

For discussion on
22 January 1999

**LEGISLATIVE COUNCIL PANEL ON ADMINISTRATION
OF JUSTICE AND LEGAL SERVICES**

**PROPOSED AMENDMENTS TO THE
INTERPRETATION AND GENERAL CLAUSES ORDINANCE
TO IMPLEMENT THE LAW REFORM COMMISSION REPORT ON
EXTRINSIC MATERIALS AS AN AID
TO STATUTORY INTERPRETATION**

INTRODUCTION

The object of this paper is to seek from the Panel a preliminary view of the Administration's proposed amendments to the Interpretation and General Clauses Ordinance (Laws of Hong Kong, Chapter 1) ("the Ordinance"). The purpose of the proposed amendments is to implement the recommendations of the Law Reform Commission on the use of extrinsic materials in statutory interpretation. The proposed amendments will only apply to Ordinances, not to the Basic Law.

PROBLEM AND ARGUMENT

2. Hong Kong law requires Ordinances to be interpreted purposively. That is, the words of an Ordinance are to be read in their fullest context with a view to giving effect to the purpose of the legislation. Section 19 of the Ordinance directs purposive interpretation in the following terms -

"19. General principles of interpretation

An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."

The significance of extrinsic aids to statutory interpretation

3. In order to give effect to the purpose of legislation, it is necessary to discover that purpose. This is achieved by considering the statutory words in their context which includes material that is both within the Ordinance (internal aids to interpretation) and external to it (extrinsic aids).

4. Internal aids to the interpretation of a statutory word include matters such as the context of the words which surround it, the part of the Ordinance in which it is found, any statement of purpose in the Ordinance, and the context of the entire Ordinance which, when read as a whole, may show a clear theme or purpose.

5. The external materials which may be referred to as aids in discovering the purpose of an Ordinance are extensive. They include, for example, the body of law of which the Ordinance forms part, other Ordinances on the same or a related topic, the legislation or common law which the Ordinance may have replaced, international obligations undertaken by treaty, and social and economic factors. The most controversial of the extrinsic aids, and the main focus of the Law Reform Commission's work, is the parliamentary or legislative history of the Ordinance.

Legislative history

6. By "legislative history" is meant material created preparatory to, and in the course of, the passage of an Ordinance. It covers four main categories -

- (a) reports of committees or commissions recommending the legislation, e.g. a report of the Law Reform Commission;

- (b) the explanatory memorandum accompanying the Bill when it was introduced to the legislature;
- (c) the changes made to the Bill during its passage through the legislature; and
- (d) the debates in the legislature during its passage.

7. The courts traditionally took a very restrictive approach to the use of such materials. The material in category (a) could be consulted by the court but only to discover the mischief the Ordinance was intended to remedy, not the purpose or meaning of the legislation proposed. The material in categories (b), (c) and (d) could not be referred to at all.

8. However, the admissibility of parliamentary history has undergone substantial change in Hong Kong and other jurisdictions over recent years. The restrictive approach to the use of legislative history largely applied in Hong Kong until 1992 when in Pepper v Hart the House of Lords set criteria for the admissibility of such material. These criteria may be summarised as follows -

"subject to any question of Parliamentary privilege, the rule excluding reference to Parliamentary material as an aid to statutory construction should be relaxed so as to permit such reference where (a) legislation was ambiguous or obscure or led to absurdity, (b) the material relied upon consisted of one or more statements by a minister or other promoter of the Bill together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied upon were clear."

Other jurisdictions

9. New Zealand and Canada have left it to the courts to develop rules on the

admissibility of extrinsic aids to interpretation. In 1984, Australia added a new section to its Acts Interpretation Act 1901 to provide expressly for the use of extrinsic aids. This complements an existing section of the Act which enjoins purposive interpretation. In 1993, Singapore enacted legislation similar to the new Australian section. In the United States of America extrinsic aids are used freely but a lack of restraint by, and clear guidelines for, the courts has been criticised.

