

LEGISLATIVE COUNCIL BRIEF

ELECTORAL LEGISLATION (MISCELLANEOUS AMENDMENTS) BILL 2011

INTRODUCTION

A With the approval from the Chief Executive (“CE”) in Council, we plan to introduce the Electoral Legislation (Miscellaneous Amendments) Bill 2011 (“the Bill”), at Annex A, into the Legislative Council (“LegCo”) on 4 May 2011.

2. The Bill amends various pieces of legislation to introduce changes to electoral and related arrangements for returning the CE and the Village Representatives (“VR”) and the formation of the LegCo and District Councils (“DC”) including allowing a party to an election petition concerning a LegCo election, DC election or VR election to lodge an appeal to the Court of Final Appeal (“CFA”) against the determination of the petition by the Court of First Instance (“CFI”); allowing letters sent free of postage by several categories of candidates in a LegCo election and candidates in an Election Committee (“EC”) subsector election to contain information on certain other candidates; increasing the financial assistance to candidates in DC elections; reflecting the change of the name of a constituent in a subsector of the EC; to make technical adjustments as regards election expenses; and to make related and incidental amendments.

JUSTIFICATIONS

Amendments to the Election Petition Mechanism

B 3. The relevant part of section 67(3) of the Legislative Council Ordinance (Cap. 542) (“LCO”) (Annex B), which is usually referred to as the “finality provision”, provides that the determination of an election petition arising from a LegCo election by the CFI is final. The finality provision is intended to provide for speedy resolution of disputes in relation to the constitution of LegCo. Identical finality provisions are contained in section 55(3) of the District Councils Ordinance (Cap. 547) (“DCO”) (Annex C) and section 45(3) of the Village Representative Election Ordinance (“VREO”) (Cap. 576) (Annex D).
C
D

4. On 13 December 2010, a judgment¹ by the CFA declared that the finality provision in section 67(3) of the LCO is unconstitutional and invalid as being inconsistent with Article 82 of the Basic Law which provides that the power of final adjudication of the HKSAR shall be vested in the CFA. The CFA also suggested that suitable changes can be made to the LCO to ensure that any restrictions or limitations on the right of appeal are indeed no more than necessary but such matter is for the Government and the Legislature to consider, taking into account those provisions in comparable legislation such as the Chief Executive Election Ordinance (Cap. 569) (“CEEEO”). On 1 March 2011, in a judgment² by the Court of Appeal (“CA”), the CA also declared that the finality provision contained section 55(3) of the DCO is unconstitutional and invalid following the decision of the CFA in *Mok Charles Peter*.

5. We consulted the LegCo Panel on Constitutional Affairs (“CA Panel”) on 17 January 2011 on our proposal to amend the appeal mechanism in relation to an election petition arising from the LegCo, DC and VR elections, in order to introduce a leap-frog mechanism similar to the one contained in the CEEEO. The details are as follows:

- (a) the leap-frog appeal mechanism would allow an appeal against the decision of the CFI in relation to an election petition arising from an election (including a by-election) under the LCO, DCO and VREO to be lodged to the CFA direct, subject to leave being granted by the Appeal Committee of the CFA;
- (b) the LCO, DCO and VREO should also be amended to provide that the period within which an application for leave to appeal to the CFA must be lodged should be within seven working days after the day on which the relevant CFI judgment is handed down; and
- (c) the sections under the LCO, DCO and VREO dealing with “proceedings against persons on grounds of disqualification” should remain unchanged so that an aggrieved party can appeal to the CA and to the CFA (if leave is granted) under the normal course of appeal.

¹ *Mok Charles Peter v. Tam Wai Ho and Another, SJ intervening* (for and on behalf of the Secretary for the Constitutional and Mainland Affairs) (FACV 8/2010).

² *Chan Yiu Chu v. Or Yiu-lam, Ricky and Another, Secretary for Justice intervening* (for and on behalf of the Secretary for Constitutional and Mainland Affairs) (CACV No. 276 of 2009).

Under this proposed mechanism, no appeal shall lie to the CA from the CFI's decision in relation to an election petition arising from the LegCo, DC and VR elections. Such appeals shall be lodged to the CFA direct with a view to achieving speedy resolution of disputes in relation to the constitution of the LegCo and DC as well as the office of VR.

6. Whilst Members of the CA Panel generally supported speedy resolution of disputes in relation to elections of the LegCo, DC and VR, some Members raised a few questions, such as whether the leap-frog mechanism should allow an appeal to lie to the CA if either of the parties concerned do not agree to the lodging of the appeal to the CFA direct. Separately, we consulted the Chairmen and Vice-chairmen of the DCs and the Heung Yee Kuk on 17 February 2011 and 22 February 2011 respectively. They indicated support to the proposed leap-frog appeal mechanism, though the Heung Yee Kuk as well as the Shatin Rural Committee requested us to consider extending the period within which an appeal should be lodged to the CFA from seven working days to 14 days. We also consulted members of the Human Rights Forum including the Law Society of Hong Kong and the Hong Kong Bar Association. While the Law Society of Hong Kong did not express objection to the proposed leap-frog appeal mechanism, the Hong Kong Bar Association showed reservations about the proposal.

