

**Legislative Council
Panel on Constitutional Affairs**

Operation of the Elections (Corrupt and Illegal Conduct) Ordinance

PURPOSE

At the meeting of the Legislative Council (“LegCo”) Panel on Constitutional Affairs on 23 April 2014, in view of LegCo Members’ concerns, the Government discussed the operation of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) (“ECICO”) with Members. Certain Members suggested simplifying certain requirements under the regulatory regime¹ provided that the integrity of elections would not be affected. The Government subsequently wrote to all LegCo Members to solicit their specific suggestions.

2. As the specific views regarding the ECICO raised at and after the meeting last year are all related to the detailed requirements for declaration of election expenses and submission of election returns (“ERs”), in order to review the relevant guidance and handling mechanism in place, apart from making reference to the views received, the Government also reviewed the more common problems found in the ERs submitted by candidates² in the past. This paper sets out the various specific views received, analysis of the issues and way forward recommended by the Government to improve the operation of the ECICO, to facilitate further discussions by Members.

THE EXISTING MECHANISM

3. To ensure that elections are held in a fair, open and honest manner, every candidate in public elections must set out all his/her election expenses at that election and all election donations received in connection with that election in an ER, and for each election expense of

¹ For the different types of corrupt and illegal conducts, offences in relation to election returns and election advertisements, penalties, relief mechanisms and the de minimis arrangements under the ECICO, please refer to the paper provided by the Government for the meeting in April 2014 (LC Paper No. CB(2)1314/13-14(03)).

² The reference to “candidate” in this paper refers to a candidate or a list of candidates, unless otherwise specified.

\$100 and above, submit an invoice and a receipt giving particulars of the expenditure. All candidates should, before expiry of the statutory period³, lodge with the appropriate authority⁴ their ERs. Candidates must also submit a declaration together with the ER verifying the contents of the ER. After receiving the ER, the appropriate authority must ensure that copies of the ER are made available for public inspection, until the first anniversary of the date on which the result of the relevant election is published. The appropriate authority will also check all ERs; if any irregularity is discovered, it would report to relevant government department(s) / organization(s) for investigation. The above mechanism is to ensure that the election expenses situation of every candidate is transparent, true and accurate, so that the investigations relevant to the ECICO, law enforcement actions as well as vetting of the candidates' claims for financial assistance, etc., would be based on true, accurate and timely information.

4. Therefore, it is a candidate's responsibility to submit his/her ER before the relevant deadline and use his/her best endeavour to ensure that the ER is accurate and accompanied by the relevant supporting documents. Under this premise, measures are already in place to facilitate compliance by candidates (see paragraph 5 below), and an appropriate relief mechanism is available in cases of breach by candidates (see paragraph 6 below).

³ According to section 37(2) of the ECICO, in the case of an election to elect a LegCo Member, the candidate must ensure that his/her ER is submitted not later than 60 days after the date of publication of the result of the election. For any other cases (such as an election to elect a District Council member), the candidate must ensure that his/her ER is submitted not later than 30 days after the date of publication of the result of the election. If the proceedings for the election have been terminated or the election has failed under the relevant electoral law, then the ERs should be submitted not later than 60 days (for LegCo elections) or 30 days (for all other cases) after the declaration of the termination of the election proceedings or failure of the election. The Court of First Instance can also allow the candidate to submit the ER in an extended period, in accordance with section 40 of the ECICO.

⁴ For an election to elect the Chief Executive, member or members of the Election Committee, LegCo or a District Council, the appropriate authority means the Chief Electoral Officer. For an election to elect a Rural Representative, the appropriate authority means the Director of Home Affairs. In the case of an election to elect members of the Heung Yee Kuk or to elect the Chairman or Vice-Chairman or a member of the Executive Committee of a Rural Committee, the appropriate authority means the Returning Officer for the election or, if the Returning Officer for the election has not been appointed, the Director of Home Affairs.

5. Regarding the deadline of ER submission, although the vast majority of election expenses can already be ascertained and paid after the end of the candidate's election campaign (generally speaking, that means after the polling hours have ended), in order to allow a reasonable period of time for candidates to fill in the ER, the ECICO currently allows all candidates to submit their ERs not later than 30 days after the date of publication of the result of the election, and for LegCo elections the relevant period extends until 60 days after the date of publication of the result of the election. On facilitating candidates to correctly fill out the ER, the appropriate authority has all along provided the relevant forms, explanatory notes and a sample of completed ER, while the Independent Commission Against Corruption ("ICAC") has also published information booklets for distribution to candidates when they submit nomination forms, so as to provide reference information on questions like how to calculate and declare election expenses.

