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[English Translation]

Ms Clara TAM
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Legislative Council Complex
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Central, Hong Kong

14 April 2021

Dear Ms TAM,

**Bills Committee on
Public Offices (Candidacy and Taking Up Offices)
(Miscellaneous Amendments) Bill 2021 ("the Bill")**

In response to the various issues raised in your letter of 8 April 2021, our reply is set out below.

**Legislative Council (Powers and Privileges) Ordinance (Cap. 382)
("LCPPO")**

2. Article 77 of the Basic Law ("BL") states that members of the Legislative Council ("LegCo") of the Hong Kong Special Administrative Region ("HKSAR") shall be immune from legal action in respect of their statements at meetings of the Council. Section 3 of LCPPO provides that there shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be

liable to be questioned in any court or place outside the Council. Section 4 of that Ordinance also provides that no civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or a committee, or by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise.

3. In *Chief Executive of the HKSAR & Another v. The President of the LegCo* (HCAL 185/2016), the court ruled that the protection provided by Article 77 of the BL and sections 3 and 4 of the LCPPO attaches only to statements made by a LegCo member in the course of official debates on the floor of the LegCo when exercising his powers and discharging his functions as a LegCo member¹.

4. The Court of Final Appeal (“CFA”), in *Leung Kwok Hung v. The President of the LegCo (No 1)* (2014) 17 HKCFAR 689, has laid down the scope and limit of the non-intervention principle as applied in Hong Kong: (1) the principle of non-intervention as applied in Hong Kong is necessarily subject to the constitutional requirements of the BL; (2) where the BL confers law-making powers and functions on the legislature, the court has powers to determine whether the legislature has a particular power, privilege or immunity. In relation to (2), the CFA also flags up the “necessity” test, i.e. it is for the courts to determine whether necessity sufficient to support a privilege is made out².

5. The court has pointed out in the reasons for verdict of *HKSAR v. Leung Kwok Hung* (DCCC 546/2016) that LegCo and the court have different and overlapping jurisdictions; for criminal conducts happening inside LegCo, LegCo may take disciplinary proceedings and the court may try the offender for the crime³. The court also points out that a proper balance needs to be struck between the protection of freedom of speech and debate in the legislature on the one hand and the equality before the law on the other⁴.

6. The aforementioned court judgments indicate that the protection provided to LegCo members by the LCPPO is not absolute. Whether a particular act by a member of LegCo will be protected by immunity depends on the actual circumstances of each individual case.

¹ See paragraphs 86-88 of the Court of First Instance judgment.

² See paragraphs 39-41 of the CFA judgment

³ See paragraphs 36, 45-47 of the reasons for verdict.

⁴ See paragraph 54 of the reasons for verdict.

7. It is the constitutional obligation of a LegCo member to uphold the BL and bear allegiance to the HKSAR. The “Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China” (“the Interpretation”) clearly states that “[t]o uphold the BL and to bear allegiance to the HKSAR as stipulated in Article 104 of the BL, are not only the legal content which must be included in the oath prescribed by the Article, but also the legal requirements and preconditions for standing for election in respect of or taking up the public office specified in the Article” and “[t]he oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law”. In the “Decision on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region” (“the Decision on Qualification of LegCo Members”) promulgated by the Standing Committee of the National People’s Congress (“NPCSC”) on 11 November 2020, it is also specified that if a member is decided in accordance with law that he or she does not fulfil the legal requirements and conditions on upholding the BL and pledging allegiance to the HKSAR, he or she is immediately disqualified from being a LegCo member. As such, when the Court is considering whether a member upholds the BL and bears allegiance to the HKSAR, his words and deeds at the LegCo meetings could be one of the determining factors. There is no conflict between the Bill and Article 77 of the BL/the LCPPO.

Powers of the Oath Administrator

8. To better implement the requirements as prescribed by the Interpretation, the Bill proposes to add a new section 20A in the Oaths and Declarations Ordinance (Cap. 11) (“ODO”) to provide that a person is to be regarded as declining or neglecting to take the oath if the person intentionally:

- (a) contravenes the oath-taking procedure of the person or desecrates the oath-taking ceremony;
- (b) alters or distorts the wording of the oath;
- (c) says words that do not accord with the wording of the oath; or
- (d) acts in a way that is not sincere or not solemn in purporting to take the oath.