7. Having considered the views received from the above organisations, we consider that appeals against the determination of election petitions by the CFI should be lodged to the CFA direct with a view to achieving speedy resolution of disputes in relation to the constitution of the LegCo and DC as well as the office of the VR. This leap-frog appeal mechanism will help minimise the period of uncertainty faced by individual LegCo Members, DC members and VRs who are subject to election petitions and will also help alleviate the constituents' feeling of uncertainty towards their representative.

Candidates to send joint promotional letters to electors free of postage

8. Under the existing arrangements, the relevant provisions of the LCO³, DCO⁴ and the CEEO⁵ specify that a validly nominated candidate or list of candidates (as the case may be) of the DC, LegCo and EC subsector elections is entitled to send a letter free of postage to each elector/voter in the constituency or an EC subsector for which the

³ Section 43 of the LCO.

⁴ Section 37 of the DCO.

⁵ Section 38 of the Schedule to the CEEO.

candidate/list of candidate is nominated. The LCO, DCO and the CEEO further provide that the letter must relate to the election concerned and must comply with the requirements and limitations prescribed by the relevant Electoral Affairs Commission Regulations. The relevant regulations⁶ specify that the letter must contain materials relating only to the candidature of the candidate at the election concerned.

9. At the meetings of the Bills Committee for the Legislative Council (Amendment) Bill 2010, some Members proposed that lists of candidates/candidates of different constituencies should be allowed to print their campaign materials in the same promotional letter to be sent free of postage. This would enable political parties to enhance the campaign publicity for their lists of candidates/candidates at the same election. This would also save paper if the lists of candidates/candidates concerned decide to jointly send one promotional letter free of postage to each elector/voter.

10. Having considered the issue, we are of the view that:

- (a) the proposal should be pursued only for elections at which lists of candidates of different constituencies or candidates of the functional constituency (“FC”) or EC subsectors with multiple seats would send their promotional letters to the same elector/voter. Specifically, the proposal would only apply to:
 - (i) a list of candidates in a geographical constituency (“GC”) and a list of candidates in the DC(second) FC;
 - (ii) candidates in the Labour FC which has three seats; and
 - (iii) candidates standing for election in the same EC subsector, which has multiple number of seats (ranging from 16 seats to 60 seats);
- (b) the proposal should not cover elections at which lists of candidates/candidates of different constituencies would have different electors/voters, such as candidates of different GCs,

⁶ The relevant provisions can be found in section 101A of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541 sub. leg. D), section 102 of the Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation (Cap. 541 sub. leg. F) and section 99 of the Electoral Affairs Commission (Electoral Procedure) (Election Committee) Regulation (Cap. 541 sub. leg. I).

candidates of different FCs and candidates of different ECs;
and

- (c) there will be no restriction to the effect that the lists of candidates/candidates printing their campaign materials in the same promotional letter may send only one promotional letter jointly to each elector/voter. However, when the new arrangements are in place, some political parties would possibly choose to send one promotional letter to each elector/voter to save their printing cost and paper. This should help to cut down the number of promotional letters to be sent.

11. Accordingly, we propose to amend the following provisions to take forward the proposed arrangements in paragraph 10(a) above:

- (a) section 43 of the LCO;
- (b) section 101A of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541 sub. leg. D);
- (c) section 38 of the Schedule to the CEEO; and
- (d) section 99 of the Electoral Affairs Commission (Electoral Procedure) (Election Committee) Regulation (Cap. 541 sub. leg. I).

12. Members generally supported the above proposal at the CA Panel meeting on 18 April 2011.

Amendment to the Financial Assistance Scheme and election expenses limit for DC Election

13. Financial assistance for election candidates was first introduced in the 2004 LegCo election with the aim of encouraging more public-spirited candidates to participate in the LegCo elections and of cultivating an environment to facilitate the development of political talent in Hong Kong. The financial assistance scheme was extended to the DC election in 2007. Under the existing arrangement, the subsidy rate is the lower of \$10 per vote times the number of valid votes received by candidates, or 50% of the declared election expenses.

14. Between 2008 and 2011, the Composite Consumer Price Index (“CCPI”) is expected to have increased by 12% on a cumulative basis⁷. The subsidy rate should be increased to \$11 if adjusted in accordance with the inflation figure. Separately, under the Legislative Council (Amendment) Ordinance 2011 which was passed by the LegCo on 5 March 2011, the subsidy rate for the LegCo election was revised from the lower of \$11 per vote or 50% of the declared election expenses to the lower of \$12 per vote or 50% of the election expenses limit provided that the subsidy amount does not exceed the amount of the declared election expenses of the lists of candidates or candidates. We propose that the same revised arrangements should be adopted for the 2011 DC election, i.e. the lower of \$12 per vote or 50% of the election expenses limit provided that the subsidy amount does not exceed the amount of the declared election expenses of a candidate.

15. Under section 45 of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) (“ECICO”), the CE in Council may, by regulation, prescribe the maximum amount of election expenses that can be incurred. At present, the Maximum Amount of Election Expenses (District Council Election) Regulation (Cap. 554 sub. leg. C) of the ECICO stipulates that a candidate standing for a DC election may incur election expenses of no more than \$48,000.

