

立法會
Legislative Council

LC Paper No. LS26/19-20

**Further Report by Legal Service Division on
Veterinary Surgeons Board (Election of Members) Regulation (L.N. 161)
Gazetted on 8 November 2019**

Members may recall from LC Paper No. LS19/19-20 which was issued to Members via LC Paper No. CB(2)247/19-20 that the Legal Service Division ("LSD") was scrutinizing the legal and drafting aspects of L.N. 161 and would make a further report if necessary. To recap, L.N. 161 is made by the Secretary for Food and Health ("SFH") under section 28(1A) of the Veterinary Surgeons Registration Ordinance (Cap. 529), as amended by section 13(2) of the Veterinary Surgeons Registration (Amendment) Ordinance 2015 (Ord. No. 6 of 2015), to provide for the procedure and other matters relating to the election of members of the Veterinary Surgeons Board ("VSB").

2. LSD has sought clarification from the Administration on certain matters relating to L.N. 161. Our enquiries and the Administration's response are summarized in the following paragraphs:

Inspection of the register and nomination of candidates

3. LSD has asked the Administration to clarify whether the register of registered veterinary surgeons maintained by VSB ("register") is open for inspection for the purpose of ascertaining whether a potential nominee is eligible to be nominated under section 13(1) of L.N. 161. The Administration has explained that under section 8(2) of Cap. 529, the register is available to any person for inspection. A list of registered veterinary surgeons with valid practising certificates is also accessible by the public on VSB's website.

Opportunity to be heard or to make representations

4. LSD has asked the Administration to clarify whether the returning officer, prior to making the following determination or declaration, will give the relevant person an opportunity to be heard or to make written representations, and if so, whether provisions to that effect should be included in L.N. 161:

- (a) determining the validity of a nomination under section 15(1);
- (b) revoking a determination that a person is validly nominated under sections 16(2)(a) and 24(2)(a); and

- (c) declaring that an election is countermanded as a result of the death or disqualification of a candidate under sections 37(2)(a) and 38(5)(a).

5. The Administration has responded that the rules of natural justice such as the right to be heard are implied by the courts into a statutory procedure, and in determining whether a person is validly nominated, the returning officer will exercise his power accordingly. As some of the disqualifying circumstances are factual in nature, whether the returning officer should afford the relevant person an opportunity to be heard or to make written representations would depend on the specific circumstances in question.

Replacement of ballot items

6. Section 32(4) of L.N. 161 provides that where an elector makes a request for another set of ballot items ("replacement set") on the ground that the elector has inadvertently spoilt any of the ballot items issued to him, the returning officer may issue to the elector a new set of ballot items, and the issue of the replacement set will invalidate the set of ballot items previously issued to the elector. In response to our enquiry on whether and how the replacement set of ballot items could be distinguished from the previous set, the Administration has clarified that a "two-envelope system", which will be provided in the rules to be made by VSB pursuant to section 6(c) of Cap. 529, will be implemented to enable traceability and verification of ballot items while maintaining secret ballot, and that the returning officer is able to distinguish the different sets of ballot items by the unique serial number allocated to the outer envelope. The two-envelope system will operate in the following manner:

- (a) the outer envelope and declaration form for each elector will be serialized with a unique number to enable the returning officer to identify the elector to which the items relate;
- (b) the inner envelope and ballot paper will not, by their design, contain any information or mark that would enable identification of the elector;
- (c) the elector is required to insert the sealed inner envelope (containing the elector's marked ballot paper) into the outer envelope together with a completed declaration form and then seal the outer envelope and submit it to the returning officer;
- (d) on the date of vote counting, the returning officer will open all sealed outer envelopes to check the serial number on the outer envelope and declaration form to verify the eligibility of the electors and the validity of the ballot items; and
- (e) the returning officer will open those sealed inner envelopes of verified outer envelopes (which will be all mixed up and no longer traceable) for vote counting.

Recounting of votes

7. Since a candidate may request the returning officer to count again the votes already counted under section 41(1) of L.N. 161 before the returning officer declares the result of an election or makes a declaration that the election is countermanded under specified circumstances, LSD has asked the Administration to clarify whether the returning officer would inform all candidates in advance before making the declaration.

8. The Administration has clarified that under section 39(3) of L.N. 161, every candidate will be notified in writing by the returning officer of the place, date and time of the counting of votes and that the candidate may be present at the counting of votes. To ensure that the candidates are aware of the counting and declaration arrangement so that their right to request a recounting of votes under section 41(1) of L.N. 161 would not be undermined, the returning officer will, as an administrative measure, remind every candidate that the counting and recounting of votes, drawing lots (if any), ascertaining of result of election and declaration of result of election will be conducted in an immediately consecutive manner by written notice in advance.

Questioning the composition of a review committee and presentation of election petition

9. In relation to LSD's enquiries on the procedure for questioning the composition of a review committee by application for changing the composition of a review committee and the procedure for questioning an election of VSB members by presenting an election petition, the Administration has explained as follows:

- (a) by virtue of sections 53(4)(d) and 57(1)(d) of L.N. 161, an application for changing the composition of a review committee and an election petition must be received by the relevant authorities before the date and time specified by VSB. Such date and time are the deadlines for making the above application and presenting the election petition;
- (b) as an administrative measure, every elector and candidate would be notified of the deadlines by written notice, which is similar to the practice of notifying every elector and candidate of the nomination period and polling period by written notice pursuant to section 9 of L.N. 161; and
- (c) an application for questioning the composition of a review committee has to be submitted after the deadline for presenting an election petition. Section 53(4)(d) of L.N. 161 sets a unified period for submitting applications for questioning the composition of review committee, regardless of when an election petition is presented. This arrangement allows SFH to consider all applications for questioning the composition

of a review committee in a holistic and coordinated manner, and avoids the need to change the composition of a review committee repeatedly.

Grounds for presenting election petition

10. Regarding the issue of why no election petition may be presented in relation to an election declared under Part 3 or 4 to be countermanded under section 55(2) of L.N. 161, the Administration has explained that where an election is countermanded, no candidate is returned as an elected member and as such, the policy is to conduct a further round of election as soon as practicable, unless the unexpired term of office is less than nine months. It is therefore not necessary to provide for the presentation of election petition under these circumstances.

Determination by a review committee

11. In response to LSD's enquiry on how a review committee would determine whether another person was duly elected under section 61(2) of L.N. 161 in cases where the review committee determines that a person who was declared to be elected was not duly elected, the Administration has clarified that the review committee would take into account the result of the election ascertained pursuant to sections 43 to 46 of L.N. 161 in making a determination under section 61(2).

12. Noting that section 61(6) of L.N. 161 provides that a determination by the review committee after hearing an election petition is final, LSD has asked the Administration to clarify whether there is any appeal mechanism. The Administration has explained that an aggrieved person in relation to the determination of the review committee may challenge the review committee's determination by way of a judicial review.

13. Subject to Members' views on the matters set out in paragraphs 3 to 12 above, no legal and drafting difficulties have been identified in relation to L.N. 161.

14. Under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the period for amending L.N. 161 will expire at the Council meeting of 11 December 2019. Members are invited to note that unless the amendment period is extended, the deadline for giving notice of amendment under Rule 29(2) of the Rules of Procedure ("RoP") is **Wednesday, 4 December 2019**, and the deadline for giving notice of a motion under section 34(4) of Cap. 1 to extend the amendment period to the Council meeting of 8 January 2020 under RoP 29(3) is **Friday, 6 December 2019**.

Prepared by
Joyce CHAN
Assistant Legal Adviser
Legislative Council Secretariat
3 December 2019