

Legislative Council Panel on Constitutional Affairs

Review of Regulation on Election Advertisements

Purpose

This paper sets out the proposed amendments to the regulation on election advertisements (“EAs”) to facilitate candidates to conduct electioneering activities in new media and simplify the procedures for handling EAs while maintaining the integrity, fairness and openness of elections.

Background

2. Legislative Council (“LegCo”) Members and political parties have been expressing concerns about the problems encountered in complying with the existing requirements regarding the submission of EAs. At meetings of the Subcommittee on Nine Amendment Regulations under the Electoral Affairs Commission Ordinance (Cap. 541) in June 2011, Members requested legislative amendments to relieve the difficulties in complying with the requirements governing EAs as a result of increasing use of the Internet in electioneering activities. The Administration undertook to further review the arrangements of declaration and submission of EAs to prepare for the LegCo election in September 2012.

Existing Regulatory Regime on EAs

3. The current regulatory regime on EAs is laid down in the Elections (Corrupt and Illegal Conduct) Ordinance (“ECICO”) (Cap. 554) and the relevant regulations made under the Electoral Affairs Commission Ordinance (“EAC regulations”). The following paragraphs provide a summary of the regime.

Definition of EA

4. EA is defined in section 2 of the ECICO. It covers notices, public announcement or any other form of publication (including printed advertisements and those distributed by electronic transmission) published for the purpose of promoting or prejudicing the election of a candidate or candidates at the election.

Declaration and submission of EA

5. Section 34(1) of the ECICO stipulates that a person must not publish a printed EA that fails to show the printing details. These include the name and address of the printer, the date of printing and number of copies printed. Nevertheless, the section is not contravened if the candidate lodges with the Returning Officer (“RO”) a statutory declaration which states the printing details mentioned above not later than seven days after the advertisement is published. Section 34(4) also provides that a person must, not later than seven days after publishing a printed EA, furnish two copies of the EA with the RO. These provisions do not cover electronic EAs.

6. The above requirements are to assist the Registration and Electoral Office (“REO”) in checking the returns of election expenses. As candidates are required to lodge election returns (which are to set out election expenses and election donations received) not later than 60 days after the publication of election result for any constituency of the LegCo and not later than 30 days for other elections, ex-post declaration and submission of EAs under the ECICO is sufficient to facilitate the REO in checking the election returns.

7. Separately, to facilitate the RO in dealing with complaints relating to EAs, the relevant EAC regulations require candidates to furnish the declarations together with two copies each of the declared EAs to the RO before they display, distribute and use the EA. If it is not practicable to make a copy of an EA for submission, the regulations allow the candidates to furnish with the RO two colour photographs in postcard size of the EA instead. The EAC regulations also provide that the RO must make available for public inspection a copy of the declaration and the EA furnished by candidates.

8. In light of the difficulties experienced by candidates in complying with the requirements for electronic EAs (viz. EAs displayed, distributed or otherwise used by electronic means), and concerns raised by LegCo Members on various occasions, the Electoral Affairs Commission introduced amendments to relax the relevant procedures for electronic EAs and the following were passed by the LegCo in July 2011:

- (a) for electronic EAs, candidates can make the required declaration and submission to the RO either electronically or in hard copy; and

- (b) where it is not practicable to submit electronic EAs to the RO before they are displayed, distributed or used (such as messages displayed or sent interactively and spontaneously through social networking platforms on the Internet like Facebook and Twitter), candidates can deposit with the RO a declaration and the electronic EAs by the end of the first working day following the day on which the advertisements are sent or displayed.

Consent of support

9. Section 27(1) and (2) of the ECICO make it an offence if a candidate or a person publishes an EA which includes the name, logo or pictorial representation of another person or an organization in such a way as to imply, or to be likely to cause electors to believe that a certain candidate has the support from such person or organization, unless the candidate or the person concerned has obtained prior written consent of support from such person or organization. The requirement is to catch the conduct of a candidate or a person publishing EAs which included false claim of support. The EAC regulations also stipulate that the candidate must deposit the consent in writing with the RO.

Problems Encountered

10. Many candidates now use different electronic platforms on the Internet to promote themselves. As messages posted on the websites such as on social networking websites are interactive in nature and may change frequently and rapidly, it is not practical for candidates to submit EAs on such platforms and make declaration before EAs on such platforms are broadcast. Moreover, candidates may have difficulty in maintaining a full record of all electronic EAs for the purpose of declaration since the messages posted on websites such as Facebook and Twitter could be removed or deleted without the candidates' prior knowledge. It is not practical to ensure that a full record of the electronic EA could be declared and submitted by the candidates.

11. On social networking and communication websites on the Internet, it is not uncommon that people may indicate support to a candidate in relation to his or her policies or activities by inserting a "Like" sign or posting supportive comments on the candidate's webpage. Such a sign or comment could amount to an indication of support under the ECICO. It is difficult, if not impossible, for the candidate to obtain prior written consent of support from people indicating such spontaneous support.

Proposed Amendments

12. When considering amendments to the existing requirements, we need to make reference to the following principles:

- (a) the proposal should facilitate public inspection, the checking of election returns and the investigation of complaints so as to ensure that the election can be conducted in a fair, just and open manner; and
- (b) the proposal should also facilitate the electioneering activities of candidates, free flow of information and ideas and allow EAs to be submitted in a reasonable and practicable manner.

