

Hong Kong Special Administrative Region, People's Republic of China: Legal Response to Covid-19

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Except where the text indicates the contrary, the law is as it stood on: 15 October 2020

I. Constitutional Framework

1. Hong Kong is a Special Administrative Region of the People's Republic of China (PRC), established under Article 31 of the PRC Constitution.¹ Hong Kong enjoys a high degree of autonomy in legislative, executive, and judicial matters under the 'One Country, Two Systems' framework by which it was integrated into the PRC—a unitary state—upon the transfer of sovereignty over Hong Kong from the United Kingdom to the PRC on 1 July 1997. The vast majority of national laws of the PRC do not apply in the Hong Kong Special Administrative Region (HKSAR).²

2. Hong Kong is subject to the PRC Constitution, but is more directly regulated in constitutional terms by the Basic Law of the Hong Kong Special Administrative Region. The majority of the provisions in the PRC Constitution do not have direct effect in the HKSAR.³ The Basic Law was enacted by the National People's Congress (NPC) of the PRC on 4 April 1990 and became the primary constitutional document governing Hong Kong on 1 July 1997. The Basic Law allocates legislative power to the Legislative Council of the HKSAR,⁴ executive power to the Government of the HKSAR,⁵ and judicial power to the courts of the HKSAR.⁶ Hong Kong is therefore governed by the separation of powers—as recognized by the Hong Kong Court of Final Appeal—⁷with the legislative,⁸ executive, and judicial acts of public bodies within Hong Kong being subject to the Basic Law as a test of their constitutional validity.⁹

3. The Chief Executive of the HKSAR, who is the head of the HKSAR,¹⁰ is appointed by the Central People's Government, following the selection of a candidate through an electoral process in which the franchise is limited to 1,200 electors.¹¹ Though Hong Kong has a documented population of over 7.5 million people,¹² the 1,200 members of the Chief Executive Election Committee are appointed using a combination of appointment and election methods, primarily from functional constituencies, the Legislative Council, Hong Kong deputies to the NPC, and Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.¹³ The National People's Congress Standing Committee (NPCSC)—the permanent (legislative) body of the NPC—has decided that the Chief Executive 'has to be a person who loves the country and loves Hong Kong'.¹⁴ The term of office of a Chief Executive is five years, and a person may serve as Chief Executive for not more than two consecutive terms.¹⁵ The Chief Executive is accountable to the Central People's Government and to the HKSAR.¹⁶ Hong Kong is often described as an executive-led system due to the relative dominance of the executive in the internal constitutional order of the HKSAR, with the Chief Executive enjoying relatively extensive powers therein. This includes signing bills passed by the Legislative Council and promulgating laws,¹⁷ with a restricted veto power,¹⁸ and a limited power to dissolve the Legislative Council.¹⁹ The High Court saw no conceptual or practical incompatibility between describing Hong Kong as a system governed by the separation of powers and as an executive-led system,²⁰ an inconsistency which is sometimes claimed of Hong Kong.

4. Law-making is divided between Ordinances enacted by the Legislative Council; the common law made and administered by judges of the superior courts; and delegated legislation—known in Hong Kong as ‘subsidiary legislation’—typically made by executive officials and subject to scrutiny before the Legislative Council. Customary law is also part of the Hong Kong legal order, though it must be crystallized in the form of legislation or common law to enjoy practical legal effect.

5. The Legislative Council comprises 70 members, 35 of whom are elected by geographical constituency and 35 of whom are elected by functional constituency—namely constituencies representing specified business, sectoral, and other interests, such as the Engineering functional constituency, the Transport functional constituency, and the Wholesale and Retail functional constituency.²¹ The written consent of the Chief Executive is required before bills relating to government policies may be introduced,²² a further example of Hong Kong’s executive-led system.

6. The power of interpretation of the Basic Law is vested in the NPCSC and the Hong Kong courts. The NPCSC enjoys a ‘general and unqualified’ power to interpret the Basic Law.²³ The Hong Kong courts may, in adjudicating cases, interpret on their own provisions of the Basic Law that are within the limits of the autonomy of the HKSAR. If the Hong Kong courts need to interpret provisions of the Basic Law that are the responsibility of the Central People’s Government, or which concern the relationship between the Central Authorities and the HKSAR, the Court of Final Appeal of the HKSAR must seek an interpretation from the NPCSC.²⁴ It is provided that ‘judgments previously rendered shall not be affected’ by an NPCSC interpretation.²⁵ There have been five NPCSC interpretations of the Basic Law to date.²⁶ The meaning of the Basic Law may in practice also be affected by other instruments, such as Decisions of the NPCSC.²⁷ The power of amendment of the Basic Law is vested in the National People’s Congress.²⁸

7. Emergency powers are vested in the Chief Executive in Council—ie the Chief Executive acting after consultation with the Executive Council—²⁹in situations which the Chief Executive in Council considers to be ‘an occasion of an emergency or public danger.’ The Chief Executive in Council may make regulations extending to, but not limited to, provision for censorship, arrest, detention, punishments for any offence, and forfeiture of property.³⁰ The governing Ordinance contains clauses conferring far reaching Henry VIII powers, ie executive law-making powers which can amend primary legislation).³¹ A broader emergency power is vested in the Central People’s Government, which may issue an order applying relevant national laws in the HKSAR if the NPCSC decides to declare a state of war or decides that the HKSAR is in a state of emergency ‘by reason of turmoil within the [HKSAR] which endangers national unity or security and is beyond the control of the government of the [HKSAR]’.³² However, the primary mechanism for regulating the HKSAR’s public health response to the Covid-19 pandemic has been under the Prevention and Control of Disease Ordinance.³³

8. The pandemic has not changed the basic constitutional structure of the HKSAR.

II. Applicable Legal Framework

A. Constitutional and international law

9. There has been no formal declaration of a state of emergency in Hong Kong in relation to the pandemic. It is provided in Article 18 of the Basic Law that the Central People’s Government may issue an order applying ‘the relevant national laws’ in Hong Kong in the event that the NPCSC decides to declare a state of war or, by reason of ‘turmoil’ within the HKSAR which endangers national unity or security and is beyond the control of the HKSAR Government, the NPCSC decides that the HKSAR is in a state of emergency.³⁴ This does not

appear to envisage a pandemic scenario but, if such powers were exercised in the context of a pandemic or other outbreak of infectious disease, it is unlikely that there would be any constitutional restraint on the national laws applied in Hong Kong by the Central People's Government. Though it may technically be possible for the HKSAR courts to purport to strike down an act of a PRC organ outside Hong Kong,³⁵ it is unlikely that this would be done in practice or that it would be tolerated by the PRC central authorities. Meanwhile, the PRC does not have a constitutional court according to the western understanding. The NPC has the power and function of supervising the enforcement of the PRC Constitution,³⁶ and the NPCSC has the power and function of interpreting the PRC Constitution and supervising its enforcement,³⁷ thus vesting the power of constitutional interpretation and enforcement in political, legislative organs.

