



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.:

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7 November 2020

Miss Evelyn Lee
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Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong

Dear Miss Lee,

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

We refer to your letter of 5 August 2020 and set out our reply to the questions raised therein.

Specific requirements as to how a mask must be worn

2. You asked for clarification on 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, and 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.

3. Please note that it is expressly provided in section 2(2) that:

“For the purposes of this Regulation—

- (a) a reference to a person wearing a mask is a reference to the person wearing a mask over and covering the person's nose and mouth, with the mask touching the person's nose, chin and cheeks; and
- (b) a reference to a person not wearing a mask is to be construed accordingly."

4. In view of the above provisions, the requirement of wearing a mask under section 5A will be a requirement to wear a mask over and covering the person's nose and mouth, with the mask touching the person's nose, chin and cheeks, and thus a person wearing a mask to cover his mouth but not his nose will not be regarded as wearing a mask under L.N. 149 or Cap. 599I. As section 2(2) has clearly provided for the manner in which a mask must be worn such that a person is regarded as wearing a mask, it is not necessary to make any amendment to L.N. 149 or Cap. 599I to further provide for the same.

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

5. Both Cap. 599I and L.N. 149 do not require an adult to ensure that a child of two years of age or above ("Child") accompanied by the adult complies with section 5A(1). You asked about the policy and legislative intent and whether the Child and/or any responsible adult accompanying the Child would be liable for prosecution.

6. Wearing of masks is an important measure to help maintain personal hygiene and prevent infections. While the Government has been calling on members of public to wear masks since earlier this year, there is a need to ensure the wearing of masks on public transport and in public places through a legislative means to suppress the spread of COVID-19 in the community as there were large number of local confirmed cases likely to have acquired the virus in confined settings during the third wave of the epidemic. The legislative intent of Cap. 599I is to induce behavioural changes among members of public to make wearing of masks a normal part of being around other people, with punishments provided to catalyse the said behavioural changes. After all, wearing of masks contributes to the well-being of the community as a whole by preventing the transmission of COVID-19 in the community from which all members of the public would benefit. It is also a moral responsibility for adults to take necessary steps to ensure the health and safety of children under his supervision. Generally speaking, parents in Hong Kong take good care of their children and this is evident during the fight against COVID-19 when most parents made adjustments to their children's routine so as to allow the latter to participate in schooling and other activities as much as possible while minimising the infection risks involved. It would be too onerous if we put the legal obligation to parents to ensure children's compliance through express provisions in law. In view of the above, we consider the existing provisions suffice in achieving our policy objective, that is to induce everyone in

the community, including children, to wear masks at any time on public transport or in public places

Interface between L.N. 149 and other Ordinances

7. A number of questions were raised in paragraph 5(a) to (d) of your letter regarding the interface between L.N. 149 and Cap. 232, Cap. 241K and Cap. 245 in respect of a person wearing a mask in an unlawful or unauthorized assembly in a public place. These questions are directed at whether a person would have a lawful authority or reasonable excuse for wearing a mask in order to comply with Cap. 599I or to protect himself from imminent health hazard or whether a person would have a reasonable excuse for not wearing a mask in order to comply with the police officer's order to remove his mask.

8. In respect of questions (a) to (c), it may not be possible to give a precise reply to each specific situation raised as the analysis of which would depend very much on the facts and evidence of each individual case. It may suffice to point out that the considerations that have to be taken into account would include the health risk involved, how removing a mask just for a brief duration to enable identification may prejudice the medical or health condition of the person, the lawfulness and necessity of the order given by a police officer and the legislative objectives of the relevant legislation.

9. As to question (d), as long as a police officer is lawfully performing a function of the officer to require a person to remove his mask, the person will have a "reasonable excuse" for not wearing a mask under section 5A(3)(f) of Cap. 599I.

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

10. You asked whether (and if so, why) section 5B(1) of Cap. 599I, which 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, 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 insofar as the provision may encroach upon a person's freedom of movement.

11. You also asked whether (and if so, why) section 6B of Cap. 599I, which 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, could satisfy the four-step test insofar as the provision may encroach upon a person's privacy under Article 14 of the Hong Kong Bill of Rights ("BOR").

12. On the first question, BL 31 provides –

“Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.”

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.”

13. The right to liberty of movement provided by BOR 8 is not absolute. It is subject to restrictions which are prescribed by law and are proportionate to achieve a legitimate aim.

