立法會
Legislative Council

LC Paper No. CB(2) 1452/98-99
(These minutes have been seen by the Administration)

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Bills Committee on
Adaptation of Laws Bill 1998

Minutes of meeting
held on Friday, 27 November 1998 at 8:30 am
in Conference Room A of the Legislative Council Building

Members present	:	Hon Andrew WONG Wang-fat, JP (Chairman) Hon Kenneth TING Woo-shou, JP Hon Margaret NG Hon Ronald ARCULLI, JP Hon Jasper TSANG Yok-sing, JP Hon Ambrose LAU Hon-chuen, JP
Members absent	:	Hon Cyd HO Sau-lan Hon James TO Kun-sun Hon Ambrose CHEUNG Wing-sum, JP
Public Officers attending	:	Security Bureau Ms Mimi LEE Principal Assistant Secretary for Security (Narcotics) Mrs Sarah KWOK Principal Assistant Secretary for Security B Civil Service Bureau Mr Thomas CHAN Principal Assistance Secretary (Civil Service) Appointments

Department of Justice

Mr YEN Yuen-ho, Tony, JP
Law Draftsman

Mr J L ABBOTT
Senior Assistant Law Draftsman

Mr SUEN Wai-chung
Senior Assistant Law Draftsman

Mr LEUNG Tung-wa, Byron
Government Counsel

Correctional Services Department

Miss Bonnie WONG
Assistant Commissioner for Correctional Services

Customs & Excise Department

Mr CHIK Wah-wai
Assistant Commissioner (Administration and Excise)

Mr CHAN Hon-kit
Senior Superintendent (Ag)
Customs Drug Investigation Bureau

Hong Kong Police Force

Mr Henrique KOO Sii-hong
Chief Superintendent, Narcotics Bureau

Clerk in attendance : Mrs Sharon TONG
Chief Assistant Secretary (2)1

Staff in attendance : Miss Betty MA
Senior Assistant Secretary (2) 1

Miss Connie FUNG
Assistant Legal Adviser 3

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I. Meeting with the Administration

Outstanding issues

Guiding principles for the Adaptation of Laws Programme

The Law Draftsman (LD) said that at the request of the Bills Committee, the Department of Justice had prepared an information paper entitled 'Adaptation of Laws Programme - Guiding Principles and Guideline Glossary of Terms' for members' reference (LC Paper No. CB(2) 739/98-99(01)).

2. Referring to the information paper, LD briefed members on the background of the adaptation exercise. He said that over 80% of the proposed amendments in the present exercise were merely technical adaptation. A guideline glossary of terms was provided at Annex A of the paper. The 'new terms' shown in the table were treated as the guideline adaptation of the corresponding 'original terms' shown in the table. Adaptation of references and provisions which were not dealt with in the present stage of the adaptation of laws exercise were highlighted in para. 12 of the information paper. He said that such references and provisions would be dealt with in separate adaptation of laws bills for the subjects concerned. LD added that various titles to government agencies and post titles had been changed upon reunification. Most of the changes had been effected under the Declaration of Change of Titles (General Adaptation) Notice 1997. LD suggested that the information paper be made available for the reference of other bills committee on adaptation of laws bills, though the guiding principles were by no means exhaustive. The Administration would explain separately to the bills committee concerned when adapting particular terms, or instances of departure from the guidelines.

Adaptation of references to "Colonial Regulations"

3. Mr TSANG Yok-sing enquired whether the proposed amendments to replace references to "Colonial Regulations" and "Regulations of the Hong Kong Government" by "relevant executive order" and "the administrative rules known as the Government Regulations and any other administrative rules or instruments regulating the public service" respectively had expanded the original scope of the Regulations. Principal Assistant Secretary (Civil Service) Appointments (PAS(CS)A) said that the Administration had prepared an information paper (LC Paper No. CB(2) 739/98-99(03)) which set out the background to the making of the Public Service (Administration) Order 1997 (PS(A)O) by the Chief Executive under Article 48(4) of the Basic Law. PS(A)O was the only executive order issued by the Chief Executive. The constitutionality and lawfulness of the Executive Order and its retrospectivity were confirmed by the Court of First Instance in its judgment in an application for judicial review by the Association of Expatriate Civil Servants of Hong Kong (LC Paper No. CB(2) 739/98-99(04)).

