Revenue (Abolition of Estate Duty) Bill 2005
The Administration's Response to the submission from the Law Society of Hong Kong dated 31 May 2005

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2. Suspension of the EDO *(paragraphs 2.1 to 2.4 of submission)*	
The Revenue (Abolition of Estate Duty) Bill 2005, in not "repealing" the Estate Duty Ordinance (Cap. 111) (EDO) but allowing it to remain on the statute book, will only have the effect of "suspending" its operation from the commencement of the Bill. This means that estate duty could be easily re-introduced at a later stage with unfortunate consequences. In order to achieve certainty, the Bill should be drafted to state that –	The Bill does not only effect a suspension of estate duty. Once the Bill is passed, the estate duty will cease to be payable in respect of people dying on or after the commencement of the Ordinance. There is no built-in mechanism for reviving the estate duty. It will take the introduction and enactment of another bill to impose estate duty again. In that sense, the abolition is as permanent as if it were effected by the repeal of EDO.
(a) the estate duty is abolished with	We will need to apply the provisions of EDO in a number of years to come in respect of people dying before the effective date of the new Ordinance. If we were to adopt the Law Society's suggestion of repealing EDO but saving its effect for transitional purposes, the Ordinance would normally have to be taken out of the Laws of Hong Kong. This would create an undesirable situation in which the

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effect from March 16, 2005; but (b) for transitional purposes the EDO will continue to apply to the estates of those persons who die before the date of abolition.	provisions are in active operation but they are no longer in the Laws of Hong Kong. The Administration's policy intent to abolish estate duty is very clear and this has been clearly reflected in the Bill. Australia and New Zealand adopted a similar legislative approach when abolishing their estate duty in 1978 and 1992 respectively. As for the date of effecting the abolition, we consider it more appropriate to give effect to the abolition of estate duty as from the date of enactment of the enabling legislation. This is in line with our policy of not conferring new legal provisions with retrospective effect. It would also remove uncertainties, obviate the possibility of unnecessary preparation and filing of affidavit, etc. to the Estate Duty Office and the possible need for making refunds.

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3. Existing Safeguards *(paragraphs 3.1 to 3.8 of submission)*	
A prudent approach should be adopted in the legislative process to ensure the interests of the beneficiaries will continue to be well safeguarded. Whilst there may no longer be any revenue protection reason for the requirement, the obligation of the personal representative and other accountable persons such as a recipient of "gift" from the deceased, surviving joint owners and any other trustees holding assets on behalf of the deceased to prepare a full inventory and account of properties comprised in a deceased's estate should be made mandatory. Furthermore, there should be clear	The Administration does not propose to make it a mandatory requirement for a schedule of property or similar document to be filed with the court on the following grounds – (a) the personal representatives are, in most cases, trusted persons or the closest relative of the deceased. Improper administration of the estate would unlikely be the norm; (b) the cost in maintaining the function to vet the contents of the schedule would not be commensurate with the benefit, given that improper administration may be rare; (c) the schedule of property merely provides an easier access to such information. Without such schedule, beneficiaries would still be able to obtain such information by other means (e.g. conduct land and companies search etc). Very often, such list is compiled by

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provisions that assets not disclosed in the inventory list cannot be dealt with by the personal representative. This is essential not only for the protection of interested parties to avoid misappropriation of assets, but for various practical purposes to ensure proper administration of the estate: e.g. to enable the personal representative and the Probate Registry to identify the appropriate beneficiaries entitled to the estate; to facilitate the registration process by the Land Registry, etc. and to avoid unnecessary family disputes on the administration and distribution of the estate.	the personal representative only by making due inquiries with the beneficiaries; (d) the preparation of a schedule of property or similar document takes time. Without such a requirement, we envisage that the personal representative would be able to obtain the grant of representation in a much shorter period of time, and the assets of the deceased could be dealt with much earlier. This could help alleviate the hardship caused to small and medium enterprises due to the freezing of assets; and (e) the personal representative may, if necessary, be required to file a true and perfect inventory and account to the court under section 56 of the Probate and Administration Ordinance (Cap. 10) (PAO). On presentation of a grant of representation clearly identifying the executor or intended administrator and sufficient proof of identity, the Land Registry would be able to process the registration for transfer of ownership of landed property. The schedule of property is not

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	required.

