

政府總部
香港下亞厘畢道



GOVERNMENT SECRETARIAT
LOWER ALBERT ROAD
HONG KONG

本函檔號 OUR REF:

來函檔號 YOUR REF:

電話號碼 TEL. NO.: 2810 2329

傳真號碼 FAX. NO.: 2524 3762

來函傳真 YOUR FAX.: 2877 5029

5 November 2010

Mr Stephen LAM
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road Central
Hong Kong

Dear Mr Lam,

Adaptation of Laws (Military References) Bill 2010

Thank you for your letter of 27 September 2010. Our response to the questions raised in your letter is set out in the attached note.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'David Lau', written in a cursive style.

(David LAU)
for Secretary for Security

Adaptation of Laws (Military References) Bill 2010
Reply to questions raised by the
Legal Service Division of the Legislative Council

Clause 5 – Savings and transitional

Those affected items of legislation as set out in clause 5 are also set out in clause 2(3). If those affected items of legislation have already been set out in clause 2(3), what is the reason for singling them out in clause 5?

1. The savings and transitional provisions in clause 5 are included with a view to providing for an additional safeguard to ensure that -
 - (a) pending or past libel actions would not be undermined (Cap. 21);
 - (b) public servants and judicial officers concerned are not adversely affected (Cap. 89A, 99A and 401A); and
 - (c) documents attested under rule 29(d) of Cap. 290A would not be rendered invalid by the repeal of the rule.
2. As the rights concerned are fundamental rights of an individual, it is considered desirable to address the above issues in the Bill directly so as to protect a person's rights under those circumstances on top of the safeguard provided under section 23 of Cap. 1.

Schedule 1

Section 2– Jury Ordinance (Cap. 3)

Is there any difference between "officers employed on full pay in the naval, military or air services of her Majesty" and "members of the Armed Forces of Her Majesty's serving on full pay"?

Why is the reference to "on full pay" omitted in both of the adapted terms?

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3. As the armed forces of Her Majesty in fact cover the naval, military and air services, it is thus appropriate to adapt both references to “members of the Chinese People’s Liberation Army”.
4. As the legislative intent of the Ordinance is to provide exemption for members of the then officers in the naval, military or air services of Her Majesty and their spouses from service as jurors, and that there are no employment conditions in the Chinese People’s Liberation Army (PLA) stipulating whether one is on full pay or not, the present adaptation proposal is thus proposed to take away the words “full pay” in the adapted terms.

Section 4 – Defamation Ordinance (Cap. 21)

Would you consider the following formulation of the adapted term more appropriate:-

"of the Chinese People's Liberation Army held outside Hong Kong under any law of the Mainland"?

5. Considering that there is no equivalent Naval Discipline Act, Army Act or Air Force Act under the laws of the Mainland and as we understand that there are no specific laws or regulations defining the jurisdiction of court-martials of the Mainland, it would not be appropriate to adapt the relevant provision with reference to “any law of the Mainland”. Further, as the proposed amendment does not have the effect of narrowing the original scope of statutory defence which might be put forward, we consider the present adaptation proposal appropriate.

Section 6 – Employment Ordinance (Cap. 57)

Why is the reference to "a military hospital" added?

6. The reference “a military hospital” is added to the adaptation proposal as “hospitals maintained by the Crown” include hospitals of the then British Garrison.

Section 8 –Pilotage Ordinance (Cap. 84)

Why is the reference to "or ships belonging to the Central People's Government and used only on non-commercial service" added in the adapted section 10D (Exemption from compulsory pilotage) of the Pilotage Ordinance (Cap. 84)?

7. Taking into account the legislative intent of the Pilotage Ordinance (Cap. 84), i.e. to offer exemption to ships providing non-commercial service, and that any ships providing commercial service, including those belonging to either the United Kingdom (UK) (before Reunification) and the Central People's Government (CPG) (after Reunification) have to follow the pilotage conditions stipulated in the Ordinance, the addition of the reference "or ships belonging to the Central People's Government and used only on non-commercial service" is considered appropriate in the adaptation proposal.

Section 10(2) and Section 13 –Pensions Regulations (Cap. 89 sub. leg. A)

Why is it necessary to adapt the term "a retired officer of the Armed Forces of the Crown" to "a retired officer of the Armed Forces of the United Kingdom and "service at any time between 3 September 1939 and 30 June 1950 in the Armed Forces of the Crown" to "service at any time between 3 September 1939 and 30 June 1950 in the Armed Forces of the United Kingdom"? These expressions in the existing provisions of the Pensions Regulations (Cap. 89 sub. leg. A) are related to facts happening in the past.

