

Re: Adaptation of Laws (Military References) Bill 2010

Comments of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“HKBA”) submits comments on the Adaptation of Laws (Military References) Bill 2010 (“the Bill”).
2. The HKBA expresses concern that the programme of the adaptation of Hong Kong laws to the circumstances of the resumption of exercise of sovereignty by the People’s Republic China over Hong Kong under the Basic Law of the HKSAR has not concluded 13 years after the establishment of the HKSAR. Proper scrutiny of adaptation of laws bills, so many years after the completion of the bulk of that programme, has become more difficult, in the light of changes in personnel and the decreasing accessibility of records. As the matters remaining for adaptation are either specialized or complex, the task has also become more challenging.
3. The HKBA notes that the Bill proposes 139 items of amendment covering 85 pieces of primary and subsidiary legislation. The HKBA has been assisted in the writing of these Comments by the Administration’s tables in Annexes C and D to LC Paper No CB(2)479/10-11(02) (14 December 2010) but regrets that the Administration has only be able to produce such tables up to s 45 of Schedule 1 to the Bill.
4. The HKBA is to focus its comments on the more fundamental issues that the Bill raises, as opposed to offering its views on each and every item of amendment in the Bill.
5. The HKBA does not claim that it is specially or expertly informed of the status, organization and mode of operation of the Chinese People’s Liberation Army (including its army, navy and air force) or of the status, organization and mode of operation of the Garrison of the Chinese People’s Liberation Army in the HKSAR (“the Hong Kong Garrison”). Publicly accessible official

information about the Hong Kong Garrison is scarce; foreign governments have been calling for “defence transparency” on the part of the People’s Republic of China. The Hong Kong community does not have adequate information on the standards and specifications for various activities engaged by the Hong Kong Garrison (such as building codes and specifications), and the training, skills and standards of professionalism and discipline of members of the Hong Kong Garrison to be assured that one is comparing like with like, the assumed basis for the “mirror image” approach of an adaptation of laws exercise. The HKBA notes that the Bills Committee has called on the Administration to provide some of the above categories of information.

6. There are, to the HKBA’s understanding, certain constitutional and legal parameters underpinning the Hong Kong Garrison and defence matters concerning the HKSAR.
7. In general terms, the Basic Law of the HKSAR provides in Article 14 that the military forces stationed by the Central People’s Government (“CPG”) in the HKSAR for defence shall not interfere in the local affairs of the HKSAR and that members of the garrison shall, in addition to abiding by national laws, abide by the laws of the HKSAR. Article 22 of the Basic Law also provides that all offices set up in the HKSAR by the CPG, and the personnel of these offices, shall abide by the laws of the HKSAR.
8. By a Notice dated 15 January 2000 (Guo Han (2000) No 5), the State Council (ie the CPG) confirmed that the Hong Kong Garrison was one of the offices set up in the HKSAR by the CPG, the others being the Liaison Office of the CPG in the HKSAR and the Office of the Commissioner of the Ministry of Foreign Affairs of the People’s Republic of China in the HKSAR. See also the Gazette Notification: Government Secretariat, *Offices set up in the Hong Kong Special Administrative Region by the Central People’s Government* (GN 300/2000).
9. At the same time, the State Council’s Notice of 15 January 2000 “requested” the Government of the HKSAR to provide to the offices set up in the HKSAR

by the CPG such “work conveniences/ facilities” (工作便利) and “immunities/exemption” (豁免) as were necessary for the carrying out of the duties of those offices.

