

立法會
Legislative Council

LC Paper No. LS46/04-05

**Paper for the House Committee Meeting
on 8 April 2005**

**Legal Service Division Report on
Chief Executive Election (Amendment)
(Term of Office of the Chief Executive) Bill**

I. SUMMARY

1. **Object of the Bill** To provide that the Chief Executive (CE) who fills a vacancy arising from a CE not finishing his or her term of office shall serve the remaining term.
2. **Comments**
 - (a) The Bill is intended to give a clear legal basis to the appointment term of the new CE in light of the latest opinions of the Secretary for Justice on CE's term of office.
 - (b) There is serious division of views on the interpretation of the relevant Basic Law provisions. Enactment of local legislation alone may not be sufficient in resolving the issue. For a more definitive solution, resort to other mechanisms under the Basic Law might arise.
 - (c) The Administration has now decided to seek an interpretation by the Standing Committee of the National People's Congress. Its terms and effect on the Bill remain to be seen.
 - (d) The single amendment proposed by the Bill may have implications on the operation of other provisions in the principal ordinance.
3. **Consultation with LegCo** The issue about the term of office of a new CE was discussed with the Administration at a special meeting of the House Committee on 15 March 2005 and the meeting of the Panel on Constitutional Affairs on 21 March 2005. It was also the subject of an adjournment debate in the Council on 16 March 2005. Members' views were divided.
4. **Conclusion** In view of the importance of the Bill, Members may wish to set up a Bills Committee.

II. REPORT

Object of the Bill

To provide that the Chief Executive (CE) who fills a vacancy arising from a Chief Executive not finishing his or her term of office shall serve the remaining term.

LegCo Brief Reference

2. CAB C5/1/3 dated 22 March 2005 and issued by the Constitutional Affairs Bureau.

Date of First Reading

3. 6 April 2005.

Comments

4. The background to the Bill is well known. Following approval of the resignation of the CE on 12 March 2005, the CE office became vacant on the same day as declared under Government Notice (E.) 11 of 2005 gazetted on 13 March 2005. Public attention has since been focused on matters relating to the future CE. These include the applicable term of office. As the incoming CE will succeed a predecessor whose full term of office has not expired, the question arises as to whether according to the proper interpretation of the Basic Law, he or she should serve the remaining term or a full 5 year term anew.

5. Section 3(1) of the Chief Executive Election Ordinance (Cap. 569) (the Ordinance), reflecting Article 46 of the Basic Law, provides that the term of office of the CE shall be 5 years. No express exception is made to this provision in the Basic Law. In response to a Member's question in LegCo on 5 May 2004, the Secretary for Constitutional Affairs advised that "the term of office of the Chief Executive, as prescribed in the Basic Law, is five years. This provision applies to any Chief Executive. There is no exception."

6. At a press conference on 12 March 2005, the Acting CE announced that "[T]he Secretary for Justice has advised that, under Article 53 of the Basic Law, the term of office of the new Chief Executive should be the remainder of the original Chief Executive term. The Executive Council accepts that advice."

7. According to paragraph 6 of the LegCo Brief, in the light of the Secretary for Justice's latest opinions and in order to give a clear legal basis to the appointment term of the new CE, the Administration proposes to amend section 3 of the Ordinance to explicitly provide that when the office of the CE has become vacant under section 4(b) (death of CE) or (c) (removal of CE) of the Ordinance, the term of office of the new CE to be elected shall be the remainder of the term of the preceding CE.

8. As such, the Bill consists of only one substantive amendment to the Ordinance, which is an addition of a new subsection (1A) to section 3 as follows –

“(1A) Where -

- (a) a vacancy in the office of the Chief Executive arises under section 4(b) or (c) during the term of office of a Chief Executive; and
 - (b) a person is appointed by the Central People's Government as the Chief Executive to fill the vacancy before the expiry of the term of office referred to in paragraph (a),
- the term of office of the Chief Executive referred to in paragraph (b) shall expire upon the expiry of the term of office referred to in paragraph (a).”

9. There is serious division of views on the interpretation of the relevant provisions of the Basic Law.¹ It is doubtful whether any attempt to clarify the legal position by legislation enacted in the Hong Kong Special Administrative Region alone would be sufficient, because such legislation may still be considered to be in contravention with the Basic Law.

