

**The Administration's response  
To the Legal Service Division's letter dated 7 November 2001**

**Clause 3 – definition of “domestic purposes” ( “住用用途” )**

“住宅” is not a “用途”, but “居住” or “住用” is a “用途”. In fact, some Chinese terms such as “居住”, “開啟”, “醫療”, “關閉” etc are composed of characters which have similar or identical meaning. We do not consider it inappropriate to use the rendition “住用用途” for “domestic purposes”.

2. “住用或工業用途” is used for “domestic or industrial purposes” under section 3 of the Fire Safety (Commercial Premises) Ordinance (Cap.502). For the sake of consistency, we should also use the rendition “住用用途” for “domestic purposes” in the Bill.

**Clause 3 – definition of “fire service installation or equipment”**

3. We will seek to revise the definition of “fire service installation or equipment” in the Fire Safety (Buildings) Bill at an appropriate juncture to bring it in line with the updated definition being proposed for use in other ordinances. This can be achieved by a Committee Stage Amendment to either the Fire Services (Amendment) Bill 2001 or the Fire Safety (Buildings) Bill, depending on the legislative progress of the two Bills.

**Clause 3(2)**

4. According to clause 3(2), where a building or part of a building is unoccupied, the owner shall be deemed to be the occupier and shall be liable as an occupier to the exercise of powers by the enforcement authority. In other words, the owner will be liable to the fire safety direction specifying the requirements in Schedule 3 served on him when his premises are unoccupied. The owner only needs to comply with the requirements specified within the prescribed time limit (even though the premises may be occupied after the issue of the direction) and will not be liable as an occupier for an indefinite period of time. Clause 3(2) is in line with our policy intent and we do not consider it necessary to set a time limit in respect of the liability of the owner.

## **Clause 7**

5. The wording “the relevant building or part of a building” (emphasis added) in clause 7(6) has clearly conveyed our policy intent that a prohibition order will be made in respect of the whole building (in case of single ownership) or part of the building (in case of multiple ownership) only if an owner of the building or part of the building, as the case may be, has failed to comply with the requirements specified in a fire safety direction or fire safety compliance order.

6. An interpretation of clause 7 as a whole suggests that a prohibition order will not be made in respect of the whole building on the basis that only some owners in a building (in case of multiple ownership) have failed to comply with separate directions or orders served on them in respect of part of the building only.

7. Please also refer to our response concerning clause 7 in a letter of 12 October 2001 to the Legal Service Division of the Legislative Council.

## **Clause 13(3)**

8. The Bill has already provided for the appeal mechanism. Clause 7(5) stipulates that the procedure for hearing and determining an application for a prohibition order is to be in accordance with the rules of court made under the District Court Ordinance (Cap. 336). Under clause 8(2)(b), a prohibition order takes effect only when the appeal is finally rejected or is withdrawn; clause 8(5) provides that an appeal includes a reference to an appeal from a decision determining the appeal. It is apparent that the relevant appeal procedures should follow the provisions of the District Court Ordinance (Cap.336). The same statutory arrangement can also be found in the Fire Safety (Commercial Premises) Ordinance (Cap. 502).

## **Clause 14(1)**

9. The owner will be given an ample opportunity to be heard after the enforcement authority has applied for the issue of a fire safety compliance order or prohibition order (cf clauses 6(5) and 7). In general, the enforcement authority will, after the magistrate or the District Court has issued the relevant

order, register such an order in the Land Registry under clause 14(1). However, the enforcement authority will reasonably consider any further representations made by the owner before the registration.

## **Clause 16**

10. As regards how the provisions in clause 16(1) and (2) of the Fire Safety (Buildings) Bill, which allows entry into premises without warrant, is consistent with Article 14 of the Hong Kong Bill of Rights (HKBOR), our explanation is provided as follows.

11. Article 14 of the Hong Kong Bill of Rights Ordinance (Cap. 383) provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Article 29 of the Basic Law provides that the homes or other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited.

12. Since the power to enter into premises is to be provided in the proposed legislation, it will have satisfied the requirement of "lawful" interference for the purpose of Article 14 of the HKBOR.

13. The term "arbitrary interference" in Article 14 of HKBOR (which is equivalent to Article 17 of the International Covenant on Civil and Political Rights ('ICCPR')) contains elements of injustice, unpredictability and unreasonableness. Moreover, the expression "arbitrary" suggests a violation by the State organs. In evaluating whether interference with privacy by a State enforcement organ represents a violation of Article 17 of ICCPR, it must especially be reviewed whether, in addition to conformity with national law, the specific act of enforcement had a purpose that seems legitimate on the basis of the Covenant in its entirety, whether it was predictable in the sense of the rule of law and, in particular, whether it was reasonable (proportional) in relation to the purpose to be achieved.<sup>1</sup> For the following reasons, we are of the view that the provisions in clauses 16(1) and (2) of the Bill do not constitute arbitrary interference for the purpose of Article 14 of HKBOR or Article 17 of ICCPR.

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<sup>1</sup> See U.N. Covenant on Civil and Political Rights CCPR Commentary, Manfred Nowak, at pp. 292- 293.

14. Clause 16 must be read together with clause 15 of the Bill. Clause 15(3)(b) of the Bill provides that when exercising or performing a function conferred or imposed by the Ordinance, an authorized officer must, if required to do so, produce for inspection the officer's identity card and, except in the case of the persons referred to in clause 15(2), the authorization issued to the officer under clause 15(1).

15. The combined practical effect of clause 15 and clause 16 of the Bill is that although an authorized officer is empowered to enter the premises without warrant, he cannot enforce such power with force. If admission is refused by an owner or occupier, then the authorized officer must apply to the magistrate for a warrant pursuant to clause 16(3) in order to enter the premises in question. Clause 16(3) provides that the magistrate will only issue a warrant if he is satisfied on sworn information that admission to the premises has been refused or that refusal of admission is reasonably expected or that it is unoccupied or that the case is one of urgency and that there is good reason for an authorized officer to enter it.

16. No criminal sanction would be imposed on the owner or occupier, under clause 18 of the Bill, who refuses to let an authorized officer enter his or her premises without a warrant if he or she has reasonable excuse to do so. What constitutes reasonable excuse is a matter of fact for the court to decide in an individual case.

17. The power of entry conferred by clause 16(1) and (2) of the Bill is only exercisable in respect of "composite building" and "domestic building". These two types of buildings are clearly defined in clause 3 of the Bill. The purpose of the Bill is to provide for fire safety improvements in these buildings.

18. In summary, in light of paragraphs 12 to 17 above, we are of the view that the power of entry provided in clause 16(1) and (2) of the Bill does not constitute "arbitrary or unlawful interference" within the meaning of Article 14 of HKBOR and Article 17 of ICCPR. First, the power of entry does not contain any element of injustice, unpredictability and unreasonableness. Secondly, the power is necessary for the achievement of the purpose of making fire safety improvements to composite buildings and domestic buildings as defined in the Bill. Thirdly, the power is both reasonable and proportional in relation to that purpose.

19. For the same reasons stated above, we are also of the view that the provision in clause 16(1) and (2) of the Bill does not contravene Article 29 of the Basic Law.

20. In practice, the fire safety measures to be complied with by owners of composite buildings in respect of parts intended for domestic purposes and domestic buildings as required by the Bill are, in general, related to the common parts of the buildings (see Schedule 2). It is very unlikely that the enforcement authority will need to enter a private unit. In case such a need arises and the occupier finds the intended visit not convenient, the enforcement authority will adopt a flexible approach and schedule a later visit for a mutually convenient time as far as possible.