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16 January 2019

Ms Wendy Jan
Clerk to Bills Committee
Legal Service Division
Legislative Council Secretariat
1 Legislative Council Road
Central, Hong Kong

Dear Ms Jan,

Hotel and Guesthouse Accommodation (Amendment) Bill 2018 (“the Bill”)

Thank you for your letter dated 13 November 2018 ref CB2/BC/5/17.
Our replies to the questions raised are set out in the ensuing paragraphs.

(a) provide examples of legislation (with the relevant provision(s)) with a “strict liability” offence and a comparison of these examples (with regard to the nature of offences, types of persons on which strict liability would be imposed, sanctions and penalties for breach of such strict liability offence and any defence available) with the “strict liability” offence under the new section 5A (as added by clause 9 of the Hotel and Guesthouse Accommodation (Amendment) Bill 2018 (“the Bill”)), and the justifications for imposing strict liability on owners and tenants of an unlicensed hotel or guesthouse under the new section 5A;

2. In criminal law, strict liability offences refer to offences in which criminal liability is imposed upon proof of the proscribed act or circumstances. It is not necessary for the prosecution to prove the existence of *mens rea* (i.e. the mental element, which refers to a person’s culpable state of mind). That said, defences, either introduced explicitly by statutes or implied by the common law, may be available.

3. On one hand, the new section 5A will address cases where operators etc. of unlicensed hotels or guesthouses (including those who are also owners or tenants of the premises) who do not show up during operation. On the other hand, it introduces statutory defences for the defendant. A defendant may adduce evidence (which may come from the defence or the prosecution) capable of raising a reasonable doubt that the defendant did not know and had no reason to suspect the premises were an unlicensed hotel or guesthouse, or that the defendant could not with reasonable diligence have prevented the premises from being an unlicensed hotel or guesthouse. If the prosecution cannot disprove such matters beyond reasonable doubt, the defendant is entitled to be acquitted.

4. We consider that imposing a strict liability on the owners/tenants is justifiable for the following reasons –

(a) Addressing Enforcement difficulties

Currently, in order to initiate prosecution, the Hotel and Guesthouse Accommodation Authority (“the Authority”) or his delegated authority (including officers of the Office of Licensing Authority (“OLA”) under the Home Affairs Department (“HAD”)) has to prove beyond reasonable doubt that (i) the subject premises provides short-term sleeping accommodation at a fee without a valid licence, and (ii) a person operates, keeps, manages or is in control of that unlicensed guesthouse.

For (ii), it is necessary to identify the operators of the unlicensed guesthouses. However, with the availability of online platforms and instant communication applications, the operators have become difficult to be identified. The operators do not need to show up at the unlicensed hotel or guesthouse for face-to-face transaction; and the bank accounts for receiving online payment may not necessarily be under the name of the operators. It has therefore become increasingly difficult to catch the operator red-handed and secure sufficient admissible evidence to prove the identity of the person who is operating, keeping, managing or controlling the unlicensed hotel or guesthouse, even though there may be admissible evidence showing that the premises concerned are being used as an unlicensed hotel or guesthouse. There have only been few cases where the owners assisted our investigation and clarified their connection with the management of the premises, or the operators somehow showed up at the subject premises and demonstrated his management role such that there were sufficient evidence for prosecution.

The proposed strict liability offence is primarily intended to target at owners / tenants who operate unlicensed hotels / guesthouses, but who

do not show up at the premises and / or use means for settling payment without traces, and hence could easily evade prosecution.

(b) Safeguarding owners/ tenants' own interests

Owner/ tenants should have a primary responsibility for the use of their premises, and are expected to ensure that their premises are not put to illegal use in order to safeguard their own interest. The introduction of a strict liability on the owners and tenants not only could facilitate enforcement actions as mentioned in (a) above, but can also encourage them to take active steps in preventing their premises from being used as unlicensed hotels or guesthouses.

5. Having regard to the above, the proposed strict liability offence provisions in the Bill will enhance the enforcement against unlicensed hotels/ guesthouses on one hand, and raise the awareness of owners/ tenants to safeguard their premises against illegal use on the other, whilst providing a statutory defence to innocent owners/ tenants.

6. In fact, strict liability offences are not uncommon in the legislation of Hong Kong, especially for regulatory offences. In *Hin Lin Yee and Another v HKSAR* (2010) 13 HKCFAR 142, the Court of Final Appeal recognised the imposition of strict liability where construing the relevant provision to require full *mens rea* would make successful prosecution so unlikely that the statutory objectives would be frustrated (as in the present case).