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The Court also ruled that the Executive Order was not in breach of Articles 48(7) and 103 of the Basic Law. The PS(A)O (Executive Order No.1 of 1997) and the Public Service (Disciplinary) Regulation (PS(D)R) made under the Executive Order had effectively replaced the Colonial Regulations dealing with the administration of the public service in relation to the appointment, dismissal and discipline of public servants.

4. Mr TSANG Yok-sing queried the reasons for not simply replacing the Colonial Regulations by PS(A)O. PAS(CS)A responded that given PS(A)O was the only executive order the Chief Executive had issued, "relevant executive order" in the Adptation of Laws Bill 1998 was referring to PS(A)O. Mr Abbott, Senior Assistant Law Draftsman (SALD) added that though only one executive order had been issued at present, there was a possibility that further executive orders could be issued in the future which might bear titles different from PS(A)O. The term "relevant executive order" was proposed so as to encompass the PS(A)O (Executive Order No.1 of 1997), the PS(D)R made under that Order and any subsequent such Order or Regulation.

5. Miss Margaret NG said that she had reservation that an executive order issued by the Chief Executive under Article 48(4) of the Basic Law was provided with the legal backing to enable the Hong Kong Special Administrative Region Government to preserve its executive authority for the continued administration of the public service. Although the Court had confirmed the legality of the PS(A)O, it did not rule on whether an executive order made by the Chief Executive under Article 48(4) of the Basic Law was equivalent to the status of the Colonial Regulations. Prior to the transfer of sovereignty, the Colonial Regulations constituted imperial legislation made under the Letters Patent and that the Governor could propose no amendments. She was concerned as to how the Chief Executive exercised the power as provided under Article 48(4) to issue executive orders. The present making of PS(A)O by the Chief Executive was tantamount to conferring on the Chief Executive a legislative power. The making of PS(A)O by administrative means would have far-reaching repercussions. To replace references to "Colonial Regulations" by "relevant executive orders" was a legal and constitutional matter and should not be dealt with in the context of adaptation of laws.

6. In response, LD said that to replace references to "Colonial Regulations" by "relevant executive orders" was to retain the provisions in the Colonial Regulations pertaining to the administrative details of the management of the public service after the reunification. PS(A)O was confined to the administration of the public service. The above-mentioned Court judgment had confirmed the legality of any executive orders issued under Article 48(4) of the Basic Law. Should members consider the proposed amendment outside the scope of the adaptation, the Administration might consider withholding the proposed amendment at the moment.

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7 Miss Margaret NG enquired about the specific parts of the Court judgment which confirmed the legal backing to an executive order issued by the Chief Executive under Article 48(4) of the Basic Law. PAS(CS)A responded that the Court had ruled in favour of the Government in the judicial review. In the judgment, the Court had noted that it was "plainly not possible for instruments to be promulgated which were identical in nature to the colonial instruments which they were replacing," and "the hallmark of the previous system was that, where procedures were to be established locally, they were established by the Governor by executive action."

8 Miss Margaret NG pointed out that the judgment did not deal with Article 48(4). PAS(CS)A said that the Court had noted that "The Chief Executive's power to promulgate executive orders, and to appoint and remove holders of public office, is derived from Article 48 of the Basic Law,".

9. Mr Ronald ARCULLI opined that since the Court was asked to decide on the legality of the Executive Order No.1 of 1997, the judge should have ruled on the issue.

10. PAS(CS)A said that provisions pertaining to the administration of public service were enshrined in the Letters Patent and the Colonial Regulations prior to reunification. Such provisions were not made by legislative procedures nor were they subject to the approval of the Legislative Council. The objective of the Administration was to replace and localize the relevant provisions of the Colonial Regulations by an executive order issued by the Chief Executive which maintained the previous system as closely as possible in the administration of the public service.

