



1. Introduction

1.1 The Panel on Constitutional Affairs discussed at its meeting on 18 May 2015 the proposed guidelines on election-related activities in respect of the District Council election. Some members raised concerns about the regulation of election-related materials published or distributed on social networking and communication websites which are broadly known as social media. In the light of the above concerns, the Research Office was requested to study overseas regulation of the use of social media in elections. This information note studies the relevant regulations and guidelines governing the publication of election-related materials, in particular election advertisements, by using social media in the United Kingdom ("the UK"), New Zealand and Canada.¹

2. Social media and election expenses in Hong Kong

2.1 In Hong Kong, election advertising and expenses are governed by *Elections (Corrupt and Illegal Conduct) Ordinance* (Cap. 554) ("ECICO")² and *Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulations* (Cap. 541F). The Electoral Affairs Commission is also empowered under the *Electoral Affairs Commission Ordinance* (Cap. 541) to issue

¹ These three places are selected as they share a similar regulatory framework for parliamentary and local elections, including imposing spending limits on candidates and putting in place a regulatory regime for third party participation in election campaigns. Moreover, these places all have the most recent experiences in handling social media in recent elections. While New Zealand held its general election in 2014, the UK and Canada held theirs in 2015.

² *Elections (Corrupt and Illegal Conduct) Ordinance* (Cap. 554) ("ECICO") aims to ensure a fair, open and honest election for the Chief Executive, Legislative Council and District Councils and other public bodies through regulation of electoral advertising. It also imposes requirements with respect to election expenses and donations. See section 3 of Cap. 554.

guidelines relating to the conduct and supervision of an election. Candidates are obliged to report the costs associated with the production and publication of the election advertisements³ as election expenses and declare them in the election return. ECICO also makes it an offence for any person incurring election expenses without prior authorization from the candidate or the candidate's agent. Any such authorized expenses are counted towards the candidate's expense limit.

2.2 Yet, the rising popularity of social media on the internet may pose new challenges to the existing regulatory framework. A major advantage of social media over traditional media is their potential to reach a large mass of people instantly at almost any time with negligible cost. Messages posted on social media can be multiplied when shared, and this multiplying effect allows candidates who are subject to restrictions on election spending to communicate faster and easier but at a much lower cost. However, it also raises concern about such sharing of election messages via social media by any individual or group, or any feedback or commentaries generated thereof should be deemed as publication or distribution of election advertisements and hence any expenses so incurred by the individual or group should have the prior authorization from the candidate or his agent and be counted towards the candidate's expense limit.

2.3 In September 2015, the Electoral Affairs Commission issued the revised District Councils Election guidelines, clarifying some of the issues on the use of social media in election advertising.⁴ These in particular include:

- (a) messages posted on the social networking or communication websites are election advertisements if they seek to promote or prejudice the election of a candidate;
- (b) sharing of the "election campaigns" for "expression of views" by the public with no intention to promote or prejudice the election does not meet the definition of publishing election advertisements;

³ Under ECICO, "election advertisement" is defined as a publicly exhibited notice; or a notice delivered by hand or electronic transmission; or a public announcement made by radio or television or by video or cinematographic film; or any other form of publication, published for the purpose of promoting or prejudicing the election of a candidate or candidates at the election. Candidates must submit their election advertisement copies to the Returning Officer or post hyperlinks of the advertisements onto a central or a dedicated online platform for public inspection.

⁴ See Electoral Affairs Commission (2015) and LC Paper No. CB(2)2127/14-15(01).

- (c) if one is instructed by the candidate or his or her election agents to share or forward the election campaigns, this may be treated as publication of election advertisements and any costs so incurred should be included in the candidate election expenses; and
- (d) in terms of financial reporting, expenses like internet service fees and online-advertisement design fees are election expenses.

