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

Purpose

This paper reports on the deliberations of the Bills Committee on Public Offices (Candidacy and Taking Up Offices) (Miscellaneous Amendments) Bill 2021.

Background

2. Article 104 of the Basic Law ("BL") stipulates that when assuming office, the Chief Executive ("CE"), principal officials, members of the Executive Council ("ExCo") and of the Legislative Council ("LegCo"), judges of the courts at all levels and other members of the Judiciary in the Hong Kong Special Administrative Region ("HKSAR") must, in accordance with law, swear to uphold BL of HKSAR of the People's Republic of China ("PRC") and swear allegiance to HKSAR of PRC ("specified oath"). The Standing Committee of the National People's Congress ("NPCSC") adopted 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") on 7 November 2016 which provides for the legal requirements of a valid oath and the consequences of failing to comply with such requirements. Article 6 of the "Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region" ("the National Security Law"), which was promulgated on 30 June 2020, stipulates that a resident of HKSAR who stands for election must take the specified oath.

3. On 11 August 2020 and 11 November 2020, NPCSC made the "Decision on the Continuing Discharge of Duties by the Sixth Term Legislative Council of the Hong Kong Special Administrative Region" and the "Decision on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region" ("Decision on Qualification of LegCo Members") under which certain acts are regarded as not fulfilling the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR of PRC.

4. According to the LegCo Brief (File Ref. CMAB C4/9/1) issued by the Constitutional and Mainland Affairs Bureau on 23 February 2021, the Administration proposes to amend local legislation to implement the requirements on oath-taking by public officers as stipulated in the aforementioned laws and decisions of NPCSC.

The Bill

5. The Bill was published in the Gazette on 26 February 2021 and introduced into the LegCo on 17 March 2021. The Bill consists of nine Parts. Parts 2 to 9 of the Bill seek to amend various Ordinances¹ to provide for matters relating to the requirements of oath-taking by certain public officers when assuming office, including:

- (a) the meaning of a reference to "upholding BL and bearing allegiance to HKSAR of PRC" ("upholding BL and bearing allegiance to HKSAR") when used in legislation;
- (b) the new requirement for members of the District Councils ("DC") to take an oath when assuming office;
- (c) the arrangement for administration of public officers' oaths; and
- (d) the legal consequences of declining or neglecting to take an oath and of breaching an oath.

6. The Bill, if passed, will come into operation on the day on which it is published in the Gazette as an Ordinance.

¹ The Ordinances include the Interpretation and General Clauses Ordinance (Cap.1), the Oaths and Declarations Ordinance (Cap. 11), the Legislative Council Ordinance (Cap. 542), the District Councils Ordinance (Cap. 547), the Hong Kong Court of Final Appeal Ordinance (Cap. 484) and the Chief Executive Election Ordinance (Cap. 569).

The Bills Committee

7. At the House Committee meeting on 19 March 2021, Members agreed to form a Bills Committee to scrutinize the Bill. The membership list of the Bills Committee is in **Appendix I**.

8. Under the Chairmanship of Mr Tommy CHEUNG Yu-yan, the Bills Committee has held five meetings with the Administration. The Bills Committee has invited written views on the Bill and received 5 562 submissions. All the submissions received express support for the Bill and can be accessed on the LegCo Website.

Deliberations of the Bills Committee

9. While members are generally supportive of the Bill, they have expressed concerns over various issues. Their major views and concerns are summarized in the ensuing paragraphs.

Meaning of "upholding the Basic Law and bearing allegiance to the Hong Kong Special Administrative Region of the People's Republic of China"

10. Clause 3 of the Bill proposes to add a new section 3AA to Cap. 1 to explain the meaning of the expression "upholding BL and bearing allegiance to HKSAR".

11. Under the proposed new section 3AA, a person upholds BL and bears allegiance to HKSAR if certain conditions (subsection (1)(a) to (f)) are satisfied (i.e. "positive list"). These include upholding the constitutional order of HKSAR established by the Constitution of PRC and BL; upholding the national sovereignty, unity, territorial integrity and national security of PRC; and upholding the implementation of "one country, two systems" principle and safeguarding the political structure of HKSAR.

12. On the other hand, a person does not uphold BL and bear allegiance to HKSAR if the person does or intends to do certain acts (as specified in subsection (3)(a) to (i)), such as refusal to recognize the constitutional status of HKSAR as a local administrative region of PRC, soliciting interference by foreign governments or organizations in the affairs of HKSAR, and desecrating the national flag or national emblem, or regional flag or regional emblem, by publicly and willfully burning, mutilating, scrawling on, defiling or trampling on it ("i.e. negative list").

