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Miss Flora Tai,
Clerk to Bills Committee,
Legislative Council
Legislative Council Building,
8 Jackson Road, Central
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1 April 2000
By Fax 2509 9055

via Mr. Michael Scott, SASG/GAU

**Bills Committee on
Statute Law (Miscellaneous Provisions) Bill 1999**

Meeting on 11 April 2000

Thank you for your letter dated 20 March 2000 in relation to the captioned matter setting out the queries raised in respect of various clauses. The Administration's responses are as follows: -

Clauses 4(b) and 5

The Legal Advisor to LegCo queried whether consequential amendments need be made to regulation 6 of the Drug Addiction Treatment Centres Regulations (Cap. 244 sub. leg.) and regulation 7 of the Training Centres Regulations (Cap. 280 sub. leg.) to empower the respective Board of Review to deal with outstanding recall orders.

The Administration is of the view that consequential amendments are not required because the power to decide –

- (a) by the Board or Review established under regulation 6 of the Drug Addiction Treatment Centres Regulation whether a recall order shall lapse; and
- (b) by the Board established under regulation 7 of the Training Centres Regulations whether an order of recall shall be suspended or treated as lapsed,

is in each case conferred by the principal Ordinance. It is not necessary to repeat the same in the subsidiary legislation.

Clause 7

The Administration agrees that paragraph (b)(2) of the CSA proposed to clause 7 tabled on 20 March 2000 should be amended to provide that the court is to, upon payment of the amount in question (instead of upon “the redemption of the encumbrance and any interest thereon”), make the requisite declaration. A revised CSA for the clause will be submitted next week.

The Hon Margaret Ng queried whether it is necessary for provide a definition for the court when the District Court would in any event be endowed with jurisdiction over transactions involving properties with ratable value not exceeding a specified amount. The Administration’s rationale for making such provision is set out in the paper enclosed marked “A”. The Administration is of the view that the flexibility which would be so provided is desirable.

Clause 8

The Administration is of the view that the proposed new section 33C(2) as presently worded is appropriate because the act or omission in question must be proved to have caused the death before the presumption arises. If the act or omission has not caused the death there would be no need for any party to rely on the presumption.

Clause 14(c)

The Administration is of the view that the proposed amendments (incorporating the CSA for the clause) are desirable. The rationale is set out in a paper enclosed marked “B”.

Clause 15(b)

The requested background to the repeal of the Affiliation and Proceedings Ordinance (Cap. 183) is set out in the paper enclosed marked "C".

Clause 16

The Administration is of the view that amendment to Cap. 1 is more appropriate. The background for the proposed amendment and the rationale for the Administration's view is set out in the paper enclosed marked "D".

Clause 22

The proposed power for the Financial Secretary and Director of Audit to amend the proposed schedule 1 and 2 respectively are by no means unfettered. More detail of the above is set out in the paper enclosed marked "E". There are similar delegations of powers in our legislation. A chart of the various legislation is annexed to the paper. Copies of the relevant sections have not been provided at this juncture but we would be happy to do so if necessary.

Chinese translation of this present letter and of the all the papers and a disc will be provided next week. Please do not hesitate to let me know if any further elaboration on any particular issue is required.

Representatives from the Department of Justice for the 11 April 2000 meeting will be the same as those for the last meeting plus Mr. Darryl Saw, S.C. DDPP and Patrick Cheung Wai-sun, SADPP, counsel from the Prosecutions Division.

Thank you for your attention to the matter.

Yours sincerely,

(Agnes Cheung)
Senior Government Counsel
Legal Policy Division

Statute Law (Miscellaneous Provisions) Bill 1999
Proposed CSA (section 12A(4)) to Clause 7 of the Bill

Background

The Administration was asked to consider whether it is necessary to provide for a definition of “court” as proposed in the CSA when the District Court already has jurisdiction to hear and determine any action which would otherwise be within the jurisdiction of that Court and in which the title to an interest in land comes into question if the rateable value of the land is within the amount specified (or to be specified) for the District Court.

