

立法會
Legislative Council

LC Paper No. CB(2)1426/05-06(02)

Ref : CB2/BC/01/05

**Bills Committee on the Chief Executive Election and Legislative Council Election
(Miscellaneous Amendments) Bill 2006**

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 17 March 2006**

Purpose

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

Method for the selection of the Chief Executive

2. Under Article 45 of the Basic Law, the Chief Executive 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 Hong Kong Special Administrative Region (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 of the National People's Congress (NPCSC) on 26 April 2004, the election of the third Chief Executive 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 in the year 2007 according to the provisions of the Basic Law.

5. The Fifth Report of the Constitutional Development Task Force published on 19 October 2005 put forth a package of proposals for the methods for selecting the Chief Executive in 2007 and LegCo in 2008. A Subcommittee was formed to study the package of proposals. On 21 December 2005, the two motions on amendments to Annexes I and II of the Basic Law regarding the methods for selecting the Chief Executive in 2007 and LegCo in 2008 respectively were put by the Government to LegCo for endorsement. As the motions did not receive the support of the two-thirds majority of all LegCo Members as stipulated in Annexes I and II of the Basic Law, the motions could not be processed further.

Term of office of the Chief Executive

Basic Law provisions

6. Article 46 provides that the term of office of the Chief Executive shall be five years and he may not serve for more than two consecutive terms.

7. Article 53 provides that if the Chief Executive is not able to discharge his 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.

Provisions in the Chief Executive Election Ordinance (CEEO) (Cap. 569)

8. Section 3(1) of CEEO 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.

9. Following the resignation of Mr TUNG Chee-hwa on 10 March 2005, the Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill was introduced into LegCo on 6 April 2005. The purpose of the Bill was to add new section 3(1A) to CEEO to provide that a Chief Executive who filled a vacancy that arose should serve the remainder of the term of his predecessor.

10. On 27 April 2005, NPCSC made an interpretation of Article 53(2). According to the Interpretation, a new Chief Executive selected in accordance with Article 53(2) shall serve the remainder term of the preceding Chief Executive. The Bill was passed by LegCo on 25 May 2005.

Past discussions

11. In the course of scrutinising the Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill, Members requested the Administration to clarify -

- (a) whether the term of a new Chief Executive elected in a Article 53(2) situation constituted a “term” for the purposes of Article 46, e.g. whether the new Chief Executive elected on 10 July 2005 would serve a maximum of 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
- (b) whether it was necessary to elect a new Chief Executive in accordance with Article 53(2) if the vacancy arose within a few months before the expiry of the term of office of the preceding Chief Executive, as the remainder of the original term might be too short to allow a further polling.

The Administration undertook to address the issue in the context of the review of constitutional development when it considered possible amendments to the method for selecting the Chief Executive in 2007.

12. As outlined in the Fifth Report of the Constitutional Development Task Force, the Administration took the view that –

- (a) the term of office of a new Chief Executive elected under Article 53(2) could only serve for one further term after the expiry of the remainder term, and the remainder term would be counted as “a term”; and
- (b) it would not be inconsistent with Article 53(2) not to hold a by-election if a vacancy arose within six months before the expiry of the term of the Chief Executive. CEE0 should be amended accordingly.

13. The Administration had originally proposed to clarify the issue in paragraph 12(a) above in the motion on the amendment to Annex I to the Basic Law concerning the method for selecting the Chief Executive, which was moved to give effect to the package of proposals in the Fifth Report of the Task Force. Some Members had cautioned that it was inappropriate for the Administration to improve clarity of the main provision of the Basic Law by way of amending provisions in annexes of the Basic Law or local legislation. The proper procedure was to amend the relevant articles of the Basic Law using the mechanism provided in Article 159.

14. After careful consideration of comments made by Members, the Administration had subsequently decided to delete the proposed provision from the motion, which was not passed at the Council meeting on 21 December 2005.

Term of office of the Election Committee

15. 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.

16. 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 9 of CEEO provides that the term of office of the Election Committee shall be five years commencing on the date on which it is constituted. The term of office of the first Election Committee constituted on 14 July 2000 had expired on 13 July 2005.

17. In the course of scrutinizing the Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill, some Members requested the Administration to explain the arrangements that were in place to address the issue that there would be no Election Committee during the period from 14 July 2005 to early 2007. They asked whether a new Election Committee might be constituted between the expiry of the first term of the Election Committee and July 2007 and if so, whether it should be so constituted, so that it might perform if necessary on or after such expiry the function of electing a new Chief Executive to fill any vacancy.

