



中華人民共和國香港特別行政區政府總部食物及衛生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

Our Ref. : FH CR 1/F/3261/92 Pt.32
Your Ref. : LS/S/18/17-18

Tel No. : 3509 8940
Fax No. : 2840 0467

31 May 2018

Ms Wendy KAN
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms KAN,

**Medical Council (Election and Appointment of Lay Members)
Regulation**

I refer to your letter dated 21 May 2018. In response to your comments on the Medical Council (Election and Appointment of Lay Members) Regulation, our reply is set out in the attached paper.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Natalie LAU'.

(Miss Natalie LAU)
for Secretary for Food and Health

c.c. DoJ (Attn: Miss Bonita WONG) (By Fax: 3918 4613)
Clerk to the Subcommittee
LA
SALA3

Medical Council (Election and Appointment of Lay Members)

Government's Responses to the Observations by the Assistant Legal Adviser ("ALA")

Part I: Legal Issues

Section 2 of the Regulation

Definition of "election"

1. It is intended that except for sections 6, 11 and 21(1), all provisions relating to "election" in this Regulation should apply to all types of election (including ordinary elections, by-elections and further rounds of either type of election) held under this Regulation. The reasons for the exclusion are set out in paragraphs 2 – 4 below.
2. Section 6 relates to compilation of an electoral register. An electoral register should be compiled once every three years before an ordinary election is held. The Secretary of the Medical Council of Hong Kong ("MCHK") is not required to compile a new register for a further round of an ordinary election. Hence, references to "election" should exclude "further round of an election" in this context.
3. Section 11 relates to nomination period. It is specifically provided in section 11(2) that the nomination period for a by-election or a further round of an election is the period beginning on the date of the notice of election and ending on a date specified in the notice. In view of the above, a reference to an election should not cover "a further round of an election" in section 11.
4. Section 21(2) relates to the determination of the polling period for an ordinary election. The application of this subsection should not extend to "a further round of an election" as the end of the polling period may have to be postponed if a further round of an election needs to be held.

5. Thus, the definition of “election” is defined to include all types of election in section 2(1) of the Regulation but the exceptions (i.e. sections 6, 11 and 21(1)) are carved out in section 2(2) of the Regulation as the carved-out provisions do not apply to any further round of an election. We note ALA’s observation on the consistency between sections 2(1) and 2(2) but in view of the fact that it is unlikely the inconsistency will affect the operation of the scheme under this Regulation, we consider it not necessary to revise the section 2(1) at this moment. We would however consider deleting section 2(2) and revising the definition of “election” to “**election** (選舉) means an ordinary election or by-election and, except for sections 6, 11 and 21(2), a reference to an election includes, if applicable, a reference to a further round of that election conducted under section 20, 30 or 31;” in future amendment exercises to clarify the matter.

Definition of “term of office”

6. Section 2(1) of Cap. 1 provides that save where contrary intention appears either from Cap.1 or from the context of any other Ordinance, the provisions of Cap.1 shall apply to any other Ordinance in force. Since section 3(5AAB) of Cap. 161 specifically provides that an elected or appointed member holds office from the date of election or appointment, which is contrary to section 71(1)(a) of Cap.1 which provides that a period of days from the happening of any event shall be deemed to be exclusive of the day on which the event happens, section 71(1)(a) of Cap.1 does not apply to section 3(5AAB) of Cap. 161. As such, there is no inconsistency between section 3(5AAB) of Cap. 161 and paragraph (b) of the definition of “term of office” in section 2(1) of the Regulation. Thus, the proposed amendment to the relevant definition is not necessary.

Section 3 of the Regulation

7. ALA’s understanding is correct. The Secretary of MCHK will compile an electoral register for ordinary election and the electoral register will remain valid until the compilation of the next electoral register, which is prepared for the next ordinary election (see section 6(3)). For a by-election (arising from vacancy with term of office is not less than one year), only electors on the electoral register in relation to the previous ordinary election are entitled to elect. As it takes time to compile an electoral

register, we consider that such arrangement is appropriate so that the vacancy can be filled as soon as possible.

Section 4(2) of the Regulation

8. When a designation of an entity is made by the Permanent Secretary for Food and Health (Health) (“the Permanent Secretary”), the Secretary of MCHK will notify the public with means considered appropriate e.g. announcement on MCHK’s website, press release or notice in the Gazette.

Section 5(1) and 8 of the Regulation

9. Section 5(1) stipulates that an application for registration as an elector is to be made in a specified form which will be specified by the Secretary. The application form will require, among others, applicant’s address and other means of communication as appropriate for the purposes of the Regulation. We consider that the existing provision is sufficient to allow the Secretary of MCHK to require such information from the applicant.

