

## **LEGISLATIVE COUNCIL BRIEF**

Emergency Regulations Ordinance (Cap. 241)

### **EMERGENCY (DATE OF GENERAL ELECTION) (SEVENTH TERM OF THE LEGISLATIVE COUNCIL) REGULATION**

#### **INTRODUCTION**

At the meeting of the Executive Council on 28 July 2020, the Council ADVISED and the Chief Executive ORDERED that the Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation (“Emergency (LCGE) Regulation”), at **Annex A**, should be made under section 2(1) of the Emergency Regulations Ordinance (Cap. 241) (“ERO”) to postpone the 2020 Legislative Council (“LegCo”) General Election (“the Election”), scheduled to take place on 6 September 2020, for a year owing to the ongoing outbreak of Coronavirus Disease 2019 (“COVID-19”).

#### **JUSTIFICATIONS**

##### **(A) The Epidemic Situation**

###### ***Latest Global Situation***

2. Since its onset early this year, the COVID-19 outbreak has shown no signs of subsiding. On 11 March 2020, the World Health Organization (“WHO”) announced that the COVID-19 outbreak could be characterised as a pandemic. As of 24 July 2020, a total of 216 countries, territories or areas had reported 15.2 million cases with about 628 000 deaths (global fatality rate at about 4.1%). The rapid and continuous rise of cases started in early March 2020. From late March to mid-May, about 70 000 to 90 000 new cases were reported every day. The number of new infections per day further rose to about 150 000 to 170 000 in late June 2020, and to well over 200 000 in early July 2020.

3. While the situation had stabilised in Europe and Western Pacific countries over time, the number of new cases in the Americas, South-East Asia

and Eastern Mediterranean mounted rapidly. The cumulative total of cases in the United States (“US”), Brazil and India were 4 million, 2 million and 1 million respectively. Together the three countries accounted for almost half of the global cases. Of particular note was the resurgence seen in some states of the US, Tokyo in Japan and Melbourne in Australia following the partial resumption of economic and social activities. For example, cases in Japan increased sharply from late June onwards, with around 200 to 600 new cases per day from 13 to 26 July. The number of new cases recorded in a day in Tokyo exceeded 200 in late-July, thereby pushing the city’s cumulative total to over 10 000 cases. Korea witnessed a rebound in infections from late May, with an average of about 55 new cases per day compared with less than ten cases per day in April to mid-May.

### ***Latest Situation in the Mainland and Macao***

4. As for the Mainland, sporadic outbreaks happened in Beijing and Xinjiang amid a hugely successful containment of the disease in the Mainland as a whole. For two weeks since mid-June 2020, Beijing experienced a large local outbreak related to the Xinfadi Wholesale Market that had reported 335 cases as at 5 July. The outbreak was subsequently contained through very vigorous boundary controls and extensive population-wide testing. Aggressive measures were likewise introduced in Xinjiang to tackle the emergence of local cases there from mid-July 2020.

5. Meanwhile, the epidemic situation in neighbouring cities was well under control. Guangdong Province as a whole had registered 1 661 cases as at 22 July, comprising 737 in Guangzhou and 462 in Shenzhen. Macao recorded a total of 46 cases, with no new local cases since late March.

### ***Latest Local Situation***

6. Before the renewed outbreak in early July, Hong Kong had coped with the disease with relative success in terms of the number of confirmed cases per million people and the number of deaths, given the absence of drastic measures such as a complete city lock-down. Under a “Suppress and Lift” strategy, timely adjustments were made to respond to the latest public health situation and to meet the aspirations of businesses and individuals. As a result, we managed to bring the city back to normal operation in some sectors, with almost all public services resumed and the Diploma of Secondary Education examinations conducted as scheduled. Above all, we had started preparations for a “health code” system to facilitate Hong Kong-Guangdong and Hong Kong-Macao travels, and commenced discussions on the “travel corridor” with overseas countries. However, the relevant work came to a halt when local

cases resurged in early July. On 26 July 2020, the Centre for Health Protection (“CHP”) of the Department of Health (“DH”) posted our accumulated total of COVID-19 cases at 2 634, and the number of deaths reached 18 while 40 patients were in critical condition. A daily high of 145 new infections was registered on 27 July.

7. Amid the latest local spike, 1 164 new cases were reported in the fortnight between 13 and 26 July, and 1 030 of them were locally acquired infections (351 in the first week, followed by 679 in the second week). The spread this time round had been wide, affecting different groups of people covering taxi drivers, patrons of restaurants/canteens/markets, students, and employees in different work settings including government departments, hospitals and clinics as well as transport companies. Among them, elderly people (like residents of residential care homes for the elderly (“RCHEs”)) were among the worst hit as they were more likely to become critically ill. Contact tracing attributed about half of these local cases to clusters at restaurants (especially those of smaller size), RCHEs, schools, tutorial centres, etc. While Wong Tai Sin District (including Tsz Wan Shan) alone accounted for about one quarter of them, the geographical spread of the remaining cases was extensive, covering various districts in the territory. Still more worrying were the other half of local cases which were of unknown sources.

8. In sum, it was evident in Hong Kong that:

- (a) the surge of cases in July 2020 was the most serious outbreak of COVID-19 in Hong Kong since its emergence in January 2020;
- (b) according to the CHP, at the time there was diffuse and plausibly propagating transmission of COVID-19 in the community, caused by silent or subclinical cases which could not be picked up hitherto by the surveillance system. The affected persons might only have mild/vague symptoms or were asymptomatic, and they went about their daily business without being identified while transmitting the infection to people they came into close contact with. The risk of explosive community outbreaks was increasing;
- (c) with extensive community testing from mid-July targeting the four categories of people with higher risk, namely RCHE staff, taxi drivers, catering business staff and property management staff totalling 400 000 to 500 000, the identification of more new cases was expected;
- (d) the large number of new cases had placed an onerous burden on public hospitals managed by the Hospital Authority (“HA”). To provide

some much needed relief, community isolation and treatment facilities were deployed for the first time for accommodating the mild patients decanted from hospitals in order to make room for the more serious patients. Should the rate of over 100 cases reported per day persist for a couple more weeks, the public hospital system might collapse; and

- (e) more drastic measures were needed to limit population mobility and restrain social contacts, coupled with aggressive testing and adequate contact tracing, to arrest this rising public danger.

