

Review of the Hotel and Guesthouse Accommodation Ordinance

Consultation Document July 2014



**Public Consultation on the
Review of the Hotel and Guesthouse Accommodation Ordinance**

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Chapter 1 Overview

1.1 Operation of hotels and guesthouses in Hong Kong is regulated by the Hotel and Guesthouse Accommodation Ordinance (Cap.349) (the Ordinance). Enacted in 1991, the Ordinance aims to, through a licensing regime, ensure that premises intended to be used as hotels or guesthouses meet the building structure and fire safety standards specified in the Buildings Ordinance (Cap. 123) (BO) and the Fire Services Ordinance (Cap. 95) (FSO) to safeguard the lodgers and the public.

1.2 The Office of the Licensing Authority (OLA) under the Home Affairs Department (HAD) is delegated by the Hotel and Guesthouse Accommodation Authority (the Authority)¹ for implementing the Ordinance, including issuing licences and performing relevant regulatory and enforcement duties.

1.3 In recent years, the upsurge of incoming visitors has led to an increased demand for guesthouses, causing nuisance and annoyance to residents in the same private buildings. There have been suggestions that the Authority should refer to the Deed of Mutual Covenant (DMC) of the building and take into account the views of residents when processing a licence application.

1.4 On enforcement, OLA has spared no effort to combat unlicensed guesthouses. Over the past few years, there have been multifold increases in enforcement raids against suspected unlicensed guesthouses, but despite continuous efforts on the part of OLA, illegal guesthouses can never be completely eradicated. OLA has encountered great difficulties in securing sufficient admissible evidence to institute prosecutions. The public are also concerned that the sentences imposed by the courts do not appear to have a sufficient deterrent effect against the operation of unlicensed guesthouses.

¹ In accordance with section 4(1) of the Ordinance, the Secretary for Home Affairs is the Authority of the Ordinance.

1.5 Against this background, the HAD has recently completed a comprehensive review on the licensing regime and related enforcement powers. Possible measures to improve the current situation are contained in this document.

1.6 Public views are invited during a period of eight weeks from 4 July 2014 to 28 August 2014.

Chapter 2 Present Situation

Licensing Regime

2.1 In accordance with the Ordinance, any premises providing sleeping accommodation at a fee shall obtain a licence unless they are exempted by the Hotel and Guesthouse Accommodation (Exclusion) Order (Cap. 349C). General exemptions include child care centres, bedspace apartments, elderly homes and those premises providing accommodation with a tenancy period of 28 consecutive days or more for each letting.

2.2 As at end of March 2014, there are 1 629 licensed hotels and guesthouses over the territory, including 249 purpose-built hotels, 1 220 guesthouses in ordinary multi-storey buildings, and 160 holiday camps and holiday flats.

2.3 In processing and approving applications for guesthouse licences, the Authority shall act under the power conferred by the Ordinance. Under section 8(3) of the Ordinance, the Authority may refuse to issue a licence in respect of a guesthouse only on the grounds that the guesthouse fails to comply with the relevant standards set out in the BO and the FSO, or that its operation is not under the continuous and personal supervision of the applicant. The Ordinance does not empower the Authority to refuse an application because of other considerations, such as views of the residents of multi-storey buildings. When the Ordinance was enacted in 1991, the then Administration stated clearly at the then Legislative Council that the licensing requirement does not include compliance with the DMC and any breach of DMC shall be dealt with by the owners of the building through civil litigation.

2.4 Under the current licensing regime, premises intended to be used as a guesthouse must obtain approval from the Building Authority (BA)² for “domestic purposes”³ and have to be in compliance with the

² Under the BO, the Building Authority is the Director of Buildings.

³ In accordance with the BO, “domestic purposes” include the use of premises as a hotel, guesthouse, boarding-house, etc.

requirements relating to building structure, fire safety and sanitary conditions as specified in the BO and the FSO. Upon receipt of a licence application, the professional staff of OLA, seconded from the Buildings Department and Fire Services Department, will inspect the premises concerned and require the applicant to conduct any necessary upgrading works. A licence will be granted only if the premises concerned have met all the prescribed safety standards and all upgrading works have been satisfactorily completed. The OLA will also ensure that the total number of occupants expected to arise from the establishment of a guesthouse shall not exceed the maximum number of persons specified in the building plans approved by the BA.

