

**President's ruling on
Committee Stage Amendments to
Chief Executive Election and Legislative Council Election
(Miscellaneous Amendments) Bill 2006
proposed by Dr Hon YEUNG Sum and
Hon James TIEN Pei-chun, GBS, JP**

Dr Hon YEUNG Sum and Hon James TIEN Pei-chun have each given notice to move Committee Stage Amendments ("CSA") to the Chief Executive Election and Legislative Council Election (Miscellaneous Amendments) Bill 2006, if the Bill gets its Second Reading at the Council meeting to be held on 10 May 2006. I am required to rule whether it complies with Rule 57 of the Council's Rules of Procedure. Before making this ruling, I have invited the Secretary for the Constitutional Affairs ("SCA") to offer his comments on the CSAs, and Dr YEUNG and Mr TIEN to offer their responses. I have also sought the advice of Counsel to the Legislature.

Purposes of the Members' proposed amendments

2. One of Dr YEUNG's proposed CSAs seeks to add a new clause 8A to amend section 16 of the Chief Executive Election Ordinance ("Ordinance") to provide that, in the event that there is only one Chief Executive (CE) candidate and that the election has been terminated and nomination re-opened, a nomination of a candidate shall be made by not less than 100 members and not more than 200 members of the Election Committee. Dr YEUNG's other proposed CSA seeks to amend clause 18 of the Bill. It aims to make failure to meet the requirement under section 31(1) of the Ordinance (i.e. a CE candidate, if elected, shall declare that he is not a member of any political party and that he undertakes not to become a member or subject himself to the discipline of any political party) not a ground for legal challenges in respect of the election. The proposed CSA, if passed, applies to the scenario where there is only one CE candidate, as well as the scenario where there are more than one CE candidate in an election.

3. Mr TIEN's proposed CSA seeks to add a new clause 49 to delete the entire section 31 of the Chief Executive Election Ordinance.

The Administration's View

4. SCA is of the view that the CSAs proposed by Dr YEUNG and Mr TIEN do not comply with the requirements of Rule 57(4)(a)^{Note} of the Rules of Procedure. The reasons are as follows:

(a) Dr YEUNG's proposed CSAs

Proposed new clause 8A

The purpose of the Bill is clearly set out in the Long Title and the Explanatory Memorandum of the Bill. Regarding the proposed electoral arrangements in the event that there is only one CE candidate, paragraph (e) of the long title makes it clear that the Bill only "provides for polling at an election" when there is only one CE candidate; it does not seek to change the manner of nomination. This is also evident in paragraph 8 of the Explanatory Memorandum, which states that the Bill aims to change the existing arrangement that the only CE candidate shall be declared as elected.

The Bill does not seek to amend, or relates to, the manner of nomination. None of the clauses in the Bill seeks to amend or relates to section 16 of the Ordinance. The proposed CSA raises a substantially new issue and is beyond the scope of the Bill.

Proposed amendments to clause 18

The Bill does not include changes to the existing requirement in section 31 of the Ordinance concerning the political party membership of a person elected as the CE. The proposed CSA seeks to exclude section 31(1) of the Ordinance as a ground for legal challenges and aims to nullify the effect of section 31(1). None of the clauses in the Bill seeks to amend or relates to section 31(1) of the Ordinance. The proposed CSA is not relevant to the subject matter of the Bill or to the subject matter of any clause of the Bill.

Moreover, as stated in paragraph 9 of the Explanatory Memorandum of the Bill, clauses 15 to 19 of the Bill aim to provide that "if the only candidate in an election is determined to be not returned at the election, election petition may be

^{Note} Rule 57(4)(a) provides that "An amendment must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates."

made and judicial review applied for to challenge the determination". Specifically, clause 18 only seeks to amend section 39(1) of the Ordinance to impose a time limit for legal challenges against the determination that a sole candidate is not returned at an election under section 26A(4). The subject matter of the clause does not extend to include changes to the specified grounds on which election with one or more than one CE candidate may be questioned. A CSA which seeks to do so is not relevant to the subject matter of the clause to which it relates (i.e. clause 18).

Hence, the proposed CSA does not comply with the requirements of Rule 57(4)(a) of the Rules of Procedure.

(b) Mr TIEN's proposed CSA

The proposed CSA seeks to abolish the requirement as provided in section 31 of the Chief Executive Election Ordinance. None of the clauses in the Bill seeks to amend or relates to section 31 of the Ordinance. The CSA raises a substantially new issue and is not relevant to the subject matter of the Bill or to the subject matter of any clauses of the Bill. It does not comply with the requirements of Rule 57(4)(a) of the Rules of Procedure.

Responses from the Members

Dr Hon YEUNG Sum's response

5. Dr YEUNG considers that his proposed CSAs comply with the requirements of Rule 57(4)(a). The reasons are stated in the following paragraphs.

Proposed new clause 8A

6. Part 6 of the Bill ("Amendments concerning conduct of poll where only one candidate is validly nominated") adds a new part to change the existing arrangement that the only Chief Executive (CE) candidate shall be declared as elected. This is also one of the main purposes of the Bill.