14. On the measure to require a person to wear a mask in a specified public place under L.N. 149, we consider that the restriction on the affected person’s right to liberty of movement which may arise from this measure has satisfied the “prescribed by law” requirement.

15. 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.

16. The requirement to wear a mask in specified public places under L.N. 149 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. When the requirement under L.N. 149 was made, it was evident that there was ongoing and widespread transmission of COVID-19 in the community, which might be silent or subclinical and could not be picked up by the surveillance system despite extensive case investigation and testing. The affected persons might only have mild/vague symptoms or were asymptomatic, and go about their daily business without being identified while transmitting the infection to people they come into close contact with. The risk of explosive community outbreaks was increasing. Contact tracing alone would not be adequate to control the transmission. In view of the high transmission risks involved in taking one's mask off, the wearing of masks was, and still is, an effective preventive measure. Taking into account that a large number of local confirmed cases likely to have acquired the virus in confined settings such as markets and shopping centres at that time, it was necessary and rational to empower the Secretary for Food and Health to specify any or all public places, or a category or description of public places (in addition to public transport carriers and MTR paid areas), for the purpose of compulsory mask-wearing requirement for a specified period of time which must not be longer than 14 days to reduce transmission risks and thereby control the spreading of COVID-19 in the community.

17. Pursuant to the new sub-sections 5A(2) and (3), the requirement to wear masks is subject to various exemptions and reasonable excuse. These exemptions and reasonable excuse 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 for Food and Health under section 3(1)(c) for the purpose of preventing, protecting against, delaying or otherwise controlling the incidence or transmission of COVID-19. Failure to comply with the requirement may result in the person being denied entry to a specified public place, or (if the person is already present in the specified public place) being required to leave the area if an authorized person reasonably considers it necessary and proportionate to ensure compliance with the mask-wearing requirement. Pursuant to section 6 of Cap. 599I (as amended by L.N. 149), a person who contravenes the requirement to wear a mask under the new section 5A(1) commits an offence and is liable on conviction to a fine at level 2. The offence is not punishable by imprisonment. 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 take the view that a reasonable balance has been struck between the societal benefits of the requirement to wear mask under the new sections 5A and 5B of Cap. 599I and the inroads made into 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.

18. On the basis of the above, we take the view that the requirement to wear mask under section 5B(1) can satisfy the four-step proportionality test laid down in the case of *Hysan Development Co. Ltd. v Town Planning Board*.

19. On the second question, BOR 14 provides –

“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.”

20. The right to privacy is not absolute. BOR 14 does not prohibit interference with privacy if such interference is neither “arbitrary” nor “unlawful”. The term “unlawful” means that no interference can take place except in cases envisaged by the law. Given that the interference with the right to privacy is clearly provided in section 6B of Cap. 599I, we take the view that the interference is not “unlawful” for the purpose of BOR 14.

21. With regard to the requirement that the interference must not be “arbitrary”, we consider that the interference arising from section 6B is a reasonable, rational and necessary measure to facilitate effective law enforcement for the implementation of the statutory scheme under Cap. 599I to combat the public health emergency situation and to protect public health, which is a legitimate aim¹.

22. The power to demand production of a person’s personal details and proof of identity for inspection under section 6B can only be invoked if an authorized

¹ In *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372, the Court of Appeal noted, at paragraph 58, that the terms “arbitrary or unlawful” in the context of the Basic Law were considered by the Court of Final Appeal in *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415 and opined that the following propositions can be derived from that judgment : (a) Something lawful may nonetheless be arbitrary; (b) Arbitrariness is to be construed broadly to include elements of inappropriateness, injustice and lack of predictability; (c) The concept of arbitrariness has developed to embrace within it the concept of manifest or gross disproportion in addition to its traditional meaning of “capricious, unreasoned or without reasonable cause”. A statutory provision can also be challenged as arbitrary if it is manifestly disproportionate; and (d) A high threshold must be crossed before a statutory provision can be struck down as arbitrary by reason of it being manifestly disproportionate. At paragraph 59 of the judgment, the Court of Appeal emphasised that the proportionality test must be applied cautiously so that only a statutory provision which is manifestly disproportionate would be struck down as arbitrary.

public officer has reason to believe that a person is committing or has committed an offence under, amongst others, section 5A. The scope of personal details which can be demanded by the officer is narrowly confined to the person's name, date of birth, address, contact telephone number (if any) and must only be for the purpose of issuing or serving a summons or other document in relation to the offence. The "proof of identity" has the same meaning as in section 17B of the Immigration Ordinance (Cap. 115). The requirement to provide personal details is subject to reasonable excuse. Although failure, without reasonable excuse, to comply with a requirement to produce the relevant personal details or to knowingly supply false or misleading information to the officer is an offence, such offence is only punishable by a fine at level 3 but not by imprisonment. The provisions under section 6B are actually in line with similar legislations conferring power to give fixed penalty notices on public officers, such as the Fixed Penalty (Public Cleanliness and Obstruction) Ordinance (Cap. 570).