Section 5(5) to (7) of the Regulation

10. We have consulted patient organizations about the eligibility requirements of an elector which are set out in section 4. The eligibility requirements are objective as far as practicable. Applicants need to submit proof so as to substantiate that they have met the eligibility requirements. The Secretary of MCHK needs to conduct due vetting and then make recommendations to the Permanent Secretary. Section 5(6) provides that in the process the Secretary of MCHK and the Permanent Secretary may make inquiry that they consider appropriate for assessing or determining the applicant’s eligibility for registration. The Secretary of MCHK and the Permanent Secretary may require applicants to submit supplementary information or clarify their application when the Secretary of MCHK and the Permanent Secretary are in doubt. We consider that it is appropriate to regard the Permanent Secretary’s decision final in the above arrangement and it is not necessary to make additional provisions.

Section 6(2) of the Regulation

11. As stipulated in section 5(7), the Permanent Secretary's determination as to an applicant's eligibility for registration is final. An organization aggrieved by the Permanent Secretary's decision could challenge the decision by way of judicial review and it would not be technically feasible to adjourn the election until the judicial review is finally disposed of, which may take months, if not years.

Section 6(4)(b) of the Regulation

12. The elector, which is a patient organization, can change its particulars from time to time. For instance, they may change their registered address or their company/ society name. The elector will need to inform the Secretary of MCHK of such changes. The Secretary of MCHK will notify the elector once the change is accepted and update the register. The electoral register will be made available on MCHK's website. The Secretary of MCHK will make public the updated register on MCHK's website.

Section 9(1)(a) of the Regulation

13. The Secretary of MCHK needs to issue notice of election for election, including ordinary election and by-election, as well as further round(s) of election. The current provision provides flexibility for the Secretary of MCHK to publish notice of election in a manner that the Secretary considers appropriate, taking into account the time constraints in by-election or further round(s) of election. The issuance may be made in the form of publication in the Gazette, press release, announcement on MCHK's website.

Section 14(5) of the Regulation

14. We have consulted patient organizations about the eligibility requirements of a candidate which are set out in section 10. The eligibility requirements are objective as far as practicable. The Secretary of MCHK's determination as to the validity of a nomination may be challenged by the disqualified applicant through election petition on the

ground that a person determined to be not validly nominated as a candidate should have been determined to be validly nominated (see sections 35 and 36). Section 14(3) also provides that the Secretary of MCHK may make inquiry that he/she considers appropriate for determining the validity of a nomination. The Secretary of MCHK may require an applicant to submit supplementary information or clarify their nomination when the Secretary of MCHK is in doubt. We consider the above arrangement is sufficient and it is not necessary to make additional provisions.

Section 16 of the Regulation

15. It is not specifically set out in section 16(b) that a person who enters into a composition or arrangement with his or her creditors without paying the creditors in full is disqualified from being elected as a specified lay person. However, a person who enters into a composition or arrangement with his or her creditors without paying them in full will not be elected because sections 29, 30 and 31 are wide enough to prevent such a person from being elected. In any event, where a Council member becomes bankrupt or enters into a composition or arrangement with his or her creditors without paying them in full, MCHK may declare the member's office to be vacant under section 3(6A) of the Ordinance. As such, the inconsistency ALA noted does not affect the operation of the scheme under this Regulation and in view of the rather unlikely chance of the occurrence of the event in question, we consider it undesirable to take on board this proposed amendment at the moment. We thank for ALA's input and would consider revising the same in future amendment exercises.

Section 23(2) of the Regulation

16. Section 23(2)(c) has already specified that a ballot paper is valid for casting a vote only if it is sent by post together with the declaration form in a manner specified in the polling notice. The Secretary of MCHK will specify the manner, including the ballot paper and declaration form be sent to the Secretary of MCHK to the specified address, in the polling notice. Section 26(1)(a) further specifies that the Secretary may reject any ballot paper if the ballot paper is, under section 23(2), not valid. Hence, we consider that the existing provisions are sufficient and it is not necessary to add additional provisions.

Section 29 of the Regulation

17. As explained in paragraph 14 above, the Secretary of MCHK's determination as to the validity of a nomination under section 14 may be challenged by the disqualified candidate through election petition. The Secretary of MCHK may require a candidate to submit supplementary information or clarify their validity of a nomination when the Secretary of MCHK is in doubt. We consider the above arrangement is sufficient and it is not necessary to make additional provisions.

