

# 立法會

## *Legislative Council*

LC Paper No. CB(2)1066/04-05

Ref. : CB2/PL/CA

### **Special meeting of the House Committee on 15 March 2005**

### **Background Brief prepared by the Legislative Council Secretariat**

### **Election of the Chief Executive and related issues**

#### **Purpose**

This paper provides background information and concerns raised by Members of the Legislative Council (LegCo) on the election of the Chief Executive and related issues.

#### **Method of selection of the Chief Executive**

2. Under Article 45 of the Basic Law, the Chief Executive of the Hong Kong Special Administrative Region (HKSAR) shall be selected by election or through consultations held locally and be appointed by the Central People's Government (CPG).
3. The method for selecting the Chief Executive shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. The specific method for selecting the Chief Executive is prescribed in Annex I to the Basic Law : "Method for the Selection of the Chief Executive of the HKSAR".
4. According to the Decision of the Standing Committee on National People's Congress (NPC) on 26 April 2004, the election of the third Chief Executive of the HKSAR to be held in the year 2007 shall not be by means of universal suffrage. Subject to this Decision, appropriate amendments that conform to the principle of gradual and orderly progress may be made to the specific method for selecting the third Chief Executive of the HKSAR in the year 2007 according to the provisions of the Basic Law.

5. The Fourth Report of the Constitutional Development Task Force on "Views and Proposals of Members of the Community on the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008" was published in December 2004. The consultation period of the Fourth Report will end on 31 March 2005.

### **Term of office of the Chief Executive**

6. Article 46 of the Basic Law stipulates that "the term of office of the Chief Executive of the HKSAR shall be five years. He or she may serve for not more than two consecutive terms."

7. Section 3 of the Chief Executive Election Ordinance (CEEEO) (Cap. 569) provides that "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 CPG in the instrument of appointment".

8. During the deliberation of the Bills Committee on Chief Executive Election Bill, the issue of the term of office of the Chief Executive elected to fill a vacancy in the office of the Chief Executive before the expiry of the five-year term was raised by Members. The Administration had responded that in the event that the office of the Chief Executive became vacant, a new Chief Executive should be selected within six months. The term of office of the new Chief Executive should be five years.

9. At the Council meeting on 5 May 2004, Hon Emily LAU raised a question concerning the term of office of the Chief Executive elected to fill a vacancy in the office of the Chief Executive before the expiry of a full five-year term. In reply, the Secretary for Constitutional Affairs had 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."

### **Circumstances giving rise to a vacancy in office of the Chief Executive**

#### Basic Law provisions

10. Under Article 52 of the Basic Law, the Chief Executive must resign under any of the following circumstances –

- (a) when he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;
- (b) when, after LegCo is dissolved because he or she twice refuses to sign a bill passed by it, the new LegCo again passes by a two-thirds

majority of all the members the original bill in dispute, but he or she still refuses to sign it; and

- (c) when, after LegCo is dissolved because it refuses to pass a budget or any other important bill, the new LegCo still refuses to pass the original bill in dispute.

11. Article 53 of the Basic Law stipulates that –

"If the Chief Executive of the HKSAR is not able to discharge his or her duties for a short period, such duties shall temporarily be assumed by the Administrative Secretary, Financial Secretary or Secretary of Justice in this order of precedence.

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. During the period of vacancy, his or her duties shall be assumed according to the provisions of the preceding paragraph."

Provisions in CEEEO

12. Section 4 of CEEEO provides that the office of the Chief Executive becomes vacant –

- (a) on the expiry of the term of office of the Chief Executive;
- (b) if the Chief Executive dies; or
- (c) if the CPG removes the Chief Executive in accordance with the Basic Law.

13. The original proposed section 4(c) and the present formulation had given rise to much debate during the deliberation of the Bills Committee on the Chief Executive Election Bill and the resumption of the Second Reading debate on the Bill. The position of the Administration is that the provision is not an empowering provision and CPG's power to remove the Chief Executive flows from the Basic Law and not the Bill. The Administration considers that it is necessary to set out in the Bill the various circumstances under which a vacancy of the Chief Executive would arise in order to tie in with other provisions in the Bill on the conduct of the election of the Chief Executive. The declaration of a vacancy is the necessary trigger for the holding of an election of a new Chief Executive.

