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**Report of the Bills Committee on
Hotel and Guesthouse Accommodation (Amendment) Bill 2018**

Purpose

This paper reports on the deliberations of the Bills Committee on Hotel and Guesthouse Accommodation (Amendment) Bill 2018 ("the Bill").

Background

2. Operation of hotels and guesthouses in Hong Kong is regulated by the Hotel and Guesthouse Accommodation Ordinance (Cap. 349) ("HAGAO"), which was enacted in 1991. Under HAGAO, any person who operates, keeps, manages or has control of a hotel or guesthouse has to obtain a licence issued by the Hotel and Guesthouse Accommodation Authority, i.e. the Secretary for Home Affairs ("the Authority"), unless the hotel or guesthouse is exempted by the Hotel and Guesthouse Accommodation (Exclusion) Order (Cap. 349 sub. leg. C). Under the current licensing regime, the Authority may rely on section 8(3) of HAGAO¹ to refuse to issue a licence in respect of a hotel or guesthouse for reasons connected with the situation, structure or safety of the premises

¹ Under section 8(3) of the Hotel and Guesthouse Accommodation Ordinance (Cap. 349) ("HAGAO"), the Authority may refuse to issue a licence in respect of a hotel or a guesthouse on the ground that it appears to him – (a) that for reasons connected with - (i) the situation, means of ingress or egress, design, construction, size, equipment, or type of building; or (ii) the protection of life and property under the Fire Services Ordinance (Cap. 95), the premises to be used for the hotel or the guesthouse are not fit to be used for the purposes of a hotel or a guesthouse; (b) that such premises do not comply with any requirement relating to design, structure, fire precautions, health, sanitation and safety set out in the Buildings Ordinance (Cap. 123); or (c) that the operation, keeping, management and other control of the hotel or guesthouse would not be under the continuous and personal supervision of the person to whom the licence is issued.

concerned. However, there is no express provision empowering the Authority to refuse to issue a licence in respect of a hotel or guesthouse for reasons (such as failing to comply with any deed of mutual covenant ("DMC") or the Government lease provisions of the premises concerned) other than those stated in section 8(3) of HAGAO. Any person who operates an unlicensed hotel or guesthouse commits an offence and is currently liable on summary conviction to a fine of \$200,000 and to imprisonment for two years, and to a daily fine of \$20,000 during which the offence continues.

3. According to the Administration, to address public concerns arising from a fire incident in 2013 which caused casualties in a guesthouse in a building with the DMC prohibiting hotel or guesthouse operation, the Home Affairs Department ("HAD") published a consultation paper in July 2014 to gauge public views on the proposed measures to enhance the existing licensing regime and facilitate enforcement actions against unlicensed hotels and guesthouses. The Administration has introduced the Bill to implement the proposals put forth in the consultation paper with a view to improving the existing licensing regime, and facilitating enforcement actions and enhancing deterrence against unlicensed hotels and guesthouses.

The Bill

4. The Bill was published in the Gazette on 6 July 2018 and received its First Reading at the Council meeting of 11 July 2018. It mainly seeks to:

- (a) improve the existing licensing regime by empowering the Authority to take into account the new factors as provided in the proposed new Part 4A, in particular, no-use restriction requirements, suitability and operational requirements,² fit and proper requirements and views of affected persons, in considering various licensing matters; and provide for a differentiation between a "hotel licence" and a "guesthouse licence";
- (b) facilitate enforcement actions against unlicensed hotels and

² The suitability and operational requirements largely reflect the existing requirements under HAGAO, relating to (a) compliance of the structure, types of building, sanitation, safety or management requirements etc. specified in the Fire Services Ordinance and the Buildings Ordinance; (b) non-contravention of any provision of HAGAO; and (c) compliance with all the requirements, orders and directions made under HAGAO.

guesthouses by empowering the Authority to apply for search warrants to enter and search any premises that are used as a (licensed or suspected to be unlicensed) hotel or guesthouse (the proposed new section 18A) and to apply to a court or magistrate for closure of premises in particular cases (the proposed new section 20A); and

- (c) enhance deterrence by enabling the offence of operating unlicensed hotel or guesthouse to be prosecuted on indictment with higher penalties (to a fine of \$500,000 and imprisonment for three years and in the case of continuing offence, to a further daily fine of \$20,000) in addition to the summary offence under HAGAO, and creating a new offence against owners and tenants of premises used as a hotel or guesthouse while no licence is in force for the premises (the proposed new sections 5 and 5A).

5. The Bill also seeks to amend HAGAO by replacing the existing Part V with a new Part 5A to provide for an updated appeal system for appeals against the decisions of the Authority under the enhanced licensing regime. Under the updated appeal system, the existing single Appeal Board would be replaced by multiple appeal boards formed by the Convenor (from members of an appeal board panel appointed by the Chief Executive) to hear separate appeals (the proposed new section 17D).

6. The Bill further seeks to provide for transitional and saving arrangements by adding a new Part 8 and a new Schedule to HAGAO. A transitional period of 12 months, beginning on the date on which the Amendment Ordinance comes into operation ("commencement date"), is proposed under the Bill. There are also provisions in the Bill dealing with applications for licences and appeals against decisions of the Authority etc. made/lodged before the commencement date.

