立法會
Legislative Council

LC Paper No. CB(2)2650/05-06

Ref : CB2/PL/AJLS

Paper for the House Committee meeting on 7 July 2006

Report of the Panel on Administration of Justice and Legal Services on issues relating to the imposition of criminal liability on the Government

Purpose

This paper reports on the deliberations of the Panel on issues relating to the imposition of criminal liability on the Government.

Background

2. In the course of deliberating the Land (Miscellaneous Provisions) (Amendment) Bill 2002, which was introduced into the Legislative Council (LegCo) on 24 April 2002, some members of the Bills Committee expressed concern that the Bill proposed to exempt the Government and any public officers from criminal liability for contravention of legislative provisions binding on the Government while performing public duties. The Bills Committee considered that there was a need to study issues relating to the mechanism for dealing with contravention of statutory requirements by public officers to ensure that a fair system was maintained. However, as the study would raise questions of wider policy concerns relating to the criminal justice system as a whole, the Bills Committee recommended the setting up of a subcommittee under the House Committee to study the relevant issues.

3. At the House Committee meeting on 4 October 2002, it was agreed that as the issues involved were part of the overall policy on the imposition of criminal liability in legislation, it would be more appropriate for the Panel on Administration of Justice and Legal Services to follow up the issues.

4. The Panel agreed at its meeting on 28 October 2002 to form a working group to undertake preparatory work to facilitate the Panel's consideration of the issues. The terms of reference of the Working Group are "to study issues relating to the imposition of criminal liability on the Government or public officers in the course of discharging their public duties for contravening any legislative provisions binding on the Government, and to report to the Panel with recommendations where appropriate."

5. The Working Group held four meetings to discuss the relevant issues and made a report for the consideration of the Panel at its meeting on 28 June 2004.

Consideration by the Panel in June 2004

Crown immunity

6. There is a common law presumption that the Crown is not bound by a statute unless expressly provided for in the statute, or unless the necessary implication can be drawn from the statute that the Crown is intended to be bound. Such an immunity is also referred to as Crown immunity.

7. Regarding application of ordinances to the Government of the Hong Kong Special Administrative Region (HKSAR), the common law presumption is retained in statutory form and adapted in section 66(1) of the Interpretation and General Clauses Ordinance (Cap. 1), which states that -

> "No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby."

"State" is defined in the Ordinance as including the Government of the HKSAR.

8. According to a research conducted by the Administration, in most of the common law jurisdictions, the Crown is not bound by a statute unless the statute expressly states that the Crown is bound by it or unless the Crown is bound by the statute by necessary implication. In some jurisdictions (e.g. British Columbia in Canada and South Australia), this common law presumption has been reversed such that a statute is binding on the Crown unless it provides otherwise.

9. On the question of whether the common law presumption should be reversed in respect of all legislation or newly enacted legislation, the Administration considers that a reversal of the current presumption might cause more problems than it solves. It is more preferable that the presumption reflected in section 66 of the Interpretation of General Clauses Ordinance (Cap. 1) be retained and that the binding effect of any proposed legislation be considered on a case by case basis. In any event a reversal of the current presumption would not have any direct bearing on the issue of the extent to which the Government is criminally liable under a particular ordinance. The reason is that relevant case law from other common law jurisdictions indicates that even if a statute is binding on the Government, the Government will not be criminally liable unless there is a clear indication that the legislature intended to create an offence of which the Government could be guilty.

Reporting mechanism for contravention of regulatory offences

10. The Administration has advised that the general approach with regard to breach of statutory provisions by a public officer in the course of discharging duties in the service of the Government is to resort to the reporting mechanism which was introduced in the 1980s. At present, a number of ordinances, mainly

environment-related ones, expressly provide that the Government shall abide by the relevant regulatory provisions but the Government or any public officers shall not be held criminally liable for contravention of the regulatory provisions while performing public duties. Instead, the ordinances impose a reporting obligation to ensure that any contravention by a governmental body is brought to the attention of a senior official who can require compliance.

11. Under the seven environment-related ordinances which adopt this approach, if contraventions are detected during regular inspection by the Environmental Protection Department (EPD), it will liaise with the government departments concerned and require them to draw up a programme to remedy the situation. If the problem has not been remedied to the satisfaction of EPD, a report would be made to the Chief Secretary for Administration (CS), who shall ensure that the best practicable steps are taken to terminate contravention or avoid recurrence. The Environment, Transport and Works Bureau would make regular submissions to CS reporting contraventions and the progress of rectification measures. CS will then decide on the need for further remedial measures which may include disciplinary action against the public officer who is found to have committed the misconduct. The most recent piece of legislation following the approach adopted by the environment-related ordinances is the amended Lands (Miscellaneous Provisions) Ordinance (LMPO) enacted in 2003.

