

立法會
Legislative Council

LC Paper No. LS65/20-21

**Paper for the House Committee Meeting
on 16 April 2021**

**Legal Service Division Report on
Improving Electoral System (Consolidated Amendments) Bill 2021**

I. SUMMARY

1. The Bill

The Bill seeks to amend certain electoral legislation to:

- (a) improve the electoral system of Hong Kong by revising the methods of forming the Election Committee ("EC"), selecting the Chief Executive ("CE") and forming the Legislative Council ("LegCo");
- (b) specify the date of the general election for the Seventh LegCo;
- (c) introduce a new requirement for EC members to sign a statutory declaration and written oath;
- (d) facilitate the conduct of various elections;
- (e) introduce offences for certain conduct at elections;
- and
- (f) make technical and related amendments.

2. Public Consultation

According to the Administration, the Government hosted over 100 seminars with stakeholders from different sectors to discuss the decision of the National People's Congress ("NPC") to improve the electoral system of Hong Kong.

3. Consultation with LegCo Panel

As advised by the Clerk to the Panel on Constitutional Affairs, the changes to the electoral system of Hong Kong under NPC's decision have been studied by a subcommittee formed by the House Committee ("Subcommittee"). The Panel has not been consulted on the Bill.

4. Conclusion

The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. At its meeting on 19 March 2021, the House Committee decided that upon the introduction of the Bill, a Bills Committee should be formed to take over the scrutiny work of the Subcommittee.

II. REPORT

The date of First Reading of the Bill is 14 April 2021. Members may refer to the Legislative Council ("LegCo") Brief (File Ref: CMAB C1/30/5/5) issued by the Constitutional and Mainland Affairs Bureau on 13 April 2021 for further details.

Object of the Bill

2. To implement the Decision of the National People's Congress ("NPC") on Improving the Electoral System of Hong Kong ("Decision") and the amendments made by the Standing Committee of NPC ("NPCSC") to the methods for selecting the Chief Executive ("CE") and forming LegCo as set out in Annexes I and II to the Basic Law ("BL"), the Bill seeks to amend certain electoral legislation (including the Chief Executive Election Ordinance (Cap. 569), the Legislative Council Ordinance (Cap. 542), the District Councils Ordinance (Cap. 547), the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) and various other enactments) to:

- (a) revise the methods of forming the Election Committee ("EC"), selecting CE and forming LegCo in accordance with Annexes I and II to BL;
- (b) specify the date of the general election for the Seventh LegCo;
- (c) require EC members to sign a statutory declaration and written oath;
- (d) facilitate the conduct of various elections;
- (e) introduce offences for certain illegal or corrupt conduct at elections; and
- (f) make technical and related amendments.

Background

3. By the Decision made and promulgated on 11 March 2021,¹ NPC decided to improve the electoral system of the Hong Kong Special Administrative Region ("HKSAR") to ensure, among others, the administration of Hong Kong by Hong Kong people with patriots as the main body. To that end, NPCSC was authorized to amend Annex I and Annex II to BL in accordance with the Decision. On 30 March 2021, NPCSC amended Annexes I and II to BL to set out in detail the new methods for selecting CE and forming LegCo in HKSAR.

Provisions of the Bill

4. The Bill seeks to amend the relevant local legislation (including Cap. 569 and Cap. 542) in accordance with the Decision and Annexes I and II to BL as amended by NPCSC. The salient amendments proposed by the Bill are summarized below.

¹ Under Articles 31, 57 and 62 of the Constitution of the People's Republic of China, NPC as the highest state organ of power may, among others, oversee the enforcement of the Constitution and enact laws to prescribe the systems instituted in special administrative regions established by the state.

Proposed amendments relating to the Election Committee

5. Pursuant to the Decision, Division 1 of Part 7 of the Bill seeks to amend Cap. 569 to revise the constitution and method of forming EC.

6. At present, under section 2 of the Schedule to Cap. 569, EC consists of 1200 members who represent four sectors, with each sector being represented by 300 members. Under clause 397 of the Bill, the membership of EC would be increased to 1500 members comprising representatives from the following five new sectors: (a) industrial, commercial, and financial sectors; (b) the professions; (c) grassroots, labour, religious, and other sectors; (d) members of LegCo, representatives of district organizations and other organizations; and (e) HKSAR deputies to NPC, HKSAR members of the National Committee of the Chinese People's Political Consultative Conference, and representatives of Hong Kong members of relevant national organizations. Elected members of the District Councils ("DC") hitherto included in the Fourth Sector under Cap. 569 would not be included in any of the five new sectors.