10. The Law of the People’s Republic of China on the Garrisoning of the Hong Kong Special Administrative Region (“the Garrison Law”) is a national law made applicable to the HKSAR by inclusion in Annex III of the Basic Law and promulgation in 1997. The Garrison Law came into effect on 1 July 1997. The Garrison Law has, inter alia, the following provisions:

- Article 1 of the Garrison Law states that the Garrison Law is enacted in accordance with the Constitution of the People’s Republic of China and the Basic Law.
- Article 2 of the Garrison Law designates as the Hong Kong Garrison the military forces stationed by the CPG in the HKSAR for defence.
- Article 3 of the Garrison Law provides that the Hong Kong Garrison shall practise a system of rotation of its members.
- Article 5 of the Garrison Law provides for the defence functions and responsibilities of the Hong Kong Garrison: (1) preparing against and resisting aggression, and safeguarding the security of the HKSAR; (2) carrying out defence duties; (3) controlling military facilities; and (4) handling foreign-related military affairs. Article 10(1) of the Garrison Law requires the HKSAR to support the Hong Kong Garrison in its performance of defence functions and responsibilities and guarantee the lawful rights and interests of the Hong Kong Garrison and its members. On the other hand, Article 9 of the Garrison Law provides that the Hong Kong Garrison shall not interfere in the local affairs of the HKSAR.
- Article 7(1) of the Garrison Law provides for the inviolability of the weapons and equipment, and material of the Hong Kong Garrison, and members and vehicles of the Hong Kong Garrison duly certified to be on official duty, from inspection, search, seizure or detention by law enforcement officers of the HKSAR. Article 27 of the Garrison Law also provides that the weapons etc of the Hong Kong Garrison are not subject to enforcement by the courts of the HKSAR of their judgments and orders.
- Article 7(2) of the Garrison Law also provides that the Hong Kong Garrison and its members shall also enjoy other rights and immunities prescribed by the laws in force in the HKSAR.
- Article 8 of the Garrison Law further empowers members of the Hong Kong Garrison to take measures to stop any act which obstructs their performance of official duties in accordance with the provisions of the laws in force in the HKSAR.
- Article 10(2) of the Garrison Law requires the HKSAR to consult the Hong Kong Garrison when formulating any policy or drafting any legislation which concerns the Hong Kong Garrison.

- Article 12 of the Garrison Law provides for the joint responsibility of the Hong Kong Garrison and the HKSAR Government to protect the military facilities within the HKSAR. Military restricted zones are to be delimited by the Hong Kong Garrison in conjunction with the HKSAR Government. The HKSAR Government shall assist the Hong Kong Garrison in maintaining the security of the military restricted zones.

11. While Article 7 of the Basic Law provides that the land and natural resources within the HKSAR shall be State property managed, used and developed by the HKSAR Government, Articles 12 and 13 of the Garrison Law make provision for the Hong Kong Garrison to protect the natural resources, historical relics and monuments and other non-military rights and interests within the military restricted zones in accordance with the laws of the HKSAR and for the return of land used by the Hong Kong Garrison for military purposes to the HKSAR Government where such land is considered by the Hong Kong Garrison no longer needed for defence purposes, with the approval of the CPG. But where the Government of the HKSAR needs for public use any part of the land used for military purposes by the Hong Kong Garrison, it must seek the approval of the CPG and find at its own expenses and costs an alternate site as agreed to by the CPG in return for the Hong Kong Garrison.
12. Article 14 of the Garrison Law provides for the calling out of the troops of the Hong Kong Garrison, upon the request of the Government of the HKSAR and the approval of the CPG, to assist in the maintenance of public order or in disaster relief. This follows from Art 14 of the Basic Law.
13. Article 26 of the Garrison Law provides that acts of state, such as actions for defence taken by the Hong Kong Garrison, shall not be subject to the jurisdiction of the courts of the HKSAR.
14. By virtue of Articles 8 and 11 of the Basic Law, laws in force in the HKSAR (including Ordinances, subsidiary legislation and laws enacted by the legislature of the HKSAR) may not contravene the Basic Law.
15. The Interpretation and General Clauses Ordinance (Cap 1) provides -

- in section 2A, that all laws previously in force to be construed with such modifications, adaptations, limitations and exceptions as may be necessary so as not to contravene the Basic Law and to bring them into conformity with the status of Hong Kong as a Special Administrative Region of the People's Republic of China. In particular, in any Ordinance, provisions relating to the rights, exemptions and obligations of military forces stationed in Hong Kong by the United Kingdom shall, subject to the provisions of the Basic Law and the Garrison Law of the Hong Kong Special Administrative Region of the People's Republic of China, continue to have effect and apply to the military forces stationed in the Hong Kong Special Administrative Region by the Central People's Government of the People's Republic of China; and
- in Schedule 8, that any reference in any provision to Her Majesty, the Crown, the British Government or the Secretary of State (or to similar names, terms or expressions) where the content for the provision involves affairs for which the CPG has responsibility shall be construed as a reference to the CPG or other competent authorities of the People's Republic of China.

