THE LAW SOCIETY OF HONG KONG 香港律師會

Submissions of the Law Society of Hong Kong on the Residential Properties (First-hand Sales) Bill ("the Bill")

A. General Comments

1. The Law Society's Property Committee has reviewed the proposals put forward in the Bill.

2. The Committee supports the objective of the proposed legislation to enhance the transparency and fairness of the sales arrangements of first-hand residential properties for the protection of purchasers. However, the proposed legislation should strike a balance between enhancing consumer protection and allowing a certain degree of flexibility for the parties to contract freely.

3. ***There are some fundamental concerns with the Bill, including but not limited to:***

   - ***whether the Bill casts its net over the correct class of persons, in particular, whether the present definition of "vendor" will catch the innocents and let go the culprits***
   - ***instead of strict liability offences, mens rea should be required as an element for the offences created under the proposed legislation or appropriate defences should be provided for in the legislation***
   - ***the need to introduce exemptions for the professionals, such as architects and solicitors, from possible criminal liability for their negligence or mistakes, in view of Clause 66 of the Bill and section 89 (in relation to aiders, abettors and accessories) of the Criminal Procedure Ordinance, Cap 221 ("CPO") and its equivalent common law rules. The imposition of criminal liability on a professional who is merely negligent or makes mistakes should not be the legislative intent. The consequences should be a civil one (at common law), and not a criminal one***
   - ***the rigidity of the proposed legislation and the absence of a mechanism to grant exemption to the statutory requirements in justifiable circumstances***
   - ***time limit for prosecutions***

4. The Committee also has some drafting concerns on the Bill which concerns the Administration should address to give more certainty in law particularly in view of the criminal liability that the Bill seeks to impose.

5. Given the relatively short time for consultation, the Committee will first set out its preliminary comments on the proposed legislation. These comments are not exhaustive and the Law Society reserves its right to make further comments on the Bill. For easy reference, the Committee's comments are set out below with reference to the provisions of the Bill.

B. Comments on the Bill

PART 1 – PRELIMINARY

Clause 2 – Interpretation

Definition of "working day"

6. Saturday may be counted as a "working day" in the Bill and mandatory provisions in the Preliminary Agreement for Sale and Purchase ("PASP") under Schedule 4 while it is not regarded as a "business day" for the purpose of Agreements for Sale and Purchase ("ASP") under Schedules 5, 6 and 7. Many law firms in Hong Kong are not open for business on Saturdays. It is suggested that Saturday should not be counted as a "working day" under the Bill.

Clause 3 – Interpretation: development, phase and building

7. Clause 3 does not provide a clear definition of "building". For illustration purpose, let's take an example - suppose a developer develops several plots of lands (each piece of land is registered at the Land Registry with a different Lot Number; each of them herein is referred as "Lot") in one go with one set of building plans approved by the Building Authority covering all the Lots; there is no division of the development scheme into two or more "phases" on the approved building plans as referred to in Clause 3(3) of the Bill. However, when the developer sells the units in the development, it sells each Lot as a separate development and there is no deed of mutual covenant ("DMC") (as defined under the Building Management Ordinance, Cap 344) covering all the Lots as a whole but there may or may not be some deed(s) of grant of right of way or easements be created covering two or more of the Lots. Then, the question is: Under the Bill,
   - Should **each Lot** be treated as **a** separate **development** on its own? or
   - Should **all the Lots** covered by the single set of approved building plans be regarded as **a single development?**

8. Moreover, each Lot may or may not have its own DMC depending on the features of the building or buildings erected or be erected thereon; and the **building(s)** erected on a Lot may be a single house, or two or more semi-detached houses or a multi-storeyed building. These questions relate to the

issues of how one should prepare the sales brochure, price lists and comply with other requirements of the Bill. These issues should be clarified.

Clause 4(2)(a) -Interpretation: Completed development pending compliance

9. A completed development can encounter several of the following circumstances:-
   (a) Occupation Permit ("OP") issued but neither a consent to assign ("CA") nor a certificate of compliance ("CC") has been issued;
   (b) OP issued and CA has been issued but the CC has not been issued (i.e. not all the positive obligations of the conditions of land grant have been complied with); or
   (c) OP issued and a CC has been issued (certifying that all the positive obligations of the land grant have been complied with).

10. The term "*completed development pending compliance*" is used in Schedule 6 of the Bill (see also Clauses 50(3)(b) & (c) of the Bill); and paragraphs 12 and 13 of Schedule 6 of the Bill refer to completion of sale and purchase after the issue of (i) CC **or** (ii) CA. In other words, if a CA (but not a CC) has been issued, then the mandatory provisions under Schedule 6 should naturally not be used, and rather the mandatory provisions under Schedule 7 (i.e. completed development that is not completed development pending compliance) should be used instead.

11. However, Clause 4(2)(a) of the Bill setting out the definition of the term "*completed development pending compliance*" of the Bill has not yet dealt with the situation where CA has been issued but not a CC as mentioned above. This is inconsistent with paragraphs 12 and 13 of Schedule 6 and the issues mentioned in point 10 above. **This should be rectified.**

12. If a CA has been issued, then even though not all positive obligations imposed under the conditions of the Land Grant have been complied with, the development should still be treated as having been completed not pending compliance and Schedule 7 (rather than Schedule 6) should be applicable (see also Clauses 50(3)(b) & (c) of the Bill). See also paragraph 1 (6) (c) of Part 1 under Schedule 1 to the Bill which mentions the "completion of development" (and for the purpose of the ASP, the completion of the sale and purchase should thereafter take place) by reference to the issuance of CC or CA. Other cross-references to the aforesaid terms throughout the Bill should also be double-checked to avoid inconsistency.

13. Moreover, Clause 4(2)(a)(iii) should be qualified to refer to "***positive obligations imposed under the condition***" so as to tally with the definition of "Certificate of Compliance" under clause 2 of the Bill.

14. Clause 4(2)(b)(ii) of the Bill (referring to phase of a development) also faces similar problems as mentioned in points 11 & 12 above.

Clause 6 - Interpretation: Residential Property

15. The definition of "residential property" in Clause 6 should specifically exclude serviced apartments or hotel which are also used for "human habitation" if it is wholly sold to one purchaser whether or not they form a part of a phase or development.

16. The kind of sale mentioned in the preceding paragraph is not intended to be covered under this Bill. For large-scale composite development, it is possible that both serviced apartments/a hotel and residential units are present in the development and the intention of the Bill should only be applicable to the sale of the residential units and not the sale of all the serviced apartments/hotel to one purchaser.

