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Panel on Constitutional Affairs
Background brief prepared by the Legislative Council Secretariat
for the meeting on 20 April 2015

Operation of the Elections (Corrupt and Illegal Conduct) Ordinance

Purpose

This paper provides background information on the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) ("ECICO"), and summarizes previous discussion of the Panel on Constitutional Affairs ("the Panel") on the operation of ECICO.

Background

2. 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. 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 Independent Commission Against Corruption ("ICAC") is obliged by law to investigate cases that involve offences under ECICO.

Corrupt and illegal conduct under ECICO

3. 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 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 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 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 ER and EAs

6. Apart from the corrupt and illegal conduct above, ECICO also stipulates requirements for lodging ERs and publishing EAs². Such requirements are summarized at **Appendix I(a)**. 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 for three years if tried summarily; or a fine of \$500,000 and imprisonment for seven years if tried on indictment.

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).

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 ECICO

9. ECICO provides a relief mechanism in respect of illegal conduct and offences in relation to EAs and ER. In addition, a de minimis arrangement was introduced in 2011 to deal with minor errors or false statements in ER. Details of the relief mechanism and de minimis arrangement are set out in **Appendix I(b)**.

Panel's discussion

10. The Panel discussed issues relating to the operation of ECICO at its meeting on 23 April 2014. The major concerns expressed by members are summarized in ensuing paragraphs.

Timeframes for lodging of ERs

11. Hon Mrs Regina IP considered that the specified period for lodging of ERs for LegCo elections was too short for candidates to finish calculating the exact election expenses/election donations and submit audited accounts on their election expenses. Hon WONG Ting-kwong pointed out that in the 2008 LegCo Election, he was elected uncontested, but he had also participated in the election campaign activities organized for certain geographical constituency ("GC") candidates. At the deadline for Mr WONG to submit his ER, he was still unable to know the expenses incurred by his participation in the above election campaign activities, as the information was made available to him by the GC candidates concerned only some time later. He pointed out that it was not his fault in being unable to report the total amount of expenses in his ER, but he had to apply to the court for granting of relief and bear the legal costs thus incurred.

12. The Administration explained that a candidate at a LegCo election had to ensure that his/her ER was lodged not later than 60 days after the date of publication of the results of the relevant election. As the dates of publication of election results for uncontested and contested elections were different, the "60-day rule" under section 37 of ECICO had given rise to different deadlines for submission of ERs by candidates in contested elections and those in

uncontested elections. Hence, the deadline for Mr WONG to submit his ER was different from that for candidates in contested elections. In view of members' concerns, the Administration agreed to look at the existing arrangements concerning timeframes for lodging of ERs.

Conduct in contravention of ECICO

13. Some members considered that some inadvertent breaches of ECICO, such as making minor errors or omissions in ERs should be decriminalized and handled by the Registration and Electoral Office ("REO") instead of ICAC. Hon IP Kwok-him considered that, e.g. breaches of the requirement that "a person must, not later than seven days after publishing a printed EA, furnish two copies of EA to the appropriate returning officer" should not entail criminal liability. He noted that such breaches might have been caused by mere negligence of members of the candidate's electioneering team in handling EAs.

14. Dr Hon Priscilla LEUNG also referred to a case involving a former DC election candidate who had failed to file the written consent of his supporters as required by ECICO, and pointed out that the candidate concerned had to bear not only substantial legal cost but also great pressure merely due to his inadvertent breach of that requirement. She opined that ECICO was too complicated and would deter persons from running for election. She suggested that REO should be tasked to handle cases involving only minor omissions and irregularities, which in her view could be dealt with by administrative punishments (e.g. imposing a fine). Hon Paul TSE proposed that cases which involved relatively minor and technical breaches of ECICO, and irregularities relating to insignificant amounts of election expenses or just slight delay in lodging ER could be handled by REO by way of summary procedure. Moreover, candidates should be given the opportunity to rectify ER after they were made aware of the errors or false statements identified in ER so as to cater for inadvertent breaches which were of a relatively minor or trivial nature.

15. The Administration explained that ECICO already provided for a relief mechanism in respect of illegal conduct and offences in relation to EAs and ER. In addition, a de minimis arrangement was introduced in 2011 to deal with minor errors or false statements in ER. Nevertheless, the Administration agreed to follow up on members' views and concerns.

De minimis arrangement under ECICO

16. Some members suggested that the specified de minimis limit should be in proportion to the relevant election expenses limit, and it could be set in the

range of 1% to 10% of the election expenses limit. The Administration advised that the specified de minimis limit was set in 2011 in the light of operational experience. In considering any proposal of raising the specified de minimis limit, the principle of fairness and equality for conducting election-related activities should be adhered to. Hon Emily LAU requested updated statistical information on the de minimis arrangement. The requisite information is in **Appendix II**.

Recent development

17. The Panel will further discuss the operation of ECICO at the next meeting on 20 April 2015.

Council Business Division 2
Legislative Council Secretariat
15 April 2015

**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.

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the Elections (Corrupt and Illegal Conduct) Ordinance**

(Extract)

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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.

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Legislative Council Panel on Constitutional Affairs

Follow up on issues raised at the Panel meeting on 23 April 2014

At the meeting of the Panel on Constitutional Affairs held on 23 April 2014, the Administration provided statistics related to the de minimus arrangements (“DMA”) introduced in 2011 under the Elections (Corrupt and Illegal Conduct) Ordinance (“ECICO”) (Cap. 554). This paper sets out the Administration’s response to Members’ request at the meeting for breakdown figures.

