

# 立法會

## *Legislative Council*

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### **Panel on Constitutional Affairs** **Background brief prepared by the Legislative Council Secretariat** **for the meeting on 16 April 2012**

### **Proposed Guidelines on Election-related Activities in respect of the** **Legislative Council Election issued by the Electoral Affairs Commission**

#### **Purpose**

This paper summarizes the past discussions held by the Panel on Constitutional Affairs ("the Panel") on the guidelines issued by the Electoral Affairs Commission ("EAC") on election-related activities in respect of Legislative Council ("LegCo") elections and relevant issues of concerns raised by the Panel and relevant committees of LegCo.

#### **Background**

2. EAC is a statutory and independent body responsible for the conduct and supervision of elections. According to section 6(1)(a) of the EAC Ordinance (Cap. 541), EAC may issue guidelines relating to the conduct or supervision of an election. These guidelines aim to provide a code of conduct based on the principle of fairness and equality for conducting election-related activities. EAC will update the guidelines before each election taking into account the operational experience and suggestions for improvements obtained from recent elections and by-elections.

3. In accordance with section 6(2) of the EAC Ordinance, EAC shall consult the public on the proposed guidelines before they are finalized for issue to the public. The 2012 LegCo election will be held on 9 September 2012. The Proposed Guidelines on Election-related Activities in respect of the 2012 LegCo Election ("the Proposed Guidelines") were issued by EAC on 28 March 2012 for public consultation until 26 April 2012.

#### **Relevant issues of concern of the Panel**

4. The Panel discussed the Proposed Guidelines in respect of 2004 and 2008 LegCo elections and the reports published by EAC after the conduct of these

elections at its meetings on 15 December 2003, 19 April 2004, 17 May 2004, 21 April 2008 and 15 December 2008. The Panel also discussed issues of concern relating to election advertisements, election expenses and donations, election return, and corrupt and illegal conduct at its various meetings. The relevant issues raised by members at these meetings are summarized in the following paragraphs.

### Financial assistance, election expenses and donation

#### *Financial assistance*

5. The amount payable as financial assistance in respect of a list of candidates/a candidate standing for the 2008 LegCo election was the lower of either the amount obtained by multiplying the total number of valid votes cast for the list of candidates/candidates by \$11 or 50% of the declared election expenses of the list of candidates. Some members were of the view that the financial assistance should be increased from \$11 to at least \$20 per vote and that the cap on the financial assistance payable should be adjusted from 50% to 70%-80% of the declared election expenses.

6. Having regard to the views expressed by members, the Administration agreed to enhance the financial assistance scheme for the 2012 LegCo election. The LegCo (Amendment) Ordinance 2011 has revised the subsidy rate for the LegCo election from the lower of \$11 per vote or 50% of the declared election expenses to the lower of \$12 per vote or 50% of the election expenses limit provided that the subsidy amount does not exceed the amount of the declared election expenses of the lists of candidates or candidates. According to the Administration, the new formula was fair as it reflected the level of support a list of candidates/a candidate received from the public and would provide more room for candidates to obtain financial assistance.

#### *Election expenses*

7. The LegCo (Amendment) Ordinance 2011 provides that the maximum amount of election expenses that can be incurred at a District Council ("DC") (second) functional constituency ("FC") election by or on behalf of all the candidates on a list is \$6 million. No adjustment has been made to the election expenses limits for geographical constituency ("GC") and other FC elections in 2012. The Administration advised that the \$6 million was the upper limit and a candidate could spend less than that. The election expenses limit for the DC (second) FC should not be set at a high level so that candidates from large or small political parties and independent candidates could participate in the election. Moreover, the election expenses could be shared by five candidates in a list. Independent candidates could also form a list with other parties to join the election to share out the cost. Paragraphs 16.8 and 16.35 of the Proposed

Guidelines set out the election expenses limit of \$6 million for the DC (second) FC and the revised subsidy rate of financial assistance respectively.

8. Members had all along called on the Administration to conduct a review on whether election complaints alleging technical and minor breaches of Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) ("ECICO") could be dealt with by administrative means. Members expressed concern that the Registration and Electoral Office ("REO") which was responsible for checking a candidate's election return ("ER") would refer any possible breach of ECICO, irrespective of how trivial it was, to the Independent Commission Against Corruption ("ICAC") for investigation. Candidates who were involved had to face considerable uncertainty as a result of the ICAC's investigation in such cases and some of them had to incur a fairly large amount of legal costs to seek an order from the Court of First Instance ("CFI") to grant relief. In the context of the Electoral Legislation (Miscellaneous Amendments) Bill 2011, the Administration agreed to introduce Committee Stage amendments to amend ECICO in order to implement a de minimis arrangement for handling ERs with minor errors or omissions.

