

本局檔號 Our Ref.: (3) in LWB R 11/3939/10

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21 September 2010

Mr YICK Wing-kin
Assistant Legal Adviser
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Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Mr Yick,

Residential Care Homes (Persons with Disabilities) Bill

Thank you for your letter of 25 August 2010 regarding the Residential Care Homes (Persons with Disabilities) Bill (“the Bill”). Our clarifications and responses to the various issues raised in your letter are provided below.

Clause 2 - Definition of “person with disabilities”

2. While we have considered the definition of “disability” in the Disability Discrimination Ordinance (Cap. 487) (DDO), given the different objectives of the two pieces of legislation, we have made suitable adjustments for the purpose of the Bill which aims to regulate homes that provide residential care services to persons with disabilities (“RCHDs”). Depending on the support and resources available in the community,

a person with “disability” defined in Cap. 487 may or may not require residential care services. In this regard, the definition of “person with disabilities” in the Bill is designed to identify persons with disabilities who are generally perceived as having a need for residential care services. The definition as currently drafted adequately reflects the policy intent and is sufficient for our purpose.

3. On the above basis, since “the presence in the body of organisms capable of causing disease or illness” (e.g. Hepatitis B, etc.) in a person and “a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction” (e.g. specific learning difficulties, etc.) as mentioned in your letter are not generally perceived as having a need for residential care services, the relevant paragraphs under DDO are not included in the definition of “person with disabilities” in the Bill.

Clauses 7 and 11 - Application for licences and certificates of exemption (“COEs”) by bodies corporate or partnerships

4. It is our intention that bodies corporate and partnerships may also apply for licences or COEs under clause 7 or 11. Under the Bill, a “person” (i.e. an applicant) may be construed as an individual, a corporate or a partnership. Such construction is based on section 3 of the Interpretation and General Clauses Ordinance (Cap. 1)¹. The application system under the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459) adopts the same approach. In line with this interpretation, Clause 7(3)(a) provides the Director of Social Welfare (“DSW”) with the power to refuse to issue a licence if it appears to DSW that the applicant or any person the applicant proposes to employ at the residential care home is not a fit person to operate, take part in the management of or be employed at the residential care home. In considering whether a corporate or partnership is a fit person, DSW may take into account general factors such as whether its employees have any known record of abuse of clients. We therefore consider provisions similar to section 7 of Cap. 573 unnecessary.

¹ Under section 3 of Interpretation and General Clauses Ordinance (Cap. 1), “person” includes any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word “person” occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.

Clause 10 - Modes of service of written orders

5. For successful application, a licence/COE will be granted and sent to the applicant. A written order under Clause 10 will be sent by registered post to the address last known to DSW, if the applicant is a corporate or a partnership. Clause 10 as currently drafted sufficiently reflects our intention.

Clause 13 – COE

6. The introduction of a COE in the Bill is a transitional arrangement providing leeway for the operator of an existing RCHD to rectify non-compliance with the licensing requirements while allowing the existing RCHD to stay in operation. Strictly speaking, DSW may refuse to issue a licence if an existing RCHD does not comply with all the licensing requirements. However, if the non-compliance is rectifiable (e.g. pending issue of the certificates of fire service installations, awaiting delivery of the necessary equipment etc.), it is our intention to allow the operator to apply for a COE with certain conditions imposed to require completion of the rectification work within a reasonable period of time. A COE will only be renewed on an exceptional basis where DSW considers that there are full justifications for further extension to allow for completion of the rectification.

7. In the best interests of RCHD residents, it is our intention to encourage an existing RCHD to strive to meet all the licensing requirements and obtain a licence as early as practicable, instead of continuously holding a COE. The absence of provision in the Bill which allows for written representations against the refusal of renewal/issue of COE is in line with the above intent. Such arrangement was also adopted in Cap. 459.

Clause 14 – Appeal

8. We agree with your suggestion. We would consider reinstating the clause under section 12(2) of Cap. 459, and adding a clause providing the same effect under the Bill.

Clause 16 - Power of entry and inspection

9. Clause 16(2)(a) provides a specified person with the power to enter and inspect both RCHDs and “suspected RCHDs”. Upon entry into a “suspected RCHD”, the specified person will ascertain whether the place is a RCHD as defined in clause 2 of the Bill (i.e. any premises at which more than 5 persons with disabilities, who have attained the age of 6 years, are habitually received for the purpose of residential accommodation with the provision of care). If the place is a RCHD, the specified person may exercise the powers under subclauses (2)(b) to (d) to carry out inspection and gather evidence for prosecution under the Bill. Same treatment is also adopted in Cap. 459.

Clause 19 - An order for cessation of use of premises as RCHD

10. The nature of karaokes/clubs and RCHDs are very different, in that the latter accommodates vulnerable persons who need priority for immediate assistance in an emergency. With the powers given under the Bill, DSW monitors closely the service performance and operating situation of all RCHDs. Therefore, DSW is in the best position to directly assess when and on what basis to invoke the power of Clause 19, thereby affording better protection to the safety of RCHD residents. For the same consideration as mentioned above, it is also our policy intention not to provide for an appeal against a cessation order to better safeguard the interest and safety of the RCHD residents. Indeed, this proposed arrangement is consistent with that of other statutory licensing schemes currently administered by SWD, including those under the Child Care Services Ordinance (Cap. 243), Cap. 459 and Drug Dependent Persons Treatment and Rehabilitation Centres (Licensing) Ordinance (Cap. 566).

Consequential and related amendments – proposed amendments to the Residential Care Homes (Elderly Persons) Ordinance (Cap. 459)

(a) Appeal mechanism

11. Since Cap. 459 came into operation in 1995, no appeal has been made to the Appeal Board established thereunder. Having regard to the operational experience of the licensing scheme of residential care homes for the elderly and its similarity with the proposed licensing scheme of RCHDs, we do not expect a significant number of appeals in respect of RCHDs. At present, quite a number of administrative decisions made under various ordinances and subsidiary legislation are subject to the appeal handled by Administrative Appeal Board (AAB),

a well-established appeal mechanism set up under the Administrative Appeals Board Ordinance (Cap. 442). To streamline the appeal mechanism, we propose for AAB to handle appeals both under Cap. 459 and the Bill, instead of setting up an additional Appeal Board.

12. As to your enquiry on clause 12(2) of Cap. 459, please refer to our response in paragraph 8 above.

(b) Immunity clause

13. Consequential amendments are proposed to Cap. 459 only if the inconsistency (with the provisions of the Bill) will generate operational problems for either licensing schemes or in the interface between the two licensing schemes. Since the immunity clauses for enforcement officers under the Bill will not affect the existing operation of the licensing scheme under Cap. 459, consequential amendment in this respect is considered unnecessary.

Yours sincerely,

(Stephen SUI)
for Secretary for Labour and Welfare

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