13. The proposed section 3AA(3)(a) which provides that a person does not uphold BL and bear allegiance to HKSAR when the person commits or intends to commit acts or carry out activities that endanger national security, including the commission of (i) an act required by Article 23 of BL to be prohibited; (ii) an offence under the National Security Law; and (iii) an offence relating to endangering national security under an enactment or under the common law. A member has asked whether the proposed provision may give rise to judicial challenges as HKSAR has not yet enacted legislation on Article 23 of BL, and whether aiders and abettors will fall within the scope of the provision. Another member has asked about the reasons for using "作出《基本法》第23條規定禁止的行為" in section 3AA(3)(a)(i) but "犯《中華人民共和國香港特別行政區維護國家安全法》規定的罪行" in section 3AA(3)(a)(ii).

14. The Administration has advised that the negative list itself will not impose any criminal liability. The list merely serves to specify that a person is regarded as not upholding BL and bearing allegiance to HKSAR if the person does any of the acts prohibited by Article 23 of BL, such as treason, secession, sedition, etc. The wording "作出...行為" rather than "犯...罪行" is used in section 3AA(3)(a)(i) because HKSAR has yet to enact legislation on acts specified in Article 23 of BL and therefore there is no offence (罪行) under Article 23 of the BL yet.

15. Questions have been raised as to the meaning of "indiscriminately objects to the Government's motion" in the proposed section 3AA(3)(f)(ii), whether a LegCo member will be regarded as not upholding BL and bearing allegiance to HKSAR if the member votes against a Government motion, and whether the provision conflicts with Article 73(9) of BL which enables the LegCo to pass a motion to impeach CE. The Administration has advised that it is not the policy intent to restrain the LegCo from exercising its constitutional rights and powers in accordance with the laws. Section 3AA(3)(f)(ii) should be read together with the lead-in of that section. On this basis, a person will only be regarded as not upholding BL and bearing allegiance to HKSAR if the person indiscriminately objects to the Government's motion with the intention of threatening the Government, rendering the Government incapable of performing its duties and functions as normal, or forcing CE to step down and overthrowing the Government.

16. The proposed section 3AA(3)(g) provides that a person does not uphold BL and bear allegiance to HKSAR when the person commits or intends to commit acts that undermine or have a tendency to undermine the overall interests of HKSAR. Some members consider that the term "overall interests" (整體利益) is too wide in scope and open to interpretation, subjecting LegCo/DC members to legal proceedings under section 73 of Cap. 542 or

section 79 of Cap. 547 on the grounds of breach of oath or failure to fulfil the legal requirements and conditions to uphold BL and bear allegiance to HKSAR. For instance, a person supporting reclamation in Hong Kong can be interpreted by some people as undermining the overall interests of HKSAR. The Administration has advised that in determining whether an act undermines the overall interest of HKSAR, a person's intent as evidenced in his words and deeds, and the consequences of the act will be taken into account.

17. Referring to section 3AA(3)(h) which provides that a person does not uphold BL and bear allegiance to HKSAR if the person desecrates the national flag or national emblem, or regional flag or regional emblem, by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it, a member is concerned whether a person who puts a video on social media showing the aforementioned acts will fall within the scope of the provision. Another member is concerned whether a person who incites voters to cast blank votes during an election period will be regarded as failing to uphold BL and bear allegiance to HKSAR. The Administration has replied in the affirmative and advised that measures against acts of manipulating or obstructing elections are being explored pursuant to the newly amended Annex I and Annex II to BL.

18. A member has pointed out that safeguarding the national sovereignty, security and development interests of PRC is a prerequisite for upholding the principle of "patriots administering Hong Kong". Nevertheless, nothing concerning the development interests of PRC is mentioned in the positive or negative list. To make the two lists more comprehensive, the member has suggested the inclusion of an item "upholds the development interests of PRC" in the positive list and "commits acts that undermine or have a tendency to undermine the development interests of PRC" in the negative list.

19. A member opines that there is already a common understanding of the meaning of the expression "upholding BL and bearing allegiance to HKSAR" in society. The member also notes that the positive and negative lists under the proposed section 3AA are not intended to be exhaustive (i.e. proposed section 3AA(4)) and takes the view that the inclusion of the two lists in the Bill may not be necessary lest this may give rise to ambiguities and uncertainties in interpretation of the expression "upholding BL and bearing allegiance to HKSAR". The member has also asked if the Administration will issue any guidelines on the matters set out in the positive and negative lists.

20. The Administration has advised that as the meaning of the expression "upholding BL and bearing allegiance to HKSAR" has aroused controversies in society, the two lists are drawn up with reference to the Interpretation, relevant decisions of NPCSC, relevant Ordinances, and court judgments, etc. The lists

are proposed to provide information to facilitate law enforcing units, persons who wish to run for elections and public officers to have a clearer understanding of the meaning of the expression. The positive list sets out the general principles while the negative list sets out the specific acts that will be regarded as failing to fulfil the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR. In any event, the lists are not exhaustive and the law enforcing units should, in accordance with the law, take into account relevant facts, evidence and circumstances when determining whether a person upholds BL and bears allegiance to HKSAR.

