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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 23 May 2011**

**Issues relating to drafting of legislation and
proposal for a new numbering system for bills**

Purpose

This paper gives an account of the past discussions of Members of the Legislative Council ("LegCo") on issues relating to drafting of legislation since the First LegCo.

Background

Bilingual legislation

2. Up until the late 1980s, all legislation in Hong Kong were drafted and enacted in English only. In March 1987, the Official Languages Ordinance (Cap. 5) was amended to require all new legislation to be enacted in both English and Chinese. As regards ordinances enacted in English only, Chinese texts were prepared under the Law Translation Programme. The Chinese texts were declared authentic by the Governor-in-Council after consulting the Bilingual Laws Advisory Committee. The Law Translation Programme was completed in May 1997. Consequently, all laws are now available in both English and Chinese.

3. Section 10B(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that both the English text and the Chinese text of an ordinance are equally authentic and the provisions of an ordinance are presumed to have the same meaning in each authentic text.

The Law Drafting Division ("LDD")

4. LDD of the Department of Justice ("DoJ") is responsible for drafting all legislation proposed by the Administration. It also vets all non-Government

Bills and subsidiary legislation put forward by non-Government bodies to make sure that they comply with current drafting practice in format and style. The Division is also responsible for ensuring that the published version of Hong Kong legislation is up to date. Law draftsmen in LDD are of the Government Counsel ("GC") grade.

Issues raised by Members during past discussions

5. Issues relating to law drafting were discussed at a number of special meetings of the Finance Committee to examine the Estimates of Expenditure, the Panel on Administration of Justice and Legal Services ("the Panel") and committees formed to study legislative proposals over the years. Recently, Members had also expressed concern over the Administration's failure to consult LegCo on its intention to adopt a new numbering system for the Companies Bill at meetings of the House Committee ("HC") and the use of reader aids during the scrutiny of the Motor Vehicle Idling (Fixed Penalty) Bill and the Companies Bill. The major issues raised by Members are summarized in the ensuing paragraphs.

Quality of law drafting and drafting practices

6. In February 2009, the issue about the quality of law drafting was referred to the Panel by the Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions under the House Committee ("HC"). The Subcommittee considered that LDD should carry out drafting and textual improvement to all existing legislation and guidelines should be provided to uphold the quality and standard of law drafting.

7. Regarding members' view on the need to cut down cross references and avoid artificial and complicated definitions in legislation to enhance the comprehensibility of legislation, the Panel was advised that LDD was committed to drafting law in plain language and would remove unnecessary cross references as far as possible. Nonetheless, in complex areas of law, law draftsmen might find it necessary to use tools such as explanatory notes to help readers understand the context of the legislation and pick up the meaning of the provisions more readily.

8. At the Panel meeting on 15 December 2009, LDD briefed members on the recent steps taken to improve the quality of Hong Kong legislation. The Panel noted that LDD had set up a Drafting Techniques and Legislative Styles Committee to review current drafting practices. As a result of the on-going review, a number of changes to drafting styles and practices had been

introduced which included use of "must" instead of "shall", gender-neutral drafting, discontinued use of cross-headings, reduced use of cross-references, more use of reader aids such as notes and examples where appropriate.

9. Noting that LDD had already started to apply new drafting styles and practices when amending existing legislation, some members expressed concern that the same piece of legislation might contain both new and old drafting styles. They also enquired whether any action had been/would be taken to harmonize the drafting style of amending legislation and whether there were any guidelines on the use of active and passive voices in drafting legislation. LDD advised that it was aware of Members' concern about the use of "must" to impose an obligation in an enactment in which "shall" had been used for the same purpose. While this should not lead to any interpretation problem, LDD would look for opportunities in amending exercises to make consequential amendments to change "shall" to "must" (especially in provisions in the proximity of those in which "must" was used) for the sake of tidiness.

10. Members were of the view that it was important for LDD to collate their views in an organized manner with a view to conducting a comprehensive review to improve the quality of law drafting. In response to members' suggestion, LDD and the Legal Service Division of the LegCo Secretariat have been holding regular working meetings to discuss views expressed by Members on law drafting in the course of examination of bills.

11. In the course of scrutiny of the Motor Vehicle Idling (Fixed Penalty) Bill, members of the relevant Bills Committee expressed concern about the appropriateness of using examples in the Bill and in legislation in general. Members may wish to refer to the letter dated 26 October 2010 from the legal adviser to the Bills Committee and the Administration's letter dated 28 October 2010 for details of the concern and the Administration's reply (**Appendix I**). At the request of the Bills Committee, the Administration deleted the relevant provision and the examples listed in a schedule to the Bill and the issue was referred to the Panel for discussion.

