

立法會
Legislative Council

Ref : CB4/BC/5/20

LC Paper No. CB(4)1471/20-21
(These minutes have been seen
by the Administration)

**Bills Committee on Improving Electoral System
(Consolidated Amendments) Bill 2021**

**Minutes of the seventh meeting
held on Thursday, 22 April 2021, at 2:30 pm
in Conference Room 2 of the Legislative Council Complex**

Members present : Hon Martin LIAO Cheung-kong, GBS, JP (Chairman)
Hon CHEUNG Kwok-kwan, JP (Deputy Chairman)
Hon Tommy CHEUNG Yu-yan, GBS, JP
Hon CHAN Hak-kan, BBS, JP
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon WONG Kwok-kin, SBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Frankie YICK Chi-ming, SBS, JP
Hon MA Fung-kwok, GBS, JP
Hon Alice MAK Mei-kuen, BBS, JP
Ir Dr Hon LO Wai-kwok, SBS, MH, JP
Hon Wilson OR Chong-shing, MH
Dr Hon CHENG Chung-tai

Member attending : Hon Holden CHOW Ho-ding

Public Officers attending : Mr Erick TSANG Kwok-wai, IDSM, JP
Secretary for Constitutional and Mainland Affairs

Mr Roy TANG Yun-kwong, JP
Permanent Secretary for Constitutional and Mainland Affairs

Ms Cherie YEUNG Lok-sze
Principal Assistant Secretary (Constitutional and Mainland
Affairs) 2

Ms Carmen KONG Ka-man
Principal Assistant Secretary (Constitutional and Mainland
Affairs) 3

Mr Llewellyn MUI Kei-fat
Law Officer (Special Duties) (Acting)
Department of Justice

Mr Peter SZE Chun-fai
Senior Assistant Law Draftsman
Department of Justice

Miss Emma WONG
Senior Assistant Law Draftsman
Department of Justice

Clerk in attendance : Ms Joanne MAK
Chief Council Secretary (4) 7

Staff in attendance : Mr Bonny LOO
Senior Assistant Legal Adviser 3

Ms Clara WONG
Assistant Legal Adviser 4

Mr Dennis HO
Senior Council Secretary (4) 7

Ms Zoe TONG
Legislative Assistant (4) 5

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I. Meeting with the Administration

[File Ref.: CMAB C1/30/5/5, LC Paper Nos. CB(3)444/20-21, LS65/20-21, CB(4)814/20-21(01) and (02), CB(4)836/20-21(01), CB(4)827/20-21(01), CB(4)858/20-21(01) and CB(4)859/20-21(01) and (02)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Discussion/Clause-by-clause examination

Clause 86: Nomination of candidates for the Legislative Council ("LegCo") Election Committee ("EC") constituency ("ECC")

2. With regard to the proposed new section 12A of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D) on the nomination of candidates for ECC, Ms Alice MAK considered it necessary to require all LegCo candidates to declare in the nomination form information including their nationality, political affiliation with foreign political organizations and any subsidies received from those organizations, whether they were in possession of any passports issued by a foreign country (e.g. British Nationals (Overseas) passports), and whether they had any integrity issues. Ms MAK considered that the above information should be provided in the relevant forms and made public. Mr Paul TSE expressed support for Ms MAK's suggestion.

3. Secretary for Constitutional and Mainland Affairs ("SCMA") explained that the Candidate Eligibility Review Committee ("CERC") was entitled to request a candidate to provide all the aforesaid information in the course of its assessment work. SCMA advised that the present thinking of the Government was that candidates would first be required to provide basic information in the nomination form, and then provide other supplementary information needed by CERC. Permanent Secretary for Constitutional and Mainland Affairs ("PSCMA") added that CERC would be consulted on the types of supplementary information to be required from candidates.

Admin

(Post-meeting note: Ms Alice MAK further wrote to the Bills Committee on 23 April 2021 [LC Paper No. CB(4)883/20-21(01)] requesting that not only LegCo candidates but also EC candidates should be required to provide the aforementioned information in the relevant nomination form/declarations and such information should be made public. She considered that the Administration should propose amendments to the Bill to that effect. In response, the Administration explained in its paper on proposed amendments to the Improving Electoral System (Consolidated Amendments) Bill 2021 [LC Paper No. CB(4)912/20-21(01)] issued to the Bills Committee on 29 April 2021 that the existing drafting approach of the provisions aimed to provide flexibility for CERC to request any other information from candidates, nominees, etc. when considering the validity of nominations of candidates, nominees, etc., including but not limited to the information mentioned above, and recommended to maintain the existing drafting approach of the provision in order to provide the greatest flexibility for CERC.)

