



**CONSULTATION ON
REVIEW OF ELECTORAL ARRANGEMENTS
THE LAW SOCIETY'S SUBMISSIONS**

1. The Law Society has considered a consultation paper released by the Constitutional and Mainland Affairs Bureau (“the Bureau”) in November 2017, on a review of Electoral Arrangements (the “Consultation Paper”).

GENERAL OBSERVATIONS

2. The issues raised in the Consultation Paper relate to three areas, i.e. election advertisements, election surveys and polling hours.
3. The above issues, in particular the first and the second ones, involve controversial matters. We anticipate detailed and focused researches.
4. The Consultation Paper however is brief in this regard; we find only a short summary of researches by the Bureau (see Annexure I of the Consultation Paper). That summary *per se* is not too helpful. We do not on the other hand agree that it is inappropriate to draw reference to overseas practices on the premises that there are differences between the “respective legislation framework and regulatory direction” in these countries (see e.g. § 2.09 of the Consultation Paper). To the contrary, we find the legislation and the related arrangements in New Zealand, Canada and the UK to be of referential value.
5. Notwithstanding the importance of the issues, disappointedly, we note the consultation period is less than two months. This short period does not avail us of the sufficient time to study all the issues. We have sought a time extension, but our request was turned down. As such, we could set out only our brief observations below, and reserve our rights to make further

submissions in due course.

6. Our observations are not laid out in a question-and-answer format as envisaged in the Consultation Paper. We consider there are important and succinct principles which underscore the issues under consultation. These should be examined and be set out in a more detailed manner.

ELECTION ADVERTISEMENTS

7. Mobilizing opinions on internet, by way of election advertisements, could have major influence on election¹. While not directly comparable, analogies could be drawn to the importance the overseas governments attach to online campaigning (or digital electioneering) in their respective elections. E.g. in the UK (over Brexit) and in the US (over the latest presidential election) – political advertising, including negative advertising, is a prominent feature of their respective political campaigns².
8. Election advertising, in the context of the local elections, is seen to
 - (a) persuade voters, either in a positive or in a negative (discrediting) manner that a party’s candidate is preferable to the alternatives;
 - (b) mobilize like-minded supporters to come out to poll and to cast a ballot for a party’s candidate, by active encouragement, urgent plea for votes (upon the possibility of losing – colloquially speaking, ‘打告急牌’); or matching of votes (配票)
9. In whatever forms these “advertising” is meant to achieve, when the Government is considering the regulation of election advertisements on internet, we consider those arrangements and practices relating to “third party advertising” in Canada (viz. the Canada Elections Act), New Zealand (viz. the

¹ E.g. see the articles in *The Economist* (issue 4 November 2017) – “Do social media threaten democracy?” and “How the world was trolled?”

² The importance on online third-party advertising could be illustrated by the United States Senate’s Honest Ads Act (<https://www.congress.gov/bill/115th-congress/senate-bill/1989/text>) proposed on 19 October 2017 to regulate campaign advertisements online by online companies such as Facebook and Google. The Act is sponsored in response to investigation regarding Russia purchasing political advertisements during the last presidential election.

Electoral Act 1993) and the UK (viz. the Political Parties, Elections and Referendums Act 2000) provide useful references. The more relevant principles that should be considered include the following.

- (a) The arrangement should not prohibit transmission of personal political views **on a non-commercial basis** on the Internet (including the social media) by an individual, which is a ‘third party’.

(third party meaning individuals or groups that are neither the relevant candidates whose elections are promoted or prejudiced, their political parties nor their election expense agents);

- (b) *A fortiori*, and for the sake of clarification,

- (i) messages sent or posted for free on social media platforms such as Facebook;
 - (ii) messages sent by email or through other messaging services (including texts sent through a cellular or mobile network); and
 - (iii) content posted on the third party’s website;
- should not be considered as election advertising;

- (c) if a website, including YouTube, Facebook, Instagram, Twitter, Weibo or other social media, is used by a candidate, or his political party for election campaign, such expression for political views should be treated as usual campaign activities and should come under the regulation on, inter alia, election expenses;

- (d) where an election advertisement posted on Facebook, Twitter, or other social media site is ‘liked’, ‘shared’, ‘retweeted’ or ‘reposted’ by another person, the individual content appearing elsewhere online will not come under regulation, unless the individual who has expressed the views **has made or received payment** in respect of the publication of those views.