6. Furthermore, the Government understands that in some inadvertent scenarios, some candidates may not be able to submit their ERs in a timely manner, or errors may still occur in completing the ER. The ECICO therefore also provides for a relief mechanism, so that candidates can apply to the Court of First Instance ("CFI") for an order that relieves the relevant problem⁵. In 2011, the Government took the further step to introduce the de minimis arrangements⁶ ("DMA"), so that the appropriate authority can first handle errors and false statements⁷ in ERs with an aggregate error value not exceeding a specified limit ("the

⁵ The CFI has to be satisfied that the inability or failure to lodge an ER before the expiry of the permitted period 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. If the candidate wishes to correct any error or false statement in an ER or be excepted 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 or the non-compliance was due to misconduct of an agent or employee of the applicant; inadvertence or accidental miscalculation / loss or destruction of the invoice or receipt or copy of the receipt; or any reasonable cause, and was not due to the applicant's bad faith.

⁶ For detailed operation of the DMA, please refer to paragraphs 10 to 12 of the Government's paper submitted for the meeting in April 2014 (LC Paper No. CB(2)1314/13-14(03)).

⁷ According to section 37A(12) of the ECICO, an error or false statement in an ER includes—

- (a) an error or false statement in any document accompanying the ER; or
- (b) a failure to send any document required by section 37(2)(b) in relation to the ER.

DM limit”), allowing candidates to make revisions within a specified period, so that cases need not be directly referred to ICAC for follow up⁸ regardless of the magnitude of errors. These mechanisms allow candidates to rectify minor breaches due to inadvertence. Based on experience from the previous election cycle⁹, the DMA can handle around 25% to 45% of cases where the ER was found to contain errors or false statements.

Views on the ECICO received by the Government

7. The suggestions of certain Members at the meeting of the LegCo Panel on Constitutional Affairs on 23 April 2014 are summarized as follows –

- (a) Raising the DM limits for ERs so that more cases with minor or technical breaches can first be handled by the Registration and Electoral Office (“REO”): There are views that in the past elections, there were still cases with minor or technical breaches which could not be handled by the REO in accordance with the DMA. The Government should consider raising the DM limits for various elections so as to allow the REO to first handle more ERs with minor breaches, such that ICAC can also focus its resources to handle cases with more serious breaches;
- (b) Extending the period allowed for submission of ERs by candidates returned from uncontested constituencies in LegCo elections: As the election results of uncontested constituencies must be published in the Gazette within 14 days of the expiry of the nomination period in accordance with the law¹⁰, that date of publication will be a few weeks earlier than the date when the election results of contested constituencies are published. Therefore, the period during which candidates returned from uncontested constituencies (“uncontested candidates”) in LegCo elections must submit their ERs (in

⁸ If the candidate does not rectify the errors or false statements within the specified period, the ER concerned will be subject to the normal investigation and prosecution arrangements under the ECICO as appropriate.

⁹ Please refer to paragraph 2 of the Government’s response to issues raised at the Panel meeting in April 2014 (LC Paper No. CB(2)829/14-15(01)).

¹⁰ See section 22 of Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D).

accordance with section 37 of the ECICO) (i.e., not later than 60 days after the date of publication of the result of the election) normally would expire earlier than that for candidates from contested constituencies (“contested candidates”). There are views that those uncontested candidates who conduct joint promotion with contested candidates may find it difficult to, for timely submission of their ERs, ascertain and apportion the relevant election expenses with the contested candidates’ election team when they are busy with their election campaigns. It would be time-consuming and costly if the uncontested candidates seek relief from the CFI to extend the submission deadline for their ERs for this. It is therefore worthwhile to consider extending such period; and

- (c) Extending the period allowed for submission of ERs by candidates in LegCo elections: There are views that it takes time to accurately calculate all election expenses and election donations, hence the current period allowed for submission of ERs by candidates in LegCo elections (i.e., not later than 60 days after the date of publication of the result of the election) should be extended.

