

立法會
Legislative Council

LC Paper No. LS62/19-20

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 27 and 28 March 2020,
and 1 April 2020**

Tabling in LegCo : Council meeting of 22 April 2020

Amendment to be made by : Council meeting of 20 May 2020 (or that of 10 June 2020 if extended by resolution)

Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (L.N. 31)

Prevention and Control of Disease (Requirements and Directions) (Business and Premises) (Amendment) Regulation 2020 (L.N. 33)

Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (L.N. 32)

Under section 8 of the Prevention and Control of Disease Ordinance (Cap. 599), the Chief Executive ("CE") in Council may make regulations for the purposes of preventing, combating or alleviating the effects of a public health emergency and protecting public health on an occasion of a public health emergency.¹ L.N. 31 to L.N. 33 are made by CE in Council under section 8 of Cap. 599 having regard to the latest situation of public health emergency relating to the Coronavirus Disease-19 ("COVID-19") ("the disease").²

L.N. 31

2. L.N. 31 imposes certain temporary measures in relation to catering business and the premises set out in Part 1 of Schedule 2 to L.N. 31 ("scheduled premises") (i.e. amusement game centre, bathhouse, fitness centre, place of

¹ "Public health emergency" is defined in section 8(5) of Cap. 599 to mean, among others, the occurrence of or the imminent threat of a disease, an epidemic or a pandemic; or the occurrence of a novel, or highly infectious, agent or matter that has a high probability of causing a large number of deaths or a large number of serious disabilities (whether or not long-term) in the population.

² The disease was specified as "severe respiratory disease associated with a novel infectious agent" in item 34AAA of Schedule 1 to Cap. 599 (L.N. 3 of 2020).

amusement, place of public entertainment and premises (commonly known as party room) that are maintained or intended to be maintained for hire for holding social gatherings). The temporary measures include:

- (a) imposing requirements on a person responsible for carrying on a catering business (including the owner, proprietor and manager of the business) ("responsible person") to cease selling or supplying food or drink for consumption on the premises of the business, and to close any premises (or part of the premises) on which food or drink is sold or supplied for consumption on the premises during a period specified by the Secretary for Food and Health ("Secretary") by notice published in the Gazette (no such notice has been published in the Gazette as at the date of issue of this report), and providing that these requirements do not apply to a catering business carried on at any premises set out in Part 1 of Schedule 1 to L.N. 31 (including a hospital, residential care home, and premises controlled or managed by the Government);
- (b) empowering the Secretary, for preventing, protecting against, delaying or otherwise controlling the incidence or transmission of the disease, to issue directions imposing requirements or restrictions on a catering business or any scheduled premises in relation to their mode of operation or any activity carried on at the premises of the business, the closing of the whole or part of the premises, and the opening hours of the business on a day during a specified period;
- (c) empowering the Chief Secretary for Administration ("CS") to designate any catering business or category of catering businesses, to be exempt from the requirements in subparagraph (a) above if certain criteria are satisfied;
- (d) specifying that any notice or direction published in the Gazette by virtue of L.N. 31 is not subsidiary legislation (and hence not subject to amendment by the Legislative Council ("LegCo")), and each specified period must not exceed 14 days; and
- (e) providing for the enforcement powers of an inspector appointed by the Secretary which include entering and inspecting any premises for a catering business or any scheduled premises ("specified premises") at any reasonable time as the inspector considers necessary.

3. L.N. 31 makes it an offence which, upon conviction, is punishable with a fine at level 5 (i.e. \$50,000) and imprisonment for six months if:

- (a) a responsible person, without reasonable excuse, contravenes any requirement as stated in paragraph 2(a) above or any applicable direction issued as stated in paragraph 2(b) above; or

- (b) a manager (who is responsible for the management or is in charge or control of the premises) of any scheduled premises, without reasonable excuse, contravenes any applicable direction issued as stated in paragraph 2(b) above.

L.N. 33

4. L.N. 33 amends L.N. 31 (i.e. Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F)) by adding six types of premises, namely, beauty parlour; club-house; establishment (commonly known as club or nightclub) that is open late into the night, usually for drinking, and dancing or other establishment; karaoke establishment; mahjong-tin kau premises; and massage establishment, to the list of scheduled premises set out in Part 1 of Schedule 2 to L.N. 31 so that the temporary measures mentioned in paragraph 2 above are also applicable to the six types of premises.

