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Paper for the House Committee meeting on 1 June 2012

**Report of the Bills Committee on Statute Law
(Miscellaneous Provisions) Bill 2012**

Purpose

This paper reports on the deliberations of the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2012.

The Bill

2. The Bill is an omnibus bill which seeks to make miscellaneous amendments to various Ordinances and repeal subsidiary legislation that have ceased to be in force. The Bill comprises 12 Parts and 72 clauses. Part 1 contains the short title and commencement clauses. The amendments are grouped under the remaining 11 Parts with the following themes –

- (a) Part 2 – amendments to the Legal Practitioners Ordinance ("LPO") (Cap. 159);
- (b) Part 3 – amendment to the Administration of Estates by Consular Officers Ordinance (Cap. 191);
- (c) Part 4 – amendment to the Crimes Ordinance (Cap. 200);
- (d) Part 5 – amendment to the Customs and Excise Service Ordinance (Cap. 342);

- (e) Part 6 – amendments to the Toys and Children's Products Safety Ordinance (Cap. 424);
- (f) Part 7 – amendments relating to editorial powers of the Secretary for Justice ("SJ") under the Legislation Publication Ordinance (Cap. 614) and the Laws (Loose-leaf Publication) Ordinance 1990 (51 of 1990);
- (g) Part 8 – amendments relating to legal practice entities introduced by the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997);
- (h) Part 9 – amendments to reflect the establishment of the legal office of Assistant Principal Solicitor in the Intellectual Property Department; and
- (i) Parts 10 to 12 – minor and technical amendments and repeals.

The Bills Committee

3. At the House Committee meeting on 4 May 2012, Members agreed to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Dr Hon Margaret NG, the Bills Committee has held two meetings with the Administration.

Deliberations of the Bills Committee

Part 2 – amendments to LPO (Cap. 159) (clauses 3 to 10)

4. Part 2 of the Bill proposes various amendments to LPO. The major amendments include –
- (a) exempting an applicant for an employed barrister's certificate from the insurance requirement under section 30(3)(b) of LPO (clause 3);
 - (b) amending section 40M(1) of LPO to allow an appeal to the Court of Final Appeal ("CFA") against any order made by a

Notaries Public Disciplinary Tribunal, in the light of the CFA's ruling in *A Solicitor v The Law Society of Hong Kong and Secretary for Justice* [2004] 1 HKLRD 214, where the CFA held that the finality provision in section 13(1) of LPO was inconsistent with CFA's power of final adjudication under the Basic Law (clause 4); and

- (c) amending section 50B(4) of LPO to clarify that a foreign lawyer or firm must not take into partnership a solicitor or barrister who holds a practising certificate (clause 9).

5. Regarding paragraph 4(a) above, the Administration has explained that the amendment is made in response to the suggestion of the Hong Kong Bar Association, which considers that there is no policy reason to justify the insurance requirement for employed barristers who only provide legal services to their respective employers, and not to the general public. The Administration has also advised that in respect of solicitors, an employed solicitor is generally not required to take out professional indemnity insurance.

Part 3 - amendment to the Administration of Estates by Consular Officers Ordinance (Cap. 191)
(clause 11)

6. Clause 11 amends the Administration of Estates by Consular Officers Ordinance to streamline the gazettal requirement of orders made under section 3 of the Ordinance. Members raise no queries on the proposed amendment.

Part 4 - amendment to Crimes Ordinance (Cap. 200)
(clause 12)

7. Under the existing common law, there is an irrebuttable common law presumption of criminal law that a boy under 14 is incapable of sexual intercourse ("common law presumption"). After reviewing the presumption and its implications, the Law Reform Commission of Hong Kong ("LRC") issued a report in December 2010 recommending that the common law presumption should be abolished. To implement the LRC's recommendation, the Bill proposes to add a new provision to the Crimes Ordinance to abolish the common law presumption. Members generally support the policy objective of the proposed abolition of the common law presumption.

8. According to the Administration, the LRC's report takes the view that the proposed reform is straightforward, as it is contrary to common sense that the law in Hong Kong should refuse to accept that a boy under 14 may be capable of sexual intercourse, regardless of evidence to the contrary. Stakeholders including the two legal professional bodies generally support LRC's proposal, and organizations such as End Child Sexual Abuse Foundation have urged for its early implementation.

9. Members note that LRC has received views from individual organizations expressing concerns in connection with the proposal, and have sought information in this regard. According to the Administration, the concerns expressed by the Hong Kong Committee on Children's Rights and Against Child Abuse relate not to the proposed abolition of the common law presumption *per se*, but to the issues of minimum age of criminal responsibility and the chance of young offenders being subjected to criminal liability. In this connection, the Administration has advised that the minimum age of criminal responsibility in Hong Kong has been raised from seven to 10 years with effect from July 2003 in the light of the recommendation made in the LRC's report on "The Age of Criminal Responsibility in Hong Kong" published in 2000. Some other common law jurisdictions (such as England and Australia) have also set the minimum age of criminal responsibility at 10.

