

JOINT WORKING GROUP

**The Hong Kong Confederation of Insurance Brokers
Professional Insurance Brokers Association
Insurance Industry Regulatory and Development Concern Group**

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March 20, 2015

Mr. Eddie Cheung
Deputy Secretary of Financial Services and the Treasury (Financial Services)
Financial Services and the Treasury Bureau
24/F Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

(by email: eddiecheung@fstb.gov.hk)

Dear Mr Cheung,

Disciplinary Process

On behalf of the interests of the insurance intermediaries we are presenting the attached Paper to highlight the gap between the Key Legislative Proposals explained to the community in Government's 2012 paper and the less definitive language applied in the Insurance Companies Amendment Bill 2014. We believe that this gap between the Government's originally stated intentions and the Bill as presented leaves a serious lack of statutory protection to the rights of intermediaries to the processes of natural justice, the right to fair oral hearings and to cross-examination of all evidence in the case. We believe that Government and the LegCo should rectify this omission by reinstating the statutory protection into the Bill and not to leave this issue of basic rights undefined and subject to the unfettered direction of the IIA when it is subsequently established.

These views have the full support of the three organizations listed on the letterhead, who have formed the Joint Working Group to represent the interests of insurance

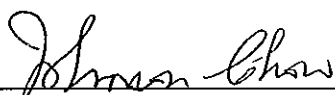
intermediaries on this subject. They also have the support and concurrence of the HKFI who have put forward separate representations on the same subject. We are all members of the FSTB's Working Group on the transition to IIA, supporting the Government in establishing the IIA and pursuing the policy objective of making Hong Kong one of the strongest financial centres in the world. We will be remiss in our duties if do not point out the blind spot and make suggestions of redress before it is too late.

We are available to meet and discuss these issues at your convenience.

Yours sincerely,



Bhabani S. Rath
Chairman
The Hong Kong Confederation of Insurance Brokers



Johnson Chow
Chairman
Professional Insurance Brokers Association



Y K Chan
Convener
Insurance Industry Regulatory and Development Concern Group

Enclosure

c.c. Members of Bills Committee on Insurance Companies (Amendment) Bill 2014

- Hon Wong Ting-kwong, SBS, JP - Chairman
- Hon Chan Kin-por, BBS, JP - Deputy Chairman
- Hon James To Kun-sun

- Hon Andrew Leung Kwan-yuen, GBS, JP
- Hon Cyd Ho Sau-lan, JP
- Hon Starry Lee Wai-king, JP
- Hon Wong Kwok-kin, SBS
- Hon Paul Tse Wai-chun, JP
- Hon Alan Leong Kah-kit, SC
- Hon Wong Yuk-man
- Hon Ng Leung-sing, SBS, JP
- Hon Steven Ho Chun-yin
- Hon Yiu Si-wing
- Hon Kwok Wai-keung
- Hon Dennis Kwok
- Hon Christopher Cheung Wah-fung, SBS, JP
- Dr Hon Fernando Cheung Chiu-hung
- Hon Sin Chung-kai, SBS, JP

Ms Annie Choi, The Commissioner of insurance

Hon Bernard Chan, Member of Executive Council

Mr Jimmy Poon, Chairman of The Hong Kong Federation of Insurers

Mr Ambrose Cheung, Chairman of Insurance Agents Registration Board

Paper in Relation to the Insurance Companies (Amendment) Bill 2014
REALIGNMENT OF THE DISCIPLINARY PROCESS

Proposed Clarifications to the Disciplinary Provisions in the Bill in line with the
Statement of Intent in the "Key Legislative Proposals" Consultation Paper

We wish to draw your attention to matters of urgent concern regarding the disciplinary provisions in the Insurance Companies (Amendment) Bill 2014 where we find that the document appears to vary from Government's originally published intentions.

We refer to paragraph 16 of the Executive Summary of the Consultation Paper entitled "**Key Legislative Proposals on Establishment of an Independent Insurance Authority**" issued on 26 October 2012 as follows:

"To ensure fairness, transparency and due process, we propose to stipulate in the ICO the procedures for exercising disciplinary powers by the IIA. Proposed statutory safeguards include the fair hearing requirement, obligation of IIA to state the reasons for imposing disciplinary sanctions and to disclose the facts and rationale behind disciplinary decisions to the public where appropriate, and right of appeal against IIA's specified regulatory decisions to the Insurance Appeals Tribunal ("IAT") chaired by a person eligible for appointment as a High Court Judge. The IIA will also establish a Disciplinary Committee to assist it in determining disciplinary sanctions."

