

立法會
Legislative Council

LC Paper No. CB(2)1867/99-00
(These minutes have been
seen by the Administration)

Ref : CB2/BC/26/98

**Bills Committee on
Adaptation of Laws (No. 16) Bill 1999**

**Minutes of second meeting
held on Tuesday, 28 March 2000 at 8:30 am
in Conference Room B of the Legislative Council Building**

Members Present : Hon Margaret NG (Chairman)
Hon Cyd HO Sau-lan
Hon Andrew WONG Wang-fat, JP
Hon Jasper TSANG Yok-sing, JP
Hon CHOY So-yuk

Member Absent : Hon James TO Kun-sun

Public Officers Attending : Miss Angela LUK
Principal Assistant Secretary for Health and Welfare (1)

Mr Eddie POON
Principal Assistant Secretary for Health and Welfare (3)

Mr Fletch CHAN
Assistant Secretary for Health and Welfare

Miss Selina LAU
Government Counsel
Department of Justice

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Clerk in Attendance : Ms Doris CHAN
Chief Assistant Secretary (2) 4

Staff in Attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Mrs Eleanor CHOW
Senior Assistant Secretary (2) 7

I. Internal discussion

(LC Paper Nos. CB(2)1453/99-00(01) and CB(2)1518/99-00)

The Chairman referred to the Administration's response and advised members that the Administration held the view that the adaptation of "servant or agent of the Crown" in non-immunity provisions proposed in the Bill was fully consistent with the principles set out in the Adaptation of Laws Programme: Guiding Principles and Guideline Glossary of Terms and that it would involve a matter of law reform to amend them differently. The Administration did not intend to introduce Committee Stage amendments (CSA) to adapt "Crown" to "Government" (as opposed to "State") in section 18 of the Hong Kong Council on Smoking and Health Ordinance (Cap. 389) and section 19 of the Prince Philip Dental Hospital Ordinance (Cap. 1081). The Chairman said that she disagreed with the views of the Administration.

2. Referring to Annex C to the paper, which listed in Parts I and II the statutory bodies which used the terms "Crown" and "Government" respectively, the Chairman said that Assistant Legal Adviser (ALA) had prepared a table setting out the commencement dates of non-immunity provisions of the various statutory bodies (The paper was tabled at the meeting and issued to members vide LC Paper No. CB(2)1518/99-00 on 29 March 2000). It appeared that the reason for the different terminology used was because the various provisions were enacted at different times. Those in Part II of the table using the word "Government" were enacted nearer to 1997, whereas those in Part I of the table using the word "Crown" were enacted well before 1997. Miss Cyd HO pointed out that there was one exception in Part I of the table, in Cap. 511 in respect of the Estate Agents Authority, the term "Crown" was used in its non-immunity provision although it only took effect in 1997.

3. In response to Miss Cyd HO, ALA confirmed that this was the first time that a Bills Committee encountered the adaptation of "servant or agent of the Crown" in non-immunity provisions of statutory bodies in the adaptation of laws programme. ALA advised that a number of bills requiring similar adaptation were awaiting resumption

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of second reading debate pending the decision of this Bills Committee.

4. The Chairman advised that during the colonial days, "Crown" used in ordinances carried two different meanings, namely as "in right of Her Majesty's Government" and "in right of the Hong Kong Government". In the adaptation exercise, the former should be adapted to "State" and the latter should be adapted to "Government". She further said that the drafting principle quoted in Annexes A and B to LC Paper No. CB(2)1453/99-00(01) was not entirely relevant to Hong Kong because UK had only one Government. In this regard, the word "Crown" must be in right of Her Majesty's Government. She said that as a matter of policy, the Hong Kong Council on Smoking and Health (COSH) and the Board of Governors of the Prince Philip Dental Hospital (PPDH) should not enjoy the immunity of the state. She invited views from members.

5. Mr TSANG Yok-sing said that he did not accept the Administration's explanation that the word "Crown" in the two aforementioned provisions must be adapted to "State". He considered that the term "Government" was much more appropriate. He said that the usage of the word "State" in law should be avoided unless it was beyond doubt that the body concerned was within the scope of "State" as defined in law. For the same reason, he did not accept the Administration's statement in paragraph 13 of the paper that "It is acknowledged that the likelihood of either body (COSH and PPDH) successfully claiming to be an agent of the State may be remote but we would hesitate to rule it out as legally impossible".

