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Panel on Constitutional Affairs

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 17 January 2011**

Election petition mechanism under the Legislative Council Ordinance

Purpose

This paper provides background information on the election petition mechanism under the Legislative Council Ordinance (Cap 542) ("LCO"), and gives a brief account of the past discussion held by the Panel on Administration of Justice and Legal Services ("the AJLS Panel") on the subject.

Background

2. An election petition in respect of a Legislative Council ("LegCo") election may be lodged with the Court of First Instance of the High Court ("the Court") under LCO. According to section 65 of LCO, an election petition may be lodged during a period of two months following the publication of the result of the election in the Gazette.

3. An election petition is triable in open court and before one judge. Section 67 of LCO stipulates that at the end of the trial of an election petition, the Court must determine whether the person whose election is questioned was or was not duly elected and, if not duly elected, whether some other person was duly elected instead. The Court must certify the determination in writing. The determination as certified is final as to the matters at issue concerning the election petition.

Past discussions of the AJLS Panel

4. When the AJLS Panel had discussed the handling of election petitions at its meeting on 9 March 1998, some members expressed concern about the long time taken by the Court to handle some election petitions. They pointed out

that there was an election petition which was concluded only at the end of the term of office of LegCo for which the election had been held. To expedite the handling and the hearings of petition cases, it was suggested that the Court should impose a schedule of six months for election petitions in respect of LegCo elections, and that the Judiciary should separate election petitions from other civil cases for listing.

5. The Administration informed members that it generally took two to three months to complete the trial of an election petition. There must be special reasons for a protracted case. The Administration advised that there was mechanism in place which allowed for an expedited procedure where the situations warranted. It was difficult to impose any rigid schedule on the operation of the Court which had its well-established practice and procedure. The Judiciary had been consulted on the suggestion of separating election petitions from other civil cases for listing and it considered that such an arrangement would be inappropriate.

6. Some members considered that the Judiciary should expedite the hearings of petition cases if the relevant documents were made available by the parties concerned. It was suggested that the Administration should take measures to prevent people from postponing submission of the required documents intentionally in a bid to delay the trial of the case. The Administration advised that the LegCo (Election Petition) Rules stipulated that subject to the provisions of LCO and the Rules, the practice and procedures of the High Court would in general apply to an election petition as if it were an ordinary action within the jurisdiction of the High Court. The Court could order an early disposal of an election petition case upon application by either party to the case with sufficient grounds. The Court had the power to impose a tight schedule as part of its case management with tight deadlines for submission of the required documents in any particular case.

7. The AJLS Panel noted that a suggestion of setting up a special court for handling election petition was raised during the deliberation process of a subcommittee formed to study subsidiary legislation relating to LegCo election. The Administration's position was that it was unnecessary and inappropriate to do so. A member also considered it unnecessary to set up such a special court on the grounds that the practice and procedure of the High Court would in general apply to an election petition, and the number of election petition cases was small.

8. A member enquired whether the government could act as a petitioner and lodge an election petition against the successful candidate if it was found after the election that he/she had committed corrupt/illegal practice during the

election. The Administration advised that the definitions of those who could lodge an election petition had been set out in section 62 of LCO, according to which an election petition could be lodged by 10 or more electors entitled to vote in the relevant constituency, or by a person claiming to have been a candidate in the relevant constituency. The provision did not provide for the government to be a petitioner. However, any charge against a candidate of committing corrupt/illegal offence at an election would be inquired into by the relevant enforcement agencies.

9. Members may wish to refer to the Administration's paper on "Handling of election petitions" [PLC Paper No. CB(2)1137(02)] and the minutes of the meeting of the AJLS Panel on 9 March 1998 [PLC Paper No. CB(2)1385] for details.

Recent development

10. The Court of Final Appeal has recently declared that the finality provision in LCO which limits appeals on election petitions to the Court is invalid and unconstitutional. In the judgment handed down on 13 December 2010, Chief Justice MA said that section 67(3) of LCO has infringed the constitutional right of appeal under Article 82 of the Basic Law. According to the Administration, its objective is to put forth proposals to amend LCO within the first half of 2011 to ensure that the amendment provisions would be enacted in time to deal with the 2012 LegCo election.

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