

立法會
Legislative Council

LC Paper No. CB(2)877/03-04(02)

Ref : CB2/SS/4/03

**Subcommittee on Particulars Relating To Candidates on Ballot Papers
(Legislative Council) Regulation**

Background paper prepared by Legislative Council Secretariat

**Proposal of printing of names and emblems of political parties or
organizations or candidates' photographs on ballot papers**

Purpose

This paper provides background information on past discussions of the Legislative Council (LegCo) on the proposal of printing of names and emblems of political parties or organizations or candidates' photographs on ballot papers.

The Regulation gazetted in 1999

2. Following public consultation in June 1999, the Electoral Affairs Commission (Printing of Name of Organization and Emblem on Ballot Paper) (Legislative Council) Regulation (L.N. 306 of 1999) made by the Electoral Affairs Commission (EAC) was published in the Gazette on 10 December 1999. The Regulation set out the procedure to be followed for having certain "particulars", i.e. the name, an abbreviation of the name or an emblem of an organization or an emblem of a natural person printed on ballot papers for use in a LegCo election. The Regulation was scrutinized by the Subcommittee on subsidiary legislation relating to 2000 Legislative Council election.

3. While the majority of the members of the Subcommittee supported the Regulation in principle, they had raised concern about the technical and implementation aspects of the proposal. These included -

- (a) the registration procedure was very cumbersome and should be simplified;

- (b) the EAC being a statutory body should not be involved in sensitive and political issues. The role of EAC should be confined to ascertaining whether a candidate was authorized to use the "particulars" for printing on ballot papers. Although the approval of EAC per se was not required, it could be empowered to refuse to grant an application on specific grounds;
- (c) the EAC should not limit the time for accepting applications for registration to a specified period before a general election was held; and
- (d) the requirement for renewal of the registered "particulars" before the next general election should be removed.

4. As the Subcommittee did not have sufficient time to discuss members' substantive views on the Regulation under the negative vetting procedure, it requested the representatives of the Constitutional Affairs Bureau and Registration and Electoral Office (Administration's team) to consider repealing the Regulation with a view to having it gazetted again with or without amendments. However, the Registration and Electoral Office had advised that the timetable could not be postponed if the proposal was to be implemented in time for the 2000 LegCo elections. After deliberation, the Subcommittee agreed that the Chairman should move a motion to repeal the Regulation. The motion was passed by LegCo on 19 January 2000. A copy of the speech made by the Chairman of the Subcommittee when moving the motion is in **Appendix I**.

5. In the course of preparing for the 2004 LegCo election, the Administration requested EAC to revisit the proposed scheme in the light of the concerns expressed by Members.

Discussions of the Panel on Constitutional Affairs

6. The Panel was consulted on the revised proposed scheme at the meetings on 24 April and 20 October 2003. While members in general supported the proposal, they had raised concerns or made comments relating to the scheme for the consideration of the Administration and EAC.

Panel meeting on 24 April 2003

7. On 24 April 2003, the Administration' team briefed the Panel on the revised preliminary proposal of EAC to print the following items on ballot papers for use in the LegCo elections -

- (a) the names and emblems of political parties or organizations or non-political organizations to which candidates belonged, or the personal emblems of independent candidates; and
- (b) the photographs of candidates.

8. Some Members raised concern that under the proposed scheme, a commercial organization which sponsored a candidate in an election could promote its business by having its name or logo registered and printed on the ballot paper. The Panel requested the Administration and the EAC to review the proposed arrangements with a view to plugging any loopholes which might give rise to abuse. These members requested the Administration's team to take into account their comments in finalizing the design of the ballot paper. An extract from the minutes of the meeting is in **Appendix II**.

Panel meeting 20 October 2003

9. On 20 October 2003, the Administration's team briefed the Panel on the essential features of the draft Printing of Name, Emblem and Photograph on Ballot Paper (Legislative Council) Regulation as follows -

- (a) application for registration of name and emblem;
- (b) processing of application;
- (c) request for printing of registered name and emblem, and photograph on ballot paper; and
- (d) de-registration of name and emblem.

10. The Panel requested the Administration's team to consider whether -

- (a) the words "Independent candidate" to describe a candidate without political party background should be replaced with the words "Non-affiliated candidate";
- (b) several candidates on the list should be allowed to use a common emblem;
- (c) an emblem of a prescribed body or a natural person should be allowed to consist of a photograph; and
- (d) the design of the ballot paper should be improved, e.g. the names of candidates should be in bold-type characters or in larger size.

11. For details on other comments made by members and the responses of the Administration's team, please refer to the extract from the minutes of the meeting in **Appendix III**.

12. The Panel also requested the Administration's team to provide the relevant common law definition/interpretation which EAC could rely upon to refuse an application for registration of the abbreviation of a name or an emblem on the ground that the subject was "offensive". The Administration's response was circulated to Members vide LC Paper No. CB(2)697/03-04(01) on 15 December 2003 (**Appendix IV**).

Council Business Division 2
Legislative Council Secretariat
5 January 2004

Draft speech by Hon Ronald ARCULLI, JP

**Motion to repeal the Electoral Affairs Commission
(Printing of Name of Organization and Emblem on Ballot Paper)
(Legislative Council) Regulation at the Legislative Council on 19 January 2000**

Madam President,

In my capacity as the Chairman of the Subcommittee on subsidiary legislation relating to 2000 Legislative Council election, I move the motion standing in my name on the agenda.

2. The Electoral Affairs Commission (Printing of Name of Organization and Emblem on Ballot Paper) (Legislative Council) Regulation sets out the procedure to be followed for having certain particulars, i.e. the name, an abbreviation of the name or an emblem of an organization or an emblem of a natural person printed on a ballot paper for use in a LegCo election (excluding an Election Committee subsector election).

