

**The Administration's Responses to Questions Raised by
the Subcommittee on Subsidiary Legislation Relating to
the Chief Executive Election at its meeting held on 26 November 2001**

Chief Executive Election (Election Petition) Rules (CE Election (EP) Rules)

Sections 3 and 4

Q 1: Explain whether sections 3 and 4 as presently drafted amounted to amending the practice and procedure of the High Court and the High Court Fees Rules and how these sections would operate by giving some examples, and consider repealing the words “as nearly as circumstances permit” in section 3 and the words “, subject to all necessary modifications,” in section 4.

A1: 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 here is “legislation by reference”. Legislation by reference is not unusual in Hong Kong and other Commonwealth jurisdiction. This technique was developed because it may not be desirable to repeat similar lengthy procedural and administrative requirements for similar subject matters.

As election petition proceedings instituted in respect of the CE Election is something new, there must be guidelines for the actual application of the existing High Court practice and procedure. The phrase “as nearly as circumstances permit” seeks to clarify the extent to which departure is allowed.

Section 4 provides for the application of the High Court Fees Rules in respect of election petition proceedings. Again, legislation by reference is considered justified in this case. The phrase “subject to all necessary modifications” is necessary because the High Court Fees Rules make no reference to election petition proceedings under the CE

Election (EP) Rules and cannot apply thereto in the existing form without slight adjustment. Given the High Court Fees Rules are subject to constant changes, the flexibility allowed by the phrase is indispensable.

Section 8

Q2: Advise whether a mechanism was in place to ensure that any election petition lodged would be disposed of before 1 July 2002 (in the case of the coming election).

A2: Measures have already been taken to help ensure that the successful candidate elected is able to assume office in due time. Under section 10(1) of the CE Election Ordinance, the polling day of the CE election will fall on the first Sunday 95 days before a vacancy in the office of the CE is due to arise. Members will recall that this formula is adopted in the light of the time that is reasonably required for settling election petitions, for the Central People's Government to make appointment and for putting in place necessary transitional arrangements.

While there is no absolute requirement for the Court to settle election petitions within a certain deadline, every effort has been made to expedite the process. The Judiciary has undertaken to settle these cases as a matter of urgency without compromising judicial integrity. Provisions have also been made under the CE Election Ordinance and the CE Election (EP) Rules to help expedite the process. These include, among other things, the requirement that an election petition must be lodged within seven working days after the declaration of election result.

Q3: Explain whether the requirement for a petitioner to apply to a judge for fixing the date of a trial within two days after the filing of the election petition in subsection (1)(b) was reasonable.

A3: Under section 8 of the CE Election (EP) Rules, a petitioner may apply to a judge for a date, time and place to be fixed for the trial of his petition within two days after the filing of his petition or such other period as the Court may direct. As the two-day period is not an absolute deadline, it should cause no difficulties in practice. Where necessary and justified, the Court can always extend the period for making such an application. Members will appreciate that 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.

Section 15

Q4: Consider a Member's view that the petition in section 15(1)(b) and (c) should not be regarded as having been withdrawn and to explain whether there were any other avenues for the petitioner to further pursue the matter if the election petition was regarded as withdrawn.

A4: Section 40 of the CE Ordinance empowers the Chief Justice (CJ) to make rules to provide for "circumstances in which an election petition is regarded as having been withdrawn". This empowers the CJ to provide for situations where petitions that are not voluntarily withdrawn are to be regarded as having been withdrawn, without limitation imposed under the Ordinance. Whether the scope of the circumstances is appropriate is a matter for the rule-making authority, subject of course to the power of the LegCo under section 34 of the Interpretation and General Clauses Ordinance.

As we have replied to a similar question from the LegCo Assistant Legal Adviser (via our letter of 23 November 2001), sections 15(1)(b) and (c) are provided in view of

section 37 of the CE Election Ordinance. Under that section, the Court of First Instance can only rule that the successful candidate is duly or not duly elected, but not that another candidate is elected instead. As Members will appreciate, in terms of effect, the occurrence of the circumstances under sections 15 (1)(b) and (c) is no different from a Court ruling that the successful candidate is not duly elected. As such, it makes no sense to continue with an election petition under such circumstances.

There are other means for a person to address his grievances over material irregularities in the election. If, for example, his grievance is over the occurrence of corrupt or illegal conduct during the election, he can pursue his case under the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554). He may also make complaints to the Electoral Affairs Commission or take civil action against the persons concerned.

Q5: Consider deleting the words “the proceedings for” at the beginning of section 15(2).

A5: If the Subcommittee agrees, we will move an amendment to cross out the phrase.

Q6: Consider whether any person other than the solicitor acting for the petitioner or the respondent should be responsible for filing a notice of the death of the petitioner, and to consider amending the provisions having regard to other similar statutes.

A6: 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.

There is currently no legislation in Hong Kong imposing duty on a person to inform the court about death of a party a civil litigation.

Section 19

Q7: Consider rewording the word “defrayed” in section 19(1).

A7: Under section 19 of the CE Election (EP) Rules, 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). In the circumstances, the word “defray” best suits the purpose of section 19.

Constitutional Affairs Bureau
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