



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 : LS/S/14/20-21

Tel : 3509 8955
Fax : 2840 0467

29 December 2020

Miss Joyce CHAN
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong
(Fax: 2877 5029)

Dear Miss CHAN,

**Prevention and Control of Disease (Compulsory Testing for Certain Persons)
(Amendment) (No. 2) Regulation 2020 (L.N. 251 of 2020)**

We refer to your letter of 15 December 2020 and set out below our reply to the questions raised therein.

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

2. L.N. 251 empowers the Secretary for Food and Health (“SFH”) to, subject to meeting specified conditions, issue a restriction-testing declaration to restrict the movement of persons into and out of any premises, require persons on the premises to undergo a specified test and comply with any other associated requirements such as staying in a particular area on the restricted premises.

3. You queried whether (and if so, how) L.N. 251 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 Article 31 of the Basic Law (“BL”) and Article 8 of the Hong Kong Bill of Rights (“BOR”) concerning the freedom/liberty of movement of Hong Kong residents.

BL 31 provides, amongst others –

“Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region...”

BOR 8 provides, amongst others –

“(1) Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence.

...

(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. The rights under BL 31 and BOR 8 are not absolute. They are subject to restrictions which are prescribed by law and are proportionate to achieve a legitimate aim.

5. Given that the interference with the rights under BL 31 and BOR 8 is clearly provided in L.N. 251, we take the view that the prescribed-by-law requirement is satisfied.

6. The restrictions of movement 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.

7. The restrictions of movement under L.N. 251 are a reasonable, rational and necessary measure to combat the public health emergency situation and to protect public health, which is a legitimate aim.

8. It is imperative that those who are subject to compulsory testing should, as far as possible, be subject to necessary preventive measures pending the availability of test results. This ensures that, during the period before test results become available, the risks of those subject to compulsory testing spreading the specified disease within the community could be minimised. In addition, given that many who have contracted the disease display no symptoms but can still spread the virus, testing remains the only means to identify those who have been infected in such cases. In situations involving outbreaks at certain premises, in order to effectively apply compulsory testing as a means of identifying persons who have contracted the specified disease, there is a need for appropriate measures to restrict movement of these persons to be taken in conjunction, in order to ensure that they stay within a premises, a building or an area until they are all properly tested and all of the test results are ascertained. Only until testing is completed could their movement restrictions be lifted so as to prevent the further spreading of the specified disease from the premise/building/area.

9. Hence, the restrictions of movement are clearly no more than is necessary to accomplish the legitimate aim of protecting public health having regard to the need to apply compulsory testing in conjunction with measures to restrict movement in order to serve as an effective means to identify persons who have contracted the specified disease, to prevent them from spreading the specified disease to the community and to minimise the risk of transmission of the specified disease among restricted persons while they are on the restricted premises. The restrictions of movement are transient and would be lifted once the public health risks posed by the restricted persons are mitigated. The effective period of the restriction-testing declaration would be no more than is necessary for the purposes of preventing, protecting against, delaying or otherwise controlling the incidence or transmission of the specified disease. The maximum effective period of the restriction-testing declaration is seven days and can be revoked earlier when the results of all the specified tests conducted on those restricted persons on the restricted premises have been ascertained; or the SFH is satisfied that revoking the restriction-testing declaration otherwise serves the public interest of Hong Kong¹.

10. A reasonable balance has been struck between the societal benefits of the restrictions of movement under L.N. 251 and the inroads made into the rights under BL 31 and BOR 8 and the restrictions do not result in an unacceptably harsh burden on the persons affected by them. During the period of restriction, the restricted persons remain free to maintain communication with the outside world by electronic means and their well-being will be taken care of by the Government, which has a statutory duty under L.N. 251 to ensure that every restricted person is provided with any basic necessities (including goods and services) that the Government considers reasonably appropriate (other than the first 12 hours of the effective period)². There are built-in safeguards in L.N. 251 to cater for situations where the restricted person has genuine and legitimate difficulties to comply with the restrictions of movement. The restrictions of movement would be lifted if the restricted person has lawful authority or reasonable

¹ Section 19F of L.N. 251 refers.

² Section 19N of L.N. 251 refers.

excuse, such as where the person has to receive urgent medical treatment or unreasonable hardship would be caused to the restricted person or any other person³.

11. On the basis of the above, we take the view that the restrictions of movement in L.N. 251 can satisfy the four-step proportionality test laid down in the case of *Hysan Development Co. Ltd. v Town Planning Board* insofar as the freedom/liberty of movement of Hong Kong residents under BL 31 and BOR 8 are concerned.

Prescribed officer's power to detain or remove restricted persons

12. You queried whether (and if so, how) section 19I could satisfy the four-step proportionality test laid down in the case of *Hysan Development Co Ltd v Town Planning Board* in relation to BL 28 and BOR 5 concerning the right to liberty.

