

Urgent by fax and by despatch
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Dear Stephen,

Electoral Procedure (Chief Executive Election) Regulation (L.N. 233)

I refer to your letter of 16 November 2001 which raises a number of questions on the captioned Regulation. Our responses, in the same order as the questions appear in your letter, are set out in the following paragraphs.

Section 2(1)

Q1 : In the definition of “election expenses”, is it necessary to add “but the reference to an election in that meaning is to be construed as a reference to an election defined in this section” (c.f. the definition of “election expenses” under section 1(1) of the Electoral Affairs Commission (Electoral Procedure) (Election Committee) Regulation (L.N. 210 of 2001) (“EAC (EP)(EC) Regulation”))?

A1 : The expression “election” is defined in the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) as an election to which the Ordinance applies. The only reasonable construction of the definition of “election expenses” is that a reference to an election in the definition in Cap. 554 is a reference to the CE election. Nevertheless, if the Subcommittee agrees, we see no difficulty in adding a qualifier similar to that in the EAC (EP)(EC) Regulation.

Q2 : In the definition of “identity document”, is it necessary to add “or” after paragraph (b)?

A2 : Although the absence of “or” will not affect the construction, it is desirable to add the word. If the Subcommittee agrees, an amendment will be made.

Q3 : In the definition of ordinary business hours”, is it necessary to replace “hour” by “hours” (c.f. the definition of “ordinary business hours” under section 1(1) of the EAC (EP)(EC) Regulation)?

A3 : This is a clerical error. “Hours” should be adopted. If the Subcommittee agrees, an amendment will be made.

Section 2(2)(c)

Q4 : Is the reference to “paragraph (a) or (b)” of section 14 ambiguous?

A4 : There is no ambiguity. Section 14 of the Electoral Procedure (Chief Executive Election) Regulation (“EP (CE Election) Regulation”) touches on the appointment and revocation of both an election agent, which is qualified by section 2(2)(a) insofar as the meaning of “candidate” is concerned, and an election expense agent, which, on the other hand, is qualified by section 2(2)(b). The phrase “paragraph (a) or (b)” under section 2(2)(c) is unambiguous when it is considered in the context of section 2(2) as a whole.

Section 4(1)(b)(iii)

Q5 : Should “be” be replaced by “being”?

A5 : We see no reason for changing “consents to be” to “consents to being”.

Section 4(1)(c), (1)(d)(ii) and (2)

Q6 : Would you explain the reason for adopting “identity card” instead of “identity document” as used in section 8 of the EAC (EP)(EC) Regulation?

A6 : The practical effect should be more or less the same, whether or not “identity card” or “identity document” is adopted. All members of the Election Committee (EC) are holders of identity card, and it should not be unreasonable for a candidate of the CE election and his witness to hold an identity card.

That said, if the Subcommittee agrees, an amendment will be made to adopt “identity documents” in these sections to provide flexibility in handling nomination.

Section 18(2)(b) and (3)

Q7 : Is the scope of “other premises” equivalent to that of section 28(2)(b) of the EAC (EP)(EC) Regulation which also includes “structure” and “place”, and intended to cover those premises set out under section 28(2)(c) – (e) of the EAC (EP)(EC) Regulation?

A7 : As there will only be one polling station for the CE election, it is not necessary to empower the Chief Electoral Officer to hire a “structure” or “place” that does not fall within the scope of “premises”. The scope is more restricted, but it will serve the purpose.

Special polling station

Q8 : Under section 18, the Chief Electoral Officer shall designate a place as the polling station and counting station. However, unlike sections 29 and 33 of the EAC (EP)(EC) Regulation and sections 29 and 33 of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (“EAC (EP)(LC) Regulation”) (Cap. 541 sub. leg.), there is no provision in the Regulation for special polling stations to be used for voting by persons with a disability. Is there any arrangement for persons with a disability to vote in the CE election?

A8 : We will, through administrative means, make necessary arrangements to facilitate disabled EC members to vote at the CE election.

Section 24(2)(b)

Q9 : What is the policy reason for adding “without lawful authority” in the provision?

