立法會
Legislative Council

立法會CB(2)877/03-04(02)號文件

檔　號：CB2/SS/4/03

《選票上關於候選人的詳情(立法會)規例》小組委員會

立法會秘書處擬備的背景資料文件

在選票上印上政黨或政治性組織名稱和標誌或候選人照片的建議

目的

本文件旨在提供背景資料，說明立法會以往就在選票上印上政黨或政治性組織名稱和標誌或候選人照片的建議進行的討論。

在1999年刊登憲報的規例

2. 政府當局在1999年6月諮詢公眾後，於1999年12月10日將選舉管理委員會("選管會")訂立的《選舉管理委員會(在選票上印上組織名稱及標誌)(立法會)規例》(1999年第306號法律公告)刊登憲報。該規例列出安排將某些"詳情"(即任何組織的名稱、名稱的簡稱或標誌或任何自然人的標誌)印在供立法會選舉使用的選票上所須遵循的程序。該規例由與2000年立法會選舉有關的附屬法例小組委員會審議。

3. 雖然小組委員會大部分委員原則上支持該規例，但他們就有關建議的技術及實施事宜提出關注。該等事宜包括——

(a) 登記程序相當繁複，應予簡化；

(b) 選管會是法定機構，不應牽涉於敏感及政治問題。選管會的職責應限於確定候選人是否獲授權使用有關"詳情"，以便印在選票上。雖然有關申請無須經選管會本身批准，但選管會可獲授權根據某些指定理由拒絕接納申請；

(c) 選管會不應規定登記申請必須在換屆選舉之前某段指定期間內提交；及

(d) 必須在下次換屆選舉之前就已登記的"詳情"申請續期的規定應予撤銷。

4. 由於在先訂立後審議的程序下，小組委員會並無充裕時間討論委員就該規例提出的實質意見，小組委員會要求政制事務局及選舉事務處的代表("政府當局的小組")考慮廢除該規例，然後再把該規例經修改或未經修改的文本刊登憲報。然而，選舉事務處表示，該項建議若要趕及在2000年立法會選舉中實施，有關的時間表便不能推遲。經商議後，小組委員會同意由主席動議議案廢除該規例。立法會在2000年1月19日通過該項議案。小組委員會主席動議議案時致辭的全文載於**附錄I**。

5. 在籌備2004年立法會選舉期間，政府當局要求選管會因應議員所表達的意見重新研究擬議計劃。

政制事務委員會的討論

6. 在2003年4月24日及10月20日的會議上，政府當局就經修改的擬議計劃諮詢事務委員會。雖然委員普遍支持該項建議，但他們曾就有關計劃提出關注及意見，供政府當局及選管會考慮。

2003年4月24日的事務委員會會議

7. 在2003年4月24日，政府當局的小組向事務委員會簡介選管會經修改的初步建議，即在立法會選舉所使用的選票上印上下列項目的建議——

(a) 候選人所屬政黨或政治性組織或非政治性組織的名稱和標誌，或獨立候選人的個人標誌；及

(b) 候選人的照片。

8. 部分議員關注到根據擬議計劃，贊助候選人參選的商業機構可登記其名稱或商標，並把其名稱或商標印在選票上，藉此推廣業務。事務委員會要求政府當局及選管會檢討擬議安排，以堵塞任何可導致濫用的漏洞。此等委員要求政府當局的小組在敲定選票的設計時考慮他們的意見。有關會議紀要的節錄部分載於**附錄II**。

2003年10月20日的事務委員會會議

9. 在2003年10月20日，政府當局的小組向事務委員會簡介《在選票上印上名稱、標誌及照片(立法會)規例》初稿，主要內容如下——

(a) 申請登記名稱和標誌；

(b) 處理申請；

(c) 要求在選票上印上登記名稱、標誌及照片；及

(d) 撤銷名稱和標誌的登記。

10. 事務委員會要求政府當局的小組考慮——

(a) 應以"無黨派候選人"而非"獨立候選人"來形容沒有政黨背景的候選人；

(b) 應准許同一份名單上的多名候選人使用共同的標誌；

(c) 應准許訂明團體或自然人的標誌包含照片；及

(d) 應改良選票的設計，例如候選人的名稱應以粗體字印刷或擴大字體。

11. 有關委員提出的其他意見及政府當局小組的回應詳情，請參閱載於**附錄III**的有關會議紀要節錄部分。

12. 事務委員會亦要求政府當局的小組說明選管會可依據甚麼普通法定義／詮釋，以某簡稱或標誌屬"令人反感"為理由，拒絕批准登記該簡稱或標誌的申請。政府當局的回應(**附錄IV**)於2003年12月15日隨立法會CB(2)697/03-04(01)號文件送交議員參閱。

立法會秘書處
議會事務部2
2004年1月5日

附錄 I

Draft speech by Hon Ronald ARCULLI, JP

Motion to repeal the Electoral Affairs Commission (Printing of Name of Organization and Emblem on Ballot Paper) (Legislative Council) Regulation at the Legislative Council on 19 January 2000

Madam President,

In my capacity as the Chairman of the Subcommittee on subsidiary legislation relating to 2000 Legislative Council election, I move the motion standing in my name on the agenda.

2. The Electoral Affairs Commission (Printing of Name of Organization and Emblem on Ballot Paper) (Legislative Council) Regulation sets out the procedure to be followed for having certain particulars, i.e. the name, an abbreviation of the name or an emblem of an organization or an emblem of a natural person printed on a ballot paper for use in a LegCo election (excluding an Election Committee subsector election).

3. The Subcommittee has met with the Administration's team, i.e. representatives of the Administration and the Registration and Electoral Office to discuss the Regulation on three occasions.