Clause 7 – Interpretation: Vendor

17. ***The Law Society is concerned that with the proposed definition of "vendor", the proposed legislation will catch the innocents and let go the culprits.***

18. Developer
It is a common arrangement in property development joint ventures between owners and experienced developers that the owners provide the land for development and the developers are responsible for the construction of the developments, the marketing and the carrying out of the sale activities. The developers have most of the commercial interest in the sale proceeds in the sale of the development and the owners are usually just passive land providers with limited resources in carrying out the development and sale on its own and who do not actually develop the land and conduct the sale of the units in the development. It would be unfair to impose the obligations on the owners.

19. Holding Companies
Further, developers in Hong Kong usually use shelf companies to acquire and develop land. A complex corporate structure may be used in commercial reality with many layers of corporate vehicles in between or among different shareholders.

20. In response to the Society's concern that the legislation will not be able to hold the holding company who may be a real culprit behind the scene, liable, the Administration has quoted S. 89 of the CPO. However, S.89 of the CPO is not a good answer to the problem as it requires the element of mens rea for the offence whereas many offences in the Bill are strict liability offences.

21. The revised definition of "Vendor" will cover not only the "owner" but also "person so engaged" (i.e. person engaged by the owner to co-ordinate and supervise the process of designing, planning, constructing, fitting out, completing and marketing the development or phase) for the purpose of attracting criminal liability to them: see Clause 7(1) and (2). The wide meaning of "person so engaged" would catch not only a developer who forms a joint venture with an Owner to develop the land but also an architect, authorised person and other professionals who will be treated as the vendor for the purpose of the new law. See the definition of "***authorized person***" in Clause 2.

22. This would worsen the legal position of an architect or other professionals who may commit an offence under the new law as the vendor, the principal offender. This should not be the legislative intent. Moreover such extension of meaning will cause problem in Part 2 of the Bill and other provisions of the Bill which refer to the requirements of the *"vendor"*. For example, should the disclosure of information on the "*vendor*" in the sales brochures under Clause 18(2)(b) include the information on the "authorized person". See also Clause 52(7) relating to the meaning of "*related party to a vendor*"; the "vendor" therein should not be intended to mean or cover an "authorised person". Other cross references to "*vendor*" throughout the Bill should also be double checked. This is not fair to the professional. The definition of "person so engaged" should be re-defined.

23. Moreover as "*the person so engaged*" is given a very wide meaning and covers a number of activities namely "*designing, planning, constructing, fitting out, completing and marketing*". How the disclosure requirements relating to vendor in advertisements, sales brochure or Register of Transaction, or otherwise should be handled in reality will create substantial practical problems. Careful considerations should be given as to how these issues could be dealt with in reality. In addition, the extension of meaning of "*vendor*" to cover "*person so engaged*" may be too wide under certain circumstances and other provisions of the Bill containing the references to "*vendor*" will need re-examination to see if the extended meaning is appropriate at all

Clause 8 - Interpretation: saleable area and related expressions

24. Since any mis-statement of the saleable area and area other than the saleable area will, after the coming into effect of the new law, becomes an offence, ***more precise definitions must be given to each item of the definition of "saleable area" (clause 8(1)(b)) and each item excluded from it (clause 8(1)(c)) so as to avoid any unintended violation of the new law.***

25. Stairhood is now excluded from the definition of "saleable area" under Clause 8(1)(c) (see Part 1 under Schedule 2 to the Bill). Such exclusion does not appear in the existing Consent Scheme; and as a stairhood is enclosed by walls, the definition of "saleable area" under the existing Consent Scheme would include the area of a stairhood. Clause 8(1)(c) is a departure from the existing Consent Scheme requirement.

26. As to the term of "air-conditioning plant room", nowadays there are other variants of this term serving similar function but with a different name as may be approved by the Building Authority and shown on the approved building plans; they may be called "air-handling unit room", "Variable Refrigerant Volume Room (VRV)", "air-conditioning plant room" etc. They are given different names on the approved building plans. The question is whether the areas of these items should be stated under "air-conditioning plant room" or stated under any other places in the form of ASP. The Administration may also wish to confirm with the Buildings Department on these issues. Under the existing Consent Scheme, the Director of Lands can approve new feature

or item to be added in either "Saleable Area" or "Other Areas" in Schedule 4 of the form of ASP (see paragraph 5 of Legal Advisory and Conveyancing Office ("LACO") Circular Memorandum No.60). The Law Society is also given similar power under Rule 5C of the Solicitors' Practice Rules. The Bill should also allow for such flexibility to suit the special features of each individual development.

27. Clarifications on what constitutes flat roof, roof, yard, terrace or garden should be provided. The question is whether they should be given their ordinary meanings or be given their technical meanings under the approved building plans. For example, there may be cases where a portion of flat roof is demarcated as "balcony" on the building plans for the purpose of gross floor area exemption or Practice Notes issued by the Building Authority. The question is whether such so-called "balcony" under Building plans ("the Portion") should be (i) treated (technically under the Building plans) as "Saleable Area" (see clause 8(1)(b)(i) of the Bill) or (ii) be treated as "flat roof" (in a lay-man's view as the Portion is physically indistinguishable from a flat roof (and of which the Portion is physically located)); in the later event the Portion will not be counted as "Saleable Area". These issues should be clarified as it will go to the question as to how the new law should be complied with. There may be other special/technical situations and the Administration should also confirm with the Buildings Department.

28. Under Clause 8(2)(a), the measurement of saleable area is from the exterior of the enclosing walls of the residential property. However, what constitutes the exterior of the enclosing walls is not precisely stated in the Bill. The question is whether the exterior of the enclosing walls should exclude the tiles, plaster and metal or other types of claddings attached to the enclosing walls or that the exterior of the enclosing walls should only just mean the wall as shown on the approved building plans. This should be clarified to avoid any ambiguity.

29. Under Clause 8(6), the area of an item specified in Part 1 of Schedule 2 is to be calculated in accordance with Part 2 of that Schedule. Under paragraph 2 of Part 2 of Schedule 2, the measurement of the area of a cockloft or a stairhood would include the internal partitions and columns within it. However, under paragraph 4 of Part 2 of Schedule 2, in the case of yard, garden, flat roof and air-conditioning plant room, the inclusion of the area of internal partitions and columns is not mentioned. It is submitted that the measurement under paragraph 4 of Part 2 of Schedule 2 should also include the internal partitions and columns within the yard, garden, flat roof, air-conditioning plant room. A sub-paragraph (c) on similar terms as paragraph 2(b) should be added to paragraph 4 of Part 2 of Schedule 2.