Declaration and submission of EAs

13. In view of the problems encountered, we propose to amend the existing requirements relating to the declaration and submission of EAs, as follows:

- (a) for electronic EAs, subject to (b) below, if a candidate has posted such EAs onto an election website maintained by him for public inspection within one working day after the publication of such EAs, there is no need for the candidate to make declaration and submission of such EAs to the RO;
- (b) for electronic EAs which are displayed or sent through open platforms on the Internet, if it is not practicable for a candidate to post such EAs onto an election website maintained by him (such as messages displayed or sent interactively and spontaneously through social networking platforms on the Internet), the candidate is only required to provide the hyperlink of such platforms on his website within one working day after the publication of the EAs;
- (c) for all EAs except electronic EAs, if a candidate has posted a digital image of such EAs onto an election website maintained by him for public inspection within one working day after the publication of such EAs, there is no need for the candidate to make declaration and submission of such EAs to the RO;

- (d) if a candidate chooses to post his EAs or hyperlink onto his website as mentioned in (a) to (c) above, the candidate is required to provide the electronic address of the website to the RO before operating the website. The RO will publicise the electronic address to facilitate public inspection;
- (e) to facilitate public inspection and investigation on complaints about EAs, a candidate is required to maintain the website for 12 months after the results of the relevant election are published;
- (f) as an alternative option for a candidate who prefers not to maintain an election website for making available his EAs for public inspection, he is required to deposit two copies of such EAs with the RO within one working day after publication. For electronic EAs which are displayed or sent through open platforms on the Internet, the candidate is only required to provide the electronic addresses of the platforms on which such EAs are displayed or sent within one working day after the publication of the EAs. The RO will make available such information for public inspection; and
- (g) candidates who fail to comply with the above revised arrangements commit an offence and are liable to a fine at Level 2 up to \$5,000 and to imprisonment of 6 months.

14. The above proposed amendments have taken into consideration that EAs published by candidates must be publicly accessible to ensure fairness and openness of elections. As the Internet is now a publicly accessible network and many candidates are making use of this electronic platform for their electioneering activities, the revised arrangement of requiring candidates to post EAs onto their websites maintained by them will enable the public to gain access to and be informed of the contents of such EAs. This can serve the purpose of public inspection of the EAs.

15. The revised arrangements also provide for flexibility under which candidates may provide only a hyperlink of the platforms on which the EAs are published on the websites if the full contents of such EAs cannot be displayed in the websites (such as those EAs which are interactive in nature in the social networking platforms on the Internet).

16. Under the existing arrangement, the RO is required to keep the EAs and the election returns for public inspection one year after the election return is lodged. To simplify the existing arrangement, it is proposed that candidates are only required to keep the websites for one year after the results of the relevant election are published to facilitate public inspection and handling of complaints on EAs by the RO. The detailed requirements will be set out in the relevant EAC regulations and election guidelines.

17. For those candidates who prefer not to maintain an election website for their printed EAs and/or electronic EAs, the revised arrangement provides an alternative for them to deposit copies of the EAs with the RO (or the electronic addresses of the platforms concerned in the case of electronic EAs which are displayed or sent through open platforms on the Internet). The RO will then make available such information for public inspection. In line with the existing requirement, the RO will keep such information for one year after the results of the relevant election are published.

18. To streamline the operation of the arrangements and facilitate electioneering activities, the revised arrangements allow candidates to post EAs onto the election website or deposit two copies of the EAs with the RO within one working day after the publication of the EAs. This replaces the existing arrangements which generally require candidates to make declaration and submission of EAs to the RO before publishing the EAs.

19. To ensure compliance, it is proposed that candidates who fail to comply with the revised arrangements commit an offence and are liable to a fine at level 2 and to imprisonment of 6 months. This is on par with the level of penalty for candidates who fail to comply with the existing requirements regarding the declaration and submission of EAs under the relevant EAC regulations.

Consent of support

20. In light of the issue relating to the consent of support in EAs, we propose to amend the existing requirements, as follows :

- (a) a candidate or a person is not required to obtain prior written consent from those who provide support in the EAs published by him if such support is provided by the supporters themselves out of their own volition; and

- (b) if a candidate or a person publishes or continues to publish the EAs with the support mentioned in (a) above without any modification of the contents or description of the support, the candidate or the person is not required to obtain prior written consent from those who provide support in such EAs. Otherwise, the candidate or the person has to follow the existing requirement to obtain prior written consent before publishing such EAs.

21. The aim of the proposed amendments is to protect a candidate or a person from being inadvertently caught under section 27 of the ECICO in circumstances under which it is difficult for him to obtain prior written consent from third parties indicating support out of their own volition.

22. Under the revised arrangement as mentioned in paragraph 20(a), a candidate or a person is not required to obtain prior written consent of support if such support is provided by the supporters themselves out of their own volition. This would relieve the candidate or the person from the burden of seeking consent in circumstances in which this is not practicable, such as when people put a “Like” sign or post supportive comments on the webpage of the candidate or the person.

23. Under the revised arrangement mentioned in paragraph 20(b), if a candidate or a person publishes and continues to publish the EA (with the support provided by the supporters themselves out of their own volition), the candidate or the person does not have to obtain prior written consent from those who provide support in such EA if there is no modification to the contents or description of the support. As the action concerned only involves the change of platforms in showing the EAs with the support (such as from his Facebook to the website), the candidate or the person should not be required to go through the cumbersome process of obtaining the consent of support.

24. The revised arrangements do not cover circumstances in which the support is not provided by their supporters themselves out of their own volition. In such circumstances the candidate or the person concerned will still be required to obtain prior written consent from the supporters. This will prevent false claim of support and offer protection to third parties from being misused for electioneering purposes.

Legislative Timetable

25. We plan to introduce into the LegCo an amendment Bill in early 2012. It is our hope that the Bill can be passed as soon as possible in order to provide sufficient lead time for preparing the LegCo election in September 2012.

Advice Sought

26. Members are invited to give views on the proposed amendments set out in the paper.

Constitutional and Mainland Affairs Bureau
November 2011