

Legislative Council Panel on Constitutional Affairs

**Consultation Report on Review of Electoral Arrangements and
Proposed Amendments to Electoral Legislation**

PURPOSE

The Government has published the Consultation Report on Review of Electoral Arrangements (“Consultation Report”) on 15 May 2018 to set out the outcome of the public consultation and our proposed way forward for the three issues covered by the consultation. This paper highlights the salient points therein and the proposed amendments to electoral legislation that we plan to put forth in the second half of this year, and seeks Members’ views.

(A) CONSULTATION REPORT

Background

2. The Constitutional and Mainland Affairs Bureau published the Consultation Paper on Review of Electoral Arrangements (“Consultation Paper”) on 13 November 2017 and launched a public consultation that last for about seven weeks to gauge the views of the public on three issues related to electoral arrangements, namely, the regulation of election advertisements (“EAs”) published through the Internet (including social media), the regulation of election surveys, as well as the polling hours. The public consultation period ended on 29 December last year.

Outcome of the consultation

3. During the consultation period, we received more than 15 400 written submissions from individuals and organisations. In summary, there is overwhelming support for our proposed relaxation on the regulation of EAs published on the Internet (including social media); views on the regulation of election surveys are diverse; and the overwhelming majority of views received opposed to shortening the polling hours of Legislative Council (“LegCo”) and District Council (“DC”) elections. Besides, we consulted this Panel on the Consultation Paper at a meeting on 20 November last year, and met with deputations/individuals at a subsequent special meeting of this Panel on 20 December. We also met with the Chairmen and Vice-Chairmen of the 18 DCs on 21 December last year to solicit their views on the Consultation Paper. A detailed analysis

of the views of political parties, LegCo and DC Members, organisations, academics and members of the public has been set out in Chapter 3 to Chapter 5 of the Consultation Report.

(1) Regulation of EAs published through the Internet (including social media)

4. We consulted the public on providing an exemption in the Elections (Corrupt and Illegal Conduct) Ordinance (“ECICO”) (Cap. 554), such that a third party incurring merely electricity and/or Internet access charges can be exempted from the criminal liability arising from incurring election expenses as a result of expression of views on the Internet (including social media) that constitutes an EA.

5. Of all the views received on the aforementioned targeted exemption in the ECICO, there was overwhelming support from the public (about 96%), political parties, LegCo and DC Members and the Hong Kong Bar Association (“HKBA”), etc.

6. As to the types of election expenses which will be eligible for the above-mentioned exemption, the majority of the public (about 67%), political parties, LegCo and DC Members and the HKBA, etc. supported exempting the criminal liability arising from incurring merely electricity and/or Internet access charges.

7. We have received a few related suggestions and our responses are as follows –

- (a) some suggested excluding employees or supporters of the candidates from the third party who may enjoy the exemption. For clarity and certainty in implementation, we recommend sticking to our proposed definition of third party i.e., individuals or groups that are neither the relevant candidates whose elections are promoted or prejudiced nor their election expense agents;
- (b) some opined that we should clarify whether the proposed exemption would be applicable to instant message applications such as WeChat and Whatsapp. We take the view that the exemption should cover expression of views on the Internet (including social media) in general, without specifying the types of communication hardware and/or software used for such expression, to allow room for advancement in technologies in future;

- (c) some suggested making reference to the overseas practices of requiring a third party publishing EAs on the Internet (including social media) to disclose his/her identity (e.g. name and even address) in order to prevent anonymous vilification against individual candidates during elections and to increase transparency. We take the view that such disclosure requirement should not be introduced as it will add complexity and uncertainty to the existing requirements. Under such proposal, a web surfer would first need to assess whether his/her publication on the Internet (including social media) constitutes an EA and hence whether the identity disclosure requirement is applicable to him/her, running contrary to the intention of our proposed exemption to address concerns of inadvertently breaching the electoral laws. Moreover, the ECICO already contains provisions to deal with deceptive behaviour in relation to electors (section 14) and publication of false or misleading statements about a candidate (section 26), which will remain intact despite our proposed exemption; and
- (d) some suggested excluding certain expenses from the definition of “election expenses”. As the design of the electoral system is to ensure that all candidates compete on an equal footing based on an identical threshold of electoral resources prescribed by law, we consider that any exclusion from election expenses must not be introduced lightly. We have not proposed any change to the definition of election expenses in this exercise.

