

立法會
Legislative Council

LC Paper No. LS44/13-14

**Paper for the House Committee Meeting
on 2 May 2014**

**Legal Service Division Report on
Statute Law (Miscellaneous Provisions) Bill 2014**

I. SUMMARY

- 1. The Bill**

The Bill seeks to provide for miscellaneous amendments to various Ordinances and for connected purposes. It covers amendments relating to a number of policy areas, including: repeal or amendments to certain provisions of the Crimes Ordinance (Cap. 200) which were ruled to be discriminatory on the basis of sexual orientation and therefore unconstitutional, amendments to four anti-discrimination ordinances, amendments to the Evidence Ordinance (Cap. 8) relating to admissibility of evidence in court proceedings, amendments to the Lands Tribunal Ordinance (Cap. 17) to clarify the powers of members and temporary members of the Tribunal, amendments to the Building Management Ordinance (Cap. 344) to replace the existing requirement of a statutory declaration by a member of the management committee with the requirement of a statement.
- 2. Public Consultation**

According to the Legislative Council Brief, the Administration has consulted the relevant stakeholders on some of the proposed amendments. All the stakeholders consulted either supported or raised no in principle objection to the proposals.
- 3. Consultation with LegCo Panel**

The Panel on Home Affairs, the Panel on Constitutional Affairs and the Panel on Administration of Justice and Legal Services were briefed on 28 May 2013, 17 June 2013 and 16 December 2013 respectively.
- 4. Conclusion**

The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Members may wish to consider whether there are any policy or other aspects which should be studied in detail by a Bills Committee.

II. REPORT

The date of First Reading of the Bill is 30 April 2014. Members may refer to the LegCo Brief (File Ref.: LP 3/00/13C) issued by the Department of Justice on 15 April 2014 for further details.

Object of the Bill

2. The Bill seeks to provide for miscellaneous amendments to various Ordinances and for connected purposes.

Provisions of the Bill

3. This is an omnibus bill which covers a number of policy areas. The major proposed amendments in the Bill are summarized in the ensuing paragraphs.

Amendments to the Crimes Ordinance (Cap. 200) (CO)

4. In *Leung TC William Roy v Secretary for Justice* (HCAL 160/2004), the applicant sought declarations that sections 118C (homosexual buggery with or by man under 21), 118F(2)(a) (homosexual buggery committed otherwise than in private), 118H (gross indecency with or by man under 21) and 118J(2)(a) (gross indecency by man with man otherwise than in private) of the CO were invalid and inconsistent with the Basic Law and the Hong Kong Bill of Rights (HKBOR). The respondent conceded that sections 118H, 118J(2)(a) and 118F(2)(a) were unsustainable in law, but argued that section 118C was constitutional and valid. The Court of First Instance (CFI) ruled that section 118C, together with the three other sections challenged, discriminate on the basis of sexual orientation. Sections 118C and 118H (to the extent that they apply to a man aged 16 or over and under 21) and sections 118F(2)(a) and 118J(2)(a) of the CO were ruled to be inconsistent with Articles 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the HKBOR and are therefore unconstitutional. The declarations sought by the applicant were granted. The Secretary for Justice subsequently appealed against the decision of the CFI insofar as section 118C of the CO is concerned. The Court of Appeal (in CACV 317/2005) upheld the decision of the CFI.

5. In *Secretary for Justice v Yau Yuk Lung Zigo and Another* (FACC 12/2006), the Court of Final Appeal (CFA) ruled that equality before the law is a fundamental human right and discrimination on the ground of sexual orientation would be unconstitutional. CFA declared that section 118F(1) (homosexual buggery committed otherwise than in private) of the CO was unconstitutional for infringing the respondents' right to equality guaranteed under Article 25 of the Basic Law and Article 22 of the HKBOR.

6. Part 2 of the Bill seeks to amend or repeal certain provisions of the CO that were declared to be unconstitutional by the courts in the above cases and to provide for consequential amendments.

Amendments to the Sex Discrimination Ordinance (Cap. 480) (SDO), Disability Discrimination Ordinance (Cap. 487) (DDO), Family Status Discrimination Ordinance (Cap. 527) (FSDO) and Race Discrimination Ordinance (Cap. 602) (RDO)

7. Part 3 of the Bill seeks to:

- (a) repeal certain items in Part 2 of Schedule 5 to the SDO which are exempted from the operation of the relevant parts of the SDO;
- (b) enable enforcement notices to be served on persons by the Equal Opportunities Commission (EOC) for discriminatory practices under the DDO;
- (c) provide protection to the members and staff of the EOC against liability when they act in good faith in the performance or purported performance of any of the EOC's functions, etc. under the DDO and FSDO as the same protection is already provided in section 68 of the SDO and in section 62 of the RDO; and
- (d) refine the Chinese text of some provisions of the DDO, SDO, FSDO and RDO.

