

For discussion
on 27 November 2006

LegCo Panel on Administration of Justice and Legal Services

**Information Paper on
Statute Law (Miscellaneous Provisions) Bill 2007**

Introduction

A number of amendments to various Ordinances are proposed in the above Bill. The proposed amendments are minor, technical and largely noncontroversial but are important for the purpose of updating or improving existing legislation. The object of this paper is to seek the preliminary views of Members of the Panel on the proposed amendments.

Background and argument

General background

2. The Administration has adopted the use of omnibus bills in recent years as an efficient way of effecting miscellaneous improvements to existing legislation. This avoids the requirement to make bids for separate slots relating to each Ordinance, the amendments to which typically involve only a few clauses.

Outline of proposed amendments

3. The proposed amendments are listed below under thirteen

headings.

(1) Public Order Ordinance (Cap. 245) and Societies Ordinance (Cap. 151)

4. In *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164, the Hong Kong Court of Final Appeal (CFA) held that ‘public order (in the law and order sense)’ should be severed from ‘public order (*ordre public*)’ in sections 14(1), 14(5) and 15(2) of the Public Order Ordinance. In this connection, the term “(*ordre public*)” has ceased to apply for all practical purposes in the context of the relevant sections following the handing down of the CFA’s judgment. It is therefore proposed to formally delete the term ‘(*ordre public*)’ from the Public Order Ordinance. As a corollary, it is also proposed to delete the definition of the term ‘public order (*ordre public*)’ from section 2(2) of the Public Order Ordinance. Similar amendments are proposed to the Societies Ordinance as well.

5. Regarding other legislation in which the term ‘(*ordre public*)’ appears¹, since the term is used in different contexts, it is considered that amendment to such other legislation is not required in the current exercise.

(2) Homicide Ordinance (Cap. 339)

6. The words “killing himself or” are to be deleted from section 5(1) and (2) of the Ordinance to reflect the abolition of the offence of suicide.

¹ These are the Registered Designs Ordinance (Cap. 522), Patents Ordinance (Cap. 514), Merchant Shipping (Liner Conferences) Ordinance (Cap. 482), Specification of Arrangements (Government of the Kingdom of Belgium) (Avoidance of Double Taxation on Income and Capital and Prevention of Fiscal Evasion) Order (Cap. 112AJ), Specification of Arrangements (Government of the Kingdom of Thailand) (Avoidance of Double Taxation on Income and Prevention of Fiscal Evasion) Order (Cap. 112AX), Mutual Legal Assistance in Criminal Matters (United States of America) Order (Cap. 525F), Fugitive Offenders (Drugs) Ordinance (Cap. 503J) and the Hong Kong Bill of Rights Ordinance (Cap. 383).

Section 5(1) provides that it shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other killing himself or being killed by another person. In 1967, the crime of suicide or self-murder was abolished by the enactment of section 33A of the Offences Against the Person Ordinance (Cap. 212).

7. However, there was no corresponding amendment of section 5(1) of Cap. 339 to delete “killing himself or”. Those words require deletion since they give the misleading impression that anyone who is a party to another person’s suicide can still be found guilty of murder or manslaughter depending on whether the accused was acting in pursuance of a suicide pact. This has been incorrect since 1967 when section 33B of Cap. 212 made it clear that being a party to another person’s suicide was no longer murder but was the new statutory offence of “complicity in another’s suicide” which carries a maximum penalty of 14 years’ imprisonment.

(3) Prevention of Bribery Ordinance (Cap. 201) and Independent Commission Against Corruption Ordinance (Cap. 204)

8. Certain minor inconsistencies between the English and Chinese texts in each Ordinance will be corrected.

(4) Costs in Criminal Cases Ordinance (Cap. 492)

9. Upon the recommendation of the Court of Appeal, it is proposed to amend section 2 of the Ordinance to enable the courts, in appropriate cases, to require legal or other representatives to compensate in costs a party injured as a result of unjustifiable conduct on their part (the progress of consultation on this item is noted at paragraphs 20 to 24 below).

