

**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 9 November 2020**

At the meeting of the Subcommittee on Emergency (Date of General Election)(Seventh Term of the Legislative Council) Regulation (Cap.241L)(“Regulation”) held on 9 November 2020, Members enquired whether there is any criterion and mechanism for the Government to decide to postpone the Legislative Council (“LegCo”) General Election, and the reasons of invoking the Emergency Regulations Ordinance (Cap. 241) (“ERO”) to postpone the election. This paper provides a response to the relevant matters.

Criteria for postponing the LegCo General Election

2. The Hong Kong Special Administrative Region (“HKSAR”) Government has repeatedly stressed that the health and well-being of the members of the public is the overriding concern of any responsible government. The wave of epidemic in July 2020 saw a rapid surge in confirmed cases and deaths, as well as an increasing risk of a community outbreak, which may result in a collapse of the local public hospital system and a significant public crisis. From 8 July to 30 July, there were 1 852 new cases, up 140% from the 1 300 cases accumulated in the past six months, of which the number of confirmed cases on 30 July hit record high of 149 cases; 90% of new cases were local ones and nearly half of them had unknown infection sources.

3. Amid the severe situation of the epidemic, the HKSAR Government has extended the validity of the Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (Cap. 599C) and the Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (Cap. 599E) to the end of this year. The most stringent measures in respect of boundary controls and social distancing were put in place in July, and new measures including the mandatory wearing of masks on all public transport and in public places, as well as the imposition of pre-arrival COVID-19 test and post-arrival 14-day compulsory quarantine in hotels were also introduced.

4. The LegCo General Election is massive in scale: 4.4 million registered electors, 70 seats, over 600 polling stations and 34 000 electoral staff, polling has to be completed within a day with long polling hour (the

poll runs consecutively for 15 hours from 7:30 a.m. to 10:30 p.m.). Coupled with a dedicated central counting station and a media centre, there would be huge infection risks associated with round the clock crowd gatherings and close human contacts, the situation of which is different from other public celebration activities. On the other hand, the outbreak of the epidemic also leads to the question of whether the election could be conducted fairly, for instance, it would not be possible for candidates to carry out any meaningful rallying activities permitted by the law amid the severe epidemic situation. Having regard to the above factors, it would be difficult to ensure that the election could be conducted in a fair and just manner if we were to hold the election on 6 September this year as originally scheduled. The Electoral Affairs Commission (“EAC”) also wrote to the Chief Executive on 28 July this year to set out their views in detail on the public health risks if the election were to be held as scheduled on 6 September. As we can see, postponing the election was a very difficult but a necessary decision.

5. As regards the considerations for postponing the 2020 LegCo General Election by one year, they have been set out in paragraph 18 of the LegCo Brief, as extracted as follows –

- “(a) the wave of epidemic in July 2020 was likely to last for weeks and it would then take another few weeks for the city to resume normal operations. Unless an effective vaccine could be developed and supplied in time for the majority of the population, both the WHO and local experts have warned that a winter surge is to be expected. This is why the HKSAR Government has extended the legal framework for various control measures up to the end of December 2020;*
- (b) LegCo performs important constitutional functions in enacting and amending legislation, approving the annual Budget, approving expenditure and revenue items, etc., and there is an annual business cycle especially in approving the annual Budget to support the whole range of government and government-funded service programmes. It was therefore necessary to have LegCo conducting its normal annual business instead of being faced with a lacuna as a result of uncertainty in when an election may be held given the volatile COVID-19 situation; and*
- (c) if we could not proceed with the 6 September election, from a logistic and planning perspective, the HKSAR Government and the EAC would need a lead time of three to four months to*

organise another election of this scale. The question then was whether for fairness the REO should have another voter registration exercise to precede the re-scheduled election date. If so, the lead time would have to be much longer. The one-year postponement was also desirable to ensure that the election would be conducted with the most updated electoral register for fairness and minimising information confusion in view of the requirement under section 32 of the (Legislative Council Ordinance (Cap. 542) (“LCO”)) that the provisional register must be prepared not later than 1 June each year.”

6. As shown above, both the rationale and timing of postponing the election involve a series of factors and various considerations, and with the latest development of the COVID-19 epidemic, the impact of the epidemic on the election also changes over time. Therefore, it is not practicable to formulate a set of rigid criteria for postponing the General Election having regard to the situation of the epidemic.