The position in Hong Kong

10. The Hong Kong courts have followed Pepper v Hart, although only a few cases have been reported. In the view of the Law Reform Commission, the Pepper v Hart criteria are insufficient on their own and should be incorporated and extended in legislation modelled on the new Australian section.

Arguments for and against reform

11. The following points were addressed by the Law Reform Commission as advantages and disadvantages of legislative reform. The Law Reform Commission concluded that the disadvantages are substantially outweighed by the advantages.

Advantages

- (1) Despite Pepper v Hart, unresolved questions remain. For example, it is uncertain which "other parliamentary materials" aside from Hansard may be used.
- (2) Judicial clarification of the law would be slow, piecemeal and incomplete, whereas legislation would provide a clear, certain and comprehensive code.
- (3) Pepper v Hart is limited in scope since it places emphasis on the second reading speech of the promoter of the Bill. Yet there is a trend in common law jurisdictions towards further relaxation of the exclusionary rules. Legislation would give the courts a clearly defined and controlled discretion to consult a wider range of materials relevant to the legislative history of an Ordinance, including

explanatory memoranda.

- (4) Legislation would make public the relaxation of the exclusionary rules and its benefits.
- (5) Legislation would specify extrinsic materials that are prima facie reliable and omit extrinsic materials that are generally unreliable.
- (6) Legislation would clarify the use of extrinsic materials in the interpretation of treaties and deal with other matters left unresolved by Pepper v Hart, such as the weight to be given to extrinsic aids other than Hansard.
- (7) Legislation would reinforce the use of the purposive approach to interpretation enjoined by section 19 of the Ordinance since the statutory purpose can often only be discovered by consulting reliable extrinsic materials.
- (8) A single Ordinance clearly explaining the use of extrinsic materials would be preferable to reliance on a number of judgments, many of which would come from overseas.

Disadvantages

- (1) Pepper v Hart might encourage an executive-led government to introduce deliberately ambiguous legislation accompanied by a clear ministerial statement which would outweigh the words of the Ordinance. Such hypothesis, however, does not appear to present a valid objection since -
 - (a) Pepper v Hart changed the law to permit such theoretical executive action without the need for legislation; and
 - (b) under established principles of interpretation (preserved by the proposed amendments), the words of deliberately ambiguous legislation would have to be reasonably capable of bearing the meaning purported to be

given them by the ministerial statement.

- (2) There is a philosophical difficulty in the Hong Kong context, where the government does not have a majority in the legislature. This means that the intention of the government, as promoter of a Bill, may not be the same as the intention of the legislature that passes it. However, even where a government has a majority in a legislature, the individual members of that majority may not have a common intention or understanding. The important point is that, even where a government does not have a majority, a majority vote in the legislature legitimises what those responsible for framing the Ordinance intended.
- (3) Developments in the law on the admissibility of extrinsic aids are continuing and it may be preferable to allow developments in the courts to continue before imposing legislation which could lead to rigidity. It is considered that this objection is met by all of the advantages specified above. If rigidity occurs it can be rectified relatively quickly by amendment. The courts are inherently constrained by the issues which happen to come before them in individual cases and are unable to conduct an overall consultative and representative review of the subject such as that undertaken by the Law Reform Commission.
- (4) Judges tend to resist attempts by the legislature to dictate how they should carry out their function of interpreting legislation. Thus legislative reform might be ineffective. The answer to this objection is that the courts are bound to apply the law whether it arises from binding precedent or a relevant statutory provision. As noted above, the Judiciary was consulted by the Law Reform Commission in the course of preparing its report.
- (5) To broaden the range of admissible materials and the circumstances in which they can be used may result in the expenditure of more time and legal costs. This is not a crucial objection if the material is indeed helpful. Pepper v Hart has already

broadened the range of admissible materials but, importantly, without clarifying (as legislation would) the circumstances in which they may be used. In Australia, search is assisted by an italicised note on the published Act referring to the date of the second reading debate (this is adopted in the proposed amendments). Australia and England require counsel intending to use Hansard to give notice to the court and to the other side. There is a costs deterrent to the introduction of unnecessary material.

