

Bills Committee on District Councils (Amendment) Bill 2023

**Government's response to the views of the Committee
and proposed Committee Stage Amendments**

Purpose

This paper sets out the response to the concerns raised by Members during the meetings of the Bills Committee on the District Councils (Amendment) Bill 2023 (“the Bill”) and in the relevant letters¹, and Government’s proposed Committee Stage Amendments (“CSAs”).

Proposed CSAs

2. Government’s proposed CSAs mainly concern –
 - (a) **Functions of the District Councils (“DCs”)**: We **propose** to amend section 4A(f) of the District Councils Ordinance (Cap. 547) (“Cap. 547”) to specify that the DCs may apply for funding for projects and activities *relating to the functions of DCs*. As regards other suggestions raised by Members concerning section 4A, we consider that the current provisions are clear enough, and we will provide more detailed explanations in the standing orders or related administrative guidelines in future; and
 - (b) **Performance monitoring mechanism for DC members**: Members were concerned about if Cap. 547 has sufficient enabling provisions for the Secretary for Home and Youth Affairs (“SHYA”) to issue guidelines on the operation of the supervisory committee. We **propose** to amend section 72B(1) of Cap. 547 by adding provisions to empower SHYA to issue guidelines to indicate the procedures relating to the implementation of sections 72C to 72E.

¹ Including (a) letter from the Legal Service Division of the Legislative Council Secretariat dated 7 June (CB(2)554/2023(01)) and (b) letter from members of the Democratic Alliance for the Betterment and Progress of Hong Kong dated 9 June (“Opinion on the District Councils (Amendment) Bill 2023”).

3. We will also take on board some comments from the Bills Committee and amend certain provisions to improve drafting. As regards other comments that the Government does not recommend to amend in the Bill, the main considerations are –

- (a) The provisions are sufficiently clear, unambiguous and in line with the Law Drafting Division’s “Drafting Legislation in Hong Kong — A Guide to Styles and Practices”; and
- (b) The relevant provisions make reference to or adopt the drafting in other electoral laws, including the Legislative Council Ordinance (Cap. 542), the Chief Executive Election Ordinance (Cap. 569), the Electoral Affairs Commission (Registration of Voters) (Legislative Council Geographical Constituencies) (District Council Constituencies) Regulation (Cap. 541A) and the Electoral Affairs Commission (Electoral Procedures) (Legislative Council) Regulation (Cap. 541D), etc. As these provisions in other electoral laws have been effective all along, changing the wording in Cap. 547 may mislead the stakeholders into thinking that the relevant electoral policies have changed or differed, and create confusion. Therefore, we propose to consider the appropriate way forward when we make miscellaneous amendments to the electoral laws in the future.

4. We also agree with the following suggestions made by the Legal Service Division of the Legislative Council Secretariat –

- (a) to amend sections 24(2) and 25(5) of the Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation (Cap. 541F) for consistency² with sections 36(2A) and (4A) of Cap. 547;
- (b) to refer to section 72D(1)(c) in sections 72(1)(b) and 72(2)(ab) of Cap. 547, in order to reflect the policy intention that the suspension of the DC members’ functions and duties under the proposed new section 72D(1)(c) does not affect the power of a DC to transact business and the validity of proceedings of a DC; and

² That the Returning Officer or the District Councils Eligibility Review Committee (“DCERC”) are only required to make the declarations on the death of validly nominated candidates or variation of the DCERC’s decision on the validity of nomination after the DCERC has issued a declaration on valid nomination pursuant to section 36(1A) of Cap. 547.

- (c) amendments relating to drafting issues as set out in paragraphs 6 and 7 of the Legal Service Division's letter.

5. Provisions that the Government proposes to amend through CSAs are at Annex.

Other concerns

6. Our responses to other concerns raised during Bills Committee meetings are as below.

(A) Provisions concerning disqualification

7. On the clauses about the disqualification of DC members (section 14 of Cap. 547), which are also in the Legislative Council Ordinance (Cap. 542) and in operation since 1997, details are as follows –

- (a) when applying section 14(1)(f) which states “a representative or a salaried functionary of the government of a place outside Hong Kong”, we need to consider factors such as the nature of the position taken up by the person, whether the person has the opportunity to exercise public power on behalf of the foreign government, and the contractual arrangement (if any) between the person and the foreign government. Therefore, we cannot generalise the application of the clause based on the title of the position; and
- (b) the “people’s consultative body” referred to in section 14(1)(g) includes not only the National Committee of the Chinese People’s Political Consultative Conference, but also other People’s Political Consultative Conferences at the provincial (including municipalities and autonomous regions) city and county levels.

(B) Practical arrangements on handling of nominations

8. We thank Members for their valuable views and suggestions on the practical arrangements for handling nomination in the election. We will consider the feasibility together with the Electoral Affairs Commission

and the Registration and Electoral Office in order to further enhance various electoral arrangements with a view to making elections more efficient and user-friendly, while being fair and just.