10. Hong Kong has a dualist legal order in relation to international legal obligations. The Hong Kong Bill of Rights Ordinance (cap 383) incorporates the provisions of the International Covenant on Civil and Political Rights (ICCPR) into Hong Kong law. The Bill of Rights binds the HKSAR Government and all public authorities and any person acting on behalf of the HKSAR Government or a public authority.³⁸ A court or tribunal may grant such remedy or relief, or make such order, in respect of a breach, violation, or threatened violation of the Bill of Rights as it has power to grant or make in relevant proceedings and as it considers appropriate and just in the circumstances.³⁹ It is provided that in a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation. Such measures must be taken in accordance with law.⁴⁰ No such measure shall be taken that is inconsistent with any obligation under international law that applies to Hong Kong—other than an obligation under the International Covenant on Civil and Political Rights—, involves discrimination solely on the ground of race, colour, sex, language, religion, or social origin, or derogates from other specified provisions.⁴¹

11. There has been no decision to derogate from the ICCPR.

12. The Prevention and Control of Disease Ordinance was enacted in 2008 in order to bring Hong Kong's legislative framework for measures to control and prevent disease into line with the International Health Regulations (2005) of the World Health Organization (WHO).⁴²

B. Statutory provisions

13. The legislative framework used for dealing with Hong Kong's public health response to the Covid-19 pandemic has primarily been under the Prevention and Control of Disease Ordinance (cap 599), and to a lesser extent the Emergency Regulations Ordinance (cap 241). These were enacted prior to the Covid-19 outbreak.

14. The Prevention and Control of Disease Ordinance was enacted in 2008 in order to bring Hong Kong's legislative framework for measures to control and prevent disease into line with the International Health Regulations (2005) of the WHO, repealing and replacing the Quarantine and Prevention of Disease Ordinance (cap 141) which had been in place since 1936.⁴³ On 8 January 2020, '[s]evere respiratory disease associated with a novel infectious agent (嚴重新型傳染性病原體呼吸系統病)' was added to Schedule 1 of the Prevention and Control of Disease Ordinance,⁴⁴ which also includes, for example, acute poliomyelitis, food poisoning, Japanese encephalitis, meningococcal infection (invasive), and Zika Virus

infection.⁴⁵ This brought Covid-19 (as it was later named) under the regulatory framework of the Ordinance.

15. Section 7 of the Prevention and Control of Disease Ordinance empowers the Secretary for Food and Health to make regulations for the purpose of preventing the introduction into, the spread in, and the transmission from Hong Kong of any disease, source of disease, or contamination. Section 8 empowers the Chief Executive in Council to, ‘on any occasion which the Chief Executive in Council considers to be an occasion of a public health emergency’, make regulations for the purposes of preventing, combating, or alleviating the effects of the public health emergency and protecting public health. This is not a formal declaration of a public health emergency as such, but rather a state of affairs—in the opinion of the Chief Executive in Council—which is a condition precedent to making such regulations. This power to make regulations does not specifically mention WHO recommendations but could feasibly be in response to and/or implementation of WHO recommendations.⁴⁶ The Director of Health may in addition prescribe any measure to be applied in light of any temporary recommendation of the WHO pursuant to Articles 15, 17 and 18 of the International Health Regulations.⁴⁷

16. There has been little systematic or sustained criticism of the HKSAR Government’s public health handling of the Covid-19 pandemic, nor of the nature or extent of measures used to implement its handling, from a legal or human rights perspective. This may be at least partly due to other major events currently affecting Hong Kong, in particular the enactment by the NPC of the ‘national security legislation’ for Hong Kong,⁴⁸ in the wake of around one year of persistent civil unrest. In that regard, one notable exception, relating to the suspension of elections, is discussed in Part III.D below.

C. Executive rule-making powers

17. Various pieces of subsidiary legislation were made during the Covid-19 pandemic under section 8 of the Prevention and Control of Disease Ordinance.⁴⁹ After ‘[s]evere respiratory disease associated with a novel infectious agent (嚴重新型傳染性病原體 呼吸系統病)’ (referring to Covid-19)⁵⁰ was listed as a scheduled infectious disease, 42 regulations have been made as of 15 October 2020 under this section which comprise the primary public health law response to Covid-19. The nomenclature in the Hong Kong legislative framework was updated to ‘coronavirus disease 2019 (Covid-19)’ to align with the WHO’s adoption of the name ‘coronavirus disease 2019 (Covid-19)’ to refer to the disease, and ‘severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)’ to refer to the virus causing the disease. The majority of these regulations have been amendments to regulations on such matters as the compulsory quarantine of persons arriving in Hong Kong,⁵¹ the requirement to give information to a health officer,⁵² restrictions on business activity,⁵³ prohibition on group gatherings,⁵⁴ regulation of cross-boundary travel,⁵⁵ and the wearing of face masks.⁵⁶

18. Various amendments were subsequently made to the aforementioned pieces of subsidiary legislation. Each piece of subsidiary legislation contains a sunset clause, which have been variously updated, and at the time of writing were dated 31 December 2020 (each was subsequently amended to 31 March 2021). There is no direct limit on the number of times (or durations by which) powers may be extended beyond the period specified in the initial sunset clause. As the Prevention and Control of Disease Ordinance does not provide that any subsidiary legislation made thereunder would be effective subject to the approval of the Legislative Council (known as the ‘positive vetting procedure’)⁵⁷, the subsidiary legislation thereunder was laid on the table of the Legislative Council for scrutiny and amendment (known as the ‘negative vetting procedure’)⁵⁸—successful motions for amendment are not common—thus providing limited opportunity for control by the legislature.⁵⁹ A Legislative Council resolution on the Prevention and Control of Disease

(Prohibition on Group Gathering) Regulation (cap 599G) was not dealt with for procedural reasons.⁶⁰

19. It should be noted that some of the regulatory response exists outside the primary and secondary legislative framework. For example, it is provided in section 12(3) of the Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (cap 599E) that any notice by the Secretary for Food and Health specifying any place outside China as a 'Category 1' or 'Category 2' specified foreign place, relevant to the application of quarantine restrictions, is 'not subsidiary legislation'.⁶¹ Similarly, it is provided in section 4(3) of the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (cap 599G) that any notice by the Secretary for Food and Health specifying a period during which no group gathering may take place is 'not subsidiary legislation'.⁶² While such notices are subject to tests of legality and constitutionality just as are instances of subsidiary legislation,⁶³ such notices would escape, unlike regulations, mandatory scrutiny by the Legislative Council.

20. The Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation (cap 241L)⁶⁴ was subsidiary legislation made under the Emergency Regulations Ordinance (cap 241).⁶⁵ As the Emergency Regulations Ordinance also does not apply the positive vetting procedure, subsidiary legislation made thereunder is likewise subject to the negative vetting procedure.

D. Guidance

21. Government guidance has been gathered in a centralized website,⁶⁶ with a secondary interactive map of Hong Kong showing case, hospitalization, and death data.⁶⁷ Government information relevant to Covid-19 has also been distributed through a Telegram channel,⁶⁸ and via televised press briefings typically given by senior representatives from the Centre for Health Protection and the Health Authority. Members of the Expert Advisory Group have made regular media appearances communicating their public health views and recommendations during the Covid-19 pandemic. These have been collated on the Government's centralized website, but all collated media appearances are in Cantonese only.⁶⁹ Non-binding guidance has been issued including the avoidance of crowded situations, hygiene advice, and sanitary recommendations.⁷⁰

III. Institutions and Oversight

A. The role of the legislature in supervising the executive

22. The Legislative Council is a relatively weak legislature for a variety of reasons, principally relating to systemically entrenched executive dominance. For example, the written consent of the Chief Executive is required before bills relating to government policies may be introduced,⁷¹ and whereas the passage of bills introduced by the government shall require a simple majority vote of the members of the Legislative Council present, the passage of motions, bills, or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the geographical constituency members and functional constituency members present—which is much more difficult to obtain.⁷² Not only is it significantly more difficult for individual members to introduce bills than for the government to introduce bills, it is also more difficult for bills introduced by individual members to proceed successfully through the legislative process. The Chief Executive also has a limited veto power over legislation, as the Chief Executive may, if they consider that a bill passed by the Legislative Council is not compatible with the overall interests of the HKSAR, return the bill to the Legislative Council within a period of three months for reconsideration.⁷³ If the Legislative Council again passes the original bill by not less than a two-thirds majority of all the members, the