### **Polling date**

14. During the deliberation of the Bills Committee on Chief Executive Election Bill, Members expressed the view that the fixing of a polling date for an election to return a candidate for appointment to fill the vacancy in the office of the Chief Executive should not give an incumbent Chief Executive seeking re-election an added advantage and the election should be held on a Sunday. The Administration had proposed the present formulation which allows the fixing of the polling date to be calculated by counting backwards from the date on which the term of a serving Chief Executive expired.

15. Section 10 of CEEO provides that the polling date will fall on –

- (a) the first Sunday on or immediately before the date 95 days before the office of the Chief Executive 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 the Chief Executive falls vacant in the event of vacancy in the office of the Chief Executive.

### **Term of office of the Election Committee**

16. Annex I to the Basic Law provides that the Chief Executive shall be elected by a broadly representative Election Committee. The term of office of the Election Committee shall be five years.

17. Section 7 of CEEO stipulates that the Chief Executive shall be elected by the Election Committee as prescribed in Annex I to the Basic Law. Section 8 provides that the Election Committee constituted on 14 July 2000 under the Legislative Council Ordinance (Cap. 542) should be continued and regarded as having been constituted as the first Election Committee under CEEO. Members of the Election Committee constituted on 14 July 2000 shall be members of the first Election Committee constituted under CEEO. Section 9 further provides that the term of office of the Election Committee shall be five years commencing on the date on which it is constituted.

18. The term of office of the existing Election Committee will expire on 13 July 2005.

### **Vacancy in membership of the Election Committee**

19. Annex I to the Basic Law provides that the Election Committee for selecting the Chief Executive shall be composed of 800 members.

20. Given the small electorate of the Chief Executive election, the Bills Committee on the Chief Executive Election Bill considered that the number of Election Committee members should be as close to 800 as possible and requested the Administration to address the problem of overlapping membership which might arise in any one of the following circumstances -

- (a) a person who was concurrently a LegCo Member and a Hong Kong deputy to the NPC; or
- (b) a person who first acquired his Election Committee membership through election by the relevant subsector or nomination by the religious subsector, and subsequently became an ex-officio member by virtue of his election to the LegCo and/or NPC office.

21. The Administration had explained that little could be done about overlapping membership arising from the situation described in paragraph 20(a) above as the two categories of membership were ex-officio in nature. The Administration had explained that the overlapping seats could not be transferred 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. Although such person's name might appear twice in the list of membership of the Election Committee, he is entitled to only one vote at the election, as stipulated in section 25(3) of CEEO.

22. As regards the situation described in paragraph 20(b) above, a mechanism has been put in place to provide that once an elected or nominated Election Committee member becomes an ex-officio member, he would be deemed to have resigned from his membership in the elected or nominated subsector (section 3, Part 2 of the Schedule to CEEO refers). Any vacancy would be filled by way of an Election Committee subsector by-election or supplementary nomination.

### **Winning candidate to declare he is not a member of political party**

23. CEEO was enacted in 2001 to provide the legal framework for conducting the 2002 Chief Executive election. Under section 31 of CEEO, members of political parties are allowed to run in the election. However, when a member of a political party is elected, he will 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.

24. Some Members have requested the Administration to review the requirement for a winning candidate who belongs to a political party to resign from the political party on a number of occasions. 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 requirement

discriminates against political parties and will retard the development of political parties.

25. The Administration has explained that in the first Chief Executive election in 1996, 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 existing requirement introduced under CEEO has been an improvement. The Basic Law lays down a blueprint for the development of the political structure which envisages changes over time, and the question of the Chief Executive's membership of a political party will be reconsidered in the light of the prevailing circumstances.

### **Election expense limit**

26. The Maximum Amount of Election Expenses (Chief Executive Election) Regulation prescribes the maximum amount of election expenses at \$9.5 million for an election to elect the Chief Executive. The Regulation applied to the Chief Executive election in 2002.