Same query applies to the adaptation proposed in section 13.

8. Although the provisions relate to facts happening in the past, expressions inconsistent with the status of Hong Kong as a Special Administrative Region (SAR) of the People's Republic of China (PRC) should be replaced by appropriate references. "Crown" is one of such expressions and should therefore be replaced by "United Kingdom" in accordance with the principles on how such expressions

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are to be construed as set out in particular in section 2A and Schedules 8 and 9 of Cap. 1.

Section 16 – Tramway Ordinance (Cap. 107)

Why is it appropriate to adapt "The Ministry of Defence (The Navy Department), The Ministry of Defence (The Army Department)" to "the Hong Kong Garrison" not the Ministry of National Defence in the Central People's Government (see Annex B to LegCo Brief on the Bill)?

9. The relevant provisions of the Ordinance that make reference to "department" broadly relate to land vested in or occupied by the Hong Kong SAR Government (HKSARG) and the then British Forces in Hong Kong. As the Exchange of Notes signed between the UK Government and the PRC on the Arrangements for the Future Use of the Military Sites in Hong Kong clearly stipulates that military land is to be occupied and used only by the Hong Kong Garrison of the PLA, it is therefore appropriate to adapt the relevant reference to "the Hong Kong Garrison".

Section 17 – Dutiable Commodities Ordinance (Cap. 109)

Why is it appropriate to include "the Chinese People's Liberation Army" in the adapted term?

10. The Government of the UK includes, amongst others, the then British Garrison stationed in Hong Kong. As such, prior to Reunification, goods imported or purchased for the British Garrison were treated as if they were imported or purchased for the Government of the UK. The term "the Chinese People's Liberation Army" is therefore added to better reflect the legislative intent of the Ordinance.

Section 18(4) – Inland Revenue Ordinance (Cap. 112)

What is the reason for adding the new section 8(2A) to the Inland Revenue Ordinance (Cap. 112)?

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11. This addition of a savings clause is to protect the rights of former members of Her Majesty's forces who receive wound or disability pensions or gratuities granted in respect of war service.

Sections 21 and 22 – Immigration Ordinance (Cap. 115), sections 57A, 57B, 58 and 58A, and The Authorization by the Governor under Section 58A (Cap. 115 sub. leg. F)

What is the reason for not adapting sections 57A (Power of arrest by Her Majesty's forces), 57B (Resisting arrest by, and obstruction of, Her Majesty's forces), 58 (Powers of Her Majesty's naval officers) and 58A (Powers of persons in charge of authorized vessels) of the Immigration Ordinance (Cap. 115) and the Authorization by the Governor under section 58A of the Immigration Ordinance (Cap. 115 sub. leg. F)?

12. As these provisions under the Immigration Ordinance relate to the power of Her Majesty's forces to arrest illegal immigrants and board, search, seize and detain ships within the waters of Hong Kong, we consider it appropriate to repeal these provisions considering that the exercise of such powers are the responsibility of the HKSARG under the Basic Law after the Reunification.

Section 23 – Rating Ordinance (Cap. 116)

What is the reason for not adapting the reference to "or by any body or organization established primarily for defence purposes and designated by the Governor for the purposes of this section" in the definition of "military land" in section 36(4) of the Rating Ordinance (Cap. 116)?

13. The Exchange of Notes signed between the UK Government and the PRC on the Arrangements for the Future Use of the Military Sites in Hong Kong clearly stipulates that military land in Hong Kong is to be occupied and used by the Hong Kong Garrison for defence purposes. There would not be any other body or organisation to occupy such land for any purpose after the Reunification. It is therefore appropriate to take away the words "or by any body or organisation established primarily for defence purposes and designated by the

Governor for the purposes of this section” in the proposal to reflect the present situation.

Sections 40(b), 41 and 42 – Medical Registration Ordinance (Cap. 161), Midwives Registration Ordinance (Cap. 162) and Nurses Registration Ordinance (Cap. 164)

What is the reason for omitting the reference to "full pay" in the adapted term?

14. As the legislative intent of the respective Ordinances is to provide exemption for members of the then officers in the naval, military or air services of Her Majesty from registration to health care professionals, and that there are no employment conditions in the Chinese PLA stipulating whether one is on full pay or not, the present adaptation proposal is thus appropriate.

Section 49(2) – Defences (Firing Areas) Ordinance (Cap. 196)

What is the reason for omitting "or any aircraft employed under The Ministry of Defence authority" in the adapted term in section 10(1)(e) of the Defences (Firing Areas) Ordinance (Cap. 196)?

