



**CONSULTATION PAPER ON THE DRAFT GUIDELINE
ON EXERCISING POWER TO IMPOSE PECUNIARY PENALTY
IN RESPECT OF REGULATED PERSONS
UNDER THE INSURANCE ORDINANCE (CAP. 41)**

SUBMISSION

1. The Law Society has reviewed the Consultation Paper on the Draft Guideline on Exercising Power to Impose Pecuniary Penalty in respect of Regulated Persons under the Insurance Ordinance (Cap.41) ("Draft Guideline") and has the following comments on the Draft Guideline.
2. The current drafting of **Paragraph 1.4** of the Draft Guideline is as follows:

"This Guideline does not have the force of law and should not be interpreted in a way that would override the provision of any law. The [Insurance Authority] may from time to time amend the whole or any part of this Guideline."

- (a) Pursuant to section 83(1) of the Insurance Ordinance (Cap.41) ("the Ordinance") (not yet in operation at the time of this submission), the Insurance Authority ("IA") must not exercise its power under section 81 of the same Ordinance (also not yet in operation) to impose a pecuniary penalty unless it has published, in the Gazette and in any other manner it considers appropriate, guidelines to indicate the way in which it proposes to exercise that power, and in exercising that power, it has had regard to the guidelines so published.

Section 81 of Cap 41 (ibid) sets out the disciplinary action in respect of regulated persons.

It is arguable that notwithstanding the text of proposed paragraph 1.4 of the Draft Guideline above, by reference to the above-quoted section, the Guideline does (or may) have legal effect. To remove any doubt, we suggest that in the Guideline, which is formulated under section 83 of the Ordinance, the wording in section 83(2) be followed, i.e. *“The Guideline is not subsidiary legislation.”*

- (b) We also suggest that the last sentence of paragraph 1.4 of the Draft Guideline be amended to *“The IA may from time to time publish any amendment to the whole or any part of the Guideline.”* which will be in line with the wording in section 83(1)(b).

Our suggestion for the amended paragraph 1.4 of the Draft Guideline is therefore:

“This Guideline is not subsidiary legislation and should not be interpreted in a way that would override the provision of any law. The IA may from time to time publish any amendment to the whole or any part of the Guideline.”

3. Pursuant to **Paragraph 3.5(d)(i)** of the Draft Guideline, the *“financial resources of the regulated person”* is one of the *“other relevant factors”* for consideration on whether to impose a pecuniary penalty and the amount of the penalty. We consider the above to be sensible but generally speaking, such information will need to be voluntarily provided by the person concerned. We therefore suggest to re-write paragraph 3.5(d)(i) of the Draft Guideline as follows:

“(d) Other relevant factors:

(i) the financial resources of the regulated person by taking into account the written or oral representations made by the person concerned - a pecuniary penalty should not have the likely effect of putting the regulated person concerned in financial jeopardy;”

**The Law Society of Hong Kong
8 January 2019**