3. The Subcommittee has met with the Administration's team, i.e. representatives of the Administration and the Registration and Electoral Office to discuss the Regulation on three occasions.

4. As proposed under the Regulation, applications for registration will only be invited in the year in which a LegCo election is to be held. If the EAC is of the opinion that it may refuse an application, the applicant will be given 14 days to lodge with the EAC a statement of reasons why EAC should not refuse to grant the application or to make a request to vary the application. The EAC will compile a Provisional Register for all the applications that it intends to grant for publication in the newspapers and for public inspection. Upon receipt of an objection, the EAC will hold a hearing. The EAC's decision is final and not subject to any appeal. An applicant has to apply to the EAC for renewing the registered particulars if the applicant would like to retain the registered particulars in the next Register, otherwise, the particulars will cease to be registered.

5. Apart from a member who has expressly indicated that he does not support the Regulation, the Subcommittee supports the proposal in principle. However, the majority of the members of the Subcommittee have raised concern about the technical and implementation aspects of the proposal.

6. I would like to quote two examples of the confusion that would arise upon the implementation of the Regulation.

Example 1

Under Section 7(1), EAC may refuse an application made by organization A for the registration of a name or an emblem if the name or an emblem is identical to or closely resembles that of organization B on the condition that -

- (i) the name or emblem of organization B is registered; and
- (ii) organization B has applied for renewal of its application.

Since the two conditions must co-exist, EAC has no power under section 7 to refuse the application of organization A if organization B does not make an application to renew its registration. The Administration's team does not consider the arrangement would pose any problem because when the Provisional Register containing details of the application of organization A is published, any objection raised by organization B will be considered by EAC. In any event, if organization B has not made an application for renewal, its name or emblem will not be entered in the new register.

However, the Administration team's has not addressed the question of the failure of organization B to object; and the question of the incapability of organization B to object to the application because it has ceased to exist.

Example 2

Under the Regulation, applications for registration should be made during a "relevant period" which falls within the nine months immediately preceding the date of a general election of LegCo.

The Subcommittee is concerned about this scenario : Shortly after the 2000 LegCo election, organization A adopts an emblem which is similar to a registered emblem of organization B. However, organization A cannot apply for registration of the emblem at that time because of the existing arrangement. When organization A submits an application for registration of the emblem in 2004 for the purpose of printing the emblem on a ballot paper of the 2004 LegCo election, can EAC refuse its application on ground that the emblem is similar to that of organization B which has also applied for renewal of its emblem? One has to bear in mind that organization A has been using the emblem for over 3 years.

7. To sum up, some members consider that the registration procedure under the Regulation is very cumbersome and should be simplified. Since candidates are at present free to use any names and emblems in election publicity materials without subject to any registration procedure, they have proposed that the registration procedure should be replaced with a notification procedure. The EAC's role should be confined to ascertaining whether a candidate is authorized to use the particulars. Although the EAC's approval per se is not required, it may refuse to accede to the request on specified grounds. These members have also expressed concern that a procedure which has imposed too many restrictions might compromise political freedom and thinking. As the EAC is an independent statutory body, it is undesirable for it to be involved in sensitive and political issues.

8. Other members have proposed that applications for registration should not be restricted to a specified period which falls within the nine months immediately preceding the date for a general election. In addition, the requirement for applicants

to apply for renewal of the registered particulars before the next LegCo general election should be removed. Applicants should be allowed to retain the registered particulars until such time when the EAC decides that the particulars should cease to be registered, such as when an organization has ceased operation.

9. All these issues have not been adequately addressed by the Administration's team.

10. In view of the time constraint for scrutinizing the Regulation under the negative vetting procedure and members' substantive views on the Regulation which is very complex, the Subcommittee has requested the Administration's team to consider repealing the Regulation at this Council meeting, with a view to having it gazetted again with or without amendments, after conclusion of deliberation by the Subcommittee. The Administration's team has advised that applications for registration will be invited in February 2000, in order that the Register containing the registered particulars will be compiled in good time before the commencement of the nomination period for the 2000 LegCo election. If the proposal is to be implemented in time for the 2000 LegCo election, the timetable could not be postponed.

11. Nine of the 13 members attended the Subcommittee's meeting on 13 January 2000. In view of the EAC's position on the timetable, members have agreed that it is impracticable for the Subcommittee to complete scrutiny and also propose amendments to the Regulation before the expiry of the scrutiny period on 19 January 2000, not to mention the time other Members need for consideration of the proposed amendments. In addition, it is undesirable for LegCo to impose a revised proposal on the EAC without adequate consultation. After deliberation, it is the consensus of the members present at the meeting that the Regulation should be repealed.

12. I would also like to say a few words on the response of the Administration' team to the Subcommittee's decision. In the view of the Administration's team, the proposal is workable. However, given members' views on the proposal, the Administration's team also considers that it is better for LegCo to repeal the Regulation

than to put forward a revised proposal which might have problems in implementation. While the EAC would reconsider the proposal having regard to the views expressed by the Subcommittee, the proposal will not be implemented for the 2000 LegCo election.

13. With these remarks, I urge members to support the motion.

**Extract from minutes of meeting of
Panel on Constitutional Affairs on 24 April 2003**

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IV. 2004 Legislative Council election : Printing of names and emblems of political parties or organisations or candidates' photographs on ballot papers
(LC Paper Nos. CB(2)1831/02-03(01) to (03))

24. CEO briefed members on the paper prepared by the Registration and Electoral Office (REO) (LC Paper No. CB(2)1831/02-03(01)), which set out the revised preliminary proposal of EAC to print the following items on the ballot papers for use in the LegCo elections -

- (a) the names and emblems of political parties or organisations or non-political organisations to which candidates belonged, or the personal emblems of independent candidates; and
- (b) the photographs of candidates.