12. In the course of scrutiny of the Companies Bill, the relevant Bills Committee has discussed the overall policies of the Companies Ordinance rewrite exercise. Members note that in order to make the new Companies Ordinance more user-friendly, the Bill has used "notes" to assist readers to understand the relevant provisions. While the Administration has explained that the purpose of the "notes" is for information only and has no legislative effect, members consider that the use of "notes" concerns policy of drafting of legislation and has agreed to refer the issue to the Panel for follow-up. A note on the modernization of drafting provided by LDD to the relevant Bills

Committee (Annex to LC Paper No. CB(1)1522/10-11(02)) is in **Appendix II**. A paper provided by DoJ on the use of notes in the Companies Bill (LC Paper No. CB(1)2133/10-11(01)) is in **Appendix III**.

Readability of Chinese legislation

13. The drafting policy on bilingual legislation was discussed at the Panel meeting on 20 March 2001. The discussion was prompted by the concern expressed by the relevant Bills Committee during the scrutiny of the Securities and Future Bill introduced into LegCo in November 2000. The Bills Committee was concerned that the differences in the drafting and style between the English and Chinese texts of the Bill would lead to different interpretations of the two texts of the Bill. The Administration explained that it was the policy of LDD to draft legislation that could reflect accurately the policy intent and were concise and easy to comprehend. With all legislation being drafted and enacted bilingually, the objective was for there to be no discrepancy in meaning between the Chinese and English texts. While every effort was made to match the two texts, an exact match was not always practicable having regard to the syntactic and grammatical differences between the two languages.

14. In addressing the concern about the readability of the Chinese texts of legislation, the Administration advised that LDD would continue to enhance the Chinese law drafting skills of law draftsmen through its in-house mentorship scheme and training programmes. As a long English text would add complexity to the Chinese rendition, LDD would also strive to make the drafting of the English text as plain as possible to assist the drafting of the Chinese text. Members were also informed that one of the practical difficulties faced by law draftsmen in preparing the Chinese texts was shortage of time. By convention, the initial text was produced in English and by the time the English text was finalized, there was limited time left for the preparation of the Chinese text. LDD further advised that in preparing the Chinese text, law draftsmen would, where appropriate, modify a passive construction in the English text into an active construction where such change accorded with the grammatical rules of the Chinese language and would help enhance the clarity and comprehensibility of the Chinese text without affecting the intended legal effect. There were diverse views on the appropriateness of using passive voice in the Chinese language and LDD was aware that some Members had strong views against the use of certain passive constructions in Chinese legislation. Internet research, however, indicated that the passive construction was commonly found in the law of the Mainland and Taiwan.

15. During the recent discussions at the Panel meetings on 15 December 2009 and 26 April 2010, members had reiterated their concern about the

readability of the Chinese text of legislation. They asked about the measures taken to enhance the Chinese drafting skills of the law drafting counsel. Noting that LDD had recently engaged the services of a Legislative Editor to ensure grammatical accuracy and uniformity of style in the English text, it was suggested that consideration be given to engaging a Legislative Editor for the Chinese text.

16. LDD advised that a number of initiatives had been adopted to enhance the readability of the Chinese text, such as using shorter sentences, placing the subject close to the action word, and allowing greater flexibility in sentence structure. In addition, the effect of the extensive adoption of plain language drafting skills to enhance the comprehensibility of the English text would also be reflected in the Chinese text. Junior law draftsmen were learning Chinese drafting skills on the job, and their supervising officers would discuss with them any issues identified in their drafting. LDD, however, pointed out that there had been instances where law draftsmen had tried to make the Chinese text more comprehensible by departing from the sentence structure of the English equivalent, but the policy bureau concerned or Members had expressed concern that the difference in the structure of the Chinese and English texts might result in discrepancy in the meaning of the two texts.

17. In response to Ms Miriam LAU's enquiry as to whether it was feasible for LDD to adopt parallel drafting or to request for drafting instructions to be given in Chinese, LDD explained that in most cases, the instructing officers would request that the initial draft be produced in English to facilitate their consideration as to whether the policy objectives as stated in the drafting instructions had been reflected accurately in the draft legislation, which explained why LDD always prepared the English text first, to be followed by the Chinese text. Even if LDD requested for drafting instructions in Chinese, the bureau concerned would still prepare the drafting instructions in English and have it translated into Chinese, which would shorten the time available for LDD to draft the legislation.

