

**Legislative Council
Panel on Constitutional Affairs**

**Conduct in contravention of
the Elections (Corrupt and Illegal Conduct) Ordinance**

Introduction

Dr Hon Priscilla LEUNG Mei-fun's letter dated 12 March 2014 to the Chairman of this Panel proposes discussion of the operation of the Elections (Corrupt and Illegal Conduct) Ordinance ("ECICO") (Cap. 554). This paper sets out the different types of corrupt and illegal conduct, penalties, and the relief mechanism and de minimis arrangement under the ECICO to facilitate Members' discussion.

Background

2. The ECICO, which was enacted in 2000, aims at prohibiting corrupt and illegal conduct at elections, regulating election advertisements ("EAs") and imposing requirements with respect to expenditure and receipt of donations in connection with elections. The ECICO applies to elections to elect the Chief Executive ("CE"), Members of the Legislative Council ("LegCo"), the District Councils ("DCs"), the Election Committee ("EC") and the Heung Yee Kuk, the Rural Representatives, and the Chairman or Vice-Chairman or members of the Executive Committee of Rural Committees. The legislation, enforced by the Independent Commission Against Corruption ("ICAC"), aims to uphold honesty, integrity and fairness of public elections in Hong Kong.

Corrupt and illegal conduct under the ECICO

3. The ECICO proscribes different types of corrupt conduct, illegal conduct, and offences in relation to election return¹ ("ER") and EAs.

¹ Within a specified period after an election, each candidate or candidate list must lodge with the appropriate authority an ER setting out his/her election expenses and all election donations received in connection with the election.

Corrupt conduct

4. Corrupt conduct as proscribed by the ECICO includes bribing candidates or prospective candidates; using or threatening to use force or duress against candidates or prospective candidates; engaging in certain deceptive behaviour in relation to candidates and prospective candidates; defacing or destroying nomination papers; bribing electors and others at elections; providing others with refreshments and entertainment at election; using or threatening to use force or duress against electors; engaging in certain deceptive behaviour in relation to electors; impersonating another at election; destroying or defacing ballot papers; making improper use of election donations; failure to dispose of certain election donations in accordance with the requirement under the ECICO; lodging false or misleading ER; withdrawing election petition or election appeal for a bribe; and other corrupt conduct with respect to voting at elections.

Illegal conduct

5. Illegal conduct as proscribed by the ECICO includes incurring election expenses by persons other than candidates and election expense agents; incurring election expenses exceeding the prescribed amount by candidates; publishing false statement that a person is or is not a candidate; publishing false or misleading statements about a candidate; and publishing EAs that include false claim of support.

Offences in relation to ER and EAs

6. Apart from the corrupt and illegal conduct as mentioned in paragraphs 4 and 5 above, the ECICO also stipulates requirements for lodging ER and publishing EAs². Such requirements are summarised at **Annex**. A person commits an offence if he/she fails to comply with such requirements.

Penalties

7. A person who engages in corrupt conduct at an election commits an offence and is liable on conviction to a fine of \$200,000 and imprisonment

² The part on EAs only applies to an election to elect members of the Heung Yee Kuk and an election to elect the Chairman or Vice-Chairman or members of the Executive Committee of Rural Committees. The provisions governing the publication of EAs in CE, LegCo, DC, EC Subsector, and Rural Representative elections are set out in the respective regulations made under the Electoral Affairs Commission Ordinance (Cap. 541).

for three years if tried summarily; or a fine of \$500,000 and imprisonment for seven years if tried on indictment.

8. A person who engages in illegal conduct, publishes EAs that do not meet the requirements under the statute or fails to lodge ER as required at an election commits an offence and is liable on conviction to a fine at level 5 (i.e. \$50,000) and imprisonment for one year if tried summarily; or a fine of \$200,000 and imprisonment for three years if tried on indictment.

Relief mechanism and de minimis arrangement under the ECICO

Relief mechanism

9. The ECICO provides a relief mechanism in respect of illegal conduct and offences in relation to EAs and ER. Details are as follows –

Illegal conduct

- A candidate, candidate's agent or other person who has otherwise committed an illegal conduct (see paragraph 5 above) may apply to the Court of First Instance ("CFI") for an order relieving the person from penalties and disqualifications imposed by any electoral law as a consequence of the illegal conduct.
- The CFI has to be satisfied that the non-compliance was due to inadvertence, an accidental miscalculation or any reasonable cause and was not due to bad faith, and believes it to be just that the applicant should not be subjected to one or more of those consequences.

