

# **立法會**

## ***Legislative Council***

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### **Paper for the House Committee**

#### **Report of Subcommittee on Prohibition on Face Covering Regulation**

#### **Purpose**

This paper reports on the deliberations of the Subcommittee on Prohibition on Face Covering Regulation ("the Subcommittee").

#### **Background**

2. Section 2(1) of the Emergency Regulations Ordinance (Cap. 241) ("ERO") provides that on any occasion which the Chief Executive ("CE") in Council may consider to be an occasion of emergency or public danger, CE in Council may make any regulations whatsoever which he may consider desirable in the public interest.

3. According to the Administration, since 9 June and until early October this year, more than 400 public order events arising from the proposed amendments to the Fugitive Offenders Ordinance (Cap. 503) ("FOO") have been staged with a significant number of incidents ended up in outbreaks of violence. 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 and in some cases engage in escalated violence. Having regard to the fact that masking is currently not outlawed in Hong Kong, the Administration introduced legislation on the prohibition on face covering through the making of the Prohibition on Face Covering Regulation ("the Regulation") under section 2(1) of ERO in order to enable the Police to investigate into the violent and illegal acts of masked protesters; to serve as a deterrent against such behaviour; and to restore public order and public peace.

#### **The subsidiary legislation**

4. The Regulation (L.N. 119 of 2019) is made by CE in Council under section 2 of ERO to:

- (a) prohibit the use in certain circumstances of any facial covering that is likely to prevent identification and provide for an offence (with a defence where the person charged with the offence had lawful authority or reasonable excuse at the time of the alleged offence);
- (b) empower a police officer to require a person in a public place to remove the person's facial covering in certain circumstances and provide for non-compliance to be an offence; and
- (c) provide for an extension of the prosecution time limit for an offence under 3(2) or 5(3) of the Regulation to 12 months beginning on the date on which the offence is committed.

5. The Regulation was gazetted on 4 October 2019 and came into operation on 5 October 2019.

### **The Subcommittee**

6. At the House Committee meeting on 11 October 2019, Members agreed to form a subcommittee to study the Regulation. The membership list of the Subcommittee is in **Appendix I**.

7. Under the chairmanship of Hon WONG Ting-kwong, the Subcommittee has held six meetings with the Administration, including one meeting to receive views from 100 deputations and individuals. The Subcommittee also received about 45 000 written submissions on the Regulation. A list of the organizations and individuals which/who have provided views to the Subcommittee is in **Appendix II**.

8. To allow more time for the Subcommittee to study the Regulation, the Subcommittee agreed that the Chairman should move a motion before the expiry of the 28 days' scrutiny period (i.e. the Council meeting of 13 November 2019) to extend the scrutiny period of the Regulation to the Council meeting of 4 December 2019. However, the motion could not be dealt with at the Council meeting of 13 November 2019 before the adjournment of the meeting. As such, the period for amending the Regulation expired at the Council meeting of 13 November 2019.

### **Deliberations of the Subcommittee**

#### **Rationale for making the Regulation**

9. Members and deputations giving views to the Subcommittee have expressed diverse views on the need for the Regulation. Members belonging

to the pan democratic camp have expressed strong reservation about the making of the Regulation. Considering that the Government has stated that ERO was invoked on the public danger ground, not emergency ground, these members have queried about the rationale and considerations of the Administration for making the Regulation under ERO. These members have also asked about the criteria for invoking ERO, the scope of application of ERO and the relationship between ERO and the Regulation. Some of these members have also asked why the Administration considers that the making of the Regulation can help protect public safety and order in Hong Kong.

10. Some other members, including Dr Priscilla LEUNG, Mr Steven HO, Mr YIU Si-wing, Mr CHAN Han-pan, Mr Holden CHOW, Mr LUK Chung-hung and Mr Vincent CHENG, in general agree that there is an imminent need for the Regulation to handle the violent incidents arising from protests in the past few months. The demonstrations and disturbances have severely affected the rule of law, public order, livelihood and economy of Hong Kong. These members consider that a number of protesters have become radical protesters, whose acts have severely endangered public safety and public order, because these protesters believe that they can conceal their identities and thus evade police investigation and legal responsibilities when masked. Moreover, laws similar to the Regulation can be found in the permanent criminal codes in other western democratic jurisdictions, such as Canada, France, Sweden, Spain, Denmark, Norway, Germany and Austria.

11. The Administration has pointed out that in the public order events in the four months from early June to early October 2019, 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. These acts had severely endangered public peace and public safety. More than 1 100 persons were injured. Moreover, bomb-making materials were seized in police operations, and there were explosions of homemade bombs in the busy parts of the city. The Administration has further pointed out that in these violent incidents, many of the protesters were all suited up and masked to conceal their identities, which enabled them to evade police investigation and emboldened them to continue with their illegal acts. As serious threats to public danger were present, CE in Council 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.