7. We would also like to emphasise that strict liability offences do not necessarily infringe the presumption of innocence. As regards the offence under the new section 5A, an evidential burden is placed on the defendant to raise the statutory defences, while the burden of proof remains on the prosecution. The Court of Final Appeal has repeatedly held that a shifting of evidential burden only does not infringe the presumption of innocence (see e.g. *Tse Mui Chun v HKSAR* (2003) 6 HKCFAR 601). We consider that creating a strict liability offence whilst providing for a statutory defence with an evidential burden for the defendant to discharge represents the most appropriate balance to be struck between the public interest in ensuring the safety of hotel and guesthouse accommodation underlying the regulatory offence on the one hand, and avoiding a snaring of the blameless, on the other.

8. Some examples of strict liability offences include the offences under the Trade Descriptions Ordinance (Cap. 362), the Dutiable Commodities Ordinance (Cap. 109) and the Water Pollution Control Ordinance (Cap. 358). It should be noted that they represent only a small fraction of the strict liability offences under the laws of Hong Kong. The regulatory regimes are not the same and imposition of strict liability might be justified for different policy objectives. Therefore, comparison of these regulatory regimes is of limited

value. That said, a comparison table is set out at **Annex A** for Members' reference.

(b) provide a comparison of enforcement actions against the "strict liability" offence under the new section 5A with those against more serious offences under other legislation in Hong Kong;

9. Comparison of enforcement actions against the strict liability offence under the new section 5A with those against more serious offences under other legislation in Hong Kong might not be meaningful, given that strict liability might be imposed for very different policy objectives. The seriousness of an offence is not a conclusive factor for the appropriateness of imposing strict liability offence.

10. As pointed out in the judgment of *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142, the more serious the offence in terms of penalty and social obloquy, the less likely the court will consider the offence one of strict liability, because one should be slow to attribute to the legislature the intention of inflicting severe punishment and stigmatising a person as a serious criminal unless he is proved to have acted with a guilty mind.

11. On the other hand, the Court of Final Appeal also pointed out that the deterrent effect of the criminal law is not confined to deterring people from doing what they know is unlawful, but encourages them to take care to avoid what may be unlawful. Given such intent, there are indeed cases where absolute or strict liability is imposed even though the relevant offence is serious and carries severe penalties.

12. That said, a comparison table is nonetheless prepared at **Annex B** for Members' reference.

(c) provide examples of "sufficient evidence" as stipulated in the new section 5A(3)(a) and (4)(a), in particular, the measures that should be taken to show that the person could not with reasonable diligence have prevented the premises from being an unlicensed hotel or guesthouse under the new section 5A(4)(a);

13. Given that questions of knowledge and reasonable diligence are fact-sensitive, it should be noted that the following examples are provided for illustration only and without prejudice to any judicial ruling in the future. Whether they, individually or collectively, could be considered as "sufficient evidence" for the defences under the new section 5A(3)(a) and (4)(a) will depend on the actual circumstances of each case.

14. Regarding the new section 5A(3), if there is evidence to show that the owner had authorised a third party (e.g. a property agent) to deal with all tenancy matters concerning the property on the owner's behalf, that this third party did not report any suspicious conditions in relation to the property to him/her, and that the owner had not personally received any complaint about the use of the property as unlicensed hotel or guesthouse, then there may be sufficient evidence to raise an issue that the owner did not know and had no reason to suspect that the premises were an unlicensed hotel or guesthouse.

15. Meanwhile, an owner who knew or had reason to suspect that the premises were an unlicensed hotel or guesthouse may in appropriate cases resort to the defence under the new section 5A(4)(a). Applying the Court of Appeal's observations in *HKSAR v Kong Hing Agency Ltd* [2008] 2 HKLRD 461 to the present context, "reasonable diligence" is not the same as "due diligence" and the use of the word "reasonable" connotes an objective test and requires the court to examine what the defendant could have been reasonably expected to have done, taking into account the owner's particular circumstances (including financial means). In other words, "reasonable diligence" as stipulated under the new section 5A(4)(a) is not the doing of everything possible, but the doing of that which, under ordinary circumstances, and having regard to expense and difficulty, can reasonably be required.

