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Report of Bills Committee on Chief Executive Election Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Chief Executive (CE) Election Bill.

The Bill

2. The CE Election Bill was introduced into the Legislative Council (LegCo) on 14 March 2001. The Bill provides the legal framework for conducting the CE election.

The Bills Committee

3. At the House Committee meeting on 16 March 2001, Members agreed to form a Bills Committee to study the Bill. The Bills Committee comprises 31 members and Hon IP Kwok-him and Hon Andrew WONG were elected Chairman and Deputy Chairman of the Bills Committee respectively. The membership list of the Bills Committee is in **Appendix I**.

4. The Bills Committee held a total of 15 meetings (equivalent to 20 two-hour sessions) with the Administration. It had also placed advertisements in two local newspapers to invite public views on the Bill and subsequently received submissions from 80 individuals and organizations, the names of which are in **Appendix II**. A total of 59 individuals and organizations also appeared before the Bills Committee to present their views. The Bills Committee had also invited views on clause 4 of the Bill from the Hong Kong Bar Association, the Law Society of Hong Kong, the Faculty of Law of the University of Hong Kong and the School of Law of the City University of Hong Kong.

Deliberations of the Bills Committee

5. The main deliberations of the Bills Committee are summarised in the following paragraphs.

Election of CE by universal suffrage

6. Members belonging to the Democratic Party and the Frontier are of the view that the "small circle" type of election of CE by an Election Committee (EC) was undemocratic and hence unacceptable. They object to the Bill in principle. Members belonging to the Democratic Party have explained that although they object to the Bill in principle, they would propose amendments to introduce a more democratic electoral system for the CE election because they consider that election of CE by universal suffrage should be implemented at an early stage. They would also propose other amendments to the Bill with a view to improving certain provisions.

Commencement date of the Bill

7. Clause 1 states that the Bill shall come into operation on a date specified by the Secretary for Constitutional Affairs in the Gazette. In anticipation that one of the six LegCo seats returned by the EC will become vacant, members have enquired about the commencement date of the Bill.

8. The Administration has explained that once the Bill comes into operation, a new mechanism for updating the membership of the EC will be brought into operation at the same time. However, no EC subsector by-election and other elections relating to the EC can be held before a new set of subsidiary legislation in relation to the EC subsector by-election and supplementary nomination (for the religious subsector) is put in place. If one of the six LegCo seats returned by the EC becomes vacant after the enactment and commencement of the Bill, the earliest possible polling date for any LegCo by-election to fill such vacancy can only be held in March 2002. As leaving a LegCo seat vacant for a long period is not conducive to the effective operation of LegCo, one option is to commence the Bill after any LegCo by-election that may be conducted. Under this option, a LegCo by-election can be conducted under the existing arrangements provided for in the LegCo Ordinance. This will make it possible for the election to be held about two to three months after the vacancy arises because no EC subsector by-election or supplementary nomination is required. The Administration has considered the option of having different commencement dates on different provisions of the Bill. As the majority of the provisions in the Bill will have an impact on the LegCo by-election, the Administration does not believe that this is a meaningful option and does not recommend it.

9. A member considers that it is inappropriate to defer commencement of the Bill for the reasons given by the Administration. She is of the view that the Bill

should come into operation as soon as possible after passage by LegCo, and any LegCo by-election should be held in accordance with the Bill. Another member opines that it is a choice of conducting a LegCo by-election under the arrangements provided either in the LegCo Ordinance or in this Bill after it comes into operation. There is legal basis for both options. The Administration has also informed the Bills Committee that should a vacancy in the six LegCo seats returned by the EC arises in July 2001, the LegCo by-election can be held by mid-September 2001, and the Bill can come into operation after the conduct of the LegCo by-election.

Election Committee

EC formed on 14 July 2000

10. Clause 8 of the Bill provides that the EC formed on 14 July 2000, which was responsible for electing six Members of the second term LegCo in September 2000, is also responsible for electing the CE in 2002.

11. Some members criticize the Administration for failing to clarify at an early stage that the EC formed in July 2000 is the same EC for selecting the second term CE despite Members' repeated requests for clarification in the past. The Administration has explained that Annex I of the Basic Law provides that the CE shall be elected by a broadly representative EC. Annex II of the Basic Law provides that the EC responsible for electing six Members of the second term LegCo is one and the same as the EC referred to in Annex I. The Basic Law provisions are clear and unambiguous.

Overlapping membership in EC

12. Annex I of the Basic Law provides that the EC for selecting the CE shall be composed of 800 members. The Administration has advised that since the EC was constituted in July 2000, the EC register was amended on two separate occasions to give effect to changes in the ex-officio membership, i.e. after the LegCo general election on 10 September 2000 and the LegCo Hong Kong Island by-election on 10 December 2000.

13. The Bills Committee has raised concern about overlapping membership in the EC which may arise in any one of the following circumstances -

- (a) a person who is concurrently a LegCo Member and a Hong Kong deputy to the National People's Congress (NPC); or
- (b) a person who first acquires his EC membership through election by the relevant subsector or nomination by the religious subsector, and subsequently becomes an ex-officio member by virtue of his election to the LegCo and/or NPC office.

14. The Administration has advised that the Bill proposes that the EC members referred to in paragraph 13(b) above may choose to give up their elected or nominated membership by tendering a resignation to the Electoral Registration Officer. The onus is on the EC member to decide whether or not to relinquish his elected or nominated membership. However, the Administration is of the view that little could be done about overlapping membership arising from the situation described in paragraph 13(a) above as the two categories of membership are ex-officio in nature.