7. The Bill proposes miscellaneous provisions to update the provisions in HAGAO about miscellaneous offences, and to facilitate the administration and enforcement of HAGAO under the enhanced licensing regime. Related amendments to other enactments are also proposed in the Bill.

8. The Bill, if passed, would come into operation on a day to be appointed by the Secretary for Home Affairs by notice published in the Gazette.

The Bills Committee

9. At the House Committee meeting on 5 October 2018, Members agreed to form a Bills Committee to study the Bill. The membership of the Bills Committee is in **Appendix I**. Under the chairmanship of Hon YIU Si-wing, the Bills Committee has held five meetings with the Administration and received views from 38 deputations/individuals at one of its meetings. A list of deputations/individuals which/who have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

10. While members in general have no objection to the legislative proposals put forward in the Bill, they have expressed concerns on various issues, in particular the impact of the proposed amendments to HAGAO on the development of home-stay lodging, the introduction of the strict liability offence, the validity periods of licences and the new licensing requirements. Members also note the views of many deputations on the need to step up regulation and enforcement against unlicensed hotels or guesthouses, which cause safety, hygiene and security concerns and serious nuisance to the community. Details of the Bills Committee's major deliberation are set out in the ensuing paragraphs.

Home-stay lodging

11. Some deputations giving views to the Bills Committee have expressed concern that the proposed amendments to HAGAO may impede the development of home-stay lodging. Some members, including Mr Charles MOK and Mr Alvin YEUNG, have shared their concern. Given that there is a four-year gap between the public consultation on the review of HAGAO and the introduction of the Bill, Mr MOK and Mr YEUNG take the view that the proposed amendments to HAGAO might be outdated and might hamper new business models of sharing economy. They have further questioned whether the Administration has taken into account the operation of home-stay lodging in drafting the Bill.

12. While welcoming the improvements to the existing licensing regime, Mr Paul TSE considers that the Administration should also address the concerns of various stakeholders and balance their interests so as to keep up with the new tourism trend of home-stay lodging.

13. Mr SHIU Ka-fai and some other deputations giving views to the Bills Committee take the view that home-stay lodging should also be

regulated by the licensing regime so as to safeguard the safety of local residents and minimize the inconvenience caused to them. Mr YIU Si-wing has stressed that while the Bill can safeguard the interest of operators of licensed hotels/guesthouses, it should not affect the development of the hotel/guesthouse sector.

14. The Administration has advised that it has taken into account the operation of various types of hotels and guesthouses, including those operating in the mode of home-stay lodging, in formulating the proposals in the Bill. The Bill should be able to strike a balance between facilitating the development of a new economy and safeguarding the interest and safety of the public. A licence may be applied for any premises for lawful operation of a hotel or guesthouse, including premises operating in the mode of home-stay lodging, provided that the premises comply with the fire and building safety requirements proportionate to the scale and mode of operation of the premises and other requirements of the proposed licensing regime. In other words, these requirements have all along been imposed on the subject premises flexibly having regard to the circumstances of each case, i.e. the requirements are contextualized and "tailor-made" for each premises. The Administration has further advised that guesthouse (holiday flat) licences have been issued to village-type houses in the New Territories which operate in the mode of home-stay lodging. The licensing requirements/conditions for holiday flats are relatively less restrictive when compared with other types of guesthouse licences, and the procedures for application for such licences have been simplified in recent years.

15. Some members, including Mr Paul TSE, Mr Charles MOK and Mr Alvin YEUNG, have urged the Administration to make reference to the regulatory systems for home-stay lodging in some other places outside Hong Kong and introduce a separate regulatory regime for home-stay lodging. Mr MOK considers that a clear regulatory system will help solve the problems associated with the operation of home-stay lodging. Having reviewed the regulatory regimes for home-stay lodging in some other places outside Hong Kong, the Administration has responded that the regulatory regimes of home-stay lodging and other forms of short-term rental sleeping accommodation vary in different jurisdictions depending on the overall environment and living conditions, without any uniform standard. While there is a dedicated regulatory regime on home-stay lodging in some places, the Administration notes that home-stay lodging is not popular or is even prohibited in some other places. The Administration has further advised that both the existing and the proposed regulatory regimes of HAGAO do not preclude home-stay lodging. The existing and proposed regimes in Hong Kong are in line with global trend

and approach. As the existing regime is already flexible enough to cater for different types of hotels and guesthouses, including home-stay lodging, the Administration maintains the view that a separate regime for home-stay lodging is not necessary.

16. Mr Alvin YEUNG has further expressed the view that the Administration's stance on home-stay lodging might not help the development of various business models for tourist accommodation in Hong Kong. He has called on the Administration to introduce more measures to facilitate the operation of home-stay lodging in the long run. Mr Charles MOK has also stressed that the Administration should balance the interests of various stakeholders and encourage the tourism trade to keep up with the global trends in home-stay lodging. The Administration has undertaken to keep in view the development of tourism accommodation, including home-stay lodging, in Hong Kong, and the global trends in this regard.