15. The Ordinance regulates practice firing within firing areas and for the clearing of firing areas. As the proposed adaptation of “any aircraft of the Chinese People’s Liberation Army” already encompassed the meaning of both “Her Majesty’s aircraft” and “any aircraft employed under the Ministry of Defence authority” in the context of the Ordinance, the present adaptation proposal is appropriate.

Section 51 – Crimes Ordinance (Cap. 200)

What is the reason for not adapting the term "the Royal Hong Kong Police Auxiliary Police Force" in section 7(1)(d) and the term "Her Majesty" in section 7(1) of the Crimes Ordinance (Cap. 200)?

16. As the term "the Royal Hong Kong Auxiliary Police Force" in section 7(1)(d) of the Ordinance and the term "Her Majesty" in section 7(1) are not military-related, they are therefore not adapted as any suggested changes would fall outside the scope of the Bill.

Section 56 – Crimes Ordinance (Cap. 200)

What would the arrangement be for application of sections 156 (anonymity of complaints) and 157 (offences and proceedings) of the Crimes Ordinance to trials by courts-martial after the repeal of section 158 of the Crimes Ordinance?

17. Section 158 deals with the application of sections 156 and 157 to trials by courts-martial. It provides for the modifications to sections 156 and 157 in the event where a person is charged with a specified sexual offence under the Naval Discipline Act 1957, the Army Act 1955 and the Air Force Act 1955 of the UK. Considering that the application of these Acts in relation to a court-martial of the PLA are now not relevant, it is appropriate to repeal this section.

Section 61(1) – Traffic Accident Victims (Assistance Fund) Ordinance (Cap. 229)

Why is it appropriate to adapt the term "the Crown ... in the United Kingdom" in section 5(1)(c) (Levy on motor vehicles) of the Traffic Accident Victims (Assistance Fund) Ordinance (Cap. 229) to "the Hong Kong Garrison" not "the Central People's Government"?

18. Section 5(1)(c) of the Traffic Accident Victims (Assistance Fund) (TAVA) Ordinance (Cap. 229) refers to "every motor vehicle owned by the Crown whether in right of Her Majesty's Government in Hong Kong or in the United Kingdom". Considering that the levy payment and the certification mechanism under section 5(2) of the Ordinance only cover the certification for motor vehicles in the possession of Her Majesty's forces in Hong Kong, the legislative intent of the section 5(1)(c) is not to cover any other vehicles of the British Government. In addition, section 6 of the Ordinance specifically stipulates that "person in the public service of the Crown" includes a member of Her

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Majesty's forces and a member of the Royal Hong Kong Auxiliary Air Force. It is therefore considered that the reference "the Crown" in section 5(1)(c) should be adapted to include "the Hong Kong Garrison" instead of "the Central People's Government".

Section 62(4) – Traffic Accident Victims (Assistance Fund) Ordinance (Cap. 229)

Why is it appropriate to impose a levy to be payable by the Government instead of the Hong Kong Garrison in the new Section 6(1)(c) (Levy on licence holders) of the Traffic Accident Victims (Assistance Fund) Ordinance?

19. Prior to the Reunification, the TAVA levies in respect of the British Garrison's vehicles and drivers were paid out of the general revenue of the Government and not apportioned as part of defence costs under the "Defence Costs Agreement" signed between the UK Government and the then Hong Kong Government. It was part of the Hong Kong Government's contribution to a no fault welfare scheme for traffic accident victims, and the contribution made in respect of the then British Forces' vehicles and drivers was part of the overall payment for Crown vehicles and drivers whether in right of the Government of Hong Kong or the Government of the UK. The proposed amendment is an adaptation to reflect the practice in place before the Reunification.

Section 71(2) – Public Order Ordinance (Cap. 245)

Would there be a difference between an employee of the Ministry of National Defence in the Central People's Government and a member of the Ministry of National Defence in the Central People's Government?

20. As far as we understand, the Mainland call the individuals serving in the Ministry of National Defence in the Central People's Government as "人員" instead of "僱員" in Chinese and as there is no equivalent concept of an "employee" in the Ministry, the word "employee" in the text is therefore suggested to be adapted as "member".

Section 72 – Public Order Ordinance (Cap. 245)

In section 37(1) of the Public Order Ordinance (Cap. 245), why is "any commissioned officer in Her Majesty's forces" not adapted to "any member of the Chinese People's Liberation Army of or above the rank of second lieutenant (or ensign)" (see Annex B to LegCo Brief on the Brief)?

