

政制及內地事務局
政府總部
香港添馬添美道2號
政府總部東翼



LC Paper No. CB(4)913/20-21(01)

CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU
GOVERNMENT SECRETARIAT
EAST WING
CENTRAL GOVERNMENT OFFICES
2 TIM MEI AVENUE, TAMAR
HONG KONG

Our Ref.: CMAB C1/30/5/5
Your Ref.: LS/B/26/20-21

Tel. No.: 2810 2908
Fax No.: 2840 1976

By Email

29 April 2021

Mr Bonny LOO
Senior Assistant Legal Adviser 3
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr Loo,

Improving Electoral System (Consolidated Amendments) Bill 2021

In response to the issues raised in your letter dated 20 April 2021, our reply is set out below.

Imposition of financial penalty for failing to comply with certain requirements

2. The proposed financial penalty, which are of a statutory instead of administrative nature, will be directly imposed by section 28A, 31A and 28A to be respectively added to the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D), Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation (Cap. 541F) and Electoral Affairs Commission (Electoral

Procedure) (Election Committee) Regulation (Cap. 541I), and the statutory requirement for the persons concerned to pay the financial penalty (i.e. the liability of those who fail to comply with the requirement made under subsection (1)) is set out at subsection (5) of the above provisions. The means of enforcing the financial penalty is set out at subsection (6) of the respective provisions. Specifically, the Government will issue General Demand Notes to the occupier/owner concerned requiring them to settle the financial penalty. If the persons concerned refuse to settle the financial penalty, the Government may recover by means of civil claims (i.e. through the Small Claims Tribunal ("SCT")). Any party dissatisfied with the order or decision of the adjudicator may apply to the SCT for review or to the Court of First Instance of the High Court for leave to appeal. Thus, it is deemed unnecessary to establish a separate appeals mechanism. On top of that, the penalty shall be paid into the general revenue in accordance with section 17A of the Public Finance Ordinance (Cap. 2).

3. In fact, the purpose of such a financial penalty is to reduce the difficulties of the Registration and Electoral Office ("REO") in securing venues for use as polling/counting stations. According to the REO, when securing venues for use as polling/counting stations, it would continue to start with sufficient communication with the venue owners/management bodies concerned, and request them to provide justifications should they decline REO's requests for lending. The REO may consult the policy bureaux/departments concerned to evaluate whether the justifications are reasonable and valid, and consider requiring the occupiers/owners who refuse to lend their premises to the REO without reasonable justifications to pay a financial penalty in accordance with the relevant regulations.

4. The REO expects that in each public election, only a few cases may warrant their consideration for requiring occupiers/owners to pay a financial penalty. It would consider drawing up guidelines depending on the actual situation in the future.

5. Having regard to the views of Members at the meeting of the Bills Committee held on 23 April, we will propose a committee stage amendment to the Bill to increase the financial penalty to \$50,000 and to introduce appropriate amendments to the provisions to better reflect the arrangements regarding the determination of the user fee by the court.

Candidate Eligibility Review Committee

6. As specified in paragraphs (e) and (f) under section 2 of the Prevention of Bribery Ordinance (Cap. 201) (“POBO”), the definition of “public body” includes:

- “(e) any board, commission, committee or other body, whether paid or unpaid, appointed by or on behalf of the Chief Executive or the Chief Executive in Council; and
- (f) any board, commission, committee or other body specified in Schedule 1”.

7. As all members of the Candidate Eligibility Review Committee (“CERC”) are appointed by the Chief Executive (“CE”), the CERC is regarded as a body appointed by the CE. According to the definition of “public body” in paragraph (e) under section 2 of POBO, the CERC is a public body even though it is not specified in Schedule 1.

8. Pursuant to section 2 of POBO, “prescribed officer” is defined to include “any principal officer of the Government appointed in accordance with the Basic Law”. Although the CE announced in a public statement that the composition of the CERC would include certain members of the community, and these individuals are not “prescribed officers”, given that CERC is a public body, its members are regarded as “public servants” within the meaning of paragraph (a) of the definition of “public servant” in section 2 of POBO¹.

Inclusion of defences in the new provisions of the Elections (Corrupt and Illegal Conduct) Ordinance

9. The Government’s legislative intent is to charge defendants with the responsibility of establishing on the balance of probabilities that their conducts are based on lawful authority or reasonable excuse. The concepts of “lawful authority” and “reasonable excuse” are common in criminal law, and interpretations to the concepts can be found in legal cases.

