

立法會
Legislative Council

LC Paper No. CB(2)588/01-02

Ref : CB2/SS/1/01

**Paper for the House Committee
on 7 December 2001**

**Fourth and final report of the Subcommittee on
subsidiary legislation relating to Chief Executive election**

Purpose

This paper reports on the deliberations of the Subcommittee on the Chief Executive Election (Election Petition) Rules (the Rules) which were tabled in the Legislative Council on 21 November 2001.

The Subcommittee

2. Under the chairmanship of Hon IP Kwok-him, the Subcommittee has held two meetings to discuss the Rules.

The Rules

3. The Rules are made by the Chief Justice of the Court of Final Appeal (CFA) under section 40 of the Chief Executive Election Ordinance (CEEO) (Cap. 569). The Rules set out the procedures for the lodging, trial, withdrawal and costs of election petitions questioning the election of the Chief Executive (CE) as well as the ancillary matters relating to such election petitions. However, appeals to the CFA against the Court of First Instance's decision under the leapfrog arrangement are outside the scope of the Rules.

Deliberations of the Subcommittee

Sections 3 and 4

4. Section 3 stipulates that the practice and procedure of the High Court shall apply to a petition as nearly as circumstances permit as if it were an ordinary action within the jurisdiction of the High Court. Section 4(2) stipulates that the High Court Fees Rules shall, subject to all necessary modifications, apply in respect of the proceedings for a petition.

5. Hon Margaret NG, a non-Subcommittee member, has queried whether sections 3 and 4 as presently drafted amount to amending the practice and procedure of the High Court and the High Court Fees Rules. She has requested the Administration to consider repealing the phrase "as nearly as circumstances permit" in section 3 and the phrase "subject to all necessary modifications" in section 4.

6. The Administration has explained that section 3 applies the practice and procedure of the High Court to proceedings relating to an election petition. It does not have the perceived effect of amending the practice and procedure in their general application. The drafting technique adopted is "legislation by reference" and is not unusual in Hong Kong and other Commonwealth jurisdiction. The technique was developed because of the undesirability to repeat similar lengthy procedural and administrative requirements for similar subject matters.

7. The Administration has further explained that as election petition proceedings instituted in respect of the CE election is new, there must be guidelines for the actual application of the existing High Court practice and procedure. The phrase "as nearly as circumstances permit" in section 3 seeks to clarify the extent to which departure is allowed.

8. As regards section 4 which provides for the application of the High Court Fees Rules in respect of election petition proceedings, the Administration points out that the phrase "subject to all necessary modifications" is necessary because the High Court Fees Rules make no reference to election petition proceedings under the Chief Executive Election (Electoral Procedure) Rules and cannot apply thereto in the existing form without slight amendment. Given the High Court Fees Rules are subject to constant changes, the flexibility allowed by the phrase is indispensable.

Time and place for trial of petition (section 8)

9. Members note that a petitioner is required to make an application to the Court within a short time for a date, time and place to be fixed for the trial, i.e. within two days after the filing of his petition or such other period as the Court may direct. Hon Margaret NG has asked the Administration to reconsider whether the proposed time limit is reasonable, taking into account factors such as the petitioner or his legal representative might not have adequate time to prepare for the hearing of the petition.

10. The Administration has explained that as the two-day period is not an absolute deadline, it should not cause any difficulties in practice. Where necessary and justified, the Court can always extend the period for making such an application. The time requirement in respect of the making of such an application is imposed as a means to help expedite the settling of election petitions by the Court.

Circumstances in which petition is regarded as withdrawn (section 15)

Section 15(1)

11. Under section 15(1), an election petition shall be regarded as having been withdrawn -

- (a) if the petitioner dies or, if there are more than one petitioner, the last remaining petitioner dies;
- (b) if the successful candidate cannot assume the office of CE before the deadline prescribed under section 11(3) of the CEEO because of death or otherwise; or
- (c) if the successful candidate ceases to hold the office of CE because of death or otherwise.

12. Hon Margaret NG considers that in the circumstances described in section 15(1)(b) and (c), the election petition should be allowed to continue. The Member has pointed out that the rules so made under section 40 of the CEEO must not deviate from the general spirit of other relevant provisions of the CEEO, for example, section 37 which aims to ensure the propriety of the election process. Otherwise, the rules would be ultra vires.

13. The Administration has explained that the CEEO empowers the Chief Justice to provide for petitions not voluntarily withdrawn to be regarded as having been withdrawn, without limitation imposed under the Ordinance. The election procedure is solely designed to deal with whether or not the person declared elected was properly elected. In terms of effect, the occurrence of the circumstances under section 15(1)(b) and (c) is no different from a Court ruling that the successful candidate is not duly elected. It would be of no purpose to continue with an election petition.

14. Members note that the grounds for election petitions are stipulated in section 32(1)(a)-(g) of the CEEO, which include contentions that the successful candidate was ineligible for being nominated in the first place or should have been disqualified from being nominated or elected, as well as allegations that corrupt or illegal conduct was engaged at the election or that material irregularity occurred in relation to the election (including the poll and counting of votes). Some members have asked whether the petitioner has legal and other channels, to address his grievances about the circumstances set out in section 32(1) of the CEEO if an election petition is regarded as withdrawn under section 15 of the Rules.

