

立法會  
*Legislative Council*

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**Report of Panel on Constitutional Affairs  
for submission to the Legislative Council**

**Purpose**

The report gives an account of the work of the Panel on Constitutional Affairs during the 2004-2005 Legislative Council (LegCo) session. It will be tabled at the Council meeting on 6 July 2005 in accordance with Rule 77(14) of the Rules of Procedure of the Council.

**The Panel**

2. The Panel was formed by a resolution passed by the Council on 8 July 1998 and as amended on 20 December 2000 and 9 October 2002 for the purpose of monitoring and examining Government policies and issues of public concern relating to constitutional affairs. The terms of reference of the Panel are in **Appendix I**.
3. The Panel comprises 58 members, with Dr Hon LUI Ming-wah and Hon Jasper TSANG Yok-sing elected as Chairman and Deputy Chairman of the Panel respectively. The membership of the Panel is in **Appendix II**.

**Major work**

Review on constitutional development after 2007

*Work progress of the Constitutional Development Task Force (Task Force)*

4. During the session, the Panel closely monitored the progress of the review of constitutional development after 2007 being conducted by the Task Force and discussed the relevant issues at a number of meetings.
5. The Third Report of the Task Force was published on 11 May 2004 and its consultation period ended on 15 October 2004. The Third Report set out the nine factors which should be considered in amending the methods for selecting the Chief Executive (CE) in 2007 and for forming LegCo in 2008 (the electoral methods), and the areas in respect of the electoral methods which could be considered for

amendment. On 18 October 2004, the Panel was advised that 12 discussion sessions on the Third Report were held and attended by some 870 participants from different sectors of the community. Based on the views collected at these discussion sessions, the Task Force would draw up more specific proposals for further consultation.

6. Some members considered that the views collected were not representative, and that a referendum was the best way to gauge whether a proposal was widely accepted by the community. Dr Hon Fernando CHEUNG moved a motion urging the Administration to conduct a referendum on the constitutional reform proposals for 2007 and 2008, including direct election by universal suffrage. The Administration considered that the motion was inappropriate, inconsistent with the established legal procedures, impractical and misleading to the public. It would not consider any suggestion on constitutional development that departed from the Basic Law and the decision of the Standing Committee on National People's Congress (NPCSC) on 26 April 2004 concerning the electoral methods in 2007 and 2008. The motion was put to vote and negated by the Panel.

7. The Fourth Report of the Task Force was published on 15 December 2004 for public consultation until end of March 2005, and the consultation period was subsequently extended to end of May 2005. The Administration explained that the Fourth Report had summarised the spectrum of views received on the Third Report in respect of how the electoral methods in 2007 and 2008 could be amended to facilitate further consultation in the hope that a mainstream proposal could be formulated.

8. Some members expressed disappointment that the Fourth Report had not addressed the public's aspiration for universal suffrage in 2007 and 2008, or provided a roadmap for constitutional development for the purpose of achieving the ultimate aim of universal suffrage.

9. At the Panel meeting on 20 December 2004, Hon KWOK Ka-ki moved a motion urging the Administration to carry out an extensive and in-depth opinion poll, and the Task Force to consult all the people of Hong Kong on the specific proposals set out in the Fourth Report, including setting a timetable for universal suffrage. The motion was put to vote and negated by the Panel.

#### *Role and development of political parties*

10. The Panel held a discussion on the need for introducing a political party law. Some members considered that such a law would restrict rather than encourage political party development. Members made various suggestions to facilitate the development of political parties. These included providing financial assistance to political parties based on the number of votes they received in an election, enhancing the financial transparency of political parties, granting tax exemption for political parties, enhancing participation of members of political parties in advisory and statutory bodies, and abolishing the statutory requirement that the CE-elect must relinquish his political affiliation.