Issues raised by members

Registration of names and emblems

25. Mr CHEUNG Man-kwong said that Members belonging to the Democratic Party were in support of the proposal. Referring to the vetting criteria for applications for registration of names and emblems, Mr CHEUNG said that an application could be rejected on the ground that the name or emblem was offensive. He opined that appropriate and clearly defined criteria should be put in place to guard against political censorship encroaching upon the freedom of expression. In response, SCA said that in making a decision on whether to grant or refuse an application made by an organisation or individual, EAC would act in accordance with the law and the provisions in the Basic Law which guaranteed rights and freedoms.

Adm 26. Mr SZETO Wah asked whether a political party or organisation would be allowed to register different emblems for different lists of candidates to facilitate identification. SCA replied that the point raised by Mr SZETO would be reflected to EAC for its consideration.

27. Mr HUI Cheung-ching said that Members belonging to the Hong Kong Progressive Alliance were in support of the proposal. Referring to Annexes A and B of REO's paper, Mr HUI questioned about the time required for

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processing straightforward applications for registration of names and emblems under the fast-track approach. CEO replied that under this approach, the maximum time required for registration during the first registration cycle and any subsequent cycle would be 10 weeks and eight weeks respectively. As most of the political parties or organisations fielding candidates to run in elections were well-known, long-established parties or organisations, it would in practice take a shorter time for the registration process to be completed.

Logos of companies in support of candidates

Adm 28. Mr NG Leung-sing pointed out that in past elections, some candidates were supported by business sectors and commercial organisations. He expressed concern that under the proposed arrangements, a commercial organisation which sponsored a candidate in an election could promote its business by having its name or logo registered and printed on the ballot papers. The Chairman opined that the ballot papers should not be used for publicity other than for the purposes of the elections. He asked the Administration and EAC to review the proposed arrangements with a view to plugging any loopholes which might give rise to abuse. SCA agreed to consider the issues raised by members.

Ballot paper for geographical constituency (GC) elections

Adm 29. A sample of the possible design of the ballot paper which would be used for the 2004 LegCo GC elections was tabled at the meeting for members' reference. Members noted how different lists of candidates in a GC, with the names and emblems of the political parties or organisations or independent candidates, and the photographs of the candidates would appear on the ballot paper. SCA also demonstrated how the ballot paper, when folded in A4 size, could easily be slotted into the newly designed ballot box.

Adm 30. In relation to the design of the ballot paper, members raised the following points for the consideration of the Administration -

- (a) the names of the candidates, particularly the Chinese names, should be larger in size and in bold print for easy identification;
- (b) the emblem should be printed beside or before the name of the political party or organisation to allow more space for the photographs of the candidates;
- (c) whether hand-drawn portraits could be used instead of personal photographs;
- (d) the design of the ballot paper should also cater for GCs which might end up with more than 12 lists of candidates; and

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- (e) the Administration might propose a number of options on the design of the ballot paper for the consideration of members, having regard to the views expressed.

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**Extract from minutes of meeting of
Panel on Constitutional Affairs on 20 October 2003**

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III. Subsidiary legislation on printing of names, emblems and photographs on ballot papers

(LC Paper Nos. CB(2)104/03-04(03) and 119/03-04(01))

3. Chief Electoral Officer (CEO) briefed the Panel on the paper prepared by the Registration and Electoral Office on the major features of the draft Printing of Name, Emblem and Photograph on Ballot Paper (Legislative Council) Regulation (the Regulation) to be made by the Electoral Affairs Commission (EAC) under the Electoral Affairs Commission Ordinance (Cap. 541) (LC Paper No. CB(2)119/03-04(01)). He informed the Panel that the Regulation was being drafted, and would contain provisions for -

- (a) application for registration of name and emblem of a prescribed body (a political party or organization or a non-political organization) or the emblem of a natural person;
- (b) processing of application;
- (c) request for printing of registered name and emblem, and photograph on ballot paper; and
- (d) de-registration of name and emblem.

Copies of the proposed sample of the ballot paper were tabled at the meeting for the Panel's reference (Appendix B to LC Paper No. CB(2)119/03-04(01)).

Issues raised by members

Reference to "independent candidate" (獨立候選人) on ballot paper

4. Mr Howard YOUNG said that he preferred to use the reference "non-affiliated candidate" (無黨派候選人) in place of "independent candidate" (獨立候選人) to describe a candidate without political party background. The Chairman asked the Administration whether the term "independent candidate" was defined in existing law.

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5. Acting Permanent Secretary for Constitutional Affairs (PS/CA (Acting)) said that "independent candidate" was meant to describe a candidate who wished to specify his status as a candidate with no political party background. As the Regulation was being drafted, Mr YOUNG's proposal to substitute the term with "non-affiliated candidate" would be conveyed to EAC for its consideration.

Registration of name and emblem

6. Mr Albert HO and Dr YEUNG Sum expressed support in principle for the Regulation which sought to provide more information on the background of the candidates and facilitate easy identification of the candidates by electors.

7. Ms Cyd HO asked whether there would be "political vetting" in processing applications of organizations and groups to EAC for registration of their names and/or emblems. In her view, there were hurdles in the registration mechanism under the Societies Ordinance, as shown by the fact that the application of registration of some activist groups and anti-government bodies (e.g. the Anti-Tung Solidarity) had so far not been granted under the Ordinance. She said that in the absence of a certificate of registration issued under the Societies Ordinance, it was unlikely that the application of the organization or group concerned for registration of its name and emblem could be approved by EAC.

8. Secretary for Constitutional Affairs (SCA) said that EAC was an independent body which exercised its statutory authority as provided under the law. The laws in Hong Kong, complied with the relevant international covenants on human rights and the Hong Kong Bill of Rights Ordinance. Under the proposed registration regime, EAC would process an application for registration according to the applicant's name as shown on the relevant certificate issued under the Societies Ordinance or the Companies Ordinance. He assured members that there would be no question of political vetting in processing applications.