12. The Administration has explained that the rationale and scope of regulations made under ERO must be in line with section 2(1) of ERO. Section 2(2) of ERO provides 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). Some members including

Mr James TO, Mr CHAN Chi-chuen and Dr CHENG Chung-tai, however, have questioned whether the legislative purpose of the Regulation falls within the matters set out in paragraphs (a) to (n) of section 2(2) of ERO. They have queried whether it is justifiable to make the Regulation under ERO. The Administration has responded that section 2(2) of ERO only lists out some specific matters that may be provided for in such a regulation, and the scope of the regulation is not confined to the matters referred to in section 2(2). The Administration has stressed that the justifications and coverage of regulations made under ERO must meet the requirements of ERO, and at the same time comply with the Basic Law ("BL") and the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"), including provisions on the protection of freedom of speech, peaceful assembly, privacy and religious freedom.

13. Some members including Mr WU Chi-wai, Dr KWOK ka-ki and Dr Fernando CHEUNG, however, take a strong view that the prohibition on the use of facial covering cannot prevent or deter the occurrence of violent incidents arising from protests relating to the proposed amendments to FOO. Instead, the Government should study the causes of the deep-rooted conflicts in Hong Kong, with a view to addressing the problems squarely and responding to demands from the society.

14. The Administration has advised that apart from making the Regulation, the Government is making efforts in implementing the "four actions" announced by CE in early September 2019, with a view to providing the driving force for the community to move forward. These include: withdrawing the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019; providing full support to the work of the Independent Police Complaints Council to publish its first phase report regarding the large-scale public order events by end 2019; reaching out to the community to start a direct dialogue from September 2019; and continuing to invite community leaders, professionals and academics to independently examine and review society's deep-seated problems and to advise the Government on finding solutions.

### Legality and constitutionality of the Regulation

15. The issue of legality and constitutionality of the Regulation has been raised during the deliberations of the Subcommittee.<sup>1</sup> Some members including Dr CHENG Chung-tai and Mr AU Nok-hin have raised concern on the legal status of ERO, which was enacted in 1922, upon the coming into effect of BL. Concern has also been raised as to whether the making of the

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<sup>1</sup> Please see paragraphs 23 to 26 below regarding whether section 3 of the Regulation can satisfy the proportionality test.

Regulation by CE in Council is incompatible with BL, i.e. whether it is consistent with the powers of CE prescribed under BL 48.

16. The Administration has advised that although ERO was enacted in 1922, it was maintained, as a piece of legislation previously in force in Hong Kong, in accordance with BL 8 when the Hong Kong Special Administrative Region ("HKSAR") was established in July 1997. Moreover, it was not declared to be in contravention of BL 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 BL 160 adopted in February 1997. As such, ERO was maintained as a piece of legislation of HKSAR. Moreover, ERO was amended by the Legislative Council ("LegCo") in 1999 for adaptation of law purposes, and is still effective.

17. The Administration has further advised that BL 66 provides that LegCo shall be the legislature of HKSAR. BL 73(1) provides that LegCo shall exercise the power and function to enact, amend or repeal laws in accordance with the provisions of BL and legal procedures. Under BL 56, CE may make subordinate legislation after consulting the Executive Council; under BL 62(5), the Government of HKSAR may draft and introduce bills, motions and subordinate legislation. Therefore, BL allows the legislature to, by way of legislation, empower other authorities or officials to make subsidiary legislation. The fact that ERO empowers CE in Council to make regulations does not contravene the provisions in relation to legislative powers under BL.

18. Noting that most overseas anti-mask laws were enacted in the form of permanent primary legislation, some members including Mr CHAN Chi-chuen and Dr Helena WONG have expressed the view that the current legislative exercise should be made in the form of a bill, instead of by way of subsidiary legislation under ERO. They consider that the scrutiny of the controversial proposal to prohibit the use of facial covering by a bills committee would allow LegCo to have sufficient time to go through the due process before its coming into operation. Some members including Mr KWONG Chun-yu have also queried as to whether the making of the Regulation under ERO by CE in Council has bypassed LegCo and violated the prescribed distribution of powers between the Government and LegCo. Some members have also pointed out that by virtue of section 2(3) of ERO, the Regulation shall continue to be in force until repealed by order of CE in Council. These members have raised concern as to whether the Regulation may only be repealed by CE in Council.

19. The Administration has highlighted that the Regulation was made in response to occasion of public danger pursuant to section 2(1) of ERO. The Administration and the Legal Adviser to the Subcommittee ("the Legal Adviser") have affirmed that 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) ("IGCO"). LegCo may by resolution amend or repeal such regulations.