Directions made by the Secretary for Food and Health under Cap. 599F and as amended by L.N. 33

Directions in relation to catering business

5. By G.N. (E.) 16 of 2020 published in the Gazette on 27 March 2020, the Secretary has made the directions in relation to catering business for a period of 14 days beginning at 6:00 p.m. on 28 March 2020. Under these directions, the number of customers at any catering premises must not exceed 50% of the normal seating capacity, the tables must be arranged in such a way to ensure that there is at least 1.5 meters or there is some form of partition between tables, and no more than four persons may be seated at one table. The directions also require the wearing of masks, conduct of body temperature screening and provision of hand sanitizers at catering premises. By G.N. (E.) 21 of 2020 published in the Gazette on 1 April 2020, the Secretary has directed that for a period of 14 days beginning at 6:00 p.m. on 1 April 2020, all karaoke and mahjong-tin kau activities at any premises on which food or drink is sold or supplied for consumption on the premises must be suspended. By G.N. (E.) 23 of 2020 published in the Gazette on 2 April 2020, the Secretary has directed that for a period of 14 days beginning at 6:00 p.m. on 3 April 2020, any premises (commonly known as bar or pub) and any part of a catering business that is exclusively or mainly used for the sale or supply of intoxicating liquors for consumption in that premises or that part of the premises must be closed.

6. By G.N. (E.) 25 of 2020 published in the Gazette on 8 April 2020, the Secretary suspended the operation of G.N. (E.) 16 of 2020, G.N. (E.) 21 of 2020 and G.N. (E.) 23 of 2020 from 10 April 2020 and made directions in relation to catering business, which are equivalent to those as stated in paragraph 5 above, for a period of 14 days beginning on 10 April 2020 to 23 April 2020.

7. By G.N. (E.) 28 of 2020 published in the Gazette on 21 April 2020, the Secretary has made directions in relation to catering business to extend the implementation of certain protective measures at the premises of catering business, which (except the requirement that the number of customers at any catering premises must not exceed 50% of the normal seating capacity) are equivalent to those as stated in paragraph 5 above, for a period of 14 days beginning on 24 April 2020 to 7 May 2020.

Directions in relation to scheduled premises

8. By G.N. (E.) 17 of 2020 published in the Gazette on 27 March 2020, the Secretary has directed that the six scheduled premises set out in Part 1 of Schedule 2 to L.N. 31 (as stated in paragraph 2 above) must be closed for a period of 14 days beginning at 6:00 p.m. on 28 March 2020.

9. By G.N. (E.) 22 of 2020 published in the Gazette on 1 April 2020, the Secretary has directed that for a period of 14 days beginning at 6:00 p.m. on 1 April 2020:

- (a) establishment (commonly known as club or nightclub) that is open late into the night, usually for drinking, and dancing or other entertainment; karaoke establishment; and mahjong-tin kau premises must be closed;
- (b) any karaoke and mahjong-tin kau activities carried on at club-house premises must be suspended; and
- (c) certain protective measures must be implemented at beauty parlour, club-house and massage establishment premises, i.e. wearing of mask at any time within such premises, conduct of body temperature screening before entering into and provision of hand sanitizers at such premises.

10. By G.N. (E.) 24 of 2020 published in the Gazette on 2 April 2020, the Secretary has directed that for a period of 14 days beginning at 6:00 p.m. on 3 April 2020, any area in a club-house that is exclusively or mainly used for the sale or supply of intoxicating liquors for consumption must be closed.

11. By G.N. (E.) 26 of 2020 published in the Gazette on 8 April 2020, the Secretary suspended the operation of G.N. (E.) 17, G.N. (E.) 22 and G.N. (E.) 24 of 2020 from 10 April 2020 and directed that for a period of 14 days beginning at 10 April 2020 to 23 April 2020, (a) the scheduled premises (with the exception of club-house) set out in Part 1 of Schedule 2 to Cap. 599F must be closed; (b) in relation to club-house, all karaoke and mahjong-tin kau activities carried on therein must be suspended, and certain protective measures must be implemented at the premises, i.e. the wearing of mask at any time within the club-house, conducting of

body temperature screening before entering into and provision of hand sanitizers at the club-house.

