



## HONG KONG BAR ASSOCIATION

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Clerk to the Bills Committee  
Legislative Council  
Legislative Council Complex  
1 Legislative Council Road, C  
Hong Kong.

Dear *Sirs*

### Bills Committee on Trade Description (Unfair Trade Practices) (Amendment) Bills 2012

I refer to your letter of 23 March 2012.

Please find enclosed a copy of the Comments of the Hong Kong Bar Association on the captioned paper for your consideration, which has been endorsed during the Bar Council Meeting held on 31 May 2012.

Yours sincerely,

Kumar Ramanathan, SC  
Chairman

## 香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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## The Hong Kong Bar Association's Position Paper on Trade Description Unfair Trade Practices (Amendment) Bill 2012

1. The Hong Kong Bar Association (HKBA) makes the following 3 observations with regard to the proposals contained in the Trade Description Unfair Trade Practices (Amendment) Bill 2012 ("The Bill").

### A. Section 7A<sup>1</sup>

2. We note the purpose and nature of this new proposed offence from the following paragraph of the Legislative Council Brief ("The Brief"):

*"4. False descriptions or misrepresentation undermine consumer's ability to make informed choices and are therefore unacceptable. At present, the Ordinance prohibits anyone from applying a false or a materially misleading indication of any of the specified aspects to any goods in the course of trade or business. Offenders are liable to a maximum fine of \$500,000 and imprisonment for five years. However, the Ordinance does not apply to services. There is a need to plug this loophole given Hong Kong's status as a service economy. We propose to extend the application of the Ordinance to prohibit traders from applying false trade descriptions to services for supply to consumers. The presumption of mens rea is displaced by the terms of the proposed offence, as in the present case of false trade descriptions to goods"*

*(emphasis added)*

3. Recently, (in a judgment issued since the Legislative Council Brief was written) the Court of Final Appeal has had cause to consider a provision

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<sup>1</sup> This and other relevant sections of the proposed legislation are attached. Sections 7, 7A, 9, 13E, 13F and 26

(s9(2) of the Ordinance read together with s26(4)) similar to that proposed (s7A read with s26(3)).

4. In that case (*Lee To Nei v HKSAR FACCC 5/2011*) the Court of Final Appeal held such a provision would have been unconstitutional but for it being “read down” to place only an evidentiary burden on the accused.
5. The HKBA respectfully suggests that the authors of the Brief may wish to consider the ramifications of *Lee To Nei* in relation to this proposal.

## **B. Section 13E**

6. This proposes a new offence: “Misleading Omissions”; the following paragraph of the Legislative Council Brief made clear its purpose and proposed ambit:

*“6. The interests of consumers may be hampered if they cannot get hold of critical pieces of information, either because of outright omissions by businesses or unclear presentation which has the effect of misleading consumers. Businesses should have the primary responsibility of presenting accurate, truthful and pertinent information in respect of which the presumption of mens rea is displaced...”*

*(emphasis added)*

7. With respect to the authors of the Brief we do not agree that the proposed wording of s13E would create an offence whereby *mens rea* is displaced.
8. It is to be noted firstly that it was the existence of s26(4) that led the Court of Final Appeal in the case of *Lee To Nei* to conclude that the offence under s9(2) was one where the “presumption of *mens rea* was displaced”.
9. It is to be equally noted that there is no equivalent of s26(4) (or s26(3)) in the proposed amendments with regard to s13E.

10. Thus the words of s13E have to be considered on their own.

11. In the leading authority of *Gammon (Hong Kong) Ltd v Att-Gen of Hong Kong* [1985] AC 1, recently applied in *Hin Lin Yee v HKSAR* [2010] 2 HKLRD 826, Lord Scarman stated the following propositions:

*"(1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence;*

*(2) the presumption is particularly strong where the offence is 'truly criminal' in character;*

*(3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;*

*(4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;*

*(5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."*

12. Section 13E would create a criminal offence carrying a potential penalty (on indictment), of a fine of \$500,000 and imprisonment for 5 years. Applying the principles of the cases of *Gammon* and *Hin Lin Yee* to s13E it is our view that the courts would regard this as an offence where the presumption of *mens rea* has not been displaced.

### **C. Section 13F**

13. This proposes another offence: “Aggressive Commercial Practice”. We understand that the purpose of the proposed section is to protect consumers’ freedom of choice. As per the following paragraph of the Legislative Council brief:

*“7. Consumers’ freedom of choice is likely to be undermined when they are under undue influence or high-pressure practices and as a result, their consumption behaviour may be affected. We propose to add new provisions to the Ordinance to prohibit the use of aggressive practices in consumer transactions by creating an offence in respect of which the mens rea requirement is displaced.”*

*(emphasis added)*

14. Our views and comments in relation to s13E are equally applicable to s13F.

No statutory defence is provided for; the penalties provided are the same as for those of the proposed offence under s13E.

15. It is our view that contrary to the comments set out in the Brief the courts are unlikely to determine that the presumption of *mens rea* has been displaced in the case of the offence to be created by s13F.

The Hong Kong Bar Association

Dated: 15 June 2012