Offences in relation to EAs

- A person who publishes an EA that does not meet the requirements under the ECICO (see paragraph 6 above and **Annex**) may apply to the CFI for the granting of relief.
- Similar to illegal conduct, the CFI has to be satisfied that the non-compliance was due to inadvertence, an accidental miscalculation or any reasonable cause and was not due to bad faith, and believes it to be just that the applicant should not be subjected to those penalties.

Offences in relation to ER

- A candidate who is unable or has failed to lodge an ER as required under the ECICO before the end of the permitted period can apply to the CFI for an order allowing him/her to lodge an ER within a further period as the CFI specifies. The CFI has to be satisfied that the inability or failure to lodge an ER was attributable to the applicant's illness or absence from Hong Kong; the death, illness, absence from Hong Kong or misconduct of an agent or employee of the applicant; inadvertence or an accidental miscalculation by the applicant or any other person; or any reasonable cause, and was not due to the applicant's bad faith.
- Moreover, a candidate can apply to the CFI for an order enabling him/her to correct any error or false statement in an ER or in any document accompanying the return, or excepting him/her from the requirement to send an invoice or a receipt, or a copy of a receipt. The CFI has to be satisfied that the error or false statement was due to misconduct of an agent or employee of the applicant; inadvertence or accidental miscalculation; or any other reasonable cause, and was not due to the applicant's bad faith.

Corrupt conduct

- There is no mechanism for granting court relief in respect of a corrupt conduct.

De minimis arrangement

10. In addition to the above court relief mechanism, a de minimis arrangement was introduced in 2011 to deal with minor errors or false statements in ER. A specified de minimis limit for each candidate or list of candidates has been set for each of the different elections as set out below –

(a)	CE election	\$5,000
(b)	LegCo DC (second) Functional Constituency election	\$5,000
(c)	LegCo Geographical Constituencies election	\$3,000
(d)	Election for LegCo Functional Constituencies other than DC (second) Functional Constituency	\$500

(e)	EC subsectors election	\$500
(f)	DC election	\$500
(g)	Heung Yee Kuk election	\$200
(h)	Election for the Chairman or Vice-Chairman or a member of the Executive Committee of a Rural Committee	\$200
(i)	Rural Representatives election	\$200

11. If the aggregate value of the errors or false statements in the declared election expenses and donations does not exceed the de minimis limit of the respective election, and the total election expenses of the relevant candidate or list of candidates do not exceed the prescribed election expenses limit for the election, the candidate or list of candidates will be informed of the errors or false statements identified in the ER and be given the opportunity to rectify the relevant ER within 30 days after the date on which the candidate receives a notice from the appropriate authority relating to the error or false statement in the ER without the need to apply for a relief order from the CFI. If the candidate or list of candidates does not rectify the errors or false statements within the specified period, the ER concerned will be dealt with according to normal procedure and be subject to investigation by the ICAC and possible prosecution under the ECICO as appropriate, as set out in paragraph 14 below.

12. The de minimis arrangement will not be applicable if, after taking into account the errors and false statements, the total election expenses of the candidate or list of candidates would exceed the prescribed election expenses limit of that particular election, which is an illegal conduct under section 24 of the ECICO. Moreover, it will not relieve the candidate or list of candidates from other offence provisions in the ECICO if the ER concerned has contravened any such provisions. If a candidate has allegedly made a statement in the ER which he/she knows or ought to know is materially false or misleading (i.e. this being itself a corrupt conduct), the ICAC will conduct investigation notwithstanding the availability of the de minimis arrangement.

Arrangements for handling complaints and possible ECICO breaches

13. The ICAC is obliged by law to investigate cases that involve offences under the ECICO. If the Electoral Affairs Commission, Returning Officers, Presiding Officers or the Police receive cases alleging offences under the ECICO, they will refer the cases to the ICAC for consideration and investigation. Besides, if the Registration and Electoral Office or (in the case of rural elections) the Returning Officers or the Home Affairs Department, identifies any irregularities or discrepancies in the course of a document check performed on a candidate's ER, the case will be referred to the ICAC for consideration as to whether such irregularities or discrepancies would amount to a breach of the ECICO and, therefore, warrant investigation under the Ordinance.