7. Clauses 430 and 434 of the Bill seek to require a member-elect of EC to sign a written EC Oath swearing, among others, to uphold BL and to pledge allegiance to HKSAR. Clause 431 proposes that proceedings could be brought by the Secretary for Justice to disqualify a person from being an EC member and to suspend the person's functions as an EC member until the court's decision in the proceedings becomes final.

Proposed amendments relating to the method for selecting CE

8. At present, under section 16(2) of Cap. 569, a nomination of a candidate for the CE election shall be made by not less than 150 members of EC. Under clause 384(1) of the Bill, a candidate for the office of CE would have to be jointly nominated by not less than 188 members of EC, with not less than 15 members of EC in each of the five sectors mentioned in paragraph 6 above. Under clauses 389 and 390 of the Bill, a candidate for the CE election who obtains more than 750 support votes from EC members would be returned at the election.

Proposed amendments relating to the method for forming LegCo

9. Under Division 1 of Part 4 of the Bill, the membership of LegCo, with effect from the Seventh LegCo, would be increased from 70 to 90 Members to be respectively elected through elections by EC, elections by functional constituencies ("FC"), and direct elections by geographical constituencies ("GC"). Under clauses 266 to 291 of the Bill, the 90 LegCo seats would be made up by: (a) 20 GC seats, with two Members being returned from each of 10 GCs;² (b) 30 FC seats;³ and (c) 40 EC seats.⁴

² Two GCs on Hong Kong Island, three in Kowloon and five in the New Territories (clause 342).

³ The new FC seats would not include the DC (first) and DC (second) FCs.

⁴ In the First and Second LegCo, there were respectively 10 and six EC seats out of a total of 60 seats. EC seats were abolished from the Third LegCo onwards.

10. At present, under section 7 of the Legislative Council (Subscribers and Election Deposit for Nomination) Regulation (Cap. 542C), the nomination paper of the nominees on a nomination list seeking nomination in respect of any GC shall be subscribed by 100 to 200 registered electors, while the nomination paper of any person seeking nomination in respect of any FC (other than the DC (second) ("DC2") FC) shall be subscribed by 10 to 20 registered electors.

11. Clause 356 seeks to amend section 7 of Cap. 542C to provide, among others, that the nomination of a person as a candidate for any constituency in a LegCo election would have to be subscribed by two to four Members from each of the five sectors of EC. In the case of a candidate for a GC or FC, the subscriptions by EC members would be required in addition to the subscriptions by electors of the constituency concerned now required under Cap. 542C as referred to in paragraph 10 above.

12. Under Part 6 of Cap. 542, the current arrangements for voting and counting of votes for the return of GC and FC Members of LegCo are as follows:

- (a) GCs or the DC2 FC – the list system of proportional representation (section 49(2));
- (b) the Heung Yee Kuk, agriculture and fisheries, insurance and transport FCs – the preferential elimination system of voting (section 50(2)); and
- (c) other FCs – the "first past the post" voting system (section 51(2)).

13. Under clauses 312 to 315 of the Bill, all constituencies would adopt the simple or relative majority system of election, i.e. the "first past the post" voting system:

- (a) Members returned by GC: the two candidates who obtain the greatest number of votes in each GC would be returned in the election;
- (b) Members returned by FC: there would be a total of 28 FCs with each FC returning one Member, except for the Labour FC which would return three Members; nine FCs would be returned by individual electors while the remaining 19 FCs by eligible corporate electors; and
- (c) Members returned by EC: the 40 candidates who obtain the greatest number of votes would be returned in the election.

Proposed amendments relating to the Candidate Eligibility Review Committee

14. At present, in relation to CE and LegCo elections, a Returning Officer ("RO") is responsible for deciding whether or not a person is validly nominated as a candidate (section 17 of Cap. 569 and section 42A of Cap. 542); and an election (including an RO's decision on a person's eligibility to be, or disqualification from being, nominated as a candidate) may be questioned on specified grounds by an election petition and/or judicial review (Part 6 of Cap. 569 and Part 7 of Cap. 542).

