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HONG KONG BAR ASSOCIATION

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5th January 2004

Clerk to the Bills Committee
 Legislative Council Building
 8 Jackson Road, Central
 Hong Kong


Attn: Mrs. Mary Tang

Dear Mrs. Tang,

Re: Landlord and Tenant (Consolidation) Ordinance (Cap. 7) Security of Tenure

I enclose herewith the Bar's comments on the Landlord and Tenant (Consolidation) Ordinance - Security of Tenure which were submitted to the Housing Department on 24th February 2003 for your information.

Yours sincerely,


 Margaret Lam
 Administrator

Encl.
 /al

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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24th February 2003

Mr. Michael Suen
 Secretary for Housing, Planning & Lands
 Housing Department
 33 Fat Kwong Street
 Homantin, Kowloon
 Hong Kong

Dear Mr. Suen,

Landlord and Tenant (Consolidation) Ordinance (Cap. 7) Security of Tenure

I refer to your letter dated 20th January 2003. I am pleased to enclose herewith the Bar's position paper on the Landlord and Tenant (Consolidation) Ordinance (Cap. 7) for your consideration.

Yours sincerely,

Edward Chan, S.C.
 Chairman

Encl.
 /al

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**HONG KONG BAR ASSOCIATION'S RESPONSE TO THE
CONSULTATION PAPER
LANDLORD AND TENANT (CONSOLIDATION) ORDINANCE
SECURITY OF TENURE**

Merits of Abolition of Security

1. The consultation paper begins by explaining that on 13 November 2002 the Secretary of Housing announced a thorough review of the Landlord and Tenant (Consolidation) Ordinance (the LTO) with a view to enabling the private rental market to operate as freely as possible. The implication of this statement was that it might not be possible for all security of tenure restrictions to be removed and that, before any such removal, a detailed consideration of the desirability and feasibility of doing so would be undertaken.
2. However, the consultation paper is neither a thorough review of the LTO nor a balanced analysis of the arguments for and against security of tenure.
3. The paper proceeds upon the assumption that a policy decision has been made to remove protection from tenants. Views are not even sought on the correctness of this assumption or policy. Instead, the paper puts forward for comment a choice of approaches to remove security of tenure.
4. There is no attempt to consider the effect of that removal. No data are cited from which the effect of the removal of the statutory controls may be assessed. For instance, how many domestic tenancies are currently governed by Part IV of the LTO? How many applications for renewal of tenancies to the Lands Tribunal were lodged in the past year and in the year before that? These figures would be obtainable from the Rating and Valuation Department and the Lands Tribunal Registry respectively.
5. The paper's account of the conditions in which Part IV was introduced in 1981 is not entirely accurate. It is asserted in para 3 of the paper that Part IV was introduced against a background of serious shortfalls in domestic accommodation leading to significant rental increases on renewal of tenancies. Rentals certainly were escalating quickly in the early 1980s but this was because of very high general inflation, not a housing shortage. In fact, ~~Part IV contains no controls on rent, unlike Parts I and II, so it was a liberalising measure.~~

6. Part IV was the result of an extensive review of the LTO and its effects carried out by a distinguished committee, including experts and members independent of government, under the chairmanship of Mr Donald Liao the then Secretary of Housing. Their report, published in 1981, contains a careful consideration and weighing of issues, supported by research, which is notably absent from this short consultation paper.
7. The purpose of Part IV, as envisaged by that committee, is to protect tenants in their homes but not to shield them from rent increases. As a result of the practice of landlords not granting terms longer than 2 years, tenants were regularly subject to the threat of eviction. That practice, and therefore that threat, remains. The consultation paper does not address this.
8. The paper states that the protection of tenants "has impeded the free operation of the private market and discouraged investors from renting out their properties". This is mere assertion. No evidence or reasoning is given in support of it. The assertion seems dubious given that there is no restriction upon the amount of rent which an investor-landlord can negotiate and that if he wishes to sell, he can do so subject to tenancy. The landlord who is most affected by the current controls is one who wishes to occupy his own property but his interests are catered for by self-use being a ground upon which he can oppose the grant of a new tenancy to his tenant.
9. Most domestic tenancies, although governed by Part IV, are in fact renewed by agreement at a negotiated, market rent. It is true that if the parties cannot agree on the rent, the Lands Tribunal sets it for them but this too is a market rent. The number of new tenancies granted, or rents fixed, by the tribunal in recent years will almost certainly have declined (because of the depressed rental market) so even this slight degree of intervention has probably been reduced.
10. The paper says (para 4) that protection has become excessively restrictive in the light of three developments: the sufficient supply of flats, falling rentals and adequate and affordable public housing. These are not really separate matters. Rents are falling partly because of the sufficient (or excessive) supply of flats and public housing waiting times are falling largely because private flats are available at low rentals. But these developments are irrelevant to the question of the continuation of security of tenure because security does not impede rentals or capital values. What it does is reduce social disruption.
11. ~~Presumably the point which the authors of the paper have in mind but do not expressly state~~ is that if a tenant is dispossessed, he may readily find