## **(B) Measures in Place to Reduce Community Transmission**

9. To combat the latest upsurge of infections, the most stringent measures in respect of boundary controls and social distancing have been reinstated. New measures have also been introduced, including the mandatory wearing of masks on all public transport and in public places, and the imposition of pre-arrival COVID-19 test and post-arrival 14-day compulsory quarantine in hotels. A list of the measures in effect as of 31 July 2020 is at **Annex B**. In light of the epidemic situation both locally and globally, we expect that we would continue to require the statutory tools available to the Government under a range of emergency regulations made under the Prevention and Control of Disease Ordinance (Cap. 599) (“PCDO”) at least in the short to medium term. A list of these regulations and their validity period as of 31 July 2020 is at **Annex C**. Extending the validity of these regulations does not mean that the restrictions or controls have to be maintained at their current level at all times, but the decision reflects the severity of the situation and the public health experts’ advice that this latest wave of epidemic is unlikely to disappear soon.

10. In the event that the epidemic situation continues to worsen and cannot be brought under control by the existing measures in the coming days, we would need to consider further strengthening our response to the outbreak. In this regard, some overseas jurisdictions have adopted measures for lock-down or restrictions on people’s movement (for example, people are prohibited from leaving their home unless for specifically exempted purposes like buying daily necessities and visiting a doctor). However, in considering whether to apply these measures, we need to take into account their effectiveness in reducing transmission of the infection in the community, their impact on the economy and people’s livelihood as well as the social acceptance of such measures, having regard to the local context.

11. Given the above assessment and the imminent date and the scale of the Election, it was imperative of the Government to make an early decision on

whether the Election should proceed as planned because the electioneering activities were underway and would intensify after the nomination period.

### **(C) The Legislative Council General Election**

12. The Election originally scheduled for 6 September 2020 as specified by the Chief Executive in accordance with the Legislative Council Ordinance (Cap. 542) (“LCO”) was to elect the members for the seventh term of LegCo. With 70 seats to be contested involving 4 466 944 registered electors according to the 2020 Final Register, the Election was expected to generate fierce competition in the lead-up to the polling day. Assuming a turnout rate of 70%, over 3 million electors would cast their votes on 6 September at 615 polling stations to be manned by some 34 000 electoral staff. With the prohibition of group gatherings of more than two people with effect from 29 July 2020 and other social distancing measures in place, it would not be possible for any meaningful election rally to take place. On top of that, there were calls for the Government to put in place arrangements to ensure that electors stranded in the Mainland and overseas were able to come back to Hong Kong to cast their votes. However, under the current boundary control restrictions, it was an impossible task. Further, the Electoral Affairs Commission (“EAC”)’s plan to set up the Central Counting Station for traditional functional constituencies and the District Council (second) functional constituencies and the Media Centre at the AsiaWorld-Expo might also be disrupted by the urgent need to transform the venue into a community isolation and treatment facility of the HA to accommodate COVID-19 patients whose condition was mild and stable. The change of venue at such late stage would impact significantly on the work flow and manpower deployment of the Registration and Electoral Office (“REO”). In short, if the Election was to proceed as planned, the community as a whole would be facing additional health risks arising from the crowd gatherings, people’s interactions and potential breaches of the social distancing measures in the weeks preceding the Election and on the polling day.

### **(D) Overseas Experience in Postponing Elections**

13. According to the International Foundation for Electoral Systems, as of 17 June 2020, postponements of elections have been recorded in 61 countries and eight territories involving a total of over 100 election events. While some elections have been postponed indefinitely, others are delayed by a few months to a year. The timing of the authority making the decision varied significantly, from several months to a few days before the scheduled date of election. For instance, the United Kingdom (“UK”) postponed the local council and the metro-mayoral elections for a year from 7 May 2020 to 6 May 2021 by an emergency legislation on 25 March (42 days before the elections). New South

Wales of Australia decided in March to postpone the local government elections to be held in September 2020 for a year (decision made six months before the elections). New Brunswick of Canada decided in mid-March to postpone the municipal elections planned for May 2020 to not later than May 2021 (decision made two months before the elections). In the US, the presidential primary elections were also postponed in many states, such as Maryland, Indiana, Georgia and Louisiana. We also note that New Zealand announced in mid-August to postpone its general election by a month to 17 October. On the other hand, there are also examples of elections taken place during the COVID-19 pandemic. For example, Singapore conducted its general election on 10 July 2020 with some special measures catering for electioneering and voting put in place (including giving political parties and candidates more airtime under the Party or Constituency Political Broadcasts to put their messages to voters, in lieu of staging traditional election rallies which typically attracted thousands but could not take place amid the COVID-19 outbreak). Tokyo also conducted its mayoral election on 5 July 2020.

14. The overseas experience in postponing elections may be illustrated by the case in the UK. The British local elections due to take place on 7 May 2020 in 118 metropolitan, district and unitary authority council areas in England, as well as other elections due to take place across the whole of England and Wales such as the London mayoral election and the metro-mayoral elections in Greater Manchester, Liverpool City Region, etc. were all postponed by one year to 6 May 2021 through provisions in the Coronavirus Act 2020. The bill was introduced on 19 March 2020, passed all its Commons stage on 23 March and the Lords stage on 24 and 25 March, and gained Royal Assent on 25 March.

15. From a briefing paper prepared by the House of Commons on the postponement of elections, we learnt that the Electoral Commission wrote to the UK Government on 12 March calling for the postponement of local elections due in May citing the following reasons:

“The risks to delivery that have been identified are such that we cannot be confident that voters will be able to participate in the polls safely and confidently, nor that campaigners and parties will be able to put their case to the electorate. We therefore call on the Government to take steps to provide early clarity to all those with an interest in the electoral process; and on the available information and position we recommend the Government now delay the 7 May polls until the autumn.”

The Association of the Electoral Administrators, the body that represents electoral administration staff, also asked for certainty on the potential postponement of the polls. In its letter to the UK Government, the Association highlighted some of the risks of holding a poll in the midst of a serious COVID-19 outbreak. They included, inter alia, that candidates must deliver nomination paper in person when council premises needed to be closed; that polling stations only had a relatively small number of people in them at any one time but across the polling day hundreds of people would be in attendance creating infection risks; that election counts would involve large numbers of people gathering in one place; and the possibility of staff unwilling or unable to staff polling stations.

