

立法會
Legislative Council

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**Bills Committee on Chief Executive Election (Amendment)
(Term of Office of the Chief Executive) Bill**

Background brief prepared by the Legislative Council Secretariat

Election of a new Chief Executive

Purpose

This paper provides a summary of the major concerns and views expressed by Members of the Legislative Council (LegCo) on the election of a new Chief Executive (CE).

Background

2. On 10 March 2005, Mr TUNG Chee-kwa tendered to the Central People's Government his resignation from the office of CE.
3. On 12 March 2005, a press conference was held by Mr Donald TSANG, Acting CE, to announce the approval of Mr TUNG's resignation by the State Council earlier on that day. Acting CE also announced the election of a new CE would be conducted on 10 July 2005, in accordance with section 10(2) of the Chief Executive Election Ordinance (CEEEO) (Cap. 569). On the basis of the advice of the Secretary for Justice (SJ) which was accepted by the Executive Council, the new CE would serve a term of two years to complete Mr TUNG's term of office.
4. On 15 March 2005, the House Committee held a special meeting to discuss the constitutional issues and legal issues arising from the vacancy in the office of the CE, and the related policies, measures and arrangements.
5. At the Council meeting on 16 March 2005, Hon LEE Wing-tat moved the following motion for debate –

“That this Council do now adjourn for the purpose of enabling Members to debate the following issue : All the constitutional and legal issues arising from the office of the Chief Executive having become vacant, and related policies, measures and arrangements.”

6. On 21 March 2005, the Administration briefed the Panel on Constitutional Affairs on the timetable for the election of a new CE, and the amendments to CEEO to deal with the case of the CE's office falling vacant before the term expires.

7. On 6 April 2005, the Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill was introduced into LegCo. The Bill seeks to amend CEEO to provide that the term of office of a CE who fills a vacancy in the office of the CE that arises otherwise than due to expiry of term of office shall last until such expiry.

8. At the Council meeting on 6 April 2005, the Chief Secretary for Administration (CS) gave a statement concerning the term of office of the new CE. CS advised Members that the Government had decided to submit a report to the State Council, proposing the State Council make a request to the Standing Committee on National People's Congress (NPCSC) to interpret, at their meeting to be held at the end of April, Article 53 of the Basic Law (BL 53) concerning the term of office of the new CE. The report was submitted to the State Council on the same day.

9. At the same Council meeting, Hon Albert HO moved the following motion for debate –

“That this Council do now adjourn for the purpose of debating the following issue: The Chief Executive's Office will submit to the State Council later today a Report, proposing that the Standing Committee of the National People's Congress interpret, at their meeting to be held at the end of April, Article 53 of the Basic Law concerning the term of office of the new Chief Executive.”

10. The Government issued a press release on 10 April 2005 to welcome the decision of the State Council to adopt the report and the recommendation submitted by the Acting CE, and to request NPCSC to make an interpretation of BL 53(2) regarding the term of office of the new CE.

11. The major concerns and views expressed by Members on the election of a new CE are summarised below.

Term of office of a new CE

Basic law (BL) and statutory provisions

12. The relevant BL and statutory provisions are –

BL 45(3)

"The specific method for selecting the Chief Executive is prescribed in Annex I : 'Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region'."

BL 46

"The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. He or she may serve for not more than two consecutive terms."

BL 53 (2)

"In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law."

Section 3 of CEEO

"The term of office of the Chief Executive shall be five years; and commence on the date on which he assumes office being the date specified for this purpose by the Central People's Government in the instrument of appointment."

The opinion of SJ

13. SJ has advised Members that after thorough study and deliberation, the Government has adjusted its understanding of the provisions of BL, and agrees that the term of office of a CE returned in a by-election is not five years but is the remainder of the term of the preceding CE. In reaching this view, SJ has taken into account the legal opinions in the Mainland, the terms of important offices in state organs, the original intent underlying the design of the BL in respect of the CE election system, the records of the Basic Law Drafting Committee relating to BL 53, and the Decision of NPCSC on 26 April 2004 on interpreting the provisions of the BL on the election of CE in 2007 and formation of LegCo in 2008. The opinion of SJ is in Annex A to the LegCo Brief on the Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill (and also issued to Members vide LC Paper No. CB(2)1077/04-05 dated 14 March 2005 for the special House Committee meeting on 15 March 2005).

14. At the adjournment debate held by the Council on 16 March 2005, the Secretary for Constitutional Affairs advised Members that SJ's opinion is supported by the Legislative Affairs Commission of NPCSC.

