

Further Submission of the Hong Kong Bar Association
on the Immigration (Amendment) Bill 2020
In respect of Clause 3 of the Bill

A. Introduction

1. The Hong Kong Bar Association (“**HKBA**”) submitted a paper on the Immigration (Amendment) Bill 2020 (“**the Bill**”) on 2 February 2021.
2. This paper is supplemental to our previous paper and focuses on Clause 3 of the Bill.

B. Clause 3 of the Bill

3. Clause 3 of the Bill proposes to add a section 6A to the Immigration Ordinance (Cap. 115) (“**the Ordinance**”). If enacted, the new section 6A would, *inter alia*, empower the Secretary for Security to make regulations:
 - (1) to provide for the supply to the Director of Immigration (“**the Director**”) of information or data relating to a carrier, its passengers or members of its crew, as may be specified in the regulations (section 6A(1)(a)); and
 - (2) to empower the Director to direct that a passenger or a member of the crew of a carrier may or may not be carried on board the carrier (section 6A(1)(b)).
4. Sub-section (5) of the proposed new section 6A of the Ordinance provides for the following definitions:

“*carrier* (運輸工具) means an aircraft or any other means of transportation as may be specified in the regulations made under this section;

member of the crew (乘組人員), in relation to a carrier, means a person actually employed in the working or service of the carrier;

passenger (乘客) means a person carried, or to be carried, on board a carrier, other than a member of the crew.”
5. The Bill generally is concerned with arrangements for the processing of *non-refoulement* protection claims made by non-residents and related matters. **The regulations to be made under the proposed new section 6A(1)(b) would, however, authorise the Director to prohibit any person, including Hong Kong residents, from leaving Hong Kong.** The proposed legislation does not set out the grounds on which the Director would be permitted to exercise this extraordinary power. Nor does it provide any safeguards against abuse.

C. The Relevant Constitutional Rights

6. An executive power to prohibit a person from leaving Hong Kong restricts the fundamental constitutional right to freedom of movement and travel, rights which are enshrined in Article 31 of the Basic Law and Article 8(2) of the Hong Kong Bill of Rights.¹ Article 31 of the Basic Law provides:

“Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. **They shall have freedom to travel and to enter or leave the Region.** Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.” (emphasis added)

7. Article 8 of the Hong Kong Bill of Rights incorporates into domestic Hong Kong law the provisions of Article 12 of the International Covenant on Civil and Political Rights, and has constitutional effect by Article 39(1) of the Basic Law. It provides:

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

(2) **Everyone shall be free to leave Hong Kong.**

(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) No one who has the right of abode in Hong Kong shall be arbitrarily deprived of the right to enter Hong Kong.” (emphasis added)

8. Paragraph 13 of *CCPR General Comment No. 27: Article 12 (Freedom of Movement)* provides:

“In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. article 5, paragraph 1²); the relation between right and restriction, between norm and exception, must not be reversed. **The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.**” (emphasis added)

¹ Section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383).

² Article 5, paragraph 1 of the International Covenant on Civil and Political Rights provides: “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”

9. A generous interpretation should be given to a constitutional right, whilst any restriction on the right should be narrowly construed.³
10. Since the freedom to travel is a fundamental right, any restriction on it can only survive constitutional scrutiny if it meets (a) the prescribed by law test, and (b) the proportionality test which involves the notions that the restriction is for a “legitimate purpose”, “no more than is necessary” and meets the “minimal impairment test”, the burden of showing which is on the party seeking to justify the restriction, i.e. the Government for present purposes.⁴
11. What “minimal impairment test” means in this context is that:⁵

“... the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.”
12. Restrictions (including statutory restrictions) on fundamental rights must be prescribed by law, or formulated with sufficient precision so that the individual is given indication of how she may regulate her conduct. In this context, of entering and leaving Hong Kong, a general discretionary power will not meet the constitutional standard. In *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 at §34, the Court of Final Appeal stated that:

“... The requirement that restrictions must be “prescribed by law” could not be satisfied by the existence of general discretionary powers for immigration control vested in immigration officials under the Ordinance and by their undertaking administratively the exercise of considering the imposition of restrictions on such constitutional rights of non-permanent residents on a case by case basis at immigration counters at entry points”
13. A related principle, the principle of legality, requires that the legislature, when enacting legislation that restrict rights, has not only directed its attention to the question of the abrogation or curtailment of the basic right, freedom or immunity concerned but has also determined upon its abrogation or curtailment.⁶

D. The HKBA’s Comments

14. Nothing in the Legislative Council Brief (“**the LC Brief**”)⁷ proffered in support of the Bill draws to the attention of Council Members the fact that clause 3 authorises the

³ See *Official Receiver and Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing* (2006) 9 HKCFAR 545 at §36; *Official Receiver v Zhi Charles* (2015) 18 HKCFAR 467 at §24.