alternative accommodation at an affordable rent. But this misses the point that the purpose of security of tenure is to relieve tenants of the dislocation and inconvenience of having to move every two years or so. It is true that the bargaining power of tenants has risen, as stated on page 2 of the paper, but it does not follow that there is no longer any justification for protection or, as the paper presumptuously puts it "excessive protection". It is not necessarily excessive to wish to give well-behaved tenants longer in their homes if they wish to have it and if the landlord has no need of the property for his own use or for redevelopment, which is what the present legislation does. The only restriction upon a landlord who wishes to continue to rent his property out is upon to whom he can let it.

12. The real problem is the shortness of the typical Hong Kong tenancy. If there was evidence that in the present tenants' market tenants were able to negotiate longer terms, the stance of the administration that now is the time to abolish security of tenure would be more persuasive.
13. But even if tenants were able to negotiate longer leases, the present state of the market will not continue for ever. When, or if, there is again a rental boom and tenants are being refused new tenancies by landlords who believe that they can exploit the tenant's natural reluctance to move or can extract a greater rent from a new tenant, the demand for security of tenure may return and the public may wonder why Part IV was so hastily dispensed with.
14. The paper argues that abolition will allow the property market to operate more freely. So it will, to a small extent. However this argument loses force when it is realised that at the end of last year the Legislative Council enacted amendments to the LTO, some of them with the support of the administration, which interfere with the market. These amendments (implied terms; restrictions upon relief against forfeiture; increased penalties for harassment; increased compensation for tenants of developers) largely favour landlords but nonetheless place limitations upon the freedom of the parties. The fact is that Hong Kong has had statutory restrictions upon landlord and tenant for many decades and that in this area support for the free market has been decidedly qualified.
15. One suggested advantage of the abolition of security of tenure is that a landlord who wishes to redevelop tenanted property will no longer need to pay compensation and could repossess the property more easily and quickly if the restrictions are abolished (para 5(b) of the consultation document). ~~This is not as advantageous as it may appear, however.~~ The landlord will still need to sue for possession, which may take months, and if he wants the

property quickly, he will have to pay the tenant to leave. In practice the cost of compensating tenants is but a small part of the costs of redevelopment.

16. The paper does not address the social cost of absolving developers from paying statutory compensation. Buildings which are subject to redevelopment tend to be older and dilapidated and the occupiers of tenements within them tend to be among the poorer elements of society who rely upon the compensation to cover the expenses of removal and rehousing.
17. The authors of the paper appear to be under the impression that Part IV provides for continuation of tenancies until the landlord applies for permission not to renew the tenancy upon certain grounds. This is inaccurate on two counts. First, there is only an interim continuation of the existing tenancy pending agreement as to, or grant by the Lands Tribunal of, a new, replacement tenancy. So the security of tenure is achieved by means of a new tenancy, not a continuation of the old one. Second, it is not the landlord but the tenant who applies to the Lands Tribunal. The tenant applies for a new tenancy. The landlord may oppose that if he has a ground of opposition such as that he requires the premises for the use of himself or members of his close family. Strictly, this is not "permission not to renew the tenancy" but successful opposition to the tenant's application for a new tenancy.
18. This is not just a matter of terminology for the idea that there is continuation of the old tenancy seems to have affected the discussion of the options as to how to disengage from security of tenure which take up paras 7 to 14 of the paper.