11. The Administration's position was that the introduction of a political party law would hinder the development of political parties. In considering the electoral methods for 2007 and 2008, the Administration would study ways to make room for political parties to participate in public affairs. The Administration would also explore other financial schemes to facilitate political party development. Subject to the outcome of the review of the financial assistance scheme provided to candidates for the 2004 LegCo election, the Administration would be prepared to listen to views on whether similar arrangements would apply to future District Council elections, in the context of the review of District Councils which would be conducted at the end of 2005.

*Special meetings to receive public views*

12. The Panel held three special meetings in January and February 2005 to receive views from a total of 37 deputations on the following issues relating to constitutional development -

- (a) pros and cons of the existing political structure and the implications on good governance;
- (b) the executive and the legislature relationship;
- (c) the system and role of the civil service;
- (d) the methods for selecting CE in 2007 and for forming LegCo in 2008; and
- (e) the role and development of political parties.

Election of CE

*Term of office of the new CE*

13. Following the resignation of Mr TUNG Chee-hwa, the office of the CE became vacant on 12 March 2005. The polling date for the election of the new CE was 10 July 2005. The Administration briefed the Panel, at its meeting on 22 March 2005, on the bill to be introduced into LegCo on 6 April 2005 to amend the Chief Executive Election Ordinance (CEEEO) to provide that the term of office of the new CE should be the remainder of the term of the preceding CE.

14. The Administration explained to the Panel that when the Government introduced the Chief Executive Election Bill in 2001, it held the view that if a new CE was elected to fill a vacancy arising prematurely, his term of office should run afresh for a period of five years. At that time, it had applied the common law rules of statutory interpretation, and considered that generally clear and unambiguous provisions should be interpreted according to their literal meaning. The Government

had also stated this stance in writing in response to a LegCo question raised at the Council meeting on 5 May 2004. It was not until March 2005 that new information and arguments concerning the term of office of CE had emerged. Taking into account the legal opinions of the Mainland, the earlier drafts of the Basic Law and documents which threw light on the discussions during the drafting process, the recollection of those who took part in the drafting, and the legislative intent underlying the design of the Basic Law, the Government had adjusted its understanding on the provisions of the Basic Law and came to the view that the term of office of the new CE so elected should be the remainder of the term of the preceding CE.

15. Some members expressed regret that the Government had made a U-turn on its position on the term of office of the new CE. These members considered that there was no legal basis for amending CEEO, and the proposed amendment would be subject to legal challenge even if passed. In order to minimise damage to Hong Kong's legal system, they requested the Government to persuade NPCSC to amend the Basic Law to expressly provide for the term of office of a CE elected to fill a vacancy before expiry of the five-year term.

16. Some members expressed concern that the Government would seek an interpretation on Article 53 of the Basic Law (BL 53) concerning the term of office of the new CE from the NPCSC. A motion, moved by Hon LEE Wing-tat and amended by Hon Howard YOUNG, urging the Government to give an account to LegCo before seeking an interpretation from the NPCSC was passed by the Panel. The Chief Secretary for Administration subsequently made a statement to the Council on 6 April 2005 to announce the decision of the Government to submit a report to the State Council, proposing that the State Council make a request to the NPCSC to interpret BL 53 concerning the term of office of the new CE.

#### *The Election Committee (EC)*

17. Some members pointed out that the five-year term of the current EC would expire on 13 July 2005. They urged the Administration to form a new EC to fill the vacuum left by the current EC so as to avoid legal complications in the event that a by-election of CE became necessary after 13 July 2005.

18. The Administration advised that it would not lightly establish a new EC to succeed the current EC after expiry of its term, given the possible changes to the electoral method for selecting the third term CE in 2007. In the unlikely event that a new EC was required to be established after 13 July 2005 for the purpose of electing a CE to fill a vacancy before 1 July 2007, its function would only cover the remainder of the second term CE when the office of CE again became vacant.

19. Some members requested the Administration to consider amending CEEO to cap the number of subscribers for nominating a CE candidate to, say, 150, so as to allow more candidates to contest in the CE election. The Administration explained

that the requirement that the nomination for the candidature of CE should be not less than 100 members of EC was specified in CEEO in order to comply with the Basic Law. The question of capping the nomination ceiling would be dealt with in the context of the ongoing review of the method for selecting CE in 2007.