15. At the special House Committee meeting on 15 March 2005, SJ undertook to provide the relevant materials which she had relied upon in arriving at her opinion on the term of office of the new CE. The materials which include the background material on the drafting of BL 53, one letter from Professor XU Chongde and two letters from Professor LIAN Xisheng were issued to Members vide LC Paper No. CB(2)1156/04-05 dated 29 March 2005.

Concerns and views expressed by Members

16. Members have expressed divided views on whether the term of office of a new CE to be elected on 10 July 2005 should be five years or should expire on 30 June 2007.

17. Members who do not accept SJ's opinion have pointed out that during the deliberation of the Chief Executive Election Bill in 2001 and in response to a LegCo question raised in the Council on 5 May 2004, the position of the Administration was that under BL, the five-year term applied to any CE, without exception, and any amendment to CEEO which would provide for a term of office other than that of five years was not consistent with BL. They have expressed regret that the Government has made a U-turn on its previous position.

18. These Members hold the view that under the common law rules of statutory interpretation, the term of a CE returned in an election is five years. They point out that the language of BL 46 is clear and unambiguous, and the Government should not distort BL for the sake of political expediency. They question how one could determine the legislative intent of the relevant provisions of BL on the basis of the views of a few Mainland legal experts, the recollection of those who took part in the drafting of BL, and some relevant historical records supplied by them. They have also expressed concern whether it is appropriate to apply the rules of statutory interpretation of the Mainland in considering the issue. These Members consider that the change in the Government's stance is a blatant violation of the rule of law, and undermines the credibility of the common law tradition and the "one country, two systems" principle.

19. Some Members are of the view that a new CE elected to fill a vacancy arising prematurely should only serve for the residue of the predecessor's term. Some other Members consider that although BL is silent on the term of office of a CE returned under such circumstances, the term of office of the new CE should expire on 30 June 2007, taking into account the original design of the Election Committee (EC). They also consider that this approach is in the interest of Hong Kong as the progress of constitutional development, i.e. the possibility of having a more representative electoral system for electing the CE in 2007, which is contemplated in BL, might be frustrated if the term of office of the next CE is five years.

20. Some Members have cautioned that the Administration's proposal to amend CEEO (i.e. to provide that the term of office of a new CE elected pursuant to BL 53 should be the remainder of the term of the preceding CE) might be subject to judicial review on the ground that it is inconsistent with BL. They have requested the Administration to consider whether an interpretation of BL to clarify the legislative intent by NPCSC is necessary, as this will provide a legal basis against any legal challenge in the courts and ensure the timely election and appointment of a new CE within the six months stipulated in BL 53.

21. Some other Members do not agree that resorting to interpretation by NPCSC could resolve the issue. They consider that the only option to deal with the present controversy is to amend BL, otherwise, there is no legal basis for amending CEEO as proposed by the Administration. These Members maintain the view that any amendment to local legislation to provide for a term of office other than that of five years is inconsistent with BL 11 and 46, and would be open to challenge in court.

22. At its meeting on 21 March 2005, the Panel on Constitutional Affairs passed a motion urging the Government to give an account to LegCo before it requests NPCSC for an interpretation on the term of office of CE.

Electoral arrangements

23. Annex I to BL stipulates that the CE shall be elected by EC, and the term of office of the EC shall be five years. Under the provisions of CEEO, the term of office of the current EC will expire on 13 July 2005. Since the polling date to elect the new CE is 10 July 2005, the current EC will be responsible for electing the new CE.

24. On 4 April 2005, the Chairman of the Electoral Affairs Commission announced at a press conference that there were 33 vacancies in 17 subsectors of EC. The six vacancies in the Religious Subsector will be filled by supplementary nominations of EC members by the religious bodies concerned. The by-elections of the remaining 27 vacancies in the other 16 EC subsectors will be held on 1 May 2005. A paper provided by the Administration setting out the 33 vacancies in the EC and the major steps leading up to the CE election polling date on 10 July 2005 was issued to Members vide LC Paper No. CB(2)1077/04-05 dated 14 March 2004 for the special House Committee meeting on 15 March 2005.

25. Given that the term of the current EC will expire on 13 July 2005, some Members consider that the Administration should establish a new EC to succeed the current EC. The succeeding EC would be able to function immediately in the event that the CE election could not be held before expiry of the term of the current EC due to unforeseen circumstances, such as inclement weather.

26. The Administration has explained that under section 21 of CEEO and section 61 of the Electoral Procedure (Chief Executive Election) Regulation, the Electoral Affairs Commission may direct the postponement or adjournment of polling or counting of votes if the Commission is of the opinion that the poll or counting is likely to be obstructed, disrupted, undermined or seriously affected by, for example, a typhoon. Under section 65 of the Regulation, the Commission shall appoint a date within the prescribed period after the date of the postponed or adjourned poll or counting for resumption of postponed or adjourned polling or counting.