16. In preparing for the DC election to be held in November 2011, we have conducted a review on the existing election expenses limit. After examining the actual amounts of election expenses incurred by candidates in the 2007 DC ordinary election and six by-elections held since then, and the forecast cumulative increase in the CCPI by 12% between 2008 and 2011 when the limit was last revised, we propose to increase the election expenses limit to \$53,800 (i.e. 12% increase, rounded up to the nearest hundred).

17. Members generally supported the proposal which was discussed at the CA Panel meetings on 21 February and 18 April 2011 respectively.

Amendment to the election expenses limit for the CE election

18. The existing election expenses limit for the CE election, as stipulated in the Maximum Amount of Election Expenses (Chief Executive Election) Regulation (Cap. 554 sub. leg. A) of the ECICO, is

⁷ According to the CCPI, the inflation rate of 2008, 2009 and 2010 was 4.3%, 0.5% and 2.4% respectively. The forecast inflation rate for 2011 is 4.5% according to the 2011-12 Budget Speech.

\$9.5 million. It was set and enacted in 2001 according to the price level in 2000, and has not been adjusted since then. This election expenses limit was used in the 2002, 2005 (by-election) and 2007 CE elections.

19. In reviewing the election expenses limit for the CE election in 2012, we have considered the following factors:

- (a) the increase in the CCPI by 12.8%⁸ from 2000 to 2012;
- (b) the impact on the mode of canvassing as a result of the expansion of the EC and the revised voting system of the CE election; and
- (c) the need for additional expense items in light of the experience in the previous CE elections.

Having considered the factors above, we propose to increase the election expenses limit for the CE election from \$9.5 million to \$13 million. Members were consulted on the proposal at the CA Panel meeting on 18 April 2011. Whilst some Members had reservation about the proposal, it was supported by some other Members.

Change of name of a constituent in the Education EC subsector

20. As a constituent of the education subsector under the EC has changed its name, we need to reflect such change in the relevant provision of the CEEO. The existing name of this organisation in the CEEO is Hong Chi Association – Hong Chi Pinehill Advanced Training Centre (匡智會 — 匡智松嶺青年訓練中心) and it is proposed to be changed to Hong Chi Association – Hong Chi Pinehill Integrated Vocational Training Centre (匡智會 — 匡智松嶺綜合職業訓練中心) in the relevant provision of the CEEO.

THE BILL

21. The main provisions of the Bill are explained below:

- (a) part 1 sets out the short title of the Bill and provides for commencement of the Bill;

⁸ The CCPI for 2000 was 107.4. The CCPI for 2012 is estimated to be 121.2, based on the forecast inflation rate of 4.5% for 2011 and the assumed trend inflation rate of 3.5% for 2012 as set out in the 2011-12 Budget.

- (b) part 2 amends the LCO, DCO and VREO to provide for an appeal mechanism through which a party to an election petition concerning a LegCo election, DC election or VR election may lodge an appeal to the CFA against the determination of the petition by the CFI. Part 2 also amends the Hong Kong Court of Final Appeal Ordinance (Cap. 484) to include in section 22 of the Ordinance the CFI's determination under section 67(1) and (2) of the LCO, section 55(1) and (2) of the DCO and section 45(1) and (2) of the VREO;
- (c) part 3 amends section 43 of the LCO to provide that a promotional letter sent by or on behalf of a list of GC candidates may contain information on a list of candidates nominated for the DC (second) FC, or vice versa; and to provide that a promotional letter sent by or on behalf of a candidate nominated for the Labour FC may contain information on another candidate nominated for that FC. Part 3 also amends section 38(2) of the Schedule to the CEEO to provide that a promotional letter sent by a candidate at an EC subsector election may contain information on any other candidate nominated for the same subsector;
- (d) part 4 amends section 60D and Schedule 7 of the DCO so that the amount payable as financial assistance to a candidate is the lowest of the following: (i) \$12 times the candidate's number of valid votes, (ii) 50% of the maximum amount of election expenses that may be incurred under the Maximum Amount of Election Expenses (District Council Election) Regulation and (iii) the candidate's declared election expenses;
- (e) part 5 amends the Maximum Amount of Election Expenses (Chief Executive Election) Regulation to adjust the election expenses limit at the CE election. The amendment increases the limit from \$9.5 million to \$13 million;
- (f) part 6 amends the Maximum Amount of Election Expenses (District Council Election) Regulation to adjust the election expenses limit for candidates at the DC elections. The amendment increases the limit from \$48,000 to \$53,800; and

- (g) part 7 amends item 6 of Table 5 of section 2 of the Schedule to the CEEO to reflect the change of name of a constituent of the education subsector.

LEGISLATIVE TIMETABLE

22. The legislative timetable is as follows:

Publication in the Gazette	29 April 2011
First Reading and commencement of Second Reading debate	4 May 2011
Resumption of Second Reading debate, Committee Stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

23. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no economic, productivity, environmental or sustainability implications. The proposed amendments will not affect the current binding effect of the principal Ordinances.