Long title of bills

18. Some members observed that while the long title of some bills was couched in broad terms, there were bills where the long title was drafted in a very detailed manner. They expressed concern that such distinction would have significant implications for the amendments which could be moved. For bills seeking to give effect to international conventions, these members also pointed out that while such objective was spelt out clearly in the long title of some bills, it might not be the case for others. For example, the Genetically Modified Organisms (Control of Release) Bill was introduced into LegCo in May 2009 to give effect to the Cartagena Protocol on Biosafety to the

Convention on Biological Diversity in Hong Kong. The Bills Committee concerned noted that while such objective was clearly spelt out in the long title of the Bill, it might not be the case for other legislation of similar nature. The Bills Committee considered that there was a need for consistency in making reference to international conventions in the long title of bills if such bills were to give effect to relevant convention(s). Members were concerned that such difference would have implications on the interpretation of the ordinances by the court. Members in general were of the view that a consistent approach should be taken in drafting the long title of bills of similar nature and there should be general principles for the drafting of long titles of bills against which future bills could be measured.

19. LLD explained that in drafting the long title of a bill, the law draftsman would have regard to Rule 50(3) of the Rules of Procedure ("RoP") of LegCo which stipulated that a long title was to set out the purposes of a bill in general terms. The policy bureau concerned would have its views on what should and should not be included in the long title which, like other parts of a bill, had to be settled within the Administration. Whether or not a particular international convention should be mentioned in the long title depended on the purpose of the bill. However, LDD agreed that there should be consistency in similar cases and undertook to see whether guidelines could be developed on the drafting of the long titles of bills.

Document design of draft legislation

20. At the Panel meeting on 26 April 2010, LDD briefed the Panel on the proposed changes to the format and visual design of Hong Kong legislation which included using larger font size of alphabets, increasing line spacing between paragraphs, and restructuring the amending provisions by adding an operative provision and setting out the relevant amendments more distinctly. Members in general supported the proposed changes to the document design of legislation. However, during the scrutiny of the Chief Executive (Amendment) Bill 2010 and the LegCo (Amendment) Bill 2010, Dr Margaret NG advised LDD that the new approach to restructure the amending provisions had made it very difficult for Members in drafting Committee Stage amendments.

Proposal for a new numbering system for the clauses of a bill

21. At the HC meeting on 7 January 2011, Members noted the intention of the Administration to introduce a new numbering system for the Companies Bill, a particularly voluminous bill with 909 clauses and 10 schedules. The Law Draftsman had proposed the adoption of a new numbering system under which each clause would be numbered by the part number of the Bill, followed by a dividing decimal and then the number representing its numerical order within

that part. However, Members noted that according to Rule 50(1) of RoP, a bill for presentation to the Council shall conform with the requirements laid down in this Rule. One of the requirements as provided in Rule 50(6) was that a bill shall be divided into clauses numbered consecutively and having a descriptive section heading above each clause. A clause numbering system which did not have the clauses of a bill numbered consecutively was not in conformity with Rule 50(6). The Administration had advised that it would not pursue the proposal for the Companies Bill and the Law Draftsman would consult Members should such a proposal be made in the future. Members stressed the need for consultation on any such proposals.

22. Members note the consultation procedure to be followed if any new numbering system for a bill is proposed by the Administration as set out in an information paper on "Procedure for Members to be consulted by the Administration on a new numbering system for a bill" issued for HC vide LC Paper No. CB(2)1130/10-11 on 22 February 2011. In summary, the Administration should consult the Panel on any such proposals and the Panel may report to HC if the new numbering system is going to affect the scrutiny and enactment of bills and may require changes to RoP. If HC considers that the proposal should be further examined from a procedural point of view, it may refer the matter to the Committee on Rules on Procedure. Upon the completion of its study, the Committee may make a report to HC with its recommendations. If the recommendations involve an amendment to RoP and if it has the support of HC, the Chairman of the Committee on Rules of Procedure will propose a resolution in the Council to amend RoP.

Mentorship Scheme and training programmes

23. On measures to enhance the drafting skills of law draftsmen, the Administration informed the Panel that a Mentorship Scheme was in place to enable junior officers to develop their skills through learning from the more experienced law drafters. The Scheme started as a trial scheme in November 2001 and was made permanent in September 2005. Under the Scheme, each counsel (mentee) in the Senior GC or GC rank was assigned a mentor at the directorate rank. Apart from serving as a quality control mechanism under which the drafting of the mentees was vetted by the mentors, the arrangement also allowed junior drafters to gain exposure to more complicated work at an early stage of their career and enabled them to acquire knowledge more efficiently from experienced colleagues. The Scheme was kept under review to determine whether any change was desirable to enhance its effectiveness as a learning and development tool. In addition, LDD would continue to organize an intensive and comprehensive in-house legislative drafting course and in-house seminars for all law-drafting counsel. Subject to operational

requirements, arrangements would also be made for law-drafting counsel to participate in international drafting conferences to broaden their exposure.

