

**Response to the matters raised at the meeting
of the Subcommittee on Emergency (Date of General Election)
(Seventh Term of the Legislative Council) Regulation
held on 30 October 2020**

At the meeting of the Subcommittee on Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation (“Regulation”) held on 30 October 2020, Members enquired about whether the Legislative Council (“LegCo”) has power to move amendments to amend or repeal the Regulation. This paper provides response to the relevant matters.

(A) Background

2. Amidst the severe COVID-19 epidemic situation in Hong Kong in July this year, the Chief Executive (“CE”) announced on July 31 this year that the 2020 LegCo General Election, originally scheduled to take place on 6 September 2020, would be postponed for a year to 5 September 2021, in order to protect public safety and public health as well as ensure that the election can be conducted openly and fairly. To implement this decision, the CE-in-Council had invoked the Emergency Regulations Ordinance (Cap. 241) (“ERO”) to make the Regulation. The Regulation involves two major aspects, i.e. bringing the electoral process of the 2020 LegCo General Election to an end and specifying 5 September 2021 as the date for the seventh term LegCo General Election, as well as dealing with matters relating to election expenses and election donations, etc.

3. Although the CE-in-Council has power to make the Regulation in accordance with the ERO to discontinue the 2020 LegCo General Election and postpone it for a year, the CE has no constitutional power to deal with the lacuna in the LegCo in the coming year. Under Article 43 of the Basic Law, the CE is the head of the Hong Kong Special Administrative Region (“HKSAR”) and shall be accountable to the Central People’s Government (“CPG”) and the HKSAR. On 28 July 2020, the CE submitted an urgent report to the CPG to report the decision of CE-in-Council to postpone the LegCo General Election, and to seek its support and guidance. The State Council replied on the next day and expressed support for the decision made by the CE-in-Council, and advised that it would make a submission to the Standing Committee of the National People’s Congress (“NPCSC”) for its decision on how to deal with the lacuna of the LegCo arising from the postponement of the LegCo General Election.

4. The NPCSC adopted the Decision of the Standing Committee of the National People’s Congress on the Continuing Discharge of Duties by the Sixth Term Legislative Council of the Hong Kong Special Administrative Region on 11 August 2020 (“Decision”). The Decision stipulates that –

“...In response to the severe local situation of the novel coronavirus epidemic, the Chief Executive of the Hong Kong Special Administrative Region in consultation with the Executive Council had decided to postpone the election for the seventh term Legislative Council of the Hong Kong Special Administrative Region for one year. As such, there will be a lacuna in the legislature of the Hong Kong Special Administrative Region. To safeguard the constitutional order and order of the rule of law in the Hong Kong Special Administrative Region and to ensure the normal governmental administration of the Government of the Hong Kong Special Administrative Region and the normal operation of the society, the Standing Committee of the National People’s Congress decides, pursuant to the relevant provisions of the Constitution of the People’s Republic of China and the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, as follows:

After 30 September 2020, the sixth term Legislative Council of the Hong Kong Special Administrative Region is to continue to discharge duties for not less than one year until the seventh term of office of the Legislative Council of the Hong Kong Special Administrative Region begins. After the seventh term Legislative Council of the Hong Kong Special Administrative Region is formed in accordance with the law, its term of office remains to be four years.”

(B) Power of the LegCo to repeal and amend subsidiary legislation

5. In accordance with section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) (“IGCO”), where subsidiary legislation has been laid on the table of the LegCo, the LegCo may, by resolution passed at a sitting of the LegCo held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation. If any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution.

Section 34(4) also provides that before the expiry of the 28-day period, the LegCo may by resolution extend that period to the first sitting of the LegCo held not earlier than the 21st day after the day of its expiry.

6. Pursuant to section 3 of the IGCO, “amend” includes repeal, add to or vary and the doing of all or any of such things simultaneously or by the same Ordinance or instrument. Besides, section 23(a) of the IGCO provides that where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect.