Response

2. The object of the proposed CSA regarding definition of “court” is to provide flexibility in case the complexity of the issues involved in any particular application require determination by the Court of First Instance. In the absence of the proposed definition, the venue for any particular application may have to depend solely on the rateable value of the property in question.

3. The proposed amendment is also consistent with section 12 of the Conveyancing and Property Ordinance (Cap. 219) which provides that applications to the court by a vendor or purchaser (which usually concern questions arising out of or connected with the title to land) should be made to the Court of First Instance unless the parties submit to the jurisdiction of the District Court.

4. The Administration is of the view that the aforesaid flexibility should be retained.

Statute Law (Miscellaneous Provisions) Bill, 1999**Background**

Cl. 14 of the Statute Law (Miscellaneous Provisions) Bill, 1999 amends s. 159E(7) of the Crimes Ordinance, Chapter 200 by adding ‘(c) any proceedings commenced after that time in respect of a conspiracy committed before that time.’ The Committee Stage Amendments seek to amend cl. 14 by adding ‘For the avoidance of doubt’ and ‘(d) any proceedings commenced after that time in respect of a conspiracy committed before and continuing after that time.’ If amended, s. 159E(7) will read as follows:

‘(7) For the avoidance of doubt, subsection (1) shall not affect –

- (a) any proceedings commenced before the time when this Part comes into operation;
- (b) any proceedings commenced after that time against a person charged with the same conspiracy as that charged in any proceedings commenced before that time;
- (c) any proceedings commenced after that time in respect of a conspiracy committed before that time; or
- (d) any proceedings commenced after that time in respect of a conspiracy

committed before and continuing after that time.’

2. This paper explains why the amendments are necessary.

The Legislative History

3. Before 2nd August, 1996, crimes of conspiracy were a creature of the common law. Common law conspiracies (with the exception of conspiracies to defraud) were abolished on 2nd August, 1996. They were replaced by statutory conspiracies, which were created by s. 159A of the Crimes Ordinance, Chapter 200.

4. The statute law relating to conspiracy is to be found in Part XIA of the Crimes Ordinance. Part XIA consists of s. 159A to 159L. That Part was added to the Crimes Ordinance, Chapter 200 by the Crimes (Amendment) Ordinance (No. 49 of 1996). It came into operation on 2nd August, 1996. Its function was not to decriminalise certain forms of conspiracy, but to codify the law and to put the law of conspiracy on a statutory basis.

The Transitional Provisions

5. S. 159E(7) of the Crimes Ordinance, Chapter 200 contains transitional provisions. It provides:

‘(7) Subsection (1) shall not affect –

- (a) any proceedings commenced before the time when this Part comes into operation; or

- (b) any proceedings commenced after that time against a person charged with the same conspiracy as that charged in any proceedings commenced before that time.’

HKSAR v. CHAN Pun-chung and Another M. A. 364/1999

6. The appellants were convicted of conspiring to obtain a pecuniary advantage by deception under s. 159A of the Crimes Ordinance, Chapter 200. The conspiracy was alleged to have taken place between 1st December, 1994 and 28th March, 1995. The appellants could not have been charged with the statutory offence because s. 159A of the Crimes Ordinance, Chapter 200 came into operation only on 2nd August, 1996. It was further argued that they could not be charged under the common law either because since 2nd August, 1996 proceedings for the offence of conspiracy at common law could only proceed in the two situations covered by s. 159E(7)(a) and (b) of the Crimes Ordinance, Chapter 200 which did not apply to that case.

