

立法會

Legislative Council

LC Paper No. LS 124/99-00

Paper for the House Committee Meeting of the Legislative Council on 28 April 2000

Legal Service Division Further Report on Adaptation of Laws (No. 27) Bill 1999

Members will recall that at the House Committee meeting held on 24 September 1999, Members agreed to adjourn decision on the Bill pending our clarification with the Administration of certain legal and drafting points relating to the Bill. Our last report was circulated to Members vide LC Paper No. LS253/98-99. We have just received the Administration's latest reply and will set out below the relevant questions and answers.

Sections 3 and 4 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) (“LC(P&P)O”)

Questions

Is section 3 consistent with Article 77 of the Basic Law (“BL”)? Article 77 provides that Members of the LegCo are immune from legal action in respect of their statements at meeting of the Council. Section 3 offers wider protection in the sense that it covers freedom of speech and debate in the Council as well as proceedings before a committee.

Is section 4 consistent with Article 77 of BL? Article 77 covers only statements made by Members at meetings of the Council. Section 4 offers wider protection in the sense that it covers words spoken or written in a report to the Council or a committee.

Answer

Article 77 provides that Members of the LegCo are immune from legal action in respect of their statements at meetings of the Council. Sections 3 and 4 of LC(P&P)O seem to offer wider protection as section 3 covers freedom of speech and debate in the Council as well as proceedings before a committee while section 4 covers words spoken or written in a report to the Council or a committee. Adopting a purposive construction of BL77, the Administration considers that it intends to maintain the privilege of freedom of speech available to LegCo Members under

LC(P&P)O. Given that there is no prohibition in BL against freedom of speech for Members in LegCo committee meetings and immunity from proceedings before a committee for words written in a report to LegCo, the HKSAR is empowered to fill such lacuna by conferring such privileges on LegCo Members in legislation. The Administration is therefore of the view that sections 3 and 4 of LC(P&P)O are consistent with BL77.

Comment

We are satisfied that the Administration's response is legally in order.

Section 5 of LC(P&P)O

Question

Is section 5 consistent with Article 78 of BL? Article 78 protects Members from being arrested when attending or on their way to a meeting of the Council. Under section 5, a Member shall not be liable to arrest for any civil debt (except a debt the contravention of which constitutes a criminal offence) whilst going to, attending at or returning from a sitting of the Council or a committee; a Member shall not be liable to arrest for any criminal offence whilst attending at a sitting of the Council or a committee. Thus, section 5 makes a distinction between the situation in which a Member has incurred civil liability and a situation in which a Member is liable to criminal offence and offers different protection to a Member respectively. Article 78 does not make such a distinction.

Answer

Article 78 provides that LegCo Members are not subject to arrest when attending or on their way to a meeting of the Council. Section 5 of LC(P&P)O also guarantees freedom from arrest for Members but draws a distinction between civil and criminal liability. The immunity from arrest for Members in respect of criminal liability is narrower in scope as compared with BL78. However, it does not render section 5 inconsistent with BL78 since LegCo Members can rely on BL78 for protection against arrest where necessary. Similarly, the Administration sees no BL problems with the existing section 5(a) which provides, inter alia, that LegCo Members shall not be arrested for civil debt when returning from a LegCo sitting.

Comment

We are satisfied that the Administration's response is legally in order.

Section 6 of LC(P&P)O

Question

Article 62 of BL provides that the Government of the HKSAR has the power to designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government. Section 6(2) refers to “public officer designated by the Governor”. Is it necessary to amend section 6(2) to read “public officer designated by the Government”?

Answer

BL62(6) provides that the Government of the HKSAR has power to designate officials to sit in on the LegCo meetings. Section 6(2) of LC(P&P)O provides that inter alia, any public officer designated by the CE for the purpose of attending sittings of the LegCo shall not be required to attend as a witness in any civil proceedings on a day when the Council is sitting. The question is whether it is necessary to amend section 6(2) to read “public officer designated by the Government”. The Administration does not think that it is necessary. In the Administration’s view, although BL62 refers to the Government of the HKSAR rather than the CE, all the powers stipulated therein could be exercised by the CE since he is the head of the Government of the HKSAR (BL60). The CE could make any designation of officials on behalf of the HKSAR Government.

Comment

We are satisfied that the Administration's response is legally in order.

Section 9 of LC(P&P)O

Question

Is section 9 consistent with Article 73 of BL? Article 73(10) provides that the LegCo shall exercise the powers and functions in paragraphs (1) and (9) and summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence. Section 9 provides that the Council or its standing committee may, subject to sections 13 and 14, order any person to attend before the Council or before such committee and to give evidence or to produce any paper, book, record or document in the possession or under the control of such person. Article 73 provides for a scope within which the LegCo may summon persons concerned to testify or give evidence. Section 9(1) however does not provide for a similar scope within which the Council or its standing committee may order attendance of witnesses. In relation to the nature of evidence, Article 73(10) empowers the LegCo to summon persons concerned to testify or give evidence. Section 9 however clearly specifies the kind of evidence a witness is required to produce. The kind of evidence to be produced under Article 73 is wider than that under section 9. In relation to the source of the evidence, Article 73 does not limit

the witness to produce evidence under his control. To the contrary, section 9(1) only requires a witness to produce specified evidence in his possession or under his control. In relation to the subject which may exercise the power to summon, only the LegCo is vested with the power to summon under Article 73. To the contrary, the Council or its standing committee is vested with the power to summon under section 9(1).