7. The ensuing paragraphs elaborate on the extent of the power of Members to move an amendment or repeal of the Regulation, and in the event that Members seek to amend or repeal the Regulation and such an amendment is passed by the LegCo, the implications of the amendment on the election date as well as matters relating to election expenses and election donations.

(C) Repealing the Regulation

(i) Election day

8. The NPCSC has made the authoritative Decision pursuant to the relevant provisions of the Constitution of the People’s Republic of China and the Basic Law on 11 August 2020. In accordance with the Decision, the sixth term LegCo of the HKSAR is to continue to discharge duties for not less than one year until the seventh term of office of the LegCo begins. After the seventh term LegCo is formed in accordance with the law, its term of office remains to be four years. Even if Members seek to repeal the Regulation and the amendment is passed by the LegCo, the amendment will not and must not have any impact on the constitutional and legal effect of NPCSC’s Decision, and the sixth term LegCo is to continue to discharge duties. In the light of the Decision, the CE has exercised the power conferred under section 46 of the IGCO to revoke the decision to prorogue the sixth term LegCo with effect from 14 August 2020, as well as G.N. 3116 of 2020 which gave notice of that decision. Notice of the revocation was published in the Gazette as G.N. (E.) 110 of 2020. Even if LegCo repeals the Regulation, there would be no impact on the legal effect of the revocation.

9. On the other hand, in accordance with sections 23(a) and 34(2) of the IGCO, even if the Regulation is repealed by LegCo, the revoked specification and notices (i.e. G.N. 3115, 3276 and 3277 of 2020) in

relation to the holding of the 2020 LegCo General Election would not revive with effect. As regards the new date of the LegCo General Election under section 6 of the Regulation, i.e. 5 September 2021, if Members seek to repeal the Regulation and the relevant amendment is passed by the LegCo, this new date of the LegCo General Election would no longer have effect. In such circumstances, the CE is obliged to specify a date for holding the LegCo General Election in accordance with section 6(1) of the Legislative Council Ordinance (Cap. 542) (“LCO”), and the date to be specified must comply with the requirements under Section 6(2) of the LCO, i.e. not earlier than 60 days and not later than 15 days before the new term of office¹ of the LegCo is to begin.

10. As a matter of fact, the original date of holding the 2020 LegCo General Election has passed. Even if the Regulation is repealed, having regard to the current circumstances, the Government will not hold the LegCo General Election immediately upon an amendment passed by the LegCo. Although the COVID-19 epidemic has eased slightly as compared to July, the situation has not yet stabilised, and preventing and controlling the disease is still the top priority of the Government and the Hong Kong community. There is yet to be any clear indication when the epidemic will end. Experts have advised that a winter surge is very likely by the end of this year. If we were to arrange the LegCo General Election now, it would involve close to 4.4 million registered electors. If a poll were to be conducted, it would lead to huge infection risks. In addition, various regulations and measures for preventing and controlling the pandemic, such as the prohibition on group gatherings and social distancing restrictions, are still in force. Although these regulations and measures have been slightly relaxed, still, it would not be possible for candidates to carry out any meaningful rallying activities. As such, in order to satisfy the requirement that the election is conducted fairly and openly, and to prevent the spread of the epidemic, we have no plan to conduct the LegCo General Election at this stage. In view of public health considerations, the decision of the Government to not hold the LegCo General Election immediately at this stage is lawful and reasonable.

¹ In accordance with section 4(3) of the LCO, each term of office of the LegCo is to begin on a date to be specified by the CE-in-Council. Section 4(5) of the LCO provides that that date must be within 30 days after the date on which the results of the general election to elect the Members for the relevant term of office are declared.

(ii) Election expenses and election donations

11. As for election expenses and election donations, we understand that the majority of candidates have submitted their election returns by the statutory deadline on 29 September 2020 in accordance with section 8(2)(b) of the Regulation, and the Registration and Electoral Office is now handling all the election returns and claim forms, with a view to making payments equivalent to the election expenses as set out in the election returns to eligible candidates as soon as possible. If Members seek to repeal the Regulation and the amendment is passed by LegCo, the legal basis as well as obligation for the Government to make such payments to candidates will become unclear.

