

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1485/04-05  
(These minutes have been seen  
by the Administration)

Ref : CB2/BC/6/04

**Bills Committee on  
Chief Executive Election (Amendment)  
(Term of Office of the Chief Executive) Bill**

**Minutes of the second meeting  
held on Thursday, 21 April 2005 at 8:30 am  
in Chamber of the Legislative Council Building**

**Members  
present**

: Hon TAM Yiu-chung, GBS, JP (Chairman)  
Hon Howard YOUNG, SBS, JP (Deputy Chairman)  
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 Martin LEE Chu-ming, SC, JP  
Hon Fred LI Wah-ming, JP  
Dr Hon LUI Ming-wah, 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 SIN Chung-kai, JP  
Dr Hon Philip WONG Yu-hong, GBS  
Hon WONG Yung-kan, JP  
Hon Jasper TSANG Yok-sing, GBS, JP  
Dr Hon YEUNG Sum  
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 Timothy FOK Tsun-ting, GBS, JP  
Hon Abraham SHEK Lai-him, JP  
Hon LI Fung-ying, BBS, JP

Hon Tommy CHEUNG Yu-yan, JP  
Hon Albert CHAN Wai-yip  
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  
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 CHEUNG Hok-ming, SBS, JP  
Hon WONG Ting-kwong, BBS  
Hon Ronny TONG Ka-wah, SC  
Hon CHIM Pui-chung  
Hon Albert Jinghan CHENG  
Hon KWONG Chi-kin

**Members  
absent** :

Hon LEE Cheuk-yan  
Dr Hon David LI Kwok-po, GBS, JP  
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP  
Hon LEUNG Yiu-chung  
Hon CHOY So-yuk  
Hon Andrew CHENG Kar-foo  
Hon Frederick FUNG Kin-kee, JP  
Dr Hon Joseph LEE Kok-long  
Hon Alan LEONG Kah-kit, SC  
Hon LEUNG Kwok-hung  
Dr Hon KWOK Ka-ki  
Dr Hon Fernando CHEUNG Chiu-hung  
Hon Patrick LAU Sau-shing, SBS, JP  
Hon TAM Heung-man

**Public Officers  
attending** :

Mr Stephen LAM Sui-lung  
Secretary for Constitutional Affairs

Mr Joseph LAI Yee-tak  
Deputy Secretary for Constitutional Affairs

Mr Raymond TAM Chi-yuen  
Principal Assistant Secretary for Constitutional Affairs

Mr Bob ALLCOCK  
Solicitor General

Mr James O'NEIL  
Deputy Solicitor General (Constitutional)

Mr Gilbert MO  
Deputy Law Draftsman (Bilingual Drafting &  
Administration)

**Clerk in attendance** : Mrs Percy MA  
Chief Council Secretary (2)3

**Staff in attendance** : Mr Jimmy MA  
Legal Adviser

Mr Arthur CHEUNG  
Senior Assistant Legal Adviser 2

Mrs Eleanor CHOW  
Senior Council Secretary (2)4

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**I. Meeting with the Administration**

(LC Paper No. CB(2)1331/04-05(01) – Administration's response to issues raised at the meeting on 14 April 2005

LC Paper No. CB(2)1331/04-05(02) – Letter dated 14 April 2005 from Hon Margaret NG to the Administration concerning Senior Assistant Legal Adviser's letter issued vide LC Paper No. CB(2)1268/04-05(04)

LC Paper No. CB(2)1331/04-05(03) – Administration's response to Hon Margaret NG's letter dated 14 April 2005

LC Paper No. CB(3)465/04-05 – The Bill

LC Paper No. CB(2)1268/04-05(02) – Marked-up copy of the Bill)

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Issues raised by members

2. The Bills Committee raised a number of issues and requested the Administration to provide a written response. These issues are summarised below –

- (a) According to the Administration's reply to a question raised at the meeting on 14 April 2005, Article 53 of the Basic Law (BL) stipulated that in the event that the office of the Chief Executive (CE) became vacant, a new CE should be selected within six months. If a vacancy

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arose within six months before the expiry of the term of office of CE whose office had become vacant, there was no need to hold a by-election, and arrangements would be in hand for the next CE election before the end of that term in time for the person elected to be appointed and started a new term of office. Mr TONG Ka-wah pointed out that neither BL 53 nor the relevant provisions of Chief Executive Election Ordinance (CEEEO) e.g. sections 6 and 10 had express provisions providing that a by-election was not required under such circumstances, and requested the Administration to explain the basis of its reply.

