

民政事務總署

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15 January 2019

Ms Vanessa Cheng
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Legal Service Division
Legislative Council Secretariat
1 Legislative Council Road
Central, Hong Kong

Dear Ms Cheng,

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

Thank you for your letter dated 5 November 2018 ref LS/B/24/17-18. Our replies to the questions raised are set out in the ensuing paragraphs.

Offence of Operating Unlicensed Hotel and Guesthouse [Clause 9 of the Bill]

(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. In criminal law, strict liability offences refer to offences in which criminal liability is imposed upon proof of the proscribed act or circumstances, i.e. 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). “Absolute liability” is a type of “strict liability”, which means that the prosecution succeeds if the prohibited act or omission is proved against the accused and *no defence*, either introduced explicitly by statutes or implied by the common law, is available.

3. Whether or not an offence is one of strict liability (including absolute liability) depends primarily on the construction of the relevant statutory provisions. In *HKSAR v Chui Shu Shing* (2017) 20 HKCFAR 333, the Court of Final Appeal held that the words in the collocation “operates, keeps, manages or otherwise has control of” in the offence under the existing section 5 of the Hotel and Guesthouse Accommodation Ordinance (Cap. 349) (“HAGAO”) are used as species of the genus “has control of”. The concept of “manage”, like each of the terms in the collocation, incorporates the idea of authority over that which is managed. It does not extend to a person who carries out essentially non-discretionary functions under the direct supervision of another on the premises (e.g. someone who is merely processing guests in and out of the premises).

4. The same interpretation is applicable to the new section 5 which employs the same collocation. In other words, there is an implied mental element in the collocation, as a person cannot be said to have control of or exercise authority over the premises that are a hotel or guesthouse unless the person intentionally or knowingly has control of or exercises authority over the hotel or guesthouse as such. The burden is on the prosecution to prove such intention or knowledge. Therefore, liability for the offence under the new section 5(1) is not strict in respect of the element “operates, keeps, manages or otherwise has control of”.

(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).*

5. As for the defence, the new section 5(3) is similar to the existing section 5(3). They are both clear to the effect that it is not a defence for a defendant to say that the defendant did not know that no licence was in force in respect of the premises. Given its clear wording, section 5(3) displaces any common law defence of honest and reasonable belief that a licence was in force in respect of the premises. Liability for the offence under the new section 5(1) is absolute in respect of knowledge that a licence was in force.

6. The “no defence provision” in section 5(3) is fully justifiable. The licensing regime is a fundamental element of the whole statutory regime concerning regulation, control and safety of hotel and guesthouse accommodation. An operator or manager of a hotel or guesthouse has the responsibility to ensure that a licence is in force in respect of the hotel or

guesthouse concerned. In practice, it would also be inconceivable for a person who operates, keeps, manages or otherwise has control of premises that are a hotel or guesthouse not to have any knowledge about whether a licence is in force. Furthermore, as it is a licensing condition that the licence must be displayed in the premises and the names of licensed hotels and guesthouses are readily available on the website of the Office of the Licensing Authority (“OLA”), a person who operates, keeps, manages or otherwise has control of the hotel or guesthouse must be in a position to ascertain whether a licence is in force.

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

7. From the land law perspective, a tenancy is different from a licence in that a tenant is given a right to exclusive possession of the leased premises while a licence is not. Therefore, the term “tenant” in section 5A(5) may include a sub-tenant but not a licensee. The definition of “tenant” in section 5A intends to exclude a bona fide guest of a hotel or guesthouse who, although quite unusually, is granted a right to exclusive possession only because sleeping accommodation is being provided.

Hotel Licence and Guesthouse Licence [Clause 11 of the Bill]

(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).*

8. The new section 12A(2) aims to provide express legislative basis for the current administrative measures adopted by the Hotel and Guesthouse Accommodation Authority (including his delegated authority) (“the Authority”) since December 2015. Under the existing administrative measures, the four different types of licences respectively cater for (1) hotels and three types of guesthouses, namely (2) guesthouses in general, (3) holiday camps and (4) holiday flats. Such classification aims to enhance transparency and provide clearer guidance to operators of different types of hotel / guesthouses.

