

LEGISLATIVE COUNCIL BRIEF

EMERGENCY REGULATIONS ORDINANCE (CAP. 241)

PROHIBITION ON FACE COVERING REGULATION

INTRODUCTION

Annex

At the meeting of the Executive Council on 4 October 2019, the Council ADVISED and the Chief Executive ORDERED that the Prohibition on Face Covering Regulation (the “Regulation”) at Annex should be made under section 2(1) of the Emergency Regulations Ordinance (Cap. 241) (“ERO”) to prohibit the use of facial covering in certain circumstances and be tabled at the Legislative Council (LegCo).

JUSTIFICATIONS

Present situation

2. Since 9 June 2019, more than 400 public order events (“POEs”) arising from the proposed amendments to the Fugitive Offenders Ordinance have been staged with a significant number of incidents ended up in outbreaks of violence. These POEs occurred in different districts of Hong Kong at frequent intervals every week, with many featuring hundreds and thousands of participants. The degree of violence in these outbreaks has been escalating, with radical and violent protesters repeatedly charging police cordon lines, blocking roads, vandalizing public facilities and shops, setting fire at police stations and various locations, damaging traffic lights, attacking citizens and police officers with weapons including high-powered laser pointers, sharpened objects and bricks, hurling petrol bombs at police vehicles and stations as well as crippling the operation of critical

infrastructures including the airport, the mass transit railway system and cross-harbour tunnel. These acts seriously breached the public peace and posed a grave threat to the safety of the public, visitors and police officers on duty. They also seriously disrupted the normal functions of the Hong Kong community.

3. The escalating illegal and violent acts of radical protesters are not only outrageous, they also push Hong Kong to a very dangerous situation. Many of the protesters are 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. They are linked by social media and are characterized by quick mobilization and versatility in tactics. They travel by mass transit and move quickly from one place to another, and are well equipped with protective gears and offensive weapons. Many a time, they outnumbered the police officers who could be mobilized at a scene. This situation has persisted for about four months and there is still no end in sight – as a matter of fact, on 1 October 2019, the use of violence by protesters was even more radical covering a large number of districts and areas with the wide use of petrol bombs against life and property, vicious attacks on police officers, vehicles and police stations, and heavy vandalism of MTR stations and government offices, etc. The Police had to fire six live rounds, effected 269 arrests and 123 people were sent to hospitals, all in a single day. Masking is currently not outlawed in Hong Kong. Due to the widespread and imminent public danger posed by the violent and illegal acts of masked protestors, there is an urgent need to consider introducing legislation to prohibit face covering to enable the Police to investigate into such acts and to serve as a deterrent against such behaviour. To restore public order, prohibition on facial covering in public assemblies, lawful and unlawful, would be necessary as it would effectively reduce act of violence and facilitate police investigation and administration of justice. The prohibition would be essential in public interest in restoring public peace, and is rationally connected to protecting public order and public safety.

Legislative proposal

4. We have critically considered the existing powers of the Police and relevant laws. We are of the view that legislation has to be enacted urgently to enable the Police to handle further illegal and violent acts of radical protesters more effectively so as to restore law and order, and to

prevent serious public disorder, as well as to apprehend the offenders and bring them to justice. The proposal has taken into account the regulatory tools required to protect public safety and order having regard to the practical experience in handling protests in the past few months, with due regard for fundamental rights even in times of public danger.

5. We propose to effect the prohibition on face covering through the making of the Regulation under section 2(1) of the ERO, which provides that on any occasion which the Chief Executive in Council (“CE-in-C”) may consider to be an occasion of public danger, the CE-in-C may make any regulations whatsoever which the CE-in-C may consider desirable in the public interest. The Government is invoking the ERO on public danger ground, not emergency ground, and similar laws can be found in the permanent criminal codes in other western democratic jurisdictions.¹

6. It is noted that most if not all of the protesters were wearing masks or covering their faces with objects to conceal their identity when engaged in violent or illegal acts. We propose that the prohibition should apply to “unlawful assembly”² (whether or not the assembly is a riot)³, “unauthorized assembly”⁴, and public meetings and public processions in

¹ Canada, France, Sweden, Spain, Denmark, Norway, Germany and Austria etc.

² Under section 18 of the POO, an unlawful assembly refers to the situation when 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace.

³ Under section 19 of the POO, when any person taking part in an assembly which is an unlawful assembly by virtue of section 18(1) commits a breach of the peace, the assembly is a riot and the persons assembled are riotously assembled.

⁴ Under section 17A of the POO, a public meeting or procession is an unauthorized assembly if –

- (a) the public meeting or procession takes place in contravention of section 7 or 13 (i.e. the public meeting or procession is one which the CP has to be notified before taking place, but the CP is either not notified or, if notified, prohibits or objects to it);
- (b) 3 or more persons taking part in or forming part of a public gathering refuse or wilfully neglect to obey an order given or issued under section 6 (i.e. order given to control and direct the conduct of all public gatherings, which is necessary in the

respect of which the Commissioner of Police (“CP”) is notified⁵ and does not prohibit or object under the Public Order Ordinance (“POO”). Any person who fails to comply with the requirement is guilty of an offence and liable to a fine at level 4 (\$25,000) and imprisonment for 1 year. We see the need to impose this control in the above-mentioned activities because according to recent experience, a public meeting or public procession which is lawfully taking place can turn into an unauthorized or unlawful assembly quickly with protesters deviating from the original location or route approved by the Police and some radical protesters resorting to violence.

