



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



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5 August 2020

Mr HO Tze-tao, Ronald
Assistant Secretary for Food and Health (Health)1A
Food and Health Bureau
19/F, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

Dear Mr HO,

**Prevention and Control of Disease (Wearing of Mask) (Public Transport)
(Amendment) Regulation 2020—L.N. 149 of 2020**

We are scrutinizing the captioned legal notice with a view to advising Members on its legal and drafting aspects. We would be grateful if you would provide the following information.

Specific requirements as to how a mask must be worn

2. Although the new section 5A(1) of the Prevention and Control of Disease (Wearing of Mask) Regulation (Cap. 599I), as amended by L.N. 149, requires a person to wear a mask at all times when the person is entering or present in a specified public place ("section 5A requirement") and while "mask" is defined in section 2 of Cap. 599I to include any covering designed or made to be worn over the nose and mouth to provide the wearer protection against infections or air pollution, Cap. 599I and L.N. 149 do not expressly require a mask to be worn "as designed or made", i.e. over the nose and mouth, or in any particular way (such as covering the wearer's nose and mouth and with the mask

touching the wearer's nose and cheeks)¹ in order for a person to comply with section 5A(1). In the absence of an express and specific requirement on how a mask must be worn in order to comply with the section 5A requirement, please clarify whether a person who wears a mask in such a way as to cover his mouth but not his nose would be liable for an offence under section 6 of Cap. 599I for contravening the section 5A requirement. Please also explain why the manner in which a mask must be worn is not expressly and specifically provided for under L.N. 149 or Cap. 599I, and consider providing for the same in L.N. 149 or Cap. 599I.

Duty to ensure that a child complies with the section 5A requirement

3. While regulation 3A(1) of the COVID-19 (Temporary Measures) (Control Order) Regulations 2020 of Singapore requires an individual to ensure that a child of two years of age or above ("Child") and escorted by the individual wears a mask at all times when the Child is outside, Cap. 599I and L.N. 149 do not require an adult to ensure that a Child accompanied by the adult complies with section 5A(1). Please clarify the policy and legislative intent with regard to a Child who fails to comply with the section 5A requirement: would the Child and/or any responsible adult accompanying the Child be liable for prosecution? Is it necessary to provide for the criminal liability of the accompanying adult under Cap. 599I or L.N. 149?

Interface between L.N. 149 and other Ordinances

4. Under section 3 of the Prohibition on Face Covering Regulation (Cap. 241K), a person must not use any facial covering (including a mask) that is likely to prevent identification while the person is at, among others, an unlawful assembly or an unauthorized assembly. While the Court of Appeal in *Leung Kwok Hung and others v Secretary for Justice & Another* (CACV 541, 542 & 583 of 2019) found that section 5 of Cap. 241K (which empowers a police officer to remove a person's facial covering in a public place if the officer reasonably believes that the covering prevents the person's identification and the person has refused to comply with the officer's instruction to remove the covering for the said purposes) to be unconstitutional, the Court considers that section 54(1)(a) of the Police Force Ordinance (Cap. 232) and section 49(1) of the Public Order Ordinance (Cap. 245), together with their incidental powers for the Police to order a person to reveal identity by removing facial covering, were

¹ Please refer to the definition of "wear" under regulation 2(1) of the COVID-19 (Temporary Measures) (Control Order) Regulations 2020 of Singapore (<https://sso.agc.gov.sg/SL/COVID19TMA2020-S254-2020/Historical/20200704?DocDate=20200407&ViewType=Pdf&=20200803214855>).

sufficient to address the law enforcement objectives.²

5. Please explain how Cap. 599I as amended by L.N. 149 interfaces with Cap. 232, Cap. 241K and Cap. 245 in respect of a person who is wearing a mask in compliance with Cap. 599I when the person is present in a specified public place (such as a shopping mall or a bus interchange which may also be a public place for the purpose of Cap. 241K) in which an unlawful or unauthorized assembly is taking place:

