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29 March 2012

Ms Wendy KAN
Assistant Legal Adviser
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Wendy,

**Bills Committee on
Electoral Legislation (Miscellaneous Amendments) Bill 2012 (“the Bill”)**

Thank you for your letter of 22 March 2012. Our response to your questions in respect of Parts 1 to 3 of the Bill is set out in a note attached. We shall provide the Chinese version of the response later on.

Yours sincerely,

(Freely K CHENG)

for Secretary for Constitutional and Mainland Affairs

c.c. DoJ (Attn: Mr Gilbert MO 2869 1302
Miss Emma WONG) 2869 1302
Clerk to Bills Committee 2185 7845

Electoral Legislation (Miscellaneous Amendments) Bill 2012

Clause 1

1. Clause 1 of Electoral Legislation (Miscellaneous Amendments) Bill 2012 (“the Bill”) provides that Parts 3, 6, 7 and 8 will come into operation on 1 June 2012 while the remaining parts will commence on the day on which the Bill is published in the Gazette.
2. Part 3 of the Bill aims to amend the regulation of election advertisements (“EAs”). To facilitate candidates to conduct electioneering activities and simplify the arrangement for handling EAs, Part 3 proposes that candidates can post their EAs onto a central portal to be maintained by the Registration and Electoral Office (“REO”) or their own election websites for public inspection. As the REO needs time to design and set up the central portal, we propose that Part 3 of the Bill should come into operation on 1 June 2012.
3. Parts 6, 7 and 8 aim to prepare for the Legislative Council (“LegCo”) election to be held in September 2012, and to fine-tune electoral procedures and make electoral procedures of various elections consistent with each other. As the majority of these amendments are related to the LegCo election, including amendments providing for the counting arrangements for the District Council (second) function constituency, we propose that these parts of the Bill should come into operation on 1 June 2012 so that the proposed arrangements can be implemented for the 2012 LegCo election in September. Under section 36(2)(a) of the Legislative Council Ordinance, no by-election will be held within the four months preceding the end of the LegCo’s current term of office. As such, no by-election of the fourth term of the LegCo will be held from 1 June 2012.

Clause 3(2)

(a) Proposed new section 27(1A)

4. Section 27(1) provides that a candidate must, amongst others, satisfy either one of the two conditions specified in section 27(1A) if the candidate publishes an EA that includes certain claim of support. We consider it appropriate to use “conditions” (in its plural form) in section 27(1A) and “condition” (in its singular form) in section 27(1). Section 27(1A) sets out what the conditions are and it is not appropriate to add “or” or “and” at the end of section 27(1A)(a).

(b) Proposed new section 27(1B)

Item (i)

5. Section 27(1), (1A) and (1B) must be read together. It is not necessary to repeat in section 27(1B) the references to “authorizes the publication of”, “the name or logo associated with a person or an organization” and “a name or logo that is substantially similar to the name or logo of or associated with a person or an organization”. In the circumstances set out in the Schedule to the letter of 22 March 2012 from the Assistant Legal Adviser, the effect of section 27(1B) is that the candidate, having satisfied one of the conditions specified in section 27(1A), would not be regarded as engaging in any illegal conduct under section 27(1) so long as the candidate does not make any modification to the relevant name, logo, pictorial representation or the content or, if any modification is made, the candidate has obtained the necessary written consent before the modification.

Item (ii)

6. We do not consider it appropriate to make the amendments as suggested. The expression “the content” is to clarify that it refers only to the content of the EA that is provided by the relevant person or organization, but not any other content of the EA.

Item (iii)

7. We do not consider it necessary to make the suggested amendment to the Chinese text.

Clause 3(4)

(a) Proposed new section 27(2A)

8. Please see our reply in paragraph 4 above.

(b) Proposed new section 27(2B)

Item (i)

9. Please see our reply in paragraphs 5 to 7 above.

Item (ii)

10. We agree that the word “某” could be added to the Chinese text as suggested. We will propose Committee Stage Amendments to effect the change.

Item (iii)

11. We consider it necessary to read subsection (2B) as a whole. For clarity sake, it is desirable to use “任何其他人士” (any person) because there are a number of different persons referred to in the same subsection and “任何人”(a person) is used in paragraph (a).

Clause 8

(a) Proposed new Part VII

12. We do not consider it appropriate to make the amendment as suggested. According to our current drafting practice, headings of Parts are no longer printed in capital letters. We will gradually convert the old format used in the existing legislation to the new format. Meanwhile, both old and new formats may appear in the same piece of legislation.

(b) Proposed new section 105(2)(a)

13. We consider that once a candidate posts his EAs onto the central platform, he has already complied with the requirement under the proposed new section 105(2)(a), and should not be regarded as failing to make the EA available for inspection on the central platform if the EA is accidentally deleted not by the actions of the candidate.