4. As proposed under the Regulation, applications for registration will only be invited in the year in which a LegCo election is to be held. If the EAC is of the opinion that it may refuse an application, the applicant will be given 14 days to lodge with the EAC a statement of reasons why EAC should not refuse to grant the application or to make a request to vary the application. The EAC will compile a Provisional Register for all the applications that it intends to grant for publication in the newspapers and for public inspection. Upon receipt of an objection, the EAC will hold a hearing. The EAC's decision is final and not subject to any appeal. An applicant has to apply to the EAC for renewing the registered particulars if the applicant would like to retain the registered particulars in the next Register, otherwise,

the particulars will cease to be registered.

5. Apart from a member who has expressly indicated that he does not support the Regulation, the Subcommittee supports the proposal in principle. However, the majority of the members of the Subcommittee have raised concern about the technical and implementation aspects of the proposal.

6. I would like to quote two examples of the confusion that would arise upon the implementation of the Regulation.

Example 1

Under Section 7(1), EAC may refuse an application made by organization A for the registration of a name or an emblem if the name or an emblem is idential to or closely resembles that of organization B on the condition that -

(i) the name or emblem of organization B is registered; and

(ii) organization B has applied for renewal of its application.

Since the two conditions must co-exist, EAC has no power under section 7 to refuse the application of organization A if organization B does not make an application to renew its registration. The Administration's team does not consider the arrangement would pose any problem because when the Provisional Register containing details of the application of organization A is published, any objection raised by organization B will be considered by EAC. In any event, if organization B has not made an application for renewal, its name or emblem will not be entered in the new register.

However, the Administration team's has not addressed the question of the failure of organization B to object; and the question of the incapability of organization B to object to the application because it has ceased to exist.

Example 2

Under the Regulation, applications for registration should be made during a "relevant period" which falls within the nine months immediately preceding the date of a general election of LegCo.

The Subcommittee is concerned about this scenario : Shortly after the 2000 LegCo election, organization A adopts an emblem which is similar to a registered emblem of organization B. However, organization A cannot apply for registration of the emblem at that time because of the existing arrangement. When organization A submits an application for registration of the emblem in 2004 for the purpose of printing the emblem on a ballot paper of the 2004 LegCo election, can EAC refuse its application on ground that the emblem is similar to that of organization B which has also applied for renewal of its emblem? One has to bear in mind that organization A has been using the emblem for over 3 years.

7. To sum up, some members consider that the registration procedure under the Regulation is very cumbersome and should be simplified. Since candidates are at present free to use any names and emblems in election publicity materials without subject to any registration procedure, they have proposed that the registration procedure should be replaced with a notification procedure. The EAC's role should be confined to ascertaining whether a candidate is authorized to use the particulars. Although the EAC's approval per se is not required, it may refuse to accede to the request on specified grounds. These members have also expressed concern that a procedure which has imposed too many restrictions might compromise political freedom and thinking. As the EAC is an independent statutory body, it is undesirable for it to be involved in sensitive and political issues.

8. Other members have proposed that applications for registration should not be restricted to a specified period which falls within the nine months immediately preceding the date for a general election. In addition, the requirement for applicants

to apply for renewal of the registered particulars before the next LegCo general election should be removed. Applicants should be allowed to retain the registered particulars until such time when the EAC decides that the particulars should cease to be registered, such as when an organization has ceased operation.

9. All these issues have not been adequately addressed by the Administration's team.

10. In view of the time constraint for scrutinizing the Regulation under the negative vetting procedure and members' substantive views on the Regulation which is very complex, the Subcommittee has requested the Administration's team to consider repealing the Regulation at this Council meeting, with a view to having it gazetted again with or without amendments, after conclusion of deliberation by the Subcommittee. The Administration's team has advised that applications for registration will be invited in February 2000, in order that the Register containing the registered particulars will be compiled in good time before the commencement of the nomination period for the 2000 LegCo election. If the proposal is to be implemented in time for the 2000 LegCo election, the timetable could not be postponed.

11. Nine of the 13 members attended the Subcommittee's meeting on 13 January 2000. In view of the EAC's position on the timetable, members have agreed that it is impracticable for the Subcommittee to complete scrutiny and also propose amendments to the Regulation before the expiry of the scrutiny period on 19 January 2000, not to mention the time other Members need for consideration of the proposed amendments. In addition, it is undesirable for LegCo to impose a revised proposal on the EAC without adequate consultation. After deliberation, it is the consensus of the members present at the meeting that the Regulation should be repealed.

12. I would also like to say a few words on the response of the Administration' team to the Subcommittee's decision. In the view of the Administration's team, the proposal is workable. However, given members' views on the proposal, the Administration's team also considers that it is better for LegCo to repeal the Regulation

than to put forward a revised proposal which might have problems in implementation. While the EAC would reconsider the proposal having regard to the views expressed by the Subcommittee, the proposal will not be implemented for the 2000 LegCo election.