9. Hotels are normally premises of which the building plans are approved for “hotel use” by the Building Authority under the Buildings Ordinance (Cap. 123). Other premises providing sleeping accommodation for persons willing to pay a reasonable sum are generally regarded as guesthouses. Guesthouses are classified into three subcategories based on the types and locations of the guesthouses –

- (a) “guesthouse (general)”: premises located in domestic buildings or the domestic part of a building;

- (b) “guesthouse (holiday camp)”: premises located within camp sites; and
- (c) “guesthouse (holiday flat)”: premises located in village type houses in the New Territories of which the Lands Department has no objection to the proposed use in writing.

10. While all premises have to meet the requisite building and fire safety standards, the technical requirements (which are translated into licensing requirements and conditions) vary from case to case, depending on the type, size, etc. of the premises. For example, premises with a floor area larger than 230 m² (as in the case for hotels) will be required to provide automatic sprinkler systems; while those “smaller” premises may only be required to provide a sufficient number of fire extinguisher(s). General licensing requirements / conditions for different types of premises have been uploaded online at <https://www.hadla.gov.hk/en/related/index.html>.

11. Specifically for hotels, the Authority will also make sure that the subject premises are in compliance with the conditions set out in the approved building plans. These conditions are generally more stringent than those applicable to guesthouses, taking into account the scale and operation mode of hotels. For example, they may include conditions not only relating to building and fire safety, but also other aspects, such as traffic and environmental impact. These conditions may include, but are not limited to, the provision of a centralised hot water supply system, a central air-conditioning system, adequate parking / loading and unloading facilities.

(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.

12. The restriction does not cover terms meaning “hotel” or “酒店” in a language other than Chinese and English, as these two languages are the official languages of Hong Kong for the purposes of communication between the Government and the public. We only accept application(s) for hotel or guesthouse licence(s) submitted in official language(s), i.e. either in Chinese or English. Accordingly, an applicant has to indicate the business name of the premises concerned in Chinese and / or English.

(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.

13. We prohibit a licensed “guesthouse” from calling itself a “hotel”, so as to prevent the former from misleading customers / guests that it is a hotel, whilst it has not met the more stringent requirements of a hotel as set out in paragraphs 9-11 above. Yet, we do not prohibit the vice versa, given that a hotel, by having met the more stringent requirements, would invariably have already met the requirements of a guesthouse. Indeed, a hotel would have exceeded the requirements of a guesthouse.

Licence Requirement: No-use Restriction Requirement [Clause 11 of the Bill – new section 12J]

(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.

14. The Building Authority will consult the Lands Department on the compliance with the Government lease when considering the issuance of the occupation permit for a new building under the Buildings Ordinance (Cap. 123). In other words, the uses specified in the occupation permit will not deviate from the permitted uses under the Government lease. It is therefore unnecessary to consider the occupation permit on top of the Government lease.

(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.

15. The restrictive provisions in most DMCs/land leases are straightforward and offer little room for interpretation. In a licence application under Cap. 349, the Authority may pursuant to the new section 12O(2)(b) require an applicant to provide a written advice by a legal practitioner stating that the premises concerned are free from a use restriction within the meaning of section 12J. The advice is however not necessarily conclusive depending on the circumstances of each individual case. For example, in cases where a contradictory advice is given by another legal practitioner (say, provided by an affected person), the Authority may ask either or both parties for further justifications and may seek the advice of the relevant bureaux/departments as appropriate.

(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.

16. A restrictive provision is defined in the new section 12J(3) as, among others, "an express provision *to the effect* that the part is prohibited from being used as a hotel or guesthouse". In other words, whether a provision in a DMC / Government lease would be regarded as a restrictive provision would depend on whether it prohibits any uses falling within the definition of hotel or guesthouse as defined in the new section 2A. The use of the exact word of "hotel" or "guesthouse" in the provision is not a pre-requisite.

