

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

Follow-up to the 4th meeting on 17 July 2014

Purpose

This paper sets out the Administration's response to the issues raised at the 4th meeting of the Bills Committee held on 17 July 2014.

Part 8 (Clauses 52 to 54)

(a) There are other provisions in HK legislation which are of the same drafting style as the proposed new sections 12(2A)(a), 26(1), 26AA and 26AAB of the Trade Descriptions Ordinance (Cap. 362). They are section 43Q(5) of the Employment Ordinance (Cap. 57), section 44(6) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and section 141(5) of the Lifts and Escalators Ordinance (Cap. 618). These provisions, similarly, require the person charged to raise an issue comprising more than one element and those elements are linked up by the connective "and". Then the same expression i.e. "the contrary is not proved by the prosecution beyond reasonable doubt" is used to elucidate the burden of proof on the prosecution.

(b) The drafting of the new provisions in clauses 52 and 54 has taken into account the judgment of the Court of Final Appeal (CFA) in *Lee To Nei v HKSAR (FACC 5/2011)* and *Lau Hok Tung and Others v HKSAR (FACC 7/2011)* in which the CFA, on reading down section 26(4) of the Trade Description Ordinance (Cap. 362), states that the accused would 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. It 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 was persuaded that in the circumstances, the accused could have discovered the falsity.

In the light of the above, in drafting the new provisions which seek to impose an evidential burden on the accused, the connective “and” is used to reflect the judgment that, for the accused to be entitled to be acquitted, an issue comprising three elements (i.e. did not know, had no reason to suspect and could not with reasonable diligence have ascertained the falsity concerned) must be raised, and that those three elements of the issue are to be read as a whole. It also requires that “the contrary is not proved by the prosecution beyond reasonable doubt”. This expression logically and clearly reflects that, as long as the prosecution could adduce evidence to disprove any one of the elements beyond reasonable doubt, the issue raised by the accused will be dispelled.

For consistency across the statute book and in view of the CFA’s ruling, we therefore come to the view that the existing drafting of the proposed new sections 12(2A)(a), 26(1), 26AA and 26AAB in clauses 52 and 54 is appropriate and could adequately reflect the policy intent.

Incidentally, we would like to propose CSAs (see attached) to the Chinese text of the proposed new sections 12(2A)(a), 26AA and 26AAB and the English text of the proposed new section 12(2A)(b) to improve the drafting.

Parts 12 and 13

Apart from the 3 unauthorized consolidated instruments dealt with in Parts 12 and 13 of the Bill, we have so far identified 3 others. The Registration of Persons (Invalidation of Identity Cards) (Consolidation) Order (Cap. 177 sub. leg. C) is to be repealed by Clause 157 of Part 15 of the Bill as it has had its effect already. The Resolutions of the Legislative Council (Cap. 61 sub. leg. A) have been editorially omitted from the Loose-leaf Edition. As for the Resolutions of the Legislative Council (Cap. 116 sub. leg. B) (**Cap. 116B**), we propose keeping the item as it is as the consolidated resolutions are unlikely to be textually amended. For future resolutions made under relevant provisions of the Rating Ordinance (Cap. 116), we will publish them as separate instruments instead of consolidating them into Cap. 116B.

Department of Justice
August 2014