

**The Administration's Response
to the Questions referred from the Committee of Rules of Procedure
to 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**

- (a) *What are the constitutional and legal justifications for submitting the proposals concerning amendments to the method for the selection of the Chief Executive and the method for the formation of the Legislative Council for the Council's endorsement by way of motions, instead of bills, as indicated in paragraph 7.02 and Annexes B and C of the Fifth Report of the Constitutional Development Task Force, in the light of clause 3 of the Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China which states: "The bills on the amendments to the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region into the Legislative Council"?*

1. The procedures for amending the provisions of Annex I and Annex II of the Basic Law are set out in Article 7 of Annex I and Article III of Annex II respectively.

2. According to Clause 3 of the Interpretation of the Standing Committee of the National People's Congress ("NPCSC") on 6 April 2004 ("the Interpretation"), after the NPCSC has made a determination on whether there is a need for change, the bills (法案) on the amendments to the methods for selecting the Chief Executive ("CE") and for forming the Legislative Council ("LegCo") shall be introduced by the SAR Government into LegCo. Likewise, any proposed amendments to the bills (修正案) shall be introduced by the SAR Government.

3. Amendments to the methods for selecting the CE and for forming the LegCo are, by their nature, amendments to the provisions of Annex I and Annex II to the Basic Law. After the amendments have been reported to the NPCSC for approval (in the case of amendments to Annex I) or for the record (in the case of amendments to Annex II), they will become, respectively, an integral part of Annex I and Annex II to the Basic Law. They are not local legislation.

4. There are two stages regarding the procedures for amending the provisions of Annex I and Annex II to the Basic Law. The first stage (i.e. endorsement of a two-thirds majority of all the Members of the LegCo and consent of the CE) will be undertaken in Hong Kong. The second stage (i.e. NPCSC approving or acceptance for the record the amendments proposed by Hong Kong) will be undertaken by the Central Authorities. Indeed, Clause 3 of the Interpretation makes it clear that the amendments may take effect only after they have gone through the above process.

5. Thus, it is clear that the amendments do not yet have legal effect, when they are passed by a two-thirds majority of all the Members of the LegCo and have received the consent of the CE. They are given legislative effect only after approval or acceptance for the record has been given or made by the NPCSC. It is, therefore, inappropriate for them to be introduced into the LegCo or promulgated by way of local bills (條例草案), because the purpose of a local bill (條例草案) is to codify or change the legal position in local legislation. As a corollary, the normal LegCo process for scrutiny of local bills (條例草案) is not applicable to any proposed amendments to the two Annexes, since they are not local legislation.

6. The Appendix to Annex B and the Appendix to Annex C of the Fifth Report are the (Draft) Amendments which (subject to LegCo's endorsement and CE's consent) the SAR Government intends to present to NPCSC for approval or for the record in accordance with Article 7 of Annex I and Article III of Annex II respectively. These (Draft) Amendments are legislative proposals that require decision by the NPCSC to be given legislative effect. Hence, it is appropriate for them to be introduced into, and to be endorsed by, LegCo by way of motions.

- (b) *In relation to the proposed amendment to the method for selecting the Chief Executive pursuant to Article 7 of Annex I to the Basic Law, would the requirement of “endorsement of a two-thirds majority of all the members of the Legislative Council” apply to the enactment of local legislation as such legislation would, on the face of it, constitute part and parcel of the method for selecting the Chief Executive as provided by law?*

7. The procedural requirement stipulated in Article 7 of Annex I to the Basic Law applies to amendments to the method for selecting the CE for the terms subsequent to the year 2007 as set out in Annex I to the Basic Law. This requirement does not apply to local legislation. Indeed, the Chief Executive Election Ordinance and its amendments were voted upon by a simple majority in LegCo in the past.