Licence Requirement: Fit and Proper Requirement [Clause 11 of the Bill – new section 12L]

(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).

17. Under the new section 12L(2)(b), a conviction resulting in a sentence of imprisonment for over 3 months is one of the factors that the Authority must consider, but not a factor automatically debarring an applicant from being considered as a fit and proper person to operate, keep, manage or otherwise have control of a hotel or guesthouse. We will lay out in the administrative guidelines more details on how such factors will be considered, as well as other discretionary ground(s) that the Authority may consider.

(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.

18. The sentence referred to in the new section 12L includes a suspended sentence. We consider it unnecessary to state this explicitly because by virtue of section 109B(5)(a) of the Criminal Procedure Ordinance (Cap. 221), subject to any provision to the contrary, a suspended sentence shall be treated as a sentence of imprisonment for the purposes of all Ordinances except any Ordinance which provides for disqualification for or loss of office, or forfeiture of pensions, of persons sentenced to imprisonment. The exception in section 109B(5)(a) of Cap. 221 does not apply to the new section 12L because section 12L(2)(b) does not provide for disqualification for or loss of office of any of the related persons referred thereto. Furthermore, the conviction referred to in section 12L(2)(b) is only one of the matters which the Authority must have regard to when considering whether a person is a fit and proper person for the purpose of a licence application under Cap. 349.

(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.*

19. The factors for considering whether a person is a “fit and proper person” for the purpose of any particular licensing scheme under each individual Ordinance may vary depending on the relevant aims and objects of such Ordinances. The factors listed in the new section 12L(2) are factors that the Authority must have regard to when considering whether a person is a fit and proper person to operate, keep, manage or otherwise have control of a hotel or guesthouse. More importantly, it should be noted that the new section 12L(2) does not prohibit the Authority from considering other relevant factors as and when appropriate. We will set out in the administrative guidelines more details.

(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.

20. An “office holder” of an unincorporated body is a person who holds an office within the unincorporated body. Who is to be regarded as holding an office of an unincorporated body (as opposed to mere employment or other capacities) will depend on the facts of individual cases. Reference may be made to the governing document (e.g. constitution, partnership agreement) in ascertaining the offices within the unincorporated body.

21. The term “office holder” has also been used in other legislation without a definition (e.g. section 20(2)(b) of the Trade Descriptions Ordinance (Cap. 362), section 6(2)(b) of the Pyramid Schemes Prohibition Ordinance (Cap. 617) and section 30(2)(b) of the Cross-boundary Movement of Physical Currency and Bearer Negotiable Instruments Ordinance (Cap. 629)). We do not think it necessary to define the term in the Bill.

Consideration of Views of Affected Persons [Clause 11 of the Bill – new section 12N]

(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.

22. Our intention is for the advisory panel to be composed of people of various experience and expertise, e.g. trade representatives and practitioners from the legal, surveying and engineering professions, as well as persons with experience in local / community services. More details will be set out in administrative guidelines to be promulgated.

(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?

23. We are still working out the details of the local consultation with reference to similar practices of other licensing authorities. For example, in the context of application for planning permission under the Town Planning Ordinance (Cap. 131), the Town Planning Board will publish the applications for public viewing, through, among others, a notice to the Owners' Corporations or other committees of the buildings within 100 feet from the boundary of the application site. More details will be set out in administrative guidelines to be promulgated.

(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.

24. An appeal mechanism is already in place under the new section 17A. Any person, including owner(s) or occupier(s) of any other premises situated in the surrounding area, who is aggrieved by the decision of the Authority for granting or renewing the licence, may appeal against the decision.

Duty of the Authority to Give Notices of Certain Intentions or Decisions [Clause 11 of the Bill – new section 12P]

(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.

