Bills Committee on the Adaptation of Laws (No. 16) Bill 1999

The adaptation of "servant or agent of the Crown" in non-immunity provisions

Introduction

This note has been prepared in response to queries by members of the Bills Committee at its meeting on 25 January 2000. It sets out the rationale for adapting "Crown" to "State" in section 18 of the Hong Kong Council on Smoking and Health Ordinance (Cap. 389) and section 19 of the Prince Philip Dental Hospital Ordinance (Cap. 1081), as proposed by clause 6 of Schedule 11 and clause 8 of Schedule 13, respectively, of the Adaptation of Laws (No. 16) Bill 1999.

Background

2. Section 18 of Cap. 389 provides that the Hong Kong Council on Smoking and Health shall not be regarded "as a servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown". Section 19 of Cap. 1081 provides that the Board of the Prince Philip Dental Hospital "is not the servant or agent of the Crown and does not enjoy any status, immunity or privilege of the Crown".

3. The Bill proposes to adapt the references to "Crown" in these two "non-immunity provisions" to "State".

Members' queries

4. At the meeting of the Bills Committee on 25 January 2000, the Administration was requested to explain the following matters -

(a) the purpose of these non-immunity provisions;

(b) the criteria for including them in an Ordinance;

(c) why "Crown" is proposed to be adapted to "State" instead of "Government";

(d) the reason for and the effect of adopting different terms in different Ordinances, for instance, "Crown" is proposed to be adapted to "State" in section 18 of Cap. 389 but "Government" is used at present in section 3(6) of Cap. 113.

The purpose of non-immunity provisions

5. Non-immunity provisions such as section 18 of Cap. 389 and section 19 of Cap. 1081 are typically included in an Ordinance if the Ordinance establishes a new corporation or other body that is empowered to perform a public function, or whose directors are appointed by the Governor (Chief Executive), and it is intended that it should operate as an independent body and without the benefit of "Crown" status. They are included for the purpose of removing doubt as regards the body's legal status. They make clear that the body is to be treated in law as an ordinary private body and is not entitled to share in any of the privileges or immunities of the "Crown", such as the general immunity from statute provided for by section 66 of the Interpretation and General Clauses Ordinance (Cap. 1), immunity from taxation, immunity from criminal law, immunity from injunctions, etc.

6. According to Wade & Bradley's *Constitutional and Administrative Law* (11th Ed., at p. 750) (Annex A) "it is good legislative practice for an Act which creates a new public corporation to state whether and to what extent it should enjoy Crown status". In the absence of a declaratory statement in the Ordinance, the corporation could argue that it has acquired the status of a Crown agent by virtue of the common law. This practice is cited with approval in G.C. Thornton's *Legislative Drafting* (4th Ed., footnote 37 at p. 213 and the form on p. 257) (Annex B) and has been followed in Hong Kong for many years. A list of the Ordinances where such provisions are found is included at Annex C.

The criteria for determining when non-immunity provisions should be included in an Ordinance

7. There are no hard and fast rules for determining when a non-immunity provision should be included in an Ordinance. There are however a number of questions which might usefully be asked when trying to determine whether such a provision should be included: Does the body established by the Ordinance perform a public or semi-public function? Does the Governor (Chief Executive) appoint any of its directors or members? Is it answerable to the Government for the conduct of its operations ? Are its operations controlled by the Government through share holdings or other means? Is it publicly funded? Does it carry out policies determined by the Government? If it is intended that the body should not enjoy Crown status, then a positive answer to any of the above questions would suggest that it would be helpful to include a non-immunity provision in the relevant Ordinance.

The proposed adaptation

8. The Bill proposes to adapt the references to "Crown" in section 18 of Cap. 384 and section 19 of Cap. 1081 to "State". In our view, this proposal best gives effect to the principle set out in paragraph 5(a) of the *Adaptation of Laws Programme: Guiding Principles and Guideline Glossary of Terms* that each provision "should, as far as possible, be to the same legal effect after its adaptation as before". The term "Crown" has a broad meaning and we believe that it should be replaced by a term that is roughly equivalent in meaning. The most suitable term in this context is "State".

9. The proposal to adapt "Crown" to "State" in section 18 of Cap. 389 and section 19 of Cap. 1081 is also consistent with the adaptation of "Crown" to "State" in section 66 of Cap. 1. One of the purposes of a non-immunity provision, if not its main purpose, is to rebut the effect of section 66. Peter Hogg states in *Liability of the Crown* (2nd Ed., at p. 248) (Annex D) that "the question whether a public corporation possesses the attributes of the Crown has most frequently arisen when the corporation has claimed immunity from a statute that does not bind the Crown". In Hong Kong, section 66 would obviously be relevant to the determination of this question. Given this purpose,

it is logical that the references to "Crown' in section 18 of Cap. 389 and section 19 of Cap. 1081 be adapted in the same manner as section 66 of Cap. 1.

10. At the Committee meeting, it was suggested that "Crown" should instead be adapted to "Government". We respectfully disagree. The term "Government" could have been used in both provisions when they were originally enacted but it was not. The term "Crown" was used instead and this suggests that the provisions were intended to have a broader scope. In our view, it would offend the principle mentioned in paragraph 8 above if "Crown" were adapted to "Government". Such an amendment is a matter for law reform rather than adaptation.

The adoption of different terms in different Ordinances

11. It was also noted at the meeting that, unlike section 18 of Cap. 389 and section 19 of Cap. 1081, other Ordinances use the term "Government" rather than "Crown" in their non-immunity provisions. Section 3(6) of the Hospital Authority Ordinance (Cap. 113) was cited as an example. A list of the Ordinances which use the term "Government" appears in Part II of Annex C. It is difficult to explain the reasons for this difference except to note that the various provisions were enacted at different times and that the use of different terminology may reflect a different policy intention or different legislative practice.

12. It is acknowledged that the non-immunity provisions which use the term "Government" are not consistent with the provisions which use the term "Crown" and that this difference in terminology may result in a different legal effect. The difference however is an existing one. It would involve a matter of law reform were these provisions to be amended to make all of them consistent, either by changing all of the references to "Crown" to "Government" or, for that matter, changing all of the references to "Government" to "State". In our view, such amendments lie beyond the scope of the Adaptation of Laws Programme. We would suggest however that, in the context of such provisions, which are intended to remove legal doubts, it would be best to use a term that has the broadest possible meaning, that is, the "State".

13. It was suggested at the Committee meeting that the Hong Kong Council on Smoking and Health and the Board of the Prince Philip Dental Hospital would not be able to claim that they were agents of the State and therefore there was no need to adapt "Crown" to "State". It is acknowledged that the likelihood of either body successfully claiming to be an agent of the State (apart from the HKSAR Government) may be remote but we would hesitate to rule it out as legally impossible. The same criticism could have been expressed with regard to the original enactments, that is, that the two bodies would not be able to claim that they were agents of the Crown in right of the United Kingdom. Yet both section 18 of Cap. 389 and section 19 of Cap. 1081 used the term "Crown". In short, we do not see this as a reason to adapt "Crown" to "Government".

Conclusion

14. We appreciate the Committee's concerns regarding section 18 of Cap. 389 and section 19 of Cap. 1081. However, we believe the adaptations proposed by the Bill are fully consistent with the principles set out in the *Adaptation of Laws Programme: Guiding Principles and Guideline Glossary of Terms* and that it would involve a matter of law reform to amend them differently.

Health and Welfare Bureau
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