FINANCIAL AND CIVIL SERVICE IMPLICATIONS

24. The financial implications of the legislative proposals are set out as follows:

- (a) there will not be civil service implications. As we cannot anticipate the number of lists of candidates/candidates standing for the elections concerned and how many would choose to send joint promotional letters to their electors/voters, it is difficult to accurately assess the financial implications of the proposals at this stage;
- (b) should any additional resource requirement arise from the proposal to amend the election petition mechanism for the LegCo, DC and VR elections, the Judiciary will endeavour to absorb it within its existing resources. It may seek additional resources through the established resource allocation mechanism where necessary;

- (c) the proposal to increase assistance for candidates in the 2011 DC election will not have civil service implications. The financial impact of the proposal will depend on a number of factors, such as the number of candidates, votes obtained by each candidate, declared election expenses of candidates, etc. We cannot accurately assess the financial implications of the proposals at this stage. Any additional resources implications arising from the proposal will be sought through the established mechanism;
- (d) the proposal to increase the election expenses limit for candidates of the CE election will have no civil service and financial implications as the Government does not provide financial assistance to the candidates of that election; and
- (e) the proposal to change the name of a constituent of the education subsector will have no civil service and financial implications.

PUBLIC CONSULTATION

25. The public consultations for the above legislative proposals are set out as follows:

- (a) for the revised election petition mechanism, we consulted the CA Panel on 17 January 2011 and other interested parties subsequently. Details are set out in paragraph 6 above;
- (b) for the joint promotional letters sent by candidates free of postage to electors and the CE election expenses limit, we consulted the CA Panel on 18 April 2011; and
- (c) for the DC Financial Assistance Scheme and the election expenses limit, we consulted the CA Panel on 21 February and 18 April 2011 respectively.

PUBLICITY

26. A press release will be issued and a spokesman will be made available to address media enquiries.

ENQUIRY

27. Any enquiry on this brief can be addressed to Ms Anne Teng, Principal Assistant Secretary for Constitutional Affairs and Mainland Affairs at 2810 2908.

Constitutional and Mainland Affairs Bureau
27 April 2011

Electoral Legislation (Miscellaneous Amendments) Bill 2011

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A BILL

To

Amend various pieces of legislation to introduce changes to electoral and related arrangements for returning the Chief Executive and the Village Representatives and the formation of the Legislative Council and District Councils including allowing a party to an election petition concerning a Legislative Council election, District Council election or Village Representative election to lodge an appeal to the Court of Final Appeal against the determination of the petition by the Court of First Instance; allowing letters sent free of postage by several categories of candidates in a Legislative Council election and candidates in an Election Committee subsector election to contain information on certain other candidates; increasing the financial assistance to candidates in District Council elections; reflecting the change of the name of a constituent in a subsector of the Election Committee; to make technical adjustments as regards election expenses; and to make related and incidental amendments.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Electoral Legislation (Miscellaneous Amendments) Ordinance 2011.
- (2) This Part and Parts 2 and 7 come into operation on the day on which this Ordinance is published in the Gazette.
- (3) Parts 4 and 6 come into operation on 1 September 2011.

Electoral Legislation (Miscellaneous Amendments) Bill 2011

Part 1

Clause 1

2

- (4) Part 3 (except Divisions 2 and 4) and Part 5 come into operation on 25 September 2011.
 - (5) Divisions 2 and 4 of Part 3 come into operation on 1 June 2012.
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Part 2

Amendments Relating to Appeal in relation to Election Petitions

Division 1

Enactments Amended

2. Enactments amended

The enactments specified in Divisions 2 to 5 are amended as set out in those Divisions.

Division 2

Amendments to Legislative Council Ordinance (Cap. 542)

3. Section 56 amended (Election to be presumed to be valid)

Section 56—

Repeal everything after “valid”

Substitute

“until—

- (a) the Court determines, on the hearing of an election petition, that the election is invalid; or
- (b) the Court of Final Appeal determines, on hearing an appeal against the Court’s determination, that the election is invalid.”.

4. Section 58A added

After section 58—

Add

“58A. Candidate declared to be returned is presumed to be duly elected

Subject to section 72(1A), a person declared under section 58 as returned at an election is presumed to be duly elected until he or she is ruled by the Court or the Court of Final Appeal, on the determination of an election petition or appeal, as not duly elected.”.

5. Section 65 amended (Period within which election petition is to be lodged)

(1) Section 65, heading—

Repeal

“is to”

Substitute

“and appeal must”.

(2) Section 65—

Renumber the section as section 65(1).

(3) After section 65(1)—

Add

“(2) Despite section 24 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), notice of a motion for the purpose of an application for leave to appeal to the Court of Final Appeal under section 22(1)(c) of that Ordinance must be filed within 7 working days after the date of the judgment of the Court to be appealed from, and the applicant must give the opposite party 3 days’ notice of his or her intended application at any time during the period of 7 working days.”.

6. Section 67 amended (Court to determine election petition)

(1) Section 67(3)—

Repeal everything after “end of the”

Substitute

“trial of an election petition, the Court must announce its determination by means of a written judgment.”.

(2) Section 67—

Repeal subsection (4).

7. Sections 70A and 70B added

After section 70—

Add

“70A. Court’s determination of election petition suspended before deadline of appeal

The effect of the determination of the Court of an election petition is suspended until the expiry of the period within which notice of a motion for the purpose of an application for leave to appeal to the Court of Final Appeal against the determination may be filed under section 65(2).

