



民航處
CIVIL AVIATION
DEPARTMENT

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

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By Email (rkt dai@legco.gov.hk)

10 August 2021

Miss Rachel Dai
Assistant Legal Adviser 2
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex,
1 Legislative Council Road, Hong Kong

Dear Miss Dai,

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

I refer to your letter dated 5 August 2021. In consultation with the Transport and Housing Bureau and the Department of Justice, our consolidated response are set out in **Annex**.

Yours sincerely,

(Michael YUEN)

Chief Operations Officer (Technical Administration)

c.c. Transport and Housing Bureau
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Department of Justice
(Attn: Mr Wallace NG, Senior Government Counsel (Acting))
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Administration's Response regarding LSD letter dated 05 Aug 2021

L.N. 116

- Q1. 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.
- A1. As SUA innovation and technology continues to evolve and with reference to international practices, SUA could potentially, in future, be used for cross-border operations, such as cross-border goods delivery, and the weight of the SUA may change during the flight. The new Small Unmanned Aircraft Order ("SUA Order") does not prohibit cross-border SUA operation so long as it complies with the applicable provisions of the Order when it is operating within Hong Kong. Section 3(3)(b) is added to clarify that, for example, if an SUA weighs 6 kg within Hong Kong during a flight, and it picks up an additional weight of 2 kg after leaving Hong Kong during the same flight (i.e. weighing 8 kg in total), it would still be classified as a category A2 aircraft in respect of that flight for the purposes of the SUA Order, as its weight does not exceed 7 kg for the part of the flight within Hong Kong.
- Q2. 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).

- A2. Taking into account that operations of SUA by educational institutions would normally take place within school premises under supervision, and with a view to facilitating the continual development of SUA applications like STEM education, it is our legislative intent that the registration, training and assessment requirements for remote pilots, equipment, insurance, and the majority of the operating requirements should not apply to flights for education or research purposes within school premises. This will allow educational institutions to, among others, design and operate SUA in accordance with their own curriculum as part of STEM education.

Notwithstanding the above, SUA carrying dangerous goods (e.g. flammable gases or liquids) will pose a higher risk to aviation safety and public safety. Under the new risk-based regulatory framework, prior permission from CAD will be required for such SUA operations. Considering the risks involved, it is our legislative intent that Part 2 shall apply if the SUA is carrying dangerous goods during the flight, no matter it is for educational or research purposes or not, and a permission granted under section 37(1)(d) will also be required.

- Q3. 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).

- A3. Under the new regulatory regime, SUA operations will be regulated under a risk-based approach. Based on the weight of the SUA and the operational risk level, SUA operations of different risk levels will be subject to the corresponding regulatory requirements. Prior permission from CAD will be

required for higher risk operations (e.g. when SUA is carrying dangerous goods). Considering the risks involved, it is our legislative intent that Subdivision 1 of Division 2 shall apply if a category A1 aircraft is carrying dangerous goods during the flight, and a permission granted under section 37(1)(d) will also be required.

- Q4. 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.

- A4. (a)&(b) Information recorded by the safety system, normally referred to as the “flight log”, contains pertinent details and records of the SUA flights operated. It is essential for the relevant authorities to follow up complaints and non-conforming/ unsafe operations and take enforcement actions under the Order.

Taking into account the normal time required for follow-up and investigative actions, particularly in complex cases, and with reference to similar statutory requirements for keeping other aviation records, the legislative intent is to require such information to be kept for six months. Persons including the remote pilot and the SUA responsible person have the responsibility to ensure that such information is so kept in compliance with the Order. The same also applies to persons who knowingly cause or permit the SUA to be operated for the flight, such as a person who owns a SUA but has not registered as responsible person. This ensures that no party causing or permitting the flight operation to take place would take deliberate actions to remove any pertinent flight records, particularly those involving alleged unsafe flight operations, within a period of six months.

(c)&(d) In the absence of any express requirement in the proof of mental element for a statutory offence, the Court in construing the particular statutory provision may take into consideration, inter alia, the availability of any statutory defence. It is stipulated under section 66 that it is a defence for a person charged with an offence under this Order (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. We consider that the defence under section 66 is sufficient and appropriate for a person charged with an offence under section 14.

- Q5. 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.

- A5. To support an SUA operation, there could be other persons such as safety manager or observing crew apart from the remote pilot, who will be involved and participated in the SUA operation on site to ensure safe operation of the SUA and proper conduct and coordination of the activity. They are considered as persons involved in the flight operation. This is particularly the case for professional deployment of SUA.