3. Regulation in the United Kingdom

Election advertisements using social media

3.1 In the UK, the use of election materials (i.e. election advertisements) by candidates and political parties in parliamentary and local elections are regulated under the *Political Parties, Elections and Referendums Act 2000* ("PPERA") and the *Representation of the People Act 1983*. Under sections 85(3) and (4) of PERA, election material is defined as material which can reasonably be regarded as intended to promote, procure or prejudice the success for political parties or candidates in elections. These include advertising posted by candidates and political parties on websites or YouTube videos created for dissemination. Under the guidelines issued by the Electoral Commission⁵, materials published on social media are regarded as election materials if they meet the criteria of a public test and a purpose test.⁶ For candidates and political parties, spending on social media is counted towards their applicable spending limit and must be reported in their returns on election expenditure. The spending include the design and production costs, cost related to updating the social media, and production of on-line petitions, and promotion cost from adding links to other websites.⁷

⁵ The Electoral Commission is an independent statutory body established under PERA to be responsible for overseeing parliamentary elections.

⁶ The public test is met if the message is aimed at, seen or heard by, or involves the public. Generally, all materials published on social media meet the public test. The purpose test is met if the content can reasonably be regarded as intended to influence voters or to promote or oppose a candidate or political party.

⁷ In its report of the 2015 parliamentary general election, the Electoral Commission noticed an increased use of social media in the election as a low cost but influential activity. The Commission noticed that social media campaigning ahead of the 2015 elections did not incur any significant costs. In many cases, the costs of posting materials on social media sites, for example sending tweets or updating Facebook page, were negligible. In other instances, some advertisements incurring relatively higher costs were placed by candidates and political parties on social media such as Facebook, YouTube or websites targeting specific types of users, based on information about people's interests and voting intentions. See Electoral Commission (2015d).

3.2 Although section 143 of PPERA requires that an imprint of the information of the person who produced an election material should be displayed on election material, such material posted on internet platforms such as websites or social media are excluded because such requirement only applies to election materials in printed form. The Electoral Commission recommends that imprints be included on election materials on internet platforms to improve transparency.⁸

Third parties involvement

3.3 In the UK, individuals or organizations who campaign in the run-up to elections, but are not standing as political parties or candidates, are known as "non-party campaigners" or "third-party campaigners". They are allowed to incur election expenses to influence voters. There are two levels of campaign the third parties can take part. Under a local campaign, any individual or group other than the candidates or their agents, can incur expenses up to certain thresholds⁹ to promote, procure or prejudice the election of a candidate in a single constituency in either a parliamentary or local government election. If the spending is above the thresholds, authorization from the candidate is required and the expenses will be counted towards the candidate's spending limit. Failure to comply with the rules on expenses is a criminal offence for the third parties under the *Representation of the People Act 1983*. In case the third parties wish to participate in a multi-constituency campaign targeting a group of candidates or political parties, the campaigners must register with the Electoral Commission if they plan to incur expenses over the relevant expense thresholds.

3.4 The same rules on spending on social media for the candidates also apply to the third parties. If the materials on the social media meet the criteria of election materials, the relevant spending such as the cost of producing, updating and distributing the material must be duly accounted for.

3.5 Complaints on election expenses are handled by the police, rather than the Electoral Commission. According to the report published by the Electoral Commission in July 2015¹⁰, there were 391 alleged campaign offences

⁸ See Electoral Commission (2015d).

⁹ Expense threshold is £500 (HK\$5,850) for parliamentary elections and £50 (HK\$585) for local government elections, excluding an allowance based on the size of electorate. For multi-constituency election campaign, the expense threshold is £20,000 (HK\$234,000) in England, and these thresholds differ across other parts of the UK.

¹⁰ At the time of the publication of this report, about a third of the 45 police forces in the UK have yet to report any complaint cases.

recorded by the police during the 2015 general election. The most commonly reported offence was the lack of election imprint (71 cases), followed by false statement made by candidates (70 cases). There was no mention of complaints relating to social media in the report.

4. Regulation in New Zealand

Election advertisements using social media

4.1 The *Electoral Act 1993* regulates election advertisement which is defined under the law as materials reasonably be regarded as encouraging or persuading voters to vote for or against a candidate or a party in any medium. While the law does not have specific provisions on social media, the Electoral Commission of New Zealand has issued guidelines on the use of social media.