9. Ms Cyd HO said that as explained in the Administration's paper, EAC might refuse to grant an application made by a prescribed body or a natural person for the registration of the abbreviation of a name or an emblem, if it included anything the use of which was likely to amount to the commission of an offence. In her view, that power of EAC could not provide an adequate safeguard against abuse. In illustrating her point, she said that at present, there was no legislation in Hong Kong making discrimination against race, age and sexual inclination etc an offence. Hence, an emblem, or the abbreviation of a name, which manifested a discrimination of the kind, might be allowed to be registered and printed on ballot paper, as there was no legal basis for EAC to refuse the application.

10. Mr TAM Yiu-chung said that the name of an organization might reflect its political platform. He expressed concern whether printing of the registered name of an organization on a ballot paper would have the effect of promoting the political platform of the organization. SCA replied that it was not uncommon for

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the names of political parties or groups to reflect their political platform or political stance. Many of these political parties or groups were long established and well known to electors. He noted Mr TAM's concern and reiterated that EAC would act in accordance with the relevant statutory provisions in processing applications for registration of abbreviations and emblems of prescribed bodies.

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11. Ms Emily LAU enquired about how EAC would exercise its power to refuse an application for the registration of the abbreviation of a name or an emblem, on the ground that the abbreviation or emblem was obscene, indecent or offensive. SCA said that EAC would have regard to the relevant criteria laid down in existing legislation in deciding whether an abbreviation or an emblem was obscene or indecent. He added that there were also case laws and principles under the common law which EAC could rely upon for determining whether an abbreviation or an emblem was "offensive". Ms Emily LAU requested the Administration to provide the relevant common law definition/interpretation for members' reference.

12. Ms Audrey EU pointed out that a precondition for the registration of the name and emblem of a prescribed body was that the body must have been registered under the Societies Ordinance or the Companies Ordinance. She expressed the view that, in considering an application, EAC should not assume a role in judging whether a name of a prescribed body was obscene, indecent or offensive. In response, PS/CA (Acting) clarified that the criteria for refusal of registration on grounds of "obscene, indecent or offensive" elements applied only to the registration of the abbreviation of a name of a prescribed body, or the registration of an emblem of a prescribed body or of a natural person. He said that EAC had no role to play in deciding whether the name of a body was appropriate for registration for the purpose of election. EAC would only verify the name of a prescribed body against that appearing on the relevant certificate, including a certificate of registration issued under the Societies Ordinance or the Companies Ordinance, and EAC would approve the application of a prescribed body for registration of the name as shown on the relevant certificate.

13. Mr WONG Sing-chi pointed out that an organization was required to apply for registration under the Societies Ordinance within one month after the organization had been established. During the one-month period, the organization was allowed to conduct its normal business, notwithstanding without a certificate of registration. However, under the proposed Regulation, EAC could not approve an application of a prescribed body for registration of its name and emblem, in the absence of a certificate of registration issued under the Societies Ordinance in respect of the body. Mr WONG opined that the requirement under the Regulation was unfair to newly established organizations which failed to get a certificate of registration under the Societies Ordinance in time for them to apply to EAC for registration of their names and emblems. This would defeat the objective of encouraging political parties or groups or other organizations to take an active part in elections.

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14. SCA said that the Regulation was intended to prescribe a legal process to facilitate EAC in exercising its statutory function in relation to processing applications for registration and printing of relevant particulars of prescribed bodies and candidates on ballot papers. He added that clear provisions would be set out in the Regulation relating to annual registration cycles and the relevant cut-off dates in relation to the registration cycles to enable prescribed bodies and candidates to plan their election activities appropriately. The provisions would also serve to minimize the possibility of misuse of names and emblems of prescribed bodies or candidates by other parties.

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15. Mr Albert HO enquired whether several candidates forming a list to stand in an election could use a common emblem. Mr James TO opined that he saw no reasons why in such cases the candidates should be prohibited from using the same emblem. PS/CA (Acting) said that if the candidates wished to specify themselves as independent candidates, they should not use a common emblem in order not to create confusion to the electors. Nevertheless, the Administration agreed to convey members' views to EAC for consideration.

16. Miss CHOY So-yuk asked whether EAC would consider imposing a condition requiring that a prescribed body must have been registered under the Societies Ordinance or the Companies Ordinance for a minimum period of time before it could apply to EAC for registration of its name and emblem. SCA responded that he understood that EAC did not intend to impose such a requirement.

Printing of registered name and emblem and photograph on ballot paper

17. Ms Audrey EU enquired about the rationale for the requirement that an emblem of a prescribed body or a natural person should not be a photograph or contain a photograph. Mr TO said that a candidate might wish to register an emblem which contained a photograph of a supporter of his. The Chairman said that for himself, his photograph represented his emblem.

Admin

18. CEO said that an emblem in essence referred to a design, not a photograph. Moreover, the printing of a photograph of a person who was not a candidate on the ballot paper would create confusion to the electors. SCA agreed to reflect members' views to EAC for further consideration.

19. Mr SIN Chung-kai asked whether a candidate who did not request EAC to print the registered name of the political party or political organization to which he belonged on a ballot paper would be accused of committing false representation.

20. Mr NG Leung-sing said that there had been an increasing number of "alliance" groups formed with certain avowed objectives. He enquired whether a candidate who was a member of such organizations would be permitted to stand in the election as an independent candidate.

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21. PS/CA (Acting) replied that it was entirely up to a candidate to decide whether to make a request to EAC to print the registered name and emblem of a prescribed body on the ballot paper. If the candidate wished to do so, his request must be accompanied by a consent given by the prescribed body concerned.

