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2 December 2002

Miss Flora Tai
Clerk to Bills Committee
Bills Committee on Village Representative
Election Bill
Legislative Council
8 Jackson Road
Central
Hong Kong

Dear Miss Tai,

Bills Committee on Village Representative Election Bill

At the Bills Committee meeting held on 22 November 2002, Members asked the Administration to provide:

- (a) a paper on why indigenous villagers should have the right to vote in both Indigenous Inhabitant Representative and Resident Representative elections;
- (b) a copy of the guidelines used in the demarcation of boundaries for Existing Villages;
- (c) a paper on the concept of ordinary residence in Hong Kong; and
- (d) a paper on the need for a residency requirement for registration as an elector for an Existing Village.

/....

As requested, I attach the following papers for Members' reference:

- (a) "Why is it justifiable for indigenous villagers to have two votes under the dual representation system?" (*Annex A*);
- (b) "General Guidelines on the Delineation of Village Boundaries for Resident Representative Elections" (*Annex B*);
- (c) "The concept of ordinary residence in Hong Kong" (*Annex C*);
and
- (d) "Residency-in-village requirement for registration as an elector for an Existing Village" (*Annex D*).

Please let me know if you have any further queries.

Yours sincerely,

(Stephen Fisher)
for Secretary for Home Affairs

c.c. D of J (Attn.: Mr. Lawrence Peng
Mr. Alan Chong)

DHA (Attn.: Miss Monica Chen)

Why is it justifiable for indigenous villagers to have two votes under the dual representation system?

Purpose

The purpose of this paper is to set out why the dual representation system is necessary and why it is consistent with Article 21(a) of the Hong Kong Bill of Rights.

Background

2. The need for new arrangements for the conduct of Village Representative elections has arisen as a result of the decision of the Court of Final Appeal in the case of Secretary for Justice v Chan Wah and others (FACV Nos 11 and 13 of 2000).

3. Mr. Chan Wah of Po Toi O in Sai Kung and Mr. Tse Kwan Sang of Shek Wu Tong in Yuen Long challenged the validity of the electoral arrangements for the posts of village representatives of these two villages by judicial review proceedings. Both Mr. Chan and Mr. Tse were born and brought up in these two villages and have lived there all their lives. Furthermore, Mr. Chan is married to an indigenous inhabitant. Under the electoral arrangements made in 1999 for the posts of village representatives of these two villages, Mr. Chan was excluded as a voter and Mr. Tse was excluded from standing as a candidate on the ground they are not indigenous inhabitants (i.e., persons who can establish patrilineal descent from an ancestor who was a resident of a village that was in existence in the New Territories in 1898).

4. The 1999 electoral arrangements used in Shek Wu Tong were ruled by the Court of Final Appeal on 22 December 2000 to be inconsistent with Article 21(a) of the Hong Kong Bill of Rights (which is set out in Part II of the Hong Kong Bill of Rights Ordinance (Cap 383)), and the arrangements used in Po Toi O were ruled to be inconsistent with both Article 21(a) of the Hong Kong Bill of Rights and section 35(3) of the Sex Discrimination Ordinance (Cap 480). Many other indigenous villages used similar arrangements in the 1999 village representative elections.

5. The Court of Final Appeal also ruled that the Secretary for Home Affairs, in deciding whether to approve an elected Village Representative, has to consider whether the person elected to represent a village was elected in accordance with electoral arrangements which are consistent with the Hong Kong Bill of Rights and the Sex Discrimination Ordinance.

Dual representation system

6. The following categories of people should have the right to vote in Village Representative elections:

- (a) indigenous inhabitants who are resident in a village (indigenous villagers);
- (b) indigenous inhabitants who are not resident in a village (non-resident indigenous inhabitants); and
- (c) residents in a village who are not indigenous inhabitants (non-indigenous villagers).

7. In order to effectively represent these three categories of people, two types of Village Representatives are necessary:

- (a) an Indigenous Inhabitant Representative to represent indigenous inhabitants of an Indigenous Village, including both indigenous villagers and non-resident indigenous inhabitants; and
- (b) a Resident Representative to represent residents of an Existing Village, including both indigenous villagers and non-indigenous villagers.

Justifications for Differential Treatment

8. Under the Village Representative Election Bill, an indigenous villager can vote in both the Indigenous Inhabitant Representative and the Resident Representative elections. This is obviously differential treatment because a non-indigenous villager can only vote in the Resident Representative election. The question then is: can such a departure from

identical treatment be justified.

