

立法會
Legislative Council

LC Paper No. LS36/01-02

**Paper for the House Committee Meeting
of the Legislative Council
on 4 January 2002**

**Legal Service Division Report on
Adaptation of Laws Bill 2001**

Object of the Bill

To adapt certain Ordinances and subsidiary legislation to bring them into conformity with the Basic Law and with the status of Hong Kong as a Special Administrative Region of the People's Republic of China.

LegCo Brief Reference

2. CSO/ADM CR 1/1/3572/90 (01) issued by the Chief Secretary for Administration's Office and dated 6 December 2001.

Date of First Reading

3. 19 December 2001.

Comments

4. A list of the Ordinances and subsidiary legislation affected by the Bill is at Annex A. A summary of the proposed adaptation is at Annex B.

5. It is observed that most of the proposed amendments are in line with the Adaptation of Laws Programme Guiding Principles and Guideline Glossary of Terms (LC Paper No. CB(2)739/98-99(01)). However, the proposed adaptation of the definition of "Commissioner" in the Prevention of Bribery Ordinance (Cap. 201) (PBO) and the proposed definition of "prescribed officer" in place of "Crown servant" in that Ordinance and the Independent Commission Against Corruption Ordinance (Cap. 204) (ICACO) may be more than terminological changes. The full texts of the definitions are set out in Annex B.

6. The proposed new definition of "Commissioner" in PBO contains words (shown underlined in Annex B) that do not exist in the current definition. They may be

considered as improvements to the extent that they may resolve any ambiguities encountered in the application of the Ordinance.

7. Regarding the new definition of "prescribed officer" in PBO and ICACO, the Legal Service Division is still considering whether the proposed definition would have the effect of altering the scope of the original definition. Our preliminary view is that the proposed approach, i.e. formulating the definition in part in principled terms and in part in the form of a list, is not objectionable in principle, provided that the meaning of the provision is clear. However, the view of the Administration set out in the LegCo Brief does give cause for concern.

8. The Administration has argued in the LegCo Brief that the addition of the five offices listed in paragraph (b) of the new definition is necessary to ensure equal coverage under the new and the old definition, i.e. "Crown servant". The reasons being that the five offices might not readily be accepted as "Government officer" due to their specific and independent nature of operation. No doubt the offices of the Monetary Authority, the Director of audit, Chairman of the Public Service Commission, the Commissioner of ICAC, and the judicial officers do in the exercise of their respective functions operate to various extents independent of the Administration. But to accept the proposed definition may by implication suggest that the operation of other public offices in Hong Kong is non-specific and not independent.

9. The Administration has also suggested that there is doubt as to whether the five offices could be regarded as "offices of emolument under the Government". It has not explained in detail why such doubts exist. It appears that such doubts need not arise if "Government" is understood less narrowly than the Administration's legal advice seems to have done. If the new definition of "prescribed officer" contains only paragraph (a), it is believed that by applying the usual rules of statutory interpretation, one could arrive at the same outcome as under the current definition as long as "Government" is given the same meaning and effect as "the Crown in right of the Government" as construed in accordance with section 2A of the Interpretation and General Clauses Ordinance (Cap. 1).

10. Also to be considered is the possible effect of the new definition on the application of the Ordinances to these five offices prior to the proposed adaptation. If the proposed paragraph (b) serves to avoid doubt on the application of the Ordinances after adaptation, it may unwittingly raise or even fortify any doubt as to whether any of these five offices falls within the definition of "Crown servant".

Public Consultation

11. There has not been any public consultation on the Bill

Consultation with the LegCo Panel

12. No consultation with nay LegCo Panel on the details of the Bill has been carried out.

Conclusion

13. The Legal Service Division has raised the above mentioned matters and other drafting points with the Administration. The written response of the Administration is attached as Annex C. It maintains that the proposed amendments are necessary and appropriate. Members may decide whether a Bills Committee should be formed.

Encl

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31 December 2001

**List of Ordinances and subsidiary legislation
affected by Schedules 1 and 2 of the Adaptation of Laws Bill 2001**

Item No.

1. Prevention of Bribery Ordinance (Cap. 201)
2. Independent Commission Against Corruption Ordinance (Cap. 204) and Independent Commission Against Corruption (Treatment of Detained Persons) Order (Cap. 204 sub. leg.)

**List of Ordinances and subsidiary legislation
affected by Schedule 3 of the Adaptation of Laws Bill 2001**

Item No.