15. Given the small electorate of the CE election, the majority of members of the Bills Committee consider that the number of EC members should be as close to 800 as possible. While agreeing with the Administration's view on overlapping membership arising in paragraph 13(a) above, these members request the Administration to address the problem of overlapping membership of EC in paragraph 13(b) above by instituting a mechanism to require an ex-officio EC member who holds more than one EC seat to give up his elected or nominated membership.

16. After considering members' views, the Administration proposes that once an elected or nominated EC member becomes an ex-officio member under the situation described in paragraph 13(b) above, he will be deemed to have resigned from his membership in the elected or nominated subsector. The vacancy will be filled by way of an EC subsector by-election or supplementary nomination. The Administration will move a Committee Stage amendment (CSA) to clause 3 of the Schedule of the Bill to give effect to the proposal.

17. One Bills Committee member strongly objects to the Administration's proposal. He considers it unfair that those persons referred to in paragraph 13(a) above are not affected. The Administration has explained that both LegCo Members and Hong Kong Deputies to the NPC should, by virtue of the office they hold, assume ex-officio membership of the EC. When an ex-officio member ceases to hold the qualifying office, his EC membership should cease, and his seat should be taken over by the person newly elected to the relevant office. The Administration has considered the issue of overlapping membership between LegCo and the NPC offices in the context of the 2000 LegCo election. However, the Administration has decided not to transfer the overlapping seats to other subsectors, since to do so would run the risk of not having sufficient seats to accommodate newly elected LegCo Members and Hong Kong Deputies to the NPC should the extent of overlapping membership be reduced in future. The Administration has also pointed out that although an EC member's name might appear twice in the list of EC membership, he or she is entitled to only one vote at the election, as stipulated in clause 24(3) of the Bill.

Date of poll

Polling date (clause 10)

18. Under clause 10, the polling date for the CE election shall be appointed by CE within six months before the date on which the office of CE becomes vacant.

19. The Administration has explained that the proposal in the Bill has the merit of giving more flexibility to CE to choose a suitable polling date. In addition, the proposed approach is modelled on the formulation adopted for the LegCo and District Councils elections. It is also made on the basis of Article 53 of the Basic Law which requires that, in the event that the office of the CE falls vacant, a new CE shall be selected within six months.

20. Some Bills Committee members are concerned that the proposed arrangement may give an incumbent CE seeking re-election an added advantage of appointing a polling date to his favour or to the disadvantage of his opponents. To ensure certainty and eliminate any perceived possibility of unfairness, members suggest that the Administration should consider prescribing a formula for fixing the polling date.

21. In response to members' concern, the Administration has put forward a formulation to fix the polling date on a date which can be calculated by counting backwards from the date on which the term of a serving CE expires. Under the Administration's proposal, the polling date for the second term CE election will be Thursday, 28 March 2002.

22. Some members consider that the election should be held on a Sunday. They point out that some EC members are ordinary employees and may have difficulties in taking leave from work to vote, if the polling date is a weekday. Some members also point out that public elections have always been held on Sundays and the CE election should adhere to this tradition.

23. After consideration, the Administration has agreed to move CSAs to clause 10 to provide that the polling date will fall on -

- (a) the first Sunday on or immediately before the date 95 days before the office of CE becomes vacant in the event of normal five-year expiry;
or
- (b) the first Sunday on or immediately after the date 120 days after the office of CE falls vacant in the event of vacancy in the office of CE.

Using the 2002 CE election as an example, the polling date will be Sunday, 24 March 2002, under the Administration's revised proposal.

Appointment of another polling date (clause 11)

24. Clause 11 deals with the situation where it is necessary to fix another polling date because -

- (a) the CE election fails; or
- (b) the CE-elect cannot assume office.

25. Members have queried why the authority for determining the polling date for the situation described in paragraph 24(a) above is the Electoral Affairs Commission (EAC), and that for the situation described in paragraph 24(b) above is the CE or the Acting CE. They also consider that there should be a procedure to cater for situations where the CE-elect cannot assume office.

26. The Administration has agreed to introduce CSAs to address members' concern. In respect of the situation referred to in paragraph 24(a) above, it is proposed that a new poll be held on the first Sunday 42 days after the election fails. A 42-day period is proposed because clause 15 of the Bill requires a minimum of 14 days for nomination and 21 days for canvassing. Moreover, an extra seven days is required to arrange for the new election. This revised proposal will do away with the power of the EAC to appoint a new polling date. As regards the situation described in paragraph 24(b) above, it is proposed that an election will be held on the first Sunday 120 days after the expiry of term of the serving CE, or on the first Sunday 120 days after the expiry of the six-month period since the vacancy first arises.

27. Some members consider that a lead time of 120 days should be provided for an election held under both situations. The Administration has explained that Article 53 of the Basic Law requires a new CE to be selected within six months after the vacancy arises. According to the proposed new clause 10, a CE election will be held on the first Sunday 120 days after the vacancy arises. If this election fails (and hence no new CE is elected), and in order to meet the six-month requirement stipulated under Article 53, only about two months are left for a new election to be arranged. Hence, a period longer than 42 days will not be possible. A few members do not agree with the Administration's interpretation of Article 53 and caution that if the second CE election fails again, it is not possible for another election to be conducted within the six-month period.

