

**Paper for the House Committee meeting
on 19 March 1999**

**Report of the Bills Committee on
Adaptation of Laws (No. 4) Bill 1998**

Purpose

This paper reports on the deliberations of the Bills Committee on Adaptation of Laws (No. 4) Bill 1998.

The Bill

2. The Bill seeks to adapt certain ordinances and their subsidiary legislation to bring them into conformity with the Basic Law and with Hong Kong's status as a Special Administrative Region (SAR) of the People's Republic of China. A list of the ordinances and subsidiary legislation specified in the Schedules to the Bill is in **Appendix I**.

The Bills Committee

3. At the House Committee meeting held on 13 November 1998, members agreed to form a Bills Committee to study the Bill. The Bills Committee first met on 7 December 1998 and Hon Andrew WONG was elected Chairman of the Bills Committee. The membership list of the Bills Committee is in **Appendix II**.

4. The Bills Committee held three meetings with the Administration. It also considered the views of the Hong Kong Bar Association.

Deliberations of the Bills Committee

Guiding principles

5. Members note that in implementing the present stage of the adaptation of laws programme, the guiding principles to be applied are 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.

"Freezing effect" of proposed adaptations

6. Members have had detailed deliberations about the Administration's proposals relating to -

- (a) the rights and duties of the Secretary for Justice (SJ) under sections 5 and 6 of the Legal Officers Ordinance (Cap. 87); and
- (b) the jurisdiction of the Court under section 3(3) of the Legal Practitioners Ordinance (Cap. 159).

Members have discussed whether the proposals would have the effect of freezing the linkage between the rights and duties of the SJ with those of the Attorney General (AG) of England and the jurisdiction of the Court as at 1 July 1997. There has been concern over the mechanical way of adaptation and whether the Administration's proposals have effectively changed the meaning of the existing laws. The deliberations are summarised in paragraphs 7 - 21 below.

Legal Officers Ordinance (Cap. 87)

Rights and duties of the Secretary for Justice (Sections 3 & 4 of Schedule 1)

7. Section 5 of the Legal Officers Ordinance provides that -

"The Attorney General shall be entitled in the Courts of the Colony to the same rights as are enjoyed in England by the Attorney General of England."

Section 6 of the Ordinance provides that -

"The Attorney General shall exercise and discharge so far as regards any proceedings over which the Courts of the Colony have jurisdiction by or by virtue of the Matrimonial Causes Ordinance (Cap. 179), the rights and duties which in England are customarily exercised and discharged by the Queen's Proctor."

8. The Bill proposes that all rights and duties which were exercisable and dischargeable by the former AG immediately before 1 July 1997 under these two sections, except for those that are inconsistent with the Basic Law, shall on and after that date be exercisable by the SJ.

9. A member points out that the proposed adaptation would have the effect of "freezing" the rights of the SJ as at 1 July 1997, thereby inhibiting any further developments in that area. Contrary to the proposed new section, existing section 5 adopts the common law approach which allows the court to interpret as to what the rights of the former AG would be under that section. It also permits changes to the

rights of the AG of Hong Kong consequent upon changes to the rights of the AG of England. The member also points out that linking the rights and duties of SJ to those of the former AG immediately before 1 July 1997, which in turn are related to the rights and duties of the AG of England and a large number of common law decisions would make it extremely difficult, as time lapses, to ascertain the rights and duties of the SJ as they existed precisely at that point in time.

10. The Administration has explained that the former AG was a public officer defined by the Interpretation and General Clauses Ordinance and hence, by virtue of section 24 of the Hong Kong Reunification Ordinance, all common law powers and statutory powers under the Ordinance adopted shall continue and be vested in the SJ, except for those that are inconsistent with the Basic Law. Moreover, those prerogative powers previously exercisable by the former AG are now vested in the Chief Executive and exercisable by the SJ, except for those that are inconsistent with the Basic Law. The Administration considers it appropriate to adapt sections 5 and 6 of the Legal Officers Ordinance along the lines of the formula in section 24 of the Reunification Ordinance.

11. Members have made a number of suggestions to deal with the matter. One suggestion is to codify the rights and duties of the SJ. The Administration has explained that codification of common law principles is an extremely broad and complex question that has serious implications for major areas of existing laws (e.g. contract and tort). The Administration is of the view that this falls outside the scope of the adaptation exercise.

