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LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By email (kathy.chan@housingauthority.gov.hk)

28 July 2021

Miss CHAN Nap-sze, Kathy
Assistant Director (Tenancy Control
on Subdivided Units)
Transport and Housing Bureau
Secretary for Transport and Housing's Office
Secretariat for Task Force for the Study on
Tenancy Control of Subdivided Units
Housing Authority Headquarters
33 Fat Kwong Street, Ho Man Tin
Kowloon

Dear Miss CHAN,

Landlord and Tenant (Consolidation) (Amendment) Bill 2021

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

Articles 6 and 105 of the Basic Law

1. The Bill seeks to introduce a tenancy control regime, which comprises rent control and security of tenure, on tenancies in relation to subdivided units ("SDUs"). It is noted that the right of private ownership is guaranteed by Articles 6 and 105 of the Basic Law. Article 105 of the Basic Law provides that the Hong Kong Special Administrative Region shall, in accordance with the law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of property. It appears that the proposed tenancy control regime restricts SDU owners' right to the use and disposal of property. In this regard, please clarify whether the proposed tenancy control regime could satisfy the four-step proportionality test ("proportionality test") laid down in *Hysan*

Development & Others v Town Planning Board [2016] 6 HKC 58 and thus be consistent with Articles 6 and 105 of the Basic Law.

Article 25 of the Basic Law

2. It is noted that the proposed tenancy control regime on SDUs including rent control, security of tenure, other statutory requirements and creation of offences for regulated tenancies under the proposed Part IVA would only be applicable to tenancies of SDUs but not other types of premises. As such, there is differential treatment between landlords of SDUs and landlords of other types of premises which are not subject to the proposed tenancy control regime. Please clarify whether such differential treatment would impinge upon the equality before the law enshrined under Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights and satisfy the proportionality test.

Proposed sections 120AA and 120AAB

3. Under the proposed new section 120AAB(1), a tenancy will be a regulated tenancy to which the tenancy control regime under the proposed Part IVA will apply if (a) it commences on or after the commencement date of the Bill enacted as an Ordinance; (b) it is a domestic tenancy; (c) the subject premises of the tenancy are an SDU; (d) the tenant of the tenancy is a natural person; and (e) the purpose of the tenancy is for the tenant's own dwelling. SDU is proposed to mean premises that form part of a unit of a building. Where an SDU is a roof or a podium, it would include any structure erected on it (proposed section 120AA(2)). "Unit", in relation to a building, is proposed to mean premises of the building falling within either or both of the following descriptions— (a) premises that are demarcated or shown as a separate unit (however described) in the building plan of the building; (b) premises that are referred to in the deed of mutual covenant of the building as a unit (however described) the owner of which is entitled to its exclusive possession, as opposed to the owners or occupiers of other parts of the building (proposed section 120AA(1)). Please clarify the following matters:

- (a) in a scenario where a flat in a building is comprised of bedroom(s), a kitchen, a bathroom and a living room, please clarify whether such individual rooms (which do not involve any structural or non-structural alteration) within the flat of a building will be considered as SDUs in light of the proposed definition of SDU as drafted and thus the tenancy in relation to such rooms (e.g. a bedroom) would be considered as a regulated tenancy under the proposed Part IVA if other conditions as provided for in the proposed section 120AAB(1) have been fulfilled;

- (b) subject to your answer in (a) above, it appears that the proposed definition of SDU, as drafted, does not discern an SDU from non-SDU since both types of premises are premises forming part of a unit of the building. In this regard, please advise the distinctive features or elements of those premises that would be considered as SDUs for the purposes of the proposed Part IVA. Please consider whether the definition of SDU should be amended by setting out the distinctive elements or features of the premises that would be considered as SDUs for the sake of clarity;
- (c) please clarify whether the existence of illegal structures in, or any unauthorized alteration to a flat of a building would still render the tenancy in relation to SDUs in such a flat subject to proposed tenancy control regime under the proposed Part IVA;
- (d) under section 2 of the Bedspace Apartments Ordinance (Cap. 447), "bedspace" means any floor space, bed, bunk or sleeping facility of any other type, or any part thereof, used or intended to be used as sleeping accommodation for one person. "Bedspace apartment" means (a) any flat; or (b) where the partitioning wall or walls between two or more adjoining flats in a building has or have been demolished, such two or more adjoining flats, in which there are 12 or more bedspaces used or intended to be used as sleeping accommodation under rental agreements. In this regard, please clarify whether a bedspace in the bedspace apartment within the meaning of Cap. 447 would be regarded as an SDU and the tenancy of such bedspace would be subject to the tenancy control regime under the proposed Part IVA; and
- (e) under the proposed section 120AAB(2), the proposed Part IVA does not apply to the tenancies specified in the proposed Schedule 6. These tenancies include a tenancy held from a social services organization of a housing unit provided by the organization. "Social services organization" is proposed to be defined as a non-profit making organization operating on a non-profit making basis for the purpose of providing social services (section 1 of the proposed Schedule 6). Please provide examples to illustrate such housing units held from social services organizations.

