



中華人民共和國香港特別行政區政府總部食物及衛生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

Our Ref.: FHB/H/16/123
Your Ref.: LS/S/44/19-20

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Ms Clara Tam
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Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong

Dear Ms Tam,

**Prevention and Control of Disease (Regulation of Cross-boundary
Conveyances and Travellers) Regulation (L.N. 142 of 2020) and
Prevention and Control of Disease (Wearing of Mask) Regulation
(L.N. 143 of 2020)**

Thank you for your letter of 31 July 2020. We set out below our reply on the issues raised in the said letter.

L.N. 142 of 2020

Question (a)

You queried that the condition imposed on the operators of the specified aircraft is not within the scope of section 5(1) of L. N. 142. The purpose of the Regulation in L.N. 142, as stated in the Explanatory Note, is to establish a regime under which the Government may impose certain regulatory measures in relation to cross-boundary conveyances arriving at Hong Kong and certain persons on those conveyances. Under the current regime, the Secretary for Food and Health (“Secretary”) is empowered to impose, by notice published in the Gazette,

conditions based on public health grounds for relevant travellers on the conveyance that arrives at, or is about to arrive at Hong Kong from specified places or who had stayed in any specified places during the 14 days before boarding on the conveyance. In this regard, as you have pointed out, section 5(1) of L.N. 142 empowers the Secretary to specify conditions for relevant travellers (Chinese version: 就相關到港者指明條件). Section 3(1) further provides that a health officer is empowered to exercise any power prescribed in section 3(2) “if any condition specified under section 5(1) is not met in relation to any relevant traveller on the conveyance”, and under section 4(1), each of the operators of the conveyance may commit an offence if a conveyance arrives at Hong Kong from a place outside Hong Kong and “any condition specified under section 5(1) is not met in relation to any relevant traveller on the conveyance”. As such, insofar as imposition of conditions under section 5(1) for the purposes of sections 3(1) and 4(1) is concerned, the conditions imposed are for the relevant travellers, i.e. concerning or in relation to the relevant travellers. It does not provide that the conditions have to be imposed only on the relevant travellers. Our legislative intent to hold both the relevant travellers and/or the operators liable for breach of conditions specified under section 5(1) is abundantly clear when we among other things impose criminal liability on the latter for such breach under section 4(1). We therefore consider it necessary for the Secretary to stipulate clearly and comprehensively in the notice all relevant conditions so as to facilitate compliance by the relevant travellers as well as the operators.

For the purposes of sections 3(1) and 4(1) of L.N. 142, the Secretary specified, inter alia, the following condition in paragraph (B)(3) of G.N. (E.) 83 of 2020 and G.N. (E.) 87 of 2020 (“Condition”):

“the operator of the specified aircraft submits to the Department of Health before the specified aircraft arrives at Hong Kong a document in a form specified by the Department of Health confirming that each relevant traveller has, before being checked-in for the flight to Hong Kong on that aircraft, produced for boarding on the aircraft the documentary proof to show that the conditions in (1) and (2) above are met.”

The conditions in (1) and (2) of the said G.N. set out the documents and confirmation that the relevant travellers are required to produce before boarding the specified aircraft. The Condition, which basically requires submission of the record of the relevant travellers’ production of the documentary proof of negative COVID-19 test results before boarding the specified aircraft to the Director of Health, clearly concerns or relates to the relevant travellers, albeit requiring the operator of the specified aircraft rather than the relevant travellers to comply with the requirement as specified. Hence, in our view, the Condition falls within the scope of section 5(1), as well as sections 3(1) and 4(1) of L.N. 142 and the

Secretary is empowered to specify the Condition by way of a notice published in the Gazette under section 5(1).