7. The Court of Appeal held that the legislation was not intended to decriminalise certain forms of conspiracy, but to put the crime of conspiracy on a statutory footing. It could not have been the intention of the legislature to make conspiracy which had been committed prior to 2nd August, 1996 unenforceable by prosecution if proceedings had not been commenced by then. That would have put beyond the reach of the criminal justice system any criminal conspiracy which had been committed before 2nd August, 1996 but which had not been detected by then or which, though detected, had not been investigated sufficiently to warrant the bringing of criminal proceedings by then. The Court of Appeal held that s. 159E(7)(b) should not be construed as providing for the only situation in which proceedings for a conspiracy at common law could be commenced after 2nd August, 1996. It therefore would not have prevented the

appellants from being charged after 2nd August, 1996 with conspiracy under the common law.

The Drafting of s. 159E of the Crimes Ordinance, Chapter 200

8. The Court of Appeal observed that the use of language which did not match the true legislative intent arose in the following way. The move to change the law of conspiracy in Hong Kong was initiated by a report published by the Law Reform Commission of Hong Kong in 1994. That report recommended the adoption of a ‘mini-code’ for conspiracy incorporating provisions based on the English Criminal Law Act, which abolished conspiracy at common law and created the statutory offence of conspiracy. The English legislation expressly provided for the retrospective operation of this new offence. In other words, all conspiracies, whether committed before as well as after the change in the law (other than those for which proceedings had already commenced), should be charged as a statutory conspiracy. However, the provision in the English legislation providing for retrospectivity – s. 5(5) of the Criminal Law Act -- was omitted in the legislation in Hong Kong. When the equivalent of s. 5(5) was removed from the Hong Kong legislation, the draftsman failed to notice the impact which that omission might have on s. 159E(7). This was accepted by the Court of Appeal to have been an error in drafting.

The Suggested Amendments

9. The suggested amendments seek to put the matter beyond doubt. Since the use of language in s. 159E(7) of the Crimes Ordinance, Chapter 200 does not match the true legislative intent, the provision should be amended to reflect the true intention of the legislature. The appellants in HKSAR v. CHAN Pun-chung and Another M. A. 364/1999 have applied to the Court of Final Appeal for leave to appeal. The amendments are also necessary as the true legislative intent can at present only be discerned by reference to the existing provision read in conjunction

with the judgment of the Court of Appeal in HKSAR v. CHAN Pun-chung and Another M. A. 364/1999. The more satisfactory position is the incorporation of these observations into the legislation by these amendments.

10. S. 23 of the Interpretation and General Clauses Ordinance, Chapter 1 is of minimal assistance in this regard because it deals specifically with the repeal of an Ordinance by another Ordinance as opposed to the instant situation of the common law being replaced by an Ordinance.

Department of Justice

April, 2000

Statute Law (Miscellaneous Provisions) Bill 1999
Clause 15 in relation to section 12 of
the Births and Deaths Registration Ordinance

Background

Proposed amendments to section 12 of the captioned Ordinance include the deletion of any reference to the Affiliation Proceedings Ordinance (Cap. 183)(the “APO”) and the addition of a new subsection (4) to provide for treatment of an order handed down by a court under section 5 of the APO. The APO was repealed by the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance 1997, the relevant parts of which came into effect on 27 June 1997.

Reasons for the repeal of APO

2. The APO, originally 28 of 1971, provided for an application for maintenance for an illegitimate child by the mother.
3. Amendments to the Guardianship of Minors Ordinance (Cap. 13) in 1993 (Ord. No. 17 of 1993) enabled either parent of an illegitimate child to apply for maintenance. It was therefore unnecessary to retain the APO, which was repealed in June 1997.

Reasons for the presently proposed amendments

4. The present proposed amendments to delete any reference to the APO in the Births and Deaths Registration Ordinance are, strictly speaking, a consequential amendment that should have been dealt with at the same time as the repeal of the APO. The new subsection (4) is to ensure that orders previously handed down pursuant to the APO are not affected.