As circumstances may vary depending on the different SUA operations, it is not practicable nor desirable to list out the different persons involved in the legislation which may undermine the evolving SUA development and applications. The current provision under the new SUA Order is meant to be generic and concise. To assist members of the public to comply with the requirements, more elaboration and examples will be provided in the Safety Requirements Document ("SRD") issued under section 63.

- Q6. 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).

- A6. The new SUA Order is specifically designed for SUA with the aim of safeguarding public and aviation safety, while allowing ample room for the development and applications of SUA in tandem with the evolving technology. Amongst other things, to ensure aviation and public safety, section 16(1)(i) provides that nothing shall be dropped ("掉下"), including projected ("投放") or lowered ("降下"), from an SUA during a flight except for specified purpose. Our legislative intent is that only tangible things are included.

- Q7. 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.
- Q8. 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.

A7&A8.

When considering an application (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) and/or the variation, suspension or revocation of the related registration, rating, approval, authorization or permission, the Director would take a host of factors into account before granting the application and/or applying the variation, suspension and revocation, in order to ensure that aviation safety and public safety can be achieved, and the provisions of the SUA Order would be complied with, in tandem with the latest safety standards and technological development.

Taking the registration of SUA as an example, other than the considerations given in section 25(4)(a), as the applications of SUA and SUA technology are developing rapidly, the applicable safety and technical requirements associated with SUA will continue to evolve. New safety standards and SUA models may emerge replacing obsolete requirements and SUA models. Under such circumstances, it may not be appropriate to register or renew the registration of obsolete SUA no longer proven or considered to be safe for operations. The same principles apply to other aspects.

Q9. 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 SUA or individuals but also a class or description of SUA 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.

- A9. As the applications of SUA and SUA technology are developing rapidly, the applicable technical and operating parameters and requirements associated with the safe operation of SUA will continue to evolve. In order to ensure that new technical and operating parameters and requirements can be put into effect in a timely manner in tandem with the developing and evolving technology, we consider that the Director-General of Civil Aviation should be given the power to specify new technical and operating requirements or specifications in the interest of aviation safety and public safety through gazette notices.

The SRD are means to assist the implementation of the provisions of the SUA Order. The SRD will provide further technical and operational guidance for members of the public to follow which will facilitate compliance. The SRD will be published and timely updated on the CAD website as well as the dedicated electronic portal developed for SUA which can be accessed via internet or mobile application.

When formulating and updating the operating requirements relating to operations of SUA which are technical in nature, CAD will take into consideration the prevailing technological development and international practices. Depending on the nature of the technical requirements, views from relevant stakeholders will also be sought as appropriate.

- Q10. 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.

A10. In the interest of aviation safety and public safety, timely action may need to be taken for exercising the power to vary or suspend a registration, rating, approval, authorization or permission of a person. Should a period of 14 days be allowed for written representation to be made before a variation or suspension may take effect, imminent safety threats and concerns may not be able to be addressed in a timely manner resulting in unacceptable safety risks.

Besides, as provided under sections 61 and 62, the Director's decision to vary, suspend or revoke a registration, rating, approval, authorization or permission will be subject to review and appeal. An administrative mechanism will be established by CAD to handle requests for review of relevant decisions, and if the person concerned is not satisfied with the result of the review, the person will have the statutory right to appeal to the Administrative Appeals Board or the Chief Secretary for Administration (as the case requires). The above arrangement will serve as a safeguard of the person's rights being affected by the Director's power of variation or suspension.

Q11. 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.

Q12. 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.

A11. & A12.

Section 53 provides the power to search and examine aircraft and device etc. to authorized officer appointed under section 48 for the purpose of exercising enforcement duties. The powers to search, examine, extract or collect information are necessary for the purpose of investigating and enforcement actions for offences under the SUA Order.

Any delay caused by an application for warrant is likely to defeat the purpose of obtaining such information. This arrangement is similar in nature to the existing laws of Hong Kong whereby officers of law enforcement agencies (LEAs) are empowered to exercise certain powers without warrant.

In exercising the power under section 53, the authorized officer is subject to an implied duty of reasonable care and will follow a set of procedures, including where practicable, returning the SUA seized or detained to the owner in reasonable time and condition.

The power under section 53 has a clear legal basis. The power can only be exercised in relation to an aircraft, device, component or any other thing seized and detained under Division 2 of Part 4 (such as pursuant to section 52(1) when an authorized officer reasonably suspects that an offence under the SUA Order has been committed, is being committed or is about to be committed in relation to an SUA operated for a flight or about to be operated for a flight). Section 53(2) offers further safeguards by providing that an authorized officer must not search, examine, extract or collect information in specified appliances (meaning, with limited and justifiable exceptions, an electronic device that is likely to contain personal information) without warrant. Authorized officers will handle the information searched, examined, extracted or collected in accordance with the Personal Data

(Privacy) Ordinance (Cap. 486). Authorized officers will also exercise the power under section 53 proportionately in the circumstances of each case having regard to, amongst others, the protection of privacy under HKBOR 14.