Vacancy in office (clause 4)

The Administration's proposal

28. Clause 4 of the Bill states that the office of CE becomes vacant -

- (a) on the expiry of the term of office of CE;

- (b) if CE dies; or
- (c) if the Central People's Government (CPG) revokes the appointment of CE.

29. Some members have expressed strong reservations about clause 4(c). They have queried the legal basis for CPG to have power to revoke the appointment of CE as the Basic Law does not provide for such power.

30. To address members' concern, the Administration has earlier proposed to amend clause 4(c) as follows -

- "(c) if CPG removes CE from office -
 - (i) upon his resignation under Article 52 of the Basic Law or otherwise;
 - (ii) upon the reporting to it for decision of a motion of impeachment passed against him under Article 73(9) of the Basic Law; or
 - (iii) under any other circumstances. "

31. Some members consider that the newly proposed clause 4(c)(iii) gives an impression that CPG has unlimited power to remove CE from office. They point out that from the textual lay-out of the Basic Law in relation to other cases where power to appoint is provided, both the power of appointment and that of removal are expressly provided. For instance, CE's power to "appoint" and "remove" principal officials and judges are clearly spelt out in Article 48(5) and (6). On the contrary, paragraph 1 of Article 45 only provides that CE shall be appointed by CPG; there is no mention of CPG's power to remove CE from office.

Removal power of CPG

32. The Administration has explained that CPG's power to remove CE flows from the Basic Law, and in the interpretation of the Basic Law a purposive approach is to be applied. Articles 15 and 45 provide that CE shall be appointed by CPG. While CPG's power to remove CE is not expressed as such in the Basic Law, it follows from the construction of the Basic Law, and in particular from Articles 52 and 73(9), that CPG has power of removal as well as power of appointment. The procedure under Article 73(9) provides for the impeachment of a CE. Where a motion of impeachment is passed by two-thirds majority of Members of LegCo, it must be reported to CPG for a decision. In this context, the "decision" would be a decision on whether or not to remove CE from office.

Furthermore, according to Article 52, CE must resign under the specified circumstances. If CE refuses to resign, the ultimate enforcement will be through the impeachment procedure under Article 73(9) which requires a decision by CPG to remove CE from office.

33. The Administration has further advised that CPG derives its status from the Constitution of the People's Republic of China (PRC) and is "the executive body of the highest organ of state power" (Article 85 of the Constitution). CPG's power to remove CE from office is not unlimited, but may be subject to various constraints such as constitutional, legal and conventional. The Administration has pointed out that although there is no specific provision in the PRC Constitution which covers exercise of this particular power, other analogous provisions relating to powers of appointment and removal of other classes of official require that such powers must be exercised in accordance with the law, which is strongly indicative of the underlying constitutional spirit. On legal consideration, the Basic Law is a national law adopted by the NPC. The legal requirements of the Basic Law thus have force not only in the Hong Kong Special Administrative Region (HKSAR), but throughout the country and apply to state organs including CPG. As regards constitutional conventions, the Administration explains that the Basic Law has not been in operation long enough for relevant conventions to develop in this area.

Purpose of clause 4

34. The Administration has stressed that clause 4 is not an empowering provision that confers additional powers on CPG to remove CE from office. It only reflects all the circumstances that the office of CE will become vacant. The declaration of a vacancy is the necessary trigger for the holding of an election of a new CE.

35. Under the Administration's proposed amendments in paragraph 30 above, clause 4(c)(i) provides that the office of CE will fall vacant if CPG removes CE upon his resignation under Article 52 or otherwise. Clause 4(c)(ii) provides that vacancy in the office of CE will arise if CPG removes CE under Article 73(9). Clause 4(c)(iii) further provides that the office of CE will become vacant if CPG removes CE from office "under any other circumstances". This is a catch-all provision to cater for circumstances which do not fall within clause 4(c)(i) and (ii). The Administration has cited the following two situations to support the need for clause 4(c)(iii) -

- (a) where a CE was physically or mentally incapable of carrying out the duties of his office but where the very impairment that prevented him from carrying them out rendered him incapable of resigning; or
- (b) where the whereabouts of a CE could not be ascertained.

36. A few members consider that the power of CPG to appoint CE is a substantive one and carries with it the power of removal. Another member is of the view that as clause 4 is intended to deal with the circumstances under which the office of CE will fall vacant, not the power of CPG to appoint or remove CE, clause 4(c)(iii) is unnecessary and could be deleted.

37. Some members remain unconvinced by the Administration's explanation of its revised proposal. They express concern that under the proposed clause 4(c)(iii), CPG could remove CE from office for political reasons or without giving any reason. They consider that CPG should not have removal power save for circumstances prescribed under the Basic Law i.e. Articles 52 and 73(9). Otherwise, it would seriously undermine the principles of "one country, two systems" and the "high degree of autonomy" of the HKSAR. As regards the two situations quoted by the Administration (paragraph 35(a) and (b) above refers), these members consider that they could be adequately covered by Articles 52 and 73(9).

Views of legal professionals

38. In its further deliberation of the issue, the Bills Committee has taken into account the views of the Legal Adviser to LegCo, the Hong Kong Bar Association, the Law Society of Hong Kong and an academic from the Faculty of Law of the University of Hong Kong.

39. The Legal Adviser is of the view that in adopting the purposive approach to the interpretation of the Basic Law, it appears that there is an implied power for CPG to remove CE from office. However, the power is not unlimited. CPG may remove CE under the circumstances specified under Articles 52 and 73(9) of the Basic Law. In other circumstances, CPG may remove CE for purposes which do not contravene the Basic Law.

