

立法會
Legislative Council

LC Paper No. CB(4)918/13-14
(These minutes have been seen
by the Administration)

Ref : CB4/BC/3/13

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2014

Minutes of the first meeting
held on Tuesday, 20 May 2014, at 10:45 am
in Conference Room 3 of the Legislative Council Complex

Members present : Hon TAM Yiu-chung, GBS, JP (Chairman)
Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon Paul TSE Wai-chun, JP
Hon Charles Peter MOK
Hon CHAN Chi-chuen
Hon Dennis KWOK
Dr Hon Fernando CHEUNG Chiu-hung
Hon Martin LIAO Cheung-kong, JP

Member absent : Hon Emily LAU Wai-hing, JP

Public Officers attending : Item II

Department of Justice

Ms Adeline WAN
Senior Assistant Solicitor General

Ms Leonora IP
Senior Assistant Law Draftsman

Ms Anthea LI
Senior Government Counsel

Ms Anita NG
Senior Government Counsel

Ms Karmen KWOK
Senior Government Counsel

Security Bureau

Mrs Millie NG
Principal Assistant Secretary for Security

Ms Alice YEUNG
Assistant Secretary for Security

Constitutional and Mainland Affairs Bureau

Mr D C CHEUNG
Principal Assistant Secretary (Constitutional and
Mainland Affairs) 5

Labour and Welfare Bureau

Miss Fanny CHEUNG
Assistant Secretary for Labour and Welfare
(Rehabilitation)

Commerce and Economic Development Bureau

Ms Manda CHAN
Principal Assistant Secretary for Commerce and
Economic Development (Commerce & Industry) SD

Home Affairs Department

Miss Linda LEUNG
Assistant Director of Home Affairs (5)

Office of the Communications Authority

Mr CHENG Chi-keung
Chief Telecommunications Engineer (Development)

Clerk in attendance : Miss Polly YEUNG
Chief Council Secretary (4)4

Legal Adviser : Mr Timothy TSO
Assistant Legal Adviser 2

Staff in attendance : Mr KWONG Kam-fai
Senior Council Secretary (4)4

Ms Sandy HAU
Legislative Assistant (4)4

Miss Emma LAM
Clerical Assistant (4)3

Action

I. Election of Chairman

Mr James TO, the member present who had the highest precedence, presided at the meeting and called for nominations for the chairmanship of the Bills Committee. Mr Dennis KWOK nominated Mr TAM Yiu-chung and the nomination was seconded by Dr Priscilla LEUNG. Mr TAM Yiu-chung accepted the nomination. There being no other nomination, Mr TAM was declared Chairman of the Bills Committee.

2. Members agreed that it would not be necessary to elect a deputy chairman for the Bills Committee.

II. Meeting with the Administration

(LC Paper No. CB(3)561/13-14 -- The Bill
(issued on 17 April 2014)

File Ref.: LP 3/00/13C -- Legislative Council Brief
(issued on 15 April 2014) issued by the Department
of Justice

LC Paper No. LS44/13-14 -- Legal Service Division
(issued vide LC Paper No. Report
CB(2)1419/13-14 on 30 April 2014)

LC Paper No. CB(4)679/13-14(02) -- Marked-up copy prepared
by the Legal Service
Division

Action

LC Paper No. CB(4)679/13-14(03) -- Background brief prepared by the Legislative Council Secretariat)

3. The Bills Committee deliberated (index of proceedings attached at **Annex**).

Approach to be adopted by the Bills Committee to scrutinize the Bill

4. Members noted a table prepared by the Administration and tabled at the meeting [LC Paper No. CB(4)693/13-14(01)]. Given that the Bill was an omnibus bill comprising 15 Parts each dealing with discrete issues, the Administration suggested that the Bills Committee might consider scrutinizing the Bill Part by Part and the public officers responsible for the Part(s) in question would be in attendance. Members agreed to take the following approach in scrutinizing the Bill after considering the suggestion of the Administration –

- (a) The Bills Committee would proceed to scrutinize the Bill Part by Part. For each Part, the Bills Committee would discuss the policy/principles, the commencement provision (if applicable), and also examine the proposed provisions clause-by-clause.
- (b) To facilitate more systematic discussion, the Bills Committee would deal with the Parts of the Bill according to the following groupings:
 - Group A [Parts 2, 3 and 4];
 - Group B [Parts 5 and 6];
 - Group C [Parts 7, 8 and 9]; and
 - Group D [Parts 10, 11, 12, 13, 14 and 15].