15. Pursuant to the Decision, clauses 292 and 383 of the Bill seek to establish a Candidate Eligibility Review Committee ("CERC") for the purposes of CE and LegCo elections. CERC would consist of the chairperson and two to four other members, each of whom must be a principal official appointed pursuant to a nomination under BL 48(5).⁵ CERC would be responsible for reviewing and confirming the eligibility of candidates in the EC, CE, and LegCo elections. According to paragraph 62 of the LegCo Brief, in considering a candidate's eligibility, CERC would take into account, among other materials, the opinion of the Committee for Safeguarding National Security of HKSAR ("CSNS") which would, on the basis of the review of the National Security Department of the Hong Kong Police, determine whether a candidate meets the legal requirements and conditions of upholding BL and swearing allegiance to HKSAR, and issue an opinion to CERC for any candidate who fails to meet such legal requirements and conditions.

16. Under clauses 327 and 391 of the Bill, for the purpose of questioning a CE or LegCo election by petition on specified grounds, "election" (including a decision by CERC) would be construed subject to Annexes I and II to BL which relevantly provide that no legal proceedings could be instituted in respect of a decision made by CERC on the eligibility of a candidate pursuant to the opinion of CSNS.⁶

Related amendments

17. The Bill also proposes to make various related and consequential amendments to, among others, the Electoral Affairs Commission Ordinance (Cap. 541), Cap. 547, Cap. 554, and various items of subsidiary legislation including Cap. 542C. These proposed amendments include those relating to voter registration arrangements (e.g. Division 3 of Part 3) and election expenses limits (clauses 372 to 379), as well as those seeking to implement the Electoral Affairs Commission's recommendations on election arrangements such as electronic poll register and special queues for electors in need (e.g. clauses 112, 156, 219 and 240).

18. Clause 366 further proposes to create a new offence under Cap. 554 of inciting by any activity in public another person not to vote, or to cast an invalid vote, at an election, which would be punishable by a maximum penalty of a fine of HK\$200,000 and imprisonment for 3 years (if tried on indictment). Moreover, Part 2 (clauses 3 and 4) of the Bill seeks to amend the Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation (Cap. 241L) to further postpone the General Election of the Seventh LegCo from 5 September to 19 December 2021.

⁵ The eligible principal officials are Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise.

⁶ Under Article 14(3) of the Law of the People's Republic of China on Safeguarding National Security in HKSAR, decisions made by CSNS are also not amenable to judicial review.

Commencement

19. The Bill, if passed, would come into operation in phases: (a) for certain provisions concerning EC and LegCo elections - (i) on the date of gazettal of the enacted Ordinance for the purpose only of enabling arrangements to be made for the constitution of the new term of office of EC in 2021 or holding the general election for the Seventh LegCo, and (ii) on 22 October 2021 or commencement of the term of the Seventh LegCo insofar as the aforesaid provisions have not come into operation under (i); (b) for certain provisions relating to the CE election, EC members' resignation and disqualification, and appeals to the Court of Final Appeal – on 22 October 2021; and (c) for certain provisions relating to voters or electors registration – on 1 May 2022.

Public Consultation

20. According to paragraphs 89 and 90 of the LegCo Brief, the Government hosted over 100 seminars with stakeholders from different sectors to discuss the Decision and NPCSC's endorsement of the amended Annexes I and II to BL.

Consultation with LegCo Panel

21. As advised by the Clerk to the Panel on Constitutional Affairs, the Panel has not been consulted on the Bill. However, a subcommittee ("Subcommittee") formed by the House Committee ("HC") has held five meetings to study the changes to the electoral system of HKSAR pursuant to the Decision and Annexes I and II to BL as amended by NPCSC. Members of the Subcommittee in general expressed support for the Decision and the amendments to Annexes I and II to BL, but expressed concerns on various issues including the changes to the number of seats allocated to certain EC subsectors, the methods for returning members of EC, the composition and operation of CERC, as well as the delineation of organizations and eligible corporate electors involved in the EC subsectors and FCs of LegCo.

Conclusion

22. We are scrutinizing the legal and drafting aspects of the Bill. At its meeting held on 19 March 2021, HC decided that a Bills Committee ("BC") be formed to take over the work of the Subcommittee to scrutinize the Bill after its introduction into LegCo and that members of the Subcommittee would become members of BC.

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