¹ According to the interpretation in section 2 of POBO (Cap. 201), *public servant* means “any prescribed officer and also any employee of a public body and, in the case of a public body other than a body referred to in paragraph (aa), (b) or (c) of this definition, any member of the public body”.

10. “Lawful authority” generally refers to engaging in actions necessary for performing duties in accordance with the law². According to a case of the Court of Final Appeal³, a consideration of the defence of “reasonable excuse” involves looking into three matters:

- (a) the matters said to constitute reasonable excuse must be identified;
- (b) the court will then examine whether the excuse is **genuine**; and
- (c) the court must make an assessment of whether that excuse is **reasonable**, which the court will do on an **objective standard** depending on the particular facts of the case.

² In *Bryan v Mott* (1975) 62 Cr App R 71, the offence of “possession of offensive weapon in public place” was involved, as in section 33(1) of the Public Order Ordinance (Cap. 245):

“The reference to lawful authority in the section is a reference to those people who **from time to time carry an offensive weapon as a matter of duty** — the soldier and his rifle and the police officer with his truncheon. They are all carrying offensive weapons, but they do so normally under lawful authority.”

³ In *HKSAR v Ho Loy* (2016) 19 HKCFAR 110, failure to comply with the requirement indicated by a traffic sign under the Road Traffic (Traffic Control) Regulations (Cap. 374G) was involved:

“36. The expression “without reasonable excuse” occurs in various statutory contexts. A consideration of the defence involves looking to three matters. First, self-evidently, the matters said to constitute reasonable excuse must be identified. Secondly, the court will then examine whether the excuse is genuine, since the reason asserted for departing from a relevant prescription must be the real reason for doing so. Thirdly, the court must make an assessment of whether that excuse is reasonable, which the court will do on an objective standard depending on the particular facts of the case.

37. In determining whether an excuse is reasonable or not, it will be relevant to have regard to the context in which the defence of reasonable excuse arises, since that context may suggest either a narrow or wide range of circumstances that might constitute a reasonable excuse. For example, the range of circumstances in which there is a reasonable excuse for failing to provide a sample of blood or urine in the context of the laws against driving under the influence of drink has been held to be narrow, since the circumstances giving rise to the offence are always essentially similar so that what might be a reasonable excuse for committing it can be envisaged. In other contexts, the defence may be construed more widely and the question of whether or not an excuse is reasonable will be determined in the light of the particular facts and circumstances of the individual case.”

In considering whether an excuse was reasonable, **the context of the relevant legislation** shall also be taken into account.

11. The two offences amended or added to the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) involve conducts which sabotage elections and shall be prohibited by law. However, as it is not possible to rule out some relatively rare situations, in which the persons should not be held criminally liable for engaging in such conducts, defence liability clauses are included in the newly added provisions. We did not prescribe what would constitute lawful authority or reasonable excuses, the persons who are suspected of committing the offence should prove that they engage in such act under lawful authority or with reasonable excuses, and the court will consider the case on the basis of its actual circumstances.

12. It must be emphasised that **all relevant circumstances should be taken into account in determining whether there are lawful authority or reasonable excuses**. Reference can be made to the following three simple examples:

- (a) Example 1: Under circumstances prescribed by the electoral laws, the Presiding Officer has reasonable cause to believe that a person has impersonated as another elector and therefore requests a police officer to arrest the person concerned⁴. The incident is later confirmed as a misunderstanding. The Presiding Officer and the police officer concerned may have obstructed or prevented an elector from voting “under lawful authority”.
- (b) Example 2: A person genuinely and reasonably, but wrongly, believes that another person has been disqualified from voting, and therefore acts in a way that has obstructed or prevented the person from voting.
- (c) Example 3: A person genuinely and reasonably, but wrongly, believes that certain persons and/or organisations have been disqualified from voting, and therefore urges by public activity the persons and/or organisations not to vote. Depending on the factual circumstances of the case, examples 2 and 3 may constitute “reasonable excuses”.

⁴ For LegCo elections, the relevant powers are prescribed under section 52 of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D).