10. The Administration has further advised that it has all along endeavoured to provide young persons with rehabilitation opportunities under circumstances which are appropriate and permitted by law. For young persons aged under 18 who are arrested for having committed relatively minor criminal offences, the Police will usually consider the applicability of the Police Superintendent's Discretion Scheme, so that young offenders will not be subject to sanction under the criminal justice system for minor criminal offences. Under the common law, there is also a rebuttable presumption of *doli incapax* applicable to children aged from 10 to 14, meaning that a child within this age range is presumed to be incapable of committing a crime. In the view of the Administration, this presumption provides adequate protection for children under the age of 14, as the prosecution must prove beyond reasonable doubt that not only was there *actus reus* with *mens rea*, but also that the child knew that the particular act was not merely naughty or mischievous, but seriously wrong. At the present stage, the Administration has no plan to further raise the minimum age of criminal responsibility.

Part 5 – amendment to Customs and Excise Ordinance (Cap. 342)
(clause 13)

11. Clause 13 proposes to repeal section 12(6) of the Customs and Excise Ordinance, which requires an officer under interdiction to seek the permission of the Commissioner of Customs and Excise before leaving Hong Kong.

12. The Administration has explained that the provision is proposed to be repealed as it may not be compatible with Article 31 of the Basic Law and Article 8(2) of the Hong Kong Bill of Rights concerning freedom to travel.

Part 6 - amendments to the Toys and Children's Products Safety Ordinance (Cap. 424)

(clauses 14 to 16)

13. The Bills Committee has not raised any queries on clauses 14 to 16 in Part 6 of the Bill, which seek to amend the Toys and Children's Products Safety Ordinance to simplify the definitions of "children's product standard" and "toy standard" and the format of Schedules 1 and 2 to the Ordinance to facilitate the updating of applicable safety standards.

Part 7 – amendments relating to editorial powers
(clauses 17 to 21)

14. Part 7 of the Bill amends the Legislation Publication Ordinance (Cap. 614) and the Laws (Loose-leaf Publication) Ordinance 1990 (51 of 1990) ("Loose-leaf Ordinance") to provide a few additional editorial powers to SJ to facilitate the editorial work involved in preparing and updating the Laws of Hong Kong. These include –

- (a) making the ambit of editorial powers for the loose-leaf edition in line with the new legislation database regime under section 12 of the Legislation Publication Ordinance (clause 21(1));
- (b) adding the power in relation to inserting after a reference to the title of an Ordinance the chapter number given to that Ordinance (clauses 18(2) and 21(3)), and
- (c) adding the power to insert after a definition its Chinese/English equivalent (clauses 18(3) and 21(4)).

In response to the request of the Bills Committee, the Administration has provided examples of editorial amendments to explain the proposed editorial powers in paragraph 14(b) and (c) above.

15. Clauses 17, 18(1), 19, 20 and 21(2) of the Bill seek to add the word "title" to the relevant provisions of the Legislation Publication Ordinance and the Loose-leaf Ordinance to the effect that SJ may "alter the title, short title or citation of [an] Ordinance". In response to members' enquiry, the Administration has clarified that these amendments do not seek to grant any new editorial power to SJ, but to achieve consistency with section 13(2) of the Interpretation and General Clauses Ordinance (Cap. 1) which provides that "any reference made to any Ordinance may be made according to the title, short title, citation, number or chapter number used in copies of Ordinances ". The Administration has also clarified that "title" in the context of these provisions refers to the title of subsidiary legislation, and not the long title of a principal ordinance.

Part 8 – amendments relating to legal practice entities
(clauses 22 to 33)

16. The Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997) ("the 1997 Ordinance"), which was enacted in June 1997, seeks, among others, to amend LPO to enable solicitors to incorporate their practices as solicitor corporations. The relevant provisions relating to solicitor corporations in the 1997 Ordinance have yet to come into operation, pending the making of the Solicitor Corporation Rules ("SCR") by The Law Society of Hong Kong ("Law Society").

17. Clauses 22 to 33 in Part 8 of the Bill seek to –

- (a) amend the 1997 Ordinance to provide that only a solicitor who is a member or employee of a solicitor corporation can be appointed as a proxy for the purpose of attending and voting at any meeting of the solicitor corporation (clause 31); and
- (b) amend various provisions of LPO and the 1997 Ordinance to enable the relevant provisions of the 1997 Ordinance relating to solicitor corporations and SCR to be brought into operation.

