香港特別行政區政府
The Government of the Hong Kong Special Administrative Region

政府總部
運輸及房屋局
香港九龍何文田佛光街 33 號

Government Secretariat
Transport and Housing Bureau
33 Fat Kwong Street, Ho Man Tin, Kowloon, Hong Kong

本局檔號 Our Ref. THB POO 7-40 (1 C)
來函檔號 Your Ref.

電話：2129 3993
傳真：2129 3829

23 August 2021

Hon. Vincent CHENG, MH, JP
Legislative Council Member cum
Chairman of the Bills Committee on the Landlord and Tenant (Consolidation) (Amendment) Bill 2021
Room 619, Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Hon. Cheng,

Landlord and Tenant (Consolidation) (Amendment) Bill 2021

Thank you for your letter dated 11 August 2021. Our response to your questions relating to the Landlord and Tenant (Consolidation) (Amendment) Bill 2021 (the Bill) is set out in the ensuing paragraphs.

Issues relating to subletting

2. Subletting of subdivided units (SDUs) is believed to be prevalent in the market. In general, when a superior tenancy expires or is terminated by notice or forfeiture, the sub-tenancy of the SDU would end simultaneously. In principle, when the sub-tenancy ends, the sub-tenant may be regarded as a trespasser, and the superior landlord has the right to request the sub-tenant to vacate the premises.

3. A regulated tenancy to which the proposed Part IVA to be introduced by the Bill would apply must fulfil the criteria provided in the proposed section 120AAB(1), i.e. (a) the tenancy commences on or after the material date; (b) the tenancy is a domestic tenancy; (c) the subject premises of the tenancy are an SDU; (d) the tenant is a natural person; and

(e) the purpose of the tenancy is for the tenant's own dwelling, and it is not an excluded tenancy specified in the proposed Schedule 6. In other words, if the tenancy between the head lessor and the head lessee does not fulfil the criteria set out in the proposed section 120AAB(1), it will not be a regulated tenancy to which the proposed Part IVA would apply.

4. Subletting would create difficulties in enforcing tenancy control on SDUs. That said, it is not our intention to subject all leases in the leasing structure to tenancy control, nor to prohibit subletting as this would be hugely disruptive to the SDU rental market and curtail the supply of SDUs for rental.

5. To deal with the problem caused by subletting, the proposed section 120AAZJ in the Bill provides that for a regulated tenancy which is a sub-tenancy, if a superior landlord applies to the court for possession of the SDU and successfully obtains an order for possession, the superior landlord must notify the tenant of the regulated tenancy (i.e. the sub-tenant) in writing by posting a notice on the main door or entrance of the SDU on three successive days. Leave to issue a writ of possession to enforce the order is not to be granted by the court before the expiry of a period of 60 days beginning on the day immediately after the last day on which the notice is posted, unless the sub-tenant has delivered up vacant possession of the SDU before the leave is granted. The aforesaid proposed "automatic stay of execution" for 60 days should provide sufficient time for the affected SDU tenants to look for alternative accommodation.

6. Proceedings for recovering possession of premises are commonly conducted in the Lands Tribunal. As the proceedings in the Lands Tribunal are conducted in a relatively informal manner, a party to the proceedings in the Tribunal may choose to appear and be heard in person without legal representation and in such case, the relevant proceedings would not involve fees paid to lawyers[1].

7. Generally speaking, where the sub-tenant holds over after the termination of the sub-tenancy, the court may order the sub-tenant to pay

---

[1] Costs of and incidental to legal proceedings shall be in the discretion of the court and the court shall have full power to determine by whom and to what extent the costs are to be paid. Generally speaking, the court shall order the costs of or incidental to any proceedings (other than interlocutory proceedings) to follow the event (i.e. the losing party pays the costs of the successful party), except when it appears to the court that in the circumstances of the case some other order should be made. In the absence of summary assessment of the costs by the court, the parties will normally first try to agree on the amount of the costs. If no agreement can be reached, a party ordered to pay costs is entitled to have those costs taxed by a taxing master of the court to ensure that the costs have not been exaggerated.