- (b) Given that CEEEO was designed on the basis that the term of office of any new CE was five years, Ms Audrey EU considered that the amendment proposed in the Bill, which was predicated on the new concept of “remainder of the term of office”, would have implications on other provisions of CEEEO. The Administration was requested to review all relevant provisions of CEEEO with a view to introducing the relevant and necessary consequential amendments to CEEEO to address any anomalies that would arise as a result of the enactment of the amendment proposed in the Bill. It should also provide a timetable/contingency plan as regards the introduction of such amendments.
- (c) Ms Audrey EU and Mr TONG Ka-wah quoted a number of examples to illustrate how the new concept of “remainder of the term of office” would have implications on other provisions of CEEEO. If a vacancy occurred in the office of CE, say 200 days before the expiry of the five-year term, two elections would be required to be held concurrently or within a very short span of time: one to return a candidate for appointment to fill that vacancy under the proposed new section 3(1A), and another to fill the vacancy which would arise under section 4(a) of CEEEO. In the same scenario, if a legal challenge was mounted against the election result of the first-mentioned election at the end of the 30 day period allowed under section 39 of CEEEO, the challenge could be rendered futile even if successful because by the time a determination was made, the CE invalidly elected would have already served almost the whole of his short remaining term. The Administration was requested to address these anomalous consequences.
- (d) Mr LEE Wing-tat requested the Administration to confirm whether the term of office of the current Election Committee (EC) could be extended despite its expiry in case an EC was required to elect a new CE to fill another vacancy that arose before 1 July 2007, but after a date which made it impossible for the current EC to hold the election.
- (e) In response to Ms LI Fung-ying 's concern about the fact that the term of office of the current EC would expire soon on 13 July 2005 and the

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electoral arrangements for filling another vacancy in the office of CE if it arose shortly, say six to seven months, before 1 July 2007, the Administration advised that it had studied the related issues in consultation with the Mainland authorities, as these issues concerned the relationship between the Central Authorities and the HKSAR. The Administration was requested to elaborate on the issues studied and the response so far received from the Mainland authorities.

- (f) Ms Margaret NG referred to the article entitled “The Rule of Law in Hong Kong : Immigrant Children, the Court of Final Appeal and the Standing Committee of the National People’s Congress” published by Mark Elliott and Christopher Forsyth in (2000) Asia Pacific Law Review 53 concerning the legality and constitutionality of the HKSAR Government’s decision to request for an interpretation by the Standing Committee of the National People’s Congress. The Administration was requested to provide its comments on the points raised in the article.

*(Post-meeting note : The article provided by Ms Margaret NG was issued vide LC Paper No. CB(2)1359/04-05(01) on 22 April 2005. The Administration’s response to the issues raised at this meeting was issued to members vide LC Paper No. CB(2)1357/04-05(01) on 23 April 2005.)*

Basis for CE to request for an NPCSC interpretation  
(Question (a) of LC Paper No. CB(2)1331/04-05(01))

3. Having noted the Administration’s paper and further explanations given at the meeting, Ms Emily LAU considered the Administration’s response unacceptable. She said that the Administration had not followed the proper procedure for seeking an NPCSC interpretation. She pointed out that there was an express provision in BL 158(3) for a judicial request for an NPCSC interpretation, but the Government had chosen to ignore it. While BL 158 had made no express provision for CE to request an NPCSC interpretation, the Acting CE had made such a request. Ms LAU said that if it was considered necessary for CE to have a role under BL 158, the article should be amended to that effect after thorough consultation and deliberation. Ms LAU expressed concern whether CE had unfettered power to request NPCSC to give an interpretation of the provisions of BL whenever he was of the opinion that such an interpretation was necessary, despite the absence of an express provision in BL 158 empowering him to do so. She sought advice from LA.

