



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

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Mr YUEN Siu-kei, Michael
Chief Operations Officer (Technical Administration)
Civil Aviation Department
Air Services and Safety Management Division
Level 6, Office Building, Civil Aviation Department Headquarters
1 Tung Fai Road, Hong Kong International Airport
Hong Kong

Dear Mr YUEN,

**Small Unmanned Aircraft Order (L.N. 116 of 2021)
Administrative Appeals Board Ordinance (Amendment of Schedule)
Order 2021 (L.N. 115 of 2021)**

We are scrutinizing the captioned items of subsidiary legislation with a view to advising Members on their legal and drafting aspects. To facilitate Members' consideration of the subsidiary legislation, we should be grateful if you could clarify the matters set out in Annex.

As the Subcommittee on Subsidiary Legislation to Regulate the Operation of Small Unmanned Aircraft is scheduled to meet on 10 August 2021, we would appreciate your early reply by email in both English and Chinese as soon as possible.

Yours sincerely,

(Rachel DAI)
Assistant Legal Adviser

c.c. Department of Justice
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L.N. 116

1. Under section 3(3)(b), in determining the weight of an aircraft for the purpose of classifying it as a category A1, A2 or B small unmanned aircraft ("SUA"), if the flight is partly within Hong Kong and partly outside Hong Kong, the part of the flight outside Hong Kong is not to be taken into account. Please clarify and illustrate with examples the application of this provision.
2. Section 9 provides that Part 2 (Operation of Small Unmanned Aircraft) (other than Division 3) does not apply to or in relation to a category A1 or A2 aircraft in respect of a flight if, among others, the aircraft is not carrying any dangerous goods at any time during the flight. Please clarify whether it is also the legislative intent for Part 2 not to apply if the aircraft is carrying dangerous goods during the flight with a permission granted pursuant to an application made under section 37(1)(d) and, if so, please consider whether the words "or the aircraft is carrying dangerous goods during the flight with a permission granted under section 37" should be included in section 9(1)(e).
3. Section 10 provides that Subdivision 1 of Division 2 (Basic Requirements relating to Operation) does not apply to or in relation to a category A1 aircraft in respect of a flight if, among others, the aircraft is not carrying any dangerous goods at any time during the flight. Please clarify whether it is also the legislative intent for Subdivision 1 of Division 2 not to apply if the aircraft is carrying dangerous goods during the flight with a permission granted pursuant to an application made under section 37(1)(d) and, if so, please consider whether the words "or the aircraft is carrying dangerous goods during the flight with a permission granted under section 37" should be included in section 10(c).
4. Under section 14(1), if an SUA is operated for a flight that is not wholly within an enclosed area, the information recorded by a safety system installed in, carried by or attached to the SUA must be kept for six months beginning on the date on which the flight begins. Please clarify:
 - (a) the rationale for the requirement for keeping the record for a period of six months;
 - (b) the rationale for providing in section 14(2) that each of following persons commits an offence if the requirement is

contravened: (i) the remote pilot of the aircraft for the flight; (ii) the responsible person of the aircraft at the time of the flight; (ii) any other person who knowingly causes or permits the aircraft to be operated for the flight;

- (c) whether the offence is intended to be one of strict liability and, if not, whether a due diligence defence similar to that provided under, for example, section 46(3) of the Sex Discrimination Ordinance (Cap. 480) should be include in L.N. 116 to provide that it shall be a defence for the responsible person if he can establish that he has taken all reasonably practicable steps to ensure that the remote pilot has kept the relevant record, and *vice versa*; and
 - (d) whether, if the offence is not intended to be one of strict liability, a provision for the application of the principle of vicarious liability, similar to section 43Q(2) of the Employment Ordinance (Cap. 57), should be include in L.N. 116 to expressly provide that where an offence committed by a remote pilot is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, the responsible person, the responsible person commits the like offence.
5. The requirements for operation set out in section 16(1) include "(e) that the distance between the aircraft and any person who is not involved in the flight operation, measured horizontally and at any altitude, is not less than the specified distance" (i.e. the distance specified by the Director-General of Civil Aviation ("Director") by notice published in the Gazette under section 17(2)). Please provide examples to clarify who, in addition to the remote pilot of the aircraft, is regarded as a person "involved in the flight operation" and consider defining the term "person who is not involved in the flight operation" for the sake of clarity.
6. Under section 16(1)(i), nothing may be dropped from an SUA during the flight except for a purpose specified by the Director by notice published in the Gazette under section 17(2). In the light of the meaning of "drop" as defined in section 16(2) (which includes project and lower), please clarify whether section 16(1)(i) only prohibits the dropping or projecting of tangible things, and whether projecting intangible things (e.g. light, image or voice) from an SUA would be regarded as dropping something from the aircraft under section 16(1)(i).

