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Paper for the House Committee meeting on 25 March 2022

**Report of the Subcommittee to Study the Emergency
(Date of Election) (Sixth Term Chief Executive) Regulation and
Related Issues**

Purpose

This paper reports on the deliberations of the Subcommittee to Study the Emergency (Date of Election) (Sixth Term Chief Executive) Regulation and Related Issues (“the Subcommittee”).

Background

2. On 23 February 2022, the Chief Executive (“CE”) in Council ordered that the Emergency (Date of Election) (Sixth Term Chief Executive) Regulation (“the Regulation”) should be made under section 2(1) of the Emergency Regulations Ordinance (Cap. 241) (“ERO”) to postpone the polling day of the Sixth Term Chief Executive Election (“CEE”) originally scheduled for 27 March 2022 to 8 May 2022.

3. According to the Legislative Council (“LegCo”) Brief issued by the Constitutional and Mainland Affairs Bureau (“CMAB”) (File Ref.: CMAB C5) on 23 February 2022, the fifth wave of the Coronavirus Disease 2019 (“COVID-19”) epidemic currently faced by the Hong Kong Special Administrative Region (“HKSAR”) is the most critical and dangerous outbreak in HKSAR’s two year efforts in fighting the epidemic. It is also the most severe public health crisis since Hong Kong’s return to the motherland. The LegCo Brief also mentions that according to the opinions of the Centre for Health Protection (“CHP”) and local experts, this wave of epidemic had yet to peak and it would be imperative to respond quickly and accurately, and to mobilize all manpower to fight the epidemic.

4. The Administration advised that conducting an election when the epidemic situation had yet to be stabilized would inevitably entail compromises in certain areas to mitigate the risks of spreading disease. This would, to a certain extent, undermine the fairness, justice and openness of the Sixth Term CEE, and might even cause negative impact on its legitimacy. In gist, the Administration considered that with the prohibition on group gatherings of more than two persons stipulated under the Prevention and Control of Disease (Prohibition on Gathering) Regulation (Cap. 599G) and the various social distancing measures as in force then, a CE candidate would not be able to solicit nomination from members of the Election Committee (“EC”) effectively nor conduct meaningful electioneering activities to promote his/her election platforms and visions to Hong Kong society. Furthermore, the Administration considered that when the epidemic was still severe, gathering 1 462 EC members and a large number of other participants (e.g. media and public) at the polling station¹ for CEE would not only increase their infection risks, but would also be contrary to the Government’s anti-epidemic strategies and efforts. Moreover, as the epidemic situation had yet to be stabilized, it would be unable to guarantee that EC members would not be subject to various anti-epidemic measures (e.g. compulsory quarantine) and thus be unable to vote in person. As CEE has a designated threshold² for a candidate to be returned, the epidemic would greatly increase the uncertainty of conducting the election smoothly. For details of the justifications put forth by the Administration, please refer to paragraph 6(a) to (c) of the LegCo Brief under reference.

The Sixth Term Chief Executive Election

(A) Original arrangement

5. The term of office of the Fifth Term CE of HKSAR will end on 30 June 2022 and the office of CE will become vacant on 1 July 2022. In accordance with section 10(1)³ of the Chief Executive Election Ordinance (Cap. 569) (“CEEEO”), the Secretary for Constitutional and Mainland Affairs (“SCMA”) has, on 22 October 2021, specified 27 March 2022 (“the

¹ The polling station of CEE will be set up at the Hong Kong Convention and Exhibition Centre.

² A CE candidate must obtain at least 751 votes to be elected.

³ The provision stipulates that if the office of CE becomes vacant on the expiry of the term of office of CE, the polling day for the election to fill the vacancy should be set on the Sunday on/before the first day of the period of 95 days expiring at the beginning of the day on which the vacancy will arise.

Original Polling Day”) as the polling day of the Sixth Term CEE. Pursuant to section 3 of the Electoral Procedure (Chief Executive Election) Regulation (Cap. 541J), the Chief Electoral Officer has also appointed the nomination period for the election to last from 20 February to 5 March 2022 (both dates inclusive).

(B) Proposal to postpone the election

6. The Administration proposes to make the Regulation under section 2(1) of ERO to postpone the polling day of the Sixth Term CEE to 8 May 2022, with the nomination period starting on 3 April and ending on 16 April 2022 (both dates inclusive). The Administration’s main considerations are set out in paragraphs 11 to 16 of the LegCo Brief under reference.

