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Dear Stephen,

Chief Executive Election Bill

I refer to your letter dated 29 March 2001. Our replies to your questions are set out in the following paragraphs, in the same order as they appeared in your letter –

General Observation

(i) Would it be necessary to provide for validity of acts of CE notwithstanding defect that may afterwards be discovered in his election or as to his eligibility to be CE?

A: The existing provisions of the CE Election Bill are already sufficient. As far as defect in the election process is concerned, clause 30 of the Bill should be sufficient to cover. Where a judicial challenge is mounted against the winning candidate and is finally proved successful, clause 39 of the CE Election Bill will provide the necessary protection.

(ii) **In relation to conduct of election, what is the reason for not adapting sections 54 (Consequences of non-compliance with requirements), 55 (Misnomer or inaccuracy not to affect operation of election document), 57 (Election not to be questioned only because of defect in the appointment of an electoral officer), 59 (Offences by electoral officers with respect to conduct of election) and 60 (Electors not to be required to disclose how vote was cast) of the Legislative Council Ordinance (Cap. 542) (“LCO”)?**

A. While, in drafting the CE Election Bill, we have made reference to the LCO, we do not consider it necessary to reflect all LCO provisions. Our drafting principle is that only those which are necessary are stipulated in the Bill. Given this general approach, you will appreciate that the five LCO provisions to which you referred are not included for the following reasons –

- (a) **Sections 54, 55 and 57 of LCO** : LegCo elections, as compared with CE elections, are much more complicated involving different types of constituency, different voting methods, many candidates and large number of electoral officials. Sections 54, 55 and 57 which are appropriate in the case of LCO, to put beyond doubt that minor defects in the election process will not affect the validity of the election result, are not considered necessary in the case of the simpler CE election process. The situation is adequately covered by the presumption of the validity of the election under clause 30 and the associated procedure for handling election petitions. Moreover, as provided for under clause 33(1), only material irregularity and serious defects could become grounds for election petition;
- (b) **Section 59** : We do not need a provision to compel electoral officers to perform their function or duties. If necessary, that can be achieved by administrative means and hence the smooth conduct of an election will not be affected; and
- (c) **Section 60** : Voting by secret ballot at the CE election is explicitly spelt out in Annex I to the Basic Law (BL) and in clause 24 of the CE Election Bill. Furthermore, we will provide that electors must not be required to disclose how vote was cast under the subsidiary legislation governing the conduct of the CE election to be made by the Electoral Affairs Commission.

(iii) In relation to election petition, would you consider adapting sections 69 (When an election petition is terminated) and 70 (When respondent can withdraw from election proceedings and be substituted) of LCO?

A: It is considered more appropriate that the detailed provisions dealing with the termination and withdrawal of election petitions are dealt with by the Judiciary. The CJ is given power under clause 41 to make rules for these matters. The Rules will be subsidiary legislation subject to the scrutiny of LegCo by negative vetting.

(iv) What is the reason for not adapting section 73 of LCO?

A: Section 73 of LCO is concerned with legal proceedings against persons acting or claiming to be entitled to act as a LegCo Member. This section deals with two situations. The first is impersonation, where a person who has not gone through the election process pretends to be a LegCo Member. We do not think that this situation will arise in the case of the CE. The second situation is where a person having become a Member has been declared not qualified to hold office under Article 79 of the Basic Law as referred to in section 15 of the LCO. If this situation arise in the case of the CE, it might become a ground for the LegCo to initiate a motion of impeachment under BL 73(9). The LegCo may pass a motion of impeachment by a two-third majority of all its Members and report it to the CPG for decision.

(v) In relation to conduct of election, what is the reason for not adapting sections 79 (Offences to obstruct or hinder electoral officers), 80 (CE may give directions as to exercise or performance of electoral officers' functions and duties), 81 (Death or incapacity of electoral officer not to terminate authority)?

A: Clauses 43 and 45 are adapted from sections 79 and 81 of the LCO, respectively. As regards section 80 of the LCO, the corresponding provision under the CE Election Bill is clause 44. The only difference is that the power to give direction to electoral officers at the CE election is conferred on the Electoral Affairs Commission (EAC) rather than the CE.