12. By G.N. (E.) 29 of 2020 published in the Gazette on 21 April 2020, the Secretary has made directions to extend (a) the closure of the scheduled premises (with the exception of club-house) set out in Part 1 of Schedule 2 to Cap. 599F and (b) the suspension of karaoke and mahjong-tin kau activities carried on in club-house and the implementation of certain protective measures at the club-house, which are equivalent to those as stated in G.N. (E.) 26 of 2020, for a period of 14 days beginning at 24 April 2020 to 7 May 2020.

L.N. 32

13. L.N. 32 is made, among others, to:

- (a) prohibit a group gathering of more than four persons in any public place³ ("prohibited group gathering") during a period specified by the Secretary by notice published in the Gazette which, as provided in section 4 of L.N. 32, must not exceed 14 days, and provide that such notice is not subsidiary legislation;
- (b) empower CS to permit any group gathering to be exempt from the prohibition as stated in subparagraph (a) above if certain criteria are satisfied;
- (c) specify 12 types of group gatherings, which are exempt from the prohibition as stated in subparagraph (a) above, in Schedule 1 to L.N. 32, which include group gatherings for the purposes of or related to transportation, for performing any governmental functions and obtaining or receiving hospital or healthcare service at a healthcare facility, and group gatherings at a place of work for the purposes of work and those necessary for the proceedings in LegCo or a District Council;
- (d) provide that a person commits an offence and is liable on conviction to a fine at level 4 (\$25,000) and to imprisonment for six months if the person (i) participates in or (ii) organizes a prohibited group gathering, or (iii) owns, controls or operates the place in which a prohibited group gathering takes place, and knowingly allows the taking place of the gathering;

³ "Public place" is defined to mean a place to which the public or a section of the public may or are permitted to have access from time to time, whether by payment or otherwise.

- (e) provide for the payment of a fixed penalty of \$2,000 to discharge the liability for the offence of participating in a prohibited group gathering; and
- (f) provide for the enforcement powers of an authorized officer appointed by the Director of Health ("DH") which include demanding personal details, inspecting the proof of identity, and dispersing a prohibited group gathering or a dispersable gathering.⁴

Gazette notices made by the Secretary for Food and Health under L.N. 32

14. By G.N. (E.) 19 of 2020 published in the Gazette on 28 March 2020 pursuant to section 4 of L.N. 32, the Secretary has specified the period from 29 March 2020 to 11 April 2020 for the purposes of the prohibition of group gatherings of more than four persons in a public place. By G.N. (E.) 27 of 2020 published in the Gazette on 8 April 2020, the Secretary suspended the operation of G.N. (E.) 19 of 2020 from 10 April 2020 and specifies, with effect from 10 April 2020, the period of 14 days from 10 April 2020 to 23 April 2020 for the purposes of the prohibition of group gatherings of more than four persons in a public place. By G.N. (E.) 30 of 2020 published in the Gazette on 21 April 2020, the Secretary has extended the prohibition of group gatherings of more than four persons in a public place for a period of 14 days from 24 April 2020 to 7 May 2020.

Legal Service Division's observations

15. It is noted that the restrictions imposed by L.N. 31 and L.N. 33 may affect a person's property right guaranteed by Article 105 of the Basic Law. It is further noted that the prohibition of group gatherings in public places under L.N. 32 may affect a person's freedom of assembly guaranteed by Article 27 of the Basic Law and Article 17 of the Hong Kong Bill of Rights in section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383). In relation to L.N. 31 and L.N. 33, we note that the Administration has explained in the relevant LegCo Briefs that in the light of the recent aggravated situation of the disease, it is necessary to implement more stringent measures for a specified period of time to restrict activities or the operation of premises where people congregate and mingle together for a prolonged period of time when it is not possible for them to use surgical masks. Similar to the measures in L.N. 31 and L.N. 33, the prohibition of gathering of more than four persons provided in L.N. 32, as explained by the Administration, is for the purpose of ensuring social distancing or preventing people from congregating, and in making L.N. 32, the Administration considers that the benchmark of four persons in a group