40. Regarding the Administration's proposed clause 4(c)(iii) which envisages the removal of CE by CPG "under any other circumstances", the Bar Association is of the view that neither the Basic Law nor the PRC Constitution justifies the existence of a plenary power of removal of CE by CPG. If there is an implied power to remove CE outside Articles 52 and 73(9), it has to be very narrowly defined and can only be justified by extreme exigencies of the situation and for purposes which do not contravene the Basic Law. In any event, such power will have to be derived from the PRC Constitution and the Basic Law, and not from the Bill. As the power to appoint CE under the Basic Law is subject to restrictions, it is odd to argue for an unrestricted power of removal from a limited power of appointment.

41. The Law Society agrees with the Administration that CPG's exercise of the power to remove CE under Article 73(9) is subject to constitutional, legal and

conventional constraints. It is of the opinion that the high degree of autonomy of the HKSAR under Articles 2 and 12, as well as CE's accountability to CPG and the HKSAR under Article 43 must be fully complied with when CPG exercises its power to remove CE. The Law Society also notes that the Basic Law of the Macao Special Administrative Region (SAR), which also provides for a high degree of autonomy, expressly recognises the power of CPG to remove the Chief Executive.

The Administration's revised proposal

42. Having considered the views received by the Bills Committee, the Administration has further proposed to amend clause 4(c) as follows -

- "(c) If CPG removes CE from office -
- (i) upon his resignation under Article 52;
 - (ii) upon his resignation otherwise than under Article 52;
 - (iii) under any circumstances under which he must resign under Article 52 but is unable to do so;
 - (iv) upon the reporting to it for decision of a motion of impeachment passed against him under Article 73(9); or
 - (v) under any other circumstances under the Basic Law".

The Administration considers that it is important for legislation to cater for all possible circumstances. In its view, the formulation proposed has set out all the circumstances for CPG to remove CE from office so that an election to return a new CE can be triggered. The Administration has also advised that there is no single Article of the Basic Law containing an express empowering provision. The power arises by necessary implications from analysing a number of Articles together, including Articles 2, 12, 15, 43, and 47, in addition to Articles 52 and 73(9).

43. A member strongly criticizes that the Administration's arguments are groundless and completely fail to explain why CPG could remove CE under Articles 2, 12, 15, 43 and 47. Some other members also strongly object to the Administration's views. All these members point out that what is provided for in Articles 2, 12, 15, 43 and 47 is a manifestation of the high degree of autonomy enjoyed by the HKSAR, and that the Administration's advice that CPG could remove CE under these Articles seriously undermines the high degree of autonomy of the HKSAR. They also strongly object to the reference made to Article 15 of the Macao SAR Basic Law. They consider it totally unacceptable that because the Macao SAR Basic Law expressly recognises the power of CPG to remove the Chief Executive of Macao, it can be argued that the power of appointment under

Article 15 of the HKSAR Basic Law could be interpreted to include the power of removal.

44. There are also mixed views among members on the legal advice given by the Legal Adviser to LegCo concerning the power of CPG under the Basic Law to revoke the appointment of CE. A member considers the Legal Adviser's conclusion (paragraph 39 above refers) to be wrong. Some members have expressed query that the Legal Adviser has quoted from a speech of Mr Ji Peng-fai, Chairman of the Drafting Committee for the Basic Law of the HKSAR, to support his analysis that when reading together Articles 52 and 73(9) on the one hand, and Articles 15 and 45 on the other, there is an implied power for CPG to revoke the appointment of CE on condition that the exercise of power is for purposes which do not contravene the Basic Law. These members do not consider the particular speech of Mr Ji useful or relevant to the discussion of clause 4.

45. Some members express agreement with the Legal Adviser's analysis. They also consider the Administration's proposed amendments (in paragraph 42 above) acceptable. They further point out that CPG's power of appointment of CE is a substantive one and carries with it the power of removal. The power of CPG is however not unlimited, but subject to the provisions of the Basic Law. These members disagree that the Administration's position is tantamount to compromising the high degree of autonomy of the HKSAR.

46. The Legal Adviser has explained that his advice aims to assist members in analysing the various issues pertinent to the discussion of clause 4. His conclusion is that it appears that there is an implied power for CPG to revoke the appointment of CE, but the exercise of such power is subject to the principles of "one country, two systems" and the "high degree of autonomy of the HKSAR". The Legal Adviser is also of the view that it is not necessary for the Bill to stipulate expressly the situations under which vacancy in the office of the Chief Executive will arise for the purposes of enacting an electoral law for the election of the Chief Executive. It is only necessary for achieving the main purpose of the Bill to provide clearly that the election procedures have to commence when vacancy in that office arises. On the above basis, clause 4 could be appropriately deleted.

47. Hon Martin LEE has indicated that he would move CSAs to clause 4. Hon Emily LAU has also informed the Bills Committee that she would consider proposing amendments to clause 4 as the Administration's proposed CSAs are unacceptable.

48. The Administration reiterates its view that clause 4 is not an empowering provision, and that CPG's power to remove CE flows from the Basic Law and not the Bill. The Administration also considers that it is necessary to set out in clause 4 the various circumstances under which a vacancy of CE will arise in order to tie in with other provisions in the Bill on the conduct of the election of the CE. The Administration has subsequently decided to further amend clause 4(c) to read "if

the Central People's Government removes the Chief Executive from office in accordance with the Basic Law."