7. Under sections 25(4)(b), 26(4), 27(3), 29(3), 30(4) and 37(4), the Director may refuse to grant certain applications (e.g. application for the registration of an SUA and the renewal thereof, application for the registration of a person as a registered remote pilot and the renewal thereof, and application for the reissue of a label in respect of a registered SUA), if the Director considers that it is inappropriate to grant such applications. Please clarify with examples the relevant factors that the Director would take into account in determining whether it is inappropriate to grant such applications and consider expressly providing for the relevant factors in L.N. 116 for the sake of clarity and certainty.
8. Sections 28(e), 31(d), 34(e), 36(d) and 38(1)(d) respectively provide that the Director may vary, suspend or revoke the registration of a registered SUA, the registration of a person as a registered remote pilot, a rating assigned to a person, an approval for a person to provide, organize or conduct a training course and an authorization for a person to conduct any assessment, and a permission granted to a person, if he considers that it is no longer appropriate to have the aircraft, the person registered, the rating assigned, the course or person approved or authorized, and the permission granted. Please clarify with examples the relevant factors that the Director would take into account in determining whether it is "no longer appropriate" to have the aircraft or person registered, etc. and consider expressly providing for the relevant factors in L.N. 116 for the sake of clarity and certainty.
9. Sections 9(5), 13(4), 17(5), 19(7), 24(4) and 68(6) respectively provide that the notices published in the Gazette in respect of the specifications of flying altitude, functions of safety system, parameters for operating requirements, the designation of restricted flying zones, the prohibition of a class or description of SUA from being operated for a flight, and the exemption(s) from the provision(s) of L.N. 116 (and any variation, suspension or revocation thereof decided by the Director) are not subsidiary legislation. In addition, section 63(4) provides that any safety requirements document for providing guidance on the operation of any provisions of L.N. 116 (and any amendment or revocation thereof) issued and published by the Director is not subsidiary legislation. Please clarify:
 - (a) why the Director's notices and the safety requirements document are not subsidiary legislation subject to scrutiny by the Legislative Council ("LegCo"), bearing in mind that the

relevant notices or documents would affect not only specified SUAs or individuals but also a class or description of SUAs or persons;

- (b) the policy intent behind these provisions which appear to give a wide power to the Director to impose requirements, prohibitions and to grant exemptions;
 - (c) whether the Director would consult any persons or parties before publishing the notices and the safety requirements document; and
 - (d) how the safety requirements document would be made known to the public.
10. Under section 47(3), on receiving the written notice of the Director's intention to revoke a registration, rating, approval, authorization or permission, the person concerned may make written representation to the Director within 14 days after the service of the notice as to why the registration, rating, approval, authorization or permission should not be revoked. Please consider whether sections 45 and 46 should contain similar provisions to give a person the right to make written representation to the Director in respect of his decisions to vary or suspend such registration, rating, approval, authorization or permission; and, if not, please provide an explanation.
11. Please clarify whether it is intended under section 53 that an authorized officer may search, examine, extract or collect any information contained in an aircraft, device, component or any other thing (except a specified appliance defined under section 53(4)) seized and detained under section 52 without a warrant issued by a magistrate under section 53(3). Please explain the rationale for this provision.
12. Under section 53, there is no specific restriction on the manner in which an authorized officer may exercise the power to search, examine, extract or collect any information contained in an aircraft, device, component or any other thing seized and detained. Please consider expressly providing for procedural safeguards in case the items seized and detained contain privileged materials. In this regard, please consider whether the absence of any procedural safeguards would lead to encroachment on the protection of privacy from "arbitrary or unlawful interference", which is protected under Article 14 of the Hong Kong Bill of Rights ("HKBOR"), the privilege against self-incrimination protected under HKBOR 11(2)(g), or the right to confidential legal advice

enshrined in Article 35 of the Basic Law. Please clarify whether and how section 53 could satisfy the four-step proportionality test as laid down by the Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.

13. It is noted that each of the offences created under L.N. 116 (e.g. dangerous operation, causing or permitting SUA to endanger person or property, interfering with SUA, operating prohibited SUA for flights, non-compliance with a requirement made by an authorized officer, providing false or misleading information, and obstructing an authorized officer) is punishable by a fine at level 6 and imprisonment for two years. Please clarify whether the maximum penalties are proportionate to the relevant offences, and whether they are consistent with existing penalties in related legislation, such as the penalties for dangerous flying under section 4 of the Civil Aviation Ordinance (Cap. 448) which provides for a penalty of a fine at level 6 and/or imprisonment for a term not exceeding six months.
14. Under section 66, it is a defence for a person charged with an offence under L.N. 116 (other than an offence under section 21, 22 or 58) to establish that, at the time of the alleged offence, the person had lawful authority or reasonable excuse for contravening the provision concerned. Please clarify with examples and relevant court cases (if any) what such "lawful authority or reasonable excuse" would be.

L.N. 115

15. L.N. 115, which adds item 79 to the Schedule to the Administrative Appeals Board Ordinance (Cap. 442), comes into operation on 1 June 2022. It is noted that section 88 of the Mercury Control Ordinance (Ord. No. 19 of 2021) adds item 78 to the Schedule to Cap. 442, and that Ord. No. 19 of 2021 comes into operation on a day to be appointed by the Secretary by notice published in the Gazette. Please confirm whether, in case Ord. No. 19 of 2021 comes into operation after 1 June 2022, editorial amendments to the item numbers mentioned above would be made by the Secretary for Justice ("SJ") under section 12 of the Legislation Publication Ordinance (Cap. 614), or a separate amendment Bill would be introduced into LegCo, to change the sequence of the items. In this connection, it is noted that section 12(f) of Cap. 614 only empowers SJ to "change the sequence of definitions, or of *unnumbered* items in a list" (italics added).