16. If there is evidence to show that the owner had sent relevant legal documents to the operator of the premises (e.g. a "cease and desist" letter), terminated the tenancy agreement or pursued legal action for eviction to prevent the operation of the unlicensed hotel or guesthouse, then the owner may rely on the statutory defence under the new section 5A(4)(a). Other examples that may qualify as "sufficient evidence" under the new section 5A(4)(a) include providing records of meeting with the Management Office of the building concerned to prevent guesthouse activities at the premises and rendering assistance to the officers of OLA or other law enforcement agencies (e.g. the Hong Kong Police Force) in combating unlicensed guesthouse activities at the premises.

17. The above examples might also be applicable to a tenant who had sublet the property to another, or had abandoned the property. However, they might not be applicable to cases where a tenant was in physical occupation of premises on which unlicensed hotel or guesthouse activities took place. Depending on circumstances of each individual case, it might be difficult for the tenant to claim to have no reasons to suspect that the premises were an unlicensed hotel or guesthouse, and the tenant, being entitled to exclusive possession of the premises, should have easily exercised reasonable diligence to prevent the premises from being an unlicensed hotel or guesthouse.

(d) advise whether there would be an increase or saving in the Administration's resources and manpower for the regulation of hotels and guesthouses after the passage of the Bill, and provide the relevant details;

18. The Bill improves the existing licensing regime by empowering/requiring the Authority to take into account more factors in the licensing process. For example, there will be additional work arising from setting up of an advisory panel to consider local residents' views. Moreover, more work is required for the launch of the new regime, for example, drawing up new procedural and administrative guidelines. These would entail additional resources and manpower.

19. On the other hand, the Bill introduces provisions to facilitate enforcement actions. For example, the Authority may apply to the Court for search warrants and fewer decoy / covert operations will be necessary. The initial increase in work will likely level off with the passage of time. These may result in savings in manpower resources. We will flexibly deploy resources and manpower in view of the actual operational needs after the passage of the Bill.

(e) provide its views on the regulation of home-stay lodging with reference to the analysis and the overseas practices set out in the Information Note entitled "Regulation of home-stay lodging in selected places" prepared by the Research Office of the Legislative Council Secretariat (LC Paper No. IN01/18-19); and

20. According to our research and the Information Note prepared by the Legislative Council Secretariat, we note that the regulatory regimes of home-stay lodging and other forms of short-term rental sleeping accommodation vary in different jurisdictions. While we recognise there may be successful home-stay lodgings in certain places, we also note that home-stay lodgings are not popular or even allowed in some other places. For example, in Singapore, the letting out of private residential housing for less than three months is prohibited by law. In Thailand, rooms that have not obtained a licence to run a hotel business cannot be rented out for less than 30 days.

21. In Hong Kong, we reiterate that the existing and the proposed regulatory regimes of the Hotel and Guesthouse Accommodation Ordinance (Cap. 349) ("HAGAO") do not preclude home-stay lodgings. As the existing regime is already flexible enough to cater for different types of hotels and guesthouses, including home-stay lodgings, we maintain the view that a "separate" regime for home-stay lodging is not necessary.

22. Under the existing regulatory regime for hotels and guesthouses in Hong Kong, one of the key elements is to ensure public safety, which can never

be compromised. In this regard, building and fire safety standards set by our professional departments have to be met. This is in line with public expectation. We also note that all regulatory regimes on home-stay lodging in other places contain building and fire safety requirements. Moreover, the building and fire safety requirements are imposed proportionate to the scale and mode of operation of the premises. For example, village-type houses in the New Territories operating in the mode of home-stay lodging may apply for Guesthouse (Holiday Flat) Licences, with a set of relatively less restrictive licence requirements / conditions (as set out in “A Guide to Licence Application for Holiday Flat”). For a typical village-type house with a floor area of less than 230 m², the operator is only required to adopt minor modifications for ensuring safety of the premises, such as providing fire detection systems, ventilators, and fire extinguishers.

23. For the enhanced regime as proposed in the Bill, another key element is to minimise possible nuisances arising from the operation of the hotels/guesthouses to the community –

- (a) Firstly, the Bill empowers the Authority to take into account restrictive provisions in land documents in the licensing process. Some sectors have expressed concerns that such requirements may be too restrictive for the operation of home-stay lodging, as premises with such restrictions in their land documents would not be given licences for hotel / guesthouse operation.

We would like to emphasise that the requirement to comply with conditions in land documents is not “new”. Land documents (including the deed of mutual covenant and Government leases) are private contracts which are binding on the relevant parties. When a person acquires any premises, he/she should have been well aware of and are obliged to comply with any “restriction” imposed on him/her by the land documents. The issue of a hotel / guesthouse licence does not waive such an obligation.

