

**立法會**  
**Legislative Council**

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**Paper for the House Committee meeting  
on 19 May 2000**

**Report of the Bills Committee on  
Statute Law (Miscellaneous Provisions) Bill 1999**

**Purpose**

This paper reports on the deliberations of the Bills Committee on the Statute Law (Miscellaneous Provisions) Bill 1999 (the Bill).

**The Bill**

2. The Bill seeks to make a miscellany of amendments to various ordinances and to clarify the status of subsidiary legislation not duly laid on the table of the Legislative Council ("LegCo").

**The Bills Committee**

3. At the House Committee meeting on 25 June 1999, members agreed that a Bills Committee be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

4. Under the chairmanship of Hon Albert HO Chun-yan, the Bills Committee has held three meetings with the Administration to discuss the Bill.

**Deliberations of the Bills Committee**

5. The Bills Committee has raised queries and sought further information on the general principles and major provisions of the Bill. The main deliberations of the Bills Committee are summarised below.

Nomenclature of the Bill's title

6. The Bills Committee notes that in the past, minor technical amendments to effect improvements to various ordinances are incorporated in an omnibus bill under the title of "Administration of Justice (Miscellaneous Provisions) Bill", instead of a "Statute Law (Miscellaneous Provisions) Bill". Members express concern that

although the title of an ordinance had no legal effect, to now name a Bill of a similar nature differently may cause confusion.

7. The Administration has informed the Bills Committee that the Special Committee on Criminal Law of the Hong Kong Bar Association had made submissions in 1995 to the then Bills Committee on Administration of Justice (Miscellaneous Provisions) Bill 1995 pointing out that the title of that Bill was a misnomer because many of the amendments proposed had "no readily discernible relationship to the administration of justice matters". LegCo Members at that time took the view that where a bill covered matters outside the administration of justice, such a title was misleading. The Administration therefore gave an omnibus bill of a similar nature the name of "Law Reform (Miscellaneous Provisions and Minor Amendments) Bill in 1996. For the current legislative exercise, it has been decided that the present title of the Bill should be adopted for the following reasons -

- (a) the present Bill contains minor and non-controversial amendments as well as some relatively more important or controversial amendments i.e. abolition of the "year and a day rule" in homicide but which do not warrant a separate bill;
- (b) the present Bill covers matters which are not strictly related to law reform; and
- (c) the Bill contains deeming provisions relating to the tabling of subsidiary legislation at LegCo which are not amendments to primary legislation.

The Administration has further advised that similar titles have been used in other countries such as Canada and Australia; and for the sake of consistency, the title would likely be adopted for bills of this nature in the future.

Provisions relating to further sentence while a detention order, supervision order or recall order is in force

8. Members note that at present there are no statutory provisions governing what happens to an existing detention order, supervision order or recall order when a detainee in a Detention Centre, or a Drug Addiction Treatment Centre, or a Training Centre, is further sentenced to one or other of the centres for a separate offence. It is therefore proposed that section 7(1) of the Detention Centres Ordinance (Cap. 239), section 6A of the Drug Addiction Treatment Centres Ordinance (Cap. 244), and section 5A of the Training Centres Ordinance (Cap. 280) be amended to clarify the appropriate treatment in dealing with these outstanding orders.

9. The Administration has advised that the proposed section 6A(2)(c) of the Drug Addiction Treatment Centres Ordinance and the proposed section 5A(3) of the Training Centres Ordinance seek to empower the Boards of Review established under the Drug Addiction Treatment Centres Regulations and the Training Centres Regulations to deal with a recall order or a supervision order i.e. to decide whether a

recall order or a supervision order may be waived, suspended or treated as lapsed.

10. Members observe that while the Commissioner of Correctional Services (the Commissioner) is expressly empowered to vary or cancel a supervision order at any time under section 5(2) of the Drug Addiction Treatment Centres Ordinance, the proposed section 5A(3)(a)(ii) of the Training Centres Ordinance provides for the Board of Review to waive or suspend such a supervision order. Members are concerned that these empowering provisions may conflict with the power of the Commissioner under the Drug Addiction Treatment Centres Ordinance and the Training Centres Ordinance, and will be inconsistent with the functions of the Boards of Reviews which are only tasked under the respective Regulations to make recommendations to the Commissioner.

11. Members suggest that either corresponding amendments should be made to the respective Regulations in order to avoid confusion, or that the Commissioner should be empowered to deal with these parallel orders instead of empowering the Boards of Review as originally proposed by the Administration. After considering members' views, the Administration has agreed to empower the Commissioner to decide on the treatment of parallel orders under Part II of the Bill and will move Committee stage amendments (CSAs) to such effect.

