

立法會

Legislative Council

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Paper for the House Committee

Report of the Subcommittee on Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation

Purpose

This paper reports on the deliberations of the Subcommittee on Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation ("the Subcommittee").

Background

Government's decision to postpone the 2020 Legislative Council General Election

2. In a gazette notice published on 12 June 2020 (G.N. 3115 of 2020), the Chief Executive ("CE"), in accordance with section 6(1) of the Legislative Council Ordinance (Cap. 542) ("LCO"), specified that 6 September 2020 would be the date for holding the general election to elect members for the seventh term of office of the Legislative Council ("LegCo") of the Hong Kong Special Administrative Region ("HKSAR"). The nomination period was to span from 18 to 31 July 2020. To ensure that all candidates (including serving LegCo Members) would compete on a level playing field, CE, in exercise of the powers under section 6(4) of LCO, specified 18 July 2020 (the commencement date of the nomination period) as the date from which the sixth term of LegCo should stand prorogued (G.N. 3116 of 2020). With 70 seats to be contested involving 4.4 million registered electors according to the 2020 Final Register, the 2020 LegCo General Election was expected to generate fierce competition in the lead-up to the polling day.

3. On 31 July 2020, the HKSAR Government announced that, amidst the severe Coronavirus Disease 2019 ("COVID-19") epidemic situation, CE in Council decided to postpone the 2020 LegCo General Election for one year to 5 September 2021, in order to protect public safety and public health as well as

ensure that the election can be conducted openly and fairly.¹ To implement the postponement, CE in Council has invoked the Emergency Regulations Ordinance (Cap. 241)² ("ERO") to make the Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation (L.N. 152 of 2020) ("the Regulation"). Apart from specifying the new election date, the Regulation also brings the electoral process of the 2020 LegCo General Election to an end and deals with matters relating to election expenses and election donations.

Decision of the Standing Committee of the National People's Congress on the continuing operation of the sixth term of LegCo

4. Article 69 of the Basic Law ("BL") stipulates that the term of office of LegCo shall be four years, except the first term which shall be two years. In accordance with BL 69, the sixth term of LegCo must end on 30 September 2020. According to the LegCo Brief issued by the Constitutional and Mainland Affairs Bureau ("CMAB") (File Ref.: CMAB C1/37) in October 2020, while the Regulation can postpone the election for a year, it cannot deal with the lacuna in LegCo arising from the postponement of the general election of the seventh term of LegCo. To overcome this constitutional problem, CE submitted an urgent report to the Central People's Government to seek its support and guidance. The State Council subsequently made a submission to the Standing Committee of the National People's Congress ("NPCSC") for a decision on how to deal with the lacuna in LegCo.

5. On 11 August 2020, NPCSC made a decision that after 30 September 2020, the sixth term of LegCo is to continue to discharge duties for not less than one year until the seventh term of office of LegCo begins. After the seventh term of LegCo is formed in accordance with the law, its term of office remains to be four years. NPCSC's decision was published in the Gazette on 14 August 2020 as L.N. 154 of 2020.

¹ Please see the relevant press release issued by the HKSAR Government on 31 July 2020 <http://www.info.gov.hk/gia/general/202007/31/P2020073100898.htm>

² Section 2(1) of ERO provides that on any occasion which CE in Council may consider to be an occasion of emergency or public danger, CE in Council may make any regulations whatsoever which he may consider desirable in the public interest. Section 2(2) of ERO specifies matters that may be provided in regulations made under section 2(1). These matters include amending any enactment, suspending the operation of any enactment and applying any enactment with or without modification.

Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation (L.N. 152 of 2020)

6. The Regulation, gazetted on 31 July 2020, was made for the following purposes:³

- (a) to revoke certain specification and notices in respect of the general election for the seventh term of office of LegCo originally scheduled to be held on 6 September 2020 ("discontinued election");
- (b) to provide that the discontinued election comes to an end at the beginning of 1 August 2020 ("discontinuation date"), and that acts done, or purportedly done, under the relevant electoral laws and guidelines issued by the Electoral Affairs Commission ("EAC") in relation to the discontinued election cease to have effect accordingly;
- (c) to provide that the general election for the seventh term of office of LegCo is to be held on 5 September 2021 instead; and
- (d) to provide for certain electoral matters related or consequential to the change of the date of the general election, including the requirement of the Government to make payments to eligible persons and eligible groups in respect of their declared election expenses.

7. The Regulation, which came into operation on 1 August 2020, was tabled before LegCo on 14 October 2020 for negative vetting.

The Subcommittee

8. At the House Committee meeting on 16 October 2020, Members agreed to form a subcommittee to study the Regulation. The membership list of the Subcommittee is in **Appendix I**. Under the chairmanship of Mr CHEUNG Kwok-kwan, the Subcommittee has held three meetings with the Administration.

9. The scrutiny period of the Regulation has been extended from the Council meeting of 11 November 2020 to that of 2 December 2020 by a resolution passed at the Council meeting of 4 November 2020.

³ Please also see paragraph 3.

Deliberations of the Subcommittee

Justifications for postponing the 2020 LegCo General Election

10. While members of the pro-establishment camp are in support of the CE in Council's decision to postpone the 2020 LegCo General Election in view of the prevailing severe epidemic situation, non-establishment members strongly oppose the postponement. In the latter's views, the general election of the seventh term of LegCo should be held as soon as the COVID-19 epidemic subsides and is brought under control. These members have queried whether the decision to postpone the election was made out of political considerations in a bid to buy time for the Government to propose legislative amendments to implement the "external voting arrangement" under which Hong Kong people residing in the Guangdong-Hong Kong-Macao Greater Bay Area would be allowed to cast votes outside Hong Kong in the LegCo General Election. A further query has been raised as to whether the casting of votes by electors on the LegCo election day is, in fact, more conducive to the spread of the epidemic than their taking part in other large-scale public events, such as those held for celebration of HKSAR Establishment Day or National Day.

11. In response, the Administration has emphasized that postponing the 2020 LegCo General Election was a very difficult but necessary decision in view of the unprecedented COVID-19 epidemic. Firstly, the LegCo General Election is massive in scale involving 70 seats, 4.4 million registered electors, over 600 polling stations and 34 000 electoral staff; and polling has to be completed within a day with long polling hour (the poll runs consecutively for 15 hours from 7:30 am to 10:30 pm). Coupled with a dedicated central counting station and a media centre, there would be huge infection risks associated with round-the-clock crowd gatherings and close human contacts, the situation of which is different from other public celebration activities held. Besides, as the regulations to prohibit group gatherings and to restrict social distancing are still in force, it would not be possible for candidates to carry out any meaningful rallying activities. Further, a large number of electors are living, working and studying in the Mainland, while many are stranded overseas. These electors will not be able to return to Hong Kong to cast their votes due to the border control measures. Elderly electors are also deterred from voting amidst the severe epidemic situation due to their higher infection risk. To satisfy the requirement that the election is conducted fairly and openly and to prevent the spread of the epidemic, the Government has no plan to conduct the LegCo General Election when the COVID-19 epidemic continues to post a threat to public health.

12. Some non-establishment members have expressed dissatisfaction that CE in Council has neither consulted LegCo Members nor public health experts before

coming to the decision to postpone the 2020 LegCo General Election. The Administration advises that given the exigency of the situation and sensitivity of election matters, the four experts on the advisory panel to provide CE with professional advice relating to anti-epidemic policies/measures have not been consulted on the postponement of the election. However, the matter has been well considered by members of the Executive Council who agreed that there was an imminent need for the Government to respond swiftly to the severe epidemic situation in early July 2020.⁴

13. In response to some members' enquiries as to why the general election of the seventh term of LegCo needs to be postponed for a year and whether the new election date can be advanced, the Administration has explained that although the epidemic has eased slightly as compared to July 2020, the situation has not yet stabilized. Preventing and controlling the disease is still the top priority of the Government. There is yet to be any clear indication when the epidemic will end. Medical experts have advised that the current wave of the epidemic is likely to last for weeks or even longer and there may also be a winter surge. As LegCo performs important and substantive functions and has an annual business cycle, and preparatory work for a general election will take months, the Government considers it reasonable and in the public interest to postpone the election for a year. Furthermore, to ensure fairness of the election, another voter registration exercise will be necessary before the re-scheduled election.