8. In light of the overwhelming support received, we **propose** to introduce 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 merely electricity and Internet access charges in publishing EAs on the Internet (including social media).

(2) Regulation of election surveys

9. In the Consultation Paper, we solicited public views on whether election surveys (including those on electors’ voting preference and choice) conducted outside the No Canvassing Zone (“NCZ”) on the polling day should be regulated; whether and to what extent election surveys on electors’ voting preference 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.

Regulation of election surveys conducted outside the NCZs on the polling day

10. A number of political parties (Business and Professionals Alliance for Hong Kong (“BPA”), Democratic Party (“DP”), Liberal Party and New People’s Party (“NPP”)), the HKBA and the Law Society of Hong Kong (“the Law Society”) were of the view that the Government should prohibit the announcement or disclosure of results of election surveys before the close of poll on the polling day, so as to avoid affecting the behaviour of electors and unfairly influencing the election process. Some political parties (Democratic Alliance for the Betterment and Progress of Hong Kong (“DAB”), Liberal Party, “Supervision by 230,000”) expressed concerns that during the 2016 LegCo General Election, some organisations disseminated the results of election surveys conducted on and before the polling day, as well as their recommended lists of candidates, with a view to unduly affecting the choice of electors. Having said that, a political party (DAB) questioned whether it would be feasible in practice to implement the prohibition if the conduct or publication of election surveys took place on the Internet through overseas servers. Besides, when the Consultation Paper was discussed at this Panel, certain Members suggested introducing a cooling-off period, but some other Members cast doubts on the feasibility of implementing the proposal.

11. On the other hand, a relatively large proportion of members of the public (about 65%), a few political parties (Hong Kong Professional Teachers’ Union (“HKPTU”), Hong Kong Association for Democracy and People’s Livelihood (“ADPL”)), Hon Charles Mok, and two academics (Chung Ting-yiu, Director of the Public Opinion Programme of The University of Hong Kong, and Ma Ngok, Associate Professor at the Department of Government and Public Administration of the Chinese University of Hong Kong) held opposing views. These respondents generally opined that the results of election surveys could serve as useful reference for both the candidates and electors, and regulating these election surveys would potentially impede the circulation of information and the electors’ right to know.

12. In light of the polarised views received for this issue and the feasibility and effectiveness of implementing any prohibition, we **propose** not to extend the existing regulation on exit polls to election surveys conducted outside the NCZs on the polling day.

Regulation of election surveys conducted before the polling day

13. As for elections surveys conducted prior to the polling day, as set out in paragraph 10 above, some political parties criticised that during the 2016 LegCo General Election, some organisations intended to use the results of election surveys to unduly affect the choice of electors. Some political parties pointed out that such election surveys were closely intertwined with the announcement of so-called “abandonment of election” by some candidates after the nomination period. A political party (Liberal Party) advocated prohibiting the announcement or disclosure of results of election surveys a few days prior to the polling day. The majority of written submissions (about 86%) from members of the public, as well as some political parties/LegCo Members (DP, The Professional Commons (“PC”), HKPTU, ADPL, Dr Hon Fernando Cheung), HKBA, the Law Society and the two academics opposed to regulating election surveys conducted prior to the polling day. These respondents expressed concerns on the potential impact of such regulations on the public’s right to know, academic freedom and freedom of the press.