70B. Court of Final Appeal’s determination

At the end of the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal must—

(a) determine—

(i) if the election petition relates to an election that was not contested—

(A) whether the decision of the Returning Officer as to the validity of the relevant nomination was correct; and

(B) if the decision was not correct, whether the person declared to have been elected in that election was or was not duly elected;

- (ii) if the election petition relates to an election that was contested—
 - (A) whether the person whose election is questioned was or was not duly elected; and
 - (B) if the person was not duly elected, whether some other person was duly elected in place of the person; and
- (b) announce its determination by means of a written judgment.”.

8. Section 71 substituted

Section 71—

Repeal the section

Substitute

“71. Acts of person not invalid if determined not duly elected

If the Court or the Court of Final Appeal determines that a person who was originally declared to have been duly elected as a Member was not duly elected as a Member, the determination does not invalidate acts purporting to have been done by the person as a Member before the date of the determination.”.

9. Section 72 amended (What is to happen if Member is determined not to have been duly elected)

(1) Section 72(1)—

Repeal everything after “a person”

Substitute

“who was declared under section 58 as duly elected as a Member was not duly elected as a Member—

- (a) subject to subsection (1A), that person ceases to be a Member; and
 - (b) subject to subsection (2), that person's office as a Member becomes vacant from the date of the determination.”.
- (2) After section 72(1)—

Add

“(1A) If—

 - (a) the Court determines that a person who was declared under section 58 as duly elected as a Member was not duly elected as a Member; and
 - (b) the person lodges an appeal under section 22(1)(c) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) against the determination,

the person continues, subject to subsection (3), to be a Member.”.
- (3) After section 72(2)—

Add

“(3) If, on the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal determines that a person who was declared under section 58 as duly elected as a Member was not duly elected as a Member—

 - (a) that person ceases to be a Member; and
 - (b) subject to subsection (4), that person's office as a Member becomes vacant from the date of the determination of the Court of Final Appeal.

(4) If, on the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal determines that a person was duly elected as a Member in place of a person that the Court of Final Appeal has determined not to have been duly elected as

a Member, the first-mentioned person becomes a Member from the date of the determination of the Court of Final Appeal.”.

Division 3

Amendments to District Councils Ordinance (Cap. 547)

10. Section 44 amended (Election to be presumed to be valid)

Section 44—

Repeal everything after “valid”

Substitute

“until—

- (a) the Court determines, on the hearing of an election petition, that the election is invalid; or
- (b) the Court of Final Appeal determines, on hearing an appeal against the Court’s determination, that the election is invalid.”.

11. Section 46A added

After section 46—

Add

“46A. Candidate declared to be returned is presumed to be duly elected

Subject to section 60(1A), a person declared under section 46 as returned at an election is presumed to be duly elected until he or she is ruled by the Court or the Court of Final Appeal, on the determination of an election petition or appeal, as not duly elected.”.

12. Section 53 amended (Period within which election petition is to be lodged)

(1) Section 53, heading—

Repeal

“is to”

Substitute

“and appeal must”.

(2) Section 53—

Renumber the section as section 53(1).

(3) After section 53(1)—

Add

“(2) Despite section 24 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), notice of a motion for the purpose of an application for leave to appeal to the Court of Final Appeal under section 22(1)(c) of that Ordinance must be filed within 7 working days after the date of the judgment of the Court to be appealed from, and the applicant must give the opposite party 3 days’ notice of his or her intended application at any time during the period of 7 working days.”.

13. Section 55 amended (Court to determine election petition)

(1) Section 55(3)—

Repeal everything after “end of the”

Substitute

“trial of an election petition, the Court must announce its determination by means of a written judgment.”.

(2) Section 55—

Repeal subsection (4).

14. Sections 58A and 58B added

After section 58—

Add

“58A. Court’s determination of election petition suspended before deadline of appeal

The effect of the determination of the Court of an election petition is suspended until the expiry of the period within which notice of a motion for the purpose of an application for leave to appeal to the Court of Final Appeal against the determination may be filed under section 53(2).

58B. Court of Final Appeal’s determination

At the end of the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal must—

(a) determine—

(i) if the election petition relates to an election that was not contested—

(A) whether the decision of the Returning Officer as to the validity of the relevant nomination was correct; and

(B) if the decision was not correct, whether the person declared to have been elected in that election was or was not duly elected;

(ii) if the election petition relates to an election that was contested—

(A) whether the person whose election is questioned was or was not duly elected; and

- (B) if the person was not duly elected, whether some other person was duly elected in place of the person; and
- (b) announce its determination by means of a written judgment.”.

15. Section 59 substituted

Section 59—

Repeal the section

Substitute

“59. Acts of person not invalid if determined not duly elected

If the Court or the Court of Final Appeal determines that a person who was originally declared to have been duly elected as an elected member was not duly elected as an elected member, the determination does not invalidate acts purporting to have been done by the person as an elected member before the date of the determination.”.

16. Section 60 amended (What is to happen if an elected member is determined not to have been duly elected)

(1) Section 60(1)—

Repeal everything after “a person”

Substitute

“who was declared under section 46 as duly elected as an elected member was not duly elected as an elected member—

- (a) subject to subsection (1A), that person ceases to be an elected member; and
- (b) subject to subsection (2), that person’s office as an elected member becomes vacant from the date of the determination.”.

