

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*

From the President

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.....".

The Law Society of Hong Kong

From the President

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)

From the President

- 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:

The Law Society of Hong Kong

From the President

“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