30. Under Clause 8(5), the measurement of the floor area of balcony, utility platform or verandah if *enclosed by a wall that is not a solid wall,* is from the external boundary of the balcony, utility platform or verandah. What is meant by "*enclosed by a wall that is not a solid wall*" in that context should be clarified. Moreover, what constitutes the external boundary is not precisely stated. Should it (i) exclude tiles and plaster and any metal or other types of cladding attached to the external boundary of these items and (ii) include kerbs

where, for example, glass balustrade is erected? This should also be clarified to avoid any ambiguity.

31. Clause 8(1)(c) states that the items the area of which will be excluded from saleable area are specified in Part 1 of Schedule 2. Part 1 of Schedule 2 does not list out swimming pool (or lower part of swimming pool, if any) and filtration plant room.

- If a swimming pool is located in the flat roof or garden or terrace, will the area of the garden, terrace and flat roof be reduced by the area of the swimming pool?

- Moreover, how the area of the swimming pool is to be measured is not mentioned. For some forms of ASP approved by the Lands Department under Consent Scheme, the measurement of swimming pool is stated to be measured from the interior walls of the swimming pool. If this measurement is also applicable under the Bill, this should be stated clearly.

32. It not also clear under Clause 8 if the unit is a house or duplex which contain an internal lift, whether the area of the lift and lift shaft should continue to be included in saleable area. Since the measurement is from the exterior of the walls; the measurement under the present practice will include the areas of an internal lift and lifts. However, after the enactment of the new law, since any mis-statement of the saleable area will be a criminal offence, the Bill should clarify the position in relation to the lift & lift shaft so as to avoid any unintended violation of the law.

33. ***In view of the uncertainties that may arise in reality (some of them are mentioned above) and other special circumstances that may arise as the building design and technology may evolve from time to time, we propose that the Authority to be established under the new Ordinance be given the power and duty to issue guidelines and to answer questions timely that may be put to the Authority in relation to the aforesaid matters.***

Clause 10 – Application of the Ordinance

Exemption Provisions

34. Clause 10(3) only exempts a completed development where 95% of the number of the residential properties in the development as set out in the OP has been held under lease since the OP has been issued and each of those residential properties has been held under lease for at least 36 months. With respect, this is impracticable and unrealistic.

35. For a development with 100 units, at least 95 of the units must be held under lease for 36 months. If a developer has pre-sold 6 units to genuine home-owners before the issue of the OP and these home-owners have not leased out their units to any third party, the requirement of 95% of the residential units held under lease will never be reached.

36. It will be more appropriate to apply the 95% threshold to units still retained by the developer unsold at the time of when the OP is issued but then, the 95%

threshold is still too high a hurdle to pass. Depending on the then rental market in Hong Kong and whether the developer intends to hold the unsold residential properties as long term investment or for sale, if the number of remaining unsold units by the developer is few, say below 20, then the 95% requirement would actually mean the developer needs to lease out 100% all its residential properties to third parties. This will be too high a hurdle to pass in practice.

37. The high threshold of 95% will prompt a developer to lease out the unsold residential properties rather than put them up for sale to the general public. This will be contrary to the Government's policy to increase the supply of residential properties in Hong Kong. There may be other unintended side effects that the Government needs to carefully consider this 95% requirement.

38. Under Clause 10(5), the proposed legislation would not apply to a one building development for which a certificate of exemption has been issued under S. 5(a) of the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121). ***It is unclear why the legislation should only exempt first-hand single building developments in the New Territories but not elsewhere in Hong Kong. There does not seem to be any good justification why NT should be given any preferential treatment and the Administration should clarify the policy intention behind this.***

39. ***Generally speaking, the exemptions granted under the Clause 10 are too limited. There may be some exceptional situations which justify the exemption from the application of the new ordinance.*** The following are some possible scenarios for which exemptions should be granted under the Bill:

(a) A family which owns the entire residential building may want to distribute the residential units only to their family members by way of notional sale or otherwise. Yet under the Bill, such family arrangement will not be possible without going through all the cumbersome procedures prescribed under the Bill. This is not sensible.

(b) An entire residential building is held under a family trust created many years ago. Under the terms of the family trust, there may be some special stipulations as to the manner of disposal of the units in the residential building e.g. the trust may only allow disposal of the residential units to the family members and not to any outsiders who are not members of the family. The new law will create a situation where the trustees of the family trust will be impossible to perform their duties and functions according to the terms of the trust.

(c) A developer who owns some unsold units in the building may, as a matter of group properties restructuring, want to transfer the unsold units by way of intra-group transfer seeking exemption under section 45 of the Stamp Duty Ordinance with no intention of selling the unsold units to outsiders whatsoever. Again such restructuring will not be possible without going through all the cumbersome procedures prescribed under the Bill. Again this is not sensible and is against the normal commercial practice and reality;

(d) transfer of residential property between charitable organizations or other non-profit making organizations.

PART 2 – SALES PRACTICES IN RELATION TO SPECIFIED RESIDENTIAL PROPERTY

Division 2 – Sales Brochure

Clause 18 – Contents of sales brochure: information required to be set out

40. There are different types of mandatory information which should be set out in the sales brochure. However, certain mandatory information to be disclosed in the sales brochure could be relatively subjective, such as lease conditions that are onerous to a purchaser, etc.

The form of "Notes to Purchasers of First-hand Residential Properties" prescribed by the Estate Agent Authority and Consumer Council

41. Item 1 of paragraph 19 (on page 8) of the Consultation Paper states to the effect that the form of "Notes to Purchasers of First-hand Residential Properties" ("the Form") needs to be set out as the first item in the sales brochure. However, Clause 18(2) of the Bill has omitted this requirement. Please clarify.

42. Moreover, since the requirement to include the Form in sales brochure is (i) presently applicable to both Consent Scheme and *Non-Consent Scheme,* and (ii) will apply to *completed development* too, the existing Note 3 of the Form which concerns only sales of uncompleted development under Consent Scheme is insufficient to cater for situation

- (i) under *Non-Consent scheme*;
- (ii) sale of uncompleted development to which *neither Consent Scheme nor Non-Consent Scheme applies* but separate legal representation are sought, and
- (iii) *completed development* situation.

Since the Form is a Government's form, the Government should amend the Form to cater for the aforesaid diverse situations. For example, for a Non-Consent Scheme project, the adoption of note 3 of the Form is already presently inappropriate to the factual situation and is already in need of amendment. As any misstatement in the sales brochure will in future become a criminal offence, amendment of the Form is acutely needed.

43. Clause 18(5) provides that if the sales brochure is required by clause 18(2) or Part 2 of Schedule 1 to set out any information that is not applicable to the developments, the sale brochure must contain a separate paragraph for the information. Under Clause 18(2) and Part 2 of Schedule 1, the information required can be said to be related to the development. Could the Administration explain what is meant by information that is not applicable to the development?