Chief Executive must sign and promulgate it within a period of one month or dissolve the Legislative Council—a power that may be exercised once only in each term of their office.⁷⁴

23. There is a Subcommittee of the Legislative Council on Subsidiary Legislation Relating to the Prevention and Control of Disease. There was also a Subcommittee of the Legislative Council on the Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation. The Legislative Council has oversight of subsidiary legislation through the positive vetting and negative vetting procedures. The negative vetting procedure has been used for the subsidiary legislation relating to the regulatory response to the Covid-19 pandemic, reflective of the fact that the majority of subsidiary legislation proceeds through the negative vetting, rather than the positive vetting, procedure. Scrutiny under the negative vetting procedure permits amendment ‘in any manner whatsoever consistent with the power to make ... subsidiary legislation’.⁷⁵

24. The Legislative Council may scrutinize executive action in line with its constitutional power and functions ‘to raise questions on the work of the government’⁷⁶ and ‘to debate any issue concerning public interests’.⁷⁷ The Legislative Council also has the constitutional power and function ‘to receive and debate the policy addresses of the Chief Executive’.⁷⁸ This provides for a limited form of executive accountability before the legislature. However, on 12 October 2020, the Chief Executive postponed her annual policy address in order to attend a meeting in Beijing on economic matters relevant to Hong Kong, at the request of the Central People’s Government.⁷⁹ The Chief Executive’s policy address was subsequently given on 25 November 2020, with the Chief Executive attending a question and answer session on her policy address at the Legislative Council on 26 November 2020. The motion debate had been postponed to a later date due to the increasing severity of the Covid-19 pandemic.⁸⁰ While members have been able to raise questions on the work of the HKSAR Government in response to the Covid-19 pandemic, replies to such questions are typically given by a member of the HKSAR Government other than the Chief Executive. The opportunity for the Legislative Council to secure direct accountability from the Chief Executive in relation to Hong Kong’s response to the Covid-19 pandemic has not been significant.

25. There are 18 Legislative Council panels tasked with monitoring the performance of the government in relation to specific policy areas, including the Panel on Constitutional Affairs, the Panel on Health Services, and the Panel on Welfare Services. These panels approximately, but do not exactly, map on to the division of briefs headed by the Official Members of the Executive Council.⁸¹ Several of the panels have their own subcommittees. The specific public health response to Covid-19 falls within the remit of the Panel on Health Services,⁸² though other matters relevant to the Covid-19 pandemic may arise in the work of other panels. The Panel on Health Services makes an annual report to the Legislative Council,⁸³ with the prevention and control of Covid-19 comprising a major part of the Panel’s work in its most recent annual report to the Legislative Council, dated 8 July 2020.⁸⁴ This included, for example, passing motions urging the HKSAR Government to deny entry to Hong Kong of all non-Hong Kong residents, conduct viral tests for all inbound travellers, and investigate the use of hotels as quarantine facilities.

B. The functioning of the legislature where its ordinary business is disrupted

26. Various changes were made to business in the Legislative Council. Meetings were sometimes adjourned after consideration of time critical items,⁸⁵ cancelled except for dealing with urgent time critical items,⁸⁶ cancelled with business carried over to a future meeting,⁸⁷ conducted with abbreviated transaction of business,⁸⁸ and conducted with restricted transaction of business.⁸⁹ The President of the Legislative Council has the power to suspend a meeting of or adjourn the Legislative Council at any time.⁹⁰ The Basic Law

also provides that the President of the Legislative Council has the power to decide on the Legislative Council agenda, giving priority to government bills for inclusion on the agenda,⁹¹ and to decide on the time of meetings.⁹² There was some disruption to the legislative agenda, though the Legislative Council continued to pass legislation during the pandemic.

27. A meeting was held on 19 February 2020 mainly to deal with urgent questions relating to the Covid-19 outbreak in Hong Kong.⁹³ Significant periods of the pandemic fell into the recess periods, with the Lunar New Year recess running from 19 January 2020 to 8 February 2020, the Easter recess running from 10 April 2020 to 18 April 2020, and the Summer recess running from 18 July 2020 to 14 October 2020.⁹⁴ No Legislative Council meetings were held between 18 July 2020 and 13 October 2020 inclusive, with the exception of a Special House Committee meeting, two special meetings of the Legislative Council Commission, a special meeting of the Panel on Welfare Services, a meeting of the House Committee, and a small number of meetings of the Finance Committee.⁹⁵ This was notwithstanding the power of the President of the Legislative Council to call special sessions during periods of recess.⁹⁶ Voluntary Covid-19 tests were offered to Legislative Council members on 1 September 2020.⁹⁷

28. The Legislative Council Secretariat implemented a range of preventive measures in view of the Covid-19 outbreak in Hong Kong. These included all persons entering the Legislative Council Complex being required to walk on a disinfectant floor mat at the entrance before entry, being subject to body temperature screening, and that those persons attending meetings be 'strongly advised' to wear a surgical mask and bring their own cups and bottles. Furthermore, there was a higher frequency of cleaning and disinfection of facilities, and all persons subject to compulsory quarantine were denied access to the Legislative Council Complex. A maximum of five members of the public were admitted as observers to meetings, and various facilities in the Legislative Council Complex were closed temporarily.⁹⁸

C. Role of and access to courts

29. Court cases began to be adjourned on 29 January 2020, the start of what came to be known as the General Adjourned Period ('GAP'). By 25 March 2020, almost 18 per cent of the annual caseload of courts at all levels had been affected since the beginning of the GAP,⁹⁹ though the Judiciary did not keep precise statistics on cases and proceedings affected during the GAP.¹⁰⁰ The GAP was initially scheduled to end on 22 March 2020, but was extended until 5 April 2020 and thereafter until 3 May 2020.¹⁰¹ Arrangements were made for urgent and essential court hearings and business, including the hearing of fresh remand cases, urgent bail reviews, and urgent civil matters to be handled promptly during the GAP.¹⁰² Parallel preparation was made for the backlog of cases which had accumulated during the GAP to be cleared and for an orderly resumption of judicial proceedings after the expiry of the GAP. This included proactive case management by all judges and judicial officers, and all judges and judicial officers considering or inviting the parties to consider disposing of their cases by paper as far as possible, without an oral hearing, in particular for civil cases, such as in relation to interlocutory matters.¹⁰³ In addition, preparations were made for an orderly reopening of judicial offices and registries in four phases: (i) reopening of the Registries of the Court of Final Appeal, the High Court, and the Competition Tribunal; (ii) reopening of the Registries of the Family Court and the District Court; (iii) reopening of the Registries of the Lands Tribunal, the Magistrates' Courts, the Obscene Articles Tribunal, and the Coroner's Court, and (iv) reopening of the Registries of the Labour Tribunal and the Small Claims Tribunal.¹⁰⁴ This was in addition to special arrangements made to regulate crowd management and an upsurge in caseload following the expiry of the GAP, such as requirements to undergo a body temperature check and wear

a surgical mask while on judicial premises, social distancing measures, and procedures for persons subject to quarantine requirements or medical surveillance to apply to the court for permission for absence from the court.¹⁰⁵

30. The Judiciary had already been developing by phases an integrated court case management system ('iCMS') across all levels of court to enable electronic handling of court documents and payments. The Court Proceedings (Electronic Technology) Bill was introduced to the Legislative Council on 8 January 2020 to provide a legislative basis for this, though whereas the Bill was signed and promulgated as law on 23 July 2020, as the Court Proceedings (Electronic Technology) Ordinance (cap 638),¹⁰⁶ it is not yet in operation and shall not be in operation until a date is appointed for the same by the Chief Justice by notice published in the Gazette.¹⁰⁷