9. The existing section 21 of the ODO provides that any person who declines or neglects to take an oath shall be disqualified from entering on the office (if he has not entered on it) or shall vacate the office (if he has

already entered on it). The newly added section 21(2) also specifies that no person may arrange for the person who declines or neglects to take the oath to retake it except that, in accordance with section 21(3)(b), the oath administrator is satisfied that the person did not intentionally decline or neglect to take the oath. As clauses 5, 6, 7 and 8 of the Bill have already specified that the oath of the relevant public officers must be administered by the Chief Executive or a person authorized by him/her, and section 21 of the ODO as amended has already empowered the oath administrator to make a ruling regarding the relevant oath taken, we consider that the powers of the oath administrator is adequately reflected by the provisions.

Proposed new grounds of disqualification of LegCo members and District Councils (“DC”) members

(a) to (c): difference between the two grounds of disqualification

10. “Breach of oath” and “failure to fulfil the legal requirements and conditions on upholding the BL and bearing allegiance to the HKSAR” are two grounds of disqualification of members.

11. Currently, the content of the oath of LegCo members is set out at Part IV of Schedule 2 to the ODO as follows: “I swear that, being a member of the Legislative Council of the Hong Kong Special Administrative Region of the People’s Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China and serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity”.

12. Similarly, the Bill proposes to add Part IVA to Schedule 2 to the ODO to specify the content of oath for DC members as follows: “I swear that, being a member of the _____ District Council of the Hong Kong Special Administrative Region of the People’s Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China and serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity”.

13. As evidenced by the content of the above oaths, a member's breach of oath is not limited to his failure to meet the legal requirements and conditions for upholding the BL and allegiance to the HKSAR.

14. In light of the Decision on Qualification of LegCo Members promulgated by the NPCSC last year, the Bill also proposes to add "failure to fulfil the legal requirements and conditions on upholding the BL and bearing allegiance to the HKSAR" as a ground of disqualification of member. The Decision on Qualification of LegCo Members clearly states that:

"A member of the LegCo of the HKSAR does not fulfil the legal requirements and conditions on upholding the BL of the HKSAR of the People's Republic of China and pledging allegiance to the HKSAR of the People's Republic of China if the member advocates or supports "Hong Kong independence", refuses to recognise the People's Republic of China's sovereignty over Hong Kong and the exercise of the sovereignty, solicits intervention by foreign or external forces in the HKSAR's affairs, or carries out other activities endangering national security. When the member is so decided in accordance with law, he or she is immediately disqualified from being a LegCo member".

15. In light of the NPCSC's decision, the HKSAR Government also announced on the same day that four members of the sixth-term LegCo, whose nominations were decided to be invalid in accordance with law by the HKSAR due to the circumstances mentioned above during the nomination period of the election for the seventh-term LegCo originally scheduled for 6 September 2020, were immediately disqualified from being LegCo members.

(d): Breach of oath

16. Logically, we agree that a person who does not meet the legal requirements and conditions on upholding the BL and bearing allegiance to the HKSAR would have also breached his/her oath. However, it is difficult to generalize the specific circumstances under which breach of oath may occur. In fact, after making reference to past court judgments and related decisions of the NPCSC, the reference to "upholding BL and bearing allegiance to HKSAR" as added in the Interpretation and General Clauses Ordinance (Cap. 1) in the Bill can also serve as a useful reference.

(e): who could decide whether there is breach of oath

17. The Court could make a ruling when the Secretary for Justice (“SJ”) brings proceedings under section 73 of the Legislative Council Ordinance (“LCO”) or section 79 of the District Councils Ordinance (“DCO”). On the other hand, Article 79(7) of the BL provides that the President of LegCo shall declare that a LegCo member is no longer qualified for the office when he or she is censured for breach of oath by a vote of two-thirds of the members of the LegCo present.

(f): what is “declared or decided in accordance with law”

18. According to section 3 of the Interpretation and General Clauses Ordinance, “law” means “any law for the time being in force in, having legislative effect in, extending to, or applicable in, Hong Kong”.