- 10. The above principles, in particular 9(d), should be taken into account when the Government is to consider whether a third party can be exempted from criminal liability arising from incurring election expenses as a result of expression of views on the Internet (including social media) that constitutes an election advertisement.

11. By way of passing remarks, we note the Consultation Paper is silent on the use of or the advertising by **instant message applications**, such as Whatsapp and Wechat. Messaging through these applications, and their chat groups, could be potentially powerful. These messaging services are however different from social media platforms which are open and are public. Should the political views communicated thereof, on or for an election campaign, be considered as election advertising? And if so, how are they regulated in terms of election expenses or otherwise? These issues are not covered in this consultation; they should properly be considered and reviewed before and in the course of next election.

12. In the above paragraphs, we have alluded to “the expression of political views”. Insofar as the regulation on internet is concerned, the above is meant the following, i.e. those advertisements in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
 - (a) to vote, or not to vote, for a candidate (or a list of candidates) described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the candidate is stated);
 - (b) to vote, or not to vote, for a party described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the party is stated).

13. As for the question on the types of election expenses eligible for exemption (if any) proposed by the Government, we have revisited the meaning of “election expenses” laid out in Elections (Corrupt and Illegal Conduct) Ordinance Cap 554 (“ECICO”), the Legislative Council Ordinance Cap 542 (where relevant applicable) and several judgments. In *Mok Charles Peter v Tam Wai Ho & Anor* [2012] HKCU 1080 the Court of Final Appeal was asked to consider a series of questions relating to election expenses. On the question of “what are election expenses”, the Court of Final Appeal stated the following (with emphasis supplied):

[41] In our legislation, ECICO does not specifically refer to expenses “in the conduct or management of an election” as such but in my view, election expenses refer precisely to those activities or matters in the conduct or management of an election by those seeking to be elected (the candidates); in other words, those activities or matters which go to the machinery of an election. This is providing of course these activities or

matters are for the purpose of either promoting the election of a candidate or prejudicing the election of another candidate. The expenses incurred in relation to such activities or matters would then be (to adopt the wording of the s 2(1) definition of election expenses) those incurred by a "candidate ... at an election" and (to use the words in s 24(1) of ECICO) expenses "incurred at or in connection with the election by or on behalf of the candidate". These are the very activities or matters in relation to a specific election that take place or occur during the election period or during the period of a person's candidacy. Thus, the said references in our legislation to specific elections, the election period and the status of a candidate in the elections provide guidance, not just on the temporal aspect of expenses (see para 39 [in the judgment]), but also on their functional aspect.

[42] The expenses that go to the conduct or management of an election will include those incurred in relation to activities or matters such as the hiring of election staff, the renting of office space for election purposes, advertisements or promotions of a candidate to make him electable. A useful list of election activities and matters is contained in Appendix M of the Guidelines on Election-related Activities in respect of the Legislative Council Election (2004) provided by the [Election Affairs Commission].

...

[61] In most situations involving the ascertainment of election expenses by a candidate at an election, the following indicators of whether the expenses concerned constitute "election expenses" and two other inquiries should be considered. They provide a useful summary of the legal position as well. Expenses are likely to qualify as "election expenses" if they meet the following five criteria; there are two further inquiries as well:-

- (1) They have been incurred by or on behalf of a candidate (as such a person is defined under s 2(1) of ECICO).
- (2) Having identified the activities or matters to which the relevant expenses relate, such activities or matters are referable to a specific election.
- (3) Such activities or matters go to the conduct or management of the election; in particular to the machinery of the election.
- (4) The expenses were incurred for the purpose of promoting the election of the relevant candidate or prejudicing the election of another candidate.

- (5) The activities or matters financed by the expenses have taken place or occurred either during the election period (as defined in s 2(1) of ECICO) or during the period when the relevant person was a candidate.
- (6) The date when the relevant expenses were incurred should be ascertained (although, as we have seen, this is not a critical question since election expenses may be incurred before, during or after an election period).
- (7) In relation to the relevant activities or matters, it should be considered whether an apportionment exercise appropriate between election expenses and non election expenses is necessary.”

The above analysis should be taken into account by the Government whilst considering the issues.