7. We consider it necessary to provide for a defence of lawful authority or reasonable excuse for the proposed offence. Examples of circumstances where a person has a reasonable excuse for using a facial covering include that the person was using the facial covering for religious reason or a pre-existing medical or health reason. Other examples of reasonable excuse are the person who was engaged in a profession or employment and was using the facial covering for the physical safety of the person while performing an activity connected with the profession or employment.

8. We also propose that, where a police officer finds in any public place any person who is using a facial covering that the police officer reasonably believes is likely to prevent identification, the police officer may

interests of national security or public safety, public order or the protection of the rights and freedoms of others); or

- (c) 3 or more persons taking part in or forming part of a public meeting, public procession or public gathering, or other meeting, procession or gathering of persons refuse or wilfully neglect to obey an order given or issued under section 17(3) (i.e. order given to prevent, stop, disperse or vary the place or route of any public gathering if it is likely to cause or lead to a breach of the peace).

⁵ Under section 7 of the POO, notice to the CP is required for holding –

- (a) a public meeting of more than 50 persons;
- (b) a public meeting held in private premises of more than 500 persons; and
- (c) a public meeting which is not a meeting in any registered school or in any registered college or in any educational establishment approved by an accredited society or the school etc. and the meeting is held with the consent of the management of such school etc.

Under section 13 of the POO, notice to the CP is required for holding –

- (a) a public procession which is a procession on a public highway or thoroughfare or in a public park;
- (b) a public procession consisting of more than 30 persons; and
- (c) a public procession not excluded by the CP by notice in the Gazette.

stop the person and require the person to remove the facial covering for verifying the identity of the person. Any person who fails to comply with the requirement commits an offence and would be liable to a fine at level 3 (\$10,000) and imprisonment for 6 months.

9. Based on the operational experience of the Police, there is a need to allow more time to collect evidence and conduct investigation for offences arising from POEs, given the huge number and complexity. Hence, instead of adopting the normal six-month limit under section 26 of the Magistrates Ordinance (Cap. 227), we propose that a prosecution for the proposed offences in paragraphs 6 and 8 above must be started before the end of 12 months beginning on the date on which the offence is committed.

10. Section 2(3) of the ERO provides that “(a)ny regulations made under the provisions of this section shall continue in force until repealed by order of the Chief Executive in Council”. As the Regulation is meant to deal with the situation of public danger at the time, approval would be sought from the CE-in-C to repeal the Regulation when the prevailing public danger drops to a level which no longer justifies the Regulation.

OTHER OPTIONS

11. There are no other timely options other than making a regulation under the ERO having regard to the current urgent situation of public danger.

THE REGULATION

12. The main provisions of the Regulation are set out below –

- (a) prohibiting the use in certain circumstances of any facial covering that is likely to prevent identification and providing for an offence (section 3) with a defence where the person has a reasonable excuse (section 4);
- (b) empowering a police officer to require a person in a public place to remove the person’s facial covering in certain circumstances and providing for non-compliance to be an offence (section 5); and

- (c) providing for an extension of the prosecution time limit for an offence under section 3(2) or 5(3) to 12 months beginning on the date on which the offence is committed (section 6).

LEGISLATIVE TIMETABLE

13. The legislative timetable will be –

Publication in the Gazette	4 October 2019
Commencement	5 October 2019
Tabling at the Legislative Council	16 October 2019

IMPLICATIONS OF THE PROPOSAL

14. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. Rights protected by the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383) are not absolute, and may be subject to permissible limitations. We have ensured that the scope of the measure strikes a careful balance between the public interest in protecting public order and safety and respect for the fundamental rights and freedoms of Hong Kong residents. We are satisfied that what is currently proposed is no more than what is necessary and proportionate to protect public order and safety in light of the escalating illegal and violent acts of radical protesters at recent public order events.

15. The proposal in the Regulation concerns the creation of a criminal offence for using facial covering in certain circumstances. We have confined the scope of the prohibition on the use of facial covering to those meetings and processions that are likely to pose greater risk to public order and safety, namely: (i) a public meeting or procession that takes place under section 7(1) or 13(1) of the POO (which is larger in scale than a “public gathering”), and (ii) an unlawful assembly, a riot and unauthorized assembly within the meaning of sections 18, 19 and 17A(2) of the POO. We have also struck a balance between the need to deter radical protesters from concealing their identity in order to commit unlawful acts with impunity and respect for various legitimate reasons for covering their face by providing for a “reasonable excuse” defence. This proposal does not deprive persons of the

essence of the right to freedom of expression and peaceful assembly guaranteed by Article 27 of the Basic Law and Articles 16 and 17 of the Hong Kong Bill of Rights (“BOR”) as they are free to participate in lawful assemblies without the use of facial covering that is likely to prevent identification, and any restrictions on such rights (including the right to privacy guaranteed by Article 14 of the BOR) is proportional in the circumstances in light of the nature, severity, and prevalence of the risks posed by radical protesters in recent months.

