

Legislative Council Panel on Constitutional Affairs

**Consultation Paper on
Review of Electoral Arrangements**

Purpose

The Government has published the Consultation Paper on Review of Electoral Arrangements on 13 November 2017. This paper highlights the salient points therein and seeks Members' views.

Background

2. The various major public elections in the 2015-2017 election cycle were successfully conducted. In view of the recommendations put forth by the Electoral Affairs Commission ("EAC") in its reports submitted to the Chief Executive after the elections, as well as the views provided by this Panel and the community for improving the electoral arrangements, the Government has commenced a review on electoral arrangements in preparation for the next election cycle.

3. We have consulted this Panel in December last year and in June and July this year in respect of a series of issues on electoral arrangements, including the three issues raised in this consultation paper, design of ballot papers, the operation of polling and counting stations of District Council ("DC") and Legislative Council ("LegCo") elections (procurement of venues for use as polling stations, use of IT in the election process), etc. The EAC also made five amendment regulations in June this year to implement its recommendation to require electors to produce the original of his/her Hong Kong Permanent Identity Card for issuing ballot papers; and to provide for alternative measures in case such an original cannot be produced. For other recommendations on operational arrangements (such as voter registration for DC (second) functional constituency, long queues at some polling stations), the Registration and Electoral Office has already taken or is examining follow-up actions.

4. This consultation mainly seeks to invite views from the public on three issues related to electoral arrangements, i.e., the regulation of election advertisements (“EAs”) published through the Internet (including social media), the regulation of election surveys, as well as the polling hours. Concrete views on other election-related issues, if any, are also welcome. The Government will decide the next step in light of the views received.

(A) Regulation of EAs published through the Internet (including Social Media)

5. During the public consultation exercises conducted by the EAC and the discussion of this Panel on the guidelines on election-related activities of several public elections, there were concerns that commentary on candidates, changing profile pictures or suggesting voting for a particular candidate on the social media could be regarded as publishing EAs, and that the associated expenses would be regarded as election expenses, hence subjecting web surfers to inadvertent breach of electoral laws and restricting freedom of expression.

Existing Regulatory Framework

6. To ensure that elections are conducted in an open, fair and honest manner, EAs and election expenses are regulated by legislation. Specifically, the Elections (Corrupt and Illegal Conduct) Ordinance (“ECICO”) (Cap. 554) adopts a “purpose test” in defining EAs, i.e., any form of publication published for the purpose of promoting or prejudicing the election of a candidate or candidates at the election constitutes an EA. Public inspection requirement for EAs is imposed on a candidate¹. The ECICO regards expenses incurred or to be incurred, before, during or after the election period, by or on behalf of the candidate for the purpose of promoting the election of the candidate or prejudicing the election of another candidate as election expenses. As such, expenses incurred for

¹ The relevant regulations under the EAC Ordinance (“EAC Regulations”) impose an obligation on a candidate to, within one working day after publication of an EA, deposit copies of the EA with the Returning Officer or an electronic copy of the EA (or, if technically impracticable, a hyperlink) at the Central Platform or Candidate’s Platform for public inspection purpose.

the purposes of producing or publishing an EA are election expenses. Under the ECICO, election expenses could only be incurred by a candidate and his/her election expense agents, and the aggregate amount of election expenses incurred by or on behalf of the candidate is subject to a prescribed threshold. A person other than a candidate or a candidate's election expense agent, who incurs election expenses, commits an offence and is liable upon conviction to a fine of \$200,000 and imprisonment for three years.

Considerations and Recommendation

7. Under the existing regulatory framework, if a web surfer publishes a publication on the Internet (including social media) merely for expression of views and does not intend to promote or prejudice the election of any candidates, such publication will not normally be regarded as EAs, and the expenses incurred will not be election expenses. There is no breach of electoral laws in such cases. However, if a web surfer publishes any form of publication on the Internet for the purpose of promoting or prejudicing the election of a candidate or candidates (hence publishing an EA), the expenses incurred (notably the electricity and Internet access charges in normal circumstances), however trivial, are election expenses under the ECICO and hence could subject the web surfer to criminal liability of illegally incurring election expenses as mentioned in paragraph 6 above.