11. Referring to the letter from the Hong Kong Bar Association (LC Paper No. CB(2) 739/98-99(05)), Miss Margaret NG shared the view with the Bar Association that a new source of power to regulate the employment of public officers was identified after the promulgation of an executive order. Despite the Administration's explanation that the Chief Executive was empowered under Article 48(4) of the Basic Law to issue an executive order, she considered that Article 48(4) dealt with the decision on government policies, and that the employment relationship between the Government and the civil servants did not fall under Article 48(4). Miss NG reiterated that the proposed replacement of "Colonial Regulations" by the "relevant executive order" was not merely a technical amendment. It was a constitutional and legal matter and should not be dealt with under the adaptation of laws exercise. In response, SALD said that Article 48(4) dealt with two issues, viz. to decide on government policies and to issue executive orders. Power was therefore conferred on the Chief Executive to issue executive orders.

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12. The Chairman opined that should executive orders have legal status, it was tantamount to conferring on the Chief Executive a legislative power. Thus, he was of the view that the deliberations as regards an executive order issued by the Chief Executive under Article 48(4) of the Basic Law was not outside the scope of the Bill.

13. PAS(CS)A said that it was spelt out clearly in Article 48(4) of the Basic Law that the Chief Executive was empowered to issue executive orders. The Administration was of the view that an executive order made by the Chief Executive was not subject to the approval by the Legislative Council. The Court had already ruled that an executive order as promulgated under Article 48(4) was a "legal procedure" for the purpose of the Basic Law and that it had to conform to the laws of Hong Kong.

14. Miss Margaret NG commented that the Administration should not interpret the Basic Law literally, instead it should adopt a purposive approach. As the proposed replacement by "relevant executive order" was not a merely technical adaptation, the Administration was amending the legislation instead of adapting the relevant provisions. The Administration might consider adopting alternatives to an executive order in replacing the Colonial Regulations, such as abolishing the complete set of Colonial Regulations and formulating a set of fresh regulations to administer the public service.

15. LD reiterated that the Chief Executive was empowered to make executive orders under the Basic Law. The promulgation of an executive order by the Chief Executive was something unprecedented. Nevertheless, he assured members that any executive orders issued by the Chief Executive could not go beyound the law. Otherwise, it would be subject to the challenge by way of judicial review. With the lapsing of the Letters Patent and the Colonial Regulations upon reunification, it was necessary to replace and localize those provisions relating to the administration of the public service to maintain continuity. The Administration therefore proposed to adapt references to "Colonial Regulations" and "Governor" to "relevant executive orders" and "Chief Executive", ie. the Chief Executive to make relevant executive orders. He said that the Court did not consider such adaptation improper in its judgment. Should any parties dissent from the proposed adaptation, they might resort to apply for judicial review.

16. Mr Ronald ARCULLI asked, apart from the Executive Order in question, whether there were other types of executive orders that could be made by the Chief Executive, eg. temporarily suspension of laws made by the Legislative Council, making of emergency regulations. Referring to the judgment as regards the challenge of section 17 of the PS(A)O being incompatible with Article 8(2) of the Hong Kong Bill of Rights, SALD said that the Court had ruled that "section 17 was no more than an administrative provision,". It followed that an executive order was a kind of administrative order and it would not prevail over legislative

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enactment.

17. The Chairman said that Article 48(4) of the Basic Law dealt with the internal administration of the civil service. It did not have a direct correlation with Articles 48(6) and 48(7). Legal backing was required for the making of an executive order under Article 48(4). He said that the Administration might consider the following alternative ways of handling the adaptation of references to "Colonial Regulations" -

(a) to add a footnote to the Hong Kong Reunification Ordinance which spelt out the validity of certain provisions of the Colonial Regulations; or

(b) to add an Annex IV to the Basic Law; or

(c) to formulate those provisions of the Colonial Regulations which were still applicable into regulations to be made by the Chief Executive in Council under a Civil Service Ordinance to be enacted by the legislature.