2. In the process of preparing the breakdown figures, the Registration and Electoral Office (“REO”) and the Independent Commission Against Corruption (“ICAC”) have reviewed the cases processed and granted relief under the DMA as well as those requiring follow up by ICAC, and updated the statistics set out in LC Paper No. CB(2)1361/13-14(01) as follows to reflect the latest actual situation¹ –

	2011 District Council Election	2011 Election Committee Subsector Election	2012 Legislative Council Election
No. of candidates / lists of candidates whose election returns (“ERs”) were found to contain errors or false statements ² (A)+(B)	783 candidates	690 candidates	87 candidates / lists of candidates ³

¹ The update is mainly to rectify double counting issues in the figures provided previously.

² For this document, errors or false statements include (i) failure to include any election expense of the candidate at the election concerned or any election donation received by or on behalf of the candidate in connection with the election, (ii) incorrectness in the amount when such election expense or donation is set out, (iii) failure to submit any document required (e.g. invoices, receipts, declarations, etc.) to accompany with that ER in accordance with section 37(2)(b) of Cap. 554 and (iv) non-compliance with legal requirements in the documents accompanied with the concerned ER.

³ ERs are submitted on a candidate basis for functional constituencies (except District Council (second) functional constituency), while those for geographical constituencies and District Council (second) functional constituency are submitted on a ‘list of candidates’ basis (including one-person list).

	2011 District Council Election	2011 Election Committee Subsector Election	2012 Legislative Council Election
No. of candidates / lists of candidates whose aggregate error value ⁴ in the ER had not exceeded the specified de minimus limit, and had been successfully processed and granted relief under DMA (A)	217 candidates ⁵	306 candidates ⁶	22 candidates / lists of candidates
No. of candidates / lists of candidates whose ERs were found to contain errors or false statements, and were not granted relief under DMA ⁷ (B)	566 candidates	384 candidates	65 candidates / lists of candidates ⁸

⁴ According to section 37A(3) of Cap. 554, the aggregate value of errors or false statements is the sum of the following —

(a) if the nature of the error or false statement is a failure to set out an election expense or election donation, the amount of the election expense or election donation;

(b) if the nature of the error or false statement is incorrectness in the amount of an election expense or election donation, the extent, in monetary terms, of the adjustment required to correct the error or false statement.

⁵ Including 49 candidates who were followed up by ICAC upon referral from REO and whose aggregate error value in the ER was subsequently found to be not exceeding the specified de minimus limit, and therefore had been successfully processed and granted relief under DMA afterwards.

⁶ Including 4 candidates who were followed up by ICAC upon referral from REO and whose aggregate error value in the ER was subsequently found to be not exceeding the specified de minimus limit, and therefore had been successfully processed and granted relief under DMA afterwards.

⁷ The reasons for not being granted relief include (i) the aggregate error value exceeded the specified de minimus limit, hence the candidate / list of candidates was ineligible for relief under DMA, and (ii) under DMA, the candidate / list of candidates failed to revise all the relevant errors by lodging a copy of ER in accordance with section 37A(4) of Cap. 554.

⁸ The 65 candidates / lists of candidates involve a total of 140 candidates whose ERs were found to contain errors or false statements, and were not granted relief under DMA.

3. The aforementioned cases where the ERs were found to contain errors or false statements, and were not granted relief under DMA (i.e., item B in the table above) have been referred to ICAC for follow up. The relevant outcomes of investigation are as follows –

	2011 District Council Election	2011 Election Committee Subsector Election	2012 Legislative Council Election
No. of candidates / lists of candidates whose ERs were found to contain errors or false statements, and were not granted relief under DMA (B) = (B1)+(B2)+(B3)+(B4)+(B5)	566 candidates	384 candidates	140 candidates ⁹
No. of candidates who applied for relief and were subsequently granted relief by the court (B1)	5 candidates	11 candidates	10 candidates
No. of candidates prosecuted (B2)	0	0	0
No. of candidates cautioned ¹⁰ (B3)	1 candidate	0	0
No. of candidates issued with warning ¹¹ (B4)	304 candidates	272 candidates	113 candidates

⁹ For 2012 Legislative Council Election, the 65 candidates / lists of candidates referred to ICAC for follow up involve 140 candidates (see footnote 8). For these referral cases, if they belonged to the same list of candidate, ICAC would investigate the cases of individual candidates who were suspected to have breached ECICO, hence the investigation figures would be listed on a candidate basis instead of 'list of candidate' basis.

¹⁰ Upon legal advice, ICAC has since 1991 implemented a three-tier sanction system against offenders who have breached the provisions of ECICO. The system, which encompasses warning, caution and prosecution, allows a more flexible and pragmatic approach to handle cases of minor nature and technical breaches.

¹¹ If the alleged contravention of ECICO is technical and minor in nature, counsel in the Department of Justice would normally advise to issue a warning as opposed to

	2011 District Council Election	2011 Election Committee Subsector Election	2012 Legislative Council Election
No. of candidates whose allegations against whom were found to be unsubstantiated after investigation, or the Department of Justice considered the evidence insufficient and hence had not proceeded with prosecution, caution or warning (B5)	256 candidates	101 candidates	17 candidates

4. Members also asked about the number of cases which involved an aggregate value of errors only slightly exceeding the specified de minimis limit. The table below lists out, for the past three elections, the number of candidates / lists of candidates who were not granted relief under DMA (i.e., figure (B) in the table under paragraph 2), but had the specified de minimus limit been raised by 10% back then, would have been eligible for DMA –

	2011 District Council Election	2011 Election Committee Subsector Election	2012 Legislative Council Election
Assuming the specified de minimus limit was raised by 10% back then, the additional no. of candidates / lists of candidates who would have been eligible for DMA	8 candidates	0	3 candidates / lists of candidates

Constitutional and Mainland Affairs Bureau
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