18. In respect of paragraph 17(a) above, the Administration has advised that the new section 7L of Part IIAA of LPO as enacted by the 1997 Ordinance provides for the application of the Companies Ordinance (Cap. 32) ("CO") to solicitor corporations. In the draft SCR proposed by the Law Society, there is a provision providing that only a solicitor who is a member or employee of a solicitor corporation can be appointed as a proxy for the purpose of attending and voting at any meeting of the solicitor corporation, so as to achieve the policy intent that control of solicitor corporations must remain with solicitors. This proposed provision in the draft SCR is arguably in breach of the *ultra vires* principle in its purported restriction or qualification of section 114C(1) of CO which provides that any person can be appointed as a proxy. To resolve the potential *ultra vires* issue, clause 31 of the Bill seeks to amend the new section 7L of LPO to the effect that section 114C(1) of CO does not apply to solicitor corporations. In response to members' enquiry, the Administration has confirmed that the Companies Bill ("CB") currently under scrutiny by the Legislative Council contains a clause similar to section 114C(1) of the existing CO, and there are provisions in CB to deal with consequential amendments required to be made to other legislation following the enactment of CB.

19. The Bills Committee notes that except for clause 31 mentioned in the preceding paragraph, the other clauses in Part 8 of the Bill are either technical or consequential amendments required to be made to enable the relevant provisions of the 1997 Ordinance and the SCR to be brought into operation. The majority of these technical or consequential amendments are to add references to "solicitor corporation" in the relevant provisions or replace references to "law firm" or "solicitor or foreign lawyer" by "legal practice entity", a term which is defined under section 2(1) of the LPO as amended by the 1997 Ordinance (which has not come into operation) to cover a solicitor or his firm, a foreign lawyer or his firm, a solicitor corporation and a foreign lawyer corporation.

20. Members also note from the Administration that it is the intention of the Law Society to bring into operation all the relevant provisions relating to solicitor corporations in the 1997 Ordinance at the same time when the SCR prepared by the Law Society comes into operation.

21. The Administration has advised the Bills Committee that it will introduce Committee Stage amendments ("CSAs") relating to solicitor corporations to clause 33 of the Bill pursuant to the request of the Law Society. These CSAs are made to –

- (a) remove the ambiguity that a solicitor corporation may act as principal to a trainee solicitor;
- (b) provide that, insofar as solicitor corporations are concerned, only a director of a solicitor corporation can employ a trainee solicitor or act as his principal; and
- (c) add the phrase "or the foreign lawyer"/"or a foreign lawyer" to section 67(3) of LPO and section 67A of LPO as enacted by the 1997 Ordinance (which has not come into operation) to achieve consistency with section 67(1) of LPO.

Part 9 – amendments to reflect the addition of the office of Assistant Principal Solicitor in the Intellectual Property Department

(clauses 34 to 43)

22. The Administration has advised that Part 9 of the Bill contains amendments to various Ordinances to reflect the establishment of the legal office of Assistant Principal Solicitor in the Intellectual Property Department to ensure that Assistant Principal Solicitors are eligible to be appointed as certain judicial officers. These Ordinances are -

- (a) High Court Ordinance (Cap. 4);
- (b) Lands Tribunal Ordinance (Cap. 17);
- (c) Labour Tribunal Ordinance (Cap. 25);
- (d) Magistrates Ordinance (Cap.227);
- (e) District Court Ordinance (Cap. 336);
- (f) Small Claims Tribunal Ordinance (Cap. 338); and
- (g) Coroners Ordinance (Cap. 504).

Parts 10 to 12 – minor and technical amendments and repeals

(clauses 44 to 72)

23. The Administration has explained that Part 10 (clauses 44 to 49), Part 11 (clauses 50 to 55) and Divisions 1 to 3 of Part 12 (clauses 56 to 71) of the Bill contain minor and technical amendments to various Ordinances or subsidiary legislation for miscellaneous purposes, for example, to correct or update references appearing in certain enactments and to achieve internal consistency in terminology and consistency between the Chinese and English texts of certain enactments.

24. Members have discussed whether the Chinese rendition ("看來是") of "purported" in the phrase "any purported disposition" in section 16(1) of

the Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO"), as amended in clause 63(2) of the Bill, accurately reflects the English text. The Administration has advised that according to Jowitt's Dictionary of English Law, "one thing purports to be another when it seems to have been designed or constructed so as to appear to be it". There are also a number of provisions in the existing Hong Kong legislation where "看來是" is used as the corresponding Chinese rendition of "purported/purporting/purports" such as sections 6H(7) and 18(4) of MPFSO. The legal adviser to the Bills Committee has also referred to Garner's Dictionary of Legal Usage in which the word "purport" is said to mean "to profess or claim falsely" or "to seem to be", which is consistent with the Administration's views. On the other hand, Dr Hon Margaret NG considers that the Chinese rendition "看來是" has not conveyed the meaning of deliberate intent in the word "purported" and requests the Administration to further study the Chinese rendition of the word when a suitable occasion arises.