16. As expounded in the Explanatory Notes to the Coronavirus Bill, “there is no existing legislative provision that allows for any of the statutory polls scheduled for 7 May to be postponed. There are some powers to move poll dates by secondary legislation, but these are only available significantly in advance and can no longer be used for the 7 May polls.” Accordingly, without the provisions passed in the Coronavirus Act, returning officers would have had to continue to prepare for polls so that they did not break the law. The Act also allows for existing councillors to serve an additional year and for those elected in 2021 to serve a three-year term instead of the normal four-year term.

## **(E) The Hong Kong Situation**

### ***Justifications of Postponing the Election***

17. Compared to the UK local and mayoral elections, we would submit that the Hong Kong Special Administrative Region (“HKSAR”) LegCo election was facing even more difficulties because of the epidemic. These included that:

- (a) a large number of Hong Kong residents who are registered electors are living, working and studying in the Mainland. According to a Census & Statistics Department estimate based on Hong Kong residents’ movement records, as in mid-2019, around 542 000 Hong Kong residents were staying in Guangdong Province. If not for the COVID-19 epidemic, these people (330 000 were aged 18 and above at the time of the estimate) who were still eligible to vote could easily return on the polling day to cast their votes. Yet the boundary control measures and the 14-day mandatory quarantine on both sides were now a major deterrent. In other words, hundreds of thousands of electors could be rendered unable to vote in the coming election;

- (b) many Hong Kong residents went to the Mainland or other countries like India and Pakistan to visit their families early this year but have since been stranded there because of city lock-down or other travelling restrictions. Despite the exceptional operations by the HKSAR Government to bring some of them back by chartered flights such as from Hubei Province, India and Pakistan, there were still tens of thousands stranded in the Mainland and overseas. Likewise, they would lose their opportunity to vote in the Election;
- (c) based on the experience of the District Council election in November 2019, the voter turnout rate was likely to be high and the long queues and crowd gatherings outside and inside the polling stations could not be avoided even with social distancing measures enforced by polling staff. The risk of cross-infections among the attendees would be very high;
- (d) under the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap. 599G), which brought social distancing measures to the most stringent level of no more than two persons with effect from 29 July 2020, it would not be possible for candidates to carry out any meaningful rallying activities. Unlike Singapore, our licensing regime for television and radio prohibits political advertising, let alone allowing candidates more opportunities to campaign on free radio and television; and
- (e) elderly people are particularly vulnerable to COVID-19 infection and their fatality rate is much higher than the average. Hence, health experts and officials have been warning the elderly to stay at home as far as possible. There were over 600 000 registered electors who are aged 71 and over. Under this health consideration and with no special arrangements put in place to facilitate their casting the vote, such as a dedicated queue (which has strong public support), it was highly probable that these elderly electors would refrain from voting.

All the above would jeopardise the chances of conducting a fair, open and honest election and may undermine the safety of the electors and their supporters as well as the polling staff.

18. As pointed out in paragraph 13 above, the duration of postponement varies significantly between places and the UK local elections were delayed by one full year. In the case of Hong Kong, a **one-year** postponement was considered necessary taking into account the following factors:



- (a) the wave of epidemic in July 2020 was likely to last for weeks and it would then take another few weeks for the city to resume normal operations. Unless an effective vaccine could be developed and supplied in time for the majority of the population, both the WHO and local experts have warned that a winter surge is to be expected. This is why the HKSAR Government has extended the legal framework for various control measures up to the end of December 2020;
- (b) LegCo performs important constitutional functions in enacting and amending legislation, approving the annual Budget, approving expenditure and revenue items, etc., and there is an annual business cycle especially in approving the annual Budget to support the whole range of government and government-funded service programmes. It was therefore necessary to have LegCo conducting its normal annual business instead of being faced with a lacuna as a result of uncertainty in when an election may be held given the volatile COVID-19 situation; and
- (c) if we could not proceed with the 6 September election, from a logistic and planning perspective, the HKSAR Government and the EAC would need a lead time of three to four months to organise another election of this scale. The question then was whether for fairness the REO should have another voter registration exercise to precede the re-scheduled election date. If so, the lead time would have to be much longer. The one-year postponement was also desirable to ensure that the election would be conducted with the most updated electoral register for fairness and minimising information confusion in view of the requirement under section 32 of the LCO that the provisional register must be prepared not later than 1 June each year.

### ***The Legislative Position***

19. Section 6(1) of the LCO imposes a duty on the Chief Executive to specify a date for holding a general election for LegCo. Section 6(2) stipulates that the date specified must be not earlier than 60 days and not later than 15 days before the new term of office of LegCo is to begin. Accordingly, the Chief Executive earlier specified 6 September 2020 as the date for the Election. Section 4(2) empowers the Chief Executive in Council to specify the commencement date of each term of office of LegCo which must be within 30 days after the results of the election are declared. Section 44(1) of the LCO empowers the Chief Executive to direct the postponement of a general election if, before the holding of the election, the Chief Executive is of the opinion that

the election is likely to be obstructed, disrupted, undermined or seriously affected by riot or open violence or any danger to public health or safety. However, section 44(4) provides that if the general election is postponed, the Chief Executive must specify by notice in the gazette another date for the election **which must not be later than 14 days** after the original date of the general election.

20. While it may be argued that as a matter of necessity the Chief Executive may exercise the power more than once if the circumstances warrant, if the power were to be invoked excessively, it could be regarded as an abuse or improper use of power. Further, to postpone the election for no longer than 14 days each time repeatedly for an indefinite period would create uncertainty to electors and prospective candidates. In addition, there would be potential legal challenges that the one-year postponement could not have been the legislative intent of section 44(4). Section 11(1) of the LCO requires the LegCo President to convene an emergency session of LegCo at the request of the Chief Executive during the period after the end of the term of office or the dissolution of LegCo but, before the date specified for the holding of a general election for all members of LegCo and for this purpose of an emergency session, section 11(2) allows for the persons holding office as members of LegCo which immediately precedes the beginning of the emergency session to be deemed as members of LegCo. It is unclear if such an emergency session is intended to be held on a regular basis for an indefinite period.