Strict liability offence

17. Clause 9 of the Bill seeks to amend HAGAO by repealing Part II of HAGAO and substituting with a new Part 2 to:

- (a) enable the offence of operating unlicensed hotel or guesthouse under the proposed new section 5 to be prosecuted on indictment with heavier penalties, in addition to prosecuting the offence summarily under the existing HAGAO. A person committing the offence would be liable (i) on summary conviction, to a fine of \$200,000 and imprisonment for two years and, in the case of a continuing offence, to a further daily fine of \$20,000 (i.e. the same as under the existing HAGAO); or (ii) on conviction on indictment, to a fine of \$500,000 and imprisonment for three years and, in the case of a continuing offence, to a further daily fine of \$20,000; and
- (b) create a strict liability offence in the proposed new section 5A, under which owners and tenants of hotel or guesthouse premises will commit an offence if no licence is in force for the premises. This offence would be subject to the same penalties as those provided for the offence of operating unlicensed hotel or guesthouse in (a) above. A person charged with the new offence would be entitled to be acquitted under the circumstances specified in the proposed new section 5A(3) and (4).

18. Some members, including Mr YIU Si-wing, Mr James TO,

Mr Paul TSE and Mr Tony TSE, have enquired about the justification for creating the strict liability offence against owners and tenants of the premises. Mr TO has expressed concern that the strict liability offence introduced under the proposed new section 5A appears to be much more stringent than other more serious offences, such as drug trafficking or keeping a vice establishment. Noting that it is not necessary for the prosecution to prove the existence of *mens rea* in respect of the owner or tenant's knowledge as to whether a licence is in force in the premises under the proposed new section 5A, the Legal Adviser to the Bills Committee has pointed out that there are examples of other legislation where the prosecution is required to prove *mens rea* of owners or tenants of premises that they have the knowledge that the premises are kept or used for illegal gambling, drug manufacturing and vice activities. Some legislation (e.g. the Noise Control Ordinance (Cap. 400) and the Fire Services (Fire Hazard Abatement) Regulation (Cap. 95 sub. leg. F)) also provided for such a requirement.

19. The Administration has advised that currently, in order to initiate prosecution, the Authority or his delegated authority (including officers of the Office of the Licensing Authority ("OLA") under HAD) has to prove beyond reasonable doubt that (a) the subject premises provide short-term sleeping accommodation at a fee without a valid licence; and (b) a person operates, keeps, manages or is in control of that unlicensed guesthouse. For (b), it is necessary to identify an operator of the unlicensed guesthouse. Since the operation mode of hotels or guesthouses is evolving rapidly and many unlicensed hotels or guesthouses are operating via the Internet, it has become increasingly difficult to catch the operator red-handed³ 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 is circumstantial evidence showing that the premises concerned are being used as an unlicensed hotel or guesthouse. There have only been a few cases where the owners assisted in the investigation and clarified their connection with the management of the premises, or the operators somehow showed up at the subject premises and demonstrated their management role such that there was sufficient evidence for prosecution. The strict liability offence is proposed to address the difficulties in evidence collection arising from the use of information technology in business operation and to facilitate enforcement actions against unlicensed hotels and guesthouses. It is primarily intended to target at owners and tenants who operate unlicensed hotels and guesthouses

³ According to the Administration, 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.

(who do not show up at the premises and/or use means for settling payment without traces, and hence could easily evade prosecution) instead of innocent owners and tenants. The Administration has also pointed out that the Bill includes a definition to make it clear that guests patronizing the premises are not tenants.⁴

20. The Administration has further advised that the introduction of strict liability can encourage owners and tenants, who have a primary responsibility for the use of premises, to take the initiative to prevent their premises from being used as an unlicensed hotel or guesthouse in order to protect their interests. Meanwhile, the Administration has proposed introducing statutory defences in the proposed new section 5A(3) and (4) alongside the introduction of strict liability offence. Statutory defences are available to innocent owners/tenants in that the person charged with the offence is entitled to be acquitted if sufficient evidence is adduced to raise an issue that (a) the person did not know and had no reason to suspect that the premises were an unlicensed hotel or guesthouse; or (b) the person 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.

21. The Administration has also pointed out that strict liability offences are not uncommon in Hong Kong, especially for regulatory offences. 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).⁵

22. Mr YIU Si-wing and Mr KWOK Wai-keung have enquired how circumstantial evidence can facilitate enforcement actions against unlicensed hotels and guesthouses and be used in cases of strict liability offence. The Administration has advised that circumstantial evidence such as advertising posters, leaflets, and other online advertisements in relation to certain premises offering sleeping accommodation at a fee and a substantial number of people other than owners or tenants gaining access to the premises can be evidence to establish the fact that the premises are being used as guesthouses. Furthermore, the address of the premises can be checked against the record in the Authority to verify whether the

⁴ Under the proposed new section 5A(5), "*tenant*", in relation to any premises, does not include a person who becomes a tenant of the premises only through being provided sleeping accommodation on the premises.