27. When the proposed election expense limit was discussed by the Subcommittee on Subsidiary Legislation Relating to Chief Executive Election, Members had mixed views. Some Members considered that it was not necessary to prescribe an election expense limit at all. Some Members were opposed to the proposed limit. They were of the view that an exceedingly high limit could deter people with insufficient means from standing for election and could also affect the chance of a candidate getting elected. They also pointed out that the election expense limit for the Chief Executive election should be set having regard to the election expenses incurred by the candidates at the first election. Some Members considered the limit reasonable as it had taken into account the important constitutional role of the Chief Executive as the head of the HKSAR Government and the need for candidates to carry out territory-wide election campaign.

### **Principal officials under the Accountability System: term of office and eligibility for nomination as a candidate at the Chief Executive election**

28. In his address to the Council on the Accountability System for Principal Officials on 17 April 2002, the Chief Executive had said that "the upper echelon of the Government, including the Chief Secretary for Administration, Financial Secretary, Secretary for Justice and all Directors of Bureau, will be covered by the Accountability System. These officials will be appointed on contract terms as Principal officials under the Accountability System. They may serve for a term of five years, but not exceeding that of the Chief Executive who nominates them."

29. Section 14 of CEEO stipulates that certain persons are disqualified from being nominated as a candidate, e.g. a prescribed public officer. Under section 2 on "Interpretation", "prescribed public officer" means, inter alia, any person holding an office, whether permanent or temporary, in a Government department or bureau and employed in the department or bureau.

30. The Code for Principal Officials under the Accountability System published in the Gazette on 28 June 2002 stipulates that principal officials are prescribed public officers defined in CEEO, and they are disqualified from being nominated as a candidate at an election of the Chief Executive.

### **Executive Council**

31. Article 55 of the Basic Law stipulates that "Members of the Executive Council of the HKSAR shall be appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures. Their appointment or removal shall be decided by the Chief Executive. The term of office of members of the Executive Council shall not extend beyond the expiry of the term of office of the Chief Executive who appoints them."

32. With the implementation of the Accountability System for Principal Officials from 1 July 2002, the membership of the Executive Council now comprises 14 principal officials appointed under the Accountability System and seven non-officials.

### **Other issues relating to the Chief Executive**

33. In the past years, Members have raised concerns on the following issues relating to the Chief Executive –

- (a) application of anti-bribery legislation to the Chief Executive;
- (b) restriction on activities of former holders of the office of the Chief Executive;
- (c) review of the remuneration for the third term Chief Executive; and
- (d) trusts set up to prevent conflict of interest.

### **Application of anti-bribery legislation to the Chief Executive**

34. Some Members raised concerns 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 2002 Chief Executive

election. The position of the Administration is that ECICO is already applicable to the Chief Executive election, and that the Chief Executive is subject to the control of the common law offence of bribery.

35. The issue of the application of provisions of POBO to the Chief Executive has been followed up by the Panel on Constitutional Affairs since early 1999. While the Administration has agreed to devise a legislative proposal for applying certain provisions of POBO to the Chief Executive, little progress has been achieved. The Administration has recently advised the Panel that it is still working on a detailed proposal and would consult the Panel when it is ready. The Panel has requested the Administration to report progress at its meeting on 21 March 2005.

#### Restriction on activities of former holders of the office of the Chief Executive

36. This issue was first raised by the Panel on Constitutional Affairs in March 2001. The Administration advised the Panel that there was no restriction imposed on commercial or political activities of former holders of the Chief Executive in and outside the HKSAR under the present legislation. The Administration was studying the issue and in the process would look into existing arrangements applicable to senior government officials and overseas practices.

37. In March 2002, the Panel considered the Research Report on "Restrictions on Activities of Former Heads of Government and Former Senior Members of Government" prepared by the LegCo Secretariat and received views from academics on the introduction of an appropriate monitoring mechanism for regulating post-office activities of the Chief Executive and principal officials so as to avoid possible conflict of interest. It was the view held by some Members and academics that any restrictions on post-office activities should be promulgated before the 2002 Chief Executive election and implementation of the Accountability System for Principal Officials.