14. Upon conclusion of an ICAC investigation into alleged offences under the ECICO and where evidence is revealed to substantiate the allegation, the investigation findings will be reported to the Department of Justice for consideration of appropriate sanction which will take the form of prosecution, formal caution or written warning as it is deemed appropriate. The outcome of investigations, similar to all other investigations conducted by the ICAC, will be reported to the Operations Review Committee.

Education and publicity activities on the ECICO

15. The ICAC launches various education and publicity activities during the election period to help candidates, their election agents/helpers and electors better understand the statutory requirements on election conduct and avoid inadvertent infringement of the law. These activities include -

- (a) conducting briefing sessions to explain the major provisions of the ECICO to candidates and their election agents/helpers;
- (b) producing information booklets to explain the legal requirements, common pitfalls in conducting electioneering activities for candidates and their election agents/helpers that may lead to breaches of the ECICO;
- (c) producing press feature articles, TV and radio programmes to remind candidates and electors of the need to abide by the ECICO;

- (d) broadcasting filmlets on public transport facilities and various venues to highlight the important points-to-note for candidates and electors to support clean election;
- (e) launching a dedicated website with all the educational and publicity materials; and
- (f) setting up the Election Enquiry Hotline to answer public enquiries on the ECICO and the ICAC's educational and publicity activities on clean elections.

Advice sought

16. In summary, while the ECICO provides a comprehensive and strict regime to ensure proper and fair public elections, it has built in relief mechanisms to cater for inadvertent breaches which are of a relatively minor or trivial nature. These are set out in detail under paragraph 9 above. It is noteworthy that the relief mechanism does not cover corrupt conduct which is invariably serious in nature. As an addition to the relief mechanism, in 2011 a de minimis arrangement (paragraph 10 above refers) was introduced to enable timely rectification to be made to ER for minor errors and omissions within a prescribed limit. Such an administrative arrangement removes the need to apply for a relief order from the CFI.

17. The current arrangement reflects an attempt to strike a balance between, on the one hand, the importance of regulating certain conducts in order to uphold the honesty, integrity and fairness of public elections in Hong Kong; and on the other hand, making allowance for inadvertent errors and omissions of trivial and minor nature absent bad faith.

18. Members are invited to provide their views on the existing arrangements under the ECICO.

Constitutional and Mainland Affairs Bureau
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Summary of requirements for lodging election return and publishing election advertisements

Lodging election return

Each candidate at an election must lodge with the appropriate authority an election return (“ER”) setting out the candidate’s election expenses at the election and all election donations received by or on behalf of the candidate in connection with the election.

2. The ER must be lodged, in the case of Legislative Council election, not later than 60 days after the date of publication of the result of the election or the declaration of the termination or failure of the election and, in any other cases, not later than 30 days after the dates of publication of the result of the election or the declaration of the termination or failure of the election.

3. The ER must be accompanied –

- (i) in the case of each election expense of \$100 or more, by an invoice and a receipt giving particulars of the expenditure;
- (ii) in the case of each election donation of more than \$1,000 or, in the case of an election donation consisting of goods or a service, of more than \$1,000 in value, by a copy of the receipt issued to the donor giving particulars of the donor and the donation;
- (iii) where an election donation or part of an election donation that was received by or on behalf of the candidate in connection with the election was not used for the purpose of meeting, or contributing towards meeting, the election expenses of the candidate or candidates; or in the case of an election donation consisting of goods, for the purpose of promoting the election of the candidate or candidates or of prejudicing the election of another candidate or other candidates was disposed of in accordance with the requirement under the Elections (Corrupt and Illegal Conduct) Ordinance (“ECICO”) (Cap. 554), by a copy of the receipt given by the recipient of the donation or part;
- (iv) where an election donation or part of an election donation that was received by or on behalf of the candidate in connection with the election was not used for that purpose was not disposed of in accordance with the requirement under the ECICO, by an explanation setting out the reason; and

- (v) by a declaration verifying the contents of the ER.

Publishing election advertisements

4. Regarding printed election advertisements (“EAs”), the following requirements are stipulated in the ECICO –

- (i) a person must not publish a printed EA (except those printed in a registered local newspaper) that fails to show, in the English or Chinese language, the name and address of the printer; the date on which it was printed; and the number of copies printed;³ and
- (ii) a person must, not later than seven days after publishing a printed EA, furnish two copies of the EA to the appropriate returning officer.

³ If the printed EA does not contain such information, the publisher should lodge a statutory declaration stating the information with the Returning Officer within seven days after the EA is published.