25. The new section 12P(1) provides for the giving of notice of the Authority's *intention* to exercise a power that would affect the existing or future status of an existing licence. The new section 12P(3), on the other hand, provides for the giving of notice of the fact that the Authority *has made a decision* to exercise a power in respect of a licence (whether existing or new). Given that the intended decision to which section 12P(1) relates may have adverse effect on the existing operation of a licensed hotel or guesthouse, the existing licensee is therefore provided with an opportunity to make written representations to the Authority. On the other hand, anyone aggrieved by a decision to which section 12P(3) relates may appeal against the decision in accordance with the appeal mechanism under the new section 17A.

Appeal Board Panel [Clause 13 of the Bill – new section 17B]

(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).

26. Anyone who is not a public officer is eligible to be appointed as members of the appeal panel. Following the existing practice, our intention is

that the appeal board panel will be composed of people of various experience and expertise, e.g. practitioners from the legal, surveying and engineering professions, persons with experience in local / community services, etc.

Hearing of Appeal by Appeal Board [Clause 13 of the Bill – new section 17D]

(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.

27. The new section 17D(6) provides for two stages for determining a question other than a question of law by voting: first, by a majority of all members of the board (which includes the Chairperson, as stated in the new section 17D(2)) who are voting (see section 17D(6)(a)); and second, if there is an equality of votes, by a casting vote of the Chairperson (see section 17D(6)(b)). It is clear from the above that the Chairperson has both an original vote in the first stage and a casting vote in the second stage (if there is an equality of votes in the first stage, e.g. when a member abstains). We therefore consider that no amendment is required.

(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.

28. An appeal board has to exercise its power reasonably and fairly having regard to all relevant circumstances of the case involved. It is therefore unlikely that an appeal board would insist that the person shall produce a document which is not in the person's possession, under the person's control or is not relevant to the appeal. The new section 17G(1)(b)(ii) has specified that refusing to produce a document by a witness may be certified as an alleged contempt only when that document is in that person's power or control and is legally required by the board to be produced.

(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.

29. Both the privilege against self-incrimination and the legal professional privilege are enjoyed by all persons under any circumstances unless abrogated by statute. Since the Bill contains no such abrogation, the appellant would be entitled to both privileges regardless of whether the appellant gives evidence. In the context of this Bill, if the appellant gives evidence in the appeal, the appellant will be entitled to the same privileges and immunities as other witness(es) as set out in the new section 17D(11).

(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.

30. Contempt under the new section 17G is the only legal consequence provided in the Bill.

(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.

31. The appeal board may make any other order it considers appropriate, which may include reasonable compensation to the witness expenses, etc. The new section 17D(8)(f) is constructed as a general provision so to allow flexibility in the operation of the appeal board.

Inquiry of Contempt [Clause 13 of the Bill – new section 17G]

(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.

32. Such refusal will not be considered as contempt.

33. The new section 17D(11) states that a witness before an appeal board has the same privileges and immunities as if the witness were a witness in civil proceedings in the Court of First Instance. Such privileges and immunities include the entitlement to refuse to produce documents or answer questions that tend to incriminate himself or herself or on the ground of legal professional privilege.

(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).

34. Section 17G(1)(c) empowers the appeal board to certify a contempt for a conduct that would, if the appeal board had been a court of law having power to commit for contempt, have been contempt to that court. A witness knowingly making a false statement before a court, subject to relevant legal proof, is regarded as a contempt to that court. By the same token, the making of a false statement knowingly by a witness before an appeal board may subject to the available evidence be certified by the chairperson of the appeal board as an alleged contempt under the new section 17G(1)(c).

Warrant to Enter and Search Premises [Clause 16 of the Bill – new section 18A]

(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.