12. Another suggestion is that the subject matter could be dealt with outside the present adaptation exercise, e.g. by way of an amendment bill which could provide more scope and flexibility to address the concerns raised. The Administration has explained that the existing sections 5 and 6 of the Legal Officers Ordinance confer rights and powers on the former AG of Hong Kong by reference, respectively, to the AG and the Queen's Proctor in England. These rights and powers derive from both the common law and statutes in England. It is provided in Article 8 of the Basic Law that the laws previously in force in Hong Kong shall be maintained and subject to any amendment by the legislature of the HKSAR. Therefore it will be inconsistent with the Basic Law if the powers of the SJ would be dependent on a foreign legislature, namely that of England. Furthermore, it is inconsistent with Hong Kong's status as a SAR because the existence of the relevant references to AG and Queen's Proctor in England is due to the fact that Hong Kong was a British colony prior to 1 July 1997. The Administration's view is that sections 5 and 6 should be properly adapted as soon as possible. Furthermore, it is not helpful to users of the Laws of Hong Kong to leave sections 5 and 6 in the current form.

13. On members' concern about the "freezing" effect of the proposed adaptations, the Administration has advised that as far as statutory rights of the former AG under sections 5 and 6 of the Legal Officers Ordinance are concerned, rights based on UK statutes cannot, after reunification, be amended by the British Parliament in such a way as to affect the SJ's rights in Hong Kong. To that extent, they are frozen. But the Hong Kong legislature can amend those rights at any time. Proposed adaptation

of the sections neither purport to prevent this nor could do so. The statutory rights are not therefore frozen so far as Hong Kong is concerned. With regard to the common law rights of the former AG under these two sections, the fact that the SJ is empowered to exercise the rights that were enjoyed by the former AG immediately before reunification does not prevent the courts from developing those rights in the normal way.

14. The legal professional bodies have been consulted on the Bill. The Hong Kong Bar Association has proposed that a footnote be inserted near the new sections 5 and 6 to set out the repealed provisions which were the legal basis for the rights and duties of the former AG prior to 1 July 1997. After discussing with the editor of the loose-leaf edition of the Laws of Hong Kong, the Administration has agreed to implement the proposal.

15. In response to members' request, the Administration has also provided information on how different common law jurisdictions (Singapore, Gambia, and Trinidad and Tobago) which were former British colonies dealt with similar provisions in their laws.

Legal Practitioners Ordinance (Cap. 159)
Jurisdiction of the Court (Section 2 of Schedule 2)

16. The Bill proposes to repeal existing section 3(3) of the Legal Practitioners Ordinance. The Bar Association has proposed to localise the provisions by expressing the jurisdiction of the Court in clear words.

17. The Administration has advised that as the existing section 3(3) deals with the jurisdiction of the Court to admit persons to practise as a solicitor in the Court which is an inherent jurisdiction provided under common law, the proposed repeal would not affect the scope and exercise of such power by the Court. In addition, the law also provides for Disciplinary Tribunals to deal with unlawful conduct and practices of solicitors and barristers. However, after further consultation within the Administration and consideration of the views expressed by the Hong Kong Bar Association, the Administration has proposed a replacement provision for the consideration of the Bills Committee. The Administration proposes to amend section 3(3) to provide that the Court or any judge thereof may exercise the same jurisdiction in respect of any person admitted to practise as a solicitor in the Court as was exercisable immediately before 1 July 1997 by the then High Court or any judge thereof. The replacement provision is drafted along the line of the proposed adaptation of sections 5 and 6 of the Legal Officers Ordinance (i.e. sections 3 and 4 of Schedule 1 to the Bill).

18. A member points out that the newly proposed section 3(3) would lead to similar problems as those envisaged in the adaptation of sections 5 and 6 of the Legal Officers Ordinance in that the jurisdiction of the Court would be "frozen" as at 1 July 1997.

19. The Administration has reiterated its advice that Article 8 of the Basic Law allows for any amendment by the legislature to existing laws. The proposed

adaptation neither purports to prevent the Hong Kong legislature to make amendments nor could do so. The proposed amendment, which is acceptable to the Judiciary, will not affect the jurisdiction of the Court.

Views of the Bills Committee

20. A member considers that a less rigid approach should be adopted to deal with the present adaptation of law exercise as a "purist" approach would only give rise to arguments as to whether the adaptation principles have been strictly adhered to. Other members who support the Administration's proposals consider that a line must be drawn between the present adaptation exercise and a law amendment exercise, and any issues which fall outside the scope of the present exercise could be pursued with the Administration separately.

21. The Bills Committee has agreed to support the Administration's proposals. The Administration will move an amendment to section 2 of Schedule 2 to the Bill to introduce the replacement provision to preserve the jurisdiction of the Court.