23. In the light of the above, we consider that the power to demand production of a person's personal details and proof of identity for inspection under section 6B is reasonable and not arbitrary. It is rationally connected, and is no more than is necessary, to accomplishing the legitimate aim of facilitating effective law enforcement for the implementation of the statutory scheme to combat the public health emergency situation and to protect public health and that a reasonable balance has been struck between the societal benefits of the power under section 6B and the inroads made into the right to privacy (under BOR 14) and that it does not result in an unacceptably harsh burden on the persons affected by it.

24. On the basis of the above, we take the view that the power to demand production of a person's personal details and proof of identity for inspection under section 6B can reasonably be justified under the four-step proportionality test.

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

25. You note that there is no provision in section 5B under L.N. 149 which expressly empowers an authorized person to use reasonable force to remove a person in contravention of the requirement to wear a mask from the relevant public place, whereas a police officer is empowered under section 5(2) of Cap. 599I to use reasonable force to remove a person in contravention of the requirement to wear a mask from a public transport carrier or an MTR paid area. You asked for the reason for the different treatments.

26. In the situation of a public place other than a public transport carrier or an MTR paid area, it is considered impracticable for a police officer to remove a person to a place that is not a specified public place when all indoor or outdoor public places become specified public places. The power to remove is therefore not provided in section 5B. Please note that all public places (save most public

places in country parks) are specified public places for the purpose of Cap. 599I with effect from 29 July 2020.

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

27. You note that 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), the same requirement does not apply to the exercise of power under section 5B(1)(a). You asked us to explain the rationale for the aforesaid difference.

28. If a person in a specified public place has already engaged in certain activities (e.g. in the middle of having a meal in a restaurant or watching a movie in a cinema) and is required to leave the place under section 5(1)(b), the person is not entitled to a refund of, or to deny the liability to pay, any money paid or charged for entry to a specified public place (see section 5B(3)). Requiring a person to leave a place may therefore not only cause more inconvenience but also a financial loss to the person. It is thus more appropriate to empower the authorized person to exercise the power to require the person to leave the place only if the authorized person reasonably considers it necessary and proportionate to ensure compliance with section 5A(1).

29. Please also note that section 5B(2) is modelled on regulation 5(7) of UK Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020.

Means to ascertain whether an officer is an authorized public officer

30. The ranks of authorized officers appointed by the Director of Health in accordance with section 6D of Cap. 599I have been uploaded on the COVID-19 thematic website (<https://www.coronavirus.gov.hk/eng/599i-authority.html>) for public information.

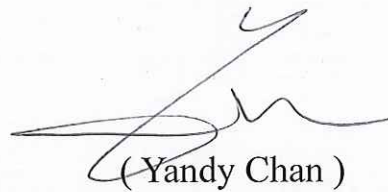
Information relating to persons arrested and/or charged prior to the implementation of the fixed penalty scheme under L.N. 149

31. On 22 July 2020, the Government amended the Prevention and Control of Disease (Wearing of Mask) (Public Transport) Regulation (the title of which had been subsequently amended to Prevention and Control of Disease (Wearing of Mask) Regulation) (Cap. 599I) mainly to expand the scope of the mask-wearing requirement to public places and introduce fixed penalty in respect of the offence

under Cap. 599I for not wearing a mask in a specified public place, a public transport carrier or an MTR paid area.

32. With effect from 23 July 2020, a person who contravenes the requirement of not wearing mask at public place commits an offence and is liable on conviction to a fine at level 2 (\$5,000), or may discharge his/her liability for the offence by paying a fixed penalty of \$2,000. Before the implementation of the fixed penalty scheme, 5 persons were charged with offence under Cap. 599I and prosecutions thereunder would follow the established criminal proceedings.

Yours sincerely,

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

(Yandy Chan)
for Secretary for Food and Health

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