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Urgent by Fax

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31 July 2002

Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Hong Kong

(Attn: Ms Connie FUNG)

Dear Ms FUNG,

Fire Services (Amendment) Bill 2001

Thank you for commenting on the above Bill. Attached is the Administration's Response to the issues you raised. Should you have any further questions, please feel free to contact the undersigned.

Yours sincerely,

(David Wong)
for Secretary for Security

**Administration's response to issues raised by
the Assistant Legal Adviser on 9.10.2001**

Clause 4 – proposed section 8A

Question (a)

Sanction against any contravention of the provision of the new section 8A is provided for in section 27. Section 27, as amended by the Bill, provides that “any person who, *without reasonable excuse*, resists, obstructs or delays any member acting in the exercise of the member’s power, or in the discharge of any duty conferred by this Ordinance shall be guilty of an offence...” [italics added]. Thus, if the answer to a question asked was not within his knowledge, or the document requested was not in his possession, a person should not incur criminal liability by failing to comply with section 8A as the statutory defence of “reasonable excuse” should be available to him.

Questions (b) and (c)

2. Under section 36 of the Crimes Ordinance, Cap. 200, if a person knowingly and wilfully makes a statement in a declaration which is false in a material particular, he commits an offence. Under section 73 of the Crimes Ordinance, Cap. 200, if a person uses an instrument which is, and which he knows or believes to be false with an intention of inducing others to accept it as genuine, he commits an offence.

3. If there is evidence to prove that a person knowingly make a statement or produces a document which is misleading with an intent to resist, obstruct or delay an FSD officer in the carrying out of the fire investigation, consideration may be given to instituting prosecution under the new section 27.

Question (d)

4. We agree that the legal professional privilege should also cover information that a person may be required to give under the new section 8A(2)(f)(ii). Subject to the Bills Committee's deliberations, we would consider appropriate CSA to stipulate it clearly in the new section 8A(3).

Question (e)

5. We agree that the obligation of non-disclosure proposed under section 8A(5) should also cover information derived from documents obtained or inspected or copies taken under the new section 8A(2)(g). Subject to the Bills Committee's deliberations, we would consider appropriate CSA to improve the provision.

Clause 4 – proposed section 8B

6. For the reasons given below, the use of compelled documents in a subsequent criminal trial against the person who produced the documents does not appear to infringe the right against self-incrimination or the right to presumption of innocence guaranteed under the fair hearing requirements of Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”) and Articles 10 and 11 of the Hong Kong Bill of Rights (“HKBOR”). In other words, the non-extension of the application of section 8B to prohibit the use of compelled documents in subsequent criminal trials is not inconsistent with the relevant human rights provisions under the Basic Law.

The reasons

7. The effects of the new sections 8A(2)(f) and (g) are to facilitate the investigation into the cause of fire by requiring the relevant person to answer truthfully the questions posed by the Fire Services officers and to produce relevant documents even if the answers or documents might tend to incriminate the person who gave them.

8. But if such answers to questions tend to incriminate the maker in any criminal proceedings against him, the new section 8B prohibits the use of the questions and answers so obtained under compulsion. It therefore serves to safeguard the rights of the accused under Article 11(2)(g) of the HKBOR and Article 14(3)(g) of the ICCPR which stipulate that the accused should not be compelled to testify against himself or to confess guilt in the determination of a criminal charge against him.

9. There is no provision under the Bill which prohibits the admission of the documents produced under the new section 8A(2)(g) in criminal proceedings. In the circumstances, the admissibility of those documents produced under compulsion would be governed by the normal

rules of evidence in connection with criminal proceedings. However, the courts have a residual discretion to exclude evidence to secure the fairness of the trial.

10. It appears that a distinction can be made between the use in subsequent proceedings of compelled answers to questions and of documents produced under compulsion. In Saunders v United Kingdom (1996) 23 EHRR 313, it was held by the European Court of Human Rights, at paragraph 69 of the judgment, that –

“The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting State and Parties to the Convention and elsewhere, *it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, blood and urine samples and body tissue for the purpose of DNA testing.*” (Italics added.)

11. In HKSAR v Lee Ming Tee & Another [2001] HKLRD 599, the Court of Final Appeal of Hong Kong, at page 641 of the judgment, took the view that –

“it is important to bear in mind that the purpose of the privilege is to respect the will of the accused to remain silent, thereby ensuring that the accused is not compelled to provide proof of his own guilt. *The privilege has no application to evidence which exists independently of the will of the accused.* This proposition was expressly recognised in *Saunders v United Kingdom* (1996) 23 EHRR 313 at para 69.”¹ (Italics added.)

