律政司
法律政策科
香港金鐘道 66 號
金鐘道政府合署高座 1 樓

圖文傳真：852-2180 9928

DEPARTMENT OF JUSTICE
Legal Policy Division
1/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong

Fax: 852-2180 9928

本司檔號 Our Ref.: LP 3/00/13C
來函檔號 Your Ref.: LS/B/16/13-14
電話號碼 Tel. No.: 2867 2847

Urgent by fax: 2877 5029
16 June 2014

Mr Timothy TSO
Assistant Legal Adviser
Legal Service Division
Legislative Affairs Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr Tso,

Statute Law (Miscellaneous Provisions) Bill 2014

We refer to your letter of 19 May 2014 and our letter of 27 May 2014. We set out below the Administration's response to the issues raised in respect of Clause 1(3) of Part 1, Parts 5, 8 and 11 of the Bill.

Part 1

Clause 1 - commencement of Part 9

Part 9 of the Bill seeks to amend the Building Management Ordinance (Cap. 344) ("BMO") to provide that a person appointed as a member of a management committee of a building is required to make a statement (instead of a declaration under the existing regime) within 21 days after the appointment to state that the person is not ineligible for the appointment as specified in paragraph 4(1)(a) or (b) of Schedule 2 to the BMO.

The secretary of the management committee is required to lodge the statements to the Land Registry within 28 days after receiving the statements from the management committee members. In the case of the first term of a management committee, the secretary of the management committee should lodge the statements to the Land Registry within 28 days after the appointment of the management committee.

In order to allow sufficient time for the management committee members to plan and prepare for the new arrangements after knowing the exact implementation date, the Home Affairs Bureau proposes that Part 9 should come into operation on the expiry of one month after the day on which the Ordinance is published in the Gazette. The Administration shall make use of the time to brief the owners' corporations on the new arrangements.

Part 5

Clauses 45 - 47

Section 10 of the Oaths and Declarations Ordinance ("ODO") provides that:

> "An oath, affidavit, affirmation and ***notarial act*** administered, sworn, affirmed, or ***done before a diplomatic or consular officer of the People's Republic of China outside the People's Republic of China shall be as effectual as if duly*** administered, sworn, affirmed or ***done*** by or ***before any lawful authority in Hong Kong***." (emphasis added)

We take the view that the term "lawful authority" in section 10 of the ODO is likely to include a "notary public" who is qualified to practise under section 40D of the Legal Practitioners Ordinance (Cap. 159).

Since a notarial act done before a diplomatic or consular officer of the PRC outside the PRC is regarded as having the same effect as if duly done before a notary public in Hong Kong under section 10 of the ODO, such a foreign notarial act would be received as prima facie evidence in civil proceedings in the courts of Hong Kong after the enactment of Part 5 of our Bill. This would have the inadvertent effect of changing the substantive law of evidence relating to the admission of overseas notarial acts executed by foreign notaries, which is apparently inconsistent with the policy intent of Part 5 of the Bill.

In order to avoid the inadvertent effect, the Department of Justice proposes that "any notarial act done before a diplomatic or consular officer of the People's Republic of China outside the People's Republic of China as referred to in section 10 of the Oaths and Declarations Ordinance (Cap. 11)" be excluded from the definition of "notarial act" in clauses 45 - 47 of the Bill.

Part 8

The judgment of the Court of Final Appeal in *Lee To Nei v HKSAR* (FACC 5/2011) and *Lau Hok Tung and Others v HKSAR* (FACC 7/2011) declares that section 26(4) of the Trade Descriptions Ordinance (Cap. 362) ("TDO") must be read down as imposing merely an evidential burden on the accused, with the persuasive burden remaining throughout on the prosecution. In the light of the judgment, Part 8 of the Bill proposes to amend section 26(4) and other similar defence provisions (including sections 12(2)(a), 26(1) and 26(3)) in the TDO to provide that these provisions impose only an evidential burden on the accused.

It would not be practicable on this occasion to initiate a review of all other Ordinances. Whether similar defence provisions in the other Ordinances should be amended is a matter to be assessed on a case-by-case basis after taking into account the context in which they apply and the policy justifications.

Clauses 52 - 54

On reading down section 26(4) of the TDO, the aforesaid judgment states that the accused would still have to adduce or be able to point to credible evidence indicating that he (i) did not know, (ii) had no reason to suspect; and (iii) could not, with reasonable diligence, have ascertained the falsity concerned. Such evidence would have to be sufficiently substantial to raise a reasonable doubt as to his guilt. Where such evidence exists, it would be up to the prosecution to furnish sufficient evidence to prove the accused's guilt beyond reasonable doubt. In cases where the prosecution is unable to prove that the accused did know or did have reason to suspect the falsity, the prosecution would still succeed if the evidence of what could have been done by way of reasonable diligence at the relevant time satisfies the Court beyond reasonable doubt that the accused could have discovered the falsity by taking the appropriate steps. In these circumstances, the accused would be convicted.

The aforesaid judgment also states that for the prosecution to bear the burden of proof, it would in practice only need to surmount the lowest hurdle by satisfying the Court that, by taking certain steps constituting reasonable diligence, the accused could have ascertained the falsity concerned. It would be no answer for the accused to say that he did not know and had no reason to suspect the falsity concerned if, taking an objective view, the Court were persuaded that in the circumstances, the accused could have discovered the falsity.

In the light of the above, the condition that "the contrary is not proved by the prosecution beyond reasonable doubt" requires the prosecution to satisfy the Court beyond reasonable doubt in respect of any one of the three conditions, i.e. (A), (B) or (C).

From the drafting perspective, with the use of the connective "and", the three conditions (A), (B) and (C) in the proposed section 12(2A)(a) should be read as a whole. The provision of "the contrary is not proved by the prosecution beyond reasonable doubt" in the proposed section 12(2A)(a)(ii) reflects the aforesaid judgment that as long as the prosecution can adduce evidence to prove either (A), (B) or (C) to the contrary beyond reasonable doubt, the reasonable doubt raised by the accused will be dispelled.

Part 11

Clauses 58 and 59

We have been advised by The Law Society of Hong Kong that the "relevant documents" in the proposed new sections 8A(4)(b) and (6)(b) under clauses 58 and 59 refer to the documents relating to the application by the solicitor, foreign lawyer or legal practice entity (as the case may be) under these provisions.

Clause 59

When there is a column number or a column heading for the first column, it will be generally referred to as column 1. However, if there is no such column number or column heading for the first column, the counting of column will start from the second column which will be generally referred to as "column 1". The reference to column in Clauses 23(3) and 59 of the Bill follows the aforesaid principle.

Yours sincerely,

(Ms Adeline Wan)
Senior Assistant Solicitor General
(General Legal Policy)

c.c. Clerk to the Bills Committee
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