Implications of impending judicial review proceedings on the scrutiny of the Regulation by the Subcommittee and the Legislative Council

20. Members note that 24 Members have submitted a letter to the House Committee (LC Paper No. CB(2)1975/18-19(01)) and declared that any speech and decision they made in relation to ERO and the Regulation must not be considered as their concession to the constitutionality and/or legal foundation of the relevant law and regulation. Noting that these 24 Members have filed an application for leave to apply for judicial review ("JR") on the legality and constitutionality of the Regulation,<sup>2</sup> members have enquired about whether the scrutiny of the Regulation by the Subcommittee and LegCo would be affected by the impending JR proceedings. In this regard, the Legal Adviser has provided members with a paper on the implications of the impending JR proceedings on and the application of the *sub judice* rule to the scrutiny of the Regulation (LC Paper No. LS13/19-20). In gist, the Legal Adviser has advised that LegCo has the constitutional power and function under BL 73(1), to enact, amend or repeal laws (including subsidiary legislation). LegCo's constitutional power and function to scrutinize subsidiary legislation is reflected in section 34 of IGCO by way of the negative vetting procedure, and LegCo can and indeed has the constitutional duty to scrutinize the Regulation in accordance with section 34 of IGCO. Moreover, no interim injunction order that may affect the current legislative exercise concerning the Regulation has been granted by the court. Nonetheless, it would be advisable for the Subcommittee to take into account the *sub judice* rule in the course of its scrutiny of the Regulation, including not to make any prejudgments on any issue required to be decided by the court in the JR case concerned.

Scope of application of the Regulation

21. Section 3(1) of the Regulation prohibits any person from using any 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 under section 7(1) of the Public Order Ordinance (Cap. 245) ("POO") or a public procession that takes place under section 13(1) of POO (i.e. a notifiable public meeting or public procession for which a notice of no objection has been issued by the Commissioner of Police). Under section 3(2) of the Regulation, a person who contravenes the above prohibition commits an

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<sup>2</sup> Please see paragraph 46 below regarding the Court of First Instance's judgment on the JR case.

offence, and is liable on conviction to a fine at level 4 (\$25,000) and to imprisonment for one year.

*Meaning of "facial covering"*

22. Some members including Mr Kenneth LEUNG have asked about the criteria for deciding whether a facial covering is likely to prevent identification under section 3(1) of the Regulation. The Administration has advised that according to section 2 of the Regulation, "facial covering" means "a mask or any other article of any kind (including paint) that covers all or part of a person's face". Whether a facial covering is likely to prevent identification is to be determined by an objective test based on the actual circumstances upon assessment considered to be reasonable or logical by an ordinary person under normal circumstances. The relevant considerations include the nature of the covering, the form and degree of concealment of the covering, whether the covering is likely to prevent the Police from identifying the person and affect the quality of identification evidence in criminal proceedings, etc.

*Proportionality of section 3*

23. Some members including Mr CHAN Chi-chuen, Dr Helena WONG and Mr HUI Chi-fung have queried whether the prohibition on the use of facial covering in a notifiable public meeting or public procession would impair the freedom of speech and freedom of assembly enjoyed by members of the public under BL 27. The Administration has explained that the legitimate aim pursued by the prohibition on the use of facial covering under section 3 of the Regulation is to safeguard public safety and public order, so as to prevent further violence and riotous acts, and to restore public peace in Hong Kong. The Administration has further explained that the prohibition on the use of facial covering at events regulated under section 3(1) of the Regulation can strengthen the deterrence against illegal and violent acts committed by radical protesters with their identities concealed by the use of facial coverings. It would also assist the Police in law enforcement and conducting investigations. Notwithstanding this, the Regulation would not impair the very essence of the freedom of speech and freedom of peaceful assembly enjoyed by members of the public because they are still free to take part in lawful and peaceful public order events without using facial covering.

24. The Subcommittee has also examined the issue of whether section 3 of the Regulation can satisfy the proportionality test. Specifically, some members have questioned the rationale for prohibiting the use of facial covering under section 3(1) of the Regulation at a notifiable public meeting or public procession (for which a notice of no objection has been issued by the Commissioner of Police) conducted in accordance with section 7(1) and 13(1) of POO.

25. The Administration has explained that due consideration was given to the human rights guarantees in BL and HKBORO, including the rights of freedom of expression, peaceful assembly, privacy and freedom of religion when enacting section 3 of the Regulation. These rights are not absolute and may be subject to restrictions; yet such restrictions must conform to the principle of proportionality. The Administration has reiterated that the provisions apply only to events regulated under section 3(1) of the Regulation, and members of the public would have a defence under section 4 if they had lawful authority or reasonable excuse for using facial covering. Therefore, the requirements under section 3 of the Regulation are a proportionate means to achieve the legitimate aim, and a reasonable balance has been struck between the following: on the one hand, the Government needs to deter radical protesters from engaging in illegal acts while concealing their identities to evade justice; and on the other hand, the Government has to cater for members of the public who may have legitimate reasons for using facial covering.

