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Paper for the House Committee meeting

**Third report of the Subcommittee on Subsidiary Legislation
Relating to the Prevention and Control of Disease**

Purpose

This paper reports on the deliberations of the Subcommittee on Subsidiary Legislation Relating to the Prevention and Control of Disease ("the Subcommittee") on another four items of subsidiary legislation under its study which are in relation to compulsory testing for certain persons and border control measures made by the Chief Executive in Council under section 8 of the Prevention and Control of Disease Ordinance (Cap. 599) with regard to the latest situation of public health emergency¹ relating to coronavirus disease 2019 ("COVID-19") ("the four items of subsidiary legislation").

The four items of subsidiary legislation

An item of subsidiary legislation in relation to compulsory testing

2. The Prevention and Control of Disease (Compulsory Testing for Certain Persons) (Amendment) (No. 2) Regulation 2020 (L.N. 251 of 2020) was published in the Gazette on 8 December 2020 to, among others, add a new Part 4A to the Prevention and Control of Disease (Compulsory Testing for Certain

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 that has a high probability of causing a large number of deaths or serious disabilities (whether or not long-term) in the population.

Persons) Regulation (Cap. 599J)² to the effect that the Secretary for Food and Health ("the Secretary") may make a restriction-testing declaration in respect of certain premises to subject persons who are on, or have entered, the premises to certain restrictions, including a requirement to stay on the premises, or a designated place to which they have been transferred, until their test results for COVID-19 are ascertained; and require persons subject to a compulsory testing direction³, compulsory testing notice⁴ or compulsory testing order⁵ to comply with certain specified requirements, such as the requirement of not to leave or enter a particular place without the permission of a prescribed officer⁶ until their test results for COVID-19 are ascertained. This item of subsidiary legislation came into operation on 9 December 2020.

Items of subsidiary legislation relating to border control measures

3. The Compulsory Quarantine of Certain Persons Arriving at Hong Kong (Amendment) (No. 9) Regulation 2020 (L.N. 259 of 2020) and the Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places (Amendment) (No. 6) Regulation 2020 (L.N. 260 of 2020) were published in the Gazette on 23 December 2020 to amend the Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (Cap. 599C)⁷ and the Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (Cap. 599E)⁸ respectively. These two items of subsidiary legislation aim to, among others, empower the Secretary, by notice published in the Gazette (such notice not being

² Cap. 599J mainly provides a mechanism for specified medical practitioners to issue written compulsory testing directions to require persons clinically suspected to have contracted COVID-19 to undergo a test for ascertaining whether the person has contracted COVID-19 ("specified test"), and for the Secretary for Food and Health to issue compulsory testing notices to require certain categories or descriptions of persons to undergo a specified test.

³ Compulsory testing direction means a direction issued under section 4(2) of Cap. 599J.

⁴ Compulsory testing notice means a notice published under section 10(1) of Cap. 599J.

⁵ Compulsory testing order means an order made under section 14(2) of Cap. 599J.

⁶ Prescribed officer is defined in section 2(1) of Cap. 599J to mean a health officer, or a public officer or a member of the Auxiliary Medical Service appointed for performing a function under Cap. 599J concerning a requirement under a compulsory testing direction or a compulsory testing notice.

⁷ Before being amended by L.N. 259 of 2020, Cap. 599C mainly provides for a temporary system of mandatory quarantine for persons arriving at Hong Kong from a specified place in China other than Hong Kong (including the Mainland, Taiwan and Macao) who have stayed in any specified places on the day of arrival or during the 14 days before the date of the person's arrival.

⁸ Before being amended by L.N. 260 of 2020, Cap. 599E mainly provides for a temporary system of compulsory quarantine for persons arriving at Hong Kong from a specified place outside China who have stayed in any specified places on the day of arrival or during the 14 days before the date of the person's arrival.

subsidiary legislation), to specify (a) different quarantine periods for different categories of relevant persons⁹; and (b) different relevant periods for different places¹⁰ in which any of the relevant persons have stayed before the arrival for determining whether the person has to be subject to compulsory quarantine; and provide that both specified periods must not exceed 28 days.

