

立法會
Legislative Council

LC Paper No. CB(2) 1681/98-99

Ref: CB2/BC/5/98

**Paper for the House Committee meeting on
16 April 1999**

**Report of the Bills Committee on
Adaptation of Laws Bill 1998**

Purpose

This paper reports on the deliberations of the Bills Committee on Adaptation of Laws Bill 1998 and seeks Members' support for the Bill to resume its Second Reading debate on 28 April 1999.

The Bill

2. The Bill seeks to adapt references in 15 ordinances and their subsidiary legislation to bring them into conformity with the status of Hong Kong as a Special Administrative Region (SAR) of the People's Republic of China and with the Basic Law. A list of these ordinances is in **Appendix I**.
3. The Bill, if enacted, shall be deemed to have come into effect on 1 July 1997.

The Bills Committee

4. At the House Committee meeting held on 23 October 1998, Members decided to form a bills committee to study the Bill. Under the chairmanship of Hon Andrew WONG, the Bills Committee held six meetings with the Administration, including a joint meeting with the Bills Committee on Adaptation of Laws (No. 2) Bill 1998 to discuss the interpretation of Article 56 of the Basic Law and its practical implications for the Adaptation of Laws exercise. The Bills Committee has also considered views from the Hong Kong Bar Association.
5. The membership list of the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

6. Since this Bills Committee was the first one formed to study an Adaptation of Laws Bill, the Committee has requested the Administration to explain the guiding principles and guideline glossary of terms to be applied in the current exercise.

7. The Bills Committee notes the guiding principles as follows -

- (a) that the provision when adapted should be consistent with the Basic Law and with the status of Hong Kong as a SAR of the People's Republic of China, but that subject to this each provision should, as far as possible, be to the same legal effect after its adaptation as before. Any amendment that is neither related to the Basic Law nor necessitated by Hong Kong's new status is outside the scope of the Adaptation of Laws Programme; and
- (b) that the adaptation of each provision should be made in accordance with the relevant provisions of the Interpretation and General Clauses Ordinance (Cap. 1) where applicable, but the adaptation must be considered in the context of the particular ordinance concerned and other related ordinances.

8. The Bills Committee also notes that the adaptation of the following references and provisions will not be dealt with in the Adaptation of Laws Bills for the individual ordinances in which they are found, but will instead be dealt with collectively in separate bills for the subject concerned -

- (a) reference to "Her Majesty's forces" and other military references;
- (b) provisions relating to proceedings against the Crown that need to be considered in the context of the adaptation of the Crown Proceedings Ordinance (Cap. 300); and
- (c) provisions relating to Article 23 of the Basic Law.

9. The Bills Committee has examined in detail the guideline glossary of terms for adaptation and the provisions of the Bill. The main deliberations of the Bills Committee are summarized below.

Adaptation of reference to “Colonial Regulations”

10. The Administration proposes to adapt the reference to “Colonial Regulations” to “relevant executive order”. The new term is defined as “any executive order issued by the Chief Executive for the administration of the public service and any regulation or direction made under such order”.

11. Members express concern about the proposed adaptation. Members point out that prior to the reunification, the Colonial Regulations were imperial instruments made under the Royal Prerogative. Article 48(4) of the Basic Law confers on the Chief Executive the power to issue executive orders. However, the scope of such orders is not specified. It is doubtful whether executive orders issued by the Chief Executive would be equivalent to the Colonial Regulations and whether such orders would be confined to the administration of the public service. In the event that the Chief Executive promulgates executive orders in relation to other government policies, such promulgation would have far-reaching repercussions from the constitutional point of view. Members also express concern that there may be an increasing number of executive orders issued by the Chief Executive in future.