14. Having considered the concerns expressed by various stakeholders, and that there is no regulation on election surveys conducted outside the NCZs on the polling day, we **propose** that the existing regulation on exit polls on the polling day should not be extended to election surveys conducted prior to the polling day. Having said that, as we have pointed out in the Consultation Paper, if an election survey involves publication of EAs and election expenses, and the publisher is neither a candidate nor an election expense agent of the candidate, the publisher may then be engaged in illegal conduct under the ECICO. If a candidate instructs that person or organisation to publish the EAs and does not include such expenses in his/her election expenses, the candidate would also violate the regulation under the ECICO.

Existing regulation on exit polls

15. There were only a few and diverse views from political parties regarding whether any change should be made to the existing regulation on exit polls on the polling day. On the other hand, the Law Society recommended that the Government should require persons or organisations conducting the exit polls to provide more information of its survey, such as sample size, sampling method, response rate, survey questions, etc. Among those members of the public who submitted relevant views during the consultation period, about 53% considered there to be a need to tighten up the existing regulation regime on exit polls. Some of the suggestions

included only allowing academic institutions to conduct exit polls, requiring the persons or organisations conducting the exit polls to release the survey results within a short period of time after the election, etc. As for the remaining respondents (about 47%), they were of the view that the existing regulations were adequate.

16. After balancing the academic freedom of the organisations/ persons conducting exit polls, the absence of similar regulation for election surveys conducted outside the NCZs on the polling day, and the need to uphold the integrity of elections, we **propose** not to make any change to the existing regulation on exit polls on the polling day. As the statute requires the Electoral Affairs Commission (“EAC”)’s approval for the conduct of exit polls in the NCZs on the polling day, we have already channeled to EAC the specific views received on strengthening the approval of applications and monitoring of exit polls, for its consideration on the need for updating the election guidelines concerning exit polls.

(3) Polling hours

17. In the Consultation Paper, we consulted members of the public on whether the current polling hours of LegCo and DC elections should be shortened and if so, how and by what extent the existing polling hours lasting from 7:30 am to 10:30 pm should be shortened.

18. Views from political parties and some major stakeholders on the issue were rather diverse. On one hand, some political parties (DAB, BPA, NPP), Dr Hon Lo Wai-ki and a DC member considered there to be a need to slightly shorten the polling hours, say advancing the closing time of the poll by an hour to 9:30 pm (DAB), or shortening the polling hours to 8:00 am to 10:00 pm (BPA). They opined that shortening the polling hours could lessen the disturbance caused to the neighbourhood of the counting stations owing to the counting of votes at night and enable the Registration and Electoral Office to return the venue of the polling stations as early as possible. On the other hand, several political parties (DP, PC, Power for Democracy, HKPTU, Democratic Alliance, ADPL), LegCo Members (Dr Hon Fernando Cheung, Hon Kwok Ka-ki, Hon Claudia Mo, Hon Charles Mok), several DC members, HKBA, and the Law Society were against shortening the polling hours. They did not consider the reasons put forth in the Consultation Paper, i.e., alleviating the fatigue suffered by candidates, agents, media and electoral staff at the final stage of the election, and facilitating the procurement of venues, to be justifiable ones for shortening the polling hours. They also remarked that as electors had well adapted to the existing polling hours, some of them may not be

able to, or may find it inconvenient, to vote because the revised polling hours may conflict with their working hours.

19. Members of the public had expressed overwhelming response to this issue. During the consultation period, the Government received more than 15 400 written submissions expressing views on the polling hours of LegCo and DC elections, of which about 15 000 were from a template generating website. An overwhelming majority (about 99.7%) of the submissions opposed to shortening the polling hours of LegCo and DC elections. The major reasons included: the voting rights of electors should not be sacrificed for administrative convenience (i.e., fatigue suffered by polling staff, candidates and agents, difficulties in identifying suitable venues for setting up as polling stations); shortening the polling hours would be inconvenient for electors who needed to work on shift or whose offices were far from their residential home; and quite a number of electors were still queuing up to cast their votes after the close of poll in the 2016 LegCo General Election.