*Disqualification of EC members from making nominations and voting in the CE election*

20. The Panel had noted that some EC members who belonged to the Chinese People's Political Consultative Conference (CPPCC), District Councils (DC), and Heung Yee Kuk (HYK) subsectors were no longer CPPCC, DC or HYK members. The Panel sought clarification from the Administration whether these members had lost their substantial connection with their subsectors, and were thus disqualified from making nominations and voting in the CE election.

21. The Administration explained that for the purpose of the EC subsector by-elections on 1 May 2005, the names of 33 members who were deceased, had resigned from EC, or had ceased to be registered as an elector for a geographical constituency had been published in an omissions list. As the loss of DC, CPPCC and HYK membership was not a ground for inclusion in the omissions list, the group of EC members in question had remained on the final register of EC members. An EC member whose name appeared on the final register would only be disqualified from making nominations and voting at the CE election if he had, among other things, ceased to have a substantial connection with the subsector concerned.

22. The Administration was of the view that whether the EC members concerned had lost their substantial connection with their respective subsectors would need to be considered on a case-by-case basis. It was for them to seek legal advice. Some members considered that it was unfair, unreasonable and irresponsible of the Government not to advise these EC members their legal position, given that it was an offence for a person to vote at an election knowing that he himself was not entitled to do so.

23. The Administration informed the Panel that the nomination form would include a note to remind candidates and subscribers to consider the legal provisions relating to disqualification from making nominations. In addition, the Registration and Electoral Office (REO) would issue a letter reminding all EC members of the relevant legal provisions on disqualification to vote and make nominations. The Administration was prepared to listen to members' views and consider whether the existing arrangement should be reviewed in future.

*Guidelines on election-related activities in respect of CE elections*

24. The Administration sought members' views on the Proposed Guidelines on Election-related Activities in respect of the Chief Executive Elections. The Proposed Guidelines were modelled basically on those used for the 2002 CE election, with suitable amendments to reflect operational experience and suggestions for improvements obtained from recent elections.

25. Some members expressed concern about the participation of principal officials (POs) in election-related activities, and how the POs would ensure that, when taking part in such activities, there was no actual or potential conflict of interest with their own official duties. Some members considered that the Proposed Guidelines should reflect the merit of election forums and provide more specific guidelines for candidates and organisers to follow. Some members sought clarification from the Administration on the legislative intent for imposing the requirement for a person who had publicly declared an intention to stand for election, but had not submitted his nomination form, to submit a return and declaration of election expenses and donations.

### LegCo election

#### *Review of the conduct of the 2004 LegCo election*

26. On the polling day of the third term LegCo election on 12 September 2004 and the days after, there was wide media coverage about complaints relating to the polling and counting arrangements. The complaints included shortage of ballot boxes for the geographical constituency (GC) elections, use of cardboard boxes as temporary boxes, opening of ballot boxes to rearrange the ballot papers inside the boxes, delay in announcement of the election results, and discrepancies between the number of ballot papers issued and the number of votes in the final outcome for some functional constituencies (FCs).

27. The Panel discussed the Interim Report and the Final Report on the 2004 LegCo election submitted by the Electoral Affairs Commission (EAC) to CE on 8 November and 11 December 2004 respectively. While the Reports affirmed that the electoral process was conducted in an open, fair and honest manner, the findings of the Reports also revealed a number of administrative and planning errors relating to the practical arrangements for the election. In view of this, CE appointed a non-statutory Independent Committee of Experts (the Experts Committee) on 15 December 2004 to review the management, planning and conduct of elections, and to make recommendations on improvement measures.

28. Some members regretted that the two EAC's Reports were written in such a way that the errors relating to the arrangements of the election were borne by staff at working level, while the question of accountability had not been addressed. They held the view the Experts Committee should also examine the performance and accountability of persons including the Secretary for Constitutional Affairs, the Chairman and members of EAC in the conduct of 2004 LegCo election, as the problems of the 2004 LegCo election reflected inadequacies in the planning and decision-making process by officers at the management level.