7. SCA has advised that members of the Election Committee may cast either a support vote or a not support vote in respect of the only CE candidate. If the number of support votes obtained by the candidate does not exceed half of the valid votes cast, he shall not be returned at the election and there will then be another round of nominations and poll and the process will be repeated

until a candidate is returned at the election when the number of support votes obtained exceeds half of the valid votes cast.

8. It is clear from the above that although the word "polling" is used in the Long Title of the Bill, both the conduct of poll itself and its consequence (i.e. another round of nominations and poll) should also be a relevant subject matter of the new proposed electoral arrangements.

9. The proposed new clause 8A is to improve the electoral arrangements to provide for more candidates to have a greater chance to get nominated in another round of nominations. This is not a separate issue nor beyond the scope of the Bill.

10. Referring to my ruling on 21 February 2000, regarding Mr Albert HO Chun-yan's CSA to the Mass Transit Railway Bill, that the grant of property development rights to MTRCL forms an integral part of the grant of the franchise to MTRCL to operate the railway, Dr YEUNG states that the facts that the proposed electoral arrangements for the event of only one candidate validly nominated would possibly result in another round of nominations and poll, and that SCA has acknowledged this and devoted a substantial amount of time and efforts in explaining its position on these matter to Members, should also naturally lead to the conclusion that it cannot be correct for SCA to claim that the Bill does not concern the subsequent round of nominations and its manner.

Proposed amendments to clause 18

11. As far as the scope of the Bill is concerned, when one considers the purpose of the Bill in substance together with the background to the Bill, one will then see the relevance of the proposed CSA to the Bill.

12. In the Legislative Council Brief prepared by the Administration, it is stated that the Bill was introduced into the Legislative Council to ensure the smooth conduct of the 2007 CE election. The public and members of the Bills Committee have raised the question of the political affiliation of the CE again and again during the deliberations of the Committee. The Administration has spent a lot of time and effort explaining its position. This is obviously important for the smooth conduct of the 2007 CE election as the issue of not complying with section 31(1) needs to be addressed properly.

13. When an elected candidate chooses not to comply with section 31(1), disputes or legal challenges may arise, leaving it uncertain whether the candidate can lawfully assume the office of CE. If the legal consequence is made clear, there will not be any uncertainty as far as non-compliance with section 31(1) is concerned. It will then be up to the Central Authority to decide whether to appoint the elected candidate who is a member of a political

party. The 2007 CE election can thus be completed without the legal challenge over the issue of political affiliation of the elected candidate hanging around.

14. The proposed CSA to clause 18 does not seek to change or to remove the requirement in section 31 but rather to spell out clearly that the legal consequence of the elected CE candidate's not complying with section 31(1) would be that the issue of whether he can lawfully assume the office shall not be questioned in the proceedings for legal challenges. That issue will be a matter for political and administrative decision and has nothing to do with the legality of the election process.

15. The subject matter of clause 18 is about legal challenges and the amendment seeks to improve clause 18 as far as the substance of "issue" for legal challenges is concerned. This is neither new nor changing section 31.

Hon James TIEN Pei-chun's response

16. Mr TIEN is of the opinion that repealing the part providing that "Winning candidate to declare he is not a member of political party" in section 31 of the Chief Executive Election Ordinance is in principle related to the subject of the Bill. Although from the Government's point of view, the proposed CSA may have exceeded the scope of the Bill in a narrow sense, from a macroscopic angle the amendment is appropriate and will also be of great benefit to the constitutional development of Hong Kong in the long run.

17. Mr TIEN considers that, in accordance with the principle of gradual development, it will be reasonable to allow the CE elected in 2007 to retain his political background.

Advice of Counsel to the Legislature

Dr Hon YEUNG Sum's proposed CSA

18. Counsel to the Legislature advises that, when considering the question of scope or subject matter of a bill, the President takes into account all relevant factors including the bill's Long Title, Short Title and Explanatory Memorandum. These factors cannot be exhaustively listed as each case depends on its own facts.

19. The Long Title and Explanatory Memorandum of this Bill provide useful reference for the President in her consideration of the scope or subject matter of the Bill. However, they are not determinative. Should the President find it necessary, she may look at other relevant factors to assist her. In the case of the Mass Transit Railway Bill ("MTR Bill"), the President took

into account the summary of the principal headings of the operating agreement between Government and the Mass Transit Railway Corporation which was annexed to the Legislative Council Brief on the MTR Bill. That summary was information available outside of the MTR Bill, but was considered relevant by the President. On the other hand, discussions on certain issues that take place in a Bills Committee or the time taken to discuss these issues cannot on their own be considered as relevant to the scope or subject matter of a bill. What may be considered as relevant in discussions that take place at a Bills Committee meeting does not necessarily become relevant to the subject matter of the bill that the Bills Committee is considering.

Proposed new clause 8A

20. Having considered the provisions of the Bill and the Chief Executive Election Ordinance, Counsel agrees with the Administration that the Bill does not seek to change the manner of nomination. The processes of nomination and polling are parts of the electoral arrangements provided in the Ordinance, and are to take place in sequence in accordance with what are provided in the Ordinance. However, it does not follow that a proposal in the Bill to amend one part will result in another part becoming part of the subject matter of the Bill.