5. As a number of members were attending the meeting of the Bills Committee on Marriage (Amendment) Bill 2014 held at the same time, members agreed to proceed with the scrutiny of the Parts of the Bill under Group C first.

Parts 7, 8 and 9 of the Bill

6. The Administration was requested to –

Action

Part 7- Clause 51

- (a) provide information on the circumstances that would be regarded as "evidence to the contrary" in the proposed new section 44(1A) of the Unsolicited Electronic Messages Ordinance ("UEMO") (Cap. 593) (clause 51 of the Bill);
- (b) provide information on provisions in other Ordinances that were similar to the proposed new section 44(1A) of UEMO (clause 51 of the Bill);
- (c) consider whether the condition "in the absence of evidence to the contrary" should also apply to the proposed new section 44(1) of UEMO (clause 51 of the Bill);

Part 8 - Existing section 26(4) of the Trade Descriptions Ordinance ("TDO") (Cap. 362)

- (d) advise whether there were defence provisions in other Ordinances that were similar to section 26(4) of TDO which should also be similarly amended;

Part 8 - Clause 52

- (e) advise whether the condition that "the contrary is not proved by the prosecution beyond reasonable doubt" (i.e. the proposed new section 12(2A)(a)(ii) of TDO (clause 52(2) of the Bill)) referred to all of the three conditions (i.e. (A), (B) and (C)) set out in the proposed new section 12(2A)(a)(i), or it only referred to one of the three conditions; and whether the drafting of the proposed section should be improved to clearly reflect the policy intent; and

Part 8 - Clauses 52 and 53

- (f) having regard to the policy intent, review the use of "and" and "or" under the various conditions listed under the proposed new sections 12(2A)(a)(i) and 26(1)(a)(i) of TDO (clauses 52(2) and 53(1) of the Bill).

III. Any other business

Arrangements of future meetings

7. Given that a number of members of the Bills Committee were also members of the Bills Committee on Marriage (Amendment) Bill 2014, members agreed that the schedule of future meetings of the Bills Committee should avoid clashing with the meetings of the Bills Committee on Marriage (Amendment) Bill 2014.

8. Members completed the scrutiny of Group C, i.e. Parts 7, 8 and 9 of the Bill, and agreed that the Bills Committee would commence scrutiny of Group A, i.e. Parts 2, 3 and 4 of the Bill, at the next meeting. They further agreed that it would not be necessary for the Bills Committee to invite public views on the Bill.

(Post-meeting note: The notice of the next three meetings and related arrangements was issued to members vide LC Paper No. CB(4)693/13-14 on 21 May 2014.)

9. There being no other business, the meeting ended at 12:25 pm.

**Proceedings of the first meeting of the
Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2014
on Tuesday, 20 May 2014, at 10:45 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker(s)	Subject(s)	Action required
Agenda Item I – Election of Chairman			
000000 - 000215	Mr James TO Mr Dennis KWOK Dr Priscilla LEUNG Mr TAM Yiu-chung	Election of Chairman	
Agenda Item II – Meeting with the Administration			
000216 - 001506	Chairman Administration Mr Charles MOK Mr James TO	Opening remarks by the Chairman. Discussion on the approach to be adopted by the Bills Committee to scrutinize the Bill and the decision to deal with it Part by Part.	
<i>Discussion on Part 7 of the Bill</i>			
001507 - 002455	Chairman Administration Mr Charles MOK	The Administration's briefing on Part 7 of the Bill. Mr Charles MOK enquired – (a) whether any difficulty was currently encountered in the service of notices for the purposes of sections 34, 35, 36 and 38 of the Unsolicited Electronic Messages Ordinance ("UEMO") (Cap. 593); and (b) whether it would be feasible and legally acceptable to serve the notices by electronic means. The Administration advised that – (a) at present, notices issued by the Communications Authority ("CA") pursuant to sections 34, 35, 36 and 38 of UEMO were deemed to be served on the person concerned if these notices were sent by registered post. However, there had been cases in which the notices could not be served because the person concerned had not provided the Authority with a correct or updated address, or the person concerned did not pick up the notices sent by registered post which resulted in undelivered mail returned by the Post Office. It was also commonly found that the address for the installation of computer systems for sending unsolicited electronic messages were located in data centres, which did not accept registered post for tenants. The proposed amendments would provide greater efficacy in the service of notices which would in turn enhance the effectiveness of enforcement actions taken by CA under UEMO;	

