

LEGISLATIVE COUNCIL BRIEF CHIEF EXECUTIVE ELECTION BILL

INTRODUCTION

At the meeting of the Executive Council on 27 February 2001, the Council **ADVISED** and the Chief Executive **ORDERED** that the Chief Executive (CE) Election Bill should be introduced into the Legislative Council (LegCo).

BACKGROUND AND ARGUMENT

2. The CE Election Bill provides the legal framework for conducting the CE election. It stipulates when and how a CE election is to be held as well as who may run and who may vote at the CE election. It also provides for the lodging of election petitions and judicial reviews that challenge whether the CE-elect is duly elected. Matters relating to the composition and formation of the Election Committee (EC) are provided for in the Schedule to the Bill.

3. In drafting the CE Election Bill, we have relied on the guiding principles and relevant provisions of the Basic Law (BL) and made reference to the rules governing the first CE election held in late 1996 as well as the well-established principles and practices in Hong Kong's local elections.

4. The guiding principles and relevant provisions of the BL which we have followed include –

- (a) BL 43 which provides that the CE shall be the head of the Hong Kong Special Administrative Region (HKSAR) and shall represent the Region. It also requires the CE to be accountable to both the Central People's Government (CPG) and the HKSAR;
- (b) BL 44 which lays down the basic qualification criteria for becoming the CE;

- (c) BL 45 which requires that the method for the selection of the CE shall be formulated on the basis of gradual and orderly progress and having regard to the actual situation of Hong Kong;
- (d) BL 46 which provides for the term of the CE and a requirement that a person cannot serve for more than two consecutive terms;
- (e) BL 47 which requires the CE to be a person of integrity and dedicated to his duties;
- (f) BL 53 which deals with vacancy in the office of the CE;
- (g) BL 104 which requires the CE, when assuming office, to swear to uphold the BL and pledge allegiance to the HKSAR; and
- (h) BL Annex I which prescribes the specific method for the selection of the CE.

THE BILL

(I) The CE Election Bill

5. The key provisions of the CE Election Bill are summarised in the following paragraphs.

(i) Term of office and election of the CE

6. **Clauses 3 to 7** provide for the term and election of the CE. In sum, the term of the CE office shall be five years and will fall vacant during a term if the CE dies or the Central People's Government revokes his appointment. An election has to be held to elect a successful candidate for appointment by the CPG as the CE.

(ii) Election Committee

7. **Clause 8** provides that the EC shall be constituted in accordance with the Schedule to the Bill and the EC constituted on 14 July 2000 shall be continued and regarded as having been constituted as the first EC under this Bill. Members of the EC constituted on 14 July 2000 shall be members of the first EC constituted under the CE Election Bill. This reflects the BL requirement that the ECs referred to in BL Annexes I and II are one and the same. **Clause 9** provides that the term of the EC, as stipulated under BL Annex I, shall be five years.

(iii) Polling date

8. **Clauses 10 to 12** stipulate the authority to determine the polling date for the CE election and the restrictions with which he has to comply in the exercise of this power. Under normal circumstances, the CE will appoint a date within six months before the expiry of his term as the polling date. However, in the event that the office of the CE becomes vacant, the Acting CE will appoint a polling date which will be within six months after the vacancy arises. It also provides for how polling date is to be determined under exceptional circumstances. We propose to confer the power on the Electoral Affairs Commission (EAC) in the event that the election fails because no candidate is validly nominated or every candidate has either died or withdrawn from the election or is disqualified. However, if the successful candidate cannot assume office after the election result is declared, the power to appoint another polling date will fall on the CE or the Acting CE, as the case may be.

(iv) Qualification and disqualification criteria for nomination

9. **Clause 13** lays down the eligibility criteria that must be fulfilled before a person can be nominated for the CE election. These are based on BL 44 which stipulates that the CE shall be a Chinese citizen of not less than 40 years of age who is a permanent resident of the HKSAR with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years.

10. **Clause 14** provides that the following persons are disqualified from being nominated –

- (a) a person holding the office of the CE for two consecutive terms. This reflects the BL 46 requirement;
- (b) judicial officers and prescribed public officers. This is the same as those applicable to the Legislative Council (LegCo) elections and District Councils (DC) elections;
- (c) the bankrupt and the mentally disordered. LegCo and DC elections have similar requirements;
- (d) persons holding passports or travel documents other than a passport or Certificate of Identity issued by the HKSAR or entry permits issued by an authority in any part of the People's Republic of China. This is necessary having regard to the important constitutional position of the CE as stipulated under BL 43; and
- (e) persons convicted of offences in relation to disqualification from being elected currently provided for in the Legislative Council Ordinance (LCO) (Cap. 542) and the District Councils Ordinance (Cap. 547).