12. In relation to the enforcement of the seven environment-related ordinances, a total of 156 cases had been reported to CS between January 1999 and September 2003. Most of the contraventions concerned the Water Pollution Control Ordinance (Cap. 358), and were related to improper wastewater discharges, sub-standard treatment facilities or lack of sewerage facilities. As at the end of 2004, all the required rectification works had been completed. No disciplinary actions have been taken against public officers for contraventions of the seven environment-related ordinances in the course of carrying out their duties. No new contravention has been recorded since October 2003. In the case of the amended LMPO, one contravention has been recorded so far. Measures were taken to avoid a recurrence of contravention shortly after the case was reported.

13. In response to the request of members, the Administration provided in 2003 information on actions taken on contraventions of the seven environment-related ordinances by the private sector. Members have noted that there were 1 681, 1 689, 1 041, 772 and 313 convictions in the years from 1999 to August 2003 respectively. Some persistent offenders were not only fined but also sentenced to imprisonment terms (ranging from seven days to four months though normally suspended). Since 1997, there have been a total of nine convicted cases with imprisonment sentence.

Overseas practices

Common law and non-common law jurisdictions

14. The Administration has provided information on the position of criminal liability of the Government and public officers in the following jurisdictions –

(a) common law jurisdictions – England and Wales, Australia, Canada and New Zealand (NZ); and

(b) non-common law jurisdictions – France, Germany and Japan.

The relevant information provided by the Administration is in **Appendix**.

Alternative approach adopted in the United Kingdom

15. The Panel has noted that the Working Group has made reference to an article entitled "Crown Immunity from Criminal Liability in England Law" written by Mr Maurice Sunkin, Department of Law, University of Essex in 2003. The article provides a brief overview of the principles relating to Crown immunity from criminal liability from the perspective of English constitutional law.

16. The article explains that the origins of the Crown immunity from criminal liability are rooted in feudalism and, in particular, in the monarch's role as dispenser of justice and in the inability to sue a lord in his own courts. The immunity is often linked to the maxim that the "King can do no wrong". The result is that the Crown immunity is now sitting uneasily with modern conceptions of domestic constitutional law and developing principles of international law concerning sovereign immunity for criminal acts. It can lead to inequalities and inconsistencies, and an impression that the central government will protect its own when private bodies and other areas of the public sector are held liable to the criminal law. It might also permit a "lack of discipline" and encourage "sloppy practice". Recognition of these problems has led to the immunity being removed or modified in the context of certain statutory crimes. This process has occurred on an ad hoc basis using a variety of remedial techniques. The more popular current method appears to be a compromise approach whereby the Crown body is expected to comply with standards, but failure to do so will open it to proceedings for a declaration of non-compliance, rather than criminal prosecution.

17. At the request of members, the Administration has provided further information on the approach adopted in the UK referred to in paragraph 16 above. The approach entails the enactment of a statutory provision that expressly stated that the Crown shall not be criminally liable for the contravention of the relevant Act by the Crown, but provides that the High Court may declare unlawful any act or omission of the Crown which constitutes such a contravention.

18. On the effect of the declaration, the Administration has explained that a declaration against the Crown does not require the Crown to do anything and the mere fact that it is disregarded is not contempt of court. However, it is still considered to be effective. It has been suggested that “[t]he essence of a declaratory judgment is that it states the rights or legal position of the parties as they stand, without changing them in any way, though it may be supplemented by other remedies in suitable cases. In administrative law, the great merit of the declaration is that it is an efficient remedy against *ultra vires* actions by governmental authorities of all kinds, including ministers and servants of the Crown, and in its latest development, the Crown itself.”

It would appear that a declaration that the Crown has contravened a statutory requirement and thereby committed an unlawful act or omission would clearly be a political embarrassment to the Government. Any Government that is committed to the rule of law would feel obliged to take steps to rectify the situation.

19. According to the search conducted by the Administration at the beginning of June 2004, there was no UK court case in which the court had made such a declaration.

Alternative approach adopted in New Zealand

20. The Administration has also provided information on the Crown Organisations (Criminal Liability) Act 2002 (COCLA), which was enacted in NZ in October 2002 to implement the recommendations of the report of the Royal Commission of Inquiry into the collapse of a viewing platform. COCLA enables, inter alia, the prosecution of Crown organisations (which includes a government department) for offences under the Building Act 1991 (BA) and the Health and Safety in Employment Act 1992 (HSEA). COCLA commenced operation on 17 October 2002.