(2) After section 60(1)—

Add

“(1A) If—

(a) the Court determines that a person who was declared under section 46 as duly elected as an elected member was not duly elected as an elected member; and

(b) the person lodges an appeal under section 22(1)(c) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) against the determination,

the person continues, subject to subsection (3), to be an elected member.”.

(3) After section 60(2)—

Add

“(3) If, on the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal determines that a person who was declared under section 46 as duly elected as an elected member was not duly elected as an elected member—

(a) that person ceases to be an elected member; and

(b) subject to subsection (4), that person’s office as an elected member becomes vacant from the date of the determination of the Court of Final Appeal.

(4) If, on the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal determines that a person was duly elected as an elected member in place of a person that the Court of Final Appeal has determined not to have been duly elected as an elected member, the first-mentioned person becomes an elected member from the date of the determination of the Court of Final Appeal.”.

Division 4

Amendments to Village Representative Election Ordinance (Cap. 576)

17. Section 34 amended (Election to be presumed valid)

Section 34—

Repeal everything after “valid”

Substitute

“until—

- (a) the Court determines, on the hearing of an election petition, that the election is invalid; or
- (b) the Court of Final Appeal determines, on hearing an appeal against the Court’s determination, that the election is invalid.”.

18. Section 36A added

After section 36—

Add

“36A. Candidate declared to be returned is presumed to be duly elected

Subject to section 50(1A), a person declared under section 36 as duly elected as a Village Representative is presumed to be duly elected until he or she is ruled by the Court or the Court of Final Appeal, on the determination of an election petition or appeal, as not duly elected as a Village Representative.”.

19. Section 43 amended (Period within which election petition is to be lodged)

(1) Section 43, heading—

Repeal

“is to”

Substitute

“and appeal must”.

(2) Section 43—

Renumber the section as section 43(1).

(3) After section 43(1)—

Add

“(2) Despite section 24 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), notice of a motion for the purpose of an application for leave to appeal to the Court of Final Appeal under section 22(1)(c) of that Ordinance must be filed within 7 working days after the date of the judgment of the Court to be appealed from, and the applicant must give the opposite party 3 days’ notice of his or her intended application at any time during the period of 7 working days.”.

20. Section 45 amended (Court to determine election petition)

(1) Section 45(3)—

Repeal everything after “end of the”

Substitute

“trial of an election petition, the Court must announce its determination by means of a written judgment.”.

(2) Section 45—

Repeal subsection (4).

21. Sections 45A and 45B added

After section 45—

Add

“45A. Court’s determination of election petition suspended before deadline of appeal

The effect of the determination of the Court of an election petition is suspended until the expiry of the period within which notice of a motion for the purpose of an application for leave to appeal to the Court of Final Appeal against the determination may be filed under section 43(2).

45B. Court of Final Appeal’s determination

At the end of the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal must—

- (a) determine—
 - (i) if the election petition relates to an election that was not contested—
 - (A) whether the decision of the Returning Officer as to the validity of the relevant nomination was correct; and
 - (B) if the decision was not correct, whether the person declared to have been elected in that election was or was not duly elected;
 - (ii) if the election petition relates to an election that was contested—
 - (A) whether the person whose election is questioned was or was not duly elected; and
 - (B) if the person was not duly elected, whether some other person was duly elected in place of the person; and
- (b) announce its determination by means of a written judgment.”.

22. Section 49 substituted

Section 49—

Repeal the section

Substitute

“49. Acts of person not invalid if determined not duly elected

If the Court of the Court of Final Appeal determines that a person who was originally declared to have been duly elected as a Village Representative for a Village at an election was not duly elected as the Village Representative for the Village, the determination does not invalidate acts purporting to have been done by the person as the Village Representative for the Village before the date of the determination.”.

23. Section 50 amended (What is to happen if a Village Representative is determined not duly elected)

(1) Section 50(1)—

Repeal everything after “a person”

Substitute

“who was declared under section 36 as duly elected as a Village Representative was not duly elected as a Village Representative—

- (a) subject to subsection (1A), that person ceases to be a Village Representative; and
- (b) subject to subsection (2), that person’s office as a Village Representative becomes vacant from the date of the determination.”.

(2) After section 50(1)—

Add

“(1A) If—

- (a) the Court determines that a person who was declared under section 36 as duly elected as a

Village Representative was not duly elected as a Village Representative; and

- (b) the person lodges an appeal under section 22(1)(c) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) against the determination,

the person continues, subject to subsection (3), to be a Village Representative.”.

- (3) After section 50(2)—

Add

- “(3) If, on the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal determines that a person who was declared under section 36 as duly elected as a Village Representative was not duly elected as a Village Representative—

- (a) that person ceases to be a Village Representative; and

- (b) subject to subsection (4), that person’s office as a Village Representative becomes vacant from the date of the determination of the Court of Final Appeal.

- (4) If, on the hearing of an appeal against the determination of the Court of an election petition, the Court of Final Appeal determines that a person was duly elected as a Village Representative in place of a person that the Court of Final Appeal has determined not to have been duly elected as a Village Representative, the first-mentioned person becomes a Village Representative from the date of the determination of the Court of Final Appeal.”.

Division 5

Amendments to Hong Kong Court of Final Appeal Ordinance (Cap. 484)

24. Part II, Division 2 heading amended

Part II, Division 2, heading—

Repeal

“Chief Executive”.