BL 28 provides –

“The freedom of the person of Hong Kong residents shall be inviolable.

No 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 5 provides, amongst others –

“(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law....”

13. We take the view that the right to liberty under BL 28 and BOR 5 is not engaged when the prescribed officer exercises his power under section 19I to detain or remove a person.

14. The power of detention and removal under section 19I must be viewed in context – a prescribed officer may exercise this power only if he/she reasonably considers it necessary to ensure that the restriction-testing declaration can be effectively implemented under the new Part 4A. Section 19I does not empower prescribed officers to detain or remove any person arbitrarily.

15. The power of removal may be exercised upon a person who is attempting to enter the restricted premises in breach of the entry restriction under section 19D(1). There is no power for the prescribed officer to detain a non-restricted person subsequent

³ Sections 19C(2), 19D(2), 19H(3) of L.N. 251 refer.

to the removal. Hence, this person's right to liberty under BL 28 and BOR 5 would not be engaged because he would not be detained.

16. The power of detention applies to a restricted person only (but not any person), and may be exercised upon a restricted person who is attempting to leave the restricted premises in breach of the exit restriction under section 19C(1), in which case the restricted person will be made to stay at a safe place in a particular area of the restricted premises (e.g. inside his flat) until the revocation or expiration of the restriction-testing declaration. The power of detention does not impose any additional burden upon the restricted person, as he is already legally obliged to remain in the restricted premises in the first place. Although his freedom/liberty of movement under BL 31 and BOR 8 is restricted (which, as we explained earlier, can be reasonably justified under the four-step proportionality test), there is no interference with his right to liberty under BL 28 and BOR 5 because the restricted person is not subject to any arrest, detention or imprisonment. The restriction measure in question is fundamentally different from detention in a correctional institution where a person's right to liberty under BL 28 and BOR 5 is typically engaged.

17. On the basis of the above, we take the view that the power to detain or remove a person under section 19I does not engage the right to liberty under BL 28 and BOR 5.

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

18. You queried 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* in relation to BL 29 and BOR 14 concerning the prohibition against arbitrary and unlawful intrusion into a resident's home or other premises and interference with a person's privacy or home.

BL 29 provides –

“The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises 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.”

19. The rights under BL 29 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”.

20. Given that the interference with the rights under BL 29 and BOR 14 is clearly provided in L.N. 251, we take the view that the lawfulness and prescribed-by-law requirements are satisfied.

21. In *Keen Lloyd Holdings Limited v Commissioner of Customs and Excise*⁴, the Court of Appeal found that in considering whether a search power is consistent with BL 29 and BOR 14, the proper approach to be adopted is to ensure that there are adequate and effective safeguards against abuse⁵. The vetting of an application for a warrant by a judicial officer who is an independent person is an important safeguard against arbitrary interference with privacy⁶. Although there could be justifications for not subjecting a search to the requirement of prior judicial authorisation, the court must examine whether the justification is cogent enough and whether other safeguards are in place to protect a citizen from abuse or excess of executive action in the name of investigation. An obvious case for exception is a situation where it would not be reasonably practicable to obtain a warrant⁷.

22. The power of entry under section 19J of Cap. 599J is consistent with the Court of Appeal's ruling in the *Keen Lloyd* case. In the ordinary course of events, a prescribed officer must obtain a warrant before entering the target premises with force. It is only in exceptional circumstances that the prescribed officer may, without a warrant, enter the restricted premises with force. Section 19J(3) sets out the conditions which must be satisfied. In particular, the power to enter target premises without warrant may only be exercised by a police officer of or above the rank of superintendent and if the officer is satisfied, amongst others, that – (1) entering the target premises without delay is necessary for preventing, protecting against, delaying or otherwise controlling the transmission of the specified disease within or from the restricted premises; and/or (2) it is not reasonably practicable to make an application for the warrant in the circumstances of the case. These two narrow exceptions are formulated with due regard to the Court of Appeal's ruling in *Keen Lloyd*.

23. We consider that the power of entry under section 19J of L.N. 251 is a reasonable, rational and necessary measure to combat the public health emergency situation and to protect public health, which is a legitimate aim. The purpose of entry is to find out whether there is a person inside the target premises, so that the person can be subject to necessary disease prevention and control measures and testing requirements. There is plainly a rational connection between protecting public health and identifying all such restricted persons. Given that the prescribed officers are required to apply for a warrant before entry unless all the conditions stipulated in section 19J(3) are satisfied, we consider that there are adequate and effective safeguards against abuse. The power of entry is proportionate and a reasonable balance has been struck between the societal benefits to be achieved and the inroads made into the rights

⁴ [2016] 2 HKLRD 1372.