25. Division 4 of Part 12 (clause 72) repeals various items of subsidiary legislation set out in the Schedule that have ceased to be in force. The Administration has further proposed that the following two items of subsidiary legislation be repealed:

- (a) Hong Kong Airport (Control of Obstructions) (Consolidation) Order (Cap. 301 sub. leg. A); and
- (b) Lifts and Escalators (Safety) (Fees) Regulations (Cap. 327 sub leg. A).

26. According to the Administration, Hong Kong Airport (Control of Obstructions) (Consolidation) Order has ceased to be in force following the repeal of section 3(1)(b) of the Hong Kong Airport (Control of Obstructions) Ordinance (Cap. 301) in 1994 and the enactment of the Hong Kong Airport (Control of Obstructions) (No. 2) Order 1997 (Cap. 301 sub. leg. D) in 1997. The Administration will move CSAs to include the Order in the Schedule to the Bill. As regards the Lifts and Escalators (Safety) (Fees) Regulations, the Administration has advised that the principal Ordinance under which it is made is to be repealed by section 157 of the Lifts and Escalators Ordinance (8 of 2012) which has yet to come into operation. Accordingly, the Administration has proposed to move CSAs to add a new clause 72(2) to the Bill to repeal the Regulations and to amend clause 1 of the Bill to provide that clause 72(2) of the Bill comes into operation on the day on which section 157 of the Lifts and Escalators Ordinance comes into operation.

Commencement arrangements

(clause 1)

27. Members note that apart from Division 1 of Part 8 relating to solicitor corporations (and also paragraph 21 above) and the new clause 72(2) relating to repeal of the Lifts and Escalators (Safety) (Fees) Regulations (paragraph 26 above), the other parts of the Bill will come into effect on the day on which it is published in the Gazette.

Committee Stage amendments

28. A full set of the CSAs to be moved by the Administration and agreed by the Bills Committee is in **Appendix II**.

29. The Bills Committee has not proposed any amendment.

Resumption of Second Reading debate

30. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting of 13 June 2012.

Advice sought

31. Members are invited to note the deliberations of the Bills Committee and the date for resumption of the Second Reading debate on the Bill.

**Bills Committee on
Statute Law (Miscellaneous Provisions) Bill 2012**

Membership list

Chairman Dr Hon Margaret NG

Members Hon James TO Kun-sun
Hon LAU Kong-wah, JP
Hon Tanya CHAN

(Total : 4 Members)

Clerk Ms Amy YU

Legal Adviser Mr Kelvin LEE

Statute Law (Miscellaneous Provisions) Bill 2012

Committee Stage

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
1(2)	By deleting “subsection (3)” and substituting “subsections (3) and (4)”.
1	By adding— “(4) Section 72(2) comes into operation on the day on which section 157 of the Lifts and Escalators Ordinance (8 of 2012) comes into operation.”.
33	By adding— “(6A) Schedule 1, after item 25—

Add

“25A. Section 20(3)	Repeal everything after “principal” and substitute— “without the special leave in writing of the Society unless the person— (a) is practising as a solicitor on the person’s own account or in partnership; or (b) is a director of a
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solicitor
corporation.”.”.

(6B) Schedule 1—

Repeal items 26 and 27.”.

33 By adding—

“(15A) Schedule 1, item 88, column 2—

Repeal

“and (3)”.

(15B) Schedule 1, Chinese text, item 88, column 3, before “律師”—

Add

“法院在”.

(15C) Schedule 1, after item 88—

Add

“88A. Section 67(3) Add “or solicitor corporation
or the foreign lawyer” after
“the solicitor”.”.

(15D) Schedule 1, item 90, column 3, new section 67A(1),
after “corporation” (wherever appearing)—

Add

“or the foreign lawyer”.

(15E) Schedule 1, item 90, column 3, new section 67A(2),

after “solicitor corporation”—

Add

“or the foreign lawyer”.

(15F) Schedule 1, item 90, column 3, new section 67A(3)(a),
after “solicitor corporation”—

Add

“or the foreign lawyer”.

(15G) Schedule 1, item 90, column 3, new section 67A(4),
after “solicitor corporation”—

Add

“or a foreign lawyer”.”.

72 (a) By renumbering the clause as clause 72(1).

(b) By adding—

“(2) The Lifts and Escalators (Safety) (Fees) Regulations
(Cap. 327 sub. leg. A) is repealed.”.

Schedule By adding after item 10—

“10A. Hong Kong Airport (Control of Obstructions)
(Consolidation) Order (Cap. 301 sub. leg. A).”.