2.5 Although the OLA is not obliged to have regard to the DMC in considering a licence application, a guesthouse licence is by no means a waiver of any DMC provisions. The OLA clearly reminds applicants and prospective licensees to ensure that the operation of the guesthouse on the premises is in compliance with the terms and conditions of relevant leases and covenants in the application forms and guidelines, the notification letters for issuance of licence and other relevant documents.

2.6 To allow time for the owners and the residents to study the DMC and consider whether they would initiate appropriate actions with reference to the permitted uses stated therein, the OLA introduced a Notification System in April 2014. Under the system the OLA will issue letters to the owners' corporation (OC), residents' organisation and/or property management company (PMC) of the building concerned, as appropriate, to inform them that a licence application has been received and is being processed by the OLA. For buildings without any OC or residents' organisation and those which are not managed by any PMC, letters will be issued to all individual occupants of the buildings concerned. Before the application is approved, the OLA will issue another round of letters to the parties concerned. The information is also uploaded onto the OLA's website for public information.

2.7 The operation of guesthouses may to a certain extent cause nuisance and inconvenience to the residents living in the building. The Government appreciates views expressed by some quarters of the community that the licensing regime should take into account DMC

provisions and the views of local residents. The Authority is currently not empowered to consider reasons other than those specified in section 8(3) of the Ordinance, so legislative amendments would be required if the Authority were to do so.

Enforcement

2.8 Operating an unlicensed guesthouse is a criminal offence, and is liable on conviction to a fine of \$200,000 and to imprisonment for 2 years, and to a fine of \$20,000 for each day during which the offence continues.

2.9 Over the past few years, the OLA has spared no effort in combating unlicensed guesthouses through a multi-pronged approach, including strengthening law enforcement action, enhancing deterrent effect and stepping up publicity.

2.10 To strengthen law enforcement action, the OLA has increased manpower resources and recruited frontline officers with law enforcement experience. It has also adjusted its enforcement strategies and strengthened its efforts to collect intelligence by setting up a dedicated Internet enforcement team to closely monitor websites, discussion boards, blogs, etc. which provide information to tourists. The OLA has also established referral mechanisms with the Travel Industry Council (TIC) and the Consumer Council (CC) respectively to collect information of suspected unlicensed guesthouses.

2.11 When suspected unlicensed guesthouse operation is identified or such a report is received, the OLA will conduct an inspection within eight working days, and having regard to the circumstances of individual cases, take follow-up actions and collect evidence by employing the most appropriate and effective tactics such as conducting surprise inspections at different times (including non-working hours and during public holidays), launching high-profile, large-scale and targeted inter-departmental operations, or conducting decoy operations. Prosecution will be instituted immediately if there is sufficient evidence that the premises concerned are involved in unlicensed guesthouse operation.

2.12 To achieve a greater deterrent effect, the OLA has implemented a stringent measure since 2010 targeting at licensed guesthouses operators who operate unlicensed guesthouses at different premises (the so-called “shadow guesthouses”). If a guesthouse licensee is convicted of an offence involving operation of an unlicensed guesthouse, the OLA will consider cancelling all the licences being held by the licensee concerned or not renewing the licences pursuant to the Ordinance. So far, the OLA has cancelled or refused to renew the licences of 17 guesthouses for this reason.

2.13 In addition, the OLA will pass information on convicted cases to the Rating and Valuation Department, the Inland Revenue Department, mortgage banks or monetary institutions, property owners, OCs and management offices of the buildings for following up under their respective purview such as prosecution against tax evasion and recovery of tax. Should any property agent or insurance agent be convicted, the OLA will also pass the conviction records to the Estate Agents Authority or the Office of the Commissioner of Insurance for their follow up actions.