9. On the question of whether any disparity of treatment can be justified, Bokhary J (as he then was) said in *The Queen v Man Wai-keung* (No. 2) [1992] 2 HKCLR 207 at p. 217 that:

"Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need."

10. According to the learned judge, there are three tests for determining whether any disparity of treatment is justified :

- (a) a necessity test;
- (b) a rationality test; and
- (c) a proportionality test.

11. As regards the necessity test, there is a need for indigenous villagers to have two Village Representatives to effectively represent their different interests, i.e., (a) their interests as indigenous inhabitants and (b) their interests as residents. According to an informal survey conducted by the Home Affairs Department in 1999 on the basis of information obtained from village representatives and village elders, there were 240,000 indigenous inhabitants represented by Village Representatives under the village representative system. Among these, 116,000 (48.3%) lived in villages in the New Territories, 54,000 (22.5%) lived in Hong Kong outside villages and 70,000 (29.2%) lived overseas. If there were only one type of Village Representatives elected by all village residents, 51.7% of the indigenous inhabitants (i.e., indigenous inhabitants not

living in a village in the New Territories) would lose their right to vote. Reasonable people would recognize the need for a "dual representation system" for indigenous inhabitants.

12. As regards the rationality test, the question is whether reasonable people would condemn the dual representation system as unreasonable. The proposed arrangements would make sense to such people because they can see that indigenous villagers need two village representatives to effectively represent their different interests. They would not condemn this dual representation system as irrational. Reasonable people could think of other possible options, but the key point is that they would not regard the proposed arrangements as unreasonable.

13. As regards the proportionality test, the proposed arrangements are not disproportionate to the need to have dual representation for indigenous inhabitants. The two types of Village Representatives represent different interests and there is no overlap of representation. Furthermore, Village Representatives would not form a village council or committee where they need to decide issues on the basis of voting. The role of the two types of Village Representatives at the village level is mainly advisory.

Margin of appreciation

14. In determining whether the reasonableness of the proposed arrangements, the doctrine of "margin of appreciation" should apply. In the case of *R v Secretary for the Civil Service exp. A.E.C.S.* (1995) 5 HKPLR 490, it was said at p. 517G-H that :

" It is for the Government to determine what restrictions are reasonably necessary, and the court's powers of intervention are limited. That is because, to adopt a phrase used by European human rights lawyers, the Government has 'a margin of appreciation' in the determination of what is reasonable. Provided that the reasonableness of a restriction is within the range of reasonable views which the Government can form, the courts cannot substitute their own view for that of the Government. "

That view was not said to be incorrect when the case got to the Court of

Appeal (CA 260/95).

15. In *Lau Cheong and Another v HKSAR* [2002] 2 HKLRD 612, the Court of Final Appeal, when considering the doctrine of margin of appreciation, recognized the discretionary area of judgement and agreed that the courts could give proper weight to the decision of the legislature depending on the context and circumstances of the case.

Administration's view

16. We are of the view the electoral arrangements set out in the Bill are consistent with the Hong Kong Bill of Rights.

Home Affairs Bureau
December 2002

2003 Village Representative Elections

**General Guidelines on the Delineation of Village
Boundaries for Resident Representative Elections**

(I) **Basic Principles on Who/What Should be Included**

1. Village Representative elections should be held for villages included in the present village representative system in the New Territories. There are around 700 villages. The existing number of villages should generally be maintained¹.
2. In general, only rural-type settlements should be included in village elections. Multi-storey buildings should be excluded. Resite villages are to be included as far as possible.
3. Structures of occupants who voted in the previous rounds of Village Representative elections should generally be included.

(II) **Drawing up of Village Boundaries**

1. Boundary lines should generally be continuous. However, in the case of Existing Villages which are indigenous villages, the boundary delineation should take into account the historical development and in exceptional cases, distinct portions of the same village (e.g. with a public housing estate development in between) could be taken as belonging to one constituency.
2. Delineation should take account of ground features, such as contour lines, roads, stream courses, etc.
3. Odd-shape constituencies should be avoided as far as possible (e.g. a hole in the middle of the constituency).
4. In the case of Existing Villages which are indigenous villages,

¹ Confirmed deserted/demolished villages may be deleted.

reference should be made to Village Environs Maps² prepared by the Lands Department (where available and as applicable).

5. Structures using the name of a village as the mailing address should be included in that constituency as far as possible.
6. It is expected that most arguments would arise with regard to 'peripheral areas'. In such cases, each case should be assessed on its own merits. Factors like affiliation with the respective villages should be taken into account in the assessment. In all, the test of 'reasonableness' should apply.

