

LC Paper No. CB(1)247/03-04(04)

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BY FAX (2869 6794)

Miss Salumi Chan  
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Bills Committee on Public Officers  
Pay Adjustments (2004/2005) Bill  
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3 Garden Road, Hong Kong

Dear Salumi,

**Re: Clause 3(1)(b)(i)(A)**

I apologize for the late response.

My question is on paragraph 3 of Annex C of CB(1)125/03-04(02). I do not agree that the term "Government" in "Member of the Lands Tribunal (being a member who is in the full-time service of the Government)" should be "interpreted having regard to its history" or "clear intent" of the Adaptation Ordinance, for all the reasons stated in the Bar Associations follow-up letter and for the reason that legislation should be unambiguous on its face.

The Administration's present stance is contrary to its stance in the Adaptation of Laws Bill 2001. There, the creation of a term "prescribed officers" was proposed instead of straightforward adaptation of "office of emolument ..... under the Crown in right of the Government" to "office of emolument ..... under the Government" in the Prevention of Bribery Ordinance, because it was thought that the functions of judges "are performed in an independent manner and it may not be entirely clear whether they hold office "under the Government"". See Annex C of LC Paper No.LS36/01-02). The same reasoning applies. Whether it is "in the ..... service of the Government" or "under the Government" makes no difference.

This is not a question of policy but clarity. I do not understand why the

Administration sees fit to insist on not removing an ambiguity which may have unsavoury and unintended consequences when a CSA can so easily put it right.

Yours sincerely,

Margaret Ng

c.c. Mr. Edward Chan, SC  
Chairman,  
Hong Kong Bar Association

MN/kc

**Regarding the further submission dated 6 October 2003 from the Hong Kong Bar Association, please provide the Administration's written response for the Bills Committee's consideration at its meeting on 24 October 2003.**

Response from the Administration

Clause 3(1)(b)(i)(A) of the Public Officers Pay Adjustments (2004/2005) Bill (the Bill) provides that the pay or allowances of a judicial officer holding a judicial office specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap.92) are excluded from the application of the Ordinance.

2. In its letter dated 6 October 2003, the Hong Kong Bar Association (Bar Association) pointed out that Members of the Lands Tribunal referred to in Schedule 1 to Cap. 92 are qualified by the words "being a member who is in the full-time service of the Government" and that the Government of the HKSAR is the "executive authorities of the HKSAR" under Article 59 of the Basic Law. The Bar Association commented that if full-time Members of the Lands Tribunal are assumed to be covered by clause 3 of the Bill, this would mean that all such members are in the full time service of the executive authorities of the HKSAR. If that is the case, all such members will have at least placed themselves in a serious conflict of interest since the Lands Tribunal has to, from time to time, resolve disputes between the citizens and the executive authorities of the HKSAR.

3. We should clarify that the term "Government" in "Member of the Lands Tribunal (being a member who is in the full-time service of the Government)" in Schedule 1 to Cap. 92 was adapted from the term "Crown" following the enactment of the Adaptation of Laws (Courts and Tribunal) Ordinance (the Adaptation Ordinance) in 1998. The term "Government" should be interpreted having regard to its history and the clear intent that the Adaptation Ordinance was not intended to affect the substance of any provision. In view of the Bar Association's comments, however, the Judiciary will consult the Chief Justice on the appropriate amendment to Schedule 1 of the Judicial Officers Recommendation Commission Ordinance (Cap. 92).

4. As far as the Bill is concerned, clause 3(1)(b)(i)(A) is intended to cover all full-time Members of the Lands Tribunal. In view of the history of the reference to “Member of the Lands Tribunal (being a member who is in the full-time service of the Government)”, we do not consider that there is any doubt that such a judicial officer is covered by that clause.

Civil Service Bureau  
October 2003

**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

Prepared by

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Legislative Council Secretariat  
31 December 2001

**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.