Disqualification from being nominated (clause 14)

British National (Overseas) (BN(O)) passport holders

49. Under clause 14(e), persons holding passports or travel documents issued by foreign countries are disqualified from being nominated for the CE election. In response to members' request for clarification, the Administration has advised that holders of BN(O) passports will be caught by this disqualification provision.

50. Some members have criticized that this criterion is discriminatory against BN(O) passport holders and treats the three million odd BN(O) passport holders as second-class citizens. They also consider that it is unfair to violate the political rights of this category of persons who have acquired the passports for historical and political reasons.

51. The Administration has explained that BN(O) passport holders are entitled to receive, upon request, British consular services and protection when in third countries. They owe allegiance to the Queen of the United Kingdom (UK) and are subject to the British law of treason. Under the Basic Law, CE is required to swear allegiance to the HKSAR of the PRC and as the head of the HKSAR is required to represent the Region. CE also has the function to conduct, on behalf of the Government of the HKSAR, external affairs. The Administration considers that any allegiance or duty to a foreign state would be inconsistent with the representational role of CE. Some members agree with the Administration's position.

52. A member is of the view that the issue should be viewed in the light of the Memoranda exchanged between the UK and PRC Governments in 1984. The Chinese Memorandum states that all Hong Kong Chinese compatriots, whether or not they are holders of the British Dependent Territories Citizens (BDTCs) passport, are Chinese nationals, and are permitted to use travel document issued by the UK Government for the purpose of travelling to other countries. The BN(O) passport was subsequently issued to the BDTCs. The member points out that from the perspective of the PRC Government, the BN(O) passport is regarded as a travel document without any nationality implication. Hence, the question of allegiance to the Queen of the UK does not arise. Some members share this view.

53. The Administration maintains its stand that the restriction is justified for the reasons stated in paragraph 51 above.

Judicial officers

54. Under clause 14(b) and (c), judicial officers and prescribed public officers

(as defined) are disqualified from being nominated as a candidate for the CE election. This is to maintain the independence of judicial officers and the political neutrality of public servants.

55. In response to members' request for information on overseas practice, the Administration has conducted a research which shows that the practice varies across countries. Of the seven countries surveyed, it is noted that judicial officers are allowed to run for presidential and/or parliamentary elections in France, Germany and the United States (US), but are generally prohibited in Canada, Singapore and the UK. In Japan, they are deemed to have resigned from the judiciary once they announce their candidacy. Nevertheless, if a judicial officer is elected in France, Germany or the US, he will be required to resign and, in the case of Germany parliamentary election, be suspended, from the judiciary before taking up the elected office.

56. A member has pointed out that all the countries surveyed by the Administration are different from the HKSAR in that they have a more democratic system for electing the head of government. The member is of the view that a person who is or has been appointed as a senior judicial officer should forever be disqualified from being nominated as a candidate for the CE election. This is to ensure that judicial independence will be maintained. The member considers that the need for this restriction could be reviewed when CE is returned by universal suffrage.

57. The Administration considers that in the absence of lawful justification, the member's proposal would run foul of the protection of political rights guaranteed by the human rights provisions of the Basic Law and Article 21 of the Hong Kong Bill of Rights, in particular Article 21(a), as it would appear that the proposal is an unreasonable restriction on judicial officers' right and opportunity to take part in the conduct of public affairs directly after they have severed their links with the Judiciary. Even if it is accepted that the proposal has a legitimate purpose and that the proposal is a rational means of achieving that purpose, the effect of the ban would not be proportionate to that purpose.

58. Hon Margaret NG has indicated that she would move a CSA to the effect that judicial officers are forever disqualified from being nominated as candidates for the CE election.

Persons convicted of treason or sentenced to death

59. The Bill proposes that a person who has been convicted of treason or sentenced to death is disqualified from being nominated as a candidate within the five years before the date of nomination. However, such a person is forever disqualified from being nominated as a candidate under section 39(1)(b) and (c) of the LegCo Ordinance.

60. The Administration has advised the Bills Committee that on reconsideration, it will propose a CSA to clause 14 to bring the disqualification provision in line with that of the LegCo Ordinance.

61. A few members do not agree that the disqualification provisions in the Bill should necessarily follow that of the LegCo Ordinance and object to the proposed amendment. Quoting some overseas examples, they consider that "prisoners of conscience", i.e. those persons who had been imprisoned because of their political or social beliefs, or because they fought against a political or social system, should be given an opportunity to run for public elections.

62. Members of the Democratic Party indicated that they would consider voting against the Administration's CSA to disqualify a person from being nominated as a candidate if he has been convicted of treason.

Nomination (clauses 16 and 18)

63. Nomination for CE election should be made by at least 100 EC members. The Administration proposes that in addition to public inspection, the names of the subscribers to candidates should also be published in the Gazette.

64. Some members express support for making public the names of subscribers. A few other members have expressed reservations about adopting the proposal for the CE election. These members stress that they support the need for transparency. Their main concern is that the CE election is a "small circle" type of election and the size of its electorate is much smaller than other elections such as the LegCo geographical constituency election. The requirement to make public the names of the subscribers would create pressure among members of the EC to nominate an incumbent CE who is seeking re-election, especially when the leaders of CPG have indicated their support for him to serve a second term. These members have also pointed out that there was no such requirement for the election of the first term CE.

65. The Administration has responded that it has been a well established feature of the local elections in the HKSAR that the names of the subscribers to candidates are made available for public inspection. In view of the importance of the CE election and the need to maintain transparency of the election, it is proposed that in addition to public inspection, the subscribers' names should also be published in the Gazette.

