

## **PROLOGUE**

### **ROLE OF THE ELECTORAL AFFAIRS COMMISSION AND THE GUIDELINES**

1. Under the Electoral Affairs Commission Ordinance (Cap 541) (“EACO”), the Electoral Affairs Commission (“EAC”) is an independent statutory body responsible for organising and supervising public elections, and to ensure that the elections are conducted in an open, fair and honest manner. Under the EACO, the EAC shall perform its function through the Chief Electoral Officer (“CEO”).

2. The EAC is empowered by the law to issue guidelines on election-related activities. The guidelines cover two different aspects, namely, to explain the relevant legislative provisions and to promulgate a code of conduct in election-related activities based on the fair and equal treatment principle.

#### **Legislation Aspect**

3. With regard to the legislation aspect, the guidelines seek to explain in simple language the relevant provisions under the electoral legislation, and where applicable to give examples of best practices.

4. Safeguarding the autonomy and secrecy of the vote are the most important principles of the electoral legislation. The electors must mark the ballot papers by themselves inside the voting compartments, and are not required to disclose their voting preference. It is a criminal offence to influence the voting preference of the elector by corrupt conduct such as the use of force, threat, coercion, inducement or deception; or by the illegal

conduct of making false statements about a candidate. It is also a criminal offence to require an elector to disclose his/her voting preference. In any case, the voting choice is ultimately made by the elector voluntarily and under the protection of secrecy. Electors may discuss among themselves their voting preference, but in no case under the influence of any corrupt or illegal conduct.

5. Nomination of candidates is an important part of an election. Candidates nominated must satisfy the requirements in two parts, namely (1) the eligibility to be nominated as a candidate and (2) the requirements to be complied with by nominated candidates (including making a declaration in the nomination form to the effect that they will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region (“HKSAR”)). Otherwise, he/she is not a validly nominated candidate. For details, please refer to Chapter 3.

6. For the first part, i.e. candidates’ eligibility for nomination, the EAC may appoint the Nominations Advisory Committees (“NACs”) to provide advice to prospective candidates and the Returning Officers (“ROs”) as to whether a prospective candidate is eligible to be, or is disqualified from being, nominated as a candidate at the election. However, as stipulated in the law, the NACs are not empowered to advise on any matter relating to the requirements to be complied with by nominated candidates under the second part (including making the above-mentioned statutory declaration). Therefore, the advice provided by the NAC on a prospective candidate’s eligibility to be nominated as a candidate does not indicate whether his/her nomination is valid or not.

7. In short, whether a candidate’s nomination is valid or not is solely determined by the RO. The EAC would not provide any guidelines to the RO for determining whether a candidate’s nomination is valid or not. The EAC

will only make practical arrangements for the election according to the list of validly nominated candidates determined by the RO. If any person is disqualified from being a candidate at an election, he/she may make an election petition to question the result of the election in accordance with the law.

8. To ensure that all candidates clearly understand the provisions of the Basic Law and the legal requirements and responsibilities involved when they sign the relevant statutory declarations in the nomination form, the EAC has prepared a Confirmation Form for candidates for submission together with the nomination form on voluntary basis to confirm that they understand the legal requirements. It also assists the ROs in determining the validity of the nominations of the candidates.

9. Another important aspect of the electoral legislation is to prescribe the maximum limit for election expenses. Election expenses mean the expenses in promoting or prejudicing the election of a candidate. The definition of “candidate” means a person who stands nominated as a candidate at an election and includes a person who has publicly declared an intention to stand for election before the close of nominations. The public declaration of the intention to stand as a candidate is a legal question which must be determined on the basis of evidence of actual facts and intention, rather than on the face of any statement alone. The setting of a maximum limit of election expenses is to ensure that the candidates do compete on a level playing field and within a reasonable level of expenditures. It is a criminal offence for a candidate to incur election expenses in excess of the prescribed maximum limit. Hence, the candidate must, in accordance with the law, submit an election return after the election to rigorously declare all the election expenses incurred by him/her; otherwise, he/she commits an offence.