12. The Administration has explained that the proposed adaptation is to retain the provisions in the Colonial Regulations pertaining to the administrative details of the management of the public service. Prior to the reunification, the administration of the public service was provided in the relevant provisions in the Letters Patent, Colonial Regulations and Civil Service Regulations. Over the years, many provisions in the Colonial Regulations pertaining to the administrative details of the management of the public service were translated into the Civil Service Regulations. Provisions in the Letters Patent and Colonial Regulations which have not been translated into the Civil Service Regulations relate to the authority to appoint, dismiss and discipline public servants; to act on representations made by public servants; and to make related disciplinary regulations. With the lapsing of the Letters Patent and Colonial Regulations upon reunification, it was necessary to replace and localise those provisions relating to the administration of the public service to maintain continuity. As the Letters Patent and Colonial Regulations were imperial instruments, it would not be possible to replace them with a mirror arrangement. An executive order issued by the Chief Executive under Article 48(4) of the Basic Law provides the legal backing to enable the SAR Government to preserve its executive authority for the continued administration of the public service.

13. The Administration has advised that Public Service (Administration) Order 1997 (PS(A)O) (Executive Order No. 1 of 1997) is, at present, the only executive order issued by the Chief Executive. The constitutionality and legality of PS(A)O were confirmed by the Court of First Instance in an

application for judicial review in 1998 (*The Association of Expatriate Civil Servants of Hong Kong v Chief Executive*). The Court has also ruled that PS(A)O is not in breach of Articles 48(7) and 103 of the Basic Law. The PS(A)O and the Public Service (Disciplinary) Regulations made under that Order have effectively replaced the Colonial Regulations dealing with the administration of the public service in relation to the appointment, dismissal and discipline of public servants.

14. Some members are of the view that although the Court has confirmed the legality of PS(A)O, it does not rule on whether an executive order issued by the Chief Executive under Article 48(4) is equivalent to the Colonial Regulations. Should executive orders have legal status, the present making of PS(A)O is tantamount to conferring on the Chief Executive a legislative power. Legal backing is required for the making of an executive order under Article 48(4).

15. A member points out that the Colonial Regulations are not confined to the administration of the public service. They also deal with the budget and public finance which are mainly covered by the Public Finance Ordinance. He considers that the best alternative way of handling the adaptation in question is to formulate those provisions of the Colonial Regulations which are still applicable into regulations to be made by the Chief Executive in Council under a civil service ordinance to be enacted by the legislature. Some members consider that the adaptation of reference to “Colonial Regulations” to “relevant executive orders” is not a technical amendment, but a legal and constitutional matter. Therefore, it should not be dealt with in the context of the Adaptation of Laws exercise.

16. The Administration has pointed out that in its judgment, the Court has noted that it was “plainly not possible for instruments to be promulgated which were identical in nature to the colonial instruments which they were replacing”, and “the hallmark of the previous system was that, where procedures were to be established locally, they were established by the Governor by executive action”. In the view of the Administration, an executive order issued by the Chief Executive does not constitute a departure from the previous system adopted by the Administration prior to the reunification in which any administrative order made by the then Governor is not subject to the approval by the LegCo. The term “relevant executive order” refers to the specific executive order published in the Gazette, i.e. PS(A)O. Its application is confined to the administration of the public service.

17. As the nature and ambit of an executive order as well as the procedures for its promulgation are constitutional issues, members suggest that the matter be followed up by the relevant Panel. For the purpose of clarity and certainty, members suggest that the specific executive order in force be included in the

definition of “relevant executive order”.

18. Having regard to the views of members, the Administration has proposed to replace “Colonial Regulations” by making reference to the existing executive order, i.e. the reference to “Colonial Regulations” will be adapted to “Public Service (Administration) Order”. A definition of “Public Service (Administration) Order” will be provided as follows -

“Public Service (Administration) Order” means -

- (a) the Public Service (Administration) Order 1997 (Executive Order No. 1 of 1997);*
- (b) the Public Service (Disciplinary) Regulation made under section 21 of that Order (and together with that Order published as S.S. No. 5 to Gazette No. 2/97); and*
- (c) any other regulation made or any direction given under that Order.*

as amended from time to time

19. Members accept the proposed amendments. The Administration would move the relevant Committee Stage amendments (CSAs) to Schedule 3 to the Bill.

