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By Fax (2147 0984)

5 November 2018

Mr LI Kin Hei, Lawrence  
Administrative Officer (4)  
Home Affairs Department  
Headquarters, Division IV  
31/F, Southorn Centre  
130 Hennessy Road  
Wan Chai, Hong Kong

Dear Mr LI,

### **Hotel and Guesthouse Accommodation (Amendment) Bill 2018**

We are scrutinizing the legal and drafting aspects of the captioned Bill and should be grateful if you could clarify the following matters:

#### Clause 9 – new section 5 (offence of operating unlicensed hotel or guesthouse)

(1) Please clarify whether the offence of operating, keeping, managing or otherwise having control of any premises that are a hotel or guesthouse while no licence is in force for the premises under the new section 5(1) is a strict liability offence or an absolute liability offence. If it is the latter case, please provide justification(s) for making it as an absolute liability offence.

(2) The new section 5(3) provides that it is not a defence to a charge for an offence under section 5(1) that the person charged did not know that no licence was in force for the premises. According to *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142, if the presumption of mens rea is displaced, it would be a defence at common law, if the defendant could prove on a balance of probabilities that the prohibited act was done in the honest and reasonable belief that the circumstances were such that, if true, he would not be guilty of the offence. Please clarify whether the common law defence of mistaken but

honest and reasonable belief would be available to a person charged with an offence under the new section 5(1).

(3) Please clarify whether a "tenant" as defined in the new section 5A(5) includes a sub-tenant or a licensee.

Clause 11 – new section 12A (hotel licence and guesthouse licence)

(4) Please clarify the different criteria for eligibility for a hotel licence and a guesthouse licence as provided for in the new section 12A(2)(a).

(5) Please clarify the subcategories of guesthouse licences and their different criteria for eligibility as provided for in the new section 12A(2)(b).

(6) Under the new section 12A(3)(b), a guesthouse licence may be subject to a licence condition that the business name of the premises concerned must not contain the term "hotel" or "酒店".

- (a) Please clarify whether the business name of the premises concerned must not contain any term in any language which means "hotel" or "酒店", and if so, please consider expressly providing for the same in the Bill.
- (b) Please consider whether a hotel licence would similarly be subject to a licence condition that the business name of the premises concerned must not contain the term "guesthouse" or "賓館" or any other term in any language which means "guesthouse" or "賓館", and if not, the reason(s) for not providing for such a condition.

Clause 11 – new section 12J (licence requirement: no-use restriction requirement)

(7) Under the new section 12J(2), the premises would not be considered as free from a use restriction if a restrictive provision (as defined in the new section 12J(3)) applies under a deed of mutual covenant ("DMC") (in respect of any part of the premises that is covered by the DMC) or the Government lease (in respect of any part of the premises that is not covered by a DMC).

- (a) Please clarify whether the premises would be considered as not free from a use restriction under the new section 12J(2) if the use of the premises as a hotel or guesthouse is inconsistent with the occupation permit of the building at which the premises are located if it is not clear from the DMC or Government lease as to whether a

restrictive provision applies. If so, please consider expressly providing it in the Bill.

- (b) Subject to your clarification to (a) above and if there is inconsistency between the DMC/Government lease and the occupation permit regarding the use of the premises or there are ambiguities in these documents as to whether the premises are free from a use restriction, please clarify how the inconsistency or ambiguities would be resolved by the Hotel and Guesthouse Accommodation Authority ("Authority"). In this connection, please also clarify if a written advice given by a legal practitioner under the new section 12O(2)(b) would be conclusive as to whether the premises to which the application or licence relates are free from a use restriction within the meaning of the new section 12J.
- (c) If a DMC/Government lease provides that the premises is prohibited from being used as a boarding house, lodging-house, hostel or dormitory or similar accommodation, please clarify whether such a provision would be construed as falling within paragraph (a) of the definition of "restrictive provision" (under the new section 12J(3)) that the part of premises is prohibited from being used as a hotel or guesthouse.

Clause 11 – new section 12L (licence requirement: fit and proper requirement)

(8) Under the new section 12L(2), when considering whether a person is a fit and proper person to operate, keep, manage or otherwise have control of a hotel or guesthouse, the Authority must have regard to whether the person (a) has been convicted of an offence under the Hotel and Guesthouse Accommodation Ordinance (Cap. 349); (b) has been convicted of an offence, other than an offence under Cap. 349, in Hong Kong or elsewhere and, in respect of the conviction, sentenced to imprisonment for a term exceeding three months; or (c) is an undischarged bankrupt, is in liquidation or is the subject of a winding-up order. Pursuant to the new section 12L(3), if the person is a body of persons, the fit and proper requirement as provided in the new section 12L(2) would similarly apply to a related person of the body of persons as defined in the new section 12L(4).