7. According to the Administration, setting the polling day on 8 May 2022 would allow about two months, which should still be sufficient, for the CE-elect to form the governing team and prepare for the work of the new term Government. In addition, by specifying 8 May (**First Polling Day**) as the polling day, even if EC could not elect the new CE on the First Polling Day, and that the Returning Officer, in accordance with section 22⁴ of CEE0, publicly declares that no candidate is returned at the election and terminates the proceedings for the election, there is still room to, pursuant to section 11(2) of CEE0, set the Sunday which is the 42nd day after the termination of the proceedings for the election, i.e. 19 June, as the **Second Polling Day**. HKSAR could still, before the expiry of the term of the current CE, select the new CE for appointment by the Central People’s Government (“CPG”) and swearing in on 1 July.

The Emergency (Date of Election) (Sixth Term Chief Executive) Regulation

8. The Regulation specifies a new polling date for the Sixth Term CEE and brings the current electoral process to an end, including:

⁴ Section 22 of CEE0 stipulates the requirements for various situations (including that a candidate is dead, a candidate is disqualified from being elected and no candidate is returned at the election) where a new CE could not be returned. For example, section 22(1AB) stipulates that, where at close of nominations only one candidate is validly nominated, a poll should still be conducted, and if the candidate cannot obtain over 750 votes of support, then he/she is not returned at the election. The Returning Officer shall publicly declare that no candidate is returned at the election and terminate the proceedings for the election.

- (a) to revoke the notice of polling date for the Sixth Term CEE made by SCMA under section 12 of CEEO and to specify a new polling day (i.e. 8 May 2022; “**Postponed Election**”) for the Sixth Term CEE. All electoral procedures are to apply on the basis of the new polling day; and
- (b) to revoke the notice⁵ of nomination for CEE published by the Chief Electoral Officer under section 3 of the Electoral Procedure (Chief Executive Election) Regulation on the basis of the Original Polling Day and to specify a new nomination period (viz. 3 to 16 April 2022) for the Sixth Term CEE.

9. Upon the commencement date (i.e. 24 February 2022) of the Regulation, the election with the Original Polling Day would be regarded as a “**Discontinued Election**”, and 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 that have been submitted) in relation to the Discontinued Election would cease to have effect (unless otherwise specified). For further details of the Regulation, please refer to paragraphs 24 to 26 of the LegCo Brief under reference.

10. The Regulation was published in the Gazette on 23 February 2022 and took effect on 24 February 2022. The Regulation was introduced into LegCo on 16 March 2022 for negative vetting.⁶

The Subcommittee

11. At the House Committee meeting on 25 February 2022, Members agreed to form a subcommittee to study the Regulation and related issues. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Mr Tommy CHEUNG, the Subcommittee has held two meetings with the Administration. The Subcommittee has also invited the public to provide written submissions on the Regulation.⁷

⁵ The notice specified details such as nomination period and the address for submitting nomination forms.

⁶ First LegCo meeting after the Regulation has been gazetted and takes effect. There was no LegCo meeting on 2 and 9 March 2022.

⁷ No written submission was received by the deadline.

Deliberations of the Subcommittee

Fallback plan for the Chief Executive Election

12. While members in general support the postponement and consider the new polling date (8 May) appropriate, members have enquired about the Administration's fallback plan in case the epidemic situation is not yet stabilized before the new polling date. The Administration has advised that as stipulated in the Basic Law, the term of office of CE shall be five years and it remains the goal of the HKSAR Government ("HKSARG") to ensure that the new term CE would be selected for appointment by CPG before the end of the term of the current CE. Having considered the time required for the CE-elect to form the governing team and prepare for the work of the new term Government, and to allow, for the sake of prudence, a Second Polling Day, HKSARG would strive to ensure that the election could be held on 8 May.

13. Members have enquired whether the election can be postponed again if the epidemic situation warrants. The Administration has advised that, under the electoral laws,⁸ the Electoral Affairs Commission ("EAC") may postpone the poll for no more than 14 days if it considers that the poll is likely to be seriously affected by, amongst others, any danger to public health or safety. The Administration has explained that while 8 May remains the only proposal for the time being, it will also have to take into consideration any new developments. As such, the Administration would not rule out the possibility of the exercise of such power by EAC to postpone the poll for 14 days where necessary. On the other hand, if the relevant conditions under ERO are satisfied, the CE in Council may make another regulation under ERO to amend the Regulation (including to change the new polling date from 8 May 2022 to another date).