Adaptation of reference to “Regulations of the Hong Kong Government”

20. The Administration proposes to adapt the reference to “Regulations of the Hong Kong Government” to “government regulations”. “government regulations” is defined as “the administrative rules known as the Government Regulations and any other administrative rules or instruments regulating the public service”. Members question the need and the rationale for the proposed adaptation.

錯誤! 尚未定義書籤。 The Administration has explained that there is no such document entitled “Regulations of the Hong Kong Government”. Only an instrument known as the “Government Regulations” is available to regulate the public service. Thus, there is a need to replace the term. The term “Regulations of the Hong Kong Government” refers generally to those regulations promulgated by the Government relating to the administration of the public service or management of civil servants. Apart from the seven volumes of “Government Regulations”, there are other administrative rules or regulations such as bureau and departmental circulars, circular memoranda, instructions, standing orders, or other administrative rules and regulations that

may be issued from time to time by bureaux or departments, which supplement “Government Regulations” and are of equal application and force to the Regulations. Given the different types of instruments and the purposes for which they are issued, the term “Regulations of the Hong Kong Government” is therefore proposed to be replaced by a generic term which would cover these different administrative rules and regulations, and the possible introduction of any new instrument in future.

21. The Administration has further explained that there is no exhaustive list of specific instruments referred to by the general reference of “government regulations”. It would be inappropriate to produce such a list as it would preclude the introduction of any new instruments.

22. Members accept the proposed adaptation and the definition of “government regulations”.

Adaptation of reference to “saving the rights of Her Majesty the Queen, Her Heirs or Successors”

23. The Administration proposes to adapt the reference to “saving the rights of Her Majesty the Queen, Her Heirs or Successors” to “saving the rights of the Central People’s Government and the rights of the Government of Hong Kong Special Administrative Region (HKSAR) under the Basic Law or other laws”.

24. Members note that prior to the reunification, a section of “saving the rights of Her Majesty the Queen, Her Heirs or Successors” is required to be included in each private bill under the Royal Instructions. The Royal Instructions ceased to apply to HKSAR after the reunification. Such savings provision can be found in 142 ordinances. The provision reads “Nothing in this Ordinance shall affect or be deemed to affect the rights of Her Majesty the Queen, Her Heirs or Successors, or the rights of any body politic or corporate or any other persons except such as are mentioned in this Ordinance and those claiming by, from or under them”. By virtue of Annex 3 of the Decision of the Standing Committee of National People’s Congress (NPC) on Treatment of the Laws Previously in Force in Hong Kong made in accordance with Article 160 of the Basic Law of the HKSAR of the PRC, the savings provision shall be construed as a reference to “nothing in this Ordinance shall affect or be deemed to affect the rights of the Central (People’s Government) or the Government of the HKSAR under the Basic Law or other laws”. The construction is now incorporated into item 21 of Schedule 8 to the Interpretation and General Clauses Ordinance (Cap. 1). In respect of the ordinances which contain the savings provision, it appears that the rights saved to Her Majesty, etc., may include, but not limited to foreign affairs, title to lands in the colonies, precious metals in land granted by the Crown, reversion of lands to the Crown and the Crown’s right to unclaimed property.

25. The Administration has explained that the inclusion of the savings provision in private bills after the reunification would continue having regard to such requirement by convention. The Administration would examine the need to retain the savings provision at a later stage.

26. Members also note that according to the Chinese text of Annex 3 of the Decision of the NPC Standing Committee, the rights of “中央” etc. are to be saved. The Bill, however, proposes to adapt the savings provision to make it read saving the rights of the “Central People’s Government” (中央人民政府) etc. To be consistent with the Chinese text of the Standing Committee’s Decision, the Administration agrees to amend “中央人民政府” to “中央”, and the English text for “中央” would be “Central Authorities”. The savings provision will refer to “保留中央或香港特別行政區政府根據《基本法》和其他法律的規定所享有的權利” (“saving the rights of the Central Authorities or the Government of the HKSAR under the Basic Law and other laws”). The relevant CSAs to Schedule 15 to the Bill would be made by the Administration.