Clause 2(1)

- (i) **In the definition of “Returning Officer”, as compared to the definition of “Returning Officer” in LCO, reference to “and includes any person appointed to act in place of such an Officer when the Officer is absent or when an office of Returning Officer is vacant” is omitted. Why is it appropriate to omit such reference in the provision?**

A: Unlike LegCo elections, the CE Election Bill provides that only a serving judge of the High Court or above may be appointed as the Returning Officer. This is proposed with a view to ensuring the fairness and impartiality of the CE election. It is a conscious policy decision that when the Returning Officer is unable to discharge his functions, there should be no acting arrangement, and the EAC should appoint another eligible judge as the permanent replacement. Moreover, clause 42(4) permits the Returning Officer to delegate his duties to an Assistant Returning Officer which is sufficient to cover short periods when the former is unable to discharge his functions personally.

- (ii) **In the definition of “Revising Officer”, as compared to the definition of “Revising Officer” in LCO, reference to “and includes any person appointed to act in place of the Officer when the Officer is absent or when the office of Revising Officer is vacant” is omitted. Why is it appropriate to omit such reference in the provision?**

A: The definition of “*Revising Officer*” is provided for in clause 1(1) of the Schedule to the Bill. This definition is essentially the same as the one adopted in the LCO.

Clause 3(1)(b)

- Q. Would it be desirable to specify in the Gazette the date on which CE assumes office?**

A: The appointment of the CE and, hence, the date on which the CE assumes office, is a matter for the Central People’s Government (CPG). We do not consider it appropriate for the CE Election Bill to provide for matters relating to or arising from the appointment of the CE.

Clause 4

(i) Article 52 of the Basic Law (“BL”) requires CE to resign under certain circumstances and hence the CE office becomes vacant. Although clause 4 also provides for the circumstances in which the CE office becomes vacant, it does not incorporate the circumstances under BL 52. For easy reference, should there be a note to clause 4 by reproducing BL 52? A similar approach is adopted in relation to section 15 of LCO (When Member ceases to hold office), where BL 79 is reproduced as a note to the provision.

A: You are well aware that this is an issue under discussion by the Bills Committee. We have already set out our views as well as the proposed amendments to clause 4(c) in our replies to the Bills Committee.

(ii) Should there be provision to prescribe the publication of the revocation of the CE appointment in the Gazette to facilitate easy identification and proof of such revocation?

A: Removal of the CE from office is a matter for the CPG. In the event of a removal it is for the CPG to determine how this should be intimated and published. It should be noted that clause 5 provides that the Acting CE shall, by notice published in the Gazette, declare the vacancy.

(iii) BL 52 requires CE to resign under certain circumstances, may CE resign other than those circumstances?

A: Yes, but, as explained above, the final decision as to whether to remove the CE from office rests with the CPG. In fact, our proposed amendments to clause 4(c) submitted to the Bills Committee for discussion have, among other things, already addressed this question.

Clause 5(2)(b)

Q: The provision is intended to cover the situation where the CE office has already become vacant when the Acting CE declares the vacancy in office. However, it is possible that the revocation of the CE appointment does not take immediate effect but takes place on a specified future date. For example, announcement is made on 1 January that the appointment of CE is to be revoked on 1 February. In such case, should clause 5(2)(b) be amended to read “specify the date on which the office became or becomes vacant” in order to cover the situation where the vacancy in office arises beyond the 21 day period referred to in clause 5(2)(a)?

A: As indicated by clause 5(1) the declaration of a vacancy is triggered only when the office “becomes vacant”. The situation envisaged in the question would not arise.

Clause 10(2)

Q: Section 6 of LCO requires CE to specify a date for holding a general election to elect LegCo Members. It further requires that the date for election must be not earlier than 60 days and not later than 15 days before the new term of office of LegCo is to begin. Should there be similar requirement for CE election?

A: After discussion with the Bills Committee, we have agreed to adopt a fixed formula to determine the polling date. Details could be found in our replies to the Bills Committee.

Clause 10(5)

Q: BL 53 requires that in the event that the CE office becomes vacant, a new CE shall be selected within six months. If the polling date falls on the last day of the six month period but the counting of votes cannot be completed within the same day, will the CE be considered to be selected within the six month requirement?

A: This will not arise under the fixed formula we now propose.