25. Section 22 amended (Civil appeals)

(1) Section 22(1)(c)(i)—

Repeal

“or”.

(2) Section 22(1)(c)(ii)—

Repeal

“Executive.”

Substitute

“Executive;”.

(3) After section 22(1)(c)(ii)—

Add

“(iii) a determination of the Court of First Instance under section 67 of the Legislative Council Ordinance (Cap. 542);

(iv) a judgment or order of the Court of First Instance in—

(A) an application for judicial review under section 21K of the High Court Ordinance (Cap. 4); or

(B) any other proceedings under that Ordinance,

which put in issue whether a candidate declared under section 58 of the Legislative Council Ordinance (Cap.

- 542) as duly elected at an election can lawfully assume the office of a Member of the Legislative Council;
- (v) a determination of the Court of First Instance under section 55 of the District Councils Ordinance (Cap. 547);
 - (vi) a judgment or order of the Court of First Instance in—
 - (A) an application for judicial review under section 21K of the High Court Ordinance (Cap. 4); or
 - (B) any other proceedings under that Ordinance, which put in issue whether a candidate declared under section 46 of the District Councils Ordinance (Cap. 547) as duly elected at an election can lawfully assume the office of the elected member of the District Council constituency concerned;
 - (vii) a determination of the Court of First Instance under section 45 of the Village Representative Election Ordinance (Cap. 576); or
 - (viii) a judgment or order of the Court of First Instance in—
 - (A) an application for judicial review under section 21K of the High Court Ordinance (Cap. 4); or
 - (B) any other proceedings under that Ordinance, which put in issue whether a candidate declared under section 36 of the Village Representative Election Ordinance (Cap. 576) as duly elected at an election can lawfully assume the office of the Village Representative for the village concerned.”.
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Part 3

Amendments Relating to Promotional Letters Sent by Candidates

Division 1

Enactments Amended

26. Enactments amended

The enactments specified in Divisions 2 to 5 are amended as set out in those Divisions.

Division 2

Amendment to Legislative Council Ordinance (Cap. 542)

27. Section 43 amended (Candidates entitled to send letter to electors free of postage)

After section 43(4)—

Add

“(4A) A letter sent under this section by or on behalf of a list of candidates which is validly nominated for a geographical constituency may contain information on one single list of candidates which is validly nominated for the District Council (second) functional constituency.

(4B) A letter sent under this section by or on behalf of a list of candidates which is validly nominated for the District Council (second) functional constituency may contain information on one single list of candidates which is validly nominated for any geographical constituency.

- (4C) A letter sent under this section by or on behalf of a candidate who is validly nominated for the Labour functional constituency may contain information on any other candidate who is also validly nominated for that constituency.
- (4D) A letter which contains information on any candidate or list of candidates under subsection (4A), (4B) or (4C) is not to be regarded, for the purposes of subsections (1) and (2), as being sent by or on behalf of that candidate or list of candidates.”.

Division 3

Amendment to Chief Executive Election Ordinance (Cap. 569)

28. Schedule, section 38 amended (Subsector candidates entitled to send letters to voters free of postage)

The Schedule, after section 38(2)—

Add

- “(2A) A letter sent under subsection (1) by a candidate who is validly nominated at a subsector election—
- (a) may contain information on any other candidate who is also validly nominated at that election; and
 - (b) is, if it contains any information mentioned in paragraph (a), not to be regarded, for the purposes of subsection (1), as being sent by that other candidate.”.

Division 4

Amendment to Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541 sub. leg. D)

29. Section 101A amended (Letters that may be sent free of postage by candidates)

Section 101A(1)(b), before “contain”—

Add

“subject to section 43(4A), (4B) and (4C) of the Legislative Council Ordinance (Cap. 542),”.

Division 5

Amendment to Electoral Affairs Commission (Electoral Procedure) (Election Committee) Regulation (Cap. 541 sub. leg. I)

30. Section 99 amended (Letters that may be sent free of postage by candidates)

Section 99(1)(b), before “contain”—

Add

“subject to section 38(2A) of the Schedule to the Chief Executive Election Ordinance (Cap. 569),”.

Part 4

Amendments Relating to Financial Assistance to Candidates in District Council Election

31. District Councils Ordinance amended

The District Councils Ordinance (Cap. 547) is amended as set out in sections 32 and 33.

32. Section 60D amended (Amount payable as financial assistance)

(1) Section 60D(1)—

Repeal

“lower”

Substitute

“lowest”.

(2) Section 60D(1)—

Repeal paragraph (b)

Substitute

“(b) 50% of the maximum amount of election expenses that can be incurred by or on behalf of the candidate under section 3 of the Maximum Amount of Election Expenses (District Council Election) Regulation (Cap. 554 sub. leg. C);

(c) the declared election expenses of the candidate.”.

(3) Section 60D(2)—

Repeal

“lower”

Substitute

“lowest”.

(4) Section 60D(2)—

Repeal paragraph (b)

Substitute

- “(b) 50% of the maximum amount of election expenses that can be incurred by or on behalf of the candidate under section 3 of the Maximum Amount of Election Expenses (District Council Election) Regulation (Cap. 554 sub. leg. C);
- (c) the declared election expenses of the candidate.”.

