

(English Translation)

Response to Letters from Hon James TO and Hon IP Kin-yuen to Subcommittee on Prohibition on Face Covering Regulation

With respect to the letters from Hon James TO and Hon IP Kin-yuen dated 24 October and 25 October 2019 respectively to the Subcommittee on Prohibition on Face Covering Regulation (“the Regulation”), the Government’s consolidated reply is as follows.

Justifications for Making the Regulation

2. Under section 2(1) of the Emergency Regulations Ordinance (“ERO”), on any occasion which the Chief Executive in Council (“CE-in-C”) may consider to be an occasion of emergency or public danger, he may make any regulations whatsoever which he may consider desirable in the public interest. As stated in paragraphs 2 to 10 of the Legislative Council (“LegCo”) Brief on the Regulation and paragraphs 2 to 3 of our reply to LegCo’s Assistant Legal Adviser (“ALA”) on 28 October, in the four months from early June to early October this year, more than 400 demonstrations, processions and assemblies arising from the amendments to the Fugitive Offenders Ordinance had been staged, with a significant number of public order events ending up in outbreaks of violence. These incidents had caused injuries to more than 1 100 people. On 29 September and 1 October, violence further escalated and took place simultaneously in various districts throughout Hong Kong, Kowloon and the New Territories. Radical protesters caused large scale harm to life and property, assaulted people holding different opinions flagrantly, used different kinds of dangerous tools and objects, threw petrol bombs, set fires and blocked roads. They viciously attacked police officers, vehicles and police stations, heavily vandalised the Mass Transit Railway stations, traffic lights, public facilities, shops and government offices, etc. and threw petrol bombs at and set fires to them. These acts had severely endangered public peace and public safety. Moreover, bomb-making materials were seized in police operations, and there were explosions of homemade bombs in the busy parts of the city. In these violent incidents, many of the protesters were all suited up and masked to conceal their identity, which enabled them to evade police investigation and emboldened them to continue with their illegal acts. As an occasion of public danger was present, CE-in-C made the Regulation in accordance with section 2(1) of ERO to prohibit the use of facial covering under certain circumstances, with a view to protecting public safety and order.

3. The rationale and scope of regulations made under ERO must be in line with section 2(1) of ERO. Section 2(2) of ERO stipulates that, without prejudice to the generality of the provisions of section 2(1), regulations made under ERO may provide for matters set out in paragraphs (a) to (n). Therefore, section 2(2) of ERO only lists out some specific matters that may be provided in such a regulation, and the scope of the regulation is not confined to the matters referred to in section 2(2).

ERO's Conformity to the Basic Law

4. Although ERO was enacted in 1922, it was maintained, as a piece of legislation previously in force in Hong Kong, in accordance with Article 8 of the Basic Law when the Hong Kong Special Administrative Region ("HKSAR") was established in July 1997. Moreover, it was not declared to be in contravention of the Basic Law in the Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law adopted in February 1997. As such, ERO was maintained as a law of HKSAR. Moreover, ERO was amended by LegCo in 1999 for adaptation of law purposes, and is still effective today.

5. Article 66 of the Basic Law provides that LegCo shall be the legislature of HKSAR. Article 73(1) provides that LegCo shall enact, amend or repeal laws in accordance with the provisions of the Basic Law and legal procedures. Under Article 56, the Chief Executive may make subordinate legislation after consulting the Executive Council; under Article 62(5), the Government of HKSAR may draft and introduce bills, motions and subordinate legislation. Therefore, the Basic Law allows the legislature to, by way of legislation, empower other authorities or officials to make subsidiary legislation. Similar to many other pieces of subsidiary legislation made by the Executive as empowered by law, regulations made under ERO are subsidiary legislation and have to be laid on the table of LegCo for negative vetting in accordance with section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). LegCo may by resolution amend or repeal such regulations, or make no amendments to the same. The fact that ERO empowers CE-in-C to make regulations does not contravene the provisions in relation to legislative powers under the Basic Law.

Applicability of Section 3 of the Regulation

6. Section 3(1) of the Regulation prohibits any person from using facial covering that is likely to prevent identification while the person is at (a) an unlawful assembly; (b) an unauthorized assembly; or (c) a public meeting that takes place according to section 7(1) of the Public Order Ordinance (“POO”) or a public procession that takes place according to section 13(1) of POO (i.e. a notifiable meeting or procession for which a letter of no objection has been issued). Under section 3(2) of the Regulation, a person who contravenes the requirement is liable to a fine at level 4 (\$25,000) and to imprisonment for one year. “A person” referred to in section 3(1) covers any natural person, including a police officer. It is worth noting that section 4(1) of the Regulation provides a defence for a person who had lawful authority or reasonable excuse for using a facial covering (see paragraph 7 below).