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4. In reply to the Chairman's enquiry on whether an independent secretariat would be provided to CERC, PSCMA said that the Administration was still conducting an internal study on the matter and it had yet to come to a view.

5. The Chairman further enquired about how the Returning Officers ("ROs") would be involved in the workflow of CERC. PSCMA said that after a candidate had submitted a nomination form to the RO, if CERC considered that there was no need to request any other information from the candidate, RO would notify the candidate that the nomination was valid. However, if CERC considered it necessary to request additional information from the candidate, it would seek the additional information directly from the candidate, and make its ruling on the validity of the nomination based on its exchanges with the candidate and the information previously provided by the candidate. PSCMA stressed that ROs would not participate in the process of CERC's seeking additional information from candidates.

Financial assistance payable to candidates

6. Members noted that in geographical constituency elections, if a candidate died or was disqualified from being nominated as a candidate, the proceedings for the election would be terminated and no financial assistance would be payable to any candidate for election expenses incurred in respect of that election. However, if a candidate died or was disqualified from being nominated as a candidate after the close of poll but before the declaration of result of the election, then all candidates, with the exception of the disqualified candidate, would still be entitled to financial assistance. Members enquired about the rationale for the arrangements. Principal Assistant Secretary (Constitutional and Mainland Affairs) 2 ("PAS(CMA)2") explained that as the number of votes obtained by the candidates would have a bearing on their entitlement to financial assistance and the amount payable in the election for a contested constituency, financial assistance would only be payable after the number of votes obtained by the candidate could be ascertained after the vote count. PAS(CMA)2 added that the termination of proceedings (and the consequential non-payment of financial assistance) would affect all candidates in the election, not just the candidate who died or was disqualified.

Clause 366: Proposed new section 27A of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554)

Proposed section 27A(1) and (2)

7. Dr Priscilla LEUNG considered that the purpose of the proposed new section 27A of Cap. 554 ("section 27A") was to prohibit manipulating or undermining an election through inciting another person not to vote, or to cast an invalid vote. As

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such, it should not affect the choice of individual voters on whether to vote or not, or prevent a person from appealing to electors not to vote for a particular candidate. Dr LEUNG expressed concerns that, as it was currently drafted, section 27A might be ambiguous so that innocent people might be charged with an offence under that section. To quote as example, she said that a person might casually talk to his friends on an MTR train (i.e. in public) about not going to vote in an election as he did not like any of the candidates. While the person might have no intention to manipulate or undermine the election at all, he might be charged with an offence under section 22(1) for having engaged in the illegal conduct under section 27A(1) since his act contained the elements of the illegal conduct.

8. In reply, PSCMA advised that in drafting section 27A, the Administration had considered an issue similar to that raised by Dr Priscilla LEUNG and had consulted the Department of Justice. The Administration was of the view that the elements of "willfully" or "with intent" had been part of "incitement" and hence there was no need to explicitly set out the element of intentionality. Law Officer (Special Duties) (Acting) of the Department of Justice ("LO(SD)/DoJ") supplemented that in prosecuting a person charged with an offence for having engaged in the illegal conduct in section 27A(1), according to the current standard of prosecution, the prosecution would have to establish that there was "an intent to incite".

9. Mrs Regina IP concurred with PSCMA's view. She pointed out that in some legislation such as the Public Order Ordinance (Cap. 245), it was not necessary to make the elements of "wilfully" or "deliberately" explicit in the offences such as "incitement" and "sedition" which had already carried the meaning of "intent to commit a crime".

10. Dr Priscilla LEUNG said that in the National Anthem Ordinance, it is an offence if a person publicly and intentionally insults the national anthem in any way. She suggested that the Administration should make reference to the National Anthem Ordinance and consider including the elements of intentionality, as well as the ultimate aim to disrupt an election, in the proposed offence of engaging in the illegal conduct in section 27A(1). In response, LO(SD)/DoJ confirmed that the current drafting of section 27A did not require the prosecution to establish "an intent to manipulate or undermine an election" in the act of inciting others not to vote.