24. LDD further briefed members at the Panel meeting on 15 December 2009 on its initiatives for the professional development of counsel. The Panel noted that six SGCs/GCs attended in 2008 an intensive in-house legislative drafting course which lasted for 24 weeks. A series of internal workshops and seminars were being conducted for instruction in the principles and mechanics of plain language drafting.

Policy on the Chinese language proficiency requirement in the recruitment of law drafters

25. Policy relating to the recruitment of law draftsmen was discussed at the Panel meetings in April 2006 and June 2007. The Panel expressed concern that the Chinese language proficiency requirement for appointment to the rank of GC would limit the choice of candidates in the recruitment process and preclude the appointment of monolingual draftsmen with experience and expertise in drafting legislation in English, and requested the Administration to review its recruitment policy for law draftsmen.

26. The Administration explained to the Panel that in line with the Government's objective to develop and maintain a biliterate civil service that was able to operate efficiently in both Chinese and English, Chinese language proficiency had been adopted as a general entry requirement for recruitment to the GC grade since 1998. As the work of LDD required bilingual legislative drafting, proficiency of draftsmen in both languages would facilitate the deployment of manpower resources in the division. Nevertheless, the Administration recognized the operational needs of LDD to recruit from time to time monolingual counsel to fill particular vacancies, and flexibility was allowed in granting exemptions from the general language proficiency requirement where justified. For instance, in the light of recruitment difficulties, DoJ had sought the agreement of the Civil Service Bureau in the 2007 GC recruitment exercise to exempt a small number of new recruits from the Chinese language proficiency requirement. This would ensure that exceptionally meritorious monolingual counsel would not be precluded from being appointed as GC. Furthermore, in relation to recruitment to the directorate GC posts, the Chinese language proficiency requirement might be waived where there was a need to do so. There had been occasions when such requirement was waived.

Relevant papers

27. A list of the relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix IV**.

Council Business Division 2
Legislative Council Secretariat
19 May 2011



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



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26 October 2010

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Dear Mr O'Brien,

Motor Vehicle Idling (Fixed Penalty) Bill – Clause 2(2)

I refer to clause 2(2) of the Motor Vehicle Idling (Fixed Penalty) Bill which seeks to provide the following -

"Where this Ordinance includes an example of the operation of a provision -

- (a) the example is not exhaustive; and*
- (b) if the example is inconsistent with the provision, the provision prevails."*

Under section 7 of Schedule 1 to the Bill (vehicles necessarily idling for certain purposes), idling prohibition does not apply to a driver of a motor vehicle if the vehicle is lawfully designed primarily for a purpose other than the carriage of the driver, any passengers and their personal effects and idling the vehicle is necessary for a purpose for which the vehicle is primarily designed. Five examples are set out under that provision in smaller print.

- 2 -

You may recall that serious concerns about the drafting of clause 2(2) of the Bill were raised by members at the Bills Committee meeting on 25 October 2010. In this regard, I would be pleased if you could advise on the following matters –

- (i) Please provide precedents in the Laws of Hong Kong where examples are given to demonstrate the "operation (實施)" of a provision in a piece of legislation.
- (ii) If inclusion of examples in a legislative provision represents a new approach to law drafting in Hong Kong, please give the justification for this new approach.
- (iii) By including an example of the operation of a provision of the Bill, the Administration should ensure that the example falls squarely within that provision and it fulfils all the conditions/requirements of that provision. However, the effect of clause 2(2) seems to be that examples which are given in the Bill are neither exhaustive nor conclusive. Please advise the Bills Committee the purpose of clause 2(2).

I look forward to your reply in bilingual form before 28 October 2010.

Yours sincerely,



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28 October 2010

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Dear Ms Cheng,

Motor Vehicle Idling (Fixed Penalty) Bill – clause 2(2)

Thank you for your letter by fax of 26 October 2010 concerning clause 2(2) of the Bill and the examples in section 7 of Schedule 1 to the Bill.

I can provide the following advice in response to the matters raised in your letter.

