

Legislative Council

LC Paper No. LS36/98-99

Paper for the House Committee Meeting of the Legislative Council on 25 September 1998

Legal Service Division Further Report on Fisheries Protection (Amendment) Bill 1998

Members may recall that the Legal Service Division made a report to the House Committee on 23 July 1998. At the meeting of the House Committee on 24 July 1998, we were instructed to follow up on (a) the Members' concern regarding the delegation to head of department level of the power of making subsidiary legislation involving criminal sanctions and (b) the clarification of aspects of the Bill that we were then seeking.

2. Pursuant to the aforesaid instructions, we wrote to the Administration on the outstanding matters on 27 July 1998. The first substantive reply of the Administration was received on 23 September 1998 and is attached to this report together with relevant correspondence from the Legal Service Division.

3. Having studied the clarifications on the technical aspects of the Bill, we are satisfied that the Bill is in order from the technical point of view. However, it would be a matter for Members to decide whether the justification put forward in point (f) of the letter from the Administration in answer to point (a) above is acceptable.

5. Subject to the Members' views, Second Reading debate of the Bill may be resumed.

Prepared by
KAU Kin-wah
Assistant Legal Adviser
Legislative Council Secretariat
23 September 1998

Encl
LS/B/6/98-99
2869 9467
2877 5029
By Fax (2868 4679) and By Post
27 July 1998

Secretary for Economic Services
Economic Services Bureau
(Attn: Miss Dora Fu,
Principal Assistant Secretary
for Economic Services)
2/F, Main & East Wings
Central Government Offices

Dear Miss Fu

Fisheries Protection (Amendment) Bill 1998

At the meeting of House Committee on 23 July 1998, Members expressed concern whether it was appropriate, as a matter of principle, for a government official at head of department level to be given the powers to specify the prohibited apparatuses to be contained in the Fisheries Protection Ordinance (Cap.171) and be delegated the power to amend a schedule of an ordinance, especially where criminal sanctions were involved.

I would be grateful if you would kindly let me have your view on this issue and your proposal, if any, to address the concern, together with your reply to my earlier letter dated 10 July 1998.

Yours sincerely
(KAU Kin-wah)
Assistant Legal Adviser

LS/B/6/98-99
2869 9467
2877 5029

By Fax (2868 4679) and By Post
10 July 1998
The Secretary for Economic Services
2/F, Main & East Wings
Central Government Offices
11 Ice House Street
Central
Hong Kong

(Attn: Miss Jenny Chan,
Assistant Secretary (ES) 6)

Dear Miss Chan

Fisheries Protection (Amendment) Bill 1998

I refer to the telephone conversation between you and the undersigned earlier this week relating to the above Bill.

2. I would be grateful if you would clarify the following points :-

- a. Whether the amendments are intended to direct against the use of certain apparatuses only and not particular modes of destructive fishing;
- b. If the answer to point (a) is yes, please provide detail particulars of the class(es) or description(s) of apparatuses the use of which is intended to be prohibited (if there is a list of potential apparatuses, please specify for Members' consideration);
- c. If the answer to point (a) is no, please list the fishing methods intended to be covered and clarify how they may be prohibited by the provisions contained in the Bill;
- d. The present wording intends a blanket prohibition of the use of certain apparatuses for fishing. Please clarify whether there are certain apparatuses that may be lawfully used for fishing and unlawfully used for destructive fishing; and
- e. The offence as contemplated is the use of certain apparatus. Unless the offender

is caught red-handed, in the majority of cases it might be difficult for the prosecution to prove a case. Has the Administration considered measures to assist the prosecution in future prosecutions?

3. I would be grateful if you would kindly let me have your reply before 16 July 1998.

Yours sincerely

(KAU Kin-wah)
Assistant Legal Adviser

URGENT

BY HAND

政府總部經濟局的信頭
Letterhead of ECONOMIC SERVICES BUREAU
GOVERNMENT SECRETARIAT
香港下亞厘華道中區政府合署
Central Government Offices
Lower Albert Road
Hong Kong

Our Ref: ECON 2755/45(88)III

Your Ref: LS/B/6/98-99

0935am

23/9/98

Telephone No. 2810 2507

Fax No. 2147 5834

23 September 1998

Mr Kau Kin-wah
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Mr Kau,

Fisheries Protection (Amendment) Bill 1998

Further to my letter of 4 September 1998.