13. With these remarks, I urge members to support the motion.

政制事務委員會
於2003年4月24日會議紀要的節錄

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IV. 2004年立法會選舉：在選票上印上政黨或組織的名稱和標誌或候選人的照片
(立法會CB(2)1831/02-03(01)至(03)號文件)

24. 總選舉事務主任向委員簡介選舉事務處擬備的文件(立法會CB(2)1831/02-03(01)號文件)，當中載述選管會經修訂的初步建議，即在立法會選舉所使用的選票上印上下列項目的建議——

(a) 候選人所屬政黨或政團或非政治組織的名稱和標誌，或獨立候選人的個人標誌；及

(b) 候選人的照片。

委員提出的事項

名稱和標誌的登記

25. 張文光議員表示，屬民主黨的議員支持該項建議。關於審批登記名稱和標誌申請的準則，張議員表示當局可以有關的名稱或標誌令人反感為由拒絕申請。他認為，當局應制訂適當和明確界定的準則，防止有侵犯發表自由的政治審查。政制事務局局長回應時表示，選管會在決定批准或拒絕某組織或個人提出的申請時，會依據法律及《基本法》中保障各項權利和自由的條文行事。

26. 司徒華議員詢問會否容許政黨或政團就不同的候選人名單登記不同的標誌，以便識別。政制事務局局長答稱，他會向選管會反映司徒議員提出的事項，供該會考慮。

政府當局

27. 許長青議員表示，屬香港協進聯盟的議員支持有關建議。關於選舉事務處的文件附件A及B，許議員質疑根據快速審批方法處理登記名稱和標誌的簡單申請所需的時間。總選舉事務主任答稱，若採用這個審批方法處理在首個登記周期及隨後周期內提出的登記申請，所需的時間分別為最多10星期及8星期。由於有派候選人參

選的政黨或政團大多屬為人熟悉和成立已久的政黨或政團，因此完成登記程序所需的時間實際上會較短。

贊助候選人的公司的商標

28. 吳亮星議員指出在以往的選舉中，部分候選人獲商界及商業機構贊助。他關注到根據擬議安排，贊助候選人參選的商業機構可登記其名稱或商標，並把其名稱或商標印在選票上，藉此推廣業務。主席認為，選票除了用作選舉用途外，不應用作宣傳用途。他要求政府當局及選管會檢討擬議安排，以堵塞任可可導致濫用的漏洞。政制事務局局長答允考慮委員提出的事項。

政府當局

地方選區選舉的選票

29. 政府當局在會上提交了在2004年立法會地方選區選舉中可能採用的選票設計樣本，供委員參閱。委員留意到地方選區不同名單的候選人姓名，連同有關政黨或政團的名稱和標誌，或獨立候選人的姓名及個人標誌，以及候選人的照片會如何印在選票上。政制事務局局長亦示範如何把選票摺成A4尺寸，然後輕易放入新設計的投票箱內。

政府當局

30. 關於選票的設計，委員提出下列各點，供政府當局考慮 ——

(a) 候選人的姓名，尤其是中文姓名，應以較大字型和粗黑體印出，以便識別；

(b) 政黨或政團的標誌應印在其名稱的旁邊或前面，以便有更多空間印上候選人的照片；

(c) 可否以手描肖像代替個人照片；

(d) 在設計選票時亦應顧及某些地方選區最終可能有超過12份候選人名單的情況；及

(e) 政府當局經考慮有關意見後，可就選票的設計提出多個方案，供委員考慮。

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政制事務委員會
於2003年10月20日會議紀要的節錄

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III. 有關在選票上印上名稱、標誌及照片的附屬法例
(立法會CB(2)104/03-04(03)及119/03-04(01)號文件)

3. 總選舉事務主任向事務委員會簡介選舉事務處擬備的文件(立法會CB(2)119/03-04(01)號文件)。鑒於選舉管理委員會("選管會")會根據《選舉管理委員會條例》(第541章)制定《在選票上印上名稱、標誌及照片(立法會)規例》("該規例")，上述文件旨在概述該規例初稿的要點。他告知事務委員會，該規例正在草擬，當中會就下列事宜作出規定——

(a) 申請登記訂明組織(政黨或政團或非政治組織)的名稱和標誌，或自然人的標誌；

(b) 處理申請的程序；

(c) 要求在選票上印上登記名稱、登記標誌及照片；及

(d) 撤銷名稱和標誌的登記。

建議的選票樣本(立法會CB(2)119/03-04(01)號文件附錄B)在會上提交，供事務委員會參閱。

委員提出的事項

在選票上提述"independent candidate"(獨立候選人)

4. 楊孝華議員表示，他屬意以"non-affiliated candidate"(無黨派候選人)而非"independent candidate"(獨立候選人)來形容沒有政黨背景的候選人。主席詢問政府當局，現行法例有否界定何謂"獨立候選人"。

5. 署理政制事務局常任秘書長表示，"獨立候選人"的描述，原意是用於本身並無政黨背景的候選人。鑒於該規例正在草擬，他會把楊議員以"無黨派候選人"取代該用詞的建議轉達選管會，以供考慮。

政府當局

名稱和標誌的登記

6. 何俊仁議員及楊森議員表示原則上支持該規例，該規例旨在提供更多有關候選人背景的資料，從而有助選民易於識別候選人。

7. 何秀蘭議員詢問，在處理組織及團體向選管會提出的登記名稱及／或標誌申請時會否進行"政治審查"。依她之見，根據《社團條例》設立的註冊機制障礙重重，這點可從一些激進團體及反政府團體(例如民主倒董力量)提出的註冊申請至今仍未獲當局根據該條例予以批准的事實顯示。她表示，如沒有根據《社團條例》簽發的註冊證明書，有關組織或團體登記名稱和標誌的申請不大可能獲選管會批准。

8. 政制事務局局長表示，選管會是一個獨立機構，所行使的法定權力都是根據法例的。香港的法例符合有關的國際人權公約及《香港人權法案條例》。根據擬議的登記制度，選管會將根據《社團條例》或《公司條例》簽發的相關證明書所顯示的申請人名稱處理登記申請。他向委員保證，在處理申請時絕不會有政治審查。

9. 何秀蘭議員表示，正如政府當局的文件所解釋，如訂明組織或自然人申請登記的簡稱或標誌包含任何在使用上可能構成違法行為的東西，選管會可拒絕批准有關申請。依她之見，選管會這項權力根本不足以防止濫用情況。她在闡述其觀點時表示，香港現時並無法例把種族、年齡及性傾向等歧視定為罪行。因此，顯示上述各類歧視的標誌或簡稱可能獲准登記及印在選票上，因為選管會並無拒絕批准該等申請的法律依據。