8. After Members raised their suggestions at the Panel meeting in April last year, in order to further seek suitable ways to improve the operation of the ECICO, the Government wrote to all LegCo Members in July last year to solicit specific suggestions. By the deadline of September last year, the Government has received three responses¹¹. The views therein which are relevant to the ECICO are all related to declaration of election expenses, and the specific suggestions are summarized as follows –

- (a) Providing more specific guidance on completing ERs before candidates submit their ERs: There are views that as a lot of documents are involved in ERs and the requirements are strict, sometimes candidates, their agents and electioneering staff may find it difficult to obtain appropriate guidance before they complete the ERs. Therefore, it is suggested that the training for the staff of the REO be enhanced; the work process of completing and inspecting the ERs as well as division of work between the REO and ICAC be made clearer; and standardized

¹¹ The three responses were from Hon Chan Kin-por, Hon Emily Lau of the Democratic Party and the New Century Forum.

and more specific guidance on completing ERs be provided, so that candidates can avoid breaching the requirements;

- (b) Extending the period allowed for submission of ERs by candidates of District Council (second) functional constituency (“DC(2nd)FC”) in LegCo elections: Currently all candidates in LegCo elections have to submit their ERs not later than 60 days after the date of publication of the result of the election. There are views that the time allowed may not be adequate for candidates of DC(2nd)FC who generally need to conduct joint promotion and apportion election expenses with other candidates. It is therefore suggested that the period allowed for submission of ERs by candidates of DC(2nd)FC be extended to not later than 90 days after the date of publication of the result of the election;
- (c) Relaxing the requirement that both invoice and receipt have to be submitted with the ERs: There are views that some vendors, due to their small scale of operation, do not have a practice of issuing invoice and receipt separately. Some candidates can therefore only furnish a receipt for the relevant election expense items, thereby violating the requirements of the ECICO. It is therefore suggested that the Government amend the law to appropriately relax such requirement; and
- (d) Raising the DM limits for ERs: Some candidates conveyed the view that election expenses are sometimes in small amounts, and hence prone to errors in declaration. As the existing DM limits are not high relative to the election expenses limits, certain ERs with only minor breaches are still being referred to the ICAC for follow up, which may have added to ICAC’s burden of work. Therefore it is suggested that the Government raise the DM limits, so that the REO can first handle more cases in which breaches are minor. This would also help ICAC focus its resources on handling cases with more serious breaches.

Common problems in ERs

9. On the other hand, the REO has reviewed the ERs submitted by District Council and LegCo election candidates in the last election cycle, and discovered the following –

- (a) Failure to submit proper invoice(s) and/or receipt(s) showing clear and sufficient details¹² and/or proper cross reference: The documents submitted by candidates lack clear and sufficient details, and cannot be treated as an invoice and/or receipt for the relevant expense item. The expense items more prone to error often involve production costs of election advertisement (e.g., the invoice or quotation submitted by candidates lacks clear information on the goods or price, or there is no receipt), as well as office rent (e.g., candidates only submitted documents issued by their own councilor office) and salary for electioneering staff (e.g., the documents lack the name of the relevant staff and signature of the recipient to confirm receipt). As revealed in checking by the REO, in the 2011 District Council election and the 2012 LegCo election, around half of the candidates in each election made such mistakes in the ERs they submitted;
- (b) Declared election expenses of \$100 or more not supported by invoice(s) and receipt(s)¹³: Candidates did not provide any documents that could serve as invoice and receipt for election expense item of \$100 or more. As revealed in checking by the REO, in the 2011 District Council election and the 2012 LegCo election, around 20% of the candidates in each election made such mistakes in the ERs they submitted;
- (c) The declared amount for certain election expense items appearing to be understated when compared with the amounts recorded on invoice(s) and/or receipt(s)¹⁴: Candidates declared an amount lower than that recorded on the invoice and/or receipt for certain election expense items in the ER. These mistakes could be attributable to carelessness in completing the ER, as well as calculation error in apportionment of expenses. As revealed in checking by the REO, in the 2011 District Council election and the 2012 LegCo election, close to 20% and close to 30% of the candidates respectively made such mistakes in the ERs they submitted; and

¹² Violating section 37(2)(b)(i) of the ECICO.

¹³ Same as paragraph 9(a), violating section 37(2)(b)(i) of the ECICO.

¹⁴ Violating section 20 of the ECICO, depending on whether the candidate makes a statement in the ER which he/she knows or ought to know is materially false or misleading (a corrupt conduct); or violating section 23(3) of the ECICO, if the candidate does not include the relevant election expenses in the ER (an illegal conduct).

- (d) Omission of expense item(s) related to certain election advertisements¹⁵: In the process of checking the ERs, the REO discovered that some candidates did not declare in his/her ER the expenses of all election advertisements which he/she had declared to the Returning Officer earlier. As revealed in checking by the REO, in the 2011 District Council election and the 2012 LegCo election, 25% and around 30% of the candidates respectively had such omissions.