18. For ALA's enquiry as set out in paragraph 14 of her letter, please refer to our reply in paragraph 25 below.

19. Section 29 provides for the arrangement on death or disqualification of candidate before polling period. The electors have yet to know who the validly nominated candidate(s) are. Under section 22(2), the electors will only know the validly nominated candidates when they receive the polling notice (the issuance date of the polling notice is the beginning date of the polling period).

Section 30 and 31(3) of the Regulation

20. As explained in paragraphs 14 and 17 above, the Secretary of MCHK's determination as to the validity of a nomination may be challenged by the disqualified candidate through election petition. The Secretary of MCHK may require a candidate to submit supplementary information or clarify their validity of a nomination when the Secretary of MCHK is in doubt. We consider the above arrangement sufficient and it is not necessary to make additional provisions. The Secretary of MCHK will inform the candidate(s) that the election is countermanded, and explain reason(s) for countermanding the election by administrative means.

Section 42 of the Regulation

21. We consider that when an election petition is jointly presented by five electors, these five electors should have common petition grounds and justifications. The petitioner may be heard by the authorized representative of one of the electors at the hearing. We consider that it is

not necessary to make an additional requirement that such authorized representative should have been authorized by all the electors concerned and it is up to the electors to consider whether to make a joint authorization for a timely conduct of the election petition.

22. We have considered and decided not to include section 37(3), (7), (8)(d) and (9) of the Medical Practitioners (Electoral Provisions) Procedure Regulation (Cap. 161B) –

- (a) section 37(3) [petitioner/ respondent may make opening statements, call witnesses, cross-examine witnesses and address MCHK] is a technical procedure and we think it is not necessary to include such details in the Regulation;
- (b) section 37(7) [a petition is to be heard in private] is removed because we would like to improve the transparency of the hearing;
- (c) section 37(8)(d) [subject to the giving notice to the Chairman of MCHK of at least 7 days' written notice of inspection, the Chairman of MCHK may permit any person to inspect any document or ballot paper relating to the election which is in the custody of the Secretary of MCHK] is removed because we would like to remove the restriction on inspection of document;
- (d) section 37(9) [MCHK may admit or reject any evidence adduced, whether oral or documentary, and the provisions of the Evidence Ordinance relating to the admissibility of evidence do not apply in relation to a petition] is removed because we consider such provision is not necessary for the election petition.

Section 46(10) of the Regulation

23. Section 46 is about “how to fill vacancy if unexpired term is less than one year.” Expediency is a matter of concern in arranging the selection meeting. When such meeting is necessary, the number of lay

members in MCHK is not known at that time. We consider that the Secretary of MCHK could make administrative arrangement as far as practicable to ensure that the majority of lay members at that time will be present at the meeting. It is more flexible not to prescribe any quorum arrangement so that the vacancy could be filled as soon as possible.

Part II: Drafting Issues

The definition of “selection” under section 2(1) of the Regulation

24. Regarding paragraph 20 of ALA’s letter –

- (a) In section 2(1), the term “selection” refers to the selection of a specified lay member under Part 10. If the office of a specified lay member becomes vacant and the unexpired term of office of the member is less than one year, there will be a selection process for the appointment of a new specified lay member by the Permanent Secretary. The process starts with invitation of nomination by the Secretary of MCHK, and depending on the number of validly nominated candidates and the number of vacancies, the selection process will continue in accordance with the relevant provisions in section 46(9). We therefore consider that the definition of “term of office” under section 2(1) of the Regulation is consistent with the term of “selection” under section 2(1) and Part 10.
- (b) Please note that section 5 of the Interpretation and General Clauses Ordinance (Cap. 1) states that where any word or expression is defined, the definition extends to the grammatical variations and cognate expressions of such word or expression. As such, we are of the view that there is no need to replace “select” with “selecting”.

Section 14(6) of the Regulation

25. The literal meaning of section 14(6) of the Regulation is that the Secretary must issue to every person nominated, whether the nomination is valid or not, a notice of the determination that relates to the validity of

the nomination. We are of the view that the “every person nominated” and “as to the validity of the nomination” are sufficiently clear to reflect the policy intent and that amendment to section 14(6) is not necessary.

Section 10 of Schedule to the Regulation

26. Regarding paragraph 22 of ALA’s letter –

- (a) We are of the view that the proposed amendment is not necessary as both texts are clear in meaning and reflect the policy intent.
- (b) For the same reasons as set out in paragraph (a), we are of the view that the proposed amendment is not necessary.

Minor drafting issues

27. We thank for ALA’s comments. We consider that this typographical error does not affect the substance nor operation of the Regulation but we would consider revising the same in the future amendment exercises.