10. 譚耀宗議員表示，組織的名稱可反映其政綱。他關注到在選票上印上某組織的登記名稱會否有宣傳該組織政綱的效果。政制事務局局長答稱，政黨或政團的名稱反映其政綱或政治立場的情況實屬常見。許多該等政黨或政團均已成立一段長時間，並為選民熟悉。他察悉譚議員的關注，並重申選管會在處理訂明組織登記簡稱和標誌的申請時會按照有關法定規定行事。

11. 劉慧卿議員詢問，選管會將如何行使權力，以某簡稱或標誌屬淫褻、不雅或令人反感為理由，拒絕批准登記該簡稱或標誌的申請。政制事務局局長表示，選管會在決定某簡稱或標誌是否淫褻或不雅時，會考慮現行法例所訂的有關準則。他補充，選管會也可根據普通法中的判例法及原則，決定某簡稱或標誌是否"令人反感"。劉慧卿議員要求政府當
政府當局　局提供有關的普通法定義／詮釋，供委員參閱。

12. 余若薇議員指出，為某訂明組織登記名稱及標誌的先決條件，是該組織必須是根據《社團條例》或《公司條例》註冊的組織。她認為，選管會在考慮某訂明組織登記名稱的申請時，在判斷該名稱是否淫褻、不雅或令人反感方面不應擔當任何角色。署理政制事務局常任秘書長回應時澄清，以名稱帶有"淫褻、不雅或令人反感"的元素為理由拒絕批准登記申請的準則，只適用於訂明組織登記簡稱的申請，或訂明組織或自然人登記標誌的申請。他表示，在決定某組織的名稱就選舉而言是否適宜登記方面，選管會並無擔當任何角色。選管會只會核實訂明組織的名稱是否與有關證明書(包括根據《社團條例》或《公司條例》簽發的註冊證明書)所顯示的名稱相同，如屬相同，選管會便會批准有關訂明組織登記該名稱的申請。

13. 黃成智議員指出，根據《社團條例》，任何組織須在成立後的一個月內申請註冊。在該一個月內，有關組織即使沒有註冊證明書，也獲准進行正常業務。然而，根據擬議規例，訂明組織如沒有根據《社團條例》就該組織簽發的註冊證明書，選管會不可批准該組織登記其名稱和標誌的申請。黃議員認為，就新成立而未能及時取得根據《社團條例》簽發的註冊證明書，以便向選管會申請登記名稱和標誌的組織而言，該規例所訂的規定並不公平。這會違背當局鼓勵政黨或政團或其他組織積極參與選舉的目的。

14. 政制事務局局長表示，該規例旨在訂明一個法律程序，以便選管會履行其法定職能，處理登記訂明組織及候選人相關資料及在選票上印上該等資料的申請。他補充，該規例會就每年登記周期及與登記周期相關的截止日期作出明確的規定，讓訂明組織及候選人得以恰當地計劃其選舉活動。有關規定亦會有助盡量減少訂明組織或候選人的名稱和標誌被他人濫用的可能。

15. 何俊仁議員詢問，組成一份名單參選的多名候選人可否使用共同的標誌。涂謹申議員認為，他看不到有何理由在該等情況下禁止有關候選人使用相同的標誌。署理政制事務局常任秘書長表示，該等候選人如擬指明本身為獨立候選人，便不應使用共同的標誌，以免令選民感到混淆。然而，

政府當局 政府當局同意把委員的意見轉達選管會考慮。

16. 蔡素玉議員詢問，選管會會否考慮施加一項條件，規定訂明組織必須根據《社團條例》或《公司條例》註冊了某個最低限度的年期，才可向選管會申請登記名稱和標誌。政制事務局局長回應時表示，據他理解，選管會不打算施加此種規定。

在選票上印上登記名稱、登記標誌及照片

17. 余若薇議員詢問規定訂明組織或自然人的標誌不應為照片或包含照片的理據為何。涂議員表示，候選人或許希望登記載有其支持者照片的標誌。主席表示，就他本人而言，他的照片便是他的標誌。

18. 總選舉事務主任表示，標誌實質上指一個設計，並非指一張照片。此外，在選票上印上的照片並非候選人的照片，則會令選民感到混淆。政制事務局局長答允向選管會反映委員的意見，供該會進一步考慮。

政府當局

19. 單仲偕議員詢問，候選人如沒有要求選管會在選票上印上所屬政黨或政團的登記名稱，會否被控虛報資料。

20. 吳亮星議員表示，越來越多"聯盟"組織以某些公開宣布的目的組成。他詢問，候選人如屬此類團體的成員，會否獲准以獨立候選人的身份參選。

21. 署理政制事務局常任秘書長答稱，應否要求選管會在選票上印上訂明組織的登記名稱及標誌，完全由候選人決定。候選人如有意這樣做，必須在提出要求時一併附上有關訂明組織發出的同意書。

22. 主席詢問，政府當局是否准許屬同一份名單的各個候選人在選票上印上不同訂明組織的名稱和標誌。主席關注到在選票上就同一份名單印上太多不同名稱和標誌的問題。主席認為，既然有關候選人決定以組成名單的方式在某選區參選，他們應有相同的政綱，並應視作屬同一黨派的候選人。主席認為，政府當局在此事上的立場反映當局對政黨發展的看法。

