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14 September 2021

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Dear Mr Lam,

Film Censorship (Amendment) Bill 2021

I refer to your letter dated 8 September 2021. Our reply to your request for clarification in relation to the Film Censorship (Amendment) Bill 2021 (“the Bill”) is as follows.

Restrictions on national security ground

(a) Factors to consider in deciding whether the exhibition of a film would be “contrary to the interests of national security”

2. When a censor decides whether a film can be approved for exhibition and its appropriate classification, the censor shall take into account all matters set out in s.10(2) and (3) of the existing Film Censorship

Ordinance (Cap. 392) (“FCO”). The Film Censorship Guidelines for Censors (“Guidelines”) also provide censors with further guidance when performing film censorship duties to decide whether the film is suitable for exhibition and its classification. Matters which are relevant to national security include –

- (i) the censor should be vigilant to the portrayal, depiction or treatment of any act or activity which may amount to an offence endangering national security, or which may otherwise jeopardise the safeguarding of national security by the Hong Kong Special Administrative Region (“HKSAR”), and any content of a film which is objectively and reasonably capable of being perceived as endorsing, supporting, promoting, glorifying, encouraging or inciting such act or activity (see paragraph 7(a) of the Guidelines);
- (ii) generally speaking, if the exhibition of a film would likely constitute an offence endangering national security, or if the film contains a matter referred to in s.10(2) of the FCO and the effect of the film as a whole and its effect on viewers may endanger national security or the safeguarding of national security, the censor should form the opinion that the film is not suitable for exhibition (see paragraph 7(d) of the Guidelines); and
- (iii) the censor should have regard to matters relating to the manner of depiction, such as the level of details of depiction, length of depiction, whether the depiction purports to be based on or adapted from real-life events; overall arrangement of the film, whether the film contains any biased presentation of viewpoints, etc. The fact that a film purports to be a documentary or purports to report on or re-enact real events with immediate connection to the circumstances in Hong Kong necessitates an even more careful consideration of its contents by the censor (see paragraphs 17 and 23 of the Guidelines).

(b) Satisfying the “prescribed by law” test

3. Although the term “*national security*” is not defined in the FCO, we consider that the proposed new s.10(2)(d) satisfies the “prescribed by law” requirement under Article 39(2) of the Basic Law which mandates legal certainty.

4. The degree of precision required of a law will vary according to the context or subject matter of the law.¹ The fact that a law is expressed in broad terms does not mean that it must be held to have failed to satisfy the “prescribed by law” requirement. It is well recognised that the law must be able to keep pace with changing circumstances and can never be couched in terms of which the consequences can be foreseeable with absolute certainty. Many laws are inevitably couched in terms which, to a greater and lesser extent, are vague and whose interpretation and application are questions of practice.² In *Leung Kwok Hung & Others v HKSAR*,³ the Court of Final Appeal emphasised that there is an inevitable tension between requiring a law to be formulated with sufficient precision and the desirability of avoiding excessive rigidity in the law. The appropriate level of precision must depend on the subject matter of the law in question.⁴

5. In assessing whether the foreseeability requirement under the “prescribed by law” requirement is satisfied, a holistic approach should be taken. One must not have regards only to the statutory provision in question but also the common law, published policy, guidelines which delineated the boundaries of the administrative discretion and the objectives and underlying context of the relevant law.⁵ Where the issue is the exercise of a discretionary power conferred by statute, the degree of precision required of the law will also be adjusted, depending on the particular subject matter of the discretion, the content of the instrument in question, the field it is designed to cover, and the number and status of those to whom it is addressed. The law needs only to be formulated with such sufficient precision to enable the individual, with appropriate advice when necessary, to regulate his conduct. Ultimately, the question is answered by whether the law is able to enunciate some boundaries which create an area of risk. There will be conduct that falls along the boundaries of the area of risk for which no definite prediction or answer can be given in advance; but the identification of the area of risk will provide guidance to citizens and that suffices for the purpose of certainty.⁶

6. The protection of national security is a permissible ground to restrict the right to freedom of expression protected under Article 16 of the Bill of Rights. Threats to national security may vary in character and may

¹ *Hong Kong Television Ltd. v Chief Executive in Council* [2015] 2 HKLRD 1035, at para. 121.

² *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, at paras 63-64 and 89. See also *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386, at paras 61-63.

³ (2005) 8 HKCFAR 229.

⁴ *Leung Kwok Hung*, at para. 28.