31. By March 2020, it was still not the practice to hold hearings by way of video conferencing, as there was only a legislative basis for using video conferencing to take evidence from witnesses overseas in civil and criminal proceedings. It was considered by the Judiciary that the use of video conferencing for holding the entire court hearing may be unlawful.¹⁰⁸ Nevertheless, limited expansion of the use of information technology was implemented in the administration of judicial business.¹⁰⁹ Starting from 3 April 2020, video conferencing facilities were used for remote hearings for suitable civil cases in the High Court, and from 15 June 2020, there was an expanded practice for remote hearings by the use of video conferencing facilities and telephone in civil cases in the Court of Appeal, the Court of First Instance, the Competition Tribunal, and the District Court (including the Family Court).¹¹⁰ Indeed, from 4 May 2020, all civil and criminal proceedings, including trials, had been scheduled to resume unless they were adjourned pursuant to specific court directions.¹¹¹ While the disposal of cases on paper, without an oral hearing, was encouraged, it was recognized that in some cases oral submissions were still necessary.¹¹² The Judiciary noted that:

Insofar as the conduct of remote hearings might impact the open justice principle, it is settled law that different balances may be struck with regard to different aspects of open justice being subject to restrictions when other competing fundamental rights are engaged. The court will be astute to ensure the appropriate balance is struck, for example by the continued public dissemination of reasoned decisions.¹¹³

Remote hearings would in general be conducted openly where the public and media could attend physically, though in the 'exceptional circumstances of the threat to public health caused by the current pandemic', remote hearings should proceed even where public or media access was impossible. The decision on whether, how, and to what extent public or media access should be permitted rested with the court.¹¹⁴

32. The Chief Judge of the High Court issued a guidance note for remote hearings for civil business in the High Court.¹¹⁵ Included in the guidance was a statement that Practice Direction 29 on the use of the 'Technology Court'¹¹⁶ would not apply to remote hearings conducted by video conferencing facilities or other video or electronic technology,¹¹⁷ though Practice Direction 29 would continue to apply where the only remote element of the hearing involved a witness giving evidence from outside Hong Kong.¹¹⁸ Judges would decide which of their cases might be suitable for disposal by way of a remote hearing using video conferencing facilities, with the initiative in that regard coming from the court, and judges not entertaining applications to use video conferencing facilities.¹¹⁹ Parties could

nevertheless object to the holding of a remote hearing, though the final decision would rest with the court.¹²⁰

33. It was considered that, in the Court of First Instance, all interlocutory applications, appeals, and final hearings ordinarily dealt with on written evidence (without oral evidence), such as applications for judicial review, would be considered for remote hearing. Applicants for leave to apply for judicial review would still have to observe the relevant rules on time limits.¹²¹ It was considered that, in the Court of Appeal, all civil appeals and interlocutory applications, including applications for leave to appeal, would be considered for remote hearing. The general position was that applications suitable for remote hearing by video conferencing facilities would be those in which the court considered that focused oral submissions could be concluded within two hours.¹²² Trials were not considered suitable for remote hearing in the first phase,¹²³ though in the second phase it was considered that some trials or parts of trials may be considered suitable for remote hearing.¹²⁴

34. All court rules and practice on court etiquette continued to apply during remote hearings—with the exception of standing when making submissions and at the beginning and conclusion of hearings—including the wearing of robes by the judge, barristers, and solicitor advocates appearing in the case.¹²⁵ All short directions hearings in the Court of First Instance, the District Court, and the Family Court were suitable for consideration to be conducted remotely by way of telephone.¹²⁶ In *Cyberworks Audio Video Technology Ltd (in Compulsory Liquidation) v Mei Ah (HK) Co Ltd*, for example, the Court of First Instance directed the use of a telephone hearing having observed that neither the High Court Ordinance (cap 4) nor the Rules of the High Court (cap 4A) required court hearings to be held with physical attendance of parties or their representatives.¹²⁷ The first case to be conducted remotely via video link was an appeal case in the Court of Appeal on 6 April 2020, with the first Court of First Instance hearing being conducted remotely via video link on 7 April 2020.¹²⁸ Remote hearings were not used in criminal proceedings.¹²⁹

35. Administrative tribunals are not part of the judicial branch in Hong Kong, nor are they administered by the Judiciary. Administrative tribunals are part of the executive branch—despite their quasi-judicial function—and are operated by individual government departments.¹³⁰ Administrative tribunals such as the Administrative Appeals Board¹³¹ and the Municipal Services Appeals Board¹³² resumed normal operation with effect from 15 September 2020. Normal operation was again suspended and scheduled to resume on 20 January 2021. There is an underlying lack of transparency pertaining to administrative tribunals in Hong Kong when contrasted with the transparency of the courts and judicial system, in addition to deep structural flaws.¹³³

D. Elections

36. The HKSAR Government announced on 31 July 2020 that the Chief Executive in Council had decided to postpone the Legislative Council General Election from 6 September 2020 to 5 September 2021.¹³⁴ The Chief Executive in Council exercised her powers under the Emergency Regulations Ordinance to make the Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation, effective 1 August 2020.¹³⁵ The Government cited the finding of the International Institute for Democracy and Electoral Assistance that, between 21 February 2020 and 26 July 2020, at least 68 countries and territories had decided to postpone elections due to Covid-19.¹³⁶

37. The Legislative Council Ordinance provided that, in a situation where ‘the election is likely to be ... seriously affected by ... any danger to public health or safety’, then the Chief Executive may by order direct the postponement or adjournment of polling to a date not later than 14 days after the date on which the election would have taken place but for the direction.¹³⁷ However, the Henry VIII clauses in the Emergency Regulations Ordinance enable the Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation to operate notwithstanding said provision of the Legislative Council Ordinance.¹³⁸ The Department of Justice of the HKSAR Government explained that it was ‘unrealistic to invoke section 44 of the Legislative Council Ordinance to postpone the election for 14 days repeatedly’.¹³⁹ There was a question as to the constitutionality of the Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation, however, which must be compliant with the Basic Law. Article 69 of the Basic Law provides that the term of office of the Legislative Council shall be four years, whereas the Regulation purported to extend the term of the sixth Legislative Council to five years. However, the NPCSC issued a decision on 11 August 2020 providing for the term of the sixth Legislative Council to be extended for no less than one year until the commencement of the seventh-term Legislative Council.¹⁴⁰ The constitutional status of the NPCSC decision remains unclear in Hong Kong considering that the NPCSC did not use the interpretation mechanism provided in Article 158 of the Basic Law,¹⁴¹ and neither did the NPC use the amendment mechanism provided in Article 159 of the Basic Law.

E. Scientific Advice

38. It was announced on 25 January 2020 that the Chief Executive would chair a Steering Committee cum Command Centre with a view to formulating relevant strategies and measures according to the development of Covid-19. This would include four workgroups: the Workgroup on Disease Prevention and Control led by the Secretary for Food and Health; the Workgroup on Responses and Actions led by the Chief Secretary for Administration; the Workgroup on Public Participation led by the Secretary for Home Affairs; and the Workgroup on Communications led by the Secretary for Constitutional and Mainland Affairs.¹⁴²

39. It was also announced on 25 January 2020 that a four-person Expert Advisory Group, appointed by the Chief Executive, would be set up under the Steering Committee cum Command Centre to provide scientific advice to the Chief Executive and the HKSAR Government.¹⁴³ This comprised medical and microbiology experts.¹⁴⁴ The advice of the Expert Advisory Group has not been published and does not appear to be binding on the HKSAR Government. Members of the Expert Advisory Group have featured regularly in the media where they have frequently expressed their views and recommendations in relation to the regulatory response to the Covid-19 pandemic.¹⁴⁵ The independence of the Group’s members from the HKSAR Government is difficult to verify.

