



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

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Ms Vanessa Cheng  
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Legislative Council Secretariat  
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1 Legislative Council Road, Central  
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Dear Ms Cheng,

**Prevention and Control of Disease (Requirements and Directions)  
(Business and Premises) (Amendment) (No. 2) Regulation 2021 (L.N. 52 of  
2021)  
and  
Prevention and Control of Disease (Prohibition on Group Gathering)  
(Amendment) (No. 3) Regulation 2021 (L.N. 53 of 2021)**

We refer to your letter of 4 May 2021 seeking our clarifications on a number of issues relating to L.N. 52 and L.N. 53 of 2021. Our reply is set out below.

**L.N. 52 of 2021**

Sections 6 and 9

2. You queried whether any directions applicable to any person who enters or is present on any catering business premises and/or scheduled premises in relation to the production of record, document or information (e.g. the medical certificate as required under G.Ns. (E.) 249 and 250 of 2021 published in the Gazette on 28 April 2021) issued under sections 6(1) and 8(1) of the Prevention and Control of Disease (Requirements and Directions) (Business and Premises)

Regulation (Cap. 599F) could satisfy the four-step proportionality test (proportionality test) as laid down in the case of *Hysan Development Co. Ltd. v Town Planning Board*<sup>1</sup> in relation to a person's right to privacy guaranteed by Article 39 of the Basic Law (BL 39) and Article 14 of the Bill of Rights (BOR 14) under the Hong Kong Bill of Rights Ordinance (Cap. 383).

BL 39 provides –

*“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.*

*The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”*

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.”*

3. It is well-established that the term “prescribed by law” in BL 39 and similar phrases such as “according to law” mandate the principle of legal certainty, requiring the subject matter to be regulated by laws which are accessible and precisely defined<sup>2</sup>. Any direction issued by the Secretary for Food and Health (Secretary) under sections 6(1) and 8(1) of the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F) must be published in the Gazette<sup>3</sup>. Further, the requirement for a person who enters, or is present on, any catering business premises or scheduled premises to comply with a direction issued under sections 6(1) and 8(1) of Cap. 599F respectively that applies in relation to the person is clearly stipulated in sections 7AA(1) and 9AA(1) respectively. Therefore, we consider that the prescribed-by-law requirement is satisfied.

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<sup>1</sup> (2016) 19 HKCFAR 372

<sup>2</sup> *Hysan Development Co. Ltd. v Town Planning Board* (2016) 19 HKCFAR 372, paragraph 30.

<sup>3</sup> See sections 6(4)(a) and 8(4)(a) of Cap. 599F.

4. The rights under 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”.

5. The term “unlawful” means that no interference or restriction can take place except in cases envisaged by the law. In the light of the above, we consider that a direction issued by the Secretary which may constitute an interference with the rights under BOR 14 is not unlawful.

6. With regard to the requirement that the interference must not be “arbitrary”, we consider that any interference in relation to a direction issued by the Secretary with a person’s rights under BOR 14 is a reasonable, rational and necessary measure to combat the current public health emergency situation and to protect public health, which is a legitimate aim<sup>4</sup>. Such interference has also satisfied the proportionality test which 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.

7. Pursuant to sections 6(1) and 8(1) of Cap. 599F, the Secretary may only issue a direction for the purposes of preventing, protecting against, delaying or otherwise controlling the incidence or transmission of the specified disease. The direction to be issued by the Secretary is for a specified period not exceeding 14 days and imposes requirements or restrictions in relation to the matters stipulated in sections 6 and 8 respectively<sup>5</sup>. The directions issued under

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<sup>4</sup> 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.

<sup>5</sup> These matters relate to, amongst others, the mode of operation of the business or activity, the closing of the premises, the opening hours of the business on a day.

G.Ns. (E.) 249 and 250 of 2021 requiring production of a medical certificate relating to the health condition of a person (a staff member for the most part) who has not yet been vaccinated and who enters, or is present on, certain types of catering business premises and/or scheduled premises which are allowed to operate with relaxed restrictions during the current epidemic situation in Hong Kong is for achieving the above legitimate purposes. Pursuant to sections 7AA(3) and 9AA(3), a person who, in purported compliance with a direction, provides any record, document or information that is false or misleading in a material particular is to be regarded as not having complied with the direction. Pursuant to sections 7AA(2) and 9AA(2), a person who contravenes sections 7AA(1) or 9AA(1) commits an offence and is liable on conviction to a fine at level 3. Pursuant to section 13A of Cap. 599F, it is a defence for a person charged with an offence under sections 7AA(2) or 9AA(2) to establish that, at the time of the alleged offence, the person had lawful authority or reasonable excuse for contravening the relevant provisions or had taken all reasonable steps to comply with the direction. A person is taken to have established a matter that needs to be established for a defence if there is sufficient evidence to raise an issue with respect to that matter and the contrary is not proved by the prosecution beyond reasonable doubt.