26. The Administration has also explained that events regulated under section 3(1) of the Regulation cover a public meeting or public procession which takes place in accordance with POO, because according to recent experience, protesters often deviate from the location or route approved by the Police, with some radical protesters resorting to violence, and a public meeting or public procession which is peacefully taking place can turn into a chaotic and violent unauthorized or unlawful assembly quickly. Masked protesters originally intending to attend a public meeting or public procession peacefully may be emboldened to engage in illegal acts; and it would be more difficult for the Police to identify violent masked protesters when such protesters intermingle with other protesters who are also masked. Therefore, public meetings and public processions carried out in accordance with POO are also included in the events regulated under section 3(1) of the Regulation so as to deter participants at the scene from engaging in violent acts, thus conducive to ensuring the peaceful conduct of the meetings and processions as well as safeguarding the rights of other participants to peaceful meetings and processions. In view of the above, the Administration considers that the interferences by section 3 of the Regulation with the rights and freedoms of members of the public could satisfy the proportionality test.

#### *Applicability of section 3 to police officers*

27. Some members including Mr IP Kin-yuen and Dr CHENG Chung-tai have questioned whether section 3 is applicable to police officers who appear at a public assembly, meeting or procession concerned. The Administration has affirmed that "a person" referred to in section 3(1) of the Regulation covers any natural person (including a police officer). That said, a person at an event regulated by section 3(1) of the Regulation could have defence if the person had



lawful authority or a reasonable excuse for using a facial covering, e.g. if 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.

#### Defence under section 4 of the Regulation

28. 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), as far as the defence is concerned, the defendant bears only an evidential burden 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 that is likely to prevent identification 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.

29. Some members including Mr LEUNG Chi-cheung, Mr LAM Cheuk-ting, Mr SHIU Ka-chun have enquired about whether reporters/journalists, social workers and any volunteers providing voluntary medical and legal assistance out of humanitarian considerations at the event regulated under section 3 of the Regulation are regarded to have had a reasonable excuse for using facial covering for their own physical safety. Some members have expressed grave concern about the enforcement of the provisions by the Police and asked whether the above reasons, if put forward, would be considered to be reasonable excuses. The Administration has affirmed that persons such as reporters/journalists and social workers might have had a reasonable excuse under section 4(3)(a) of the Regulation if, at the assembly, meeting or procession concerned, they were engaged in a profession or employment and were using the facial covering for their physical safety while performing an act or activity connected with the profession or employment.

30. Some members consider that the scope of reasonable excuse provided under section 4 is too narrow. Mr CHAN Chi-chuen has pointed out that a person may have various legitimate reasons for using a facial covering to

prevent others from identifying him/her at the event regulated under section 3. For instance, the person may be concerned that he/she is likely to be dismissed by his/her employer or to be annoyed or threatened in everyday life by reason of his/her presence at the event. A person taking part in a lesbian, gay, bisexual, and transgender event may also use a facial covering at the event regulated under section 3 to prevent others from knowing his/her sexual orientation. Some members including Mr James TO, Mr SHIU Ka-fai and Mr Jeremy TAM have also expressed concern that a person may use a facial covering for his/her own physical safety at a lawful public meeting in the event that the Police have used tear gas to handle violent acts which have suddenly occurred at the scene.

31. The Administration has advised that an important aim of the Regulation is to prevent the concealment of identity at events regulated under section 3(1) of the Regulation, thus deterring violent acts by masked rioters and facilitating police investigation work and administration of justice. As for establishing a reasonable excuse under section 4(1) of the Regulation, the Administration has advised that the responsibility for determining whether there was 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 there was a reasonable excuse in those situations referred to by members. According to case authorities, three matters are involved when considering the defence of "reasonable excuse": (a) the matters said to constitute reasonable excuse must be identified; (b) the court would then examine whether the excuse was genuine; and (c) the court must make an assessment of whether that excuse was reasonable, which the court would 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 be taken into account.

32. The Administration has further advised that at the operational level, the Police would make inquiries during law enforcement to examine whether the excuse put forward by a suspect was reasonable before deciding whether there is any reasonable suspicion to make an arrest. In considering whether to commence prosecution, the Department of Justice would also examine all evidence in a case (including whether the suspect might have had a reasonable excuse) and consider whether there is a reasonable prospect of conviction before making a prosecutorial decision. If the suspect is charged, the court would also review all evidence to determine whether the excuse was genuine and reasonable.

33. Concern has also been raised as to why the Administration has not adopted "without lawful authority or reasonable excuse" as an element of the offence under section 3(2) but to provide "lawful authority or reasonable excuse" as a defence for a person charged with the offence. The Administration has explained that the absence of "lawful authority" and "reasonable excuse" should not form part of the elements of a charge since it is

impractical for the prosecution to furnish evidence first to disprove various reasonable excuses. To so require would severely undermine the deterrent effect of the Regulation. Under section 4(2) of the Regulation, the defendant only has an evidential burden to establish lawful authority or reasonable excuse. If the defendant can adduce sufficient evidence to raise an issue that he/she had lawful authority or reasonable excuse for using a facial covering, the prosecution shall have to rebut the defendant's excuse beyond reasonable doubt. The evidence can come from the defence (e.g. the defendant testifies in person) or from the prosecution. However, it is not adequate for the defendant to discharge his/her evidential burden if he/she only makes bald assertions. Having regard to the legislative purpose of the Regulation, it is an appropriate arrangement to provide "lawful authority" and "reasonable excuse" as a defence and impose an evidential burden on the defendant, as it can help the prosecution and the court to consider evidence in a case in a focused manner. According to the Administration, this approach conforms to the principle of "presumption of innocence" under Article 11(1) of the Hong Kong Bill of Rights ("Bill of Rights").