Note: The guidelines are drawn up to facilitate District Officers to determine the election boundaries for village elections. However, these are general principles, and individual cases may have to be considered on its merits. District Officers would have to exercise balanced judgement to ensure a fair and just arrangement.

² "Environs of a recognized village", in general, refers to a 300-foot distance surrounding a recognized village where small house applications are considered.

The concept of ordinary residence in Hong Kong

Introduction

Under clause 22(2) of the Village Representative Election Bill, a person is eligible to be nominated as a candidate at an election for an Indigenous Village or a Composite Indigenous Village only if the person, inter alia, ordinarily resides in Hong Kong.

2. This paper sets out the concept of ordinary residence in Hong Kong and the general guidelines for determining it.

What is "ordinary residence" in Hong Kong?

3. This concept appears in several pieces of legislation, but it has different definitions in different Ordinances. The relevant provisions are outlined below.

District Councils Ordinance (Cap 547)

4. Section 20(1) of the District Councils Ordinance provides that a person is eligible to be nominated as a candidate at a District Council election only if the person, inter alia, "has ordinarily resided in Hong Kong for the 3 years immediately preceding the nomination". In fact, prospective candidates in the 1999 District Councils Election were required to indicate in their nomination forms any absence from Hong Kong lasting more than three months. However, such an absence, per se, would not automatically render a person ineligible. This point was set out in the "Guidelines on Election-related Activities in respect of the 1999 District Councils Election" (the Guidelines) issued by the Electoral Affairs Commission in September 1999.

5. Paragraph 2.3 of the Guidelines stated that "A person has ordinarily resided in Hong Kong when he has habitually and normally lived there lawfully for a settled purpose, apart from temporary and occasional absences such as holidays and absence abroad for studying purposes. Each case has to be examined upon its own facts." The

Guidelines suggested that factors, such as the length of the person's absence, the reason for his absence, the location of the home of the person and that of his spouse, children and parents, and his continuing connections with Hong Kong, should be taken into account.

Broadcasting Ordinance (Cap 562)

6. Section 8(4)(a)(iv) of the Broadcasting Ordinance provides that, except with the prior approval of the Broadcasting Authority, the majority of the directors of the company applying for a licence and the majority of the principal officers of that company shall each be an individual who is for the time being ordinarily resident in Hong Kong and who has been so resident for at least a continuous period of not less than seven years. The term "ordinarily resident" is defined in the Ordinance to mean (a) residence in Hong Kong for not less than 180 days in any calendar year or (b) residence in Hong Kong for not less than 300 days in any two consecutive calendar years.

Immigration Ordinance (Cap 115)

7. The Immigration Ordinance does not define what is "ordinarily resident in Hong Kong" for the purpose of that Ordinance. However, it prescribes in section 2(4) the circumstances under which a person shall not be treated as ordinarily resident in Hong Kong. Persons excluded include individuals whose stay in Hong Kong is unlawful, refugees, contract workers under a Government importation of labour scheme, foreign domestic helpers and members of a consular post.

8. Section 2(6) of the Ordinance provides that a person does not cease to be ordinarily resident in Hong Kong for the purpose of that Ordinance if he is temporarily absent from Hong Kong. Whether that person ceases to be so ordinarily resident depends on the circumstances of that person and his absence. Such circumstances include :

- (a) the reason, duration and frequency of any absence;
- (b) whether he has habitual residence in Hong Kong;
- (c) employment by a Hong Kong-based company; and

- (d) the whereabouts of the members of his immediate family (spouse and dependent children).

Precedent case

9. In the 1999 District Councils Election, Ms Lin Shiu-lin submitted a nomination form for her candidature in the Fung Tsui Constituency of North District. Having consulted a Nominations Advisory Committee, the Returning Officer decided that Ms Lin had not ordinarily resided in Hong Kong for the three years immediately preceding the nomination. Subsequently, Ms Lin challenged the decision by way of an election petition. The court ruled in her favour. A background note on this case is in the Appendix.

10. The Lin case has brought out a number of points on the concept of ordinary residence in Hong Kong, including :

- (a) The possession of a passport issued by another country or place does not necessarily imply that the holder is no longer ordinarily resident in Hong Kong. There are Hong Kong permanent residents who have acquired foreign passports, but this has no effect on their being ordinarily resident in Hong Kong.
- (b) It is accepted that a person could be ordinarily resident in two countries or places at the same time.
- (c) Ordinary residence is different from domicile.