- (i) *Please provide precedents in the Laws of Hong Kong where examples are given to demonstrate the operation of a provision in a piece of legislation.*

There are numerous precedents in the laws of Hong Kong for the use of examples. See, for instance, section 52(2) of the Evidence Ordinance (Cap. 8), section 35(1) of the Bills of Exchange Ordinance (Cap. 19), section 30(2) of the Limitation Ordinance

(Cap. 347), section 106(2) of the Copyright Ordinance (Cap. 528), and the Schedule to the Widows and Orphans Pension Ordinance (Cap. 94), which contains numerous examples of the operation of the provisions in that Schedule.

- (ii) *If inclusion of examples in a legislative provision represents a new approach to law drafting in Hong Kong, please give the justification for this new approach.*

As indicated in my response to item (i) above, the inclusion of examples in legislative provisions is not new to Hong Kong.

The Bills Committee may also wish to note the following extract from the information paper submitted by the Department of Justice for the meeting of the Panel on Administration of Justice and Legal Services on 15 December 2009 (LC Paper No. CB(2)512/09-10(04)):

“20. **Reader aids** – The use, where appropriate, of reader aids such as notes and examples will be encouraged. An ordinance-specific interpretation provision to clarify their status will be included in contexts in which clarification is required, while the question of a provision of general application is being considered.”.

As indicated in this extract, examples are a form of reader aid. The use of examples would not be appropriate in every piece of legislation. However, where the subject matter of the law touches the everyday life of people in Hong Kong, as is the case with the Motor Vehicle Idling (Fixed Penalty) Bill, reader aids such as examples can play an important role in assisting the reader to understand and comply with the law.

- (iii) *By including an example of the operation of a provision of the Bill, the Administration should ensure that the example falls squarely within that provision and it fulfils all the conditions/requirements of that provision. However, the effect*

of clause 2(2) seems to be that examples which are given in the Bill are neither exhaustive nor conclusive. Please advise the Bills Committee the purpose of clause 2(2).

The purpose of clause 2(2) is two-fold. Clause 2(2)(a) provides that where an example is included, it is not exhaustive. The purpose of this is to confirm that the example is not an exhaustive statement of the law, it is only an example of the operation of the provision. Clause 2(2)(b) provides that if the example is inconsistent with the provision, the provision prevails. The purpose of this is to preserve the primacy of the operative provision over the example such that, in the most unlikely event that there may be some inconsistency in the interpretation of the example and the interpretation of the operative provision, primacy would be given to the operative provision.

The Bills Committee may wish to note that a similar interpretation provision applies in the Commonwealth of Australia. Section 15AD of the Acts Interpretation Act 1901 (Australia) reads:

“15AD Examples

Where an Act includes an example of the operation of a provision:

- (a) the example shall not be taken to be exhaustive; and
- (b) if the example is inconsistent with the provision, the provision prevails.”.

Yours sincerely,



(Paul O'Brien)

Senior Assistant Law Draftsman

c.c. “B” File

[DM# 175526-v1]

Modernisation of Drafting

One of the purposes of the Companies Ordinance (“CO”) Rewrite exercise is to modernise the company law. Among the measures directed to this purpose is improving the structure of the parts and sections of the CO and enhancing the clarity of the provisions so as to make the law more accessible to users. It also includes modernising and re-arranging the sequence of some of the provisions in a more logical and user-friendly order so as to make the provisions more readable and comprehensible.

2. The Companies Bill (“the Bill”) has been drafted with these goals in mind and in accordance with current law drafting practices, including some recently introduced initiatives.¹ From the law drafting perspective, the overall objective was to improve the comprehensibility of the law in both the English and Chinese texts and to make the Bill more user-friendly in general. The main drafting improvements are –

- (a) Structure of provisions – Structural improvements have been made in an effort to reduce complexity and aid comprehension. The main structural improvement is the revision of the Part headings and the grouping of sections under new Division and Subdivision headings.² Another major improvement is the division of provisions into a greater number of sections and the grouping of provisions within a Part in a more logical order. For example, all general interpretation provisions have been placed at the beginning of the Part³ and exceptions to general rules have been placed together within the same Division or

¹ An information paper on the drafting of legislation was prepared by the Law Drafting Division, Department of Justice, for a meeting of the Panel on Administration of Justice and Legal Services of the Legislative Council held on 15 December 2009 (LC Paper No. CB(2)512/09-10(04)).

² e.g., Part XI of the CO (which relates to non-Hong Kong companies) consists of 19 long sections without Divisions or Subdivisions. On the other hand, Part 16 of the Bill (which corresponds to Part XI) consists of 32 shorter sections which are divided into 9 Divisions.