#### Discharge of encumbered

12. The Bills Committee notes that there are circumstances under which the sale or development of the property concerned will be hindered when a mortgagor of an interest in land is unable to repay even an insignificant amount of the mortgage money if the mortgagee cannot be found, or the mortgage documents are missing. It is proposed that amendments be made to the Conveyancing and Property Ordinance (Cap. 219) to allow payment into court under these circumstances of the amount outstanding under the mortgage, subsequent to which the court may make an order to declare the property free from that particular encumbrance.

13. In view of the policy implications of the proposed amendments, the Bills Committee had suggested that the Hong Kong Conveyancing and Property Law Association Limited ("the Association") be consulted. The Administration subsequently informed the Bills Committee that the Association was consulted and it expressed support for the proposed amendments. The Association has further proposed that the relief be extended to cases of untraceable mortgage to situations where no sale or exchange is involved, where the property owner only wishes to further mortgage or charge the subject property to secure fresh finance (the Association's further proposal). The Law Society of Hong Kong ("the Law Society") has also indicated support for the Association's further proposal.

14. The Administration has advised that there may be merit in the Association's further proposal because -

- (a) the basic criteria for the amendments as proposed in the Bill and as proposed by the Association are the same, namely a mortgagee cannot be traced and the mortgage cannot be discharged even when the owner is ready and willing to make payment;
- (b) the court will, based on the circumstances of individual cases, decide whether it is appropriate for the order to be made and on what conditions; it is up to an applicant to satisfy the court that an order is appropriate;
- (c) there is no reason to grant relief or withhold the same because of what the owner proposes to do with the property; and
- (d) although the relief is not provided for in section 50 of the United Kingdom Law of Property Act, 1925, on which the proposed amendments are based, such has been provided for in the relevant legislation of Australia and New Zealand which were enacted more recently.

15. Members generally consider the Association's further proposal acceptable and note that the Administration would move CSAs to such effect. At members' suggestion, the Administration has also agreed to amend clause 7 (b)(2) to the effect that the court is to, upon payment of the amount in question, make the requisite declaration.

16. The Administration has further informed members that the Law Society has also made proposals to allow the costs of the application to be deducted from the amount to be paid into court; and to add a savings provision for the right of a mortgagee over New Territories land under section 14 of the Limitation Ordinance (Cap. 347).

17. Members note that while the Administration is prepared to adopt the Law Society's proposal in relation to the provision for costs of the application, it is of the view that the proposed savings provision is unnecessary and is outside the scope of clauses 6 and 7 of the Bill for the following reasons -

- (a) any current owner of New Territories land who has derived title from a mortgagee in possession has done so by way of operation of law and will not be affected by the present proposed amendments. As a matter of practice, the mortgagee in possession must have either asserted and established his title upon default by the mortgagor or successfully established the same pursuant to section 14 of the Limitation Ordinance before he can pass on his title, and every party in the chain of title from the mortgagee in possession down to the current owner would have no

reason for wanting to vacate the title of the mortgagee in possession;

- (b) the only parties who may want to vacate the title of the mortgagee in possession would be the original mortgagor whose title had been dispossessed by the mortgagee in possession pursuant to the operation of section 14 of the Limitation Ordinance and those who seek to claim under his interest. They will be barred from doing so by section 14;
- (c) if the mortgagee in possession is only theoretically so who cannot in fact be found and the statutory limitation period has not yet expired, a mortgagor who is willing to make repayment of the mortgage should be entitled to do so and falls within our proposed amendments; and
- (d) if the mortgagee who is theoretically in possession deliberately stays inaccessible to the mortgagor for repayment of the mortgage, and assigns his interest, then the scenario and the issues involved are outside the scope of the present amendment.

However, the Administrations has undertaken to consider the issues in greater detail and deal with them in another exercise if appropriate.

18. Members are generally in support of the Administration's views and note that the Administration would move CSAs to allow the costs of the application to be deducted from the amount to be paid into the court.

19. Members note that the Administration has also proposed to additionally define the court as "the Court of First Instance unless the party to the application submits to the jurisdiction of the District Court" in the draft CSAs to be proposed. A member queries whether it is necessary to do so as the District Court will in any event be endowed with jurisdiction over transactions involving properties with rateable value not exceeding a specified amount. The Administration has responded that the object of the proposed definition is to provide flexibility in case the complexity of the issues involves in any particular application require determination by the Court of First Instance. In the absence of the proposed definition, the venue for any particular application may have to depend solely on the rateable value of the property in question.

#### Abrogation of the "Year and a Day Rule"

20. Members note that in light of the medical and technological advances in treatment and life support made since the rule was first established, the Law Reform Commission recommended the abolition of the "year and a day" rule in its report published in June 1997. It is therefore proposed that the Offences Against the Person Ordinance (Cap. 212) be amended to provide for the abolition of the rule.