⁵ For justifications for imposing strict liability against owners and/or tenants, please also refer to the Administration's response to issues raised at the meeting on 6 November 2018 for details (LC Paper No. CB(2)640/18-19(01)).

premises are licensed guesthouses. The Authority has set up an Internet enforcement team to browse web pages for information and intelligence about suspected unlicensed guesthouses.

23. Noting the proposed increased penalty under the proposed new section 5(2) (with a maximum penalty of \$500,000 and imprisonment for three years upon conviction on indictment), the Legal Adviser to the Bills Committee has enquired whether it is justifiable to make the offence under the proposed new section 5(1) (i.e. 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) as an offence with absolute liability regarding the element that no licence is in force for the premises, notwithstanding that the defendant had mistakenly but honestly and reasonably believed that a licence had been in force in respect of the premises. The Administration has advised that the "no defence provision" in the proposed new section 5(3) is fully justifiable and is the same as the existing section 5(3) (except that a certificate of exemption is no longer mentioned because of the proposed repeal of the existing Part III of HAGAO). 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. According to the case of *HKSAR v Chui Shu Shing* (2017) 20 HKCFAR 333, the Court of Final Appeal held that the concept of "manage" incorporated the idea of authority and control over the premises which was managed. In practice, it would be inconceivable for a person who operates, keeps, manages or otherwise has control of premises that are a hotel or guesthouse not to have 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 accessible on the website of 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.

24. The Legal Adviser to the Bills Committee has sought clarification on whether a person who is employed to manage an unlicensed hotel or guesthouse has a defence against an offence under the proposed new section 5(1) if the person has been misled and reasonably believed that a licence is in force for the premises. The Administration has advised that if there is evidence that a person has been deliberately misled to believe that the forged licence purportedly issued by the Authority is a valid one, such evidence may be taken into account in the decision on whether to prosecute that person. The Administration has further advised that the threshold for establishing the commission of the offence under the proposed new section 5 is high in the sense that the elements of "operates, keeps, manages or otherwise has control of" under the proposed new

section 5(1) are required to be proved by the prosecution. The concept of "manage" does not extend to a person who carries out essentially non-discretionary functions which are not a manifestation of managerial authority in light of the decision of *Chui Shu Shing*.⁶

25. Mr Alvin YEUNG has remarked that a manager would be reasonably expected to check whether there was a licence in force as the requirement expected of a manager would be higher than a cleaning worker. He suggested that, from a policy perspective, the Administration should put in place a mechanism which should be simple enough to facilitate management staff of hotels/guesthouses to find out whether a licence is in force for the hotels/guesthouses concerned, and that notices on the possible legal consequences of managing unlicensed hotels/guesthouses should be posted in conspicuous places in hotels/guesthouses. Mr YIU Si-wing has also suggested that administrative guidelines should be drawn up for management staff of hotels/guesthouses on the matters to which they should pay attention. The Administration has undertaken to consider the suggestions and enhance publicity in this regard after passage of the Bill.

26. In response to the enquiries made by Mr YIU Si-Wing on the criminal liability of agents/agencies (e.g. travel agents/agencies and real estate agents) who/which inadvertently promoted unlicensed hotels or guesthouses via online platforms, the Administration has advised that depending on the circumstances of the case, an agent would not incur legal liability by merely promoting unlicensed hotels or guesthouses via online advertisements unless the acts of agents could be construed as falling within the elements of "operates, keeps, manages or otherwise has control of any premises" under the proposed new section 5.

Validity periods of licences and new licensing requirements

27. Clause 11 seeks to add a new Part 4A to HAGAO to provide for an enhanced licensing regime. Under the proposed licensing regime, there will be two types of licences, namely hotel licence and guesthouse licence. In considering licensing matters, it is proposed that the Authority be empowered to take into account the new requirements as provided in the proposed new Part 4A, in particular the no-use restriction requirement, fit and proper requirement and local consultation requirement.

⁶ Regarding the legal issues concerning the proposed new sections 5 and 5A discussed above and raised by the Legal Adviser to the Bills Committee, please also refer to the Legal Adviser to the Bills Committee's letter to the Administration dated 5 November 2018 (LC Paper No. CB(2)201/18-19(01)), the Administration's reply dated 15 January 2019 (LC Paper No. CB(2)640/18-19(04)) and the minutes of the meeting of the Bills Committee on 22 January 2019 (LC Paper No. CB(2)1190/18-19) for details.

Validity periods of licences

28. Under the proposed new section 12I(3),⁷ licence holders whose licence has a validity period exceeding 36 months are required to submit to the Authority a certificate signed by an authorized person ("AP")⁸ which contains a statement certifying the matters specified in the proposed new section 12I(3) on an annual basis. Mr Tony TSE considers that all hotel/guesthouse licence holders should, irrespective of the length of the validity period of the licence, submit to the Authority an annual certificate issued by an AP so as to ensure building and fire safety.

