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Panel on Constitutional Affairs

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 16 March 2020**

**Proposed Guidelines on Election-related Activities in respect of the
Legislative Council Election issued by the Electoral Affairs Commission**

Purpose

This paper gives a brief account of past discussions of the Panel on Constitutional Affairs ("the Panel") on the proposed Guidelines on Election-related Activities in respect of the Legislative Council ("LegCo") Election issued by the Electoral Affairs Commission ("EAC") in March 2016 ("the 2016 Guidelines") and the EAC Report on the 2016 LegCo General Election.

Background

2. EAC is a statutory and independent body responsible for the conduct and supervision of elections. According to section 6(1)(a) of the Electoral Affairs Commission Ordinance (Cap. 541) ("EACO"), EAC may issue guidelines relating to the conduct or supervision of an election. These guidelines aim to provide a code of conduct based on the principle of fairness and equality for conducting election-related activities. EAC will update the guidelines before each election taking into account the operational experience and suggestions for improvements obtained from recent elections and by-elections. In accordance with section 6(2) of EACO, EAC shall consult the public on the proposed Guidelines before they are finalized for issue to the public.

3. The 2020 LegCo General Election will be held in the third quarter of 2020. The latest proposed Guidelines on Election-related Activities in respect of LegCo Election were issued by EAC on 9 March 2020 ("the proposed Guidelines") for public consultation until 7 April 2020. The major changes in the proposed Guidelines as compared with the version last updated in 2016 are set out in the Appendix to the "Message from the Chairman" in the proposed Guidelines.

Past discussions of the Panel

4. The Panel discussed the 2016 Guidelines and the EAC Report on the 2016 LegCo General Election at its meetings on 21 March 2016 and 25 January 2017 respectively. The major issues raised by the Panel are summarized below.

Election advertisements and election expenses

5. Some members expressed concern that the coverage of the legal definition of election advertisements ("EA") was too wide and whether changing the profile pictures and sharing or forwarding different candidates' election campaigns through online platforms would also be regarded as EAs. There were also concerns over whether the relevant expenses would be regarded as election expenses. Some other members raised that in the past, some newspapers had published articles to promote or prejudice the election of certain candidates, but such articles had not been counted as EAs.

6. The Administration explained that under the Elections (Corrupt and Illegal Conduct) Ordinance ("ECICO") (Cap. 554), EA referred to any form of publication published for the purpose of promoting or prejudicing the election of a candidate or candidates at the election. A person who incurred expenses to publish any materials caught by the definition of EA without the prior consent of the candidate concerned might have breached section 23 of ECICO, as under the law only a candidate or a person who had been duly authorized by the candidate as his/her election expense agent might incur election expenses.

7. Members may wish to note that the Administration subsequently introduced a targeted exemption under section 23(1) of ECICO to the effect that if a third party (i.e. individuals or bodies that were neither the relevant candidates whose elections were being promoted or prejudiced nor their election expense agents) published EAs and incurred election expenses, and the election expenses thus incurred were merely electricity and/or Internet access charges, such act would no longer be regarded as an illegal conduct. The Electoral Legislation (Miscellaneous Amendments) Bill 2018, which sought to implement the targeted exemption mentioned above, was introduced into LegCo in June 2018 and was passed at the Council meeting of 16 January 2019.

"Abandonment of election" after the nomination period

8. Some members considered it extremely unfair that during the 2016 LegCo General Election, some candidates had announced "abandonment of election" a few days before the polling day and yet they appealed to electors to cast their votes to one to two particular candidates. They expressed concern that the latter had benefited in terms of the votes they gained, owing to the publicity effect achieved by the substantial election expenses incurred by those candidates who had announced "abandonment of election". Some other members, however, considered that a candidate could decide to quit during the election for health, family or any other reasons, and to announce his/her decision prior to the election. They opposed EAC's recommendation in its Report on the 2016 LegCo General Election to regulate claims of "abandonment of election" by candidates after the nomination period.

9. The Administration advised that there was currently no such mechanism for the so-called "abandonment of election" after the close of nomination. The Administration explained that EAC recommended to regulate claims of "abandonment of election" by candidates after the nomination period with a view to addressing public concern that the claims of "abandonment of election" might give rise to confusing information about the election, thereby impairing the integrity of the election. The Administration undertook that it would take into account members' comments in taking a view on the EAC's recommendation.

Confirmation Form

10. Some members raised concern that a Confirmation Form was adopted for use in the 2016 LegCo General Election without public consultation. They questioned the legal basis for the requirement and whether the Confirmation Form would continue to be used in future LegCo elections.