Statute Law (Miscellaneous Provisions) Bill 1999
Clause 16 in relation to references to “former or retired judge”

Background

Section 6 of the Hong Kong Reunification Ordinance (Ord. No. 110 of 1997) added a Schedule 8 to the Interpretation and General Clauses Ordinance Cap. 1 entitled “Construction on and After 1 July 1997 of Words and Expressions in Laws Previously in Force”. Items 7, 8, 9, 10,12,13 and 14 pertain to references to judges and courts. Effectively, reference to courts and judges by their post-1 July 1997 titles would include reference to courts and judges as titled prior to 1 July 1997.

2. The Adaptation of Laws (Courts and Tribunals) Ordinance, 25 of 1998, which was enacted on 16 April 1998 and with retrospective operation from 1 July 1997, amended (amongst others) section 4 of the Post Release Supervision of Prisoners Ordinance, Cap. 475 and section 6 of the Long-term Prison Sentences Review Ordinance, Cap. 524, by repealing the term “Supreme Court” and replacing it with “High Court”.

3. As a result of the amendments referred to in paragraph 2 above, what Schedule 8 of Cap. 1 sought to achieve in respect of the change in nomenclature of the courts (and judges thereof) has been nullified. Persons who have held offices as judges of the Supreme Court or the High Court before 1 July 1997 would no longer qualify as the “2 persons who hold or have held office as a judge” (referred to in section 4(1)(a) of Cap. 475) and the “2 judges or former judges” (referred to in section 6(2)(a) of Cap. 524). They are therefore no longer eligible for appointment to the Post-Release Supervision Board or the Long-term Prison Sentences Review Board.

4. The events set out in the last preceding three paragraphs alerted the Administration to the need for clarification.

Number of legislation with reference to former judges

5. To date, the following Ordinances with references to former judges have been identified: -

- (a) Post-Release Supervision of Prisoners Ordinance, Cap. 475(section 4);
- (b) Long-term Prison Sentences Review Ordinance, Cap. 524 (section 6);
- (c) Securities (Insider Dealing) Ordinance, Cap. 395 (section 2).

6. There is no definitive way to describe a person who has been a judge and the above three Ordinances employ two descriptions of such person; there may be other Ordinances, which in effect refer to judges of the pre-1 July 1997 courts.

Issues

7. It is the policy intent of the Administration, and a matter of general principle, that persons who were qualified to perform specific duties, or be eligible to do so, on the strength of their having been judges of courts in Hong Kong before 1 July 1997, as may be specified in respective pieces of ordinances, should continue to be so qualified or so eligible.

8. The focus is not on qualification or eligibility for any particular organization or body. Under the circumstances, it was considered that amendment to Cap. 1, and not to the individual pieces of legislation, would be more appropriate.

9. The proposed amendments would not affect the definitions of the relevant courts either before or after 1 July 1997. These would still depend on the respective pieces of legislation.

10. The proposed amendments would not exclude persons previously included or vice versa. The classes of persons would depend on the definitions of the courts.

Department of Justice
April 2000

**Clauses 17 to 24 of the Statute Law (Miscellaneous Provisions) Bill
Proposed amendments to the Audit Ordinance**

Elaboration and justification for empowering the Financial Secretary and the Director of Audit to respectively amend the proposed Schedules 1 and 2 of the Ordinance. Would there be a possible misuse of a wide discretionary power?

The proposed **Schedule 1** of the Audit Ordinance sets out a list of accounts and funds subject to audit by the Director of Audit. The funds involved are moneys held in the custody of public officers. As the Financial Secretary has overall responsibility for the management of government finance, it is appropriate to empower him to amend the proposed Schedule 1.

2. The proposed **Schedule 2** of the Audit Ordinance specifies the directorate officers in the Audit Commission to whom the Director of Audit may delegate his powers to certify certain accounts. As the Director of Audit is the head of the Audit Commission and responsible for overseeing the staff, overall operations and audit activities of the Commission, he is best placed to decide who he wants to delegate his authorities to under the proposed Schedule 2.