⁴ Under section 10(2) of L.N. 32, if the distance between any participant of a gathering in a public place and any participant of another gathering in the place is less than 1.5 meters, and the total number of participants of the gatherings is more than four, then each of the gatherings is a dispersable gathering.

to gather in public places is reasonable and realistic in the case of Hong Kong after taking into account the practices in overseas countries where the cap on the number of people gathering ranges from two to ten persons. In view of the Administration's explanation and given the seriousness of the existing public health emergency caused by the disease, the limited duration of the measures and that the Government has recently announced that financial relief and support will be offered to those businesses and employees who are affected by the implementation of the measures, it appears unlikely that the measures in L.N. 31 to L.N. 33 would be regarded as unreasonable or disproportionate having regard to the criteria set out in the four-step proportionality test as laid down in the case of *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.⁵

Enquiries with the Administration

16. The Legal Service Division ("LSD") has made enquiries with the Administration on certain matters relating to L.N. 31, L.N. 32, and L.N. 33.

Meaning of "catering business"

17. Since "catering business" is not defined in L.N. 31 or Cap. 599, LSD has made enquiries with the Administration on what kind(s) of acts/activities would be considered as falling within the meaning of "catering business" for the purposes of L.N. 31. The Administration has explained that "catering business" should be accorded with its ordinary meaning in the dictionary with due regard to the context in which it appears. According to *Oxford English Dictionary*, "cater" means "to provide a supply of food for" and "business" bears a wide definition including "action which occupies time and demands attention and effort; serious occupation or work, as opposed to pleasure or recreation; an activity or matter that someone is engaged in, or with which he or she is concerned at a particular time; a person's official or professional duties as a whole; one's regular, habitual, or stated profession, trade, or occupation". As held by the Court of Final Appeal,⁶ the question of whether something amounted to the carrying on of a business was a question of fact and degree to be answered by the fact-finding body upon consideration of all the circumstances. Generally, the court has adopted the fundamental notion of the exercise of an activity in an organized and coherent way and one which is directed to an end result. Whether an act/activity would fall within the meaning of "catering business" has therefore to be decided based on the facts and circumstances in each

⁵ The four-step proportionality test is (i) whether the restriction or limitation pursues a legitimate aim; (ii) whether the restriction or limitation is rationally connected to that legitimate aim; (iii) whether the restriction or limitation is no more than is necessary to accomplish that legitimate aim; and (iv) 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.

⁶ *Lee Yee Shing v Commissioner of Inland Revenue* (2008) 11 HKCFAR 6.

case, having regard to the object of L.N. 31 and the exclusion of certain catering business set out in section 3(3) of L.N. 31.

Closing an area adjacent to the premises of business

18. LSD has asked the Administration to clarify whether a responsible person is required under section 3(1) of L.N. 31 to close an area adjacent to his premises of business even though such area (where seating or tables are made available by somebody else) is not within his control ("uncontrolled part"). The Administration has explained that the effect of section 3(1)(b) and (5) of L.N. 31 is that a responsible person is responsible for "closing" the uncontrolled part where there are seating or tables, even though they are not made available by him or her. Closing an area does not necessarily mean that the responsible person must physically shut down or cordon off the uncontrolled part. In order for a responsible person to fulfil the duty of "closing" the uncontrolled part, while he may not have the control or power to stop any person from entering into or staying in such part, he is required to take reasonably feasible steps to prevent people from consuming any food or drink sold or supplied by his catering business inside such part. In this regard, the Administration has further explained that the defence of "reasonable excuse" to any breach of section 3(1)(b) is available to a responsible person under section 3(6) of L.N. 31.

The premises to be entered and inspected by an inspector

19. LSD has asked whether any specified premises that an inspector is empowered to enter and conduct inspection as stated in paragraph 2(e) above could be residential premises, and if so, whether an inspector may enter such premises without a warrant. The Administration has explained that Part 1 of Schedule 1 to L.N. 31 lists out the catering premises to which the requirements as stated in paragraph 2(a) above do not apply, which include "premises that have been constructed to be used, and are used, as a private dwelling" and would hence exclude residential premises. Moreover, the specified premises, according to their definition or description in section 10 of L.N. 31, are premises that are used for the carrying on therein of a business, which are by their nature not premises for residential use. Hence, the question of whether an inspector may enter and inspect specified premises which are residential premises without a warrant under section 12(1)(a) of L.N. 31 should not arise.