21. Taking into account the above, there seems to be no way to achieve a postponed LegCo election by one year under the existing legislative provisions, let alone a LegCo that may function as per its normal annual cycle until the next general election.

22. Based on the circumstances as explained in paragraphs 6 to 11 above, the situation could be regarded as an occasion of public danger and/or emergency under the ERO, under which the Chief Executive in Council may make regulations to postpone the Election. There was public danger as the safety of the public as a whole was seriously threatened by COVID-19 which was at the time widespread in Hong Kong and would be aggravated by the electioneering and polling activities. The emergency limb was also applicable because the danger or threat was imminent as reflected in the upsurge of confirmed cases of COVID-19 since early July and that large-scale electioneering activities were already underway and more were expected to be held between late July and the scheduled polling date.

23. The Chief Executive in Council has made several regulations under section 8 of the PCDO ([Annex C](#) refers) for the purpose of preventing,

combating and alleviating the effects of the public health emergency and protecting public health. However, the PCDO may not be relied upon as the primary purpose of the postponement of the Election is to ensure its fairness and openness rather than just for preventing, combating and alleviating the effects of the public health emergency and protecting public health. The scope of the ERO, however, is wider and can be invoked on occasion of emergency or public danger to make regulations desirable in the public interest.

24. Further, the ERO empowers regulations made thereunder to amend or suspend the operation of any enactment including primary legislation as provided by section 2(2)(g) and section 2(4) of the ERO but section 8 of the PCDO does not have empowering provision to that effect. In postponing the Election, relevant provisions of the LCO will have to be overridden or suspended and therefore it is necessary to invoke the ERO.

25. We have therefore proposed that the above purpose be achieved by an emergency regulation made under the ERO under both limbs of public danger and emergency. The Court of Appeal (“CA”) has upheld the constitutionality of the ERO in its judgement of April 2020 in respect of the Prohibition on Face Covering Regulation (Cap. 241K) made under the ERO. Specifically, the CA acknowledged that “the ERO is powerful and versatile enough to enable the Chief Executive in Council to legislate speedily and effectively to meet all and every kind of emergency and public danger that imposes serious and subsisting threats to Hong Kong and its citizens”. The CA “observed by way of judicial notice that in tackling the current COVID-19 pandemic, the Government has invoked sections 7 and 8 of the PCDO to make emergency regulations. If that Ordinance did not exist, it would appear that the Government would need to invoke the ERO”. In sum, the CA has ruled that “the ERO is constitutionally compliant and should remain as part of the laws of Hong Kong to empower the Chief Executive to make emergency regulations for tackling emergency and public danger”. This provides additional support to invoke the ERO to achieve the postponement.

26. The justifications for invoking the ERO are:

- (a) the COVID-19 pandemic situation in July 2020 was the most serious in Hong Kong since its emergence with new cases and deaths rising. Election entails a lot of crowd events and social contacts which will aggravate the public health situation if these activities are allowed. On the other hand, as is the position as of late July, as such public gathering would not be allowed under the PCDO regulations, the fairness and openness of the Election would be compromised;

- (b) with the Election due to take place in less than six weeks' time, and tens of thousands of registered electors stranded in the Mainland and overseas, and hundreds of candidates contesting in the Election and some 4.4 million registered electors seeking certainty on whether the Election would be held as scheduled, an emergency decision was needed in the public interest;
- (c) repeatedly invoking the existing provision that empowers the Chief Executive to postpone an election by 14 days for an indefinite period could be regarded as an abuse of power, cause uncertainty and is unrealistic and not conducive to effective governance;
- (d) postponing the Election by one year would be in the public interest as the decision could preserve the election right of the registered electors. It would also help ensure a fair, open and informed election, and reduce the further risks and danger of more infections that could otherwise overwhelm the public hospital system; and
- (e) the postponement by one year would also avoid disruption to the normal LegCo business and electoral cycles.

## **OTHER OPTIONS**

27. Having regard to the imminence of the election and the public health considerations that have necessitated postponement of the Election by one year, there was no other timely option apart from making a regulation under the ERO.

## **EMERGENCY (DATE OF GENERAL ELECTION) (SEVENTH TERM OF THE LEGISLATIVE COUNCIL) REGULATION**

28. The purpose and effect of the main provisions of the Emergency (LCGE) Regulation are set out below.

### ***Specification of New Election Date and Bringing the Current Electoral Process to an End***

29. The Chief Executive's previous specification, under section 6(1) of the LCO, of 6 September 2020 as the date for holding the general election to elect members for the seventh term of office of LegCo is revoked. The new date (i.e. 5 September 2021) for holding the LegCo general election ("2021

Election”) is specified. All electoral procedures are to apply on the basis of the new election date.

30. The notices of general election published by the Chief Electoral Officer under sections 4 and 5 of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D), which specified details such as the nomination period and the address for submitting nomination forms, etc. for the Election originally scheduled for 6 September 2020 are also revoked.

31. In essence, the electoral process leading to the Election comes to an end on the effective date of 1 August 2020<sup>1</sup> (discontinuation date), to the following effect:

- (a) all electoral matters (i.e. acts done or purportedly done under the electoral law, including any nominations made, nomination forms and other election related documents<sup>2</sup> that have been submitted) in relation to the Election cease to have effect<sup>3</sup>; and
- (b) electoral officers are no longer required to perform, in relation to the Election, any function provided in any electoral law (e.g. Returning Officer’s duty to determine the validity of nominations).

32. The position mentioned in paragraph 31 above is subject to certain exceptions (such as those mentioned in paragraph 33 below).

### ***Matters Related or Consequential to Change of Date of General Election***

33. Although the Election has ended, electoral officers and candidates are to comply with obligations in respect of making copies of election advertisements and related documents available for public inspection.

34. Any election expenses incurred at or in connection with the Election by or on behalf of a candidate will be disregarded for the purpose of calculating whether the aggregate amount of election expenses incurred at or in connection with the 2021 Election exceeds the statutory maximum. Any person who has,

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<sup>1</sup> Same as the effective date of the Emergency (LCGE) Regulation.