21. It appears from Dr YEUNG's response that he is arguing that, under the proposed new electoral arrangements if a single candidate does not receive support of over half of the valid votes cast, there would be another round of nomination and poll. Hence, his proposed amendment should be a relevant subject matter of the new proposed electoral arrangements. Counsel agrees that the proposed amendment is relevant to the proposed new electoral arrangements. However, under the Rules of Procedure, the President should only consider the issue of relevance in the context of the Bill. Section 16 of the Ordinance provides for the manner of nomination which applies to all situations where proceedings for an election are to begin. This section is not subject to any amendment proposed in the Bill. It is not a tenable argument by the Member that, because the Bill seeks to change the polling provisions in the Ordinance, proposed changes to the manner of nomination must be relevant.

22. The President does not consider the merits of any proposed amendment when considering its admissibility under the Rules of Procedure. The Member's view that his proposed amendment would improve the electoral arrangements is not relevant.

Proposed amendment to clause 18

23. Clause 18 of the bill provides:

"Section 39(1) is amended by repealing everything after "which put in" and substituting –

"issue –

(c) whether a candidate is duly determined to be not returned at an election under section 26A(4); or

(d) whether the candidate declared under section 28 as elected at an election can lawfully assume the office of the Chief Executive,

shall be made or commenced more than 30 days after the publication of the declaration under section 22(1AB)(d) or the publication of the result of the election under section 28 unless the leave of the Court has been obtained."

24. Proceedings covered by existing section 39 are those which put in issue "whether the candidate declared under section 28 as elected at an election can lawfully assume the office of the Chief Executive". Such issue would remain in identical terms in the form of section 39(1)(d) if clause 18 was passed into law, and it would appear alongside with a new section 39(1)(c) which is a new issue to be added to this section consequent upon the enactment of the proposed new section 26A(4) and 22(1AB)(d). The new section 26A(4) provides that where there is only one candidate and if the number of support votes obtained by the candidate does not exceed half of the total number of valid votes cast in the poll, the candidate shall not be returned at the election. Where such single candidate is not returned, the new section 22(1AB)(c) and (d) provide that the Returning Officer shall publicly declare that no candidate is returned at the election and publish the declaration and the result of the poll in the Gazette.

25. In spite of the Bill's proposal in clause 18 to repeal the entire reference of what may be put in issue in proceedings in order for them to come within section 39, the proposed substitution puts back the repealed reference in identical terms. Clause 18 does not seek to change the substance of this part of existing section 39.

26. The effect of Dr YEUNG's proposed amendment to clause 18 would be to exclude explicitly the non-compliance with section 31 of the Ordinance as a possible ground in proceedings regarding whether a candidate declared under section 28 as elected can lawfully assume the office of the Chief Executive. In an indirect way, the proposed amendment would also have an effect on section 31.

27. Dr YEUNG's argument, that his amendment is relevant to the subject matter of the Bill and is also relevant to the subject matter of the clause to which it relates, appears to be based on the assertion that the proposed amendment's effect would be to clarify what is already the case rather than to change or remove the requirement of section 31(1). However, such assertion, even if it could stand, is but a point of merit. The admissibility of the proposed amendment would still be subject to the relevance test under Rule 57(4)(a) of the Rules of Procedure.

28. Counsel advises that the proposed amendment seeks to deal with an issue which is not within the scope of the Bill and, for that reason, should be considered as not relevant to the subject matter of the Bill in accordance with Rule 57(4)(a) of the Rules of Procedure.

Hon James TIEN Pei-chun's proposed CSA

29. Counsel advises that the proposed amendment seeks to delete section 31 of the Ordinance by adding a new clause to the Bill. Counsel agrees with the Administration that the amendment is not relevant to the subject matter of the Bill for the reasons set out in the paragraph 4(b) above. The Member's response does not appear to raise any new points of principle which the President would need to address.

My opinion

30. I have carefully reviewed the arguments put forth by SCA, Dr Hon YEUNG Sum and Hon James TIEN Pei-chun, as well as the very comprehensive advice tendered by Counsel to the Legislature. I fully agree to Counsel's analysis as to what constitutes the subject matter of the Bill, and the nature and possible effect of the CSAs proposed by the two Members. I accept Counsel's advice that what is relevant to matters in the Ordinance is not necessarily relevant to the subject matters in the Bill which seeks to amend the Ordinance. Also, matters discussed in the Bills Committee do not as a rule make them relevant to the Bill. The purposes of the Bill are set out in detail in both the Long Title and Explanatory Memorandum of the Bill, and the scope of the clauses in the Bill are quite clearly defined. I am satisfied that the Members' proposed CSAs are not relevant to the Bill and are outside the scope of the Bill.

Ruling

31. I rule that Dr Hon YEUNG Sum and Hon James TIEN Pei-chun may not move their respective proposed CSAs to the Chief Executive Election and Legislative Council Election (Miscellaneous Amendments) Bill 2006 as they are not in compliance with Rule 57(4)(a) of the Rules of Procedure.

(Mrs Rita FAN)
President
Legislative Council

4 May 2006