

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, fairness and honesty. 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 the practical arrangements for the elections, the REO also advises the EAC on the practicality on the 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 the 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 set out the detailed electoral procedures for the 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 views for reference of the Government. 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 resolution. Subsidiary legislation must also be submitted by the Government to LegCo by way of the negative vetting procedure.

3. 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. As the EAC is not a court of law, it has no authority to make judicial interpretation for disputed provisions of the statutes; 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 the election, safeguarding the autonomy and secrecy of the vote are the most important principles of the electoral law. The voters 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 the voters by corrupt conduct such as the use of force, threat, coercion, inducement, deception or obstruction; or by the illegal conduct of making false statements about a candidate. It is also a criminal offence to require a voter to disclose his/her voting preference. In any case, the voting choice is ultimately made by the voter voluntarily and under the protection of secrecy. Voters may well discuss among themselves their voting preference, but in no case under the influence of any corrupt or illegal conduct.

6. Nomination of candidates is an important part of an election. According to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law"), the Candidate Eligibility Review Committee ("CERC"), instead of the Returning Officers ("ROs") in the past elections, shall be responsible for reviewing and deciding the validity of nomination of candidates for Election Committee ("EC") members. The CERC may request the ROs to provide advice to the CERC regarding the nomination of candidates. It may also make decision pursuant to the opinion of the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region ("Committee on National Security"). The Committee on National Security shall, on the basis of the review by the National Security Department of the Hong Kong Police Force, make findings regarding candidates' compliance with the legal requirements and conditions for "upholding the Basic Law and pledging allegiance to the Hong Kong Special Administrative Region ("HKSAR")" and will issue an opinion to the CERC for those who fail to meet such legal requirements and conditions. As stipulated in Annex I to the Basic Law and the electoral law, no legal proceedings may be instituted in respect of a decision made by the CERC on the eligibility of a candidate pursuant to the opinion of the Committee on National Security. However, if the CERC's decision to disqualify a person from being a candidate/nominee is based on his/her failure to meet other statutory eligibility requirements (e.g. age, Hong Kong permanent

resident status or criminal records), the person being disqualified may lodge an appeal to question the election result in accordance with the law. For details, please refer to Chapter 4.

7. Whether the nomination of a candidate/nominee is valid or not is solely determined by the CERC. The EAC is neither empowered nor involved in the making of such decision, and will not provide any advice. The EAC will only make practical arrangements for the election according to the validly nominated candidates determined by the CERC.

8. Another important aspect of the law is to prescribe the maximum limit for election expenses. The setting of a maximum limit 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. 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 limit. 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 sanction 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, no matter it is 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, the candidate should declare all election expenses in his/her election return (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 it is necessary to regulate EAs for calculation of 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. As 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. Apart from the electoral law, the EAC has promulgated guidelines on election-related activities based on the principle of fairness and equality. However, the guidelines promulgated by the EAC are not legally binding. Any breaches of the guidelines will not constitute a legal offence. Where necessary, the EAC will issue public statements of censure in order to inform the voters 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, owners' corporations and mutual aid residents' associations 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 candidate fairly and equally. If a management organisation 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 subsector to do so (whether to make the same request is 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 subsector should also be rejected. However, this principle does not apply to election activities and EA concerning private properties.

14. It is noteworthy that, as Hong Kong is a pluralistic society with different sectors of people who may have different pursuits, whether a particular matter is fair or not will often have contrary views. Whereas it is ideal to achieve absolute fairness, but that 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. In the context of considering whether any conduct is unfair in the absence of contravention of the law, a decision could not be made lightly without careful consideration of all relevant matters and circumstances. 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 the complaint is substantiated, the EAC may, where necessary, issue public statements of censure in order to inform the voters 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. Voters rely on fair and orderly elections to elect their representatives. Election is a solemn matter, the electoral procedures are strictly sanctioned 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, fair and honest 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.

SPECIAL VOTER REGISTRATION ARRANGEMENTS IN 2021

20. The Improving Electoral System (Consolidated Amendments) Ordinance 2021 (“Amendment Ordinance”) was published in the Gazette and came into effect on 31 May 2021. To tie in with the major changes in the

composition and registration eligibilities of the EC subsectors, an exercise of “Special Voter Registration Arrangements” was conducted by the REO from 1 June to 5 July 2021. The following initiatives in respect of the “Special Voter Registration Arrangements” were also taken by the EAC and the REO:

Before Commencement of the Amendment Ordinance

- (a) The Constitutional and Mainland Affairs Bureau submitted supplementary information to the LegCo on 29 April to explain the upcoming voter registration arrangements pursuant to the Amendment Ordinance. Copies of the supplementary information were also made available to the public at the Electoral Information Centre (“EIC”) of the REO and the Home Affairs Enquiry Centres in 18 Districts;
- (b) To prepare for the verification and processing of voter registration applications to be received during the “Special Voter Registration Arrangements”, the REO collected from all the umbrella organisations of the EC subsectors the information of eligible members or corporate members;
- (c) To facilitate submission of voter registration applications of eligible individuals and bodies during the “Special Voter Registration Arrangements”, the REO prepared explanatory notes for registration in respect of each EC subsector and the 8 subsectors with ex-officio members of the EC, and “frequently asked questions” relating to voter registration. The explanatory materials were uploaded to the REO website and the Voter Registration website for reference by the general public;

- (d) The REO re-designed the registration forms for use by ex-officio members of the EC and voters of EC subsectors respectively according to the composition, registration eligibilities and registration procedures of the EC subsectors;
- (e) The REO updated documents relating to voter registration, such as the notice to be issued to applicants upon completion of the voter registration application. The computer system for processing voter registrations was also updated to ensure timely notification from the REO to the applicants about progress of their applications and to enable effective processing of voter registrations; and
- (f) To facilitate effective handling of enquiries by frontline staff manning the hotline, the REO provided training for them when the above-mentioned preparation work was completed and before the “Special Voter Registration Arrangements” commenced.

After Commencement of the Amendment Ordinance

- (a) The REO issued a press release on the commencement date of the Amendment Ordinance to explain the launch of the “Special Voter Registration Arrangements”. As stated in the press release, individuals and bodies whose eligibility was affected and those who were newly eligible for registration had to update their voter registration, and the voter registration applications must be submitted before the deadline;
- (b) The EAC and the REO published the details of registration of respective subsectors in a press release on 7 June, and uploaded

reference materials on voter registration eligibilities (including the composition and eligibility for registering as voters of each subsector) to the EAC website and the REO website. Copies of the reference materials were also made available to the public in the EIC and the Home Affairs Enquiry Centres in 18 Districts;

- (c) The REO sent letters, new registration forms and posters of the “Special Voter Registration Arrangements” to umbrella organisations to appeal to eligible umbrella organisations and/or their eligible members or corporate members to register as voters; and
- (d) The REO briefed officers of the Correctional Services Department (“CSD”) on the voter registration exercise under the “Special Voter Registration Arrangements”, and provided penal institutions with reference folders of voter registration eligibilities to facilitate their handling of relevant enquiries from persons imprisoned or held in custody.