11. Dr CHENG Chung-tai noted that in accordance with section 27A(2), the illegal conduct in section 27A(1) applies only to an activity in public carried out during the election period of the election concerned. He asked for the definition of "election period". PSCMA said that in the context of Cap. 554, election period means the period beginning with the nomination day for the election and ending with the polling day for the election (or the last polling day if there is more than one polling day).

12. Dr CHENG Chung-tai then enquired whether a person would be charged with an offence under section 22(1) of Cap. 554 for carrying out the activity in section 27A(1) in public if the activity was carried out outside the election period. PSCMA confirmed that the illegal conduct in section 27A(1) only covered an activity carried out during the election period. However, PSCMA cautioned that while an activity carried out outside the election period might not be caught by section 27A(1), one should beware whether that activity would constitute offences in other applicable laws in Hong Kong, such as The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law").

13. Mr Paul TSE questioned why the proposed new section 27A was necessary if the activity in section 27A(1) might constitute an offence under the National Security Law. In response, PSCMA stressed that the National Security Law specifically targeted acts and activities to split the country, subvert state power, organise and carry out terrorist activities and other behaviour that would seriously endanger national security, as well as activities of foreign and external forces interfering in the affairs of the Hong Kong Special Administrative Region ("HKSAR"), which were completely different and much wider in scope than the new section 27A.

14. PSCMA further said that according to the decision made by the National People's Congress on Improving the Electoral System of HKSAR ("the Decision") on 11 March 2021 and Annexes I and II to the Basic Law as amended by the Standing Committee of the National People's Congress, the HKSAR Government should effectively organise and regulate relevant electoral activities and take measures against acts of manipulating or undermining election in accordance with law. Since inciting voters not to vote, to cast blank or invalid votes during an election period were acts that manipulate or undermine elections, the Administration was obliged to regulate it in accordance with the Decision and the amended Annexes I and II to the Basic Law. PSCMA said that section 27A would provide a clear message to the public on what acts would constitute a manipulation or undermining of elections.

15. Mr Paul TSE said that while he could appreciate the legislative intent of section 27A, the targeted acts on what constituted an illegal act of incitement should be specific and clear for enforcement. He pointed out that there were various reasons why someone might incite (or have the intent to incite) others not to vote but the reasons might have nothing to do with manipulating or undermining an election. For example, one might tell others in public not to vote simply because of bad weather or a desire for others to join one in other activities instead, which should not be caught by the definition of "illegal conduct" under section 27A(1). Mr TSE said that he concurred with Dr Priscilla LEUNG and considered that illegal

conduct under section 27A(1) should contain the element of "with the intent of manipulating or undermining the election".

16. Mr Wilson OR pointed out that, as section 27A was to regulate the incitement of others not to vote or to cast an invalid vote, it would not regulate those acts such as "queue with you" (和你排) in the 2019 District Council Ordinary Election through which someone repeatedly queued up in the line of voters with a view to delaying the process of voting. In reply, PSCMA said that such acts would constitute an offence under Cap. 554 if the persons obstructed or prevented another person from voting at the election.

Section 27A(4)

17. Mrs Regina IP and Senior Assistant Legal Adviser 3 requested the Administration to provide examples for illustrating what would constitute "lawful authority or reasonable excuse" for inciting another person not to vote or to cast an invalid vote in public during the election period", which could be used as a defence under section 27A(4).

18. PSCMA gave two examples in response and said that, while these examples might be considered extreme scenarios and whether the conduct falls under section 27A would be subject to the actual circumstances of the cases, the spirit of legislative drafting did require that such extreme scenarios be catered to. In the first example, a person genuinely believed that another person was not qualified to vote and asked the latter not to vote. In the second example, someone had called an election a de facto referendum and, out of one's bona fide belief that such an election was illegal or unconstitutional, a person incited others not to vote. PSCMA said that in either example, the person who incited others not to vote might appeal to his genuine belief as a defence that the activity engaged in was not an illegal conduct under section 27A(1).

Section 27A(5)

19. Dr CHENG Chung-tai said that the expression "activity in public" as proposed to be defined in section 27A(5) was too broad in scope. He was concerned that what one wore to the polling station, any gesture he made after voting, or any slogan chanted might easily be interpreted as symbolizing one of the illegal conducts in section 27A(1). In response, PSCMA said that under section 27(3), in determining whether an activity in public incites another person as described in section 27A(1), one might have regard to all circumstances of the case including the contents of the activity; the intended audience of the activity and the circumstances in which the activity was carried out. Therefore, it was not appropriate for him to comment on the scenarios raised by Dr CHENG out of context.

