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Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

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Dear Miss Dai,

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

We refer to your letter of 26 November 2020 and set out below our reply to the questions raised therein.

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

2. You asked us to clarify if there is any legal or disciplinary consequence if a specified medical practitioner fails to comply with the notification requirement under section 5(1) or 5(2) of L.N. 221 of 2020.

3. Concerning legal consequences, no specific penalty is imposed on a specified medical practitioner who fails to comply with the requirement under section 5(1) or 5(2) of L.N. 221 of 2020. Concerning disciplinary consequences, it is a matter for the Medical Council, the statutory body established under the Medical Registration Ordinance (Cap. 161), to consider. In this connection, you may wish to note that the

“Code of Professional Conduct for the Guidance of Registered Medical Practitioners”, as promulgated by the Medical Council, provides for the relevant professional obligation of a medical practitioner as follows -

Introduction in Part I of the Code:

“The Code embodies two cardinal values of the medical profession. It is committed to maintaining high standards of proper conduct and good practice to fulfill doctors’ moral duty of care. Importantly also, the Code upholds a robust professional culture to support self-governing through identifying role-specific obligations and virtues of the medical profession. These obligations and virtues define the moral ethos and shape the professional identity of the medical community...

Contravention of this Code, as well as any written and unwritten rules of the profession, may render a registered medical practitioner liable to disciplinary proceedings.” (emphasis added)

The meaning of the term “misconduct in a professional respect” in Part II of the Code:

“It includes not only conduct involving dishonesty or moral turpitude, but also any act, whether by commission or omission, which has fallen below the standards of conduct which is expected of members of the profession. It also includes any act which is reasonably regarded as disgraceful, dishonourable or unethical by medical practitioners of good repute and competency.” (emphasis added)

4. It is also stated in the Code that the Council will have regard to the International Code of Medical Ethics adopted by the World Medical Association in the exercise of its disciplinary power. Under the said International Code, the physician shall, inter alia, strive to use health care resources in the best way to benefit patients and their community and act in the patient’s best interest when providing medical care.

Non-compliance with compulsory testing order

5. The following questions were raised in paragraph 2 of your letter -

- (1) whether a child would be guilty of an offence under sections 8(1), 13(1) or 16(1) for failing to comply with a requirement under a compulsory

- testing direction, notice or order; and
- (2) whether it is necessary to impose a duty of the parent or guardian of a child to cause the child to comply with such a requirement.

On question (1), it is conclusively presumed that no child under the age of 10 years can be guilty of an offence (see section 3 of the Juvenile Offenders Ordinance (Cap. 226)). For children aged between 10 and 14, the presumption that the child is incapable of committing a crime is rebuttable by proving beyond reasonable doubt that the child knew that his conduct was seriously wrong and knew the natural and probable consequences of his act (see Archbold Hong Kong 2020 paragraphs 1-76) and thus the question of whether children aged between 10 and 14 will be liable under section 8(1), 13(1) or 16(1) is a fact-sensitive issue depending on the facts, available evidence and all the circumstances.

6. In drawing up the legal framework of the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (Cap. 599J), we consider that there are merits in stepping up testing of certain groups of persons, such as symptomatic patients, persons living or working in places with cluster outbreak and persons of a higher risk of contracting the virus/of a higher exposure to the virus, etc. to cut transmission, in particular silent transmission, of the virus in the community such that we are able to achieve “early identification, early isolation and early treatment” of those infected and have more room to allow social and economic activities to resume to a certain extent during the time when we needed to co-exist with the virus under the new normal. 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 is also a moral responsibility for adults to take necessary steps to ensure the health and safety of children under their supervision. It would be too onerous if we put the legal obligation on parents/guardians to ensure children’s compliance with the compulsory testing direction, notice or order through express provisions in law. In view of the above, we consider the existing provisions suffice in achieving our policy objective, which is to induce persons in the community with a higher risk of contracting COVID-19 to undergo a compulsory testing.

Defence

7. Clarifications are sought on the meaning of the defence of “lawful authority”, “reasonable excuse” and “with reasonable diligence”.

8. It is not feasible to identify an exhaustive list of the circumstances that may constitute a lawful authority or reasonable excuse for the offences under L.N. 221 of 2020. Examples of “lawful authority or reasonable excuse for the failure to comply with the requirement” referred to in sections 8(2), 13(2) and 16(2) can be found in sections 8(2)(b), 13(2)(b) and 16(2)(b) which include physical or mental illness, impairment or disability.

