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LP 5019/6 III

CB2/BC/19/98

5 May, 1999

Mr Raymond Lam,
Clerk to Bills Committee,
Legislative Council,
Legislative Council Building,
8 Jackson Road, Central,
Hong Kong.
(Fax No. 2877 8024)

Dear Mr Lam,

Bills Committee on
Interpretation and General Clauses (Amendment) Bill 1999

Thank you for your letter of 29 April 1999 enclosing copies of submissions by the Hong Kong Bar Association and the Law Society of Hong Kong on the above Bill. As requested, our written responses to the points raised follow.

Hong Kong Bar Association

The Bar Association's submissions are incorporated in a letter dated 4 November 1998 to this department. Our response is incorporated in a letter dated 16 November 1998 to the Bar Association, essentially in the following terms –

> It is understood from the general comment on p. 1 of the letter [dated 4 November 1998] that the Bar Association contends it is too early to adopt the principles in Pepper v Hart [1993] AC 593 for use in Hong Kong. It is also understood that Findlay J is relied upon in support of that contention where the judge says, in Ngan Chor Ying v Year Trend Development Ltd [1995] 1 HKC 605, p.610H –
>
> "I am not sure how applicable [Pepper v Hart] is to a

> legislature that has no majority party to ensure the passage of legislation. Where a majority party exists, one can be reasonably sure that what is said by a minister or other promoter of a bill represents the intention of the majority of the legislature."

It is not seen how Findlay J's statement is pertinent to the Bar Association's case for delay. In the case of a majority party too it may be possible to say that the individual members have no common intention or understanding. The important point is that even where there is no majority party, a majority vote in the legislature legitimises what those responsible for framing the statute intended (Burrows Statute Law in New Zealand (1992), p.88).

It is also not seen how the Bar Association's contention that "we should wait a few years and see how [the] new constitutional arrangements worked before dealing with this subject" is consistent with the judgment of the Court of Appeal in HKSAR v Ma Wai Kwan, David & Others [1997] 1 HKLRD 761, p.803C-D, where Mortimer VP said –

> "The Basic Law is made under art. 31 of the constitution of the People's Republic of China. It is Chinese law applicable to Hong Kong which falls initially to be interpreted by Hong Kong courts used to interpreting laws passed in the common law tradition, applying common law principles. No doubt, from time to time, difficult questions of interpretation will arise, but not, it seems to me, from any inherent difficulty arising between the two traditions. The common law principles of interpretation, as developed in recent years, are sufficiently wide and flexible to purposively interpret the plain language of this semi-constitutional law. The influence of international convenants has modified the common law principles of interpretation." [Emphasis added.]

And at p.803J - 804A –

> "The language of the Basic Law in arts. 8, 18 and 160 is imperative and clear. The Basic Law adopts the common law save where excepted as being in contravention of it in the Standing Committee of the NPC's Decision of 23 February 1997. … The common law previously applied in Hong Kong was adopted into the law of the SAR on 1 July 1997 by the Basic Law."

The David Ma case has made it plain that the common law principles of interpretation continue to apply under the Basic Law – including in respect of interpretation of the Basic Law itself. As such, it seems that there is no requirement to delay a desirable statutory clarification of such principles of interpretation which the courts have

already made clear are applicable to the new constitutional arrangements.

In respect of the four specific comments made on p.2 of the letter, the response is as follows –

(a) comment at para. (a) The draft section 19A at Annex II to the LRC Report did not permit "a court to look at extrinsic materials in order to confirm an interpretation". It is considered that the Bar Association is referring to section 15AB(1)(a) of the Acts Interpretation Act 1901 of the Commonwealth of Australia set out in Annex I to the LRC Report. That section was not supported by the LRC Report. (See paras. 11.59 and 11.60 of the LRC Report.);

(b) comment at para. (b) In respect of the first arm of the comment, it cannot be seen how any document produced after the enactment of a provision can carry any weight (as extrinsic material vis-à-vis new section 19A) to assist in the ascertainment of the meaning of the provision. Put another way, any document which did not exist before the enactment of the provision cannot have been within the purview of the collective mind of the legislature (or, indeed, any mind) at the time of the enactment of the provision. (And, accordingly, cannot have contributed in any way to the meaning of the provision.) See also paras 11.66 and 11.67 of the Report and section 15AB(2)(a) of the Acts Interpretation Act 1901 of the Commonwealth of Australia on which the draft section 19A(2)(a) is based. No criticism to date of the Australian section has been uncovered. In respect of the 2nd arm of the comment, we advise that "photocopies of this class of documents" are not prima facie admissible;

(c) comment at para. (c) It is considered that it would be inappropriate to refer to "documents issued … by the Legislative Council Commission" simpliciter because proposed section 19A(3)(a)(i) and (ii) specifies the only material meant to be covered. (That is, the Legislative Council Commission may publish other material which is not germane.) In respect of the possibility that a printer other than the Government Printer may be used by LegCo, it is considered more prudent to leave the provision as presently drafted, in particular because the "quality" of any alternative printer would need to be assessed before the provision could be extended to cover the alternative printer; and

(d) comment at para. (d) The comment raises purely a drafting matter and will be considered on that basis. As an aside, it should be noted that the word "verbatim", although ultimately of Latin derivation, is not a Latinism.