20. Having critically examined all the views received during the consultation period, we consider that there is a need to take into account all other related issues holistically in reviewing the polling hours (e.g., whether alternative arrangements could be provided for electors who are unable to go to the polling stations in person on the polling day owing to a change in polling hours to cast their votes). We **propose** that the present polling hours of LegCo and DC elections should be maintained for the time being before the Government reviews these issues related to polling hours, and before a consensus is reached by the community. We will relay the relevant proposals to the EAC for consideration at an appropriate juncture in the future.

(4) Other issues

21. In addition to the three issues above, respondents were invited to submit their views on other election-related issues. We have received a number of suggestions which are set out in Chapter 6 of the Consultation Report. For instance, there were views that the Government should arrange advance polling for civil servants who serve as polling staff or who are on shift on the polling day so as to safeguard their right to vote; should allow eligible electors who are Hong Kong permanent residents working/residing in the Mainland to cast their votes in advance; should explore the use of information technology for handling election data disseminated on the polling day, etc.. We will study the issues raised by respondents, and

should there be the need to introduce changes to the existing electoral arrangements, we will consult the views of this Panel.

(B) PROPOSED AMENDMENTS TO ELECTORAL LEGISLATION

22. As mentioned in paragraph 8 above, we propose to introduce a targeted exemption to the ECICO. To implement the proposal, we plan to introduce an amendment Bill into LegCo in the second half of 2018 and aim to have the Bill enacted within 2018, so that the amendments can come into effect before the next election cycle starts from 2019.

23. Meanwhile, in preparation for the elections in the next election cycle, we have also reviewed the electoral legislation, and intend to further improve and clarify the legislation, in the light of the experience gained from previous elections. We **propose** to incorporate into the above amendment Bill the following changes to the electoral legislation.

Enhancement of voter registration system

24. In view of the concerns expressed by members of the public on matters relating to Voter Registration (“VR”) in the 2015 VR cycle, the Government embarked on a review of the existing VR system and conducted a public consultation on enhancement of VR system between 26 November 2015 and 8 January 2016. The Government also sought the views of this Panel at the meeting on 21 December 2015 and Members were in general supportive of taking measures to enhance the VR system. The Government published the Consultation Report on Enhancement of VR System on 21 January 2016, putting forward a series of measures, including the proposals to raise the penalties for the offence of making false statements in VR and improve the objection mechanism

(1) Raising the penalties for the offence of making false statements

25. As the community is generally of the view that the offence of making false statements in VR would severely affect the fairness and impartiality of the election system and that the penalties should have a sufficient deterrent effect, we **propose** to raise the penalties for making false statements in VR under the Electoral Affairs Commission Ordinance (Cap. 541) from the current maximum penalties of a fine of \$5,000 and imprisonment for 6 months to a maximum fine of \$10,000 and imprisonment for 2 years in order to enhance deterrent effect. We

consulted this Panel on the above-mentioned proposal on 16 April 2017 and Members in general supported the proposal.

(2) Improving the objection mechanism

26. As a follow-up to the Consultation Report on Enhancement of VR System, we **propose** to improve the objection mechanism so as to process claim/objection cases more effectively and minimise the chance of any possible abuse of the objection mechanism. Specific measures include: (i) specifying in the law that it is the duty of the claimant or objector to provide sufficient particulars relevant to the case so as to inform the Revising Officer, the Electoral Registration Officer (“ERO”) and the elector(s) being objected to of the grounds of the claim or objection; (ii) empowering the Revising Officer to dismiss a claim/objection case forthwith if the claimant/objector or his/her representative as authorised in writing do not attend the hearing; (iii) regarding indubitable claim/objection cases, allowing the ERO to seek the ruling of the Revising Officer by written submissions in lieu of hearing. We consulted this Panel on these proposals on 23 February 2017 and Members in general supported the proposal.