*Reasonable excuse on grounds of "a pre-existing medical or health reason"*

34. Some members including Dr Fernando CHEUNG, Mr LAM Cheuk-ting, Dr Pierre CHAN and Mr Jeremy TAM have expressed concern that a person may wear a surgical mask for public hygiene considerations, rather than by reason of suffering from any illnesses. These members have asked about the evidence required to raise an issue that a person had a reasonable excuse on the grounds of a pre-existing medical or health reason under section 4(3)(c) for using a facial covering in an event regulated under section 3(1) of the Regulation.

35. The Administration has stressed that the prohibition on the use of facial covering is applicable only to events regulated under section 3(1) of the Regulation and members of the public can wear facial coverings on other occasions. It has also stated that during the making of the Regulation, the Food and Health Bureau ("FHB") had full knowledge of the defence of reasonable excuse on the ground of "a pre-existing medical or health reason" under section 4(3)(c) of the Regulation. FHB issued a press release on 5 October 2019 to clarify that the Regulation is not in conflict with its public health appeal. The Regulation would not prohibit the public from wearing masks for health reasons to prevent the infection and transmission of diseases. The Administration has further advised that generally speaking, in determining whether the person concerned had a reasonable excuse relating to a pre-existing medical or health reason, factors that may be considered include: the behaviour of the person concerned at the time, the person's apparent state of health, the type of facial covering involved, and whether a medical certificate is available, etc.

Police's power to require a person in a public place to remove facial covering

36. Section 5 of the Regulation empowers a police officer, who reasonably believes that the facial covering used by a person in a public place is likely to prevent identification, to stop the person and require the person to remove the facial covering to enable the police officer to verify the identity of that person, and to remove the facial covering if the person fails to comply with the above requirement. Under section 5(3), a person commits an offence and is liable on conviction to a fine at level 3 (\$10,000) and to imprisonment for six months for failure to comply with the police officer's requirement to remove the facial covering.

37. Some members including Ms Claudia MO, Mr Dennis KWOK, Mr Andrew WAN and Mr Gary FAN have expressed grave concern that some reporters/journalists, healthcare personnel and members of the public have complained that police officers have stopped and forced them to remove their facial covering in a public meeting, even after the reporters/journalists and healthcare personnel have already identified themselves. These members are particularly concerned whether the enforcement of the requirement of removing the facial covering has been abused.

38. The Administration has advised that a police officer may exercise the power to remove a person's facial covering in a public place only when the police officer reasonably believes that the facial covering is likely to prevent identification of the person concerned and the person has failed to comply with the police officer's request to remove the facial covering. While the power to require removal in section 5 applies to any person in a public place, including one who might otherwise have had reasonable excuse for using a facial covering at certain public order events as a defence to the offence in section 3 of the Regulation, the police officer shall ensure that the relevant actions are entirely lawful, necessary and appropriate in the circumstances. The person in question will only be stopped and asked to remove the facial covering for a short period of time, and may put on the facial covering again after verification is completed. The Administration has stressed that compliance by members of the public with requirements made by police officers to remove facial covering is pivotal to achieving the purpose of the Regulation. Members' attention has also been drawn to the fact that for any alleged inappropriate conduct of police officers, there is established mechanism to handle and investigate complaints against the Police.

39. Some members have pointed out that police officers are authorized under various existing laws, including the Police Force Ordinance (Cap. 232) ("PFO"), to demand proof of identity, and questioned the considerations for a new offence under section 5(3) of the Regulation. The Administration has

explained that pursuant to section 17C of the Immigration Ordinance (Cap. 115), section 54 of PFO and section 49 of POO, a police officer may require any member of the public to produce proof of his/her identity. Failure to comply with a police officer's requirement may constitute an offence under these Ordinances. However, these provisions do not expressly empower a police officer to require a person to remove the person's facial covering for verifying his or her identity. In view of the prevailing situation in the society and the purpose of the Regulation in deterring and reducing violent acts of persons with facial covering, the Administration considers it necessary to clearly empower a police officer under section 5(2) of the Regulation to stop a person and require the person to remove his/her facial covering.

40. To deter and reduce violent acts of persons with facial covering, some members including Ms YUNG Hoi-yan and Mr YIU Si-wing consider it necessary to clearly specify in the Regulation the consequences for non-compliance with a police officer's requirement so that members of the public would clearly understand the circumstances under which they would be criminally liable as well as the corresponding penalties.