(5) Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240)

10. The proposed amendment will enable magistrates to make orders for costs under section 3A of the Ordinance. Where a person has not paid a fixed penalty or notified the Commissioner of Police that he wishes to dispute liability, a magistrate shall, on application under section 3A, order him to pay the fixed penalty together with an additional penalty equal to the amount of the fixed penalty. However, there is no provision empowering magistrates to order costs in such proceedings.

11. The Costs in Criminal Cases Ordinance (Cap. 492) repealed, amongst other provisions, section 69 of the Magistrates Ordinance (Cap. 227) (see section 24 of 39/96) which empowered magistrates to award costs in respect of proceedings under section 3A of the Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240) (“FP(CP)O”). Following the repeal it is doubtful whether a magistrate has power to award costs in FP(CP)O proceedings under Cap. 240.

(6) Various Ordinances containing offence provisions with the drafting formula “to the satisfaction of” an enforcement official

12. The Court of First Instance held that the drafting formula was too vague to enable a person to ascertain the elements of the offences under the provisions concerned. The proposed amendment will add a requirement that no offence is committed unless the official has specified to the affected person the measures to be taken to his “satisfaction”, or the person has commenced the regulated activity without approaching the official to ascertain the measures to be taken. The burden of proof in either case will expressly be on the prosecution.

(7) Criminal Procedure Ordinance (Cap. 221)

13. Upon the recommendation of the Court of Appeal, section 101I of the Ordinance is to be amended to raise the maximum penalty for the offence of perverting the course of public justice. There will be no fixed maximum, thereby enabling the court to impose a sentence that is appropriate to the seriousness of the situation which has arisen in accordance with established sentencing guidelines (information requested by the Panel on this item is noted at paragraphs 25 to 30 below).

(8) Finality of appeals in the Fire Services (Installation Contractors) Regulations (Cap. 95A), Pharmacy and Poisons Ordinance (Cap. 138) and Lifts and Escalators (Safety) Ordinance (Cap. 327)

14. The amendments will delete finality provisions preventing further appeal, similar to section 13(1) of the Legal Practitioners Ordinance (Cap. 159), which was held by the Court of Final Appeal to be inconsistent with its power of final adjudication under Article 82 of the Basic Law in *Solicitor v Law Society of Hong Kong* [2004] 1 HKLRD 214. The detailed background and proposals are at Annex.

(9) Legal Practitioners Ordinance (Cap. 159) and Rules of the High Court (Cap. 4A)

15. The amendments will rectify inconsistencies relating to the time for serving notices of motion of appeal in the Legal Practitioners Ordinance and the High Court Rules. The amendments are consequential to the replacement of “6 weeks” in Rule 4(1)(c), Order 59 of the Rules of the High Court with “28 days” pursuant to section 3(b) of the Rules of the High Court (Amendment) Rules

2000.

(10) Legal Practitioners Ordinance (Cap. 159): bankruptcy of solicitors

16. The Law Society has proposed the amendment of section 53(1) of the Legal Practitioners Ordinance to make it clear that a law firm which intends to employ a bankrupt solicitor or foreign lawyer should apply to the Law Society for written permission to do so, irrespective of (a) whether he holds a practising certificate or (b) his registration status at the time of his bankruptcy.

(11) Definition of “PCLL” in the Legal Practitioners Ordinance (Cap. 159)

17. In accordance with the recommendation of the Standing Committee on Legal Education and Training, it is proposed that the definition of “Postgraduate Certificate in Laws” in Cap. 159 be amended to include the PCLL to be awarded by The Chinese University of Hong Kong. This will place PCLL graduates from that university in the same position as other PCLL graduates for the purposes of entering the legal profession.

(12) Bankruptcy Ordinance (Cap. 6)

18. On 20 July 2006, the Court of Final Appeal ruled that section 30A(10)(b)(i) of the Ordinance² is unconstitutional on grounds of being unreasonably restrictive of the right to travel guaranteed under Article 31 of the Basic Law and Article 8(2) of the Hong Kong Bill of Rights. The proposed amendment will repeal section 30A(10)(b)(i).

² Under section 30A(10)(b)(i), if a bankrupt left Hong Kong without notifying the trustee in bankruptcy of his itinerary and where he could be contacted, his period of bankruptcy would be extended for the period he was absent from Hong Kong and until he notified the trustee of his return.

