

Re: Prevention and Control of Disease Bill

Submission of the Hong Kong Bar Association

1. The Bills Committee on the Prevention and Control of Disease Bill (“the Bills Committee”) requests the views of the Hong Kong Bar Association (“HKBA”) on the papers prepared by the Administration and the Legal Service Division of the Legislative Council Secretariat regarding requisition of private properties in a public health emergency.

The Two Papers

2. The Administration’s paper addresses the questions of whether the power of requisition under clause 8(2)(c) of the Prevention and Control of Disease Bill (“the Bill”) complies with the guarantee to the right of private ownership of property under Arts 6 and 105 of the Basic Law of the HKSAR and also of whether compensation would be provided to owners of premises and conveyances, as well as people ordered to be quarantined or isolated for public health purposes, if they suffered financial loss as a result.

3. The Legal Service Division's paper addresses the question of whether the requisition power proposed in the Bill is consistent with Art 105 of the Basic Law of the HKSAR. It also addresses the question of whether a requisition in respect of patented pharmaceutical products is consistent with Art 105.

The Bill

4. The Bill is introduced to replace the Quarantine and Prevention of Disease Ordinance (Cap 141) by a new Ordinance designed to bring up-to-date and in line with the WHO International Health Regulations 2005 ("the IHR 2005") the legislative basis for measures to control and prevent disease.
5. The Bill proposes the provision of extensive coercive powers for the purposes of preventing the introduction into, the spread in and the transmission from, Hong Kong of any disease, source of disease or contamination and of preventing any disease, including (1) the power to seize and forfeit articles (clauses 3 and 4), (2) the power of entry and examination (regulation C1), (3) the power of subjecting persons to medical surveillance or a medical examination or a test (regulation C6), (4) the power of placing persons under

isolation or quarantine (regulations E1, E5), (5) the power of placing articles under isolation (regulation E2), (6) the power of placing a place under isolation (regulation E3), (7) the power of ordering the carrying out of a disease control measure (regulations G1, G2, G3, G5), (8) the power of ordering the prohibition of certain categories of persons from leaving Hong Kong (regulation I2) and (9) the power of arrest (clauses 5 and 6).

6. In addition, the Bill proposes the provision of two other extraordinary coercive powers. Clause 8 seeks to empower the Chief Executive in Council to make regulations on an occasion of a public health emergency for the purposes of preventing, combating or alleviating the effects of the public health emergency and protecting public health. These public health emergency regulations may provide for the requisitioning of property and matters relating to compensation of such requisition.

7. Clause 9 seeks to empower the Director of Health to prescribe by order published in the Gazette measures to be applied in the light of any temporary recommendation made by the WHO pursuant to Arts 15, 17 and 18 of the IHR 2005 for the purposes of preventing the introduction into, the spread in and the transmission from, Hong Kong of any disease. Such temporary recommendations may include health measures to be implemented by State Parties to the

Regulations regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels to prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic. More specifically, they include (1) requiring medical examinations, (2) requiring vaccination or other prophylaxis, (3) placing suspect persons under public health observation, (4) implementing quarantine or other health measures for suspect persons and articles, (5) implementing isolation and treatment where necessary of affected persons, (6) implementing tracing of contacts of suspect or affected persons, (7) refusing entry of suspect and affected persons, (8) refusing entry of unaffected persons to affected areas, (9) implementing exit screening and/or restrictions on persons from affected areas, (10) seizure and destruction of infected or contaminated articles under controlled conditions, and (11) refusing departure or entry of articles. The exercise of this power appears to be extraneous of any regulatory framework to be established under the Bill.

8. Clause 12 seeks to make provision for the Director of Health to order payment of just and equitable compensation for damage, destruction, seizure, surrender or submission of any *article* pursuant to the enacted legislation and for the use of arbitration to determine any dispute as to whether compensation is payable or the amount of compensation in default of agreement. This clause has no application to cases for which compensation is provided for by regulations made under the

provisions in Clause 8.

9. Clause 13 seeks to provide for immunity for personal liability of public officers for acts or omission done in good faith under the enacted legislation without prejudice to the liability in tort of the Government for the same act or omission.

The Context of the Bill

10. Article 2 of the IHR 2005 states that the purpose and scope the Regulations are to prevent, protect against, control and provide a public health response to the international spread of disease *in ways that are commensurate with and restricted to public health risks*, and which avoid unnecessary interference with international traffic and trade. Article 3(1) of the same provides that the implementation of the Regulations *shall be with full respect for the dignity, human rights and fundamental freedoms of persons*. Article 3(4) provides that while States that are party to the Regulations have the sovereign right to legislative and implement legislation in pursuance of their health policies, they should *uphold* the purpose of the regulations in doing so.

11. The HKBA is of the view that the Administration and the Legislative Council should adhere to these principles in the legislative processes regarding not only all provisions of the Bill and but also all subsidiary legislation to be made under the enacted legislation; and that adherence to these principles implicates the satisfaction of a *proportionality test* in the making of regulations under the enacted legislation and the exercise of all the proposed coercive powers mentioned above.

Clause 8

12. The HKBA welcomes the Administration's recent decision to provide for a definition of the expression "requisition" in Clause 8. This is because the ordinary meaning of this expression is ambiguous and inclusive. It had been described as follows: 'The effect of requisition may be of the most various kinds. It is not an operation of stereotyped form. Requisition is not a term of art. It is barely more than a colloquial expression which has come into use during recent years. It has some connection with a term with which English people became familiar twenty-five years ago – the term "commandeering." A requisition is a process by which the State takes the use or the possession of, or the property in, chattels, and sometimes in land. But it is infinitely various': The Meandros [1925] P 61 at 65 (Sir Henry Duke P). It was also

held to mean in the context of regulations made under the Emergency Powers Act 1920 [Eng] “some effective and positive dominion or control constituted by a definite order given under the Regulations”: France Fenwick & Co v R [1927] 1 KB 458 at 464 (Wright J). It was further held to include “the taking of property in full ownership, the taking of the possession of the property, and the acquisition of a right to have the property used in a particular manner without any taking of possession”: Australasian United Steam Navigation Co v Shipping Control Board (1945) 71 CLR 508 at 521 (Latham CJ).