4.2 All materials on social media are election advertisements if they meet the legal definition of election advertisement, with the exception of expressing personal political views. It is the Electoral Commission's practice to examine the content on the social media as a whole to determine if the definition is met. A promoter statement¹¹ must be placed on the advertisement on social media. Any costs incurred on election advertisements on social media are considered as election expenses including paid-advertising, production or designing costs of the advertisements, and website-hosting fee. Yet the costs of setting up and maintaining the hardware and software infrastructure of a website are excluded. Candidates must declare these expenses in their returns.

Exemption for personal political views

4.3 The *Electoral Act 1993* provides an exemption¹² for election advertisement that excludes "the publication on the internet or other electronic medium personal political views by an individual who does not make or receive payment in respect of the publication of those views". Under this

¹¹ The statement must contain the name and address of the promoter. Under the Electoral Commission guidelines, there is no need to put the statement in each picture, article and post on a website, provided the statement is contained on the home page or the page that contains the election advertising. On Facebook, the Electoral Commission recommends to put the statement in the "About" section. For other social media like Twitter, YouTube or Pinterest, the statement can be included in the landing page.

¹² The exemption was introduced in 2010 in an amendment to the *Electoral Act 1993*, replacing the original provision that did not include the publication on a non-commercial basis of personal political views on the internet, which was by then known as blog, in the definition of election advertisement.

exemption, individual posts or comments on interactive websites, and election advertisements shared on the internet are not election advertisements, unless payment is involved. The law does not define "personal political views by an individual", although the Electoral Commission guidelines generally set it against the views expressed on behalf of a party or a group.

4.4 Despite the exemption in place, the interpretation of the exemption was among the subjects of arguments in two recent court cases relating to election advertisements disputes. In *Greenpeace of New Zealand Incorporated & Ors v Electoral Commission [2014]*, the submission from the green group claimed that the exemption of "personal political views by an individual" could apply to the group concerning its dedicated website featuring the stances of political parties on climate change issues. However, such posts on the website were regarded as election advertisements by the Electoral Commission. The court was of the view that a "group" could not be treated as "an individual" and ruled that the exemption could not apply.¹³ In *Watson & Jones v Electoral Commission [2015]*, the court did not accept the submission of the Electoral Commission on the interpretation over "making or receiving payment in respect of the publication of personal political views" and whether a group of individuals can express personal political views. While the court declared the concerned materials were not election advertisements, the Electoral Commission has recently filed to seek further clarification from the court over the meaning of election advertisement.¹⁴

¹³ In *Greenpeace of New Zealand Incorporated & Ors v Electoral Commission*, the High Court ruled that it was the legislative intent of the Parliament to refer an individual as a natural person when the Parliament considered the exemption provision. However, the court, for other reasons, did not make any declaration whether the dedicated website, known as Climate Voter, was an election advertisement. See *Greenpeace of New Zealand Incorporated & Ors v Electoral Commission [2014]* NZHC 2135 [8 September 2014].

¹⁴ In *Watson and Jones v Electoral Commission*, a song writer and a music video producer sought declaration from the High Court of New Zealand that their creation of a song and a related music video about a candidate in the run up to the election in September 2014 were not election advertisements as decided by the Electoral Commission. The song, costing NZ\$721(HK\$3,818) to produce, was on sale via iTunes, while the related music video was posted on YouTube for free. An argument put forward by the Commission was that the duo was a group instead of an individual expressing personal political views, and that the song writer was paid to publish his view when the song was downloaded by the public. The court did not accept the submission of the Electoral Commission and declared that the song and music video were not election advertisements. The court ruled that "allowing more than one individual to express their political views on electronic media does not damage participant equality and enhances participant freedom." See *Watson and Jones v Electoral Commission [2015]* NZHC 666 [2 April 2015]. The Electoral Commission has filed to seek further clarification of the meaning of election advertisement from the Court of Appeal in May 2015.