Proposed requirement for members of the District Councils to take oath

21. Clause 8 of the Bill seeks to amend Cap. 11 to introduce a new requirement for DC members to take an oath in a form as set out in the proposed new Part IVA of Schedule 2 to Cap. 11. Clause 29 proposes to amend Schedule 3 to the National Anthem Ordinance to add the oath-taking ceremony by DC members as an occasion on which the national anthem must be played and sung.

22. As there are currently over 400 DC members, a member has suggested that the Administration should devise measures, such as requiring every DC member to sing the national anthem alone and videotaping the singing of each member at the ceremony to ensure that every DC member is in compliance with the standard and etiquette for singing the national anthem.

23. The Administration has advised that at present, all participants at the Ceremonial Opening of the Legal Year stand up solemnly when the national anthem is played and sung. Such an arrangement is considered appropriate. Given the large number of DC members, it is time-consuming if they are required to sing alone at the oath-taking ceremony. The Secretary for Home Affairs ("SHA") and the Home Affairs Department ("HAD") are actively studying the arrangement details for the oath-taking ceremony of DC members, such as whether members will be arranged to take oath in small groups, and will announce the details after enactment of the Bill.

Scope of public officers

24. Some members consider it necessary to require, with a timetable for implementation, all other public officers including members of the Election Committee ("EC") and those of the statutory bodies to take the specified oath when assuming office. There is also a suggestion that a monitoring mechanism should be established to ensure that the public officers have fulfilled the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR during the term of office. The Administration agrees with members that the

oath-taking requirement should be introduced for all public officers as soon as possible to ensure full implementation of the principle of "patriots administering Hong Kong" and has advised that oath-taking requirement for EC members will be introduced through the Improving Electoral System (Consolidated Amendments) Bill 2021.

Proposed arrangement for administration of public officers' oaths

25. Under the existing Cap. 11, different persons are specified for administering the oath for different categories of public officers as specified under BL104. The Bill proposes to amend Cap. 11 to specify CE or a person authorized by CE to be the oath administrator for the taking of oath of ExCo members, LegCo members, judges of the courts at all levels and other members of the judiciary, and DC members. The existing arrangements for the oath-taking of CE and principal officials to be administered by a representative of the Central People's Government ("CPG"), or a person authorized by CPG under Cap. 11 remain unchanged.

26. Questions have been raised as to the eligibility criteria for authorization as oath administrators and whether a mechanism will be in place to avoid any authorization that may constitute apparent conflict of interest situation. According to the Administration, an individual's ability to determine whether an oath taken is in compliance with the requirements under the laws of HKSAR will be taken into account in considering the authorization of oath administrators. In fact, the existing arrangements for the oath-taking of judges at the Court of First Instance ("CFI") level and above and other judicial officers to be administered respectively by CE and a judge of CFI remain unchanged. The preliminary thoughts on the oath administrators for LegCo and DC members are the Chief Secretary for Administration and SHA respectively.

Powers of oath administrators

27. Some members are of the view that oath administrators should be empowered to act as gatekeepers who can bar a person from taking an oath or determine his/her oath as invalid immediately after the oath is taken where there is sufficient evidence that the person does not uphold BL and bear allegiance to HKSAR, and that the Administration should consider adding a provision to reflect such powers of the oath administrators.

28. In addition, the legal adviser to the Bills Committee has pointed out that according to paragraph 2(4) of the Interpretation, the person administering the oath has the duty to ensure the oath is taken in a lawful manner and such person shall determine whether an oath taken is in compliance with the

Interpretation and the requirements under the laws of HKSAR. She has asked the Administration to consider adding an express provision to the Bill to provide for the powers and duties of the oath administrator to reflect paragraph 2(4) of the Interpretation.

29. According to the Administration, to better implement the requirements as prescribed by the Interpretation, the Bill proposes to add a new section 20A in Cap. 11 to provide that a person is to be regarded as declining or neglecting to take oath if the person intentionally (a) contravenes the oath-taking procedure 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.

30. In addition, the existing section 21 of Cap. 11 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 CE or a person authorized by him/her, and section 21 of Cap. 11 as amended has already empowered the oath administrator to make a ruling regarding the relevant oath taken, the Administration is of the view that the powers of the oath administrator are adequately provided in the Bill.

31. Some members consider the word "intentionally" in section 20A(2) inappropriate as a person will not perform the acts involved in sections 20A(2)(a), (b) and (d) unintentionally. There should be sufficient grounds to rule the oath-taker as "declining or neglecting" to take an oath regardless of whether the acts were done intentionally. There is also a suggestion that the Administration should consider amending the Chinese text of section 21(3) as "某人作出20A(2)某項的行為；而監誓者信納該人並非故意作出該等行為" to make the public easier to understand the provision.

