

II. REPORT

The date of First Reading of the Bill is 17 March 2021. Members may refer to the Legislative Council ("LegCo") Brief (File Ref.: CMAB C4/9/1) issued by the Constitutional and Mainland Affairs Bureau on 23 February 2021 for further details.

Object of the Bill

2. The main object of the Bill is to amend various Ordinances to provide for matters relating to the requirement of oath-taking by certain public officers when assuming office.

Background

3. 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 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 an 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", promulgated on 30 June 2020, stipulates that a resident of HKSAR who stands for election must take the specified oath.

4. According to paragraph 5 of the LegCo Brief, the Administration proposes to amend local legislation to implement the requirements on oath-taking by public officers as stipulated in the laws mentioned above and the relevant decisions of NPCSC.¹

Provisions of the Bill

5. The Bill consists of nine Parts. Part 1 sets out the short title of the Bill. Parts 2 to 9 set out the proposed amendments to various Ordinances. The

¹ 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" under which certain acts are regarded as not fulfilling the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR of PRC.

major proposed amendments in the Bill are summarized in the following paragraphs.

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

6. Clause 3 of the Bill proposes to add a new section 3AA to the Interpretation and General Clauses Ordinance (Cap. 1) to explain, for the purpose of an Ordinance, the meaning of the expression "upholding BL and bearing allegiance to HKSAR". Under the proposed new section 3AA, a person upholds BL and bears allegiance to HKSAR if certain conditions are satisfied. 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. On the other hand, a person would not uphold BL and bear allegiance to HKSAR if the person does or intends to do certain acts (e.g. 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 wilfully burning, mutilating, scrawling on, defiling or trampling on it).

7. The meaning of the word "uphold" is defined in the proposed new section 3AA(2) as "intend to genuinely and truthfully observe, support, maintain and embrace, and genuinely and truthfully observe, support, maintain and embrace in words and deeds".²

8. Under the proposed section 3AA(4), the proposed section 3AA would not limit the meaning of a reference to upholding BL and bearing allegiance to HKSAR.

Proposed requirement for members of the District Councils to take oath

9. Currently, members of the District Councils ("DC") are not required to take the specified oath when assuming office under the Oaths and Declarations Ordinance (Cap. 11). 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. Part 8 of the Bill proposes to amend Schedule 3 to the National Anthem Ordinance (Ord. No. 2 of 2020) to add the oath-taking ceremony by DC members as an occasion on which the national anthem must be played and sung.

² According to Footnote No.1 of the LegCo Brief, the proposed amendment is made with reference to the judgement in *Chan Ho Tin v Lo Ying-ki Alan and others* [2018] HKCFI 345, paragraphs 132(1) and 142.

Proposed arrangement for administration of public officers' oaths

10. 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.

Consequences of declining or neglecting to take an oath and of breach of an oath

Meaning of "declining or neglecting to take an oath" and retaking of an oath

11. Under section 21 of Cap. 11, a person who declines or neglects to take an oath duly as required, shall vacate from his office if he has already entered on it, or be disqualified from entering on his office if he has not entered on it. Cap. 11 does not define the expression "declining or neglecting to take an oath" nor provide for the circumstances under which a person may or may not retake the oath.

12. The proposed new section 20A of Cap. 11 provides that a person would 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. Further, clause 10 of the Bill proposes to amend section 21 of Cap. 11 to provide that no person may arrange for any person who declines or neglects to take oath to retake it unless the oath administrator is satisfied that the person did not intentionally decline or neglect to take the oath.

Grounds of disqualification from being a LegCo/DC member

13. 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 BL79.³ Sections 19 and 24 of the District Councils Ordinance (Cap. 547)

³ Under BL79, a LegCo member may be disqualified due to serious illness, absence from meetings, loss of status as a permanent resident of HKSAR, acceptance of a government appointment as a public servant, bankruptcy, imprisonment of more than one month, being censured for misbehaviour or breach of oath by a vote of two-thirds of the LegCo members present.

respectively specify certain grounds on which an ex officio member and an elected member may be disqualified from holding office.

14. The Bill proposes to amend section 15 of Cap. 542 and sections 19 and 24 of Cap. 547 to add new grounds of disqualification from holding office as LegCo/DC member (i.e. breach of an oath taken under Cap. 11 and failure to fulfil the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR).

Restrictions on a person's right to stand for public elections

15. The Bill further proposes to amend section 39 of Cap. 542, section 21 of Cap. 547 and section 14 and section 20 of the Chief Executive Election Ordinance (Cap. 569) to disqualify a person from being nominated as a candidate or from being elected at the relevant elections. Under the Bill, a person would be disqualified from being nominated as a candidate or from being elected if: the relevant date of nomination or date of election is within five years after the person has been disqualified from entering on an office for declining or neglecting to take the specified oath, breach of such an oath or failing to fulfil the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR.

Legal proceedings against persons on the grounds of disqualification

16. The Bill proposes to amend section 73 of Cap. 542 and section 79 of Cap. 547 to –

- (a) remove the existing time limit of six months within which SJ may institute proceedings before the Court of First Instance ("CFI") against a person on the ground of disqualification from acting as a LegCo member or DC member or respectively, and
- (b) provide that immediately after such proceedings are brought by SJ against a person on the ground of disqualification for breach of oath or for failure to fulfil the legal requirements and conditions on upholding BL and bearing allegiance to HKSAR, the person's functions and duties as a LegCo/DC member would be suspended until the decision of CFI in the proceedings becomes final as defined in the proposed new section 73(2B) of Cap. 542 and the proposed new section 79(2B) of Cap. 547.

17. Part 4 of the Bill proposes to amend the Hong Kong Court of Final Appeal Ordinance (Cap. 484) to provide for an application for leave to appeal to the Court of Final Appeal direct to expedite the judicial procedure.⁴

⁴ 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, LegCo, DC and rural representatives.

Commencement

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

Public Consultation

19. It is not mentioned in the LegCo Brief that the Administration has conducted public consultation.

Consultation with LegCo Panel

20. As advised by the Clerk to the Panel on Constitutional Affairs, the Panel has not been consulted on the Bill. However, when the Panel received the policy briefing by the Secretary for Constitutional and Mainland Affairs on 5 January 2021, members were briefed on the implementation progress of the requirements on oath-taking by public officers. Members in general considered that amendments should be made to the relevant legislation to introduce the oath-taking requirements for DC members as DC members were also expected to uphold BL and bear allegiance to HKSAR when discharging their duties. Members urged the Administration to submit the relevant amendment bill to LegCo for scrutiny as early as possible.

Conclusion

21. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the importance of the proposed amendments relating to the oath-taking by public officers, Members may consider whether a Bills Committee should be formed to study the Bill in detail.

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