35. An enforcement officer authorised by a warrant issued under the new section 18A to enter and search any premises shall exercise his/her power reasonably and fairly having regard to all relevant circumstances of the case involved. Otherwise, such decision would be subject to legal challenge by way of judicial review. If the court does not specify the time in the warrant, it is then for the enforcement officer to take into account all relevant circumstances involved in the case (including the nature of the hotel and guesthouse business, which provides sleeping accommodation and operates 24 hours a day) to decide when the entry and search of the premises under the authorization of the warrant should be made. The decision (if made by the enforcement officer) as regards

the time of the entry and search shall be reasonable and fair. In this regard, we do not consider it necessary to spell out the “reasonable time” requirement in the provision.

Remedial Order [Clause 19 of the Bill – new section 20]

(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).*

36. Please see our response in paragraph 35 above.

(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.*

37. The new section 20(11) requires the person who operates, keeps, manages or otherwise has control of the hotel or guesthouse (“the operator”) to pay back debt due to the Government for expenses incurred because of the work executed to give effect to the remedial order (e.g. to remove the danger to guests in the hotel or guesthouse). The expenses incurred should be related to the operation of the licensed hotel or guesthouse by the operator. As the landlord or tenant may not be involved in the operation of the licensed hotel or guesthouse, it may be unfair to require them to be responsible for the payment of the expenses. That said, it is of course up to the operator to consider whether to pursue against the landlord or tenant in respect of the expenses incurred having regard to their contractual arrangement by reference to its tenancy agreement with the landlord or tenant.

Closure Order [Clause 20 of the Bill – new section 20A]

(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.*

38. The new section 21(6)(j) has specified that it is an offence for a person to enter or be in the premises when a closure order is in force without reasonable excuse.

Issue of Warrant to bailiff after Making Closure Order [Clause 20 of the Bill – new section 20B]

(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).

39. Please see our response in paragraph 35 above.

Rescission of Closure Order on Application [Clause 20 of the Bill – new section 20C]

(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), and (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.

40. Under the new section 20C(5)(a), the applicant should convince the court that the applicant did not know of the charge or the appeal. That the applicant could not with reasonable diligence and inquiries discover the existence of the charge or the appeal may be one of the applicant's arguments, but this should not be considered as a decisive and/or the only acceptable argument.

(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).

41. The new section 20C(5)(b) aims to protect the interests of an "interested person" as defined in the new section 20C(2) and (3). The court or magistrate will take into account the circumstances of each individual case when considering whether it would be unjust for the applicant's interest in the premises to be affected by the closure order. What constitutes "unjust" will be case-specific, and hence the legislation does not seek to limit or restrict the court's or magistrate's discretion by setting out what should be regarded as "unjust".

Rescission of Closure Order on Successful Appeal against Conviction [Clause 20 of the Bill – new section 20B]

(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?

42. The "another offence" as mentioned in the new section 20D(2)(b) refers to "another offence that the order could have been made". As it is stated in the new section 20A, a closure order may be made only for convictions of an offence under the new section 5 or 5A. In other words, "another offence" in the new section 20D(2)(b) refers to "another offence" under the new section 5 or 5A of Cap. 349.

Variation of Conditions of Suspension Order [Clause 20 of the Bill – new section 20F]

(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.

43. The purpose of the new section 20F(5)(b) is to cater for special cases and help protect the rights of a person who would be held liable if a condition of the suspension order is breached. Who such a person would be will depend on the actual terms of the condition concerned. In most circumstances, an "affected person" would be the mortgagee, chargee or the occupier of the premises.

Order and Notice to be Registered in Land Registry [Clause 20 of the Bill – new section 20J]

(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) above 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.*

44. It is expressly provided in the new section 20J(5) that a failure to register a copy of the order or the notice does not affect the validity of the order or notice as against any person. Hence, the order or notice would not be void as against any person, i.e. including a subsequent bona fide purchaser. In the case of a closure order, if a subsequent bona fide purchaser considers it unjust to be bound by the closure order, the purchaser may apply for rescission of the closure order under the new section 20C.

Offences in relation to Certificates of Exemption and Licences [Clause 23 of the Bill – section 21 amended]

(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.*

45. The new section 21(6)(a) is not intended to apply to the giving of false evidence or the production of false document(s) by a witness before an appeal board. Such a conduct however may be certified as an alleged contempt as provided in the new section 17G.