14. Thus, if election expenses (for the purpose of any exemptions of criminal liability) are to be regulated, such expenses should *not* be limited to only the paltry charges of electricity or Internet access charges. In our views, the expenses should *also* include other costs. By drawing references to the arrangement in Canada³, we suggest the Government to consider including “production costs” and “distribution costs” when they are considering the exemption as proposed. “Production costs” includes the cost incurred for hiring an external third party to create election advertising, or for a third party using its own paid staff and resources to produce election advertising. If a website has been created for the purpose, then the costs should include the design, set up and the maintenance of the website. “Distribution costs” on the other hand is the cost of communicating the election advertising to recipients, for example, the cost of postage or the cost of advertising space in the media.
15. In putting forth the above, we invite the Government (1) to re-read the Guidelines on Election-related Activities in respect of the Legislative Council Election (2004), as referred by the Court of Final Appeal in the case of *Mok Charles Peter* (ibid) (2) to expand and also (3) to revisit the relevant

³ See the Canada Elections Act

researches⁴. The Government may also consider the question of mandating the registration of those third parties whose election advertisements come under the regulation; this issue should be considered in due course.

ELECTION SURVEYS

16. The Government in the Consultation Paper identifies the following issues (§3.05, Consultation Paper) in relation to election surveys:
 - (a) There is no regulation on election surveys conducted outside of the “No Canvassing Zones” (“NCZ”) on the polling day, and on election surveys conducted through different channels (e.g. by phone, on the Internet) prior to the polling day.
 - (b) If the election survey concerned involves publication of election advertisements and election expenses, and the publisher is neither a candidate nor an election expense agent of the candidate, the publisher may then be engaging in an illegal conduct under the law.
 - (c) If a candidate instructs that person or organization to publish the election advertisements concerned and does not include such expenses in his/her election expenses, the candidate would also violate the regulation under the law.
17. For issues 16(b) and (c) above, we repeat our above observations on third-party election advertising on internet *mutatis mutandis*.
18. For issue 16(a), i.e. the regulating of the election surveys or opinion polls, we note in Hong Kong, the media and organizations conducting exit polls are expected not to announce or disclose the results of the exit polls or make specific remarks or predictions in relation to the performance of any candidate/list of candidates before the close of poll. However, at present, there is no formal regulation on the use of these results or the making of predictions/pleas (whether or not based on such results) by candidates, their

⁴ including e.g. a review of a comparative study prepared by the LegCo Secretariat on 30 Oct 2015 (Cheung Chi Fai and Ambrose Leung, ‘Information Note: Regulation of the use of social media in election in selected places’ (IN01/15-16))

supporters, or voters, on polling day.

19. In the UK, the *publication* of exit polls is prohibited. See the UK section 66A of the Representation of the People Act 1983:

(a) No person shall, in the case of an election to which this section applies, publish before the poll is closed—

- i. any statement relating to the way in which voters have voted at the election where that statement is (or might reasonably be taken to be) based on information given by voters after they have voted, or*
- ii. any forecast as to the result of the election which is (or might reasonably be taken to be) based on information so given.*

b. If a person acts in contravention of subsection (1) above, he shall be liable on summary conviction to a fine not exceeding GBP 5,000 or to imprisonment for a term not exceeding six months.

20. In New Zealand, the *conducting* of polls is not allowed - a person who at an election at any time on polling day before the close of the poll, conducts a public opinion poll in relation to the election commits an offence (section 197(1)(e), Electoral Act 1993).

21. Hong Kong is a comparatively small area where population is dense, and communication is efficient. Public or open dissemination of information or messages is very easy and fast. Such dissemination purported to be derived from “observations” or “survey results”, which seeks to “predict” the voting result, could be a blatant attempt to influence voters to vote or not to vote for particular candidate(s). This is undesirable, since:

- the intense lobbying coupled with the making of “pleas” (usually taking place on the streets to maximize effects) can be annoying to the electorate. It distracts attention and causes disturbances to the election process;
- very often, shouting matches arising from the exit polls prediction send confusing messages to the electorate;
- the above unwarrantedly affects the inclination of voters.

The integrity of the electoral process as a whole could be compromised as a

result.