⁵ *Chee Fei Ming v Director of Food and Environmental Hygiene* [2020] 1 HKLRD 373, at paras 37-51.

⁶ *Hong Kong Television Network Ltd*, at para. 121.

be unanticipated or difficult to define in advance. Further, clarification of how the term is to be applied in practice will further be elaborated in the Guidelines to be updated after the Bill comes into effect and the Guidelines are available to the public including film-makers and other stakeholders. Given the above considerations, the scope of the discretion to be given to the relevant public officials would inevitably have to be suitably framed to avoid excessive rigidity. Hence, we consider that the proposed new s.10(2)(d) satisfies the “prescribed by law” requirement.

(c) Updated Guidelines

7. The Government will further update the Guidelines after the Bill came into effect, to provide updated guidance to censors in exercising their duties under the FCO. The Guidelines are available to the public, including film-makers and other stakeholders.

(d) Reasons for not adopting the formulation of “*endangering national security*”

8. The Bill serves to enhance the film censorship regulatory framework to ensure more effective implementation of the duty to safeguard national security under the Law of the People's Republic of China on Safeguarding National Security in Hong Kong Special Administrative Region (“NSL”).

9. It is the duty of the HKSAR to effectively prevent and suppress any act or activity endangering national security (see, for example, Articles 3, 8 and 9 of the NSL). Article 10 of the NSL also provides that the HKSAR is responsible for raising the awareness of Hong Kong residents of national security and of the obligation to abide by the law.

10. In light of the above, in order to ensure that the film censorship regulatory framework accords with and implements effectively the HKSAR’s duty to safeguard national security under the NSL, we consider it necessary to adopt the formulation of “*contrary to the interests of national security*” as the relevant consideration, which accords with the preventive nature of the duty to safeguard national security under the NSL, i.e. to prevent any act or activity which would be contrary to the interests of national security from taking place before there is any actual harm or prejudice caused to national security.

(e) Satisfying the necessity requirement

11. The right to freedom of expression protected under Article 16 of the Hong Kong Bill of Rights is not absolute and the exercise of this right may be subject to restrictions that are necessary “*for the protection of national security*”, amongst other factors as set out in Article 16(3). Requiring the censor to consider the interests of national security is consistent with Article 2 of the NSL which provides that the provisions in Articles 1 and 12 of the Basic Law on the legal status of the HKSAR are the fundamental provisions in the Basic Law; no institution, organisation or individual in the HKSAR may contravene these provisions in exercising their rights and freedoms, including the right to freedom of expression.

12. The context of the expression is crucial in determining whether a restriction is justifiable under Article 16 of the Bill of Rights. The relevant context here is the passing and promulgation of the NSL and the duty of the HKSAR under Article 3 of the NSL to “*effectively prevent, suppress and impose punishment for any act or activity endangering national security*” in accordance with the NSL and other relevant laws. The HKSAR also has a duty under Article 7 of the NSL to refine such other relevant laws for safeguarding national security. The provisions of the FCO are such relevant laws. The HKSAR is further obliged under Article 9 and 10 of the NSL to, amongst others, take necessary measures to strengthen guidance, supervision and regulation over matters concerning national security relating to the media, and to raise the awareness of Hong Kong residents of national security and of the obligation to abide by the law.

13. In relation to matters (such as those touching on national security, defence and foreign policy) which the court considers the decision-maker (i.e. the executive) is likely to be better placed than it to assess what is needed in the public interest, the Court of Final Appeal has held that the court would give a wide margin of discretion to the decision-maker’s views by adopting the “manifestly without reasonable foundation” threshold for intervention, such that the Court is unlikely to intervene unless the impugned measure is “manifestly without reasonable foundation”.⁷

14. Given the overarching importance of safeguarding national security and the necessity to prevent and suppress activities contrary to the interests of national security in Hong Kong, we take the view that the

⁷ *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, paras 116-118, *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353, paras 36-46.

proposed amendments can satisfy the legal principles laid down in the case of *Hysan Development Co. Ltd. v Town Planning Board* insofar as the freedom of expression under Article 16 of the Hong Kong Bill of Rights is concerned.