Clause 20 – Contents of sales brochure: other requirements for information

44. Clause 20(2) provides that the information set out in the Sales Brochure must be accurate and Clause 20(5) provides that if Clause 20(2) is contravened, the Vendor is liable to imprisonment. ***The Bill as drafted will catch any minor and inadvertent mistake and can render the Vendor or its officers liable to imprisonment. The person should have the relevant mens rea before imprisonment should be imposed. The person should have knowledge of the inaccuracy before he should be imprisoned.***

45. An analogy can be drawn from the Trade Descriptions Ordinance (Cap 362) ("TDO") although the defence under S26 of TDO is similar to Clause 62 of the Bill, the charging provision under S2, 7 and 9 under TDO are different as "false trade description" requires description which is false and misleading to a material degree. TDO requires the person acting "with intent to defraud" namely the mens rea to defraud.

Clause 21 – Sales brochure must not set out other information

46. Clause 21(1) provides that the sales brochure "must not set out any information other than the information required or authorized by the Ordinance" and the detailed requirements for such information are set out in Schedule 1 Part 1.

47. However, each development has its own unique features and also special covenants in the Government Grant and DMC. The restriction in Clause 21(1) will not be suitable for developments with special features and special requirements under the Land Grant, or otherwise as may be required by the Lands Department, Buildings Department, Town Planning requirements or any other statutory or governmental requirements.

48. If the restriction is intended to exclude advertisement of other irrelevant information, then it should be stated out explicitly to such effect rather than imposing such absolute prohibition.

49. Clause 21 also provides no room for, and even prohibits the vendor from, giving more information which would assist prospective purchasers in making an informed decision. It is unfair to punish those vendors who have, apart from setting out the mandatory information, set out other information in the sales brochure with a view to make it more comprehensive. It is not unusual that there are instruments which are neither the land grant nor DMC that create rights and obligations affecting the owners of a development, eg. deed of grant of easement, deed of grant of right of way, footbridge construction and maintenance agreement, etc. Such instruments and other matters that affect the rights and obligations of an owner should be disclosed in the sales brochure.

50. It is proposed that ***there should be a mechanism to allow inclusion of additional relevant and material information of the development in the sales brochure.***

Division 3 – Price List

Clause 31 – Sale of specified residential property at price in relevant price list

51. Clause 31(2)(a) states that the vendor may only sell the property at the price of that property as set out in the relevant price list.

52. Depending on the prevailing economic condition, a vendor may launch different payment methods to suit purchasers' needs from time to time. It is also quite often that a purchaser, subsequent to the signing of ASP, requests a change of payment method and consequently a variation in the purchase price. For example, the purchaser may subsequently select another payment method and asks for payment of full purchase price before completion. Normally, the developer will give a discount on the purchase price for the early payment of purchase price and the parties will enter into a supplemental agreement to vary the payment terms including the amount of purchase price. Under Clause 31(2)(a) of the Bill, such variation is not permitted, notwithstanding the genuine agreement of the parties. Another possible scenario is that if there is a sharp downturn in the property market and a purchaser cannot obtain sufficient mortgage finance from banks, the purchaser will naturally ask the developer-vendor for a reduction of purchase price so as to avoid its default of the purchase. Under Clause 31(2), the vendor will not be able to entertain the purchaser's request. The remaining option for the vendor will be to rescind the contract and resell the property to third party and sue the defaulting purchaser until he bankrupts or otherwise. This may cause an even more severe selling pressure on the market and prompt the number of bankruptcies in Hong Kong to rise sharply as what happened in 2000-2003 or other periods of financial crisis.

53. ***Clause 31 should therefore be amended to avoid the aforesaid consequences.***

<u>Division 5 – Viewing of Property in Completed Development or Phase</u>

Clause 40 – Viewing before sale

54. "Completed development" is defined in Clause 4 as "a development in respect of which an OP has been issued". For a "completed development", the requirements of viewing of property under Division 5 of Part 2 will apply. Further, for a "completed development" governed by the Consent Scheme but the CA or CC has not yet been issued, the ASP shall contain certain mandatory provisions as under Clause 50(3). The proposed mandatory provisions in this regard are set out in Schedule 6.

55. However, in respect of a development governed by the Consent Scheme, the issuance of an OP does not mean that the development has been completed in all respects and is in a condition ready to be handed over to the purchaser. Normally, after the issue of an OP and before the issue of the CA or CC, construction and fitting out works will continue to be carried out on site for a period of 7 months. As it is not safe and is in fact dangerous for the property to be opened to potential purchasers for viewing during this period, such development should not be regarded as a "completed development" for the purpose of this property viewing obligation unless and until the relevant CA or

CC has been issued by the Director of Lands and the vendor is in a position to validly assign property in the development to the purchasers.

56. For a development not governed by the Consent Scheme, they should only be regarded as a "completed development" for the purpose of this property viewing obligation when the OP has been issued with all the fittings, finishes and appliances set out in the ASP completed and the vendor is in a position to validly assign property in the development to the purchasers.

57. According to the mandatory provisions in Schedule 6, before the issue of the CA or CC, the property will not be sold in an as-is condition but will be sold with the fittings, finishes and appliances as set out in the ASP which are to be completed. The requirement of viewing the property during this period really serves no meaningful purpose.

58. ***The Committee submits that the meaning of "completed development" and "completed phase" for the purpose of the property viewing obligation shall be amended as appropriate***

59. Clause 40(2) provides that the vendor is not required to make available a specified residential property for viewing if, among others, the vendor has provided a "comparable" residential property in substitution.

60. The word "comparable" has no legal meaning; and does not lend itself to certainty. Is a residential property with a ±15% difference in area a comparable? How about a property with a different elevation from the specified residential property?

61. It is important to prescribe a set of parameters within which a "comparable" may be identified. For example, in terms of area, the variation may not exceed a ±15% difference. Even with the proposed parameters, it is also necessary to provide plans for both the specified residential property and the comparable, along the line as provided under Clause 35(3), so that prospective purchasers may make a relevant genuine and meaningful comparison between the specified residential property and the comparable.

<u>Division 7 – Preliminary Agreement and Agreement</u>

Clause 49(2) – Execution of agreement for sale and purchase

62. It is not unusual that a purchaser may fail to execute the ASP within 3 working days after the date of the PASP due to unexpected reasons, such as leaving Hong Kong due to urgent matters, admission into hospital or the power of attorney made by the purchaser has not been properly executed... etc. Irrespective of the reasons behind, according to Clause 49(2), the PASP is terminated and the preliminary deposit is forfeited if the ASP is not executed within 3 working days by the purchaser. This will cause hardship and unfairness to such willing purchaser who has lost the preliminary deposit.

