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17 November 2014

Clerk to Panel on Constitutional Affairs
(Attn : Miss Joanne MAK)
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong
(Fax No. : 2509 9055)

Dear Ms Mak,

**Supplementary information on
Disqualification of District Council Members and
Rural Representatives with Unserved Prison Sentences
from Holding Office**

I am writing to provide supplementary information requested by Members at the meeting of the Panel on Constitutional Affairs held on 20 October 2014 concerning disqualification of District Council (“DC”) members and Rural Representatives with unserved prison sentences from holding office.

Corrupt or illegal conduct under the Elections (Corrupt and Illegal Conduct) Ordinance (“the ECICO”) (Cap. 554)

2. As a follow-up to a Member’s enquiry about whether minor omissions relating to the ECICO (e.g. minor negligence in filling out election returns) would lead to disqualification of a DC member or Rural Representative from holding office, the Administration is

requested to provide supplementary information on the corrupt or illegal conduct under the ECICO that would lead to such disqualification.

3. In accordance with the District Councils Ordinance (Cap. 547) and the Rural Representative Election Ordinance (Cap. 576)¹, a DC member or Rural Representative is disqualified from holding office if he/she, after being elected, is convicted of having engaged in corrupt or illegal conduct in contravention of the ECICO.

4. Corrupt and illegal conduct are prescribed in Parts 2 and 3 of the ECICO respectively. Specifically, corrupt conduct as proscribed by the ECICO includes bribing candidates or prospective candidates; using or threatening to use force or duress against candidates or prospective candidates; engaging in certain deceptive behaviour in relation to candidates and prospective candidates; defacing or destroying nomination papers; bribing electors and others at elections; providing others with refreshments and entertainment at election; using or threatening to use force or duress against electors; engaging in certain deceptive behaviour in relation to electors; impersonating another at election; destroying or defacing ballot papers; making improper use of election donations; failure to dispose of election donations in accordance with the requirement under the ECICO; lodging false or misleading election return²; withdrawing election petition or election appeal for a bribe; and other corrupt conduct with respect to voting at elections.

5. Illegal conduct as proscribed by the ECICO includes incurring election expenses by persons other than candidates and election expense agents; incurring election expenses exceeding the prescribed amount by candidates; publishing false statement that a person is or is not a candidate; publishing false or misleading statements about a candidate; and publishing election advertisements that include false claim of support.

¹ Sections 14(1)(d)(ii), 19(1)(d)(ii) and 24(1)(d)(ii) of the District Councils Ordinance (Cap. 547), and section 9(1)(d)(ii) of the Rural Representative Election Ordinance (Cap. 576).

² According to section 20 of the ECICO, "A candidate engages in corrupt conduct at an election if the candidate, in an election return lodged under section 37 or a copy of an election return lodged under section 37A, makes a statement that the candidate knows or ought to know is materially false or misleading whether or not the statement is the subject of a correction effected under section 37A."

6. It should be noted that the ECICO provides a relief mechanism under which a candidate, candidate's agent or other person who has otherwise committed an illegal conduct may apply to the Court of First Instance ("CFI") for an order relieving the person from penalties and disqualifications imposed by any electoral law as a consequence of the illegal conduct. In making the order, the CFI has to be satisfied that the non-compliance was due to inadvertence, an accidental miscalculation or any reasonable cause and was not due to bad faith, and believes it to be just that the applicant should not be subjected to one or more of those consequences.

7. Apart from the corrupt and illegal conduct as mentioned in paragraphs 4 and 5 above, the ECICO also stipulates requirements for lodging election return which are applicable to DC and Rural Representative elections.³ Such requirements are summarised at **Annex A**. A person commits an offence if he/she fails to comply with such requirements. If a DC member or Rural Representative is convicted of such offences only (but not convicted of having engaged in corrupt or illegal conduct in paragraphs 4 and 5 above), he/she will not be disqualified from holding office, provided that he/she is not caught by other disqualification provisions for the same conviction⁴.

8. In summary, corrupt conduct as proscribed by the ECICO involves intentional acts, and if allowed, would produce a direct effect on the election, while illegal conduct is relating to election expenses and false information. Where a person is convicted of criminal offences by engaging in corrupt or illegal conduct, this may raise questions over the person's credibility and integrity to continue to be a DC member or a Rural Representative. The Administration sees a need to maintain the existing disqualification provisions in paragraph 3 above to ensure elections be conducted fairly, openly and honestly and be free from corrupt and illegal conduct.

³ While the ECICO also stipulates requirements for publishing election advertisements, those requirements do not apply to DC and Rural Representative elections. The provisions governing the publication of election advertisements in DC and Rural Representative elections are set out in the respective regulations made under the Electoral Affairs Commission Ordinance (Cap. 541) instead.