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4. Court Fees *(paragraphs 4.1 to 4.2 of submission)* As the proposals in paragraph 3.8 may probably lead to an increased role and workload of the Probate Registry, the Committees believe that the Court fees should be commensurate with the work ultimately required of the Probate Registry.	It is Government policy that fees charged by the Government should in general be set at levels adequate to recover the full cost of providing the goods or services. If the Committees' proposals will lead to an increase in costs, as pointed out by the Committees, the increase will ultimately be reflected in the appropriate fees. If there is any subsequent change to the Administration's proposal impacting the level of court fees, the Judiciary Administrator will also assess the actual impacts on fees.

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5.2 Safe Deposit Box *(paragraphs 5.2.1 to 5.2.5 of submission)*	
(i) Whereas the main objectives of opening the safe deposit boxes of a deceased should be to ascertain the existence of the will and to prepare an inventory of its contents, it has not been made an automatic requirement for an inventory list of its contents to be prepared when a safe deposit box is opened for inspection in the future. It is unclear if the Secretary for Home Affairs (SHA) will impose this as a condition in every certificate.	(i) Currently the two officers from the Inland Revenue Department (IRD) take inventory of the contents of the safe deposit box for revenue protection purpose. Following the abolition of estate duty, there is no revenue protection purpose to require the compilation of a schedule of property, including those assets in the safe deposit box. As a schedule of property is not necessary for application for grant of representation, we propose not to make it a requirement for an inventory to be taken during the inspection of the safe deposit box. Nonetheless, the personal representative may, if necessary, be required to file a true and perfect inventory and account to the court under section 56 of the PAO.
(ii) What is or is not a will is a question	(ii) The mis-handling of testamentary instruments could be avoided by

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of law and under the proposed new regime, there is a real risk of e.g. a home-made will in the form of a letter or other informal format being released or tampered with or mislaid before legal advice can be obtained.	administrative measures, for example, by attaching a condition to the effect that the bank can release any document purporting to be a "will" to the holder of the certificate **only if** the latter is clearly identified as the executor in that purported testamentary instrument, as under the current practice. Further, given the importance of the will and codicil, the Administration proposes that the existing practice of making a copy of the will and placing it inside the box upon its removal be retained. This arrangement could also be one of the conditions attached to the certificate for inspection.
(iii) It is equally unclear under what circumstances the SHA will issue a certificate to permit the holder to open the safe deposit box to ascertain the existence of and take possession of "documents or article other than the Will" and what	(iii) The purpose of allowing "documents or articles other than the will" to be released to the holder of the certificate is to retain the existing practice where the Commissioner for Inland Revenue (CIR) would allow the removal of such documents as marriage certificate, birth certificate and documents belonging to persons other than the deceased, either to support the application for grant of representation or other purposes.

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conditions the SHA will impose as to safeguard the interests of the beneficiaries against intermeddling with the estate. Without clear legislative provisions, there is a danger that articles may be removed and not reported and accounted for and documents removed and destroyed.	Examples of conditions that may be attached include that of the bank being required to release the documents or articles specified in the certificate to the holder of the certificate **only if** the identity of the latter matches with the personal particulars shown on the respective documents or articles.