9. The Administration, however, stressed that if ICAC had received complaints or intelligence indicating that a candidate might have made a statement that he knew or ought to know was materially false or misleading which amounted to corrupt conduct under section 20 of ECICO, ICAC would conduct investigation into this case despite the de minimis arrangement. The rectifications of ERs under the de minimis arrangement would not exempt the candidate or the list of candidates from being investigated or subsequently prosecuted under ECICO in such circumstances.

10. The above statutory relief mechanism for handling minor errors or omissions in the return and declaration of election expenses is set out in paragraphs 16.26 to 16.31 of the Proposed Guidelines.

#### *Donation*

11. Some members enquired whether donations would be taken into account in calculating the amount of financial assistance payable to the candidate; and whether unused donations could be kept by candidates for future use. The Administration advised that donations would not be netted off in calculating the amount of financial assistance payable to a list of candidates/a candidate; and that candidates should use donations received from respective GC/FC in the areas of work as pledged. Candidates could keep unused donation for future use if they had promised their donors to use donations in the development of the political party, including assisting candidates to run for elections and carrying out district work.

12. According to paragraph 16.17 of the Proposed Guidelines, candidates should give the unspent or unused election donations to charitable institutions or trusts before lodging the return and declaration of election expenses and donations.

### Matters relating to election-related publicity materials

#### *Definition of an election advertisement*

13. Some members expressed concern on whether a special edition issued by a newspaper on the polling day of the 2007 LegCo By-election should be regarded as election advertisements ("EAs") for the purpose of promoting or prejudicing a candidate in the election and whether EAC should introduce measures to prevent recurrence at future elections. According to the Administration, EAC had conducted detailed investigation into complaints concerning these issues. Substantiated cases were referred to relevant enforcement authority for follow-up action. The EAC would issue warning letters, censure or reprimand according to relevant circumstances.

14. According to paragraph 8.6 of the Proposed Guidelines, materials published by any person, including a candidate, for the purpose of prejudicing a candidate or candidates are treated as EAs, if reference could be made from the materials to identify the candidate(s) being prejudiced. The Proposed Guidelines also remind candidates and other persons that any person, who wishes to publish a statement about a candidate or candidates, should make every effort to ensure its accuracy before its publication.

#### *Electronic EAs*

15. On the sending of EAs and related materials, some members expressed support for encouraging candidates to disseminate EAs by electronic means for the protection of the environment. They considered that REO should provide candidates with the choice of receiving the address labels of electors for sending EAs on an individual or household basis, in order to reduce the consumption of address labels.

16. According to REO, it had been an established practice to provide each candidate with a set of address labels pertaining to the electors in the constituency. Under the present arrangement, the address labels were printed on an individual basis. To facilitate candidates who wished to send their EAs on a household basis, a mark "H" was currently printed on the address labels with two or more electors sharing the same address. Candidates might just send only one mail to the addresses marked "H". In order not to affect the right of individual electors to receive EAs, REO would continue with the existing practice to provide address

labels on an individual basis to candidates. Members noted that it was the EAC's view that the real solution lay in encouraging electors to provide e-mail addresses and candidates to disseminate EAs by electronic means, and various channels had been used to solicit e-mail addresses from electors.

17. Under the previous arrangements, a candidate or list of candidates of the DC, LegCo and Election Committee ("EC") subsector was entitled to send a letter free of postage to each elector/voter in the constituency or an EC subsector for which the candidate/list of candidates was nominated. However, the letter must relate to the election concerned and must comply with the requirements and limitations prescribed by the relevant EAC Regulations. Some members had strongly urged the Administration to take on board the suggestion previously made by Members that lists of candidates/candidates of different constituencies should be allowed to print their campaign materials in the same promotional letter to be sent free of postage. They stressed that it would enable political parties to enhance the campaign publicity for their lists of candidates/candidate at the same election and economize on paper. Members also enquired whether such arrangement would be applicable to the making of banners, posters and signboards for elections.