<sup>2</sup> “Election related document” (與選舉有關的文件) means any form, declaration, application, authorisation, notice, statement or a nomination form required or used for the purposes of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation.

<sup>3</sup> However, if a person committed an electoral offence before the discontinuation date, the person is still liable to prosecution notwithstanding that the Election has ended.

prior to the discontinuation date, publicly declared an intention to stand as a candidate at the Election would not be regarded as a candidate<sup>4</sup> at the 2021 Election by virtue of such declaration of intention. The main purpose of this provision is to enable a “re-set” of the maximum amount of election expenses that can be incurred by or on behalf of all prospective candidates for the 2021 Election, regardless of whether or not they have submitted a nomination form or publicly declared an intention to stand for the Election.

35. The Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) continues to apply to the Election. All candidates still have to lodge an election return setting out their election expenses and election donations received in accordance with section 37 of the ordinance. This serves two key purposes:

- (a) the declared election expenses will be used as the basis for calculating the amount payable by the Government to the candidates (see below); and
- (b) the election return enables proper scrutiny of whether or not candidates have committed any corrupt or illegal conduct in the preceding period, which is an important aspect of a fair, open and honest election, a principle that should not be dispensed with notwithstanding the change of election date.

36. It is envisaged that candidates who have already incurred election expenses may feel aggrieved by the sudden and unexpected change of the election date and would demand that the Government compensate them for such expenses<sup>5</sup>. The financial assistance scheme for candidates under the existing electoral law (i.e. Part 6A of the LCO) is inapplicable to the present situation. Given the highly exceptional nature of the proposed change of election date, it would seem fair and reasonable for the Government to make a

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<sup>4</sup> Section 2(1) of the Elections (Corrupt and Illegal Conduct) Ordinance defines “candidate” as follows:

“**candidate** (候選人)-

- (a) means a person who stands nominated as a candidate at an election; and
- (b) also means a person who, at any time before the close of nominations for an election, has publicly declared an intention to stand as a candidate at the election, and in relation to an election to return members for a LegCo geographical constituency or the District Council (second) functional constituency, includes a person who is one of a group of candidates”.

<sup>5</sup> Sections 63(2)(g) and (h) of the UK Coronavirus Act 2020 empower the relevant authorities to make provisions about expenses incurred in relation to elections by persons including the expenses of candidates, and compensation for local authorities or candidates incurring additional expenditure as a result of the Act.

payment to a candidate whose nomination form was accepted by the Returning Officer before the discontinuation date (unless, before the discontinuation date, the Returning Officer decided that the nomination form or the nomination was invalid, or the Returning Officer rejected the nomination list, or the nomination was withdrawn, as the case may be).

37. The amount of payment will be the amount of the declared election expenses of the candidate or list of candidate(s). 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. Guidelines for making a claim for such payments were issued by the Secretary for Constitutional and Mainland Affairs on 7 August 2020.

38. Under the existing electoral law, candidates must ensure that any unused election donation is given to a charitable institution or trust of a public character chosen by them. Failure to comply with the above requirement constitutes corrupt conduct. This requirement is considered reasonable because:

- (a) unused election donations are never returned to donors under the existing electoral law, hence the donors could not reasonably expect that the donations would somehow be returned to them in the present situation;
- (b) there will be practical difficulties if the unused donations are to be returned to the donors. For instance, a donation not more than \$1,000 can be made anonymously. Also, where multiple sums of donations have been received by a candidate, it may not be easy to tell precisely which donation received by the candidate has been used first; and
- (c) it would not be right to allow a candidate to keep the unused election donations for use at the election to be held on the new election date. As explained above, the nomination form submitted by the candidate has ceased to have effect by operation of the Emergency (LCGE) Regulation. The candidate may or may not stand for the election (and for the same constituency) on the next occasion.

39. Any deposit lodged to the Returning Officers will be returned to the candidates. This is in line with the existing electoral law where a candidate who is not validly nominated or whose nomination is withdrawn is entitled to return of the deposit.

## LEGISLATIVE TIMETABLE

40. The legislative timetable is as follows:

Publication in the Gazette	31 July 2020
Commencement	1 August 2020
Tabling at LegCo	14 October 2020

## IMPLICATIONS OF THE REGULATION

41. Article 69 of the Basic Law stipulates that the term of LegCo shall be four years, except the first term which shall be two years. In accordance with Article 69, the current term of LegCo must end on 30 September 2020. While the general election is postponed by one year to 5 September 2021 pursuant to the Emergency (LCGE) Regulation, the Chief Executive may only recall LegCo into business by invoking section 11 of the LCO in the form of emergency sessions. However, it will be challenged that the spirit of this section is to deal with an exceptional one-off situation when the election could not be conducted before the expiry of the current term of office of LegCo, and not for sustaining the LegCo operation for a much longer period. Moreover, the apparent incompatibility with Article 69 of the Basic Law on the four-year term of office of LegCo is likely to be subject to serious challenge and close scrutiny. To overcome this constitutional problem, a decision (“Decision”) promulgated by the National People’s Congress Standing Committee (“NPCSC”) can provide the firm and solid basis for the continued operation of LegCo as a result of the postponement of the election until the next election.

42. Subsequent to the meeting of the Executive Council on 28 July 2020, the Chief Executive submitted an urgent report to the Central People’s Government (“CPG”) on the decision of the Chief Executive in Council to postpone the Election, and sought the CPG’s support and guidance. The State Council replied and expressed support for the Chief Executive in Council’s decision. The CPG advised that it would make a submission in accordance with the law to the NPCSC for a Decision on how to deal with the lacuna of LegCo arising from the postponement of the Election. The NPCSC deliberated at its Twenty-first Session the motion submitted by the State Council requesting a Decision on the continuing operation of the sixth-term LegCo. A Decision was made by the NPCSC on 11 August 2020 that, pursuant to the relevant provisions of the Constitution of the People’s Republic of China and the Basic Law, after 30 September 2020 the sixth-term LegCo of



the HKSAR 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 LegCo is formed in accordance with the law, its term of office remains to be four years. The Decision was published in the Gazette on 14 August 2020.