63. It should be noted here that for the protection of the purchasers, under Rule 5C of the Solicitors' Practice Rules, a solicitor is entitled to act for both parties in specified conveyancing transactions provided the ASP to be entered into by the parties contain certain mandatory clauses approved by the Chief Justice. In the case of separate representation, the Law Society Practice Direction A4 provides, inter alia, that the solicitor acting for a purchaser in respect of a flat in an uncompleted development must (1) make a detailed comparison between the proposed form of ASP drafted by the vendor and the clauses required for mandatory inclusion in such an agreement under Rule 5C of the Solicitors' Practice Rules in the case of joint representation; (2) give the purchaser written advice stating, if such be the case, that the proposed agreement does not contain all the mandatory clauses required by Rule 5C agreement for joint representation cases, giving details with full particulars of the omissions/variations (if any) and making clear the extent that the purchaser may be prejudiced by the omissions / variations in whole or in part of such mandatory clauses; and (3) allow the purchaser 48 hours after the delivery to him of such written advice before he can arrange for the purchaser to execute the ASP. It is submitted that the 3 days' rule mentioned in Clause 49(2) could not be complied with in practice by solicitors in separate representation situations given the requirements of the Law Society's Practice Direction A4.

64. ***It is suggested that, similar to an application for a waiver from the Lands Department under the Consent Scheme, there should be provisions in the Bill to deal with such special cases by allowing the purchaser to enter into the ASP within a specified time period as the Authority may prescribe.***

Clause 50 – Owners must not enter into preliminary agreement or agreement without certain provisions

65. Mandatory Terms of the ASP for Completed Development –We fail to see the need to incorporate the mandatory terms in the ASP for completed development where the CC or the CA has been issued if the purchaser has separate legal representation. ***The freedom of contract should be respected and it is suggested that the legislature should leave the vendor and the purchaser to negotiate the terms of the ASP for completed units if they have separate legal representation.***

66. Please clarify the position under Clause 50(4) regarding PASP which are drawn up principally in Chinese but with some words in English or vice versa: would this be treated as one in both languages?

Division 8 – Register of Transactions

Clause 52 – Contents of, and entries in, Register of Transactions

67. Clause 52(1)(g) requires the register of transactions to set out information on whether the purchaser is or is not a related party to the vendor. Clause 52(8) states where the vendor is a company, a related party is (i) a director of the vendor; (ii) a parent, spouse or child of a director of the vendor; or (iii) a manager of the vendor. The drafting is inadequate as it does not extend the

disclosure requirement to a director of the *holding company of the vendor* or the *joint venture developer* of the vendor or parent/holding company of the vendor and the *parent/holding company of the joint venture developer*.

68. Under the present drafting of Clause 52, for example, if the vendor (e.g. URA, MTRC, KCRC or other governmental special purpose corporate vehicles or a religious/charitable institution) forms a joint venture with a developer to develop the development, then even if the purchaser is a director of the joint venture developer/the parent company of the joint venture developer, there is still no need to make the disclosure. Also if the vendor develops on its own, then even if the purchaser is a director of the parent company of the vendor but not a director of the vendor, there is still no need to make the disclosure. This is contrary to the intention of the Bill.

69. ***The Committee suggests that Clause 52 should be re-drafted to catch the aforesaid situations.***

70. Clause 52(3)(b) only allows changes if there is any change in the particulars of the transaction mentioned in Clause 52(2)(e) i.e. disclosure of related party to the vendor but not allow changes in other particulars mentioned in Clause 52(2) for example, any change in price of the transaction and the terms of payment. It should be noted that a purchaser may opt for change of terms of payment and obtain a discount in price or cause an increase in price after the signing of the formal ASP. A supplemental agreement will then be executed between the purchaser and the vendor to reflect the change. Moreover, if the area of the residential property is increased or decreased as a result of change in the Building Plans, the price will also be adjusted pursuant to the terms of the formal ASP. Other changes in price may also be made due to some financial advantage or benefit made available in connection with the purchase (as stated under Clause 52(2)(d) of the Bill) and when the purchaser exercises such option or right to such financial advantage or benefit. Hence, Clause 52(3)(b) should also allow the updating of such changes and be revised in the Register of Transaction; otherwise the Register of Transaction may not be reflecting the updated and accurate position regarding the executed ASP; "misleading information" may then be conveyed to the public as a result of the lack of the updated information in the Register of Transactions. It should be noted that under Clause 53(3) the Register of Transactions is required to be kept until the first day on which the first assignment of each specified residential property in the development has been registered in the Land Registry. This is a very long period. During that long period, any members of the public may inspect the Register of Transactions and the data stated therein may as a result of the limitation of clause 52 (3)(b) not be reflecting the updated position.

71. Moreover, as mentioned in the preceding paragraph, ***supplemental agreements*** may be entered into between a purchaser and the vendor, the Administration consider whether to require or allow the creation of another Register under Division 8 of Part 2 of the Bill to allow for the disclosure of the information of the supplemental agreements to the public.

72. Under Clause 53(3) the Register of Transactions is required to be kept until the

first day on which the first assignment of each specified residential property in the development has been registered in the Land Registry (i.e. until all assignments of the residential units have been registered at the Land Registry). This is a very long period. **Whether the Register of Transactions should be kept that long is another question to be considered.** What if the developer keeps some residential property as investment and not sell some of them. Assignments of these investment units will not be made. Does it mean that the Register of Transactions will then need be kept forever?

Division 9 – Exemptions and Additional Requirements

Clause 58 – Additional requirement: unsold property in completed development

73. Some development projects may have been completed a long time ago and most of the residential units have been sold and only a small number of unsold units are retained by the developer. The development may be under the management of a manager who is not the DMC manager and a substantial second market of the residential unsold units in the development has been in existence for some time.

74. For such cases, there is no real difference between the sale of such unsold units held by the developer and the second hand sale of a sold unit by subsequent purchasers.

75. It is unreasonable to require the developer to prepare a sales brochure which may never have been in existence in order to comply with Division 2 of Part 2 for sale of such unsold units.

76. The information about the development in the possession of the developer may also not be update. For example, the club house facilities and the other common areas and facilities may have already been changed. It will be extremely burdensome and costly on the developer who will pass the cost onto prospective purchasers.

77. ***The Committee proposes that Clause 58(5) should be amended to the effect that if the number of unsold property in completed development mentioned in Clause 58 shall not exceed certain percentage (e.g. 5%) of the total residential units in the development and the development has been completed for a certain period (e.g. 5 years), the requirement under Division 2 of Part 2 shall be dispensed with.***

Rigidity in the legislation and absence of mechanism to approve deviations in justifiable circumstances

78. The Bill basically includes all the detailed requirements regarding sales brochure, pricelist, show flat, advertisements, form of PASP and formal ASP, etc. into the body of legislation. Such arrangement results in rigidity and the lack of flexibility. Any amendment would call for amendment of the legislation which entails lengthy and cumbersome procedures.