27. In conjunction with the measures to improve the VR objection mechanism, we also **propose** to advance the existing statutory deadline for the ERO to forward notices of claim/objection to the Revising Officer from 2 July to 29 June (for non-DC election years) or from 2 September to 29 August (for DC election years), so as to allow more time for the Revising Officer to process claims/objections. Regarding claims/objections determined by the Revising Officer through written submissions, we **propose** that the Revising Officer shall inform the claimant/objector and the elector(s) being objected to (for objection cases) of his ruling not later than 7 July (in non-DC election years) or 7 September (in DC election years). In line with the present regulation, for cases determined by the Revising Officer through written submissions, the claimant/objector or the elector(s) being objected to may also request the Revising Officer to review the ruling if they can provide good cause for the relevant case.

(3) Appointment of Revising Officers

28. The Legislative Council Ordinance (Cap. 542) provides that the Chief Justice may appoint any magistrate, or any legal officer within the meaning of the Legal Officers Ordinance (Cap. 87), to be a Revising Officer. If no appointment is made, the Registrar of the High Court is taken to be a Revising Officer. Since the work of Revising Officers is non-judicial in nature, the Judiciary recommends the Government to review the arrangement of appointing serving magistrates to serve as Revising Officers and consider if the eligibility criteria for appointment as Revising Officers may be broadened so as to allow any serving, former or retired magistrates to be appointed as Revising Officers. This allows more flexibility for the Judiciary to deploy resources in making suitable appointment of Revising Officers. We **propose** to amend the relevant provisions regarding the appointment of Revising Officers in the Legislative Council Ordinance (Cap. 542), the Chief Executive Election Ordinance (Cap. 569) and the Rural Representative Election Ordinance (Cap. 576) so as to broaden the eligibility criteria for appointment as Revising Officers.

Clarification of electoral legislation and rationalisation of electoral procedures

(4) Clarification of issuance of ballot papers in Election Committee Subsector (“ECSS”) elections

29. Currently, a person who is voting as both a voter and an authorised representative in ECSS elections is to be issued two ballot papers. We **propose** making reference to the relevant provisions for the LegCo elections to clarify in the legislation that a person who is entitled to be issued with two ballot papers in ECSS elections must be handed over the ballot papers in one go.

(5) Rationalisation of counting process for the Chief Executive (“CE”) elections

30. Currently, the relevant legislation for CE elections provides that the Returning Officer (“RO”) must, before the counting of votes, count, record, verify the number of ballot papers from all the polling stations and prepare a statement in writing. And, the RO must, after the counting of votes, record and verify the number of valid and invalid ballot papers, and prepare a statement in writing. Those requirements imply duplication of efforts which prolongs the counting process and delay the declaration of

election result. To speed up the counting process, we **propose** amending those requirements by making reference to the arrangements for the main counting stations in LegCo and DC elections, and those for the counting stations in Rural Representative (“RR”) elections, i.e., before the counting of votes, to count, record and verify the number of ballot papers and prepare a statement in writing for ballot papers from dedicated polling station(s), and to mix such ballot papers with ballot papers in at least one of the ballot boxes at the main polling station, in order to protect secrecy of votes. And, after the counting of votes, to count, record and verify the number of ballot papers and prepare a statement in writing for the ballot papers from the main polling station, thereby saving the additional time currently spent on the duplicating procedures.

(6) Rationalisation of the authority for issuing the notification for returning election deposits

31. Currently, election deposit is required for LegCo, DC, and ECSS elections¹. Relevant legislation provides that the RO is to notify the Director of Accounting Services to return the election deposit lodged by the candidates. We **propose** to amend the legislation to allow Assistant RO or the Chief Electoral Officer to issue the notification as well, in order to provide flexibility for possible scenarios (e.g. department restructuring and the lapse of the supernumerary post of the RO for DC (second) functional constituency).

(7) Classification of certain ballot papers as clearly invalid to streamline the counting process

32. Currently, the legislation for LegCo, DC and RR elections provides that certain overmarked ballot papers are to be treated as clearly invalid and not to be counted. We **propose** introducing similar provision to the CE and ECSS elections. Besides, we **propose** to stipulate in the legislation for LegCo and DC elections^{2,3} that a ballot paper with vote recorded for a candidate list with the only candidate(s) on the list deceased or disqualified is to be treated as clearly invalid and not to be counted, in order to streamline the counting process.