Liability of Partners, Office Holders, etc. of Unincorporated Bodies [Clause 25 of the Bill – new section 21C]

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

46. Please see our response in paragraphs 20 and 21 above.

Renewal under Section 12C [Clause 28 of the Bill – section 6 of new Schedule]

(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.*

47. Under section 3(1)(b) of the new Schedule, the former Part IV applies in relation to an old regime licence. Section 6(1) of the new Schedule enables the renewal of an old regime licence under the new section 12C by stating that the new Part 4A, in so far as it relates to the renewal of the licence would be applicable to that old regime licence for the purposes of the renewal. However, as the licence is, in other respects, still an old regime licence, some parts of the new Part 4A relating to matters other than renewal that are applicable to a new regime licence should not apply in relation to the old regime licence. Section 6(1)(a), (b) and (c) aims to exclude such parts (e.g. the new section 12O on the Authority's power to request documents, information and legal advice; and the new section 12P on the duty of Authority to give notices of certain intentions or decisions).

Further Particulars [Clause 31 of the Bill – new regulation 5 of Cap. 349A]

(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.

48. This provision is introduced to cater for situations in which the requested party does not have the requested information. Under the new regulation 5(5), what amounts to "reasonable grounds" is to be considered against the context having regard to the fact and circumstances of each individual case, and the legislation does not seek to limit or restrict the relevant authority's discretion by setting out what should be regarded as "reasonable grounds".

Failure of Appellant to Attend Hearing [Clause 34 of the Bill – new regulation 12 of Cap. 349A]

(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.

49. A body corporate is a legal person who has to act through an authorised person. It is our policy intent to regard a body corporate as attending an appeal hearing in person if one of its directors attends the hearing as its authorised representative.

Failure of Appellant to Serve Notice of Appeal, etc. [Clause 34 of the Bill – new regulation 13 of Cap. 349A]

(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.*

50. It is not necessary to provide for an exception because under the new regulation 13, the appeal board has the discretion on how to deal with non-compliance of the new regulations 4(1) and 5(3) and it is not mandatory for the appeal board to dismiss the appeal.

Service of Notices and Other Documents [Clause 36 of the Bill – new regulation 15 Cap. 349A]

(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*

51. In the general context of civil procedure in court, according to the Hong Kong Civil Procedure 2018, service to a “last known” address means the address known to the plaintiff. Hence, it is the knowledge of the plaintiff that matters. If a person to be served with the notice is a body corporate, the last known address may include its registered office or a place at which the body corporate carries on business, depending on what is known to the plaintiff. The essence is a location where the person/the body corporate may be reached or where contact or communication in written form could be established.

52. In the context of an appeal board under Cap. 349, the new regulation 15(b) of Cap. 349A, which refers to the address “last known to the sender”, reflects the similar approach. In the absence of other information known to the sender, the last known address of an appellant could be the address provided by the appellant in the notice of appeal, while the last known address of a witness could be the address provided in the application for summons to witness submitted by a party to an appeal.

(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.

53. Regarding the service of notices and other documents by registered post under the new regulation 15(b) of Cap. 349A, section 8 of the Interpretation and General Clauses Ordinance (Cap. 1) provides, among other matters, that unless the contrary is proved, the service of notices and documents by registered post shall be deemed to have been effected at the time at which the notice or document would be delivered in the ordinary course of post. It is therefore unnecessary to make further provisions in the Bill.

Failure of Appellant to Serve Notice of Appeal, etc. [Clause 34 of the Bill – new regulation 13 of Cap. 349A]

(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.

54. The forms may be modified from time to time having regard to practical experience. Specifying the forms under Cap. 349A does not allow flexibility for making immediate enhancement to the forms.

Yours sincerely,



(Miss Grace Li)
for Director of Home Affairs

cc. Department of Justice (Attn: Mr Peter Sze)
Clerk to Bills Committee