Penalty for causing obstruction or hindrance of, or interference with, an electoral officer or CERC

13. Pursuant to the amended Annexes I and II to the Basic Law, the eligibility of candidates standing for CE elections, Election Committee Subsector elections and Legislative Council (“LegCo”) elections will be reviewed and confirmed by the newly established CERC. The CERC will perform the functions conferred or imposed on it under the Chief Executive Election Ordinance (Cap. 569) (“CEEEO”) and the Legislative Council Ordinance (Cap. 542) (“LCO”). For the avoidance of doubt, we propose to amend section 42 of CEEEO and section 79 of LCO to extend the offence of obstruction or hindrance of, or interference with, an electoral officer in the performance of the functions conferred or imposed on him under the relevant ordinances to cover conducts that cause obstruction or hindrance of, or interference with, CERC in the performance of its functions. Meanwhile, to reflect more precisely the gravity of obstruction or hindrance of, or interference with, an electoral officer or CERC in the performance of the statutory functions conferred or imposed on him/it, we propose to increase the penalty of the offence from Level 2 (\$5,000) to Level 5 (\$50,000) to enhance deterrence.

The requisite three-year operating period in respect of a corporate voter

14. The amendments under clauses 294(17) and 415(8) to (10) of the Bill are made in accordance with Article 4(3) of Annex I and Article 3 of Annex II to the Basic Law, i.e. unless specified in the electoral law of the HKSAR, an association or enterprise may become a corporate voter for a subsector/functional constituency only if it has been operating for not less than three years after acquiring relevant qualifications for that subsector/functional constituency. The requisite three-year operating period should be construed together with all relevant provisions, including clause 294(19) (making proposed amendment to section 25(7) of the LCO) and clause 415(10) (making proposed amendment to add section 12(23) to the Schedule to the CEEEO) of the Bill. Therefore, the requisite three-year operating period is subject to acquirement of relevant qualifications for that subsector/functional constituency, i.e. to have been operating for three years after obtaining relevant licence or becoming a corporate member of the relevant association (as appropriate).

15. As for the catering business, an association should have been operating for three years as the holder of a food business licence under the Public Health and Municipal Services Ordinance (Cap. 132) before being eligible for registration as a corporate voter.

16. As mentioned above, the Bill has specified the relevant commencement date of the requisite three-year operating period.

Other law drafting issues

Paragraph 6(a) of the letter

17. The wording of “a declaration to the effect that the person will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region” in section 5K(a), 7A(a) and 17A(a) of the Schedule to Cap. 569 is used in consistent with the existing provision requiring CE candidates to make declaration (i.e. section 16(7)(a)(ii) of Cap. 569).

18. On the other hand, “bear allegiance” is used in the oaths of CE, principle officials, members of the Executive Council and the LegCo, and judicial officers in Schedule 2 to the Oaths and Declarations Ordinance (Cap. 11). In defining a “specified oath”, the wording of “an oath ... the oath-taker will ... bear allegiance” is also used in clauses 19(3), 22(2), 23(2) and 27(2) of the Public Offices (Candidacy and Taking Up Offices) (Miscellaneous Amendments) Bill 2021. Therefore, sections 5M(3), 9(3) and 18(3) of the Schedule to Cap. 569 follow the same wording for consistency.

Paragraphs 6(b), (d) and (e) of the letter

19. We agree with the observation and will move committee stage amendments in this respect.

Paragraph 6(c) of the letter

20. According to the List of All Societies and Branches Registered or Exempted from Registration maintained by the Hong Kong Police Force, the registered English name of “中國舞蹈家協會香港會員分會” is “Chinese Dancers Association Hong Kong Member Branch”. To

accurately specify the association, “Dancres” is used in Cap. 542 and Cap. 569 in consistent with its registered English name.

Yours sincerely,



(Ms Cherie YEUNG)
for Secretary for Constitutional and
Mainland Affairs

c.c.

Legislative Council Secretariat
Clerk to Bills Committee on
Improving Electoral System
(Consolidated Amendments)
Bill 2021
Assistant Legal Adviser 4
Legal Service Division

Ms Joanne MAK

Ms Clara WONG

Department of Justice
Law Officer (Special Duties) (Acting)
Senior Assistant Law Draftsman
Government Counsel

Mr Llewellyn MUI
Mr Peter SZE
Mr Wallance NG