32. The Administration has advised that the proposed wording in the Bill has made reference to the "Explanations on the Draft Interpretation by NPCSC of Article 104 of BL" (extracted as follows): "if an oath taker intentionally contravenes or desecrates the oath-taking procedure and ceremony by means of conduct, words, attire or paraphernalia, etc., or intentionally alters, distorts the wording of the oath prescribed by law or reads out words which do not accord with the wording of the oath prescribed by law, such oath-taking conduct shall

be regarded as not in compliance with the requirements in respect of oath taking in form or in substance". As such, the Administration considers it appropriate to retain the current drafting of the clause.

New grounds of disqualification from being a Legislative Council/District Council member

33. Under section 15 of the Legislative Council Ordinance (Cap. 542), a LegCo member ceases to hold office on certain grounds including death, resignation and being declared to be no longer qualified to hold office under BL79. Sections 19 and 24 of the District Councils Ordinance (Cap. 547) respectively specify certain grounds on which an ex officio member and an elected member may be disqualified from holding office. The Bill proposes to amend section 15 of Cap. 542 and sections 19 and 24 of Cap. 547 to add breach of a specified oath and failure to fulfil the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR as new grounds of disqualification from holding office as LegCo/DC members.

34. A member has asked why violating the National Security Law is not a ground of disqualification from holding office as LegCo/DC members. The Administration has advised that Article 35 of the National Security Law has already provided 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 DCs of HKSAR, holding any public office in the Region, or serving as a member of EC for electing CE.

35. A member has asked about the reasons for providing the two separate grounds of disqualification from holding office as LegCo/DC members under section 15 of Cap. 542 and sections 19 and 24 of Cap. 547 as there may be overlapping between the two grounds of disqualification.

36. The Administration has explained that according to the content of the LegCo Oath and DC Oath as set out in Part IV and the proposed new Part IVA of Schedule 2 to Cap. 11, LegCo/DC members must swear to uphold BL of HKSAR, swear allegiance to HKSAR of PRC, and swear to serve HKSAR conscientiously, dutifully, in full accordance with the law, honestly and with integrity. As such, a member's breach of oath is not limited to his failure to meet the legal requirements and conditions for upholding BL and allegiance to HKSAR.

37. The Administration has further explained that in light of the Decision on Qualification of LegCo Members, the Bill also proposes to add "failure to fulfil the legal requirements and conditions on upholding BL and bearing

allegiance to 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 BL of HKSAR of PRC and pledging allegiance to HKSAR of PRC if the member advocates or supports 'Hong Kong independence', refuses to recognize PRC's sovereignty over Hong Kong and the exercise of the sovereignty, solicits intervention by foreign or external forces in 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".²

38. Some members consider the proposed new sections 15(1)(f) and (g) of Cap. 542 and sections 19 and 24 of Cap. 547 not clear. The Administration should specifically set out in the provisions who will have the legal authority to determine a LegCo/DC member is in breach of an oath or fails to fulfill the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR.

39. The legal adviser to the Bills Committee has asked about the types of declarations or decisions and the relevant laws envisaged under the reference "declared or decided in accordance with any law" in respect of the ground of failure to fulfill the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR, and the reasons for not including such reference under the ground of breach of a specified oath.

40. According to the Administration, the Court can make a ruling when the Secretary for Justice ("SJ") brings proceedings under section 73 of Cap. 542 or section 79 of Cap. 547. On the other hand, Article 79(7) of BL provides that the President of the LegCo shall declare that a LegCo member is no longer qualified for the office when he/she is censured for breach of oath by a vote of two-thirds of LegCo members present.

41. As regards who can decide whether a person fails, or is declared or decided in accordance with any law to have failed, to fulfill the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR of PRC, the Administration has advised that according to section 3 of Cap. 1, "law" means "any law for the time being in force in, having legislative effect in, extending to, or applicable in, Hong Kong". With reference to the principles in the Decision on Qualification of LegCo Member, "decided in accordance with

² 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 Returning Officer due to the circumstances mentioned in paragraph 37 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.

law" may include:

- (a) pursuant to section 2 of the Decision on Qualification of LegCo Members, decisions made by the Returning Officer ("RO") in accordance with law and related procedures³;
- (b) as prescribed under section 73 of Cap. 542 or section 79 of Cap. 547, 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 BL which states that LegCo members of HKSAR must, in accordance with law, swear to uphold BL and swear allegiance to HKSAR when assuming office. The Interpretation also explains the oath-taking requirements and consequence of breaching an oath after assuming office;
- (d) Article 79 of BL sets out the circumstances where the President of the 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 LegCo members present; and
- (e) Article 35 of the National Security Law 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 HKSAR. If a person so convicted is a LegCo/DC member, who has taken an oath or