14. Members have further enquired whether the selection of CE "through consultations" as provided for under Article 45(1) of the Basic Law would be considered as a fallback plan. The Administration has advised that pursuant to paragraph 3 of Article 45 of the Basic Law, the

⁸ In accordance with section 21(1) of CEEO, EAC may direct the postponement of a poll if, before the commencement of polling, EAC is of the opinion that the polling is likely to be obstructed, disrupted, undermined or seriously affected by riot or open violence or any danger to public health or safety. In accordance with section 65 of the Electoral Procedure (Chief Executive Election) Regulation, if a poll is postponed, EAC shall appoint a date within 14 days after the date of the postponed poll as the new polling date.

specific method for selection CE is prescribed in Annex I “Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region”, which provides that “[t]he Election Committee shall elect the Chief Executive designate from the list of nominations by secret ballot on a one-person-one-vote basis. ...The specific election method shall be prescribed by the electoral law of the HKSAR”. As such, the local electoral laws only provide for the selection of CE by way of election. The Administration has stressed that the selection of CE “through consultations” is beyond the prerogative of HKSARG.

Ensure the smooth conduct of the Chief Executive Election

15. Members have requested the Administration to strive to conduct the election on 8 May as scheduled and ensure that it will be held smoothly. In particular, members note that Cap. 599G was amended to, among others, tighten existing group gathering restriction in a public place by reducing the number of persons allowed per group gathering in a public place from four to two, and that this tightened measure is planned to be extended to 20 April, whereas the nomination period for the Postponed Election would commence on 3 April. Members have requested CMAB and the Food and Health Bureau (“FHB”) to coordinate in the implementation and invoke the relevant exemption provisions under Cap. 599G, where necessary, with a view to enabling the election to be held in a smooth manner. The Administration has stressed that its target is to conduct CEE on 8 May and has undertaken that it will carefully examine the situation and take necessary measures.

16. Members have also enquired whether it would be necessary to set up additional polling station(s) so as to avoid people from gathering during the election. The Administration has advised that under section 18(1) of Cap. 541J, the Chief Electoral Officer shall designate a place as the main polling station for conducting a poll and a place as the counting station for counting of the votes cast in the election. Such arrangements aim to ensure more efficient vote counting, and to facilitate a second round or further rounds of voting, if required, to be conducted on the same day, in case no candidate obtains more than 750 valid votes in the first round of voting. The Administration has assured members that adequate facilitation measures will be drawn up in consultation with FHB and CHP for the election to ensure public health safety and to prevent the spread of COVID-19 in the polling/counting stations while also ensuring the exercise of electors’ voting rights as far as possible. For example, in the 2021 LegCo General Election, electors with fever or respiratory symptoms would be segregated from other electors and assigned to vote at designated

compartments at the polling station. The compartments will be suitably disinfected after each use. Similar arrangements would be considered and put in place in the Sixth Term CEE.

17. In response to members' concern, the Administration has advised that similar to the past CEEs, the Radio Television Hong Kong and other media channels may conduct election forums for CE candidates to promote their election platforms to the public.

Election expenses and unused election donation

Election expenses

18. Members have enquired whether a candidate of the Discontinued Election would still have to meet the requirements on election advertisements ("EAs"), election expenses and election returns as set out in the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) ("ECICO") and CEEO following the postponement of the polling day of the Sixth Term CEE. The Administration has advised that notwithstanding that the electoral matters of the Discontinued Election would cease, the requirements on EAs, election expenses and election returns as set out in ECICO and CEEO would be maintained so as to ensure that the election would be fair, just and open. The Administration has explained that pursuant to section 2(1) of ECICO (as read together with the Regulation), a "candidate", in relation to the Discontinued Election, means (a) a person who stands nominated as a candidate at the election, as well as (b) a person who, at any time before 24 February 2022 (i.e. the commencement date of the Regulation), has publicly declared an intention to stand as a candidate at the election. In this connection, the Regulation provides that:

- (a) electoral officers and candidates are required to comply with the obligations in respect of making copies of EAs and related documents available for public inspection; and
- (b) candidates are also required to lodge an election return in relation to the Discontinued Election so as to enable proper scrutiny by the relevant authorities on whether or not candidates have committed any corrupt or illegal conduct in the preceding period.⁹

⁹ ECICO read with the Regulation stipulates that the candidate must ensure that the election return is lodged before the expiry of the period of 60 days beginning with 24 February 2022.