Withdrawal of candidature (clause 19)

66. The Bill proposes 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 in unforeseen circumstances. The CE election will continue despite the withdrawal of candidature. Members note that

for LegCo election, a candidate cannot withdraw from an election after the nomination period ends.

67. Given the small electorate size of the CE election and the requirement for nomination to be made by at least 100 EC members, a few members have expressed concern that the proposal would lead to unfair or corrupt practices at the election. For instance, a candidate could offer advantage to, or enter into arrangement with, other candidate(s) on the understanding that the latter will withdraw from the election before the polling date. Referring to the case of a candidate being unable to withdraw from the 2000 LegCo election after the nomination period ends, a member is of the view that this incident might not be too relevant in considering the withdrawal mechanism for the CE election because the voting system of the CE election is different from the list voting system adopted for the LegCo election.

68. In view of members' concerns, the Administration proposes to move CSAs to the effect that a candidate may only withdraw his candidature before the close of nominations, in line with the arrangement applicable to the LegCo election.

Death or disqualification of a candidate (clauses 27 and 28)

69. Members of the Bills Committee note that in the event that a candidate has died or is disqualified on the polling date but before the close of any round of voting of the poll, and that there is only one remaining candidate, this candidate will be declared elected. Members have expressed concern about public acceptance of the remaining candidate being elected as CE. In view of the important position of CE, members consider that a new polling should be held in the circumstance.

70. After careful consideration, the Administration proposes that, if any candidate dies or is disqualified after the close of nomination but before the declaration of the election result, the CE election should be terminated and nomination be re-opened. A new polling would then be held on the first Sunday 42 days later. The Administration will move CSAs in this respect.

Winning candidate to declare not a member of political party (clause 32)

71. In the first CE election, all potential candidates were nominated in their individual capacity. Members of political parties or political organizations had to resign from their political parties or political organizations before declaring their intention to run in the election. The Bill proposes to allow members of political parties to run in the CE election, but such candidates have to declare that they stand in their individual capacity. Only when a member of a political party is elected will he be required to resign from his political party or undertake that he will not become a member of any political party or be bound by the discipline of any political party during his term of office.

72. According to the Administration, the proposal to require a winning candidate who belongs to a political party to resign from the political party has taken into account Hong Kong's unique constitutional order. The HKSAR is physically and legally a part of China. CE, being accountable to both CPG and the HKSAR, has a unique position of power and responsibility. CE must maintain the appropriate relationship between the "one country" and must apply the "two systems". Hence, CE must be impartial and always act in the overall interests of Hong Kong.

73. The Administration has explained that in making the proposal, it has also taken into account Hong Kong's unique political situation. The political institutions of the HKSAR are still at an evolutionary stage. Political parties in Hong Kong have not developed to the level of maturity of those in western countries. At this stage of Hong Kong's political development, requiring CE to be independent from all political parties enables him to perform his constitutional role without divided loyalties, or conflict (or perceived conflict) of interest, and enables all political parties to operate on a level-playing field.

74. In response to members' query, the Administration confirms that the proposed restriction is consistent with the requirements of freedom of association guaranteed under Article 27 of the Basic Law and Article 22 of the International Covenant on Civil and Political Rights. The Administration has explained that the purpose of the restriction is to ensure the proper functioning of the current political order and the encouragement of pluralism. Hence, prohibiting CE from being a member of any political party is a rational and proportional means of achieving that purpose.

75. The Administration has also assured members that the Basic Law lays down a blueprint for the development of the political structure which envisages changes over time. The question of CE's membership of a political party will be reconsidered in the light of the prevailing circumstances.

76. Some members remain unconvinced by the Administration's explanation. They have pointed out that the majority of overseas systems have no such restriction. Moreover, the restriction is not stipulated in the Basic Law. They are of the view that the proposal discriminates against political parties and will retard the development of political parties. The question of whether a CE is a member of political party has no direct bearing on whether he will act impartially and in the overall interests of the HKSAR. It is ultimately a matter for electors to decide whether to vote for a candidate who is a member of political party. Hon Martin LEE will move CSAs to delete this proposal from the Bill.

Application of anti-bribery legislation to the CE election

77. Some members are concerned about the application of anti-bribery

legislation, such as the Elections (Corrupt and Illegal Conduct) Ordinance (ECICO) and the Prevention of Bribery Ordinance (POBO), to the CE election.

78. The Administration has explained that the ECICO is already applicable to the CE election. Under the Bill, consequential amendments have been proposed to the ECICO so as to make it fully compatible with the CE election process. To allay members' specific concerns, the Administration has explained that under section 11 of the ECICO, it is an offence for a person to solicit or accept advantage in exchange for an elector voting for a particular candidate. The term "advantage" is defined in ECICO to include "the exercise of or forbearance from exercising a right or power", "the performance of or forbearance from performing a duty", "any favour" and "any other service". The offences under sections 7, 8 and 9 in relation to bribery of candidates, specifically cover prospective candidates. In addition, the corruption offences under ECICO apply to conduct engaged before, during or after the "election period" which is defined as beginning on the nomination day, so conduct before nomination could be caught.

79. The Administration has also explained that the application of provisions of POBO to CE should be considered separately from the Bill. The Administration is working on a viable option that seeks to set out in separate legislative provisions a framework of control similar to that being applied to government officers under POBO for application to CE. In the meantime, CE will continue to be subject to the common law offence of bribery and the ECICO in respect of corrupt act and illegal practices relating to the CE election.