22. We have no objection for the conducting of exit polls, as exit polls in theory might be useful to academic studies in the future. The results however should **not** be disclosed in any way to any party, including candidates and their election teams, **before the announcement of election results.**
23. We therefore consider that
 - (a) election surveys (including those on electors' voting preference and choice) conducted outside the No Canvassing Zones by (i) universities and (ii) recognized mass media, prior to and on the polling day could be allowed, BUT
 - (b) the *public announcement or disclosure* of such survey results or the making of specific remarks or predictions on the performance of individual candidates on the polling day before the formal announcement of the election results should be prohibited.
 - (c) by reference to the overseas practices mentioned in the above paragraphs, the Government should consider regulating the conducting of the exit polls by, e.g. requiring the pollsters to register with the Government those information which are relevant to the analysis of the polls, and make all these information available to the public *at the same time* when the survey results are made public (i.e. after the polling day). The above information relevant to the analysis may include the following⁵:
 - (1) the name and address of the person or organization that conducts the survey;
 - (2) the date on which or the period during which the survey is conducted;
 - (3) information about the method used to collect the data from which the survey results are derived, including
 - i. the sampling method,
 - ii. the population from which the sample is drawn,

⁵ Similar to the situation in Canada, these information shall be disclosed by the pollsters (to the Elections Canada (under Section 326(1) of the Canada Elections Act))

- iii. the size of the initial sample,
 - iv. the number of individuals who are asked to participate in the survey and the numbers and respective percentages of them who participate in the survey, refuse to participate in the survey, and are ineligible to participate in the survey,
 - v. the dates and time of day of the interviews,
 - vi. the method used to recalculate data to take into account in the survey the results of participants who express no opinion, are undecided or fail to respond to any or all of the survey questions, and
 - vii. any weighting factors or normalization procedures used in deriving the results of the survey; and
- (4) the wording of the survey questions and, any margins of error in respect of the data obtained.
- (d) The proposal of having a ‘cooling off’ period prior to the election should continued to be considered by the Government.

POLLING HOURS

24. In the latest Legco Election on 4 September 2016, approximately 2.2 million people (with a turnout rate of 58.28%) voted in the five geographical constituencies, clogging many of the polling stations in Hong Kong. Reportedly, there have been fiascos when long queues were observed in various polling stations, with the longest one being seen outside the Eastern District Junior Police Call Clubhouse polling station at Taikoo Shing. At 01:30 on the next day, an estimated 1,000 people were still at that station in line to vote. The station was eventually forced to open till 02:30 - four hours after the polls were scheduled to close.
25. Similar late-night congestion was reported at polling stations in Lam Tin and Heng Fa Chuen. Some voters, according to a news report, went to the polling station late as they thought there would be fewer people, while some claimed

that they just rushed back from business trip to vote.⁶

26. In the aftermath of the above, the Electoral Affairs Commission (EAC) prepared a Report for the LegCo. The Report⁷ considered the difficulties in identifying and acquiring suitable and sufficient venues for use as polling stations.
27. The EAC also noted the increasing voter turnout for Legco elections in recent years that has led to a significant rise in the number of ballot papers to be counted, and as a result, the lengthening of the vote counting time.
28. In its Report, the EAC made the following recommendations⁸:
 - (a) if the polling day is still to be fixed on a Sunday, given that most of the polling stations are set up at school premises, the relevant authority may consider whether it is desirable to designate the day following the Legco election polling day (i.e. Monday) a school holiday;
 - (b) the polling day may be scheduled on a Saturday in order to allow the count to be extended to Sunday at the same venue (although the setting up of the polling stations will have to be advanced to a Friday accordingly); and
 - (c) one or more regional counting stations may be set up for each Geographic Constituency.
29. The Consultation Paper draws no reference to the above. This is perplexing. In our views, the above Report by the EAC is useful and relevant. We invite the Government to carefully go through each of the recommendations, as the issue of polling hours should *not* be considered in isolation.
30. In view of the long working hours of Hong Kong people and the habit of polling, subject to further review as we have suggested in the above, we are of the preliminary view that the current polling hours should not be shortened; to the contrary, the Government should consider slightly extending the polling

⁶ SCMP. "Hong Kong Legco elections live: polls finally close in hotly contested races" (4 September 2017). Available at <http://www.scmp.com/news/hong-kong/politics/article/2014517/hong-kong-legco-elections-watch-voter-turnout-compared-2012>

⁷ Full text available at http://www.eac.gov.hk/pdf/legco/2016LCE_Report/en/2016lce_detailreport.pdf

⁸ *Ibid.*

hours.

The Law Society of Hong Kong
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