23. 政制事務局局長表示，政府當局的立場是候選人可要求在選票上印上政治組織或非政治組織的登記名稱和標誌，以及候選人的照片。政制事務局局長又表示，根據上次立法會選舉的經驗，支持候選人組成單一份名單參選的政黨或政團數目不多於兩個。政制事務局局長表示，鑒於主席的關注，政府當局會要求選管會研究如何處理超過3名來自不同組織的候選人組成一份名單的情況。

24. 署理政制事務局常任秘書長回應余若薇議員時表示，如某名候選人獲超過一個訂明組織的支持，該名候選人只應要求在選票上印上其中一個組織的名稱。

25. 譚耀宗議員表示，選票樣本的設計頗為複雜。他關注到候選人的名稱並不顯而易見，並認為應擴大名稱的字

體，讓選民(尤其是年長的選民)一目了然。蔡素玉議員建議，候選人的名稱可以粗體字印刷。政府當局解釋，在設計選票時，首要的考慮因素是選票應載有候選人的基本資料，在選票上編配予不同名單的阿拉伯數字亦可協助選民投票。總選舉事務主任答允向選管會轉達委員對選票設計的意見，供該會考慮。

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26. 蔡素玉議員詢問，選管會會否容許在選票上印上名單上所有或部分候選人的團體照片，並容許印上尺寸不同的照片。涂謹申議員認為，只要照片的尺寸沒有超出選票所准許的空間，便應容許屬同一份名單的候選人決定以何尺寸或方式在選票上印上照片。政府當局回應時表示，選管會認為鑒於選票的空間有限，印在選票上的個別候選人照片應以標準尺寸為準。這安排亦可盡量減少候選人不必要的爭議及指受到不公平待遇的情況。

公眾諮詢

27. 總選舉事務主任回應劉慧卿議員時表示，選管會不打算就該規例進行公眾諮詢。政制事務局局長補充，政府當局已在2003年4月24日的會議上向事務委員會簡介各項建議。他表示，有意參選的候選人應可透過立法會的討論得悉有關建議。

立法時間表

28. 政制事務局局長告知委員，該規例將於2003年12月初刊登憲報，並須提交立法會以先訂立後審議的程序處理。當局將於2004年2月開始接受登記申請，而提交申請的截止日期為2004年3月1日。

29. 主席及楊森議員認為，內務委員會適宜成立小組委員會詳細審議該規例。

其他事項

地方選區選舉的名單投票制

30. 政制事務局局長回應何俊仁議員時表示，政府當局已否決容許選民在地方選區選舉中投票支持名單內個別候選人的建議。他表示，《2003年立法會(修訂)條例草案》委員會已研究此事。

經辦人／部門

就選民的電郵地址編製資料庫

31. 單仲偕議員建議，選舉事務處在2004年年初進行選民登記工作時，可考慮要求合資格的選民自願提供電郵地址，以便候選人與選民溝通。他表示，透過電郵傳送資料可加強候選人與選民的接觸，而這方法又更方便和更環保。政制事務局局長答允把單議員的建議轉交選管會考慮。

政府當局

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立法會 CB(2)697/03-04(01)號文件

本局檔號：CAB in C1/33/8

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立法會政制事務委員會秘書
馬朱雪履女士

馬女士：

《在選票上印上名稱、標誌及照片（立法會）規例》

在二零零三年十月二十日舉行的立法會政制事務委員會會議上，議員曾討論上述規例。對於選舉管理委員會如何行使其權力，以有關物品的內容“令人反感”為理由拒絕一個簡稱或標誌的登記申請，議員要求政府就這個用語提供一個定義。

在成文法中“令人反感”一詞的使用

“令人反感”一詞普遍用於許多本地和海外的成文法中。例如，在《公司條例》（第 32 章）第 20(1)(d)條規定，一間公司的名稱如被視為“令人反感”，將不獲註冊。

在英國，《2000 年政黨、選舉及公民投票法令》規定，如政黨的名稱和標誌被認為“令人反感”[1]，當局將拒絕其登記。澳洲至少有兩個省也有類似的法律條文[2]，訂明政黨的名稱如“令人反感”，當局將拒絕其登記。

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1 《2000 年政黨、選舉及公民投票法令》第 28 及 29 條。

2 西澳州《1907 年選舉法令》第 62J 條及昆士蘭省《1992 年選舉法令》第 73 條。

“ 令人反感 ” 一詞的意思

在成文法中並無對 “ 令人反感 ” 一詞作出界定，所以在這用語的釋義方面會以字面上的意思為準。根據 Oxford Dictionary（牛津詞典），“ offensive ” 的意思是 “ giving or meant to give offence, insulting, disgusting, nauseous or repulsive ”（大意是冒犯的、侮辱人的、討厭的、令人噁心的、令人厭惡的）。粗言穢語便是一個例子。

香港並無這方面的訴訟案件。然而，在澳洲則有一宗訴訟案件：***Patrick 訴 Cobain*** [1992] 1VR 290，維多利亞省最高法院裁定 –

(a) 在考慮有關物品內容是否 “ offensive ”（令人反感）時，有關人員須判斷該物品的內容是否有可能冒犯他人，而無須尋求客觀事實根據，去證明它真的冒犯了某人；

(b) 在決定有關物品內容是否有可能冒犯他人，或是否有挑釁性或令人厭惡的，會參照用語在字典上的解釋；以及

(c) 假如有關物品內容是一個陳述，即使這陳述是真實，也有可能冒犯他人。

—— 有關判決的副本(只有英文版本)夾附於後。

煩請把本函送交事務委員會委員，以供參考。

政制事務局局長

（譚志源　　代行）

二零零三年十二月十二日

SUPREME COURT OF VICTORIA

PATRICK v. COBAIN

GOBBO J.