Proposed sections 120AAE and 120AAF

4. Under the proposed section 120AAE, a person having an interest in any premises may apply to the Lands Tribunal ("the Tribunal") to determine

whether or not a tenancy for the premises is a regulated tenancy for the purposes of Part IVA. The proposed section 120AAF(1) provides that the Tribunal must make a determination on receiving an application under the proposed section 120AAE. Please clarify the following matters:

- (a) whether a person may apply to the Tribunal for determination of whether the subject premises of the tenancy is an SDU should there be such a dispute arising;
- (b) if your answer to (a) above is in the affirmative, the considerations that may be taken into account by the Tribunal in making the determination and whether it is appropriate to spell out such considerations in the Bill for sake of clarity; and
- (c) whether a determination made by the Tribunal under the proposed section 120AAF(1) is final or can be subject to appeal, if it is the latter case, the grounds of appeal and whether it is appropriate to provide for the same in the Bill.

Proposed section 120AAK

5. The proposed section 120AAK provides that the use of any premises as a boarding or lodging house is a use other than as a dwelling. Please clarify whether the use of any premises as a hotel, guesthouse, hostel, dormitory or similar accommodation would be regarded as a use other than a dwelling, and if so, please consider whether the same should be spelt out in the Bill.

Proposed section 120AAN

6. Under the proposed section 120AAN(2), despite a tenancy specifies in writing that the premises are not let for the tenant's own dwelling, the Tribunal may still determine that the premises are indeed let for the tenant's own dwelling if the Tribunal considers it appropriate to do so. Please advise the considerations that would be taken into account by the Tribunal for determining that the premises are indeed let for the tenant's own dwelling.

Proposed section 120AAS

7. The proposed section 120AAS(6) provides that a second term offer, once made, remains open for acceptance by the tenant before the expiry of the first term tenancy, and the landlord may not withdraw the offer. There may be circumstances where the tenant has breached certain obligations set out in Part 4 of the proposed Schedule 7 after the acceptance of the second term offer but

before the commencement of the second term tenancy e.g. failing to pay rent within 15 days after the due date, use of the premises for immoral or illegal purpose, or structural alteration of the premises without prior written consent of the landlord. Please clarify whether it is necessary to provide that a landlord may withdraw the second term offer in such circumstances and if not, the rationale for not allowing the withdrawal of the offer.

Proposed section 120AAY

8. The proposed section 120AAY(1) provides that the section applies if, among others, the first term tenancy of the regulated cycle for the SDU has already been terminated before its expiry otherwise than by the landlord enforcing by action a right of re-entry or forfeiture under section 120AAZI(2)(b). Please clarify the circumstances under which the first term tenancy will be terminated before its expiry other than by the landlord enforcing by action a right of re-entry or forfeiture.

Proposed section 120AAZA

9. The proposed section 120AAZA(6) provides that the sub-landlord is treated as having a reversion expectant on the regulated tenancy even though the term of the regulated tenancy expires at the same time as the expiry of the term of the superior tenancy. Please clarify the purpose and effect of the proposed section 120AAZA(6).

Proposed section 120AAZB

10. The proposed section 120AAZB applies if (a) a tenant of a regulated tenancy for an SDU dies during the term of the tenancy; and (b) a family member of the tenant is residing with the tenant in the SDU at the time of the tenant's death ("relevant time") (proposed section 120AAZB(1)). Under the proposed section 120AAZB(2), the subsisting benefits and protection under the regulated tenancy to which the tenant is entitled under Part IVA during the tenant's life time ("specified interest") are, after the tenant's death, available to the family member. "Family member", in relation to a person, is proposed to mean (a) the person's spouse; (b) the person's parents; or (c) the person's adult child (proposed section 120AA(1)). Only one family member of the tenant is entitled to the specified interest at one time (proposed section 120AAZB(3)).