- (a) Please consider if it is necessary to provide specifically in the new section 12L(2)(b) that the conviction of the person is for an offence for which it was necessary to find that the person had acted fraudulently, corruptly or dishonestly. Similar requirements can be found in section 30(4)(b)(iii) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615), section 8A(4)(a)

of the Dutiable Commodities Ordinance (Cap. 109) and section 11(2)(a)(iv), (b)(iv) and (c)(vi) of the Property Management Services Ordinance (Cap. 626).

- (b) Regarding the sentence of imprisonment for a term exceeding three months as referred to in the new section 12L(2)(b), please clarify whether the sentence includes a suspended sentence, and if so, please consider spelling it out for clarity sake.
  - (c) Apart from the consideration that the person is an undischarged bankrupt or is in liquidation or is the subject of a winding-up order as referred to in the new section 12L(2)(c), please clarify (and consider including in the Bill) whether the Authority would also take into account the following, with reference to section 11 of Cap. 626 and section 21(5)(c) and (d) of the Electronic Transactions Ordinance (Cap. 553):
    - (i) whether the person (in the case of an individual) has entered into a composition or arrangement with his or her creditors;
    - (ii) whether a receiver has been appointed (if the person is a body corporate) or it has entered into a composition or scheme of arrangement with its creditors;
    - (iii) whether the person or a related person (in the case of an individual) is a mentally disordered person, or a patient, within the meaning of section 2(1) of the Mental Health Ordinance (Cap. 136); and
    - (iv) whether the person or a related person, is or was a director or officer of, or a partner or sole proprietor (if the person or related person is an individual) in, a business entity (whether a body corporate, partnership or unincorporated body that operates, keeps, manages or otherwise has control of a hotel or guesthouse) whose application for a hotel licence or a guesthouse licence has been refused or whose licence has been revoked or suspended.
- (9) Please clarify the meaning of an "office holder" as referred to in paragraphs (b)(iii) and (c)(ii) of the proposed definition of "related person" in the new section 12L(4) and consider if the same should be spelt out in the Bill.

Clause 11 – new section 12N (consideration of views of affected persons)

(10) Under the new section 12N, a consultation must have been conducted to take into account the views of affected persons collected by an advisory panel appointed by the Authority before approving a new or licence renewal application. Please clarify the composition of the advisory panel, eligibility and terms of appointment of a member of the advisory panel.

(11) "Affected person" is defined in the new section 12N(6) to include an owner or occupier of any other premises situated in the surrounding area specified by the Authority for the application (if the premises form part but not the whole of a building) (section 12N(6)(a)(ii)) and an owner or occupier of any other premises situated in the surrounding area specified by the Authority for the licence application (if the premises form the whole of a building) (section 12N(6)(b)).

- (a) How far the area extending from the premises to which the application relates would be covered and be considered as the "surrounding area" in the new section 12N(6)(a)(ii) and (b)? What are the considerations that would be taken into account in determining the scope of owners or occupiers of other premises that would be affected?
- (b) Please consider if it is necessary to provide for an appeal mechanism whereby owner(s) or occupier(s) of any other premises situated in the surrounding area aggrieved by the decision of the Authority for granting or renewing the licence can appeal to an appeal board formed under the new section 17D against the decision, and if not, the rationale for not providing such an appeal mechanism. It is noted from section 17(5) of the Dutiable Commodities (Liquor) Regulations (Cap. 109B) that the applicant for a liquor licence or 20 or more persons residing within a radius of 400 metres from the premises to which the application relates may appeal to the Municipal Services Appeals Board against the decision.

Clause 11 – new section 12P (duty of Authority to give notices of certain intentions or decisions)

(12) Unlike the arrangement in the new section 12P(1)(b) relating to licence holders, please explain why an "interested person" as defined in the new section 12P(6) after having been informed of the Authority's decision to exercise certain powers in relation to a licence and the reasons for it under the new section 12P(3) would not have the opportunity to make written representations to the Authority in relation to the Authority's intention to exercise the powers.

Clause 13 – new section 17B (appeal board panel)

(13) A panel of persons would be appointed by the Chief Executive for the purposes of hearing appeals under the new section 17B(1). Under the new section 17B(2), the panel is to consist of at least two individuals who must be qualified for appointment as a District Judge and not less than 16 other individuals appointed by the Chief Executive. Please clarify what are the eligibility requirements that the 16 other individuals must meet in order to be appointed by the Chief Executive under the new section 17B(2)(b).

Clause 13 – new section 17D (hearing of appeal by appeal board)

(14) The new section 17D(6) provides that a question before an appeal board, except a question of law, is to be determined (a) by a majority of all members of the board who are voting; or (b) if there is an equality of votes – by a casting vote of the chairperson. Please clarify whether the casting vote of the chairperson is in addition to his original vote, and if so, please consider spelling this out in the Bill for clarity sake.