6. The Chairman said that according to the Interpretation and General Clauses Ordinance (Cap. 1), "State" was defined as -

- "(a) the President of the People's Republic of China;
- (b) the Central People's Government;
- (c) the Government of the HKSAR;
- (d) the Central Authorities of the People's Republic of China that exercise functions for which the Central People's Government has responsibility over the Basic Law;
- (e) subordinate organs of the Central People's Government that -
 - (i) on its behalf, exercise executive functions of the Central People's Government or functions for which the Central People's Government has responsibility under the Basic Law; and
 - (ii) do not exercise commercial functions, when acting within the scope of the delegated authority and the delegated functions of the subordinate organ concerned; and
- (f) subordinate organs of the Central Authorities of the People's Republic of China referred to in paragraph (d), that -
 - (i) on behalf of those Central Authorities, exercise executive functions of the Central People's Government or functions for which the Central People's Government has responsibility under

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- the Basic Law;
- (ii) and do not exercise commercial functions, when acting within the scope of the delegated authority and the delegated functions of the subordinate organ concerned."

7. Members were of the unanimous view that since it was out of the question that the two bodies could be regarded as part of "State" under the categories listed in the definition, other than the Government of the HKSAR, it was not right to adapt the word "Crown" in the non-immunity provision of Cap. 389 and Cap. 1081 to "State". They agreed that adaptation to "Government" would be more appropriate but if the Administration had any special reasons for the proposed adaptation, they would consider the reasons.

II. Meeting with the Administration

8. The Chairman advised the Administration of the deliberations of Bills Committee. In gist, while members agreed to the policy that statutory bodies such as COSH and PPDH should not be given immunity under section 66 of Cap. 1, members disagreed with the proposed adaptation of the term "Crown" to "State" in the context of the two provisions. Members were of the consensus that "Government" was the more appropriate term. The Chairman said that if the Administration was unable to accept members' proposal, it should consider other ways of drafting to express the non-immunity provisions.

9. Mr Andrew WONG held the view that the alternative suggested by the Chairman departed from the spirit of the adaptation exercise. He asked the Administration whether the proposed adaptation was intended to pave the way for the future, say for example the Central People' Government delegating certain authorities to COSH to combat cigarette smuggling, and therefore the word "State" was used.

10. Principal Assistant Secretary for Health and Welfare (3) (PAS/HW(3)) responded that the Administration had never considered the scenario mentioned by Mr WONG. He also pointed out that the terms of reference of COSH did not include dealing with contraband tobacco. Government Counsel of the Department of Justice (GC/DJ) supplemented that the main consideration of the proposed adaptation was to give effect to the principle that the term when adapted should, as far as possible, be to the same effect after its adaptation as before.

11. The Chairman said that the adaptation of "Crown" to "State" or "Government" depended upon the nature of the bodies and the context of the provisions concerned. It was by the same adaptation principle mentioned by GC/DJ that the Bills Committee considered that the word "Government" was more appropriate for the non-immunity provisions in Cap. 389 and Cap. 1081. The Chairman said that if the Administration did not intend to propose relevant CSAs to the Bill, the Bills Committee would do so.

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12. Principal Assistant Secretary for Health and Welfare (1) said that the Administration would need time to consider members' views as any steps to be taken would affect other bureaux which intended to introduce similar adaptation to other relevant ordinances. PAS/HW(3) said that the Health and Welfare Bureau would consider the two options and might propose a third option of repealing the proposed amendments to non-immunity provisions so as to facilitate passage of the Bill within this LegCo session.

13. The Chairman responded that since it was a government bill, the Administration had the prerogative to do so. However, since so much effort had already been spent on the adaptation exercise, she considered that the Administration should try to solve the problem once and for all. She said that if the Administration accepted the Bills Committee's proposal, it only needed to notify the Bills Committee and no further meeting would be necessary. If the Administration insisted on adaptation to "State", the Bills Committee would propose an amendment to adapt "Crown" to "Government".

III. Date of next meeting

14. Members agreed that subject to the response of the Administration, a further meeting would be arranged.

15. The meeting ended at 9:15 am.

Legislative Council Secretariat
3 May 2000