Amendments to the Evidence Ordinance (Cap. 8) (EO), Lands Tribunal Ordinance (Cap. 17) (LTO) and Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLACMO)

Powers of members and temporary members of the Lands Tribunal

8. The Lands Tribunal is established by section 3 of the LTO which has the jurisdiction to determine the amount of compensation (if any) payable by the Government in respect of any claim submitted to it etc. Section 81 of the EO currently empowers judges and judicial officers (JJOs) at various courts and tribunals in Hong Kong to bring up any person in lawful custody before the courts or tribunals to enable such person to prosecute, defend, or be examined as a witness. There is, however, no reference to the JJOs of the Lands Tribunal in section 81 of the EO. Part 4 of the Bill seeks to amend section 81 of the EO to provide explicit powers for the JJOs of the Lands Tribunal to bring up any person in lawful custody before the Tribunal.

9. Part 4 of the Bill also seeks to amend section 6A of the LTO to put it beyond doubt that the temporary members shall exercise the same powers of a member of the Tribunal (including the power under section 81 of the EO).

Admissibility of notarial instruments

10. Part 5 of the Bill seeks to amend the EO and the relevant court rules to the effect that a notarial instrument (i.e. a document evidencing and showing any notarial act of a notary public and bearing the signature and the seal of the notary public) may be received in evidence in civil proceedings in the courts of Hong Kong, without further proof, as duly authenticated unless the contrary is proved.

Admissibility of evidence obtained pursuant to request for assistance in criminal matters

11. Part 6 of the Bill seeks to introduce amendments to the EO and the MLACMO by specifying that a deposition received pursuant to a request under section 9(1) of the MLACMO includes an affidavit, affirmation or declaration made under an obligation to state the truth according to the law of the place where the affidavit, affirmation or declaration is made. The effect of the amendments is that such an affidavit, affirmation or declaration, together with any document or thing exhibited or annexed to it, received pursuant to such a request shall be admitted in the criminal proceedings concerned in Hong Kong as prima facie evidence of any fact stated in them. For depositions to be so admissible under section 77F(2)(c) of the EO, the court must be satisfied that no unfairness is likely to occur in those criminal proceedings consequent upon such depositions being admitted in evidence. According to the Administration, the proposed amendments would bring Hong Kong in line with its major partners in mutual legal assistance matters in respect of the law and practice relating to the admissibility of foreign public and routine business documents.

Amendments to the Unsolicited Electronic Messages Ordinance (Cap. 593) (UEMO)

12. Part 7 of the Bill seeks to amend section 44 of the UEMO to the effect that, for the purposes of serving a notice issued by the Communications Authority pursuant to section 34, 35, 36 or 38 of the UEMO, further modes of service, namely by delivering it to the person by hand, or by leaving it or sending it by ordinary post to the person at the person's usual or last known place of abode or business, may be adopted in addition to sending it by registered post under the existing provision.

Amendments to the Trade Descriptions Ordinance (Cap. 362) (TDO)

13. Section 26(4) of the TDO provides that in any proceedings for an offence under section 9(2), it shall be a defence for the person charged to prove

that he did not know, had no reason to suspect and could not with reasonable diligence have ascertained, that a forged trade mark had been applied to the goods or that a trade mark or mark so nearly resembling a trade mark as to be calculated to deceive had falsely been applied to the goods. In *Lee To Nei v HKSAR* (FACC 5/2011) and *Lau Hok Tung and Others v HKSAR* (FACC 7/2011), the CFA declared that section 26(4) of the TDO must be read down as imposing merely an evidential burden on the accused, with the persuasive burden remaining throughout on the prosecution. Part 8 of the Bill seeks to amend section 26(4), together with similar defence provisions in the TDO, to make it clear that these provisions impose only an evidential burden on the accused.

Amendments to the Building Management Ordinance (Cap. 344) (BMO)

14. Under the existing provisions of the BMO, a member of the management committee of an owners' incorporation is required to lodge a statutory declaration stating that he/she does not fall within any of the categories of ineligible persons specified in paragraph 4(1) of Schedule 2 to the BMO within 21 days after the appointment. According to paragraph 12 of the LegCo Brief, the existing requirement has been criticized for being too stringent. Part 9 of the Bill seeks to amend the BMO to replace the existing requirement of a statutory declaration in section 7(3)(e) of and paragraphs 4(3), 4(5), 4(6) and 4(7) of Schedule 2 to the BMO with the requirement of a statement.

