By fax (2511-1682) and by post
Your ref: REO 14/19/19 (Pt.17)

11 August 2006

The Chairman
Electoral Affairs Commission
10/F, Harbour Centre
25 Harbour Road, Wanchai,
Hong Kong.

Dear Sir,

Re: Public Consultation: Proposed Guidelines on Election-related Activities in respect of the Election Committee Subsector Elections

1. I refer to the captioned consultation paper of the Electoral Affairs Commission ("EAC") and now send you the Bar's comments of the same.

2. The Bar notes with regret that the EAC declined to extend the deadline of the captioned consultation at the Bar's request. As a matter of historical record, the Bar wrote in October 2001 in relation to an earlier consultation on the same matter that "due to the short consultation period and in particular with the intervening public holidays, it has not been possible for the Bar to come to a sensible view on the proposed guidelines". The Bar does not share the EAC's view that "extending the deadline upon individual request would be viewed as unequal and unfair treatment of others". On the other hand, bearing in mind the code of practice of the United Kingdom Cabinet Office on consultations (November 2000) (which sets out, inter alia, the following consultation criteria: "5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation."), the Bar considers that not only the four week consultation period prescribed for the captioned consultation was manifestly inadequate, but also that "considered responses" were arguably stifled by reason of the EAC not allowing sufficient time for their careful formulation.

3. **Paragraph 3.19**: This paragraph makes provision for the method of drawing lots in the event of an equality in the number of votes for two or more candidates. The method provided requires each *candidate* concerned to draw a numbered ball out of an opaque bag. The Bar considers that this paragraph is arguably ultra vires s 29(6) of the Schedule to the Chief Executive Election Ordinance (Cap 569) since that section provides that in the event of an equality in the number of votes for "the most successful candidates remaining" the *Returning Officer* (rather than the candidates concerned) shall *determine* the result of the election by drawing lots. It is instructive, in this connection, to refer to the method adopted for drawing lots in Levers v Morris [1972] 1 QB 221 at 231, where the court determined the result of the election by lot, which involved the master of that court drawing from a box an envelope containing the name of the fortunate candidate.

4. **Paragraphs 5.40 and 5.41**: The Bar repeats its comments made in February 2000 preferring the keeping of the system set out in the 1998 electoral procedure regulations to the effect that ticks, circles, crosses, etc were all permissible provided their meaning was clear.

5. **Paragraphs 8.2 to 8.6**: The Bar notes that the proposed Guidelines elaborate the definition of "election advertisement" for practical guidance and the elaboration includes "website (except those discussion forums on websites)". The proposed Guidelines also state that a performance report in the format of a website "published or distributed by an incumbent candidate **during** or **before** the election period will also be regarded as an election advertisement". The Bar understands that the Electoral Affairs Commission (Electoral Procedure) (Election Committee) Regulation (Cap 541 sub leg I) reg 100 provides for a number of requirements of election advertisements, including serial numbering, the making of a declaration, furnishing of copies to the Returning Officer, and inspection; and that contravention of any of these requirements is a criminal offence. The Bar finds that neither the requirements in reg 100 nor the terms of the exemption in reg 100(15) (particularly "election advertisement ... to be sent by facsimile or any other form of electronic transmission") address in practicable terms the operation of websites, bearing in mind that the information uploaded to a website is intended to be accessed to or downloaded, rather than sent; and that there are physical and technological difficulties in complying with the said requirements in relation to a website (especially one that is studiously up-dated). Part V of Chapter 8 of the proposed Guidelines is also not of much assistance.

6. **Paragraphs 8.47**: The Bar finds that not all the questions associated with oral speeches delivered by a candidate during election meetings or ad hoc visits have been touched upon or adequately dealt with in this paragraph. Although it states that a candidate's speech will not be treated as an election advertisement if no copies of the speech are provided to the audience or media, it does not state whether the speech will or will not be treated as such if a recording of the speech is made by a member of the audience or media and then made available on the Internet or broadcast. The paragraph also fails to clarify whether the steps described therein of making a submission to the Returning Officer after delivering the speech but before distributing copies of it to the audience or media are mandatory. In any event, the Bar considers that interposing the step of making a submission to the Returning Officer between the delivery of the speech and the distribution of copies to be impractical, bearing in mind the

hectic and often spontaneous nature of electioneering and the usual need of capturing the audience or media's attention by distribution immediately or shortly after the speech. Further, the Bar notes that the paragraph has not dealt with the situation where the candidate deviates from the prepared speech during delivery to, for example, respond to a press report or a rival candidate's handbill. Should two different and thus separate submissions be made to the Returning Officer, one of the prepared speech and the other of the impromptu improvised version thereof.

7. **Chapter 9, Part III**: The proposed Guidelines make reference at different places of the "principle of fair and equal treatment mentioned in" Part III of Chapter 9. However, the Bar does not find that principle to have been adequately stated, highlighted and elaborated in the said Part III. If it is the EAC's intention that paragraph 9.14 is a statement of that principle and that the paragraphs that follow applications of that principle, these matters should be highlighted. Further the Bar suggests that the principle might be better understood if there is included in paragraph 9.14 a sentence like the last sentence in paragraph 4 of Appendix L (which emphasizes on "equal opportunity"). See also the Bar's comments in relation to paragraphs 11.3 to 11.8 and Appendix L.

8. **Paragraphs 10.11 and 10.16**: The references in these two paragraphs to "public order (ordre public)" should be amended to "public order" to comply with the ruling of the Court of Final Appeal in Leung Kwok Hung & Ors v HKSAR (2005) 8 HKCFAR 229 that the relevant provisions of the Public Order Ordinance (Cap 245) should be rendered constitutional by way of severance in relation to the ground of restriction of "public order (ordre public)" so that restrictions under that Ordinance may henceforth only be applied on the ground of public order in the law and order sense.

9. **Paragraphs 11.3 to 11.8 and Appendix L**: Paragraph 11.6 states that the paragraphs 11.3 to 11.5 state three "principles". The Bar disagrees. The Bar considers that the proposition that *no unfair advantage* should be offered to or obtained by a candidate over others regarding election campaigning should be the *primary* principle in relation to media coverage. The propositions of "equal time" and "similar invitation" are but applications of the "no unfair advantage" principle. They should not be applied rigidly.

10. **Paragraph 16.22**: The Bar considers that the elaboration of the expression "voluntary service" in this paragraph that "it must not be service normally provided by the person during such time for the purpose of earning income or profit" might generate a difficulty in the legal subsector in relation to advice provided by a lawyer-supporter to a candidate voluntarily and personally on, for example, the proper construction of electoral regulations. While such legal advice qualifies as "voluntary service" under s 2 of the Election (Corrupt and Illegal Conduct) Ordinance (Cap 554) s 2(1), it might be inconsistent with the elaboration quoted above. The Bar suggests that the EAC should consider withdrawing the said elaboration.

I trust that you would understand that due to the shortness of time, the Bar is not in a position to claim that the above comments are exhaustive of all potential issues associated with the proposed Guidelines. Nevertheless, I believe that you would find them to be of assistance.

Yours faithfully,

Philip Dykes SC
Chairman

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