9. Regarding “reasonable excuse” referred to in sections 18(3) and 19(4), sections 18(3)(b) and 19(4)(a)(ii) provide for an example of reasonable excuse that the information required to be provided was not within the knowledge, in the possession or under the control of the person, and could not reasonably have been ascertained or obtained by the person. As for “reasonable excuse” referred to in section 21(4) which concerns obstruction of prescribed officers or specified medical practitioners, subject to the actual circumstances of the case, an example may concern a scenario where a danger appears in the premises at which the person is present and such person needs to remove it before allowing a prescribed officer to enter and search the premises with warrant.

10. In respect of “reasonable excuse for the failure to comply with a requirement made under section 19(2)” in section 19(4)(b), examples might include a defendant having no proof of identity with him because all proof of identity of which he was the holder had been lost or destroyed and (a) he had reported the loss or destruction to a police officer at a police station or, in the case of an identity card, to a registration officer; or (b) he had reported the loss or destruction to a police officer at a police station or, in the case of an identity card, to a registration officer (see section 17C(4) of the Immigration Ordinance (Cap. 115)).

11. Regarding the meaning of “with reasonable diligence”, the use of the word “reasonable” connotes that the test is an objective one (see *HKSAR v Kong Hing Agency Ltd* [2008] 2 HKLRD 461). The court is required to examine what the accused could have been reasonably expected to have done in the circumstances of the case. “Reasonable diligence” does not require the doing of everything possible, but the doing of that which, under ordinary circumstances, and having regard to expense and difficulty, can reasonably be required (see *HKSAR v Kong Hing Agency Ltd* and *R v Multitex (Exports) Ltd* [1996] 4 HKC 422). What reasonable steps are, and what reasonable diligence is will vary with the legislative context in which those words appear and with the facts of the case.

12. While it is not feasible to identify an exhaustive list of the circumstances under which a person could not with reasonable diligence have discovered the requirement under a compulsory testing direction, compulsory testing notice or a compulsory testing order, it is reasonably arguable that a person who is illiterate and takes no step to find out the contents of the direction, notice or order upon receipt or a person who suffers from physical or mental illness, impairment or disability are examples of such circumstances.

Immunity

13. You asked for the reason for providing under section 4(2) immunity to a specified medical practitioner who is not a public officer or a person acting under the direction of such a medical practitioner.

14. Under section 13 of the Prevention and Control of Disease Ordinance (Cap. 599), immunity from personal liability has been provided to public officers or a person acting under the direction of a public officer in the exercise of a power under the ordinance in good faith. A specified medical practitioner in private practice is performing a public function when he or she exercises the power under section 4(2) of Cap. 599J. As long as such a medical practitioner is performing the public function in good faith, the medical practitioner should be in the same position of a public officer in exercise of similar power and should also have the protection of immunity. Similarly, a person performing the public function under the direction of a specified medical practitioner in private practice should also be in the same position of a person acting under the direction of a specified medical practitioner who is a public officer and should also have the protection of immunity.

15. It should be noted that despite the immunity afforded to medical practitioner in private practice or persons acting under their direction, the Government's liability in respect of anything done or omitted to be done by a specified medical practitioner or a person acting under the direction of the medical practitioner will not be affected.

Requirements specified in a compulsory testing notice

16. You asked for clarifications on whether there are circumstances under which a person required to undergo a specified tested by a compulsory testing notice but is not required to submit the result of the test. Whether such submission is required would depend on the actual arrangements for that specific category of persons as specified in the compulsory testing notice. The recent compulsory testing notice issued in respect of staff of residential care homes for the elderly/the disabled or nursing homes provides

such an example. A copy of the notice is attached. You will note that instead of requiring the persons subject to the specified test to submit the result, they are only required to keep the SMS message containing the test result and to provide the message for checking upon request.

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

17. Cap. 599J empowers the Government to require certain categories of persons, and to empower medical practitioners to require symptomatic patients, to undergo a specified test if necessary for the purpose of preventing, combating or alleviating the current public health emergency and protecting public health in Hong Kong.

18. You queried whether (and if so, why) Cap. 599J could satisfy the proportionality test laid down in the case of *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 (“four-step proportionality test”) in relation to a person’s right not to be subjected without his free consent to medical or scientific experimentation under Article 3 of the Hong Kong Bill of Rights (“BOR 3”), a person’s right not to be subjected to arbitrary or unlawful search of the body under Article 28 of the Basic Law (“BL 28”), and a person’s right of privacy under Article 14 of the Hong Kong Bill of Rights (“BOR 14”).