27. The Administration has also explained that the current EC is responsible for electing the second term CE whose term of office will expire on 30 June 2007. A new EC should be established in early 2007 for the purpose of electing the third term CE in 2007. The Administration would not make a rash decision to establish a new EC before 2007 as this might affect the current review on the method for selecting the third term CE in 2007. In the unlikely event that a new EC is required to be established for the purpose of electing a CE to fill the office left vacant by the second term CE, consideration would be given to limiting its term of office.

28. In relation to electoral arrangements, Members have also expressed concerns and views on the following related issues –

- (a) the term of office of the new CE elected on 10 July 2005, i.e. whether it should be seven years (i.e. the remainder of Mr TUNG's term plus a five-year term) or 12 years (i.e. the remainder of Mr TUNG's term plus two consecutive five-year terms), and whether the same arrangement would apply to future office holders;
- (b) the circumstances under which a by-election will or will not be held to fill a vacancy occurs in the office of CE, e.g. whether a by-election will be held, say, seven months before the term expires;
- (c) whether the number of subscribers required for nominating candidates for the office of CE should be capped so that more potential candidates could contest the election; and
- (d) whether the existing requirement for a winning candidate who belongs to a political party to resign from the political party should be abolished.

Relevant papers

29. A list of relevant papers which have previously been issued to Members, with their hyperlinks at the LegCo website, is in the **Appendix**.

Election of a new Chief Executive

List of relevant papers

Papers for special meeting of the House Committee on 15 March 2005

LC Paper No. CB(2)1066/04-05 – Background brief prepared by the Legislative Council Secretariat on "Election of the Chief Executive and related issues"

[<http://www.legco.gov.hk/yr04-05/english/hc/papers/shc0315cb2-1066e.pdf>]

FS11/04-05 – Fact sheet on legislative provisions in relation to election of the Chief Executive prepared by Research and Library Services Division of Legislative Council Secretariat

[<http://www.legco.gov.hk/yr04-05/english/sec/library/0405fs11e.pdf>]

LC Paper No. CB(2)1077/04-05(01) – Paper provided by the Administration on "Election of a new Chief Executive Pursuant to Article 53 of the Basic Law: Timetable"

[<http://www.legco.gov.hk/yr04-05/english/hc/papers/shc0315cb2-1077-1e.pdf>]

LC Paper No. CB(2)1077/04-05(02) – Opening statement of the Acting Chief Executive at a press conference held at the Central Government Offices on 12 March 2005

[<http://www.legco.gov.hk/yr04-05/english/hc/papers/shc0315cb2-1077-2e.pdf>]

LC Paper No. CB(2)1077/04-05(03) – Statement by the Secretary for Justice on "The Term of the New Chief Executive" at a press conference held at the Central Government Offices on 12 March 2005

[<http://www.legco.gov.hk/yr04-05/english/hc/papers/shc0315cb2-1077-3e.pdf>]

LC Paper No. CB(2)1077/04-05(04) – Statement by the Secretary for Constitutional Affairs on "Election for a new Chief Executive Pursuant to Article 53 of the Basic Law: Electoral Arrangements" at a press conference held at the Central Government Offices on 12 March 2005

[<http://www.legco.gov.hk/yr04-05/english/hc/papers/shc0315cb2-1077-4e.pdf>]

LC Paper No. CB(2)1156/04-05 – Background material on the drafting of Article 53 of the Basic Law and three letters from Professor XU Chongde and Professor LIAN Xisheng provided by the Administration

[<http://www.legco.gov.hk/yr04-05/english/hc/papers/shc0315background-index-e.pdf>]

LC Paper No. CB(2)1202/04-05 – Verbatim record of the proceedings of the special meeting on 15 March 2005

[<http://www.legco.gov.hk/yr04-05/chinese/hc/minutes/hc050315.pdf>]

Paper for meeting of Panel on Constitutional Affairs on 21 March 2005

LC Paper No. CB(2)1121/04-05(01) – Paper provided by the Administration on "Election of a New Chief Executive Pursuant to Article 53 of the Basic Law : Amendments to the Chief Executive Election Ordinance (Cap. 569)"

[<http://www.legco.gov.hk/yr04-05/english/panels/ca/papers/ca0321cb2-1121-1e.pdf>]

Papers for the Council meeting on 6 April 2005

Statement made by the Chief Secretary for the Administration concerning the term of office of the new Chief Executive

Report to the State Council concerning the submission of a request to the Standing Committee of the National People's Congress regarding the interpretation of Article 53(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China