20. Mrs Regina IP enquired whether activities of communications such as dissemination of messages through social media, emails or even secretive circulation of papers, which were not specifically listed under section 27A(5), would constitute an activity in public. Mr Wilson OR also asked whether "internet" would be included as one of the possible forms of communication under section 27A(5).

21. In response, PSCMA explained that as section 27A(5)(a) specified "any form of communication including" rather than specific means in which the communication took place, the communications mentioned by Mrs Regina IP and Mr Wilson OR should be covered as an activity in public. Nevertheless, he undertook to study with DoJ whether the means of communication needed to be explicitly incorporated into the subsection.

The definition of "election period"

22. Mr Tommy CHEUNG considered the definition of "election period" in Cap. 554 might be too narrow to regulate certain illegal conduct. For example, he considered that declaring to run for an election and providing entertainment to potential voters before the election period had started might circumvent the law. PSCMA said that the definition of "election period" applicable to section 27A had been provided in Cap. 554 without any amendment since it was first enacted. However, the various election activities regulated by Cap. 554 might not necessarily be only restricted to during the election period. For instance, election expenses in relation to a candidate or group of candidates at an election means expenses incurred or to be incurred, before, during or after the election period.

23. Mr Tommy CHEUNG further asked whether it would be an illegal conduct if one, before the election period had commenced, called others to register as voters with a view to having more voters to vote against a certain potential candidate. In response, PSCMA said that if the person making the call was a candidate in the election and the call was with the purpose of promoting the election of the candidate or group; or prejudicing the election of another candidate or group, an election expense had been incurred and thus declaration would be required.

24. Members noted that the next meeting would be held on Friday, 23 April 2021, from 9:00 am to 1:00 pm.

Action

II. Any other business

25. There being no other business, the meeting ended at 4:24 pm.

Council Business Division 4
Legislative Council Secretariat
31 August 2021

**Proceedings of the seventh meeting of the
Bills Committee on Improving Electoral System
(Consolidated Amendments) Bill 2021
on Thursday, 22 April 2021, at 2:30 pm
in Conference Room 2 of the Legislative Council Complex**

| Time Marker | Speaker(s) | Subject(s) | Action required |
|--------------------|---|---|--|
| 000350 - 000441 | Chairman | Opening remarks | |
| 000442 - 003008 | Chairman Ms Alice MAK Administration | Continuation of clause-by-clause examination of the Improving Electoral System (Consolidated Amendments) Bill 2021 ("the Bill") <u>Examination of clauses 111(4), (5) and (12), 121, 124, 127-131, 138, 141, 142(1), (6) and (9)-(13), 143(1)-(4) and (7), 158(7), 241(5), 242 and 243(2) of the Bill</u> - Discussion on the electoral arrangements for the Legislative Council ("LegCo") Election Committee ("EC") constituency | |
| 003009 - 005154 | Chairman Mr WONG Kwok-kin Ms Alice MAK Mr Paul TSE Administration | <u>Examination of clauses 80(11) and (12), 81, 82, 86, 92(1) and (6), and 332(1) and (2) of the Bill</u> - Concerns about issues relating to the nomination of candidates for the LegCo EC constituency | Admin to follow up and provide further information (para. 3 of minutes) |
| 005155 - 010916 | Chairman Dr Priscilla LEUNG Mr Paul TSE Administration | <u>Examination of clauses 106, 107(1), 146(2)-(4), 159(3), 309(5) and (6), 319(7) and (8), 320, 321, 323, 353, 354 and 371(3) of the Bill</u> - Discussion on the provision of financial assistance for candidates | |
| 010917 - 015758 | Chairman Senior Assistant Legal Adviser Dr Priscilla LEUNG Mrs Regina IP Dr CHENG Chung-tai Mr Paul TSE Mr Wilson OR Mr Tommy CHEUNG Administration | <u>Examination of clauses 133(1), 241(1), 249, 366, 373(1)-(5), 374, 375 and 378-379 of the Bill</u> - Discussion on the proposed new offence under the proposed new section 27A of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554), which prohibited any person from inciting another person not to vote, or to cast an invalid vote, by activity in public during the election period | |

| Time Marker | Speaker(s) | Subject(s) | Action required |
|--------------------|---------------------|--|------------------------|
| 015759 - 015826 | Chairman Members | Date of next meeting and closing remarks | |

Council Business Division 4
Legislative Council Secretariat
31 August 2021