Answer

Article 73(10) provides that the LegCo shall summon, as required when exercising its powers and functions under BL73, persons concerned to testify or give evidence. Section 9 of LC(P&P)O provides that the LegCo or its committees may, subject to sections 13 and 14, order any person to attend before the Council or before such committees and to give evidence or to produce any paper, book, record or document in the possession or under the control of such person. The Administration's views on the various areas in respect of section 9 are –

- (a) the scope: BL73 sets out the powers and functions of LegCo in paragraphs (1) to (9) and provides in paragraph (10) that LegCo may summon witnesses as required when exercising such functions. In the Administration's view, it is unnecessary for section 9 to repeat the scope of functions stipulated in BL73(1) to (9) because the interpretation of section 9 is guided by BL73 and the power in section 9 is subject to BL73(1) to (9);
- (b) the nature of evidence: while BL73(10) does not specify the kind of evidence that a witness is required to produce to LegCo, it does not mean that section 9 of LC(P&P)O cannot provide for specifics;
- (c) the source of evidence: while BL73(10) does not specify the source of evidence, it is reasonable for section 9 to restrict the production of evidence to that in the possession or under the control of a witness, since it is unrealistic to expect a person to be able to produce evidence that is not in his possession or under his control; and
- (d) the subject: it is consistent with BL73 and open to the HKSAR to empower by legislation LegCo committees to order attendance of witnesses.

Comment

We are satisfied that the Administration's response is legally in order.

Section 12 of LC(P&P)O

Question

The form of warrant needs adaptation. The form as adapted should be included into the loose-leaf edition of the law and given the proper recognition as subsidiary legislation.

Answer

The Administration notes that the word “prescribed” is used in section 12(6) of LC(P&P)O and given the word “prescribed” when used in or with reference to any Ordinance is defined in section 3 of Cap. 1 as “prescribed or provided by that Ordinance or by subsidiary legislation made under that Ordinance”, the Administration agrees it would be appropriate to treat an Order made under section 12(6) of LC(P&P)O as subsidiary legislation, and the Administration will take the necessary action in due course to have the Order made as subsidiary legislation.

Comment

Since the proposed amendment is outside the scope of the adaptation of law exercise, it is agreeable that the necessary action be taken in due course.

Section 14 of LC(P&P)O

Question

Is section 14 consistent with BL? Article 48(11) of BL empowers the Chief Executive to determine, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the LegCo or its committees. Section 14(2) provides that no person, other than a public officer acting with the consent of the Governor, shall before the Council or a committee give any evidence relating to the correspondence concerning military matter or any other matter relating to the security of Hong Kong; or the responsibilities of Her Majesty’s Government in the United Kingdom otherwise than with respect to the administration of Hong Kong by its Government. The scope of evidence that may not be disclosed under Article 48(11) is wider than that under section 14(2). Article 48(11) only applies to government officials or other personnel in charge of government affairs; while section 14(2) applies to everybody except a public officer acting with the consent of the Governor.

Answer

Article 48(11) of BL empowers the Chief Executive to determine, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the LegCo. The Administration considers the two conditions of “security” and “vital public interests” under BL48(11) should be read disjunctively. As to the scope of section 14(2)(ii) in comparison with that of “vital public interests” under BL48(11), the Administration considers the scope of the former is narrower because, as reflected in the report of the sittings of the then Legislative Council passing the Ordinance, the essence of section 14(2) is meant to deal with defence, security or foreign policies which are outside Hong Kong’s jurisdiction. The condition of “vital public interests” under BL48(11), on the other hand, is broader in scope. The Administration also reiterates that the difference in scope between section 14(2)(ii) and BL48(11) does not render section 14 inconsistent with BL48(11). While the Chief Executive can make a

decision as to whether government officials or other personnel in charge of government affairs should testify or give evidence before LegCo in accordance with BL48(11), it does not preclude the granting of privileges and immunities to other persons by legislation through relevant provisions of LC(P&P)O.

Comment

We are satisfied that the Administration's response is legally in order.

Section 15 of LC(P&P)O

The Administration proposes a CSA to the Chinese version of section 15 on the following ground. Clause 17 of the Bill currently proposes that in section 15 of the LC(P&P)O, all references to “立法局”, except for the second last reference, be adapted as “立法會”. Upon further examination of the Bill, the Administration is of the view that the last reference to “立法局” in section 15 of LC(P&P)O should be adapted as “立法局或立法會” instead of simply adapted as “立法會”. This is because prior to 1 July 1997, there had been motions moved by the then LegCo for the purposes of section 15 of LC(P&P)O such as the one moved by the Hon Selina Chow at the meeting on 25 May 1994. In order to put beyond doubt that the usage and practice of the former LegCo as well as the existing LegCo can be preserved, it would be necessary to move a CSA to clause 17 of the Bill to adapt the last reference to “立法局” in section 15 of LC(P&P)O as “立法局或立法會”. No adaptation is considered necessary in the English text for the corresponding reference since “Council” may be interpreted as the legislative body existing before the reunification, the provisional body or the present LegCo.

Comment

We are satisfied that the Administration's response is legally in order.

2. Copies of the correspondence between the Legal Service Division and Administration are available for Members' inspection at the office of the Division.

Conclusion

3. With the proposed CSA to the Chinese version of section 15 of LC(P&P)O, we are satisfied that the legal and drafting aspects of the Bill are in order. Subject to Members' view, the Bill is ready for resumption of Second Reading debate.

Prepared by
Lam Ping-man, Stephen
Assistant Legal Adviser
Legislative Council Secretariat
25 April 2000