21. While members are in support of the proposed abolition, they have discussed as to whether the drafting of the proposed section 33C(2) i.e. the phrase "which caused

the death" is appropriate. The Administration has explained that the proposed section 33C(2) is a savings provision which provides for the continued application of the rule referred to in subsection (1) to a case whether the act or omission which caused the death occurred before the commencement of the Statute Law (Miscellaneous Provisions) Ordinance 1999. It is of the view that the proposed section 33C(2) as presently worded is appropriate because the act or omission in question must be proved to have caused the death before the presumption in subsection (1) arises. However, it is only necessary to prove that there is a *prima facie* case that the act or omission did cause the death before a murder charge can be laid. If the act or omission has not caused the death, there will be no need for any party to rely on the presumption.

22. Having considered the Administration's explanation, members are satisfied that the legislative intent of the proposed section 33C(2) is clear, that is, to preserve the application of the rule in respect of any charge against an act occurred before the enactment of the proposed provision which, *prima facie*, did cause the death.

Conspiracy committed before commencement of Crimes (Amendment) Ordinance 1996

23. Members note that section 159E of the Crimes Ordinance (Cap. 200) is ambiguous as to whether acts of conspiracy committed before the commencement of the section on 2 August 1996 for which proceedings have not been started may be prosecuted. It is proposed that savings amendments be made to remove the ambiguity and ensure that such acts remain an offence and subject to prosecution.

24. Members query why the savings amendments are necessary because -

- (a) the Court of Appeal has recently held in *HKSAR v CHAN Pun-chung and Another* M.A. 364/1999 that section 159E(7)(b) of the Crimes Ordinance should not be construed as providing for the only situation in which proceedings for a conspiracy at common law could be commenced after 2 August 1996; and
- (b) it appears that section 23(c) and (d) of the Interpretation and General Clauses Ordinance (Cap. 1) has already provided for the continuous effect of any right, privilege, obligations or liability acquired, accrued or incurred under any Ordinance so repealed, and of any penalty, forfeiture or punishment incurred in respect of any offence committed against any Ordinance so repealed.

25. The Administration has advised that the provision in the English legislation, on which the statute law relating to conspiracy was based, provides for retrospectivity but such provision was omitted in the Hong Kong legislation. Although the Court of Appeal has held that the legislation is not intended to decriminalise certain forms of conspiracy, but to put the crime of conspiracy on a statutory footing, it accepted that there was an error in drafting because of the omission. The Administration is

therefore of the view that the savings amendments are necessary on the grounds that -

- (a) it is undesirable that the true legislative intent at present can only be discerned by referencing to the existing provision, together with the judgement of the Court of Appeal; and
- (b) section 23 of the Interpretation and General Clauses Ordinance is of minimal assistance in this regard because it deals specifically with the repeal of an Ordinance by another Ordinance as opposed to the instant situation of the common law conspiracies being replaced by statute conspiracies.

26. Members note that the appellants in *HKSAR v CHAN Pun-chung and Another* M.A. 364/1999 have applied to the Court of Final Appeal for leave to appeal. They express concern that enactment of the proposed amendments will have an impact on the appellants' right to appeal, and ask the Administration to consider removing the proposed amendments from the Bill. In response to members' suggestion, the Administration has decided to move a CSA to delete clause 14 from the Bill on the grounds that the outcome of the relevant application to the Court of Final Appeal for leave to appeal will not be available until 19 May 2000, and it will not be appropriate to withhold the whole Bill because of that one item.

#### References to former or retired judge

27. Members note that although it is not its policy intent, the Adaptation of Laws (Courts and Tribunals) Ordinance, 25 of 1998, has excluded persons who are formerly judges of the High Court (i.e. those who had retired before 1 July 1997) from serving on the Post-Release Supervision Board and the Long-term Prison Sentences Review Board. It is therefore proposed to add a new section 3A (References to former or retired judge) to the Interpretation and General Clauses Ordinance (Cap. 1) in order to reflect more accurately the policy intent.

28. Some members ask whether it is more appropriate to amend the respective pieces of legislation rather than the Interpretation and General Clauses Ordinance if the number of ordinances with references to judges of courts in Hong Kong before 1 July 1997 is small. The Administration has responded that although only three Ordinances have been identified to date which refer to judges of courts in Hong Kong before 1 July 1997, there is no definitive way to describe a person who has been a judge and there may be other ordinances which in effect refer to judges of courts in Hong Kong before 1 July 1997. The Administration is of the view that amendment to the Interpretation and General Clauses Ordinance is more appropriate because it is the policy intent and a matter of general principle that persons who were qualified to perform specific duties, or be eligible to do so, on the strength of their having been judges of courts in Hong Kong before 1 July 1997, as may be specified in respective pieces of ordinances, should continue to be so qualified or so eligible.

