

Submissions to the Electoral Affairs Commission for its Public Consultation on the Proposed Guidelines on Election-related Activities in respect of the Legislative Council Election

April 2020

Introduction

Justice Centre Hong Kong (“Justice Centre”) appreciates this opportunity to provide submissions to the Electoral Affairs Commission (“the Commission”) for its Public Consultation on the Proposed Guidelines on Election-related Activities in respect of the Legislative Council Election (“the Proposed Guidelines”).

Universal Periodic Review Recommendations on Hong Kong

In the third cycle United Nations (“UN”) Universal Periodic Review (“UPR”) of the People’s Republic of China (“China”) in November 2018, Canada, France and Australia each made a recommendation on Hong Kong¹:

- Canada recommended that China ensures the right of Hong Kong people to take part in government, without distinction of any kind.
- France recommended that China guarantees freedom of speech, assembly and association [in] Hong Kong;
- Australia recommended that China upholds the rule of law and rights embodied in the One Country, Two Systems framework for Hong Kong.

China has accepted these three UPR recommendations in the Human Rights Council in February 2019². The Hong Kong Government has confirmed its acceptance of the recommendations to the Legislative Council of Hong Kong in April 2019³.

We invite the Commission to take into account these UPR recommendations in its consideration on whether the Proposed Guidelines are compliant with international human rights standards.

¹ Human Rights Council. (2018). *Report of the Working Group on the Universal Periodic Review: China*. A/HRC/40/6. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/446/59/PDF/G1844659.pdf?OpenElement>, paragraphs 28.205, 28.343, 28.345.

² Human Rights Council. (2019). *Report of the Working Group on the Universal Periodic Review: China. Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*. A/HRC/40/6/Add.1. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/041/01/PDF/G1904101.pdf?OpenElement>, paragraphs 28.205, 28.343, 28.345.

³ Constitutional and Mainland Affairs Bureau of Hong Kong. (2019). “The formal adoption by the United Nations Human Rights Council of the report by its Working Group on the Universal Periodic Review on the third review of the Hong Kong Special Administrative Region.” Available at: <https://www.legco.gov.hk/yr18-19/english/panels/ca/papers/ca20190415cb2-1179-3-e.pdf>, paragraph 10.

The Provision of the Non-Mandatory Confirmation Form

Since the introduction of the non-mandatory Confirmation Form by the Commission in 2016, multiple candidates in the 2016 District Council Ordinary Election and subsequent elections have been disqualified for their failure to return their signed Confirmation Form and/or their answers to requests for further information from Returning Officers⁴⁵⁶⁷. This gives rise to concerns about the screening of candidates based on their political opinion.

Apart from the abovementioned UPR recommendations, we would like to draw the Commission's attention to relevant legal principles that govern Hong Kong people's right to take part in public life.

Domestically, Hong Kong's constitutional instruments guarantee Hong Kong people's right to take part in public life. Relevant provisions include Article 26 of the Basic Law and Article 21 of the Hong Kong Bill of Rights Ordinance, which gives domestic effect to Article 25 of the International Covenant of Civil and Political Rights.

The UN Human Rights Committee commented in its concluding observations on the third periodic report of Hong Kong on 29 April 2013⁸ that:

“Hong Kong, China, should ensure the proper functioning of judicial structures in accordance with the Covenant and with principles governing the rule of law. As previously recommended (CCPR/C/HKG/CO/2, para.18), it **should also ensure that all interpretations of the Basic Law, including on electoral and public affairs issues, are in full compliance with [the ICCPR].** (*emphasis added*)

Hong Kong, China, should take all necessary measures to implement universal and equal suffrage in conformity with [the ICCPR] as a matter of priority for all future elections. It should outline clear and detailed plans on how universal and equal suffrage might be instituted and **ensure enjoyment by all its citizens, under the new electoral system, of the right to vote and to stand for election in compliance with article 25 of [the ICCPR], taking due account of the Committee's general comment No. 25 (1996)** on the right to participate in public affairs, voting rights and the right of equal access to public service. It is

⁴ Stands News. (2016). 梁天琦、吳文遠申司法覆核 挑戰選管會要求交代港獨立場、簽「確認書」做法。 Available at <https://www.thestandnews.com/politics/梁天琦-吳文遠申司法覆核-挑戰選管會要求交代港獨立場-簽-確認書-做法/>.

⁵ The Initium. (2016). 香港民族黨陳浩天被選管會取消立法會參選資格。 Available at <https://theinitium.com/article/20160725-dailynews-Edward-Leung-Judicial-review/>.

⁶ InMedia. (2018). 朱凱迪：現任立法會議員不能選村長極荒謬。 Available at <https://www.inmediahk.net/node/1060993>.

⁷ RTHK News. (2019). 黃之鋒不獲確認區議會參選資格。 Available at <https://news.rthk.hk/rthk/ch/component/k2/1488778-20191029.htm>.

⁸ Human Rights Committee. (2013). *Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013)*. CCPR/C/CHN-HKG/CO/3. Available at <https://undocs.org/en/CCPR/C/CHN-HKG/CO/3>, paragraphs 5, 6.

recommended to consider steps leading to withdrawing the reservation to article 25(b) of the Covenant. (*emphasis added*)”

The Human Rights Committee sets out in its General Comment No. 25⁹ that:

“1. Article 25 of [the ICCPR] recognizes and protects the rights of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, [the ICCPR] **requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.** Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of [the ICCPR]. (*emphasis added*)

4. **Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria.** For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office. (*emphasis added*)”

Therefore, we invite the Commission to take these principles into account, and consider whether the non-mandatory Confirmation Form constitute screening based on political opinions in the candidacy confirmation process.

Counting Arrangements

We are concerned that the Proposed Guideline’s proposal on counting arrangements, at paragraph 8.56, to limit the admission to the public area for observing the counting of the votes at each counting station may affect public perceptions about the fairness of the electoral process.

The Human Rights Committee’s General Comment No. 25, which elaborates on rights guaranteed under Article 25 of the ICCPR, provides¹⁰:

“The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. **There should be independent scrutiny of the voting and counting process** and access to judicial review or

⁹ Human Rights Committee. (1996). *General Comment No. 25 (57)*. CCPR/C/21/Rev.1/Add.7. Available at <https://undocs.org/CCPR/C/21/Rev.1/Add.7>, paragraphs 1, 4.

¹⁰ Human Rights Committee. (1996). *General Comment No. 25 (57)*. CCPR/C/21/Rev.1/Add.7. Available at <https://undocs.org/CCPR/C/21/Rev.1/Add.7>, paragraph 20.

other equivalent process so that **electors have confidence in the security of the ballot and the counting of the votes.** (*emphasis added*)”

We suggest that the Commission take into account relevant international human rights standards and consider alternative ways of managing the number of people observing the counting of the votes, such as by locating larger venues and public education on the counting arrangement, with the aim of ensuring the actual or perceived fairness and transparency of the upcoming Legislative Council election.

Please contact Preston Cheung at preston@justicecentre.org.hk with any questions regarding this submission.

About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit organisation focused on the promotion of human rights through our legal, psychosocial, research, policy and advocacy work. We are committed to driving change for a just and fair society. Founded in 2007 as The Hong Kong Refugee Advice Centre, over seven years we helped over 2,000 men, women and children on the road to a new life. Building on our expertise in refugee issues, in 2014 we identified a clear need for an increased response to tackling forced labour and human trafficking in Hong Kong, and expanded our remit to fill this gap and rebranded as Justice Centre Hong Kong. We now help around 300 people each year through our direct services and aim to benefit many more through our research, policy and advocacy work.