Amendments to the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997) (the 1997 Ordinance)

15. Part 10 of the Bill seeks to amend Schedule 1 to the 1997 Ordinance to retain the existing definition of controlled trust (which refers to solicitor or foreign lawyers, rather than legal practice entities, as trustees or co-trustees) for the purposes of Part IIA of and Schedule 2 to the Legal Practitioners Ordinance (Cap. 159) (LPO).

Amendments to the Legal Practitioners Ordinance (Cap. 159)

16. Part 11 of the Bill seeks to amend section 8A of the LPO in order to empower the Council of the Law Society of Hong Kong to revoke or restore a suspension of a solicitor's practice or a foreign lawyer's registration pending a decision of the Solicitors Disciplinary Tribunal if the Council is satisfied that the circumstances that gave rise to the suspension/revocation no longer exist or otherwise considers appropriate. Amendments are also proposed to the 1997 Ordinance to provide for similar powers.

Other miscellaneous amendments

17. According to paragraph 15 of the LegCo Brief, in order to enhance the accuracy and the user-friendliness of the statute book, the Bill also seeks to

provide for miscellaneous and technical amendments to various Ordinances or subsidiary legislation for different purposes, for example, to provide for consequential amendments that were omitted in previous amendment exercises, to correct cross references in certain provisions, to make provisions for correcting certain consolidation irregularities and to achieve internal consistency in terminology and consistency between the Chinese and English texts of certain enactments.

Commencement

18. The Bill, if passed, would come into operation on the day on which it is published in the Gazette, except that:-

- (a) Part 9 (amendments to BMO relating to declaration requirement) would come into operation on the expiry of one month after the day on which the Ordinance is published in the Gazette; and
- (b) Divisions 1, 2 and 3 of Part 12 (amendments relating to specification of public offices) would come into operation immediately after Division 4 of that Part comes into operation.

Public Consultation

19. According to paragraph 22 of the LegCo Brief, the Security Bureau informed the Review of Sexual Offences Sub-committee of the Law Reform Commission, the EOC and the Advisory Group on Eliminating Discrimination against Sexual Minorities of the proposals set out in paragraph 6 above, and they welcomed the proposals in general.

20. According to paragraph 24 of the LegCo Brief, the Department of Justice consulted the relevant legal professional bodies and the Judiciary on the proposals as set out in paragraphs 10 and 11 above. All the institutions consulted either supported or raised no in principle objection to the proposals.

Consultation with LegCo Panel

21. The Clerk to the Panel on Home Affairs advised that the Panel was briefed on 28 May 2013 on the findings of the Interim Report of the Review Committee on the BMO. Members generally welcomed the proposal to require members of the management committees of owners' corporations to make a written statement on their eligibility upon appointment instead of taking an oath before the Commissioner for Oaths. Members were also advised that the Review Committee would further study various building management issues involving

complicated legal and operational implications at its next stage of work, including termination of the appointment of Deed of Mutual Covenant (DMC) manager and remuneration of DMC managers.

22. The Clerk to the Panel on Constitutional Affairs advised that the Panel has not been consulted on the legislative proposals proposed by EOC in relation to the four anti-discrimination ordinances. However, when the Panel discussed "Follow-up on EOC's legislative amendment proposal related to the scope of protection against sexual harassment under the Sex Discrimination Ordinance (Cap. 480)" at its meeting on 17 June 2013, the Administration informed the Panel that the Administration intended to introduce a Statute Law (Miscellaneous Provisions) Bill tentatively by the end of 2013 to deal with the legislative proposals from EOC concerning technical amendments to the four anti-discrimination ordinances. No member expressed any comments.

23. The Clerk to the Panel on Administration of Justice and Legal Services advised that whilst supporting the introduction of the omnibus bill into the Council, Panel members had sought explanation from the Administration regarding some of the proposed amendments, including those proposed to the 1997 Ordinance and the LPO. Some members expressed concern about the progress of the Law Reform Commission's review of provisions related to sexual offences under the CO. There was also a view that the Administration should avoid bundling too many discrete issues into a single omnibus bill.

Conclusion

24. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Members may wish to consider whether there are any policy or other aspects which should be studied in detail by a Bills Committee.

Prepared by

TSO Chi-yuen, Timothy
Assistant Legal Adviser
Legislative Council Secretariat
28 April 2014