

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.: CB4/BC/3/13  
電話號碼 Tel. No.: 2867 4727

**By fax: 3151 7052**  
17 June 2014

Mr Kwong Kam Fai  
Clerk to Bills Committee  
Legislative Council  
Legislative Council Complex  
1 Legislative Council Road  
Central  
Hong Kong

via Ms Adeline Wan, SASG/GLP

Dear Mr Kwong,

**Bills Committee on  
Statute Law (Miscellaneous Provisions) Bill 2014**

**Follow-up to the meeting on 20 May 2014**

Thank you for your letter of 21 May 2014 forwarding the list of issues arising from the meeting on 20 May 2014.

I attach a copy of the English version of the paper setting out the Administration's response to the issues raised in the list of follow-up actions. The Chinese version will be sent to you as soon as possible.

Yours sincerely,

(Ms Anita Ng)  
Senior Government Counsel  
Legal Policy Division

cc Mr Timothy Tso, ALA  
Mr Gary Poon, AA/SJ

**Legislative Council Bills Committee on  
Statute Law (Miscellaneous Provisions) Bill 2014**

**Follow-up to the first meeting on 20 May 2014**

**Purpose**

This paper sets out the Administration's response to the issues raised at the first meeting of the Bills Committee held on 20 May 2014.

**Part 7**

Clause 51

*Question (a) - provide information on the circumstances that would be regarded as "evidence to the contrary" in proposed section 44(1A) of the Bill;*

2. Under the existing section 44(1) of the Unsolicited Electronic Messages Ordinance (Cap. 593) ("UEMO"), the only means that a specified notice may be served on a person is by delivering it by registered post to his usual or last known place of abode or business. Unless there is evidence to the contrary, it shall be deemed to have been served and received at the time at which such post would have been delivered in the ordinary course of post. The Communications Authority ("CA") has encountered a number of occasions that, among other specified notices, an enforcement notice sent to the person concerned by registered post was returned by the Post Office as no one received the post after a specified period. Such return of registered post by the Post Office to the CA is an example of "evidence to the contrary" that the notice has been successfully served on the person concerned in accordance with the requirement under section 44(1) of UEMO.

3. Under the proposed section 44(1), a specified notice may be served on a person by, in addition to registered post, delivering it by hand to that person, leaving it at or sending it by ordinary post to the person's usual or last known place of abode or business, with presumed timing of serving of notice set out in the proposed section 44(1A). Whether there is "evidence to the contrary" that the notice is presumed to have been successfully served would need to be assessed on a case-by-case basis. For instance, if the person concerned has genuinely moved to a new place of business but has not timely updated its registered business address when a specified notice is delivered to his last known place of business (i.e. his old address), the person would not be

able to receive the notice concerned, irrespective of whether the notice was sent by registered or ordinary post, or left at the last known place of business. Under such circumstances, the person concerned may provide evidence that its business address has been changed at the material time, thereby adducing facts that could be considered as “evidence to the contrary” to the presumption that the notice has been served on him at the time specified in the proposed section 44(1A).

*Question (b) - provide information on provisions in other Ordinances that are similar to the proposed new section 44(1A) of the Bill;*

4. A similar "service of notices" provision can be found in section 37ZV of the Immigration Ordinance (Cap. 115):-

**“Section 37ZV of the Immigration Ordinance (Cap. 115)**

- (1) A notice or other document (howsoever described) required to be served or given (howsoever described) by the Director, an immigration officer or the Appeal Board on or to another person under this Part may be served on or given to that other person—
  - (a) personally;
  - (b) by leaving it for the person, or by sending it by post addressed to the person—
    - (i) if the person is a claimant, at the last known residential or correspondence address provided by the claimant to the Director or the Appeal Board under section 37ZA(2); or
    - (ii) if the person is not a claimant, at the person’s usual or last known place of abode or business; or
  - (c) if the person is acting by a legal representative, by leaving it for the legal representative, or by sending it by post addressed to the legal representative, at the place of business or correspondence address of the legal representative.
- (2) A notice or other document served or given in the manner described in subsection (1), other than by sending it by post, is conclusively presumed to have been served or given and received at the following time—
  - (a) if it is served on or given to the person personally, when it is so served or given; or
  - (b) if it is left at a place of abode or business or an address, on the second working day after it was so sent.

- (3) A notice or other document served or given by sending it by post in the manner described in subsection (1) is presumed, in the absence of evidence to the contrary, to have been served or given and received on the second working day after it was so sent.”

*Question (c) - consider whether the condition “in the absence of evidence to the contrary” should also apply to proposed section 44(1) of the Bill;*

5. The proposed sections 44(1) and (1A) should be read as a whole and the condition "in the absence of evidence to the contrary" is applicable to the whole presumption.

6. To improve the presentation of the presumption and to align with the Chinese text, Committee Stage Amendments will be proposed to the English text of section 44(1A) by moving “in the absence of evidence to the contrary” before “The notice is presumed to have been served”.

## **Part 8**

*Question (d) – advise, where practicable, whether there are defence provisions in other Ordinances that are similar to section 26(4) of TDO which would also require amendment;*

7. 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 Statute Law (Miscellaneous Provisions) Bill 2014 (“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.

8. It would not be practicable on this occasion to initiate a review of all other Ordinances. Whether similar defence provisions in 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.

## Clause 52

*Question (e) – advise whether the condition that “the contrary is not proved by the prosecution beyond reasonable doubt” (i.e. proposed section 12(2A)(a)(ii) of the Bill) refers to all of the three conditions (i.e. (A), (B) and (C)) set out in the proposed new section 12(2A)(a)(i), or only refers to one of the three conditions; and whether the drafting of the proposed section should be improved to clearly reflect the intent;*

9. 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.

10. 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.

11. 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).

12. 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.

### Clauses 52 - 53

*Question (f) - having regard to the policy intent, to review the use of “and” and “or” under the various conditions listed under the proposed sections 12(2A)(a)(i) and 26(1)(a)(i) of the Bill.*

13. The use of “and” and “or” for the conditions listed under the proposed section 12(2A)(a)(i) (which replaces the existing section 12(2)(a)) and section 26(1)(a)(i) (which replaces the existing section 26(1)(a)) of the Bill mirrors the existing provisions concerned in the TDO.

14. The defence provision in the proposed section 12(2A)(a)(i) is applicable to an offence under section 12 (on prohibition of import and export of goods to which a false trade description or forged trade mark is applied) of the TDO. A person charged is entitled to be acquitted if sufficient evidence is adduced to raise an issue that the person charged (A) did not know, (B) had no reason to suspect, **and** (C) could not with reasonable diligence have ascertained that the goods are goods to which a false trade description or forged trade mark is applied. For the purpose of prohibiting false trade descriptions and forgery of trade marks, and hence protecting the interests of consumers and the mercantile interests of the registered trade mark owners, the Administration considers it appropriate that the person charged be required to provide evidence in respect of all three conditions.

15. On the other hand, the defence provision in the proposed section 26(1)(a), as applicable to any offence under the TDO, provides that the person charged is entitled to be acquitted if sufficient evidence is adduced to raise an issue that the commission of the offence is due to (A) a mistake, (B) reliance on information supplied to the person charged by another person, (C) the act or default of another person, (D) an accident; **or** (E) some other cause beyond the control of the person charged, **and** the person charged took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. The person charged is required to provide evidence in respect of either (A), (B), (C), (D) or (E), as it may not be practical to require evidence in respect of all five conditions to exist in one offence. Similar to the proposed

section 12(2A)(a)(i), the person charged is still required to provide evidence that he has exercised reasonable diligence.

**Department of Justice**  
**June 2014**

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