29. The Panel also discussed the proposal of EAC in its Final Report that consideration could be given to decentralising the counting of GC votes to the regional level, with one counting station in each of the five GCs, or to the district level,

with one counting station in each of the 18 districts. Some members expressed their support for continuing the polling-cum-counting arrangement for GC votes as it would speed up the counting process and the announcement of the election results. Some members expressed reservations about adopting the polling-cum-counting arrangement, given that the LegCo election was much larger in scale and more complicated than the DCs election.

30. Some members expressed concern about the long working hours of polling cum counting staff, and the legality of the contingency measures adopted during the election, such as using cardboard boxes as ballot boxes.

31. The Report of the Experts Committee was published on 6 May 2005. The Administration briefed the Panel on the preliminary views of EAC and REO on how to follow up the recommendations of the Experts Committee. The Panel noted that the Experts Committee did not find any fundamental or major problems with the existing electoral system and procedure. The Experts Committee was of the view that the problems on the polling day were the result of a number of implementation problems, and had put forth eight conclusions and 13 recommendations which were accepted by EAC and the Administration. Some members remained of the view that the report had failed to address the management responsibilities for the blunders occurred on the polling day.

*Matters relating to election-related publicity materials*

32. The Panel was invited to consider three options put forward by the Administration to reduce paper consumption in distributing election-related publicity materials to electors –

- (a) option A – electors would be given a choice of whether or not to receive the candidates' introductory leaflets produced by REO by post. Electors could also view the leaflets on the website of REO.
- (b) option B – REO would cease producing candidates' introductory leaflets in paper form. The leaflets would be posted on REO's website only. This option should bring paper consumption to the minimum.
- (c) option C – REO would not produce candidates' introductory leaflets even in electronic form.

Under the three options, REO would continue to send poll cards, location maps of polling stations, and the guideline on voting in paper form by post.

33. The majority of the members of the Panel supported option B. Some members also suggested to further reduce paper consumption, election-related publicity materials should be sent on a household basis, or by e-mail. The Administration considered that as some households comprised both GC electors and

FC electors, sending election-related publicity materials on a household basis would cause confusion and inconvenience. As regards the use of e-mail, the Administration responded that it was necessary to assess the amount of work involved in initial registration and further updating of e-mail addresses, given that there were over 3.4 million registered electors.

### Issues relating to CE

#### *Application of the Prevention of Bribery Ordinance (POBO) to CE*

34. Members noted that the Panel first followed up the issue of the application of certain provisions of POBO to CE in early 1999. Since then, the issue was discussed at a number of meetings of the Panel. The Administration advised the Panel at its meeting on 7 May 2001 that it was looking into the feasibility and implications of creating separate legislative provisions to set out the bribery offences for exclusive application to CE. In response to the Panel's repeated requests that the regulatory and legal framework should come into effect before the second term CE assumed office in July 2002, the Administration advised that the legislative proposal would be introduced in the 2002-03 session. However, the relevant legislative proposal had not been introduced.

35. The Panel requested the Administration to report on the progress of the review at its meeting on 30 May 2005. The Administration reiterated its views as follows –

- (a) given CE's special constitutional position in the Hong Kong Special Administrative Region (HKSAR) and CE was not an agent of the HKSAR Government within the meaning of section 2(1) of POBO, it was difficult to fit him within the structure of the existing offence provisions in POBO;
- (b) legal advice was that CE might fall within the meaning of "public officer" under the common law and would be liable to prosecution if he accepted a bribe even without any amendment to POBO; and
- (c) pending the review on application of POBO to CE, there were various measures in place to ensure that CE must be a person of the highest integrity and conduct.

The Administration would further consider whether any legislative provisions for exclusive application to CE should be given effect through amendment to POBO or other legislative vehicles.

36. Some members considered that the lack of progress of the review after a lapse of more than six years was totally unacceptable. They criticised the Administration for failing its duty to devise an appropriate statutory framework of bribery prevention for application to CE. After discussion, the Panel agreed to form a subcommittee under the Panel to follow up the issue.