31 July 1992

Local government — Election — How-to-vote cards — Registration — Card containing allegations concerning candidate and council — Whether allegations constituted "offensive material" — Local Government Act 1989 (No. 11), Sch. 5, cl. 2(3).

Sub-clause 2(3) of Sch. 5 of the *Local Government Act* 1989 provides that the returning officer at a local government election "must refuse to register a form or sample of how-to-vote card which the Returning Officer is satisfied ... contains offensive ... material".

The appellant (who was not a candidate in the election) submitted to the respondent a draft how-to-vote card which read:

"In Ken Oliver's two years on council, the council has—

- taken no action against illegal real estate signs on properties;
- sold council land to a lucky few at one-third its true value;
- allowed developers to avoid providing parking by making a cash payment of half the actual value of the car space;
- failed to prevent an increase in the density of residential property;
- permitted signwriting on estate agent offices in excess of that permitted by the Brighton Planning Scheme.

For more of the same return to office your local estate agent Ken Oliver ..."

Oliver was a candidate in the election. The respondent refused to register the card. The appellant appealed to the Administrative Appeals Tribunal, which dismissed the appeal. On a further appeal to the court on questions of law:

Held: (1) In considering an application to register a how-to-vote card the returning officer has to make a judgment as to whether the contents of the card are capable of giving offence. He should not proceed upon a factual finding that the contents have in fact offended anyone.

(2) The word "offensive" in sub-cl. 2(3) of Sch. 5 of the Act does not bear a criminal connotation. The term is wide enough to comprehend material which is capable of giving offence or which is aggressive or shocking.

(3) The material contained in the how-to-vote card submitted by the appellant was capable of amounting to offensive material.

Appeal

This was an appeal from the Administrative Appeals Tribunal pursuant to s. 52 of the *Administrative Appeals Tribunal Act*. The facts are stated in the judgment.

The appellant in person.

A. E. Radford for the respondent.

Gobbo J.: This is an appeal under the *Administrative Appeals Tribunal Act* 1984 from a decision of the Administrative Appeals Tribunal. The decision

relates to an appeal that had been instituted to the Administrative Appeals Tribunal by Mr. Peter Edmund Patrick, the appellant before me, who appeared in person. His appeal to the Administrative Appeals Tribunal related to a how-to-vote card which had been proposed by him and submitted to the returning officer for the relevant council election.

I refer to an election in the Central Ward in the City of Brighton for which there were two candidates, one of which was a Mr. Kenneth Oliver, who had been a councillor of that city for that ward since August 1988. The election takes place tomorrow, 1 August 1992, and this appeal has come on before me in the practice court as a matter of urgency this day.

The Administrative Appeals Tribunal gave its decision on 23 July 1992. The Administrative Appeals Tribunal was constituted by a single presiding member, who brought down a decision that the returning officer's decision to refuse to register the how-to-vote card should be affirmed. The member gave reasons on 28 July 1992 and I have those reasons before me.

The how-to-vote card, after containing the identification of the ward and the date, reads:

"In Ken Oliver's two years on council, the council has—

- taken no action against illegal real estate signs on properties;
- sold council land to a lucky few at one-third its true value;
- allowed developers to avoid providing parking by making a cash payment of half the actual value of the car space;
- failed to prevent an increase in the density of residential property;
- permitted signwriting on estate agent offices in excess of that permitted by the Brighton Planning Scheme.

For more of the same return to office your local estate agent Ken Oliver.

For information about Ken's policies try Simon Cooper on ... [two phone numbers that are set out]".

There then appears to be a signature and then the statement that a number must be placed against the name of each candidate. Then the further notation "Authorised by, printed by and distributed on behalf of Mr. P. E. Patrick, 10 St. Andrews Street, Brighton", and then what was further proposed was "Registered by the returning officer for the Central Ward, Brighton City Council".

The how-to-vote card had been submitted by Mr. Patrick, who is not a candidate in the election, to the returning officer, who refused to register the how-to-vote card, which then provoked the appeal to the Administrative Appeals Tribunal.

The relevant provisions of the legislation are to be found in the *Local Government Act* 1989, and in particular s. 56, which is brief and to the point. Under the heading "How-to-vote cards" it reads "Schedule 5 has effect with respect to how-to-vote cards". When one turns to Sch. 5 there are then provisions for registration of how-to-vote cards, and in cl. 2 there is the heading "Matters to be Considered", and that contains the following material at sub-cl. 3 of cl. 2:

"The returning officer must refuse to register a form or sample of how to vote card which the returning officer is satisfied is likely to mislead or deceive a voter in relation to the casting of a vote of the voter or contains offensive or obscene material."

Annex

The matter was fought out, as appears from the affidavits, and as appears from the reasons of the tribunal, upon the basis that the question was whether the how-to-vote card contained offensive material. It is true that the issue of whether the card, within s. 57 of the Act, contained false or defamatory statements was referred to, but I am satisfied on the material before the court that the appeal was considered and decided upon the single question as to whether or not the how-to-vote card contained offensive material.

The appeal to this court can only lie upon a question of law. Unlike the Administrative Appeals Tribunal, this court does not, according to the legislation, afford appellants an appeal in the full sense of that word, meaning thereby a rehearing *de novo*. It is necessary for the appellant to make out an error of law on the part of the Administrative Appeals Tribunal.

There are two matters that fall to be considered. The first is whether or not an appeal is made out on the merits; that is, on the merits of being able to show an error of law, and the second is whether, having regard to the terms of the legislation and the discretion in the court, subject always to the overriding words of s. 52, an order should be made for relief in the present case.

I should indicate at the outset that I would not be disposed to exercise my discretion in favour of the application to grant relief in the present circumstances, for reasons that I will set down shortly. But in view of the arguments that have been put, albeit that they have been put under some constraints of time, I am prepared at least to consider the arguments of law that have been put to me and to indicate my opinion in relation to those. I turn then to those arguments.

