

**Ensuring that the HKSARG abides by the law  
and implement laws already in force**

Article 64 of the Basic Law provides (in part) that the 'Government of the Hong Kong Special Administration Region must abide by the law .... it shall implement laws passed by the Council and already in force.' This paper explains the actions taken by the Department of Justice to ensure that these obligations are fulfilled.

2. The Government, like all others in Hong Kong, has a duty to abide by the law. If it fails to do so, legal remedies are available. Article 35 of the Basic Law expressly provides that Hong Kong residents shall have the right to institute court proceedings in the courts against the acts of the executive authorities and their personnel. In fact, as a public authority, the Government is subject to far greater legal constraints than persons in the private sector, since it is subject to administrative law remedies. Decisions that, if made in the public sector, could not be challenged may, if made by the Government, be challenged as being irrational or procedurally improper. Proceedings by way of judicial review can be brought and, if successful, can lead to a decision being set aside. In addition, any Government official who fails to fulfil a duty that is imposed on him, can be ordered by the court to do so. In order to enforce the law, the courts have powers to grant remedies, including injunctions, against government officials, and to punish them for contempt of court.

3. It must be readily apparent that the Government is subject to the rule of law by virtue of the number of proceedings that are brought against it. In 1998, for example, civil proceedings were brought against the Government in 947 cases.

## **Civil Division**

4. It is the duty of the Department of Justice, and its Civil Division in particular, to give legal advice to Government bureaux and departments to ensure that they abide by the law in all their actions. In 1998, a total of 13,026 pieces of advice were provided to those bureaux and departments on civil law issues.

5. These pieces of advice address a wide range of issues, and cover all aspects of government work. Those issues include whether a desired course of action can lawfully be undertaken at present, or whether legislation would be needed to authorise it. They include advice on the procedural steps that must be taken, and the factors that must, or must not, be taken into account before an administrative decision can properly be made. They include advice as to the duties that must be performed by government officials.

6. Advice is given not only in response to specific requests but, also in a pro-active manner. For example, following the court decision in Caltex Oil Hong Kong v Governor in Council[1995]1 HKC 80, the Department of Justice advised bureaux that they must change their procedures in respect of appeals against administrative decisions in order to ensure that this decision is complied with. As a result, interested parties are now assured of adequate opportunities to properly present their objections to decisions that are being appealed to the Chief Executive in Council.

7. Civil Division also assists in the preparation by bureaux and departments of circulars and booklets explaining the law in certain areas e.g. booklets issued by the Immigration Department. These circulars and booklets help members of the public understand their rights, and therefore help to ensure the law is properly implemented.

8. From time to time, counsel in Civil Division give lectures, or speak at seminars, for the benefit of civil servants e.g. lectures on aspects of administrative law. This helps officials to understand how to make administrative decisions in accordance with the law.

### **Prosecutions Division**

9. In respect of criminal matters, the Department of Justice must abide by Article 63 of the Basic Law. This provides that the Department of Justice of the Hong Kong Special Administrative Region shall control prosecutions, free from any interference.

10. The Department of Justice has committed itself unreservedly to the notion of prosecutorial independence as enshrined in Article 63 of the Basic Law. It has at all times ensured that those suspected of crime are treated fairly and in accordance with established criteria. It has upheld the right of the citizen not to be placed upon trial in the absence of a proper evidential foundation.

11. Prosecutors have a vital role to play in protecting and advancing the rule of law. Prosecutions Division has therefore set great store by training, professionalism and leadership. The programme of training, reform and modernisation within the Prosecutions Division is bearing fruit in terms of greater skills, higher standards and increased professionalism amongst prosecutors. That, in turn, has raised the quality of the service that prosecutors provide to others in government. So also has the creation of a series of criminal law policy coordinators who offer a pool of expert and consistent advice to other prosecutors and to law enforcement agencies. In 1998, prosecutors gave 13,675 advices to police and other enforcement officials.

12. The Prosecutions Division in 1998 provided 132 lectures and mock trials to other governmental agencies as part of a determined campaign to raise standards amongst all those concerned with the

enforcement of the criminal law in Hong Kong. Prosecutors have done their utmost to ensure that investigative powers are properly understood and exercised, that proper procedures are followed, and that the core concepts of criminal law and evidence are adhered to. Government Counsel themselves in 1998 prosecuted a total 3,828 cases from the magistrates courts up to the Court of Final Appeal. They discharged their duties in accordance with the common law tradition, namely, with professionalism, fairness and firmness.

13. The Department of Justice sets great store by transparency. In 1998 the 'Prosecution Policy' booklet was published. Some 10,300 copies have been issued. This explains not only to others in government, but also to the public at large, the policies, principles and practices of the prosecuting authority. Through openness of this kind comes understanding. If the public is aware of these matters then that, in turn, is good for the rule of law.

14. Appeals to the Court of Final Appeal have increased the appellate work of Prosecutions Division. Whereas in the 21/2 years prior to reunification there were 40 criminal cases from Hong Kong to the Privy Council, in the first 18 months of its operation there were 85 CFA and CFA-related cases.