(13) Minor amendments to various ordinances

19. In the course of continuous review of the statute book, the Law Drafting Division has identified a number of minor and technical amendments which can conveniently be included in the Bill.

Public consultation and policy support

Costs in Criminal Cases Ordinance (Cap. 492)

20. The Law Society, the Hong Kong Bar Association, the University of Hong Kong, the City University of Hong Kong, the Chinese University, the Director of Legal Aid, the Judiciary Administrator and the Consumer Council were consulted in August 2006 on the proposal referred to in paragraph 10 above.

21. Consultation is still in progress. The responses received indicate both support and opposition.

22. The Law Society and the Bar Association oppose the proposal and reiterate concerns expressed when the wasted costs provisions were considered by the Legislative Council in 1996. For example, the possibility that the threat of a wasted costs order may diminish creativity and deter legal representatives from fearlessly conducting cases in ways which they consider to be in the best interests of their clients.

23. The Consumer Council, the Legal Aid Department, two academic lawyers, and one practitioner, support the proposal but suggest amendments to clarify the intended effect. Most importantly, to ensure that the purpose of

detering extremely deficient work of the nature identified in the relevant judgments of the Court of Appeal is balanced against the interest in maintaining a vibrant and uncowed adversarial component in the criminal justice system.

24. In order to recognise, in the Bill, the concerns of the legal profession, the Administration is exploring the possibility of including in the proposed amendment a provision which requires the court to take into account the public interest in fearless advocacy when determining whether or not to make a wasted costs order against a legal representative. An example of the text of such a provision (possibly to be added to section 18) is –

“When determining whether or not to make an order under subsection (1), the court or judge shall, in addition to all other relevant circumstances, take into account the interest that there be fearless advocacy under the adversarial system of justice.”

Criminal Procedure Ordinance (Cap. 221)

25. At the meeting of the Panel on 22 May 2006, Members requested the Administration to provide the following additional information (minutes, paragraph 47) –

- (a) the maximum years of imprisonment for the offence of perverting the course of public justice and the sentences imposed by the courts in other common law jurisdictions; and

(b) the relevant case law in respect of (a) above.

26. Regarding (a), the maximum terms in other common law jurisdictions vary widely. In the United Kingdom and Ireland, perverting the course of public justice is an offence at common law and carries a maximum sentence of life imprisonment. However, no sentence above ten years has been passed in the last century for this offence (Susan Edwards “Perjury and perverting the course of justice considered” (2003), Google).

27. In *Drury and others* [2001] EWCA Crim 975, several serving or retired police officers or informants were convicted of various offences in a corruption racket involving confiscated dangerous drugs. They were sentenced (sometimes concurrently, sometimes consecutively) for perverting the course of public justice to up to 8 years’ imprisonment, reduced to 7 years on appeal (cited by Edwards).

28. In another case (not appealed), a defendant was sentenced in 2000 to 8 years’ imprisonment for his part in perverting the course of public justice in a murder trial involving three other defendants (newspaper reports cited by Edwards).

29. The maximum penalty for perverting the course of public justice in Queensland is 7 years, New South Wales 14 years, and Victoria 25 years. Despite the relatively high maximum penalty in New South Wales, statistics of 96 offences noted by a law reform subcommittee showed that imprisonment was the sentencing option (as opposed to a fine or community

service) in only 30 cases (Law Reform Committee of Victoria, Inquiry by Administration of Justice Subcommittee, 13 November 2003).

30. In those 30 cases, the sentences ranged from six months to five years, reflecting the wide range of activity covered by the offence of perverting the course of public justice. In the case of *Taouk* (1993) 65 A Crim R 387, when the maximum penalty for the offence in New South Wales was life imprisonment, a sentence of five years and four months was imposed for an attempt to bribe a judge to give a relative a lesser sentence. The accused had acted on a belief that he was responsible for the care of his relatives as head of the family.

Others

31. No public consultation is considered necessary in respect of other proposed amendments due to their minor and noncontroversial nature.