Possibility of further postponing the election beyond September 2021

14. Grave concern has been expressed by many non-establishment members over the possibility that CE might seek to reschedule, on different grounds, the general election of the seventh term of LegCo beyond September 2021, thereby transforming the sixth term of LegCo into a "perpetual legislature", undermining the legitimacy of LegCo. These members have enquired whether the Administration has any objective criteria (e.g. how long "zero infection" has to be achieved consecutively or how many new infection cases are recorded each day etc.) under which it might consider the epidemic as severe as the situation in July 2020 such that it would need to take a decision as to whether to further postpone the date for holding the general election of the seventh term of LegCo. Some other members, including Dr Priscilla LEUNG and Ms Elizabeth QUAT, are of the view that in order to ensure that the 2021 LegCo General Election can be conducted smoothly in a fair and just manner, the Administration should explore

⁴ According to the Administration, from 8 to 30 July 2020, there were 1 852 new cases, up by 140% from the 1 300 cases accumulated in the past six months, of which the number of confirmed cases on 30 July 2020 hit record high of 149 cases; 90% of new cases were local ones and nearly half of them had unknown infection sources.

the use of technology to implement electronic voting, including the use of an electronic poll register for issuing ballot papers, the introduction of online voting and electronic counting at polling stations.

15. According to the Administration, both the rationale for and timing of postponing the election involve a host of factors and considerations. With the latest developments of the COVID-19 epidemic, the impact of the epidemic on the election also changes over time. It is therefore not practicable to formulate any rigid criteria for postponing the general election. As the Regulation has specified 5 September 2021 as the new election date, CMAB will, as in the past, work closely with EAC to ensure that the election is conducted in an open, fair and impartial manner in accordance with the relevant legislation. CMAB and the Registration and Electoral Office ("REO") will also strive to improve the existing electoral arrangements, while closely monitoring the development of the COVID-19 outbreak in assessing the impact of the epidemic on the election from now until the 2021 LegCo General Election. The Administration will formulate in a timely manner various plans in view of the different scenarios concerning the development of the epidemic.

Constitutional and legal implications if the Regulation is repealed or amended by LegCo

16. Some non-establishment members are strongly of the view that the general election of the seventh term of LegCo should be held as soon as the epidemic subsides and is brought under control. Noting that LegCo has the power to amend the Regulation in accordance with section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO"), these members have enquired about the constitutional and legal implications involved (including the effect of the gazette notices, i.e. G.N. 3115 of 2020, G.N. 3116 of 2020, G.N. 3276 of 2020, G.N. 3277 of 2020 and G.N. (E.) 110 of 2020, previously published) and what response actions would be taken by the Administration (in particular, whether an alternative decision by NPCSC will be sought regarding the continuing operation of the sixth term of LegCo) in the following scenarios:

- (a) in the event that the new date (i.e. 5 September 2021) for holding the LegCo General Election as specified in the Regulation is amended by LegCo (e.g. advanced to an earlier date); and
- (b) in the event that the Regulation is repealed by LegCo.