Third parties involvement

4.5 The *Electoral Act 1993* provides for a third parties regime, permitting any individual or group, known as a promoter under the law, to initiate or instigate an election advertisement for or against a candidate or a party. All promoters are obliged to get authorization from the candidates or parties for publishing election advertisements, and the expenses so incurred are also counted towards the relevant candidates or political parties' spending limits. The only exception to the authorization and expense allocation requirement is when a promoter attacks a political party in its election advertising.

4.6 A promoter has to register¹⁵ with the Electoral Commission if he or she intends to spend over the specified threshold of NZ\$12,300 (HK\$61,000), and must file a return for expenses totaling over NZ\$100,000 (HK\$496,000) but under the spending limit of NZ\$308,000 (HK\$1.52 million). A promoter who does not spend over the threshold is not required to register and disclose to the Electoral Commission how much he or she has spent although the promoter is advised to keep records of his or her spending. It is an offence if a promoter fails to abide by the registration and expense declaration requirements.

4.7 As far as the use of social media by third parties is concerned, all the election advertising rules including the exemption of personal political views apply. Complaints on the use of social media were handled by the Electoral Commission and may be referred to the police.¹⁶

¹⁵ Under sections 204K and 207K of the *Electoral Act 1993*, a registered promoter cannot be a constituency candidate, a list candidate, a party, an overseas person, and a person involved in the administration of the affairs of a candidate in relation to the election campaign, or the affairs of a party. An overseas person is defined as an individual who resides outside New Zealand, and is not a New Zealand citizen or registered as an voter, or a body corporate incorporated outside New Zealand, or an unincorporated body that has its head office or principal place of business outside New Zealand.

¹⁶ In the 2014 election, the Electoral Commission received 96 specific complaints on the use of social media in relation to the ban under section 197 of the *Electoral Act 1993* on all promotion activities by any person to influence voters on the election day. Twenty-four complaints were referred to the police for follow-up, with about half of them being related to sharing a Facebook page with a video and canvassing message urging people to vote for a particular party. See Report of the Electoral Commission on 2014 General Election. Among others referred to the police included sporting celebrities tweeting their choices of votes on election day to their followers. It was reported that the police was still investigating the cases in July 2015.

5. Regulation in Canada

Election advertisements using social media

5.1 In Canada, election advertising is defined under section 319 of the *Canada Elections Act* as the transmission by any means during an election period of an advertising message that promotes or opposes a registered political party or the election of a candidate. Under section 376(1) of this legislation, any cost incurred to promote or oppose any candidates or political parties during a federal election will be considered as election expenses. According to election guidelines issued by Elections Canada, such expenses include the cost associated with the design and development of online communications including websites, videos posted on YouTube, and any cost of staff to maintain the social media.¹⁷ Candidates and political parties are required to set out in the electoral campaign returns the details of such election expenses to Elections Canada under sections 477.59(2) and 437(2) of the *Canada Elections Act*. All candidates and political parties must spend within the relevant election expenses limits in federal elections. Any election advertising will require the authorization of the relevant candidate or the political party, and this authorization must be mentioned in or on the advertisement as a form of identification.¹⁸

Exemption for personal political views

5.2 Under section 319(d) of the *Canada Elections Act*, "the transmission by an individual, on a non-commercial basis on what is commonly known as the internet, of his or her personal political views" is excluded from the definition of election advertising. The term "personal political views" has not been defined in the legislation. In order to clarify whether materials communicated on the internet will be considered as election advertising, Elections Canada issued an interpretation in July 2015 stating that any text, emails and messages sent for free over social media networks such as Twitter or Facebook will not be considered as election advertising unless they incur a

¹⁷ Elections Canada (2015e).

¹⁸ Under Elections Canada's guidelines, any election advertising has to be authorized by the official agent of a candidate or a political party. This authorization has to be mentioned in the message. Where the authorization statement cannot be included on the advertising message on the internet because of its size, this is acceptable if the statement is made immediately apparent to the viewer by following the link in the advertising message.

placement cost, i.e. the cost to place sponsored stories, banner-styled advertisements on a home page or pre-roll advertisements that play before a video chosen by the viewer.¹⁹

Third parties involvement

5.3 The *Canada Elections Act* provides for a third party regime²⁰ under which any members of the public such as individuals or groups, other than the candidates or the political parties, may incur election advertising expenses provided that they do not spend over CAN\$500 (HK\$2,927). Neither such individuals or groups have to seek authorization from the candidates or political parties nor do they have to report their spending to the regulatory body. However, any individuals or groups must register immediately after incurring election advertising expenses over the specified threshold, and these registered third parties are then subject to an advertising expense limit under the law and obliged to declare their expenses to Elections Canada. It is a criminal offence for the third parties to breach the spending limit or failing to register as required.