Clause 11(2)

- (i) **For easy identification and proof of the fact that the CE-elect “cannot assume” the CE office, should there be procedure for acceptance of office by the CE-elect?**

A: There are different reasons which may result in the successful candidate not being able to assume office. Death or resignation before appointment are two obvious examples. The provision of a clause on acceptance of office will not eliminate such possibilities.

- (ii) **Is nomination of candidates re-open?**

A: Under such circumstances, the nomination will be re-opened.

- (iii) **In the event that nomination of candidates is not re-open, what would happen if all the remaining candidates die or are disqualified for being elected, since clause 11(1) does not apply to subclause (2)?**

A: See the answer to (ii) above.

Clause 14

- (i) **General Observation**

A person disqualified from being nominated as a candidate and from being elected as a LegCo Member, if he has been convicted of treason: section 39(1)(c) of LCO. Why does not the same requirement also apply to a candidate who runs the CE’s election?

A:

The disqualification provisions in the LCO followed closely the arrangements established in earlier legislation. In drafting the CE Election Bill it was considered that the proposed eligibility criteria and disqualifications were sufficient without the additional restriction referred to.

- (ii) **Paragraph (d)**

What are the differences, if any, in scope intended to be covered by the provision and section 39(1)(i) of LCO?

A: Under the CE Election Bill, only an undischarged bankrupt is disqualified. Those who obtained a discharge in bankruptcy or has entered into a composition or voluntary arrangement in the previous five years are not disqualified.

(iii) Paragraph (f)(i)

In relation to death sentence, can you explain the reason for different treatment of a candidate who runs the CE's election and LegCo election provided for in section 39(1)(b) of LCO?

A: The disqualification provisions in the LCO followed closely the arrangements established in earlier legislation. In drafting the CE Election Bill it was considered that the proposed eligibility criteria and disqualifications were sufficient without the additional restriction referred to.

Clause 16(5)

Q: In relation to LegCo election, section 7(2)(iii) of the LegCo (Subscribers and Election Deposit for Nomination) Regulation (Cap. 542 sub. leg.) provides that so long as a person is being a member registered in respect of the EC, he is qualified to make nomination at the EC election. After publication of the EC final register, section 32(2) (which is proposed to be repealed) provides that it can only be updated to reflect the change in the ex-officio membership. It is noted that clause 16(5) proposes to set out specific circumstances in which a member of EC (whether or not he is an ex-officio member) will be disqualified from making nomination. Could you explain the reason for adopting such change?

A: The purpose of clause 16(5) is to make sure that persons who are no longer qualified for being an EC member will be disqualified from making nomination. This is necessary because, had the disqualification happened before the cut-off date for updating the EC register, such persons would have ceased to be a member of the EC. What we have proposed in clause 16(5) is an important measure to guarantee the validity of all nominations.

Section 7(2)(iii) of the LegCo (Subscribers and Election Deposit for Nomination) Regulation (Cap. 542, sub. leg.) will be amended to tally with the CE Election Bill later in time.

Clause 20(1)

Q: Would a candidate be disqualified from being elected if he is convicted of any offence under clause 14(f) after the nomination but before the close of polling?

A: The candidate would be disqualified from being nominated under clause 14 if this takes place before the close of nominations. His nomination will be invalidated upon the conviction. If it takes place after the close of nominations but before the close of polling, he will be disqualified from being elected under clause 20(1)(b).

Clause 27(1)

Q: The provision provides that if, on the polling date but before the close of any round of voting of the poll, proof is given to the satisfaction of the Returning Officer that a candidate has died or is disqualified from being elected, the Returning Officer shall terminate that round of voting immediately. Section 46A(1) of LCO, which is similar in nature to the provision, adopts the formula that “ it comes to the knowledge of the Returning Officer”. Would you explain the reason for adopting a different formula in the provision?

A: The difference is a slight improvement in drafting. Under the CE Election Bill, RO has to act on evidence. As long as there is sufficient proof, he can decide to terminate that round of voting immediately.

Clause 27(2)

Q: In relation to the polling, does clause 11(1) apply when all the candidates die or are disqualified from being elected?

A: Yes. Clause 11(1) will apply if every candidate has died or disqualified.