F. Freedom of the press and freedom of information

40. Article 27 of the Basic Law provides that ‘Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions; and to strike’. Further protection is found in Article 16 of the Hong Kong Bill of Rights which provides for ‘freedom of opinion and expression’, though it is provided that freedom of expression ‘carries with it special duties and responsibilities’, and that it may be restricted as provided by law and when necessary for, inter alia, the protection of public health.

41. Nevertheless, there have been increasing concerns about restrictions on freedom of the press in Hong Kong in recent years. Hong Kong's rating in Reporters Without Borders' World Press Freedom Index has fallen from a rating of joint 58th of 180 territories in 2013, to 80th of 180 territories in 2020.¹⁴⁶ The Liaison Office of the Central People's Government of the HKSAR controls two newspapers in Hong Kong, namely *Ta Kung Pao* and *Wen Wei Po*,¹⁴⁷ while the South China Morning Post—generally regarded as the most credible mainstream newspaper in Hong Kong—was acquired by the Alibaba Group—a Mainland Chinese technology corporation—in 2016. Some independent online media, which are often critical of the HKSAR Government, operate in Hong Kong.¹⁴⁸

42. There have been numerous reports of journalists being harassed and targeted by the police in relation to the civil unrest which was sparked by the introduction of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, more commonly known as the 'Hong Kong Extradition Bill'. These reports have included allegations of journalists being subjected to police tear gassing, baton attacks, and attempts by police officers to prevent protests being covered by the press.¹⁴⁹ Among several notable incidents was the shooting of a protestor by a police officer with a live bullet during the civil unrest in 2019.¹⁵⁰ The role of law enforcement during the Covid-19 pandemic should be viewed in this context. In July 2020, the Hong Kong Journalists Association accused riot police of fining 17 student reporters for violating restrictions on group gatherings while they were covering protests to mark the anniversary of a mob attack in Yuen Long.¹⁵¹ More broadly, restrictions on group gatherings have been used to suppress and prevent public protests at a time of rapid constitutional change and increasing authoritarianism in Hong Kong.¹⁵² It remains to be seen what effect the recently enacted Law of the PRC on Safeguarding National Security in the HKSAR,¹⁵³ more commonly known as the 'Hong Kong National Security Law', will have on press freedom during the Covid-19 pandemic and beyond.

43. Hong Kong has a weak freedom of information framework. The primary document regulating freedom of information is the Code on Access to Information, introduced in March 1995, which has no formal, legally-binding character inasmuch as it is not enshrined in legislation.¹⁵⁴ It is therefore difficult to assess whether and to what extent the Covid-19 pandemic has impacted the freedom of information framework in Hong Kong. The only statistics available at the time of writing in relation to access to information requests during the Covid-19 pandemic are for the period January to March 2020. During this period, 2,377 requests were concluded, of which 1,924 were met in full, 131 were met in part, 67 were refused, and 255 were withdrawn or were requests for information that was not in the public agency's possession or were requests for which the existence of information could neither be confirmed nor denied by the public agency.¹⁵⁵ The figures for the equivalent period in the preceding year, January to March 2019, show that 1,947 requests were concluded, of which 1,636 were met in full, 66 were met in part, 49 were refused, and 196 were withdrawn or were requests for information that was not in the public agency's possession or were requests for which the existence of information could neither be confirmed nor denied.¹⁵⁶ The Ombudsman of Hong Kong has limited jurisdiction over compliance with the Code on Access to Information in relation to the Independent Commission Against Corruption, Hong Kong Auxiliary Police Force, Hong Kong Police Force, and Secretariat of the Public Service Commission.¹⁵⁷

G. Ombuds and oversight bodies

44. The Ombudsman of Hong Kong is the general ombudsman for Hong Kong appointed under the Ombudsman Ordinance (cap. 397).¹⁵⁸ The Ombudsman has jurisdiction over maladministration committed by a diverse range of public bodies including the Airport Authority, Department of Justice, Inland Revenue Department, Radio Television Hong Kong, and Water Supplies Department.¹⁵⁹ The Ombudsman has to date not conducted any general accountability investigation in relation to the handling of the Covid-19 pandemic, though at the time of writing the Ombudsman was conducting a direct investigation into the Government's mechanism for monitoring vaccines provided by private healthcare facilities,¹⁶⁰ which may be relevant to the medical and public health response to Covid-19. The Ombudsman, their staff, and advisers to the Ombudsman are subject to a statutory obligation to maintain secrecy in respect of all matters that arise from any investigation or complaint made to the Ombudsman, and come to their actual knowledge in the exercise of their functions.¹⁶¹

IV. Public Health Measures, Enforcement and Compliance

A. Public health measures

45. As of 23 February 2021, the HKSAR recorded 10,896 confirmed Covid-19 cases, including 197 deaths, out of a population of 7.5 million, which appeared small relative to commensurate jurisdictions, such as Switzerland's 551,355 cases (9,919 deaths) out of 8.7 million people.¹⁶² The former British Crown colony and current Chinese Special Administrative Region offers an interesting case study about the effective containment of Covid-19 without imposing general lockdowns.¹⁶³

46. The relatively minor impact of Covid-19 on the health of the HKSAR's population seemed counterintuitive,¹⁶⁴ given the territory's geographical connection with Wuhan, and many other affected parts of Mainland China, through a highspeed railway network, among other transportation options. The territory's apparent success thus far may in part be attributed to its traumatic experience in handling the severe acute respiratory syndrome (SARS) epidemic of 2003, which prompted the local community to take early hygiene precautions in January 2020, such as frequent handwashing and social distancing before official guidelines were issued,¹⁶⁵ and wearing face masks to prevent asymptomatic transmissions, the WHO's contrary advice notwithstanding.¹⁶⁶ Many Hong Kong residents were prepared to act in concert in anticipation of public crises, due to frequent collective mobilizations in recent memory,¹⁶⁷ and the existence of a vibrant civil society.¹⁶⁸ State-society conflicts in the months before the Covid-19 outbreak reinforced a widespread scepticism—even in the medical and healthcare community¹⁶⁹—of the early optimistic assessments of Covid-19 by the Chinese authorities.¹⁷⁰

47. The HKSAR was one of the first jurisdictions in the world to declare a public health emergency when the Chief Executive in Council in February 2020 promulgated two public health emergency regulations through an exercise of her wide ranging¹⁷¹ powers provided by Section 8 of the Prevention and Control of Disease Ordinance (cap 599).¹⁷² Section 8(5) (a)–(c) of the Ordinance defines the novel concept of 'public health emergency' as 'the occurrence of or the imminent threat of a disease, an epidemic or a pandemic'; 'the occurrence of a novel, or highly infectious, agent or matter'; or 'the widespread exposure or the imminent threat of widespread exposure of human beings to an infectious agent' that has 'a high probability of causing a large number of deaths in the population or a large number of serious disabilities (whether or not long-term) in the population.' This precise definition is an improvement on the vague notion of 'emergency or public danger' contained in the controversial Emergency Regulations Ordinance (cap 241),¹⁷³ enacted in 1922, which would likely be the statutory basis for public health emergency regulations had the

Prevention and Control of Disease Ordinance not existed,¹⁷⁴ as the Court of Appeal recently speculated.¹⁷⁵