Mechanism for postponing the election and reasons of invoking the ERO

7. For the above reasons, in order to protect public safety and public health as well as ensure that the election would be conducted openly and fairly, there was a need for the Government to postpone the LegCo General Election by one year. However, there are currently no mechanism under both the LCO and Prevention and Control of Disease Ordinance (Cap. 599) (“PCDO”) for the Government to postpone the LegCo General Election by one year solely for the aforesaid reasons –

- (a) Section 44(1) of the LCO empowers the Chief Executive to direct the postponement of a General Election if, before the holding of the election, the Chief Executive is of the opinion that the election is likely to be obstructed, disrupted, undermined or seriously affected by riot or open violence or any danger to public health or safety. However, section 44(4) of the Ordinance also provides that if the General Election is postponed, the Chief Executive must specify by notice in the gazette another date for the election which must not be later than 14 days after the original date of the General Election. If the Chief Executive exercises the power once and again, it could be regarded as an abuse or improper use of power. Further, to postpone the election for no longer than 14 days each time repeatedly for an indefinite period would create uncertainty

to electors and prospective candidates, and there may be potential legal challenges; and

- (b) The Chief Executive in Council made several regulations under section 8 of the PCDO for the purpose of preventing, combating and alleviating the effects of the public health emergency and protecting public health. However, the PCDO may not be relied upon because the primary purpose of postponing the 2020 LegCo General Election is to ensure its fairness and openness rather than just for preventing, combating and alleviating the effects of the public health emergency and protecting public health.

8. As the epidemic situation in July this year could be regarded as an occasion of public danger and/or emergency, invoking the ERO to enact the Regulation to postpone the election was the only option that was in the public interest. In fact, there was public danger as the safety of the public as a whole was seriously threatened by COVID-19 which was at the time widespread in Hong Kong and would be aggravated by the electioneering and polling activities. The emergency limb was also applicable because the danger or threat was imminent as reflected in the upsurge of confirmed cases of COVID-19 since early July and that large-scale electioneering activities were already underway and more were expected to be held between late July and the scheduled polling date.

9. In light of the above, the Chief Executive in Council enacted an emergency regulation under the ERO under both limbs of public danger and emergency to postpone the LegCo General Election by one year to 5 September 2021. The justifications of invoking the ERO to postpone the election have been set out in detail in paragraph 26 of the LegCo Brief and extracted as follows –

“(a) the COVID-19 pandemic situation in July 2020 was the most serious in Hong Kong since its emergence with new cases and deaths rising. Election entails a lot of crowd events and social contacts which will aggravate the public health situation if these activities are allowed. On the other hand, as is the position as of late July, as such public gathering would not be allowed under the PCDO regulations, the fairness and openness of the Election would be compromised;

- (b) with the Election due to take place in less than six weeks’ time, and tens of thousands of registered electors stranded in the Mainland and overseas, and hundreds of candidates contesting in*

the Election and some 4.4 million registered electors seeking certainty on whether the Election would be held as scheduled, an emergency decision was needed in the public interest;

- (c) repeatedly invoking the existing provision that empowers the Chief Executive to postpone an election by 14 days for an indefinite period could be regarded as an abuse of power, cause uncertainty and is unrealistic and not conducive to effective governance;*
- (d) postponing the Election by one year would be in the public interest as the decision could preserve the election right of the registered electors. It would also help ensure a fair, open and informed election, and reduce the further risks and danger of more infections that could otherwise overwhelm the public hospital system; and*
- (e) the postponement by one year would also avoid disruption to the normal LegCo business and electoral cycles.”*

10. Generally speaking, in deciding which legal mechanism shall be invoked in postponing the election, we need to consider matters including the rationale and timing of postponing the election. As for which legal mechanism is the most appropriate to postpone the election, it will depend on the actual circumstances.

11. Section 6(2) of the Regulation has clearly specified that the new election date will be on 5 September 2021. As the HKSAR Government has pointed out time and again, the Constitutional and Mainland Affairs Bureau will, as in the past, work closely with the EAC to ensure that the election is conducted in an open, fair and honest manner in accordance with the relevant legislation. The Constitutional and Mainland Affairs Bureau and the Registration and Electoral Office will also strive to improve the existing electoral arrangements, while closely keep in touch with the Food and Health Bureau and the Centre for Health Protection to carefully monitor the development of the outbreak in assessing the impact of the epidemic on the election from now until the 2021 LegCo General Election, and formulate various plans in view of the different possibilities concerning the development of the epidemic in a timely manner.

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