

立法會
Legislative Council

LC Paper No. CB(2)2363/99-00

Ref : CB2/BC/26/98

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

Purpose

This paper reports on the deliberations of the Bill Committee on Adaptation of Laws (No. 16) Bill 1999.

The Bill

2. The Bill seeks to adapt 13 Ordinances and their subsidiary legislation relating to hospitals, clinics, mental health and other health-related matters to bring them into conformity with the Basic Law and with the status of Hong Kong as a Special Administrative Region of the People's Republic of China.

The Bills Committee

3. The House Committee agreed at its meeting on 25 June 1999 to form a Bills Committee to study the Bill. The Bills Committee first met on 20 January 2000 and Hon Margaret NG was elected Chairman. The membership of the Bills Committee is in **Appendix I**. The Bills committee has held two meetings with the Administration.

Deliberations of the Bills Committee

4. Members note that most of the amendments proposed in the Bill are straightforward adaptations. However, they consider the proposed adaptation of the word "Crown" to "State" in section 18 of the Hong Kong Council on Smoking and Health Ordinance (Cap. 389) and in section 19 of the Prince Philip Dental Hospital Ordinance (Cap. 1081) inappropriate in the context of the respective provisions.

The non-immunity provisions

Discrepancies noted by the Bills Committee

5. The two provisions, which are similar in nature, stipulate that the Hong Kong Council on Smoking and Health / the Board of Governors of the Prince Philip Dental Hospital is not the servant or agent of the Crown and does not enjoy any status, immunity or privilege of the Crown. Members note that the Hospital Authority Ordinance (Cap. 113) has the same provision but the word used is "Government" and not "State". In view of the discrepancies found, the Bills Committee has requested the Administration to explain the criteria and purpose of such non-immunity provisions as well as the reason for and the effect of adapting different terms in the ordinances in question.

Purpose of and criteria for such provisions

6. The Administration explains that such non-immunity provisions are typically included in an ordinance if the ordinance establishes a new corporation or other body that is empowered to perform a public function, and it is intended that it should operate as an independent body and without the benefit of "Crown" status. They are included for the purpose of removing any doubt as regards the body's legal status. They make it clear that the body is to be treated in law as an ordinary private body and is not entitled to share in any of the privileges or immunities of the "Crown". Such immunities include the general immunity from statute provided for by section 66 of the Interpretation and General Clauses Ordinance (Cap. 1), immunity from taxation, immunity from criminal law, and immunity from injunctions.

7. As regards the criteria for determining when such provisions should be included in an ordinance, the Administration advises that there are no hard and fast rules, but there are a number of questions which might usefully be asked to help determine whether such a provision should be included: Does the body established by the ordinance perform a public or semi-public function? Does the Governor (Chief Executive) appoint any of its directors or members? Is it answerable to the Government for the conduct of its operations? Are its operations controlled by the Government through share holdings or other means? Is it publicly funded? Does it carry out policies determined by the Government? If it is intended that the body should not enjoy Crown status, then a positive answer to any of the above questions would suggest that it would be helpful to include a non-immunity provision in the relevant ordinance.

The proposed adaptation

8. In the Administration's view, the proposed adaptation of the references to "Crown" in section 18 of Cap. 389 and section 19 of Cap. 1081 to "State" best gives effect to the principle of the Adaptation of Laws Programme that each provision "should as far as possible, be to the same legal effect after its

adaptation as before". The term "Crown" has a broader meaning and the Administration believes that it should be replaced by a term that is roughly equivalent in meaning. It considers that the most suitable term in this context is "State". The Administration also considers that the proposed adaptation is consistent with the adaptation of "Crown" to "State" in section 66 of Cap. 1.

The adoption of different terms in different ordinances

9. As regards the use of the term "Government" in the non-immunity provisions of some other ordinances, the Administration admits it is difficult to explain the difference. However, since the various provisions were enacted at different times, the use of different terminology may reflect a different policy intention or different legislative practice.