29. The Administration has advised that, while hotels and guesthouses whose licences exceed 12 months but do not exceed 36 months are not required to submit an annual certificate, OLA randomly inspects 20% of these premises annually to check whether the premises concerned have undergone any major alteration or violated any building regulations. For premises whose licence exceeds 36 months, the licence holder has to comply with the more stringent requirement that a building safety inspection must be conducted annually by an AP. If abnormality is found in the AP's annual certificate, OLA will arrange inspection at the premises as appropriate to ensure public safety. Moreover, to ensure compliance with fire safety, OLA conducts inspection upon licence renewal and annually on all licensed premises regardless of their licence periods. Ad-hoc inspections are also arranged as necessary when complaints or incidents arise. The Administration has further undertaken to explain to hotel/guesthouse operators the justifications for not requiring all licence holders to submit to the Authority an AP's certificate on an annual basis.

30. Members note that under the proposed new section 12H(1),⁹ the maximum validity period of a licence is 84 months. According to the

⁷ The requirements set out in the proposed new section 12I(3) are basically the same as those in the existing sections 8(5A)(c) and 9(3A)(c).

⁸ According to the Administration, the authorized person ("AP")'s certificate requirement has been implemented since 1998. Before 1998, only licences with validity period of not more than 12 months could be issued under HAGAO. To enhance the licensing process and obviate the need for annual renewal, the Administration proposed to extend the period of new or renewed licences to a maximum period of 36 months while the trade counter-proposed further extending the maximum period of a licence to seven years, subject to the submission of an annual certificate issued by an AP. The Administration agreed with the proposal as the annual certificate requirement could ensure that safety standards would not be compromised for licences with validity periods beyond 36 months.

⁹ The requirements set out in the proposed new section 12H(1) are basically the same as those in the existing sections 8(5)(d) and 9(1).

Administration, first-time applicants who have no prior experience in operating hotels/guesthouses would normally be granted a licence of 12 months upon satisfaction of all licence requirements under the current practice. Other than first-time applicants, it is up to the licensees and applicants to opt what licence periods (on a yearly basis ranging from 12 months to 84 months) for which they would like to apply. OLA has the discretion to determine the period of a licence with reference to the safety conditions and the record of compliance of the premises. Licences with validity periods not exceeding 84 months are usually issued to hotels, whilst licences with validity periods not exceeding 36 months are usually issued to guesthouses. Mr YIU Si-wing has suggested that the Administration should make it clear to guesthouse operators the criteria for issuing licences with validity periods beyond 36 months.

31. The Administration has explained that there is no provision prohibiting the Administration from issuing a licence with a validity period exceeding 36 months to a guesthouse with good compliance records. However, in actual practice, only a small number of purpose-built hotels¹⁰ have opted for longer licence periods. Many operators opt for the licence period to be not more than 36 months as they may consider it a financial burden to engage an AP annually to inspect the premises and to submit the required certificate to OLA. The Administration has further advised that it will set out in administrative guidelines the criteria for issuing licences with validity periods beyond 36 months and will explain to hotel/guesthouse operators the arrangements for the validity periods of licences.

32. Under the proposed new section 12C(3)(a), an application for a licence renewal must be made within the period beginning six months before, and ending three months before, the end of the licence period of the licence ("specified period"). According to the Administration, allowing renewal applications to be submitted during the specified period only, but not more than six months before the expiration of the licence, is an enhancement to the existing arrangement. This enhancement is proposed to avoid the accumulation of backlogs due to licensees submitting renewal applications well in advance, rendering the information out-of-date when the licences expire. Members note the arrangement under the proposed new section 12H(4) that a licence remains in effect despite the end of its licence period if the renewal application is made within the specified period

¹⁰ Purpose-built hotels, in general, are premises which have been purposely designed, approved and constructed for hotel use in accordance with the Buildings Ordinance and the Fire Services Ordinance. For non-purpose-built premises (i.e. normally the case for guesthouses), most of them are situated in multi-storey buildings and share common areas and facilities with other occupants of the buildings.

and the application is pending as at the end of the licence period.

No-use restriction requirement

33. Members note that the no-use restriction requirement under the proposed new section 12J requires that DMC of the building concerned (or if there is no DMC, the Government lease of the premises concerned) does not contain any restrictive provision which prohibits the premises concerned from being used as a hotel or guesthouse, for commercial purposes or for any purpose other than private residential purposes.

34. The Legal Adviser to the Bills Committee has sought clarification from the Administration as to how the Authority will resolve the ambiguities, if any, in the DMC/Government lease as to whether the premises are free from a use restriction within the meaning of the proposed new section 12J. Mr YIU Si-wing has enquired whether written legal advice should be provided by the licence applicant or by the affected person when the two parties had disputes over whether the premises could be used as a guesthouse/hotel. In response to these enquiries, the Administration has advised that the restrictive provisions in most DMCs/land leases are straightforward and leave little room for interpretation. In a licence application under HAGAO, the Authority may, pursuant to the proposed 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 the proposed new 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.

35. The Legal Adviser to the Bills Committee has enquired whether a provision in the DMC/Government lease prohibiting the premises from being used as a boarding house, lodging house, hostel or dormitory or similar accommodation would be construed as falling within the proposed definition of "restrictive provision" (under the proposed new section 12J(3)) that the part of premises is prohibited from being used as a hotel or guesthouse. The Administration has advised that a restrictive provision is defined in the proposed 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 proposed new section 2A. The use of the exact word of "hotel" or "guesthouse" in the provision is not a pre-requisite.