*Remuneration package and post-office arrangements for CE*

37. The Independent Commission on Remuneration Package and Post-office Arrangement for the Chief Executive of the HKSAR (the Independent Commission), chaired by Mr WONG Po-yan, which was appointed by the Government on 7 April 2005, published its report on 9 June 2005. After seeking the advice of the Executive Council, the Administration decided to adopt in principle the report of the Independent Commission.

38. The Panel discussed the recommendations of the Independent Commission. Members in general supported the new remuneration package for CE which would be capped at the same level as the existing package (excluding entertainment allowance, housing as well as medical and dental care) and implemented for the third term CE in July 2007.

39. The Panel noted the restrictions recommended to be imposed on future CEs in respect of the use of official information and participation in political and commercial/professional activities. Some members expressed concern that the committee to be set up to advise former CEs on post-office employment was a “toothless tiger” without power as its advice was not binding on former CEs. The Administration explained that the advice of the committee would be published, e.g. as soon as a former CE took up a private sector job which the committee had scrutinised. However, there would be no announcement if a former CE decided not to go ahead with his plans after hearing the views of the committee.

40. On the recommendation that a written undertaking in the form of an agreement would be signed by each CE signifying agreement to abide by the post-office restrictions on taking up office, members had requested the Administration to provide information on the main provisions of the agreement and to explain how the agreement was legally enforceable in case of non-compliance.

41. In response to some members’ concern about the scope and duration of the post-office services recommended for former CEs, the Administration explained that the office accommodation set up to serve former CEs would be available for any former CE who was prepared to play an “ambassadorial role”. The provision of a car with driver would be withdrawn if a former CE had taken up gainful employment in the private sector or had re-engaged in commercial activities which provided a car with chauffeur services. The provision of bodyguard services would be subject to the security assessment by the Police from time to time. Some members considered that these services should not be provided on a life-long basis and should only be provided on a need basis, e.g. to facilitate the participation of a former CE in public services. On the issue of former CEs undertaking ambassadorial activities, some members expressed concern about a role conflict between former CEs and the incumbent CE. Some members also pointed out that the creation of a new political class of “former CEs” might give rise to “old-man politics”.

Issues relating to prorogation of the Council

42. On the recommendation of the Committee on Rules of Procedure, the House Committee referred the following issues relating to the prorogation of the Council to the Panel for consideration –

- (a) whether the power to prorogue the Council should be transferred from CE to the President of LegCo;
- (b) whether the power to determine the commencement and ending dates of a LegCo session should be transferred from CE to the President of LegCo; and
- (c) whether the Council and its committees can resume operation during prorogation in circumstances other than at the request of CE for convening emergency Council meetings.

43. The Administration's position was that section 6 of the Legislative Council Ordinance (LCO) empowered CE to specify the dates for holding general elections of LegCo and prorogation of the Council, and section 9(2) of LCO provided CE with the power to determine the commencement and end dates of an ordinary session of LegCo. The existing legal provisions and arrangements were appropriate and should remain unchanged. In addition, the Council and its committees could resume operation during prorogation only at the request of CE for convening emergency Council meetings under BL 72(5).

44. Some members considered that after the reunification, the new constitutional order prescribed in the Basic Law clearly demarcated the powers and functions of the executive and the legislature. Under BL 72, the power to convene and decide on the timing of meetings rested with the President. BL 73 further empowered LegCo to make laws and transact business on its own. Neither BL 48 (on the powers and functions of CE) nor any other provisions of the Basic Law provided CE with such powers. Given that LCO had not reflected the spirit of the roles and functions of LegCo as embodied in BL 72 and BL 73, LCO should be amended to transfer the powers to prorogue the Council, and to determine the commencement and end dates of a LegCo session from CE to the President.