Clause 28(1)(b) & (2)(b)

(i) After close of polling but before declaration of result, where proof of death or disqualification of a candidate is given to the satisfaction of the Returning Officer, the Returning Officer is required to take specified actions. Section 46A(2) of LCO, which is similar in nature to the provision, adopts the formula that “it comes to the knowledge of the Returning Officer”. Would you explain the reason for adopting a different formula in the provision?

A: The difference is a slight improvement in drafting. Under the CE Election Bill, RO has to act on evidence. As long as there is sufficient proof, he can publicly declare the result or continue with the counting of votes.

(ii) In relation to the polling, does clause 11(1) apply when all the candidates die or are disqualified from being elected?

A: Yes. Clause 11(1) will apply if every candidate has died or disqualified.

Clause 32(2)

Q: In relation to the meaning of the term “political party”, it is noted that the term “political body” is used in section 2(1) of Societies Ordinance (Cap. 151) and section 2(1) of the Electoral Affairs Commission (Cap. 541) to describe an organization of similar nature. Would it be desirable to synchronize the use of the terms?

A: The definition of “political party” under the CE Election Bill is largely modelled on that for “political body” under the Societies Ordinance (Cap. 151) and the Electoral Affairs Commission Ordinance (Cap. 541), but we have also made some adjustments to fit in with the special circumstances of the CE election. We do not see any inconsistency between the two definitions.

Clause 34**(i) Subclause (1)**

The grounds of petition as provided for in clause 33 are against the person elected. However, clause 34(1)(b) provides that an election petition may be lodged by a person aggrieved by certain conditions which are unrelated to the person elected. How do you connect clause 33(1) with clause 34(1)(b)?

A: Clause 33(1)(g) concerning material irregularity is the basis on which persons covered by clause 34(1)(b) may lodge election petitions. For example, a person ruled by the Returning Officer to be invalidly nominated may have cause to challenge the decision of the Returning Officer and, if the decision is overturned, it could materially affect the result of the election.

What is the reason for excluding the EC members from lodging an election petition? (c.f. section 62(2) of LCO)

A: Given the time constraint of the CE election and the need for the election result to be settled beyond doubt expeditiously, the categories of persons who may lodge election petitions must be confined to those for whom such a right is absolutely necessary. You will appreciate that EC members (except those who are validly nominated candidates or who, but for a different decision, would have been nominated as a candidate) do not fall within this category of absolute necessity.

Is it intended that an EC member could subscribe to more than one election petition?

A: It may not be inappropriate for a member of the EC to subscribe more than one election petition. For instance, if the Returning Officer have rejected more than one nomination, a member of the EC might subscribe to all such election petitions.

(ii) Subclause (4)

What is the reason for allowing an EC member who is disqualified from voting under clause 25 to subscribe to an election petition but not an EC member who is disqualified from making nomination?

A: The grounds and circumstances under which an EC member is disqualified from making nomination is exactly the same as those under which an EC member is disqualified from voting. Once an EC member is disqualified from making nomination, he is also disqualified from voting. Thus, our provision is already sufficient to address both

scenarios.

Clause 38

(i) In subclause (1)(a)(ii), does “determination” refer to a determination made under clauses 17 and 29? If that is the case, should express provision be made to that effect?

A: ”Determination” in subclause (1)(a)(ii) refers to determination under clauses 17 and 20(1). Specific cross references are not considered necessary. Clause 29 only deals with the RO’s determination of which candidate is returned at an election before he publicly declares the result.

(ii) In subclause (1)(b)(ii), should the Court be given the power to declare, after a person is declared to be not duly elected, whether some other person was duly elected?

A: It is a conscious policy decision that the court can only uphold or quash the election, but not rule that another candidate other than the one whose election is being questioned is duly elected. This is necessary in view of the importance of the CE election. It will be in interest of fairness and prudence if a new election is held in the event that the Court quashes the election.

(iii) What is the reason for not adapting section 67(5) – (7) of LCO?

A: The analogy between LegCo elections and CE elections is not applicable in this context. The question is to whom the Court would report. Clerk to LegCo is not appropriate. The making of report by the Court to the EAC could, however, be achieved administratively. The EAC may then report to the Administration, if necessary. Therefore, it is not necessary to provide for it under the CE Election Bill.