18. According to the Electoral Legislation (Miscellaneous Amendments) Ordinance 2011, lists of candidates of different constituencies and candidates of FC or EC subsectors with multiple seats are allowed to send their promotional letters to the same elector/voter free of postage. The arrangements will only apply to a list of candidates in a GC and a list of candidates in the DC (second) FC; candidates in the Labour FC which has three seats; and candidates standing for election in the same EC subsector, which has multiple number of seats (ranging from 16 seats to 60 seats).

19. The conditions that candidates contesting in a GC, DC (second) FC and Labour FC election must comply with when posting joint election mails to electors free of postage are set out in paragraphs 8.62 to 8.69 of the Proposed Guidelines. According to the Administration, REO would review the arrangements in relation to the production of banners, posters and signboards when drawing up the electoral guidelines for the coming elections.

20. Some members were of the view that in anticipation of the need for DC (second) FC candidates to reach out to all registered electors across the territory, they should be allowed to present their election platform through the electronic media. They pointed out that distribution of EAs via electronic media was common place in overseas countries and the current restriction on electioneering on television and radio should be relaxed. The Administration, however, maintained its view that EAs via electronic media should be prohibited in an election campaign to ensure a level-playing field for all candidates.

21. Some members considered it very inconvenient for candidates to submit to REO hard copies of EAs, authorization letters, ERs, etc. in order to comply with the current statutory declaration requirement under the respective electoral procedures regulations made by EAC. They requested the Administration to facilitate candidates by accepting election materials transmitted electronically and develop an information technology system to cater for the electronic transmission of all types of election materials.

22. When REO briefed the Panel on its proposal to facilitate the submission of electronic EAs by candidates in June 2011, some members were of the view that dissemination of EAs via social networking or communication websites was getting more popular and messages posted on these websites could change quite rapidly and frequently within a short period of time. It would be impractical to require candidates to deposit with REO every electronic EA posted on these websites by the end of the first working day following the day on which the EAs were displayed on the Internet. They also considered that there should be clear guidelines setting out the relevant legislation in regulating electronic EAs including those messages sent through mobile phone short message services ("SMS") or other multimedia messaging services.

23. REO advised that candidates would be allowed to submit electronic EAs and the required declaration electronically. Candidates would also be allowed to deposit with REO the declaration and electronic copies of the EAs by the end of the first working day following the day on which the concerned EAs were sent or displayed through social networking or communication websites on the Internet. REO would organize briefing sessions and formulate supplementary guidelines for candidates regarding the new arrangement. According to ECICO, any material published for the purpose of promoting or prejudicing the election of a candidate or candidates in an election was an EA. SMS fell within the definition of an EA and candidates should make a relevant declaration to REO before distribution of the messages. Candidates were also required to declare any expenses incurred in the production of these messages. However, consideration would be given to reviewing the guidelines with a view to providing clear guidance to candidates on compliance with the relevant electoral legislation. Amendments have been made to relax the relevant electoral procedures set out under the EAC (Electoral Procedure) (LegCo) Regulation (Cap. 541D).

24. When REO briefed the Panel in November 2011 on its proposals to further relax the existing requirements relating to the declaration and submission of EAs, members in general welcomed the proposals to relax the regulation on EAs so as to facilitate candidates to conduct electioneering activities. Some members, however, expressed concern about the practical difficulties for a candidate to

comply with the proposed requirement to maintain his election website for a 12-month period after publication of the election results and considered the proposed penalty for failing to meet the requirement too heavy. It was suggested that a central portal to be maintained by REO should be provided for submission of electronic EAs by candidates.

### *Consent of support*

25. Members noted that the Administration also proposed to amend the existing requirements so that (a) a candidate or a person was not required to obtain prior written consent from those who provided support in the EAs published by him if such support was provided by the supporters themselves out of their own volition; and (b) if a candidate or a person published or continued to publish the EAs with the support mentioned in (a) above without any modification of the contents or description of the support, the candidate or the person was not required to obtain prior written consent from those who provided support in such EAs. Otherwise, the candidate or the person had to follow the existing requirement to obtain prior written consent before publishing such EAs. Some members expressed concern that as it might not be possible to ascertain the real identity of a person who had indicated support, there would be practical difficulties for the candidate to obtain prior written consent from persons indicating support to a candidate on social networking and communication websites on the Internet given the spontaneous support received.