Guidelines for Determining Ordinary Residence

11. Our electoral laws do not define the term "ordinarily resident in Hong Kong". According to the general guidelines issued to Returning Officers, a person may be considered to be ordinarily resident in Hong Kong :

- (a) if he lives here habitually and normally (the duration may be short or long);
- (b) if he lives here lawfully;

- (c) if he lives here voluntarily; and
- (d) if he lives here for a settled purpose.

12. Returning Officers are also advised to take into account the following points :

- (a) the possession of a foreign passport or landed status is not of vital importance;
- (b) ordinary residence is different from domicile; and
- (c) a person may be ordinarily resident in two places at the same time.

13. A Returning Officer should consider the following points when deciding whether a prospective candidate has lost his "ordinarily resident" status :

- (a) Whether the prospective candidate intends to abandon or has abandoned his ordinary residence in Hong Kong status. To study overseas does not by itself mean abandoning that status. However, if he continues to work overseas after his study, this may represent an intention to stay on overseas and abandon that status.
- (b) Length of absence from Hong Kong. There is no hard and fast rule in determining the length of time that would amount to a break in ordinary residence. In each case the test is whether the prospective candidate intends to return to Hong Kong. If he does, then the break or absence in residence is temporary.
- (c) Frequency of absence. Again, there is no hard and fast rule. The same consideration as in the case for the length of absence applies.
- (d) Reason for absence. This reflects the person's intention to return to Hong Kong and to retain his ordinarily resident status. For example, he may have been sent by a Hong Kong-based company to work abroad and intends to return to Hong Kong. Such absence may not lead to the loss of his ordinarily resident status.

- (e) Location of the home/main residence of the person and that of his family members.
- (f) Maintenance of connections with Hong Kong during his absence. For example, does he return periodically to visit his family during his stay abroad?

Conclusion

14. It is obvious that ordinary residence in Hong Kong is not a simple concept. The guidelines set out above are meant to assist Returning Officers in understanding the issues involved. Each case has to be considered on its own merits.

Home Affairs Bureau
December 2002

**Eligibility for Candidature in District Councils Election:
Residency Requirement
- The Case of Ms. LIN Shui-lin**

Background

In October 1999, Ms. Lin Shui-lin submitted a form for her nomination as a candidate for the North District Council constituency of Fung Tsui. For the 1999 elections, candidates were required to indicate any absence from Hong Kong of more than 3 months in their nomination forms. According to her submission, Ms Lin studied in Taiwan from 1996 to 1997.

2. Ms. Lin was invited to submit further information regarding her nomination. The additional documents provided included certificates of her studies, a Taiwan passport and a tenancy agreement with the Housing Authority (with her mother as the main tenant and her as a family member).

3. Her nomination, with all the concerned documents, was submitted to a Nominations Advisory Committee for advice as to whether Ms. Lin met the residency requirement for candidates. The Nominations Advisory Committee advised that Ms Lin failed to meet that criterion. The Returning Officer subsequently ruled that her nomination was invalid.

4. In January 2000, Ms. Lin submitted an election petition to question the validity of the election for the Fung Tsui Constituency. After considering the advice of an outside counsel, the Returning Officer decided not to contest the petition. The court declared the election void. A by-election was conducted.

Advice of the Nominations Advisory Committee

5. According to the "Guidelines on Election-related Activities in respect of the 1999 District Councils Election" (the Guidelines) issued by the Electoral Affairs Commission, absence from Hong Kong would not automatically render a prospective candidate ineligible. In the Lin case,

the Returning Officer sought advice from the Nominations Advisory Committee because :

- (a) Ms Lin had been absent for some months (about 10 months of the required residency period); and
- (b) Ms Lin possessed a Taiwan passport which might be construed as an intention to become ordinarily resident in Taiwan.

6. The Nominations Advisory Committee, having considered the case in detail, advised that, since Ms Lin was absent from Hong Kong from 1996 to 1997, she would not have been ordinarily resident in Hong Kong during that period and would not satisfy the residency requirement for candidature. The Committee, however, noted that there "may be situations in which a person can be regarded as being ordinarily resident in a place notwithstanding temporary absences or even a prolonged absence if it is due to some specific and unusual cause. However, no such circumstances are apparent on the documents presented by Miss Lin."