1. Public Service Commission Ordinance (Cap. 93)
2. Audit Ordinance (Cap. 122)
3. Banking Ordinance (Cap. 155)
4. Police Force Ordinance (Cap. 232)
5. Prison Rules (Cap. 234 sub. leg.)
6. Public Order Ordinance (Cap. 245)
7. Peak Tramway By-laws (Cap. 265 sub. leg.)
8. Kowloon-Canton Railway Corporation By-laws (Cap. 372 sub. leg.)
9. Road Traffic Ordinance (Cap. 374)
10. Hong Kong Bill of Rights Ordinance (Cap. 383)
11. Fugitive Offenders Ordinance (Cap. 503)
12. Justices of the Peace Ordinance (Cap. 510)
13. Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)

14. Interception of Communications Ordinance (Cap. 532)*
15. Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541 sub. leg.)
16. Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation (Cap. 541 sub. leg.)
17. Legislative Council Ordinance (Cap. 542)
18. District Councils Ordinance (Cap. 547)
19. Chief Executive Election Ordinance (Cap. 569)

* The Ordinance has not yet come into operation.

Adaptation of Laws Bill 2001
Summary of the Proposed Adaptations

Original Terms	Proposed Terms
"Commissioner"(專員) means the person appointed by the Governor to be in charge of the Independent Commission Against Corruption and includes the Deputy Commissioner;	"Commissioner"(專員) means the Commissioner of the Independent Commission Against Corruption appointed in accordance with the Basic Law and includes the Deputy Commissioner <u>appointed under section 6 of the Independent Commission Against Corruption Ordinance (Cap. 204) and the person appointed to act as the Commissioner of the Independent Commission Against Corruption under section 7(2) of that Ordinance¹</u> ;
"Crown servant" (官方僱員) means a person holding an office of emolument, whether permanent or temporary, under the Crown in right of the Government;	"prescribed officer" (訂明人員) means - (a) any person holding an office of emolument, whether permanent or temporary, under the Government; and (b) <u>the following persons (to the extent that they are not persons included in paragraph (a)) -</u> (i) <u>the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap. 66) and any person appointed under section 5A(3) of that Ordinance;</u> (ii) <u>Director of Audit;</u> (iii) <u>Chairman of the Public Service Commission;</u> (iv) <u>Commissioner of the Independent Commission Against Corruption and any member of the staff of that Commission;</u> (v) <u>any judicial officer holding a judicial office specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap. 92) and any judicial officer appointed by the Chief Justice, and any member of the staff of the Judiciary²;</u>
Governor or the Governor in Council	Chief Executive or the Chief Executive in Council

¹ The words underlined do not appear in the original provision (section 2 of the Prevention of Bribery Ordinance (Cap. 201)).

² The words underlined do not appear in the original provision (section 2 of the Prevention of Bribery Ordinance (Cap. 201) & of the Independent Commission Against Corruption Ordinance (cap. 204)).

行政局	行政會議
立法局	立法會
Crown servant	prescribed officer
Governor	Chief Executive
Crown	Government ³
Governor in Council	Chief Executive in Council
"Commissioner"(廉政專員) means the Commissioner of the Independent Commission Against Corruption appointed under section 5 and the Deputy Commissioner appointed under section 6;	"Commissioner"(廉政專員) means the Commissioner of the Independent Commission Against Corruption appointed in accordance with the Basic Law and <u>includes</u> the Deputy Commissioner appointed under section 6; ⁴
-	"Public Service (Administration) Order"(公務人員(管理)命令) means - (a) the Public Service (Administration) Order 1997 (Executive Order No. 1 of 1997); (b) the Public Service (Disciplinary) Regulation made under section 21 of that Order (and together with that Order published as S.S. No. 5 to Gazette No. 2/1997); and (c) any other regulation made or any direction given under that Order, as amended from time to time. ⁵

³ The expression appears in sections 12(2) & (3), and 12AA(8) of the Prevention of Bribery Ordinance (Cap. 201). The context of section 12(2) relates to the payment of the amount or value of the advantage received to the Crown/Government. Section 12(3) relates to the payment to the Crown/Government of the sum of the pecuniary resources or value of the property the acquisition of which is not explained. Section 12AA (8) provides for the taking of possession and disposal of pecuniary resources or property pursuant to a confiscation order by the Crown/Government.

⁴ The word underlined does not appear in the original provision (section 2 of the Independent Commission Against Corruption Ordinance (Cap. 204)). The definition is different from that in section 2 of the Prevention of Bribery Ordinance (Cap. 201).