43. In light of the NPCSC's Decision, a gazette notice was published on 14 August 2020 to revoke the decision made under sections 6(3) and (4) of the LCO that the sixth-term LegCo stood prorogued on 18 July 2020.

## **PUBLIC CONSULTATION**

44. Given the exigency of the situation and sensitivity of election matters, public consultation was not feasible.

## **PUBLICITY**

45. The Chief Executive held a press conference on 31 July to announce the decision to postpone the Election by a year to 5 September 2021 with a view to protecting public safety and public health as well as safeguarding the conduct of an open and fair election. A spokesperson has been made available to respond to public or media enquiries.

## **BACKGROUND**

46. The COVID-19 pandemic has posed an unprecedented health challenge across the globe. In the absence of an effective treatment or vaccine, the exponential growth in infections has led many countries/territories to implement measures with far-reaching implications, including temporary border closures or stringent control measures, restrictions on non-essential travel, confinement and quarantine arrangements, in an attempt to prevent imported cases and major community outbreak. In Hong Kong, the Government has taken a two-pronged approach which aims to reduce movement of people between Hong Kong and other places by, inter alia, imposing quarantine requirements on arrivals, and enforce social distancing in the community at the same time.

47. In the gazette notice on 12 June 2020, the Chief Executive specified that 6 September 2020 would be the date for holding the general election for the seventh-term LegCo with the nomination period set at 18-31 July 2020 in

light of the polling date. To ensure that all candidates (including serving LegCo members) would compete on a level playing field, the Chief Executive appointed 18 July 2020, which was the commencement date of the nomination period, as the date from which the sixth-term LegCo should stand prorogued and its operation would then be terminated.

## **ENQUIRY**

48. Any enquiry on this brief can be addressed to Ms Cherie Yeung, Principal Assistant Secretary for Constitutional and Mainland Affairs (Tel: 2810 2908).

**Constitutional and Mainland Affairs Bureau**  
**October 2020**

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

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## Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation

(Made by the Chief Executive in Council under section 2 of the Emergency Regulations Ordinance (Cap. 241))

### Part 1

#### Preliminary

##### 1. Commencement

This Regulation comes into operation on 1 August 2020.

##### 2. Interpretation

In this Regulation—

**2021 election** (2021 年選舉) means the general election to be held on 5 September 2021, as required under section 6(1);

**Cap. 541D** (《第 541D 章》) means the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541 sub. leg. D);

**Cap. 542** (《第 542 章》) means the Legislative Council Ordinance (Cap. 542);

**Cap. 554** (《第 554 章》) means the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554);

**Chief Electoral Officer** (總選舉事務主任) has the meaning given by section 2(1) of the Electoral Affairs Commission Ordinance (Cap. 541);

**discontinuation date** (中止日期) means 1 August 2020;

**discontinued election** (已中止的選舉) means the general election scheduled to be held on the original date pursuant to the Chief Executive's specification referred to in section 3(1);

**election expenses** (選舉開支)—

- (a) in relation to the discontinued election—has the meaning given by section 2(1) of Cap. 554, as read together with section 8(2); and
- (b) in relation to the 2021 election—has the meaning given by section 2(1) of Cap. 554;

**electoral law** (選舉法)—

- (a) means any law in force providing for the election of the members of the Legislative Council; and
- (b) includes any guidelines issued under section 6(1) of the Electoral Affairs Commission Ordinance (Cap. 541);

**electoral matter** (選舉事宜)—

- (a) means an act that is done, or purportedly done, under the electoral law; and
- (b) includes an election related document (as defined by section 103(4) of Cap. 541D);

**function** (職能) includes a power and a duty;

**general election** (換屆選舉) means an election to elect members for a new term of office, being the seventh term of office, of the Legislative Council;

**original date** (原定日期) means 6 September 2020;

**Returning Officer** (選舉主任) has the meaning given by section 3(1) of Cap. 542.

## Part 2

### Change of Date of General Election

#### 3. Revocation of specification of date of general election made under section 6(1) of Cap. 542

- (1) The Chief Executive's specification is revoked.
- (2) In this section—

*Chief Executive's specification* (行政長官指明) means the specification made by the Chief Executive under section 6(1) of Cap. 542—

- (a) that specified the original date as the date for holding the general election; and
- (b) the notice of which was published in the Gazette on 12 June 2020 as Government Notice 3115 of 2020.

#### 4. Revocation of notices published by Chief Electoral Officer under sections 4 and 5 of Cap. 541D

- (1) The Chief Electoral Officer's notices are revoked.
- (2) In this section—

*Chief Electoral Officer's notices* (總選舉事務主任公告) means the following notices published by the Chief Electoral Officer—

- (a) the Notice of General Election of the Legislative Council (Geographical Constituencies), which was published, under section 4 of Cap. 541D, in the Gazette on 19 June 2020 as Government Notice 3276 of 2020; and
- (b) the Notice of General Election of the Legislative Council (Functional Constituencies), which was published, under

section 5 of Cap. 541D, in the Gazette on 19 June 2020 as Government Notice 3277 of 2020.

#### 5. Discontinued election ends and related electoral matters cease to have effect

- (1) The discontinued election comes to an end at the beginning of the discontinuation date.
- (2) Except for the purposes of the matters provided in Part 3, all electoral matters in relation to the discontinued election that took place or came into being before the discontinuation date (including but not limited to the Chief Executive's specification and the Chief Electoral Officer's notices referred to in sections 3 and 4 respectively) cease to have effect as from the beginning of that date.
- (3) To avoid doubt, and without limiting subsections (1) and (2)—
  - (a) the discontinued election is not to be regarded as an election that has failed for the purposes of section 46(2) of Cap. 542;
  - (b) except for the purposes of the matters provided in Part 3, on and after the discontinuation date, an electoral officer (as defined by section 3(1) of Cap. 542) is not required to perform any function provided in any electoral law in relation to the discontinued election; and
  - (c) the electoral matters referred to in subsection (2) do not have any effect in relation to the 2021 election.

#### 6. New date of general election and application of electoral law to 2021 election

- (1) Section 6(1) and (2) of Cap. 542 does not apply to the 2021 election, and the general election is to be held on 5 September 2021 instead of the original date.

