Summary of Views Expressed by the Hong Kong Bar Association and the Law Society of Hong Kong on the Mandatory Provident Fund Schemes (Amendment) Bill 2007

Clause	The Law Society of Hong Kong dated 3 September 2007 (CB(1)2320/06-07(09))	The Hong Kong Bar Association dated 12 October 2007 (CB(1)65/07-08(01))	Response by the Administration/MPFA
3-10 (Part 2)	(a) Why undertaking should be in the form of "deed"; and (b) What is "like form" and who decides what is "like form".		(a) These amendments are made for consistency with existing provisions in the Mandatory Provident Fund ("MPF") legislation containing the same wording (i.e. sections 12 and 68 of the General Regulation which already allow the Mandatory Provident Fund Schemes Authority ("MPFA") to accept a document in deed or "like form"). Requiring written undertaking to be in the form of a deed ensures that the document is legally enforceable. (b) Where the law of the jurisdiction in which the issuer of the undertaking is established does not have the legal concept of a "deed" or seal, or where a deed for some reasons cannot be produced, in such cases, the provisions allow the undertaking to be given in "like form" "acceptable to the Authority". Please note the words "acceptable to the Authority" following the words "like form". The Authority has the power to decide whether the form of undertaking is acceptable.
24 (Part 8)	(a) It should be "Section 7C is amended by adding the following immediately after section 7C(2)", instead of "Section 7C is amended by adding"; and (b) The proposed section 7C(2A) should be renumbered to 7C(7).		• This is no longer an issue as a committee stage amendment is proposed to be made to the Bill to delete clause 24.

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28 and 29	Proposed section 145(8), "has been notified", should be "has been notified by the employee or employer or former employer of the employee in accordance with this Section 145".	No comment.	• Under the amended section 145, only two parties could give notice of the employee's cessation of employment, i.e. the former employer or the employee. • Clause 28(2) (which amends section 145(8)) already covers these two parties. "Employer" is not relevant here. • Similar rationale applies to Clause 29.
33 - 34	The words "determine the application" would read better as "consider the application made under subsection (5)".	"determine" should be changed to "consider" (Paragraph 3)	• The wording "determine the application" is consistent with wording used in a number of sections of the legislation, e.g. sections 20, 21, 21A, 34B, 34D of the MPFSO.
36 (Part 12)	In a benefit statement, consideration should be given as to whether "in accordance with section 159" should be literally adopted in the notice made under the proposed section 172(5)(b)(ii).		• The trustees are not required, when informing members of certain matters, to repeat verbatim the wording in the MPF legislation. The trustees could discharge their statutory obligations, for example, by informing scheme members of the relevant procedures using plain language if the trustees consider that that mode of communication can better convey the message to members.
37 (Part 12)	The register to be maintained under the proposed section 172C should indicate whether benefits have already been paid to court.		• This will be specified if and when appropriate.

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41 (Part 14)	The power in the proposed section 42(1)(g) is very broad. Suggest to subject such power to "reasonably considering…"	(a) New provisions should be added to require MPFA to publish information disclosed under the proposed section 42(1)(g) of the Ordinance and to authorize disclosure of information obtained by its power under Part IV of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (the Ordinance) for the purpose of section 42(1)(g); and (b) Section 42(1)(a) should be modified by deleting "but only if the summary of compiled… from being ascertained from the summary" to enhance further disclosure. (Paragraph 5)	Law Society's comments • The information that can be disclosed has already been confined to information relating to provident fund schemes or constituent funds or approved pooled investment funds for the purposes specified in detail. • Besides, MPFA is a public body carrying out public functions and must exercise its statutory powers reasonably according to administrative law principles. We therefore do not consider it necessary to add "reasonably" before "consider". Bar Association's comments (a) It is intended that the information that can be disclosed by virtue of the new section 42(1)(g) is confined to information relating to provident fund schemes or constituent funds or approved pooled investment funds. Practically the MPFA is seeking a power to provide information to the public about provident fund schemes, constituent funds, and approved pooled investment funds such as the applicable fees and charges, so that members of the public can make comparative decisions without the need to collect literature from each service provider. We do not consider it necessary to add a provision to require the MPFA to publish information as referred to in section 42(1)(g) of the MPFSO. Section 42(1) already allows MPFA to disclose "information obtained by it under the Ordinance" for the purpose stipulated in subsections (a) to (g). As such, there is no need for a separate provision with regard to disclosure of information obtained under