19. With reference to the principles in the Decision on Qualification of LegCo Member, “decided in accordance with law” may include:

- (a) pursuant to section 2 of the Decision on Qualification of LegCo Members, decisions made by the Returning Officer in accordance with law and related procedures⁵;

⁵ Relevant electoral laws have laid down the legal requirements, including:

- (a) Section 16(7)(a)(ii) of the Chief Executive Election Ordinance (Cap. 569) (“CEEEO”), under which candidates for Chief Executive elections must submit the nomination form in accordance with the statutory nomination procedures. The nomination form must include a signed declaration to the effect that the person will uphold the BL and pledge allegiance to the HKSAR. The Returning Officer shall determine whether the nomination is valid in accordance with section 17 of the CEEEO;
- (b) Section 40(1)(b)(i) of the LCO, under which candidates for LegCo elections must submit the nomination form in accordance with the statutory nomination procedures. The nomination form must include a signed declaration to the effect that the person will uphold the BL and pledge allegiance to the HKSAR. The Returning Officer shall determine whether the nomination is valid in accordance with section 42A of the LCO and section 16 of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D); and
- (c) Section 34(1)(b) of the DCO, under which candidates for DC elections must submit the nomination form in accordance with the statutory nomination procedures. The nomination form must include a signed declaration to the effect that the person will uphold the BL and pledge allegiance to the HKSAR. The Returning Officer shall determine whether the nomination is valid in accordance with section 36(1) of the DCO and section 16 of the Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation (Cap. 541F).

- (b) as prescribed under section 73 of LCO or section 79 of DCO, the SJ may bring proceedings in the Court against any person who is acting, claims to be entitled to act, as a member on the ground that the person is disqualified from acting as such, and the ruling so made by the Court;
- (c) Article 104 of the BL which states that the LegCo members of the HKSAR must, in accordance with law, swear to uphold the BL and swear allegiance to the HKSAR when assuming office. The Interpretation also explains the oath-taking requirements and consequence of breaching of oath after assuming office;
- (d) Article 79 of the BL sets out the circumstances where the President of LegCo shall declare that a LegCo member is no longer qualified for the office, among which Article 79(7) provides that a member could be disqualified when he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the members of the LegCo present; and
- (e) Article 35 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region provides that a person who is convicted of an offence endangering national security by a court shall be disqualified from standing as a candidate in the elections of the LegCo and DC of the HKSAR. If a person so convicted is a member of the LegCo or a member of the DC, who has taken an oath or made a declaration to uphold the BL and swear allegiance to the HKSAR, he or she shall be removed from his or her office upon conviction, and shall be disqualified from standing for the aforementioned elections or from holding any of the aforementioned posts.

20. The relevant law stipulates the circumstances under which relevant declarations or decisions are made in accordance with the law. As such, we believe that the provisions in the Bill are sufficiently clear. If we were to specifically set out the laws, or the circumstances under which the declarations or decisions are made, the provision would not be able to cover any changes that may be made to those laws in future.

Proposed removal of time limit for instituting legal proceedings by SJ

21. The objectives of section 73 of LCO or section 79 of DCO are to enable proceedings to be brought in the Court against any person who is acting, claims to be entitled to act, as a member on the ground that the person is disqualified from acting as such, and to seek a declaration from the Court that the member is not qualified to be or is disqualified from holding the relevant office, resulting in the discontinuation of that person's holding the relevant office or acting as a member. On this basis, it seems that there is little meaning to bring such proceedings after the member has left office.

22. As the guardian of public interest, SJ will act strictly in accordance with the rights and obligations granted or imposed by the law, and will take timely legal actions against the persons concerned.

Proposals relating to the suspension of functions and duties of LegCo and DC members

23. The issues of the remuneration of LegCo and DC members are the internal affairs of the LegCo / the administrative arrangements of the DCs. During the period when a member is suspended, whether he/she has been disqualified as a member is yet to have a final decision. It is not appropriate for us to decide, by providing the relevant clauses in the Bill, for the LegCo whether the remuneration and allowances should also be suspended. Therefore, the Bill is silent in this regard to respect the autonomy of LegCo in handling internal affairs.

24. The Bill does not specify whether a LegCo member should be regarded as absent when his/her duties are suspended. This is because Article 79(2) of the BL stipulates that a LegCo member shall be declared no longer qualified for the office if the member, **with no valid reason**, is absent from meetings for three consecutive months without the consent of the President of the LegCo. We believe that the President of the LegCo should not be deprived of the right to judge whether the absence of the member is reasonable. The above-mentioned Article of the BL could deal with the issue of whether a LegCo member should be regarded as absent when his duties are being suspended. However, section 24(5) of DCO only provides that an elected member is also disqualified from holding office for the remainder of that member's term of office if the member does not attend meetings of the DC for four consecutive months without obtaining the **consent of the Council** before the end of that period.

25. Unlike the LegCo, where the President may decide whether the absence of the member has a valid reason, the provisions of DCO do not specify what factors the DC should consider. We therefore stipulate in the Bill that a DC member should not be regarded as absent during the period when his duties are suspended.

Yours sincerely,



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for Secretary for Constitutional and
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c.c.

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