- (a) For the purpose of ascertaining whether a person is the deceased tenant's parents or adult child for the purpose of the definition of family member, please clarify the following matters:

- (i) whether an adult child includes an illegitimate child, an adopted child and a step child of the deceased tenant;
 - (ii) whether any relationship of the half-blood would be treated as relationship of the whole blood; and
 - (iii) if your answer to (i) and (ii) above is in the affirmative, please consider providing for the same expressly in the Bill.
- (b) Please clarify why a brother or sister, grandparent and grandchild, minor child of the deceased tenant, whether whole blood or half-blood, are excluded from the definition of family member.
- (c) Under the proposed section 120AAZB(4), if two or more family members are residing with the tenant at the relevant time; and they are unable to reach an agreement among themselves as to who should be entitled to the specified interest, they must refer the matter to the Tribunal for a determination. The proposed section 120AAZB(5) provides that the Tribunal must determine the matter on any ground that appears to be just and equitable. Please clarify the factors that will be taken into account by the Tribunal in making the determination.

Proposed section 120AAZE

11. The proposed section 120AAZE sets out the mechanism for ascertaining the maximum rent payable by a tenant for a regulated tenancy of the second term. It is proposed that the rate of rent increase for the second term tenancy must not exceed (a) the percentage change of the territory-wide rental index for all classes of private domestic properties compiled and published by the Rating and Valuation Department ("RVD") in the relevant period ("control percentage"); or (b) 15%, whichever is the lower. Please provide the justifications for setting the cap on the rent increase at 15%.

Proposed section 120AAZF and section 6 of the proposed Schedule 7

12. Under the proposed section 120AAZF, the provisions in the proposed Schedule 7 are to be impliedly incorporated into every regulated tenancy and prevail over any other provision of the tenancy that is in conflict or inconsistent with the incorporated provisions. Section 5 of the proposed Schedule 7 provides for the obligations of the landlord to maintain and keep in repair the drains, pipes and electrical wiring serving the premises exclusively and windows of the premises. Section 6 of the proposed Schedule 7 provides that

the tenant may by giving not less than 30 days' prior notice in writing terminate the tenancy if the landlord fails to fulfil an obligation under section 5 of the proposed Schedule 7. Please clarify whether the restriction under the proposed section 120AAZH(3) that the date of termination must not be a date earlier than the last day of the first year of the term applies to a termination under section 6 of the proposed Schedule 7.

Proposed section 120AAZI

13. The proposed section 120AAZI seeks to forbid a landlord of a regulated tenancy to terminate the tenancy before the expiry of the term unless the termination is in accordance with the proposed section 120AAZ(7) or section 4(3) of Part 2 of the proposed Schedule 7, or is for the enforcement of the landlord's right of re-entry or forfeiture in accordance with Part 4 of the proposed Schedule 7. Under the proposed section 120AAZI(2)(b), a landlord may enforce a right of re-entry or forfeiture in accordance with Part 4 of Schedule 7 impliedly incorporated into the tenancy under the proposed section 120AAZF. The proposed section 120AAZI(4) provides that despite section 58(14) of the Conveyancing and Property Ordinance (Cap. 219), (a) section 120AAZI(2)(b) and sections 7 and 12(1)(a) and (2) of Part 4 of Schedule 7 have effect subject to section 58(4) and (10) of Cap. 219; and (b) section 120AAZI(2)(b) and sections 8,9,10,11 and 12(1)(b) and (2) of Part 4 of Schedule 7 have effect subject to section 58 (except section 58(14)) of Cap. 219. Please clarify the following matters:

- (a) apart from the early termination in the circumstances as provided for in the proposed section 120AAZI, please consider whether it is necessary to provide that a landlord may exercise the right of early termination where the landlord reasonably requires the premises as a residence for himself or herself or the landlord's close family members; and
- (b) please clarify the purpose and effect of the proposed section 120AAZI(4).