"mesne profits" in respect of the period from the termination of the subject sub-tenancy to the date on which the sub-tenant vacates the premises, which would generally be at an amount equivalent to the ordinary letting value of the premises in question. The superior landlord may also be able to claim other losses he suffered, for example, where the sub-tenant causes damage to the premises during the said period.

8. According to the proposed section 120AAZA(3) in Clause 4 of the Bill, if a regulated tenancy is a sub-tenancy created out of a superior tenancy and the two-year term of the regulated tenancy provided under the proposed section 120AAO expires at the same time as, or on a day later than, the expiry of the fixed term of the superior tenancy, without limiting the proposed section 120AAZA(5), the term of such regulated tenancy is to expire no later than the expiry of the term of the superior tenancy. The proposed section 120AAZA(4) provides that the said proposed section 120AAZA(3) does not affect any remedy that the sub-tenant may have for the revision of the term of the regulated tenancy. It follows that any remedies which the sub-tenant may have under the existing law would be unaffected. Whether a sub-tenant has a valid claim against the sub-landlord in a particular case is fact-sensitive, and matters such as the circumstances in which the sub-landlord and the sub-tenant entered into the sub-tenancy and the terms and conditions of the sub-tenancy may be relevant. For example, depending on the facts and circumstances of the case, where misrepresentation by the sub-landlord (which may be oral or in writing or arise by implication from words or conduct) is involved, the sub-tenant may be able to rescind the tenancy agreement and/or claim damages for the misrepresentation.

9. The landlord and tenant of a regulated tenancy are free to negotiate and decide on the terms on which they enter into the tenancy as long as such terms are not in conflict with the provisions of the Bill or the terms impliedly incorporated into every regulated tenancy by virtue of the proposed section 120AAZF. An exemption clause which seeks to absolve the sub-landlord's liability for damages in the event that the sub-tenancy is terminated due to the end of the superior tenancy before the expiry of a two-year period would generally be valid, subject to control under the existing law (such as section 4 of the Misrepresentation Ordinance (Cap. 284)[2]).

---

[2] Section 4: Avoidance of provision excluding liability for misrepresentation
If a contract contains a term which would exclude or restrict—
(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
(b) any remedy available to another party to the contract by reason of such a misrepresentation,

The right for the landlord to terminate a tenancy

10. One of the important objectives of the Bill is to provide suitable security of tenure for SDU tenants. To this end, the proposed section 120AAZI provides that a landlord of a regulated tenancy for an SDU may not terminate the tenancy before the expiry of the term other than under the circumstances provided in the proposed subsection (2). Furthermore, the proposed section 120AAR(1) provides that a tenant of a first term tenancy for an SDU is entitled to be granted a second term tenancy of the regulated cycle for the SDU. The landlord cannot terminate a regulated tenancy early or refuse to grant the tenant a second term tenancy of the regulated cycle on the grounds that the landlord intends to rebuild the premises or requires the premises for occupation as a residence for himself.

11. As we have mentioned in our reply dated 13 August 2021 to the Assistant Legal Advisor of the Legislative Council Secretariat (LC Paper No. CB(1)1190/20-21(04)), we understand that under the previous security of tenure regime, that the premises are reasonably required by the landlord for occupation as a residence for himself, his parent or his adult child and that the landlord intends to rebuild the premises were amongst the grounds on which a landlord might oppose an application made by the tenant to the Lands Tribunal for a new tenancy[3]. However, unlike the previous regime which provided for unlimited security of tenure as long as the tenant agreed to pay the prevailing market rent, the security of tenure under the proposed Part IVA is only limited to four years for each regulated cycle, and the landlord may repossess the premises for his or his family's own use or rebuilding after the completion of a regulated cycle. To avoid any possible abuse, we do not propose to provide that a landlord of a regulated tenancy may terminate the tenancy early, or refuse to grant a second term tenancy of the regulated cycle, on the grounds that the premises are required as a residence for himself or his immediate family members or that the landlord intends to rebuild the premises.