12. Meanwhile, the Regulation clarifies the relationship between the discontinued election and the 2021 election. For instance, section 7(3) and (4) of the Regulation provides that any election expenses incurred, or any declaration to stand as a candidate, in connection with the discontinued election will not affect the 2021 election. If the Regulation is repealed, these matters will also become uncertain.

13. In view of the above reasons, we oppose Hon Lam Cheuk Ting's motion to support the LegCo to repeal the Regulation.

(D) Amending the Regulation

14. In accordance with the NPCSC's Decision, after 30 September 2020, the sixth term LegCo of the HKSAR is to continue to discharge duties for not less than one year until the seventh term of office of the LegCo of the HKSAR begins. The earliest date for the seventh term LegCo to commence would therefore be 1 October 2021.

15. Section 34(2) of the IGCO provides that any amendment made by the LegCo to subsidiary legislation must be consistent with the power to make such subsidiary legislation. As such, as far as the Regulation is concerned, any amendment must be consistent with the power to make the Regulation, i.e. the ERO. The amendment must be *bona fide* in furtherance of the statutory purpose of the ERO to deal with an occasion of emergency or public danger, and must be in the public interest. It must also comply with the constitutional requirements, including the Basic Law as well as the provisions concerning human rights therein. The LegCo has no power to make any amendment that is in breach of the aforesaid requirements. Any amendment in breach of the aforesaid requirements is invalid.

16. Any amendment to the Regulation regarding the date of the seventh term LegCo General Election must comply with the above legal requirements. By virtue of section 4(5) of the LCO, a date to be specified by the CE-in-Council regarding the commencement of the term of office of the LegCo must be within 30 days after the date on which the results of the General Election to elect the Members for the relevant term of office are declared. When the LegCo amends provision(s) concerning the date of the seventh term LegCo General Election in the Regulation, such amendment cannot cause the CE-in-Council to violate the NPCSC's Decision owing to compliance with the requirement of section 4(5) of the LCO, otherwise such amendment is invalid.

(E) Matters relating to the reimbursement of election expenses

17. In accordance with sections 38(5) and 42A of the LCO and section 16 of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D), whether a candidate's nomination is valid or not is determined by the Returning Officer according to the legal requirements and relevant procedures.

18. Pursuant to section 8 of the Regulation, the discontinued 2020 LegCo General Election is an election to which the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) ("ECICO") applies. Candidates are required to submit election returns in relation to the discontinued election to set out the election expenses incurred by the candidates at the election and all the election donations received by the candidates or his/her representatives. Under section 2 of the ECICO, "election expenses" means expenses incurred or to be incurred, before, during or after the election period, for the purpose of promoting the election of the candidate or group, or prejudicing the election of another candidate or group. Part 2 of Chapter 16 and Appendix 15 of the Guidelines on Election-related Activities in respect of the Legislative Council Election published by the Electoral Affairs Commission also provide guidance on the definition of election expenses.

19. Given the highly exceptional nature of the postponement of the LegCo General Election, in order to pay candidates an amount equivalent to the election expenses that have already been incurred at the election, section 9 of the Regulation provides that the Government will make a payment equivalent to the amount of election expenses declared to a candidate/list of candidate whose nomination form was accepted by the Returning Officer, unless before the discontinuation date, the Returning Officer had decided that the nomination form or the nomination was

invalid, or the Returning Officer had rejected the nomination list, or the nomination had been withdrawn. Section 9(5) of the Regulation further provides that “declared election expenses” mean the amount set out as the eligible person’s or eligible group’s election expenses in the election return lodged for the discontinued election.

20. The Constitutional and Mainland Affairs Bureau has issued guidelines on the payment arrangements on 7 August 2020 indicating the manner and form in which a claim for a payment must be made, supported and verified; and the particulars that such a claim must contain.

Constitutional and Mainland Affairs Bureau
Department of Justice
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