The introduction of the requirement for the Authority to take into account restrictions in land documents in processing licence applications merely incorporates such obligation into the licensing regime, so as to encourage operators to honour their undertakings in acquiring the premises. It is not proper for the Government to step into private contracts and waive the land document requirement for a certain type of hotels or guesthouses. Indeed, this would be tantamount to abrogating private property rights.

- (b) The Bill also empowers the Authority to consider local residents’ views in the licensing process. Some may be worried that this would render the issuance of licence to home-stay lodging impossible, as it would be

difficult to solicit support from the local residents. We consider that such worries are unfounded. In fact, the proposed local consultation would provide a proper channel for affected persons to express their views. Taking into account such views, the Authority may impose specific conditions to address concerns of the neighbourhood. This should help resolve any potential conflicts between the operators and the local community.

24. The above requirements are introduced in response to public concerns (including many District Council members and owners' corporations) and the overwhelming support for the proposals during the public consultation conducted in 2014.

25. In fact, the above-mentioned requirements (as set out in paragraphs 23-24) are similar to, or even more lenient than, those in other places where a specific regulatory regime for home-stay lodging is in place. An easy reference can be made to the summary table of "Key features of regulation of home-stay lodging in selected places" prepared by the Research Office of the Legislative Council Secretariat (Appendix to the LC Paper No. IN01/18-19). For instance, apart from the building and fire safety requirements (similar to those in Hong Kong), home-stay lodgings in Japan are subject to a maximum of 180 operating days per year; while home-stay lodgings are only permitted in designated areas such as specific scenic spots and registered recreational farms in Taiwan. There is no such restriction on location and operating days for operation of guesthouses in Hong Kong.

26. Our detailed response to the *Information Note entitled "Regulation of home-stay lodging in selected places"* prepared by the Research Office of the Legislative Council Secretariat is at **Annex C**.

27. As can be deduced from Annex C, the existing and proposed regimes in Hong Kong are in line with global trend and approach. In addition, they are flexible and allow for pragmatic calibration in precise requirements to take into account the nature of lodgings, including the operation of hotel, guesthouse and home-stay lodging.

(f) advise whether agents/agencies (e.g. travel agents/agencies, real estate agents/agencies) or someone who advertised hotels or guesthouses via online platforms would be held criminally liable if they had inadvertently promoted unlicensed hotels or guesthouses.

28. Under the new section 5(1), "a person commits an offence if the person operates, keeps, manages or otherwise has control of any premises that are a hotel or guesthouse while no licence is in force for the premises." As agents/agencies or someone who inadvertently promoted unlicensed hotels or guesthouses are

not considered to be “operating, keeping, managing or having control of” the unlicensed hotel or guesthouse, they should unlikely be held criminally liable, depending on the facts of each individual case. It should also be noted that the arrangement of the new section 5(1) is the same as the existing section 5(1).

Yours sincerely,

A handwritten signature in cursive script that reads "Grace".

(Miss Grace Li)
for Director of Home Affairs

cc. Department of Justice (Attn: Mr Peter Sze)

**Proposed “Strict Liability” Offence under the Hotel and Guesthouse Accommodation (Amendment) Bill 2018 –
Comparison with Other Strict Liability Offences**