¹ Election deposit is not required for CE and RR elections.

² This proposal is not applicable to CE elections which would be terminated if a candidate dies or is disqualified after the close of nominations but before the declaration of the election result.

³ The proposal has limited merits and may unnecessarily complicate the ECSS and RR elections in which the number of members/ representatives to be elected may reach double digit.

(8) Rationalisation of the stamping arrangements for ballot papers under specified circumstances

33. Currently, the legislation for LegCo, DC, ECSS and RR elections⁴ requires, before the issuance of a ballot paper to a voter, corresponding words be stamped on it to cross out the name and other related information of any candidate who is deceased or disqualified after the close of nominations but before the date of the election. We **propose** to cross out the relevant information by a line and displaying a corresponding notice in a prominent place of each polling station, in order to address operational difficulties in stamping, e.g. difficulties in stamping properly due to the small size of wording on a ballot paper with a large number of candidates/candidate lists; and possibility of the ballot paper being stained by the ink of the stamp and thereby becoming a questionable ballot paper.

(9) Minor technical amendments

34. We **propose** to introduce some minor technical amendments to the electoral legislation as stated in **Annex**.

VIEWS SOUGHT

35. Members are invited to express their views on the above issues.

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⁴ This proposal is not applicable to CE elections which would be terminated if a candidate dies or is disqualified after the close of nominations but before the declaration of the election result.

Proposed Minor Technical Amendments to Electoral Legislation

(1) To tally the provisions related to marking of a ballot paper in Election Committee Subsector (“ECSS”) elections

We **propose** to tally the provisions related to marking of a ballot paper in section 56 and Form 1 of Schedule 2 in the Electoral Affairs Commission (Electoral Procedure) (Election Committee) Regulation (Cap. 541 I).

(2) To clarify the counting arrangement in Legislative Council (“LegCo”) elections under Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D)

2. We **propose** to amend sections 75(7)(a) and 81 in Cap. 541D to reflect the legislative intent and the existing actual counting arrangement for Geographical Constituencies (“GCs”). That is, questionable ballot papers should be separated and forwarded to the Presiding Officer (“PRO”) or (in case they are GC ballot papers misplaced in a Functional Constituency (“FC”) ballot box) to the Returning Officer (“RO”) (instead of to the PRO), because the PRO would not be handling misplaced ballot papers in the Central Counting Station.

3. We also **propose** to amend the reference to sections 56(2) and 56(2A) in sections 76(6)(a)(ii), 80(1)(h), 80(2), 80(2)(b)(ii) and 81(3) of Cap. 541D to reflect the legislative intent that special FC ballot papers not marked with descending Arabic numerals are clearly invalid, whereas those with Arabic numerals marked outside the circle opposite the name of the a candidate are questionable ballot papers.

(3) To clarify the arrangement of marking “UNUSED” on a ballot paper in Chief Executive (“CE”) and Rural Representative (“RR”) elections

4. We **propose** to clarify in the legislation for CE and RR elections that a ballot paper returned by an elector and kept by the PRO should be marked “UNUSED” by the PRO if the elector does not return to the polling

station to cast the vote before the close of poll, by making reference to the existing legislation for LegCo, District Council (“DC”) and ECSS elections.

(4) To clarify the requirement of providing full identity document number of election expense agents in the corresponding notice of appointment in CE and RR elections

5. It is an existing requirement for the identity document number of election expense agents to be stated in a notice of appointment in CE and RR elections. We **propose** to make reference to the legislation for LegCo, DC and ECSS elections and codify the requirement.

(5) To rationalise the reference to the Registration of Persons Ordinance (Cap. 177) in the definition of identity card/identity document under the electoral legislation

6. We **propose** to amend the definition of identity card/identity document in the legislation for CE, LegCo, DC, ECSS and RR elections to more accurately describe the Certificate of Exemption issued by the Commissioner of Registration, and to reflect the relevance of the Certificate to regulation 25 of the Registration of Persons Regulations (Cap. 177A).

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