Adaptation of reference to “Governor” to “Chief Executive in Council”

27. As agreed at the joint meeting with the Bills Committee on Adaptation of Laws (No. 2) Bill 1998, all references to “Governor” will be adapted to “Chief Executive” irrespective of the character of the instruments to be made by the Chief Executive. The Administration would move CSAs to this Bill and other Adaptation of Laws Bills which contains adaptations replacing “Governor” by “Chief Executive in Council” to this effect.

Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405) - Adaptation of reference to “Country or territory”

28. On the proposed adaptation of reference to “country or territory” to “country, territory or place” in section 28 of the Drug Trafficking (Recovery of Proceeds) Ordinance, members question whether it is necessary to add “place” in the reference.

29. The Administration has explained that section 28 of the Ordinance provides that countries or territories outside Hong Kong may be designated, by order, to enable their confiscation orders to be enforced in Hong Kong. China as one of the parties to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, was so designated before 1 July 1997. After 1 July 1997, China could not be a country or territory outside Hong Kong. Designation of component parts of China (provinces, autonomous regions, etc.) as “territories” outside Hong Kong may also present difficulties, since “territory” could bear a number of meanings,

depending on the context in which it occurs. Moreover, China without Hong Kong might be taken as not a “country” or “territory” in its fullest sense. There could be an argument that a designation under section 28(1)(a) must be in respect of a “country” or “territory” in its entirety and that a designation of “China (except Hong Kong)” may not be a proper designation of “country” or “territory” and so ultra vires and void. The addition of “place” could avoid unnecessary court disputes over the interpretation of the enforcement of confiscation orders.

30. Though some members consider the addition of “place” unnecessary, members accept the proposed adaptation of reference to “country or territory” to “country, territory or place”.

Transfer of Sentenced Persons Ordinance (Cap. 513)

31. On the proposed repeal of section 8 of the Transfer of Sentenced Persons Ordinance, members note that section 8 was intended to cater for any arrangements which might have been put in place before the Repatriation of Prisoners (Overseas Territories) Order 1986, which the Ordinance supersedes, lapsed. No such arrangements had in fact been put in place. Section 8(3) provides that this section shall expire immediately upon the expiration of 30 June 1997. Accordingly, section 8 is no longer applicable and therefore should be repealed.

32. On section 9, members query whether it is necessary to replace the reference to “Secretary of State” by “Central People’s Government” (CPG). They have also asked which authority of CPG is responsible for matters relating to the transfer of sentenced persons between Hong Kong and places outside Hong Kong.

33. The Administration has explained that section 9 sets out the procedure for notifying the sovereign government in respect of requests for the transfer and transit of sentenced persons. Notification will be given by the HKSAR Government to the CPG in respect of requests for inward transfer, outward transfer, and transit of sentenced persons through the HKSAR. Such notification is accompanied by a copy of the request, the accompanying documents, a summary of the material facts supporting the request, and other relevant information. The Office of the Commissioner of the Ministry of Foreign Affairs of the People’s Republic of China in the HKSAR will be notified and will relay any instructions from the CPG to the HKSAR. The notification procedure was agreed in the Joint Liaison Group before the reunification. The proposed amendments are necessary for the adaptation of the Ordinance to ensure that it is consistent with the Basic Law and with the status of Hong Kong as a SAR. A provision in section 9 relating to the notification of CPG is essential as it reflects legitimate CPG interests in the

HKSAR's handling of transfer requests pursuant to agreements between HKSAR and other jurisdictions, as CPG has ultimate responsibility for any international rights and obligations that will arise from such agreements.

34. Members accept the proposed adaptation of reference to "Secretary of State" to "Central People's Government" in the Ordinance.

Committee Stage amendments

35. The draft CSAs to be moved by the Administration, which have the support of the Bills Committee, are in **Appendix III**.