⁵ Paras. 69-70 of *Keen Lloyd*.

⁶ Para. 71 of *Keen Lloyd*.

⁷ Para.75 of *Keen Lloyd*.

under BL 29 and BOR 14, and that the exercise of the power 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 of entry under section 19J(3) can satisfy the four-step proportionality test laid down in the case of *Hysan Development Co. Ltd. v Town Planning Board* insofar as the prohibition against arbitrary and unlawful intrusion into a resident's home or other premises and interference with a person's privacy or home under BL 29 and BOR 14 are concerned.

Vulnerable persons

25. On section 19L(5) in the Part 4A of Cap. 599J regarding vulnerable persons, you asked for examples of the circumstances under which a prescribed officer may consider it appropriate to require a vulnerable person who is accompanied by a person other than a responsible person to undergo a specified test.

26. A possible scenario is an outbreak in a residential building in which a vulnerable person happens to be alone at the person's home. In such situation, a specified test may be carried out on the vulnerable person in the presence of a neighbor of the person who knows the vulnerable person and is able to contact a responsible person of the vulnerable person and to seek the views of the vulnerable person and the responsible person. In such circumstances the power under section 19L(5) may be exercised in respect of a vulnerable person accompanied by a person other than a responsible person.

27. You also asked for 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.

28. This may happen if all of the responsible persons of the vulnerable person may not be contacted before the relevant power under Part 4A has to be exercised, e.g. the power to remove the vulnerable person to another designated place under section 19G for protecting the vulnerable person in view of the contamination in the environment where the vulnerable person is situated. In such situation, as the vulnerable person will have to be removed to another place as soon as possible, it may not be reasonably practicable to delay the removal after reasonable effort to contact a responsible person has been made but in vain.

29. You further asked whether the powers under sections 19H, 19I and 19K are exercisable against a vulnerable person not accompanied by a responsible person under the section 19L(6) and the rationale for making such powers applicable.

30. The power to regulate movement under section 19H is expressly provided for the purpose of reducing contact among restricted persons during the effective period of a restriction-testing declaration. It is thus clear that the power may be exercised if

persons (including vulnerable persons) in a certain place in the premises are suspected to be infected and these persons and the other persons inside the premises (which may also include vulnerable persons) have to stay in separate areas on the restricted premises to avoid getting into contact with each other to minimise transmission of the disease from those who are infected to those who are not.

31. The power under section 19I to detain or remove a person in the premises subject to a restriction-testing declaration may have to be exercised where a particular part inside the restricted premises is contaminated and hence the need to detain people inside the premises (including vulnerable persons) in a particular part of the premises other than the contaminated area and to remove people (including vulnerable persons) inside the contaminated area to other part of the premises.

32. Section 19K provides for the power to demand information where the officer has reason to believe that the information is within the knowledge, in the possession or under the control of the inquired person and it is not reasonably practicable to perform the function if the information is not obtained; and to demand assistance from a manager, owner or occupier of any restricted premises where the officer reasonably considers necessary to enable the officer to perform a function under Part 4A.

33. The power to demand information may be necessary if information relating to the persons residing in the premises subject to the restriction-testing declaration is required. It may happen where a prescribed officer has to ascertain under section 19D with a person present on the premises (including a vulnerable person) if a person requesting entry to the premises is a resident and therefore that person's entry has to be allowed. The power to demand assistance from an occupier of the premises (including a vulnerable person) may have to be exercised where for the purpose of, say, detaining in another part of the restricted premises a disabled person cohabiting with the occupier of a residential unit, the occupier is required to assist in taking care of that disabled person when they are both being removed to another area of the premises for staying together.

Defence relating to physical or mental illness etc

34. You asked us to clarify the rationale for the absence in sections 19H and 19K of a similar defence as the ones based on physical or mental illness, impairment or disability in section 19E.

35. It should be first pointed out that the general defence under section 19E (which provides for the power to require a person to undergo a specified test) is one of lawful authority or reasonable excuse. To put things beyond doubt in situations where dispute may more readily be anticipated, it is expressly provided that any physical or mental illness, impairment or disability amounts to a defence for non-compliance with the requirement under section 19E.

36. The general defence of lawful authority or reasonable excuse is also available in both sections 19H and 19K. In section 19H(3), the general defence is based on lawful authority or reasonable excuse whereas in section 19K(3), the general defence is based on reasonable excuse. We take the view that the defence of reasonable excuse may, in appropriate circumstances, be able to cover a defence based on physical or mental illness, impairment or disability and the absence of an express reference to such defence does not imply that it may not amount to a defence based on reasonable excuse under section 19H or section 19K.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sophia HUI', written in a cursive style.

(Sophia HUI)

for Secretary for Food and Health