Legal Officers Ordinance (Cap. 87)

Adaptation of "Crown" (Section 2, Schedule 1)

22. Members have sought the Administration's explanation for adapting "Crown" to "Government" in section 4(1)(b) of the Legal Officers Ordinance. Members point out that before the reunification, references to "Crown" in the law could mean either the Crown in right of the Government of Hong Kong or the Crown in right of the Government of the United Kingdom, and are concerned whether matters referred to in the section could include matters which are of interest to the latter but not to the former. If so, the proposed adaptation might have narrowed the rights and privileges of legal officers under section 3(1) of the Ordinance.

23. The Administration has advised that in relation to references to "Crown", the relevant principles of interpretation are in sections 1, 2 and 21 of Schedule 8 and section 7 of Schedule 9 to the Interpretation and General Clauses Ordinance. Since the matters specified in section 1 of Schedule 8 (namely, those relating to title to land in the HKSAR, those involving affairs for which the Central People's Government of the People's Republic of China has responsibility, and those involving the relationship between the Central Authorities and the HKSAR) are not within the scope of matters which legal officers might act, the question of limiting the rights and privileges of legal officers acting in such matters do not arise. The reference to "Crown" in section 4(1)(b) of the Ordinance is therefore adapted to "Government" in accordance with the interpretation principle in section 2 of Schedule 8 to the Interpretation and General Clauses Ordinance to reflect the constitutional arrangements after the reunification.

Legal Practitioners Ordinance (Cap. 159)

Qualifying period of active practice of barristers (Section 1 of Schedule 2)

24. Members query whether the addition of "... a reference to the Department of Justice shall, in relation to any period of time before 1 July 1997, be deemed to be a reference to the then Legal Department." in section 2 of the Legal Practitioners

Ordinance is necessary.

25. The Administration has explained that the proposed amendment is for avoidance of doubt. Under the Barristers (Qualification) Rules, the prescribed "qualifying period of active practice" for the purposes of qualifications for practising as barristers under section 31 of the Ordinance includes any period not less than nine months spent as a pupil in the Department of Justice. The proposed amendment would remove any doubt about a person's qualification if part of his period of active practice is spent in the former Legal Department.

Legal Practitioners Ordinance (Cap. 159)

Repeal of the reference to "Her Majesty's Overseas Judiciary" (Section 6 of Schedule 2)

26. Members enquire about the reasons for the proposed repeal of the reference to "any member of Her Majesty's Overseas Judiciary" in section 75(1)(a) of the Legal Practitioners Ordinance. The Administration has explained that the term is a colonial reference for which there is no direct substitute after the reunification. This part of the Ordinance deals with the rights and privileges of specified classes of persons not to be bound by certain provisions of the law. Having consulted the Judiciary and the policy bureaux, it is considered unnecessary for any exemption to be granted to this particular class of persons after the change of sovereignty.

27. Members are concerned whether the proposal would deprive certain people of their existing statutory rights. The Administration has advised that there is a Compensation Scheme for payment of compensation to members of Her Majesty's Overseas Civil Service, and a member of Her Majesty's Overseas Civil Service or Her Majesty's Overseas Judiciary will be eligible to receive compensation under certain conditions. The Compensation Scheme was organised by the Overseas Development Administration in the UK. Therefore these matters would not be affected by the repeal of the said expression.

Adaptation of terms being considered by other bills committees

28. The Administration has advised that the adaptation of the terms "Governor" and "Colonial Regulations" would take into account any decisions made in respect of earlier adaptation bills, which also contain the same terms, being examined by separate bills committees.

Legal Officers Ordinance (Cap. 87)

Adaptation of "Governor" (Section 7 of Schedule 1)

29. The Bill proposes to adapt the word "Governor" in section 11 of the Legal Officers Ordinance to "Chief Executive in Council".

30. In line with the decision adopted by the Bills Committee on Adaptation of Laws (No. 2) Bill 1998, the Administration has agreed to adapt the term "Governor" to "Chief Executive" for provisions relating to subsidiary legislation. The Administration will move an amendment to delete "in Council" in section 7 of Schedule 1.

Official Solicitor Ordinance (Cap. 416)

Adaptation of "Colonial Regulations" (Section 1(b) and (e) of Schedule 3)

31. The Bill proposes to adapt the term "Colonial Regulations" in section 2(4) of the Official Solicitor Ordinance to "government regulations" which is defined to mean " the administrative rules known as the Government Regulations and any other administrative rules or instruments regulating the public service" under proposed section 2(9). The Hong Kong Bar Association considers that the proposed definition wider than the original term.