(c) Proposed new section 106

14. Section 34(1) and (4) of the Elections (Corrupt and Illegal Conduct) Ordinance (“ECICO”) provides that a person is required to show printing details on a printed EA and furnish two copies of the EAs with the Retuning Officer (“RO”) not later than seven days after publishing a printed EA. Under section 35 of ECICO, the person who publishes a printed EA without complying with the abovementioned requirements may apply to the Court for a relief. On hearing of an application, the Court will consider whether the non-compliance was due to inadvertence, an accidental miscalculation or any reasonable cause and was not due to bad faith.

15. To consolidate the regulatory regime of EAs, the Bill proposes to transfer sections 34(1) and 35 from the ECICO to the relevant regulations made under the Electoral Affairs Ordinance (“EAC regulations”) so that all provisions relating to EAs can be grouped in the regulations concerned. Moreover, to align the regulation of other forms of EAs with that of printed EAs, the Bill proposes that the right to apply for relief from the Court should be extended to other forms of EAs. As such, under the proposed arrangements, if a candidate fails to post his EA onto a central portal or his election websites for public inspection, or fails to provide copies of the advertisement with the RO within one working day after the publication of the EA, he may apply to the Court for a relief. This arrangement could avoid candidates from being caught inadvertently.
16. As regards the permission obtained for the purposes of the Public Health and Municipal Services Ordinance and the consent referred to in the ECICO set out in the proposed new section 105(1)(b) or (c), there is no arrangement for a candidate to apply for relief from the Court under the existing ordinances and regulations concerned. As such, we propose to follow the existing arrangement under which a person is not entitled to apply to the Court for relief in relation to the permission and consent mentioned above.

Clauses 11, 14, 18 and 22

17. Please see our reply in paragraphs 12 to 16 above.

Clause 25

(a) Rural Committee

18. We do not consider it necessary to amend the definition in section 2 of the ECICO. We fail to see any confusion that could be caused even if paragraph (a) of section 3(3) of the Heung Yee Kuk Ordinance (Cap. 1097) is not specified in the definition. In this respect, you may also see the definition of ***Rural Committee*** in section 2 of the District Councils Ordinance (Cap. 547) and section 2 of the Village Representative Election Ordinance (Cap. 576).

(b) Publish

Item (i)

19. If a candidate publishes an EA by means of displaying the EA in the form of a bill or poster within the meaning of section 104E(4) of the Public Health and Municipal Services Ordinance (Cap. 132), the candidate must comply with certain requirements set out in clauses 8, 11, 14, 18 and 22. The meaning of “publish” under the relevant subsidiary legislation should therefore include

“display”. There is no equivalent requirement under the ECICO.

Item (ii)

20. Both “展示” and “展覽” accurately reflect the meaning of “exhibit”. As both “display” and “exhibit” appear in the same provision, we consider it appropriate to adopt “展覽” as the rendition of “exhibit” and “展示” as the rendition of “display”.

Item (iii)

21. We fail to see any difference in the legal effect of the two phrases and we do not consider it necessary to make any amendments to the relevant clauses in the Chinese text.

Clause 30

22. At present, the provisions regulating EAs are scattered in the ECICO and the relevant EAC regulations. The main objective of the ECICO is to prohibit corrupt and illegal conducts at elections, and to impose requirements with respect to election donations and expenditures. On the other hand, the main objective of the EAC regulations is to require candidates to provide their EAs for public inspection. To consolidate the regulatory regime and simplify the arrangements for handling EAs, the Bill proposes to transfer the relevant provisions from the ECICO to the EAC regulations so that all relevant provisions on EAs can be grouped in the EAC regulations.
23. After the transfer of relevant provisions, there will be a change in penalty for some offences. Under the existing provisions in the ECICO, if a person fails to show printing details on a printed EA or provide copies of the EA with the RO not later than seven days after the publication, he commits an offence and is liable on conviction to a fine of \$200,000 and to imprisonment for three years, if tried on indictment. On the other hand, if any person who commits the offences in relation to all forms of EAs under the relevant EAC regulations, he is liable on conviction to a fine of \$5,000 and to imprisonment for six months.
24. As the main objective of the ECICO is to prohibit corrupt and illegal conduct at elections, penalties for contravening the provisions under the ECICO are more severe. We have reviewed the penalty level. The relevant provisions of the Bill would relax the regulation on EAs and would align the regulatory regime for various forms of EAs. In line with this, the Bill proposes that no matter whether the advertisement is a printed EA or in other forms, if a candidate contravenes the proposed requirements in relation to EAs, the penalty should be aligned at the current level provided for in the relevant EAC

regulations, i.e. a fine of \$5,000 and imprisonment for six months, which is the level of penalty for candidates who fail to comply with the existing requirements regarding the declaration and submission of EAs.

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