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			Part IV of MPFSO only for the purpose of subsection (g). (b) Section 42 of the MPFSO contains various gateways for the MPFA to disclose certain information. We envisage that the type of information that may be disclosed by the MPFA by virtue of the gateway in section 42(1)(a) is not confined to "fees and expenses" charged by approved trustees or service providers in respect of provident fund schemes or constituent funds or approved pooled investment funds. In this connection, we consider it not appropriate to delete "…but only if the summary is compiled…from being ascertained from the summary".
47-49 (Part 18)	No comment.	(a) The prosecution period should not be open ended periods. A "long stop" alternative date ought to be considered. For e.g., "…or comes to the notice of, the Authority but no later than 2 years after the occurrence of the offence." (b) Sections 43 and 43A of the Ordinance should be subject to the same time limit of prosecution in line with section 389 of the	(a) Comments from the Hong Kong Bar Association are noted. Committee stage amendments will be proposed to amend clauses 47, 48 and 49 to impose a definite prosecution time bar on the offences against sections 43C, 43E of the MPFSO and section 26 of the Exemption Regulation. (b) and (c) The proposed amendments to the prosecution time bar in sections 43C and 43E of the MPFSO and section 26 of the Exemption Regulation are put forward to address the operational needs of the MPFA. If operational needs arise in respect of offences against section 43, 43A and other sections of the MPFSO or circumstances necessitate a review, the MPFA will consider reviewing and amending the prosecution time bar in those sections.

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		Securities and Futures Ordinance (Cap. 571). (c) Section 26 of the Magistrates Ordinance (Cap. 227) should be excluded from all offences under the Ordinance, except section 43D. (d) Anti-discrimination provision in similar form to that which exists under sections 63A(5) and 72B of the Employment Ordinance (Cap. 57) should be introduced to protect the "whistle blowing" employees so that open ended extension of prosecution time limit may not be necessary (paragraph 8). (paragraph 6)	(d) The MPFA has submitted to the Administration a proposal to better protect the interests of an employee who makes a non-compliance report to the MPFA. The Administration is considering the proposal in consultation with the Department of Justice and the MPFA.

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51 (Part 20)	No comment.	(a) The proposed section 47C should be further amended to "…by post to, the address stated in the employer's business registration certificates or in the absence of which, any place at which the employer carries on business"; (b) The Rules of the High Court allow service at its "principal place of business" (but not at "any place at which the employer carries on business"); and (c) Leaving a summons at any place at which it might be said the employer carries on business would not be effective of bringing the document to the employer's attention promptly.	• We are concerned that the wording "in the absence of which" as suggested by the Hong Kong Bar Association will render the new provision useless in many cases, because employers are likely to have an address stated in the business registration certificate but the problem the MPFA has encountered is that there is no business operating at that stated address. • The legislative intent of the new provision is to ensure that more effective enforcement actions can be taken for the purpose of protecting the integrity of the MPF System. To ensure that such intent is achievable, we do not consider it appropriate to adopt the amendments suggested by the Hong Kong Bar Association.

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		(Paragraph 7)	
54 (Part 22)	Replace "contain such information" by "contain such further information" and "reasonably specified by the Authority".		• We do not consider it necessary to replace "contain such information" with "contain such further information" as in practice, MPFA would only need to specify information other than those that is already required to be included in the annual benefits statement under section 56(3) of the General Regulation. • MPFA is a public body carrying out public functions and must exercise its statutory powers reasonably according to administrative law principles. We therefore do not consider it necessary to add "reasonably" before "specified".
57 (Part 23)	"Related company" in the proposed section 71(1) and (3) of the General Regulation should be changed to "associated company".		• The term "related company" is defined in the new section 71(4) for the purpose of section 71(1)(c) of the General Regulation. "Associated company" is a separate term which is defined in section 2 of the MPFSO as "has, except in section 12A, the meaning given by Part 3 of Schedule 8" to the MPFSO.
60 (Part 25)	No comment.	Support the proposed amendments in the Bill. (Paragraph 11)	• Noted
61 (Part 26)	The new power of the proposed section 19A of the Ordinance provides the Authority with too extensive a power to	Support the proposed amendments. (Paragraph 12)	• It is not clear what is meant by "relevant persons" as suggested by the Law Society. The power of the MPFA in section 19A of the MFPSO is already restricted by the opening words of the section "for the purpose of ensuring compliance with the provisions of

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	require not only the employer or the self-employed person, but "any other person" as well to produce record for inspection. This should be limited to "relevant persons".		this Ordinance but for no other purpose". • Moreover, section 19A is drafted with reference to section 19(1)(b) with the latter already requires "any other person" to produce any record required to be kept under the MPFSO or otherwise in that other person's possession or under his control and inspect, examine and copy the same etc.
62-63 (Part 27)	No comment.	Hope the proposed amendments will assist the taking of effective steps against defaulting employers. (Paragraph 13)	• Noted