Options for Removal of Security

19. Four options are posited: phased removal, starting with more valuable premises followed by others after a review; exemption of new tenancies only; complete abolition; and complete abolition with a grace period. In fact there is little difference between these proposals. They are all in effect phased withdrawals of security of tenure. Even complete and immediate abolition would result in progressive withdrawal of security in practice. This is because tenancies which are subject to Part IV are contractual agreements, each with a term. If all such tenancies ceased immediately to be subject to Part IV, that would not destroy the agreements by which those tenancies were granted. ~~The agreements would run their course to expiry~~ which could be in a few days or in several years, depending upon what had

been agreed.

20. In reality, therefore, complete and immediate abolition would have the same effect as the exclusion of new tenancies from statutory protection. This is because, as explained above, when a Part IV tenancy has been terminated, it is usually followed by the grant of a new tenancy, not the extension of the old tenancy.
21. Perhaps by "new tenancies" the authors of the consultation paper mean any tenancy which is the first one entered into by the particular landlord with a particular tenant in respect of particular premises, rather than a new tenancy which replaces a previous tenancy made between the same parties concerning the same premises. If so, the effect of excluding the former but not the latter from Part IV would be to create two classes of tenant, one (existing tenants) with potentially perpetual though qualified security of tenure, the other (completely new tenants) with no security beyond that granted by their tenancy agreement.
22. Similarly, the proposal to exempt more valuable premises would create two classes of tenant, one with statutory security, the other without it. Such discrimination is unattractive in principle because it results in some tenants with privilege and some tenants without privilege. It also makes the law more complicated and creates confusion. However, the withdrawal of statutory protection has created two or more classes of tenant in the past, although temporarily and for reasons of fairness.
23. The justification for discrimination between old and new tenants is presumably that existing tenants entered into their tenancies in the expectation that they would be able to renew their tenancies at a market rent if they so wished whilst new tenants entering into their tenancies after abolition of statutory protection should have no such expectation. There is some force in this but that expectation must have included the possibility that the law might change. Justice would be done to existing tenants by allowing them the chance of one further renewal under Part IV but no more.
24. The justification for discrimination between tenants on the basis of the rateable value of their premises is presumably that tenants of higher-rated property tend to be wealthier and so are better able to engage advisers to negotiate with the landlord and are more likely to be able to afford the expense of moving that may result from the withdrawal of security of tenure. ~~Yet this is an argument in favour of not abolishing security for~~ tenants of lower-rated property, not for postponing its removal. The

proposal is that protection should be withdrawn later, so poorer tenants would have to face the disruption and expense of negotiating and moving at some point in the not-too-distant future.

25. Neither proposal which involves creation of two classes of tenant is greatly attractive but of the two the withdrawal of security from completely new tenancies seems the superior proposal. To ensure that the distinction was only temporary and to avoid the creation of a class of long-standing protected tenants, existing tenants could be allowed one further renewal under Part IV but no more than that.
26. The least attractive option is the last, ie removal of all tenancies from Part IV on a date to be appointed by the Secretary of Housing. On what basis would that date be chosen?
27. This option is said to allow a reasonable transitional period and to be fairer than withdrawing protection progressively according to rateable value. It may well be fairer than that option but it is difficult to see much difference between it and complete abolition of security of tenure on a date appointed by the Legislative Council. It is better that something so important as the timing of the abolition of security of tenure be decided by lawmakers rather than by an administrator.
28. The transitional period envisaged under the last option would be effected by allowing any existing tenant whose tenancy expires before the date nominated by the Secretary to apply for a new tenancy whilst those whose tenancies expire after that date would have no such opportunity. There may be difficulties in enacting such a scheme because Part IV provides for termination of tenancies by notice rather than by expiry, but the principle of allowing those who already have a tenancy protected by Part IV some limited further protection is attractive. There is no need for this to be linked to a date set by the administration, however. Nor need it be restricted only to a certain date. As suggested above, all existing Part IV tenants could be given the right to one further renewal but no more. This is preferable to permitting only some of them a right of renewal for they all will have entered into their present tenancy expecting that they would be allowed to renew it.
29. Whichever option were to be adopted, provision would have to be made for applications for the grant of a new tenancy which had already been filed with the Lands Tribunal. It will also have to be considered what if any ~~provision is to be made in respect of tenancies for which notice of termination has been given (by either party) but which have not yet reached~~

the stage of the lodging of an application with the tribunal.