10. The Administration acknowledges that the non-immunity provisions which use the term "Government" are not consistent with the provisions which use the term "Crown". However, it would involve a matter of law reform if these provisions were to be amended to make all of them consistent as such amendments lie beyond the scope of the Adaptation of Laws Programme.

The Bills Committee's views

11. Members note that during the colonial days, the term "Crown" used in ordinances carried two different meanings, namely, "in the right of Her Majesty's Government" and "in the right of the Hong Kong Government". In the Adaptation of Laws Programme, the former should be adapted to "State" while the latter should be adapted to "Government". They share the view that adaptation of "Crown" to "State" or "Government" should depend upon the nature of the bodies and the context of the provisions concerned.

12. Members have examined the two lists of the statutory bodies which use the terms "Crown" and "Government" respectively. It appears from this examination that the reason for the different terminology used is because the various provisions were enacted at different times. Those in the list using the word "Government" were enacted closer to 1997, whereas those in the list using the word "Crown" were enacted well before 1997, except for the provision in respect of the Estate Agents Authority in Cap. 511 which only took effect in 1997.

13. While members agree to the policy that statutory bodies such as the Hong Kong Council on Smoking and Health and the Board of the Governors of the Prince Philip Dental Hospital should not be given immunity under section 66 of Cap. 1, they disagree with the proposed adaptation of the term "Crown" to "State". They consider that "Government" is the more appropriate term in the context of the two provisions since there is no question that the two bodies concerned could be regarded as part of the "State" under the categories listed in the definition of "State" in Cap. 1, other than the category of the Government of Hong Kong Special Administrative Region. The definition is set out in

Appendix II.

The Administration's proposals

14. After consulting the other bureaux which intend to introduce similar adaptation to other relevant ordinances, the Health and Welfare Bureau has informed members that it fully appreciates the Bills Committee's view. However, adapting "Crown" to "Government" in these situations is inappropriate because it is beyond the ambit of the Adaptation of Laws Programme as explained by the Administration earlier in response to the Bills Committee's questions.

15. To take forward members' suggestion, the Administration proposes to take out the adaptation proposals of the two non-immunity provisions from the Bill, and introduce legislative amendments to revise "Crown" to "Government" in the two provisions in a separate legislative exercise in the coming session in 2000-01. It believes that this approach would be able to address members' concern without changing the scope of the Adaptation of Laws Programme.

16. The Bills Committee accepts the proposed approach.

17. Members note that this is the first time a Bills Committee has encountered the adaptation of "servant or agent of the Crown" in non-immunity provisions of statutory bodies in the Adaptation of Laws Programme. Nine other bills requiring similar adaptation are awaiting resumption of the Second Reading debate pending the decision of this Bills Committee.

Committee Stage amendments (CSAs)

18. The Administration will move CSAs to Schedules 11 and 13 of the Bill to repeal the amendments to 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) respectively. It will also move two technical amendments to Schedule 10 in respect of the Smoking (Public Health) Ordinance (Cap. 371). The draft CSAs are in **Appendix III**.

Consultation with the House Committee

19. The Bills Committee consulted the House Committee on 9 June 2000 and obtained its support for the Second Reading debate on the Bill to be resumed on 26 June 2000.

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

Membership List

Hon Margaret NG (Chairman)

Hon Cyd HO Sau-lan

Hon James TO Kun-sun

Hon Andrew WONG Wang-fat, JP

Hon Jasper TSANG Yok-sing, JP

Hon CHOY SO-yuk

Total : 6 members

Legislative Council Secretariat

26 January 2000

Appendix II

"State" ("國家") includes only -

- (a) the President of the People's Republic of China;
- (b) the Central People's Government;
- (c) the Government of the Hong Kong Special Administrative Region;
- (d) the Central Authorities of the People's Republic of China that exercise functions for which the Central People's Government has responsibility under 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 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; (Added 26 of 1998 s. 4)