Mr. Patrick, who conducted his case with admirable clarity, said in substance that he relied upon three matters. There are more matters than are raised as questions of law but in a sense they can be reduced to three principal arguments. The first was that there was no evidence that Oliver or the returning officer were offended as neither of these parties/persons gave evidence, and for that reason it was not open to the returning officer to reach the view that he did, and it was not open to the Administrative Appeals Tribunal to put itself in the same position as the returning officer to reach the decision that it did.

The second argument was that the test adopted by the tribunal was wrong and that it misdirected itself because it treated "offensive" as amounting to hurtful. Part of this argument also involved the proposition that the appropriate test to adopt was one drawn from cases relating to offensive behaviour in criminal statutes.

The third argument was of a more general kind and involved a reliance upon public policy and policy interest considerations which in effect it was said led to two considerations, namely, that the legislation should be interpreted in a way that permitted the maximum capacity to provide criticism of candidates and council and the opportunity for free debate, and also that the presence of a provision in the Act, namely, s. 57A, giving persons aggrieved the opportunity to seek an injunction from the court told against the returning officer interpreting the legislation in a way that was too sensitive of the issues of offence or criticism.

On behalf of the returning officer, Mr. Radford submitted that the test was plainly not whether the words were offensive in any criminal context and that in the context of these regulations it was inappropriate to adopt such a test.

He further argued that the nature of the legislation told against the returning officer having to conduct any inquiry as to the truth or offensiveness of the material and that it must necessarily be implied that the returning officer had to reach a judgment on what was before him or was readily available to him in the sense that it had been provided for him in order to reach an expeditious decision on what was in large measure an administrative series of acts.

It was further submitted that the reasons did not indicate that the tribunal had misdirected itself and that the allegations contained in the how-to-vote card were of a nature that raising, as they did, illegalities and improprieties on the part of the council and the councillor necessarily connoted that misbehaviour was worthy of condemnation and was such as would be likely to give offence by the very nature of their aggressive and shocking nature.

As to the first matter, I am of the view that it is not necessary that the returning officer have evidence that the candidate Oliver was offended, nor was it necessary that he give evidence that he was in fact offended. It was for the tribunal on appeal to put itself in the position of the returning officer, armed with the same discretion and saddled with the same responsibilities. In my view, the inquiry to be made in that situation was essentially one that looked at the material and considered whether it was capable of giving offence. It is not entirely clear what is the category of person caught up by that description, but it may even be that the returning officer himself, for example, in a particular case might not be offended by the material. That would not in my opinion be decisive of the issue.

By its very nature the provision as it appears is directed towards material capable of giving offence to those persons likely to read it. In my view the tribunal has not misdirected itself in any consideration of the matter and it was not necessary for it to have evidence before it since what it had to consider was whether this material was capable of giving offence. It is, after all, a judgment that has to be made before the how-to-vote card sees the light of day. It would be intolerable to produce a test that meant that the returning officer had to have, as it were, a trial run of the how-to-vote card with someone before he could be satisfied that it was offensive.

It is plain that the nature of the clause contemplates that the returning officer has to make a judgment as to whether it is capable of giving offence and not proceed upon a factual finding that it has in fact offended anyone. For these reasons, the first argument must fail.

As to the second argument, I am of the view that the test adopted by the tribunal should be gleaned from the reasons given by the tribunal and not from what may have passed in the course of argument or what may have been said by someone who attended the hearing. It is clear that the tribunal did not confine itself. The evidence is that it had before it dictionary meanings. Those dictionary meanings included a general meaning which comprehended what I have just covered, namely, that offensive material is

Although "hurtful" was included in the range of words that was canvassed in argument before the tribunal, I am satisfied that the tribunal did not confine itself to the word "hurtful".

I am further of the view that the test to be applied is not one that is to be uplifted from the criminal statute with its higher burden of proof and with, in particular, its connotation of gravity and seriousness. I am assisted in reaching that conclusion by the consideration that when the Act was amended to provide that electoral material, which on one extension was to include how-to-vote cards, might be the subject of a criminal sanction, it was expressed in terms that did not include offensive material.

Section 55 of the *Local Government Act* 1989 was amended by Act No. 15 of 1992 by the insertion of sub-s. 5 which reads:

"A person must not print, publish or distribute or cause to be printed, published or distributed any electoral material that is likely to mislead or deceive a voter in relation to the casting of the vote of the voter."

Then there is provison for a penalty of 10 penalty units if the offender is a natural person or 20 penalty units if the offender is a corporation.

It is to be noted that that offence does not include offensive or obscene material. It restricts itself to the earlier part of sub-cl. 3 of cl. 2 of Sch. 5, namely, it concerns itself only with material that is likely to mislead or deceive a voter. It is in my view unlikely that the legislature in making that change in the legislation and not carrying with it the word "offensive" would have done so if it was at all times intended that the word "offensive" was to have a criminal connotation in the clause. If that was so it seems hard to see why then it would have added the provision for offensive material and made it also an offence.

The next argument that needs to be considered is whether there was evidence capable of amounting to offensive material. Mr. Patrick was concerned to argue that the allegations made in the statement were true and that he could produce evidence that they were true. In the course of argument, however, he conceded, and in my view properly conceded, that a statement could still be offensive even if it was true and that whatever might be the situation in relation to defamatory statements the question as to whether a statement was offensive was a different one as to whether it was defamatory and that the fact that the statement might in fact be shown in some way to be true was not decisive and could not mean that the statement was incapable of being offensive.