- (a) Would the person have lawful authority or reasonable excuse for the purposes of section 4(1) or (3)(c) of Cap. 241K if the person is able to establish that he is wearing a mask in compliance with the new section 5A of Cap. 599I at the material time?
- (b) Would the person be excused from removing the mask which a police officer has ordered him to remove under section 54(1)(a) of Cap. 232 or section 49(1) of Cap. 245 ("Provisions") if:
 - (i) the place is at the material time known to be subject to severe public health hazard caused by a public health emergency within the meaning of section 8 of the Prevention and Control of Disease Ordinance (Cap. 599) (such as being contaminated by the COVID-19 virus); and
 - (ii) the person is wearing a mask at the place in order to protect himself from being exposed to any health hazard caused by such public health emergency?
- (c) How would the power under the Provisions be exercised in the circumstances described in paragraph 5(b) above to avoid compromising the person's health and well-being in the public health emergency?
- (d) If the person complies with the police officer's order to remove his mask, would the person have a "reasonable excuse" for not wearing a mask within the meaning of section 5A(3)(f) of Cap. 599I?

² Please refer to paras 269-282 of the judgment.

Conformity with the Basic Law and the Hong Kong Bill of Rights Ordinance

6. It is noted that the new section 5B(1) added to Cap. 599I by L.N. 149 mainly empowers an authorized person to deny a person's entry to a specified public place or to require the person to leave the place if the person contravenes the section 5A requirement. As Article 8 of the Hong Kong Bill of Rights and Article 31 of the Basic Law provide, among others, for a person's freedom of movement within Hong Kong, please clarify whether (and if so, why) section 5B(1) of Cap. 599I could satisfy the four-step proportionality test laid down in the case of *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 ("four-step test") insofar as the section may encroach upon a person's freedom of movement.

7. It is also noted that the new section 6B added to Cap. 599I by L.N. 149 empowers an authorized public officer to, among others, demand a person to supply the person's personal details and produce the person's proof of identity for the public officer's inspection if the officer has reason to believe that the person has contravened the section 5A requirement. According to Article 14 of the Hong Kong Bill of Rights, no one shall be subjected to arbitrary or unlawful interference with his privacy. Please clarify whether (and if so, why) section 6B of Cap. 599I could satisfy the four-step test insofar as the section may encroach upon a person's privacy.

Consequence if a person fails to comply with section 5B(1)(b)(ii) of Cap. 599I

8. Although the new section 5B(1)(b)(ii) of Cap. 599I empowers an authorized person (including a police officer) to require a person who refuses to wear a mask in a specified public place to leave the place, there is no provision under L.N. 149 which expressly empowers the authorized person to use reasonable force to remove such person from the public place in such case. However, a police officer is empowered under section 5(2) of Cap. 599I to use reasonable force to remove a person from a public transport carrier or an MTR paid area if the person refuses to wear a mask and remains on the public transport carrier or MTR paid area. Please explain the difference in the powers conferred on a police officer/an authorized person in respect of non-compliance under the above two situations.

Condition imposed on an authorized person when exercising the powers under the new section 5B(1) of Cap. 599I

9. According to section 5B(1)(b), if an authorized person reasonably considers that another person is in contravention of the section 5A requirement, the authorized person may deny that person entry (see section 5B(1)(a)) to the

specified public place or, if the person has already entered the specified public place, require the person to wear a mask or to leave the place (see section 5B(1)(b)). While section 5B(2) requires an authorized person to exercise the power under section 5B(1)(b) only if the authorized person reasonably considers it necessary and proportionate to ensure compliance with section 5A(1), such officer is not required to consider the issues of necessity and proportionality while exercising the power under section 5B(1)(a). Please explain the rationale for the aforesaid difference.

Means to ascertain whether an officer is an authorized public officer

10. Under section 6D of Cap. 599I, the Director of Health may appoint any public officer as an authorized public officer for the purposes of Cap. 599I. Please explain how members of the public may know if a public officer has been appointed as an authorized public officer under Cap. 599I.

Information relating to persons arrested and/or charged prior to the implementation of the fixed penalty scheme under L.N. 149

11. Please provide information on whether any person had been arrested for and/or charged with an offence under section 6(1) of Cap. 599I for contravening section 4(1) of Cap. 599I prior to the implementation of the fixed penalty scheme under L.N. 149 (which came into operation on 23 July 2020) and the way in which the Department of Justice dealt with or proposes to deal with these persons in the light of the scheme.

12. Please let us have your reply in both languages by 12 August 2020, if practicable.

Yours sincerely,



(Evelyn LEE)
Assistant Legal Adviser

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