15. To meet this challenge, and to ensure that the CFA is serviced to the highest possible standard in criminal matters, a dedicated team of prosecutors has been set in place. This team ensures that CFA cases are properly prepared, that correct procedures are followed, and that prosecutors are fully advised and trained in this new area of responsibility. This team has been successful thus far in meeting its objectives and that is good for the development of the common law in this jurisdiction.

## **Legal Policy Division**

16. The Legal Policy Division plays a key role in ensuring that the Government abides by the Basic Law and, in particular, by its human rights provisions. That division not only responds to request for Basic Law advice from bureaux and departments, but ensures that the Basic Law implications of all papers submitted to the Executive Council are thoroughly considered.

17. In 1999, counsel in Legal Policy Division gave 242 pieces advice in respect of human rights issues and 208 pieces of advice in respect of other aspects of the Basic Law. Advice on human rights issues is informed by the opinions of the United Nations treaty monitoring bodies, and Legal Policy Division plays a key role in preparing reports to those bodies on the implementation in Hong Kong of relevant treaties.

18. The Legal Policy Division, through its Basic Law Unit, and in conjunction with counsel of other divisions, renders significant assistance to the Administration in promoting greater understanding of the Basic Law within the civil service. For example, jointly with the Civil Service Training and Development Institute and relevant departments, 25 seminars were conducted in 1998 and 8 were organised in the first quarter of 1999. These seminars ranged from a general introduction of the Basic Law to such specialist topics as fundamental rights, economic provisions and external affairs power of the HKSAR under the Basic Law, with reference to Basic Law principles laid down by SAR courts. These seminars have helped civil servants to keep abreast of, and take into full account, the current development of the Basic Law in the performance of their duties.

### **International Law Division**

19. The International Law Division advises on, amongst other things, the circumstances in which assistance may be lawfully given to foreign governments in areas of legal cooperation. For example, the Division advises on whether a foreign national who has been convicted and sentenced in Hong Kong may lawfully be transferred out of Hong Kong to serve his sentence in his home country. And the Division also advises in cases where a request is made by or to Hong Kong for a person to be surrendered to face trial in the place where the crime is alleged to have been committed. Advice is also given in relation to other forms of legal assistance that may be requested, including the obtaining of evidence.

20. Matters such as these are usually provided for in international agreements (either bilateral or multilateral) and are governed by locally enacted implementing legislation, such as the Fugitive Offenders Ordinance (Cap. 503), the Transfer of Sentenced Persons Ordinance (Cap. 513) and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525). In 1998/99 the Mutual Legal Assistance Unit of the International Law Division advised on 205 cases of this general type.

### **Law Drafting Division**

21. The Law Drafting Division is responsible for drafting all government legislation. In doing so, it seeks to ensure that all necessary provisions are included so that the policy proposals underlying the draft legislation can be achieved in a lawful and constitutional way. It also consults other divisions in this respect, e.g. Legal Policy Division will be consulted in respect of any Basic Law implications of the proposals.

### **Implementing laws already in force**

22. The following paragraphs indicate ways in which the Department of Justice ensures that the Hong Kong SARG implements laws passed by the Legislative Council and already in force.

### **Updating the laws of the SAR**

23. In order that government officials and members of the public can have ready access to the laws enacted and amended by the Legislative Council, the loose-leaf edition of the Laws is updated as soon as possible. At present the revised pages are produced about 3 to 5 months after the law is changed. In addition the computerised BLIS edition of the laws (which is available on the Internet) is updated within 1 to 4 weeks after the law is changed. In fact, on the Friday that new or amending laws are Gazetted, an icon is added on the BLIS edition to all provisions that have been amended, so as to alert those reading the laws that the provision may have been changed.

24. These methods of updating the texts of the laws are important steps in assisting everyone to abide by the law.

### **Bulletins and circulars**

25. Various types of circulars and bulletins are issued by the Department of Justice in respect of changes to the law.

26. The Research Unit of the Prosecutions Division issues regular circulars to departmental counsel, court prosecutors and law enforcement officials to inform them of important changes in the criminal law.

27. In respect of legislation for which the Secretary for Justice has the policy carriage, Legal Policy Division issues notices informing parties concerned, both within and outside Government, of the gist and commencement of the legislation. In addition, similar messages are

related to the relevant parties through regular meetings (e.g. Legal Practitioners Liaison Committee) and, where appropriate, meet-the-media sessions. Meetings with relevant bodies and persons on an ad hoc basis (e.g. luncheon talks and conferences, seminars, etc.) are from time to time held to facilitate the delivery of messages.

28. Since March 1998, the Law Drafting Division has produced a monthly New Legislation bulletin. This bulletin is issued to the judiciary and also distributed within the Department of Justice. It was produced initially at the request of the judiciary. Its purpose is to keep the judges up-to-date with new legislation and to draw their attention to features of any new legislation of particular concern to them, such as increases in penalties, appeal provisions and provisions relating to burden of proof.

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