79. The Bill does not provide any mechanism to approve deviation from the mandatory provisions of the PASP and the formal ASP provided in the Schedules and it could result in very harsh consequences for purchasers. As mentioned above, under Clause 49(2), if a purchaser fails to execute the formal ASP within 3 working days after entering into the PASP, the PASP is terminated and the preliminary deposit is forfeited. There is no exception even if the purchaser has died or is hospitalised in the meantime. Similar requirement can be found, as one of the standard conditions, in the pre-sale consent granted by LACO under Consent Scheme. However, in practice, in special circumstances on giving reasonable explanations to LACO's satisfaction, LACO would give specific waiver of the relevant pre-sale consent condition and allow the purchaser to sign the formal ASP within a further period or allow refund of preliminary deposit paid out of the stakeholder account.

80. ***The Committee proposes that:***

- ***Some sales practices in Part 3 should not be included in the main body of the legislation but can be included in the guidelines to be issued by the Enforcement Authority to be published in the Gazette; and***

- ***The Ordinance should also include a mechanism to provide flexibility in approving deviations from the detailed requirements in justifiable circumstances by the Enforcement Authority.***

PART 3 – ADVERTISEMENT OF SPECIFIED RESIDENTIAL PROPERTY

Clause 60 – Advertisement must not contain false or misleading information

81. Clause 60 creates an offence for publishing an advertisement containing information that is false or misleading in a material particular. What is material is not well defined. ***The imprecision of this offence is worrying. More precise definitions must be provided.***

82. In view of the magnitude of the offence - a maximum fine of HK$ 5 million and imprisonment of 7 years, the charge should be limited to cases where the offending act would cause actual financial loss to a purchaser *of a sufficient large amount* and not of a trivial omission or acts which can be compensated or remedied by the vendor readily.

83. In the interest of justice, more deliberations on how this offence should be defined in a more precise way are needed.

Clause 63 – Additional requirements for printed advertisement

84. Clause 63(3)(a) provides that an advertisement must contain the information of the vendor and if the vendor is a company, every holding company of the vendor. As mentioned earlier in this paper, the Bill fails to make the holding company of the vendor (i.e. the developer) liable. In that case, what is the use

of setting out the information of the holding company? This information is beneficial to the vendor only and may be misleading to the purchasers.

PART 4 – MISREPRESENTATION, AND DISSEMINATION OF FALSE OR MISLEADING INFORMTION ETC.

Clauses 65 and 66 – Deletion of reference to omission of a material fact in relation to the offence of misrepresentation under Clause 65 and offence of dissemination of false or misleading information under Clause 66

85. Clause 65(1) creates an offence of a person making a fraudulent misrepresentation or reckless misrepresentation for the purpose of inducing another person to purchase a specified residential property. The scope of fraudulent misrepresentation and reckless representation as defined under Clauses 65(4) and (5) respectively are very wide. The creation of such offence is worrying. ***A more precise definition of what constitutes an offending fraudulent or reckless misrepresentation is needed.***

86. Omission of a material fact will also render a statement a fraudulent or reckless misrepresentation. ***The meaning of "omission of a material fact" is too vague and creates uncertainty:***

- a fact, e.g. a cemetery which is within the view of the property (even on the other-side of the harbour), may be material to some prospective purchasers but not others
- in the case of sale of an uncompleted development, if the vendor provides the sales brochure in compliance with the new law, it is difficult to see what else the vendor would need to further disclose. In the interest of certainty (as a breach of Clause 65(1) will be an offence) "omission of a material fact" should be qualified such that the vendor cannot be said to have omitted a material fact if he provides a compliant sales brochure in accordance with the new law.
- similarly, in case of completed development, if the vendor produces a compliant vendor's information in accordance with Clauses 56 or 58, then the vendor cannot be said to have omitted a material fact.

87. It is different from other Ordinances like the Securities & Futures Ordinance ("SFO") as the Bill has already set out in great specific detail what is required to be disclosed in the Sales Brochure whereas the SFO does not list out the details of what is required to be disclosed to prospective purchasers.

88. ***The Committee proposes that:***

- ***Clauses 65(4)(c), 65(5)(c) and 66(1)(b)(ii) should be deleted.***
- ***If those Clauses are not deleted, at least what constitute the scope of omission of a material fact should be defined clearly.***

PART 5 – DEFENCE PROVISIONS, AND OTHER SUPPLEMENTARY PROVISIONS ON OFFENCES

Division 1 – Defence of Reasonable Precautions and Due Diligence

Clause 67 - Defence

89. Clause 67 provides that it is a defence to prove that the person took all reasonable precaution and exercised all due diligence to avoid the commission of the offence by that person if the person is charged with an offence under Part 2 or 3 (i.e. on the sales practices and advertisement) (other than Clause 60). It is too vague and lacks certainty.

90. ***The Committee proposes that:***

- ***The word "all" in line 2 and line 3 of Clause 67 shall be deleted.***
- ***It shall be a defence if a person can prove that the person took reasonable practicable steps or measures so far as is necessary to ensure that proper safeguards exist to avoid the commission of the offence by that person.***
- ***Alternatively, it shall be a defence if a person did not know and could not with reasonable diligence have known that the offence has been committed.***

Defence Provisions for professionals

91. Clause 66(1) may be too wide. A person commits an offence if the person disseminates, or *authorizes or is concerned* in the dissemination of, information. Solicitors acting for the Developer in preparing sales brochure or other sales materials or in interpreting the relevant documentation to the parties in a conveyancing transaction may commit an offence.

92. It is foreseeable that if a person is charged with such an offence, that person may try to make an excuse that he has relied on professional advice such as an authorized person (i.e. Architect) or its legal advisor in relation to the preparation of the relevant documents or making of statements. In this regard, the relevant professional may be dragged into the criminal charge and there is a possibility that the relevant professional may become criminally liable under the Bill for its mere negligence or mistake in advice or preparation of documents to the developer/ vendor (because of section 89 of the CPO or its equivalent common law rules). This in effect will impose a potential criminal liability for negligence or mistake on the professionals, such as architect or solicitors.

93. There are too many grey areas under the Bill (e.g. the definition of saleable area) on which developers or surveyors may seek to obtain legal advice but the way the legislation was drafted would inhibit conveyacing solicitors from giving proper legal advice to the parties for fear of being "*reckless*".