The right not to be subjected without his free consent to medical or scientific experimentation under BOR 3

BOR 3 provides -

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

19. We consider that the right not to be subjected without his free consent to medical or scientific experimentation under BOR 3 is simply not engaged because the compulsory testing required under Cap. 599J is not “experimentation” under BOR 3.

20. Reference may be made to Article 7 of the International Covenant on Civil and Political Rights (“ICCPR 7”) which is in the same terms as BOR 3. The purpose of ICCPR 7 is to prohibit criminal experiments on human beings such as those committed

in Nazi concentration camps. For example, normal medical treatment in the interest of the patient's health or compulsory vaccination to fight the spread of contagious diseases would not fall under the term "experimentation" in ICCPR 7 and is thus outside the scope of this provision. As a result, the patient's consent is not required¹. By analogy, medical testing for the purpose of fighting the spread of a highly infectious disease would not fall under the term "experimentation" in ICCPR 7 / BOR 3.

21. Further, it follows from the words "in particular" at the beginning of the second sentence of ICCPR 7 that only experiments that by their very nature are to be deemed torture or cruel, inhuman or degrading treatment are prohibited. The prohibition in ICCPR 7 against medical or scientific experimentation without free consent does not extend to experiments whose interference with personal integrity does not reach the degree of degrading or inhuman treatment². Under section 22 of Cap. 599J, the power to require a person to undergo testing under Cap. 599J must not be exercised to require a person to undergo any specified test that is more intrusive or invasive than is necessary for ascertaining whether the person has contracted COVID-19. It is clear that the test for COVID-19, which merely requires a swab or deep throat saliva sample be taken from the person (or a stool sample to be left in some cases), does not reach the "minimum level of severity" of degrading or inhuman treatment in which a "very high" threshold is adopted³.

The right not to be subjected to arbitrary or unlawful search of the body under BL 28 and the right of privacy under BOR 14

BL 28 provides –

“The freedom of the person of Hong Kong residents shall be inviolable. No

¹ William A. Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary*, 3rd ed. (Kehl: N.P. Engel Publisher, 2019). See paragraph 71 at page 215.

² *Ibid*, at paragraphs 73-74 at pages 215-216.

³ In *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, the Court of Final Appeal held at paras. 172-173 that two main requirements must be established for the person to bring himself within the terms of BOR 3 in the context of cruel, inhuman or degrading treatment or punishment and a "very high" threshold must be surmounted to establish each of the requirements. One requirement was that the ill-treatment attains what has been called "a minimum level of severity". The Court cited with approval the case of *R (Limbuella) v Secretary of State for the Home Department* [2006] 1 AC 396, which held that a "treatment" would fall within the scope of Article 3 of the European Convention on Human Rights if it attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 of the European Convention on Human Rights.

Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or 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 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.”

22. The rights under BL 28 and BOR 14 are not absolute. They are subject to restrictions which are prescribed by law and are proportionate to achieve a legitimate aim, and which are not “arbitrary” or “unlawful”.

23. The term “unlawful” means that no interference can take place except in cases envisaged by the law. Given that the interference with the rights under BL 28 and BOR 14 is clearly provided in Cap. 599J, we take the view that the interference is not “unlawful” and the prescribed by law requirement is satisfied.

24. With regard to the requirement that the interference must not be “arbitrary”, we consider that the interference is a reasonable, rational and necessary measure to combat the public health emergency situation and to protect public health, which is a legitimate aim⁴.

⁴ 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 emphasized that the proportionality test must be applied cautiously so that only a statutory provision which is manifestly disproportionate would be struck down as arbitrary.

25. 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.

26. The requirement to undergo testing under Cap. 599J is a reasonable, rational and necessary measure to combat the public health emergency situation and to protect public health, which is a legitimate aim. Virus testing is an integral part of our epidemic control strategy. It helps to cut silent transmission chains as far and as early as possible and slow down the transmission of the virus in the community. In view of the volatile local epidemic situation, there is a rational connection between protecting public health and stepping up testing of certain groups of persons, such as symptomatic patients, persons living or working in places with cluster outbreak and persons of a higher risk of contracting the virus/of a higher exposure to the virus, etc. to cut transmission of the virus in the community.