12. In the Canadian case of British Columbia Securities Commission v Branch (1995) 123 DLR (4th) 464, at 500, it was held by the court, in relation to the fair trial provisions of the Canadian Charter of Rights and Freedoms that:

¹ It has been agreed by both parties to the proceedings in Lee Ming Tee that “no privilege against self-incrimination protects such [company] documents.”

“it is not necessary to recognise any additional protection at the trial state in order for pre-existing documents to be compellable at the subpoena [investigative] stage...an order requiring an individual or an officer of a corporation to produce documents did not involve the fabrication of evidence; the individual or officer acted as a ‘mere conduit’ for the delivery of pre-existing records...Thus there is no suggestion that the use of such evidence in a subsequent trial would affect the fairness of the proceedings”.

13. In the circumstances, the non-extension of the application of the new section 8B to prohibit the use of compelled documents in subsequent criminal proceedings does not appear to infringe the relevant human rights provisions under the Basic Law.

Clause 10 – proposed section 25

14. Following the passage of the Extension of Vetting Period (Legislative Council) Ordinance 2002 last April, the Legislative Council may by resolution extend the 28-day vetting period, from the previous one Legislative Council sitting to 21 days, or if there is no Council sitting on that 21st day, to the first sitting after 21 days. Appropriate arrangement has also been put in place for a vetting period that straddles two Legislative Council sessions. The new arrangements have been agreed with Members in a bid to enable the Legislative Council to have sufficient time to perform the important function of scrutinising subsidiary legislation, especially in the case of complicated or lengthy subsidiary legislation.

15. In the current case, the proposed Fire Service (Fire Hazard Abatement) Regulation is not at all a complicated or lengthy one. It mainly provides for matters of procedure, and part of it reproduces section 9 to 9D of the Ordinance with a view to updating the provisions. Subject to its enactment, Members will have ample time to scrutinise it during the negative vetting process and if Members so wish, they may propose amendments to it by resolution. In fact, during the current Bills Committee process, we would already welcome any early views from Members on the proposed Regulation.

16. Given the forgoing, we do not consider it necessary to change the way that regulations are made under section 25 of the principal

Ordinance, which already strikes a proper balance between efficiency and adequate scrutiny by the Legislative Council.

Clause 20 – Consequential Amendments

17. In clauses 21 and 22, we agree that “or place” should be added after “premises” in paragraph (d) of the respective proposed definition of “fire service installation or equipment” in the Places of Public Entertainment Regulations (Cap.172 sub. leg.) and the Fire Safety (Commercial Premises) Ordinance (Cap.502).

Miscellaneous

Clause 3: amended section 2, in the definition of “fire service installation or equipment”

18. For better presentation, we propose to amend the English text by deleting “under” and substituting with “manufactured, used or designed to be used for the purpose mentioned in”. The Chinese text will be proposed to be amended accordingly.

Clause 4: new section 8A(f)

19. We consider that the Chinese text as currently drafted is in order.

Clause 4: new section 8B

20. We agree that the Chinese text may be improved by deleting “但檢控《刑事罪行條例》(第200章)第36條就該答案所訂的罪行的法律程序除外” and replacing it with “但就該答案而根據《刑事罪行條例》(第200章)第36條所訂罪行所進行的法律程序，則屬例外”.

Clause 5: new section 9(f)

21. We agree to delete “具有以下効力的” and add the term “規定” before “按” in subparagraphs (i) and (ii). Correspondingly in the English text of subparagraphs (i) and (ii), we propose to substitute “to close” and “to prohibit” by “that closes” and “that prohibits” respectively.

22. Regarding new section 9(f)(iv), we agree, for the sake of consistency, to delete “處所” and replace it with “任何處所內”. As to the term “逃生途徑”, we propose to amend “any means of escape’ in the English text to read “the means of escape”.

Clause 10: new section 25

23. In paragraph (hb), we agree to delete “飭令” and add “規定” at the beginning of subparagraphs (i) and (v) as the rendition for the word “requires”.

24. As in the new section 9(f), we propose to replace “any means of escape” in paragraphs (hb)(v) and (hd) with “the means of escape’.

25. Regarding paragraph (hi), we have no objection to replacing “某人” with “任何人”.

26. Regarding the new subsection (2), as a drafting practice, we use “may not” to negate a right or a power given in legislation. Accordingly, “不得” is an appropriate rendition for “may not”. Precedents of use of such a rendition can be found in order 12 rule 1(1) and order 5 rule 6(2) of the Rules of the High Court (Cap.4 sub. leg.); s.6(5) of the Protection of Investors Ordinance, Cap. 335; s.48(5) & (6) of the Legislative Council Ordinance, Cap.542; and s.29(5) & (6) of the District Court Ordinance, Cap.547.

Clauses 20, 21 and 22

27. The same amendments as set out in paragraph 18 above would be proposed.