These statements in the how-to-vote card contain serious allegations against the council. They state that the council failed to take action in respect of illegal signs. More significantly, the card states that the council sold land to some few persons at one-third its true value. It also states that developers were allowed to make payments at half the actual value of a car space, and that unlawful sign writing on estate agent offices was permitted. The word unlawful is not used but that is the clear inference from the statement. Mr. Patrick did not shrink from that. Indeed his whole case is that the council has done these things, and he at one stage sought to endeavour to prove that.

The how-to-vote card goes on to identify one person, namely Mr. Oliver, as being a participant in this as a former councillor. The only reasonable inference from the statement is that he was not simply a member of council, but that he was actively involved in all that is complained of. And there is an added edge given to the statement by the fact that he is described as the local estate agent and a number of the matters involve matters of land value, real estate transactions and real estate signage.

In all of those circumstances I am of the view that the material was capable of amounting to offensive material. It is not for me to decide that matter. I have a more limited inquiry, because the issue for me is an issue of law as to whether the tribunal's decision was one that no reasonable tribunal could have come to on the material before it and, for the reasons I have indicated, that cannot be found.

There remains the general resort to public interest and public policy. They share the general recourse to principles of free speech and strong accountability by councils and councillors. But we are here concerned with a how-to-vote card, not with electoral material at large. This restriction about offensive material does not apply to electoral material, as I have already pointed out. It applies to how-to-vote cards. The limitations on Mr. Patrick and others in his situation are not such as to preclude him from canvassing all of these matters in a whole variety of ways for many days before the election, and right up to within a certain geographic distance of the polling booth on the day in question. They simply relate to a how-to-vote card.

I am indeed surprised that on the regulations as they stand one can have how-to-vote cards that contain testimonials for particular candidates and criticisms, (that is falling short of being offensive) of other candidates. It would seem odd that that fits within the character of what is intended to be simply information about how-to-vote. Indeed, the interesting feature of this card is that it could fairly be described on one view as not being a how-to-vote card but a how-not-to-vote card, because it did not at any stage identify the candidate for whom someone should vote.

In any event, as I have indicated, the regulations to be found in Sch. 5 in my view are dealing with a restricted subject matter and recourse to general and valid principles does not have a great deal of weight having regard to the fact that the appellant and other ratepayers and voters in the community in question have ample opportunity to use electoral material to express their views, without giving out offensive material.

I turn to the second matter to be dealt with shortly, namely as to whether I would be prepared to grant relief in the present case. The appellant is not a candidate. Presumably this card is, as it were, a draft or proposed card, and the inference is to be that, of course, these cards have not been printed, for the good reason that the returning officer had not yet approved the card. But, in any event, Mr. Patrick is not in the position of being a candidate who has been deprived of the opportunity to secure office by reason of an allegedly improper exercise of power by the returning officer.

The ordinary method of disposition of this case, were I to accept the appellant's arguments, would have been to have set aside the decision of the tribunal and then remitted it for the tribunal to decide according to law. I do not understand that I would have had the power to remit the matter direct to the returning officer with a direction as to what the returning officer is to do. Having regard to the lateness of the hour, and the fact that this election is to take place tomorrow morning, it is really quite impracticable to contemplate a situation where the court should be asked to

bring about an order remitting a matter for further hearing by the tribunal, when nothing can practicably come of that.

Moreover, even if something might have been said for such a course were a candidate gravely disadvantaged as a result of an adverse ruling, it plainly cannot apply to the person who is not a candidate, who simply has an interest, no matter how strong in terms of its enthusiasm and vigour, in the result of the election, I therefore would not have been disposed, if I had been satisfied, to grant the relief. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for the respondent: *Purves Clarke Richards.*

R. R. S. TRACEY
BARRISTER-AT-LAW

SUPREME COURT OF VICTORIA

DIX and Another v. CRIMES COMPENSATION TRIBUNAL

APPEAL DIVISION

FULLAGAR, BROOKING and TADGELL JJ.

6, 12 August 1992

Administrative law — Administrative Appeals Tribunal — Appeal to Supreme Court — Question of law — Power of tribunal to extend time to apply for review — Whether acceptable explanation of delay in making application a condition precedent to exercise of power — (CTH) *Administrative Appeals Tribunal Act 1984* (No. 10155), s. 31(2).

Section 31(2) of the *Administrative Appeals Tribunal Act 1984* empowers the Administrative Appeals Tribunal to extend the time for the making of an application to the tribunal for a review of a decision, whether or not the time has expired.

In November 1990 the appellants applied to the tribunal for an extension of the time in which to apply for a review of an administrative decision. The tribunal refused the applications for an extension of time, saying that it was a pre-condition to the grant of an extension of time that the appellants show an "acceptable explanation for the delay". The appellants then appealed to the Supreme Court, claiming the tribunal had erred in law.

***Held*, allowing the appeal: (1) The power conferred by s. 31(2) of the *Administrative Appeals Tribunal Act* 1984 was unrestricted and it was not for the court to impose an arbitrary limitation not expressed in the words of the statute.**

***FAI General Insurance Co. Ltd. v. Southern Cross Exploration NL* (1987) 165 C.L.R. 268, applied.**

(2) In stating that it was a condition precedent to the grant of an extension of time under s. 31(2) that the applicant show an "acceptable explanation of the delay", the tribunal erred in law.

***Hunter Valley Developments Pty. Ltd. v. Minister for Home Affairs and Environment* (1984) 58 A.L.R. 305, not followed.**

Appeal

This was an appeal on a question of law from a decision of the Administrative Appeals Tribunal. The facts are stated in the judgment of Brooking J.

A. L. Cavanough for the appellants.

J. W. Thwaites for the respondent.

Cur. adv. vult.