4. The Prevention and Control of Disease (Regulation of Cross-boundary Conveyances and Travellers) (Amendment) (No. 3) Regulation 2020 (L.N. 261 of 2020) was published in the Gazette on 23 December 2020 to amend the Prevention and Control of Disease (Regulation of Cross-boundary Conveyances and Travellers) Regulation (Cap. 599H)¹¹ to, among others, empower the Secretary, by notice published in the Gazette (such notice not being subsidiary legislation), to specify the period during which a relevant traveller has stayed at a specified place for determining whether the traveller has to be subject to the conditions imposed by the Secretary under Cap. 599H; and provide that such a specified period must not exceed 28 days.

5. L.N. 251 of 2020 and L.N. 258 to L.N. 261 of 2020 were tabled before the Legislative Council ("LegCo") at its meetings of 9 December 2020 and 6 January 2021 respectively and are subject to negative vetting by LegCo.

The Subcommittee

6. At the House Committee meetings on 11 December 2020 and 8 January 2021, Members agreed that L.N. 251 of 2020 and L.N. 258 to L.N. 261 of 2020 should be studied by the Subcommittee.

7. The scrutiny period of L.N. 251 of 2020 has been extended from the Council meeting of 6 January 2021 to the Council meeting of 27 January 2021 by a resolution passed at the Council meeting of 6 January 2021. The scrutiny period of L.N. 259 to L.N. 261 of 2020 will expire at the Council meeting of 3 February 2021.

⁹ For the purpose of Cap. 599C, relevant persons are persons arriving at Hong Kong from a place in China other than Hong Kong. For the purpose of Cap. 599E, relevant persons are persons arriving at Hong Kong from a place outside China.

¹⁰ In accordance with Cap. 599C and Cap. 599E, such places could be a place in China or a foreign place outside China.

¹¹ Cap. 599H mainly provides for a mechanism under which regulatory measures may be imposed on cross-boundary conveyances (i.e. aircraft or vessels) arriving (or about to arrive) at Hong Kong from a place outside Hong Kong and certain persons on those conveyances.

8. Under the chairmanship of Dr Hon CHIANG Lai-wan, the Subcommittee has held two meetings with the Administration to study L.N. 251 of 2020. The Subcommittee also studied L.N. 259 to L.N. 261 of 2020 at one of these meetings.

Deliberations of the Subcommittee

Compulsory testing

Making of a restriction-testing declaration

9. According to the new section 19B(2) of Cap. 599J, for the Secretary to make a restriction-testing declaration in relation to certain premises, the Secretary must be satisfied, inter alia, that either or both of the following conditions are met: (a) a considerable number of persons who have recently contracted COVID-19 have recently been present on the premises; (b) a person who has recently contracted COVID-19 and who has recently been present on the premises is likely to have been in close proximity to a considerable number of other persons on the premises. Once the declaration takes effect,¹² no restricted person¹³ may leave or enter the premises in relation to which the declaration is in effect. The new section 19F(1) of Cap. 599J provides that a restriction-testing declaration may be revoked if the Secretary is satisfied that the results of all the specified tests¹⁴ conducted on those restricted persons who have been found, and who are remaining, on the restricted premises¹⁵ have been ascertained or the revocation serves the public interest of Hong Kong.

10. At the time of the discussion with the Administration on 16 December 2020, members have enquired about the circumstances under which the Secretary would make a restriction-testing declaration under Cap. 599J. They note that as an option, it is provided under section 25 of the Prevention and Control of Disease

¹² In accordance with the new section 19B(5) of Cap. 599J in section 11 of L.N. 251 of 2020, a restriction-testing declaration takes effect immediately after a copy of the declaration is displayed in a prominent position at or near every entrance to the premises concerned.

¹³ Restricted person means a person who, when a restriction-testing declaration takes effect in relation to any premises under section 19B(5) of Cap. 599J in section 11 of L.N. 251 of 2020, is on the premises; or who enters the premises during the effective period of the declaration, but does not include a prescribed officer or a person specified under section 19M(3) of L.N. 251 of 2020.

¹⁴ Specified test, in relation to a person, is defined under section 2 of Cap. 599J to mean a test for ascertaining whether the person has contracted COVID-19.

¹⁵ Restricted premises, subject to the new section 19G(4) of Cap. 599J in section 11 of L.N. 251 of 2020, means any premises in relation to which a restriction-testing declaration is in effect.