⁴ See *Official Receiver v Zhi Charles* (above) at §53.

⁵ *Ibid.*

⁶ *A v Commissioner of the Independent Commission Against Corruption* (2012) 15 HKCFAR 362 at §28.

⁷ SB CR 10/3221/15 https://www.legco.gov.hk/yr20-21/english/bills/brief/b202012041_brf.pdf

making of subsidiary legislation that would abrogate the fundamental right of Hong Kong residents, and others, freely to travel out of the HKSAR. Indeed the LC Brief does not provide any justification all for clause 3 of the Bill. Paragraph 3 of the Explanatory Memorandum to the Bill merely states that:

“Clause 3 adds a new section 6A to the Ordinance to empower the Secretary for Security to make regulations to provide for the supply to the Director of Immigration (*Director*) of information relating to the passengers and crew members of a carrier. Such regulations may empower the Director to direct that any particular passenger or crew member may or may not be carried on board a carrier.”

15. As noted above, the freedom to leave Hong Kong may only be restricted where it is necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others. The Bill does not identify any reason, within this closed list, for the extraordinary power in the proposed new section 6A of the Ordinance for executive officials to bar Hong Kong residents and others from leaving the Region.
16. It is essential, if the Legislature is to authorise the executive to make subsidiary legislation that restricts fundamental rights, that the empowering legislation itself identifies the purpose for which the interference with rights is permitted, and places clear limits on the scope of the power. The proposed section 6A of the Ordinance fails to do this. It gives no indication of the grounds on which the contemplated subsidiary legislation would permit the Director to impose a travel ban on a given person. Individuals have no way of regulating their conduct accordingly. It is also unclear for what purpose this power would be applied not only to passengers but to “members of the crew”.
17. There already exist various powers to prevent persons from leaving Hong Kong, for example where they have been arrested for a criminal offence,⁸ for the prevention of any disease⁹ (e.g., COVID-19), or where it is necessary to prevent a debtor from obstructing or delaying enforcement of a judgment.¹⁰ Similarly, the Implementation Rules for Article 43 of the National Security Law refer to surrender of travel documents in certain defined circumstances.¹¹ It is therefore difficult to understand what further purpose or class of cases clause 3 of the Bill is intended to cater for.
18. In all of the cases just mentioned (save for the example of prevention of disease), the power to decide whether or not it is necessary and proportionate to interfere with the freedom of movement and travel of the person concerned is vested in the Courts, not the executive. If the proposed section 6A of the Ordinance is to be retained at all, section 6A(1)(b) should be amended to read:

“(b) to empower the Court of First Instance, on the application of the Director, to order that a passenger or a member of the crew of a carrier may or may not be carried on board the carrier”

⁸ Section 9D(3)(b)(ii) of the Criminal Procedure Ordinance (Cap. 221).

⁹ Section 7(2)(e)(i) of the prevention and Control of Disease Ordinance (Cap.599)

¹⁰ Section 21B of the High Court Ordinance (Cap. 4) and section 52E of the District Court Ordinance (Cap. 336).

¹¹ Section 2(2) of Schedule 2 of the Implementation Rules for Article 43 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region.

19. The maximum duration of any such order should also be stated. It is not possible to comment on what a reasonable maximum duration would be at this stage because the purpose of the proposed power to impose travel bans has not been explained.
20. The HKBA notes that, by a letter dated 19 January 2021,¹² the Assistant Legal Adviser to the Legislative Council raised the following query (at §8):

“Please also clarify whether (and if so, how) the Secretary’s proposed new power under clause 3 to empower the Director to direct that a passenger or member of the crew of a carrier may or may not be carried on board the carrier, insofar as it may interfere with Hong Kong residents’ freedom to travel and to enter or leave Hong Kong, could satisfy the four-step proportionality test laid down in the case of *Hysan Development Co Ltd v Town Planning Board* [2016] 19 HKCFAR 372 as far as Article 31 of the Basic Law and Article 8(2) of the Bill of Rights under the Hong Kong Bill of Rights Ordinance (Cap. 383) are concerned.”
21. The HKBA is deeply concerned about the proposal to confer an apparently unfettered power on the Director to prevent Hong Kong residents and others from leaving Hong Kong. It is particularly troubling that the grounds on which such an intrusive power may be exercised are not stated in the proposed legislation, and no explanation for why such a power is necessary, or even how it is intended to be used, is set out in the LC Brief.
22. If a new power to prevent Hong Kong residents and others from leaving the Region is to be conferred, the grounds on which it may be exercised must be stated clearly in the primary legislation, and it should be for the Courts, not the Director, to decide when it is necessary and proportionate to impose a travel ban. Proper safeguards, including the maximum duration of any such ban, must be also be provided.

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Hong Kong Bar Association

¹² Accessible at: <https://www.legco.gov.hk/yr20-21/english/bc/bc53/papers/bc5320210120cb2-682-1-e.pdf>