21. Section 6 of the COCLA provides that a Crown organisation may be prosecuted for an offence against section 80 of the BA, and an offence against section 49 or section 50 of the HSEA. While a Crown organisation will not be fined on conviction of such offences, it may be liable to be ordered to make reparation to a victim or may be liable to a remedial order.

22. The Administration has advised that, as at early June 2004, there had been two prosecutions brought under COCLA, with a university and a tertiary institution named as the defendants in the cases. In both cases, the court ruled that the defendants, being employers, committed an offence under HSEA.

Recommendations to the Administration

23. With respect to the continuing operation of Crown immunity in Hong Kong, the Panel has recommended that the Administration should consider -

(a) in respect of regulatory offences, that Crown immunity should be removed as a matter of policy on a case-by-case basis and when legislative opportunities arise; and

(b) the development of alternative approaches taken in the UK and NZ in removing Crown immunity.

Consideration by the Panel in 2006

The Administration's position

24 After studying the issues with the relevant bureaux and departments, the

Administration reverted to the Panel on its position on imposition of criminal liability on the Government and public officers at the meeting on 27 February 2006. The Administration considers that the existing policy of not imposing criminal liability on the Government and public officers is an important principle and, having regard to the practice in most other common law jurisdictions, should be retained. Its views are summarised below.

Effectiveness of existing reporting mechanism

25. The Administration considers that the existing reporting system has been working satisfactorily in the open setting of our community. In relation to the seven environment-related ordinances, all the required rectification measures have been completed within a reasonable period of time, and no new contravention has been recorded since October 2003.

26. In the case of non-compliance with statutory requirements, public officers may, depending on the circumstances of the case, face disciplinary actions according to established civil service regulations. Where applicable, cases of professional misconduct may also be referred to the relevant professional bodies for action. The existing reporting mechanism, backed by the possibility of disciplinary action, has been effective in terms of rectifying the contraventions in a timely manner. The Administration considers that in a society as open and transparent as Hong Kong, the real, and a more powerful, sanction rests with revelation of the wrongdoing, which will be swiftly followed by public censure through the news media and scrutiny by LegCo.

Limited experience in overseas common law jurisdictions

27. The Administration has pointed out that in the two pioneering jurisdictions i.e. the UK and NZ, changes have been introduced on a very restrictive basis. A declaration of non-compliance by the United Kingdom courts stops short of imposing criminal liability. The adoption of such a "half-way house" approach perhaps indicates the UK's reservation in adopting radical changes in imposing criminal liability on the Government. The NZ approach is narrow and restrictive in application. The courts may hand down an order to Crown organisations to make reparation to a victim or a remedial order, but the NZ approach also stops short of imposing criminal liability on Crown organisations.

28. In both jurisdictions, there has been little actual experience in the operation of the respective regimes. Given that changes have only been introduced by the two countries for a limited period of time, it would not be prudent for Hong Kong to adopt the UK or NZ approach without a clear idea of the full impact of the changes arising from the proposal. The Administration will keep the overall situation under review, having regard to the latest developments in the UK, NZ and other common law jurisdictions.

Prosecution in courts

29. In response to some members' comments that there are more advantages than disadvantages in removing Crown immunity, the Administration has further explained that to enforce statutory requirements in regulatory provisions through prosecution in courts would raise complex technical questions of procedure and efficacy such as whether a government department had legal personality, whether one government department could prosecute another government department, and whether imposing fine on the Government is meaningful as the money to pay for the fine would be from public coffers.

Views of the Hong Kong Bar Association

30. The Hong Kong Bar Association is of the view that Crown immunity is not entrenched constitutionally, either in the UK or in the Basic Law of Hong Kong. In the UK, the immunity has been eroded over the years by legislation and by decisions of the courts. Imposing criminal liability on the authorities concerned would enhance the confidence of the public and meet the expectations of society. Hong Kong should move forward and adopt a new approach as in the case of Germany and Japan where criminal liability is imposed on the government. The Bar Association considers that the Government should decide whether exempting Government and public officers from criminal liability is justified on a case by case basis, and provide policy justifications if it decides to maintain the status quo.

31. The Bar Association has also pointed out that in jurisdictions such as England, Wales, Canada and Australia, Crown immunity is only enjoyed by the central government, and not the local authorities which handle matters of daily lives such as environment and hygiene. However, many of these "local" functions are dealt with by the Government in Hong Kong for historical reasons. The Bar Association has urged the Administration to be more sensitive to the demand of the public to remove Crown immunity in respect of criminal liability, particularly in matters concerning public health and safety.