Question (b)

You would like to know the reason(s) for the Secretary to impose the Condition similar to the requirement under section 6(1) of L.N. 142. Firstly, we would like to point out that the power of a health officer or an authorized officer acting on the advice of a health officer under section 6(1) of L.N. 142 to require an operator of a specified conveyance to provide information in a form specified by a health officer confirming the meeting of the conditions specified under section 5(1) for the relevant travellers on the conveyance is essential for the purposes of safeguarding the integrity of our public health and healthcare systems. Such requirement ensures that the operator of the conveyance concerned does check that travellers who came from high-risk places have a negative COVID-19 test result before boarding on the flight bound for Hong Kong. That said, apart from collecting and checking the very basic information provided by travellers (e.g. ensuring the COVID-19 test result is shown negative) during the check-in process, the operator will not be held responsible for ensuring the authenticity and factual accuracy of the information collected. Secondly, we would like to clarify that the power provided under section 6(1) of L.N. 142 is a separate power from the power of the Secretary to specify conditions under section 5(1) for the purposes of sections 3(1) and 4(1). The health officer can exercise the power under section 3(2) (e.g. prohibiting the specified aircraft from landing in Hong Kong and the embarkation or disembarkation of persons from the specified aircraft) for non-compliance with the conditions under section 5(1), but not for non-compliance with the requirement under section 6(1). Having regard to the measures required to handle the public health situation, the Secretary therefore considered it necessary to impose the requirement as a condition under section 5(1) for the purposes of sections 3(1) and 4(1) of the L.N. 142 as under the said G.N.

L.N. 143 of 2020

Question (a)

L.N. 143 imposes a mandatory requirement to wear a mask at all times on a public transport carrier or in an MTR paid area during a period specified by the Secretary, failing which, a person may be denied boarding to a public transport carrier or entry to an MTR paid area; or be removed from such carrier or paid area (with reasonable force if the police officer considers necessary and proportionate to ensure compliance). You enquired, in the light of Article 28 of the Basic Law (“BL 28”) and Article 8 of the Hong Kong Bill of Rights (“BOR 8”) in section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383), whether (and, if so, why)

the requirements/restrictions imposed under L.N. 143 could satisfy the four-step proportionality test as laid down in the case of *Hysan Development Co. Ltd. v Town Planning Board* (2016) 19 HKCFAR 372.

BL 28 provides:

“The freedom of the persons of Hong Kong residents shall be inviolable.

No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention, imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.”

BOR 8 provides:

- “(1) Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence.*
- (2) Everyone shall be free to leave Hong Kong.*
- (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Bill of Rights.*
- (4) No one who has the right of abode in Hong Kong shall be arbitrarily deprived of the right to enter Hong Kong.”*

The right to liberty of the person provided by BL 28 and the right to liberty of movement provided by BOR 8 are not absolute rights. These rights are subject to restrictions which are prescribed by law and are proportionate to achieve a legitimate aim.

On the measure to require a person to wear a mask on a public transport carrier (i.e. one of those set out in Schedule 1 to L.N. 143) or in an MTR paid area under L.N. 143, we consider that the restriction on the affected person’s right to liberty (under BL 28) and the right to liberty of movement (under BOR 8) which may arise from this measure has satisfied the “prescribed by law” requirement.

Further, the restriction can reasonably be justified under the four-step proportionality test laid down in the case of *Hysan Development Co. Ltd. v Town Planning Board* (2016) 19 HKCFAR 372. The four-step proportionality test consists of the following analysis -

- (a) whether the restriction or limitation pursues a legitimate aim;
- (b) whether the restriction or limitation is rationally connected to that legitimate aim;
- (c) whether the restriction or limitation is no more than is necessary to accomplish that legitimate aim; and
- (d) 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 results in an unacceptably harsh burden on the individual.