22. The Chairman asked whether it was the Administration's position to allow individual candidates on the same list to print different names and emblems of prescribed bodies on the ballot paper. The Chairman expressed concern about the problem of having too many different names and emblems in respect of the same list printed on the ballot paper. The Chairman was of the view that since the candidates decided to run in the election as a list in respect of a constituency, they should have the same political platform and be regarded as candidates of the same affiliation. The Chairman considered that the Administration's position on the matter reflected its view on the development of political parties.

23. SCA said that the position of the Administration was that a candidate could request for printing of the registered name and emblem of a political or non-political organization, and his photograph on a ballot paper. SCA further said that in the light of the experience of previous Legislative Council (LegCo) elections, the number of political parties or organizations sponsoring candidates to form a single list had not exceeded two. In view of the Chairman's concern, SCA said that EAC would be requested to consider how to deal with the situation in the event that a list was formed by more than three candidates from different organizations.

24. In response to Ms Audrey EU, PS/CA (Acting) said that where a single candidate was supported by more than one prescribed body, the candidate should request to print the name of only one of the bodies on the ballot paper.

25. Mr TAM Yiu-chung said that the design of the sample ballot paper was quite complicated. He expressed concern that the candidates' names were not conspicuously displayed, and considered that the size of the names should be enlarged for the convenience of electors, in particular the elderly electors. Miss CHOY So-yuk suggested that bold-type characters could be used for the names of the candidates. The Administration explained that in designing the ballot paper, the primary consideration was that the ballot paper should contain the essential information about the candidates. The arabic numerals assigned to the different lists on the ballot paper would also assist electors in voting. CEO undertook to convey members' views on the design of the ballot paper to EAC for consideration.

Admin

26. Miss CHOY So-yuk enquired whether EAC would allow a group photograph containing all, or some, of the candidates on the list to be printed on a ballot paper, and allow photographs of different sizes to be printed. Mr James TO opined that candidates on the same list should be allowed to decide on the size or the format of the photograph(s) to be printed, as long as the photograph(s) was within the space permitted on the ballot paper. The Administration responded

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that EAC took the view that standard-sized photographs of individual candidates should be printed, having regard to the limited space on the ballot paper. It would also minimize unnecessary disputes and allegations of unfair treatment.

Public consultation

27. In response to Ms Emily LAU, CEO said that EAC had not planned to conduct public consultation on the Regulation. SCA added that the Administration had previously briefed the Panel on the proposals at a meeting on 24 April 2003. He said that potential candidates should be aware of the proposals through discussions of LegCo.

Legislative timetable

28. SCA advised members that the Regulation would be gazetted in early December 2003 and subject to negative vetting of LegCo. Applications for registration would commence in February 2004 and the cut-off date for registration was 1 March 2004.

29. The Chairman and Dr YEUNG Sum opined that it would be appropriate for a subcommittee to be set up under the House Committee to scrutinize the Regulation in detail.

Other issues

List voting system for Geographical Constituency (GC) elections

30. In response to Mr Albert HO, SCA said that the Administration had decided against the proposal to allow electors to vote for individual candidates within a list for the GC elections. He said that the issue had been considered by the Bills Committee on Legislative Council (Amendment) Bill 2003.

Compilation of database on e-mail addresses of electors

31. Mr SIN Chung-kai suggested that in conducting the voter registration campaign in early 2004, the Registration and Electoral Office might consider requesting eligible electors to provide, on a voluntary basis, their e-mail addresses for the purpose of facilitating candidates in communicating with the electors. He said that transmission of information through e-mail would be a more convenient and environment-friendly means of enhancing contacts with electors. SCA agreed to refer Mr SIN's proposal to EAC for its consideration.

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Our Ref: CAB in C1/33/8

12 December 2003

Mrs Percy Ma
Clerk to LegCo Panel on Constitutional Affairs
Legislative Council
3/F, Citibank Tower
3 Garden Road, Central
Hong Kong

Dear Mrs Ma,

**Printing of Name, Emblem and Photograph on Ballot Paper
(Legislative Council) Regulation**

At the meeting of the Legislative Council Panel on Constitutional Affairs held on 20 October 2003, the captioned Regulation was discussed. On the issue of how the Electoral Affairs Commission would exercise its power to refuse an application for registration of the abbreviation of a name or an emblem on the ground that the subject was “offensive”, the Administration was requested to provide Members with a definition of the term.

Use of the term “offensive” in statutes

The term “offensive” is commonly used in many local and overseas statutes. For example, section 20(1)(d) of the Companies Ordinance (Cap. 32) provides that a company name which is considered “offensive” shall not be registered.

In the United Kingdom, the Political Parties, Elections and Referendums Act 2000 provides that the authority shall refuse to register the name and emblem of a political party if they are considered “offensive”.¹ At

¹ Section 28 and 29 of the Political Parties, Elections and Referendums Act 2000.

least two states in Australia also have similar provisions² to provide that the authority shall refuse to register a political party if its name is “offensive”.

Meaning of the term “offensive”

The term “offensive” is not defined in statutes and the literal rule shall apply to the interpretation of the term. According to the Oxford Dictionary, “offensive” means giving or meant to give offence, insulting, disgusting, nauseous or repulsive. Foul language will be one example.

There is no Hong Kong court case on this subject. However, in an Australian court case, *Patrick v. Cobain* [1992] 1 VR 290, the Supreme Court of Victoria has ruled that –

- (a) in considering whether the subject in question is offensive, the officer has to make a judgement as to whether it is capable of giving offence. He should not proceed upon a factual finding that it has in fact offended anyone;
- (b) the dictionary meaning of the term applies when determining whether the subject in question is capable of giving offence or which is aggressive or shocking; and
- (c) in case the subject in question is a statement, it could be capable of being offensive even if it is true.

— A copy of the judgement is enclosed.

I would be grateful if you would circulate this letter to Members of the Panel.