- (2) Subject to subsection (1), in applying the provisions of any electoral law to the 2021 election, 5 September 2021 is to be taken as a date specified under section 6(1) of Cap. 542.
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### Part 3

## Matters Related or Consequential to Change of Date of General Election

### 7. Matters arising from change of date of general election

- (1) On and after the discontinuation date—
- (a) a Returning Officer or the Chief Electoral Officer, as the case may be, must continue to perform their functions under sections 26 and 105(7) and (8) of Cap. 541D in relation to the discontinued election;
  - (b) a Returning Officer must send any document referred to in section 86(1)(e), (f), (g) or (h) of Cap. 541D in relation to the discontinued election to the Chief Electoral Officer, who must deal with the document in accordance with section 88 of Cap. 541D (as if the reference in that section to “the date of the election to which they relate” were a reference to the discontinuation date); and
  - (c) a candidate (as defined by section 2(1) of Cap. 541D) must continue to comply with section 105(2)(b) of Cap. 541D in relation to the discontinued election.
- (2) The Director of Accounting Services must return the amount of any deposit lodged under section 2(1) of the Legislative Council (Subscribers and Election Deposit for Nomination) Regulation (Cap. 542 sub. leg. C) in relation to the discontinued election to the person who lodges the deposit.
- (3) Any election expenses incurred at or in connection with the discontinued election by or on behalf of a person are not to be regarded as election expenses incurred by or on behalf of the person at or in connection with the 2021 election.

- (4) Anything done by a person before the discontinuation date is not to be regarded as a public declaration by the person of the person's intention to stand as a candidate at the 2021 election.

**8. Application of Cap. 554 to discontinued election**

- (1) For the purposes of section 4(1) of Cap. 554, the discontinued election is an election to which Cap. 554 applies.

- (2) Cap. 554 applies to the discontinued election with the following modifications—

- (a) in section 2(1) of Cap. 554, the following definition is taken to be substituted for the definition of *election period*—

“*election period* (選舉期間) means the period beginning with 18 July 2020 and ending with 31 July 2020;” and

- (b) the following provision is taken to be substituted for section 37(1B) and (1C) of Cap. 554—

“(1B) For the discontinued election (as defined by section 2 of the Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation), the candidate must ensure that the election return is lodged before the expiry of the period of 60 days beginning with 1 August 2020.”

**9. Government's payment in respect of declared election expenses**

- (1) An eligible person or eligible group is entitled to receive a payment from the Government in an amount equal to the declared election expenses.
- (2) For the purposes of subsection (1), a person is an eligible person if—

- (a) a Returning Officer at the discontinued election accepted a nomination form in respect of the person;
- (b) the Returning Officer did not decide that the nomination form or the nomination was invalid under section 16 of Cap. 541D before the discontinuation date; and
- (c) the person did not withdraw the person's candidature.
- (3) For the purposes of subsection (1), a group of persons is an eligible group if—
- (a) a Returning Officer at the discontinued election accepted a nomination form containing a nomination list in respect of the group;
- (b) the Returning Officer did not decide that the nomination form was invalid under section 16 of Cap. 541D before the discontinuation date; and
- (c) the Returning Officer did not reject the nomination list under section 38(7) of Cap. 542 before the discontinuation date.
- (4) To avoid doubt, a payment referred to in subsection (1) is not an election donation within the meaning of Cap. 554.
- (5) In this section—
- declared election expenses* (申報選舉開支) means—
- (a) in relation to an eligible person—the amount set out as the person's election expenses in the election return lodged for the discontinued election; and
- (b) in relation to an eligible group—the amount set out as the group's election expenses in the election return lodged for the discontinued election;

*election return* (選舉申報書) means the return required to be lodged in accordance with section 37 of Cap. 554, as read together with section 8(2);

*nomination form* (提名表格) has the meaning given by section 2(1) of Cap. 541D;

*nomination list* (提名名單) has the meaning given by section 2(1) of Cap. 541D.

**10. Guidelines regarding Government's payment in respect of declared election expenses**

- (1) The Secretary for Constitutional and Mainland Affairs (*Secretary*) may issue guidelines indicating—
  - (a) the manner and form in which a claim for a payment referred to in section 9(1) must be made, supported and verified; and
  - (b) the particulars that such a claim must contain.
- (2) The Secretary may amend the guidelines, and a reference in this section to the guidelines is to be construed as including a reference to the guidelines as so amended.
- (3) The guidelines, and the amendments made to them, may be published in any manner the Secretary considers appropriate.
- (4) Neither the guidelines, nor the amendments made to them, are subsidiary legislation.

Clerk to the Executive Council

COUNCIL CHAMBER

2020

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### Explanatory Note

The purposes of this Regulation are to—

- (a) revoke certain specification and notices in respect of the general election for the seventh term of office of the Legislative Council originally scheduled to be held on 6 September 2020 (*discontinued election*);
- (b) provide that the discontinued election comes to an end at the beginning of 1 August 2020, and that acts done, or purportedly done, under the electoral law in relation to the discontinued election cease to have effect accordingly;
- (c) provide that the general election for the seventh term of office of the Legislative Council is to be held on 5 September 2021 instead; and
- (d) provide for 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.

**Social Distancing and Boundary Control Measures**  
*(position as of 31 July 2020)*

**A. Social Distancing Measures imposed under Cap. 599** *(with effect from 29 July 2020)*

- (1) Control measures on catering business:
  - Ceasing of sale or supply of food or drink for consumption on the business premises
  - Closure of bars/pubs
  - Suspension of live performance and dancing activities
  
- (2) Closure of scheduled premises:
  - (a) Amusement game centres
  - (b) Bathhouses
  - (c) Fitness centres
  - (d) Places of amusement (e.g. billiard establishments, bowling alleys)
  - (e) Places of public entertainment (e.g. cinemas, theme parks)
  - (f) Party rooms
  - (g) Clubs or nightclubs
  - (h) Karaoke establishments
  - (i) Mahjong-tin kau premises
  - (j) Beauty parlours and massage establishments
  - (k) Club-houses (except for catering business therein)
  - (l) Sports premises
  - (m) Swimming pools
  
- (3) Prohibition on a group gathering of more than 2 persons (except exempted group gatherings specified in Cap. 599G)
  