#### Implementation of the Regulation

41. Members have asked about the effectiveness of the Regulation since its coming into operation on 5 October 2019. According to the Administration, since the commencement of the Regulation on 5 October 2019 and until 31 October 2019<sup>3</sup>, a total of 303 persons (including 459 males and 218 females) aged 12 to 63 were arrested for suspected breach of section 3 of the Regulation, among which 61 persons (including 37 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 Regulation. They had not yet been charged with the offence. Members have further been advised that the number of protesters who wear masks during protests is observed to be declining, but some violent acts have escalated.

42. Some members including Mr WU Chi-wai, Mr Alvin YEUNG, Mr Andrew WAN and Mr HUI Chi-fung have criticized that as compared with the total number of persons arrested for suspected breach of offences under the Regulation, the number of persons who were actually charged with the offences represents only a small proportion. These members are concerned whether the police officers have rightfully applied the relevant provisions of the Regulation in taking enforcement actions. These members have also cast doubt about the

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<sup>3</sup> According to the Administration, the Police temporarily suspended enforcement actions in respect of the Regulation on 18 November 2019 in view of the judgment delivered on the application for JR mentioned in paragraph 20 above (see also paragraph 46 below).

effectiveness of the Regulation in achieving its legislative intent to prevent or deter the occurrence of violent incidents arising from protests, as the situation of protests and violent acts across the territory has been persisting and indeed escalating. Some other members including Dr Priscilla LEUNG and Mr Holden CHOW have suggested that the Administration should draw reference from the practices adopted by the Government of the United Kingdom for dealing with the disturbances in 2011 and consider allocating additional resources to the Judiciary, so that the courts may operate on a round-the-clock basis to handle expeditiously cases relating to the social disturbances.

43. The Administration has advised that more time is needed to assess the effectiveness of the Regulation after it has come into operation. The Administration has assured members that the Government is determined to stop violence and curb public disorder as soon as possible. In response to the upsurge in the number of court cases arising from recent social unrest, the courts have been exercising flexibility to continue with court hearings beyond normal court hours on a need basis.

#### Factors to be taken into consideration in deciding whether to repeal the Regulation

44. Members note that as stated in the LegCo Brief on the Regulation, the Regulation is meant to deal with the occasion of public danger at the time. The Administration has stated that approval would be sought from CE in Council to repeal the Regulation when the prevailing public danger drops to a level which no longer justifies the Regulation. Members have asked about the factors to be taken into consideration in deciding whether to repeal the Regulation. Some members including Mr Dennis KWOK, Mr Alvin YEUNG, Mr HUI Chi-fung and Mr Gary FAN take a strong view that the Regulation should be repealed as soon as practicable.

45. The Administration has advised that 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 would seek the approval from CE in Council to repeal the Regulation. In assessing whether the occasion of public danger remains, the Government would 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.

Judgment on the application for judicial review by 24 Members and Mr LEUNG Kwok-hung

46. Members note that the Court of First Instance ("the Court") of the High Court handed down on 18 November 2019 its judgment on the applications for JR respectively made by 24 Members and Mr LEUNG Kwok-hung in relation to the Regulation (HCAL 2945/2019 and 2949/2019). In summary, the Court ruled that:

- (a) section 2(3) of ERO does not itself prevent regulations made under ERO from repeal by resolution of LegCo during negative vetting under section 34 of IGCO. But insofar as the power of CE in Council to make regulations on the public danger is concerned, ERO is so wide in its scope, the conferment of powers so complete, its conditions for invocation so uncertain and subjective, the regulations made thereunder invested with such primacy, and the control by LegCo so precarious, that the Court considered it is incompatible with the constitutional order laid down by BL, having regard in particular to BL 2, 8, 17(2), 18, 48, 56, 62(5), 66 and 73(1). The Court leaves open the question of the constitutionality of ERO insofar as it relates to any occasion of emergency;
- (b) ERO was not impliedly repealed by section 5 of HKBORO. Insofar as it is invoked in situations not falling within the kind of public emergency referred to in HKBORO, the Bill of Rights is not suspended and the measures adopted will have to comply with it;
- (c) ERO does not in itself fall foul of the "prescribed by law" requirement (i.e. the principle of legal certainty);
- (d) it is not necessary to deal with the argument based on the principle of legality;
- (e) the provisions in section 3(1)(a), (b), (c) and (d) of the Regulation are rationally connected to the legitimate societal aims that the Government intends by those measures to pursue. However, having regard to the reach of the impugned restrictions to perfectly lawful and peaceful public gatherings, the width of the restrictions affecting public gatherings for whatever causes, the lack of clarity as regards the application of the restrictions to persons present at the public gathering other than as participants, the breadth of the prohibition against the use of facial covering of any type and worn for whatever reasons, the absence of any mechanism for a case-by-case evaluation or assessment of the risk of violence or crimes such as would justify the application of the restrictions, the

lack of robust evidence on the effectiveness of the measure, and lastly the importance that the law attaches to the freedom of expression, freedom of assembly, procession and demonstration, and the right to privacy, the restrictions that paragraphs (b), (c) and (d) of section 3(1) impose on fundamental rights go further than is reasonably necessary for the furtherance of those legitimate objects and therefore paragraphs (b), (c) and (d) of section 3(1) do not pass the proportionality test; and