2.14 As regards publicity, the OLA has launched the Licensed Guesthouse Logo Scheme to facilitate tourists identifying licensed guesthouses. The frequency of Announcements in Public Interest on television and radio has also been increased, whilst posters/banners are displayed and publicity leaflets distributed at immigration checkpoints and districts with more suspected unlicensed guesthouses in order to remind tourists to Hong Kong of patronising licensed guesthouses. Moreover, the OLA collaborates with the Tourism Commission and Hong Kong Tourism Board to encourage tourists to patronise licensed guesthouses and to convey the messages to the Mainland tourism authorities. The CC is also urging visitors not to patronise unlicensed guesthouses on its dedicated "Shopsmart" website for Mainland tourists. A full list of licensed hotels and guesthouses has been uploaded onto the OLA's webpage (www.hadla.gov.hk) for easy reference by tourists. A smartphone application for searching licensed guesthouses will also be launched later this year.

2.15 As illustrated in the table below, the number of inspection, enforcement and prosecution against suspected unlicensed guesthouse operation have drastically increased over the past few years. Since 2009, a total of 27 persons have been sentenced to imprisonment for unlicensed guesthouses operation.

Enforcement Figures against Unlicensed Guesthouse Operation

	2009	2010	2011	2012	2013	2014 (1st Quarter)
Enforcement action	2 430	2 678	3 125	6 791	9 889	3 217
Prosecution ^(note)	39	38	53	128	171	46
Conviction ^(note)	36	44	39	110	161	43

Note : The figures of prosecution and those of conviction in the same year are slightly different because trials of some prosecution cases were/will be conducted in the following/next year.

2.16 While the vigorous and continuous efforts against unlicensed guesthouses do bear some fruit, the OLA is finding it increasingly difficult to secure sufficient admissible evidence as the unscrupulous operators have become very alert after the OLA stepped up its the enforcement actions. Also, many lodgers of guesthouses do not wish to cooperate with the law enforcement agency in terms of providing relevant information or returning to Hong Kong to serve as witness in the court. There is therefore a need to review the Ordinance in order to better facilitate enforcement and prosecution actions.

Chapter 3 Enhancing the Licensing Regime

3.1 This chapter sets out the proposals to enable the Authority to take into account DMC and local residents' views in the licensing process. A number of enhancement measures to offer better protection to the lodgers and public are proposed in light of the OLA's practical and operational experience.

(A) *DMC*

3.2 DMC is a private covenant among the owners, the property manager and the developer of the building concerned. It is a legal document defining the rights, interests and obligations of the parties in a building with multiple ownerships. The parties to this private contract are entitled to enforce the provisions of the DMC, and take civil actions against those parties to the contract who do not comply with it.

3.3 The Government is not in a position to interpret or enforce a private contract to which the Government is not a party. In accordance with the Building Management Ordinance (Cap. 344), interpretation of a DMC is under the jurisdiction of the Lands Tribunal. There was a case in 1997 where an OC successfully applied for an injunction order from the Lands Tribunal against the operation of two guesthouses in its building, the DMC of which stipulated that uses other than "private residential purpose" were not allowed in the premises. In the light of the injunction order, the OLA subsequently cancelled the licences of these two guesthouses.

3.4 We maintain the view that the Government should not interpret the terms and provision of the DMC, which is a private contract *per se*, in the licensing process. The Authority may not have strong legal grounds to refuse an application or cancel a licence based on its own non-judicial interpretation of DMC, and its decision may be judicially reviewed. Nevertheless, if a DMC contains explicit restrictive provisions, or the court of law has already handed down a judgment against the use of the premises for guesthouse purpose, then it is reasonable for OLA not to issue a licence because an injunction order will likely be granted if the case is brought to the court. Such action by the OLA will save the

residents' time, costs and trouble in bringing the case before the court by themselves, and assist them in managing their building properly in accordance with the DMC.

3.5 Drawing reference to the precedent case as mentioned in paragraph 3.3 above, the Authority will make it a standing practice, with immediate effect, to refuse the licence application or revoke the licence if the court of law has granted an injunction order against the use of a premises as guesthouse on grounds of non-compliance with DMC. Depending on the judgment, such arrangement may also apply to other premises used for guesthouse purpose in the same building. The OLA will also suspend the processing of the application when the owners or the OC concerned file a case to the court of law on grounds of breaching the DMC.

3.6 There is currently no clear provision in the Ordinance to empower the Authority to consider the provisions of DMC. We propose to amend the Ordinance to –

- (i) enable the Authority to refuse to issue/renew licences or cancel the existing licences where the DMC of the building concerned contains explicit restrictive provisions stipulating that guesthouse operations or commercial activities are not allowed in the building concerned, or the premises are for “private residential use” only; and
- (ii) require the applicant to submit a certificate signed by a solicitor affirming that there are no such explicit restrictive provisions in the DMC.