Clause 42

Q: Would it be appropriate to provide that the Returning Officer be provided with such staff as that Officer requires in order to exercise and perform that Officer's functions?

A: We will provide for the staff and resources administratively. It is not necessary to provide for it under the CE Election Bill.

Clause 56(c)(i)

Q: What is the reason for repealing the restriction on a person from being appointed as a member of the Electoral Affairs Commission, if, within the four years immediately before the date of appointment, he has been nominated as a candidate in the election of CE?

A: Under clause 55(a)(ii) of the Bill, it is proposed that the term "*election*" in the Electoral Affairs Commission Ordinance (EACO) should be amended to include the election of Chief Executive. With the proposed amendment in place, the restriction in question will be covered by section 3(5)(k)(vi) of EACO which provides that a person is not eligible for appointment as a member of the Commission, if within 4 years immediately before the date of appointment, he has been nominated as a candidate in an *election*. Subparagraph (i) of section 3(5)(k) of the EACO will then become redundant and should be repealed.

Clause 62

(i) Paragraph (a)(i)
What is the reason for repealing the restriction on a member of the Electoral Affairs Commission, during his term of office" from being nominated as a candidate for election as CE.

A: The reason is similar to that for repealing section 3(5)(k)(i) of the EACO (c.f. clause 56(c)(i) of the Bill). With the extended meaning for "*election*", the restriction in question will be provided for by section 13(1)(b)(i) of the EACO.

(ii) In paragraph (c)

What is the reason for repealing the restriction on a person who has ceased to hold office as a member of the Electoral Affairs Commission during the period of four years beginning on the date he ceases to hold office, from being nominated as a candidate for election as CE?

A: The reason is similar to that for repealing section 3(5)(k)(i) of the EACO (c.f. clause 56(c)(i) of the Bill). With the extended meaning for “*election*”, the restriction in question will be covered by section 13(1)(c)(v) of the EACO.

Clause 76(b)

Q: It appears that there is no clause 35(3) in the Bill.

A: Thanks for spotting the anomaly. There is no clause 35(3) under the Bill. We shall amend it through Committee Stage Amendments.

Clause 1(3)(b)(ii) of the Schedule

Q: Why is it necessary to differ from the formula adopted in 3(2)(c) of LCO, which refers to “a corporate member of such a body”?

A: The definition of “corporate member” is provided in section 3(1) of the LCO. With this definition, a formula which refers to “a corporate member of such body” can be adopted in section 3(2)(c) of the LCO. In the case of the CE Election Bill, the definition of “corporate member” as stated in section 3(1) of the LCO has been incorporated in clause 1(3)(b)(ii) of the Schedule so that a separate definition for this term is not required. Although the two differ in presentation format, this provision has the same meaning as section 32(c) of the LCO.

Clause 3 of the Schedule

Q: Can you explain the reason for allowing an EC member (other than an ex-officio member) to resign?

A: Members of the EC (other than the ex-officio members) are either elected or nominated by their respective subsectors. According to the Basic Law, the term of office of the EC is five years. It is likely that some EC members may not be able to serve out the five-year term, and wish to relinquish his EC membership before the term ends. We

consider that in such cases, the EC member concerned should be allowed to resign so that his place can be filled by others through a subsector by-election or a supplementary nomination (for religious subsector). This can ensure that the number of EC members will be brought as close to 800 as possible, when the EC is called upon to elect a new CE or a new Member in a LegCo by-election.

Clause 4(4) of the Schedule

Q: In considering whether to strike out the name of an EC member from the existing final register when compiling a provisional register, why does not the Electoral Registration Officer consider the factors set out under clause 25 of the Bill which provides for conditions as to when an EC member is disqualified from voting?

A: We propose under the Bill that the Electoral Registration Officer (ERO) should strike out the name of an EC member when compiling a provisional register if he satisfies on reasonable ground that that member: -

- (a) has passed away;
- (b) has resigned from the membership of the EC; or
- (c) has ceased to be registered, or eligible to be registered as a geographical constituency elector.

With the exception of clause 18(a) of the Schedule, the above three factors have generally covered all other conditions set out in clause 25 of the Bill, under which an EC member would be disqualified from voting in the CE election.