The Chairman considered (c) to be the best alternative.

18. The Chairman considered that the making of executive orders by the Chief Executive had given him another source of legislative power. He pointed out that Colonial Regulations were not confined to the administration of public service. They also dealt with the budget and public finances and these were largely covered by the Public Finance Ordinance. He expressed concerns that there might be an increasing number of executive orders made by the Chief Executive in future. Miss Margaret NG added that the Administration ought to consider introducing an amendment bill to deal with the proposed amendments.

19. LD stressed that the Chief Executive was empowered to issue an executive order under the Basic Law. As PS(A)O and PS(D)R were in force and subject to no challenge from the Court, the Administration considered it appropriate to continue the present arrangement. Nevertheless, the Administration would further consider members' views on the making of an executive order by the Chief Executive under Article 48(4).

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20. Miss Margaret NG suggested and members agreed that the Bills Committee would consult the Hong Kong Bar Association and the Law Society of Hong Kong on the proposed adaptation of references to "Colonial Regulations" by "relevant executive orders".

(*Post-meeting note* : The Secretariat had issued letters on 30 November 1998 to invite the Hong Kong Bar Association and the Law Society of

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Hong Kong to put forward their views.)

Consultation with the legal profession

21. LD said that views from the public or bodies would normally be invited when the legislative proposals in question had policy implications. As the proposed amendments in the adaptation of laws bills were merely terminological changes and were essentially straightforward adaptations, consultation with the public was not considered necessary for every adaptation of laws bill in order not to delay the legislative timetable. As an interim measure, LD said that the Administration would consult the legal profession in the course of scrutinizing an adaptation of laws bill if some of the proposed amendments were regarded as controversial or involved legal issues.

22. Miss Margaret NG said that she had no strong objection to the Administration's proposal. In fact, bills committees on other adaptation of laws bills might consider whether they should invite views from the legal profession if the Administration failed to do so.

Adaptation of references to "Chief Justice of the Supreme Court"

23. Miss Margaret NG said that prior to the reunification, the Chief Justice of the Supreme Court was the head of the Judiciary. She asked whether the adaptation would cause confusion with the title of the Chief Justice of the Court of Final Appeal. In response, LD said that the proposed amendment was originated from the judiciary and was supported by the members of the judiciary.

Adaptation of references to "court of first instance"

24. Miss Margaret NG said that the adaptation to references to "原訟法庭" by "初審法院|" might not reflect the situation truly because the word "初審" might be interpreted as the first trial of a court case whilst the court of first instance dealt with appeal cases. LD clarified that the Court of First Instance (原訟法庭) was established in the light of the Basic Law whereas the court of first instance (初審法院) dealt with cases heard by the court the first time. Though the titles showed great resemblance, they could be differentiated in English by using capital or small letters. To avoid unnecessary confusion in the Chinese titles, the Administration therefore proposed the amendment. He stressed that the proposal was supported by members of the judiciary.

Adaptation of references to "Crown"

25. Miss Margaret NG requested and LD agreed to prepare an information paper to explain the background to and the basis of formulating the principles of interpretation in item 7 of Schedule 9 to Cap.1.

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(*Post-meeting note* : The requested information was subsequently provided vide LC Paper No. CB(2) 858/98-99(01)).

Adaptation of references to "saving the rights of Her Majesty, Her Heirs and Successors"

26. Miss Margaret NG enquired about what the rights of Her Majesty, Her Heirs and Successors were and the purpose of such provisions. She also asked about the rationale for adaptation of reference to "saving the rights of Her Majesty, Her Heirs and Successors" with "saving the rights of the Central People's Government and the rights of the Government of Hong Kong Special Administration Region under the Basic Law or other laws", and the practical implication after the adaptation. LD agreed to provide the requested information.

