

PROLOGUE

ROLE OF THE ELECTORAL AFFAIRS COMMISSION AND THE GUIDELINES

1. Under the Electoral Affairs Commission Ordinance (Cap 541) (“EACO”), the Electoral Affairs Commission (“EAC”) is an impartial, independent and apolitical body responsible for conducting and supervising public elections in accordance with the electoral law and strives to conduct public elections under the principles of openness, honesty and fairness. Although the EAC is responsible for making the subsidiary legislation on electoral procedures, the guidelines on election-related activities, and the related practical arrangements, it is not part of the Government. All along, the EAC does not formulate electoral policies nor take into account any political considerations, but considers whether the relevant arrangements do comply with the law and are reasonably practicable and will facilitate the smooth operation of the election. Under the EACO, the EAC shall perform its function through the Chief Electoral Officer (“CEO”). The Registration and Electoral Office (“REO”) is the executive arm of the EAC. Apart from making practical arrangements for the elections, the REO also advises the EAC on the practicality of various electoral arrangements.

2. All electoral arrangements in Hong Kong are regulated under the relevant primary legislation and subsidiary legislation. The EAC must conduct and supervise the conduct of elections in strict compliance with the subsisting law. Under the present institution, matters relating to electoral policies and system are under the purview of the executive authorities, whereas the legislature is responsible for the enactment and amendment of the primary legislation. On the other hand, pursuant to the principles and provisions in the primary legislation, the EAC makes the corresponding subsidiary legislation to

specify the electoral procedures for various elections. The EAC cannot act beyond the power conferred by the primary legislation. Where necessary, the EAC would provide its advice from practical and operational points of view for the Government's reference. Under the existing arrangement, any enactment or amendment of the primary legislation must be introduced by the Government in the form of bills to the Legislative Council ("LegCo") for deliberation and passage. Subsidiary legislation must also be submitted by the Government to the LegCo by way of the negative vetting procedure.

3. As the EAC is not a court of law, it has no authority to make judicial interpretation for disputed provisions of the statutes. The EAC is empowered by the law to issue guidelines on election-related activities. The electoral guidelines are not law, and cover the following two aspects: (1) to explain in simple language the subsisting electoral law so as to remind candidates and other stakeholders of the provisions and requirements under the electoral law, and (2) with regard to election-related activities not stipulated by the law, to promulgate a code of conduct based on the principle of fairness and equality.

Legislation Aspect

4. With regard to the legislation aspect, all relevant provisions are enacted by the legislature. The guidelines only seek to explain in simple language the relevant provisions based on the electoral law, and where applicable to give examples to illustrate the best practices.

5. In order to ensure the fairness of an election, safeguarding the autonomy and secrecy of the vote is the most important principle of the electoral law. Electors must mark the ballot papers by themselves inside the voting compartments, and are not required to disclose their voting preference. It is a criminal offence to influence the voting preference of an elector by

corrupt conduct such as the use of force, threat, coercion, inducement, deception or obstruction; or by illegal conduct of making false statements about a candidate. It is also a criminal offence to compel an elector to disclose his/her voting preference. In any case, the voting choice is ultimately made by the elector voluntarily and under the protection of secrecy. Electors are free to discuss their voting preference, as long as no corrupt or illegal conduct is involved.

6. Nomination of candidates is an important part of an election. According to the amended District Councils Ordinance (Cap 547) (“DCO”), the District Council Eligibility Review Committee (“DCERC”) shall be responsible for reviewing and confirming the eligibility of any person nominated as a candidate for the District Councils (“DCs”) election, as well as any persons proposed to be appointed as a member and any person proposed to be registered as an ex officio member (for details of the DCERC, see paras. 3.42 to 3.43 of Chapter 3). The DCERC may request the Returning Officers (“ROs”) to give advice to the DCERC regarding the nomination of candidates. In deciding the eligibility of a person as to whether the person fails to fulfil the legal requirements and conditions on upholding the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (“Basic Law”) and bearing allegiance to the Hong Kong Special Administrative Region (“HKSAR”) of the People’s Republic of China, the DCERC is to seek the opinion of the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region (“Committee on National Security”). If an opinion is given by the Committee on National Security, the DCERC must make the decision in accordance with the opinion.

7. The validity of the nomination of a candidate is determined by the DCERC. The EAC will only make arrangements for an election for the validly nominated candidates determined by the DCERC. If the nomination of any person is decided invalid by the DCERC at an election (except for that

made pursuant to the opinion of the Committee on National Security), he/she may make an election petition in accordance with the law.

8. Another important aspect of the law is to prescribe the maximum amount of election expenses. The setting of a maximum amount of election expenses is to ensure that the candidates do compete on a level playing field and within a reasonable level of expenditures. According to the law, election expenses mean the expenses in promoting or prejudicing the election of a candidate. The definition of “candidate” means a person who stands nominated as a candidate at an election and includes a person who has publicly declared an intention to stand for election before the close of nominations for an election. The “public declaration of the intention to stand as a candidate” is a legal question which must be determined on the basis of actual facts and intention, rather than on the face of any statement alone. It is a criminal offence for a candidate to incur election expenses in excess of the prescribed maximum amount. Hence, the candidate must, in accordance with the law, submit an election return after the election to rigorously declare all the election expenses incurred by him/her; otherwise, he/she commits an offence.

