

LETTERHEAD OF THE LAW SOCIETY OF HONG KONG

PA0005/98/9625

From the President

BY FAX.

3 April 1998

Secretary for Justice
Department of Justice
Queensway Government Offices
Hong Kong

Dear Elsie,

RE: THE ADAPTATION OF LAWS (INTERPRETATIVE PROVISIONS) BILL (“the Bill”)

The Law Society has reviewed the definition of “State” as defined in section 4(b) of the Bill and it is of the view that, as drafted, there is cause for concern. It is noted that the Administration intends to introduce Committee Stage Amendments (“CSA”) to the definition of “State” and the Society welcomes the narrowing of the definition.

The Society has the following comments:

1. Substitution of the word “Crown” by the word “State”

The Administration has stated that the term “State” is narrowly defined so that it corresponds to the meaning of “the Crown”, however as defined in the CSA the definition is too wide (see comments in paragraph 2 below). At Common Law “the Crown” is recognised as a mixture of: the role of the Monarch within the Constitutional framework and also the exercise of power by the Executive branch of the Government.

The proposed amendment does not address the exercise of “prerogative power” which is *“the residue of discretionary power left at any moment in the hands of the Crown, whether such power is in fact exercised by the King himself or by his Ministers”* (see Dicey’s Introduction to the Study of the Law (8th ed. 1915) as cited in Council of Civil Service Unions v. Minister for the Civil Service [1985]AC 374.

The definition of the “**State**” does not in fact achieve the Administration’s stated intention to make its definition *“correspond to the commonly understood meaning of “the*

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Crown".

2. The Definition of "State"

The Administration stated in its Press Release that "*..... the purpose of the Bill is limited to adaptation of Cap. 1. Since July 1 1997, the reference to "the Crown" in section 66 of Cap. 1 should be interpreted as referring to all organs of the People's Republic of China, that correspond to the organs that were part of "the Crown"*".

The CSA now defines "State" as including :-

- (a) The President of the PRC
- (b) The Central People's Government
- (c) The Government of the HKSAR
- (d) The Central Authorities of the PRC that exercises functions which the Central People's Government has responsibility under the Basic Law
- (e) Certain Subordinate organs of the Central People's Government of those Central Authorities

The Law Society queries the inclusion of "Central Authorities" ("中央當局") which does not exist in the Chinese version of the Basic Law. In fact, "Central Authorities" is only referred to in the English version of the Basic Law, namely in Articles 17, 48(9), and 158. The Chinese characters for Central Authorities are "中央" and, in our opinion is a reference to the Central People's Government. It is submitted that in relation to the HKSAR there is no state organ which corresponds to the "Central Authorities". If it is to be retained, it will require specific definition.

In *The Constitution of the People's Republic of China* adopted by the National People's Congress on 4 December 1982 (and subsequently amended in 1988 and 1993) the structure of the State was cited in Chapter 3 as being comprised of the following :-

- 1. The National People's Congress
- 2. The President
- 3. The State Council (including the Foreign Ministry)
- 4. The Central Military Commission
- 5. The Local People's Congresses and Governments
- 6. The Organs of Self-Government of National Autonomous Areas
- 7. The People's Courts And The People's Procuratorates

It is submitted that only the first four cited organs are relevant to Hong Kong under the Basic Law and therefore the current CSA should be amended to delete any reference to the "Central Authorities" as they do not appear to have any constitutional basis. Article 22 of the Basic Law is clear that "no department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.....".

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3. Executive Functions

In paragraphs (e) and (f) of the CSA there is reference to the exercise of “*executive functions*” by the “subordinate organs” of the Central People’s Government:

- e) *Subordinate organs of the Central People’s Government*
 - 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)*
 - 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.

The Law Society has grave reservations on the inclusion of the words “*executive functions*” in (e)(i) and (f)(i) as cited above as “*executive functions*” are clearly defined in Article 19 of the Basic Law. Their presence carries an implication that there are other executive functions which are outside those reserved in Article 19 of the Basic Law. The Law Society therefore recommends the deletion of the words “*executive functions*” in order to prevent any potential conflict with the provisions of Article 19 of the Basic Law.