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(*Post-meeting note* : The requested information was subsequently provided vide LC Paper No. CB(2) 858/98-99(02)).

Adaptation of references to "Regulations of the Hong Kong Government"

27. Miss Margaret NG said that though the proposed adaptation was not controversial, she suggested that a better expression be adopted. This point would be considered when the adaptation of references to "Regulations of the Hong Kong Government" in the relevant sections of the Bill were discussed.

Clause-by-clause examination

Schedule 1 - Control of Chemicals Ordinance (Cap.145)

28. Members raised no question on the proposed amendments to the Ordinance, viz. sections 13, 14, 16(1) and 18A(2).

Schedule 2 - Juvenile Offenders Ordinance (Cap.226)

29. Members raised no queries on the proposed amendments to sections 12, 13, 16(1), 16(5) and 21 of the Ordinance.

Section 17 - Provisions as to the custody of children and young persons in places of detention

30. Miss Margaret NG enquired about the rationale for the proposed splitting of existing sub-section (3) into two separate provisions. SALD responded that there were two references to the Governor in the provision, viz. "cause places of detention to be inspected" and "make rules as to the places to be used as places of detention". Regarding the second part of the provision, it was a power of making

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subsidiary legislation. Therefore, the appropriate adaptation would be the Chief Executive in Council in accordance with the guiding principles. However, for the first part, since it was not a power of making subsidiary legislation, the appropriate adaptation would be the Chief Executive. Hence, the Administration proposed to split the existing sub-section (3) into two parts.

31. Miss Margaret NG said that she had some reservations on the application of the guiding principles in respect of making subsidiary legislation. She queried why the making of rules as to places to be used as places of detention and causing these places of detention to be inspected would be treated as two matters. Instead, they should be dealt with under one set of regulations. SALD said that there were technical difficulties in selecting an appropriate adaptation. If the term "Chief Executive" was proposed to be used for both parts of the provision, the Chief Executive would be given a power to make subsidiary legislation which was inconsistent with the Basic Law. On the other hand, if the term "Chief Executive in Council" was proposed for section 17(3), the amendment as regards the power to cause places of detention to be inspected might be beyond the scope of the adaptation of laws exercise. The first part of the provision imposed on the then Governor an obligation to ensure that places of detention were inspected. It was not a legislative power of the then Governor and therefore should be separated from the power of making subsidiary legislation.

32. In response to Miss Margaret NG's enquiry about the existing arrangement regarding causing places of detention to be inspected and the making of rules as to places to be used as places of detention, Assistant Commissioner for Correctional Services said that under the Prison Rules, each penal institution should be visited by two Justices of Peace at least once every fortnight.

33. Miss Margaret NG said that the proposed adaptations to existing section 17(3) should not be treated as a mechanical exercise. If the then Governor had never caused places of detention to be inspected other than by making subsidiary legislation, then there was a power of the Governor to make subsidiary legislation. There also seemed to be an anomaly that the Chief Executive caused places of detention to be inspected and the Chief Executive after consultation with the Executive Council might make rules as to the places to be used as places of detention and as to their inspection. She considered that the provisions in existing section 17(3) should be treated as one matter. SALD responded that it was not anomalous to confer a power on an officer and then to confer a rule-making power on another person to enforce and give effect to the purposes of the ordinance.

34. Miss Margaret NG was of the view that the language and the structure of existing section 17(3) suggested that the rule-making power under the second part of the provision should necessarily be exercised by the same person as was charged with the duty under the first part of the provision.

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35. The Chairman opined that though the then Governor did cause places of detention to be inspected by way of subsidiary legislation, this should be seen as a general duty on the part of the Governor. He considered that the proposed separation was acceptable.

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36. The Chairman suggested and PAS/S(N) agreed to consider Miss Margaret NG's views on section 17(3).

II. Date of next meeting

37. The next meeting was scheduled for 15 December 1998 at 8:30 am.

38. The meeting ended at 10:45 am.

Legislative Council Secretariat
26 February 1999