17. The Administration reiterates that in accordance with the decision made by NPCSC, the sixth term of LegCo is to continue to discharge duties for not less than one year until the seventh term of office of LegCo begins. After the seventh term

of LegCo is formed in accordance with the law, its term of office remains to be four years. Even if Members seek to repeal the Regulation and the relevant resolution is passed by LegCo, the repeal of the Regulation will not and cannot have any impact on the constitutional and legal effect of NPCSC's decision on the continuing operation of the sixth term of LegCo. In the light of NPCSC's decision, CE has exercised the power conferred under section 46 of IGCO to revoke the prorogation notice (G.N. 3116 of 2020) which specified that the sixth term of LegCo should stand prorogued on 18 July 2020. The notice of that decision was published in the Gazette as G.N. (E.) 110 of 2020 ("revocation notice") on 14 August 2020. Section 23(a) of IGCO provides that "where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect". As such, even if LegCo repeals the Regulation, there would be no impact on the legal effect of the revocation notice.

18. The Administration and the Legal Adviser to the Subcommittee both advise that in accordance with sections 23(a) and 34(2) of IGCO, even if the Regulation is repealed by LegCo, the revoked specification and notices (i.e. G.N. 3115, 3276 and 3277 of 2020) in relation to the holding of the 2020 LegCo General Election would not be revived. As regards the new date for holding the LegCo General Election specified under section 6 of the Regulation (i.e. 5 September 2021), if Members seek to repeal the Regulation and the relevant resolution is passed by LegCo, this new date of general election would no longer have effect. Under such circumstances, CE is obliged to specify a date for holding the LegCo General Election in accordance with section 6(1) of LCO, and the date to be specified must comply with the requirements under Section 6(2) of LCO, i.e. not earlier than 60 days and not later than 15 days before the new term of office of LegCo is to begin.⁵ The Administration further stresses that the original date for holding the 2020 LegCo General Election has passed. Even if the Regulation is repealed, having regard to the current situation, the Government will not hold the LegCo General Election immediately upon the passing of an amendment by LegCo.

19. The Administration has further pointed out that the majority of candidates have submitted their election returns by the statutory deadline on 29 September 2020 in accordance with section 8(2)(b) of the Regulation. REO is handling all the election returns and claim forms, with a view to making payments to eligible candidates as early as possible. If the Regulation is repealed, the legal basis as

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

well as obligation for the Government to make such payments to candidates will become unclear. In addition, the Regulation clarifies the relationship between the discontinued election and the 2021 election. For instance, section 7(3) and (4) of the Regulation provides that any election expenses incurred, or any declaration to stand as a candidate, in connection with the discontinued election will not affect the 2021 election. If the Regulation is repealed, these matters will also become uncertain.

20. Regarding the scenario that the Regulation is amended, the Administration advises that in accordance with NPCSC's decision, the earliest possible commencement date for the seventh term of LegCo is 1 October 2021. Section 34(2) of IGCO provides that any amendment made by LegCo to subsidiary legislation must be consistent with the power to make such subsidiary legislation. As such, as far as the Regulation is concerned, any amendment must be consistent with the power to make the Regulation, i.e. ERO; and the amendment must be *bona fide* in furtherance of the statutory purpose of ERO to deal with an occasion of emergency or public danger and must be in the public interest. It must also comply with the constitutional requirements, including BL as well as the provisions concerning human rights therein. LegCo has no power to make any amendment that is in breach of the aforesaid requirements, and any amendment in breach of the aforesaid requirements is invalid. By virtue of section 4(5) of LCO, a date to be specified by CE in Council regarding the commencement of the term of office of LegCo must be within 30 days after the date on which the results of the general election to elect the members for the relevant term of office are declared. When LegCo amends the Regulation concerning the date for holding the general election of the seventh term of LegCo, such amendments cannot cause CE in Council to violate NPCSC's decision owing to compliance with the requirement of section 4(5) of LCO. Otherwise, such amendments are invalid.

21. Notwithstanding the Administration's explanations as set out in paragraphs 17 to 20 above, some non-establishment members maintain the view that the Regulation should not have been brought into operation. Mr LAM Cheuk-ting has proposed that a motion be moved in Council in the name of the Subcommittee to repeal the Regulation (see **Appendix II**). His proposal, however, has not been dealt with by the Subcommittee since Mr LAM withdrew his membership from the Subcommittee with effect from 13 November 2020.