16. As regards the proposal on the Police’s power to remove facial covering in a public place, it is only reasonable that a police officer should be empowered to require a person to remove the person’s facial covering in order to verify the person’s identity, as a police officer is authorized under various laws to demand proof of identity⁶. The person in question will only be stopped and asked to remove the facial covering for a short period of time, and may wear the facial covering after the officer has completed the verification process. Such minor interference with the person’s right to privacy guaranteed by Article 14 of the BOR is justifiable. It is also a proportionate measure to make non-compliance with the requirement an offence, given that refusal to comply with the requirement in such circumstances may, under existing law, amount to the offence of resisting or obstructing a police officer in the due execution of the officer’s duty⁷.

PUBLIC CONSULTATION

17. Given the exigency of the situation, public consultation is not feasible.

PUBLICITY

18. The Administration will arrange a press conference and issue a press release on 4 October 2019. A spokesperson will be made available to respond to public or media enquiries.

⁶ Such as section 17C of the Immigration Ordinance (Cap. 115), section 54 of the Police Force Ordinance (Cap. 232), section 49 of the POO (Cap. 245), etc.

⁷ Such as section 36(b) of the Offences Against the Person Ordinance (Cap. 212), section 63 of the Police Force Ordinance (Cap. 232), and section 23 of the Summary Offences Ordinance (Cap. 228) (which applies to all public officers).

BACKGROUND

19. The ERO confers on the CE-in-C power to make regulations on occasions of emergency or public danger in the public interest. Over the years since the ERO was made in 1922, a number of regulations were made pursuant to the ERO thereafter especially in the 1950's and a large number were made in the year of 1967 during the period of unrest.

ENQUIRIES

20. For enquiries on this brief, please contact the Security Bureau at 2810 2327.

Security Bureau
October 2019

Prohibition on Face Covering Regulation

(Made by the Chief Executive in Council under section 2 of the Emergency Regulations Ordinance (Cap. 241))

1. Commencement

This Regulation comes into operation on 5 October 2019.

2. Interpretation

In this Regulation—

Cap. 245 (《公安條例》) means the Public Order Ordinance (Cap. 245);

facial covering (蒙面物品) means a mask or any other article of any kind (including paint) that covers all or part of a person's face;

police officer (警務人員) has the meaning given by section 3 of the Police Force Ordinance (Cap. 232);

public meeting (公眾集會) has the meaning given by section 2(1) of Cap. 245;

public place (公眾地方) has the meaning given by section 2(1) of Cap. 245;

public procession (公眾遊行) has the meaning given by section 2(1) of Cap. 245;

unauthorized assembly (未經批准集結) has the same meaning as in section 17A(2) of Cap. 245;

unlawful assembly (非法集結) has the same meaning as in section 18 of Cap. 245.

3. Use of facial covering in certain circumstances is an offence

- (1) A person must not use any facial covering that is likely to prevent identification while the person is at—
 - (a) an unlawful assembly (whether or not the assembly is a riot within the meaning of section 19 of Cap. 245);
 - (b) an unauthorized assembly;
 - (c) a public meeting that—
 - (i) takes place under section 7(1) of Cap. 245; and
 - (ii) does not fall within paragraph (a) or (b); or
 - (d) a public procession that—
 - (i) takes place under section 13(1) of Cap. 245; and
 - (ii) does not fall within paragraph (a) or (b).
- (2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 1 year.

4. Defence for offence under section 3(2)

- (1) 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.
- (2) A person is taken to have established that the person had lawful authority or reasonable excuse for using a facial covering if—
 - (a) there is sufficient evidence to raise an issue that the person had such lawful authority or reasonable excuse; and
 - (b) the contrary is not proved by the prosecution beyond reasonable doubt.

- (3) Without limiting the scope of the reasonable excuse referred to in subsection (1), a person had a reasonable excuse if, at the assembly, meeting or procession concerned—
- (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.

5. Power to require removal in public place of facial covering

- (1) This section 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.
- (2) The police officer may—
- (a) stop the person and require the person to remove the facial covering to enable the officer to verify the identity of the person; and
 - (b) if the person fails to comply with a requirement under paragraph (a)—remove the facial covering.
- (3) A person who fails to comply with a requirement under subsection (2)(a) commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.

6. Prosecution deadline for offences

A prosecution for an offence under section 3(2) or 5(3) may only be started before the end of 12 months beginning on the date on which the offence is committed.



Clerk to the Executive Council

COUNCIL CHAMBER

4 Oct. October 2019

Explanatory Note

The purposes of this Regulation are to—

- (a) prohibit the use in certain circumstances of any facial covering that is likely to prevent identification and provide for an offence (section 3) (with a defence where the person charged with the offence had lawful authority or reasonable excuse at the time of the alleged offence (section 4));
- (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 (section 5); and
- (c) provide for an extension of the prosecution time limit for an offence under section 3(2) or 5(3) to 12 months beginning on the date on which the offence is committed (section 6).