12. As we have stressed on other occasions, the Bill is not to "legalise" illegal "SDUs", and the new tenancy control regime on SDUs would not prejudice law enforcement actions taken by relevant authorities under existing legislation, particularly those concerning building and fire safety.

---

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 3(1) of the Control of Exemption Clauses Ordinance (Cap. 71); and it is for the person claiming that the term satisfies that requirement to show that it does.

[3] The repealed section 119E(1)(b) and (c) of Part IV of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7).

Therefore, if a statutory order requiring demolition of an SDU is served, the relevant person is obliged to comply with such order. The landlord and tenant may consider and discuss how to deal with the tenancy concerned. For example, where there is consensus between the parties, the tenant may surrender the tenancy to the landlord; also, the tenant may exercise his right provided under the tenancy, if any, to terminate the tenancy by notice, or if applicable, terminate the tenancy after the first year of the term by giving the landlord prior written notice pursuant to the proposed section 120AAZH.

13. It is open to the landlord and tenant to include a "force majeure" clause or other appropriate clauses in the tenancy to provide for the agreed consequence in the event that the SDU concerned is damaged by fire or "force majeure". If the tenancy does not contain such term, the landlord and tenant may consider and discuss how to deal with the situation practically, for example, upon consensus, the tenant may surrender the tenancy to the landlord. Also, the proposed Part IVA does not prevent the application of the doctrine of frustration under the existing law to regulated tenancies. That said, whether a tenancy would be frustrated (so that it is automatically discharged) where the SDU is destroyed by fire or on the happening of other events would depend on the facts and circumstances of each case, e.g. the degree and duration of the interruption in the expected use of the SDU by the tenant relative to its overall use under the tenancy, etc.

Availability of benefits to family members after the tenant's death

14. According to the proposed section 120AAZB, if a tenant of a regulated tenancy for an SDU dies during the term of the tenancy, the subsisting benefits and protection under the regulated tenancy to which the tenant is entitled under the proposed Part IVA during the tenant's life time (specified interest) are, after the tenant's death, available to the family member of the tenant who is residing with the tenant in the SDU at the time of the tenant's death.

15. The proposed section 120AA(4) provides that for the purposes of the proposed Part IVA and except in the proposed section 120AAZB, a reference to a tenant includes the tenant's family member who is entitled to the tenant's specified interest under the proposed section 120AAZB. Hence, obligations imposed on a tenant of a regulated tenancy under the proposed Part IVA would also apply to the family member of the deceased tenant who is entitled to the specified interest of the deceased tenant under the proposed section 120AAZB.

16. At present, the Bill does not provide that after the tenant has passed away and the specified interest becomes available to his family member, the family member concerned must notify the landlord. Neither does the Bill provide that when there is more than one eligible family member residing with the deceased 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 so that the matter is referred to the Lands Tribunal for a determination, the family member whom the Lands Tribunal determines to be entitled to such specified interest must notify the landlord of the determination of the Tribunal. That said, we believe that practically, the family member concerned would notify the landlord of this.

17. If the landlord does not know that the tenant has passed away and made a second term offer in Form AR1 to the deceased tenant, the offer should be valid and is capable of being accepted by the family member who is entitled to the specified interest of the deceased tenant under the proposed section 120AAZB in accordance with the provisions in Subdivision 2 of Division 3 of the proposed Part IVA because the reference to a tenant in those provisions include such family member by virtue of the aforesaid proposed section 120AA(4). If there is more than one eligible family member residing with the deceased 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, the family members concerned should resolve the dispute as soon as possible. If the family member who is determined by the Lands Tribunal to be entitled to the specified interest has failed to notify the landlord of his acceptance of the second term offer before the expiry of the first term tenancy[4], according to the proposed section 120AAV(2), the tenant is taken to have rejected the second term offer.