19. However, it should be noted that when determining whether the election expenses have exceeded the statutory limit¹⁰, the election expenses incurred by (or on behalf of) the candidate will be “re-set” on 24 February 2022. Election expenses previously incurred¹¹ would not be regarded as the election expenses of the Postponed Election. Further, any person who has, before 24 February 2022, publicly declared the intention to stand as a candidate in the Discontinued Election will not be regarded as a candidate of the Postponed Election because of that previous public declaration.

20. Members have enquired about the apportionment of election expenses incurred by a candidate who runs in both the Discontinued Election and the Postponed Election, if the relevant expenditure item spans some time beyond 24 February 2022. The Administration has explained that according to ECICO, “election expenses”, in relation to a candidate at an election, means expenses incurred or to be incurred, before, during or after the election period, by or on behalf of the candidate for the purpose of (a) promoting the election of the candidate; or (b) prejudicing the election of another candidate. The Administration has advised that as a general principle, the cost that has been incurred and paid for in relation to the Discontinued Election should be declared in the election return that has to be lodged within 60 days after the date on which the proceedings for the election are declared to have been terminated (i.e. 24 February 2022). Then, the cost so declared would not be regarded as the candidate’s election expenses of the Postponed Election.

Unused election donation

21. Members note that under the existing electoral law, candidates must ensure that any unused election donation is given to a charitable institution or trust of a public character¹² chosen by them. Failure to comply with the above requirement constitutes corrupt conduct. Members have asked whether the requirement can be disapplied if the candidate will also run for the Postponed Election, so that the election donation that the candidate has solicited for the Discontinued Election can be used to support

¹⁰ According to section 2(b) of the Maximum Amount of Election Expenses (Chief Executive Election) Regulation (Cap. 554A), the maximum amount of election expenses that can be incurred by or on behalf of a candidate at CEE is \$17,600,000.

¹¹ As stated in paragraph 18(b), candidates still need to submit election returns in relation to the Discontinued Election.

¹² According to section 19(6) of ECICO, “charitable institutions or trust of a public character” means a charitable institution or trust of a public character that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap. 112).

his/her electioneering activities that still have to be carried out for the Postponed Election. There is a view that if the candidate must donate the unused election donation in relation to the Discontinued Election, he/she may not be able to solicit adequate donation again for the Postponed Election. The Administration has advised that the arrangement is consistent with the stipulations of ECICO which provide that candidates are required to lodge election return (and donate unused election donation) within a statutory period regardless of whether the election is smoothly held or the proceedings of the election are declared to have been terminated. Given the electoral proceedings of the Discontinued Election have been terminated, the Administration considers it appropriate for the same principle to apply instead of giving exceptional treatments to the candidates of the Discontinued Election.

Effect of gazette notices concerning the valid registration of ex-officio members of the Election Committee

22. Members note that under the Regulation, all electoral matters in relation to the Discontinued Election that took place or came to being before 24 February 2022 (i.e. the commencement date of the Regulation) would cease to have effect as from the beginning of that date. The Legal Adviser to the Subcommittee has sought the Administration's clarification on whether a gazette notice of valid registration, issued by the Candidate Eligibility Review Committee upon determining certain persons' registration as ex-officio members of EC to be valid, is an "election related document" within the definition of "electoral matter" under the Regulation. If that is the case, the Legal Adviser to the Subcommittee has enquired whether by virtue of section 4(2) of the Regulation, such gazette notices have ceased to have effect as from 24 February 2022, and whether it would be necessary to make that clear under Part 3 of the Regulation. In response, the Administration has explained that the gazette notices concerned should not be considered as "election related documents" (as defined under section 84(6) of Cap. 541J) in relation to the Discontinued Election for reasons as set out in the Administration's letter dated 3 March 2022 (LC Paper No. CB(4)150/2022(01)). Therefore, the gazette notices concerned will continue to have effect, and it would be unnecessary to specify that the matters in those gazette notices are not affected by the change of date of the Six Term CEE.

Recommendation

23. Members of the Subcommittee support the Regulation. The Subcommittee will not propose any amendment to the Regulation.

Advice Sought

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

Council Business Division 4
Legislative Council Secretariat
23 March 2022

**Subcommittee to Study the Emergency (Date of Election)
(Sixth Term Chief Executive) Regulation and Related Issues**

Membership list

Chairman Hon Tommy CHEUNG Yu-yau, GBS, JP

Members Hon Alice MAK Mei-kuen, BBS, JP
Ir Dr Hon LO Wai-kuok, GBS, MH, JP
Hon Tony TSE Wai-chuen, BBS, JP
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Hon Nixie LAM Lam
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(Total : 15 members)

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