26. The latest proposals on regulation on EAs (**Appendix I**) and the proposed revised requirements for obtaining consent of support have been included in the Electoral Legislation (Miscellaneous Amendments) Bill 2012 which is under scrutiny by LegCo. These proposed relaxed requirements have been incorporated in paragraphs 8.41 to 8.48 and paragraph 18.1 of the Proposed Guidelines.

### Electioneering at buildings

27. Noting that EAC would appeal to all management bodies (i.e. owners' corporations ("OCs"), mutual aid committees, management companies, etc.) of organizations or buildings to provide equal opportunity to all candidates competing in the same constituency for the purposes of electioneering, some members expressed concern that some management bodies of private buildings did not comply with the principle of fair and equal treatment of all candidates/GC lists competing in the same constituency for the purposes of electioneering. For example, a particular candidate/GC list was allowed to conduct electioneering activities at a private building or post EAs and banners in the common parts of a building but other candidates/GC lists in the same constituency were not allowed to do so. Some members enquired how EAC would deal with complaints about

unequal treatment of candidates in this regard and whether the Administration would consider introducing laws to prohibit discriminatory treatment of candidates.

28. The Administration responded that while the management bodies of organizations or buildings would be advised to adhere to the fair and equal treatment principle in handling electioneering activities, electioneering activities in private premises were outside the purview of the Government. Since OCs had the statutory power to manage private property, any law which sought to impose parity treatment of candidates by OCs and interfere with the jurisdiction of OCs to manage private property would be subject to challenge. In the event that a complaint was lodged against a management body for unequal treatment and was found to be justified, it could make a censure or reprimand in a public statement which might include the names of candidates/GC lists favourably or unfavourably treated. Since the Basic Law provided Hong Kong residents with the right to vote and to engage in politics, the Administration considered it inappropriate to make laws to prohibit any organizations or individuals from supporting certain candidates.

### Corrupt and illegal conduct

#### *Interference of Mainland officials in election*

29. As a result of calls made by members of the public to radio phone-in programmes claiming about interference of Mainland officials in the 2004 LegCo election, the Panel discussed the relevant issues at its meeting in May 2004. Some members expressed concern about the adequacy of existing legislation on the use of force or duress against electors with a view to influencing their voting behaviour, and the use of camera-equipped mobile telephones for taking photographs of ballot papers inside polling stations. They also expressed concern whether the law governing offences in relation to voter intimidation could be enforced if Mainland officials were involved. Other members were concerned about wide-spread "hearsay" cases targeting at Mainland officials which were neither substantiated nor reported to the law enforcement agencies for investigation. They considered such "hearsay" cases were totally unfair and would have a negative impact on the 2004 LegCo election.

30. The Panel noted that it was an offence for any person to induce or to bribe another person, or to use or to threaten to use force or duress against another person, to vote for a particular candidate under ECICO. ECICO applied to all conduct concerning an election, whether the conduct was engaged within Hong Kong or elsewhere. Furthermore, it was an offence for electors to use mobile telephones for electronic communication or take photographs inside polling stations under the EAC (Electoral Procedure) (LegCo) Regulation.



### *Regulatory measures over electioneering*

31. In the light of the court rulings over two election-related cases that the offering of a free seminar to electors was not considered as an advantage and that since the candidate had not declared his intention to run for the election, there was no need to count the expenses incurred in carrying out election-related activities as election expenses, members considered that the Proposed Guidelines should be revised accordingly.

32. Some members were of the view that the current regulation over electioneering was too stringent and should be reviewed. They were dissatisfied that while a candidate would be prevented from participating in non-election related matters, the acts of sponsoring free meal, free trips or free rice distribution to electors by a prospective candidate before declaring his candidacy would not be subject to any regulation.

33. The Administration advised that there were clear guidelines which required all candidates to submit election returns to REO. All the election expenses incurred before, during or after an election, by the candidate for the purpose of promoting his or her election should be covered in the return. Political parties had been carrying out all sorts of activities to address the need of the low-income people. The Administration considered that there was no ground to regulate such activities provided that they were not carried out during the election period.

### Election petition

34. When the Administration briefed the Panel on its proposal to amend the appeal mechanism against the decision of the CFI in relation to election petitions arising from LegCo, DC and Village Representative ("VR") elections, some members supported the speedy resolution of election petitions. Some other members, however, expressed concerns about the legal costs incurred, the effect of such a leap-frog procedure on the caseload of the Court of Final Appeal ("CFA"), and the right to adopt the normal appeal procedure.