Deliberations of the Panel

The issue of criminal liability

32. Members have expressed concern that the number of bills with immunity provisions to exempt the Government or public officers from criminal liability is on the increase, e.g. the Smoking (Public Health) (Amendment) Bill 2005 which is being scrutinised by LegCo. Members are not convinced that the Government and public officers should be exempt from criminal liability for contravention of statutory provisions while performing public duties. Members consider that all people, including public officers and private individuals, should abide by the statutes applicable to them in the same way and in all circumstances. Adopting different approaches in dealing with the issue of criminal liability is unfair and inconsistent with the principle of equality before the law.

33. Members have noted that the Administration has decided against any changes as the majority of common law jurisdictions including the UK, Australia, Canada and NZ still retain Crown immunity in respect of criminal liability, and the existing approach adopted by Hong Kong in respect of contraventions of regulatory provisions by government departments or public officers is in line with the practice in those common law jurisdictions. Members consider that the Administration should adopt an open mind, and should also make reference to the experience of non common law jurisdictions on the issue of imposition of criminal liability on the Government and public officers. Members are disappointed that despite the Administration's emphasis of the importance of the practices of common law jurisdictions, it has refused to consider following the alternative approaches adopted in the two leading common law jurisdictions, namely the UK and NZ, on the ground that the new practices have only been put into operation for a limited period of time, and the full impact of the changes have yet to be assessed.

34. Given the large number of contraventions of environment-related ordinances by Government departments in the past and the different treatment by the Government in dealing with contraventions by public officers and the private sector, members have reservations about the Government's commitment in environmental protection.

Existing approach adopted by the Administration

35. Members consider that any approach adopted by the Administration in dealing with contraventions of regulatory provisions by public officers in the course of discharging duties in the service of the Government should be equitable, transparent and effective, in order to maintain a high standard of public conduct and ensure accountability in governance.

36. Members have pointed out that in respect of the 156 contraventions reported to CS between January 1999 and September 2003, only the names and locations of the facilities involved, the dates of the contraventions and the improvement measures taken, and not the names of individual public officers involved in the cases, were included in the report to CS. Members have expressed reservations about the transparency and effectiveness of the reporting mechanism in deterring public officers from committing contraventions, as it has fallen short of pinpointing the individual public officer involved in the report. Members consider that the names of the public officers involved in cases of contraventions should be included in the report submitted to CS.

37. Despite the Administration's advice that public officers may face disciplinary actions in case of non-compliance with statutory requirements, members have expressed concern that no disciplinary action had ever been taken against any of the public officers involved in the 156 cases. Members consider that the Administration should conduct a detailed investigation into cases of contravention of statutory requirements by the Government and public officers. Apart from taking remedial measures to terminate the contravention or avoid recurrence, any public officer

identified by the investigation as personally responsible for the contravention should face appropriate disciplinary actions.

Conclusion of the Panel

38. The Panel considers that in the context of regulatory offences, the issue of whether there should be Crown immunity from criminal liability is essentially a matter of policy and not a matter of constitutional or legal principle. When legislative proposals are introduced into LegCo imposing obligations which are also binding on the Government, the issue of public officers' immunity from criminal liability if they are in breach of those obligations in discharging their public duties should be considered on a case-by-case basis in the same way as the other policy proposals of a bill. Where a reporting mechanism is provided in lieu of criminal liability on the public officers concerned, measures should be taken to ensure the effectiveness and transparency of the mechanism by, where appropriate, taking disciplinary action against individual officers responsible for the contravention and making public such disciplinary action.

Advice sought

39. Members are invited to note the deliberations and conclusion of the Panel.

Council Business Division 2
Legislative Council Secretariat
4 July 2006

Appendix

Overseas practices

Common law jurisdictions

The Department of Justice (DoJ) has conducted a research into the position in several leading common law jurisdictions (England and Wales, Canada, Australia and New Zealand) on legislation relating to the exemption of criminal liabilities of the government or public officers carrying out their duties in the service of the government. The majority of the common law jurisdictions have either retained or codified the common law presumption -

(a) in England and Wales, the common law presumption continues;

(b) in Australia, the common law presumption has been reversed in South Australia and the Australian Capital Territory but it has been codified in Queensland and Tasmania. The common law presumption remains in other Australian jurisdictions;

(c) British Columbia and Prince Edward Island in Canada have each enacted a provision reversing the common law presumption. However, the presumption has been statutorily entrenched in other Canadian jurisdictions, namely federal Canada, Alberta, Manitoba, Nova Scotia, Newfoundland, Ontario, Saskatchewan, New Brunswick and Quebec; and

(d) the common law presumption has been codified in New Zealand.