³ The CO is not consistent. For example, the general interpretation provisions in Part XI of the CO are placed at the end of the Part.

Subdivision.⁴ Related but widely-separated provisions have also been placed closer together.⁵

- (b) Length of provisions – The sections of the Bill are generally shorter in length than those in the CO, with fewer and less complicated subsections.
- (c) Cross-references – There are far fewer cross-references. Unnecessary cross-references have been eliminated wherever possible.
- (d) Section headings – The section headings have generally been made more informative (e.g., exceptions to general rules are clearly identified as exceptions) and efforts have been made to make them more concise.
- (e) Terminology – The wording used in the CO has been modernised and simplified and inconsistencies removed. Redundant or archaic terminology has been eliminated to the extent practicable.⁶ The wording has also been updated to match current drafting practices.⁷ In addition, to assist comprehension, new definitions have been created⁸ and more informative expressions have been employed.⁹
- (f) Gender neutral language – Gender neutral language has been used throughout the English version of the Bill.
- (g) Notes – Notes have been added to certain provisions as a readers’ aid.

⁴ See, e.g., Subdivision 3 of Division 5 of Part 5 and Subdivision 3 of Division 3 of Part 11.

⁵ e.g., the penalties for the offences are set out in the relevant sections or Parts rather than in a Schedule at the end of the Bill as in the case of Schedule 12 to the CO.

⁶ e.g., in the English text, the word “said” in phrases such as “the said person” and Latin expressions such as “prima facie” and “bona fide” have been eliminated.

⁷ e.g., in the English text, “must” is used to impose an obligation rather than “shall” as in CO, and the offence provisions use the modern formula “commits an offence and is liable” rather than the now obsolete “shall be guilty of an offence and liable”.

⁸ e.g., the definition of “qualified private company” in clause 5.

⁹ e.g., “responsible person”, which is used as a general term in the Bill rather than “officer who is in default” in the CO; and “non-tendering member” (see clause 694) which is used in place of “relevant shareholder” in the CO (see section 1 of Schedule 13).

Use of Notes

3. One of the measures to modernize the drafting is the use of notes. The notes included in the Bill¹⁰ are intended to serve as aids to comprehension for the general reader. Although they are not included in every Bill, the practice of including notes to provisions (in one form or another) has a long history in Hong Kong. In most cases in the Bill, the notes draw the reader's attention to other relevant provisions of the Bill. For example, the note to clause 130(2) reminds readers that Division 2 of Part 4 of Schedule 10 contains transitional provisions relating to clause 130. Other notes provide the reader with factual information which is available elsewhere, such as the commencement dates of previous amendments to the CO.¹¹

4. In addition, there are a few notes, notably the notes to clauses 155(1), 175(2), 183(2), 205(1) and 207(3) and section 27(2) of Schedule 10 to the Bill, which provide examples of the situations in which the relevant section will apply or illustrate how it will work in practice. For instance, clause 155(1) states that the section applies if a company's articles give a member of the company a right to purchase shares on the occurrence of an event that constitutes *a transmission* of the right to the shares by operation of law, etc. The term "transmission" is a legal term which many readers may find difficult to understand. The note gives an example of a transmission to better assist their understanding, i.e., a "transmission of the right to shares on the death or bankruptcy of a shareholder".

¹⁰ See the notes to the definition of article in clause 2(1) and the notes to clauses 130(2), 133, 155(1), 162(3), 165(3), 166(4), 169(1), 175(2), 183(2), the definition of distributable profits in clause 198(1), and clauses 205(1), 207(3), 218(1), 225(1), 231(3), 237, 253(2), 261(1), 266(2), 272, 279(5), 280(2), 281(4), 285(1), 346(4), 420(1), 534(1) and 710(4). Notes are also included in sections 15, 27(2), 34(2), 39(1), 45 and 46 of Schedule 10 to the Bill.

¹¹ See, e.g., the note to section 15 of Schedule 10 to the Bill.

5. Members may wish to note the following extract from the information paper on the drafting of legislation submitted by the Department of Justice for the meeting of the Panel on Administration of Justice and Legal Services on 15 December 2009¹² –

“20. Reader aids – The use, where appropriate, of reader aids such as notes and examples will be encouraged. An ordinance-specific interpretation provision to clarify their status will be included in contexts in which clarification is required, while the question of a provision of general application is being considered.”