Q1. Do you have any views on the above legislative proposal which aims to allow the Authority to take into account the explicit restrictive provisions in the DMC?

(B) Local Consultation

3.7 Some DMCs do not contain any provision against the establishment of guesthouses in the building. In this circumstance, we consider it prudent for the Authority to listen to the views of the residents before making a decision on the licence application.

3.8 Legislative amendments to the Ordinance will be required before the Authority can take into consideration local views in the licensing process. Three possible options are set out below –

Option I - Conducting local consultation through District Officers (DOs)

- Drawing reference to the current licensing requirements for amusement game centres and mahjong parlours which are also under OLA's jurisdiction, OLA may invite DOs to solicit local views on the application. The powers to grant or reject a licence application are still vested with the Authority.

Pros

- (i) It is simple, straight-forward and easy to implement. The impact on the processing time of an application is relatively small as compared to other options described below.
- (ii) It can be implemented quickly after enactment of the newly added provisions since no significant changes to the current licensing procedures are required.

Cons

- (i) Without an independent body to consider the objections received, either the applicant or the residents may be dissatisfied with the decision made by the Authority.
- (ii) The aggrieved party is likely to seek an appeal to the Appeal Board (Hotel and Guesthouse Accommodation) pursuant to the Ordinance. This may overload the Appeal Board and

longer waiting time will be required for handling the appeal cases.

Option II - Setting up an independent panel to consider local views

- An independent panel, comprising unofficial members, is to be set up to collect local views and consider objections. The applicant may also be invited to propose measures to address the objectors' concerns. The powers to grant or reject a licence application are still vested with the Authority. However, the Authority shall take into account the advice and recommendations of this independent panel in making a decision.

Pros

- (i) The independent panel can provide impartial advice and make recommendation having regard to all relevant factors.
- (ii) The recommendation made by the independent panel is expected to be more acceptable to the parties concerned.

Cons

- (i) Processing time of the licence application will be longer than Option I if the independent panel should go through a thorough process to collect and consider local views.
- (ii) If the Authority does not accede to the recommendation made by the independent panel even with good reasons, it will likely be subject to legal challenges by the aggrieved party.

Option III - Setting up a new statutory body responsible for the licensing work

- A new statutory body comprising unofficial members is to be set up to consider applications and issue licences. All relevant powers will be transferred from the Authority to this new statutory body. Public hearings will be held, if necessary, to listen to the views of the objectors before a decision is made. OLA will play a new role as the executive arm of this statutory body, providing secretariat and technical support and undertaking relevant enforcement duties.

Pros

- (i) The applicant and the objectors will be given a fair chance to express their views and make statements in front of the members of the statutory body. The process is highly transparent.
- (ii) The decision to grant or renew licences is made by independent unofficial members after careful consideration of all relevant factors including local views. It is perceptually more impartial, legitimate and acceptable.

Cons

- (i) Processing time of the application will be longer than Option I and II if the statutory body goes through a thorough process to collect and consider local views and hold public hearings before making a decision.
- (ii) As it involves fundamental and substantial changes to the existing licensing regime, it will take considerable time to revamp the procedures for processing applications and work out the detailed consultation arrangements before implementation.

Q2. What are your views on the three options for conducting local consultation?

(C) Other Enhancements

“Fit and Proper” Person

3.9 Under the current licensing system, OLA is not empowered to consider the conviction records of applicants in processing a licence application. Even if an applicant has been convicted of unlicensed guesthouse operation, he can still apply for a licence and the Authority has no power to refuse the application on such grounds.

3.10 There is a very common requirement in other licensing regimes that the applicant must be “fit and proper”. We consider it reasonable and necessary to amend the Ordinance to introduce a similar requirement for the guesthouse licensing regime. In considering whether an applicant is “fit and proper”, the Authority may have regard to whether the applicant (including every partner or director if the applicant is a partnership and company respectively) –

- (i) has been convicted of an offence against any provision of the Ordinance;
- (ii) has been convicted, whether in Hong Kong or elsewhere, of a criminal offence involving fraud or dishonestly;
- (iii) is an undischarged bankrupt (in the case of an individual) or is in liquidation or the subject of a winding up order (in the case of a body corporate); and
- (iv) is a mentally disordered person.