94. It should not be the original intent of the Bill to make the relevant professionals criminally liable for their negligence or mistake in this way. The consequences should be a civil one (at common law), and not a criminal one. ***The defences available under the Bill should be further expanded and it should be made clear to exempt the relevant professionals from any possible criminal charge for their mere negligence or any mistakes made. It is morally wrong to make the professionals criminally liable for the acts committed by the vendor. If the commission of an offence is due to a mistake made by a third party, or accident or some other cause beyond his control, then this should also be a defence. Similar defence of mistake, accident etc provided under section 26 of TDO should also be included in the Bill.***

Division 3 – Other Supplementary Provisions on Offences

Clause 72 – Liability of company officers etc. for offence committed by company

95. "Recklessness" should be deleted from Clause 72(1)(b)(ii) as consent or connivance should be sufficient. There are too many obligations to comply with (some in minute details) and recklessness is too low a mental state requirement. An analogy can be drawn from S101E of CPO.

Clause 73 – Time Limit for prosecution

96. Clause 73 provides that proceedings other than an indictable offence may be brought within 3 years after the commission of the offence.

97. Most of the offences under the Bill are akin to offences stated under the TDO. It is provided under section 19 of the TDO that the time limit for prosecution of an offence under the TDO is 3 years from the date of commission of the offence or the expiration of 1 year from the date of discovery of the offence by the prosecutor, whichever is the earlier.

98. ***Given that the nature of the offences stipulated under the Bill are all easily ascertainable by the prosecutor, it is submitted that a shorter period for prosecutions should be similarly imposed in the Bill so as to remove any uncertainty of the criminal liability of the relevant persons, which should not be dragged on indefinitely. As time passes, the memories of the relevant persons or witnesses would fade and the evidence of the commission of the offences or possible defences to any criminal charges may disappear or be difficult to trace; hence in the interest of justice, a shorter period of prosecution is needed. Clause 73 should be drafted in more or less similar terms as section 19 of the TDO.***

SCHEDULE 1 – INFORMATION IN SALES BROCHURE

Part 1 – Detailed Requirements for Specific Information Required to be Set Out (See Clause 18(2))

Item 1 – Information on the development

99. Item 1(2)(b) states that the sales brochure must state the street number allocated by the Commissioner of the Rating and Valuation ("CRV"). What if the street number is not yet allocated by the CRV or the street number at the date of printing of the sales brochure is just a provisional one allocated by the CRV and subject to change? Please clarify.

Item 15 – Summary of land grant

100. Item 15(2)(f) states that the sales brochure must contain a summary of land grant concerning the lease conditions that are onerous to a purchaser. What lease conditions are *onerous* is sometime unclear and is a matter of subjective judgement. A more precise definition of what is onerous in that context should be stated clearly under the Bill.

Item 16 – Information on public facilities and public open space

101. Item 16(6) requires the sales brochure to set out the provisions of the land grant, the DMC and the deed of dedication that concern those facilities in open space and the part of the land. This means the reproduction of the entire title documents in the sales brochure. This is not sensible as they could be very lengthy and may not be comprehensible to the laymen-purchasers. Rather, a summary of the terms thereof should only be required.

102. Moreover, item 16(6) does not include any Deed of Grant of Easement or right of way or other rights of different nature granted under previous title document(s) or to be granted under other title document(s) that is/are to be entered into. Apart from the Land Grant, DMC and deed of dedication, there may be other important title documents of various nature that may affect the rights of the purchasers. These important documents should also be included in the list for disclosure under the sales brochure.

Part 2 – Additional Information Required to be Set Out

Item 22 – Service agreements

103. Item 22 states that the sales brochure must set out information on any agreement with a utility company for providing utility service for the residential property. The extent of information to be set out is not stated precisely under the said item 22. More exact scope of information required should be specified.

Item 26 – Maintenance of slopes

104. Item 26 mentions slope maintenance information. What about the requirement as to the maintenance of any footbridge, any turnabout, any public road, etc.? Are they also be required to be set out? Please clarify.

SCHEDULES 4 5, 6 & 7 – Proposed Mandatory Provisions for Preliminary Agreement and Agreement for Sale and Purchase

105. There is the general concern that the mandatory provisions of the PASP and the formal ASP provided in the Schedules may not be applicable to all circumstances but that the Bill has not provided any mechanism to approve deviation from the mandatory provisions and it could result in very harsh consequences for purchasers. The Bill should provide that the statutory mandatory clauses could be modified as circumstances may require or include a mechanism to provide flexibility in approving deviations from the statutory mandatory provisions contained in the Schedules in justifiable circumstances by the Enforcement Authority.

106. It should also be noted that for the protection of the purchasers, the Government has prescribed ASP forms under the Consent Scheme to follow. For cases not covered by the Consent Scheme, solicitors can only act for both parties in specified property transactions under Rule 5C of the Solicitors' Practice Rules, provided they adopt specified mandatory clauses as approved by the Chief Justice under the rule. As some of the mandatory provisions provided in the Schedules of the Bill are in conflict or at variance with the Consent Scheme ASP forms and the mandatory provisions under Rule 5C of the Solicitors' Practice Rules, a sufficiently long grace period should be allowed to enable necessary amendments to be made to the Consent Scheme prescribed forms or for obtaining Chief Justice's endorsement of the proposed revisions to the Rule 5C mandatory provisions before the statutory mandatory clauses under the Schedules of the Bill should come into operation.

Schedule 4 – paragraph 3; Schedule 7 – paragraph 3 - Purchase Price

107. Please clarify the need for the purchase price to be stakeheld in the case of completed developments and if this is necessary, the terms of the stakeholding arrangement should be clearly defined.

Schedule 4 – paragraph 7

108. Please refer to the concern on Clause 49(2) above.

Schedule 4 – paragraph 9; Schedule 7 – paragraph 6

109. These mandatory provisions are not appropriate for completed developments as the purchaser would have been given the opportunity to inspect the property and agreed to purchase the property on an as is basis.

Schedule 4 – paragraph 10, Schedule 5 – paragraph 16, Schedule 6 – paragraph 14, Schedule 7 – paragraph 5,

110. These paragraphs state that the vendor shall not restrict the purchaser's right to raise requisition or objection in respect of title. Such mandatory restriction is inappropriate.

111. In the majority of cases, a vendor is under a duty to, and can as a matter of law, prove and give good title and these situations should not present a problem. However, there may be some exceptional cases, e.g. where there is

missing land grant, missing power of attorney, defective company's execution, missing title documents, possible adverse possession claim by a trespasser, or the developer-vendor is in fact selling an interest in a property under construction which is for less than the whole of the residue of the term of years under which the property is held under the relevant Land Grant (see also Law Society's Practice Direction A2 requiring separate representation under such situation, an example is *Robertson Place*, which was sold for a lease term of 99 years out of a 999-year term of the Land Grant). In these special situations, the vendor and purchaser will be separately legal represented and the PASP and formal ASP will be specially drafted to include special provisions dealing with such title issues.