18. The Administration had advised that when CEEO was enacted in 2001, it was anticipated that a gap would arise upon the expiry of the term of office of Election Committee. It was also envisaged that after the intervening period had passed, the term of the Chief Executive and that of the Election Committee would be more synchronised in future. The Administration would not form a new Election Committee lightly, as this might affect the review on the method for selecting the Chief Executive in 2007 which was underway, e.g. possible changes to the composition of Election Committee. In the event of another vacancy arising before 1 July 2007, the Government would act in accordance with the Basic Law and CEEO. If necessary, it might consider forming an Election Committee, but the possible implications to the review of the method for selecting the Chief Executive in 2007 must be carefully considered.

Electorate base of the Election Committee

19. Some Members pointed out that although NPCSC had ruled out the implementation of universal suffrage for the 2007 Chief Executive election, the Administration should enhance the democratic representation by broadening the electorate base of the Election Committee to include all registered voters. The proposal, which could be implemented by way of local legislation, would not contravene the Basic Law as well as the Interpretation and Decision of NPCSC.

20. The Administration advised that the package of proposals put forth in the Fifth Report of the Task Force had sought to increase the democratic representation of the

Chief Executive elections by expanding the participation of the District Council members in the Election Committee. Unfortunately, the package of proposals did not have the required two-thirds majority support of all the LegCo Members. The Administration had made clear at the time that in accordance with the Interpretation made by NPCSC on 6 April 2004, if no amendment was made to the method for selecting the Chief Executive, the provisions in Annex I of the Basic Law would still be applicable. In the circumstances, the 2007 Chief Executive election would be held on the basis of the existing arrangements, i.e. the electorate base would remain unchanged.

Requirement that the Chief Executive should not have political affiliation

21. 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.

22. Some Members had repeatedly requested the Administration to review the requirement for a winning candidate who belonged to a political party to resign from the political party on a number of occasions. They pointed out that the majority of overseas systems had no such restriction. Moreover, the restriction was not stipulated in the Basic Law. They were of the view that the requirement discriminated against political parties and would retard the development of political parties.

23. The Administration had 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 had been an improvement. The requirement had taken into account Hong Kong's unique constitutional order. HKSAR was physically and legally a part of China. The Chief Executive, being accountable to both the CPG and the HKSAR, had a unique position of power and responsibility. The Chief Executive must maintain the appropriate relationship between the "one country" and must apply the "two systems". Hence, the Chief Executive must be impartial and always act in the overall interests of Hong Kong.

24. The Administration had also confirmed that the requirement was 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. It had explained that the purpose of the restriction was to ensure the proper functioning of the current political order and the encouragement of pluralism. Hence, prohibiting the Chief Executive from being a member of any political party was a rational and proportional means of achieving that purpose.

25. The Task Force had advised that in the public consultation conducted on constitutional development, there were views that the requirement should be abolished. The reasons were that if the Chief Executive had the support of his/her political party, LegCo Members of the same party could help promote government policies, resulting in better governance; besides, this would be conducive to grooming political talent by political parties, and the recruitment of political talent by the government. There were also views that the existing requirement was appropriate, as it could ensure that a Chief Executive would uphold fairness and maintain impartially. The Task Force concluded that there was no clear mainstream view on the issue among different sectors of the community. Further, it considered that the existing requirement had not impeded effective governance. It therefore proposed that the existing provision be maintained.

Subscribers for nominating candidates in a Chief Executive election

26. Paragraph 4 of Annex I to the Basic Law stipulates that candidates for the office of Chief Executive may be nominated jointly by not less than 100 Election Committee members.

27. Members had, on various occasions, proposed that CEEEO should be amended to introduce an upper limit on the number of subscribers required for nominating candidates for the office of the Chief Executive, so that more potential candidates could contest in the election. They pointed out that the threshold of requiring candidates to secure nominations from not less than 100 Election Committee members, i.e. 12.5% of the registered voters, was unreasonably high by world standard. In addition, the proposal would not contravene the Basic Law.

28. The Administration considered that the proposal would unduly restrain Election Committee members from exercising their right to nominate candidates. The Administration had no intention to impose such a limit.