Regulation (Cap. 599A) that the Director of Health ("the Director") may, when considers it necessary for the prevention of the spread of a specified infectious disease, issue an isolation order to place any place under isolation. Under the isolation order, no person, other than a health officer, shall enter or leave a place that is placed under isolation. Holding the view that members of the public would find the Chinese term "限制與檢測宣告" ("restriction-testing declaration" in English) difficult to be comprehended fully, Mrs Regina IP has suggested that the Chinese term "禁足令" ("lockdown order" in English) should be used.

11. According to the Administration, the threshold for invoking the power to place any place under isolation under Cap. 599A is generally tied to there being sufficient reasons to suspect that a place or person has been infected, which is generally a higher threshold than the threshold for imposing compulsory testing under Cap. 599J in a public health emergency for the sake of preventing, protecting against, delaying or otherwise controlling the incidence or transmission of COVID-19. In addition, Cap. 599A does not provide for ancillary powers exercisable by other authorized officers to effectively impose and enforce the restriction on movement in conjunction with testing. In the light of the above, the Administration takes the view that introducing specific provisions in Cap. 599J to enable the exercising of restriction on movement in conjunction with the carrying out of compulsory testing will be more effective for the prevention of the spread of COVID-19 in view of the public health emergency.

12. The Administration has further explained that this approach of restriction on movement-cum-testing is not meant to be one-size-fits-all. For instance, it may not be appropriate or necessary in some situations involving outbreaks or multiple infections. In situations where there is an environmental source of infection (e.g. spread through defective sewerage system) and there is a high risk of infection of people in the vicinity, the more appropriate approach is to remove the source of infection and evacuate asymptomatic persons who are of a higher infection risk to quarantine centres to cut the transmission chain in the community as soon as possible, and subject other persons who have been present on the premises concerned during a specified period to compulsory testing. Such an approach was adopted in the case of Richland Gardens where it was believed that environmental factors might be the source of infection. The Administration would examine all the circumstances of each individual case in determining whether a restriction-testing declaration should be made or whether a compulsory testing notice should be issued.

13. Subsequent to the above discussion, the Administration has advised the Subcommittee that since 30 December 2020 and as at the time of discussion with members on 12 January 2021, it had expanded the scope of "compulsory testing on mandatory basis" such that a building would be included in the compulsory

testing notice if two or more confirmed cases not epidemiologically linked to each other were found in the building concerned in the past 14 days. Mr POON Siu-ping has suggested that consideration should be given to including in the compulsory testing notice all buildings in the district concerned rather than only buildings with confirmed cases so as to cut the transmission chain in the district as soon as possible.

14. There is an enquiry as to whether monitoring of the COVID-19 virus level in sewage would be conducted for all residential buildings with confirmed cases and their neighboring blocks such that the Secretary could issue compulsory testing notices promptly for those buildings whereby the sewage samples are constantly tested positive, implying that persons infected with COVID-19 may be present at the relevant premises. The Administration has advised that The University of Hong Kong was supported under the Health and Medical Research Fund to conduct waste water surveillance from, among others, housing estates to provide a complementary system to monitor virus activity at the population level and to detect a resurgence of COVID-19 at an early stage. The study had earlier revealed that the sewage samples in Fung Chak House of Choi Wan (II) Estate constantly tested positive. While there was no confirmed cases at Fung Chak House at the time, for prevention purposes and after taking into account expert views, the Secretary had issued a compulsory testing notice to require persons who had been to Fung Chak House for more than two hours at any time during the period from 15 to 28 December 2020 to undergo testing by 31 December 2020.

15. Members note that at present, persons subject to compulsory testing under Cap. 599J may choose to undergo a specified test free of charge at any community testing centres and mobile specimen collection stations set up by testing service providers. Some members including Ms Elizabeth QUAT and Mr CHAN Chun-ying have expressed concern that it could take a few hours to queue up for undergoing the specified test at the community testing centres and mobile specimen collection stations. They have urged the Administration to deploy additional manpower to shorten the waiting time for both registration and testing. Mr CHAN Chun-ying has gone further to suggest that a quick reaction team comprising staff of the Department of Health ("DH"), the Home Affairs Department and the Hospital Authority as well as members of Civil Aid Service and retired civil servants should be set up to co-ordinate the logistic arrangements relating to compulsory testing (including the making of a restriction-testing declaration). The Administration has assured members that it will continue to review the public's demand for the testing service and discuss with the service providers accordingly. It should be noted that apart from community testing centres and mobile specimen collection stations, persons subject to compulsory testing can undergo testing through various routes as set out in the relevant notices.