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		<p>and</p> <p>(b) according to some complainants, they continued to receive unsolicited electronic messages from the same senders even though they had sent "unsubscribe" requests to the senders by e-mail. According to the investigation by CA, it was found that the senders concerned had not received such "unsubscribe" e-mails because they relied on the service of third party e-mail systems for receiving e-mails where some e-mails were blocked due to various reasons. As the service of notices was a crucial part of the enforcement process, from the evidential point of view, it would be more prudent to serve the notices by hand, ordinary post or registered post instead of via e-mail.</p>	
002456 - 003714	Mr Albert HO Administration Chairman Assistant Legal Adviser 2 ("ALA2")	<p>Mr Albert HO enquired about the circumstances to be regarded as "evidence to the contrary" in proposed section 44(1A) of UEMO (clause 51 of the Bill) and whether the proviso "in the absence of evidence to the contrary" would also apply to proposed section 44(1).</p> <p>The Administration explained that what constituted "evidence to the contrary" would have to be considered on a case-by-case basis as there could be different reasons why a notice sent by ordinary/registered post could not be delivered to the recipient. For example, proof of undelivered mail returned by the Post Office might be evidence that the notice could not be served. However, it should be noted that there might be incidents in which the recipients deliberately returned the mail to the Post Office in order to give rise to a case of non-delivery.</p> <p>Mr HO requested the Administration to review whether the proviso "in the absence of evidence to the contrary" should also be expressly added to the proposed section 44(1).</p> <p>ALA2 said that the Bills Committee might consider requesting the Administration to provide information on –</p> <p>(a) provisions in other Ordinances that were similar to the proposed section 44(1A) of UEMO; and</p> <p>(b) the circumstances to be regarded as "evidence to the contrary" in proposed section 44(1A) of UEMO.</p> <p>The Chairman asked the Administration to provide the information to the Bills Committee accordingly.</p>	<p>The Administration to take action as in paragraph 6(c) of the minutes</p> <p>The Administration to take action as in paragraphs 6(a) and 6(b) of the minutes</p>

Time marker	Speaker(s)	Subject(s)	Action required
003715 - 003921	Mr Albert HO Administration Chairman	<p>Mr Albert HO enquired about the penalty, if any, for contravention of sections 34, 35, 36 and 38 of UEMO.</p> <p>The Administration advised that under section 35 of UEMO, CA might impose financial penalties on telecommunication service providers for non-compliance with directions issued by notice in writing under section 34. A person would commit an offence if he failed to comply with notices issued under section 38 and would be liable to a fine and imprisonment upon conviction.</p>	
003922 - 004440	Mr Charles MOK Administration	<p>Mr Charles MOK enquired about –</p> <p>(a) relevant statistics on enforcement actions taken under UEMO since it came into operation in 2008; and</p> <p>(b) the types of unsolicited electronic messages involved in the cases that enforcement notices had been issued.</p> <p>The Administration provided the following information –</p> <p>(a) So far, the telecommunication service providers or relevant persons had been cooperative in complying with the relevant requirements set out in the notices issued on them under sections 34 and 36 of UEMO.</p> <p>(b) 23 enforcement notices had been issued under section 38 of UEMO since 2009 but 15 of them could not be served. Court proceedings of the first prosecution case had commenced.</p> <p>(c) The unsolicited electronic messages involved in the cases concerned were mainly fax messages, pre-recorded telephone messages and short messages.</p> <p>Given the relatively large number of enforcement notices which could not be successfully served as mentioned in (b) above, Mr Charles MOK considered that there was a need for legislative amendment to facilitate enforcement.</p>	
004441- 004933	Mr Albert HO Administration ALA2	<p>Noting that penalties might be imposed on telecommunication service providers for non-compliance with the notices issued under sections 34, 36 and 38 of UEMO, Mr Albert HO opined that the Administration should also consider the service of notices by other means, such as publishing the relevant notices in specified newspapers or the Gazette.</p>	