- (f) the measure introduced by section 5 of the Regulation is rationally connected to the legitimate societal aims pursued. However, having regard to the fact that the power under section 5 can be exercised irrespective of whether there is any public meeting or procession taking place in the vicinity, and regardless of whether there is any risk of outbreak of violence or other criminal acts, at the place where the person is found, or in the neighbourhood, or indeed anywhere else in Hong Kong, and may, on its face, be used by a police officer for random stoppage of anyone found wearing a facial covering in any public place, the restrictions it imposes on fundamental rights also go further than is reasonably necessary for the furtherance of those legitimate objects, and therefore section 5 fails the proportionality test.

Members also note that the Court made it clear that it is not the Court's judgment that "anti-mask" law is generally objectionable or unconstitutional. Its validity must, however, depend on the details of the legislation and the particular societal aims sought to be pursued by the measure being brought in through the legislation.

47. Having regard to the Court's judgment, the Administration has stated that it would temporarily suspend the enforcement actions in respect of the Regulation. In the light of the latest development and the fact that the scrutiny period of the Regulation has already expired, the Subcommittee considers that its scrutiny work should come to a halt.

#### Examination of provisions of the Regulation

48. In the light of the Subcommittee's decision to conclude its scrutiny work, the Subcommittee has not examined the provisions of the Regulation section-by-section or considered the draft amendments proposed by individual Members to the Regulation. Members note that the Legal Adviser has raised with the Administration a number of legal and drafting issues in relation to the Regulation (LC Paper No. CB(2)30/19-20(01)) and the Administration has provided its response vide LC Paper No. CB(2)74/19-20(02). Members also note that nine Members have given respective notices to move a total of 11



proposed resolutions to repeal or amend the Regulation at the Council meeting of 13 November 2019, but the proposed resolutions could not be dealt with at that Council meeting before the adjournment of the meeting.

**Advice sought**

49. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2  
Legislative Council Secretariat  
9 December 2019

**Subcommittee on Prohibition on Face Covering Regulation**

**Membership list \***

**Chairman** Hon WONG Ting-kwong, GBS, JP

**Deputy Chairman** Hon YUNG Hoi-yan, JP

**Members**

Hon James TO Kun-sun  
Hon LEUNG Yiu-chung  
Prof Hon Joseph LEE Kok-long, SBS, JP  
Hon Starry LEE Wai-king, SBS, JP  
Hon CHAN Hak-kan, BBS, JP  
Hon CHAN Kin-por, GBS, JP  
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP  
Hon Paul TSE Wai-chun, JP  
Hon Claudia MO  
Hon Steven HO Chun-yin, BBS  
Hon Frankie YICK Chi-ming, SBS, JP  
Hon WU Chi-wai, MH  
Hon YIU Si-wing, BBS  
Hon MA Fung-kwok, SBS, JP  
Hon Charles Peter MOK, JP  
Hon CHAN Chi-chuen  
Hon CHAN Han-pan, BBS, JP  
Hon LEUNG Che-cheung, SBS, MH, JP  
Hon Kenneth LEUNG  
Hon Alice MAK Mei-kuen, BBS, JP  
Dr Hon KWOK Ka-ki  
Hon KWOK Wai-keung, JP  
Hon Dennis KWOK Wing-hang  
Hon Christopher CHEUNG Wah-fung, SBS, JP  
Dr Hon Fernando CHEUNG Chiu-hung  
Dr Hon Helena WONG Pik-wan  
Hon IP Kin-yuen  
Hon Elizabeth QUAT, BBS, JP  
Hon POON Siu-ping, BBS, MH

Dr Hon CHIANG Lai-wan, SBS, JP  
Ir Dr Hon LO Wai-kwok, SBS, MH, JP  
Hon CHUNG Kwok-pan  
Hon Alvin YEUNG  
Hon Andrew WAN Siu-kin  
Hon CHU Hoi-dick  
Hon Jimmy NG Wing-ka, BBS, JP  
Dr Hon Junius HO Kwan-yiu, JP  
Hon HO Kai-ming  
Hon LAM Cheuk-ting  
Hon Holden CHOW Ho-ding  
Hon SHIU Ka-fai, JP  
Hon SHIU Ka-chun  
Hon Wilson OR Chong-shing, MH  
Dr Hon Pierre CHAN  
Hon CHAN Chun-ying, JP  
Hon Tanya CHAN  
Hon HUI Chi-fung  
Hon LUK Chung-hung, JP  
Hon LAU Kwok-fan, MH  
Dr Hon CHENG Chung-tai  
Hon KWONG Chun-yu  
Hon Jeremy TAM Man-ho  
Hon Gary FAN Kwok-wai  
Hon AU Nok-hin  
Hon Vincent CHENG Wing-shun, MH, JP  
Hon Tony TSE Wai-chuen, BBS  
Hon CHAN Hoi-yan

(Total : 59 members)

**Clerk** Miss Betty MA

**Legal adviser** Mr Alvin CHUI

\* Changes in membership are shown in Annex to Appendix I.