Fit and proper requirement

36. Members note that the fit and proper requirement under the proposed new section 12L(1) requires that the applicant is a fit and proper person to operate, keep, manage or have control of a hotel or guesthouse, and that the proposed new section 12L(2) requires that the Authority must have regard to whether the applicant, or (if the applicant is a body of persons) a related person, has been convicted of an offence under HAGAO, or any offence resulting in imprisonment for more than three months, or is an undischarged bankrupt, in liquidation or the subject of a winding-up order. Apart from those factors listed in the proposed new section 12L(2), the Legal Adviser to the Bills Committee has enquired whether the Authority will also take into account other factors¹¹ in relation to the fit and proper requirements (that are listed in some other legislation) in the Bill and if so, whether the Administration will consider spelling out such other factors.

37. The Administration has advised that the list of factors in the proposed new section 12L(2) is not exhaustive and does not preclude the Authority from considering other factors as appropriate. The Authority will consider setting out in administrative guidelines other factors that it may consider (and how the factors will be considered) in determining whether a person is a fit and proper person to operate, keep, manage or otherwise have control of a hotel or guesthouse ("other relevant factors"). The Legal Adviser to the Bills Committee has pointed out that as administrative guidelines are not legally binding, the Administration might consider including other relevant factors in the Bill. Mr Alvin YEUNG has enquired about the legal basis for considering other relevant factors set out in administrative guidelines. Mr YIU Si-wing has suggested that the Administration may consider spelling out other relevant factors by way of subsidiary legislation.

38. The Administration has explained that the Authority has the power to

¹¹ Other factors include whether the conviction of the person is for an offence for which it is necessary to find out the person has acted fraudulently, corruptly or dishonestly; whether the person has entered into a composition or arrangement with his or her creditors; whether a receiver has been appointed; whether the person is a mentally disordered person; and whether the person or a related person is a director, officer, partner or sole proprietor in a business entity whose application for a hotel licence or a guesthouse licence has been refused or whose licence has been revoked or suspended.

consider other factors set out in the administrative guidelines. Such a power is mainly derived from the proposed new section 12L(1), which is a general provision empowering the Authority to exercise discretion in considering whether a person is a fit and proper person. The Administration has further explained that since the essential considerations that the Authority must consider have already been set out in the Bill, it is not inappropriate to set out other considerations that the Authority may consider in the administrative guidelines. Such arrangements offer flexibility to better cope with the needs of an evolving society and business market. Similar arrangements have been adopted in some other well-established 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). In addition, the Administration has undertaken to elaborate on the intended use of administrative guidelines during the Second Reading debate on the Bill.

Local consultation requirement

39. Under the proposed new section 12N, a local consultation exercise must have been conducted to take into account the views of affected persons¹² collected by an advisory panel appointed by the Authority ("the Advisory Panel"), or the condition under the proposed new section 12N(5)(b) must be satisfied, before an application for a new or renewal licence is approved. Some members, including Mr YIU Si-wing and Mr KWOK Wai-keung, have enquired about the composition and mode of operation of the Advisory Panel. Mr YIU Si-wing has further asked how the Administration can ensure the Advisory Panel's impartiality in collecting views during the local consultation exercise.

40. The Administration has advised that its preliminary intention is that the Advisory Panel will comprise representatives from various professions, local communities and the hotel and guesthouse sector so as to ensure that the views of the Advisory Panel are fair and balanced. The representatives from the hotel/guesthouse sector, however, cannot participate in the discussion or advise on the application for a hotel/guesthouse licence in which they have interest. Certain members

¹² Under the proposed new section 12N(6), "*affected person*", in relation to a licence application for any premises, means – (a) if the premises form part but not the whole of a building – (i) an owner or occupier of any other part of the building; and (ii) if the Authority considers appropriate – an owner or occupier of any other premises situated in the surrounding area specified by the Authority for the application; or (b) if the premises form the whole of a building – an owner or occupier of any other premises situated in the surrounding area specified by the Authority for the application.

will be selected from the list of the Advisory Panel members to make assessment in relation to each application for issue or renewal of hotel or guesthouse licence. The Administration has further advised that, after the passage of the Bill and with reference to the established guidelines and practice for conducting local consultation on applications for other licensing regimes, administrative guidelines will be drawn up for the Advisory Panel to follow.

Transitional arrangements

41. The Bill provides for the transitional arrangement that the Authority may renew an existing licence once on the basis of the existing licensing requirements, for a period not exceeding 12 months, after the enhanced licensing regime under the Bill comes into operation. If a licence expires beyond the 12-month transitional period, the renewal application would have to be made and processed in accordance with the new regime (see the proposed new Part 8 and the proposed new Schedule).