Legal Policy Division
Department of Justice
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**Amendments to “Finality Provisions” in
Fire Service (Installation Contractors) Regulations (Cap. 95A),
Pharmacy and Poisons Ordinance (Cap. 138) and
Lifts and Escalators (Safety) Ordinance (Cap. 327)**

Introduction

It is proposed to amend the Fire Service (Installation Contractors) Regulations (Cap. 95A), Pharmacy and Poisons Ordinance (Cap. 138) and Lifts and Escalators (Safety) Ordinance (Cap. 327) to remove some provisions restricting an aggrieved person’s right of appeal and to make consequential amendments.

Background

2. Under regulation 12(1) of the Fire Service (Installation Contractors) Regulations (Cap. 95A), any registered contractor aggrieved by an order made in respect of him by a disciplinary board may appeal to the Court of First Instance. Regulation 12(4) of Cap. 95A provides that the decision of the Court of First Instance on the appeal is final.

3. Under the Pharmacy and Poisons Ordinance (Cap. 138), it is stipulated that any appeal in the following cases shall be lodged to Court of First Instance :

- (a) Under section 16(3)(a), any person or body in respect of whom or which a direction has been made by the Disciplinary Committee, and
- (b) Under section 30A, any person whose appeal is dismissed or allowed in part only by the Pharmacy and Poisons Appeal Tribunal.

4. It is also stipulated in sections 16(3)(b) and 30A of Cap. 138 that the decision of the Court of First Instance with respect to the appeals in the cases set out in paragraph 3 above is final.

5. Under the Lifts and Escalators (Safety) Ordinance (Cap. 327), it is stipulated that any appeal in the following cases shall be lodged to a judge of the Court of First Instance :

- (a) Under section 11(1), any lift engineer or escalator engineer aggrieved by an order made in respect of him by a disciplinary board;
- (b) Under section 11I(1), any lift contractor or escalator contractor aggrieved by an order made in respect of him by a disciplinary board; and
- (c) Under section 18(1), any person aggrieved by a decision of an appeal board as being erroneous in point of law.

6. It is also stipulated in section 11(4), 11I(4) and 18(4) of Cap. 327 that the decision of the judge of the Court of First Instance with respect to the appeals in the cases set out in paragraph 5 above is final.

7. The Court of Final Appeal handed down in December 2003 the judgment in *A Solicitor v The Law Society of Hong Kong & Secretary for Justice (Intervener)* [2004] 1 HKLRD 214 (“the Judgment”) in which it held that the finality provision in section 13(1) of the Legal Practitioners Ordinance (Cap. 159) was invalid. Section 13(1) of Cap. 159 provides that an appeal shall lie to the Court of Appeal against any order of a Solicitors Disciplinary Tribunal and it includes a provision which provides that “the decision of the Court of Appeal on any such appeal shall be final”.

8. Sixteen ordinances were subsequently identified as containing finality provisions (providing finality at the Court of Appeal level) which were identical to the finality provision in section 13(1) of Cap. 159 in all material aspects. These provisions were amended under the Statute Law (Miscellaneous Provisions) 2005.

Problem

9. In the light of the Judgment, the provisions in regulation 12(4) of

Cap. 95A, sections 16(3)(b) and 30A of Cap. 138 and sections 11(4), 11I(4) and 18(4) of Cap. 327 that the decision of the Court of First Instance or a judge of the Court of First Instance is final are not likely to be constitutional.

Objectives

10. The objectives of amending Cap. 95A, Cap. 138 and Cap. 327 are as follows :

- (a) To remove the provisions that are not likely to be constitutional; and
- (b) To make consequential amendments.

Proposal

11. It is proposed to amend Cap. 95A, Cap. 138 and Cap. 327 as follows :

- (a) To repeal the provisions stipulating that the decision of the Court of First Instance or a judge of the Court of First Instance is final; and
- (b) To make consequential amendments to provide that, in respect of a certain action (e.g., the publication of a disciplinary order in the Gazette) or a certain order, the time at which such action is to be carried out or, as the case may be, such order is to take effect, is to be determined by reference to an appeal to the Court Final Appeal (instead of to an appeal to the Court of First Instance).