- (c) *Assuming that it would be legally in order to use motion as the procedural vehicle for members of the Legislative Council to express their preference on the proposed amendment to the method for the formation of the Legislative Council as indicated in the draft motion in Annex C to the Fifth Report of the Constitutional Development Task Force (“draft motion”), and in the light of the specific provision in Article 3 of Annex II to the Basic Law which makes reference to “amend the provisions of this Annex” (as opposed to amending the method as provided in Article 7 of Annex I), why is the draft motion not expressed in such a way that the motion, if passed, would have the effect of amending the provisions in Annex II to the Basic Law by way of repealing relevant provisions of or adding new provisions to the Annex?*

8. As explained in paragraph 3 above, amendment to the method for forming the LegCo is, by nature, amendment to the provisions of Annex II to the Basic Law. As explained in paragraphs 4 and 5 above, clause 3 of the NPCSC Interpretation makes it clear that the draft amendment to the method for forming the LegCo may take effect only after they have gone through the entire process stipulated in Article III of Annex II to the Basic Law. After amendment have been reported to and accepted by the NPCSC for the record, it will become an integral part of Annex II to the Basic Law. Specifically, it will provide that the fourth term of the LegCo in the year 2008 shall have 70 members, including 35 to be returned by functional constituencies, and 35 by geographical

constituencies through direct elections. Since the amendment is expressly for the formation of the fourth term of the Leg Co in 2008, there is no need to repeal other provisions in Annex II. It should also be noted that Clause 4 of the NPCSC Interpretation stipulates that if no amendment is made to the method for forming the LegCo as stipulated in Annex II to the Basic Law, the provisions relating to the method for forming the third term of the LegCo in Annex II (i.e. 60 members, including 30 to be returned by functional constituencies and 30 by geographical constituencies through direct elections) will still be applicable to the method for forming the fourth term of the LegCo.

- (d) *According to Article III of Annex II of the Basic Law, the two-thirds majority requirement relates to amendment of the provisions of the Annex. Since the amendment as proposed in the draft motion does not relate to any of the provisions of Annex II, does it not mean that Annex II does not require any amendment?***

9. The draft amendment to the method for forming the LegCo is proposed pursuant to Article III of Annex II to the Basic Law. If the draft amendment is passed by a two-thirds majority of the LegCo, receives the consent of the CE, and is accepted by the NPCSC for the record, it will have the effect of amending the provisions of Annex II to the Basic Law. Specifically, it will provide that the fourth term of the LegCo in the year 2008 shall have 70 members, including 35 to be returned by functional constituencies, and 35 by geographical constituencies through direct elections. It should be noted that Clause 4 of the NPCSC Interpretation stipulates that if no amendment is made to the method for forming the LegCo as stipulated in Annex II to the Basic Law, the provisions relating to the method for forming the third term of the LegCo in Annex II (i.e. 60 members, including 30 to be returned by functional constituencies and 30 by geographical constituencies through direct elections) will still be applicable to the method for forming the fourth term of the LegCo.

- (e) *Do the draft motions concerning the methods for selecting the Chief Executive and for forming the Legislative Council possibly fall under the category of “important bill” referred to in Article 50 of the Basic Law?*

10. As explained in paragraph 3 above, the proposed amendments to the provisions of Annex I and Annex II to the Basic Law are not local legislation. As such, we do not consider that Article 50 of the Basic Law is applicable.

- (f) *Would it be in order for the draft motions to have the words: “is hereby endorsed by this Council by a two-thirds majority of all Members” when in reality it would not be possible for any of the Members who are voting in support of the motion to know the voting result before it is declared by the President in accordance with the Rules of Procedure?*

11. The draft motions must be endorsed by the LegCo by a two-thirds majority of all Members in accordance with the Basic Law. If the motions are passed by the requisite two-thirds majority, the wording in the (passed) motion will serve as a clear record that the Basic Law requirement is met. If the motions are not endorsed by a two-thirds majority, the President will declare the requisite two-thirds majority is not reached. There is no question of knowing the result before voting.

**Constitutional Affairs Bureau
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