³ Relevant electoral laws have laid down the legal requirements, including:

- (a) Section 16(7)(a)(ii) of Cap. 569, under which candidates for CE 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 BL and pledge allegiance to HKSAR. RO shall determine whether the nomination is valid in accordance with section 17 of Cap. 569 ;
- (b) Section 40(1)(b)(i) of Cap. 542, 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 BL and pledge allegiance to HKSAR. RO shall determine whether the nomination is valid in accordance with section 42A of Cap. 542 and section 16 of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D); and
- (c) Section 34(1)(b) of Cap. 547, 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 BL and pledge allegiance to HKSAR. RO shall determine whether the nomination is valid in accordance with section 36(1) of Cap. 547 and section 16 of the Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation (Cap. 541F).

made a declaration to uphold BL and swear allegiance to HKSAR, he/she shall be removed from his/her office upon conviction, and shall be disqualified from standing for the aforementioned elections or from holding any of the aforementioned posts.

42. Since the relevant laws stipulate the circumstances under which relevant declarations or decisions are made in accordance with the law, the Administration is of the view that the provisions in the Bill are sufficiently clear. If the Administration was to specifically set out the laws, or the circumstances under which the declarations or decisions are made, the provision will not be able to cover any changes that may be made to those laws in future. In response to members' concerns, the Administration has assured that the validity of nominations for elections will no longer be determined by ROs with the establishment of the Candidate Eligibility Review Committee in accordance with the newly amended Annex I and Annex II to BL.

43. A member notes that at present, making a false oath is a criminal offence under the Crimes Ordinance (Cap. 200) and is concerned whether the Administration intends to criminalize engaging in conduct in breach of oath. The Administration has responded in the negative.

44. A member has asked the interface between the proposed mechanism for breach of oath in the Bill and Article 79(7) of BL. The legal adviser to the Bills Committee has also pointed out that Rule 49B of the Rules of Procedure of the LegCo provides for the mechanism for disqualification of a member under Article 79(7) of BL. The Administration takes the view that the two mechanisms relating to disqualification of a LegCo member on the ground of breach of an oath are compatible with each other. While Article 79(7) of BL confers authority on the President of the LegCo to declare that a member is no longer qualified for the office on the ground of, amongst others, breach of oath, provided that the relevant motion must be passed by two-thirds of LegCo members present, it does not, however, preclude the Court from exercising its constitutional duty and power to adjudicate and determine the compliance or otherwise of the constitutional requirement under Article 104 of BL. This is also in line with the spirit of the Interpretation. The Administration has further explained that when considering whether legal proceedings should be brought under section 73 of Cap. 542, SJ will have regard to any relevant proceedings in the LegCo.

45. The legal adviser to the Bills Committee has asked whether the Administration will consider adding to the Bill a provision to explain the circumstances under which a person will be regarded as being in breach of a

specified oath. The Administration agrees that logically, a person who does not fulfil the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR will have also breached his/her oath. However, the Administration is of the view that it is difficult to generalize the specific circumstances under which breach of oath may occur. In fact, the reference to "upholding BL and bearing allegiance to HKSAR" as added to Cap. 1 by the Bill can also serve as a useful reference.

Proposed removal of time limit for instituting legal proceedings on the grounds of disqualification

46. The Bill proposes to amend section 73(2) of Cap. 542 and to repeal section 79(2) of Cap. 547 to remove the existing time limit of six months within which SJ may institute proceedings before CFI against a person who is acting, claims to be entitled to act as a LegCo/DC member on the ground that the person is disqualified from acting as such. In other words, the proposal will allow SJ to bring such proceedings anytime.

47. A member is deeply concerned that the proposal may have an effect that LegCo members will be subject to the institution of legal proceedings on the ground of disqualification during the whole term he/she is serving or even after the term of his/her office, posing a grave threat to their speeches and behaviour. As a result, LegCo members may refrain from commenting on controversial issues and making critical remarks when discharging the duties of a member. Another member considers that LegCo/DC members are obliged to uphold BL and bear allegiance to HKSAR during the term of office.

48. The legal adviser to the Bills Committee has asked whether there will be any legal safeguards for ensuring that the relevant proceedings will be brought without delay so as to avoid unfairness caused to the respondents as the relevant evidence may have been diminished after a long lapse of time from the alleged act is committed.

49. The Administration has explained that the objectives of section 73 of Cap. 542 or section 79 of Cap. 547 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. Moreover, 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.

50. Some members are worried that after the passage of the Bill, they will no longer be protected under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) when expressing their views in debates in meetings of the Council and proceedings in a committee. The Administration has advised that it is not the legislative intent of the Bill to restrict the freedom of speech and debate in the Council or proceedings before a committee protected under Article 77 of BL and sections 3 and 4 of Cap. 382.

