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By Fax (2840 0467)

26 November 2020

Ms CHAN Sheung-man, Ellen  
Principal Assistant Secretary for  
Food and Health (Health) 7/  
Head (Chinese Medicine Unit)  
Food and Health Bureau  
19/F, East Wing  
Central Government Offices  
2 Tim Mei Avenue  
Tamar  
Hong Kong

Dear Ms CHAN,

**Prevention and Control of Disease  
(Compulsory Testing for Certain Persons) Regulation  
(L.N. 221 of 2020)**

We are scrutinizing the captioned Regulation with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Regulation, we should be grateful if you could clarify the following issues.

A specified medical practitioner's failure to comply with section 5

1. Under section 5(1), a specified medical practitioner who issues a compulsory testing direction must, as soon as reasonably practicable after doing so, send, or cause to be sent, to the Director of Health ("Director") a notification of the issue of the direction; and provide the Director with, or cause the Director to be provided with, any other information that is relevant to the identification and tracing of the person to whom the direction is issued. By section 5(2), a similar notification requirement also applies where the specified medical

practitioner revokes or varies a compulsory testing direction. Please clarify whether there would be any legal or disciplinary consequence for a specified medical practitioner who fails to comply with the notification requirements under section 5(1) and (2).

### Non-compliance with the compulsory testing requirement

2. A person who fails to comply with a requirement under a compulsory testing direction, notice or order commits an offence under section 8(1), 13(1) or 16(1) respectively. Would a child be guilty of an offence under section 8(1), 13(1) or 16(1)? Is it necessary to impose a duty on the parent or guardian of a child to cause the child to comply with the requirement(s) under a compulsory testing direction, notice or order, and provide for criminal liability of the parent or guardian under L.N. 221 for the purpose of a child's non-compliance with a compulsory testing direction, notice or order?

### Defence

3. Under section 8(2), 13(2) or 16(2), it is a defence for a person charged with an offence under section 8(1), 13(1) or 16(1) to establish that the person had lawful authority or reasonable excuse for the failure to comply with the respective requirement under a compulsory testing direction, notice or order. Please give examples of: (a) "lawful authority or reasonable excuse for the failure to comply with the requirement" referred to in sections 8(2), 13(2) and 16(2); and (b) "reasonable excuse" referred to in sections 18(3), 19(4) and 21(4).

4. Under section 13(2)(b)(i), it is a defence for a person charged under section 13(1) to establish that the person did not know, and could not with reasonable diligence have discovered, the requirement under a compulsory testing notice. Please clarify the meaning of "with reasonable diligence". Given that a compulsory testing notice is to be published in the Gazette and two newspapers (one English and one Chinese) pursuant to section 10(1) and (4), please give examples of the circumstances under which a person could not with reasonable diligence have discovered the requirement under a compulsory testing notice.

5. Under section 16(2)(b)(i), it is a defence for a person charged under section 16(1) to establish that the person did not know, and could not with reasonable diligence have discovered, the requirement under a compulsory testing order. Please clarify the meaning of "with reasonable diligence". Given that a compulsory testing order is to be served on a person personally or by sending it by post to, or leaving it at,

the person's last known place of residence or work pursuant to section 14(4), please give examples of the circumstances under which a person could not with reasonable diligence have discovered the requirement under a compulsory testing order.

### Immunity

6. Under section 9(1), no personal liability is incurred by a specified medical practitioner or a person acting under the direction of the medical practitioner in respect of any thing done or omitted to be done by the medical practitioner or person in good faith in the performance or purported performance of a function under section 4(2) in relation to the issuance of a compulsory testing direction. If the specified medical practitioner or the person acting under the direction of the medical practitioner is not a public officer or a prescribed officer for the purpose of L.N. 221, please give the reason(s) for granting such medical practitioner or person immunity from personal liability.

### Requirements specified in a compulsory testing notice

7. Section 12(1)(d) sets out certain additional requirements that must be specified in a compulsory testing notice *if the result of a specified test is required to be submitted under section 10(3)(b)* [emphasis added]. Please clarify whether there are circumstances under which a compulsory testing notice requires the specified person to undergo a specified test but does not require the result of the specified test to be submitted.

### Conformity with the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383)

8. L.N. 221 provides for a mechanism for requiring a person to undergo a test for ascertaining whether the person has contracted COVID-19 ("specified test"). Please clarify whether (and if so, why) L.N. 221, insofar as it compels a person to undergo a specified test, 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 as far as Article 3 of the Hong Kong Bill of Rights and/or Article 28 of the Basic Law (experimentation and/or search of the body) and Article 14 of the Hong Kong Bill of Rights (protection of privacy) are concerned.

9. Section 18 empowers a prescribed officer to require a person to provide any information relevant to the purpose of ascertaining whether that person is a target person (i.e. a person on whom a compulsory testing order may be served under section 14(2)) if the

prescribed officer has reason to believe that the person is a target person. Please clarify whether (and if so, why) section 18 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 as far as Article 14 of the Hong Kong Bill of Rights (protection of privacy) is concerned.

### Fixed penalty

10. It is noted that the amount of the fixed penalty payable under section 24(1) is the same as the maximum penalty payable under section 8(1) or 13(1) (i.e. \$2,000). This is different from the fixed penalty regime under the Prevention and Control of Disease (Wearing of Mask) Regulation (Cap. 599I) where the maximum penalty for the substantive offence is \$5,000 while the fixed penalty is \$2,000. Please explain the policy and legislative intent of the difference between the two fixed penalty regimes. Under section 24(1), if a person commits an offence under section 8(1) or 13(1), punishable by a fine at level 1 (i.e. \$2,000), the person may discharge liability for the offence by paying a fixed penalty of \$2,000. What are the incentives for someone to pay the fixed penalty of \$2,000 instead of appearing before the court where he or she, upon making a mitigation plea, may be fined a lesser amount?

Please let us have your response in both English and Chinese as soon as practicable, preferably on or before 3 December 2020.

Yours sincerely,



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