Law Society of Hong Kong

The Law Society's submissions are incorporated in a paper dated 29 April 1999 prepared by its Constitutional Affairs Committee which was sent to the Legislative Council. We are grateful to note that the views of the Law Society as expressed in the paper coincide with those of the Law Reform Commission (LRC) and the Administration. Accordingly, our responses to the submissions are made by way of further explaining why we consider that the points identified by the Law Society in support of the Bill are important.

General comment

As noted by the Law Society, the rules associated with Pepper v Hart are complicated and unclear. The Bill will clarify the rules in a simple document and obviate the need to refer to a number of lengthy judgments in court. This in turn will help to increase the efficiency of court proceedings and reduce the costs of litigation.

It is also important to note that Pepper v Hart created as well as solved problems. For example, para. 11.49(3) of the LRC Report states –

> "*Pepper v Hart*, by placing emphasis on the second reading speech of the Bill's promoter, is limited in scope, yet the trend in many common law jurisdictions is towards further relaxation of the exclusionary rules. By expanding the scope, legislation would give the courts a discretion to consult a wider range of materials relating to the history of an ordinance, including explanatory memoranda."

Para. 11.5 of the Report notes that Pepper v Hart linked the use of "other parliamentary material" to understanding "ministerial statements and their effect". The English and Scottish Law Commissions, however, in their joint report of 1969, referred to the use of material which might be relevant and reliable in the construction of statutes rather than of ministerial statements (LRC Report, paras 7.2 – 7.18) as did the Renton Committee (LRC Report, paras 7.19 – 7.25).

In Pepper v Hart [1993] AC 593, 634, Lord Browne-Wilkinson stated that "as presently advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet" the criteria of disclosing the mischief aimed at or the legislative intention of the words of the statute. At p.617 he referred to giving "effect to the words used [by the minister] so long as they are clear". These statements appear to emphasise the second reading speech at the expense of all other material (for example, reports of other phases of the legislative debate, executive materials such as explanatory memoranda, and reports of commissions and committees) which might be relevant and reliable in statutory interpretation.

Bennion Statutory Interpretation Third Edition, pp. 491 – 492, notes that, under the reasoning in Pepper v Hart, where the literal meaning of

the enactment is uncertain but the Minister's statement is plain the court should invariably apply the Minister's meaning (at p. 642, Lord Browne-Wilkinson said that "as a matter of pure law this House should look at Hansard and give effect to the parliamentary intention it discloses in deciding the appeal"). In Bennion's view (citing in support, Dawn Oliver Public Law Spring 1993, 5 at pp.12–13) this reasoning confuses the respective constitutional roles of parliament as the maker of law and the courts as interpreter of the statutory words (as opposed to merely reflecting what is disclosed in Hansard).

It is submitted that the Bill would solve this difficulty with the reasoning in Pepper v Hart by ensuring that it is the meaning of a provision of an Ordinance that is to be ascertained (s. 19A(1)) with any second reading speech taking its place as one of a number of items of extrinsic material that may be capable of assisting in the ascertainment of the meaning of that provision (s.19A(2)).

As a further general point in support of the introduction in Hong Kong of a Bill comparable to the section enacted in Australia in 1984, it is noted that, at p.521, Bennion states –

> "an Interpretation Act, in order to be of maximum utility, ought to codify all clearly worked out judicial rules regarding the construction of enactments."

Detailed comments

(1) Agreed.

(2) Agreed. In AG v Whangarei City Council [1987] 2 NZLR 150, 152, the court stated –

> "while we have been prepared to look at reports of parliamentary debates in some cases, this development is certainly not intended to encourage constant references to Hansard and indirect arguments therefrom. Only material of obvious and direct importance is at all likely to be considered; and the Court will not allow such references to be imported into and to lengthen arguments as a matter of course."

(3) Agreed.

(4) Agreed. See also our response (b) above to the submissions of the Bar Association.

(5) Agreed. These points are reflected in paras 12.91 – 12.93 of the LRC Report.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

c.c. D of J (Attn: Mr Geoff Fox, SALD
Mr Sunny Chan, SGC
Mr Thomas Leung, SGC)