4. Subordinate organs of the Central People’s Government

- a) The Administration has stated in its Press Release that it considers the following entities as “Subordinate Organs of the Central People’s Government” :-
 - the Office of the Commissioner of the Ministry of Foreign Affairs of the PRC in the HKSAR
 - the Office of the Chinese Senior Representatives of the Sino-British Joint Liaison Group
 - Xin Hua Agency (Hong Kong Branch)

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- the PLA Garrison

As the Administration has indicated that these organs would be officially recognised, the Law Society suggest that all recognised subordinate organs which come within this definition be named in a schedule attached to the Ordinance.

- b) Xin Hua Agency (“Xin Hua”)

The present role of Xin Hua is unclear to the public and unless a parallel can be drawn between the function of Xin Hua with the other sub-organs of the Central People’s Government, the Law Society has reservations on whether this body should be included. It is undesirable for this uncertainty to remain and be left to the Court to resolve. The Administration *has a duty* to remove the uncertainty at this stage rather than face challenges in the future.

5. Definition of “crown lease”

Section 32 of the Hong Kong Re-unification Ordinance (Ordinance 110 of 1997) states:-

“The Chief Executive may on behalf of the Government of the HKSAR lease or grant land and natural resources within the HKSAR which are *State property*” (emphasis added)

It is submitted that including the HKSAR within the definition of “the State” in the CSA will cause confusion. Under Article 7 of the Basic Law all land is State property and the HKSAR is the Administrator of the State property.

**6. Section 14 of the Conveyancing and Property Ordinance (“CPO”):
“Conversion of the equitable interest to legal estate where right to Crown lease”**

It is submitted that the definition of “crown lease” in the Bill is defective as it does not make any provision for the statutory provisions contained in Section 14 of the CPO which makes provisions for “Crown leases” which have “...*deemed to be issued*.....”. If this matter is not resolved it would of cause confusion to the existing conveyancing system.

7. Section 30 of the Bill: “Reference to subsidiary legislation under national laws applying in Hong Kong”

The amendments to the existing Section 38 by sub-paragraph (b) states:

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“by repealing “Order in Council” and substituting “resolution”.

It is noted that there is no definition of “*resolution*”. Is this a reference to the resolution(s) of the Standing Committee of the National People’s Congress as referred to in Article 18 of the Basic Law? If so, the Law Society recommends that the word “*resolution*” be defined as “resolution of the Standing Committee of the National People’s Congress” and the words “rule, regulation, proclamation, order, notice, rule of court, by-law or other instruments” in Section 78 of Cap. 1 be deleted.

8. S.1(2) of the Bill · Retroactivity

Although the issue of retroactive criminal liabilities has been dealt with in S.1(4) of the Bill, it is of concern that the Bill departs from the established legislative principles as enshrined in S.23 of Cap.1 in so far as they affect civil rights and liabilities by retroactive operation on 1 July 1997. As the Hong Kong Re-unification Ordinance passed on 1 July 1997 dealt with the enactment of the necessary transitional provisions, it seems that the Bill does not require retroactive operation.

9. The definition of “common law”

It is not clear if the definition of “common law” in the Bill includes the rules of equity which are part of the laws of HKSAR under Article of 8 of Basic Law. We recommend clarification in the Bill.

10. Definitions of “solicitor” and “counsel”

For avoidance of doubt, it seems to be appropriate to add the words “or deemed to have been admitted” after the words “a person admitted” in the definitions of “solicitor” and “counsel” in the Bill.

The Law Society believes that it would be very difficult for practitioners to advise their clients on the legislation as drafted and that a high degree of certainty is desirable but is still missing from the CSA’s.

It is hoped that the Administration would adopt the above recommendations.