The requirement to wear a mask on a public transport carrier or in an MTR paid area under L.N. 143 is a reasonable, rational and necessary measure to combat the public health emergency situation and to protect public health, which is a legitimate aim. COVID-19 is highly infectious and the incubation period can last up to about 14 days. An infected person may spread the virus to those around him before he/she shows any symptoms, if at all. In fact, a significant cluster of local cases of infection of COVID-19 involved taxi drivers. Public transport drivers / operators including taxi drivers come into close contact with large number of passengers¹ usually in very confined environments on a regular basis. It is therefore considered necessary to put in place infection control measures to minimise the risks of spread of infection through our public transport system. In addition, the environment of most MTR stations are confined and usually very crowded. Hence, it is necessary and rational to require all persons including drivers, crews and passengers of public transport while boarding or on board a public transport carrier and all persons entering or staying inside the paid area of MTR to wear masks which has been shown to be an effective preventive measure to significantly reduce transmission risks in settings where ventilation is limited and adequate distancing cannot be maintained among members of the public.

¹ Every day, about 8.9 million passenger journeys are made on our public transport system which includes railways, trams, buses, minibuses, taxis and ferries in the first half of 2020.

Pursuant to section 4(2) and (3) of L.N. 143, the requirement to wear masks is subject to various exemptions and reasonable excuse. These exemptions and reasonable excuses are not exhaustive and will cater for situations when there are genuine difficulties for a person to comply with the requirement to wear a mask. Further, the requirement is only limited to the period specified by the Secretary under section 3(1)(b) for the purpose of preventing, protecting against, delaying or otherwise controlling the incidence or transmission of COVID-19. Failure to comply with the requirement will result in the person being denied boarding to the carrier, or entry to the area, or (if the person is already on board a public transport carrier or present in an MTR paid area) being required to disembark from the carrier or leave the area. Pursuant to section 5 of L.N. 143, the use of reasonable force by an authorized person to remove a person from the public transport carrier or MTR paid area for failure to comply with the requirement to wear mask can only be exercised if the person fails to comply with the requirement to disembark from the carrier or leave the area and if the authorized person reasonably considers it necessary and proportionate to ensure compliance with the requirement. Further, pursuant to section 6 of L.N. 143, a person who contravenes the requirement to wear a mask under section 4(1) commits an offence and is liable on conviction to a fine at level 2. The offence is not punishable by imprisonment. Thus, the requirement is clearly no more than is necessary to accomplish the legitimate aim of protection of public health, not arbitrary and is not unreasonable if we have to balance on the other side of the scale, the protection of public health and preservation of human lives. In the light of the above, we are of the view that a reasonable balance has been struck between the societal benefits of the requirement to wear mask under L.N. 143 and the inroads made into the right to liberty of the person (under BL 28) and the liberty of movement (under BOR 8) and that the requirement does not result in an unacceptably harsh burden on the persons affected by it.

On the basis of the above, we take the view that the requirement to wear mask under L.N. 143 can satisfy the four-step proportionality test laid down in the case of Hysan Development Co. Ltd. v Town Planning Board.

Question (b)

You asked about the Administration's position in relation to enforcement of the relevant provisions of the Prohibition of Face Covering Regulation (Cap. 241 sub. leg. K) ("Cap. 241K") and L.N. 143. Under section 3(1)(a) and (b) of Cap. 241K, a person must not use any facial covering that is likely to prevent identification while the person is at an unlawful assembly (whether or not the assembly is a riot within the meaning of section 19 of the Public Order Ordinance (Cap. 245)) or an unauthorized assembly. On the other hand, sections 4(1) of L.N. 143 requires a person to wear a mask at all times during

a specified period when the person is boarding or on board a public transport carrier or entering or present in an MTR paid area. You were of the view that the requirements under the two regulations would come into conflict when an unlawful assembly or an unauthorized assembly takes place in an MTR paid area or on a public transport carrier.

We have to first point out that the legislative intent and issues addressed by the two regulations are fundamentally different. While Cap. 241K seeks to deal with public order matters, L.N. 143 is one of the measures introduced to handle the current public health emergency arising from the outbreak of COVID-19. In carrying out enforcement action under the two regulations, due regard will be given to the different objectives behind the two regulations and the safeguards required to ensure compliance with both regulations.