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		<p>The Administration advised that where prosecution was taken out against a person, the prosecution had to prove to the court all the elements of the offence beyond reasonable doubt.</p> <p>ALA2 further advised that if the court was satisfied that the notice had not been duly served on a person charged with an offence under section 39 of UEMO, then, the offence might not be substantiated.</p>	
004934-005208	Chairman Mr Albert HO Administration	<p>The Chairman said that the proposed amendments to section 44 of UEMO would facilitate enforcement action by CA.</p> <p>Mr Albert HO stressed that expediency or administrative convenience should not be the only factor for consideration as far as public policy and legislative amendment were concerned. The Administration should consider whether the arrangements under the relevant provisions were practicable.</p>	
005209 - 005444	Chairman Administration Mr Albert HO	<p><u>Clause-by-clause examination</u></p> <p><i>Clause 51</i></p> <p>Mr HO reiterated his request that the Administration should consider whether the condition "in the absence of evidence to the contrary" should also be included under proposed section 44(1).</p>	
<i>Discussion on Part 8 of the Bill</i>			
005445 - 005741	Chairman Administration	Briefing by the Administration on Part 8 of the Bill	
005742 - 005854	ALA2	<p>Referring to his letter to the Administration, which was tabled at the meeting, ALA2 requested the Administration to advise whether there were defence provisions in other Ordinances that were similar to the existing section 26(4) of the Trade Descriptions Ordinance ("TDO") (Cap. 362) and should also be amended having regard to the judgement of the Court of Final Appeal in <i>Lee To Nei v HKSAR</i> (FACC 5/2011).</p>	
005855 - 010754	Mr Albert HO Administration	<p>Mr Albert HO enquired on the justifications for the proposed amendments and whether there were defence provisions in other Ordinances that were similar to the section 26(4) of TDO which should also be amended.</p> <p>The Administration advised that –</p> <p>(a) the judgement of the Court of Final Appeal had declared that section 26(4) of TDO should be read down as imposing merely an evidential burden on the accused, with the persuasive burden</p>	

Time marker	Speaker(s)	Subject(s)	Action required
		<p>remaining throughout on the prosecution. The proposed amendments to section 26(4) and similar defence provisions under TDO sought to make it clear that these provisions imposed only an evidential burden on the accused; and</p> <p>(b) in the light of the judgement of the Court of Final Appeal, the current legislative amendment exercise was confined to relevant provisions under TDO. It would not be practicable on this occasion to initiate a review on all other Ordinances. Whether similar defence provisions in other Ordinances should be amended was a matter to be assessed on a case-by-case basis after taking into account the context in which they applied and the policy justification.</p> <p>Mr Albert HO requested the Administration to advise whether there were defence provisions in other Ordinances that were similar to section 26(4) of TDO which should also be similarly amended.</p>	<p>The Administration to take action as in paragraph 6(d) of the minutes</p>
010755 - 010942	Chairman Administration	<p>The Chairman enquired whether it was a practice of the Department of Justice to inform all policy bureaux of a court judgement if amendments to certain legislation would be required in the light of the judgement.</p> <p>In reply to the Chairman, the Department of Justice confirmed that all policy bureaux involved in the case in which such a judgement was made would be informed.</p>	
010943 - 011701	Chairman ALA2 Administration Mr Albert HO	<p><u>Clause-by-clause examination</u></p> <p><i>Clause 52</i></p> <p>ALA2 sought clarification from the Administration on whether the condition that "the contrary is not proved by the prosecution beyond reasonable doubt" (i.e. proposed section 12(2A)(a)(ii) under clause 52(2)) referred to all of the three conditions (i.e. (A), (B) and (C)) set out in the proposed new section 12(2A)(a)(i), or it only referred to one of the three conditions.</p> <p>The Administration confirmed that the condition of "the contrary is not proved by the prosecution beyond reasonable doubt" referred to (A), (B) or (C) under proposed section 12(2A)(a)(i) but not to all of the three conditions.</p> <p>In this regard, ALA2 suggested that the Administration should consider whether the drafting of the proposed section should be improved to clearly reflect the policy intent. Mr Albert HO concurred with ALA2's suggestion.</p>	

