(By Fax : 2509 9055)

Our Ref: CAB in C1/33/8

Tel No: 2810 2852
Fax No: 2840 1976

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 provisions[2] 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

GOBBO 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:

Held: (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.

Gobbo 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 to 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."

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.

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.

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.

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. 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.

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.

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.

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 material capable of giving offence or which is aggressive or shocking.

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.

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.

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.

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.

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.

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.

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

bring about an order remitting a matter for further hearing by the tribunal, when nothing can practicably 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 — (CTH) 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.L.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. Cavanough for the appellants.

J. W. Thwaites for the respondent.

Cur. adv. vult.

Fullagar J.: I agree in the judgment of Mr Justice Brooking