51. In this connection, the legal adviser to the Bills Committee has asked whether the Administration will consider adding to the Bill a provision to such effect to reflect the legislative intent to address members' concern. The Administration has advised that Article 77 of BL states that LegCo members of HKSAR shall be immune from legal action in respect of their statements at meetings of the Council. Section 3 of Cap. 382 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 Cap. 382 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. Nevertheless, a number of court judgments⁴ have clearly detailed that the protection provided to LegCo members by Cap. 382 is not absolute. Whether a particular act by a LegCo member will be protected by immunity depends on the actual circumstances of each individual case.

52. The Administration has further explained that it is the constitutional obligation of a LegCo member to uphold BL and bear allegiance to HKSAR. The Interpretation clearly states that "[t]o uphold BL and to bear allegiance to HKSAR as stipulated in Article 104 of 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 Qualification of LegCo Members, it is also specified that if a member is decided in accordance with law that he/she does not fulfil the legal requirements and conditions on upholding BL and pledging allegiance to HKSAR, he/she is immediately disqualified from being a LegCo member. As such, when the Court is considering whether a member upholds BL and bears

⁴ Please refer to *Chief Executive of the HKSAR & Another v. The President of the LegCo* (HCAL 185/2016) (paragraphs 86-88 of the Court of First Instance judgment), *Leung Kwok Hung v. The President of the LegCo (No 1)* (2014) 17 HKCFAR 689 (paragraphs 39-41 of the Court of Final Appeal judgment) and *HKSAR v. Leung Kwok Hung* (DCCC 546/2016) (paragraphs 36, 45-47, and 54 of the reasons of verdict).

allegiance to HKSAR, his words and deeds at LegCo meetings can be one of the determining factors. There is no conflict between the Bill and Article 77 of BL/Cap. 382.

Proposed suspension of functions and duties of a Legislative Council/District Council member

53. Under the proposed new section 73(2A) of Cap. 542 and section 79(2A) of Cap. 547, immediately after the proceedings are brought by SJ against a LegCo/DC member on the grounds of breach of an oath or failure to fulfil the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR, the member's functions and duties will be suspended until the decision of CFI in the proceedings becomes final.

54. There is concern from some members about the new mechanism for SJ to bring proceedings against a LegCo/DC member and provide for an immediate suspension of the Member's functions and duties. The members are worried that SJ may be conferred with excessive power because the decision to bring such proceedings seems to be left entirely to SJ's discretion. The new mechanism may not only damage the dignity of LegCo members, but also undermine their scrutiny power and gate-keeping role in monitoring the Government. Some members have queried whether such a strict mechanism is also applicable to other public officers. There is a suggestion for putting in place proper check and balance, such as SJ to apply to the Court for such suspension of functions and duties rather than an automatic suspension following the institution of the proceedings, and the LegCo to decide with a simple majority whether a member's suspension of functions and duties warrants, etc.

55. The Administration has reiterated that the proposed clauses seek to reflect the related requirements as stipulated in the Interpretation which provides that "[t]o uphold BL and to bear allegiance to HKSAR as stipulated in Article 104 of 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 Qualification of LegCo Members, it is also specified that if a member is decided in accordance with law that he/she does not fulfil the legal requirements and conditions on upholding BL of HKSAR and pledging allegiance to HKSAR, he/she is immediately disqualified from being a LegCo member. Considering the important functions exercised by a LegCo member, the Administration considers allowing a member who is subject to the legal proceedings on the ground of breaching an oath or not complying with the legal requirements and conditions on upholding BL of

HKSAR and bearing allegiance to HKSAR to continue exercising the important functions and duties in the LegCo to be extremely inconsistent with the spirit of the Interpretation and the Decision on Qualification of LegCo Members.

56. The Administration has further advised that to strike a balance, the Bill has included the following to safeguard the interest of the member concerned:

- (a) the member concerned may apply to CFI to lift such suspension under the proposed section 73(2D) of Cap. 542 and the proposed section 79(2E) of Cap. 547; and
- (b) a leap-frog appeal mechanism for proceedings brought under section 73 of Cap. 542 and section 79 of Cap. 547 is provided. A party who is not satisfied with a decision made by CFI may lodge an appeal to the Court of Final Appeal ("CFA") direct (instead of lodging an intermediate appeal to the Court of Appeal of the High Court), subject to leave being granted by the Appeal Committee of CFA. The period within which an application for leave to appeal to the CFA must be lodged will be within 14 working days after the day on which the relevant CFI judgment is handed down. Such arrangement will facilitate speedy resolution of proceedings brought by SJ on the grounds of breach of oath of a member or failure to fulfil the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR, thereby ensuring the final decision of the legal proceedings could be attained as soon as possible.

57. In addition, the Administration has reiterated that when considering whether the relevant legal proceedings should be brought, SJ must have full regard to public interest, strictly abide by the rights and obligations granted or imposed by the law, and take timely legal actions against the persons concerned.