11. The Administration explained that pursuant to sections 4 and 5 of EACO, EAC could take steps and make arrangement it considered appropriate for the purpose of ensuring that the LegCo elections were conducted openly, fairly and honestly. The Confirmation Form was devised for use against the background that there were views and acts which had deviated from Hong Kong's constitutional status as prescribed in the Basic Law. Moreover, some members of the public had expressed concerns over whether persons seeking candidature fully understood the Basic Law. The Administration explained that to assist the Returning Officers ("ROs") in ensuring that all persons seeking candidature clearly understand the contents of the Basic Law and the legal requirements and responsibility in signing the declaration in the nomination form so that the nomination procedures were completed in accordance with the law, EAC had prepared a Confirmation Form for the use by ROs. To address members' concerns, the Administration has further provided an information paper entitled "Nomination matters in LegCo elections" [LC Paper No. CB(2)903/17-18(01)] to elaborate on the powers of ROs and the rights to vote and to stand for election. Members may wish to refer to the paper for detail.

Election forums

12. Some members expressed concern as to whether broadcasters were able to meet the requirement that the broadcaster should "give each candidate/list of candidates in the relevant part of the election forum equal time to present his/her/its election platform". The Administration advised that forum organizers were all along required to adhere to the "fair and equal treatment" principle in organizing election forums. The "fair and equal treatment" principle did not require that each candidate/list of candidates be provided with exactly the same amount of speaking time in an election forum. This was to allow the broadcaster or forum organizer greater flexibility in the design of such programmes. Having

regard to past experience, it might not be practicable to rigidly require broadcasters to give equal speaking time to each candidate in every part of an election forum as some tended to speak more while some tended to speak less in different parts of the forum. Broadcasters were, however, required to give each candidate/list of candidates equal time to present his/her/its election platform. The Administration advised that if there were complaints about unfair or unequal treatment of candidates by any broadcaster or forum organizer and if such complaints were substantiated, EAC might issue a reprimand in a public statement.

Exit poll

13. Some members expressed concern about the possible use of exit poll results by political parties to plan their electioneering activities before the close of poll. They asked about the regulation of exit polls so as to ensure fairness in the elections (e.g. interviewers should not be allowed to carry mobile telephones or other communication devices to avoid premature disclosure of relevant figures). They further suggested that EAC should restrict the number of organizations approved to conduct exit polls, and that an area outside each polling station should be designated for the exclusive use of interviewers and the electors being interviewed.

14. The Administration explained that organizations or persons applying for the conduct of exit polls¹ were required to sign an undertaking not to release, directly or indirectly, the results of the exit polls or make specific remarks or predictions on the performance of any candidate before the close of poll. Moreover, applicants had to declare that they were neither contesting nor had members contesting in the constituency(ies) to be covered by the exit poll and had not publicly expressed support for any candidate contesting in the constituency(ies). Furthermore, to ensure transparency, a list of approved pollsters would be uploaded to the election website before the polling day; and a notice showing the particulars of the approved pollsters with their contact numbers would also be displayed at each of the polling stations concerned. In addition, the interviewers were required to display prominently an identification device showing the identity of the organization conducting exit poll, and to read out a standard script to the interviewee before conducting the interview, making clear that the exit poll was not commissioned by the Government and that the interviewee was entirely at liberty as to whether to respond to the pollster.

Guidelines for operators of elderly institutions

15. Some members asked whether sufficient measures were taken to prevent electors living in elderly institutions from being taken by persons other than their

¹ According to 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 without the express permission of the Presiding Officer or EAC, information as to the candidate for whom an elector in the polling station is about to vote or has voted, commits an offence.

relatives to the polling stations to cast their votes. The Administration advised that in the 2016 voter registration ("VR") cycle, REO had issued guidelines to operators of elderly homes through the Social Welfare Department to remind them that under the Personal Data (Privacy) Ordinance (Cap. 486), unless with the express consent voluntarily given by the data subjects, personal data should only be used for the purposes for which they were collected or a directly related purpose; and remind the operators to take note of the guidelines on election-related activities issued by EAC. In addition, operators of elderly institutions were advised to keep a record of organizations conducting VR activities on their premises. At the request of the Panel, the Administration has provided a copy of the guidelines on election-related activities issued to elderly homes for members' reference [LC Paper No. CB(2)1513/15-16(01)].

Recent development

16. The Administration will consult the Panel on the proposed Guidelines at the next meeting on 16 March 2020.

Relevant papers

17. A list of the relevant papers available on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
12 March 2020

Appendix

Relevant documents on Proposed Guidelines on Election-related Activities in respect of the Legislative Council Election issued by the Electoral Affairs Commission

Committee	Date of meeting	Paper
Panel on Constitutional Affairs ("CA Panel")	21.3.2016 (Item IV)	Agenda Minutes
CA Panel	18.4.2016 (Item III)	Agenda Minutes
CA Panel	25.1.2017 (Item IV)	Agenda Minutes
House Committee	4.1.2019	Report of the Bills Committee on Electoral Legislation (Miscellaneous Amendments) Bill 2018

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