

Comments by the Law Society's Constitutional Affairs Committee on the Interpretation and General Clauses (Amendment) Bill 1999

General comment:

The Committee, in principle, agrees with the proposed legislation as 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 here 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.

Detailed comments:

- (1) There does not appear to be any pressing need for the proposed legislation. On the other hand, there does not appear to be valid justification for postponing its passage.
- (2) Concern was expressed on the possible abuse by practitioners in making unnecessary references to extrinsic material, thereby escalating legal costs and lengthening the trial. It was noted however, that since the introduction of similar legislation in Australia in 1984, it has apparently been used in a restrained manner. Moreover, the Judiciary in Australia has also been able to resist attempts to refer to extrinsic aids when the text appears to them to be clear, see para 8.20 of the Law Reform Commission's Report ("the Report"). There does not seem at present, any real danger of widespread abuse. The Chief Justice can issue a practice direction to curb/minimise any such abuse should it be necessary to do so.
- (3) One notable departure of the proposed legislation from the Australian legislation is the deletion of the use of extrinsic aids to confirm the ordinary meaning of a statutory provision. The Committee agrees with the Law Reform Commission's recommendation to drop this limb, see paras 11.59 and 11.60 of the Report. This may also help to avoid/minimise unnecessary reference to extrinsic materials.
- (4) The proposed s.19A(2)(a) refers to 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. On the face of it, this may allow the Administration to publish "self-serving statements" about its intentions after the enactment of legislation. In the Report, paras 11.66 and 11.67 similar provision exists in the Australian legislation and it refers basically to the long titles, marginal notes and headings. Users of statutes do in practice use such material to assist in discerning

the meaning of legislation. There does not seem to be any evidence that the Administration would take unfair advantage of this provision by publishing additional self-serving statements to depart from the existing practice. If the Administration were to do that, there would inevitably be severe opposition from the public as well as from the LegCo members. In any event, the Court is perfectly entitled under the proposed s.19A(1) to place no weight on such self-serving statements on ground that they are not "*capable of assisting in the ascertainment of the meaning*" of the legislation.

- (5) It is of vital importance that all the extrinsic material set out in the legislation be conveniently accessible to practitioners as well as to the general public. In particular, the proposed s.19A(2)(e) refers to any other relevant document that was laid before or furnished to LegCo members. This provision covers LegCo Briefs. As the proposed legislation applies also to previously enacted statutes, the Administration should ensure that all those LegCo Briefs (and other documents furnished to the LegCo members) which were previously cited as "confidential" must now be made generally available and accessible to the public.

The Constitutional Affairs Committee
The Law Society of Hong Kong
29 April 1999