5.4 Where materials posted by third parties on the internet do not qualify as election advertising because no placement cost is incurred, the third parties will not have to count the costs of the materials, for example the cost to produce and host a website, towards their spending thresholds.²¹

5.5 A summary table comparing the salient features of the regulatory framework in the three places studied is given in the **Appendix**.

¹⁹ Placement cost is the cost charged to purchase advertising space. Even when advertising space is provided for free or at a reduced rate, there would still be a placement cost which is the cost that would normally be charged by the provider for such advertising space. The on-going costs of creating and maintaining the website are, however, not placements costs. See Elections Canada (2015d).

²⁰ Eligible third parties are Canadian citizens, permanent residents, a corporation in Canada or any group in charge by Canadian citizens or permanent residents.

²¹ See Elections Canada (2015c).

Regulation of the use of social media in election in the United Kingdom, New Zealand and Canada

	United Kingdom	New Zealand	Canada
Definition of election advertisement	<ul style="list-style-type: none"> Under section 85(3) of the <i>Political Parties, Elections and Referendums Act 2000</i> (PPERA), election material is material which can reasonably be regarded as intended to promote, procure or prejudice electoral success at any relevant election for political parties or candidates. Election materials that meet the public test of aiming at the public and the purpose test of intending to influence voters to vote for or against a candidate or a party are subject to regulations such as spending limits. 	<ul style="list-style-type: none"> Under section 3A of the <i>Electoral Act 1993</i>, an election advertisement means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to vote, or not to vote a type of candidate or party described or indicated by reference to views or positions that are or are not held or taken. 	<ul style="list-style-type: none"> Under section 319 of the <i>Canada Elections Act</i>, election advertising means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated.

Regulation of the use of social media in election in the United Kingdom, New Zealand and Canada (cont'd)

	United Kingdom	New Zealand	Canada
Exemption provided under the law for election advertisement on social media	<ul style="list-style-type: none"> None. 	<ul style="list-style-type: none"> Election advertisement does not include personal political views published online by an individual, provided the individual does not make or receive payment for publishing those views.²² 	<ul style="list-style-type: none"> Election advertisement does not include the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views.²³

²² Section 3A(2)(e) of the *Electoral Act 1993*. The law does not define personal political views by an individual.

²³ Section 319 of the *Canada Elections Act*. Under this legislation, the term "personal political views" has not been defined. Under Elections Canada guidelines, as long as the election message met the statutory criteria of "promoting or opposing" a party or candidate and has a placement cost, it is an election advertisement. Others are not.

Regulation of the use of social media in election in the United Kingdom, New Zealand and Canada (cont'd)

	United Kingdom	New Zealand	Canada
Regulation of election advertisements on social media	<p><u>Election expenses</u></p> <ul style="list-style-type: none"> Any spending on election materials on social media published by candidates is counted towards the spending limit and must be reported in the return on election expenditure.²⁴ 	<p><u>Election expenses</u></p> <ul style="list-style-type: none"> All items and costs of internet advertising as well as other forms of advertising and publicity must be filed in the candidate's return to the Electoral Commission.²⁵ 	<p><u>Election expenses</u></p> <ul style="list-style-type: none"> Each candidate and political party is respectively required to set out in the electoral campaign return the details of election advertising to the Chief Electoral Officer.²⁶

²⁴ Schedule 8 of PPERA.

²⁵ Sections 205 and 205K of the *Electoral Act 1993*.

²⁶ Sections 376 (1) and (3) of the *Canada Elections Act* define election expense as any of the following: (a) any cost incurred, or non-monetary contribution received, by a registered party or a candidate in relation to the production of advertising or promotional material; or (b) the distribution, broadcast or publication of such material in any media or by any other means, during the election period.