8. It is noted that despite the clarifications made by the EAC in its guidelines on election-related activities², there are still concerns among

² In view of the concerns of web surfers, the EAC has since 2015 elaborated in its guidelines on election related activities that, if a web surfer merely shares or forwards different candidates' election campaigns through the Internet platform (for expression of views) and does not intend to promote or prejudice the elections of any candidates, such sharing or forwarding will not normally be construed as publishing EAs. However, if a web surfer is instructed by the candidate or his/her election helpers to share or forward the election campaigns through the Internet platform with the intention to promote or prejudice the election of a candidate or candidates at the election, such an act will be regarded as publication of the candidate's EAs and any costs incurred will be counted as the candidate's election expenses. The EAC has also relayed the worries of web surfers to the Government, and recommended that a review of the relevant legislation be conducted. The EAC is open-minded on proposal that relaxes control over the publication of election-related messages on the Internet.

some members of the public on possible breaches of electoral laws that might arise from the expression of views on the Internet (including social media). In this regard, the breach itself, i.e., expenses incurred in publishing the views concerned (which are electricity and Internet access charges in normal circumstances), is indeed trivial. After balancing the objective of upholding the fairness of elections against the need to safeguard the freedom enjoyed by the public in their daily expression of views on the Internet, we consider that the relevant legislative provisions may be relaxed. The direction is in line with the overseas practices under our study, as well as the Panel's general support last year to the exemption of the criminal liability that might arise from the expression of personal views on the Internet (including social media).

9. As elaborated in paragraph 7 above, the inadvertent breach by a web surfer arises from the trivial election expenses, i.e., electricity and Internet access charges incurred in publication of EAs on the Internet. We recommend a targeted exemption of the criminal liability under the ECICO in respect of a third party (including individuals and groups, except for the candidates whose election is being promoted or prejudiced and their election expense agents) who incurs electricity and Internet access charges in publishing EAs on the Internet (including social media). The proposed relaxation should have addressed cases of inadvertent breach resulting from a mere expression of views by these third party web surfers, without exempting those web surfers who have incurred election expenses such as the cost of setting up and designing online platforms for promoting the election of a candidate. It will not affect the obligation of candidates or their election expense agents under the existing electoral legislation. The definitions of EAs and election expenses under the existing legislation will also remain intact.

10. Our proposed exemption applies to both individuals and groups because the room for abuse is believed to be limited when the types of election expenses that can be exempted are only limited to electricity and/or Internet access charges. Moreover, the law enforcement agencies can then be spared of the difficulty of distinguishing whether the view is from an individual or a group on Internet platforms (e.g. social media, online fora, and instant messaging applications) on which nicknames are frequently used without identity verification.

Views Sought

11. We would like to invite the public to express their views on the proposed exemption in paragraph 9 above and whether the types of election expenses eligible for the exemption should be restricted to electricity and Internet access charges.

(B) Regulation of Election Surveys

12. In the 2016 LegCo General Election, various election surveys were conducted by different organisations on or before the polling day with announcement of the results. There were also media reports that some people intended to use the results of such surveys for the matching of votes. There were views in the LegCo and the community that the Government should review the relevant legislation in relation to the use of election survey results to match or canvass votes, and regulate the various types of election surveys conducted on or before the polling day. In view of keen public concern on various types of election surveys, the EAC considers that society should address and explore how this issue should be handled in future public elections.

Existing Regulatory Framework

13. According to the EAC Regulations, a person who obtains or attempts to obtain in any manner within a polling station or a No Staying Zone, or within a No Canvassing Zone (“NCZ”) without the express permission of the Presiding Officer or the EAC, information as to the candidate for whom an elector in the polling station is about to vote or has voted, commits an offence.