32. Having regard to the decision of the Bills Committee on the Adaptation of Laws Bill 1998 that the term "Colonial Regulations" should be adapted to "Public Service (Administration) Order" with the term properly defined, the Administration will move an amendment in this respect.

Other amendments

Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997
Commencement date (Clause 2(2))

33. Clause 2(2) stipulates that section 9(b) of Schedule 2 to the Bill shall come into operation on the day appointed for the commencement of sections 9 (in so far as it relates to the addition of new section 10D) and 10 of the Mental Health (Amendment) Ordinance 1997 (81 of 1997).

34. The Administration has advised that as sections 9 and 10 of the Mental Health (Amendment) Ordinance 1997 have already come into operation on 1 February 1999, it is necessary to move an amendment to this clause.

Legal Officers Ordinance (Cap. 87)

Adaptation of military references (Section 2 (c) of Schedule 1)

35. The Bill proposes an amendment to section 4(1)(d)(i) of the Legal Officers Ordinance by adding the words "of China in Hong Kong" after "authorities". However, the Administration has advised that further to a general review, this item is proposed to be dealt with collectively with other adaptations of military references in a separate Adaptation of Laws Bill to be introduced later. The Administration will move an amendment to delete the section from the Bill.

Committee stage amendments (CSAs)

36. A complete set of the CSAs to be moved by the Administration is in **Appendix III**.

Recommendations

37. The Bills Committee recommends that, subject to the CSAs to be moved by the Administration, the Second Reading debate on the Bill be resumed on 31 March 1999.

Advice sought

38. Members are invited to note the deliberations of the Bills Committee and support the resumption of the Second Reading debate on the Bill.

Legislative Council Secretariat
18 March 1999

**Ordinances and subsidiary legislation specified in Schedules to
Adaptation of Laws (No. 4) Bill 1998**

SCHEDULE 1

Legal Officers Ordinance (Cap. 87)

SCHEDULE 2

Legal Practitioners Ordinance and its Subsidiary Legislation and Related Ordinance

Legal Practitioners Ordinance (Cap. 159)

Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997)

Legal Practitioners (Amendment) Ordinance 1998 (27 of 1998)

Admission and Registration Rules

Solicitors Disciplinary Tribunal Proceedings Rules

Barristers (Qualification) Rules

Solicitors' Practice Rules

Solicitors (Trade Marks and Patents) Costs Rules

Practising Certificate (Barristers) Rules

Barristers Disciplinary Tribunal Proceedings Rules

Foreign Lawyers Practice Rules

SCHEDULE 3

Official Solicitor Ordinance (Cap. 416)

Bills Committee on Adaptation of Laws (No. 4) Bill 1998

Membership List

Hon Andrew WONG Wang-fat, JP (Chairman)

Hon Margaret NG

Hon James TO Kun-sun

Hon Jasper TSANG Yok-sing, JP

Hon Mrs Miriam LAU Kin-yee, JP

Hon Ambrose LAU Hon-chuen, JP

Total : 6 Members

Legislative Council Secretariat

7 December 1998

win95u: jannie:csa-4
1st draft : 1.3.99
2nd draft : 3.3.99
3rd draft : 8.3.99

ADAPTATION OF LAWS (NO. 4) BILL 1998

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
2(2)	By deleting "come into operation on the day" and substituting "be deemed to have come into operation on 1 February 1999, which is the date".
Schedule 1, section 2	By deleting paragraph (c).
Schedule 1, section 7	By deleting "in Council".
Schedule 2	By deleting section 2 and substituting - "2. Section 3(3) is repealed and the following substituted - "(3) Subject to the provisions of this Ordinance, the Court or any judge thereof may, in so far as it is not inconsistent with the Basic Law, exercise the same jurisdiction in respect of any person admitted to practise as a solicitor in the Court

as was exercisable immediately before 1 July 1997 by the then High Court or any judge thereof, as the case may be, in respect of any person admitted to practise as a solicitor in the then High Court."

Schedule 3,
section 1

- (a) By deleting paragraph (b) and substituting -
 - "(b) in subsection (4), by repealing "Such Ordinances, Colonial Regulations" and substituting "The Public Service (Administration) Order, and such Ordinances";".
- (b) By deleting paragraph (e) and substituting -
 - "(e) by adding -
 - "(9) In this section, "Public Service (Administration) Order" () means -
 - (a) the Public Service (Adminis-tration) 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."."