The Ordinance	Trade Descriptions Ordinance (Cap. 362)	Dutiable Commodities Ordinance (Cap. 109)	Water Pollution Control Ordinance (Cap. 358)	Hotel and Guesthouse Accommodation (Amendment) Bill 2018
Relevant provision	Section 7	Section 17	Section 8	Proposed new section 5A
The offence	It is an offence for a person to, in the course of any trade or business, – (i) apply a false trade description to any goods; or (ii) supply or offer to supply any goods to which a false trade description is applied; or (iii) have in the person’s possession for sale or for any purpose of trade or manufacture any goods to which a false trade description is applied.	It is an offence for a person to import or export or have in the person’s possession, custody or control, or in any way deal with or dispose of, any goods to which the Ordinance applies, except in accordance with the provisions of this Ordinance (i.e. requirements relating to duty to be paid).	It is an offence to discharge any waste or polluting matter into the waters of Hong Kong in a water control zone.	The owner or tenant of an unlicensed hotel or guesthouse commits an offence (as proposed in the Bill).
Maximum penalty upon conviction	A fine of \$500,000 and imprisonment for 5 years (on conviction on indictment), or a fine at level 6 (i.e. \$100,000) and imprisonment for 2 years (on summary conviction)	A fine of \$1,000,000 (plus an additional fine not exceeding 10 times the amount of duty payable on the dutiable goods in respect of which the person committed the offence) and imprisonment for 2 years	Imprisonment for 6 months and (a) for a first offence, a fine of \$200,000 or (b) for a second or subsequent offence, a fine of \$400,000	A fine of \$500,000 and imprisonment for 3 years (on conviction on indictment), or a fine of \$200,000 and imprisonment for 2 years (on summary conviction)
Defence available to the defendant	Sufficient evidence is adduced to raise any of the following issues, and the contrary is not proved by the prosecution beyond reasonable doubt: (Section 26) The commission of the offence was due to— (a) a mistake; (b) reliance on information supplied to the person charged by another person; (c) the act or default of another person; (d) an accident; or (e) some other cause beyond the control of the person charged; and the person charged took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by— (a) the person charged; or (b) any person under the control of the person charged. (Section 26AA) The person charged— (a) did not know; (b) had no reason to suspect; and (c) could not with reasonable diligence have ascertained, that the goods or service did not conform to the trade description, or that the trade description had been applied to the goods or service.	It is for the defendant to prove any of the following defences: (a) When such goods came into the defendant’s possession, custody or control the defendant had good and sufficient reason to believe that the provisions of this Ordinance relating to the goods had been complied with. (b) The offence was committed without the defendant’s consent or connivance and that he took all reasonable steps to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions.	(Section 12) A person does not commit an offence if he proves that— (a) the discharge or deposit in question is an existing discharge or deposit in respect of which an application has been made and the prescribed application fee paid when required and the applicant has not been notified of a refusal to grant a licence; (b) the discharge or deposit in question is made under, and in accordance with, a licence / approval granted; (c) the discharge or deposit was made in an emergency in order to avoid danger to life or property and as soon as was reasonably practicable he informed the Authority thereof in writing; or (d) he acted under instructions given to him by his employer and he exercised the care and took the steps that the court, having regard to his position as an employee, considers reasonable in the circumstances to avoid the occurrence of the prohibited discharge or deposit.	Sufficient evidence should be adduced to raise any of the following issues, and the contrary is not proved by the prosecution beyond reasonable doubt: (a) that the defendant did not know and had no reason to suspect that the premises were an unlicensed hotel or guesthouse, or (b) that the defendant could not with reasonable diligence have prevented the premises from being an unlicensed hotel or guesthouse.

**Proposed “Strict Liability” Offence under the Hotel and Guesthouse Accommodation (Amendment) Bill 2018 –
Comparison with More Serious Offences**

The Ordinance	Dangerous Drugs Ordinance (Cap. 134)	Societies Ordinance (Cap. 151)	Crimes Ordinance (Cap. 200)	Proposed section 5A of the Hotel and Guesthouse Accommodation (Amendment) Bill 2018
Relevant provision	Section 4	Section 19	Section 122	Proposed new section 5A
The offence	Trafficking in dangerous drug	Being an office-bearer of a triad society	Indecent assault	The owner and tenant of unlicensed hotel or guesthouse
Maximum penalty upon conviction	A fine of \$5,000,000 and imprisonment for life (on conviction on indictment), or a fine of \$500,000 and imprisonment for 3 years (on summary conviction)	A fine of \$1,000,000 and imprisonment for 15 years	Imprisonment of 10 years	A fine of \$500,000 and imprisonment of 3 years (on conviction on indictment), or a fine of \$200,000 and imprisonment for 2 years (on summary conviction)
Level of proof	Proof of full <i>mens rea</i> required	Proof of full <i>mens rea</i> required	Strict liability offence (in respect of whether the alleged victim was under the age of 16)	Strict liability offence
Defence available to the defendant	Not applicable. No defence is expressly provided because the prosecution has to prove the <i>mens rea</i> .	Not applicable. No defence is expressly provided because the prosecution has to prove the <i>mens rea</i> .	Burden on the defendant to prove that he/she had an honest and reasonable belief that the person was 16 years old or above (A common law defence according to <i>HKSAR v Choi Wai Lun</i> (2018) 21 HKCFAR 167).	Sufficient evidence should be adduced to raise an issue that the defendant did not know and had no reason to suspect that the premises were an unlicensed hotel or guesthouse, or could not with reasonable diligence have prevented the premises from being an unlicensed hotel or guesthouse, and the contrary is not proved by the prosecution beyond reasonable doubt.