10. Moreover, as there were views that the DM limits should be increased, the Government also took the effort to make reference to the some sixty ERs for the 2012 LegCo election which were not granted relief under DMA after the REO’s inspection and needed to be referred to ICAC for follow up, in order to understand the extent to which the aggregate error value has exceeded the applicable DM limits in the past. The distribution of the aggregate error values involved in these ERs is shown below –

	Number of candidates / lists of candidates in the 2012 LegCo Election (the applicable DM limit is stated in brackets)		
Aggregate error value in the ER as revealed by the REO’s checking	<u>Geographical Constituency</u> (\$3,000)	<u>DC(2nd)FC</u> (\$5,000)	<u>Other Functional Constituency</u> (\$500)
At or within 100% of the DM limit ¹⁶	1 list of candidates	1 list of candidates	0
Exceeding 100% but at or within 500% of the DM limit	10 lists of candidates	1 list of candidates	4 candidates
Exceeding 500% but at or within 1000% of the DM limit	6 lists of candidates	1 list of candidates	5 candidates
Exceeding 1000% of the DM limit	20 lists of candidates	2 lists of candidates	13 candidates

¹⁵ Same as paragraph 9(c), violating section 20 or 23(3) of the ECICO. See footnote 14.

¹⁶ Although the aggregate error value in the ER of these candidates did not exceed the DM limits, they failed to revise all the relevant errors by lodging a copy of ER in accordance with section 37A(4) of the ECICO, and hence needed to be referred to ICAC for follow up.

11. Regarding the suggestion to extend the period allowed for submission of ERs by candidates in LegCo elections, we have reviewed the records and found that in the 2008 and 2012 LegCo elections, only one list of candidates contesting in a geographical constituency in the 2012 LegCo election could not submit the ER within the period allowed, sought and was granted relief by the CFI. All other candidates submitted their ERs before expiry of the statutory period (i.e., not later than 60 days after the date of publication of the result of the election).

ANALYSIS OF THE ISSUES

12. Having studied the views of Members (paragraphs 7 and 8 above) and the past scenarios of breaches (paragraphs 9 to 11 above), the Government considers that there are three main areas in the existing system which are worth looking into –

- (a) Firstly, regarding deadlines: including extending the period allowed for submission of ERs for (i) LegCo election uncontested candidates ; (ii) candidates of DC(2nd)FC in LegCo elections and/or (iii) all LegCo election candidates, so that they have more time for providing the information required;
- (b) Secondly, regarding completion of ERs: as the contents of the ERs are relatively complex, providing clearer guidance to avoid breaches could be considered; and
- (c) Thirdly, regarding relief mechanisms for minor errors and omissions: whether the DM limits should be raised to give more candidates a chance to rectify the errors in their ERs by simplified procedures could be reviewed.

13. Regarding deadlines, the Government considers that overall speaking, the existing statute has provided a reasonable period of time for candidates in LegCo elections to compile the relevant information and submit their ERs, and there is also a suitable, fair and effective mechanism to handle special situations where timely submission of ERs cannot be achieved (see paragraphs 3 to 6 above). Based on past experience (paragraph 11 above), it seems that the vast majority of candidates in LegCo elections did not encounter material difficulty in submitting their ERs on time. Therefore we consider that the existing arrangement has struck a reasonable balance between maintaining the effectiveness of the regime in monitoring and facilitating candidates' compliance. Nonetheless, we understand that in LegCo elections,

candidates conducting joint promotion with contested candidates and are subsequently returned uncontested may face difficulties in terms of time when they verify and apportion the relevant election expenses¹⁷ with the team of the contested candidates. Therefore, there may be merit in extending the period allowed for ERs submission by uncontested candidates¹⁸ in LegCo elections so that it ends on the same date as that allowed for contested candidates of the election (which means giving those uncontested candidates around 30 days more for completing their ERs). To implement this suggestion, section 37 of the ECICO would have to be amended, and, as a result, the period allowed for submission of claim for financial assistance by uncontested candidates in accordance with section 60I(1) of the Legislative Council Ordinance (Cap. 542), which is pegged to the period stipulated in section 37 of the ECICO, would be extended correspondingly. To ensure that the period allowed for public inspection of the relevant ERs in accordance with section 41 of the ECICO would not be curtailed due to implementation of this suggestion, we would also need to amend that section accordingly.