For the above reasons, we consider that the power under section 53 is lawful and justifiable under the proportionality test, and has not engaged the privilege against self-incrimination or the right to confidential legal advice. As mentioned above, the power is necessary for effective investigation and enforcement actions under the SUA Order. The power serves the legitimate aim of ensuring compliance with the regulatory regime under the SUA Order (which seeks to ensure aviation and public safety), and is rationally connected to such aim. The power is proportionate and no more than necessary to achieve such aim, in particular given that power is carefully limited in scope having taken into account all the safeguards in place. A reasonable balance has been struck between the public interests of ensuring compliance with the SUA Order (thereby ensuring aviation and public safety) and the inroads made into the constitutionally protected rights of an individual.

- Q13. 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.
- A13. Under the new SUA Order, if a person commits an offence, the person is liable on conviction on indictment to a fine at level 6 and to imprisonment

for two years. In determining the level of maximum penalty, due consideration has been given to section 2A(7) of the Civil Aviation Ordinance (Cap. 448) and the penalty for similar endangering offences under Article 91(6) of the Air Navigation (Hong Kong) Order 1995 (Cap. 448C). Compared with section 4 of Cap. 448, the scope of endangering acts covered under the SUA Order is much broader and could induce safety risks to a wider scope of persons or properties, including but not limited to those on land or water (for instance, affecting large commercial aircraft and its passengers in the air). A higher level of maximum penalty is thus provided for in the new SUA Order, taking into account the broader scope and the potentially higher risks.

Depending on the types and seriousness of the offences and circumstances of the cases, enforcement agencies which include the police officers and the authorized persons appointed under the SUA Order may take actions ranging from issuance of warnings / safety direction, suspension or revocation of registration / permission / rating / approval, etc. to prosecution in court.

For cases of minor technical breach, for example, failure to update personal particulars as required by the SUA Order, a safety direction could be issued, under which the person concerned may be required to take the corrective actions in accordance with the safety direction within a specified period of time. Examples of corrective actions may include requiring the remote pilot to undergo appropriate training before he can resume flying, or requiring the responsible person to upgrade the equipment of SUA to meet the required standard.

In sum, depending on the types and seriousness of the offences and circumstances of the cases, enforcement agencies will determine the most appropriate actions to be taken, with the main objective of requiring the concerned person to rectify the breach in a timely manner and ensure safe operation of SUA.

- Q14. 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.

- A14. Reference has been made to other legislation in Hong Kong to provide for a defence of lawful authority or reasonable excuse, such as section 13A of the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F) and section 4 of the Prohibition on Face Covering Regulation (Cap. 241K).

As the Court held in *HKSAR v. Ho Loy* (2016) 19 HKCFAR 110 at [36], a consideration of the defence of "reasonable excuse" involves looking to three matters:-

- (i) the matters said to constitute reasonable excuse must be identified;
- (ii) the Court would then examine whether the excuse was genuine; and
- (iii) the Court must make an assessment of whether that excuse was reasonable on an objective standard depending on the particular facts of the case.

The question of whether or not an excuse is reasonable will be determined in the light of the particular facts and circumstances of the individual case.

What constitutes lawful authority or reasonable excuse largely depends on the facts and circumstances of the case and has to be decided on a case by case basis. From the Administration's experience, there could be context (e.g. in emergency situations) where managers of venues (particularly those which gather large assembly of people) are required to resort to means to prevent unauthorized SUA from entering and operating in a venue in order to protect public safety. When facing a potential charge of interfering with a SUA, which is contrary to Section 23 of the SUA Order, the defence of reasonable excuse under Section 66 of the SUA Order may be available. Consideration would then be given to the above three matters in determining whether there existed any reasonable excuse.

L.N. 115

Q15. 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*).

A15. In case the addition of item 79 commences before that of item 78, an editorial note may be added by the Hong Kong e-Legislation editor as appropriate for clarity. An example of similar editorial practice can be found in Schedule 1 to the Waste Disposal (Designated Waste Disposal Facility) Regulation (Cap. 354L).

25.	<i>(Addition not yet in operation—see L.N. 65 of 2004)</i>
26.	Mui Wo Temporary Public Fill Reception Facility
	Mui Wo Ferry Pier Road, Mui Wo, Lantau, N.T.
	Plan number P 20332-8 (<i>L.N. 165 of 2004</i>)