27. Given the importance of early identification, early isolation and early treatment of those infected, we consider it proportionate to require certain persons to undergo testing if necessary. Pursuant to sections 8(2), 13(2) and 16(2), the requirement to undergo testing is subject to the defence of lawful authority or reasonable excuse, such as the person could not comply with the requirement because of any physical or mental illness, impairment or disability; or (for the offence under section 13(1)) the person reasonably believed that the requirement was not imposed on him or her. Furthermore, the power to require a person to undergo testing under Cap. 599J must not be exercised to require a person to undergo any specified test that is more intrusive or invasive than

is necessary for ascertaining whether the person has contracted the specified disease⁵. Hence, the requirement is clearly no more than is necessary to accomplish the legitimate aim of protecting 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. A reasonable balance has been struck between the societal benefits of the requirement to undergo testing under Cap. 599J and the inroads made into the rights under BL 28 and BOR 14, and that the requirement does not result in an unacceptably harsh burden on the persons affected by it.

28. On the basis of the above, we take the view that the statutory mechanism for requiring a person to undergo a test for ascertaining whether the person has contracted COVID-19 does not engage BOR 3, and can satisfy the four-step proportionality test laid down in the case of *Hysan Development Co. Ltd. v Town Planning Board* insofar as the right not to be subjected to arbitrary or unlawful search of the body under BL 28 and the right of privacy under BOR 14 are concerned.

29. Section 18 of Cap. 599J empowers a prescribed officer to require a person to provide any information relevant to the purpose of ascertaining whether the person is a target person, i.e. a person on whom a compulsory order may be served under section 14(2). You queried whether (and if so, why) section 18 of Cap. 599J could satisfy the four-step proportionality test insofar as a person's privacy under BOR 14 is concerned.

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.”

30. 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 18 of Cap. 599J, we take the view that the interference is not “unlawful” for the purpose of BOR 14.

⁵ Section 22 of Cap. 599J refers.

31. With regard to the requirement that the interference must not be “arbitrary”, we consider that the interference arising from section 18 is a reasonable, rational and necessary measure to facilitate effective implementation of the statutory scheme under Cap. 599J to combat the public health emergency situation and to protect public health, which is a legitimate aim.

32. The power to demand provision of the person’s information under section 18 can only be invoked if a prescribed officer has reason to believe that the person is a target person, i.e. a person on whom a compulsory testing order may be served under section 14(2). The scope of information which can be demanded by the officer is narrowly confined to the purpose of ascertaining whether the person is a target person. The requirement to provide information is subject to the defence of reasonable excuse, such as situations where the information required to be provided was not within the knowledge, in the possession or under the control of the person, and could not reasonably have been ascertained or obtained by the person. Although failure, without reasonable excuse, to comply with a requirement to produce the relevant information or to knowingly or recklessly 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.

33. In the light of the above, the power to demand information under section 18 can reasonably be justified under the four-step proportionality test. It is rationally connected, and is no more than is necessary, to accomplish the legitimate aim of implementing the statutory scheme for compulsory testing 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 18 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.

Fixed Penalty

34. You pointed out that the fixed penalty and the maximum penalty for the offence under section 8(1) and 13(1) are the same whereas the fixed penalty is less than the maximum penalty for the offence under Prevention and Control of Disease (Wearing of Mask) Regulation (Cap. 599I). You would like us to explain the difference in approach and how incentive will be provided to persons to pay the fixed penalty in the first case.

35. While the fixed penalty is usually lower than the maximum penalty for an offence, regard will also have to be given to circumstances in which the offence is

committed when the amount of the fixed penalty is to be decided. In the context of compulsory testing, as it was considered that a person who refuses to undergo testing (which is free for those required to undergo testing as long as they opt for testing provided by the public sector) would likely refuse to do so as a result of the time and efforts involved and such a person would also likely wish to avoid the need to appear in court proceedings due to the more time-consuming and onerous process involved albeit the possibility of being fined a lesser amount upon making a mitigation plea, a fine at level 1 (which is the same amount as the fixed penalty) would cast sufficient deterrence. That said, during the process of reviewing the amount of fixed penalties under the emergency regulations made under Cap. 599, it was considered that, while the level of fixed penalties is to be increased to \$5,000, there was room to further increase the original penalty for the offence of failing to comply with a requirement under a compulsory testing direction or a compulsory testing notice so as to emphasise the importance for persons who have received a compulsory testing direction or who fall under the category of persons specified by the Secretary for Food and Health to undergo testing with a view to helping cut silent transmission chains in the community hence the original penalty would be increased to a fine at level 3 (\$10,000).

36. Despite the above, we wish to highlight the fact that the amount of fixed penalty is the same as the maximum penalty does not mean that there is no incentive for a person to pay fixed penalty. The payment of fixed penalty will discharge a person's criminal liability and hence avoid any stigma arising from a conviction and will also absolve a person of the burden to go through the concerned judicial process, including trial.

Yours sincerely,



(Sophia HUI)

for Secretary for Food and Health