Part V of LTO

30. The consultation paper invites comments upon abolition of s122, the provision of Part V which lays down a minimum period of notice to be given, by both landlord and tenant, to terminate a non-domestic tenancy.
31. Part V has its origins in legislation enacted more than 40 years ago in response to a shortage of commercial accommodation. The usefulness of the minimum period of notice lies in the warning or reminder that it gives to the small business tenant that his tenancy will end in 6 months' time. It may be said that, having negotiated the tenancy himself, he should be aware of when it will expire. This is true of fixed-term tenants but in the case of a tenant who simply has a monthly tenancy, which at common law is terminable on notice of one full month only, there can be no such awareness. This sort of tenant remains especially vulnerable, for the landlord may change his mind about wishing to continue with the tenancy without warning.
32. The disruptive effect upon a small business of a sudden notice to quit in one month's time may well be imagined. Whilst in the present economic climate the business would have no difficulty in finding alternative premises at a reasonable rent, location can be an important business consideration and the loss of business goodwill consequent upon abrupt removal of the business from its established location may be considerable.
33. Therefore the merits of abolition of Part V are not clear-cut. There is a case for requiring that landlords of business premises held on periodic tenancies of, say, one month or shorter, be required to give written notice of termination of a certain minimum period, perhaps three or six months.
34. If the notice requirements in Part V are to be abolished, there is little point in retaining the rest of Part V. Several sections of Part V were removed by the 2002 amendment ordinance. The only remaining substantive provision would be s126 which implies a covenant to pay rent on due date with a condition for forfeiture if it is broken.

False Information by Tenants

35. We are not convinced that the provision of misleading or false information by tenants is a significant or widespread problem.
36. Apparently the suggestion that provision of false information be made a crime originated in the Bills Committee considering what became the 2002 amendments. The purpose of the suggestion was to underpin a requirement that tenants provide certain personal information, such as their salary, prior to entering into a tenancy agreement with a view to making later default by the tenant less likely. It seems highly dubious that the provision of that kind of information would make the tenant more likely to pay the rent. We are also concerned that compulsory supply of such personal information would fall foul of Human Rights provisions.
37. If a landlord wishes to guard against letting his property to a bad tenant, he can ask for references and check those references. This is not the current practice in Hong Kong but there is no reason that it should not become so.
38. The landlord could also insist upon a higher security deposit. Such deposits are commonplace and in Hong Kong tend to be larger than elsewhere. In addition he might ask that a third party guarantee the payment of rent.

Position of Sub-tenants

39. The concern expressed by the Bills Committee about the threat to sub-tenants of being dispossessed if their landlord, the principal tenant, defaults and the head landlord forfeits the head tenancy is misplaced. As the consultation paper correctly suggests, in these circumstances a sub-tenant is protected by s58(4) of the Conveyancing and Property Ordinance.
40. That subsection aside, any head landlord who wishes to continue to let the property is likely to negotiate with the sub-tenants for them to take a fresh tenancy or tenancies directly from him or for one of them to become principal tenant in place of the defaulting tenant.

Consultation Period

41. The time allowed for consultation upon these important proposals is surprisingly short. The main proposals, if adopted, will affect the rights of many thousands of tenants, yet they have attracted little publicity and even less comment. ~~The paper presents only cursory arguments as to the merits..~~ or otherwise of the abolition of security of tenure, treating the case in

favour of abolition as obvious and overwhelming. This impression is increased by the brevity of the consultation process, less than six weeks. We are concerned that that very brevity will reduce the number of views expressed and in turn reinforce the impression that abolition is a forgone conclusion.

24th February 2003