13. The HKBA also notes that while the Quarantine and Prevention of Disease Ordinance (Cap 141) s 16 qualifies the power to requisition property to an authority to a health officer “to requisition *temporarily any vehicle or vessel for any period ... necessary for the carrying out on that occasion of such provision* [of the Ordinance]”, Clause 8(2)(c) is not similarly qualified in terms of object, nature and duration. Hence it is desirable for the expression “requisition” to be defined.
14. Articles 6 and 105 of the Basic Law together provide the constitutional basis for the exercise of a statutory power to deprive (zhengyong) or deprive (zhengyong) *de facto* property in the public interest, bearing in mind that the appropriate meaning of zhengyong is expropriation, provided that the

compensation payable corresponds to the real value of the property concerned; see Weson Investment Ltd v Commissioner of Inland Revenue [2007] 2 HKLRD 567, CA at [79]; Harvest Good Development Ltd v Secretary for Justice & Ors [2007] 4 HKC 1, CFI at [18], [80], [81], [82], [84], [142]; Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No 5) [2007] 5 HKC 122, CFI at [16]-[42]; and Fine Tower Associates Ltd v Town Planning Board [2008] 1 HKLRD 553, CA at [17]-[24]. On the other hand, the HKBA notes that the Court of Final Appeal has not yet ruled comprehensively on the proper interpretation of these two articles of the Basic Law and will be asked to do so in the near future in the Fine Tower case.

15. The HKBA agrees with the Legal Service Division and the Law Society of Hong Kong that the Bills Committee should ask the Administration to produce a detailed compensation scheme in regulation to be made under Clause 8(2)(c).
16. Both the Administration and the Legal Service Division consider that a “fair balance test” derived from European Convention of Human Rights jurisprudence would apply as an *implicit* requirement under Arts 6 and 105 of the Basic Law for cases of interference with property rights falling short of

deprivation (zhengyong). The HKBA reserves its position on this issue bearing in mind that there is to date no judgment of any court of the HKSAR discussing and ruling on this matter. The courts thus far have seen fit to rely on the Privy Council decision of Grape Bay Ltd v Attorney General of Bermuda [2000] 1 WLR 574, particularly the proposition at 583C-F that regulatory restriction on use, imposed in the public interest, that does not amount to a taking or deprivation of the property, gives no right to compensation. See, for example, the Fine Tower case (above) at [17]. Therefore, the HKBA considers that it is more desirable for the Bills Committee to urge the Administration to incorporate in the compensation scheme in regulation to be made under Clause 8(2)(c) a class for compensation for interference with property rights falling short of deprivation (zhengyong).

Clause 9

17. The HKBA finds the Clause 9 to be an extraordinary power since it seeks to empower the Director of Health to prescribe *any* measure provided only it is “in the light of” a temporary recommendation made by the WHO under the IHR 2005. The exercise of this power is not integrated into the operation of regulations to be made under Clause 7 or Clause 8. While the designation of

the Director's orders under Clause 9 as subsidiary legislation enables the Legislative Council to scrutinize them by way of negative vetting, the HKBA questions the rationale of seeking to enact this standalone power.

Clause 12

18. The HKBA, like the Law Society of Hong Kong, finds Clause 12 to be unsatisfactory.
19. Clause 12 appears to be a reproduction of the Quarantine and Prevention of Disease Ordinance s 17 and has not been brought up-to-date.
20. The HKBA, like the Law Society of Hong Kong, finds the refusal of the Administration to countenance payment of compensation to persons subject to the coercive powers proposed under the Bill to be *inequitable*. Clause 12 anticipates the possibility of payment of compensation for the seizure, surrender or submission of *articles*. Persons who voluntarily submit to surveillance, isolation and quarantine are in effect restricted, if not seized, by the Government. It is an offence to human dignity for the Administration to refuse to contemplate payment of compensation for the suffering and loss of such persons.

21. The claim by the Administration that the Director of Health has the best knowledge of his staff's work is not a good reason for vesting with him the power to decide whether compensation should be paid in a particular case and if so, the just and equitable amount to be paid.

22. Clause 12(2), which does not mandate arbitration in default of agreement, is, in the view of the HKBA, a retrograde step. Section 17(2) of the Quarantine and Prevention of Disease Ordinance has at least the merit of a fallback position of mandatory third party resolution or determination of dispute on its merits. Clause 12(2) does not achieve that position. The Director of Health in such a situation may refuse to agree to submit the dispute to arbitration and the person aggrieved is left with recourse to an application for judicial review of the legality of the Director's order.

23. The HKBA recommends that the Bills Committee should urge the Administration to consider introducing amendments to the Bill to bring in a compensation regime that provides for both options of arbitration and judicial determination, similar to that in the Telecommunications Ordinance (Cap 106) ss 14(5) and 15. Another option that should also be considered is the establishment by statute of a compensation tribunal whose determination is

subject to appeal to a court, such as the Court of Appeal.

24. The HKBA makes the same recommendation in relation to the compensation regime to be put in place under regulations made under Clause 8 for public health emergencies.

Dated 5 April 2008.

Hong Kong Bar Association