4. The Administration responded that it was always the position of the Government that only under very exceptional circumstances would a request for interpretation be considered. CE had a constitutional duty to implement the Basic Law. If in the process, he came across exceptional difficulties, he had a responsibility to report to the Central People’s Government. The whole process of interpretation was in accordance with the Constitution and the Basic Law.

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5. LA said that no power given by law could be an unfettered power. Powers conferred by law had to be exercised by the party empowered to do so by considering all relevant factors and adopting a reasonable and proportional approach. According to the Administration, CE not only had the power but also a duty to implement BL. It required a judgment on the part of CE to decide whether in exercising his powers and functions, there was a need for him to seek an interpretation by NPCSC. LA further said that BL 158 stipulated the bodies which had the power to interpret BL. However, the issue under discussion by members was the mechanism for triggering off the process of interpretation by NPCSC. In his view, these were two separate legal issues.

**II. Any other business**

(LC Paper No. CB(2)1289/04-05 – A list of tentative dates for future meetings)

6. Members noted that the next meeting would be held on 23 April 2005 to receive views from deputations on the Bill.

7. The meeting ended at 10:36 am.

Council Business Division 2  
Legislative Council Secretariat  
6 May 2005

**Proceedings of the second meeting of the Bills Committee on  
Chief Executive Election (Amendment)  
(Term of Office of the Chief Executive) Bill  
on Thursday, 21 April 2005 at 8:30 am  
in Chamber of the Legislative Council Building**

| <b>Time Marker</b> | <b>Speaker(s)</b>                                  | <b>Subject(s)</b>   | <b>Action required</b>  |
|--------------------|--|---|---|
| 000000 - 001303    | Chairman<br>Ms Margaret NG<br>Admin                | <p>The meaning of “term” in the Basic Law (BL) and the Bill, i.e., whether it included part of a term such as remainder of the term of a Chief Executive (CE) who left office prematurely.</p> <p>The effect of the new concept of “remainder of the term of office” on the Chief Executive Election Ordinance (CEEEO). For instance, how to deal with the requirements under section 6 concerning the conduct of an election to fill a vacancy in the office of CE and section 11(3)(b) concerning fixing new polling date under certain circumstances.</p>  |   |
| 001304 - 003430    | Chairman<br>Ms Audrey EU<br>Admin<br>Legal Advisor | <p>The need for introducing consequential amendments to CEEEO to rationalize any anomalies arising from the new concept of “remainder of the term of office”.</p> <p>Scenario for holding two elections under section 10 of CEEEO within a span of 15 days, i.e. electing a new CE to fill a vacancy that arose, say 200 days, before the expiry of the second term CE on 30 June 2007 under the proposed new section 3(1A), and electing the third term CE to fill a vacancy that arose under section 4(a) of CEEEO.</p> <p>Basis for not holding a by-election to fill the vacancy in the office of CE which arose within six months before the expiry of the term of office, given that neither BL 53 nor the relevant provisions of CEEEO e.g. sections 6 and 10 had express provisions providing that a by-election was not required under such circumstances.</p> | <p>The Administration to review all relevant provisions of CEEEO with a view to introducing the necessary consequential amendments to CEEEO and to provide a timetable/contingency plan as regards the introduction of such amendments.</p> <p>The Administration to address anomalous consequences.</p> <p>The Administration to provide a written response.</p> |