58. Noting that LegCo/DC member concerned is entitled to apply to CFI to lift the suspension of functions and duties, members have asked about the consideration factors for lifting such suspension. The Administration considers it not appropriate to set out consideration factors in the relevant provision.

59. Members note that the time limit for an elector to institute legal proceedings on the grounds of disqualification remains unchanged (i.e. no later than six months from the date on which the person concerned acted, or claimed to be entitled to act, as a LegCo member). Unlike legal proceedings brought by SJ, proceedings brought by electors will not lead to an immediate suspension of the member's functions and duties. To avoid possible abuse of legal proceedings

by electors, there is a suggestion that consideration should be given to allow the taking over of such legal proceedings initiated by an elector by SJ, as in a private prosecution.

Appeal mechanism

60. Members have asked about the expected processing time that can be reduced with the implementation of the leap-frog appeal mechanism. To facilitate speedy resolution of such proceedings, he considers that the mechanism should be implemented alongside other measures, for example, such appeals should be given priority and fast-tracked for hearing.

61. The Administration has advised that the proposed arrangement is similar to that currently adopted for appeal against CFI's determination of an election petition made in relation to the elections of CE, the LegCo, DC and rural representatives. As regards other measures, prioritization of cases is the internal affair of the Judiciary which will not be intervened under the principle of judicial independence.

Arrangement during suspension of functions and duties

62. The Bill does not provide for the handling of the remuneration of a LegCo/DC member whose functions and duties are suspended or who is disqualified as a result of proceedings brought under section 73 of Cap. 542 or section 79 of Cap. 547. There are repeated calls from some members that the remuneration and allowances of the member concerned should be withheld during suspension of functions and duties. These members consider that the Bill should be amended to provide for such withholding to avoid dispute or unnecessary litigation and to adhere more closely to section 2(1) of the Interpretation which provides that "[n]o public office shall be assumed, no corresponding powers and functions shall be exercised, and no corresponding entitlements shall be enjoyed by anyone who fails to lawfully and validly take the oath or who declines to take the oath".

63. According to the Administration, the original proposal in the Bill has taken into account that the issues of the remuneration of LegCo/DC members are the internal matter of the LegCo and administrative arrangement of DC. Furthermore, during the period when a member's functions and duties are being suspended, whether he/she has been disqualified as a member is yet to have a final decision. It is therefore not appropriate to specify in the Bill whether the remuneration and allowances of a member should be withheld while the member's functions and duties are being suspended. However, to alleviate members' concerns and after taking into account their views, the Administration

proposes to move amendments to section 73(2C) of Cap. 542 and section 79(2C) of Cap. 547 to the effect that the member concerned should not enjoy corresponding entitlements, which will include remuneration, allowances and various kinds of reimbursement for expenses, during the suspension.

64. In this connection, there is a view that HAD should work out the implementation details for handling the corresponding entitlements of DC members during the suspension as soon as practicable to facilitate Member's discussion during the Second Reading debate.

65. The proposed section 79(2D) of Cap. 547 expressly provides that a DC member will not be regarded as being absent from a DC meeting during the suspension under section 79(2A) for the purposes of sections 19(4) and 24(5) of Cap. 547. Some members have asked the reasons for not providing a similar provision under Cap. 542 or any other legislation to clarify whether a LegCo member will be regarded as being absent from a LegCo meeting during the suspension.

66. The Administration has advised that 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. Hence, 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 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 Cap. 547 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 DC for four consecutive months without obtaining the consent of the Council before the end of that period. Unlike the LegCo, where the President may decide whether the absence of the member has a valid reason, the provisions of Cap. 547 do not specify what factors DC should consider. It is therefore stipulated in the Bill that a DC member should not be regarded as absent during the period when his duties are being suspended.

67. Some members have asked the Administration to explain how the remuneration of a LegCo/DC member will be handled if the member (a) has resigned as Member before he/she is adjudged as having in breach of oath or failed to uphold BL and bear allegiance to HKSAR, and (b) is declared as disqualified by the Court, that is, whether the remuneration paid to the member concerned should be returned from the date of disqualification. According to the

Administration, in line with the Interpretation and the Decision on Qualification of LegCo Members, if the Court has ruled that a member is disqualified from acting as a member beginning on a date, the member should cease to be entitled to any corresponding entitlement beginning on that date. The member concerned has to return the remuneration paid to him/her from the date of disqualification.

68. A member has suggested that the Bill should add an express provision to the effect that a disqualified member shall not enjoy any corresponding entitlements and shall return the remuneration paid to him/her from the date of disqualification to the LegCo Commission (for disqualified LegCo member) and to the Government (for disqualified DC member).