35. During the scrutiny of the Electoral Legislation (Miscellaneous Amendments) Bill 2011 which sought to institute a leap-frog appeal mechanism in relation to an election appeal arising from the LegCo, DC and VR elections, members of the relevant Bills Committee enquired about the financial implication of the proposed leap-frog appeal mechanism. According to the Administration, as the costs involved in an appeal would depend on the nature, length and complexity of the case, which in turn would determine the judicial and other resources that have to be put in, it was not feasible to generalise the costs. Members also enquired whether the proposed seven-working day appeal period

could be extended to 14 working days. According to the Administration, the proposed seven-working day appeal period could facilitate speedy resolution of disputes. It was important to minimize the period of uncertainty faced by the individuals concerned who were subject to election petitions and to alleviate the constituents' feeling of uncertainty towards their representative.

36. The Electoral Legislation (Miscellaneous Amendments) Ordinance 2011 was enacted on 6 July 2011. Paragraph 6.5 of the Proposed Guidelines has set out the mechanism to lodge an appeal against the decision of CFI in relation to an election petition arising from a LegCo election.

### **Related development**

37. The Administration is scheduled to brief the Panel on the Proposed Guidelines for the 2012 LegCo election at the upcoming meeting on 16 April 2012.

### **Relevant papers**

38. A list of the relevant papers available on the LegCo website is in **Appendix II**.

Council Business Division 2  
Legislative Council Secretariat  
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### Revised Proposals on Regulation on Election Advertisements (EAs)

- (a) for electronic EAs, subject to (b) below, if a candidate has posted such EAs onto a central portal maintained by the Registration and Electoral Office (REO) or an election website maintained by him for public inspection within one working day after the publication of such EAs, there is no need for the candidate to make declaration and submission of such EAs to the RO;
- (b) for electronic EAs which are displayed or sent through open platforms on the Internet, if it is not practicable for a candidate to post such EAs onto the central portal maintained by the REO or his election website (such as messages displayed or sent interactively and spontaneously through social networking platforms on the Internet), the candidate is only required to post the hyperlink of such platforms on the central portal or his election website (whichever is applicable) within one working day after the publication of the EAs;
- (c) for all EAs except electronic EAs, if a candidate has posted a digital image of such EAs onto the central portal maintained by REO or his election website for public inspection within one working day after the publication of such EAs, there is no need for the candidate to make declaration and submission of such EAs to the RO;
- (d) if the candidate has posted his EAs or hyperlink onto the central portal, the REO will make public the information posted by the candidates. If a candidate chooses to post his EAs or hyperlink onto his election website, the candidate is required to provide the electronic address of the website to the RO who will then publicize such information. All interested parties can view the EAs and hyperlink posted by the candidates via the Internet;
- (e) to facilitate public inspection and investigation on complaints about EAs, a candidate is required to maintain his election website (as mentioned in (a) to (c) above) for 12 months after the results of the relevant election are published. As for the central portal, the REO will maintain the information posted by the candidates on the portal for 12 months after the results of the relevant election are published;
- (f) as an alternative option for a candidate who prefers not to post his EAs onto the central portal or maintain an election website for public inspection, he is required to deposit two copies of such EAs with the RO within one working day after publication. For electronic EAs which are displayed or sent through open platforms on the Internet, the candidate is only required to provide the electronic addresses of the platforms on which such EAs are displayed or sent within one working day after the publication of the EAs. The RO will make available such information for public inspection; and
- (g) candidates who fail to comply with the above revised arrangements commit an offence and are liable to a fine at Level 2 up to \$5,000 and to imprisonment of 6 months.

**Relevant documents on Proposed Guidelines on  
Election-related Activities in respect of the  
Legislative Council Election issued by the Electoral Affairs Commission**

Committee	Date of meeting	Paper
Panel on Constitutional Affairs ("CA Panel")	15.12.2003 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	19.4.2004 (Item VI)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	17.5.2004 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	15.10.2007 (Item III)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	21.4.2008 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	19.5.2008 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	15.12.2008 (Item III)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	17.1.2011 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	18.4.2011 (Item III)	<a href="#">Agenda</a> <a href="#">Minutes</a>
House Committee	18.2.2011	<a href="#">Report of the Bills Committee on Legislative Council (Amendment) Bill 2010</a>
	24.6.2011	<a href="#">Report of the Bills Committee on Electoral Legislation (Miscellaneous Amendments) Bill 2011</a>
CA Panel	21.11.2011 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>