Government's payment in respect of declared election expenses

22. Section 9 of the Regulation provides that an eligible person or eligible group is entitled to receive a payment from the Government in an amount equal to

the declared election expenses,⁶ and a person/group of persons is eligible for payment if a Returning Officer ("RO") at the discontinued election accepted a nomination form in respect of the person/group of persons and did not decide that the nomination form or the nomination was invalid before the discontinuation date, and the person/group of persons did not withdraw the candidature. Such payment from the Government is not an election donation within the meaning of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) ("ECICO"). Many members have expressed concerns about the possibility of candidates' abusing the arrangement and making fraudulent claims. Queries have been raised on the scope of coverage for "declared election expenses" as provided for in section 9 of the Regulation and the measures to prevent abuse.

23. According to the Administration, pursuant to section 8 of the Regulation, ECICO applies to the discontinued election. Candidates are required to submit election returns in relation to the discontinued election to set out all the election expenses incurred by the candidates at the election and all the election donations received by the candidates or their agents. Under section 2 of ECICO, "election expenses" means expenses incurred or to be incurred, before, during or after the election period, for the purpose of promoting the election of the candidate or group, or prejudicing the election of another candidate or group. Given the highly exceptional nature of the postponement of the LegCo General Election, in order to pay candidates an amount equivalent to the election expenses that have already been incurred at the election, section 9 of the Regulation provides that the Government will make a payment equivalent to the amount of election expenses declared to a candidate/list of candidate whose nomination form was accepted by RO (except for the circumstances as elaborated in paragraph 22 above). Section 9(5) of the Regulation further provides that "declared election expenses" means the amount set out as the eligible person's or eligible group's election expenses in the election return lodged for the discontinued election. This arrangement may, in some cases, be more generous than that in the financial assistance scheme under the existing electoral law, but is relatively easy to administer and, more importantly, fair to the candidates. CMAB has issued on 7 August 2020 guidelines on the payment arrangements, indicating the manner and form in which a claim for a payment must be made, supported and verified; and the particulars that such a claim must contain.

24. The Administration has further advised that ECICO aims at prohibiting corrupt and illegal conducts, regulating election advertisements and imposing reporting requirements with respect to expenditure and receipt of donations at the

⁶ "Declared election expenses" is defined under section 9(5) of the Regulation to mean the amount set out as the election expenses of an eligible person or eligible group in the election return lodged for the discontinued election.

public elections in Hong Kong. The offence provisions under ECICO include, among others, offences relating to election returns. The Administration has also reiterated that the reporting requirements regarding election expenses and receipt of donations under ECICO remain unchanged and are applicable to the discontinued 2020 LegCo General Election. After REO has received the election returns from candidates, it would carefully check the election returns to ascertain whether all the election expense and donations received have been properly declared. If the election returns are incomplete or contain mistakes, REO would invite candidates to provide further clarifications or information for the purpose of verification, and suspected cases and complaints involving offences in relation to election returns will be referred to the Independent Commission Against Corruption for investigation. For the discontinued 2020 LegCo General Election, REO will be vigilant in vetting election returns, to ensure that Government's payments will only be released to candidates whose election returns and the election expenses declared therein are in order.

25. Given members' concerns over possible abuse of the arrangement provided for under section 9 of the Regulation where eligible persons and groups are entitled to make claims for Government's payment in respect of declared election expenses, the Administration has been requested to provide the Panel on Constitutional Affairs in due course with a report on the measures adopted by the Administration to prevent such abuse (as elaborated in paragraphs 22 to 24 above). Such report should cover, among others, irregularities detected (if any) involving candidates' making of materially false or misleading statements in their election returns, and follow-up actions taken by the Administration against suspected offences under ECICO etc.

Recommendation

26. The majority of members of the Subcommittee support the Regulation. The Subcommittee will not propose any amendment to the Regulation.

