

Legislative Council Panel on Security

**2009-2010 Policy Address
Briefing by the Commissioner
Independent Commission Against Corruption**

**Information Paper by the ICAC
in response to the issues raised on election-related reports
dealt with by the ICAC**

Purpose

This paper provides information in response to concern expressed by members of the Panel on Security during the briefing by the Commissioner, ICAC on 20 October 2009 regarding election-related reports arising from the 2008 Legislative Council Election.

Background

2. During the briefing, the Commissioner, ICAC informed members, among other things, that for the first nine months of 2009, 214 election-related reports were received, of which 177 were related to the 2008 Legislative Council Election. In response, members expressed concern regarding the large number of election-related reports and the implication on the deployment of ICAC resources. Members requested ICAC to provide further information concerning the nature of the reports and the course of action taken by ICAC in dealing with them.

Duty of the Commissioner, ICAC

3. Under section 12 of ICAC Ordinance, the Commissioner, ICAC is required, among other things, to investigate any alleged or suspected offence under Elections (Corrupt and Illegal Conduct) Ordinance (**ECICO**).

Elections (Corrupt and Illegal Conduct) Ordinance

4. ECICO aims at prohibiting corrupt and illegal conducts; regulating election advertisements and imposing reporting requirements with respect to expenditure and receipt of donations at the public elections in Hong Kong so as to ensure that the elections are conducted fairly, openly and honestly. The offence provisions under ECICO include Part 2 offences relating to corrupt conduct¹; Part 3 offences relating to illegal conduct; Part 5 offences relating to election advertisement; and Part 6 offences relating to election returns. Offences under Parts 3, 5 and 6 are distinguished from those under Part 2 in that ECICO provides a relief mechanism for an offender to apply to the Court of First Instance (**Court**) for a Relief Order (**RO**), if the commission of offences under Parts 3, 5 and 6 are due to inadvertence, accidental miscalculation, or any other reasonable cause absent bad faith.

Investigation of Alleged Offences under ECICO

5. All reports alleging breaches of ECICO are dealt with by the Operations Department, ICAC. An investigation will be carried out if the report contains sufficient details for it to be pursuable. The outcome of the investigation will be reported to the Operations Review Committee (**ORC**) which oversees the work of the Department. If the investigation reveals no evidence to substantiate the allegation, a report recommending that no further investigative action be taken will be submitted to ORC for endorsement.

6. If the investigation reveals evidence to substantiate the allegation, a report will be submitted to the Department of Justice (**DoJ**) for advice on the appropriate action to be taken. If following preliminary investigation there is evidence to substantiate the allegation and the relief mechanism is applicable to the offences under investigation, ICAC, as a matter of practice, will advise the subject to consider seeking independent legal advice as to whether it is appropriate to make an application for a RO. The practice is adopted because the application for a RO is not obligatory but the granting of a RO by the Court will relieve the subject from criminal responsibility. If the subject, upon independent legal

¹ For the purpose of this information paper, it should be mentioned that section 20 under Part 2. ECICO concerns corrupt conduct of a candidate if he makes a statement in his election return that the candidate knows or ought to know is materially false or misleading.

advice, considers that application for a RO is necessary or has made an application accordingly, ICAC will withhold further investigation so that if a RO is granted by the Court, a report recommending no further action be taken will be submitted to ORC for endorsement. If the subject disputes the alleged contravention of ECICO and/or declines to seek a relief, ICAC will continue to investigate the allegation and if it is substantiated will submit a report to DoJ seeking advice on the appropriate sanction. If the alleged contravention of ECICO is technical and minor in nature, counsel in DoJ usually advises to issue a verbal warning as opposed to a formal caution or prosecution². The investigation of the case and subsequent action taken will also be reported to ORC.

Reports Arising from the 2008 Legislative Council Election

7. The 2008 Legislative Council Election was held on 7 September³. For the first nine months of 2009, a total of 177 reports arising from the Election were received by ICAC. Of the 177 reports, 175 were capable of investigation while the remaining two were classified as non-pursuable reports in view of insufficient details. Of the 175 reports under investigation, 166 concern offences relating to election return and were referred to ICAC by Registration and Electoral Office (**REO**) in March 2009 for investigation. The remaining nine cases concern offences other than relating to election return.

8. Experience shows that over the years, election return cases referred by REO have taken up the bulk of election-related reports⁴. All these referred cases were investigated by ICAC as required by law, given the alleged contravention may range from serious corrupt conduct i.e. knowingly making a materially false or misleading statement in the election return to offences which are relatively minor and technical in

² Upon legal advice, ICAC has since 1991 implemented a three-tier sanction system against offenders who have breached the provisions of ECICO. The system which encompasses verbal warning, formal caution and prosecution allows a more flexible and pragmatic approach to those minor and technical breaches.

³ As at 19 November 2009, a total of 276 pursuable reports arising from the 2008 Legislative Council Election have been received.

⁴ All candidates are required under s.37, Part 6 of ECICO to submit election returns not later than 60 days after the date of publication of the result of the election to REO. The submission of the return is accompanied by a declaration on oath by the candidate that he has verified the election return of election expenses and donations and the annexures and to the best of his knowledge and belief, it is an accurate account of all election expenses incurred/donations received. The REO is responsible for checking of the election returns to ascertain if all the election expense and donations received have been properly declared. Otherwise, the matter will be referred to ICAC for investigation.

nature e.g. failing to submit a receipt for an expense more than \$100 or even miscalculation in the election return. As in all other election related cases, legal advice will be sought if there is evidence to substantiate the alleged contravention. Verbal warnings will be issued for minor infractions or no further action will be taken in the presence of mitigating circumstances.

Way Forward

9. In recent years concern has been expressed by some candidates and members of the community regarding the role of ICAC in conducting investigation and administering verbal warnings on what may be perceived as minor and technical breaches of ECICO as not warranting ICAC action. Such concern is appreciated in view of its impact on deployment of ICAC investigative resources and ICAC's service to the community, within the context that the Commissioner, ICAC is vested with the statutory duty to enforce ECICO to ensure that public elections in Hong Kong are conducted fairly, openly and honestly.

10. In July 2009, ICAC has conducted a comprehensive review of the investigations concerning the seven public elections which took place between 2006 and 2008⁵ identifying issues of concern based on ICAC enforcement experience. With the support of ORC, an inter-departmental working group is being set up to address those issues with a view to improvement, including a review of the approach to dealing with minor breaches of ECICO. The ICAC is committed to working closely with other stakeholders to ensure that reports alleging ECICO offences are dealt with expeditiously and effectively.

Independent Commission Against Corruption February 2010

⁵ 2006 Election Committee Subsector Elections, 2007 Village Representative Elections, 2007 Rural Committee Elections, 2007 Chief Executive Election, 2007 District Council Election, 2007 Legislative Council By-Election, 2008 Legislative Council Election (No complaint was received for the 2007 Heung Yee Kok Election).