21. Annex B to LegCo Brief on the Bill lists the examples of adaptation proposal. It is by no means an exhaustive list and the terms may need to be adapted in accordance with the intent and circumstances context of specific Ordinances. In the specific situation stipulated in section 37(1) of the Public Order Ordinance (Cap. 245), the focus of the provision was on the type of persons that could be authorized by the Commander, rather than an officer of a particular rank.

Section 74(3) – Public Order Ordinance (Cap. 245)

In the proposed new section 39(4)(ba) of the Public Order Ordinance, would you give examples to illustrate the "area or place" in the case of "a closed area which is an area or place occupied ... for other purposes of the Central People's Government ..."?

22. The present adaptation limits the power of arrest by members of the PLA to a closed area occupied by the Garrison or for the purposes of the CPG, but not in other closed areas for which the HKSARG has responsibility under the Basic Law. One such example is military closed areas.

Section 76(2), (3) and (4)(b) – Public Order Ordinance (Cap. 245)

Why is it appropriate to adapt "Her Majesty's forces acting in aid of the civil power" in section 50(3), (4) and(5) of the Public Order Ordinance to "the Chinese People's Liberation Army acting under Article 14 of the Law of the People's Republic of China on the Garrisoning of the Hong Kong Special Administrative Region ..."?

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23. Article 14 of the Law of People's Republic of China on the Garrisoning of the Hong Kong Special Administrative Region (the Garrison Law) sets out, among other things, the exercise of powers conferred by the laws of the HKSAR when members of the Garrison render assistance in the maintenance of public order or in disaster relief. As such, the proposed adaptation is appropriate in reflecting the situation after the Reunification.

Section 80 – Protected Places (Safety) (Authorized Guards) Order (Cap. 260 sub. leg. C)

Why is section 2(b) of the Protected Places (Safety) (Authorized Guards) Order (Cap. 260 sub. leg. C) not adapted?

Why is section 3(b) of the Protected Places (Safety) (Authorized Guards) Order not adapted?

Why is section 4(b) of the Protected Places (Safety) (Authorized Guards) Order not adapted?

24. As the Garrison does not have similar post in its establishment to “any person employed by the Ministry of Defence [The Army/Navy/Air Force Department] as a member of its Police Force”, it is appropriate not to adapt sections 2(b), 3(b) and 4(b) of the Order.

Section 90 – Adoption Rules (Cap. 290 sub. leg. A)

Why is rule 29(d) of the Adoption Rules (Cap. 290 sub. leg. A) not adapted?

25. All along, the Administration has the intent to repeal the colonial references in Rule 29 of Cap. 290A to better reflect the situation after the Reunification and to tie in with the colonial references in Rule 29(a) to (c) (which were non-military) in the Adoption (Amendment) Ordinance 2004. In the Adoption (Amendment) Ordinance 2004, the manner of attestation concerns a document that is executed in UK, a colony of UK or before a consular officer of the UK Government etc. have been repealed in Rule 29(a), (b) and (c)(i) and (ii). Further, as

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far as we understand, the PLA Garrison will not be utilising Rule 29(d) for the attestation of documents and declarations as well. Therefore, the proposed change is considered appropriate.

Sections 93, 94, 95 and 96 – Shipping and Port Control Ordinance (Cap. 313)

Would it be necessary to specify clearly that warships used by Her Majesty's Government in sections 3(1) (Application), 11(b) (Application), 15(2)(a) (Port clearance to be obtained before departure) and 52(2) (Port dues and remissions) of the Shipping and Port Control Ordinance (Cap. 313) is confined to warships used by the Chinese People's Liberation Army (see Annex B to LegCo Brief on the Bill)?

26. Sections 3(1)(Application), 11(b)(Application), 15(2)(a) (Port clearance to be obtained before departure) and 52(2) (Port dues and remissions) of the Ordinance make reference to both warships and ships for the time being used by Her Majesty's Government. It is therefore appropriate to adapt the reference to cover ships that are used by the CPG, as well as warships and ships that are under the command of the PLA to reflect the original intent. As those provisions simply refer to "warship[s]", it is considered appropriate to retain such references without having to specifically refer to warship[s] used by the PLA.

Section 98 – Shipping and Port Control Regulations (Cap. 313 sub. leg. A)

Would it be necessary to specify clearly that warships used by Her Majesty's Government in regulation 22(4) of the Shipping and Port Control Regulations (Cap. 313 sub. leg. A) is confined to warships used by the Chinese People's Liberation Army (see Annex B to LegCo Brief on the Bill)?