Recommendation

36. The Bills Committee recommends that, subject to the CSAs to be moved by the Administration, the Second Reading debate of the Bill be resumed at the Legislative Council meeting on 28 April 1999.

Advice Sought

37. Members are invited to support the recommendation of the Bills Committee in paragraph 37 above.

List of Ordinances affected by the Adaptation of Laws Bill 1998

| Item No. | Ordinances |
|-----------------|--|
| 1. | Control of Chemicals Ordinance (Cap. 145) |
| 2. | Juvenile Offenders Ordinance (Cap. 226) |
| 3. | Prisons Ordinance (Cap. 234) |
| 4. | Detention Centres Ordinance (Cap. 239) |
| 5. | Drug Addiction Treatment Centres Ordinance (Cap. 244) |
| 6. | Training Centres Ordinance (Cap. 280) |
| 7. | Rehabilitation of Offenders Ordinance (Cap. 297) |
| 8. | Prisoners (Release under Supervision) Ordinance (Cap. 325) |
| 9. | Drug Addicts Treatment and Rehabilitation Ordinance (Cap. 326) |
| 10. | Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) |
| 11. | Prisoners' Education Trust Fund Ordinance (Cap. 467) |
| 12. | Post-Release Supervision of Prisoners Ordinance (Cap. 475) |
| 13. | Transfer of Sentenced Persons Ordinance (Cap. 513) |
| 14. | Long-term Prison Sentences Review Ordinance (Cap. 524) |
| 15. | Correctional Services Children's Education Trust Ordinance (Cap. 1131) |

《1998年法律適應化修改條例草案》委員會

**Bills Committee on
Adaptation of Laws Bill 1998**

Membership List

| | |
|-----------|---|
| 黃宏發議員(主席) | Hon Andrew WONG Wang-fat, JP (Chairman) |
| 丁午壽議員 | Hon Kenneth TING Woo-shou, JP |
| 何秀蘭議員 | Hon Cyd HO Sau-lan |
| 吳靄儀議員 | Hon Margaret NG |
| 夏佳理議員 | Hon Ronald ARCULLI, JP |
| 涂謹申議員 | Hon James TO Kun-sun |
| 曾鈺成議員 | Hon Jasper TSANG Yok-sing, JP |
| 劉漢銓議員 | Hon Ambrose LAU Hon-chuen, JP |

合共 : 8位議員
Total : 8 Members

日期 : 1998年12月17日
Date : 17 December 1998

ADAPTATION OF LAWS BILL 1998

COMMITTEE STAGE

Amendments to be moved by the

| <u>Clause</u> | <u>Amendment Proposed</u> |
|-----------------------------|---|
| Schedule 2, section 4 | By deleting it and substituting - "4. Section 17(3) is amended by repealing "Governor" and substituting "Chief Executive". |
| Schedule 3, section 1(b) | By deleting the proposed definition of "relevant executive order" and substituting - ""Public Service (Administration) Order" () means - (a) the Public Service (Administration) Order 1997 (Executive Order No. 1 of 1997); (b) the Public Service (Disciplinary) Regulation made under section 21 of that Order (and together with that Order published as S.S. No. 5 to Gazette No. 2/1997); and (c) any other regulation made or |

any direction given under that Order,
as amended from time to time;"

| | |
|--|--|
| Schedule 3, sections 6, 7, 8, 9(a) and (b) and 22 | By deleting "relevant executive orders" and substituting "the Public Service (Administration) Order". |
| Schedule 7, section 3 | By deleting paragraph (a). |
| Schedule 9, section 1 | By deleting "in Council". |
| Schedule 12, section 4 | By deleting "in Council". |
| Schedule 13, section 1(b) | By deleting "in Council". |
| Schedule 14, sections 7(b) and 8 | By deleting "in Council". |
| Schedule 15, section 6 | By deleting everything after "Central" and substituting "Authorities or the Government of the Hong Kong Special Administrative Region under the Basic Law and other laws". |