(C) Performance monitoring mechanism for DC members

9. Regarding the enquiries from Members of the Bills Committee and enquiries and suggestions as mentioned in paragraphs 2 and 3 of the letter from the Legal Service Division, the consolidated reply is as below

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- (a) Members asked whether the various implementation details and procedures should be set out in the legislation. The policy intention is to lay down the implementation procedures for the performance monitoring mechanism through administrative arrangements so as to provide more flexibility for future adjustments as appropriate. In accordance with the policy intention, the administrative details would therefore be set out in the relevant guidelines. As stated in paragraph 2(b) above, we propose to amend section 72B(1) of Cap. 547 by adding a clause to empower SHYA to issue guidelines for the procedures relating to the implementation of sections 72C to 72E under Part VIA (Misconduct and Sanctions) of Cap. 547;
- (b) It was mentioned in paragraph 2(a) of the letter from the Legal Service Division that Members were concerned about the opportunity for the relevant DC member to make representation and the timing for imposing sanctions and informing the member. Before SHYA decides whether sanctions should be imposed pursuant to section 72D(1), the DC member concerned can make representation. We will clearly set out the arrangements to make representation in the relevant administrative guidelines. Under section 72D(6), after SHYA has decided to impose sanction on the relevant DC member, the DC member concerned will be informed as soon as practicable in writing with the reasons for the decision. The sanction may take effect immediately (e.g. in the case of a warning letter) or at a later time (e.g. in the case where financial penalty is to be deducted from the remuneration);
- (c) As regards paragraphs 2(b), 3(a) and 3(e) of the letter from the Legal Service Division, since the DC member concerned can

appeal to the Chief Secretary for Administration (CS) against the decision of SHYA (including the issuance of letters of persuasion), and the decision of CS is also subject to judicial review, SHYA and CS therefore must state the reasons for their decisions so that the aggrieved DC member may appeal against SHYA's decision or commence legal proceedings against CS' decision as appropriate. We consider it unnecessary to specify in the proposed new subsections that reasons have to be provided for the relevant decisions;

- (d) In respect of paragraph 3(c) of the letter from the Legal Service Division, section 72E(4) does not empower CS to make decisions outside the scope as stipulated in section 72D(1) or substitute SHYA's decision with other decisions, and hence the decision made by CS on the appeal must fall within the scope of section 72D(1);
- (e) Paragraphs 3(b) and 3(d) of the letter from the Legal Service Division concerned the procedures of appeal, including whether the procedures for appeal and the period within which CS should issue his/her notice of decision should be stipulated in section 72E. According to paragraph 9(a) above, we consider it appropriate to set out the above and other relevant procedures in administrative guidelines. The time required by CS to consider the appeal would vary depending on the nature and complexity of the case concerned, hence the time period should not be stipulated in section 72E. Furthermore, section 70 of the Interpretation and General Clauses Ordinance (Cap. 1) stipulates that "where no time is prescribed or allowed within which any thing shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises." Hence, CS will issue his/her notice of decision without unreasonable delay;
- (f) Members were concerned about the arrangement during the suspension of functions and duties of DC members. According to the proposed performance monitoring mechanism, the concerned DC member still holds office during the suspension period. Under section 72D(4), "the person is entitled to be reimbursed the operating expenses incurred by the person during the period of suspension." Even if the DC member is suspended from his/ her functions and duties, he/ she is still

entitled to be reimbursed the operating expenses. This arrangement is made under the consideration of the temporary nature of the suspension, during which the DC member still needs to continue to pay for office rentals, utility expenses, staff salary, etc.; and

- (g) Members were concerned about sections 72B(5) and 72B(6). Breaching the standard of performance required of a member or committing the misconduct as set out in the guidelines referred in section 72B(1) may constitute a ground for SHYA to impose sanction. As to the legal status of the guidelines, section 72B(5) clearly sets out that a person does not incur any civil or criminal liability only because the person has contravened any of the guidelines. Based on that subsection, contravening the guidelines in itself will not create a cause of action or offence. In other words, the conduct which contravened the guidelines may still form the factual basis for a cause of action or offence under the statutory provisions and principles of civil or criminal law. But if legal proceedings are to be commenced, a cause of action or offence must be established in accordance with the relevant civil or criminal law statutory provisions and principles (but not the guidelines referred in section 72B(1)). As to whether section 72B(5) can constitute a defence, since the legal effect of section 72B(5) is that a breach of the guidelines does not in itself give rise to a cause of action or a criminal offence, the said subsection does not constitute a defence in civil or criminal proceedings.

Section 72B(6) provides for the evidential effect of the guidelines in any legal proceedings. That is, if a court is satisfied that a provision of the guidelines is relevant to the determination of a matter that is in issue in the proceedings, the court may admit the guidelines as evidence (section 72B(6)(a)) and any party to the proceedings may rely on whether a person has contravened the guidelines' provision as proof to establish or negate the matter that is in issue (section 72B(6)(b)).

Provisions similar to sections 72B(5) and (6) are also common in other legislation in Hong Kong, for example section 24(5) of the Companies Ordinance (Cap. 622), section 8(4) of the Deposit Protection Scheme Ordinance (Cap. 581), section 13(4) of the Accounting and Financial Reporting Council Ordinance (Cap.

588), section 88(5) of the Residential Properties (First-hand Sales) Ordinance (Cap. 621), etc.

Advice Sought

10. Members' views are sought on the proposed draft CSAs.

**Constitutional and Mainland Affairs Bureau
Home and Youth Affairs Bureau
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