10. The central question that would be posed by the Bill relates to the proper interpretation of the relevant provisions in the Basic Law. The main controversy seems to have revolved around the differences in application of the rules of interpretation in ascertaining the legislative intention of those provisions. Any such disagreement may be resolved by the courts. In so far that the matter involves the Basic Law, the local courts are required to exercise its function subject to Article 158 of the Basic Law. Mechanisms also exist in the Basic Law for the Standing Committee of the National People's Congress (NPCSC) to interpret and the National People's Congress to amend the Basic Law, if and as appropriate.

¹ See for example Secretary for Justice's statement on "The Term of the New Chief Executive" at the press conference on 12 March 2005 (CB(2)1077/04-05(03)), speech delivered by her at the special House Committee meeting on 15 March 2005 (CB(2)1136/04-05), speeches at LegCo adjournment debate on 16 March 2005, statement of the Hong Kong Bar Association dated 17 March 2005 (http://www.hkba.org/whatsnew/submission-position-papers/2005/20050317_e.pdf), press release of the Law Society of Hong Kong on 18 March 2005 (http://www.hklawsoc.org.hk/pub_e/news/press/20050318.asp), response of the Department of Justice to The Hong Kong Bar Association's statement of 17 March 2005 (<http://www.doj.gov.hk/eng/public/pdf/barasoe.pdf>) and response of the Department of Justice to The Law Society's statement of 18 March 2005 (<http://www.doj.gov.hk/eng/public/pdf/lawsoc.pdf>).

11. Apart from the interpretation question, the amendment proposed by the Bill may have implications on the operation of other provisions in the Ordinance as follows :-

- (a) would the meaning of “term” as used in “2 consecutive terms” in section 3(2) include part of a term such as the remainder of the term of a CE who leaves office pre-maturely;
- (b) would the requirement under section 6 that an election be held to fill every vacancy without exception be affected in that the remainder of the term may be too short for an election to fill the vacancy to be practicable;
- (c) would section 11(3)(b) be similarly affected where the remainder of the original term is too short to allow a further polling.

12. According to the LegCo Brief CAB C5/6 on “Election of a new Chief Executive Pursuant to Article 53 of the Basic Law: Timetable” dated 12 March 2005 and issued by the Constitutional Affairs Bureau, the polling date for the new CE election will be 10 July 2005. The Electoral Affairs Commission will also take a number of statutory steps to fill the vacancies in the Election Committee. The polling date for filling the 27 vacancies in 16 subsectors (excluding the religious subsector where vacancies are to be filled by nominations) is expected to be in early May 2005.

NPCSC Interpretation

13. On 6 April 2005, the Chief Secretary for the Administration made a statement at LegCo, informing Members of the Administration’s decision to submit a Report to the State Council, proposing that the State Council make a request to NPCSC to 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 CE. On the same day, LegCo held an adjournment debate on the Administration’s request for an NPCSC interpretation. It remains to be seen, if an interpretation is made by NPCSC, what will be the terms of the interpretation and its effect on the Bill.

Consultation with LegCo

14. The issue about the term of office of a new CE was discussed at a special meeting of the House Committee on 15 March 2005 and at the meeting of the Panel on Constitutional Affairs (CA Panel) on 21 March 2005. It was also the subject of an adjournment debate in the Council on 16 March 2005. Members have expressed divided views on the issue on those occasions.

15. Some Members maintain that the term of an elected CE should be five years without exception. Any amendment to local legislation to reduce its duration to the remainder of an unexpired term does not accord with the Basic Law. The reduction should require amendment of the Basic Law.

16. Some other Members consider that a CE elected to fill a vacancy arising pre-maturely should only serve the remainder of the same term. They cautioned the Administration about the possibility of a judicial review. The Administration was also asked to consider the need for an interpretation by NPCSC.

17. At the CA Panel meeting, a motion was passed urging the Administration to give an account to LegCo before it requests an NPCSC interpretation of the Basic Law on the issue.

Conclusion

18. In view of the importance of the Bill, Members may wish to set up a Bills Committee.

Prepared by

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