27. Please see paragraph 26 above.

Section 106 – Motor Vehicles (First Registration Tax) Ordinance (Cap. 330)

Why is section 5 (Tax not payable in respect of certain motor vehicles) of the Motor Vehicles (First Registration Tax) Ordinance (Cap. 330) not adapted?

28. The Ordinance imposes a tax to be paid on the first registration of certain motor vehicles and section 5(1) exempts vehicles imported by a member of Her Majesty's forces from First Registration Tax provided that a similar tax has been paid in any Commonwealth country. As the arrangement for exemption from taxation relates to a similar tax that has been paid in any Commonwealth country, the provision is no longer relevant after the Reunification and should be repealed.

Section 112 – Road Traffic (Driving Licences) Regulations (Cap. 374 sub. leg. B)

Would you explain the terms "member of a civilian component of Her Majesty's forces" and "person who is attached to Her Majesty's forces" in regulation 4(2)(b) and (d) respectively (Application to State) of the Road Traffic (Driving Licences) Regulations (Cap. 374 sub. leg. B)? Why is it unnecessary to adapt the two provisions?

29. The legislative intent of the legislation is to exempt members of the military establishment from regulations relating to driving licences. The personnel included in the "member of a civilian component of Her Majesty's forces" and "person who is attached to Her Majesty's forces" in the existing regulation 4(2)(b) and (d) will be covered by the adaptation "any member of the Chinese People's Liberation Army" in paragraph (a) or "any person who is employed by the Chinese People's Liberation Army" in paragraph (b).

Section 118 – Pension Benefits (Judicial Officers) Regulations (Cap. 401 sub. leg. A)

Would it be necessary to provide for a savings provision consequent to the repeal of regulation 15 (Military service to count for pension benefit) of the Pension Benefits (Judicial Officers) Regulations (Cap. 401 sub. leg. A)?

30. As mentioned in paragraphs 1 and 2 of this reply, the savings provision is provided in clause 5(b) of the Bill to provide additional safeguard for judicial officers who have served Her Majesty's Forces in time of war and before so serving were employed in public service.

Section 119 – Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413, section 5(3) (Application of part III))

Why is it necessary to include "used only on non-commercial service" in the adapted section 5(3) (Application of part III) of the Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413)?

31. In preparing the adaptation proposal, we have taken into account the legislative intent of the Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413). The Ordinance suggests that, in accordance with the requirements of international conventions, it shall not apply to any warships, naval auxiliary or other ships owned or operated by a State and used for government, i.e. non-commercial purposes. Taking into account that the Marine Department has been applying the Ordinance to all vessels used for commercial purposes, even to those owned by the UK Government (before Reunification) or the CPG (after Reunification), it is considered appropriate to adapt the phrase "used only on non-commercial service" in the new section 5(3).

Section 120(3) – Civil Aviation Ordinance (Cap. 448, section 2A(8))

Why is it appropriate to adapt "a Secretary of State" in the definition of "state of emergency" in section 2A(8) (Power to give effect to Chicago Convention and regulate air navigation) of the Civil Aviation Ordinance

(Cap. 448) to "the Standing Committee of the National People's Congress"?

32. The Civil Aviation Ordinance (Cap. 448) provides for the regulation of civil aviation. Section 2A gives effect to the Chicago Convention, which is a multi-lateral treaty entered into by States to establish the principles and arrangements for the safe and orderly development of civil aviation. The present adaptation proposal is in line with Article 18 of the Basic Law as the Standing Committee of the National People's Congress is the authority that could declare a state of war or, by reason of turmoil within HKSAR which endangers national unity or security and is beyond the control of the HKSARG, decide that HKSAR is in a state of emergency.

Section 132 – Merchant Shipping (Seafarers) Ordinance (Cap. 478)

Why is it appropriate to include "or ... ship belonging to the Central People's Government and used only on non-commercial services" in the adapted section 4(1)(a) [3(1)(a)] (Application) of the Merchant Shipping (Seafarers) Ordinance (Cap. 478)?

33. The Merchant Shipping (Seafarers) Ordinance (Cap. 478) provides for the establishment of Seafarers' Authority, Mercantile Marine Office and Seafarer's Advisory Board, the registration of seafarers, control of supply, selection, employment, and discharge of registered seafarers, etc. The legislative intent of section 3(1)(a) of the Ordinance is to exempt any ship of war of the PLA and of any other country, as well as any ship belonging to the CPG and used only on non-commercial service, from the application of the Ordinance. The present adaptation proposal therefore accurately reflects the legislative intent.

**Security Bureau
November 2010**