

Legislative Council Panel on Constitutional Affairs

2007 Chief Executive Election

**Legal and other issues to be addressed through
amending the Chief Executive Election Ordinance**

INTRODUCTION

This paper informs Members of the scope of amendments to be made to the Chief Executive Election Ordinance (CEEEO) to address relevant legal and other issues to ensure the smooth conduction of the 2007 Chief Executive (CE) election.

BACKGROUND

2. In January 2004, the CE set up the Constitutional Development Task Force (“the Task Force”) to address issues relating to the 2007/08 electoral arrangements. In the ensuing months, the Task Force carried out a series of wide and open public consultations, and issued a number of reports, culminating in the Fifth Report which set out a package of proposals for the methods for selecting the CE in 2007 and for forming the Legislative Council (LegCo) in 2008.

3. On 21 December 2005, the two motions on, respectively, amendment to Annexes I and II of the Basic Law were put by the Government to LegCo for endorsement. Of the 60 Members, 34 voted for the two motions, 24 against, and there was one abstention. Although the two motions received the support of more than half of the LegCo Members, they fell short of the two-thirds majority support of all LegCo Members stipulated in Annexes I & II of the Basic Law. Therefore, the two motions could not be processed further.

4. In accordance with the Interpretation made by the Standing Committee of the National People’s Congress (NPCSC) on 6 April 2004, if no amendment is made to the methods for selecting the CE and for forming the LegCo as stipulated in Annexes I and II of the Basic Law, the provisions relating to the two methods in Annexes I and II of the Basic Law will still be applicable. In the circumstances, the 2007 CE election

will be held on the basis of the existing arrangements, i.e. the electorate base will remain unchanged.

5. However, certain amendments will need to be made to the local legislation (i.e. the CEEO) to address some legal issues relating to the CE elections identified in the Fifth Report of the Task Force, as well as the situation where only one candidate for a CE election is validly nominated. Further, legislative amendments are necessary:

- (a) to address the practical difficulties in implementing the “substantial connection” provision in relation to the District Council (DC), the Chinese People’s Political Consultative Conference (CPPCC) and the Heung Yee Kuk (HYK) subsectors; and
- (b) to reflect changes in names of the organisations which are eligible to be the electorate of the Election Committee (EC), or the names of umbrella organizations the members of which are eligible to be the electorate of the EC, and to remove those organisations or umbrella organizations which have ceased to exist.

SCOPE OF AMENDMENTS TO CEEO

(a) Legal Issues Identified in the Fifth Report of the Task Force

6. The Fifth Report of the Task Force has put forth ways to address some legal issues relating to the CE elections. 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 (“the Subcommittee”), set up by the LegCo House Committee, has also discussed these issues in the course of scrutinizing the two motions. Paragraphs 7 - 12 below outline the relevant issues and how they are to be addressed in the context of local legislation.

(i) Chief Executive by-election

7. Paragraph 2 of Article 53 of the Basic Law provides that, in the event that the office of the CE becomes vacant, a new CE shall be selected within six months in accordance with the provisions of Article 45 of the Basic Law. According to the Interpretation made by NPCSC

on 27 April 2005, a new CE selected to fill a vacancy shall serve the remainder of the term of the preceding CE.

8. As to how a situation whereby a vacancy arises close to the expiry of the term of a CE should be dealt with, our position is that, in considering the issue, the fundamental principle is to ensure that the requirement under Article 53 of the Basic Law, i.e. a new CE shall be selected within six months after a vacancy arises, is fulfilled. At the same time, we should avoid holding two CE elections within a short period of time. Therefore, we will amend the CEEO to provide for following arrangement:

- (a) if an election for a new term (5-year) CE will be held within six months after a vacancy in the office of the CE has arisen, it will not be necessary to hold a by-election; and
- (b) before the new term CE takes up his office, the Acting CE will continue to assume the duties of the CE.

(ii) Commencement Date of the Election Committee

9. The term of the EC should tie in with the arrangement for CE by-election described above. We will amend the CEEO to stipulate that, in future, the term of office of the EC will commence on 1 February in a CE election year, while the elections for the EC could be held in December of the preceding year. If a by-election is required because a vacancy arises during the term of the CE, this will be dealt with by the original EC. The new term (5-year) CE will be elected by a new term EC.

(iii) The number of consecutive terms that a new CE returned in a by-election may serve

10. Article 46 of the Basic Law provides that “[t]he term of office of the CE of the HKSAR shall be five years. He or she may serve for not more than two consecutive terms”. The question which arises is whether the term of office of a new CE elected in paragraph 2 of Article 53 of the Basic Law situation, which is the remainder of the term of the preceding CE, constitutes a “term” for the purposes of Article 46 of the Basic Law.

11. Our position is that, if the remainder term served by a new CE were not counted as a term for the purpose of Article 46 of the Basic Law, a new CE might be in office for more than 14 years in the most extreme scenario (a remainder term of more than four years coupled with two five-year terms in succession). Such a long term of office could not have been intended by the Basic Law which has clearly restricted the number of consecutive years that a CE may be in office to ten. Thus, we consider that a new CE returned in a by-election may only serve for one more term after expiry of the remainder term, and the remaining term is counted as “a term”.

12. We originally proposed to clarify this provision in the motion on amendment to Annex I of the Basic Law. However, when the motion was scrutinized by the Subcommittee, some Members considered that this issue should not be dealt with under Annex I of the Basic Law. After careful consideration, we decided to accept the views of these Members and to deal with this issue in the context of local legislation.

