

Statement of the Hong Kong Bar Association (“HKBA”)
on the Hong Kong Government’s decision to
postpone the Legislative Council election

1. The HKBA expresses its grave concern in relation to the decision of the HKSAR Government to postpone the Legislative Council (“**LegCo**”) election, which was due to be held on 6 September 2020, for one year.
2. The right to vote and to stand for election is guaranteed by Article 26 of the Basic Law and Article 21(b) of the Hong Kong Bill of Rights. It is a vital constitutional right.
3. The HKBA considers that there are serious doubts about the legal and evidential basis of the Government’s decision.
4. The Government has sought to justify the postponement on the ground of public health risks, due to the resurgence in COVID-19 cases. We note in this regard that international human rights experts have repeatedly warned that governments must not use COVID-19 as a pretext to suppress human rights.¹ Recently, on the specific topic of elections, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has emphasised that:

“States should provide transparency as to their decision-making processes in the context of elections...and should consult with civil society in determining appropriate approaches. While limitations on in-person voting may be necessary in some cases, States should take all measures possible to ensure the timely carrying out of elections, including through the utilization of alternative voting procedures such as mail-in ballots. In all cases, the integrity of electoral processes must be ensured.”²

5. The HKBA notes with concern that the HKSAR Government has apparently not consulted with civil society. The HKSAR Government indicated that it did not consult with relevant experts on the appropriate balance to be struck between protecting public health and protecting the constitutional right of Hong Kong residents to participate in elections. There is also little evidence that the HKSAR

Government has considered alternative measures to alleviate the possible health risks.

6. Moreover, the HKSAR Government has failed to satisfactorily explain why the LegCo election was to be postponed for one year, instead of a shorter period of several weeks or months (when more precautionary measures could be implemented to protect public health). Whilst there were other countries which had postponed their elections due to the COVID-19 pandemic as referred to by the Chief Executive, there are also countries – having higher reported Covid-19 case number - which have held elections in the past few months at both national and local level.³ Further, many of the countries which have postponed elections did so for considerably shorter periods.
7. With regard to the HKSAR Government’s decision to cancel the scheduled election by invoking the Emergency Regulations Ordinance (Cap. 241) (“**ERO**”) and making regulations thereunder to revoke the relevant government notices gazetting the scheduled election, the HKBA notes that the constitutionality of the ERO (in relation to the Prohibition on Face Covering Regulation (Cap. 241K) made last year by the Government) is pending appeal to the Court of Final Appeal. The HKSAR Government’s action to invoke the ERO for the purpose of cancelling the scheduled election may turn out to be unlawful.
8. The HKBA also notes that there are specific provisions in the Legislative Council Ordinance (Cap 542)⁴ for postponing an election at times of danger to public health, which however are not being used by the HKSAR Government. These provisions would have provided for 14 days’ postponement only. Generally, a later law which addresses a specific problem – in this case, public health hazards at election time – would take precedence over an earlier, general law (i.e. the ERO) which addresses emergencies and public dangers generally but does not address the specific issue of public health problems at election time.
9. Further, Article 69 of the Basic Law stipulates that the term of office of LegCo shall be 4 years.⁵ Elections of members of LegCo are matters within the autonomy of the

HKSAR. Alarming, the HKSAR Government has decided to seek a decision of the Standing Committee of the National People's Congress to resolve the question arising from the decision to postpone the election relating to the term of office of LegCo as stipulated by the Basic Law. Instead of abiding by the express provision of the Basic Law, the HKSAR Government is effectively inviting the Central Government to override the relevant provisions of the Basic Law and Hong Kong legislation to circumvent possible legal challenges. This is contrary to the principles of legality and legal certainty and degrades the rule of law in Hong Kong.

Dated 2 August 2020

The Hong Kong Bar Association

¹ See e.g. the statement by a group of UN Special Rapporteurs dated 16 March 2020 ("COVID-19: States should not abuse emergency measures to suppress human rights"), published at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>. See also the statement by the UN High Commissioner for Human Rights (Ms. Michelle Bachelet) dated 6 March 2020 ("Coronavirus: Human rights need to be front and centre"), published at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25668&LangID=E>.

² Statement by UN Special Rapporteur on the rights to freedoms of peaceful assembly and of association (Mr. Clément Voule) dated 14 April 2020, "States' responses to Covid 19 threat should not halt freedoms of assembly and association", published at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E>.

³ Examples include Singapore, South Korea, Japan, Iceland, Poland, Croatia, Mongolia, Israel, Mali, and Burundi.

⁴ See: Section 44 of the Legislative Council Ordinance, which is entitled "When general election can be postponed or adjourned".

⁵ except for LegCo's first term after the 1997 handover, which shall be 2 years.