

For discussion
on 16 December 2013

Panel on Administration of Justice and Legal Services

Statute Law (Miscellaneous Provisions) Bill 2014

Introduction

A number of amendments to various Ordinances are proposed for inclusion in the above Bill. The proposed amendments are largely technical and non-controversial but are important for the purpose of updating or improving existing legislation. The object of this paper is to seek the views of Members of the Panel on the proposed amendments.

General background

2. The Administration has used omnibus bills in recent years as an efficient way of effecting miscellaneous improvements to existing legislation. This avoids the requirement to make bids for separate slots relating to each Ordinance, the amendments to which typically involve only a few clauses. This practice has worked well in the past, and the Administration intends to adopt the same practice in this legislative year.

Outline of the proposed amendments

3. The proposed amendments to be included in the Bill are set out below under different headings.

Crimes Ordinance (Cap. 200)

4. In *Leung TC William Roy v S for J* [2006] 4 HKLRD 211, the Court of Appeal upheld the decision of the Court of First Instance, which declared that 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 Crimes Ordinance are inconsistent with Articles 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the Hong Kong Bill of Rights (“HKBOR”) and are therefore unconstitutional.

5. In *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, the Court of Final Appeal declared that section 118F(1) of the Crimes Ordinance was unconstitutional for infringing the respondents' right to equality guaranteed under Articles 25 and 39 of the Basic Law and Articles 1 and 22 of the HKBOR.

6. The Security Bureau proposes to amend/repeal the parts of the above provisions of the Crimes Ordinance that were ruled unconstitutional by the courts in the above two judgments.

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. The Constitutional and Mainland Affairs Bureau (“CMAB”) and the Labour and Welfare Bureau have decided to proceed with the following legislative amendments proposed by the Equal Opportunities Commission (“EOC”) in relation to the above four anti-discrimination ordinances:

- (a) to 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) to enable enforcement notices to be served on persons by the EOC for discriminatory practices under the DDO;
- (c) to 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) to refine the Chinese text of some provisions of the DDO, SDO, FSDO and RDO.

8. Regarding the proposal in paragraph 7(a) above, Part 2 of Schedule 5 to the SDO exempts a number of practices specified therein. As such, the specified practices are not caught by the provisions of the SDO as being unlawful discrimination. The EOC proposed and the Administration

has agreed to repeal certain exemptions in Part 2 of Schedule 5 to the SDO. For example, item 8 of Part 2 of Schedule 5 to the SDO exempts any discrimination between persons of different marital status arising from the proviso to regulation 4(1) of the Royal Hong Kong Auxiliary Police Force (Pensions) Regulations (Cap 233 sub. leg. B) (“the Regulations”) from the provisions of Parts 3, 4 and 5 of the SDO. Since the Regulations were repealed in 1997, item 8 of Part 2 of Schedule 5 to the SDO has become obsolete and should be repealed.

9. As regards paragraph 7(b) above, section 41 of the DDO defines “discriminatory practice” and provides that the EOC may bring proceedings in accordance with a number of specified provisions including section 73, which deals with enforcement notices. While section 73(1) specifies the matters to which the provision applies, a reference to section 41 is missing. The omission appears to be an oversight as there are similar provisions to that effect in the SDO, FSDO and RDO. The EOC proposed and the Administration has agreed to add, under section 73, a reference to section 41 for the sake of clarity and completeness.

10. CMAB informed the LegCo Panel on Constitutional Affairs at its meeting on 17 June 2013 that the Administration intended to take forward the legislative proposals concerning technical amendments to the four anti-discrimination ordinances as proposed by the EOC by way of the above Bill.

Evidence Ordinance (Cap. 8) (“EO”)

Notarial act or instrument

11. It is proposed that the EO be amended to the effect that a notarial act or instrument of a notary public registered in Hong Kong may be received in evidence in civil proceedings in the courts of Hong Kong without further proof as duly authenticated in accordance with the requirements of the law unless the contrary is proved. The proposal was initiated by a request by the Hong Kong Society of Notaries to consider whether it would be appropriate to adopt a provision in Hong Kong similar to rule 32.20 of the *English Civil Procedure Rules 1998*. To follow up on the request, the Department of Justice issued a consultation paper in May 2012 to seek the views of the relevant legal professional bodies in both Hong Kong and the UK as well as the Judiciary on the proposal. All the institutions that we have consulted, including the Hong Kong Bar Association and the Law Society of Hong Kong, support the proposal in principle.

Foreign public, banking, routine business and computer records

12. The Department of Justice proposes to introduce legislative amendments to the EO and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) to render foreign public, banking, routine business and computer records obtained pursuant to mutual legal assistance requests admissible in the courts of Hong Kong as *prima facie* evidence of any fact stated therein if they are annexed to a deposition, affidavit, affirmation or declaration made according to the law of the foreign jurisdiction concerned. The proposal 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.