(15) Under the new section 17D(8)(b) and (c), in hearing an appeal, an appeal board may admit or take into account any statement, document, information or matter whether or not it would be admissible in evidence in a court of law; and may by written notice, summon any person to appear before it as a witness to produce any document relating to the appeal or to give evidence.

- (a) Please consider if it is necessary to provide in the new section 17D that an appeal board may only require the person to produce document(s) in his possession or under his control that may be relevant to the appeal.
- (b) Please clarify whether the appellant would be considered as a witness under the new section 17D(8)(c) and be entitled to refuse to give evidence or produce any document on the ground that the evidence or document tends to incriminate himself or herself or on the ground of legal professional privilege.
- (c) Subject to your answer in (b) above and if the appellant or a witness is not excused from giving evidence or providing information or document(s) on the ground that to do so might tend to incriminate the person, please consider adding a provision to the effect that such evidence, information or document(s) are not admissible in evidence against the person in criminal proceedings, other than those in which the person is charged with an offence under Part V of the Crimes Ordinance (Cap. 200) or for perjury.

(d) Please clarify whether there is any other legal consequence(s) for not complying with the summons issued under the new section 17D(8)(c) apart from contempt as provided in the new section 17G.

(16) Please clarify whether any other order that may be made by an appeal board under the new section 17D(8)(f) would include awarding to a witness the expenses that the witness has reasonably incurred because of the witness's attendance, and if so, please consider spelling it out in the Bill.

Clause 13 – new section 17G (inquiry of contempt)

(17) Under the new section 17G(1)(b)(ii) and (iii), the chairperson of an appeal board may certify the refusal of a person (attending the appeal hearing as a witness) to produce a document or answer a question which the board may legally require as an alleged contempt. Please clarify whether the witness is entitled to refuse to produce a document or answer any question which tends to incriminate himself or herself or on the ground of legal professional privilege, and such a refusal would not be considered as contempt.

(18) Please clarify whether the making of a statement or production of a document or information (by a witness before an appeal board) that is false in a material particular and that the witness knows or reasonably ought to know is false in that material particular would be certified by the chairperson of the appeal board as an alleged contempt under the new section 17G(1)(c).

Clause 16 – new section 18A (warrant to enter and search premises)

(19) Please consider if it is necessary to provide that an enforcement officer authorized by a warrant issued under the new section 18A to enter and search any premises may enter the premises at any reasonable time (instead of at any time) under the new section 18A(5)(a) if no time is specified in the warrant.

Clause 19 – new section 20 (remedial order)

(20) Please also consider if it is necessary to provide that an enforcement officer may enter any place at a reasonable time (instead of at any time) if no time is specified in the remedial order made by the District Court for effecting the closure of premises under the new section 20(6)(a).

(21) A "responsible person" (as referred to in the new section 20(5)(c), (9)(b) and (10)) is defined in the new section 20(11) to mean a person who operates, keeps, manages or otherwise has control of the hotel or guesthouse. Please clarify why the landlord and tenant of the hotel or guesthouse are excluded from the definition.

Clause 20 – new section 20A (closure order)

(22) Please consider if it is necessary to provide that no person shall occupy the premises to which a closure order relates during the continuance in force of the order.

Clause 20 – new section 20B (issue of warrant to bailiff after making closure order)

(23) Please consider if it is necessary to provide that a bailiff executing the warrant may enter any place at a reasonable time (instead of at any time), if no time is specified in the warrant for effecting the closure of the premises under the new section 20B(2)(a).

Clause 20 – new section 20C (rescission of closure order on application)

(24) Under the new section 20C(5), the court or magistrate may rescind the closure order if the court or magistrate is satisfied that (a) at the time the applicant became a bona fide purchaser of the premises, the applicant did not know of the charge mentioned in subsection 2(b) or the appeal mentioned in subsection (3)(b), having regard to all the circumstances, it would be unjust for the applicant's interest in the premises to be affected by the order.

- (a) Please clarify whether it is necessary for the applicant to show that he could not with reasonable diligence and inquiries discover the existence of the charge or the appeal before the applicant could be said to have no knowledge of the charge or the appeal.
- (b) Please explain the circumstances that the court or magistrate may take into account in determining that it would be unjust for the applicant's interest in the premises to be affected by the order as provided for in the new section 20C(5)(b).

Clause 20 – new section 20D (rescission of closure order on successful appeal against conviction)

(25) Under the new section 20D(2)(b), the appellate court may decide not to rescind the closure order if it substitutes a verdict of guilty of another offence by reference to which the order could, if the appellant had originally been convicted of that other offence, have been made. Please clarify the meaning of "another offence". Does it refer to another offence under Cap. 349? If "another offence" refers to an offence other than under the new section 5 or 5A, what are the considerations that the appellate court would take into account in determining that the closure order would not be rescinded?