3. The scope of amendments to Schedules 1 and 2 is prescribed by proposed provisions in the Audit Ordinance. In respect of Schedule 1, only those moneys which are in the custody of public officers as prescribed in clause 18 (i.e. the proposed section 8(1)(b) of the Audit Ordinance) may be included. In respect of Schedule 2, only public officers as prescribed in clause 20 of the Bill (i.e. the

proposed Section 10(4) of the Audit Ordinance) may be included. The Financial Secretary or the Director of Audit cannot make any amendments beyond the prescribed parameters.

4. In addition, there is a procedural safeguard for amending the Schedules of the Audit Ordinance. Any amendment by way of notice published in the Gazette by any designated officer is subject to negative vetting by the Legislative Council pursuant to section 34 of the Interpretation and General Clauses Ordinance (Cap 1). Similar power to amend subsidiary legislation by a designated public officer by way of notice in the Gazette can be found in many other legislation.

Cap	Section	Authorized Officer	Authorized Amendment
1	102	Secretary for Justice	amend Schedule 1
29	4	Financial Secretary	amend the Second Schedule
32	360	Financial Secretary	amend the Sixteenth Schedule
51 B	reg 44A	Secretary for Economic Services	amend Schedule 2 or 3
51 D	reg 36	Secretary for Economic Services	amend Schedule 1 or 2
51 G	9	Secretary for Economic Services	amend Schedule 1, 2 or 3
60	31	Director-General of Trade	amend the Schedule, amend that
60	39	Secretary for Trade and Industry	amend Schedule 2 or 3
60	6B	Director-General of Trade	replace the Schedules to the Regulations or amend them
60	6F	Director-General of Trade	amend Part II of the First or Second Schedule, amend the Schedule
60 A	reg 7	Director-General of Trade	amend Part I of the First or Second Schedule, the Third Schedule, the Fourth Schedule, or the Fifth Schedule
65	6	Financial Secretary	amend the Schedule
99	34	Chief Secretary for Administration	amend the Schedule
99 A	reg 24	Secretary for the Civil Service	amend the Schedule
112	88A	Secretary for the Treasury	amend Schedule 10
112	88B	Secretary for the Treasury	amend Schedule 11
132 AC	4	Director of Food and Environment Hygiene	amend the First Schedule
132 AF	reg 4	Director of Food and Environment Hygiene	amend the concentrations specified in Column C of the First Schedule
132 AQ	4	Secretary for the Environment and Food	amend Schedule 1
132 BD	reg 11	Director of Food and Environment Hygiene	amend the concentration specified in Column 3 of Part I of the First Schedule
132 V	reg 4	Director of Food and Environment Hygiene	amend the concentrations specified in Column C of the First and Second
134	34A	Director of Health	amend the Sixth Schedule
134	49I	Secretary for Security	amend the Forth Schedule
134	50	Secretary for Security	amend the Second Schedule
136	73	Secretary for Health and Welfare	amend the Schedule
139 A	reg 5	Director of Agriculture, Fisheries and	amend Schedule 2
139 A	reg 7B	Director of Agriculture, Fisheries and	amend Schedule 5
139 A	reg 9A	Director of Agriculture, Fisheries and	amend Schedule 6
141	72	Director of Health	amend the First and Second Schedules
145	18A	Secretary for Security	amend Schedules 1 and 2
148	29	Financial Secretary	amend the Schedule
155	135	Financial Secretary	amend the Third, Forth, Fifth, Ninth, Eleventh or Twelfth Schedule
170	22	Secretary for the Environment and Food	amend any Schedule
171	10	Director of Agriculture, Fisheries and	amend the Schedule
172	7	Secretary for Home Affairs	amend Schedule 1
187	19	Secretary for the Environment and Food	amend Schedule 1, 2 or 3 or the Sixth Schedule
202	35	Secretary for Health and Welfare	amend any of the Schedules