9. For the effective regulation of the limit on election expenses, the law also stipulates that only candidates and their authorised election expense agents may incur election expenses. It is a criminal offence for other unauthorised persons, whether for the purpose of promoting or prejudicing the election of a candidate, to incur election expenses. Nevertheless, as far as opinions published on the Internet are concerned, even though they promote or prejudice the election of a candidate and amount to election advertisements (“EAs”), if the publisher is a third party (i.e. a person other than a candidate and his/her election expense agents) and the only election expenses incurred are either electricity charges and/or charges necessary for accessing the Internet, he/she is exempted from the relevant criminal liability. However, if the publisher is a candidate or his/her election expense agent, the exemption does

not apply. As such, candidates shall declare all election expenses (i.e. including election expenses incurred in relation to the Internet and all other media).

10. EA has always been an important part of election expenses, and therefore there is a practical necessity to regulate the publication of EAs for the purpose of calculating election expenses. Notwithstanding that EAs are regulated, the paramount principles of freedom of speech, press freedom and the dissemination of election information must be guaranteed. In determining whether certain statements are EAs and whether election expenses are involved, consideration must be given to the overall circumstances and evidence, including the nature of those statements, the expenses involved and the intention of promoting or prejudicing any candidate from being elected.

11. The EAC is not a law enforcement agency, it will refer any complaint involving any offence to the law enforcement agencies for follow-up and investigation. Any issues over the law or fact will ultimately be a matter for the adjudication of the court.

12. The EAC will seek to provide a statement of principle on the compliance of the electoral law. However, the EAC is not the legal advisor for a candidate and any person who has any questions on any particular matter should seek independent legal advice.

Code of Conduct

13. The EAC promulgates guidelines on election-related activities based on the principle of fairness and equality. Although any breaches of the guidelines will not constitute a legal offence, where necessary, the EAC may make censures through public statements in order to inform the electors and the general public of important matters that have occurred during the elections.

An important application of the principle of fairness and equality is concerned with the utilisation of the public resources, for example:

- (a) The guidelines prescribe a fair and equal system in allocating the designated spots for display of EAs on government land, premises and roadways;
- (b) Licensed radio and television stations as well as registered newspapers and magazines should uphold the fair and equal treatment principle in their treatment of the candidates;
- (c) Building management organisations and owners' corporations should observe the principle of fairness and equality in handling the requests of the candidates for the display of EAs and conducting electioneering activities in the common parts of the buildings under their management; and
- (d) A candidate must not make use of any public resources for electioneering.

The management organisations mentioned under (c) above should handle the applications from the candidates fairly and equally. If a management organisation has decided to allow a particular candidate to conduct electioneering activities in the common parts of the buildings under its management, it should also allow other candidate(s) in the same District Committees constituency or District Council geographical constituency ("constituency") to do so (whether to make the same request is an individual candidate's own choice). On the other hand, if it is decided to reject an application from a particular candidate, the same applications from other candidate(s) in the same constituency should also be rejected. However, this

principle does not apply to election activities and EAs concerning other private properties.

14. It is noteworthy that, as Hong Kong is a pluralistic society with different sectors of people who may have different pursuits, there are often contrary views as to whether a particular matter is fair or not. While achieving absolute fairness is ideal, it is often not practicable. The bottom line is to guard against serious and material unfairness.

15. The EAC will solemnly handle complaints against any breach of the principle of fairness and equality as set out in the electoral guidelines. Investigation must be based on factual evidence and be in accordance with the principle of procedural fairness. The parties concerned must be given the opportunity to make representations in defence. The EAC will make the decision after taking all relevant circumstances into consideration. In the context of considering whether any conduct is unfair even in the absence of contravention of the law, the EAC cannot make a decision lightly and shall still consider all relevant matters and circumstances carefully. Furthermore, while complaints are often made shortly before the polling day, the EAC cannot circumvent or compress the established procedure because of the time constraint so as to avoid any unfairness.

16. If a complaint is substantiated, the EAC may, where necessary, issue public statements of censure in order to inform the electors and the general public of important matters that have occurred during the elections. The EAC may also issue press statements on matters of principle which have attracted widespread public concern in order to set the record straight. Apart from that, the EAC, as a long-standing practice, does not comment on the political platforms of candidates, individual comments and reporting, or hearsays.

17. Electors rely on fair and orderly elections to elect their representatives. Election is a solemn matter. The electoral procedures are strictly governed by the relevant electoral law. Persons who wish to run for an election and other stakeholders must understand and comply with the requirements of the electoral law so as to avoid committing any criminal offence inadvertently.

18. Apart from the legislation aspect, candidates and stakeholders should also make reference to the good practices provided in the guidelines in order to ensure that the elections are conducted in an open, honest and fair manner.

19. The EAC appeals to members of the public to be acquainted with and to uphold the electoral law and electoral guidelines in order to carry on the good election culture in Hong Kong, so that the election can be conducted smoothly in a fair and equal manner.