Q3. What are your views on the proposal to amend the Ordinance to require the applicant to be a “fit and proper” person?

Third Party Risks Insurance

3.11 There is currently no mandatory requirement in the Ordinance and in the licensing conditions, for guesthouse licensees to procure third-party liability insurance for their guesthouses.

3.12 To provide better protection to lodgers residing in a licensed guesthouse and, at the same time, reduce the risks of huge amount of compensation faced by guesthouse operators in case of accidents, we propose to require all guesthouse licensees to procure third-party risk insurance for their guesthouses.

Q4. What are your views on the proposal to require the licensees to procure third-party risk insurance for their guesthouses?

Continuous and Personal Supervision

3.13 There are existing provisions under the Ordinance requiring the guesthouses to be under the “continuous and personal supervision” of the applicants/licencees. The Authority may refuse to grant a licence or refuse its renewal application on this ground. To clarify the requirement and provide better protection to the lodgers, we propose to make it clear by specifying in the licensing conditions that the licensee shall provide a 24-hour manned reception counter inside their guesthouses. No legislative amendment will be required.

Q5. What are your views on the proposal to require the licensee to provide a 24-hour manned counter in their guesthouse?

Differentiation between a 'Hotel' and a 'Guesthouse'

3.14 Under the definitions of the Ordinance, the terms 'hotel' and 'guesthouse' carry the same meaning and no differentiation is made. There are suggestions from the hotel industry that in the light of their difference in size, mode of operation and facilities etc., the Authority should issue different types of licences to purpose-built hotels and guesthouses in residential building respectively.

3.15 We appreciate the industry's views and consider it helpful to facilitate tourists in choosing suitable sleeping accommodation. We therefore propose to issue "hotel licence" to purpose-built hotels and "guesthouse licence" to other types of short-term sleeping accommodation located in residential buildings. It can be achieved through administrative arrangement without legislative amendment.

Q6. Do you have any views on the proposal to issue different types of licence to "hotels" and "guesthouses"?

Chapter 4 Enhancing Enforcement against Unlicensed Guesthouses

4.1 As mentioned in Chapter 2, the OLA has been undertaking vigorous enforcement actions against unlicensed guesthouses. To combat and tackle the problem of unlicensed guesthouse more effectively, we would like to introduce a number of amendments to the Ordinance with a view to facilitating the collection of criminal evidence and enhancing the deterrent effect of penalties.

(A) Premises for Unlicensed Guesthouse

4.2 To instigate a prosecution, the OLA has to collect sufficient admissible evidence pursuant to the Evidence Ordinance (Cap. 8) and prove beyond reasonable doubt that the defender has committed an offence under the Ordinance. There are two key elements, namely (i) a premises is providing short-term sleeping accommodation at a fee without a valid licence, and (ii) a person operates, keeps, manages or is in control of that unlicensed guesthouse.

4.3 In most of the suspected cases, the OLA manages to collect circumstantial evidence, such as advertisement on the street or on Internet, price list, a guesthouse layout and setting, etc, showing that a premises may be used as an unlicensed guesthouse. However, it is difficult to secure sufficient evidence to prove that unlicensed guesthouse activities are taking place/have taken place in that premises and the persons therein are operating, keeping, managing or controlling that guesthouse.

4.4 As a result, most of the prosecution cases have to rely on decoy operations in order to collect sufficient evidence. Since the unlicensed operators have become more and more alert, it is not uncommon for the OLA officers be refused entry, even under cover. Even with sufficient evidence, if the owner or the operator is not caught red-handed, it is still very difficult to institute a prosecution against them and the OLA may only be able to prosecute the keeper who is employed to manage the unlicensed guesthouse.

4.5 To facilitate enforcement, we propose to add new “deeming provisions” in the Ordinance to the effect that until the contrary is proved,

any premises which are found to be offering or have provided short-term sleeping accommodation at a price shall be deemed to be used as a guesthouse. The property owner, tenant or occupier of the premises concerned shall also be deemed to be the operator of the guesthouse. These deeming provisions shall effectively relieve OLA's burden of proof and make it easier to instigate prosecution against the owners and operators of the unlicensed guesthouses.