Electoral arrangements in the event that only one Chief Executive candidate is validly nominated

29. Paragraph 5 of Annex I to the Basic Law stipulates that Election Committee shall elect Chief Executive by secret ballot on a one-person-one-vote basis. The specific method shall be prescribed by the electoral law. Under section 24 of CEEEO, a poll shall be conducted where there are two or more candidates in an election. Section 23 of CEEEO stipulates that if at the close of nomination only one candidate is validly nominated, that candidate shall be declared elected ipso facto as the Chief Executive.

30. The Administration consulted the Panel on Constitutional Affairs on the major proposals in the Chief Executive Election and Legislative Council Election (Miscellaneous Amendments) Bill 2006 on 16 January 2006. On the proposed electoral arrangements in the event that only one Chief Executive candidate was validly nominated, the Administration proposed that Election Committee members should be required to indicate in the ballot papers either to “support” or “not support” the sole candidate. If the number of support votes obtained by the only validly nominated candidate fell short of more than half of the total valid votes cast, there should be a new round of nominations.

31. Some Members suggested that if the sole candidate was unable to obtain more than half of the valid votes cast, and if, after nominations had been re-opened, there was still only one candidate, some finality should be provided for in the electoral arrangements, e.g. whether the same candidate who was the only candidate at the new round of nominations should be elected ipso facto. The Administration agreed to consider the suggestion when finalising the details of the electoral arrangements in the event that there was only one candidate.

32. Some Members suggested that unmarked ballot papers should not be counted as invalid votes, given the small size of Election Committee. They pointed out that if unmarked ballot papers were regarded as invalid votes, a candidate who obtained a small number of votes could still be elected as the Chief Executive, e.g. if there were 790 invalid votes cast, the candidate would only need to obtain six votes to be elected as the Chief Executive. The Administration was of the view that the extreme example quoted by members was unlikely to happen in reality given that under the proposed arrangement, Election Committee members could choose to mark the “not support” column on the ballot paper, if they did not support the sole candidate.

33. In response to members’ request, the Administration had provided information on overseas practices regarding the electoral arrangements in the event of single candidacy, particularly on the measures to provide some finality to the electoral process, and the handling of blank ballots in vote counting.

Substantial connection with the District Council, Chinese People’s Political Consultative Conference and Heung Yee Kuk subsectors

34. The issue that the names of some former members of District Council, Chinese People’s Political Consultative Conference or Heung Yee Kuk had remained on the final register for the Chief Executive election on 10 July 2005 was discussed by the Panel on Constitutional Affairs on 30 May 2005. Some Members suggested that such members had lost their substantial connection with their sectors and were thus disqualified from making nominations and voting in the Chief Executive election.

35. The Administration explained that under CEEO, there were no provisions which provided that these Election Committee members should cease to be members

of Election Committee. Sections 16 and 26 of CEEO provided that an Election Committee member whose name appeared on the final register should be disqualified from making nominations and voting at the election if he had ceased to have a substantial connection with the subsector concerned. However, according to section 1(3) of the Schedule to CEEO, whether a person had a substantial connection with a subsector should not be determined solely by whether he was a member of a body included in the subsector. The policy intention behind the existing legislative provisions was that it was possible that some of the Election Committee members who had lost their membership in a body included in a subsector might still maintain substantial connection with their respective subsectors. Whether the Election Committee members concerned had lost their substantial connection with their respective subsectors needed to be considered on a case-by-case basis.

36. Some Members considered that Election Committee members whose names had remained on the final register might need to ascertain their eligibility for making nominations and voting in the Chief Executive election to be held in July 2005. As any person who voted at an election knowing that he himself was not entitled to do so would commit an offence under the Election (Corrupt and Illegal Conduct) Ordinance, the existing arrangement was unfair to the Election Committee members concerned as they might face the risk of being prosecuted if they had made a wrong decision. These Members asked the Administration to address the situation in future elections. The Administration agreed to consider whether the arrangement should be reviewed in future.

Relevant papers

37. A list of relevant papers which are available on the LegCo website is in the **Appendix**.

Appendix

Bills Committee on the Chief Executive Election and Legislative Council Election (Miscellaneous Amendments) Bill 2006

List of relevant papers

<u>Council/Committee meeting</u>	<u>Meeting Date</u>	<u>Papers/Motion/Council Question</u>
Legislative Council	11 July 2001	Resumption of the Second Reading Debate on the Chief Executive Election Bill [Hansard] Report of the Bills Committee on the Chief Executive Election Bill [LC Paper No. CB(2)1989/00-01]
Legislative Council	13 March 2002	Motion on "The second Chief Executive election" moved by Hon Emily LAU [Hansard]
Legislative Council	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 [Hansard]
Legislative Council	12 November 2003	Motion on "Election of the Chief Executive and all Members of the LegCo by universal suffrage" moved by Hon James TO [Hansard]
Legislative Council	5 May 2004	Question on "Term of office of the Chief Executive elected to fill a casual vacancy" raised by Hon Emily LAU [Hansard]
House Committee	15 March 2005	Background brief prepared by the Legislative Council Secretariat on "Election of the Chief Executive and related issues" [LC Paper No. CB(2)1066/04-05]