80. Some members are of the view that there is urgency in extending the applicability of POBO to CE before the CE election in March 2002. The Bills Committee has suggested that the matter be followed up by the Panel on Constitutional Affairs.

Election expenses limit

81. Members have asked whether any ceiling will be set on the election expenses for the CE election. Some members consider that an election expense limit would ensure a level-playing field for all candidates, and that in determining the basis for the limit, consideration should be given to the electorate size of the CE election. A few members have no strong view and consider that a limit is not absolutely necessary as many democratic countries do not have such a restriction.

82. The Administration has advised that the issue of election expenses ceiling is regulated by the ECICO which provides that CE in Council may set a ceiling on election expenses for local public elections of all levels. After passage of the Bill, the Administration intends to prescribe, by regulation, an election expense limit for the CE election under the ECICO.

83. In response to member's request, the Administration has provided information on the election expense limits for presidential election in a number of overseas countries.

Regulation of electioneering activities at the CE election

84. The Administration advises the Bills Committee that the Electoral Affairs Commission (EAC) will issue guidelines relating to the conduct of the CE election and the electioneering activities of candidates at the election. The EAC will consult the public on the content of the guidelines. In addition, a number of subsidiary legislation will be made by the EAC and submitted to LegCo for scrutiny.

85. As regards members' concern about participation of senior government officials in electioneering activities, the Administration advises that the Civil Service Bureau will issue a circular on the participation of civil servants in electioneering activities for the CE election, similar to that issued for the LegCo election.

86. Some members are particularly concerned whether government officials should be allowed to express views at public or other functions which could be seen as in support of a particular candidate for the CE election. The Administration advises that the EAC has recommended, among other things, in the report for the 2000 LegCo election that in future, the electoral guidelines should be extended to cover the participation of senior government officials at functions during the election period. The underlying principle of the guidelines will strike a balance between the need for civil servants to remain impartial and avoid possible conflict of interest and the rights enjoyed by individual civil servants as residents of Hong Kong.

87. Regarding members' concern about electioneering activities of an incumbent CE seeking re-election, the Administration sees a need to differentiate between official duties of CE and electioneering activities undertaken by him in his capacity as a candidate. The Administration considers that it is inappropriate to regulate a CE's official activities; otherwise, the ability of the CE to discharge his constitutional obligations would be undermined. However, the Administration agrees that safeguards should be put in place to ensure a level-playing field for all candidates in the conduct of electioneering activities. The EAC will set out in the electoral guidelines for the CE election the principles and practical arrangements to ensure that the process of the election is fair, open and honest.

Committee Stage amendments

88. Apart from the major CSAs explained above, the Administration will move a number of technical CSAs. The Bills Committee has not proposed any CSAs.

Consultation with the House Committee

89. The Bills Committee reported its deliberations to the House Committee on 29 June 2001.

Council Business Division 2
Legislative Council Secretariat
30 June 2001

Bills Committee on Chief Executive Election Bill

Membership list

Chairman	Hon IP Kwok-him, JP
Deputy Chairman	Hon Andrew WONG Wang-fat, JP
Members	Hon James TIEN Pei-chun, GBS, JP Hon David CHU Yu-lin, JP Hon Cyd HO Sau-lan Ir Dr Hon Raymond HO Chung-tai, JP Hon Martin LEE Chu-ming, SC, JP Hon Eric LI Ka-cheung, JP Hon NG Leung-sing, JP Prof Hon NG Ching-fai Hon Margaret NG Hon CHEUNG Man-kwong Hon HUI Cheung-ching, JP Hon CHAN Yuen-han, JP Dr Hon Philip WONG Yu-hong Hon Jasper TSANG Yok-sing, JP Hon Howard YOUNG, JP Dr Hon YEUNG Sum Hon Ambrose LAU Hon-chuen, GBS, JP Hon Emily LAU Wai-hing, JP Hon CHOY So-yuk Hon SZETO Wah Hon Timothy FOK Tsun-ting, SBS, JP Hon TAM Yiu-chung, GBS, JP Hon Abraham SHEK Lai-him, JP Hon Tommy CHEUNG Yu-yan, JP Hon Michael MAK Kwok-fung Hon LEUNG Fu-wah, MH, JP Dr Hon LO Wing-lok Hon LAU Ping-cheung Hon Audrey EU Yuet-mee, SC, JP (Total : 31 members)
Clerk	Mrs Percy MA
Legal Advisers	Mr Jimmy MA, JP Mr Stephen LAM
Date	3 July 2001

《行政長官選舉條例草案》委員會
Bills Committee on Chief Executive Election Bill

曾向法案委員會表達意見的團體／人士名單
List of organizations/persons who have
submitted views to the Bills Committee

團體／人士名稱	<u>Name of organization/person</u>
* 1. 九龍東區各界聯會	
* 2. 九龍社團聯會	Kowloon Federation of Associations
* 3. 九龍城區居民聯會	Kowloon City District Resident Association
* 4. 九龍婦女聯會	Kowloon Women's Organisations Federation
* 5. 大坑關注社	Tai Hang Concern Association
* 6. 工聯會社會政策委員會	The H.K. Federation of Trade Unions, Social Policy Committee
* 7. 中山大學法律系香港同學會	Zhongshan University Law Faculty Hong Kong Students Association
* 8. 文康服務中心	Cultural and Recreational Services Centre
* 9. 牛頭角社區協進會	Ngau Tau Kok Community Affairs Association
* 10. 汕尾市海陸豐同鄉會有限公司	Shan Wei City Hai Lu Feng Clansmen Association Ltd.
* 11. 西貢文化中心	Sai Kung Cultural Centre
* 12. 坊眾社會服務中心	Fong Chung Social Service Centre Limited
* 13. 汽車交通運輸業總工會	Motor Transport Workers General Union