1. Individual mobility restrictions on citizens (*stay-at-home, curfews, etc*)

48. As at 23 February 2021, there was no primary or subsidiary legislation mandating a general lockdown in the HKSAR, although this all-or-nothing containment strategy was first devised by China in Wuhan, Hubei, in January 2020, and eventually deployed by jurisdictions across the world, including liberal democracies in North America and Europe, such as England in the United Kingdom—whose legal tradition the HKSAR has inherited—to combat the pandemic.¹⁷⁶ A piece of subsidiary legislation, the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (cap 599J), adopted by the Chief Executive in Council on 15 November 2020, was later deployed to legitimise dozens of highly controversial ‘ambush’ lockdowns of designated residential blocks for overnight Covid-19 testing since 23 January 2021. These lockdowns were typically preceded by no warning, and featured police officers using barricade tape to seal off residential buildings and people of all ages within them, a law enforcement procedure more associated with the isolation of crime scenes. A person who breaks a compulsory testing notice under this Regulation commits a criminal offence punishable by a fine of HK\$25,000 (US\$3,225) and 6 months’ imprisonment.¹⁷⁷

2. Restrictions and international or internal travel

49. Demands from the general public and the medical community for restrictions on international travel and cross-border travel with Mainland China remained strong since the first Covid-19 confirmed case was recorded in the HKSAR on 23 January 2020.¹⁷⁸ The Chief Executive’s refusals to completely shut down the HKSAR’s land border with the Mainland were interpreted by many as politically motivated.¹⁷⁹ The HKSAR Government did adopt measures to significantly reduce traffic with the Mainland, starting with the suspension of highspeed railway services on 30 January 2020. The Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (cap 599C) decreed on 8 February 2020, imposed a compulsory quarantine for 14 days on any person who arrives from Mainland China, or had been there in the previous 14 days.¹⁸⁰ A person breaking a quarantine order commits a criminal offence punishable by a fine of HK\$25,000 (US\$3,225) and 6 months’ imprisonment.¹⁸¹

50. From 19 March 2020, every individual, including a Hong Kong permanent resident, arriving from places outside Mainland China, Macau, and Taiwan, was subject to compulsory quarantine for 14 days, under the Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (cap 599E), promulgated in light of an increase in imported COVID-19 cases from its new epicentres in Europe and North America.¹⁸² On 25 December 2020, in response to the spread of Covid-19 variants in South Africa and the United Kingdom, the HKSAR tightened its immigration control regime under the Prevention and Control of Disease (Regulation of Cross-boundary Conveyances and Travellers) Regulation (cap 599H), so that all who have stayed in South Africa, in addition to the United Kingdom, as earlier decreed, for more than two hours in the past three weeks will not be allowed to board for the HKSAR.

51. The same Regulation imposes requirements on people who stayed in designated high-risk jurisdictions during the past 21 days to submit laboratory or healthcare test reports with negative results in nucleic acid tests for Covid-19 within the past 72 hours,¹⁸³ and proof of hotel reservations in the HKSAR for the next 21 days. As at 23 February 2021, jurisdictions on the list included ‘extremely high-risk’ ones: Brazil, Ireland, South Africa, and the United Kingdom, and the ‘very high-risk’ countries of Bangladesh, Belgium, Canada, Ecuador, Ethiopia, France, Germany, India, Indonesia, Kazakhstan, Nepal, Pakistan, the Philippines, Romania, Russia, Switzerland, Turkey, Ukraine, the United Arab

Emirates, and the United States.¹⁸⁴ Arriving travellers were required to wait for their test results following the collection of deep throat saliva samples for testing at a Temporary Specimen Collection Centre of the Department of Health, in accordance with the Prevention and Control of Disease Ordinance. Whether Hong Kong residents or not, those tested negative were permitted to complete their 21-day compulsory quarantine at hotels they reserved beforehand; those testing positive were sent to hospitals for isolated treatment.

3. Limitations on public and private gatherings and events

52. The Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (cap 599G) prohibits gatherings of over two to four persons in public places, depending on the circumstances. A family consisting of any number of persons is nonetheless exempt from this prohibition insofar as they live in the same household. Examples of other exemptions under this Regulation, now repealed by amendments to this Regulation that took effect on 2 December 2020, include those that were provided on 2 October 2020 to religious gatherings at religious buildings with numbers of participants half their normal size; and on 23 October 2020 to local tours organized by licensed travel agents of no more than 30 participants and wedding ceremonies of no more than 50 participants. An offence against this Regulation is punishable by a fine of at HK\$25,000 (US\$3,226) and imprisonment for 6 months. In *Leung Chi Hung v Hong Kong Government*,¹⁸⁵ the Court of First Instance of the High Court ruled that the Regulation's restriction on the freedoms of speech, of the press, of publication, of association, of assembly, of procession, of demonstration, to form and join trade unions, to strike, and of freedom of the person guaranteed by Articles 27 and 28 of the Basic Law—which are not absolute rights—was not disproportionate, and was therefore constitutional.

53. The law or the administrative state has, with some exceptions such as restaurants, largely left the decision of whether and how to impose actual physical distancing measures in workplaces, shopping arcades, shops, and so on into the hands of those in charge of them. There is no binding legal requirement of physical distancing that applies uniformly throughout all of Hong Kong. The Secretary for Food and Health does have administrative power under sections 4 and 6 of the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (cap 599F) to specify pandemic measures for catering businesses, including shortened business hours, but these measures are not subsidiary legislation, and thus not part of the law. In Directions G.N. (E.) 106 of 2021, issued on 17 February 2021, the Secretary inter alia demanded catering businesses ensure that there is a distance of at least 1.5 metres between one group of customers from another, and that the number of customers at any one time must not exceed 50% of the premises' seating capacity.

4. Closure of premises and facilities (eg schools, shops, services, parks, churches, sport facilities)

54. The Chief Executive announced on 31 January 2020 that all schools would not resume until at least 2 March 2020, a date repeatedly postponed afterwards. On 21 March 2020, she declared an indefinite class suspension. In late August 2020, after the end of the territory's 'third wave' of Covid-19 infections, the Government announced that schools would resume half-day face-to-face teaching in two phases. Schools were shut down again in early December 2020, in response to Hong Kong's 'fourth wave' of infections, triggered more or less by super-spreading events associated with a number of dance clubs. The legal basis of the territory-wide power of the Chief Executive, presumably acting through the Secretary for Education, to close or re-open schools was not self-evident in the Prevention and Control of Disease Ordinance. It may be possible to justify, albeit with considerable stretch, the closing of schools under a pandemic on the basis of powers conferred by section 83(1)(a) of the Education Ordinance (cap 279), which authorizes the Permanent

Secretary for Education, a senior civil servant position subordinate to the Secretary, to instruct school management bodies to close their premises, if 'there is any danger or risk of danger to persons in any school premises.'

55. Commencing on 28 March 2020, the Prevention and Control of Disease (Requirement and Directions) (Business and Premises) Regulation (cap 599F) contains a list of businesses and premises in its Schedule 2 that can be shut down in whole or in part by the Secretary for Food and Health. As of 23 February 2021, these included amusement game centres, bathhouses, fitness centres, places of amusement, places of public entertainment, party rooms, beauty parlours, club-houses, clubs or nightclubs, karaoke establishments, Mahjong-tin kau premises, massage establishments, sports premises, swimming pools, hotels, or guesthouses not exempted from the Hotel and Guesthouse Accommodation (Exclusion) Order (cap 349C).