15. The Administration has explained that the election procedure is not intended to address individual grievances. The averments in an election petition, depending on their nature, may well give grounds for other legal or

administrative actions. The withdrawal of an election petition would not preclude such other avenues being pursued. This might range from complaints to the Electoral Affairs Commission, civil action against another candidate (e.g. defamation) or against a public officer (for abusing a public office) to criminal actions against candidates, agents or electoral officers under the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554).

16. Members have requested the legal adviser to the Subcommittee to advise on the issue of vires about section 15(1)(b) and (c) of the Rules.

17. The legal adviser has advised that as section 15(1)(b) and (c) of the Rules relate only to a respondent who is the returned candidate, they do not apply to a respondent who is a Returning Officer. In other words, there are no circumstances in which an election petition will be regarded as withdrawn when the respondent is the Returning Officer. Under the circumstances specified in section 32(1)(a), (b), (c), (f) and (g) of the CEEO, the respondent is most likely to be the Returning Officer. As there will be no deemed withdrawal of an election petition under these circumstances, the legal adviser is of the view that the issue of ultra vires will not arise.

18. In relation to section 32(1)(d) and (e) of the CEEO relating to corrupt and illegal conduct at an election, the legal adviser advises that section 15(1)(b) and (c) of the Rules will apply. However, in arriving at the conclusion of whether a returned candidate was duly elected, the main concern of the Court in an election petition appears to be about the election result, i.e. whether the returned candidate was duly elected, but not the propriety of the election process. The issue of whether the returned candidate is guilty of an offence under the Elections (Corrupt and Illegal Conduct) Ordinance will be considered by the Secretary for Justice and charged criminally if there is sufficient evidence. Although the Court has to take into account the grounds specified under section 32(1) of the CEEO when hearing an election petition, it may not be an appropriate forum to determine the substantive issues specified under section 32(1) of the CEEO. The propriety of the process of the election, when an election petition is regarded as withdrawn, will be taken care of through other channels, for example through criminal proceedings. The legal adviser is therefore of the view that section 15 of the Rules is not ultra vires.

Amendments to section 15(1)(b) and (c)

19. Section 11(3) of the CEEO provides for the fixing of a new polling date where the candidate returned at an election cannot assume the office of the CE. However, it does not specify the reasons why the returned candidate cannot assume office. The Subcommittee considers that it might not be appropriate to specify in section 15(1)(b) the reason, i.e. due to his death or otherwise, for the returned candidate's failure to assume office.

20. Section 5 of the CEEO refers to the declaration of vacancy of the office of CE arising from section 4 (b) (i.e. the death of CE) or (c) (i.e. the removal of CE from office in accordance with the Basic Law by the Central People's Government) of the CEEO. The Subcommittee considers that it might not be appropriate to specify in section 15(1)(c) grounds which are not specified under section 4(b) and (c) of the CEEO for CE to cease to hold the office of CE.

21. After consideration, the Administration has agreed to move an amendment to delete the words "due to his death or otherwise" in section 15(1)(b) and (c).

Section 15(2)

22. Under section 15(2), if an election petition is regarded as having been withdrawn upon the death of the petitioner, the solicitor acting for him in the proceedings, or where no solicitor acts for him, any respondent learning of the death, shall file a notice of the death of the petitioner. The Registrar shall publish a notice of the withdrawal in the Gazette. Hon Margaret NG has raised concern about the requirement and asked the Administration to consider amending the provision making reference to similar provisions of existing legislation.

23. The Administration has advised that as a petitioner does not necessarily have a relative or friend, no person is in a better position than his solicitor and the respondent to know of the death of the petitioner in the earliest instance. Members note that there is currently no legislation in Hong Kong imposing duty on a person to inform the court about death of a party in a civil litigation.

24. In response to the Chairman's question, the Administration has advised that failure on the part of the solicitor or the respondent to file a notice of the death of the petitioner is not an offence. In fact, the filing of such a notice is not a prerequisite for the Registrar to publish the notice of withdrawal in the Gazette.

Section 19

25. The Subcommittee has asked the Administration to consider whether the phrase "be defrayed" should be amended to "be paid" in section 19(1).

26. The Administration has advised that under the section, the Court is empowered, in appropriate circumstances, to order any party or parties to pay the costs or expenses incurred for the petition. It is therefore anticipated that the court may order one party, besides paying for his own costs, to be responsible for the costs (or part thereof) of another party. The meaning of the phrase "be defrayed" is wider than "be paid" in the sense that it means both "be paid" (in the case of his own costs) and "be reimbursed" (in the case of that of the other party). The Administration considers that the phrase "be

defrayed" best suits the purpose of section 19.

Proposed amendments

27. In response to the Subcommittee, the Administration has agreed to move the amendments discussed in paragraphs 19 - 21 above and other technical amendments to the Rules at the Council meeting on 19 December 2001. The Subcommittee supports the proposed amendments as set out in the **Appendix**.

Recommendation

28. The Subcommittee recommends support of the Rules and the Administration's proposed amendments.

Advice sought

29. Members are invited to note the recommendation of the Subcommittee.