A9 : Only unlawful use of sound amplifying system or device is prohibited in a no canvassing zone. This is a qualified prohibition as there may be circumstances under which the use of sound amplifying system or device is necessary (e.g. for the maintenance of law and order).

Section 24(2)(d)

Q10 : It is noted that the wording of the provision is different from similar provision in section 41(1)(d) of the EAC (EP)(EC) Regulation and section 41(1)(ca) of the EAC (EP)(LC) Regulation. It is appreciated that new arrangement is necessary consequential to section 16(7) of the Chief Executive Election Ordinance. Could you give examples as to display of propaganda material in the no canvassing zone that will be considered with reasonable excuse under the new arrangement?

A10 : One obvious example will be the display of, say, banners by the Electoral Affairs Committee (“EAC”) publicising the CE election as an event.

Section 24(4)(c)

Q11 : Would it be appropriate to define what misconduct is (c.f. section 41(6) of the EAC (EP)(EC) Regulation)?

A11 : Section 41(6) of the EAC (EP)(EC) Regulation is not an exhaustive definition, but only seeks to extend the meaning of “misconduct” to include “causing an obstruction to any person who is in the no canvassing zone or the no staying zone or on his or her way to vote”. You will appreciate that this purpose is achieved by section 24(4)(b) of the EP (CE Election) Regulation. Read together, section 24(4)(b) and (c) of the EP (CE Election) Regulation is, in terms of substance, the same as section 41(2)(a) of the EAC (EP)(EC) Regulation as supplemented by section 41(6) thereof.

Section 26(3)

Q12 : Could you give examples where a person will be authorized to enter and stay in the polling station?

A12 : One example is authorization for electrical and mechanical maintenance contractors and/or IT contractors to enter and stay in the polling station.

Section 27(3)(i)

Q13 : Could you give examples where a person will be authorized by the Chief Electoral Officer or a member of the Electoral Affairs Commission to do an act prohibited by subsection (2)?

A13 : One example could be for an electoral officer to use a mobile phone to contact officers elsewhere for matters relating to the CE election.

Section 27(5)(b)

Q14 : Could you give examples where display of propaganda material in the polling station on the polling date that will be considered with reasonable excuse?

A14 : One obvious example is the display of banners and posters, if any, within the polling station by the EAC to publicise the CE election as an event.

Section 27(7)(d)

Q15 : Would it be appropriate to define what misconduct is (c.f. section 41(6) of the EAC (EP)(EC) Regulation)?

A15 : The corresponding provision under the EAC (EP)(EC) Regulation is section 46(2)(a) as supplemented by section 46(6) thereof. You will see that, despite the difference in presentation, the combined effect of these two sub-sections is the same as that of section 27(7)(b), (c) and (d).

Section 35(3)(b) and (6)

Q16 : Section 30(2)(c) provides that the EAC may decide to have ballot papers to be used in different rounds of voting printed in different colours. Would it be appropriate to provide for the circumstance in which an elector is re-issued the original ballot paper but its colour is different from the colour of the ballot papers to be used for the particular round of voting upon his return?

A16 : Section 35 is applicable only if an elector returns to claim the ballot paper issued to him earlier on at the same round of voting. This restriction is evident from the phrase “before the close of that round of voting” in section 35(5). As such, the possibility of cross-round voting will not happen, and hence there is no need to provide for such a situation.

Section 35(5)(c)(i)

Q17 : Who is supposed to return the ballot paper?

A17 : The elector is to return the ballot paper.

Section 40(2)(b)

Q18 : Would it be appropriate to add “in” before “subsection (1)(a) or (b)?

A18 : The word “in” is inadvertently omitted. If the Subcommittee agrees, an amendment will be made.

Section 46(2)

Q19 : Could you give examples where a person will be authorized to enter and stay in the counting station?

A19 : One example is for electrical and mechanical maintenance contractors and/or IT contractors to enter and stay in the counting station.

Section 47(3)(b)

Q20 : Could you give examples as to display of propaganda material in the counting station that will be considered with reasonable excuse?

A20 : See our reply to Q.14 concerning section 27(5)(b) above.

Section 47(3)(e)

Q21 : Would it be appropriate to define what misconduct is?