Advice Sought

27. Members are invited to note the deliberations of the Subcommittee.

**Subcommittee on Emergency (Date of General Election)
(Seventh Term of the Legislative Council) Regulation**

Membership list*

Chairman	Hon CHEUNG Kwok-kwan, JP
Deputy Chairman	Hon LUK Chung-hung, JP
Members	Hon Abraham SHEK Lai-him, GBS, JP Hon Tommy CHEUNG Yu-yan, GBS, JP Hon Jeffrey LAM Kin-fung, GBS, JP Hon WONG Ting-kwong, GBS, JP Hon CHAN Kin-por, GBS, JP Dr Hon Priscilla LEUNG Mei-fun, SBS, JP Hon Mrs Regina IP LAU Suk-ye, GBS, JP Hon Paul TSE Wai-chun, JP Hon Steven HO Chun-yin, BBS Hon Frankie YICK Chi-ming, SBS, JP Hon YIU Si-wing, BBS Hon MA Fung-kwok, GBS, JP Hon CHAN Han-pan, BBS, JP Hon LEUNG Che-cheung, SBS, MH, JP Hon Alice MAK Mei-kuen, BBS, JP Hon KWOK Wai-keung, JP Hon Christopher CHEUNG Wah-fung, SBS, JP Hon Elizabeth QUAT, BBS, JP Hon Martin LIAO Cheung-kong, GBS, JP Ir Dr Hon LO Wai-kwok, SBS, MH, JP Hon CHUNG Kwok-pan Hon Holden CHOW Ho-ding Hon SHIU Ka-fai, JP Hon YUNG Hoi-yan, JP Hon CHAN Chun-ying, JP Hon Vincent CHENG Wing-shun, MH, JP

(Total : 28 members)

Clerk Miss Josephine SO

Legal Adviser Mr Alvin CHUI

Date 19 November 2020

* Changes in membership are shown in Annex to Appendix I.

**Subcommittee on Emergency (Date of General Election)
(Seventh Term of the Legislative Council) Regulation**

Changes in membership

Member	Relevant date
Hon Kenneth LAU Ip-keung, BBS, MH, JP	Up to 1 November 2020
Hon Jimmy NG Wing-ka, BBS, JP	Up to 2 November 2020
Hon IP Kin-yuen	Up to 10 November 2020
Hon Charles Peter MOK, JP	Up to 11 November 2020
Hon HUI Chi-fung	Up to 11 November 2020
Hon Jeremy TAM Man-ho	Up to 11 November 2020
Hon James TO Kun-sun	Up to 12 November 2020
Hon Claudia MO	Up to 12 November 2020
Dr Hon Helena WONG Pik-wan	Up to 12 November 2020
Hon Andrew WAN Siu-kin	Up to 12 November 2020
Hon LAM Cheuk-ting	Up to 12 November 2020
Hon KWONG Chun-yu	Up to 12 November 2020
Hon LEUNG Yiu-chung	Up to 15 November 2020
Dr Hon Fernando CHEUNG Chiu-hung	Up to 18 November 2020

Note 1 According to the announcement made by the Hong Kong Special Administrative Region Government on 11 November 2020 pursuant to the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region, Kenneth LEUNG, KWOK Ka-ki, Dennis KWOK Wing-hang and Alvin YEUNG were disqualified from being a member of the Legislative Council ("LegCo") on 30 July 2020.

Note 2 Pursuant to section 15(1)(a) of the Legislative Council Ordinance (Cap. 542), HUI Chi-fung ceased to hold office as a member of LegCo upon his resignation on 12 November 2020.

Note 3 Pursuant to section 15(1)(a) of the Legislative Council Ordinance (Cap. 542), Claudia MO ceased to hold office as a member of LegCo upon her resignation on 13 November 2020.

《緊急情況(換屆選舉日期)(第七屆立法會)規例》小組委員會
2020年10月30日

議決本小組委員會支持立法會廢除《緊急情況(換屆選舉日期)(第七屆立法會)規例》。

動議人：林卓廷

和議人：許智峯 楊岳橋