Time marker	Speaker(s)	Subject(s)	Action required
		The Administration advised that it would review the drafting of the provision with reference to similar provisions in other Ordinances.	The Administration to take action as in paragraph 6(e) of the minutes
011702 - 012549	Chairman ALA2 Administration Mr Albert HO	<p><i>Clauses 52 and 53</i></p> <p>Mr Albert HO sought explanation on the use of "or" in connection with the various conditions listed under proposed section 26(1)(a)(i)(A) to (E); whereas "and" was used in connection with the various conditions listed under proposed section 12(2A)(a)(i)(A) to (C).</p> <p>The Administration would review the use of "and" and "or" in connection with the various conditions listed under proposed sections 12(2A)(a)(i) and 26(1)(a)(i) of TDO (clauses 52(2) and 53(1) of the Bill), having regard to the policy intent of these provisions.</p> <p>In reply to Mr Albert HO, the Administration advised that there was no difference in the standard of proof required under section 26(1)(a)(i) and section 26(1)(a)(ii).</p>	The Administration to take action as in paragraph 6(f) of the minutes
012550 - 012749	Chairman Administration	<p><i>Clause 54</i></p> <p>Members raised no query.</p>	
<i>Discussion on Part 9 of the Bill</i>			
012750 - 012930	Chairman Administration	The Administration's briefing on Part 9 of the Bill.	
012931 - 013213	Chairman Administration	<p>The Chairman sought explanation on the policy intent of the existing requirement on a member of the management committee of an owners' incorporation to make a statutory declaration before a justice of peace, or other persons authorized by law to administer an oath, and the rationale for introducing the proposed amendments.</p> <p>The Administration advised that the requirement on a member of the management committee of an owners' incorporation to make a statutory declaration was introduced when the Building Management Ordinance ("BMO") (Cap. 344) was amended in 2007. There was a view that members of the management committee of an owners' incorporation played a key role in building management and should therefore be required to make a statutory declaration that they did not fall within any of the categories of ineligible persons specified in Schedule 2 to BMO. However, in the light of operational experience since 2007, concern had been expressed that the requirement was too stringent. The proposed amendments sought to</p>	

Time marker	Speaker(s)	Subject(s)	Action required
		address such concern by replacing the existing requirement of a statutory declaration with the requirement of a written statement.	
013214 - 013333	ALA2 Administration Chairman	<p>Referring to clause 1(3) in Part 1 of the Bill, ALA2 sought explanation on the commencement of Part 9 of the Bill on the expiry of one month after the day on which the enacted Ordinance was published in the Gazette.</p> <p>The Administration explained that a member of the management committee was given a period of 21 days from the date of his/her appointment to lodge a written statement with the Secretary of the Management Committee and the Secretary should cause the written statement to be lodged with the Land Registrar within 28 days after receipt. To allow for the lead time, the proposed amendments to BMO would therefore come into operation on the expiry of one month after the day on which the enacted Ordinance was published in the Gazette. Publicity on the new requirement could also be made during this one-month period.</p>	
013334 - 013451	Mr Charles MOK Administration Chairman	<p>Mr Charles MOK enquired whether under existing practice, the Administration would verify the information on eligibility as declared by members of the management committee, and whether the Administration had identified any case of false declaration.</p> <p>The Administration responded that no such irregularities had been detected since the requirement on statutory declarations came into force in 2007.</p>	
013452 - 013712	Chairman ALA2 Administration	<p><u>Clause-by-clause examination</u></p> <p><i>Clause 55</i></p> <p>Members raised no query.</p> <p><i>Clause 56</i></p> <p>ALA2 enquired about the proposed addition of subparagraph (8) to paragraph 4 in Schedule 2 to BMO.</p> <p>The Administration explained that according to proposed paragraph 4(8), any change to the information stated in a declaration lodged under the existing provision could be made by means of lodging a statement after the commencement of the amended provisions.</p> <p>The Chairman enquired about the difference in legal effect between a statutory declaration and a written statement.</p>	

Time marker	Speaker(s)	Subject(s)	Action required
		The Administration said that the making of a statutory declaration was governed by the Oaths and Declarations Ordinance (Cap. 11).	
Agenda Item III – Any other business			
013713 - 014017	Chairman Mr Ronny TONG Administration Mr Charles MOK	Arrangements of future meetings	

Council Business Division 4
Legislative Council Secretariat
9 July 2014