

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 impartial, independent 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, fairness and honesty. Although the EAC is responsible for making the subsidiary legislation on electoral procedures, the guidelines on election-related activities, and the 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 Director of Home Affairs (“DHA”) for the Rural Representative (“RR”) Election. The Home Affairs Department (“HAD”) is the executive arm of the EAC for the RR Election. Apart from making the practical arrangements for the elections, the HAD also advises the EAC on the practicality of 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 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 specify the detailed electoral procedures for 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 view for the Government's reference. 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 passage. 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. As 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 seek to explain in simple language the relevant provisions based on the electoral law, and where applicable to give examples to illustrate the best practices.

5. In order to ensure the fairness of an election, safeguarding the autonomy and secrecy of the vote is the most important principle 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 the elector 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 compel 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. One of the important aspects 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 and 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 nomination. The public declaration of the intention to stand as a candidate is a legal question 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.

7. 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, no matter it is for the purpose of promoting or prejudicing the election of a candidate, to incur election expenses. Nevertheless, as far as opinions published on the Internet are concerned, even though they 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 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 all election expenses in his/her election return (i.e. including election expenses incurred in relation to the Internet and all other media).

8. EA has always been an important part of election expenses, and therefore it is necessary to regulate 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.

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

10. 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 a candidate and any person who has any questions on any particular matter should seek independent legal advice.

Code of Conduct

11. 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. Where necessary, the EAC will issue public statements of 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 candidates fairly and equally. If a management organisation has decided 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 Rural Area to do so (whether to make the same request is individual candidate's own choice). On the other hand, if it is decided to reject an application from a particular candidate, the same applications from other candidate(s) in the same Rural Area should also be rejected. However, this principle does not apply to election activities and EAs concerning private properties.

12. It is noteworthy that, 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.

13. 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 fairness. The parties concerned must be given the opportunity to make representations in defence. The EAC will make the decision after taking all relevant circumstances into consideration. In the context of considering whether any conduct is unfair in the absence of contravention of the law, the EAC's 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.

14. If a complaint is substantiated, the EAC may, where necessary, issue public statements of 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.

15. 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.

16. 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, fair and honest manner.

17. 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 the election can be conducted smoothly in a fair and equal manner.

Rural Representative Election

18. Under the Rural Representative Election Ordinance (Cap. 576) (“RREO”), election of RR is provided for designated Rural Areas. There are 4 types of Rural Areas, namely, the (1) Existing Village (“EV”); (2) Indigenous Village (“IV”); (3) Composite Indigenous Village (“CIV”) (i.e. a Village composed of two or more IVs); and (4) Market Town (“MT”) (on Cheung Chau and Peng Chau). An RR can be a Resident Representative (“ReR”) for an EV, an Indigenous Inhabitant Representative (“IIR”) for an IV/CIV or a Kaifong Representative (“KFR”) for an MT.

19. Eligibility for registration as an elector varies with different types of Rural Areas. For an IV/CIV, an eligible person should be an indigenous inhabitant of the IV/CIV (i.e. a male or female descended through the male line of a person who was a resident of an IV that existed in 1898 or of an IV branching off from an IV that existed in 1898 (commonly referred to as “a branched off IV”) or a spouse or surviving spouse of the indigenous inhabitant, an adult aged 18 years or above and a holder of an identity document. Whether the person is a permanent resident of Hong Kong or a resident of the IV/CIV does not affect his/her eligibility to be registered as an elector for the IV/CIV.

20. For an EV, an eligible person must be a resident of the EV and has been a resident therein for the 3 years immediately before the date of application for registration, in addition to being an adult and a permanent resident of Hong Kong. In the case of an MT, the eligibility of an elector is similar to that for an EV. To be a resident of an EV/MT means that the person’s principal residential address (i.e. the address of the dwelling place constituting the person’s sole or main home) must be within the boundary of that EV/MT.

21. If a registered elector for EV/MT no longer resides in the Village/MT for which he/she is registered, or his/her residential address in the Village/MT is no longer his/her sole or main home, he/she is no longer eligible to remain registered as an elector. Even though his/her name is still on the Final Register (“FR”), the person will commit an offence if he/she votes at the election. In order to maintain the accuracy of the FR, electors should report to the HAD any change of their principal residential addresses as soon as practicable (especially when moving out of the EV/MT for which he/she is registered) to fulfill their civic responsibility.

22. The eligibility for nomination as a candidate also varies with different types of Rural Areas. For an IV/CIV, an eligible person should be an indigenous inhabitant of the IV/CIV and a registered elector for that Village.

Besides, the person must be a permanent resident of Hong Kong who is aged 21 years or above and ordinarily residing in Hong Kong in order to be eligible for nomination.

23. As for an EV, a person eligible for nomination as a candidate must be a resident of the EV, a registered elector for that Village and has been a resident therein for the 6 years immediately preceding the nomination. Besides, the person must be a permanent resident of Hong Kong who is aged 21 years or above. In the case of an MT, the nomination eligibility is similar to that for an EV, including being a resident of that MT for the 6 years immediately preceding the nomination.