The above should be read subject to the updates provided by DoJ as set out in paragraphs 17 to 19 of this paper (in relation to England and Wales) and in paragraphs 20 to 22 of this paper (in relation to New Zealand).

41. DoJ has made the following observations and comments relating to immunity of the Crown and Crown servants -

(a) in most of the jurisdictions covered in the research, the Crown is not bound by a statute unless the statute expressly states that the Crown was bound by it or unless the Crown is bound by the statute by necessary implication. In some jurisdictions (e.g. British Columbia and South Australia), the common law presumption has been reversed such that a statute is binding on the Crown unless it provides otherwise;

(b) even if a statute expressly or by necessary implication binds the Crown, the Crown will not be criminally liable unless there is clear

indication that the legislature intended to create an offence of which the Crown could be guilty. The fact that the common law presumption has been reversed in some jurisdictions does not seem to have changed this position. In South Australia and Australian Capital Territory (where the common law presumption has been reversed), the relevant statutory provision which reverses the common law presumption expressly provides that criminal liability is not imposed on the Crown by reason only of such a reversal;

(c) none of the sampled statutory provisions enacted in various jurisdictions imposes criminal liability on the Crown itself although a small number of them are related to the issue of the criminal liability of the Crown and among such provisions, those which appear to impose criminal liability on persons acting on behalf of the Crown amount to a very small percentage of the total number of provisions reviewed; and

(d) in relation to an officer of the Crown, the mere fact that the officer is acting in the course of employment would not entitle the officer to Crown immunity. He will be entitled to immunity only if it could also be established that compliance with the statute would prejudice the Crown.

Non-common law jurisdictions

42. At the request of the Working Group, DoJ has also obtained information from some non common law jurisdictions on their position.

Germany

43. The Germany's Department of Justice has provided the following information -

(a) legislation is binding on the government and public officers as the duty of abiding by law and justice is expressly stated in the Constitution;

(b) the German Criminal Law makes no provisions for the legal liability of bodies corporate, companies, associations, etc., i.e. only a natural person can commit a criminal offence. The German Government, like any commercial establishment, cannot incur criminal liability. It follows that law enforcement agencies themselves cannot be held responsible and that only their members and staff can be held responsible. Individual members of the parliament, civil servants and other members of the executive power, however, are invariably liable under the Basic Law and can commit a criminal offence; and

(c) criminal acts by civil servants can bring about disciplinary actions. What penalty will be handed down depends on the severity of the offence concerned and such penalty ranges from reprimands, abatement of salary to removal from the public service. Disciplinary actions will be taken in addition to any criminal prosecutions that may be brought.

Japan

44. The Japan's Ministry of Justice has provided the following information -

(a) legislation is in general binding on the Government and public officers;

(b) under no circumstances will the State be criminally liable for contravening a statutory provision (which is binding on the State);

(c) Japanese legislation has some offences in which specified illegal conducts of a public officer are criminalized. In other words, these offences can be committed only by public officers. If a public officer commits such an offence in the course of carrying out his official duties, he may be prosecuted in his personal or individual capacity, regardless of whether any disciplinary action will be or has been taken against him; and

(d) when a public officer carries out an illegal act, he may be subject to disciplinary proceedings regardless of his criminal liability. The State Redress Law provides that if a public officer intentionally or by negligence causes damage to another in carrying out his/her duties, the person who has suffered damage may claim compensation from the Government for such damage.

France

45. The information provided by DoJ in respect of the position on France is as follows -

(a) the President of the Republic shall not be held accountable for actions performed in the exercise of his office except in the case of high treason. He may be indicted only by the two assemblies ruling by an identical vote in open balloting and by an absolute majority of the members of the said assemblies. He shall be tried by the High Court of Justice;

(b) members of the Government shall be criminally liable for actions performed in the exercise of their office and deemed to be crimes or

misdemeanours at the time they were committed. They shall be tried by the Court of Justice of the Republic; and

(c) as a rule, civil servants are criminally liable for penal offences they commit. On top of that, there are some offences specific to civil servants, such as bribery, misappropriation of public funds, false entry, favouritism. In parallel, disciplinary sanctions can be imposed on public officials by their superiors. It can coincide with criminal sanctions, but its nature is different, as it is not considered to be a juris