**Subcommittee on Prohibition on Face Covering Regulation**

**Changes in membership**

<b>Member</b>	<b>Relevant date</b>
Hon KWONG Chun-yu	Since 28 October 2019

**Subcommittee on Prohibition on Face Covering Regulation**

List of deputations/individuals which/who have given oral representation to the Subcommittee

1. Amnesty international Hong Kong
2. Civic Party
3. HKEd4All
4. Hong Kong Professional Teachers' Union
5. Miss Alice YANG
6. Miss B
7. Miss Candy TAM
8. Miss CHAN Kaman
9. Miss CHENG Wing-ki
10. Miss Cherie WONG Cheuk-ni
11. Miss CHIU Kar-man
12. Miss CHIU kei-ying
13. Miss CHUNG Wai-ting
14. Miss FONG Yuk-man
15. Miss Gigi PANG Che-kwan
16. Miss Janet KWOK Lan
17. Miss KWONG Man-kwan
18. Miss LAI Lili
19. Miss LAI Yin-shan
20. Miss LIU Lok-lok
21. Miss NG Lok-heng
22. Miss Sarah WONG See-nga

23. Miss Sindy CHOW Sin-yee
24. Miss SIU Wing-yan
25. Miss WONG Hoi-ching
26. Miss WONG Nga-chi
27. Miss WONG Sau-wan
28. Miss YEUNG Yi-lam
29. Miss 陳麗珊
30. Miss 熊璐珊
31. Miss 謝笑瓊
32. Mr Anderson CHAN
33. Mr AU Kin-kan
34. Mr CHAN Chi-kan
35. Mr CHAN Chiwah
36. Mr CHAN Tze-chin
37. Mr CHAN Yiu-lam
38. Mr CHEUNG Cho-kwai
39. Mr CHEUNG Ning
40. Mr CHEUNG Ping
41. Mr CHEUNG Yiu-fai
42. Mr Colin NG Wing-lun
43. Mr DONG Qizhen
44. Mr Francis TSANG Chung-hong
45. Mr Gary KWAN
46. Mr HUI Ka-ho
47. Mr IP Tsz-kin

48. Mr KWOK Tat-sing
49. Mr KWOK Wing-kin
50. Mr LAU Hoi-man Michael Felix
51. Mr LEI Chi-wang
52. Mr LEUNG Kwok-hung
53. Mr MOK Ka-kit
54. Mr NG Ka-ho
55. Mr NG Wai-chiu
56. Mr Raphael WONG Ho-ming
57. Mr TSUI King-sing
58. Mr WAT Tat-fei
59. Mr WEI Youyi
60. Mr WONG Lap-kwan
61. Mr WONG Wai-kit
62. Mr YEUNG Wai-kwan
63. Mr 王吉顯
64. Mr 伍錦波
65. Mr 吳偉樑
66. Mr 李偉強
67. Mr 李廣宇
68. Mr 林悅鉦
69. Mr 范強
70. Mr 奚鴻泉
71. Mr 容寶駿
72. Mr 梁達壯

- 73. Mr 梁駿聲
- 74. Mr 陳國師
- 75. Mr 陳舵
- 76. Mr 陳雲廣
- 77. Mr 陳霆峰
- 78. Mr 陸浩麟
- 79. Mr 黃斯強
- 80. Mr 黃瑋琛
- 81. Mr 黃曉輝
- 82. Mr 黃曜彰
- 83. Mr 楊志偉
- 84. Mr 鄭宇曦
- 85. Mr 鄭國基
- 86. Mr 盧梓豪
- 87. Mr 甄灼宁
- 88. Mr 羅國豪
- 89. Mrs CHUI Lai-yi
- 90. Ms FU Guangiong
- 91. Ms LIN Huiyin
- 92. Ms MOK Wan-ching
- 93. Ms XIE Wen
- 94. Ms YU Fung-han
- 95. Ms 盛滿英
- 96. Ms 趙琚
- 97. People power



- 98. 香港快遞貨運從業員總會
- 99. 香港法學交流基金會
- 100. 香港專業及資深行政人員協會

List of deputation/individuals which/who have provided written views to the Subcommittee only

[https://www.legco.gov.hk/yr18-19/english/hc/sub\\_leg/sc63/agenda/sc6320191109-ag-app.htm#not\\_attend](https://www.legco.gov.hk/yr18-19/english/hc/sub_leg/sc63/agenda/sc6320191109-ag-app.htm#not_attend)