



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

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8 September 2021

Mr Keith GIANG
Principal Assistant Secretary for
Commerce and Economic Development
(Communications and Creative Industries) A
Commerce and Economic Development Bureau
21/F, West Wing,
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2 Tim Mei Avenue, Tamar
Hong Kong

Dear Mr GIANG,

Film Censorship (Amendment) Bill 2021

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. We should be grateful if you could clarify the following issues.

Restrictions on national security ground

2. The proposed new section 10(2)(d) of the Film Censorship Ordinance (Cap. 392) seeks to require a censor to consider whether the exhibition of a film would be contrary to the interests of national security. The proposed new section 14A of Cap. 392 seeks to empower the Chief Secretary for Administration ("CS") to direct in writing the Film Censorship Authority ("Authority") to revoke any certificate of approval or exemption of a film if the exhibition of the film concerned would be contrary to the interests of national security (collectively "national security restrictions"). According to Article 16 of the Hong Kong Bill of Rights Ordinance (Cap. 383), the exercise of freedom of opinion and expression may be subject to restrictions for, among others, the protection of national

security provided that the restrictions are provided by law ("prescribed by law" requirement) and necessary (necessity requirement). According to *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, to satisfy the "prescribed by law" requirement, the restrictions "must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct" (paragraph 27). Also, a statutory discretion conferred on a public official to restrict a fundamental right must give an adequate indication of the scope of the discretion with a degree of precision appropriate to the subject matter (paragraph 76). Please explain:

- (a) what factors would be taken into account in deciding whether the exhibition of a film would be "contrary to the interests of national security" in the national security restrictions;
- (b) how would the national security restrictions satisfy the "prescribed by law" test with regard to: (i) the requirement for sufficient precision to enable the citizens (i.e. persons who submitted the film for approval for exhibition) to regulate their conduct; and (ii) the requirement for public officials empowered to exercise the statutory discretion to be given an adequate indication of the scope of the discretion; and
- (c) whether the Administration would issue guidelines (similar to the updated version of guidelines for censors issued in June 2021) to provide guidance for both film-makers and censors on the precise scope of the national security restrictions.

3. According to *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, the test to be adopted for the necessity requirement is "one of reasonableness: the court must consider whether some less onerous alternative would have been available without unreasonably impairing the objective" (paragraph 86). It is noted that Article 3 of the Law of the People's Republic of China on Safeguarding National Security in Hong Kong Special Administrative Region requires the executive authorities and legislature to prevent and suppress any act or activity endangering national security. Please explain:

- (a) the reasons for not adopting the formulation of "endangering national security" in the national security restrictions; and
- (b) how would the adoption of "contrary to the interests of national security" instead of "endangering national security" satisfy the necessity requirement.

Extending the period for making film censorship decisions

4. The proposed new section 10A of Cap. 392 seeks to empower the Secretary for Commerce and Economic Development ("SCED") to grant extension of time for a period of no more than 28 days each time for a censor to make a decision where the Authority is of the opinion that the exhibition of the film might be contrary to the interests of national security. There is no express provision in the Bill on maximum number of extension of time SCED could grant under the proposed section 10A. In absence of such a provision, the total decision period for film censorship would be uncertain and unpredictable for the persons who submitted the film for approval. Please clarify the legislative intent.

Powers of the Board of Review

5. The proposed new section 19A of Cap. 392 seeks to provide that review mechanism of the Board of Review provided in sections 17, 18 and 19 of Cap. 392 would not apply in relation to a decision by the Authority or a censor which is based on national security ground. According to *De Smith's Judicial Review*, on occasion, the procedural unfairness of summary refusal of a licence will be so manifest, that the deciding body is under a duty to give the applicant an opportunity to make representations and of being apprised of all information on which the decision may be founded. The presumption for an opportunity to be heard by administration should be especially strong where revocation causes deprivation of livelihood or serious pecuniary loss (see Lord Woolf and others, *De Smith's Judicial Review*, 8th edition (2018), 7-007, 7-019 to 7-020). Please explain:

- (a) the justification for disapplying sections 17, 18 and 19 of Cap. 392 in relation to a decision by the Authority or a censor made on national security ground; and
- (b) in view of the serious pecuniary loss a film-maker may suffer if the certificate of approval or exemption of the film concerned is revoked or not issued, how could such denial of access to administrative review (in contrast to judicial review which is usually costly and time-consuming) under the proposed section 19A of Cap. 392 satisfy the principle of procedural fairness.

Direction to revoke the certificate of a film on national security ground

6. Under the proposed new section 14A of Cap. 392, CS may direct the Authority to revoke the certificate of approval or exemption that

is in force for a film if CS is of the opinion that the exhibition of the film concerned would be contrary to the interests of national security. Please explain:

- (a) whether this proposed power of CS would apply to an intended exhibition, a current exhibition or a past exhibition of the film concerned; and
- (b) what matters would CS take into consideration when making such decision and whether those matters could be set out in the Bill.

Definition of "physical storage medium for films"

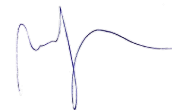
7. Clause 3 of the Bill seeks to define "physical storage medium for films" to mean "an article that contains a record of visual moving images, such as a videotape or laserdisc". Please clarify whether "article" in this proposed definition would include hardware located outside Hong Kong such that an exhibition (in Hong Kong) of film stored in hardware outside Hong Kong (e.g. exhibit via internet) would also fall within the regulatory scope of the Bill.

Drafting issue

8. It is noted that the English text of the proposed new section 19A does not provide the corresponding terms for "政務司司長或檢查員" which appears in the Chinese text. Please consider if it is necessary to propose appropriate amendments to achieve the clarity and consistency between the Chinese and English texts.

9. I look forward to receiving your reply in both English and Chinese as soon as possible, preferably by **14 September 2021**.

Yours sincerely,



(Mark LAM)

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