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Urgent by fax (2840 0467)

15 December 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)
(Amendment) (No. 2) Regulation 2020
(L.N. 251 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.

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

Restrictions of movement

2. Under section 19B in the new Part 4A of the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (Cap. 599J), the Secretary for Food and Health may make a restriction-testing declaration in respect of any premises when certain specified conditions are met. If a person is on any premises in relation

to which a restriction-testing declaration is in effect ("restricted premises"), that person will not be permitted under section 19C to leave the restricted premises ("restricted person") unless the person has lawful authority or reasonable excuse to do so. Under section 19D, apart from a prescribed officer or a person specified by a prescribed officer for the purpose of performance of a function under Cap. 599J, no person is permitted to enter any restricted premises unless under certain specified conditions (e.g. the person is a resident of the restricted premises).

3. L.N. 251 also amends sections 4, 10 and 14 of Cap. 599J to provide that a person who is subject to a compulsory testing direction/notice/order may be required not to leave or enter a particular place without the permission of a prescribed officer until the test result for COVID-19 is ascertained.

4. Furthermore, under the new section 19H of Cap. 599J, a prescribed officer is empowered to require a restricted person to stay in a particular area on the restricted premises and impose any other requirement during the effective period of the restriction-testing declaration if the officer reasonably considers it necessary and proportionate for preventing, protecting against, delaying or otherwise controlling the transmission of COVID-19 within or from the restricted premises.

5. In relation to the above, please clarify whether (and if so, how) L.N. 251, insofar as it restricts the movement of persons, 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 31 of the Basic Law and Article 8 of the Hong Kong Bill of Rights (concerning the freedom/liberty of movement of Hong Kong residents) are concerned.

Prescribed officer's power to detain or remove restricted persons

6. Under the new section 19I of Cap. 599J, a prescribed officer may detain a restricted person in a particular area of the restricted premises or remove him/her, and may use reasonable force when exercising the above powers, if the officer reasonably considers it necessary and proportionate to ensure compliance with Part 4A. Please clarify whether (and if so, how) section 19I, insofar as it empowers a prescribed officer to detain or remove a restricted person (and the officer may do so by reasonable force), 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 28 of the Basic Law and Article 5 of the Hong Kong Bill of Rights (concerning the right to liberty

and security of person in the context of arbitrary arrest or detention) are concerned.

Prescribed officer's power to enter and search premises without warrant

7. Under section 19J(3) in the new Part 4A of Cap. 599J, a police officer of or above the rank of superintendent may break into and forcibly enter a premises that constitute or form part of any restricted premises ("target premises") without warrant. Section 19J(3)(a) to (c) specifies the circumstances under which the officer may enter a target premises (including residential premises) without warrant, e.g. if the officer is satisfied that there are reasonable grounds for suspecting that a person on the target premises has, by refusing or neglecting to enable access to the target premises by a prescribed officer who is performing a function under Part 4A, delayed or hindered the prescribed officer in contravention of section 21 (obstruction of prescribed officer).

8. With regard to the above, please clarify whether (and if so, how) the new section 19J(3) 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 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights are concerned.

Vulnerable persons

9. Section 19L(5) in the new Part 4A of Cap. 599J provides that a prescribed officer may require a vulnerable person (i.e. to a child or a mentally incapacitated person) to take the prescribed test only when such vulnerable person is either in the presence of a responsible person (e.g. the father or mother of a child), or in the presence of an adult whom the officer reasonably considers to be appropriate, having regard to any views of the vulnerable person. In that regard, please give examples of the circumstances under which an adult accompanying a vulnerable person would be considered as appropriate by a prescribed officer for the purpose of the above provision.

10. The new section 19L(6) empowers a prescribed officer to exercise a power under Part 4A in relation to a vulnerable person not accompanied by a responsible person. It is provided that the prescribed officer must, if reasonably practicable, contact a responsible person for the vulnerable person before the power is exercised, or, if that is not reasonably practicable, take reasonable steps after the power is exercised to contact a responsible person and inform him/her of the exercise of the power. Please give examples of the circumstances under which it would be considered as not being reasonably practicable for a prescribed officer

to contact a responsible person for the vulnerable person before any power under Part 4A (except the power to require test under section 19E) is exercised.

11. Please also clarify whether the powers of a prescribed officer listed below are powers exercisable against a vulnerable person not accompanied by a responsible person under the new section 19L(6), and if so, please explain the rationale for making such powers applicable to vulnerable persons not accompanied by responsible persons:

- (a) the power to regulate the movement of restricted persons in restricted premises under the new section 19H;
- (b) the power to detain or remove restricted persons under the new section 19I; and
- (c) the power to demand information or assistance under the new section 19K.

Defence relating to physical or mental illness etc

12. Under the new section 19E of Cap. 599J, it is a defence if a person can prove that his/her failure to comply with the requirement to take a prescribed test is because of any physical or mental illness, impairment or disability. Unlike the new section 19E, the new sections 19H and 19K of Cap. 599J do not provide similar defence(s). Please clarify the rationale for the absence of such similar defence in relation to the new sections 19H and 19K.

13. Please let us have your response in both English and Chinese as soon as practicable.

Yours sincerely,



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