



立法會秘書處

LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF :
本函檔號 OUR REF : LS/B/26/20-21
電話 TELEPHONE : 3919 3503
圖文傳真 FACSIMILE :
電郵 EMAIL : bloo@legco.gov.hk

By Email (cherieyeung@cmab.gov.hk)

20 April 2021

Ms Cherie YEUNG
Principal Assistant Secretary
(Constitutional & Mainland Affairs)2
Constitutional and Mainland Affairs Bureau
12/F, East Wing, Central Government Offices,
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms YEUNG,

Improving Electoral System (Consolidated Amendments) Bill 2021

Further to our letter dated 16 April 2021, we would appreciate your further clarifications on the matters set out **at Annex**. We should be grateful for your reply in both languages as soon as possible.

Our observations on the Chinese text of the Bill will follow.

Yours sincerely,

(Bonny LOO)
Senior Assistant Legal Adviser

c.c. Department of Justice
(Attn: Mr Wallance NG, Government Counsel)
(By email: wallanceng@doj.gov.hk)
(Attn: Mr Peter SZE, Senior Assistant Law Draftsman)
(By email: petersze@doj.gov.hk)
Legal Adviser
Assistant Legal Adviser 4
Clerk to Bills Committee

1. Clauses 7, 102, 161 and 202 of the Bill seek to provide for the imposition of a financial penalty not exceeding \$10,000 for contravention of certain requirements provided in regulations made under the Electoral Affairs Commission Ordinance (Cap. 541), and for the enforcement in court of such a financial penalty which would be recoverable as a civil debt due to the Government. In this regard, please clarify:
 - (a) whether such financial penalties are of an administrative nature;
 - (b) what factors the Electoral Affairs Commission ("EAC") would take into account in deciding whether to impose a financial penalty and (if so) the amount of such penalty, and whether these factors should be set out clearly in Cap. 541 and its subsidiary legislation;
 - (c) who (e.g. the Chairman of EAC or the Chief Electoral Officer ("CEO")) would have the authority to impose the financial penalty;
 - (d) whether due process would be observed when EAC/CEO imposes a financial penalty: for instance, whether the person liable to pay the penalty would be given an opportunity to make written or oral representations; if so, whether a provision similar to, for example, section 36C(7) of the Telecommunications Ordinance (Cap. 106) should be added to the Bill to provide for this matter;
 - (e) whether there would be an appeal mechanism for persons aggrieved by EAC/CEO's decision to impose a financial penalty; for instance, in proceedings to recover any such penalty as a civil debt, would it be a defence that it was not reasonably practicable to comply with the requirement to which the proceedings relate? See, for example, section 45C of the Mandatory Provident Fund Schemes Ordinance (Cap. 485);
 - (f) whether EAC would issue guidelines pursuant to section 6 of Cap. 541 to further set out the mechanism of imposing financial penalties; and
 - (g) whether any such penalty recovered by the Government would be paid into the general revenue in accordance with section 17A of the Public Finance Ordinance (Cap. 2).

2. Under clauses 292 and 383 of the Bill, the Candidate Eligibility Review Committee ("CERC") would consist of the chairperson and two to four other members each of whom would be appointed by the Chief Executive ("CE"), and only principal officials appointed pursuant to a nomination under Article 48(5) of the Basic Law ("BL") would be eligible for appointment to CERC. As such, please confirm whether:

- (a) CERC being a committee appointed by CE would be a "public body"; and
- (b) each member of CERC (including the chairperson) being a principal official would be a "prescribed officer" and hence also a "public servant",

within the meaning of section 2(1) of the Prevention of Bribery Ordinance (Cap. 201).

3. Under clauses 362 and 366 of the Bill (i.e. the proposed sections 14(1B) and 27A(4) of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554)), it would be a defence for a person charged with one of the proposed new offences (i.e. wilfully obstructing or preventing another person from voting, or inciting another person not to vote, or to cast an invalid vote, at an election) "to prove that, at the time of the alleged offence, the person had lawful authority or reasonable excuse for doing the act to which the charge relates". It is noted that under clauses 156, 173, 219 and 240, examples of what constitutes "legal authority" are given in relation to the proposed offence of obtaining access to a final register electronic copy/extract without legal authority. Please confirm:

- (a) whether, by using the word "prove", clauses 362 and 366 intend to place a legal or persuasive (rather than evidential) burden on the defendant to prove, on a balance of probabilities, that he or she had lawful authority or reasonable excuse: see paragraph 6.2.17 of *Drafting Legislation in Hong Kong – A Guide to Styles & Practices* (2012); and
- (b) what would constitute "lawful authority" and "reasonable excuse" (by providing examples thereof) in the context of the proposed new offences?

