

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, impartial and apolitical body responsible for conducting and supervising public elections in accordance with the electoral law and strives to conduct public elections under the principles of openness, honesty and fairness. Although the EAC is responsible for making the subsidiary legislation on electoral procedures, guidelines on election-related activities, and related practical arrangements, it is not part of the Government. All along, the EAC does not formulate electoral policies nor take into account any political considerations, but considers whether the relevant arrangements do comply with the law and are reasonably practicable and will facilitate the smooth operation of the election. Under the EACO, the EAC shall perform its function through the Chief Electoral Officer (“CEO”). The Registration and Electoral Office (“REO”) is the executive arm of the EAC. Apart from making the practical arrangements for the elections, the REO also advises the EAC on the practicality on various electoral arrangements.

2. All electoral arrangements in Hong Kong are regulated under the relevant primary legislation and subsidiary legislation. The EAC must conduct and supervise the conduct of elections in strict compliance with the subsisting law. Under the present institution, matters relating to electoral policies and the system are under the purview of the executive authorities, whereas the legislature is responsible for the enactment and amendment of the primary legislation. On the other hand, pursuant to the principles and provisions in the primary legislation, the EAC makes the corresponding

subsidiary legislation to set out the detailed electoral procedures for the various elections. The EAC cannot act beyond the power conferred by the primary legislation. Where necessary, the EAC would provide its advice from practical and operational points of views for reference of the Government. Under the existing arrangement, any enactment or amendment of the primary legislation must be introduced by the Government in the form of bills to the Legislative Council (“LegCo”) for deliberation and resolution. Subsidiary legislation must also be submitted by the Government to the LegCo by way of the negative vetting procedure.

3. The EAC is empowered by the law to issue guidelines on election-related activities. The electoral guidelines are not law, and cover the following two aspects: (1) to explain in simple language the subsisting electoral law so as to remind candidates and other stakeholders of the provisions and requirements under the electoral law. The EAC is not a court of law. It has no authority to make judicial interpretation for disputed provisions of the statutes; and (2) with regard to election-related activities not stipulated by the law, to promulgate a code of conduct based on the principle of fairness and equality.

Legislation Aspect

4. With regard to the legislation aspect, all relevant provisions are enacted by the legislature. The guidelines only explain in simple language the relevant provisions under the electoral law, and where applicable illustrate with examples the best practices.

5. In order to ensure the fairness of an election, safeguarding the autonomy and secrecy of the vote are the most important principles of the electoral law. 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 electors by corrupt conduct such as the use of force, threat, coercion, inducement, deception or obstruction; 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 well discuss among themselves their voting preference, but in no case involving any corrupt or illegal conduct.

6. Nomination of candidates is an important part of an election. According to Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law"), the Candidate Eligibility Review Committee ("CERC") shall be responsible for reviewing and confirming the eligibility of candidates for the LegCo members (for details of the CERC, please refer to Section 6 of Chapter 5). The CERC may request the Returning Officers ("ROs") to provide advice to the CERC regarding the nomination of candidates. It may also make decisions pursuant to the opinion of the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region ("National Security Committee"). The National Security Committee shall, on the basis of the review by the National Security Department of the Hong Kong Police Force ("HKPF"), make findings regarding candidates' compliance with the legal requirements and conditions on "upholding the Basic Law and pledging allegiance to the Hong Kong Special Administrative Region ("HKSAR") of the People's Republic of China" and will issue an opinion to the CERC for those who fail to meet such legal requirements and conditions. According to Article 14 of the Law of the People's Republic of China on Safeguarding National Security in the HKSAR ("the Hong Kong National Security Law"), no institution, organisation or individual in the Region shall interfere with the work of the National Security Committee. Information relating to the work of the National Security Committee shall not be subject to disclosure. As stipulated in Annex II to the

Basic Law and the electoral law, no legal proceedings may be instituted in respect of a decision made by the CERC on the eligibility of a candidate pursuant to the opinion of the National Security Committee. For details, please refer to Chapter 5.