A21 : As explained in our replies to Q.11 concerning sections 24(4)(c) and Q.15 concerning 27(7)(d) above, there is no need to define “misconduct” in the same way as section 68(7) of the EAC (EP)(EC) Regulation. Section 47(3)(d) of the EP (CE Election) Regulation achieves the same purpose by providing that no person shall “disrupt the counting of the votes or disturb or cause inconvenience to any person.”

Section 58

Q22 : It is noted that in section 87 of the EAC (EP)(LC) Regulation and section 84 of the EAC (EP)(EC) Regulation, the reference is “criminal proceedings” instead of “other legal proceedings”. Could you explain the reason for adopting a different reference in section 58? A consequential reference is also found in section 59(b).

A22 : The wider term “other legal proceedings” is preferred to the narrower one of “criminal proceedings”. Unlike LegCo or EC subsector elections, judicial reviews or appeals to the Court of Final Appeal may be made against the CE election in accordance with the CE Election Ordinance. These cases may not be criminal proceedings, but definitely have a legitimate case for the court concerned to inspect the relevant ballot papers, if any.

Section 60(3)

Q23 : Should the reference be “as if they are ballot papers and documents sent to the Chief Electoral Officer under section 57” instead of “as if they are ballot papers and documents sent to the Returning Officer under section 57” (emphasis added)?

A23 : The reference to “Returning Officer” should be replaced by “Chief Electoral Officer”. If the Subcommittee agrees, an amendment will be made.

Section 61

Q24 : Is it appropriate to add “further occurrence, i.e. “riot, open violence or other occurrence of public danger”, to be the ground for the EAC to postpone or adjourn a poll or the counting of the votes in respect of a poll (as the case may be) (c.f. sections 1 and 2 of Schedule 1 to EAC (EP)(EC) Regulation)?

A24 : There is no need to make a reference to “further occurrence”. Section 21 of the CE Election Ordinance already confers the power of postponement and adjournment on the EAC. The definitions of “postponement” and “adjournment” under the EP (CE Election) Regulation cover section 21 of the CE Election Ordinance.

As a matter of law drafting principle, the Department of Justice sees no merit in repeating a power already given under another ordinance or regulation.

Section 63(3)

Q25 : In comparing to section 5(3) of Schedule 2 to the EAC (EP)(LC) Regulation, what is the reason for omitting the arrangement for deposit of the items in a building other than that mentioned in section 63(3)(a) – (c)?

A25 : We consider that the provision of section 63(3) is already sufficient to meet the practical needs in the event of an adjournment of a poll by the EAC. As there is only one polling station, an appropriate place will be selected so that section 63(3) needs not be very broad.

Section 64(b)

Q26 : In comparing to section 6(2) of Schedule 2 to the EAC (EP)(LC) Regulation, what is the reason for omitting the arrangement for deposit the ballot box, etc. in a building other than that mentioned in section 64(b)(i) – (iii),

A26 : See our reply to Q.25 concerning section 63(3) above.

Section 69(2)(e)

Q27 : It appears that a person who stays in the counting station under section 46(3) is not required to be “authorized”.

A27 : If the Subcommittee agrees, an amendment will be made to cross out the word “authorized” and put in place a neutral phrase.

Section 81(1)(a)

Q28 : Are you satisfied that the EAC does not have power to exempt any other class or type of election advertisement from the application of subsection (1)(a) (c.f. section 102(16) of the EAC (EP)(LC) Regulation)?

A28 : It may be desirable to provide this exemption power under section 81 to give the EAC more flexibility in handling election advertisements. If the Subcommittee agrees, an amendment will be made.

Section 84(6)

Q29 : Are your satisfied that the reference to “authorization” is omitted (c.f. section 103(4) of the EAC (EP)(LC) Regulation)?

A29 : We are satisfied with the omission of “authorization” in this section. The list in section 84(6) should be sufficient for our purpose. “Authorization” is necessary in EAC (EP)(LC) Regulation because election expense agents are appointed by means of an authorization. In our regulation, election expense agents are appointed under notices of appointment.

In the interest of time, I am issuing the English version of the letter first. The Chinese translation will follow shortly.

Yours sincerely,

(Chris SUN)
for Secretary for Constitutional Affairs

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