Our replies to the questions raised in your letters are as follows -

- (a) Whether the amendments are intended to direct against the use of certain apparatuses only and not particular modes of destructive fishing?

No. Indeed, the proposed amendments are intended to direct against particular modes of destructive fishing by prohibiting the use for fishing of the related apparatus to be specified by the Director of Agriculture and Fisheries (DAF) by legal notice in the Gazette.

- (b) If the answer to point (a) above is yes, please provide detail particulars of the class(es) or description(s) of apparatuses the use of which is intended to be prohibited (if there is a list of potential apparatuses, please specify for Members' consideration).

Not applicable as the answer to question (a) above is in the negative.

- (c) If the answer to point (a) is no, please list the fishing methods intended to be covered and clarify how they may be prohibited by the provisions contained in the Bill.

The fishing methods intended to be covered by the proposed amendments are destructive fishing practices including electric fishing and fishing with suctions and dredging devices.

Clause 2 of the Amendment Bill^(note 1) and Section 2 of the Amendment Regulation,^(note 2) if passed, would enable prohibition of such fishing practices by banning the use for fishing of the related apparatus to be specified by DAF by legal notice in the Gazette.

- (d) The present wording intends a blanket prohibition of the use of certain apparatuses for fishing. Please clarify whether there are certain apparatuses that may be lawfully used for fishing and unlawfully used for destructive fishing.

^(note 1) Clause 2 of the Amendment Bill enables the Chief Executive in Council to make regulations to prohibit or restrict the use of any kind of apparatus for the purpose of fishing specified by DAF by legal notice in the Gazette and increases the maximum fine that may be provided for under regulations made under the Fisheries Protection Ordinance to \$200,000.

^(note 2) Section 2 of the Amendment Regulation prohibits the use for the purpose of fishing of any kind of apparatus specified by DAF by legal notice in the Gazette.

It is intended to introduce a blanket prohibition of the use for fishing of certain apparatus to be specified by DAF by legal notice in the Gazette. No specified apparatus may be lawfully used for fishing on the one hand and unlawfully used for destructive fishing on the other.

- (e) The offence as contemplated is the use of certain apparatus. Unless the offender is caught red-handed, in the majority of cases it might be difficult for the prosecution to prove a case. Has the Administration considered measures to assist the prosecution in future prosecutions?

The Administration considers that the following measures would help the enforcement of the amendments, if passed -

- (i) regular sea patrols by the Marine Police;
 - (ii) regular sea patrols by the Agriculture and Fisheries Department (AFD); and
 - (iii) a hot-line for report of suspected use of the specified apparatus for fishing to the Marine Police via AFD.
- (f) Whether it is appropriate, as a matter of principle, for a government official at head of department level to be given the powers to specify the prohibited apparatuses to be contained in the Fisheries Protection Ordinance (Cap. 171) and be delegated the power to amend a schedule of an ordinance, especially where criminal sanctions were involved.

We propose that DAF should be empowered to specify the types of apparatus to be prohibited for fishing by legal notice in the Gazette. Moreover, we propose to transfer to her the power to amend the Schedule to the Fisheries Protection Ordinance which specifies the substances deemed to be toxic substances for the purposes of the Ordinance. We make such proposals on the grounds that AFD possesses the necessary expertise to make such specifications, which are indeed technical in nature. We see no practical need for the power to make such specifications to rest with the Chief Executive in Council. Nevertheless, the exercise of such power would be subject to scrutiny by the Legislative

Council through negative vetting of the legal notice to specify such apparatus and the order to amend the Schedule.

Yours sincerely,

(Miss Dora H M FU)
for Secretary for Economic Services