16. Section 2(4)(a)(viii) of the Immigration Ordinance (Cap 115) provides that a person shall not be treated as ordinarily resident in Hong Kong during any period in which he remains in Hong Kong as a member of the Hong Kong Garrison. This provision was added in 1997 in preparation for the establishment of the HKSAR.

17. Having considered these constitutional and legal parameters, the HKBA makes the following observations:

(a) Given that the Hong Kong Garrison refers to the military forces stationed by the CPG in the HKSAR for defence; that the Hong Kong Garrison is administered in a largely closed scheme and practises a rotation of its members and that its members are not taken as a matter of law to be ordinarily resident in Hong Kong during their period of service in Hong Kong, consideration may be given to adapting "Her Majesty's forces" and "officers employed on full pay in the naval, military or air services of Her Majesty" to "the Hong Kong Garrison" and "members of the Hong Kong Garrison". If it is thought that there is a need to make provision for "other" members of the Chinese People's Liberation Army in Hong Kong, the Administration should clarify.

(b) Some legislation proposed to be amended (such as the "Star" Ferry Company, Limited By-laws (Cap 104 sub leg E), bylaw 13 and the Wild Animals Protection Ordinance (Cap 170) section 13(3)(a)) assumes or envisages that members of the armed forces stationed in Hong Kong may be involved in civilian and local affairs, in possession of firearms. Compare with the proposed repeal of sections 57A, 57B, 58, 58A of the Immigration

Ordinance. This assumption is inappropriate and may be inconsistent with the intent of both Art 14 of the Basic Law and Article 9 of the Garrison Law.

(c) The exercise under the Bill seems to involve disaggregating defence related elements from the “Crown in right of the United Kingdom” or “Crown”, designating those defence related elements, and then making provision for the remainder. Guidelines of construction in the Interpretation and General Clauses Ordinance are not substitute for legal policy decision-making in the context of the legislation in question, which might not be part of the present adaptation exercise. In addition, the application of the said guidelines may be controversial since the criterion is “where the content for the provision involves affairs for which the CPG has responsibility” and therefore involves definition of “affairs for which the CPG has responsibility”. This matter is particularly pertinent bearing in mind that the monarchical “Crown” has been a nebulous concept both in itself and in adapting its associated contexts and matters for special administrative region of a unitary state under a constitutional instrument and national law enacted pursuant to the socialist constitution; that the continued subsistence of the common law doctrine of “Crown immunity” is a matter that has received attention of the Court of Appeal (see Cheung, Eric, Gu, Weixia and Zhang, Xianchu, *Crown Immunity Without the Crown* (2010) (11) *Hong Kong Lawyer* 12); and that the constitutional validity of s 66 of the Interpretation and General Clauses Ordinance, which stipulates that Ordinances shall not bind “the State” unless there is expressly provided therein or unless it appears by necessary implication that the State is bound thereby, has remained doubtful (see Tai, Benny, *The Jurisdiction of the Courts of the Hong Kong Special Administrative Region*, in Lee, Alice (ed), *Law Lectures for Practitioners 1998* (Hong Kong Law Journal, 1998) pp 65-117).

(d) The Administration should explain why it considers that the “Government of the United Kingdom” included “the British Forces stationed in Hong Kong prior to 1 July 1997”.

(e) The Administration should explain whether members of the Hong Kong Garrison are “locally engaged”, bearing in mind the definition of “serviceman” in the Immigration Ordinance section 2(1).