Proposed sections 120AAZK and 120AAZL

14. Under the proposed section 120AAZK, a landlord of a regulated tenancy commits an offence if the landlord requires the tenant to pay, or receiving from the tenant, any money other than the rent, deposit (which must not be more than two months' rent), reimbursement of charges for any of the specified utilities and services payable by the tenant under the tenancy, and damages for the tenant's breach of the tenancy. The proposed section 120AAZL provides that a landlord

commits an offence if the landlord requires or receives reimbursement of the charges for any of the specified utilities and services from the tenant (a) without producing copies of the bill and providing an account in writing showing a breakdown of the apportionment amongst the SDU and other parts in the same unit in which the aggregate of the apportioned amounts does not exceed the billed amounts; or (b) at a sum exceeding the apportioned amount for the SDU as shown in the account provided by the landlord. A person who commits an offence under the proposed section 120AAZK(1) or 120AAZL(2) and (3) would be liable on a first conviction to a fine at level 3 (i.e. \$10,000), and on a second or subsequent conviction to a fine at level 4 (i.e. \$25,000).

15. For an offence under the proposed section 120AAZK(1) and 120AAZL(2) and (3), the mistaken belief of the person charged as to the money the person is entitled or permitted to receive is not a defence (see proposed sections 120AAZK(3) and 120AAZL(5)). Please clarify the following matters:

- (a) whether the offences created in the proposed sections 120AAZK(1) and 120AAZL(2) and (3) are absolute liability or strict liability offences, if it is the former case, the justifications for making them as absolute liability offences; and
- (b) subject to your answer in (a) above and if the offences are strict liability offences, please clarify whether the proposed sections 120AAZK(3) and 120AAZL(5) would have the effect of excluding the common law defence of mistaken but honest and reasonable belief and if so, the justifications for such exclusion.

Proposed sections 120AAZX and 120AAZY

16. Under the proposed section 120AAZX, the Commissioner of Rating and Valuation ("the Commissioner") may, with a warrant issued by a magistrate, enter the premises and exercise the powers specified in the proposed section 120AAZY for the purpose of determining the primary user of the premises and ascertaining whether an offence under the proposed Part IVA is being, or has been committed, in relation to the premises. These powers set out in the proposed section 120AAZY include inspection of the premises, taking any photograph and video recording inside the premises, requiring any person present on the premises to provide any assistance or information necessary for enabling the Commissioner to perform the Commissioner's functions and examination of any document found on the premises, etc. In this regard, please clarify whether there are legal consequences of not complying with a requirement made by the Commissioner under the proposed section 120AAZY.

Proposed sections 120AAZY and 120AAZZ

17. A person may be required to provide information and documents to the Commissioner under the proposed section 120AAZY for the purpose of determining the primary user of the premises and ascertaining whether an offence under the proposed Part IVA is being, or has been committed, in relation to the premises. Under the proposed section 120AAZZ, the Commissioner may disclose any information obtained under the proposed Part IVA to a specified person if the Commissioner considers that the disclosure will enable or assist the specified person to exercise a power (including a right) conferred or perform a function (including a duty) imposed on the person by the Landlord and Tenant (Consolidation) Ordinance (Cap. 7), the Rating Ordinance (Cap. 116) or the Government Rent (Assessment and Collection) Ordinance (Cap. 515). In connection with such production or disclosure of information and documents, please clarify whether it is necessary to provide that the proposed Part IVA does not affect any claims, rights or entitlements that would arise on the ground of legal professional privilege. Reference can be made to section 200 of the Financial Institutions (Resolution) Ordinance (Cap. 628), section 56 of the Financial Reporting Council Ordinance (Cap. 588) and section 52A of the Payment Systems and Stored Value Facilities Ordinance (Cap. 584).

Proposed section 120AAZZB

18. The proposed section 120AAZZB(2) provides that the Commissioner or an RVD officer (i.e. a public officer employed in RVD) may only be called to give evidence in any proceedings before the court for determining whether or not a tenancy is a domestic tenancy for the purposes of section 120AAB(1)(b). Please consider whether it is necessary to provide that the Commissioner or an RVD officer giving evidence in such court proceedings is entitled to the same privileges and immunities as he or she would have in civil proceedings in the Court of First Instance.

Proposed section 120AAZZF

19. The proposed section 120AAZZF seeks to empower the Commissioner to specify the forms (to be published in the Gazette) to be used under the proposed Part IVA. Please clarify whether these forms would be subsidiary legislation, if not, please consider including an express provision to that effect for the sake of clarity.

We should be grateful if you could let us have the reply in both English and Chinese as soon as practicable.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'V. Cheng', written in a cursive style.

(Vanessa CHENG)
Assistant Legal Adviser

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