Clause 20 – new section 20F (variation of conditions of suspension order)

(26) Under the new section 20F(1), if a suspension order is subject to a condition, an affected person may apply in writing to a court or magistrate for a variation of the condition. "Affected person" is defined under the new section 20F(5)(b) to include a person who would be held liable if a condition of the suspension order is breached. Please clarify who this person would be.

Clause 20 – new section 20J (order and notice to be registered in Land Registry)

(27) Under the new section 20J(5), a copy of an order or a notice required to be registered in the Land Registry under the new section 20J is taken to be an instrument affecting land, but a failure to register the copy of the order or the notice does not affect its validity as against any person.

- (a) Please clarify whether the order which affects land but is not registered would be void as against a subsequent bona fide purchaser in good faith for valuable consideration.
- (b) If your answer in (a) is in the affirmative, please clarify whether the order (which is not registered in the Land Registry) to which the premises is subject would cease to have effect.
- (c) Subject to your answer in (b) above, please clarify in what ways the failure to register the order does not affect its validity as against any person.

Clause 23 – section 21 amended (offences in relation to certificates of exemption and licences)

(28) The amended section 21(6)(a) provides that a person commits an offence if the person in, or in connection with, an application under Cap. 349, makes a statement (whether oral or written) or furnishes any information that is false in a material particular; and that the person knows or reasonably ought to know is false in that material particular (clause 23(6)). Please clarify whether the amended section 21(6)(a) applies to the giving of evidence or production of document(s) by a witness summoned to appear before an appeal board under the new section 17D(8)(c), and if not, please consider if it is necessary to provide for similar legal consequences to that effect.

Clause 25 – new section 21C (liability of partners, office holders, etc. of unincorporated bodies)

(29) Please clarify the meaning of "an office holder" as referred to in the new section 21C(3)(c) and (4)(b).

Clause 28 – section 6 of the new Schedule (renewal under section 12C)

(30) Please explain to members the effect of section 6(1) of the new Schedule and clarify the relevant part(s) of the new Part 4A (which includes the new licensing requirements for the issue, renewal, cancellation etc of the hotel licence or guesthouse licence and their related matters) that would not be applicable to the renewal of an old regime licence.

Clause 31 – new regulation 5 of the Hotel and Guesthouse Accommodation (Appeal Board) Regulations (Cap. 349A) (further particulars)

(31) Under the new regulation 5(5), the relevant authority may, on application, direct that the requested party need not comply with subregulation (3) in respect of a requested particular ("exempted particular") if it is satisfied that the request for the exempted particular was unreasonable or reasonable grounds exist for not giving the exempted particular. Please clarify what are the circumstances under which the request for particulars would be considered as unreasonable, and provide illustration as to what are the reasonable grounds for not giving the requested particular.

Clause 34 – new regulation 12 of Cap. 349A (failure of appellant to attend hearing)

(32) If the appellant is a body corporate, please clarify whether the appellant is to be regarded as attending the hearing in person if it participates through any of its directors, and if so, please consider providing for this in the Bill.

Clause 34 – new regulation 13 of Cap. 349A (failure of appellant to serve notice of appeal, etc.)

(33) Please consider if it is necessary to provide for an exception of reasonable defence for the appellant in relation to his non-compliance with the new regulation 4(1) (service of notice of appeal and other accompanying documents) or 5(3) (giving requested particulars) as a ground for the appeal board not to dismiss the appeal under the new regulation 13.

Clause 36 – new regulation 15 of Cap. 349A (service of notices and other documents)

(34) Under the new regulation 15(b), a notice or any other document permitted or required to be served on a person under Cap. 349A may be sent to the person by registered post at the person's address last known to the sender.

- (a) If the person to be served with the notice or any other document is a body corporate, please clarify whether the last known address includes its registered office or a place at which the body corporate carries on business.
- (b) Regarding the mode of service by registered post, please clarify whether the notice or the document is taken, in the absence of evidence to the contrary, as having been served or given on the second day after the day on which it was posted, and if so, please consider providing this in the Bill.

Clause 37 – new regulation 16 of Cap. 349A (Convenor may specify forms)

(35) The new regulation 16 provides that the Convenor may specify a form to be used for the purposes of any matter provided for under Cap. 349A. Unlike the existing forms (in the Schedule to Cap. 349A) which form part of Cap. 349A, please let members know the rationale for empowering the Convenor to specify forms, instead of providing for these forms by way of regulation under Cap. 349A.

We should be grateful if your reply in both English and Chinese could reach us as soon as practicable, and preferably before the second meeting of the Bills Committee.

Yours sincerely,

  
(Vanessa CHENG)  
Assistant Legal Adviser

c.c. DoJ (Attn.: Mr Peter SZE (Acting SALD))  
Ms Carmen CHU (SGC)) (By Fax: 3918 4613)  
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