⁴ For example, if he/she is convicted and is sentenced to imprisonment for a term exceeding three months without the option of a fine, he/she will be disqualified from holding office pursuant to sections 14(1)(d)(i), 19(1)(d)(i) or 24(1)(d)(i) of the District Councils Ordinance (Cap. 547), or section 9(1)(d)(i) of the Rural Representative Election Ordinance (Cap. 576).

Past records of disqualification of DC members and Rural Representatives from holding office by reason of conviction(s) and/or sentence of imprisonment

9. A Member asked for past records of disqualification of DC members and Rural Representatives from holding office by reason of conviction(s) and/or sentence of imprisonment. The information provided by the Home Affairs Department is set out in **Annex B** for Members' reference.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Helen Chung', written in a cursive style.

(Miss Helen Chung)
for Secretary for Constitutional and Mainland Affairs

**Summary of Requirements for Lodging Election Return in
the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554)**

Each candidate at an election must lodge with the appropriate authority an election return (“ER”) setting out the candidate’s election expenses at the election and all election donations received by or on behalf of the candidate in connection with the election.

2. The ER must be lodged, in the case of District Council or Rural Representative election, not later than 30 days after the date of publication of the result of the election or the declaration of the termination or the failure of the election, as the case may be.

3. The ER must be accompanied –

- (i) in the case of each election expense of \$100 or more, by an invoice and a receipt giving particulars of the expenditure; and
- (ii) in the case of each election donation of more than \$1,000 or, in the case of an election donation consisting of goods or a service, of more than \$1,000 in value, by a copy of the receipt issued to the donor giving particulars of the donor and the donation; and
- (iii) where an election donation or part of an election donation that was received by or on behalf of the candidate in connection with the election was not used for the purpose of meeting, or contributing towards meeting, the election expenses of the candidate or candidates; or in the case of an election donation consisting of goods, for the purpose of promoting the election of the candidate or candidates or of prejudicing the election of another candidate or other candidates was disposed of in accordance with the requirement under the Elections (Corrupt and Illegal Conduct) Ordinance (“ECICO”) (Cap. 554), by a copy of the receipt given by the recipient of the donation or part; and
- (iv) where an election donation or part of an election donation that was received by or on behalf of the candidate in connection with the election was not used for that purpose was not disposed of in accordance with the requirement under the ECICO, by an explanation setting out the reason; and
- (v) by a declaration in a form provided or specified by the appropriate authority verifying the contents of the ER.

**Past Records of Disqualification of District Council Members and Rural Representatives
from Holding Office by reason of Conviction(s) and/or Sentence of Imprisonment**

1. District Council members who were disqualified from holding office by reason of conviction(s) and/or sentence of imprisonment

Fourth Term District Council (2012-2015) (till October 2014)

One District Council member has been disqualified from holding office by reason of a conviction and/or sentence of imprisonment during the fourth term District Council so far. Details are as follows –

	Offence convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
1.	Obtaining pecuniary advantage by deception	21 months' imprisonment, suspended for 2 years	Section 24(1)(d)(i) of the District Councils Ordinance ("DCO") (Cap. 547) ¹

Third Term District Council (2008-2011)

Three District Council members were disqualified from holding office by reason of conviction(s) and/or sentence of imprisonment during the third term District Council. Details are as follows –

	Offence(s) convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
1.	Fraud	16 months' imprisonment, suspended for 3 years, and fined \$130,000	Section 24(1)(d)(i) of the DCO

¹ Under section 24(1)(d)(i) of the DCO, an elected District Council member is disqualified from holding office if the member, after being elected, is convicted in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine.

	Offence(s) convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
2.	Fraud and misconduct in public office	5 months' imprisonment	Section 24(1)(d)(i) of the DCO
3.	Fraud and theft	15 months' imprisonment	Section 24(1)(d)(i) of the DCO

Second Term District Council (2004-2007)

Six District Council members were disqualified from holding office by reason of conviction(s) and/or sentence of imprisonment during the second term District Council². Details are as follows –

	Offence(s) convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
1.	Omitting a material particular from an election-related document (an offence prescribed by regulation in force under the Electoral Affairs Commission Ordinance)	Fined \$500	Section 24(1)(d)(iv) of the DCO ³
2.	Conspiracy to defraud	24 months' imprisonment	Section 24(1)(d)(i) of the DCO
3.	Fraud	4 months' imprisonment	Section 19(1)(d)(i) of the DCO ⁴

² Apart from the six District Council members listed out in the table, two District Council members were convicted and sentenced to imprisonment for a term exceeding three months which would render them disqualified from holding office under section 24(1)(d)(i) of the DCO. However, with application of Rule 29 of the Criminal Appeal Rules (Cap. 221A), their disqualification pursuant to section 24(1)(d)(i) of the DCO were suspended pending appeal to the Court of Appeal. These two District Council members were imprisoned while pending appeal. Before determination of the appeal result by the Court of Appeal, the two members were disqualified from holding office pursuant to sections 24(5), (6) and (7) of the DCO for continued absence from District Council meetings for four consecutive months and three consecutive meetings without obtaining consent.