38. The Panel has noted that the Code for the Principal Officials under the Accountability System published in the Gazette on 28 June 2002 provides that within one year after stepping down from office, principal officials should seek the advice of a committee appointed for this purpose by the Chief Executive before commencing any employment, becoming a director or a partner in any business or profession or starting any business or profession on his own account or with others. The proceedings of the committee shall be kept confidential but the advice given shall be made public.

39. The Administration had agreed to revert to the Panel on the mechanism for regulating post-office activities of the Chief Executive when it was in a position to do so. In November 2004, the Administration advised the Panel that its present priority was to deal with the methods for selecting the Chief Executive in 2007 and for forming LegCo in 2008. When the overall direction for the electoral methods for 2007 and 2008 had been set, it would deal with this issue.

### Review of the remuneration for the third term Chief Executive

40. In his address to the Council on the Accountability System for Principal Officials on 17 April 2002, the Chief Executive advised that the remuneration of the second term Chief Executive would remain basically at the present level, and would be adjusted necessarily according to the current mechanism. The Chief Executive also suggested that the remuneration package for the third term Chief Executive should be considered by an independent committee.

41. In its Twelve-month Report on Implementation of the Accountability System for Principal Officials submitted to the Panel on Constitutional Affairs in July 2003, the Administration advised Members that it would pursue and revert to LegCo, as appropriate, the review of the remuneration for the third term Chief Executive. The issue has been included in the list of outstanding issues of the Panel since then.

42. The Administration advised the Panel in November 2004 that its present priority was to deal with the methods for selecting the Chief Executive in 2007 and for forming LegCo in 2008. When the overall direction for the electoral methods for 2007 and 2008 had been set, it would deal with this issue.

### Trusts set up to prevent conflict of interest

43. At the Council meeting on 19 May 2004, Hon Emily LAU raised a question on whether trusts set up by the Chief Executive and principal officials to manage their assets should be "blind trusts", instead of "family trusts", as the trustee of a "blind trust" had to be an independent person who was not required to report to the settler and beneficiaries the details of the trust's investments and specific assets.

44. The Administration advised that the investments and interests of the Chief Executive and principal officials were made available for public inspection and subject to the scrutiny of the public, the media and LegCo. Different measures could be taken to avoid conflict of interest on the part of the Chief Executive and principal officials, and the setting up of "blind trusts" was only one way of doing so. The Administration did not consider it necessary to require the Chief Executive and principal officials to set up "blind trusts".

### **Relevant questions and motions raised/moved at Council meetings**

45. A list of the relevant questions and motions raised/moved at Council meetings is in the **Appendix**.

## List of questions and motions raised/moved at Council meetings

<u>Date of Council meeting</u>	<u>Question/Motion</u>
13 January 1999	Written question on "Inclusion of the Chief Executive in the ambit of the Prevention of Bribery Ordinance" raised by Hon Emily LAU
1 March 2000	Oral question on "Role conflict of the incumbent Chief Executive who seeks to be re-elected" raised by Hon Cyd HO
7 March 2001	Written question on "Arrangements for the holder of the office of Chief Executive after his departure from the office" raised by Hon Cyd HO
13 March 2002	Motion on "The second Chief Executive election" moved by Hon Emily LAU
10 April 2002	Written question on "Expenses of Chief Executive election" raised by Hon CHEUNG Man- kwong
21 May 2003	Motion on "Expediently implementing the election of the Chief Executive and all Members of the LegCo by universal suffrage" moved by Hon Albert HO
12 November 2003	Motion on "Election of the Chief Executive and all Members of the LegCo by universal suffrage" moved by Hon James TO
5 May 2004	Written question on "Term of office of the Chief Executive elected to fill a casual vacancy" raised by Hon Emily LAU
19 May 2004	Oral question on "Management of CE's and principal officials' assets by private trusts" raised by Hon Emily LAU
2 February 2005	Motion on "Monitoring the post-retirement employment of the CE, principal officials under the accountability system and civil servants at directorate level with private-sector organizations" moved by Hon CHEUNG Man- kwong