



立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

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本函檔號 OUR REF : LS/B/21/2024  
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3 December 2024

Dr Sunny CHEUNG  
Assistant Director (Environmental Compliance)  
Environmental Protection Department  
Environmental Compliance Division  
27th floor, Southorn Centre  
130 Hennessy Road  
Wan Chai, Hong Kong

Dear Dr CHEUNG,

**Air Pollution Control (Amendment) Bill 2024**

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill, we should be grateful if you could clarify the matters set out in the **Appendix**.

Please let us have your reply in both English and Chinese as soon as practicable, preferably by **9 December 2024**.

Yours sincerely,



(Alvin CHUI)

Assistant Legal Adviser 3

c.c. Department of Justice  
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**Closure notice**

1. Under the proposed new section 30D of the Air Pollution Control Ordinance (Cap. 311), the Director of Environmental Protection (“Authority”) could issue a closure notice in respect of any premises (“subject premises”) to a person who conducts specified processes (“SP”) on the subject premises (“specified person”) if the Authority has reasonable cause to believe that an offence under section 13 of Cap. 311 has been or is being committed. It is noted that under some other similar legislative frameworks for closure orders, a closure order is made by a court or magistrate in respect of the conviction of a relevant offence (see, for example, section 27 of the Fire Services (Fire Hazard Abatement) Regulation (Cap. 95F) and section 20A of the Hotel and Guesthouse Accommodation Ordinance (Cap. 349)). In this regard, please clarify:

- (a) the rationale for empowering the Authority, rather than a court or magistrate, to issue the closure notice under Cap. 311; and
- (b) the rationale for empowering the Authority to issue a closure notice before the specified person concerned is convicted of the offence under section 13 of Cap. 311.

2. Under the proposed new section 30G of Cap. 311, the Authority would be empowered to close subject premises. However, it is noted that the Bill does not provide for the power to enter the subject premises. Please clarify how the closure notice can be executed effectively without such power, and consider whether the Bill should provide for such power. Reference can be made to section 31 of Cap. 95F.

**Proposed new offences under Cap. 311**

3. The Bill proposes to introduce new offences for contravention of the prohibitions under the proposed new sections 30H (prohibition on conducting SP on the subject premises), 30I (prohibition on entering or remaining on subject premises), 30K (prohibition on removing or defacing closure notices) and 30L (prohibition on breaking or interfering with lock or seal attached to subject premises). Regarding these new offences, please clarify:

- (a) whether it is the Administration’s legislative intent that each of these new offences is a strict liability offence and that the prosecution needs not prove the existence of *mens rea* (i.e. the mental element) of committing the offence;

- (b) if your answer in (a) is in the affirmative, whether it is the Administration's legislative intent that the implied common law defence of "honest and reasonable mistaken belief" is available to a person charged with each of these new offences, and if so, whether the defendant only bears an evidential burden (i.e. the second alternative referred to in *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 ("*Kulemesin*")), or is required to discharge a persuasive burden (i.e. the third alternative referred to in *Kulemesin*), as to the defendant's belief; and
- (c) if it is the Administration's intent that the third alternative referred to in *Kulemesin* applies, how the derogation of the constitutional right to be presumed innocent under Article 87 of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights could satisfy the rationality and proportionality tests laid down in *Hysan Development Co Ltd v Town Planning Board* [2016] 6 HKC 58.

#### Liability

4. Under the proposed new section 30H of Cap. 311, it would be an offence if the specified person of the subject premises fails to ensure that no SP described in the closure notice is conducted on the subject premises. Please clarify:

- (a) in the case that the specified person concerned is a company, whether a director, principal officer or manager of the company would also commit the offence and be liable to be proceeded against and punished accordingly; and
- (b) whether it is necessary to provide in the Bill the circumstances under which a person will be liable for an offence under the proposed new Part VA of Cap. 311 committed by a company. Reference can be made to section 20(1) of the Trade Descriptions Ordinance (Cap. 362).

#### "Person having an interest"

5. Under the proposed new section 30N(1) of Cap. 311, apart from the specified person, any person having an interest in any subject premises could apply in writing to the Authority for the cancellation of a closure notice issued in respect of the subject premises. Please clarify (with examples) the types of person that would fall within the intended

meaning of “person having an interest” in the subject premises. Please consider whether the term “person having an interest” should be defined in the Bill for the sake of clarity. Reference can be made to section 20C(2) of Cap. 349.

#### Appeal against the Authority’s decisions

6. It is noted that according to rule 3(10)(a) of Order 53 of the Rules of the High Court (Cap. 4A), where leave to apply for judicial review is granted and the order sought is certiorari or prohibition, the grant takes effect as a stay of proceedings to which the application relates until the application is determined or the court otherwise directs. The implementation of an executive decision is a process that could be categorized as a proceeding for the purpose of ordering a stay under rule 3(10)(a).<sup>1</sup> Please clarify whether the execution of the closure notice will be suspended if, after the closure notice was served on a specified person in respect of any subject premises, the leave to apply for judicial review to challenge the Appeal Board’s dismissal of the appeal against the Authority’s decision to cancel the relevant SP licence or the decision to refuse to renew the relevant SP licence is granted by the court to the specified person in respect of the subject premises.

#### Defence

7. Clause 9 of the Bill seeks to add a new section 48A to Cap. 311 to provide for a defence of emergency for certain offences under Cap. 311. Please clarify:

- (a) whether it is the Administration’s legislative intent that the implied common law defence of “honest and reasonable mistaken belief” regarding the existence of an emergency situation is available to a person charged with each of the offences as mentioned in the proposed new section 48A of Cap. 311, and if so, whether the defendant only bears an evidential burden (i.e. the second alternative referred to in *Kulemesin*), or is required to discharge a persuasive burden (i.e. the third alternative referred to in *Kulemesin*), as to the defendant’s belief; and

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<sup>1</sup> See *Anglo Starlite Insurance Co. Ltd. and The Insurance Authority* [1992] 2 HKLR 31 and *Mcgettigan & Anor v Municipal Services Appeal Board & Anor* [2014] 2 HKC 521.

- (b) if it is the Administration's intent that the third alternative referred to in *Kulemesin* applies, how the derogation of the constitutional right to be presumed innocent under Article 87 of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights could satisfy the rationality and proportionality tests laid down in *Hysan Development Co Ltd v Town Planning Board* [2016] 6 HKC 58.