69. The Administration has reiterated that the original proposal in the Bill is silent on this issue having considered that the remuneration of LegCo/DC members are the internal matter of the LegCo and administrative arrangement of DC, and they should have sufficient powers to handle the matter. As such, the Bill did not provide express provisions relating to the member's remuneration. Nevertheless, after consideration, the Administration agrees that relevant provisions can be provided in the Bill to clarify the policy intent. The Administration therefore proposes to move amendments to section 73 of Cap. 542 and section 79 of Cap. 547 to the effect that if a LegCo/DC member is disqualified from acting as a member beginning on a date, he/she should not enjoy corresponding entitlements beginning on that date.

Drafting issues

70. The legal adviser to the Bills Committee has pointed out that "提出" in the new subsection (2A) added to section 79 of Cap. 547 is inconsistent with "提起" used in the existing sections 79(1) and 79(3). To ensure consistency of the wording in the Chinese text of section 79 of Cap. 547, the Administration has proposed to amend the existing heading of that section and the proposed subsection (2A) by replacing "提出" with "提起".

71. The legal adviser to the Bills Committee has pointed out that the position of "如" in "根據第(2A)款被暫停議員職能和職務的人，如在被暫停該職能和職務的期間沒有出席區議會的會議" in the Chinese text of the proposed new section 79(2D) of Cap. 547 seems to suggest that the member concerned may still attend meetings during suspension of functions and duties. To reflect that the DC member concerned is not allowed to attend the relevant meeting during suspension, the Administration has proposed to amend the proposed section 79(2D) as "如某人的議員職能和職務根據第(2A)條被暫停，而該人在該職能和職務被暫停的期間沒有出席區議會的會議".

Proposed amendments to the Bill

72. As mentioned in paragraphs 63, 69, 70 and 71 above, the Administration proposes moving the amendments to the Bill in **Appendix II**, which are supported by a majority of members. No difficulties have been identified by the legal adviser to the Bills Committee in relation to the legal and drafting aspects of the proposed amendments. The Bills Committee will not propose any amendments in its name.

Resumption of the Second Reading debate

73. The Bills Committee supports the Administration to resume the Second Reading debate on the Bill at the Council meeting of 12 May 2021.

Consultation with the House Committee

74. The Bills Committee reported its deliberations to the House Committee on 23 April 2021.

Council Business Division 4
Legislative Council Secretariat
6 May 2021

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

Membership list

Chairman Hon Tommy CHEUNG Yu-yan, GBS, JP

**Deputy
Chairman** Hon Holden CHOW Ho-ding

Members Hon WONG Kwok-kin, SBS, JP
Hon Paul TSE Wai-chun, JP
Hon YIU Si-wing, BBS
Hon LEUNG Che-cheung, SBS, MH, JP
Hon YUNG Hoi-yan, JP
Dr Hon Pierre CHAN
Hon CHAN Chun-ying, JP
Hon LAU Kwok-fan, MH
Dr Hon CHENG Chung-tai
Hon Vincent CHENG Wing-shun, MH, JP
Hon Tony TSE Wai-chuen, BBS, JP

(Total : 13 Members)

Clerk Ms Angel WONG

Legal Adviser Ms Clara TAM
Mr Mark LAM

Public Offices (Candidacy and Taking Up Offices)
(Miscellaneous Amendments) Bill 2021

Committee Stage

Amendments to be moved by the Secretary for Constitutional and Mainland Affairs

<u>Clause</u>	<u>Amendment Proposed</u>
21(2)	In the proposed section 73(2C)(b), by deleting “and”.
21(2)	After the proposed section 73(2C)(b), by adding— “(ba) must not enjoy any corresponding entitlement; and”.
21(3)	Before the proposed section 73(4A), by adding— “(4AA) If, in proceedings brought under this section, it is proved that the defendant was disqualified from acting as a Member beginning on a date, the defendant ceased to be entitled to any corresponding entitlement beginning on that date.”.
26	By adding— “(1A) Section 79, Chinese text, heading— Repeal “提出” Substitute “提起”.”.
26(2)	In the Chinese text, in the proposed section 79(2A), by deleting all “提出” and substituting “提起”.
26(2)	In the proposed section 79(2C)(b), by deleting “and”.
26(2)	After the proposed section 79(2C)(b), by adding— “(ba) must not enjoy any corresponding entitlement; and”.

26(2) In the Chinese text, by deleting the proposed section 79(2D) and substituting—

“(2D) 如某人的議員職能和職務根據第(2A)條被暫停，而該人在該職能和職務被暫停的期間沒有出席區議會的會議，則就第 19(4)及 24(5)條而言，該人不得視為沒有出席該會議。”。

26(3) Before the proposed section 79(4A), by adding—

“(4AA) If, in proceedings brought under this section, it is proved that the defendant was disqualified from acting as a member beginning on a date, the defendant ceased to be entitled to any corresponding entitlement beginning on that date.”。