12. Following its consideration of the advantages and disadvantages of legislative reform, and noting in particular the incompleteness, complexity and uncertainty of the common law position, the Law Reform Commission concluded that it would be desirable to give coherence to the common law principles and developments and to provide clear legislative guidelines for the use of extrinsic material.

DETAILED RECOMMENDATIONS

Principal amendments

13. A summary of the legislative amendments recommended by the Law Reform Commission is set out below.

14. The main recommendation of the Law Reform Commission was that legislative criteria for the use of extrinsic material in statutory interpretation be provided in a new section 19A of the Ordinance based on the new Australian section.

15. The proposed new section 19A would provide that, where a provision of an Ordinance is ambiguous or obscure, or its ordinary meaning in the context in which it is used leads to a result that is absurd or unreasonable, then material not forming part of the Ordinance but which is capable of assisting in ascertaining the meaning of the provision ("extrinsic material"), may be considered for the purpose of ascertaining the meaning of the provision.

16. The proposed new section 19A would then set out a list of items of extrinsic material that may be considered in the interpretation of a provision of an Ordinance. These include -

- (a) matters apart from the Ordinance set out in any document containing the text of the Ordinance and printed by the Government Printer;
- (b) any relevant report of a body in Hong Kong such as the Law Reform Commission published before the enactment of the provision;
- (c) any relevant report of a body similar to the Law Reform Commission outside Hong Kong where the provision was modelled on legislation from the place implementing any recommendations of the report;
- (d) any relevant treaty or other international agreement referred to in the Ordinance or in any material listed in section 19A(2);
- (e) any explanatory memorandum to the Bill containing the provision;
- (f) the second reading speech made to the Legislative Council by the presenter of the Bill;
- (g) any relevant report of a committee of the Legislative Council made before the enactment of the provision;
- (h) any document that is declared by the Ordinance to be a relevant document for the purposes of section 19A;
- (i) any relevant material in the official record of proceedings in the Legislative

Council.

17. The records of proceedings in the Legislative Council would be admissible in court for the purposes of section 19A.

18. The proposed new section 19A would enable a note to be added to a provision of an Ordinance stating when the Bill was read the second time.

19. It would be provided that the weight to be attached to extrinsic material is not to be more than is appropriate in the circumstances.

20. The proposed new section 19A would apply to all Ordinances, including those in operation before the commencement of section 19A.

21. It would be made clear that the proposed new section 19A is in addition to and not in derogation of the common law applicable to statutory interpretation, in particular any rule of law relating to the use of extrinsic material, and any rule of law that a provision of an Ordinance which is ambiguous or obscure is not to be interpreted as derogating from the rights or privileges of individuals.

Associated amendments

22. Section 18(1) of the Ordinance would also be amended to enable a note to be added to a provision of an Ordinance referring to any provision of law or report of any law reform commission or similar body, whether in Hong Kong or not, or to any treaty, on which such provision it is based.

23. Section 18(2) and (3) of the Ordinance would be amended to enable references added under section 18(1), and marginal notes or section headings, respectively to be used in interpretation where section 19A applies.

PUBLIC CONSULTATION

24. The Law Reform Commission consulted the Bar Association, the Law Society, the Judiciary, the Legislative Council Secretariat, and members of the Legislative Council's Panel on the Administration of Justice and Legal Services.

25. Comments on the Administration's proposed amendments have been sought from the Bar Association, the Law Society, a law professor of the University of Hong Kong, and the Judiciary Administrator.

26. Of these only the Bar Association has expressed reservations. In its view it is too early to decide whether the principles in Pepper v Hart should be adapted for use in Hong Kong where the promoters of Bills are not accountable to the legislature. It considers that we should wait a few years to see how the new constitutional arrangements work.

27. In fact, the government, as promoter of Bills, is accountable to the Legislative Council under Article 64 of the Basic Law, and a majority vote in the legislature legitimises the intention of those who frame Bills. Furthermore the common law principles of statutory interpretation previously applied in Hong Kong - including those in Pepper v Hart - continue to apply in the Hong Kong SAR further to Articles 8, 18 and 160 of the Basic Law. Accordingly, there is no reason to delay the proposed amendments.

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