18. If rent is in arrears under a regulated tenancy, i.e. the tenant is in breach of section 7 of Part 4 of the proposed Schedule 7, the landlord may enforce a right of re-entry or forfeiture in accordance with sections 7, 12(1)(a) and (2) of that Part, subject to sections 58(4) and (10) of the Conveyancing and Property Ordinance (Cap. 219). The existence of dispute among the family members concerned as to who should be entitled to the specified interest would not affect the landlord's right of re-entry or forfeiture.

---

[4] According to the proposed section 120AAV(3), if the notice of acceptance is served by the tenant on the landlord only after the expiry of the first term tenancy or the tenant has not signed the Form AR1 when the Form is returned to the landlord, the tenant fails to notify the landlord of the tenant's acceptance of the second term offer.

The possibility of committing an offence by requiring the tenant to make other payments

19. The proposed section 120AAZK in the Bill provides that a landlord of a regulated tenancy commits an offence if the landlord requires the tenant to pay, or the landlord otherwise receives from the tenant, any money in relation to the tenancy other than (i) specified rents, (ii) specified rental deposits, (iii) reimbursement of charges for any of the specified utilities and services payable by the tenant under the tenancy, and (iv) damages for the tenant's breach of the tenancy. If the landlord considers that the tenant is in breach of the tenancy and requires the tenant to pay damages for the breach, but the landlord in fact does not have the right to receive such damages from the tenant under the law, the landlord may commit an offence under the proposed section 120AAZK(1) by requiring the tenant to pay "damages" for the reason that such "damages" fall outside the above four types of payment. As we have mentioned in our reply dated 13 August 2021 to the Assistant Legal Adviser of the Legislative Council Secretariat (LC Paper No. CB(1)1190/20-21(04)), the offence under the proposed section 120AAZK(1) is an absolute liability offence. The proposed section 120AAZK(3) provides that for an offence under section 120AAZK(1), the mistaken belief of the person charged as to the money the person is entitled or permitted to receive is not a defence. We have not provided in the Bill a statutory defence for the offence, and no common law defence of honest and reasonable belief is available to the person charged. In view of the rampant phenomenon that SDU landlords charge their tenants miscellaneous fees, making the offence an absolute liability one would strengthen its deterrent effect and, in turn, materially enhance the protection provided to SDU tenants.

20. The proposed Schedule 7 of the Bill sets out the mandatory terms implied for every regulated tenancy, which are to be impliedly incorporated into every regulated tenancy by virtue of the proposed section 120AAZF. According to Part 3 of that Schedule, the landlord must maintain and keep in repair the drains, pipes and electrical wiring serving the premises exclusively, and windows of the premises. The landlord must also keep in repair and proper working order the fixtures and fittings provided by the landlord in the premises. On receiving a notice from the tenant for repair of any of the above items, the landlord must carry out the repair as soon as practicable. However, if the damage to the item is caused by the wilful or negligent act of the tenant, an occupier (other than the tenant) of the premises or a person permitted by the tenant to be on the premises, the landlord is not responsible for the maintenance and repair of the item. If the tenancy entered into by the landlord and tenant specifies that the tenant

or other occupiers of the premises must not cause damage by any wilful or negligent act to the relevant items, the tenant would be regarded as committing a breach of the tenancy if the above person(s) caused damage to the relevant items by a wilful or negligent act. If a right for the landlord to claim damages from the tenant arises as a result of a breach of the tenancy by the tenant, generally speaking, the landlord is not in breach of the proposed section 120AAZK(1) if he requires the tenant to pay relevant damages for the breach. That said, depending on the term of the tenancy, if the said conduct does not constitute a breach of the tenancy by the tenant but the landlord requires the tenant to pay "repair fees", the relevant fees required may not fall under "damages for the tenant's breach of the tenancy" as referred to in the proposed section 120AAZK(1)(d) such that the landlord may commit an offence under the proposed section 120AAZK(1).

(Miss Kathy CHAN)
for Secretary for Transport and Housing

cc Secretary for Justice (Attn: Ms. Rayne CHAI)
Commissioner of Rating and Valuation (Attn: Ms. Sandy JIM)
Legal Service Division (Attn: Ms. Vanessa CHENG)
Clerk to Bills Committee