³ Under section 24(1)(d)(iv) of the DCO, an elected District Council member is disqualified from holding office if the member, after being elected, is convicted of any offence prescribed by regulations in force under the Electoral Affairs Commission Ordinance (Cap. 541).

⁴ Under section 19(1)(d)(i) of the DCO, a person who is a Chairman of a Rural Committee is disqualified from holding office as an ex officio District Council member, if the person, where the term of office is to begin within 5 years after the date of the person's conviction, has been convicted, or is convicted after the beginning of the term of office, in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine.

	Offence(s) convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
4.	Conspiracy to defraud, conspiracy to steal, removal of stone from unleased land, unauthorized excavations in unleased land, conspiracy to pervert the course of public justice	24 months' imprisonment and fined \$10,000	Section 19(1)(d)(i) of the DCO
5.	Soliciting an advantage and accepting an advantage as an agent (an offence against Part II of the Prevention of Bribery Ordinance)	12 months' imprisonment	Section 24(1)(d)(iii) of the DCO ⁵
6.	Fraud	4 months' imprisonment	Section 24(1)(d)(i) of the DCO

First Term District Council (2000-2003)

Two District Council members were disqualified from holding office by reason of a conviction and/or sentence of imprisonment during the first term District Council. Details are as follows –

	Offence convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
1.	Falsely pretending to be a public officer	4 months' imprisonment, suspended sentence for 18 months, and with costs of \$10,000	Section 24(1)(d)(i) of the DCO
2.	False accounting	12 months' imprisonment	Section 24(1)(d)(i) of the DCO

⁵ Under section 24(1)(d)(iii) of the DCO, an elected District Council member is disqualified from holding office if the member, after being elected, is convicted of an offence against Part II of the Prevention of Bribery Ordinance (Cap. 201).

2. Rural Representatives who were disqualified from holding office by reason of conviction(s) and/or sentence of imprisonment

2011 – 2015 (till October 2014)

Four rural representatives have been disqualified from holding office by reason of a conviction and/or sentence of imprisonment during the term since April 2011. Details are as follows –

	Offence convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
1.	Electoral corruption	14 weeks' imprisonment	Section 9(1)(d)(ii) of the Rural Representative Election Ordinance ("RREO") (Cap. 576) ⁶
2.	Blackmail	6 months' imprisonment and suspended for 2 years	Section 9(1)(d)(i) of the RREO ⁷
3.	Fraud	13 months' imprisonment and suspended for 3 years	Section 9(1)(d)(i) of the RREO
4.	Dangerous driving causing death	28 months' imprisonment	Section 9(1)(d)(i) of the RREO

⁶ Under section 9(1)(d)(ii) of the RREO, a person elected as a Rural Representative is disqualified from holding office if the person, after being elected, is convicted of having engaged in corrupt or illegal conduct.

⁷ Under section 9(1)(d)(i) of the RREO, a person elected as a Rural Representative is disqualified from holding office if the person, after being elected, is convicted in Hong Kong or any other place, of an offence for which the person has been sentenced to imprisonment, whether suspended or not, for a term exceeding 3 months without the option of a fine.

2007 – 2011

One rural representative was disqualified from holding office by reason of a conviction and/or sentence of imprisonment during the term between April 2007 and March 2011. Details are as follows –

	Offence convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
1.	Drug trafficking	22 years' imprisonment	Section 9(1)(d)(i) of the RREO

2003 - 2007

Seven rural representatives were disqualified from holding office by reason of conviction(s) and/or sentence of imprisonment during the term between April 2003 and March 2007. Details are as follows –

	Offence(s) convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
1.	Conspiracy to defraud	6 months' imprisonment	Section 9(1)(d)(i) of the RREO
2.	Assault Occasioning Actual Bodily Harm and Common Assault	7 months' imprisonment	Section 9(1)(d)(i) of the RREO
3.	Conspiracy to pervert the course of public justice	11 months' imprisonment	Section 9(1)(d)(i) of the RREO
4.	Fraud	4 months' imprisonment	Section 9(1)(d)(i) of the RREO
5.	Conspiracy to defraud, conspiracy to steal, removal of stone from unleased land, unauthorized excavations in unleased land, conspiracy to pervert the course of public justice	24 months' imprisonment and fined \$10,000	Section 9(1)(d)(i) of the RREO

	Offence convicted	Length of Sentence / Fine imposed	The Disqualification Provision Relied on
6.	Conspiracy to pervert the course of public justice	11 months' imprisonment	Section 9(1)(d)(i) of the RREO
7.	Making a false statement (offence prescribed by the Electoral Affairs Commission Regulations)	Fined \$3,000	Section 9(1)(d)(iv) of the RREO ⁸

⁸ Under section 9(1)(d)(iv) of the RREO, a person elected as a Rural Representative is disqualified from holding office if the person, after being elected, is convicted of any offence prescribed by the Electoral Affairs Commission Regulations.