Advice on Election Petition

7. An outside counsel was briefed to advise the Returning Officer on the election petition. His advice is set out below:

- (a) The Taiwan passport could be regarded by Ms Lin as just a travel document. There are Hong Kong permanent residents who have acquired foreign passports but it has no effect on their being ordinarily resident in Hong Kong.
- (b) Ms Lin was ordinarily resident in Taiwan when she studied there. But that did not prevent her from being ordinarily resident in Hong Kong as well. It is accepted that a person could be ordinarily resident in two places at the same time.
- (c) There is no evidence of abandonment of her ordinary residence in Hong Kong. Ms Lin returned to Hong Kong a number of times during her studies in Taiwan.

The counsel concluded that the Returning Officer did not have a case.

Home Affairs Bureau
December 2002

Residency-in-village requirement for registration as an elector for an Existing Village

Issues

The Administration is asked to consider :

- (a) whether there is a real need for a residency-in-village requirement for registration as an elector for an Existing Village;
- (b) amending the Village Representative Election Bill to align the residency-in-village requirements for electors and candidates in Village Representative elections with that for electors and candidates in District Council and Legislative Council elections; and
- (c) amending the Bill to the effect that a person who has close affiliations with a village and who has a residence in that village would be allowed to choose to use his residence in the village as his principal residential address for the purpose of voter registration for an Existing Village.

Background

2. A person is not eligible to be registered as an elector for a constituency in the Legislative Council and District Council elections unless he is a permanent resident in Hong Kong. The person also has to reside in Hong Kong. He is allocated a constituency in the Legislative Council and the District Council elections according to his residential address (i.e. his only or principal residence in Hong Kong).

3. Under section 37 of the Legislative Council Ordinance (Cap 542), a person is eligible to be nominated as a candidate at an election for a geographical or functional constituency or for election by the Election Committee, only if the person "has ordinarily resided in Hong Kong for the 3 years immediately preceding the nomination". There is no requirement for a candidate to be resident in the constituency in which he is running for office.

4. Under section 20(1) of the District Councils Ordinance (Cap 547), a person is eligible to be nominated as a candidate at an election only if the person "has ordinarily resided in Hong Kong for the 3 years immediately preceding the nomination". Again, there is no requirement for a candidate to be resident in the constituency in which he is running for office.

The Bill

5. Under clause 15(4)(a) of the Village Representative Election Bill, a person is not eligible to be registered as an elector for an Existing Village unless the person is, inter alia, a resident of the Village. This residency-in-village requirement applies to both indigenous inhabitants and non-indigenous villagers.

6. Under clause 15(3) of the Bill, the Electoral Registration Officer may not include a elector's name in a subsequent provisional register for an Existing Village if he "is satisfied on reasonable grounds that the person has not been a resident of the Village for the 3 years immediately before the compilation of the register". The Electoral Registration Officer would also omit the person's name from the final register for the Village.

7. Clause 17(4)(a) empowers the Electoral Registration Officer to strike out the names of the persons whom the Electoral Registration Officer is satisfied on reasonable grounds as being no longer eligible to have their names included in the final register for the Village.

8. If an elector for an Existing Village ceases to be a resident of the Village after registration, he is disqualified from voting under clause 14(a) of the Bill.

9. Under the Bill, a "resident", in relation to an Existing Village, is defined as a person whose principal residential address is in the Village. The Bill defines "principal residential address", in relation to a person, as the address of the dwelling place at which the person resides and which constitutes the person's sole or main home.

Need for Residency-in-village Requirements

10. There is a real need for residency-in-village requirements for electors and candidates in Resident Representative elections because:

- (a) the electors and the candidates should have some knowledge and understanding of the Village and a sense of belonging to the village community; and
- (b) "vote planting" in a small electorate is a real possibility and a residency-in-village requirement prevents such electoral abuse.

Consistency with District Council and Legislative Council elections

11. Under the Bill, a person has to establish that his sole or main home is in the Existing Village before he can be a resident of the Village. This requirement is a more stringent one when compared with a requirement for "ordinary residence" in Hong Kong.

12. The Administration does not intend to amend the residency-in-village requirements for electors and candidates in Resident Representative elections.

Choice of Principal Residential Address

13. What constitutes a person's principal residential address is defined in the Bill. Each case should be considered on its own merits. It would not be appropriate to let a person choose his principal residential address without reference to the facts and merits of the case.

14. In case of doubt, the amount of time a person stayed at the address would be used to determine whether the place should be considered his principal residential address. A person dissatisfied with the Electoral Registration Officer's decision may appeal to a Revising Officer, whose decision shall be final.