112. The practice mentioned in the above paragraph is a well accepted practice in Hong Kong and should not be altered by the Bill; otherwise it will make these developments with special title issues virtually not saleable even with full disclosure to the purchasers and with separate legal representation.

113. There is also the concern that the mandatory provision may be interpreted as an expression of contrary intention to the 15-year statutory title proving period under Section 13 of the Conveyancing and Property Ordinance and the 15-year statutory title giving period under Section 13A of the Conveyancing and Property Ordinance. For the avoidance of doubt and to avoid any future litigation, the relevant proposed statutory provisions should in any event expressed not to be affecting the statutory presumptions under Sections 13 and 13A (which are rebuttable by contrary intention expressed in the instrument) of the Conveyancing and Property Ordinance.

Schedule 5 – paragraph 1,

114. The Committee has the following comments on the definitions:

Paragraph 1(e) – "*Certificate of Compliance*" should be an optional definition as it is not applicable to Non-Consent Scheme cases;

Paragraph 1(f) – the words "*in so far as they relate to Phase [ ] of the Development*" should be added after the words "*Government Grant*" in paragraph 1(f)(i) and (iii) to cater for the case of phased development;

Paragraph 1(h) – why only the definition of "*Exclusion Order*" was provided but not the "*Redevelopment Order*" under the Lands (Compulsory Sale Order for Redevelopment) Ordinance, Cap 545?

Paragraph 1(i) – the definition of "*expiry date of the Building Covenant Period*" has not dealt with cases under the Lands (Compulsory Sale Order for Redevelopment) Ordinance, Cap 545; the Land Tribunal Order has a 6 years' building covenant period;

Paragraph 1(m) – is there a need to add paragraph 1(m)(i) in the definition of "*Occupation Document*" when the legislation would not apply to a New Territories Exempted House Development;

Paragraph 1(o) – the use of the description "*Blocks*" in the definition of "*Phase*" is too restrictive when other descriptions such as "*Tower*" or "*Houses*" or other terms may be used in practice;

Paragraph 1(r) – the definition of "*Vendor's Solicitors*" does not cater for the situation with several solicitors' firms acting for the developer in a project development. For example, the "*Vendor's Solicitors*" mentioned in the beginning part of paragraph 24 for holding any part of the purchase price paid by the purchaser pending completion will mean the "*Vendor's Solicitors in the particular transaction*" whereas the "*Vendor's Solicitors*" referred to in Paragraph 24(c) to hold as stakeholders a sufficient sum to cover the entire outstanding balance of the Construction Costs and the Professional Fees, etc. would mean "*all the Vendor's Solicitors*" acting in the project development and not just the one in the particular transaction in question.

Schedule 5 – paragraphs 2 & 18; Schedule 6 – paragraphs 2 & 16; Schedule 7 – paragraphs 2 & 7

115. Please refer to the comments on Clause 8 of the Bill above.

Schedule 5 – paragraphs 4 & 5

116. These paragraphs should also cater for the case of compulsory sale under the Lands (Compulsory Sale Order for Redevelopment) Ordinance, Cap 545. It should be noted here that Schedule 3 of the Cap. 545 legislation use different wordings, i.e "completed and made fit for occupation" as opposed to the wordings "in accordance with the building plans" as mentioned in the Redevelopment Order in paragraph 5(b) of Schedule 5. Indeed, consideration should be given to making appropriate provisions in the proposed legislation to cater for Cap. 545.

Schedule 5 – paragraphs 14 & 17(a)

117. There are problems with these proposed mandatory provisions when issuance of the Occupation Document does not necessarily mean that the Vendor is in a position validly to assign the property.

118. The Committee believes that the reference to CC was with respect to Consent Scheme cases whereas the reference to "*Occupation Document*" was with respect to Non-Consent Scheme cases. In reality, the property would be ready upon the issuance of the Occupation Document but without any fittings and finishes; it would take 6-7 months after issuance of the Occupation Document to install these in the property in the Non-Consent Scheme cases. For Non-Consent Scheme cases, 7 months instead of 1 month should be allowed for giving notice of completion under paragraph 14 and for the purpose of paragraph 17(a) (incorporation of fittings, finishes and appliances).

Schedule 5 – paragraphs 23

119. It is noted with concern that the mandatory clause has omitted the existing mechanism contained in the Consent and Non-Consent Scheme forms to enable disputes on the extent of variation in the Measurements and the extent of adjustment of the purchase price to be referred to an Authorized Person. Please clarify whether inclusion of such mechanism in the Agreement would be considered as altering the nature of the statutory mandatory clauses and in breach of the Ordinance.

Schedules 5 – paragraphs 18, 31 & 32; Schedule 6 – paragraphs 16, 28 & 29; Schedule 7 – paragraphs 7, 18 & 19

120. It is more appropriate for detailed information on the Measurements, fittings and furnishes and communal and recreational facilities should be provided in Schedules rather than the main body of the Agreement

SCHEDULE 8– VENDOR'S INFORMATION FORM

121. Paragraphs 1(1)(h) and (i) may not be wide enough to cover building orders, illegal structures or alterations.

TRANSITIONAL PROVISIONS

122. The Bill does not include any transitional period provisions. It takes substantial time for the vendor and the developer to prepare sales brochure and other documents and to set up show flats and make arrangements to comply with the requirements under the new law and such requirements cannot be confirmed as the law in its final format cannot be ascertained unless and until the Bill (with all the guidelines set out) is passed.

123. It is suggested that suitable transitional measures should be adopted. This is required so that, for example:

- The form of ASP (i) already approved by the Lands Department under the existing Consent Scheme or (ii) already annexed to a statutory declaration declared by a partner of a law firm and registered at the Land Registry for the purpose of pre-sale under the Non-consent Scheme should not be affected by the Bill after the passing of the Bill.

- Show flats already built by a vendor and already opened for viewing by prospective purchasers or by the general public used for sale adopting the previous measures stipulated under the Consent Scheme or REDA's guidelines should not be affected so that there is no further need to make further alterations so as to suit the new requirements of the Bill.

- Similarly, sales brochure already printed prior to the date of the Bill's coming into effect should not need be amended to fit the new requirements under the new law as sales have already implemented; this transitional measure is also needed to avoid any confusion to the public.

- Other matters covered under the Bill should also have similar transitional provisions. This requires a more careful consideration of the other provisions of the Bill.

The Law Society of Hong Kong
The Property Committee
23 April 2012