11. While LegCo Members are allowed to stand as a candidate at the CE election, **Clause 31** provides that a LegCo member is deemed to have resigned from LegCo on the date the CPG appoints him as the CE. This is necessary to maintain the checks and balances of our constitutional order as enshrined in the BL.

12. For the first CE election held in late 1996, candidates were required to run in their own individual capacities. Furthermore, candidates who were members of political parties were required to resign from their political parties before they could run. Under the CE Election Bill, we propose that members of political parties should be allowed to run in the CE election provided they, as required by **clause 16**, declare in the nomination that they stand in their individual capacity. If a member of a political party is elected, **clause 32** provides that he must, within seven working days after his election, publicly make a statutory declaration that he is no longer a member of any political party and

undertakes in writing that, during his term of office, he will not become a member of any political party or be bound by the discipline of any political party. This is to ensure that the CE, when discharging his duties, will take into account the overall interest of the HKSAR instead of the interest of the political party to which he belongs.

(v) Nomination

13. **Clause 15** provides that the nomination period should last at least 14 days and that there shall be a gap of at least 21 days between the close of nominations and the polling date.

14. **Clause 16** provides that the nomination for the CE election should be made by at least 100 EC members and that a candidate must declare on his nomination form that he will uphold the BL and will pledge allegiance to the HKSAR. These requirements are respectively proposed having regard to BL Annex I and BL 104. The requirement that a candidate must stand in his individual capacity has been explained in paragraph 12 above. Clause 16 also provides that an EC member who has resigned or is disqualified from being elected is not eligible for making nomination for the purpose of the CE election and that each EC member can only nominate one candidate.

15. **Clause 18** provides that the Returning Officer shall, within seven days after the close of nominations, declare by notice in the Gazette the names of the validly nominated candidates and, for each of these candidates, the names of the EC members subscribing to his nomination form. It has been a well-established feature of LegCo and DC elections that the names of the subscribers to candidates are made available for public inspection. In view of the need to maintain transparency and the importance of the CE election, we propose that, in addition to public inspection, the Returning Officer should also publish the subscribers' names in the Gazette.

(vi) Withdrawal of candidature

16. **Clause 19** provides that a candidate may withdraw from the election on or before the working day immediately before the polling date, so that candidates can consider withdrawing from the election when facing unforeseen circumstances. The CE election will continue despite the withdrawal of candidature.

(vii) Election and polling

17. **Clause 20** sets out the circumstances under which a candidate for the CE election is disqualified from being elected.

18. **Clause 21** provides that the EAC may postpone the polling date or adjourn the polling in the event of public disorder. This is similar to the practice adopted for LegCo elections.

19. **Clause 22** provides that a candidate will be elected ipso facto if he is the only one validly nominated after the close of nominations or if he is the only remaining candidate as a result of death, withdrawal, disqualification or a combination of the foregoing of the other candidates.

20. **Clause 25** provides that an EC member is disqualified from voting at the CE election if he has resigned or is disqualified from being elected an EC member.

21. **Clause 26** provides that a poll has to be held if there are two or more validly nominated candidates and prescribes how votes are to be counted. It provides that at any one round of the election if a candidate obtains an absolute majority of validly cast votes, he will be elected. Otherwise, all candidates will be eliminated except those who obtain the highest and, if there is only one candidate who obtains the highest, the second highest votes. These candidates will proceed to the next round of voting. The process will continue until one candidate obtains an absolute majority of votes to win.

(viii) Death and disqualification of a candidate

22. **Clauses 27 and 28** provide for how the voting and counting are to proceed, respectively, in the event of death or disqualification of candidates on the polling date but before the declaration of election results. The underlying principle is that the election will continue under such circumstances.

(ix) Election petition and judicial review

23. **Clause 30** provides that the CE election shall be presumed to be valid until it is ruled otherwise by the court.

24. **Clauses 33 to 39 and 41** provide for election petition. It

is provided that election petitions must be lodged within seven working days from the declaration of the election result. Similarly, under the leap-frog procedures (see paragraph 28(a) below), any application for leave to appeal the decision of the Court of First Instance must be made to the Court of Final Appeal within seven working days. It is also provided that only persons who are

- (a) a candidate; or
- (b) a person claiming to have been a candidate and with the support of at least 10 EC members

may lodge an election petition. The grounds for lodging election petitions are similar to those for LegCo and DCs elections.

25. **Clause 40** provides that judicial review which puts in issue whether the CE-elect is duly elected must be lodged within 30 days after the publication of election result. This deadline will be extended only if -

- (a) the applicant has used his best endeavours to make the application or commence the proceedings within the 30 days; and
- (b) the Court considers that it would be in the interest of justice to do so.

The fast-track judicial review is necessary in order to settle any legal challenges as a matter of urgency so that there would be no doubt over the legality of the CE by the time he assumes office, thereby avoiding any grave constitutional and legal problems that may arise.