⁵ The definition is added to section 2 of the Independent Commission Against Corruption Ordinance (Cap. 204). This is necessary because in the following provisions the original references to "Colonial Regulations" are replaced by "Public Service (Administration) Order".

The Governor may appoint a Commissioner who, subject to the orders and control of the Governor, shall be responsible for the direction and administration of the Commission.	The Commissioner, subject to the orders and control of the Chief Executive, shall be responsible for the direction and administration of the Commission. ⁶
be appointed	hold office ⁷
The Commissioner shall not, while he holds that appointment, discharge the duties of any other office of emolument under the Crown in right of the Government of Hong Kong.	The Commissioner shall not, while he holds the office of the Commissioner, discharge the duties of any other prescribed officer. ⁸
Colonial Regulations	Public Service (Administration) Order
Crown or	prescribed officer or ⁹
總督特派廉政專員公署福利基金	廉政公署福利基金
《總督特派廉政專員公署(被扣留者的處理)令》	《廉政公署(被扣留者的處理)令》
《總督特派廉政專員公署條例》	《廉政公署條例》
廉政專員公署	廉政公署
(總督特派廉政專員公署)	(廉政公署)

⁶ Section 5(1) of the Independent Commission Against Corruption Ordinance (Cap. 204). Please note that Article 57 of the Basic Law states that the Commission "shall function independently and be accountable to the Chief Executive".

⁷ Section 5(3) of the Independent Commission Against Corruption Ordinance (Cap. 204).

⁸ Section 5(4) of the Independent Commission Against Corruption Ordinance (Cap. 204).

⁹ The context of the adaptation is the phrase of "Crown or public servant" in section 13(1)(b) of the Independent Commission Against Corruption Ordinance (Cap. 204).

**Administration's Response to the Observations Raised by
Assistant Legal Adviser to the Legislative Council
on the Adaptation of Laws Bill 2001**

Schedule 1

Clause 1(a)(i)

- Before reunification, the acting Commissioner was to be appointed by the Governor (see section 7(2) of the Independent Commission Against Corruption Ordinance (Cap. 204) (ICACO)), hence, the former was already included in the existing definition of “Commissioner” in the Prevention of Bribery Ordinance (Cap. 201) (POBO). The proposed definition of “Commissioner” in Schedule 1 makes it clear that the acting Commissioner, whilst not appointed in accordance with the Basic Law, is included in that definition.

Clause 1(a)(ii)

- The proposed definition of “prescribed officer” is not intended to improve upon the existing definition of “Crown servant” but rather to preserve, to the extent possible, the legal effect it had before 1 July 1997. As we explained in the Brief for Legislative Council on this Bill, the adaptation of the definition is not a straightforward matter. The problem arises from the use of the expression “office of emolument ... under the Crown in right of the Government” in the existing definition. In paragraph (a) of the new definition of “prescribed officer”, we have proposed to adapt that expression to “office of emolument ... under the Government”. The adaptation of “Crown” to “Government” however may create a gap insofar as the officers listed in paragraph (b) are concerned. For example, judicial officers fell within the definition of “Crown servant” before 1 July 1997 because they clearly held an office of emolument “under the Crown in right of the Government”. But, keeping in mind Article 85 of the Basic Law, it is not entirely clear if judicial officers hold office “under the Government” (the wording proposed in paragraph (a) of the new definition). Similar doubts arise with respect to the other officers listed in paragraph (b) of the new definition. Their functions are performed in an independent manner and it may not be entirely clear whether they hold office “under the Government”. Further, the five offices in paragraph (b) do not form part of the permanent establishment of the civil service. In short, paragraph (b) of the new definition of “prescribed officer” aims to avoid possible doubts that could arise from simply adapting “Crown in right of the Government” to “Government”. With Ordinances such as the POBO and ICACO, which

contain important penal provisions, we consider it prudent to include express provisions to address those possible doubts for the sake of greater certainty.

Schedule 2

Clause 2(a)

- In view of the language of section 7(2) of the ICACO, it would not be necessary to include the acting Commissioner in the proposed definition of “Commissioner” in Schedule 2. The word “includes” is used after “and” to achieve consistency with the wording used in the proposed definition of “Commissioner” in Schedule 1.

Clause 2(b)

- See our response to clause 1(a)(ii) above.

Schedule 3

Clause 4

- The current drafting of the English version and Chinese version of the Bill reflects the areas requiring adaptation amendments as they appear in the English version and Chinese version of section 3 of the Police Force Ordinance (Cap. 232) respectively. We see no need for modification.