14. There is no provision under the existing legislation on details of the regulation of exit polls approved to be conducted within the NCZs. Instead, the EAC has promulgated guidelines in relation to the conduct, publication and broadcast of exit polls conducted within NCZs (“the Guidelines”) to avoid unfair interference with the election process by unduly influencing electors. The Guidelines stipulates that any announcement or disclosure of results of exit polls or predictions, particularly in relation to any individual candidate, during the polling

hours may affect electors' behaviour and have an impact on election results. The EAC therefore had in the past reminded the media and organisations concerned that they should not announce the results of exit polls or make specific remarks or predictions on the performance of individual candidate before the close of poll. Since the 2015 DC Ordinary Election, the EAC has also required applicants or the applicant organisations for conducting exit polls to make a statutory declaration to abide by the relevant terms and the Guidelines on the conduct of exit poll. Failure to comply with the terms of the statutory declaration or requirements of the Guidelines could result in revocation of the approval for the conduct of exit poll, censure or even reprimand by the EAC in a public statement. If applicants or applicant organisations knowingly make a false statement on a material particular in the statutory declaration, they may be subject to criminal liability.

15. As for election surveys conducted outside of the NCZs on the polling day, and on election surveys conducted through different channels (e.g. by phone, on the Internet) prior to the polling day, there is currently no regulation under the existing legislation or the Guidelines.

Considerations

16. Regulation of election survey in overseas countries and territories ranges from no regulation to prohibition of the publication of election survey results starting from some time prior to the polling day. A number of overseas countries and territories have enacted legislation to prohibit the publication of any form of election survey results, or the predictions of election results before the close of poll on the polling day. When we presented those practices to this Panel in December last year, some Members were of the view that measures should be introduced to regulate the publication of statistical data of election surveys on or even a few days before the polling day in order to ensure the election is conducted in a fair manner. On the other hand, some Members did not support imposing regulations on election surveys.

17. Views are diverse in the community as to whether legislation should be enacted to regulate election surveys. On one hand, some consider that in order to avoid affecting electors' behaviour and election results, the Government should prohibit the announcement or disclosure of

any form of election survey results across-the-board (including exit poll results) conducted on and prior to the polling day (if such results have not been announced or disclosed before the polling day), and the making of specific remarks or predictions on the performance of individual candidates. There are also views that the Government should introduce a cooling-off period by prohibiting the publication of statistical data of election surveys starting from a few days before the polling day. On the other hand, some consider that even if the Government prohibits the publication of election survey result, candidates who intend to take part in the matching of votes could still give out other forms of voting instructions to their supporters.

Views Sought

18. We would like to consult the public on the following issues: whether and to what extent election surveys conducted outside the NCZs on the polling day should be regulated; whether and to what extent election surveys conducted prior to the polling day should be regulated; and whether any change should be made to the existing regulation on exit polls on the polling day.

(C) Polling Hours

19. At present, polling hours of public elections are arranged by the EAC. The polling hours for both DC and LegCo elections are from 7:30 am to 10:30 pm³. Some LegCo Members opined that the poll, running for 15 hours, was too long and proposed shortening the polling hours, including advancing the closing time of the poll.

Considerations

20. We have studied the polling hours in Australia, Canada, New Zealand, Singapore and the United Kingdom (“UK”). While the UK adopts a 15-hour polling day as that of Hong Kong, polling hours of the remaining four countries range from only 10 to 12 hours⁴. During our

³ Polling hours for dedicated polling stations set up at penal institutions are an exception. Owing to security reasons, polling hours for these stations are from 9:00 am to 4:00 pm.

⁴ The polling hours of the five countries concerned are as follows: Australia – 8:00

consultation with this Panel in July this year, a Member recommended that the closing time of the poll be advanced to 10:00 pm. Another suggested that the polling hours be shortened to the period from 7:00 am to 6:00 pm, or from 9:00 am to 8:00 pm. A Member opposed shortening the polling hours.