14. As regards completion of ERs, the views of Members (paragraph 8(a) and 8(c) above) and analysis of the past scenarios of breaches (paragraph 9 above) reveal that errors that do not seem to be due to bad faith, such as failure to submit supporting documents (i.e., invoices and receipts), submission of invalid supporting documents, lack of details in supporting documents, declared amount being lower than that indicated in the supporting documents, erroneous apportionment of expenses, etc., are common. The Government considers that if more specific and detailed guidance targeted at these common problems could be provided, candidates should be able to avoid many breaches in relation to submission of ERs. The specific improvement measures that could be considered are detailed in paragraph 16 below.

¹⁷ It is worthwhile to note that the election campaign of the uncontested candidates in LegCo elections ends on the day when the election results of their constituencies are published (i.e. within 14 days after expiry of the nomination period); therefore, vast majority of the election expenses of these candidates, including those that they need to share with other contested candidates, should have been ascertained and paid on or before that day. Even if the other candidates conducting joint promotion with the uncontested candidates continue their electioneering and incur new election expenses after that date, those expenses would not count towards the election expenses of the uncontested candidates.

¹⁸ Generally speaking, the period for submission of ERs by uncontested candidates in LegCo elections would only expire more than 20 days after the polling day. For example, in the 2012 LegCo election, the polling day was on 9 September, while the period for submission of ERs by uncontested candidates expired only on 6 October.

15. As for relief mechanisms for minor errors and omissions, although the aggregate error values in the ERs of the candidates seem to far exceed the DM limits (see paragraph 10 above), many errors involving huge amounts are invoice and receipt problems as described in paragraph 14 above. In fact, as explained in paragraph 10 above, among the some sixty ERs for the 2012 LegCo election which were not granted relief under the DMA, more than half of them involved an aggregate error value that exceeded the applicable DM limit by a factor of ten. Therefore, although raising the DM limits for ERs of various public elections and thereby allowing the appropriate authority to first handle more cases may be a direction to explore, whether substantially raising the limit for errors and omissions across the board would go against the original intent of the DMA is certainly worth serious consideration. We also need to carefully consider whether such an adjustment would de facto encourage some candidates to complete their ERs recklessly. Moreover, it would be more pragmatic to publish more specific ER completion guidance targeted at the common problems as described in paragraph 14 above for the next election cycle, so as to address the relevant breaches.

IMPROVEMENT MEASURES FOR CONSIDERATION

16. Based on the above analysis, all in all, the Government is of the opinion that the following improvement measures could be considered to assist candidates in complying with the requirements on ERs set out in the ECICO, and at the same time reducing the number of cases with minor breaches that need to be referred to ICAC for follow up –

- (a) extending the period allowed for ER submission for uncontested candidates in LegCo elections so that it ends on the same date as that for contested candidates of the election. This suggestion involves amending the ECICO;
- (b) providing more specific written guidance on completing ERs for candidates, their agents and electioneering staff. The contents could include:
 - i. based on the analysis in paragraph 9(a) and (b) above, problems related to invoices and/or receipts are the most common ones. Therefore, explanations on the particulars required in an invoice and a receipt (including in the

situation where the vendor only issues one document)¹⁹ could be offered to the candidates, so that they can submit invoices and receipts with sufficient particulars. Such particulars include:

- date;
 - details of the expense item (i.e., information and amount of the goods or services);
 - information of the organization or person providing the goods or services; and
 - information supporting that the organization or person providing the goods or services has received the relevant payment in full (e.g., name and signature of the recipient);
- ii. for election expense items that are prone to errors (e.g., salary of electioneering staff), samples of invoice and receipt could be provided for reference by candidates, so that candidates can submit invoices and receipts with sufficient particulars;
- iii. explanations on how copies of invoices and receipts could meet the requirements, in case the originals cannot be provided; and
- iv. reminders to candidates on ensuring that there is no omission, by comparing their declarations of election advertisements with their ERs before they submit the latter; and
- (c) enhancing the training for the staff of the REO, thereby avoiding potential misunderstandings in giving reference information.

¹⁹ According to section 37(3) of the ECICO, an invoice and a receipt for an election expense may be included in the same document. In other words, invoice and receipt need not necessarily be submitted in two separate documents; as long as the document submitted contains all the information related to that election expense item as described in paragraph 16(b)(i), it would satisfy the requirements.

ADVICE SOUGHT

17. Members are invited to provide their views on the operation of the ECICO and the above improvement measures.

**Constitutional and Mainland Affairs Bureau
April 2015**