Q7. Do you have any views on the above proposal to add “deeming provisions” in the Ordinance to facilitate the OLA to prosecute the owner and operator of the unlicensed guesthouse?

(B) Entry to a suspected unlicensed guesthouse

4.6 Section 18(a) currently empowers the public officer authorised by the Authority, without warrant, at all reasonable times to enter and inspect any premises which he has reason to suspect are used as a guesthouse. In practice, however, it is difficult for OLA's officers to exercise this power. They are often frustrated by uncooperative owners or occupants who refuse to grant them entry, or the premises are unattended. The Ordinance does not empower the OLA to break in to suspected premises for the purpose of investigating unlicensed guesthouse activities.

4.7 We therefore propose to make provision to allow the OLA to apply to the Magistrate's Court for warrants to facilitate its public officers to enter into, and break in if necessary, individual premises for inspection and enforcement actions. We believe that the likelihood of abuses should be small as the Court will act as the gatekeeper to ensure that the warrant would only be granted in accordance with the statutory requirements and is genuinely necessary.

Q8. Do you have any views on the above proposal to make provision for empowering the OLA officer to apply for a court warrant for enter into the suspected unlicensed guesthouse for inspection?

(C) Imposing heavier penalties and closure of premises

4.8 We note that convicted persons are usually fined a few thousand dollars only. This achieves very little deterrent effect since many unscrupulous operators would just count it as part of the operating costs.

4.9 To give a clear message to the community that operating unlicensed guesthouse is a serious offence and poses a high risk to the life and property of the lodgers and the public, we propose to increase the maximum fines for operating unlicensed guesthouses from \$200,000 to \$500,000 and imprisonment from 2 years to 3 years. We expect that the court will impose a heavier sentence accordingly after the maximum penalties for the offence have been increased.

Q9. Do you have any views on the proposal to increase the maximum penalty for operating unlicensed guesthouses?

4.10 We are also considering a more stringent measure by drawing reference to the established practice of closing vice establishments pursuant to the Crimes Ordinance (Cap. 200). We propose to amend the Ordinance to empower the OLA to apply to the Court, upon the second conviction of an unlicensed guesthouse, to issue a Closure Order against the relevant premises for six months.

Q10. Do you have any views on the above proposal to close the premises, upon the second conviction, for six months?

Chapter 5 Invitation of Views

5.1 We would like to receive your views on various proposals to improve the licensing regime so as to minimise the nuisance or impact caused by licensed guesthouses, and to enhance the effectiveness of enforcement action against unlicensed guesthouses.

5.2 Please forward your views and comments to us by email, mail or facsimile on or before 28 August 2014 -

Email address : review_hagao@had.gov.hk

Address : Division IV
Home Affairs Department
31/F Southorn Centre
130 Hennessy Road
Wan Chai, Hong Kong

Fax number : 2147 0984

5.3 It is voluntary for any member of the public to supply his/her personal data upon providing views on this consultation document. Any personal data provided with a submission will only be used for the purpose of this consultation exercise.

5.4 The submission and personal data collected may be transferred to other Government bureaux and departments or agencies for purpose(s) directly related to this consultation exercise. The parties receiving the data are bound by such purposes in their subsequent use of such information.

5.5 The names and views of individuals and organisations which put forth submissions in response to this consultation document (“senders”) may be published, in whole or in part, for public viewing after conclusion of the public consultation exercise. The Government may use, adopt or develop any views put forward without seeking permission or providing acknowledgement of the party making the view. The Government may, either in discussion with others or in any subsequent report, whether

privately or publicly, attribute comments submitted in response to the consultation document. If you do wish to remain anonymous and/or keep your views submitted in relation to all or part of a submission confidential, it is necessary for you to state so when making your submission.

5.6 Any sender providing personal data to this Department in the submission will have right of access to or correction of personal data contained in the submission. Any requests for data access or correction of personal data should be made in writing to –

Address : Executive Officer (4)1
Home Affairs Department
31/F Southorn Centre
130 Hennessy Road
Wan Chai, Hong Kong

Fax number : 2147 0984

Email address : review_hagao@had.gov.hk

Home Affairs Department
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