45. The Panel requested the Administration to reconsider its position in the light of members' views. In view of the Administration's concern about the practical difficulty for the President to fix a commencement date for the first session in a LegCo term, members suggested that a mechanism could be put in place for fixing in advance the commencement date of the session. To facilitate further consideration of the Panel, members decided to invite views from academics with expertise in constitutional law and the legal professional bodies to provide views on the relevant issues.

**Panel meetings**

46. Between the period from October 2004 and June 2005, the Panel held a total of 14 meetings.

Council Business Division 2  
Legislative Council Secretariat  
30 June 2005

**Panel on Constitutional Affairs**

**Terms of Reference**

1. To monitor and examine Government policies and issues of public concern relating to implementation of the Joint Declaration and the Basic Law, relations between the Hong Kong Special Administrative Region Government and the Central People's Government and other Mainland authorities, electoral matters and district organizations.
2. To provide a forum for the exchange and dissemination of views on the above policy matters.
3. To receive briefings and to formulate views on any major legislative or financial proposals in the above policy areas prior to their formal introduction to the Council or Finance Committee.
4. To monitor and examine, to the extent it considers necessary, the above policy matters referred to it by a member of the Panel or by the House Committee.
5. To make reports to the Council or to the House Committee as required by the Rules of Procedure.

**Panel on Constitutional Affairs**

**Membership list for 2004 - 2005 session**

<b>Chairman</b>	Dr Hon LUI Ming-wah, JP
<b>Deputy Chairman</b>	Hon Jasper TSANG Yok-sing, GBS, JP
<b>Members</b>	Hon James TIEN Pei-chun, GBS, JP Hon Albert HO Chun-yan Ir Dr Hon Raymond HO Chung-tai, S.B.St.J., JP Hon LEE Cheuk-yan Hon Martin LEE Chu-ming, SC, JP Dr Hon David LI Kwok-po, GBS, JP Hon Fred LI Wah-ming, JP Hon Margaret NG Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP Hon James TO Kun-sun Hon CHEUNG Man-kwong Hon CHAN Yuen-han, JP Hon Bernard CHAN, JP Hon CHAN Kam-lam, JP Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP Hon LEUNG Yiu-chung Hon SIN Chung-kai, JP Dr Hon Philip WONG Yu-hong, GBS Hon WONG Yung-kan, JP Hon Howard YOUNG, SBS, JP Dr Hon YEUNG Sum Hon LAU Chin-shek, JP Hon LAU Kong-wah, JP Hon LAU Wong-fat, GBS, JP Hon Miriam LAU Kin-ye, GBS, JP Hon Emily LAU Wai-hing, JP Hon CHOY So-yuk Hon Andrew CHENG Kar-foo Hon Timothy FOK Tsun-ting, GBS, JP Hon TAM Yiu-chung, GBS, JP Hon Abraham SHEK Lai-him, JP Hon Tommy CHEUNG Yu-yan, JP Hon Albert CHAN Wai-yip

Hon Frederick FUNG Kin-kee, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon Vincent FANG Kang, JP  
Hon WONG Kwok-hing, MH  
Hon LEE Wing-tat  
Hon LI Kwok-ying, MH  
Dr Hon Joseph LEE Kok-long  
Hon Daniel LAM Wai-keung, BBS, JP  
Hon Jeffrey LAM Kin-fung, SBS, JP  
Hon MA Lik, JP  
Hon Andrew LEUNG Kwan-yuen, SBS, JP  
Hon Alan LEONG Kah-kit, SC  
Hon LEUNG Kwok-hung  
Dr Hon KWOK Ka-ki  
Dr Hon Fernando CHEUNG Chiu-hung  
Hon CHEUNG Hok-ming, SBS, JP  
Hon WONG Ting-kwong, BBS  
Hon TONG Ka-wah, SC  
Hon CHIM Pui-chung  
Hon Patrick LAU Sau-shing, SBS, JP  
Hon Albert Jinghan CHENG  
Hon KWONG Chi-kin  
Hon TAM Heung-man

(Total : 58 members)

<b>Clerk</b>	Mrs Percy MA
<b>Legal Adviser</b>	Mr Arthur CHEUNG
<b>Date</b>	12 October 2004