As regards clause 18(a) of the Schedule concerning the requirement on “substantial connection with relevant subsector”, the circumstances in which a person has a substantial connection with a subsector is governed by clause 1(3) of the Schedule. These circumstances are the same as those provided for in the Legislative Council Ordinance. Unlike death, resignation and loss of GC status and other disqualifying conditions which are clear and unambiguous, it would be difficult for the ERO to collect information, conduct investigation and determine whether an EC member has ceased to have a substantial connection with the concerned subsector within the limited time available for the ERO to compile a provisional register of EC members (he is required to do so within 14 days after it is declared that the office of the Chief Executive becomes vacant). We therefore consider that it would not be prudent for the ERO to strike out the name of an EC member on this ground when compiling the provisional register.

Clause 5, 9, 17(3) and 25 of the Schedule

Q: Can you explain the reason for introducing by-election to fill vacancy in membership of EC?

A: It is provided in Annex I to the Basic Law that the CE shall be elected a broadly representative EC. During the 5-year term of the EC, vacancies in the membership of the EC may arise for various reasons such as death or resignation of an EC member. We believe that as a matter of principle, we should, as far as possible, remove those EC members who have passed away, have tendered resignation or have lost their GC status, before the EC is to elect a new-term CE. The Electoral Affairs Commission will then arrange for a subsector by-election or supplementary nomination (for religious subsector) to fill the vacancy. With a by-election mechanism, we can ensure that the number of the EC member can be brought to as close to 800 as practicable.

Clause 9(c)(i) and (e) and 18(e)(i) of the Schedule

Q: Would it be appropriate to add “conduct” after corrupt? (c.f. clause 14(f)(ii))

A: There is no confusion that the term “corrupt or illegal conduct” adopted in the above clauses refers to “corrupt conduct or illegal conduct”. We therefore do not think that it is necessary for these clauses to adopt the wordings used in clause 14(f) of the Bill.

Clause 13 of the Schedule

Q: Why would it be appropriate not to adapt section 9(8) of Schedule 2 of LCO?

A: In previous Legislative Council elections, subsector elections and functional constituency elections were held around the same period. For operational convenience, corporate electors were required to appoint the same person as their authorized representative for functional constituency election and subsector election. In future, however, functional constituency elections and subsector elections will be held at different times and it is no longer necessary to have the same person being appointed as an authorized representative for both elections.

Clause 18(f) of the Schedule

Q: In the light of the recent amendment to section 10(2) of the Mental Health Ordinance (Cap. 136), should the provision be redrafted along the line of clause 14(g)?

A: We will redraft clause 18(f) of the Schedule along the line of clause 14(g) of the Bill proper.

Clause 26(1) of the Schedule

(i) Why would it be appropriate to continue with the election proceedings in the case that, on the date of a subsector election but before declaring the result of the subsector election, a candidate dies or is disqualified from being elected? (c.f. section 46A(1) of LCO).

A: Our objective is to ensure that the conduct of the election will not be affected by the death or disqualification of a candidate and that the seats to be returned by the election can be filled as far as practicable. We therefore suggest that the election proceedings should continue as if the death or disqualification has not occurred, and if the deceased or disqualified candidate is successful at the election, the person who obtains the greatest number of votes among the remaining candidates will be declared as duly elected.

(ii) The formula used in the provision is “..... it comes to the knowledge of the Returning Officer”. However, clause 28(1)(b) and (2)(b), which are similar in nature to section 26(1) of the Schedule, adopt a different formula, namely “..... proof is given to the satisfaction of the Returning Officer”. Could you explain the reason for using two different formulas in provisions of similar nature?

A: We will consider re-drafting clause 26(1) of the Schedule by adopting the formula used in clause 28(1)(b) and (2)(b) of the Bill proper.

Clause 39(2) of the Schedule

Q: Why would it be appropriate to change the time limit from 14 days to 7 days to lodge an appeal? (c.f. section 32(2) of Schedule 2 to LCO).

A: It is provided for in the Basic Law that if the office of CE becomes vacant, a new CE should be selected within 6 months. The shorter appeal period is one of the many arrangements we propose to put in place to ensure that all the electoral procedures could be completed expeditiously.

Yours sincerely,

(Bassanio SO)
for Secretary for Constitutional Affairs

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