The definitions of "fitness centre" and "beauty parlour" in L.N. 31 and L.N. 33

20. In relation to whether the premises used for teaching ballet or modern dance would fall within the definition of "fitness centre", the Administration has explained that one of the limbs in the definition of "fitness centre" refers to "the provision of advice, instruction, training or assistance on improving physical fitness". The question of whether the premises used for teaching a particular dance or any

activity would fall within this definition has to be decided on a case by case basis having regard to the nature of the activity and whether it is for improving physical fitness or is only a recreational activity (which would fall outside the definition).

21. In relation to whether a hair salon providing the manicure or pedicure service apart from the basic services of hair cutting, colouring or styling would be considered as a "beauty parlour" as defined under section 3(2) of L.N. 33,⁷ the Administration has responded that if a hair salon provides manicure or pedicure service, depending on the actual circumstances and the extent and nature of service provided, it may fall within the definition of "beauty parlour". As to whether a hair salon applying special shampoo, conditioner or liquid which is alleged to have hair loss improvement/prevention effect to its customers would be considered as a "beauty parlour", the Administration has responded that if the use of such kind of agent for washing hair is a mere step incidental to the process of hair cutting or hair styling which is service normally provided by a hair salon, it is unlikely that such step alone would be regarded as falling within the definition of "beauty parlour". The Administration stated that whether a particular premises falls under the definition is a fact-sensitive issue and whether a hair salon is a premises providing the service of a beauty parlour will depend on the actual circumstances and the extent and service provided by it.

The requirement for an authorized officer to produce written proof of appointment under L.N. 32

22. Unlike an inspector appointed under L.N. 31, an authorized officer appointed under L.N. 32 is not required to produce written proof of the appointment before performing a function under L.N. 32. LSD has asked why a different approach is adopted. The Administration has explained that the performance of a function by an inspector under L.N. 31 would very often entail entry into the relevant premises which may or may not be public places and production of proof of appointment upon request is considered more appropriate for the effective performance of the inspector's function in those premises which are not public places. The reason why there is no similar express provision in L.N. 32 is mainly due to the fact that L.N. 32 regulates group gatherings in public places only. It is anticipated that the performance of a function under L.N. 32 will be carried out mainly in public places which are open to the public. The Administration has further explained that in any event, as a matter of practice, an authorized officer appointed by DH will carry with him or her the proof of appointment and will, if so required, produce it to demonstrate his or her identity in the course of performing a function under L.N. 32.

⁷ Under section 3(2) of L.N. 33, "beauty parlour" is defined to mean any premises on which one or more of the following services are provided: (a) chemical, mechanical or energetic procedure for beautifying purpose, including cosmetic procedures that involve skin puncture for non-medical purposes, on any part of the body (excluding hair on the head); (b) nail treatment services (including manicure or pedicure service, nail extension, nail polish and nail art); (c) hair loss improvement service (including hair transplant and hair weaving) for non-medical purpose.

Consultation

23. According to paragraph 29 of the LegCo Brief (no file reference) issued by the Food and Health Bureau in March 2020 on L.N. 31 and L.N. 32 and paragraph 11 of the LegCo Brief (no file reference) issued by the same Bureau in April 2020 on L.N. 33 respectively, the Administration is of the view that given the exigency of the situation, public consultation is not feasible.

24. As advised by the Clerk to the Panel on Health Services, the Panel has not been consulted on L.N. 31, L.N. 32 and L.N. 33.

Commencement and expiry

25. L.N. 31 and L.N. 33 came into operation on 28 March 2020 and at 3:00 p.m. on 1 April 2020 respectively and expire at midnight on 27 June 2020. L.N. 32 came into operation on 29 March 2020 and expires at midnight on 28 June 2020.

Concluding observations

26. Subject to Members' views on the matters set out in paragraphs 15 to 22 above, no legal and drafting difficulties have been identified in relation to L.N. 31, L.N. 32 and L.N. 33.

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