7. Whether the nomination of a candidate is valid or not is solely determined by the CERC. The EAC is neither empowered nor involved in the making of such decision, and will not provide any advice. The EAC will only make practical arrangements for the election according to the validly nominated candidates determined by the CERC. 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 s 61 of the Legislative Council Ordinance (Cap. 542) (“LCO”). However, as mentioned in para. 6 above, by virtue of Annex II to the Basic Law and the electoral law, no legal proceedings may be instituted in respect of a decision made by the CERC on the eligibility of a candidate pursuant to the opinion of the National Security Committee.

8. Another important aspect of the law is to prescribe the maximum limit for election expenses. The setting of a maximum limit of election expenses is to ensure that the candidates do compete on a level playing field within a reasonable level of expenditures. According to the law, 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 issue which must be determined on the basis of actual facts and intention, rather than on the face of any statement alone. 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.

9. For the effective sanction of the maximum 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, no matter it is for the purpose of promoting or prejudicing the election of a candidate, to incur election expenses. Nevertheless, with regard to the opinions published on the Internet, even though they are to promote or prejudice the election of a candidate and 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 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 all election expenses in his/her election return (i.e. including election expenses incurred in relation to the Internet and all other media).

10. EA has always been an important part of election expenses, and therefore it is necessary to regulate the publication of EAs for calculation 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.

11. As the EAC is not a law enforcement agency, if a complaint involves any offence, the EAC will refer to the law enforcement agencies for

follow-up and investigation. Any disputes over the law or fact will ultimately be a matter for the adjudication of the Court.

12. The EAC will seek to provide a statement of principle on the compliance of the electoral law. However, the EAC is not the legal advisor for candidates. Any person who has any questions on any particular matter should seek independent legal advice.

Code of Conduct

13. Apart from the electoral law, the EAC has promulgated guidelines on election-related activities based on the principle of fairness and equality. However, the guidelines promulgated by the EAC are not legally binding. Any breaches of the guidelines will not constitute a legal offence. However, where necessary, the EAC will issue a public reprimand or censure in order to inform the electors and the general public of important matters that have occurred during the elections. An important application of the principle of fairness and equality 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' corporations and mutual aid residents' associations should observe the principle of fairness and equality 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.

The management organisations mentioned under (c) above should handle the applications from the candidate fairly and equally. If a management organisation decides to allow a particular candidate to conduct electioneering activities in the common parts of the buildings under its management, it should also allow other candidate(s) in the same geographical constituency (“GC”)/functional constituency (“FC”)/the Election Committee constituency (“ECC”) to do so (if other candidate(s) make(s) the same request). On the contrary, if it is decided to reject an application from a particular candidate, the same applications (if any) from other candidate(s) in the same constituency should also be rejected. However, this principle does not apply to election activities and EA concerning private properties.

14. It is noteworthy that Hong Kong is a pluralistic society with different sectors of people who may have different pursuits. There are often conflicting views on whether a particular matter is fair or not. Achieving absolute fairness is ideal, but that is not always feasible. The bottom line is to guard against serious and critical unfairness.

15. The EAC will solemnly handle complaints against any breach of the principle of fairness and equality as set out in the electoral guidelines. Investigation must be based on factual evidence and be in accordance with the principle of procedural justice. The parties concerned must be given the opportunity to make representations in defence, and the EAC will make a decision after duly taking into account of all relevant matters and circumstances. If the conduct does not contravene any law, when considering

whether the conduct concerned is unfair, the EAC would not make a judgement lightly without careful consideration of all relevant matters and circumstances. Furthermore, while complaints are often made shortly before the polling day, the EAC would not circumvent or compress the established procedure because of the time constraint so as to avoid any unfairness.

16. If a complaint is substantiated, the EAC may, where necessary, issue a public reprimand or censure in order to inform the electors and the general public of important matters that have occurred during the elections. 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.

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

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

19. The EAC appeals to members of the public to be acquainted with and to uphold the electoral law and electoral guidelines in order to carry on the good election culture in Hong Kong, so that an election can be conducted smoothly in a fair and equal manner.