

**The Government's response to the matters raised
at the meetings of the Bills Committee
on the Property Management Services Bill
held on 21 April and 4 May 2015**

Purpose

This paper sets out the Government's response to Members' concerns raised at the meetings of the Bills Committee on 21 April and 4 May 2015.

Communication with Property Management-Related Professional Organisations and Associations

2. After the last meeting, we have further communicated and met with the professional organisations and associations of the industry. They acknowledged that the Government and the relevant bodies had consensus on the direction and major principles of the licensing criteria, which should cover four aspects, namely academic qualifications, professional qualifications, years of working experience and the suitability of the person in holding property management practitioner (PMP) licence. They also expressed concerns and commented on the presentation of the professional requirements for Tier 1 PMP. We are actively pursuing the matter with the industry and will report to the Bills Committee in due course.

Provisions in Relation to Immunity and Privilege against Self-Incrimination (Clauses 30 and 31 of the Bill)

Clause 30

3. Clause 30 of the Bill provides that a person who gives evidence under section 18 and a person, such as a party, solicitor, counsel and witness, who appears at a disciplinary hearing under section 23 have the same privileges and immunities as the person would have if the investigation / hearing were civil proceedings in the Court of First Instance. The privileges and immunities originate from the common law principles, the purpose of which is to protect persons who give evidence or appear at a disciplinary hearing from any civil liability (e.g. damages for negligence or defamation, etc.) for the evidence given or the information or documents provided. This ensures that the persons concerned would not be deterred from providing information or documents or

giving evidence for fear of being sued in civil proceedings in future. Depends on the facts of the individual case, such as the capacity of the person in the investigation / hearing etc., the provision applies to all persons directly involved in an investigation or disciplinary hearing.

4. We consider that the Bill should provide the above protection to persons providing information to the investigators or the disciplinary committee, or those attending disciplinary hearing, so as to allow the investigators and the disciplinary committee to conduct investigation and hearing smoothly and effectively. The relevant provision is very common in other Hong Kong legislations, such as the Estate Agents Ordinance (Cap. 511), Professional Accountants Ordinance (Cap. 50), Travel Agents Ordinance (Cap. 218), etc. As indicated at the meeting of the Bills Committee last time, we will propose amendments to provide the same protection to persons providing information and giving evidence at the appeal tribunal.

Clause 31

5. Clauses 21(2), 22(1), 24(1)(b) and 28(2) of the Bill provide that a person commits a criminal offence if the person, without reasonable excuse, fails to comply with the requirements of the investigators or the Property Management Services Authority (PMSA) to provide specific information or responses. Clause 31(2) stipulates that a person is not excused from providing such information or responses only on the ground that to do so might incriminate the person. However, if the information or responses might tend to incriminate the provider, clause 31(4) prohibits the direct use of such information and responses as evidence in subsequent criminal proceedings. Clauses 31(3), (4) and (5) protect the person providing the information or responses. Depends on the facts of the individual case, such as the capacity of the person in the investigation / hearing etc., the provision applies to all persons directly involved in an investigation or disciplinary hearing.

6. The proposed inclusion of clause 31 in the Bill is to prevent a person from refusing to cooperate on the ground of worrying that the information or responses provided might incriminate the person himself. It strikes a fair balance between enabling investigators and the PMSA to obtain the necessary information or responses to carry out an effective investigation or to determine any disciplinary matters on one hand, and respecting the right of the persons providing the information or responses against self-incrimination on the other. Similar provisions can be found in other legislation, such as the Residential Properties (First-hand Sales) Ordinance (Cap 621) and the Securities and Futures Ordinance (Cap 571).

7. We will consider making necessary amendments to the Bill so as to avoid clauses 31(4)(b) and (c) from being repetitive.

Clause 36

8. We will consider making necessary amendments to the Bill to enhance the clarity, readability and comprehensibility of clause 36(1)(d). We will also consider specifying in clause 36(3) that any parties to the appeal may request the hearing, or any part of the hearing, be held in private and the chairperson of the appeal tribunal has the authority to decide. Clause 24(4) of the Bill has provision similar to clause 36(3), which empowers the PMSA to order a hearing or any part of the hearing to be held in private. We will consider making corresponding amendments to the relevant provision.

9. Clause 36(6) of the Bill provides that the chairperson of the appeal tribunal may make an order such as giving a verbal warning or written reprimand, imposing a fine, suspending or revoking the licence against a licensee who fails to comply with his order and publicises or discloses any evidence, information or document given at the hearing. If the person is not a licensee, the chairperson may order a public reprimand against the person.

10. We have examined other licensing or registration regimes with hearings held in private. Section 33(3)(b) of the Estate Agents Ordinance provides that the appeal tribunal may, after consulting the parties to the appeal, by order direct that the proceedings or part of the proceedings be conducted in private. The appeal tribunal may also by order give directions prohibiting or restricting the publication or disclosure of any evidence given at the proceedings by any parties to the appeal. However, the Estate Agents Ordinance does not impose any penalty on persons who fail to comply the relevant order (including public reprimand).

11. We consider that the nature and gravity of failing to comply with the order made by the chairperson of the appeal tribunal and publicise or disclose any evidence, information or document given at the hearing is similar to disciplinary offences committed by a licensee. Hence, the Bill proposes that the chairperson of the appeal tribunal may make a disciplinary order against the licensee concerned.

12. For a non-complying person who is not a licensee, it is not possible to impose sanctions such as suspending or revoking the licence by a disciplinary order. With reference to the arrangement in other legislation, we consider it appropriate and proportionate to order a public reprimand against the person.