33. Schedule 7 amended (Financial assistance: specified rate)

Schedule 7—

Repeal

“\$10”

Substitute

“\$12”.

Part 5

Amendment Relating to Election Expenses Limit for Chief Executive Election

34. Maximum Amount of Election Expenses (Chief Executive Election) Regulation amended

The Maximum Amount of Election Expenses (Chief Executive Election) Regulation (Cap. 554 sub. leg. A) is amended as set out in section 35.

35. Section 2 amended (Maximum amount of election expenses)

Section 2—

Repeal

“\$9,500,000”

Substitute

“\$13,000,000”.

Part 6

Amendment Relating to Election Expenses Limit for District Council Election

36. Maximum Amount of Election Expenses (District Council Election) Regulation amended

The Maximum Amount of Election Expenses (District Council Election) Regulation (Cap. 554 sub. leg. C) is amended as set out in section 37.

37. Section 3 amended (Maximum amount of election expenses)

Section 3—

Repeal

“\$48,000”

Substitute

“\$53,800”.

Part 7

Amendment Relating to Constituent in Education Subsector of Election Committee

38. Chief Executive Election Ordinance amended

The Chief Executive Election Ordinance (Cap. 569) is amended as set out in section 39.

39. Schedule, section 2 amended (How Election Committee is to be constituted)

The Schedule, section 2, Table 5, item 6, column 3, paragraph (4)—

Repeal subparagraph (d)

Substitute

“(d) Hong Chi Association—Hong Chi Pinehill Integrated Vocational Training Centre;”.

Explanatory Memorandum

The object of this Bill is to amend various pieces of legislation for the purposes set out in the long title.

Part 1 of the Bill

2. Clause 1 sets out the short title and provides for commencement.

Part 2 of the Bill

3. Clauses 3 to 25 amend the Legislative Council Ordinance (Cap. 542), the District Councils Ordinance (Cap. 547), the Village Representative Election Ordinance (Cap. 576) and the Hong Kong Court of Final Appeal Ordinance (Cap. 484).
4. Under current legislation, an election to return a Member of the Legislative Council, an elected member of a District Council and a Village Representative may be questioned by an election petition. The determination of the Court of First Instance of an election petition is final and is not subject to appeal.
5. The amendments in clauses 3 to 25 allow an appeal to be lodged directly to the Court of Final Appeal from the determination of the Court of First Instance of an election petition.

Part 3 of the Bill

6. Clauses 27 and 29 amend the Legislative Council Ordinance (Cap. 542) and the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541 sub. leg. D) to allow letters sent free of postage by certain categories of candidates under the Legislative Council Ordinance (Cap. 542) to include information on certain other candidates.
7. Clauses 28 and 30 amend the Chief Executive Election Ordinance (Cap. 569) and the Electoral Affairs Commission (Electoral Procedure) (Election Committee) Regulation (Cap. 541 sub. leg. I) to allow letters sent free of postage by a candidate in a Labour

subsector election to include information on any other candidate in the same subsector.

Part 4 of the Bill

8. Clauses 32 and 33 amend the District Councils Ordinance (Cap. 547) to increase the amount of financial assistance payable by the Government to candidates in District Council elections.

Part 5 of the Bill

9. Clause 35 amends the Maximum Amount of Election Expenses (Chief Executive Election) Regulation (Cap. 554 sub. leg. A) to raise the upper limit of election expenses that can be incurred by or on behalf of a candidate in a Chief Executive election.


Part 6 of the Bill

10. Clause 37 amends the Maximum Amount of Election Expenses (District Council Election) Regulation (Cap. 554 sub. leg. C) to raise the upper limit of election expenses that can be incurred by or on behalf of a candidate in a District Council election.

Part 7 of the Bill


11. Clause 39 amends the Chief Executive Election Ordinance (Cap. 569) to reflect the change of the name of a constituent in a subsector.

Annex B

Chapter: 542 Title: LEGISLATIVE COUNCIL Gazette Number: L.N. 130 of 2007
 ORDINANCE
Section: 67 Heading: **Court to determine election** Version Date: 01/07/2007
petition

(3) At the end of the trial, the Court must certify the determination of the Court in writing. The judge must sign the certificate and ensure that the seal of the Court is applied to the certificate. The determination as certified is final as to the matters at issue concerning the election petition.

Annex C

Chapter:	547	Title:	DISTRICT COUNCILS	Gazette	L.N. 130 of
			ORDINANCE	Number:	2007
Section:	55	Heading:	Court to determine election petition	Version Date:	01/07/2007

(3) At the end of the trial of an election petition, the Court must certify the determination of the Court in writing. The judge must sign the certificate and ensure that the seal of the Court is applied to the certificate. The determination as certified is final as to the matters at issue concerning the election petition.

Annex D

Chapter:	576	Title:	VILLAGE REPRESENTATIVE ELECTION ORDINANCE	Gazette Number:	2 of 2003
Section:	45	Heading:	Court to determine election petition	Version Date:	14/02/2003

(3) At the end of the trial of an election petition, the Court shall certify the determination of the Court in writing. The judge shall sign the certificate and ensure that the seal of the Court is applied to the certificate. The determination as certified is final as to the matters at issue concerning the election petition.