(b) Electoral arrangements in the event that only one CE candidate is validly nominated

13. The Fifth Report proposed amending the CEEO to establish a mechanism whereby, in the event that only one candidate is validly nominated at the close of nominations for a CE election, election proceedings shall continue.

14. After detailed consideration, we propose that if only one CE candidate is validly nominated, the following electoral arrangement will be adopted:

- (i) when voting, EC members may choose to either “support” or “not support” the sole candidate; and
- (ii) the sole candidate shall be returned at the election if the number of “support votes” he obtains constitutes more than half of the total number of valid votes cast ^{Note 1}.

We have provided some examples at the Annex to illustrate the proposed electoral arrangement mentioned above.

^{Note 1} Under existing legislation, any ballot paper which is unmarked, mutilated or on which there is any writing or mark is regarded as invalid vote.

15. If the number of support votes obtained by the candidate falls short of more than half of the total valid votes cast, we propose that there shall be a new round of nominations.

(c) Substantial connection with the DC, the CPPCC and the HYK subsectors

16. During the CE by-election held in June 2005, it was noted that some members of the EC in the DCs, CPPCC and HYK subsectors had ceased to be members of the relevant bodies. Under the CEEO, there are no provisions which provide that these EC members shall cease to be EC members. Sections 18 and 26 of the CEEO provide that a member of the EC is disqualified from making a nomination and voting at an election of a CE if the member has ceased to have a substantial connection with the subsector concerned. According to section 1(3) of the Schedule to the CEEO, however, whether a person has a substantial connection with a subsector should not be determined solely by whether he is a member of a body included in the subsector. The policy intention behind the existing legislative provisions is that it is possible that some of the EC members who have lost their membership in a body included in a subsector may still maintain substantial connection with their respective subsectors. However, as these members of the EC are no longer members of the DCs, CPPCC and HYK, there are, after all, some doubts about their eligibility to participate in the nomination and voting processes.

17. In view of the practical difficulties in implementing the “substantial connection” provision and for the avoidance of doubt, we will amend the CEEO to stipulate that only individuals who are members of DC, CPPCC and HYK may be members of the relevant EC subsectors, and that when they cease to be members of the DC, CPPCC, and HYK, they will also cease to be members of the relevant EC subsectors. A subsector by-election will be held, following existing legislative arrangements generally applicable for subsector by-election, to fill any such vacancy.

(d) Technical Legislative Amendments relating to EC Electorate

18. The new EC will elect the new term CE in March 2007. Most of the EC members will be returned through election ^{Note 2}. The electorate to elect the EC is set out in the CEEO which, in turn, contains cross references to the LegCo functional constituency electorate set out in the Legislative Council Ordinance (Cap. 542). Although we will not make any changes to the EC electorate base, some technical amendments to the CEEO and the Legislative Council Ordinance are required to reflect changes in the names of the organisations which are eligible to be the electorate of the EC, or the names of umbrella organizations the members of which are eligible to be the electorate of the EC. Organizations and umbrella organizations which have ceased to exist will also be removed.

LEGISLATIVE TIMETABLE

19. We plan to introduce into LegCo a bill to amend the CEEO in March 2006. As outlined in paragraph 18 above, the bill will include technical amendments relating to the EC electorate to reflect changes in the names of the organisations which are eligible to be the electorate of the EC or the names of umbrella organizations the members of which are eligible to be the electorate of EC, and to remove organisations and umbrella organizations which have ceased to exist. According to existing legislation ^{Note 3}, the deadline for registration as voters for the 2006 EC subsectors is 16 May 2006. Hence, the bill would need to be passed by LegCo and to take effect before this date.

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^{Note 2} Amongst the 38 EC subsectors, members of 35 subsectors are returned through election. Hong Kong deputies to the National People's Congress and Members of the LegCo are ex-officio members of the EC. Members of the religious subsector are nominated to the EC by the six designated religious bodies of that subsector.

^{Note 3} Section 19(4) of the Electoral Affairs Commission (Registration)(Electors for Legislative Council Functional Constituencies)(Voters for Election Committee Subsectors)(members of Election Committee) Regulation (Cap.541B)

**Electoral arrangements in the event that
only one CE candidate is validly nominated**

According to the proposed arrangement outlined in paragraph 14 above:

- (a) when voting, EC members may choose to either “support” or “not support” the sole candidate. Under existing legislation, any ballot paper which is unmarked, mutilated or on which there is any writing or mark is regarded as invalid vote; and
- (b) the sole candidate shall be returned at the election if the number of “support votes” he obtains constitutes more than half of the total number of valid votes cast.

2. Assuming that the 800-member Election Committee (EC) elects the Chief Executive using the above arrangement, the following examples show the minimum number of valid support votes that the sole candidate needs to obtain to be returned at the election under different scenarios.

| No. of EC members who cast votes | No. of valid votes cast (including “support” and “not support” votes) | No. of invalid votes cast | <u>Minimum no. of support votes that needs to be obtained for the candidate to be returned</u> |
|----------------------------------|---|---------------------------|--|
| <u>Example 1</u> 800 | 800 | 0 | 401 |
| <u>Example 2</u> 800 | 780 | 20 | 391 |
| <u>Example 3</u> 800 | 760 | 40 | 381 |