8. Given the limited scope and effective period of the direction which may be issued by the Secretary and the purposes to be achieved by it, we consider that a reasonable balance has been struck between the societal benefits of protection of public health and the interference with a person's rights under BOR 14 and that it does not result in an unacceptably harsh burden on the person.

## **L.N. 53 of 2021**

### Section 7

9. Sections 5C(2) and 5D(2) of the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap. 599G) provide that the organizer(s) of a qualified persons' gathering or a tour gathering may require a specified participant or a staff member participant not to participate or to cease to participate in the gathering if such participant is not a qualified person or fails to produce documentary proof that he/she is a qualified person. Sections 5C(3) and 5D(3) then provide that if the said participant fails to comply with the requirement made by the organizer(s) not to participate or to cease to participate in the gathering under sections 5C(2) and 5D(2), a police officer may use any force that is reasonably necessary for securing the participant's compliance with the requirement, i.e. not to participate or to cease to participate in the gathering concerned.

10. For instance, if a person wishes to participate in an exempted qualified persons' gathering but refuses to provide any record, document or information

to prove that he/she is a qualified person; and that person also refuses to comply with the organizer's repeated requests to not to participate in the gathering, then police officer(s) may, having regard to actual circumstances at the time, use such force as is necessary, reasonable and appropriate in the circumstances to remove that person from the exempted qualified persons' gathering, with a view to ensuring that each of the persons participating in the gathering is a qualified person. It should be noted that the Police have strict and prudent guidelines on the use of force. When handling reported incidents/cases, police officers will take action as appropriate in accordance with provisions of the relevant legislation and established procedures, while taking into consideration all relevant facts and circumstances.

### Section 9

11. Under the new sections 7(1B)(b)(ii) and 7(1C)(b)(ii), it is a defence for a person who (a) organizes an exempted qualified persons' gathering / exempted tour gathering; or (b) owns, controls or operates the place or premises at which the gathering takes place and knowingly allows the taking place of the gathering, and is charged with an offence in respect of a prohibited group gathering to establish that the person had taken all reasonable steps to ensure that each of the persons participating in the gathering / each of the persons participating in the gathering as staff members in the case of tour gathering was a qualified person.

12. The conditions in respect of qualified persons are specified by the Secretary in G.N. (E.) 252 of 2021 issued under section 5B of Cap. 599G. In accordance with the aforesaid conditions, examples of actions to be taken by an organizer of an exempted qualified persons' gathering / exempted tour gathering that would constitute "reasonable steps" include (a) ensuring that all participants aged 6 and above but below 16 have obtained a negative test result for a polymerase chain reaction-based nucleic acid test for the coronavirus disease 2019 (COVID-19) conducted within (i) 14 days (for participants of qualified persons' gatherings) or (ii) 7 days (for staff member participants of tour gatherings), preceding the day on which the gathering commences (relevant test result) by asking for and checking relevant records, documents or information (for an organizer of an exempted qualified persons' gathering only); (b) ensuring that all participants aged 16 or above / all staff member participants have received the first dose of a COVID-19 vaccine by asking for and checking relevant records, documents or information; and (c) where any of the participants aged 16 or above / any of the staff member participants cannot, on medical ground, be administered with a COVID-19 vaccine, ensuring all such participants have declared that fact in the specified form with the relevant medical certificate and have obtained the relevant test result by asking for and checking relevant records, documents or information.

13. The definition of *staff member* in the new section 7(3) explains the meaning of the term “staff member” which is used in the new section 7(1C). As a definition must be understood in its context, the definition of *staff member* must be read together with the new section 7(1C).

14. The new section 7(1C) provides for a defence where a defendant establishes, among others, that the prohibited group gathering concerned would have been an exempted tour gathering if each of the persons participating in the gathering as a staff member were a qualified person. The reference to “a group gathering” in the definition of *staff member* obviously points to such a group gathering. Having considered the proper context, we are of the view that it is sufficiently clear to simply refer to “a group gathering”.

15. On the other hand, *tour gathering* is defined in the new section 5A (for the purposes of Part 3 only) as “a group gathering that is, or is intended by a licensee who organizes it to be, an exempted group gathering specified in item 19 of Part 1 of Schedule 1”. That definition is inapposite for the purposes of the defence in the new section 7(1C), because the group gathering in respect of which a charge is brought is not itself an exempted group gathering, but a prohibited group gathering. Also, it is not an element of the defence to be established by the defendant that the group gathering is intended by the licensee who organizes it to be an exempted group gathering.

Yours sincerely,



(Sophia Hui)

for Secretary for Food and Health