* 14. 東九龍居民委員會	East Kowloon District Residents' Committee
15. 東區協進社	The Society for the Coordination & Promotion of Eastern District
* 16. 油尖旺社團聯會	Yau Tsim Mong Federation of Association
* 17. 社會民主論壇	Social Democratic Forum
18. 政府人員協會	Government Employees Association
* 19. 香港人權監察	Hong Kong Human Rights Monitor
* 20. 香港中文大學學生會	The Chinese University of Hong Kong Student Union
* 21. 香港中西區婦女會	Hong Kong Central and Western District Woman Association
* 22. 香港中華出入口商會	The Hong Kong Chinese Importers' & Exporters' Association
23. 香港中華總商會	The Chinese General Chamber of Commerce
24. 香港天主教正義和平委員會	Justice and Peace Commission of The Hong Kong Catholic Diocese
25. 香港印刷業工會	Hong Kong Printing Industry Workers Union
* 26. 香港各界婦女聯合協進會	Hong Kong Federation of Women
* 27. 香港行政管理文職人員協會	The Hong Kong Executive, Administrative & Clerical Staff Association
* 28. 香港佛山工商聯會有限公司	Hong Kong Foshan Trader Association Ltd.
* 29. 香港青年協進會	Hong Kong Youths Unified Association
* 30. 香港青年會	
* 31. 香港南區各界聯會	The Hong Kong Southern District Community Association Ltd.
* 32. 香港南區聯盟	The Hong Kong Southern District Alliance

* 33. 香港建造業總工會	The Hong Kong Construction Industry Employees General Union
34. 香港洋務工會	Hong Kong Union of Chinese Workers in Western Style Employment
* 35. 香港島各界聯合會	The Hong Kong Island Federation
36. 香港海員工會	Hong Kong Seamen's Union
* 37. 香港國際投資總商會	Hong Kong Association of International Investment
* 38. 香港婦女發展聯會	Hong Kong Women Development Association
* 39. 香港教育工作者聯會	Hong Kong Federation of Education Workers
* 40. 香港理工大學學生會	The Hong Kong Polytechnic University Students' Union
41. 香港造船機械鋼鐵業總工會	
* 42. 香港華人革新協會有限公司	Hong Kong Chinese Reform Association Limited
* 43. 香港廈門聯誼總會	The General Association of Xiamen (H.K.) Ltd.
44. 香港搬運裝修清潔總工會	Hong Kong Transportation, Decoration & Cleaning Workers General Union
45. 香港嘉應商會有限公司	Ka Ying Chow Commercial Association Limited
* 46. 香港漁民互助社	Hong Kong Fishermen's Association
* 47. 香港漁民團體聯席會議	Joint Committee of Hong Kong Fisherman's Organizations
* 48. 香港福建社團聯會	Hong Kong Federation of Fujian Associations
* 49. 香港廣東社團總會	Federation of Hong Kong Guangdong Community Organisations Ltd.

* 50. 香港衛生護理專業人員協會	The Association of Hong Kong Health Care Professionals
* 51. 香港福建體育會	Fukien Athletic Club Ltd.
* 52. 旅港福建商會	Fukien Chamber of Commerce
* 53. 海港運輸業總工會	Harbour Transportation Workers General Union
54. 酒店及餐飲從業員協會	Hotels, Food & Beverage Employees Association
* 55. 深水埗居民聯會	Sham Shui Po Residents Association
56. 港九五金工業總工會	Hong Kong and Kowloon Metal Industry Workers General Union
* 57. 港九新界販商社團聯合會	Federation of Hong Kong Kowloon New Territories Hawker Associations
* 58. 華富服務中心	Wah Fu Services Centre
59. 飲食業潮粵籍職工會	Catering Trade Chiuchow and Cantonese Workers Union
60. 飲食業職工總會	Eating Establishment Employees General Union
* 61. 新界社團聯會	New Territories Association of Societies
* 62. 新界青年聯會	Federation of New Territories Youth
* 63. 葵青青年團	
64. 筲箕灣柴灣坊眾會	Shauiwan and Chaiwan Residents Fraternal Association
* 65. 福州十邑旅港同鄉會有限公司	The Foochow Association Limited
66. 製衣業職工會	Garment-Making Trade Workers Union
67. 雞鴨業職工會	Poultry Trade Workers Union

68. 鰂魚涌居民協會	Quarry Bay Residents' Association
69. 一名市民	
* 70. 匡增意先生	
* 71. 吳民光先生	
72. 林淑芬女士	Ms LAM Suk-fun
* 73. 許葆真女士	Ms Janet HUI Po-chun
* 74. 麥正衡先生	Mr MAK Tsing-hang, John
* 75. 曾健成先生	
* 76. 楊佩芬小姐及朱潔儀小姐	
77. 選舉委員會勞工界別委員陳榮宗先生	
* 78. 董惠明先生	
* 79. 黎榮耀先生	Mr LAI Wing-yiu
* 80. 關康全先生	Mr KWAN Hong-chun

* 此等團體／人士曾出席法案委員會的會議
Organizations/persons who have attended meetings of the Bills Committee