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5.3 Release of funds for burial expenses and maintenance *(paragraphs 5.3.1 to 5.3.7 of submission)*	
(i) The Government should provide statistics on the number of instances where the power of the CIR under section 24(4) of the EDO has been invoked to justify the need for such power.	(i) About 600 applications for release of funds for funeral expenses and 20 applications for maintenance of former dependants under section 24(4) of the EDO are received each year.
(ii) Given the possible conflict with the judicial power under Cap. 481, there is also a need to define clearly in the legislation the types of person that the SHA could consider to be "fit and proper" to apply for a certificate and to be "former dependents"	(ii) <u>Maintenance for former dependants</u> In practice, CIR would only authorize the release of money from the estate for maintenance of "former dependants" who would be beneficiaries under the will of the deceased or intestacy. In exercising her power under section 24(4) of the EDO, she would normally only authorize the release of money for maintenance of the spouse and unmarried children. CIR would require supporting

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under the new Section 60B of the PAO.	documents such as marriage certificate and birth certificate. As regards other persons claiming to be former dependants such as parents and common law spouses, CIR would require the personal representative to produce proof that such persons have interests in the estate. In the absence of proof, CIR would reject the application and suggest the applicant to apply for a court order under section 3 of Cap. 481. (In practice, the scope of section 4 of Cap. 481 (powers of court to make order) is wider since the applicant will not be restricted to beneficiaries under the will or intestacy and the amount ordered to be paid may exceed the legal entitlement of the applicant under the will or intestacy.) We intend to follow the current practice in future, including the condition that the bank concerned shall make maintenance payments to the former dependant by monthly installments. This should help alleviate the hardship of the former dependants of the deceased and protect the interests of other beneficiaries.

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	Funeral expenses of the deceased Whereas the power to authorize release of funds for maintenance would only apply to "former dependants" of the deceased, the Administration proposes to empower SHA to authorize the release of funds for meeting funeral expenses to any person who appears to SHA to be a "fit and proper person" to be the holder of the certificate. Currently, about 200 to 300 out of the 600 applications received each year regarding funeral expenses are made by persons such as siblings, grandchildren, nephews, nieces and friends of the deceased. Most of them are not the executor or intended administrator and have no interest in the estate. They merely assist with the funeral service of the deceased because (a) the widow/widower/parents have not recovered from the death of his/her spouse/child; (b) the children are minors; or (c) no next of kin is found. In line with the current practice, the applicant would be required to provide documentary proof of relationship with the deceased and a quotation from the funeral service supplier. The bank concerned

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	would be required to make direct payment by cashier's order to the funeral service supplier specified in the certificate. In cases of fraud or provision of a false statement, SHA may, depending on the circumstances of the case in question, consider legal action under section 36 of the Crimes Ordinance (Cap. 200) and/or section 16A of the Theft Ordinance (Cap. 210). According to IRD's records, no fraudulent application has ever been made.
(iii) It is submitted that the SHA should only be empowered to authorize the release of a "fair amount" for these purposes.	(iii) SHA would follow the existing internal guidelines of IRD, and set ceilings for application for release of money from the estate for funeral expenses of the deceased and maintenance of former dependants of the deceased respectively. Currently, the ceilings set by IRD for such applications are as follows – (a) Funeral expenses: If the applicant is the spouse or child of the deceased, the maximum amount allowed for application is half the value of the estate of the deceased, but the amount shall not exceed $20,000. If the

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	applicant and the deceased are of relationships other than the above, the maximum amount allowed for application is half the value of the estate of the deceased, but the amount shall not exceed $10,000. (b) Maintenance: The amount of money that CIR would allow to be released from the estate for maintenance of former dependants would not exceed the legal entitlement of such applicants under the will or intestacy. The bank concerned would be required to make monthly payments to the applicant for a maximum period of three months. If the grant of representation has not been obtained after three months, the applicant may apply again. We consider these guidelines and ceilings can guard against abuses that result in the benefits of other beneficiaries being adversely affected.

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(iv) The legislation should specify clearly the liabilities in cases where there should be wrongful release of documents or assets from the estate under the proposed Section 60B and 60C of the PAO.	(iv) We are advised that under the common law, an authority will be liable for wrongful exercise of statutory power. It is not common or necessary for such legal position to be expressly spelt out in a statutory provision.

Home Affairs Bureau

4 June 2005