Cap	Section	Authorized Officer	Authorized Amendment
218	53	Financial Secretary	amend Schedule 1
231	7	Director of Health	amend the Schedules
254	4	Secretary for Security	amend the Schedule
289	3	Secretary for the Treasury	amend the Schedule
310	18	Financial Secretary	amend Schedule 2
313	33	Director of Marine	amend any Schedule
313	80	Director of Marine	amend any Schedule
313 A	reg 72	Director of Marine	amend the Schedules
313 C	reg 19	Director of Marine	amend the First Schedule
313 D	reg 14	Director of Marine	amend the Schedule
335	9	Financial Secretary	amend Part I of the Schedule
354	37	Secretary for the Environment and Food	amend the relevant dates specified in the First, Second and Fifth Schedule
354 L	8	Secretary for the Environment and Food	amend the Schedule
364	9	Financial Secretary	amend Schedule 1
369	112A	Director of Marine	amend any Schedule
369 AI	reg 10	Director of Marine	amend the Schedule
369 AK	reg 5	Director of Marine	amend the Schedule
369 AO	reg 4	Director of Marine	amend the Schedule
369 AP	reg 4	Director of Marine	amend Schedule 1
369 AR	3	Director of Marine	amend all or any of the Schedules
369 AS	reg 6	Director of Marine	amend the Schedules
369 AT	11	Director of Marine	amend the Schedule
369 T	reg 10	Director of Marine	amend the Schedules
371	16A	Secretary for Health and Welfare	amend the Schedules
374	21	Secretary for Transport	amend Schedule 1
374	77H	Financial Secretary	amend Schedule 10
374	88H	Financial Secretary	amend Schedule 8
374 C	reg 12	Secretary for Transport	amend Schedule 5
374 Q	reg 28	Secretary for Transport	amend Schedule 1, 2, 3 or 4
378	13	Secretary for Health and Welfare	amend the Schedule
384	3	Director of Civil Aviation	amend any Schedule
384 A	reg 9	Director of Civil Aviation	amend the Schedule
403	17	Secretary for the Environment and Food	amend the Schedule
420	19	Financial Secretary	amend Schedule 1 or 2
421	51	Director of Agriculture, Fisheries and	amend any Schedule
421 A	35	Director of Agriculture, Fisheries and	amend any of the Schedules
424	6	Secretary for Trade and Industry	amend the Schedule
435	2	Secretary for Home Affairs	amend Schedule 2
478	125	Secretary for Economic Services	amend Schedule 1
487	87	Secretary for Health and Welfare	amend Schedule 1 or 2
490	4	Secretary for the Environment and Food	amend the Schedule
493	41	Secretary for the Education and Manpower	amend any Schedule
496	4	Secretary for the Environment and Food	amend the Schedule
502	24A	Secretary for Security	amend Schedule 1
502	24A	Secretary for Security	amend Schedule 4

Cap	Section	Authorized Officer	Authorized Amendment
502	25	Secretary for Security	amend the relevant Schedule
505	39	Secretary for Health and Welfare	amend Schedule 2
506	27	Director of Marine	amend any Schedule
506	28	Director of Marine	amend any Schedule
508	10	Director of Marine	amend Part I of Schedule 1
517	31	Secretary for Security	amend Schedule 1
518	31	Secretary for Security	amend Schedule 1
528	195	Secretary for Education and Manpower	amend Schedule 1
529	4	Secretary for the Environment and Food	amend Schedule 1
529	29	Secretary for the Environment and Food	amend Schedule 2
544	39	Secretary for Trade and Industry	amend Schedule 1 or 2
548	89	Director of Marine	amend any Schedule
549	24	Secretary for Health and Welfare	amend Schedule 3
549	25	Secretary for Health and Welfare	amend Schedule 4
549	113	Secretary for Health and Welfare	amend Schedules 1 and 2
549	157	Secretary for Health and Welfare	amend Schedule 5
553	50	Secretary for Information Technology and Broadcasting	amend Schedules 1 and 2
1165	24	Secretary for Education and Manpower	amend Schedule 1 or 2