

立法會

Legislative Council

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Subcommittee on subsidiary legislation relating to Chief Executive Election

At the Subcommittee meeting held on 26 November 2001, a member requested the Legal Service Division to advise on the issue of vires about section 15(1)(b) and (c) of the Chief Executive Election (Election Petition) Rules (L.N. 241 of 2001) ("the Rules"). The concern is that although section 40(d) of the Chief Executive Election Ordinance (Cap. 569) ("the Principal Ordinance") empowers the Chief Justice to make rules to provide for circumstances in which an election petition is regarded as having been withdrawn, the rules so made must not according to the member, be ultra vires (outside the powers of making them) the general spirit of other relevant provisions of the Principal Ordinance, for example, section 37, which aim to ensure the propriety of the election process.

2. 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 the Returning Officer. In other words, there is no circumstance in which an election petition will be regarded as withdrawn when the respondent is the Returning Officer.

3. It appears that in most of the circumstances specified under section 32(1)(a)-(g), the respondent is the Returning Officer. In relation to section 32(1)(a) and (b), the Returning Officer under section 17 of the Principal Ordinance has to determine whether or not the person nominated in the nomination form is validly nominated in accordance with the Principal Ordinance as a candidate at the election. In relation to section 32(1)(c) of the Principal Ordinance, the Returning Officer under section 20(1) of the Principal Ordinance has to make a determination whether or not the candidate should be disqualified. Section 32(1)(f) and (g) of the Principal Ordinance relate to the general conduct of the election, it appears that the Returning Officer may well also be the respondent. Therefore, there will be no deemed withdrawal of an election petition when a respondent is the Returning Officer under

section 32(1)(a), (b), (c), (f) and (g) of the Principal Ordinance and hence the issue of vires will not arise.

4. In relation to section 32(1)(e) and (f), the likely respondent is the returned candidate. Section 15(1)(b) and (c) of the Rules will apply. The purpose of an election petition is for a person specified under section 33 of the Principal Ordinance to question an election on grounds specified under section 32 of the Principal Ordinance for the Court to determine under section 37 of the Principal Ordinance whether the returned candidate was duly elected. In arriving at the conclusion of whether a returned candidate was duly elected, the Court will take into account the factors specified under section 32(1)(e) and (f). However, 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 and if not another election will be held to fill the office of the Chief Executive, but not the propriety of the election process. This view is borne out on the following ground. When the Court finds that a returned candidate was not duly elected because, for example he engaged in corrupt conduct or illegal conduct at the election under section 32(1)(d) of the Principal Ordinance, the Court will not convict the person of an offence for the corrupt conduct and illegal election in those proceedings which appear to be civil rather than criminal in nature. The issue of whether the returned candidate is guilty of an offence under the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) will be considered by the Secretary for Justice and charged criminally if there is sufficient evidence. It appears that the combined effect of sections 32, 33 and 37 of the Principal Ordinance is that the Court, though has to take into account the grounds specified under section 32(1) when hearing an election petition, may not be the appropriate forum to determine the substantive issues specified under section 32(1). 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. Therefore, section 15 of the Rules is not ultra vires other relevant provisions of the Principal Ordinance.

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