### Delegation of the Director of Audit's power

29. Members note that amendments are proposed to the Audit Ordinance (Cap.122) to empower the Director of Audit to delegate to directorate officers of the Audit Commission (in addition to the Director) the duties or powers to certify and report on certain accounts. A member queries why the Director has not been so delegated in the first place.

30. The Administration has explained that when the Audit Ordinance was enacted in 1971, the accounts of the Government and various funds were much less complex than those of the present day. It was considered appropriate at that time for the Director to personally certify all the accounts. Presently the Director has to personally certify over 70 accounts (in 1999-2000) which vary in size and complexity. In order to relieve the Director's workload for his performance of other tasks including value-for-money audits and other administrative functions in the Audit Commission, it is considered necessary to empower the Director to delegate the certifying and reporting of the less complicated accounts to his directorate officers. The Administration has confirmed that such delegation is in line with international practices.

31. Members note that the proposed Schedule 1 sets out a list of accounts and funds subject to audit by the Director and the proposed Schedule 2 specifies the directorate officers in the Audit Commission to whom the Director may delegate his duties or powers to certify certain accounts. Members express concern that the power for the Financial Secretary and the Director to amend the proposed Schedules 1 and 2 respectively will be unchecked. The Administration has explained that the scope of amendments to Schedules 1 and 2 is prescribed by proposed provisions in the Audit Ordinance. While only those moneys which are in the custody of public officers as prescribed in clause 18 of the Bill may be included in Schedule 1, only public officers as prescribed in clause 20 of the Bill may be included in Schedule 2. The Administration has further pointed out that any amendment by way of notice published in the gazette by any designated officer is subject to negative vetting by LegCo.

### Subsidiary legislation deemed laid before LegCo

32. Members note that some items of subsidiary legislation were inadvertently not laid before LegCo, contrary to section 34 of the Interpretation and General Clauses Ordinance and a Subcommittee was formed under the House Committee to study issues relating to the tabling of subsidiary legislation in LegCo. While the Subcommittee has taken the preliminary view that the tabling requirement should not affect the effect of subsidiary legislation, it is prepared to further consider the Administration's proposal to clarify the matter by way of deeming provisions in principal legislation, given the conflicting but equally respectable views on the issue of legal effect. The Administration's proposal is to enact provisions to deem those items of subsidiary legislation as having been duly laid. Members further note that an indemnity provision has been included to indemnify all persons against any



possible liability for the common law offence of contempt of statute.

33. A member expresses concern about the possible implication of the Administration's proposal on the Hong Kong Bill of Rights. The Administration has pointed out that clause 47(1) of the Bill has already provided that the deemed laying shall be subject to Article 12 of the Hong Kong Bill of Rights as set out in Part II of the Hong Kong Bill of Rights Ordinance (Cap 383). This means that the provision does not create retrospective offences or increase penalties with retrospective effect. The Administration has further advised that there are established authorities to the effect that unless the subsidiary legislation is invalid on its face, or the invalidity is patent, they will be presumed valid unless struck down by a court of competent jurisdiction. Any act done pursuant to the subsidiary legislation was therefore done pursuant to valid law at that time. The deemed laying will only clarify the status once and for all, which is the same before and after enactment of the deeming provisions, but will not affect the nature of any act done.

34. The Bills Committee is of the view that although LegCo Members and the Administration have taken different views on the legal effect of the subsidiary legislation which were not laid before LegCo, it acknowledges that it is a matter of legal technicality and the Administration's proposal seeks to settle any doubt on the legal effect of the subsidiary legislation. The Bills Committee therefore does not object to the Administration's proposal.

### **Committee stage amendments**

35. Apart from the CSAs mentioned above, the Administration will introduce further CSAs to Schedules 2 and 3 of the Bill to add three more amendments of enactments and to repeal a piece of subsidiary legislation respectively. The CSAs proposed by the Administration are in **Appendix II**. The Bills Committee has not proposed any amendments.

### **Recommendation**

36. The Bills Committee recommends that, subject to the CSAs to be moved by the Administration, the Second Reading debate on the Bill be resumed on 31 May 2000.

### **Advice sought**

37. Members are invited to support the recommendation of the Bills Committee in paragraph 36 above.

Legislative Council Secretariat

18 May 2000

**Bills Committee on Statute Law (Miscellaneous Provisions) Bill 1999**

**Membership List**

Hon Albert HO Chun-yan (Chairman)  
Hon Martin LEE Chu-ming, SC, JP  
Hon Margaret NG  
Hon Andrew WONG Wang-fat, JP  
Hon Jasper TSANG Yok-sing, JP  
Hon Ambrose LAU Hon-chuen, JP

Total : 6 members