

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.

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