Yours sincerely,

(Raymond TAM)
for Secretary for Constitutional Affairs

² Section 62J of the Electoral Act 1907 of Western Australia and section 73 of the Electoral Act 1992 of Queensland.

SUPREME COURT OF VICTORIA

PATRICK v. COBAIN

GOBRO J.

31 July 1992

Local government - Election - How-to-vote cards - Registration - Card containing allegations concerning candidate and council - Whether allegations constituted "offensive material" - Local Government Act 1989 (No. 11), Sch. 5, cl. 2(3).

Sub-clause 2(3) of Sch. 5 of the Local Government Act 1989 provides that the returning officer at a local government election "must refuse to register a form or sample of how-to-vote card which the Returning Officer is satisfied ... contains offensive ... material".

The appellant (who was not a candidate in the election) submitted to the respondent a draft how-to-vote card which read:

"In Ken Oliver's two years on council, the council has -

- taken no action against illegal real estate signs on properties;
- sold council land to a lucky few at one-third its true value;
- allowed developers to avoid providing parking by making a cash payment of half the actual value of the car space;
- failed to prevent an increase in the density of residential property;
- permitted signwriting on estate agent offices in excess of that permitted by the Brighton Planning Scheme.

For more of the same return to office your local estate agent Ken Oliver ...

Oliver was a candidate in the election. The respondent refused to register the card. The appellant appealed to the Administrative Appeals Tribunal, which dismissed the appeal. On a further appeal to the court on questions of law:

Add: (1) In considering an application to register a how-to-vote card the returning officer has to make a judgment as to whether the contents of the card are capable of giving offence. He should not proceed upon a factual finding that the contents have in fact offended anyone.

(2) The word "offensive" in sub-cl. 2(3) of Sch. 5 of the Act does not bear a criminal connotation. The term is wide enough to comprehend material which is capable of giving offence or which is aggressive or shocking.

(3) The material contained in the how-to-vote card submitted by the appellant was capable of amounting to offensive material.

Appeal

This was an appeal from the Administrative Appeals Tribunal pursuant to s. 52 of the Administrative Appeals Tribunal Act. The facts are stated in the judgment.

The appellant in person.

A. E. Radford for the respondent.

Gobro J.: This is an appeal under the Administrative Appeals Tribunal Act 1984 from a decision of the Administrative Appeals Tribunal. The decision

relates to an appeal that had been instituted to the Administrative Appeals Tribunal by Mr. Peter Edmund Patrick, the appellant before me, who appeared in person. His appeal in the Administrative Appeals Tribunal related to a how-to-vote card which had been proposed by him and submitted to the returning officer for the relevant council election.

I refer to an election in the Central Ward in the City of Brighton for which there were two candidates, one of which was a Mr. Kenneth Oliver, who had been a councillor of that city for that ward since August 1990. The election takes place tomorrow, 1 August 1992, and this appeal has come on before me in the practice court as a matter of urgency this day.

The Administrative Appeals Tribunal gave its decision on 23 July 1992. The Administrative Appeals Tribunal was constituted by a single presiding member, who brought down a decision that the returning officer's decision to refuse to register the how-to-vote card should be affirmed. The member gave reasons on 28 July 1992 and I have those reasons before me.

The how-to-vote card, after containing the identification of the ward and the date, reads:

"In Ken Oliver's two years on council, the council has -

- taken no action against illegal real estate signs on properties;
- sold council land to a lucky few at one-third its true value;
- allowed developers to avoid providing parking by making a cash payment of half the actual value of the car space;
- failed to prevent an increase in the density of residential property;
- permitted signwriting on estate agent offices in excess of that permitted by the Brighton Planning Scheme.

For more of the same return to office your local estate agent Ken Oliver.

For information about Ken's policies try Simon Cooper on ... (two phone numbers that are set out)".

There then appears to be a signature and then the statement that a number must be placed against the name of each candidate. Then the further notation "Authorised by, printed by and distributed on behalf of Mr. P. B. Patrick, 10 St. Andrews Street, Brighton", and then what was further proposed was "Registered by the returning officer for the Central Ward, Brighton City Council".

The how-to-vote card had been submitted by Mr. Patrick, who is not a candidate in the election, to the returning officer, who refused to register the how-to-vote card, which then provoked the appeal to the Administrative Appeals Tribunal.

The relevant provisions of the legislation are to be found in the Local Government Act 1989, and in particular s. 56, which is brief and to the point. Under the heading "How-to-vote cards" it reads "Schedule 5 has effect with respect to how-to-vote cards". When one turns to Sch. 5 there are then provisions for registration of how-to-vote cards, and in cl. 2 there is the heading "Matters to be Considered" and that contains the following material at sub-cl. 3 of cl. 2:

"The returning officer must refuse to register a form or sample of how to vote card which the returning officer is satisfied is likely to mislead or deceive a voter in relation to the casting of a vote of the voter or contains offensive or obscene material."

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Annex

The matter was fought out, as appears from the affidavits, and as appears from the reasons of the tribunal, upon the basis that the question was whether the how-to-vote card contained offensive material. It is true that the issue of whether the card, within s. 57 of the Act, contained false or defamatory statements was referred to, but I am satisfied on the material before the court that the appeal was considered and decided upon the single question as to whether or not the how-to-vote card contained offensive material.

The appeal to this court can only lie upon a question of law. Unlike the Administrative Appeals Tribunal, this court does not, according to the legislation, afford appellants an appeal in the full sense of that word, meaning thereby a rehearing *de novo*. It is necessary for the appellant to make out an error of law on the part of the Administrative Appeals Tribunal.

There are two matters that fall to be considered. The first is whether or not an appeal is made out on the merits; that is, on the merits of being able to show an error of law, and the second is whether, having regard to the terms of the legislation and the discretion in the court, subject always to the overriding words of s. 52, an order should be made for relief in the present case.

