



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

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By Fax (2868 5074)

18 October 2019

Ms Mimi LEE, JP
Deputy Secretary for Security 1
Security Bureau
10/F, East Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms LEE,

Prohibition on Face Covering Regulation (L.N. 119 of 2019)

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

We would appreciate it if you could let us have your reply (in both English and Chinese) as soon as practicable.

Yours sincerely,

(CHUI Ho-yin, Alvin)
Assistant Legal Adviser

Encl.

c.c. Department of Justice
(Attn: Ms Fanny IP, Deputy Law Draftsman II)
(Fax: 3918 4613)
Clerk to Subcommittee
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Senior Assistant Legal Adviser 1

Similar overseas legislation

1. It is stated in paragraph 5 of the Legislative Council ("LegCo") Brief issued by the Security Bureau in October 2019 (File Ref.: SBCR 3/3285/57) that similar laws imposing prohibition on face covering can be found in the permanent criminal codes in other western democratic jurisdictions, such as Canada, France, Sweden, Spain, Denmark, Norway, Germany and Austria.

- (a) Please provide the provisions of such overseas legislation for members' reference.
- (b) Please clarify whether any similar law of the above jurisdictions was made by the executive authority in the form of subsidiary / subordinate legislation instead of primary legislation. Please also clarify whether any such law applies to both unlawful and lawful assemblies / meetings / processions.

Section 3

2. Under section 3 of the Regulation, the use of any facial covering by a person that is likely to prevent identification is prohibited while the person is at an unlawful assembly, unauthorized assembly, or a public meeting or a public procession in respect of which the Commissioner of Police is notified and does not prohibit the holding of the meeting or object to the procession ("lawful assemblies"). A person who contravenes the above prohibition commits an offence. In this regard, in light of Articles 27 and 39 of the Basic Law, and Articles 14, 15, 16 and 17 of the Hong Kong Bill of Rights in section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383), please clarify (in addition to the implications of the proposal as stated in paragraphs 14 to 16 of the LegCo Brief) whether the prohibition in section 3, especially in relation to lawful assemblies, could satisfy the four-step proportionality test as laid down in the case of *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 as follows:

- (a) whether the restriction or limitation pursues a legitimate aim;

- (b) whether the restriction or limitation is rationally connected to that legitimate aim;
- (c) whether the restriction or limitation is no more than is necessary to accomplish that legitimate aim; and
- (d) where an encroaching measure has passed the above three steps, whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, in particular whether pursuit of the societal interest would result in an unacceptably harsh burden on the individual.

3. Please clarify how a person is considered to be at an unlawful assembly etc. for the purposes of section 3(1) of the Regulation. Who is to delineate the geographical limits of a public assembly or meeting and how these geographical limits are delineated? Is it necessary to prove that a person knew he was within the geographical limits of the public assembly or meeting at the material time?

4. What are the criteria for deciding whether a facial covering is likely to prevent identification in section 3(1)? Is an objective test to be applied? Please also clarify whether the wearing of sunglasses or goggles is prohibited under section 3(1).

Section 4

5. Section 4 of the Regulation provides for a defence of lawful authority or reasonable excuse for a person charged with the offence under section 3(2).

- (a) Section 4 operates as a defence. It is noted that under numerous provisions of existing legislation, "without lawful authority or reasonable excuse" is an element of the offence of the offence creating provision (see e.g. section 17(1) of the Witness Protection Ordinance (Cap. 564) and section 70(9) of the Private Columbaria Ordinance (Cap. 630)). Please clarify why the Administration has decided not to make "without lawful authority or reasonable excuse" as an element of the offence under section 3(2) but to provide it as a defence for a person charged with the offence.

- (b) Please clarify how the reasonable excuse on the grounds of "religious reasons" and "a pre-existing medical or health reason" under section 4(3)(b) and (c) can be established. What evidence would be required to raise an issue that the person had such reasonable excuse under section 4(2)(a)?
- (c) Instead of providing that a person had a reasonable excuse if section 4(3)(a), (b) or (c) applies, will the Administration consider exempting a person falling within the description in section 4(3)(a), (b) or (c) from liability for the offence, with the result that the offence under section 3(2) of the Regulation does not apply to such person?

Section 5

6. Section 5 of the Regulation empowers a police officer to stop a person in a public place and require the person to remove the facial covering to enable the officer to verify the identity of that person ("the requirement"), and to remove the facial covering if the person fails to comply with the requirement. Section 5(3) provides that a person who fails to comply with the requirement commits an offence.

- (a) It is noted that the defence in section 4 does not apply to the offence under section 5(3). Please clarify whether the offence under section 5(3) is an absolute / strict liability offence, and if so, explain the rationale for such an offence.
- (b) The only condition upon which a police officer may require a person in a public place to remove his facial covering is having a reasonable belief that the person using the facial covering is likely to prevent identification. It is noted that under other legislation which confers on police officers the power to stop a person, the police officer needs to be satisfied that the person acts in a suspicious manner (see section 54(1) of the Police Force Ordinance (Cap. 232)), to have a reasonable suspicion that the person has committed or is about to commit or intends to commit any offence (see section 54(2) of Cap. 232), or to have a reasonable belief that the verification of identity is necessary for the purpose of preventing, detecting or investigating any offence (see section 49(1) of the Public Order Ordinance (Cap. 245)). Please clarify whether a different approach is adopted in section 5 of the Regulation, and if so, why.

- (c) As stated in paragraph 16 of the LegCo Brief, a police officer is authorized under various laws (including section 54 of the Police Force Ordinance (Cap. 232)) to demand proof of identity. It is further stated in paragraph 16 that, a refusal to comply with the requirement in section 5 of the Regulation may, under existing laws (including section 23 of the Summary Offences Ordinance (Cap. 228) and section 63 of Cap. 232), amount to the offence of resisting or obstructing a police officer in the due execution of the officer's duty. Given that there are existing laws to handle the same matter, please clarify why a new offence is provided in section 5(3) of the Regulation.
- (d) Given a person's right to privacy guaranteed by Article 39 of the Basic Law and Article 14 of the Bill of Rights under Cap. 383, please clarify (in addition to the implications of the proposal as stated in paragraphs 14 to 16 of the LegCo Brief) whether section 5 of the Regulation could satisfy the the four-step proportionality test as laid down in the case of *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 as stated above.

Section 6

7. Section 6 provides for an extension of the prosecution time limit for the offence under section 3(2) or 5(3) to 12 months beginning on the date on which the offence is committed. Under section 26 of the Magistrates Ordinance (Cap. 227), however, the time limit for prosecuting a summary offence is generally six months from the date of the offence. Accordingly, the prosecution time limit provided in section 6 of the Regulation is not consistent with that provided in section 26 of Cap. 227. Under section 28(1)(b) of the Interpretation and General Clauses Ordinance (Cap. 1), no subsidiary legislation shall be inconsistent with the provisions of any Ordinance. Given section 2(4) of the Emergency Regulations Ordinance (Cap. 241) (which provides that a regulation shall have effect notwithstanding anything inconsistent therewith contained in any enactment), please clarify whether section 6 of the Regulation has the effect of disapplying section 28(1)(b) of Cap. 1 and section 26 of Cap. 227 in the absence of express provision to that effect in the Regulation.