| Time Marker     | Speaker(s)   | Subject(s)  | Action required                                       |
|-----------------|--|---|---|
| 003431 - 005156 | Chairman<br>Mr Martin LEE<br>Admin                 | Legal basis for the Government of the Hong Kong Administrative Region (HKSARG) to introduce the Bill before NPCSC's interpretation of BL53(2) concerning the term of office of CE.<br><br>Basis for not adhering to BL8 while preserving the common law legal system in Hong Kong.  |   |
| 005157 - 010502 | Chairman<br>Ms Emily LAU<br>Admin<br>Legal Advisor | Basis for HKSARG to make a report to the State Council to request the Standing Committee of the National People's Congress (NPCSC) to make an interpretation of BL53(2) regarding the term of office of CE under BL 43 and BL 48.   |   |
| 010503 - 011403 | Chairman<br>Mr LAU Kong-wah<br>Admin               | Reasons for HKSARG not requesting NPCSC to make an interpretation of BL46 regarding the maximum number of years to be served by the new CE elected on 10 July 2005, i.e. whether it should be seven or 12 years.  |   |
| 011404 - 012425 | Chairman<br>Mr LEE Wing-tat<br>Admin               | Remarks made by Mr QIAO Xiaoyang, Deputy Secretary of NPCSC on BL53(2) regarding the term of office of CE.<br><br>Clarification on whether the term of office of the current Election Committee (EC) could be extended despite its expiry in case an EC was required to elect a new CE to fill another vacancy that arose before 1 July 2007, but after a date which made it impossible for the current EC to hold the election.  | The Administration to provide a written response.     |
| 012426 - 013118 | Chairman<br>Mr TONG Ka-wah<br>Admin                | The need for introducing consequential amendments to CEEO to rationalize any anomalies arising from the new concept of "remainder of the term of office".<br><br>Scenario of a vacancy in the office of CE arose shortly, say six to seven months, before the expiry of the second term CE on 30 June 2007, and the related question of legal challenge under section 39 of CEEO.<br><br>Basis for not holding a by-election to fill the vacancy in the office of CE which arose within six months before the expiry of the term of office. | The Administration to address anomalous consequences. |



| <b>Time Marker</b> | <b>Speaker(s)</b>                    | <b>Subject(s)</b>  | <b>Action required</b>   |
|--------------------|--------------------------------------|--|--|
| 013119 - 013640    | Chairman<br>Mr Albert HO<br>Admin    | The need for HKSARG to uphold its belief and principle and not to succumb to pressure from the Central Authorities on the interpretation of BL53(2) regarding the term of office of CE.  |  |
| 013641 - 014105    | Chairman<br>Mr CHAN Kam-lam<br>Admin | Arrangements for electing a new CE and the third term CE in the event of a vacancy in the office of CE arose shortly, say six to seven months, before the expiry of the second term CE on 30 June 2007.  |  |
| 014106 - 01463     | Chairman<br>Mr Albert CHAN<br>Admin  | Application for leave to apply for judicial review in respect of the term of office of the new CE, and lawfulness for the Legislative Council to pass the Bill which would be heard by the Court of First Instance on 10 May 2005.<br><br>Possibility of further legal challenges relating to other aspects of CEEO as a result of the proposed amendment in the Bill. |  |
| 014644 - 014818    | Chairman<br>Mr LUI Ming-wah<br>Admin | Clarification on whether the election and appointment of CE were affairs within the limits of HKSAR's autonomy.  |  |
| 014819 - 015329    | Chairman<br>Ms LI Fung-ying<br>Admin | Arrangements to address the issue of the lack of EC during the period from 14 July 2005 to early 2007.<br><br>Arrangements for electing a new CE to fill a vacancy in the office of CE if it arose shortly, say six to seven months, before the expiry of the second term CE on 30 June 2007.  | The Administration to elaborate on the issues studied and the response so far received from the Mainland Authorities, given its advice that these issues concerned the relationship between the Central Authorities and HKSARG and had been studied in consultation with the Mainland Authorities. |
| 015330 - 020021    | Chairman<br>Ms Margaret NG<br>Admin  | Basis for HKSARG to request NPCSC to make an interpretation of BL53(2) regarding the term of office of CE under BL 43 and BL 48.<br><br>The Solicitor General was requested to give views on the article entitled "The Rule of Law in Hong Kong : Immigrant Children, the Court of Final Appeal and the Standing Committee of the National                             | The Administration to provide its comments on the points raised in the article.  |

| <b>Time Marker</b> | <b>Speaker(s)</b> | <b>Subject(s)</b>   | <b>Action required</b> |
|--------------------|-------------------|---|------------------------|
|                    |                   | People's Congress" published by Mark Elliott and Christopher Forsyth in (2000) Asia Pacific Law Review 53 concerning the legality and constitutionality of the HKSARG's decision to request for an interpretation by the NPCSC. |                        |
| 020022 - 020127    | Chairman          | Date of next meeting.   |                        |

Council Business Division 2  
Legislative Council Secretariat  
6 May 2005