6. Clause 2(6) of the Bill states that a note is provided for information only and has no legislative effect. In other words, the notes are not intended to have a legal effect in the same way as a section of an Ordinance. Clause 2(6) is similar to section 2(5) of the existing Arbitration Ordinance (Cap. 341) (which is being replaced by a new Ordinance) and section 3(4) of the Legislative Council Ordinance (Cap. 542).

7. The wording used in Clause 2(6) and in the provisions noted above, in particular the words “has no legislative effect”, derive from the wording used in section 18(3) of the Interpretation and General Clauses Ordinance (Cap. 1), which provides that “[a] marginal note or section heading to any provision of any Ordinance *shall not have any legislative effect* and shall not in any way vary, limit or extend the interpretation of any Ordinance”. The rule in section 18(3) has been interpreted generally¹³ as meaning that a court is not entitled to have regard to the marginal notes or section headings for the purpose of ascertaining the meaning of an Ordinance. In other words, marginal notes and section headings are not to be used to resolve any purported ambiguities in the text. Clause 2(6) of the Bill is intended to achieve the same effect but the wording is expressed in more modern terms. By stating that the

¹² LC Paper No. CB(2)512/09-10(04).

¹³ See, e.g., *AG v. Asia Electronics Co. Ltd.* [1974] HKCA 62, CACC334/1974 (HC) (unreported) at para. 3; *Re An Application by the Official Solicitor (No. 1)* [1983] HKCFI 290, [1983] 2 HKC 259, HCMP2644/1983 (HC) (Full Bench) at para. 23; *Harknett v. Venning (Permanent Magistrate)* [1983] HKCFI 135, [1983] 2 HKC 348, HCMP1345/1983 (HC) (Full Bench) at para. 4; and *Inglis v. Loh Lai Kuen Eda (Permanent Magistrate)* [2005] HKCA 212, [2005] 3 HKC 115, CACV341/2004 (CA) at para. 14.

notes “are provided for information only”, the legislative purpose of the notes is made abundantly clear: they are provided only for the information of the reader and serve no other purpose. They are not intended to have any other effect, whether legal or otherwise.

**Law Drafting Division
Department of Justice
March 2011**

Bills Committee on Companies Bill

Use of Notes in the Companies Bill

The Administration has been requested to prepare a paper to –

- (a) list the clauses of the Bill in which notes are used;
- (b) divide these clauses into appropriate categories; and
- (c) give an explanation on the intended effect of notes in these clauses.

Clauses of Bill in which notes are used and appropriate categories

2. As explained in the note on Modernisation of Drafting annexed to the paper on Overall Policies of the Companies Ordinance Rewrite submitted by the Administration to the Bills Committee on 7 March 2011¹, the notes included in the Bill are intended to serve as aids to comprehension for the general reader. The Bill includes a total of 37 notes the purposes of which can be classified into 3 broad categories, namely –

- (a) to draw readers' attention to other relevant provisions of the Bill (25 notes fall within this category);
- (b) to provide readers with factual information which is available elsewhere (5 notes fall within this category); and
- (c) to provide examples of the situations in which the relevant clause applies or illustrate how it will work in practice (7 notes fall within this category).

3. Set out in the **Annex** is a table listing the clauses of the Bill in which notes are used and their purpose.

¹ LC Paper No. CB(1)1522/10-11(02).

Intended effect of notes

4. Members may wish to refer the following extract from the paper on Modernisation of Drafting mentioned above –

“6. Clause 2(6) of the Bill states that a note is provided for information only and has no legislative effect. In other words, the notes are not intended to have a legal effect in the same way as a section of an Ordinance. Clause 2(6) is similar to section 2(5) of the existing Arbitration Ordinance (Cap. 341) (which is being replaced by a new Ordinance) and section 3(4) of the Legislative Council Ordinance (Cap. 542).

7. The wording used in Clause 2(6) and in the provisions noted above, in particular the words “has no legislative effect”, derive from the wording used in section 18(3) of the Interpretation and General Clauses Ordinance (Cap. 1), which provides that “[a] marginal note or section heading to any provision of any Ordinance *shall not have any legislative effect* and shall not in any way vary, limit or extend the interpretation of any Ordinance”. The rule in section 18(3) has been interpreted generally as meaning that a court is not entitled to have regard to the marginal notes or section headings for the purpose of ascertaining the meaning of an Ordinance. In other words, marginal notes and section headings are not to be used to resolve any purported ambiguities in the text. Clause 2(6) of the Bill is intended to achieve the same effect but the wording is expressed in more modern terms. By stating that the notes “are provided for information only”, the legislative purpose of the notes is made abundantly clear: they are provided only for the information of the reader and serve no other purpose. They are not intended to have any other effect, whether legal or otherwise.”