Regulation of the use of social media in election in the United Kingdom, New Zealand and Canada (cont'd)

	United Kingdom	New Zealand	Canada
Regulation of election advertisements on social media (cont'd)	<ul style="list-style-type: none"> Under election guidelines, a candidate must include advertising cost of any kind, including the design and production cost of websites or YouTube videos, as part of their election spending. As for material on a website for people to print off for their personal use such as window posters or petition forms, the design and website costs are also counted as candidate spending. 	<ul style="list-style-type: none"> Election advertising on the internet includes the costs incurred in preparing, designing and publishing the advertisement, website hosting fees but excludes the costs of setting up and maintaining the hardware and software infrastructure of a website. Paid-advertising on Facebook or Twitter is also counted as election expenses.²⁷ 	<ul style="list-style-type: none"> Any associated costs, such as costs for producing videos, websites and other on-line content, are election expenses and have to be reported as such under sections 477.59(2) and 437(2) of the <i>Canada Elections Act</i>.

²⁷ Candidates are required to file an election expense return on advertising expenses in traditional media, internet advertising and other publicity. In its filing, the candidate might also include the salary of staff hired to manage social networking and communications websites, and expenses in relation to the design and production of smartphone applications.

Regulation of the use of social media in election in the United Kingdom, New Zealand and Canada (cont'd)

	United Kingdom	New Zealand	Canada
Regulation of election advertisement on social media (cont'd)	<p><u>Promoter statement</u></p> <ul style="list-style-type: none"> • Not required as such requirement only applies to election materials in the printed form media. 	<p><u>Promoter statement</u></p> <ul style="list-style-type: none"> • A promoter statement containing the name and address of the promoter must be incorporated in election advertisements. 	<p><u>Promoter statement</u></p> <ul style="list-style-type: none"> • Messages of authorization from the candidates must be incorporated in election advertisements.

Regulation of the use of social media in election in the United Kingdom, New Zealand and Canada (cont'd)

	United Kingdom	New Zealand	Canada
Regulation of third party participation in election campaigns	<ul style="list-style-type: none"> Under a local campaign, any individual or group other than the candidates or their agents, can incur expenses up to certain thresholds to promote, procure or prejudice the election of a candidate in a particular constituency, ward or other electoral area in a parliamentary or local government election. If the spending is above the threshold, authorization from the candidate is required and the expenses will be counted towards the candidate's spending limit. 	<ul style="list-style-type: none"> A third party can participate as a promoter who initiates or instigates an election advertisement for or against a candidate or party. Prior written authorization is required from the candidate or party for publication of advertisement promoting the candidate or party, and the expenses so incurred are counted towards the relevant candidate or political party's spending limit. The only exception to the authorization and expense allocation requirement is when a promoter attacks a political party in its election advertising. 	<ul style="list-style-type: none"> A person or a group other than a candidate or a registered party may incur election advertising expenses provided that they do not spend over the specified threshold. They are not required to seek authorization from the candidates or political parties or report their spending to Elections Canada.

Regulation of the use of social media in election in the United Kingdom, New Zealand and Canada (cont'd)

	United Kingdom	New Zealand	Canada
Regulation of third party participation in election campaigns (cont'd)	<ul style="list-style-type: none"> If third parties wish to participate in a multi-constituency campaign targeting a group of candidates or political parties, the third parties must register with the Electoral Commission as non-party campaigners if they plan to incur expenses over the relevant expense threshold. 	<ul style="list-style-type: none"> There is an additional requirement for third parties if they spend more than the specified expense threshold. Those who spend above the threshold have to register with the Electoral Commission and are subject to a spending limit. Those who spend less than the specified threshold are not required to register and disclose their spending to the Electoral Commission. 	<ul style="list-style-type: none"> A person or group must register with Elections Canada as a third party immediately after incurring election advertising expenses above the specified threshold. The third party is then subject to an election advertising expense limit for the third party and has to declare their expenses to Elections Canada.

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