Anthony Chow
President

c.c Provisional Legislative Council

Letterhead of Hong Kong Bar Association

Statement of the Bar Council of the Hong Kong Bar Association on the Adaptation of Laws (Interpretative Provisions) Bill

1. The Adaptation of Laws (Interpretative Provisions) Bill proposes to amend Section 66 of the Interpretation and General Clauses Ordinance (Cap 1) by substituting a newly defined concept of “State” for the word “Crown”. **The amendment raises fundamental constitutional issues. We strongly disagree that it is “straightforward”, “purely technical” or “mere adaptation” as described by the Administration.**
2. Section 66 of Cap 1 now provides:

“No Ordinance shall in any manner whatsoever affect the right of or be binding on the Crown unless it is therein expressly provided or unless it appears by necessary implication that the Crown is bound thereby.”
3. The Administration seeks to change the word “Crown” to “State”. “State” is defined to include organs of the People’s Republic of China, including subordinate organs which (1) exercise *executive functions* of the Central Authorities of the People’s Republic of China or functions for which the Central People’s Government has responsibility under the Basic Law (2) do not exercise commercial functions and (3) are acting within the scope of the authority and functions delegated to it by the Central People’s Government or the relevant Central Authorities. The definition of “State” is new and not a matter of adaptation. The word “Crown” has many meanings and the meaning of the word “Crown” in section 66 is subject to common law principles. The amendment does away with these principles and presumes that the State is exempt from the law *when exercising executive functions*. This is highly controversial.

4. Whatever the previous colonial position, the question is whether the proposed amendment is in line with the Basic Law, a high degree of autonomy and the concept of “One Country, Two Systems”.
5. **The proposed presumption that a law shall not apply to the State unless it expressly says so is not in line with Article 22 of the Basic Law** which provides:

“All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region.”
6. The effect of Article 22 is that all PRC organs (or subordinate organs) in Hong Kong are presumed to be governed and bound by the laws of the HKSAR. The only exceptions are matters of foreign affairs and defence over which the HKSAR legislature is incompetent to legislate. In short Article 22, which came into effect on 1st July replaced the colonial presumption of exclusion of the Crown by a presumption of inclusion of PRC organs under the HKSAR law. **Contrary to Article 22, the proposed amendment reverses the presumption of inclusion.** We see no justification for this reversal.
7. The proposed definition of “State” refers to “executive functions” of the Central People’s Government. This is far wider than the areas of foreign affairs and defence which, under the Basic Law, are the responsibilities of the Central People’s Government. **We see no justification for the HKSAR to reduce its high degree of autonomy by enacting the proposed amendment whereby these PRC organs (or subordinate organs) in Hong Kong will be presumed not to be subject to Hong Kong law.** Furthermore it is unclear what “executive functions” will be carried out by these PRC organs (or subordinate organs) in Hong Kong which are outside matters of foreign affairs and defence. The Administration is rushing into this amendment without explaining to the public what these executive functions are.
8. The proposed definition of “State” gives rise to uncertainty. The Administration accepts that Xinhua News Agency falls within the definition in (1) and (2) in paragraph 3 above. If there is a repeat of the earlier incident when the Xinhua News Agency fails to comply with a provision in the Personal Data (Privacy) Ordinance Cap 486, it will be said that no offence is committed because the Ordinance is presumed not to

apply to Xinhua News Agency.

9. The Administration promises to review and consider if 17 Ordinances, which expressly bind the HKSAR Government, should also bind the State. This is side stepping the issue. The issue is not simply whether these 17 Ordinances should apply to the PRC organs (or subordinate organs) in Hong Kong but whether the rest of the law should also do so. For example, is it said that the Xinhua News Agency does not have to comply with the Fire Services Ordinance Cap. 95 because it is a subordinate organ that carries out executive function?
10. **It is fundamental to the rule of law and the concept of One Country Two Systems that state organs in Hong Kong should comply with the HKSAR laws save in the areas of foreign affairs and defence.**
11. We see no urgency for rushing through this amendment before an elected legislature is in place. Given the constitutional implications of this amendment and the justifiable concern and anxiety of the public, we think it wrong to push through the amendment without thorough public consultation and debate.
12. The Bar was not consulted on this particular amendment. It was consulted on an earlier version which proposed to substitute the word “HKSAR Government” for “Crown”. The earlier version made no reference to “State”. The original proposal was in line with the previous process of adaptation of laws.

6th April 1998

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Chairman
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