16. The new section 19F(3) of Cap. 599J provides that a restriction-testing declaration that is not revoked under section 19F(1) ceases to have effect on the expiry of seven days after the date on which the declaration takes effect. Mr CHAN Chun-ying has pointed out that it was the view of some experts that the maximum effective period of a restriction-testing declaration should be 14 days to align with the arrangement that asymptomatic close contacts of confirmed cases would be transferred to quarantine centres to undergo 14-day quarantine. He has also called on the Administration to ensure that same as the operation of the quarantine centres, additional manpower should be deployed to provide restricted persons with necessary supplies and appropriate support.

Enforcement of Cap. 599J

17. It is provided under Cap. 599J that any person who fails to comply with the requirements under a compulsory testing notice commits an offence and is liable to a fixed penalty at \$5,000. A prescribed officer may, by a compulsory testing order served on the person, require the person to undergo a specified test in compliance with the compulsory testing notice. Failure to comply with a requirement under a compulsory testing order is an offence punishable by a fine of \$25,000 and imprisonment for six months. Members including Ms Elizabeth QUAT and Mr Wilson OR are of the view that to achieve the aim of "compulsory testing on mandatory basis", the Administration should strictly enforce Cap. 599J and proactively trace those persons who are covered by compulsory testing notices but have not undergone the specified test. They note that in accordance with the compulsory testing notices published in the Gazette on 30 and 31 December 2020, persons who had been present on any of the 40-odd specified premises in any capacity for more than two hours at any time during the specified periods had to undergo the specified test by 4 January 2021. They have sought information from the Administration on the number of persons who have failed to undergo the specified test and the follow-up actions taken by the Administration against these persons, including the deadline by which these persons are required to undergo a specified test under the compulsory testing order subsequently issued and whether any prosecution have been instituted.

18. The Administration has advised that as of 12 January 2021, it has been verified that a total of some 59 000 persons (or around 91% of the estimated number of residents of the buildings covered in the compulsory testing notices concerned) have complied with the requirements under the notices to undergo the specified test at mobile specimen collection stations and community testing centres or through other testing routes specified in the notices by 4 January 2021. The Administration will first verify the testing records and make verbal warning to ensure the compliance with the compulsory testing requirements. To encourage

persons who have not taken the tests at community testing centres and mobile specimen collection stations but through other testing routes specified in the compulsory testing notices (such as undergoing the specified test at private laboratories recognized by DH) to provide information on tests so taken, the Administration has issued notices to the residents, post notices at lobbies, conduct random check at main entrances and conduct home visits to collect and verify the test records of the persons concerned. It will also suitably adjust the relevant records taking into account that some of the household may have moved out of the flats or be currently away from Hong Kong.

19. The Administration has further advised that in respect of the enforcement action taken on compulsory testing notice at Ming Yan Lau of Jat Min Chuen in Sha Tin on 24 December 2020, there were 150 cases whereby the test records could not be verified on that day. Among these 150 cases, 133 cases have later been verified that they have complied with the requirements of the compulsory testing notice. A compulsory testing order has been served on a case and DH is following up on the remaining cases.

20. Dr CHENG Chung-tai notes that for the purpose of reducing contact among restricted persons during the effective period of a restriction-testing declaration, it is provided under the new section 19H of Cap. 599J that a prescribed officer may require a restricted person to stay in a particular area on the restricted premises unless permitted by a prescribed officer. Given that many buildings in Hong Kong are of a high density, he has expressed concern about the enforcement of the above requirement in order to achieve the goal of community clearing. Separately, the Legal Adviser to the Subcommittee responsible for advising members on the legal and drafting aspects of L.N. 251 of 2020 has drawn to the attention of members that under the new section 19E of Cap. 599J, which provides for the power to require a person to undergo a specified test, it is a defence if a person can prove that his or her failure to comply with the requirement to take the test is because of any physical or mental illness, impairment or disability. Unlike the new section 19E, the new sections 19H and 19K of Cap. 599J, which provide for, among others, the power to regulate movement in restricted premises and the power to demand information or assistance respectively, do not provide similar defence(s) explicitly.