Defence under Section 4 of the Regulation

7. Under section 4(1) of the Regulation, it is a defence for a person charged with an offence under section 3(2) to establish that, at the time of the alleged offence, the person had lawful authority or reasonable excuse for using a facial covering. Under section 4(2), in relation to the defence, the defendant bears an evidential burden only but not a legal burden of proof. Section 4(3) provides that without limiting the scope of the reasonable excuse referred to in section 4(1), a person at an event regulated by section 3(1) of the Regulation had a reasonable excuse for using a facial covering if –

- (a) the person was engaged in a profession or employment and was using the facial covering for the physical safety of the person while performing an act or activity connected with the profession or employment;
- (b) the person was using the facial covering for religious reasons; or
- (c) the person was using the facial covering for a pre-existing medical or health reason.

8. According to section 4(3)(b) of the Regulation, the reasonable excuse for using a facial covering for religious reasons applies to a person who used a facial covering at an event regulated under section 3(1) of the Regulation (even if the event was not for a religious purpose). According to section 4(3)(c)

of the Regulation, “a pre-existing medical or health reason” refers to a medical or health reason that existed before being present at an event regulated under section 3(1) of the Regulation.

9. If the lawful authority or reasonable excuse referred to in section 4(1) is established, that will be a defence and the person concerned will be absolved from criminal liability under section 3(2) of the Regulation. As stated in paragraph 7 above, in relation to the defence, the defendant bears an evidential burden only but not a legal burden of proof. In other words, if the defendant can adduce sufficient evidence to show that a reasonable doubt exists as to whether he or she had lawful authority or reasonable excuse, the prosecution will have to rebut the defendant’s authority or excuse beyond reasonable doubt. Such evidence can come from the defence (e.g. by the defendant testifying in person) or from the prosecution. For example, if the defendant relies on a pre-existing medical or health reason as a reasonable excuse for using a facial covering, and adduces evidence (such as a certificate of diagnosis in relation to his or her health conditions) to show that he or she may have a reasonable excuse for using the facial covering, the prosecution must prove beyond reasonable doubt that the defendant does not have a reasonable excuse. Otherwise, the reasonable excuse will be taken as established and the defendant must be found not guilty.

10. A number of hypothetical situations were mentioned in paragraphs 5 to 7 of Hon TO’s letter, and it was asked whether the acts of a person in those situations would constitute a reasonable excuse under section 4(1) of the Regulation. As the responsibility for examining a reasonable excuse rests ultimately with the court, and the court needs to consider the specific and particular facts of a case before determining whether an act constitutes a reasonable excuse, it is not appropriate for us to comment on whether a reasonable excuse can be established in those situations. This said, as stated in paragraphs 17 and 18 of our reply to LegCo’s ALA dated 28 October, according to case authorities, consideration of the defence of “reasonable excuse” involves looking to three matters: (a) the matters said to constitute reasonable excuse must be identified; (b) the court will then examine whether the excuse was genuine; and (c) the court must make an assessment of whether that excuse was reasonable, which the court will do on an objective standard based on the particular facts of the case. In considering whether an excuse was reasonable, the context of the relevant legislation shall also be taken into account.

Implementation of the Regulation

11. According to information from the Police, since the commencement of the Regulation on 5 October 2019 and until 31 October 2019, a total of 303 persons (including 202 males and 101 females) aged 12 to 62 were arrested for suspected breach of section 3 of the Regulation, among which 21 persons (including 11 males and 10 females) were charged with the offence. A total of four persons aged 21 to 40, all male, were arrested for suspected contravention of section 5 of the Regulation¹. They had not yet been charged with the offence. The Police do not maintain figures for the other items requested in paragraphs 9 to 11 of the letter from Hon TO.

12. The Government has been closely monitoring the public order and public safety situation since the commencement of the Regulation. The Government has made clear to the public that when the prevailing public danger drops to a level which no longer justifies the Regulation, the Security Bureau will seek the approval from CE-in-C to repeal the Regulation. In assessing whether the occasion of public danger remains, the Government will objectively consider relevant factors for a holistic assessment, including but not limited to whether public order events can be carried out orderly and peacefully, the frequency and degree of violent acts, the coverage of affected areas, relevant risk assessment, etc.

Security Bureau October 2019

¹ Under section 5(1) of the Regulation, section 5 applies in relation to a person in a public place who is using a facial covering that a police officer reasonably believes is likely to prevent identification. According to section 5(2), the police officer may stop the person and require the person to remove the facial covering to enable the officer to verify the identity of the person; and remove the facial covering if the person fails to comply with the requirement. According to section 5(3), a person is liable to a fine at level 3 (\$10,000) and to imprisonment for six months for failure to comply with the police officer's requirement of removing the facial covering. The penalty level is similar to that for failure to produce proof of identity for inspection when required by a police officer under section 49(1) of POO.