5. Physical Distancing

56. See Part IV.A.3, paragraph 53 above.

6. Use of face coverings and personal protective equipment (PPE)

57. In early October 2019, the Chief Executive in Council invoked the Emergency Regulations Ordinance (cap 241) (ERO) to promulgate a Prohibition on Face Covering Regulation (cap 241K) (PFCR) which controversially banned the wearing of face masks in both unlawful and lawful public assemblies, and was almost immediately defied by tens of thousands of protesters in subsequent protests and demonstrations, who were concerned with being identified by facial recognition surveillance technology.¹⁸⁶ Elements of the ERO and the PFCR were declared unconstitutional on the grounds of unconstitutional delegation of legislative power and disproportionality, respectively, by two High Court judges sitting within a divisional court of the Court of First Instance in *Kwok Wing Hang v Chief Executive in Council* in mid-November 2019.¹⁸⁷ On appeal in April 2020,¹⁸⁸ the Court of Appeal partly reversed their judgment, and reaffirmed the ERO's constitutionality. It nevertheless upheld the High Court ruling that the PFCR outlawing of the wearing of facial covering in authorized assemblies and empowerment of police to remove face masks are unconstitutional. On 21 December 2020, the Court of Final Appeal, with Lord Hoffmann sitting as the fifth judge, delivered its ultimate judgment in *Kwok Wing Hang v Chief Executive in Council*,¹⁸⁹ affirming the constitutionality of the PFCR and the ERO in their entirety.

58. It was against this background that the HKSAR Government had remained equivocal about the mandatory use of protective face masks, resulting in further criticism from the press and netizens.¹⁹⁰ This ambiguity ended with the promulgation of Prevention and Control of Disease (Wearing of Mask) Regulation (cap 599I), which entered into force on 23 July 2020, obligating every person to wear face masks in public places.¹⁹¹ In *Haider Ali v Social Welfare Department*,¹⁹² one of the two aforementioned High Court judges rejected a challenge against the Regulation, holding that the compulsory mask-wearing rule pursued and was rationally connected with the legitimate aim of preventing or controlling the transmission of Covid-19; was not manifestly without reasonable foundation; and struck a reasonable balance between societal benefits and the restriction on the applicant's freedom to not wear a mask in public places.¹⁹³

7. Isolation of infected individuals and quarantine of individuals suspected of infection

59. The aforementioned Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (cap 599C), which took effect on 8 February 2020, required unexempted individuals who were in Mainland China for any duration during the previous 14 days to be subject to compulsory quarantine for 14 days, irrespective of their nationality and HKSAR residency. In *Horsfield Leslie Grant v Chief Executive of HKSAR*,¹⁹⁴ the Court of First Instance of the High Court rejected a *habeas corpus* challenge from applicants, five Hong Kong residents and their domestic helper returning from South Africa, to the lawfulness of their alleged detention at a quarantine centre, pursuant to this Regulation. The High Court judge determined that the quarantine's restriction on the applicant's rights to liberty and personal security under the Basic Law, the Bill of Rights, and the common law was constitutional, as it inter alia did not impose an unacceptably harsh burden on the applicants.

8. Testing, treatment, and vaccination

60. On 1 September 2020, the Government introduced a two-week Universal Community Testing Programme, backed by the authorities in Beijing, that tested 1.78 million people on a voluntary basis, which ended up identifying 32 Covid-19 carriers.¹⁹⁵ By the conclusion of the Programme, the HKSAR had conducted over 3.31 million Covid-19 tests, averaging around 440,000 tests conducted per one million people, a rate higher than those of jurisdictions such as Japan, Singapore, and South Korea.¹⁹⁶ The aforementioned Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (cap599J), promulgated on 15 November 2020, authorizes the Secretary for Food and Health and designated medical practitioners to issue compulsory testing instructions to persons clinically suspected to have contracted Covid-19. The Prevention and Control of Disease (Use of Vaccines) Regulation (Cap. 599K), gazetted on 23 December 2020, authorizes the Secretary for Food and Health to permit the emergency use of a certain Covid-19 vaccine, in light of the expert advice. A voluntary vaccination programme, using the Sinovac Biotech (CoronaVac) Covid-19 vaccine, was set to begin in late February 2021. As of 23 February 2021, there was no Covid-19 mandatory vaccination law in the HKSAR.

9. Contact tracing procedures

61. General contact tracing procedures in Hong Kong remain considerably traditional. There is no widespread use of any particular contact tracing mobile app. In February 2020, a month after the initial Covid-19 outbreak in the HKSAR, the Department of Health did invite the Hong Kong Police to deploy its computerized Major Incident Investigation and Disaster Support System to enhance overall contact tracing work. In January 2021, 100 police, customs, and immigration officers were co-opted into a contact-tracing team whose responsibility was to make phone calls or visit close contacts of infected persons, under the supervision of health personnel.¹⁹⁷

62. The Prevention and Control of Disease (Disclosure of Information) Regulation (cap 599D) made it an offence for any person to knowingly giving false or misleading information to health officers or medical practitioners, punishable by a fine of at HK\$10,000 (US\$1,290) and imprisonment for 6 months.¹⁹⁸ As at 31 October 2020, the general population of the HKSAR had not been legally obligated to download any contact tracing app. However, wristbands connected to an app called 'StayHomeSafe' were mandatorily distributed to people arriving from overseas, who were required to wear them throughout their 14-day

home quarantine period. There were privacy concerns about the app despite repeated reassurances from the Government.¹⁹⁹

63. In June 2020, the HKSAR Government rolled out a proposal to create a ‘Hong Kong Health Code’ mobile app that would enable individuals wanting to enter neighbouring Guangdong Province, and potentially also Macau, to present electronic versions of their Covid-19 nucleic acid test results for health declaration purposes.²⁰⁰ Similar apps, which assigned QR codes to people, indicating their health statuses, were in use in Mainland China. It was hardly surprising, in the context of the HKSAR’s pronounced polarization and mistrust since 2019, that there were concerns that the Health Code, under the guise of an electronic health passport, would open a backdoor for sensitive genomic data of Hong Kong residents to be transferred to state security agencies in Mainland China.²⁰¹

64. On 24 November 2020, the Secretary for Food and Health obligated persons in charge of premises covered by the Prevention and Control of Disease (Requirements & Directions) (Business & Premises) Regulation (Cap 599F) to apply for and display on their premises a location-specific ‘LeaveHomeSafe’ QR code linked to a mobile app of the same name for the general public’s use. As of 23 February 2021, it is not legally required for residents to download ‘LeaveHomeSafe’—whose primary function remains to alert its users on whether they have been in the same place with a Covid-19 infected person. Without any positioning function, LeaveHomeSafe has yet to evolve into a health passport in the sense of the aforementioned Health Code.

10. Measures in long-term care facilities or homes for the elderly, restrictions on visitors etc.

65. The Centre for Health Protection, a division of the Department of Health under the Secretary for Food and Health, issued a set of Guidelines for Residential Care Homes for the Elderly or Persons with Disabilities for the Prevention of Coronavirus Disease (COVID-19) in January 2020, and Health Advice to Hostel for Staff Working in Residential Care Homes for the Elderly or Residential Care Homes for Persons with Disabilities for the Prevention of Coronavirus disease (COVID-19) in July 2020, which addressed the control of infections in residential care homes and hostels for residential care home staff, respectively. The Elderly Health Service of the Department of Health conducted on-site inspections of infection control measures undertaken by residential care facilities in the light of the above guidelines and advice, and offered customized training for staff of these institutions.²⁰²

66. Care homes in Hong Kong turned out to be relatively well prepared to shield their residents from Covid-19. Post-SARS measure commonly taken by care homes to combat the present pandemic include pre-emptive and very strict visiting restrictions, obligating all staff to wear surgical masks, and rigorous policies with the aim of guaranteeing that new residents are virus free.²⁰³

B. Enforcement and Compliance

1. Enforcement

67. The People’s Liberation Army Hong Kong Garrison has not played any role in enforcing public health emergency regulations. The primary enforcement agents designated by Section 5(1) of the Prevention and Control of Disease Ordinance are the police, the Director of Health, the Deputy Director of Health, the Controller of the Centre for Health Protection, and medical practitioners appointed by the Director of Health as health or port health officers.