21. The Administration has pointed out that the general defence of lawful authority or reasonable excuse is applicable to the new section 19E. To put things beyond doubt in situations where dispute may more readily be anticipated, it is expressly provided that any physical or mental illness, impairment or disability amounts to a defence for non-compliance with the requirement under the new section 19E. The defence provided under the new section 19H(3) is one of lawful authority or reasonable excuse, or that the person's complying with the

requirement concerned would cause unreasonable hardship to the person or any other person. As regards the new section 19K(3), the general defence provided thereunder is based on reasonable excuse. The view of the Administration is that the defence of reasonable excuse and the defence of causing unreasonable hardship may, in appropriate circumstances, be able to cover a defence based on physical or mental illness, impairment or disability, and the absence of an express reference to such defence does not imply that it may not amount to a defence based on reasonable excuse under the new section 19H or the new section 19K.

22. The above Legal Adviser to the Subcommittee has also enquired as to why the powers under the new sections 19H and 19K are applicable to vulnerable persons (which means a child or a mentally incapacitated person under L.N. 251 of 2020) without being accompanied by a responsible person, whereas the power to require test under the new section 19E may only be exercised when a vulnerable person is being accompanied by a responsible person.¹⁶ The Administration has explained that a different arrangement is provided for the exercise of the power to require test under the new section 19E as the nature of the requirement is different from that of those under the new 19H and 19K which concern, respectively, regulation of movement and demand for information or assistance.

Border control measures

23. According to the Administration, while the advice of the World Health Organization is that the incubation period of the COVID-19 virus could be up to 14 days, the advice of members of the Expert Advisory Panel under the Steering Committee cum Command Centre at Emergency Response Level under the Preparedness and Response Plan for Novel Infectious Disease of Public Health Significance is that a small proportion of patients may have incubation periods of longer than 14 days. In view of the above advice and the emergence of new virus variants of COVID-19, the Administration has decided to, as precautionary measures for the purpose of infection control, amend Cap. 599C, Cap. 599E and

¹⁶ In relation to the new section 19L of Cap. 599J in section 11 of L.N. 251 of 2020 which provides for the functions related to vulnerable persons, "child" is defined to mean a person who is under the age of 10, whereas "mentally incapacitated person" is defined to mean a person who is mentally disordered, or mentally handicapped, within the meaning of the Mental Health Ordinance (Cap. 136). "Responsible person" is defined under the section to mean (a) a father or mother of the person, including an adoptive father, adoptive mother, stepfather or stepmother; (b) for a child—a person who is assuming guardianship of the child under the Guardianship of Minors Ordinance (Cap. 13) for a child; or for a mentally incapacitated person—a guardian of the person within the meaning of the Mental Health Ordinance; or (c) any other person who has the custody or care of the vulnerable person, such as a domestic helper, or a relative of the vulnerable person, who has such a custody or care.

Cap. 599H by L.N. 259 to L.N. 261 of 2020 to introduce greater flexibility by empowering the Secretary to specify (a) the compulsory quarantine period (a maximum of 28 days) for persons arriving at Hong Kong from a certain place and the period (a maximum of 28 days) for a certain place in which persons who arrive at Hong Kong have stayed before the arrival for determining whether the person has to be subject to compulsory quarantine under Cap. 599C and Cap. 599E; and (b) the period (a maximum of 28 days) during which a relevant traveller has stayed at a specified place for determining whether the traveller has to be subject to certain conditions under Cap. 599H. This is to ensure that no case would slip through the net even under very exceptional cases where the incubation period of the virus is longer than 14 days.

24. Given that the global pandemic situation remains dire, members in general have raised no other views on the tightening of the compulsory quarantine requirements for persons arriving at Hong Kong to reduce the health risk they may bring to Hong Kong. As a related matter, Mr YIU Si-wing has sought information from the Administration on the number of confirmed cases of COVID-19 among persons who are in transit at the Hong Kong International Airport ("HKIA") since 2020 and the mechanism for the handling of any such cases. The Administration has advised that it does not maintain statistics on the number of COVID-19 cases involving persons who are in transit. At present, all passengers must wear face masks in all indoor and outdoor public areas at HKIA. For persons who transit via Hong Kong, they have to pass temperature checks of DH upon arrival. It is compulsory for those persons having fever to be sent to hospitals for treatment. The above apart, the Airport Authority has implemented other preventive measures for passengers in transit at HKIA, including designating specific meal area for these passengers and requiring them to proceed directly to the boarding gate of their onward flights.

Recommendation

25. The Subcommittee raises no objection to the four items of subsidiary legislation and will not propose any amendment to them.

Advice sought

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