21. In fact, as the vote count can only start after 10:30 pm, the election results will usually not be available for announcement until the morning or, for LegCo elections, even the afternoon on the day after the polling day. Counting staff, candidates and their agents often need to perform and monitor the counting work overnight. If the present closing time of the poll is advanced, the counting work may correspondingly start earlier, such that the election results may be announced earlier.

22. However, as the present polling hours have been in force since the first-term LegCo election in 1998 and the first-term DC election in 1999, electors have well adapted to this arrangement. If the closing time of the poll is advanced, some electors may not be able to vote because the revised polling hours may conflict with their working hours, or they may find it inconvenient to vote as compared to before. In this regard, we have analysed the voter turnout in different time slots during the 2015 DC Ordinary Election and the 2016 LegCo Geographical Constituency (“GC”) Elections, details of which are set out as follows –

Time Slots	2015 DC Ordinary Election		2016 LegCo GC Elections	
	Voter Turnout	As a Percentage of Voter Turnout for Whole Day	Voter Turnout	As a Percentage of Voter Turnout for Whole Day
07:30-08:30	39 903	3%	49 420	2%
08:30-09:30	80 410	5%	91 506	4%
09:30-10:30	91 665	6%	128 120	6%
10:30-11:30	128 070	9%	148 435	7%
11:30-12:30	112 029	8%	149 159	7%

am to 6:00 pm (10 hours); Canada – 7:00 am to 7:00 pm (12 hours); New Zealand – 9:00 am to 7:00 pm (10 hours); Singapore – 8:00 am to 8:00 pm (12 hours); UK – 7:00 am to 10:00 pm (15 hours).

	2015 DC Ordinary Election		2016 LegCo GC Elections	
Time Slots	Voter Turnout	As a Percentage of Voter Turnout for Whole Day	Voter Turnout	As a Percentage of Voter Turnout for Whole Day
12:30-13:30	99 106	7%	146 812	7%
13:30-14:30	103 474	7%	152 024	7%
14:30-15:30	100 048	7%	152 408	7%
15:30-16:30	99 732	7%	159 605	7%
16:30-17:30	100 377	7%	156 553	7%
17:30-18:30	105 276	7%	160 487	7%
18:30-19:30	98 462	7%	153 314	7%
19:30-20:30	97 828	6%	159 537	7%
20:30-21:30	105 069	7%	179 164	8%
21:30-22:30	105 780	7%	215 739	10%
Total	1 467 229	100%	2 202 283	100%

23. The above figures show that the voter turnout is quite evenly distributed throughout different time slots on the polling day, except that it is relatively low for the first hour and relatively high for the last hour. Based on the above analysis, our preliminary view is that it will be difficult to significantly shorten the polling hours. However, given the present long polling hours and the time needed for vote counting, it is indeed an exhausting experience for polling and counting staff, candidates and their agents, as well as members of the media, all of whom have to put in long hours. In light of the above, we consider that on the premise of ensuring that the elections are conducted in an open, fair and honest manner, if the community reaches a consensus of slightly shortening the polling hours (e.g. by half an hour or one hour, in the start and/or close of poll), we can relay the relevant proposal to the EAC to facilitate its consideration of the polling arrangements.

Views Sought

24. We would like to consult the public on the following issues: whether the current polling hours should be shortened; if the polling hours are to be shortened, whether only the closing time of the poll be advanced, only the starting time of the poll be postponed, or both the starting and closing time of the poll be respectively postponed and advanced at the same time; and for how long should it be shortened.

VIEWS SOUGHT

25. Members are invited to express their views on the above issues. The public consultation has commenced on 13 November 2017 and will last until 29 December 2017. The Government will collate views from the public and decide the next step in the light of the views received.

**Constitutional and Mainland Affairs Bureau
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