13. In October 2012, the Department of Justice issued a consultation paper to seek the views of the Hong Kong Bar Association, the Law Society of Hong Kong and the Judiciary on the proposal. Both the Law Society and the Judiciary raise no objection to the proposal. The concern expressed by the Bar Association is being addressed through the preparation of the draft provisions.

Powers of members and temporary members of the Lands Tribunal

14. 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 to be examined as a witness. There is, however, no reference to the JJOs of the Lands Tribunal in section 81 of the EO. Arguably, the presiding officers and other members of the Lands Tribunal may still rely on some other existing provisions (e.g. section 81(1) of the EO read together with section 10(1) of the Lands Tribunal Ordinance, Cap. 17) to exercise the power under section 81(1) of the EO to issue a warrant or order to bring any person in custody before the tribunal. For the sake of clarity and to avoid any unnecessary arguments, the Judiciary Administration proposes to amend section 81 of the EO to provide explicit powers for the President, presiding officers and other members of the Lands Tribunal to do so.

15. Further, as the work of temporary members and permanent members of the Lands Tribunal is identical, similar to other courts, it is proposed that the temporary members of the Lands Tribunal be given similar power under section 81 of the EO. In this regard, section 6A of the Lands Tribunal Ordinance provides, inter alia, that "... a temporary member shall, during the period for which he is appointed, exercise all the jurisdiction and

powers of the Tribunal, and perform all the duties of a member". The Judiciary Administration proposes to amend section 6A of the Lands Tribunal Ordinance 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). The above approach is a desirable long-term solution to resolve any doubt as to whether temporary members of the Lands Tribunal may exercise the powers of a member of the Tribunal.

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

16. Schedule 1 to the 1997 Ordinance contains consequential amendments to the Legal Practitioners Ordinance (Cap. 159) ("LPO") relating to solicitor corporations and has not yet come into operation. The existing provisions of the LPO, read together with Schedule 1 to the 1997 Ordinance, would have the effect of referring to "legal practice entities" (which is defined to include solicitor corporations) as trustees or co-trustees of a trust. The Council of the Law Society has resolved to reinstate the law prior to the 1997 Ordinance, namely, only solicitors or foreign lawyers can become trustees or co-trustees of a trust. The Law Society therefore proposes to amend Schedule 1 to the 1997 Ordinance to this effect.

Legal Practitioners Ordinance (Cap. 159)

17. The Law Society proposes to amend section 8A of the LPO in order to empower the Council of the Law Society to revoke and 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 considers appropriate. Amendments are also proposed to the 1997 Ordinance to provide for similar powers.

Trade Descriptions Ordinance (Cap. 362)

18. The Commerce and Economic Development Bureau ("CEDB") proposes to amend certain provisions in the Trade Descriptions Ordinance in the light of the judgment of the Court of Final Appeal in *Lee To Nei v HKSAR (2012) 15 HKCFAR 162*, which declares that section 26(4) of the Trade Descriptions Ordinance must be read down as imposing merely an evidential burden on the accused, with the persuasive burden remaining throughout on the prosecution. CEDB proposes to amend section 26(4), together with

similar defence provisions in the Trade Descriptions Ordinance, to make it clear that these provisions impose only evidential burden on the accused.

Unsolicited Electronic Messages Ordinance (Cap. 593) (“UEMO”)

19. CEDB further proposes to amend section 44 of the UEMO to the effect that, for the purposes of serving the notices issued by the Communications Authority pursuant to sections 34, 35, 36 and 38 of the UEMO, two more modes of service, namely delivery by hand and sending by ordinary post, may be adopted in addition to sending by registered post under the existing provision. The proposal seeks to provide greater flexibility in the service of the notices and to enhance the effectiveness of the enforcement mechanism under the UEMO.

Building Management Ordinance (Cap. 344) (“BMO”)

20. 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 does not fall within any of the category of ineligible persons specified in paragraph 4(1) of Schedule 2 to the BMO within 21 days after his/her appointment. A statutory declaration has to be made before a justice of peace, notary public, commissioner or other persons authorized by law to administer an oath.

21. The existing requirements of statutory declaration has been criticized for being too stringent as many management committee members find it very inconvenient to go to the designated venues during office hours for the purpose of making statutory declaration. Some owners complained that the existing requirement had discouraged them from serving as management committee members. To obviate the need of taking an oath, the Home Affairs Bureau proposes to amend the BMO to replace the existing requirements of 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 written statement.

22. This proposal is one of the proposals included in the Interim Report of the Review Committee on the Building Management Ordinance published in March 2013. The Administration briefed the Legislative Council Panel on Home Affairs on the findings in the Interim Report at its meeting on 28 May 2013, and the Panel Members welcomed the proposal in general.

Other miscellaneous amendments

23. It is proposed that miscellaneous and technical amendments to various Ordinances or subsidiary legislation be made 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 standardize the Chinese titles of the principal offices in the Customs and Excise Department (i.e. Commissioner of Customs and Excise, Deputy Commissioner of Customs and Excise and Assistant Commissioner of Customs and Excise) and to achieve internal consistency in terminology and consistency between the Chinese and English texts of certain enactments.

Department of Justice
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