4. Clause 395 of the Bill proposes amending section 42 of the Chief Executive Election Ordinance (Cap. 569) to extend the application of the obstruction offence (which has hitherto applied only vis-à-vis an electoral officer) to the obstruction or hindrance of, or interference with, CERC in the performance of its functions. It is further noted the proposed maximum penalty would increase from a fine at level 2 (i.e. \$5,000) to a fine at level 5 (i.e. \$50,000). What is the reason for increasing the maximum penalty to \$50,000 insofar as the proposed new penalty would also apply to the obstruction or hindrance of, or interference with, an electoral officer (as opposed to CERC)?
5. Clauses 294(17) and 415(8) to (10) of the Bill propose to require a body to have been operating for three years immediately before making its application for registration as a corporate elector in a functional constituency ("FC") of the Legislative Council or a corporate voter in the Election Committee ("EC").
 - (a) In respect of a society registered or exempted from registration under the Societies Ordinance (Cap. 151), which of the following dates would mark the commencement of the requisite three-year operating period: (i) the date of establishment or deemed establishment under section 2(2B) or 4 of Cap. 151; or (ii) the date of registration or exemption from registration by the Societies Officer under section 5A of Cap. 151?
 - (b) In respect of a limited company operating as a catering business, which of the following dates would mark the commencement of the requisite three-year operating period: (i) the date of incorporation regardless of the type of business the company undertook at that time; or (ii) the date of issuance of its first food business licence under the Public Health and Municipal Services Ordinance (Cap. 132)?
 - (c) Is it necessary for clauses 294 and 415 to clearly specify the relevant commencement date of the requisite three-year operating period for each relevant EC subsector or FC?
6. We have also identified the following drafting issues:
 - (a) The Bill seeks to introduce a new requirement under the Schedule to Cap. 569 ("the Schedule") for EC members to sign a statutory declaration and written oath to the effect that they will uphold BL and bear allegiance to HKSAR. In that regard, the Bill uses two different expressions:

- (i) "pledge allegiance" (保證效忠) (see, for example, clauses 401, 408 and 419, i.e. the proposed sections 5K(a), 7A(a) and 17A(a) of the Schedule); and
- (ii) "bear allegiance" (效忠) (see, for example, clauses 401, 410 and 420, i.e. the proposed sections 5M(3), 9(3) and 18(3) of the Schedule).

Please explain why two different expressions are proposed in the relevant clauses/proposed sections of the Schedule.

- (b) In clauses 161 and 202, the proposed section 31A(7) of Cap. 541F and proposed section 28A(7) of Cap. 541I seek to define, among others, "owner" as a person who appears to be "the owner of the land on which the premises *situate*". Please consider whether the proposed definition of "owner" should be rephrased as "the owner of the land on which the premises *are situated*": see, for example, section 11(2)(c)(ii) of the Fire Services (Fire Hazard Abatement) Regulation (Cap. 95F);
- (c) In clause 338, the proposed Schedule 1B, Part 2 refers to "20. Chinese Dancres Association Hong Kong Member Branch". Should the word "Dancres" be revised to "Dancers" to reflect "舞蹈家" in the corresponding Chinese text? Also, should the English name of 中國舞蹈家協會 be "*China* Dancers Association"¹ rather than "*Chinese* Dancers Association"?
- (d) In clause 401, the proposed section 5I(5)(b) of the Schedule refers to "the total number of NPC deputies and CPPCC members who chooses to be registered as an ex officio member". Please consider whether the expression should be changed to "the total number of NPC deputies and CPPCC members who choose to be registered as ex officio members";
- (e) Clause 450 refers to "**repeal the subsection (4)**". Should the redundant word "the" be deleted?

¹ <https://www.cdanet.org/index> [accessed on 20 April 2021].