- (4) A person must wear a mask at all times when the person is boarding or on board a public transport carrier, or is entering or present in an MTR paid area, or is entering or present in a public place

## **B. Boundary Control and Related Measures**

- (1) 14-day compulsory quarantine requirement for persons arriving in Hong Kong from the Mainland, Macao and Taiwan
- (2) 14-day compulsory quarantine requirement for persons arriving in Hong Kong from all foreign countries
- (3) Persons arriving from nine specified places under Cap. 599H (i.e. Bangladesh, Kazakhstan, India, Indonesia, Nepal, Pakistan, the Philippines, South Africa and the United States of America) are required to take a pre-departure test prior to boarding and undergo quarantine at a hotel for 14 days upon arrival in Hong Kong
- (4) Foreign Domestic Helpers are required to take a pre-departure test prior to boarding and undergo quarantine at a hotel for 14 days upon arrival in Hong Kong
- (5) Non-Hong Kong residents (non-HKRS) will be denied entry to Hong Kong if they have visited the Hubei Province in the 14 days preceding their arrival
- (6) All non-HKRS (including those from the Mainland, Macao and Taiwan) will be denied entry to Hong Kong if they have been to any overseas countries and regions in the past 14 days preceding their arrival
- (7) Apart from the Hong Kong International Airport, only two (out of seven) of the land boundary control points maintain operation with shortened service hours
- (8) All cross-boundary ferry services and cross-boundary high speed rail/railway services are suspended
- (9) Transit/transfer services are provided under specified conditions at the Hong Kong International Airport. However, transit/transfer services to and from all destinations in the Mainland China remain suspended

## **C. Suspension of Public Services and the Work-from-home Arrangement for Civil Servants**

- (1) Save for those involved in the provision of emergency services and essential public services, all other government employees should work

- from home until 2 August. The Government will provide relevant personnel with adequate surgical masks and other necessary protective gear
- (2) Apart from the suspension of most government counter services, community halls and centres, and leisure venues/facilities such as beaches, swimming pools, libraries, museums, performance venues and music centres are closed. Moreover, recreational, sports and cultural programmes as well as events and conferences scheduled to be held in July are cancelled.

#### **D. School Arrangement**

- (1) Advanced commencement of summer holidays of secondary schools, primary schools and kindergartens on 13 July
- (2) Special arrangements have been made for the online distribution of the Hong Kong Diploma of Secondary Education results on 22 July

#### **E. Public Health, Hospital and Elderly Residential Care Services**

- (1) The Hospital Authority has suspended the special visiting arrangement in non-acute hospitals and rescheduled the work on resuming non-emergency services
- (2) Non-acute services, including Maternal and Child Health Centres, Child Assessment Service, Student Health Service Centres under the Department of Health, have been rescheduled or suspended
- (3) No visiting is allowed in all residential care homes for the elderly and people with disabilities

**Regulations made under the  
Prevention and Control of Disease Ordinance (Cap. 599)**  
*(position as of 31 July 2020)*

Section 8 of the Prevention and Control of Disease Ordinance (Cap. 599) empowers the Chief Executive in Council to make public health emergency regulation for the purposes of preventing, combating or alleviating the effects of a public health emergency and protecting public health. Having regard to the public health emergency concerning COVID-19, seven pieces of new regulations have been made to enhance social distancing or reduce the flow of people across the border. These regulations, which will expire on 7 September 2020 (for Cap. 599C), 14 October 2020 (for Cap. 599H and 599I) or 31 December 2020 (for Cap. 599D, 599E, 599F and 599G) respectively, may be further extended by the Chief Executive in Council as and when necessary. The purposes of the seven regulations are summarised as follows -

- (1) ***The Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (Cap. 599C)*** stipulates that all persons who have stayed in the Mainland, Macao and Taiwan for any period during the 14 days preceding their arrival in Hong Kong, regardless of nationality and travel documents used, would be required to undergo compulsory quarantine for 14 days, unless otherwise exempted. Under a two-tiered regime, the Secretary for Food and Health (SFH) is empowered to specify the category of persons arriving in Hong Kong from specified place(s) in China outside Hong Kong should continue to be subject to compulsory quarantine arrangements, and the category of persons from certain place(s) in China outside Hong Kong who would be exempted from the requirements on the above quarantine arrangement if relevant specified conditions are met;
- (2) ***The Prevention and Control of Disease (Disclosure of Information) Regulation (Cap. 599D)*** provides that a health officer may require a person to give any information that is relevant to the handling of the public health emergency. A person commits an offence if he fails to comply with such a requirement or if he knowingly gives a health officer any information that is false in a material particular;
- (3) ***The Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (Cap. 599E)*** mandates persons arriving in Hong Kong from a specified place outside China or has stayed in a specified place outside China for any period of time in the 14 days preceding their arrival to undergo compulsory quarantine for 14 days,

unless otherwise exempted. Under a two-tiered regime, SFH is empowered to specify the category of persons arriving in Hong Kong from place(s) outside China to continue to be subject to the compulsory quarantine arrangement and specify the category of persons arriving in Hong Kong from specified place(s) outside China who would be exempted from the arrangement if relevant specified conditions are met;

- (4) ***The Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F)*** empowers SFH to issue directions to impose social distancing measures such as limits on number of persons/capacity, infection control requirements, and to require the closure, etc., of catering business and scheduled premises;
- (5) ***The Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap. 599G)*** empowers SFH to issue directions to prohibit group gatherings in public places;
- (6) ***The Prevention and Control of Disease (Regulation of Cross-boundary Conveyances and Travellers) Regulation (Cap. 599H)*** introduces a regime under which the SFH is entitled to impose conditions on cross-boundary conveyances arriving in Hong Kong from specified places and relevant travellers coming to Hong Kong on the conveyances in order to reduce the health risk they may bring to Hong Kong; and
- (7) ***The Prevention and Control of Disease (Wearing of Mask) Regulation (Cap. 599I)*** provides that a person must wear a mask at all times when the person is boarding or on board a public transport carrier, is entering or present in an MTR paid area, or is entering or present in a public place specified by the SFH. With effect from 29 July 2020, the specified public places include public places irrespective of whether the location is indoor or outdoor.