68. On 30 March 2020, a man who provided an officer at the border with a false residential address as his place of quarantine became the first person to be convicted under the new Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (cap 599C); he was sentenced to three months' imprisonment by a Magistrate.²⁰⁴ Shortly afterwards, in early April 2020, six chess players and observers became the first group to be fined HK\$2,000 (US\$256) each for illegal public gathering on a public housing estate in the New Territories, contrary to the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (cap 599G).²⁰⁵

69. Anxiety about selective or politically motivated enforcement of public health measures was expressed, although they were strongly denied by the Commissioner of Police before a heated Legislative Council session on 9 April 2020, among other occasions.²⁰⁶ Riot police arrested or fined protesters, student journalists, and others in the name of enforcing social distancing,²⁰⁷ re-enacting some of the scenes of police-citizen clashes that occurred in the preceding months.

70. On 5 February 2021, a 63-year-old Covid-19 patient, who escaped from his isolation room in Queen Elizabeth Hospital until being tracked down by police 54 hours later, became the first to be sentenced to four months' imprisonment under the Prevention and Control of Disease Regulation (cap 599A), which forbids anyone, 'knowing that he is a contact or is infected with a specified infectious disease, [to] expose other persons to the risk of infection.'²⁰⁸

2. Compliance

71. Tendencies to comply with viral containment guidance and legal requirements should be viewed in the context of Hong Kong's experience of the SARS epidemic in 2003. The initial death rate of SARS infected patients in Hong Kong was around 15 per cent.²⁰⁹ This relatively recent experience of an outbreak of a novel infectious disease likely predisposed Hong Kong to a similar response to the Covid-19 outbreak in 2020. Indeed, a number of measures adopted in Hong Kong during the SARS epidemic were implemented in response to the Covid-19 pandemic. This included the use of isolation or quarantine centres for close contacts of infected patients, mask wearing, disinfection of affected areas, temperature screening of inbound and outbound travellers, and completion of health declaration forms.²¹⁰ Lessons were learned that may have assisted in Hong Kong's biomedical response to the Covid-19 outbreak, including about intensive care capacity, infection control measures, professional training, manpower deployment, staff facilities, and stockpiling of drugs and personal protective equipment.²¹¹

72. Additional major epidemic risks were faced by Hong Kong in subsequent years which may have contributed to systemic and attitudinal preparedness for the Covid-19 pandemic, such as Avian (A/H7N9) Influenza. For example, one study found that 94.4 per cent of respondents considered mask wearing to be an active personal hygiene measure for reducing the risk of influenza transmission when displaying respiratory symptoms.²¹² While actual hygiene practice for such persons fell to 39 per cent of respondents wearing a mask when displaying respiratory symptoms,²¹³ this would be significantly higher than in many territories pre-Covid-19. Indeed, the wearing of surgical masks among Hong Kong residents was a common sight prior to the Covid-19 outbreak, thus reducing the likely contentiousness of mask-wearing that has arisen in other territories during the Covid-19 pandemic. In this broader context, public health guidance regarding Covid-19 would not have been altogether novel for many Hong Kong residents; public health and infectious disease announcements were already a commonplace feature at Hong Kong International

Airport prior to the outbreak of Covid-19. Hong Kong's experience of relatively recent epidemic risks may also have increased its regulatory preparedness.²¹⁴

73. The Hong Kong COVID-19 Health Information Survey was conducted between 9 and 23 April 2020; 1,501 adults—52.5% female and 72.3% aged 18–59 years—were sampled, randomly, for online surveys (n = 1,001) and landline telephone interviews (n = 500). Among the participants of the Survey, 74.2% reported that they avoided going out, 72.7% claimed that they avoided going to crowded places, and 59.7% reported that they avoided social gatherings of more than four people; 58.4% had stayed at home for no less than four out of the previous seven days.²¹⁵ An observational study of 10,211 pedestrians across Hong Kong from 1 to 29 February 2020 revealed that 94.8% (n = 9683) wore some sort of facial covering, including 83.7% who wore disposable surgical masks; only 13.0% wore these masks incorrectly.²¹⁶

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Footnotes:

¹ Constitution of the People's Republic of China (1982).

² Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990) (hereinafter Basic Law), art 18(2).

³ Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (4 April 1990).

⁴ Basic Law, art 66.

⁵ Basic Law, art 59.

⁶ Basic Law, art 80.

⁷ *Leung Kwok Hung v President of the Legislative Council* (2014) 17 HKCFAR 689, [27]–[28] (Hong Kong Court of Final Appeal [hereinafter HKCFA]).

⁸ Basic Law, art 11(2).

⁹ *Chief Executive of the HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460, [22] (Hong Kong Court of Appeal [hereinafter HKCA]).

¹⁰ Basic Law, art 43.

¹¹ Basic Law, art 45, Annex I; Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (6 April 2004); Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (31 August 2014).

¹² Census and Statistics Department, 'Population' (accessed 29 October 2020).

¹³ Chief Executive Election Ordinance (cap. 569) (LN 187 of 2001), part 3 and schedule.

- 14** Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region (31 August 2014).
- 15** Basic Law, art 46.
- 16** Basic Law, art 43.
- 17** Basic Law, art 48(3).
- 18** Basic Law, arts 49, 50.
- 19** Basic Law, art 50.
- 20** *Leung Kwok Hung v President of the Legislative Council* [2007] 1 HKLRD 387, [66]–[67] (Hong Kong Court of First Instance [hereinafter HKCFI]; *Leung Kwok Hung v Secretary for Justice (No 2)* [2020] HKCA 192 (HKCA).
- 21** Legislative Council Ordinance (cap. 542) (3 October 1997), ss 20–21.
- 22** Basic Law, art 74.
- 23** Basic Law, art 158; *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 [57] (HKCFA).
- 24** Though see EC Ip, 'Interpreting interpretations: a methodology for the judicial enforcement of legislative interpretations of the Hong Kong Basic Law' (2017) 4 Public Law 552–562; J M M Chan, 'A shrinking space: a dynamic relationship between the judiciary in a liberal society of Hong Kong and a socialist-Leninist sovereign state' (2019) 72(1) Current Legal Problems 85–122.
- 25** Basic Law, art 158.
- 26** See CL Lim and J Chan, 'Autonomy and Central-Local Relations' in J Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet and Maxwell 2015) [2.080]–[2.093]; S Thomson, *Administrative Law in Hong Kong* (CUP 2018) 28.
- 27** See S Thomson, 'The New Constitutional Disorder: The Unlawful Application of Mainland Chinese Law to Hong Kong' (2019) 54(1) Texas International Law Journal 115–148.
- 28** Basic Law, art 159.
- 29** Interpretation and General Clauses Ordinance (cap 1) (LN 88 of 1966), s 3; see S Thomson, *Administrative Law in Hong Kong* (CUP 2018) 316–319.
- 30** Emergency Regulations Ordinance (cap 241) (28 February 1922, amended 71 of 1999 s 3).
- 31** *Ibid*, s 2(2)(g), 2(4).
- 32** Basic Law, art 18(4).
- 33** See Parts II.B, II.C below.

- 34** See Basic Law, art 18.
- 35** *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 [70]-[71] (HKCFA); *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141 (HKCFA).
- 36** Constitution of the People's Republic of China, art 62(2).
- 37** Constitution of the People's Republic of China, art 67(1).
- 38** Hong Kong Bill of Rights Ordinance (cap 383) (8 June 1991), s 7.
- 39** *Ibid*, s 6.
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