Law Drafting Division
Department of Justice
May 2011

List of clauses in which notes are used and their purpose

	Clause	Purpose of note
Part 1		
	2 (definition of <i>articles</i>)	draw readers' attention to other provisions in the Bill
Part 4		
	130(2)	draw readers' attention to other provisions in the Bill
	133	draw readers' attention to other provisions in the Bill
	155(1)	provide example
	162(3)	draw readers' attention to other provisions in the Bill
	165(3)	draw readers' attention to other provisions in the Bill
	166(4)	draw readers' attention to other provisions in the Bill
	169(1)	draw readers' attention to other provisions in the Bill
	175(2)	provide example
	183(2)	provide example
Part 5		
	198(1) (definition of <i>distributable profits</i>)	draw readers' attention to other provisions in the Bill
	205(1)	provide example
	207(3)	provide example
	218(1)	draw readers' attention to other

	Clause	Purpose of note
		provisions in the Bill
	219(1)	draw readers' attention to other provisions in the Bill
	220(1)	draw readers' attention to other provisions in the Bill
	225(1)	draw readers' attention to other provisions in the Bill
	231(3)	draw readers' attention to other provisions in the Bill
	237	draw readers' attention to other provisions in the Bill
	253(2)	draw readers' attention to other provisions in the Bill
	261(1)	draw readers' attention to other provisions in the Bill
	266(2)	draw readers' attention to other provisions in the Bill
	272	draw readers' attention to other provisions in the Bill
	279(5)	draw readers' attention to other provisions in the Bill
	280(2)	draw readers' attention to other provisions in the Bill
	281(4)	draw readers' attention to other provisions in the Bill
	285(1)	draw readers' attention to other provisions in the Bill
Part 8		
	346(4)	provide example

	Clause	Purpose of note
Part 9		
	420(1)	draw readers' attention to other provisions in the Bill
Part 11		
	534(1)	draw readers' attention to other provisions in the Bill
Part 13		
	710(4)	draw readers' attention to other provisions in the Bill
Schedules		
	Schedule 10, clause 15	provide readers with factual information which is available elsewhere (commencement date)
	Schedule 10, clause 27(2)	provide example
	Schedule 10, clause 34(2)	provide readers with factual information which is available elsewhere (brief content of statutory provision referred to)
	Schedule 10, clause 39(1)	provide readers with factual information which is available elsewhere (commencement date)
	Schedule 10, clause 45	provide readers with factual information which is available elsewhere (commencement date)
	Schedule 10, clause 46	provide readers with factual information which is available elsewhere (commencement date)

**Relevant papers on issues relating to drafting of legislation and
proposal for a new numbering system for bills**

Committee	Date of meeting	Paper
Finance Committee (Special meeting)	24.3.2000	Minutes
Legislative Council	5.4.2000	Official Record of Proceedings Page 26 (Written question)
Panel on Administration of Justice and Legal Services ("AJLS Panel")	20.2.2001	Minutes
	20.3.2001 (Item IV)	Agenda Minutes
Finance Committee (Special meeting)	22.3.2001	Minutes
	30.3.2004	Minutes
AJLS Panel	24.1.2005 (Item V)	Agenda Minutes CB(2)835/04-05(01)
	17.10.2005	Minutes
Finance Committee (Special meeting)	16.3.2006	Minutes
AJLS Panel	24.4.2006 (Item V)	Agenda Minutes CB(2)1937/05-06(01) and (02)
Finance Committee (Special meeting)	22.3.2007	Minutes
AJLS Panel	25.6.2007 (Item IV)	Agenda Minutes
Finance Committee (Special meeting)	1.4.2008	Minutes

Committee	Date of meeting	Paper
AJLS Panel	28.4.2008 (Item V)	Agenda Minutes
Finance Committee (Special meeting)	23.3.2009	Minutes
AJLS Panel	15.12.2009 (Item IV)	Agenda Minutes
Bills Committee on Motor Vehicle Idling (Fixed Penalty) Bill	5.11.2010 (Item II)	Agenda Minutes
AJLS Panel	26.4.2010 (Item VI)	Agenda Minutes
House Committee	7.1.2011 (Item II)	Minutes (Paragraphs 4 - 9) CB(2)1130/10-11
Bills Committee on Companies Bill	29.3.2011 (Item I)	Agenda
House Committee	14.1.2011 (Item II)	Minutes (Paragraph 3)

Council Business Division 2
Legislative Council Secretariat
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