42. Mr YIU Si-wing and Mr KWOK Wai-keung have asked how the Administration will deal with applications for licence renewal from existing licensees who cannot meet the new licensing requirements. The Administration has advised that there will be a transitional arrangement for operators of existing hotels/guesthouses affected by the new licensing requirements (particularly those operating on premises which may contain restrictive provisions in the DMC or Government lease concerned). The existing licence can be renewed once for not more than 12 months if the existing licence expires before the end of the transitional period and has not been renewed within the transitional period. The new licensing requirements will not apply to that renewal of the old regime licence in such circumstances.

Other areas of concern

Inspection of hotels/guesthouses

43. The existing section 18 of HAGAO empowers any public officer authorized 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 guesthouse. It does not specify whether the hotel or guesthouse has to be licensed. According to the Administration, it is difficult to rely on section 18 to gain entry into suspected unlicensed premises, because the owners or occupants are often uncooperative in allowing entry of the officers. Members note that a new section 18A is proposed to be added to allow an enforcement officer, with a

warrant issued by a magistrate, to enter (with reasonable force if necessary) and search (a) a suspected unlicensed hotel or guesthouse; or (b) licensed guesthouses where a contravention of a licence condition or an offence under HAGAO is suspected and entry by an enforcement officer under section 18 has been refused. With the introduction of the proposed new section 18A to deal with the above circumstances, the existing section 18 is replaced by the proposed new section 18, under which the powers of entry and inspection without warrant are limited to licensed premises only.

44. The Legal Adviser to the Bills Committee has sought clarification from the Administration as to whether it is necessary to provide that an enforcement officer authorized by a warrant issued under the proposed new section 18A may enter the premises at any reasonable time (instead of at any time) under the proposed new section 18A(5)(a) if no time is specified in the warrant. The Administration has advised that an enforcement officer authorized by a warrant to enter and search any premises shall exercise his/her power reasonably and fairly having regard to all relevant circumstances of the case involved (including the nature of the hotel and guesthouse business, which provides sleeping accommodation and operates 24 hours a day). Otherwise, such decision would be subject to legal challenge by way of judicial review. The Administration does not consider it necessary to spell out the "reasonable time" requirement in the provision.

45. In response to the suggestions of Mr YIU Si-wing and Mr Charles MOK on drawing up guidelines setting out the responsibilities of various enforcement officers in conducting inspections of hotels/guesthouses and on how the powers under the proposed new sections 18 and 18A are to be exercised, the Administration has undertaken that relevant guidelines will be provided for enforcement officers.

Mechanism relating to closure orders

46. Under the proposed new section 20A of the new proposed Part 6A, the Authority may apply to a court or magistrate, upon the second conviction within 16 months of a specified offence (i.e. the offence of operating an unlicensed hotel or guesthouse under the proposed new section 5 or the new offence committed by the owner or tenant of premises used as an unlicensed hotel or guesthouse under the proposed new section 5A) in respect of the same premises, for a closure order of the premises directing that the premises are to be closed for six months.

47. Some members, including Mr Paul TSE and Mr Alvin YEUNG, have pointed out that for the sake of due process, hotel/guesthouse

operators affected by closure orders should be informed of their legal right to contest to the court the applications for closure orders (in particular, if the application is made at any time which is subsequent to the date when the second conviction has been made by the court) or closure orders made by the court. Mr Alvin YEUNG takes the view that there should be provisions in the Bill to ensure that hotel/guesthouse operators will be informed of the Authority's applications for closure orders and the closure orders made against them. Mr YIU Si-wing has enquired how guests will know that a closure order has been made against a hotel/guesthouse.

48. The Administration has explained that there are provisions enabling interested persons and affected persons to be informed of the conviction, etc. of a specified offence in respect of the premises concerned, and hence the possible application for a closure order, through notices registered in the Land Registry (in the proposed new section 5B(1)) and notices affixed to the premises (in the proposed new section 20A(3)). The proposed 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 legal proceedings as soon as the court convicts the defendant and before the sentence is passed. After a closure order is made, the proposed new section 20B(1)(a) requires a copy of the order to be affixed to a conspicuous part of the premises, while the proposed new section 20J(2)(b) requires a copy of the order to be registered in the Land Registry. There are also provisions enabling interested persons and affected persons to contest a closure order made by the court by making applications for suspension (under the proposed new section 20C) or rescission (under the proposed new section 20E) of the closure order, which have to be determined by a court hearing. The Administration considers that the above mechanism relating to closure orders fulfils the requirement of having a due process to safeguard an individual's right to a fair and public hearing.

Convenor may specify forms

49. The Legal Adviser to the Bills Committee has noted that unlike the existing forms (in the Schedule to the Hotel and Guesthouse Accommodation (Appeal Board) Regulations (Cap. 349 sub. leg. A) ("Cap. 349A")) which form part of Cap. 349A, the Convenor of the appeal board panel may specify a form to be used for the purposes of any matter provided for under Cap. 349A. In response to the enquiry of the Legal Adviser to the Bills Committee and Mr YIU Si-wing on the rationale for empowering the Convenor to specify forms instead of providing for these forms by way of subsidiary legislation, the Administration has explained that the forms may be modified from time to time having regard to practical

experience. Specifying the forms by way of subsidiary legislation in Cap. 349A does not allow flexibility for making timely enhancement or revisions to the forms. The forms to be specified by the Convenor will be published on the Administration's website to maintain transparency.