Clauses 25, 38, 39 and Part 6

13. Clause 25(2) of the Bill empowers the PMSA to order the licensee to pay the costs and expenses incurred in relation to the hearing, whether by the PMSA or any person attending the hearing as a witness if it makes an order under Clause 25(1) against a licensee. The “costs and expenses” referred to in Clause 25(2) may cover the legal costs and legal fees incurred in relation to a disciplinary hearing. We consider the current drafting of the provision has empowered the PMSA to order a licensee to pay the legal costs and legal fees incurred in relation to the hearing.

14. We agree that Part 6 of the Bill should empower the appeal tribunal to make an order in respect of the costs and expenses incurred in relation to a hearing. We will consider making necessary amendments to the Bill.

15. Clause 38 of the Bill provides that the Secretary for Home Affairs (SHA) may, by regulation, prescribe the procedures for the hearing of appeals. We understand Members’ concern over the appeal procedures. As we undertook earlier, the subsidiary legislations relating to the Bill will be submitted by batches. The draft subsidiary legislation will also be made available to the relevant panel for information as early as practicable.

16. Clause 39 of the Bill sets out the offences relating to appeal. Clause 39(1) provides that a person commits an offence if the person, at a hearing before an appeal tribunal, gives any evidence, or provides any information or document, that is false or misleading in a material particular, and the person knows that, or is reckless as to whether, the evidence, information or document is false or misleading in a material particular. Clause 39(2) specifies that a person commits an offence if the person, without reasonable excuse, fails to comply with a summons issued by an appeal tribunal to the person under clause 36(1)(b). Clause 39(3) provides penalties for the above offences. A person who commits the above offences is liable on conviction on indictment to a fine of \$200,000 and to imprisonment for one year; or on summary conviction to a fine at level 6 (i.e., \$100,000) and to imprisonment for six months.

17. In proposing penalties for the offences under clause 39, we have made reference to those penalties of the same nature under other legislation, such as the Estate Agents Ordinance. In accordance with sections 55(1)(h)(iv) and (3)(b) of the Estate Agents Ordinance, any person who, without reasonable excuse, makes any statement or furnishes any information, which is false or misleading in a material particular in purported compliance with any requirement imposed for the purposes of proceedings conducted by an appeal tribunal, commits an offence. The penalties are the same as those provided under clause 39 of the Bill.

18. While no offences of an identical nature to those under clauses 28 and 39 of the Bill are found under the Criminal Procedure Ordinance (Cap. 221), we note that offences such as perjury are provided under Part V of the Crimes Ordinance (Cap. 200). In accordance with section 31 of the Crimes Ordinance (Cap. 200), if any person lawfully sworn as a witness wilfully makes a statement in any judicial proceeding which is material in that proceeding and which he knows to be false or does not believe to be true, he shall be guilty of perjury and shall be liable on conviction upon indictment to imprisonment for seven years and to a fine.

19. The Director of Public Prosecutions will, depends on the actual circumstances of individual case, apply the appropriate legal provision for prosecution.

Clause 45

20. Clauses 45(1) and (2) of the Bill separate the requirements for members of the PMSA and members of the committees under the PMSA. We consider that this arrangement could enhance clarify and readability.

21. Clause 45(3)(a) of the Bill provides that for the purposes of subsections (1) and (2), the PMSA may determine the class or description of the interests required to be disclosed. Our preliminary thinking is that this will include pecuniary interest (whether direct or indirect) and personal interest (greater than that which the member has as a member of the general public).

Disclosure of Interests

PMSA

22. Clause 45(1) of the Bill provides that a member of the PMSA must disclose to the PMSA any interest that the member has on the member's first appointment to the PMSA, at the beginning of each calendar year after the member's appointment, on becoming aware of the existence of an interest not previously disclosed under this subsection, and after any change occurs to an interest previously disclosed under this subsection.

23. Clause 46(2) of the Bill provides that if a member of the PMSA has a pecuniary interest (whether direct or indirect) or a personal interest (greater than that which a person has as a member of the public) in any matter under discussion at a meeting of the PMSA, the member must disclose the nature of the interest at the meeting and the disclosure must be recorded in the minutes.

Committees of the PMSA

24. Under clause 23 of Schedule 3 to the Bill, the PMSA may establish committees¹. Every member of a committee is to be appointed by the PMSA. They may include members of the PMSA and those who are not. For the disclosure of interests of committee members, clauses 45(1) and (2) set out the requirements pertaining to members and non-members of the PMSA respectively².

25. Clause 46(9) of the Bill provides that subsections (1), (2), (3) and (8) of clause 46 apply to a member of a committee of the PMSA, hence the requirements under clause 46(2) (see paragraph 23 for details) also apply to a member of a committee of the PMSA (including the disciplinary committee). If a member of the disciplinary committee has a disclosable interest with the property management company or practitioner involved in a hearing of the

¹ Clause 2 of the Bill specifies that the disciplinary committee means the standing committee established under section 23(1) of Schedule 3.

² Clauses 45(1) and (2) provide respectively that a member of the PMSA and a member of its committee who is not also a member of the PMSA must disclose to the PMSA any interest on the member's first appointment, at the beginning of each calendar year after the member's appointment, on becoming aware of the existence of an interest not previously disclosed under this subsection and after any change occurs to an interest previously disclosed under this subsection.

disciplinary committee, the member should make a disclosure under clause 46(2) of the Bill.

Appeal Tribunal

26. Clause 38 of the Bill empowers SHA to prescribe, by regulation, the procedures for an appeal. SHA will consider whether it is necessary to specify in the subsidiary legislation the requirements and procedures etc. in respect of disclosure of interests by a member of an appeal panel or an appeal tribunal.

**Home Affairs Department
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