I should indicate at the outset that I would not be disposed to exercise my discretion in favour of the application to grant relief in the present circumstances, for reasons that I will set down shortly. But in view of the arguments that have been put, albeit that they have been put under some constraints of time, I am prepared at least to consider the arguments of law that have been put to me and to indicate my opinion in relation to those. I turn then to those arguments.

Mr. Patrick, who conducted his case with admirable clarity, said in substance that he relied upon three matters. There are more matters than are raised as questions of law but in a sense they can be reduced to three principal arguments. The first was that there was no evidence that Oliver or the returning officer were offended as neither of these parties/persons gave evidence, and for that reason it was not open to the returning officer to reach the view that he did, and it was not open to the Administrative Appeals Tribunal to put itself in the same position as the returning officer to reach the decision that it did.

The second argument was that the test adopted by the tribunal was wrong and that it misdirected itself because it treated "offensive" as amounting to hurtful. Part of this argument also involved the proposition that the appropriate test to adopt was one drawn from cases relating to offensive behaviour in criminal statutes.

The third argument was of a more general kind and involved a reliance upon public policy and policy interest considerations which in effect it was said led to two considerations, namely, that the legislation should be interpreted in a way that permitted the maximum capacity to provide criticism of candidates and council and the opportunity for free debate, and also that the presence of a provision in the Act, namely, s. 57A, giving persons aggrieved the opportunity to seek an injunction from the court told against the returning officer interpreting the legislation in a way that was too sensitive of the issues of offence or criticism.

On behalf of the returning officer, Mr. Radford submitted that the test was plainly not whether the words were offensive in any criminal context and that in the context of these regulations it was inappropriate to adopt such a test.

5 He further argued that the nature of the legislation told against the returning officer having to conduct any inquiry as to the truth or offensiveness of the material and that it must necessarily be implied that the returning officer had to reach a judgment on what was before him or was readily available to him in the sense that it had been provided for him in order to reach an expeditious decision on what was in large measure an administrative series of acts.

10 It was further submitted that the reasons did not indicate that the tribunal had misdirected itself and that the allegations contained in the how-to-vote card were of a nature that raising, as they did, illegalities and improprieties on the part of the council and the councillor necessarily connoted that misbehaviour was worthy of condemnation and was such as would be likely to give offence by the very nature of their aggressive and shocking nature.

15 As to the first matter, I am of the view that it is not necessary that the returning officer have evidence that the candidate Oliver was offended, nor was it necessary that he give evidence that he was in fact offended. It was for the tribunal on appeal to put itself in the position of the returning officer, armed with the same discretion and saddled with the same responsibilities. 20 In my view, the inquiry to be made in that situation was essentially one that looked at the material and considered whether it was capable of giving offence. It is not entirely clear what is the category of person caught up by that description, but it may even be that the returning officer himself, for example, in a particular case might not be offended by the material. That would not in my opinion be decisive of the issue.

25 By its very nature the provision as it appears is directed towards material capable of giving offence to those persons likely to read it. In my view the tribunal has not misdirected itself in any consideration of the matter and it was not necessary for it to have evidence before it since what it had to consider was whether this material was capable of giving offence. It is, after all, a judgment that has to be made before the how-to-vote card sees the light of day. It would be intolerable to produce a test that meant that the returning officer had to have, as it were, a trial run of the how-to-vote card with someone before he could be satisfied that it was offensive.

30 It is plain that the nature of the clause contemplates that the returning officer has to make a judgment as to whether it is capable of giving offence and not proceed upon a factual finding that it has in fact offended anyone. For these reasons, the first argument must fail.

35 As to the second argument, I am of the view that the test adopted by the tribunal should be gleaned from the reasons given by the tribunal and not from what may have passed in the course of argument or what may have been said by someone who attended the hearing. It is clear that the tribunal did not confine itself. The evidence is that it had before it dictionary meanings. Those dictionary meanings included a general meaning which comprehended what I have just covered, namely, that offensive material is 40 material capable of giving offence to a substantial number of persons.

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Although "hurtful" was included in the range of words that was canvassed in argument before the tribunal, I am satisfied that the tribunal did not confine itself to the word "hurtful".

I am further of the view that the test to be applied is not one that is to be uplifted from the criminal statute with its higher burden of proof and with, in particular, its connotation of gravity and seriousness. I am assisted in reaching that conclusion by the consideration that when the Act was amended to provide that electoral material, which on one extension was to include how-to-vote cards, might be the subject of a criminal sanction, it was expressed in terms that did not include offensive material.

Section 55 of the *Local Government Act 1989* was amended by Act No. 15 of 1992 by the insertion of sub-s. 5 which reads:

"A person must not print, publish or distribute or cause to be printed, published or distributed any electoral material that is likely to mislead or deceive a voter in relation to the casting of the vote of the voter."

Then there is provision for a penalty of 10 penalty units if the offender is a natural person or 20 penalty units if the offender is a corporation.

It is to be noted that that offence does not include offensive or obscene material. It restricts itself to the earlier part of sub-cl. 3 of cl. 2 of Sch. 5, namely, it concerns itself only with material that is likely to mislead or deceive a voter. It is in my view unlikely that the legislature in making that change in the legislation and not carrying with it the word "offensive" would have done so if it was at all times intended that the word "offensive" was to have a criminal connotation in the clause. If that was so it seems hard to see why then it would have added the provision for offensive material and made it also an offence.

The next argument that needs to be considered is whether there was evidence capable of amounting to offensive material. Mr. Patrick was concerned to argue that the allegations made in the statement were true and that he could produce evidence that they were true. In the course of argument, however, he conceded, and in my view properly conceded, that a statement could still be offensive even if it was true and that whatever might be the situation in relation to defamatory statements the question as to whether a statement was offensive was a different one as to whether it was defamatory and that the fact that the statement might in fact be shown in some way to be true was not decisive and could not mean that the statement was incapable of being offensive.