Follow-up actions by the Administration

50. The Administration has undertaken to:

- (a) consider putting in place a simple mechanism to facilitate management staff of hotels/guesthouses to find out whether a hotel/guesthouse has a licence, and posting notices in conspicuous places in hotels/guesthouses on the possible legal consequences of managing unlicensed hotels/guesthouses (paragraph 25 refers);
- (b) explain to hotel/guesthouse operators the justifications for not requiring all licence holders to submit to the Authority an AP's certificate on an annual basis (paragraph 29 refers) and the arrangements for the validity periods of licences (paragraph 31 refers);
- (c) set out by way of administrative guidelines:
 - (i) the matters that management staff of hotels/guesthouses should pay attention to (paragraph 25 refers);
 - (ii) the criteria for issuing licences with validity periods beyond 36 months (paragraph 31 refers);
 - (iii) other relevant factors that may be considered (and how the factors will be considered) in determining whether a person is a fit and proper person to operate, keep, manage or otherwise have control of a hotel or guesthouse (paragraph 37 refers);
 - (iv) how the Advisory Panel should conduct local consultation on licence applications (paragraph 40 refers); and
 - (v) the responsibilities of various enforcement officers in conducting inspections of hotels/guesthouses and how the

powers under the proposed new sections 18 and 18A are to be exercised (paragraph 45 refers); and

- (d) elaborate on the intended use of administrative guidelines during the Second Reading debate on the Bill (paragraph 38 refers).

Resumption of Second Reading debate

51. The Bills Committee will not propose any amendments to the Bill and raises no objection to the resumption of the Second Reading debate on the Bill at a future Council meeting.

Advice sought

52. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
7 May 2020

**Bills Committee on
Hotel and Guesthouse Accommodation (Amendment) Bill 2018**

Membership list

Chairman	Hon YIU Si-wing, BBS
Deputy Chairman	Hon CHEUNG Kwok-kwan, JP
Members	Hon James TO Kun-sun Hon Paul TSE Wai-chun, JP Hon Charles Peter MOK, JP Hon KWOK Wai-keung, JP Hon Alvin YEUNG Hon SHIU Ka-fai, JP Hon Vincent CHENG Wing-shun, MH, JP Hon Tony TSE Wai-chuen, BBS (Total : 10 members)
Clerk	Mr Colin CHUI (up to 9 December 2018) Ms Wendy JAN (since 10 December 2018)
Legal Adviser	Ms Vanessa CHENG

**Bills Committee on
Hotel and Guesthouse Accommodation (Amendment) Bill 2018**

List of deputations/individuals which/who have made oral representation to the Bills Committee

1. The Federation of Hong Kong Hotel Owners
2. Hong Kong Guesthouses Association
3. The Incorporated Owners of Mirador Mansion, 11th Management Committee Board
4. Kowloon Incorporated Owners Joint Alliances
5. Miss CHIU Wai-lam
6. Mr LI Siu-tong
7. TWH-Tai Wan Hotel Ltd
8. Mr LAM Yuet-man
9. Mrs CHEN Chen-eng
10. 大華旅館集團
11. 美麗都大廈業主立案法團
12. Miss Hazel HO Mu-zi
13. Mr CHAN Yuk
14. The Tourist Guest Houses Federation of Hong Kong
15. Hong Kong Hotels Association
16. Southern District Office, HKI, Liberal Party
17. The Lion Rock Institute
18. Mr LAU Yin-ming
19. Hong Kong Association of Hostels
20. The Incorporated Owners of The Sorrentino
21. Dr CHENG Lee-ming, Member of Kowloon City District Council
22. 反對無牌旅館大聯盟
23. The Federation of Buildings Owners Organization of Cheung Sha Wan and Lai Chi Kok
24. 自由黨青年團
25. Booking.com
26. Broadway Nassau Investments Ltd
27. Mr CHAN Chun-yin
28. Miss Yolanda NG, Member of Wan Chai District Council
29. 朱美美女士
30. Airbnb
31. Mr CHOY Kwai-tim
32. Mr David CHAN
33. Impact Communications Company
34. Mr Yoshiaki KUBOTA
35. Ms AU Tak-mei

36. 五洲大廈業主立案法團
37. Foreign Guest Houses Investor Concern Group
38. Miss Sammi FU Hiu-lam, Member of Islands District Council

List of deputations/individuals which/who have provided written submissions
to the Bills Committee only

1. Mr LI Ying-cho
2. Mr NG Po-keung, MH, Member of Kowloon City District Council
3. Mr YUEN Kwun-sing
4. 錦華樓業主立案法團
5. Hopewell Hotels Management Limited
6. Mr LEUNG Hong-sing
7. Mr Aaron LEE
8. Mr CHAN Ka-yu
9. The Civic Party
10. 張麗瓊
11. 黃美梅
12. 葉輝
13. 王賢
14. 陳同
15. 葉大鈞
16. 呂強