Extending the period for making film censorship decisions

15. Notwithstanding there is no express provision in the Bill on maximum number of extension of time Secretary for Commerce and Economic Development (“SCED”) could grant, the censor nevertheless is under the common law duty to make a decision within a reasonable time. In deciding whether to grant a time extension for a censor to make a decision, SCED shall consider whether there is actual operational need, and whether it is reasonable and proportionate on a case-by-case basis, bearing in mind the duty of the censor to make a decision within a reasonable time. We consider the proposal important and justifiable for addressing the need for more time to process cases that may involve national security considerations, while maintaining certainty of no more than 28 days of extension each time.

Powers of the Board of Review

(a) Justification

16. The Board of Review (Film Censorship) (“Review Board”) is comprised of members from different sectors of the community, to reflect the prevailing standard of acceptance of films. The Review Board’s intended remit does not include judging whether a decision involving national security considerations is appropriate. We consider that it is more appropriate for the executive authorities, or the court in the case of a judicial review, to make such judgement.

(b) Satisfying the principle of procedural fairness

17. In discharging their functions under the FCO, the censors and the Chief Secretary for Administration (“CS”) have to observe principles of procedural fairness under administrative law. Whether the principles of procedural fairness require a decision-maker to give a reasonable opportunity to be heard to a person affected by the decision, and if so, to what extent, would depend on the facts and circumstances of a particular case.

18. As such, notwithstanding the disapplication of ss.17, 18 and 19 of the FCO, when processing cases of revocation of certificate on national security ground, the Administration will ensure compliance with the legal principles of procedural fairness, including that the holder of the film certificate will be given reasonable opportunity to make representations for the authority's consideration.

19. In practice, film-makers may seek advice from a censor before submission of a film intended for exhibition under the FCO. Such advice, despite non-binding by nature, serves to, among other things, iron out problems that may arise in the suitability or otherwise of any particular scene or content. Moreover, the censor would inform the applicant of the film censorship decision and the relevant considerations. Having considered the censorship decision, the applicant may re-apply for the certificate of approval after proper modification of the film.

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

(a) Proposed power of CS

20. When considering whether to exercise the proposed power to direct the Film Censorship Authority ("FCA") to revoke certificates in force, CS would form his opinion as to whether or not the exhibition of the film concerned would be contrary to the interests of national security by considering all relevant matters and circumstances at the time CS is called upon to make the decision.

21. Although such power may be exercised in respect of a film of which a certificate was issued before the proposed provisions come into effect, it may be noted that the exercise of such power would not retrospectively render any past exhibition of film criminally liable under the FCO.

(b) Matters to consider

22. CS would consider all relevant matters and circumstances in deciding whether the exhibition of the film concerned would be contrary to the interests of national security.

23. It is not possible to set out exhaustively in the Bill all relevant matters which may be taken into account by CS in exercising the proposed power. As explained above, by the nature of things, threats to national

security may vary in character and may be unanticipated or difficult to define in advance.

24. While matters which may be taken into consideration may differ depending on individual cases, some examples may be referenced from the Guidelines (subject to further update) after the enactment of the Bill.

Definition of “*physical storage medium for films*”

25. The definition of “*physical storage medium for films*”, as it reads, has no geographical element in it, but neither the FCO nor the Bill has extra-territorial effect. As such, it does not apply to physical storage medium located outside Hong Kong

26. It should also be pointed out that the term “*exhibition*”, as defined in s.2(1) of the FCO, does not depend on the medium through which a film is exhibited. Provided that the screening of the film in Hong Kong satisfies the definition of “*exhibition*”, it would be subject to the regulatory scope of the FCO (and the proposed provisions of the Bill).

Drafting issue

27. The new s.19A(1) refers to a decision which “*is based on an opinion that the exhibition of a film would be contrary to the interests of national security*”. In the context of the FCO, the opinion is either that of a *censor* under the new s.10(2)(d) or that of *CS* under the new s.14A.

28. The relevant sentence in the Chinese text of the new s.19A(1) is expressed in the active voice so as to enhance readability. The reference to the subject “*政務司司長或檢查員*” conforms to the grammatical rules of the Chinese language and caters for a more natural language flow. The meaning presented in both texts of the section is consistent and clearly reflects the policy intent.

Yours sincerely,



(Keith GIANG)

for Secretary for Commerce and Economic Development

c.c. Department of Justice
(Attn : Ms Angela Young, Senior Government Counsel/CU
Mr Salvador Tsang, Senior Government Counsel/LDD
Miss Carol Lam, Government Counsel/LDD)
Office for Film, Newspaper and Article Administration
(Attn : Mr. Derek Lee, AD(FNAA))