(x) Miscellaneous

26. **Clauses 42 to 45**, among other things, provide for the appointment of electoral officers and that the EAC may give directions to electoral officers.

27. **Clause 47** provides for the powers for the CE in Council to make regulations and **clause 48** empowers the CE in Council to amend the Schedule by regulation subject to positive resolution by LegCo.

(xi) Consequential amendments

28. **Part 8** provides for consequential amendments. The key provisions are highlighted as follows –

- (a) High Court Ordinance (Cap. 4) and Hong Kong Court of Final Appeal Ordinance (Cap. 484): to provide for a “leap-frog” procedure such that an appeal against the decision of the Court of First Instance in relation to the CE election will be lodged to the Court of Final Appeal direct, subject to leave granted by the Appeal Committee of the Court of Final Appeal;
- (b) LCO: to provide that the EC constituted in July 2000 shall continue to be responsible for electing, if any, one or more LegCo Members to fill the vacancy or vacancies that may arise from the six seats returned by the EC in the second term LegCo;
- (c) Elections (Corrupt and Illegal Conduct) Ordinance (ECICO) (Cap. 554): to amend the necessary provisions in relation to electoral procedural matters so that the ECICO will be fully compatible with this Bill;
- (d) Electoral Affairs Commission Ordinance (Cap. 541): to empower the EAC to organise and supervise the CE election; and
- (e) Electronic Transactions Ordinance (ETO) (Cap. 553): to exempt some provisions of the CE Election Bill from the requirements of the ETO.

(II) The Schedule to the CE Election Bill

29. **The Schedule to the CE Election Bill** provides for the composition and formation of the EC. The majority of its provisions are transplanted from Schedule 2 to LCO which governs how the EC is to be constituted. The key amendments and additions to what is provided for under Schedule 2 to LCO are highlighted in the following paragraphs.

30. **Clause 4** empowers the Electoral Registration Officer (ERO) to strike out names from the EC register if the ERO is satisfied that such persons have died, resigned or ceased to be registered, or eligible to be registered, as LegCo Geographical Constituency electors. If this results in vacancies in EC membership, **Clause 5** empowers the EAC to arrange by-elections, and for the religious subsector, supplementary nomination, to fill such vacancies. It should be noted that such a mechanism is necessary only for the CE election to be held in 2002 or in the event that the office of the CE or one or more of the six seats in the second term LegCo returned by the EC fall vacant.

31. **Clause 14** provides for the compilation of subsector voter register on a regular basis. Currently, there are no such provisions under Schedule 2 to the LCO.

32. **Clause 21** provides that a candidate for EC Subsector election may withdraw from the election on or before the working day immediately before the polling date. **Clause 23** makes it clear that the EC Subsector elections will continue despite death, withdrawal or disqualification of candidates, and provides for the procedures that the RO has to follow under such circumstances. Currently, there are no such provisions under Schedule 2 to the LCO.

33. **Clause 26** provides that, even if one or more candidates die or are disqualified on the polling day but before the declaration of election results, the EC subsector elections should continue as if the death or disqualification had not occurred. **Clause 29**, among other things, provides that if the deceased or disqualified candidate is returned, the RO should not declare him elected but should instead assign his seat to another candidate, if any, who obtains the next highest number of votes.

34. **Clause 39** provides that appeals against EC Subsector elections must be lodged within seven days after the publication of election results, as against 14 days presently laid down in Schedule 2 to LCO.

LEGISLATIVE TIMETABLE

35. The legislative timetable are as follows –

Publication in the Gazette	9 March 2001
First Reading and commencement of Second Reading debate	14 March 2001
Resumption of Second Reading debate, Committee Stage and Third Reading	to be notified

BASIC LAW IMPLICATIONS

36. D of J advises that the proposals are consistent with those provisions of the BL carrying no human rights implications.

HUMAN RIGHTS IMPLICATION

37. D of J advises that the proposals are consistent with the human rights provisions of the BL.

BINDING EFFECT OF THE LEGISLATION

38. The Bill does not contain a provision which expressly binds the State.

FINANCIAL AND STAFFING IMPLICATIONS

39. Funds have been included in the draft Estimates for 2001-02 to meet the expenses arising from the preparation and the conduct of the 2002 CE election.

PUBLIC CONSULTATION

40. We have consulted the LegCo Panel on Constitutional Affairs. The Panel has been informed of the preliminary legislative proposals for the CE Election Bill.

PUBLICITY

41. A press release will be issued before gazettal of the CE Election Bill and a spokesman will be made available to answer queries from the media.

ENQUIRY

42. Inquiries in relation to the CE Election Bill should be directed to Mr Bassanio SO, Principal Assistant Secretary for Constitutional Affairs (5), at 2810 2852 or Mr Chris SUN, Assistant Secretary for Constitutional Affairs (5A), at 2810 2064.

8 March 2001
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