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26 March 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 12 March 2019 ref CB2/BC/5/17.
Our replies to the questions raised are set out in the ensuing paragraphs.

(a) justifications for providing in administrative guidelines (instead of spelling out clearly in legislation) certain factors for considering whether a person was a fit and proper person to operate, keep, manage or otherwise have control of a hotel or guesthouse under the proposed new section 12L, and examples of legislation having similar arrangements for the fit and proper requirements in respect of licensing requirement;

2. The new section 12L(1) empowers the Authority to consider whether a person is a fit and proper person to operate, keep, manage or otherwise have control of a hotel or guesthouse. The new section 12L(2) lists the factors that the Authority **must** consider in determining whether the person is a fit and proper person. The list of factors in the new section 12L(2) is not exhaustive and does not preclude the Authority from considering other factors as appropriate. These factors, and how the factors would be considered, will be promulgated in administrative guidelines in due course. Such arrangements

offer flexibility to better cope with the needs of an evolving society and business market.

3. Similar arrangements have been adopted in some other well-established regulatory regimes, including those under the Securities and Futures Ordinance (Cap. 571), the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615) and the Estate Agents Ordinance (Cap. 511).

(b) information on the circumstances under which a warrant was or was not required for conducting searches and inspections of hotels/guesthouses;

4. Hitherto, officers of the Office of the Licensing Authority (OLA) have been relying on the existing section 18 to conduct searches and inspections of hotels/guesthouses. The existing section 18 empowers any public officer authorised by the Authority to, without warrant at all reasonable time, enter and inspect any hotel, any guesthouse or any premises which the Authority has reason to suspect are used as a hotel or a guesthouse. It does not specify whether the hotel or guesthouse has to be licensed. It also does not empower the use of reasonable force for gaining entry into the subject premises. According to actual operational experience, it is difficult to rely on this provision to gain entry into suspected unlicensed premises, because the owners or occupants are often uncooperative in allowing entry of our officers.

5. In order to facilitate enforcement actions, we have proposed a new section 18A in the Bill, which empowers the Authority to apply to the court for a search warrant to allow enforcement officers to enter into, or break into, with reasonable force when necessary, and search (i) a suspected unlicensed hotel or guesthouse, or (ii) licensed premises where a contravention of a licence condition or an offence under the Ordinance is suspected and entry by an enforcement officer under section 18 has been refused.

6. With the introduction of the new section 18A to deal with the above circumstances, the existing section 18 is replaced by a new section 18, under which the powers of entry and inspection without warrant are limited to licensed premises only.

(c) information on how affected persons (i.e. operators, landlords and/or tenants of hotels/guesthouses) (“affected persons”) would be informed of the applications of closure orders, the procedures involved in the making of the application of closure orders (in particular, if the application was made at any time which was subsequent to the date when the second conviction had been made by the court) and after the closure orders had been made by the court and the legal right, if any, afforded to such affected persons to enable them to contest the application of closure orders or closure orders made by the court to ensure due process;

(d) a response to the suggestion of providing provisions in the Hotel and Guesthouse Accommodation (Amendment) Bill 2018 to ensure that affected persons would be informed of the applications of closure orders and the closure orders made against them;

7. The Bill empowers the Authority to apply to the court, upon the second conviction within 16 months of the offence of operating an unlicensed hotel or guesthouse or the new strict liability offence (“specified offence”) in respect of the same premises, to issue a closure order for the premises for six months. Affected persons will be informed of the possible application of a closure order by virtue of the following –

- (a) New section 5B(1) requires notices relating to specified offences, including (i) the laying or withdrawal of a charge against a person for a specified offence and (ii) the conviction or acquittal of a person of a specified offence, to be registered in the Land Registry; and
- (b) New section 20A(3) requires the Authority to affix a notice in English and a notice in Chinese to a conspicuous part of the premises within 14 days after the conviction of a specified offence. The notice must include a statement to the effect that a closure order may be made in respect of the premises if any person commits and is convicted again a specified offence in respect of the premises. The compliance with this procedural requirement is one of the prerequisites which the court has to be satisfied for making a closure order.

8. Apart from the procedural requirements in the new section 20A(3), the new section 20A(6) requires the court to disregard a closure order when sentencing the convicted person. Accordingly, an application for a closure order has to be made in the relevant criminal proceedings as soon as the court convicts the defendant and before the sentence is passed.

9. After a closure order is made, the new section 20B(1)(a) requires a copy of the order to be affixed to a conspicuous part of the premises, while the new section 20J(2)(b) requires a copy of the order to be registered in the Land Registry. To contest a closure order made by the court or a magistrate, an

interested person¹ would be able to apply for rescission of the closure order under the new section 20C, while an affected person² would be able to apply for suspension of the closure order under the new section 20E.