(f) The Administration should explain whether there are present in Hong Kong persons “with or in connection with the Hong Kong Garrison” who are not members of the Hong Kong Garrison, with reference to the Air Passenger Departure Tax Ordinance (Cap 140) Schedule 2.

(g) On the basis that, presumably, family members of members of the Hong Kong Garrison do not come to Hong Kong to live with them while they are serving in Hong Kong on rotation, the Administration should explain whether exemptions previously accorded to family members of members of the British Forces stationed in Hong Kong should be maintained.

(h) Consideration might have to be given, on an informed basis as to the military justice system of the Chinese People’s Liberation Army (including

whether its military judicial organs operate in Hong Kong with the Hong Kong Garrison), to adapting “court-martial” to “military judicial organs”.

(i) The Administration should be asked of the reason for the HKSAR Government to pay the levy to the Traffic Accident Victims Assistance Fund in respect of members of the Hong Kong Garrison who are permitted by the Commander of the Hong Kong Garrison to drive Hong Kong Garrison vehicles on the roads of the HKSAR.

(j) The Administration should be asked to provide the rationale for adapting section 50(4) of the Public Order Ordinance (Cap 245) on the basis of equating “commissioned officer in Her Majesty’s forces” with “member of the Chinese People’s Liberation Army of or above the rank of second lieutenant (or ensign)”.

(k) The Administration should be asked to clarify for what “other purposes of the [CPG]” would land in the HKSAR be occupied and possibly become a closed area.

(l) The Bills Committee may wish to be informed of the circumstances (if any) in which the CPG does own ships and vessels other than warships, with reference to the relevant maritime law of the People’s Republic of China (where appropriate).

(m) The Administration should be asked why section 31(6)(m) of the Public Order Ordinance should be the subject of adaptation, suggesting that the Ministry of National Defence in the CPG and the Hong Kong Garrison may each issue passes for persons on duty or proceeding to or from duty during a curfew declared by the Chief Executive of the HKSAR, a matter of local affairs.

(n) The Bills Committee may wish to be informed whether the Ministry of National Defence in the CPG does sponsor civilians to travel abroad.

(o) The Bills Committee may wish to be informed of the circumstances (if any) in which persons (other than members of the Hong Kong Garrison) may possess or deal in arms or ammunition in Hong Kong on behalf of the CPG.

(p) It may be more appropriate to omit Schedule 1, section 4 of the Bill from adaptation if the intention is not to adapt at the same time the expression “throughout any part of the Commonwealth outside Hong Kong” in the same paragraph of the Schedule to the Defamation Ordinance (Cap 21).

(q) It may be more appropriate to omit Schedule 1, section 18 of the Bill from adaptation as the proposal is to adapt also the reference to permanent Government service in the context of non-military service. In any event, how and where emoluments are paid to members of the Hong Kong Garrison, and whether the Chinese People’s Liberation Army grants wound and disability pensions and gratuities to its members are facts that must be inquired into and confirmed.

(r) It may be more appropriate to omit Schedule 1, section 51 of the Bill from adaptation as amendments to section 7 of the Crimes Ordinance (Cap 200) may be concerned with Article 23 of the Basic Law legislation.

(s) It may be more appropriate to narrow the amendment in Schedule 1, section 60 to “the navy of the Chinese People’s Liberation Army”.

(t) The Bills Committee may wish to be informed that military doctors and dentists in the service of the Hong Kong Garrison are exempted from registration and deemed to be registered medical practitioners and dentists respectively and as such, a military doctor may instruct a sister in charge of ward in a health centre or clinic of the Hong Kong Garrison to inject dangerous drugs without such activity being held as supplying of the dangerous drug.

18. The HKBA calls on the Administration and the Legislative Council to carefully examine the continued policy and legal validity of the extensive exemptions and other different treatments in the laws of the HKSAR accorded to the Hong Kong Garrison, the Chinese People’s Liberation Army and defence related matters. An alternative is turning the current legislative process of the Bill into such an examination.

Dated 31 December 2010.

HONG KONG BAR ASSOCIATION