Block
Queensway Government Offices
Hong Kong

Dear

Interpretation & General Clauses (Amendment) Bill 1998

We have had an opportunity to consider this bill. Whilst we are generally in favour of the courts not being strait-jacketed when it comes to the use of extrinsic aids we have reservations about this bill.

The main one is timing. When first consulted over the LRC paper 'The Use of Extrinsic Materials as an Aid to Interpretation' in 1996 we thought that it was too early to say whether the principles laid down by the House of Lords in Pepper v. Hart [1993] A.C. 593 could, or should, be adapted for use in the HKSAR which has a very different constitutional set up, (Findlay J., a former law draftsman, had already said in Ngan Chor Ying v. Year Trend Development [1995] 1 HKC 605 that he doubted the application of Pepper v. Hart principles in a colonial legislature where the promoters of bills were not accountable to the legislature.) We thought that we should wait a few years and see how new constitutional arrangements worked before dealing with this subject. We still think that it is too early to introduce a bill like this.

.../2

THE HONG KONG BAR ASSOCIATION

We have a number of points by way of detailed comment:

- (a) We see that the draft bill accompanying the LRC report permitted a court to look at extrinsic materials in order to confirm an interpretation [C1.3, new 19A(1)(a) of original draft]. Why has this been dropped?
- (b) C1. 3, new s.19A(2)(a) permits a court to look at matters not forming part of the Ordinance that are set out in any document containing the text of the ordinance and printed by the Government Printer. It would be useful to know what kinds of documents are contemplated. The concern is that the Administration can publish self-serving statements about intention after the enactment of legislation without reproducing any contrary view. Does the clause permit the court to look at photocopies of this class of documents?
- (c) As regards C1.3, new s.19(3), it is assumed that Legco publications will invariably be published by the Government Printer. It is better to refer to *documents issued (or published) by the Legislative Council Commission* or something along those lines so as to ensure that should Legco decide to use some other publisher a legislative amendment will not be needed. Provision should also be made for the use of copy documents so that the court is not obliged to call for an original document every time this sub-clause is invoked.
- (d) We note the use of a couple of Latinisms, *prima facie* [C1.3 new s.19A(3)] and *verbatim* [C1. 2, new s.18] when plain English is clearly preferable.

Yours sincerely,

Susan Kwan
Hon. Secretary

PD/al