10. The mechanism relating to closure orders, with provisions enabling interested persons and affected persons to (i) be informed of possible application of a closure order by notices registered in the Land Registry and notices affixed to the premises; and (ii) contest a closure order made by the court by making applications for suspension or rescission, which have to be determined by a court hearing, viewed as an entire process, complies with the requirement of due process safeguarding an individual's right to a fair and public hearing.

(e) justifications for setting the time frame at within 16 months in the proposed new section 20A(2) between the previous conviction and the commission of the offence leading to the present conviction in respect of the same premises in considering making a closure order on application;

11. The closure order procedure seeks to protect public safety by preventing the continued operation of unlicensed hotel or guesthouse at the subject premises. Repeated commission of the specified offences gives rise to reasonable grounds to believe that there is such a continued operation, and therefore constitutes the basis of an application for a closure order. On the other hand, due regard should be paid to the rehabilitation of offenders, and we consider that the burden of a previous conviction should not be carried indefinitely in the present context. Accordingly, the possible consequence resulting from a previous offence should lapse after a certain period of time.

¹ Pursuant to the new sections 20C(2) and (3) –

“(2) A person is an interested person for any premises if the person becomes a purchaser, mortgagee or chargee in good faith for valuable consideration of an interest in the premises (*bona fide purchaser*) –

(a) after the date on which a notice about the previous conviction within the meaning of section 20A was registered under section 5B(1); and
(b) before the date on which a notice about laying of the charge resulting in the present conviction was registered under that section.

(3) A person is also an interested person for any premises if the person becomes a bona fide purchaser of the premises –

(a) after the date on which a notice about the quashing of the present conviction on appeal (acquittal) was registered under section 5B(1); and
(b) before the date on which a notice about an appeal against the acquittal was registered under that section.”

² Pursuant to the new section 20E(9), “affected person, in relation to a closure order made in respect of any premises, means –

(a) a person who is a mortgagee or chargee of the premises; or
(b) a person who would, if the premises were not closed because of the order –
(i) be entitled or permitted to occupy or possess the premises; or
(ii) be the immediate landlord of the occupier of the premises.”

This is similar to the concept of “spent conviction”, i.e. as if an offender had not been convicted previously. Accordingly, we consider it appropriate to set a time period after which a previous conviction will cease to have effect to trigger an application for a closure order. Moreover, the ownership or tenancy of the subject premises may be transferred from time to time. In view of the above factors, we believe that a period of 16 months is an appropriate time period in this context.

(f) justifications for setting the closure period of the premises subject to a closure order at six months in the proposed new section 20A(5);

12. The introduction of a closure order mechanism serves two main purposes, i.e. to (i) better protect public safety and (ii) strengthen deterrence against the operation of unlicensed hotels and guesthouses which pose safety risks and nuisance to the neighbourhood. We have therefore made reference to other regulatory regimes with similar purposes, in particular the Fire Services (Fire Hazard Abatement) Regulation (Cap. 95 sub. leg. F) and the Crimes Ordinance (Cap. 200).

13. The closure of premises where there is illegal possession of a controlled substance under Cap. 95F aims at removing fire hazards and ensuring public safety, whereas the closure of vice establishments under Cap. 200 aims at strengthening deterrence to the occupiers or operators of the premises and lessening nuisances to members of the public that vice activities may cause. The closure periods under both regimes are six months. We consider it appropriate to set the closure period in the new section 20A(5) as six months as well.

(g) justifications for setting the effective period of suspension orders at not more than two years in the proposed new section 20E(5).

14. A closure order is not regarded as a form of sentence. Nevertheless, in setting the effective period of suspension orders, we have made reference to section 109B(1) of the Criminal Procedure Ordinance (Cap. 221), which provides that a court may suspend a sentence of imprisonment for a term of not more than two years for one to three years.³ At the same time, we are mindful

³ Section 109B(1) of the Criminal Procedure Ordinance (Cap. 221) states that –
“A court which passes a sentence of imprisonment for a term of not more than 2 years, other than an excepted offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than 1 year nor more than 3 years from the date of the order, the offender commits in Hong Kong another offence punishable with imprisonment and thereafter a court having power to do so orders under section 109C that the original sentence shall take effect.”

that hanging suspension orders over the subject premises for too long may put an unfair and excessive burden on the affected persons.

15. For these reasons, we believe a suspension period of not more than two years is appropriate, and can strike a balance between deterring future offences and protecting the interests of the affected persons.

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)