In fact, general defence or reasonable exemption has been built in under each of the regulations to absolve a person of the criminal liability of violating the requirement imposed. Under Cap. 241K, a person may defend himself/herself by establishing lawful authority or reasonable excuse for using a facial covering at the material time (see section 4(1) thereof). In particular, it is provided under section 4(3)(c) that a person had a reasonable excuse if, at the assembly, meeting or procession concerned, the person was using the facial covering for a pre-existing medical or health reason. On the other hand, under L.N. 143, it is expressly provided that the requirement to wear mask under the regulation does not apply to a person who has lawful authority or reasonable excuse for not wearing a mask (see section 4(2)(b)). The availability of such defence or exemption which deals with different circumstances under the two regulations demonstrates their different legislative intent and the different scenarios under which the regulations are envisaged to apply when they were made. We are therefore of the view that the requirements under Cap. 241K and L.N. 143 are not in conflict. Their application will depend on the circumstances and availability of defence or reasonable excuse not to comply with the requirements.

Question (c)

Your question (c) concerns 2 situations involving the proof of a reasonable excuse – (i) at the scene when the requirement to wear masks is enforced; and (ii) in the criminal proceedings if the person is prosecuted.

For (i), while there is no strict legal requirement for a person to “prove” the reasonable excuse at the scene, the person seeking to claim a reasonable excuse for not complying with a statutory requirement should substantiate or at least explain at the scene such claim, otherwise the enforcement officers may proceed to take enforcement action in the absence of any evidence to prove any reasonable excuse

For (ii), it should be noted that section 6(3) is subsequently added by virtue of the Prevention and Control of Disease (Wearing of Mask) (Public Transport) (Amendment) Regulation 2020 (L.N. 149 of 2020), which extends the scope of the requirement to wear masks to public places specified by the Secretary, to specify that the defendant only bears an evidential burden to establish any lawful authority or reasonable excuse for not wearing a mask in criminal proceedings. Although section 6(3) was introduced on 23 July 2020, the Administration is prepared to adopt the view that, for cases concerning the period between 15 and 22 July 2020, a defendant only has an evidential burden to establish a lawful authority or reasonable excuse under section 4(2) or (3) of L.N. 143.

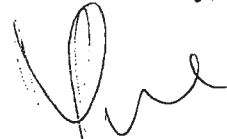
Question (d)

According to section 4(3)(f) of L.N. 143, if a person is required by a public officer (who is performing a function of the officer) to remove a mask the person is otherwise wearing, the person has a reasonable excuse for not wearing a mask. You would like us to explain the circumstances in which the provision applies.

Generally, section 4(3)(f) applies when a public officer exercising his/her statutory power to require a person to remove his/her masks for lawful purposes. As an example, under section 54(1)(a) of the Police Force Ordinance (Cap. 232), a police officer may stop a person in a street who acts in a suspicious manner and demand the person to produce proof of his/her identity. This power is obviously for the purpose of verifying a person’s identity. By virtue of section 40(1) of the Interpretation and General Clauses Ordinance (Cap. 1) (which provides that where any Ordinance confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing), a police officer acting under section 54(1)(a) will also have the power to require the person to remove his/her mask so as to enable the police officer to verify the person’s identity.

Another example is section 17C of the Immigration Ordinance (Cap. 115). By virtue of the power under section 17C(2), certain public officers may demand production of proof of identity for inspection by a person who are required to have with him at all times proof of his/her identity. As read together with section 40(1) of Cap. 1, these officers will also have the power to require the person to remove his/her mask so as to enable them to verify the person's identity. The public officers empowered under section 17C(2) include any police officer, immigration officer, immigration assistant or any person authorized for the purpose by order published in the Gazette who is in uniform or who, if required to do so, produces proof of his appointment as such an officer or person.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Eileen Yue', written in a cursive style.

(Eileen Yue)
for Secretary for Food and Health

c.c. Department of Health (Attn.: Dr Alice Wong)
Department of Justice (Attn.: Ms Michelle Chan)