10. For the effective sanction of the limit on election expenses, the law also stipulates that only candidates and their authorised election expense

agents may incur election expenses. It is a criminal offence for other unauthorised persons to incur election expenses. Nevertheless, as far as opinions published on the Internet are concerned, even though they amount to election advertisements (“EAs”), if the publisher is a third party (i.e. a person other than a candidate and his/her election expense agents) and the only election expenses incurred are either electricity charges and/or charges necessary for accessing the Internet, he/she is exempted from the relevant criminal liability. However, if the publisher is a candidate or his/her election expense agent, the exemption does not apply. As such, the candidate should declare the relevant election expenses in his/her election return.

11. EA has always been an important part of election expenses. Notwithstanding that EAs are regulated, the paramount principles of freedom of speech, press freedom and the dissemination of election information must be guaranteed. In determining whether certain statements are EAs and whether election expenses are involved, consideration must be given to the overall circumstances and evidence, including the nature of those statements, the expenses involved and the intention of promoting or prejudicing any candidate from being elected.

12. As the EAC is not a law enforcement agency, it will refer any complaint involving any offence to the law enforcement agency for follow-up and investigation. Any issues over the law or fact will ultimately be a matter for the adjudication of the Court.

13. The EAC will seek to provide a statement of principle on the compliance of the electoral legislation. However, the EAC is not the legal advisor for a candidate and any person who has any question on any particular matter should seek independent legal advice.

## **Code of Conduct**

14. Apart from the electoral legislation, the EAC has promulgated guidelines on election-related activities based on the fair and equality principle. The EAC is authorised under the law to issue censure or reprimand against unfair conduct in breach of the guidelines. An important application of the fair and equal treatment principle is concerned with the utilisation of the public resources. For example:

- (a) The guidelines prescribe a fair and equal system in allocating the designated spots for display of EAs on Government land, premises and roadways;
- (b) Licensed radio and television stations as well as registered newspapers and magazines should uphold the fair and equal treatment principle in their treatment of the candidates;
- (c) Building management organisations, owners' incorporations and mutual aid residents' associations should observe the fair and equal treatment principle in handling the requests of the candidates for the display of EAs and conducting electioneering activities in the common parts of the buildings under their management; and
- (d) A candidate must not make use of any public resources for electioneering.

15. However, as Hong Kong is a pluralistic society with different sectors of people who may have different pursuits, whether a particular matter is fair or not will often have contrary views. Whereas it is ideal to achieve

absolute fairness, but that is often not practicable. The bottom line is to guard against serious and material unfairness.

16. The EAC will solemnly handle complaints against any breach of the fair and equality principle as set out in the election guidelines. Investigation must be in accordance with the principle of procedural fairness and be based on factual evidence. The parties concerned must be given the opportunity to make representations in defence. In the context of considering whether any conduct is unfair in the absence of contravention of the law, a decision could not be made lightly without careful consideration of all relevant matters and circumstances. Furthermore, while complaints are often made shortly before the polling day, the EAC cannot circumvent or compress the established procedure because of the time constraint so as to avoid any unfairness.

17. If the complaint is substantiated, the EAC may, if necessary, make a censure in a public statement to enable that the electors and the public be informed of the major occurrences during the election. The EAC may also issue press statements on matters of principle which have attracted widespread public concern in order to set the record straight. Apart from that, the EAC, as a long-standing practice, does not comment on the political platforms of candidates, individual comments and reporting, or hearsays.

18. Electors rely on fair and orderly elections to elect their representatives. Hence, election is a solemn matter. The electoral procedures are strictly sanctioned by the relevant electoral legislation. Persons who wish to run for an election and other stakeholders must understand and comply with the legislative requirements so as to avoid committing any criminal offence inadvertently.

19. Apart from the legislation aspect, candidates and stakeholders should also make reference to the best practices provided in the Guidelines in order to ensure that the elections are conducted in an open, fair and honest manner.