On reviewing the Bill and in particular the provisions contained in section 81, we cannot find that the promised "statutory safeguards" have been included.

While recognizing that Government in alignment with the IAIS and LegCo Members' preferences wishes to apply an executive based disciplinary system within the IIA, excluding involvement of the Insurance Industry, we have serious concerns to preserve the rights of natural justice in the process as indicated in the "Key Legislative Proposals" paper.

In particular:

- A. The right of the defendant to have access to all of the information and evidence supporting the charges against him.**
- B. The right of the defendant to demand and be given an oral hearing to hear and test the evidence and the right to have his solicitor present at such oral hearing where cross examination is to be permitted.**
- C. That an appropriate burden of proof should be required.**

We believe these rights should be statutorily enshrined in the Bill to ensure that the process must follow the principles of natural justice. This is particularly important where, as in this case, the IIA is acting both as prosecutor, judge and jury and therefore not in accordance with one of the normal principles of natural justice. This is brought into sharp focus by its ability to impose a pecuniary penalty in an unlimited amount.

It has been strongly indicated in meetings and communications between the FSTB and the industry that it is Government's intention that the disciplinary processes of the IIA with relation to insurance intermediaries should follow the pattern established by the SFC. This has subsequently applied to the MPFA and the Competition Commission and now to be applied to the FRC and the IIA which we believe is not appropriate. We are aware that the SFC's Disciplinary Proceedings provide or apply the following:

- a) That a defendant may request a meeting with the SFC and must explain why he thinks such a meeting is necessary. The SFC is under no obligation to permit such a meeting and in any event a "meeting with the regulator" falls well short of the accepted understanding of the meaning of a "fair oral disciplinary hearing".
- b) That the SFC is not obliged to disclose to defendants all of the information and evidence on which the charge is based and the decision made; in view of such limitation even if the SFC agrees to a meeting with the defendant it would be difficult for the defendant to mount a complete defence.

If the provisions of section 81(1) of the Bill are applied in similar fashion as the SFC procedures and practices above, then the proposed safeguards are not adequately met and a clear statutory statement of specific safeguards should be included in the Bill.

In summary, we see the situation which has currently developed as being less transparent than originally intimated by Government and that the following concerns need to be addressed:

- i) That the "**statutory safeguards**" well enumerated in the "**Key Legislative Proposals**" paper now absent from the Bill and should be **reinstated**.
- ii) That while the SFC disciplinary matters relate largely to open and shut regulatory compliance issues and fraud, where insurance intermediaries and in particular brokers due to their particular legal relationship with their clients are concerned, the issues tend to be more complex and relate to allegations of professional misconduct rather than strict regulatory compliance. Thus, to provide a **fair hearing** the defendant must be **able to explain** his side of the case and with the true circumstances elicited by **cross examination** by the parties.

- iii) That particularly in relation to its ability to impose a financial penalty under Section 80(4)(e) where the IIA is exercising a quasi criminal jurisdiction, a criminal burden of proof should be required i.e. proof “**beyond reasonable doubt**” rather than “**on balance of probabilities**”.
- iv) That an added cause for concern at the perceived inadequacy of the proposed disciplinary proceedings of IIA and the lack of safeguards in the Bill is that the first real opportunity to challenge decisions of the executive-led in-house disciplinary process and its appeals mechanism is only by a judicial process. Many insurance intermediaries are individuals who could not afford the cost of a legal challenge with the added risk of incurring IIA costs in addition in the event of failure of the appeal means that many of these smaller practitioners will be denied any proper redress or the opportunity to clear their name and penalties imposed. Hence we see it as necessary to ensure a **fair and transparent disciplinary process at first instance**.
- v) That in order to make the **appeals mechanism** financially available to all defendants, we would propose that **costs be capped** at a realistically affordable level to be discussed and agreed with the stakeholders.
- vi) That there should be a **Professional Conduct Advisory Committee** formed within the IIA framework consisting of members who are seasoned insurance practitioners to ensure that the **necessary advice** on customary professional conduct and practice is provided **to the Disciplinary Committee**.
- vii) That the whole process should follow the principles of **natural justice**.

We are disappointed that the statutory safeguards promised by Government’s earlier paper setting out “Key Legislative Proposals” have not been carried into the Bill and we believe it would be a travesty of justice if the Bill is allowed to proceed with these reasonable safeguards absent.

We trust that the FSTB and/or the Bills Committee will give due and fair considerations to these concerns.

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20 March 2015