These statements in the how-to-vote card contain serious allegations against the council. They state that the council failed to take action in respect of illegal signs. More significantly, the card states that the council sold land to some few persons at one-third its true value. It also states that developers were allowed to make payments at half the actual value of a car space, and that unlawful sign writing on estate agent offices was permitted. The word unlawful is not used but that is the clear inference from the statement. Mr. Patrick did not shrink from that. Indeed his whole case is that the council has done these things, and he at one stage sought to endeavour to prove that.

The how-to-vote card goes on to identify one person, namely Mr. Oliver, as being a participant in this as a former councillor. The only reasonable inference from the statement is that he was not simply a member of council, but that he was actively involved in all that is complained of. And there is

an added edge given to the statement by the fact that he is described as the local estate agent and a number of the matters involve matters of land value, real estate transactions and real estate signage.

5 In all of those circumstances I am of the view that the material was capable of amounting to offensive material. It is not for me to decide that matter. I have a more limited inquiry, because the issue for me is an issue of law as to whether the tribunal's decision was one that no reasonable tribunal could have come to on the material before it and, for the reasons I have indicated, that cannot be found.

10 There remains the general resort to public interest and public policy. They share the general recourse to principles of free speech and strong accountability by councils and councillors. But we are here concerned with a how-to-vote card, not with electoral material at large. This restriction about offensive material does not apply to electoral material, as I have already pointed out. It applies to how-to-vote cards. The limitations on Mr. Patrick and others in his situation are not such as to preclude him from canvassing all of these matters in a whole variety of ways for many days before the election, and right up to within a certain geographic distance of the polling booth on the day in question. They simply relate to a how-to-vote card.

15 I am indeed surprised that on the regulations as they stand one can have how-to-vote cards that contain testimonials for particular candidates and criticisms, (that is falling short of being offensive) of other candidates. It would seem odd that that fits within the character of what is intended to be simply information about how-to-vote. Indeed, the interesting feature of this card is that it could fairly be described on one view as not being a how-to-vote card but a how-not-to-vote card, because it did not at any stage identify the candidate for whom someone should vote.

20 In any event, as I have indicated, the regulations to be found in Sch. 5 in my view are dealing with a restricted subject matter and recourse to general and valid principles does not have a great deal of weight having regard to the fact that the appellant and other ratepayers and voters in the community in question have ample opportunity to use electoral material to express their views, without giving out offensive material.

25 I turn to the second matter to be dealt with shortly, namely as to whether I would be prepared to grant relief in the present case. The appellant is not a candidate. Presumably this card is, as it were, a draft or proposed card, and the inference is to be that, of course, these cards have not been printed, for the good reason that the returning officer had not yet approved the card. But, in any event, Mr. Patrick is not in the position of being a candidate who has been deprived of the opportunity to secure office by reason of an allegedly improper exercise of power by the returning officer.

30 The ordinary method of disposition of this case, were I to accept the appellant's arguments, would have been to have set aside the decision of the tribunal and then remitted it for the tribunal to decide according to law. I do not understand that I would have had the power to remit the matter direct to the returning officer with a direction as to what the returning officer is to do. Having regard to the lateness of the hour, and the fact that this election is to take place tomorrow morning, it is really quite impracticable to contemplate a situation where the court should be asked to

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bring about an order remitting a matter for further hearing by the Tribunal, when nothing can practically come of that.

Moreover, even if something might have been said for such a course were a candidate gravely disadvantaged as a result of an adverse ruling, it plainly cannot apply to the person who is not a candidate, who simply has an interest, no matter how strong in terms of its enthusiasm and vigour, in the result of the election, I therefore would not have been disposed, if I had been satisfied, to grant the relief. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for the respondent: *Purves Clarke Richards.*

R. R. S. TRACEY
BARRISTER-AT-LAW

SUPREME COURT OF VICTORIA

DIX and Another v. CRIMES COMPENSATION TRIBUNAL

APPEAL DIVISION

FULLAGAR, BROOKING and TADGELL JJ.

6, 12 August 1992

Administrative law - Administrative Appeals Tribunal - Appeal to Supreme Court - Question of law - Power of tribunal to extend time to apply for review - Whether acceptable explanation of delay in making application a condition precedent to exercise of power - (CAT) Administrative Appeals Tribunal Act 1984 (No. 10155), s. 31(2).

Section 31(2) of the *Administrative Appeals Tribunal Act 1984* empowers the Administrative Appeals Tribunal to extend the time for the making of an application to the tribunal for a review of a decision, whether or not the time has expired.

In November 1990 the appellants applied to the tribunal for an extension of the time in which to apply for a review of an administrative decision. The tribunal refused the applications for an extension of time, saying that it was a pre-condition to the grant of an extension of time that the appellants show an "acceptable explanation for the delay". The appellants then appealed to the Supreme Court, claiming the tribunal had erred in law.

Held, allowing the appeal: (1) The power conferred by s. 31(2) of the *Administrative Appeals Tribunal Act 1984* was unrestricted and it was not for the court to impose an arbitrary limitation not expressed in the words of the statute.

PAI General Insurance Co. Ltd. v. Southern Cross Exploration NL (1987) 165 C.J.R. 268, applied.

(2) In stating that it was a condition precedent to the grant of an extension of time under s. 31(2) that the applicant show an "acceptable explanation of the delay", the tribunal erred in law.

Hunter Valley Developments Pty. Ltd. v. Minister for Home Affairs and Environment (1984) 58 A.L.R. 305, not followed.

Appeal

This was an appeal on a question of law from a decision of the Administrative Appeals Tribunal. The facts are stated in the judgment of Brooking J.

A. L. Cavanaugh for the appellants.

J. W. Thwaites for the respondent.

Cur. adv. vult.

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