		<p>Paper provided by the Administration on "Election of a New Chief Executive Pursuant to Article 53 of the Basic Law : Timetable" [LC Paper No. CB(2)1077/04-05(01)]</p> <p>Verbatim transcript of meeting [LC Paper No. CB(2)1202/04-05]</p>
Legislative Council	16 March 2005	<p>Adjournment motion on "All the constitutional and legal issues arising from the office of the Chief Executive having become vacant, and related policies, measures and arrangements" moved by Hon LEE Wing-tat [Hansard]</p>
Panel on Constitutional Affairs	21 March 2005	<p>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)" [LC Paper No. CB(2)1121/04-05(01)]</p> <p>Minutes of meeting [LC Paper No. CB(2)1626/04-05]</p>
Legislative Council	6 April 2005	<p>Statement made by the Chief Secretary for Administration on the Government's decision to seek an interpretation on Article 53(2) of the Basic Law concerning the term of office of the new Chief Executive from the Standing Committee of the National People's Congress [Hansard]</p> <p>Adjournment motion on the Government's decision to seek an interpretation on Article 53(2) of the Basic Law concerning the term of office of the new Chief Executive from the Standing Committee of the National People's Congress moved by Hon Albert HO [Hansard]</p>

Bills Committee on Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill	14 April 2005	Background brief prepared by the Legislative Council Secretariat [LC Paper No. CB(2)1268/04-05(03)]
Panel on Constitutional Affairs	18 April 2005	Paper provided by the Administration on "Proposed Guidelines on Election-related Activities in respect of the Chief Executive Elections" [LC Paper No. CB(2)1293/04-05(01)] Minutes of meeting [LC Paper No. CB(2)1955/04-05]
Bills Committee on Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill	29 April 2005	Text of the interpretation made by the Standing Committee of the National People's Congress on 27 April 2005 regarding Article 53(2) of the Basic Law [LC Paper No. CB(2)1407/04-05(01)]
House Committee	6 May 2005	Report of the Bills Committee on Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill [LC Paper No. CB(2)1450/04-05]
Legislative Council	18 May 2005	Question on "Election Committee Members Disqualified from Voting in Chief Executive Election" raised by Dr Hon YEUNG Sum [Hansard]
Legislative Council	25 May 2005	Resumption of the Second Reading debate on the Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill [Hansard]

Panel on Constitutional Affairs	30 May 2005	Paper provided by the Administration on "Disqualification of Election Committee Members from Making Nominations and Voting in the Chief Executive Election" [LC Paper No. CB(2)1670/04-05(02)] Minutes of meeting [LC Paper No. CB(2)2452/04-05]
Legislative Council	19 October 2005	Fifth Report of the Constitutional Development Task Force [Report] Question on "Political Reform" raised by Dr Hon YEUNG Sum [Hansard]
Panel on Constitutional Affairs	21 October 2005	Background brief prepared by the Legislative Council Secretariat on "Constitutional development after 2007" [LC Paper No. CB(2)115/05-06(03)] Minutes of meeting [LC Paper No. CB(2)597/05-06]
House Committee	9 December 2005	Report of the Subcommittee to Study the Administration's Proposals for the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008 [LC Paper No. CB(2)600/05-06]
Legislative Council	21 December 2005	Motion on "The Amendment to the Method for the Selection of the Chief Executive" moved by the Secretary for Constitutional Affairs [Hansard]

<p>Panel on Constitutional Affairs</p>	<p>16 January 2006</p>	<p>Paper provided by the Administration on "2007 Chief Executive Election : Legal and other issues to be addressed through amending the Chief Executive Election Ordinance" [LC Paper No. CB(2)870/05-06(02)]</p> <p>Information paper provided by the Administration on "Overseas practices regarding electoral arrangements in the event that only one candidate is validly nominated in an election" [LC Paper No. CB(2)1171/05-06(01)]</p> <p>Minutes of meeting [LC Paper No. CB(2)1398/05-06]</p>
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