

**Administration's Responses to Points raised on 22 May 2001  
by Members of the Bills Committee  
on the Chief Executive Election Bill**

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*(for submission to the Bills Committee meeting to be held on 29 May 2001)*

**Clause 4**

**Q1: Whether CPG has the power to remove the CE from office in circumstances not specified under the Basic Law, and if it has, the legal source for the power and how that power should be exercised? Moreover, will the Administration reconsider the proposed amendment to clause 4(c) having regard to Members' views expressed at the meeting?**

**A1: (i) *Source of power of removal***

As previously explained the CPG's power to remove the CE flows from the Basic Law. BL15 and 45 provide that the CE shall be appointed by the CPG. While the CPG's power to remove the CE is not expressed as such in the Basic Law, it follows from the construction of the BL, and in particular from BL52 and 73(9), that the CPG has a power of removal as well as the power to appoint.

The procedure under BL73(9) provides for the impeachment of a CE. Where a motion of impeachment is passed by the necessary majority, it must be reported to the CPG for a decision. In this context the "decision" would be a decision on whether or not to remove the CE from office. Furthermore, according to BL52, the CE must resign under the specified circumstances. If the CE refuses to resign, the ultimate enforcement will be through the impeachment procedure under BL73(9) which requires a decision by the CPG to remove the CE from office.

*(ii) Purpose of clause 4(c)(iii)*

Clause 4 is not an empowering provision that confers additional powers on the CPG to remove the CE from office. It only reflects all the circumstances that the office of the CE will become vacant.

Clause 4(c)(i) provides that the office of the CE will fall vacant if the CPG removes him from office upon his resignation under BL 52 or otherwise. Clause 4(c)(ii) provides that vacancy in the office of the CE will arise if the CPG removes the CE from office upon the reporting to it for decision of an impeachment motion passed by LegCo under BL 73(9).

Clause 4(c)(iii) further provides that the office of the CE will become vacant if the CPG removes the CE from office “under any other circumstances”. This is a catch-all provision to cater for circumstances which do not fall within clause 4(c)(i) and (ii).

In the absence of a catch-all provision of this nature, the Bill would be deficient. There would be a lacuna as there would be no basis to declare a vacancy arising in circumstances other than those set out in clause 4(c)(i) and (ii). The declaration of a vacancy is the necessary trigger for the holding of an election of a new CE.

A number of circumstances could be envisaged which do not fall easily into the scope of clause 4(c)(i) and (ii) and where the question of vacancy in office may arise. A situation could arise where a CE was physically or mentally incapable of carrying out the duties of his office but where the very impairment that prevented him from carrying them out rendered him incapable of resigning. Or where the whereabouts of a CE could not be ascertained. It is not possible to predict every combination of circumstances that might arise in the future. The legislation should be capable of working no matter what happens.

After careful consideration and having regard to Members' views, we are of the view that the above proposed form of wording is appropriate.

*(iii) Power of removal must not be used in an arbitrary manner*

The CPG derives its status from the PRC Constitution and is "the executive body of the highest organ of state power" (Article 85 of the Constitution). The CPG's power to remove the CE from office is not unlimited but may be subject to various constraints such as constitutional, legal and conventional.

**(a) constitutional consideration**

Powers derived from or reliant on a status derived from the constitution must not to be used in an arbitrary manner but must be exercised in accordance with the principle of constitutionality. When considering the constitutionality of any act one must look at the underlying spirit of the constitution and any conventions which may have developed over time in relation to the exercise of powers and functions under the constitution. Although there is no specific provision in the PRC constitution which covers exercise of this particular power, other analogous provisions relating to powers of appointment and removal of other classes of official require that such powers must be exercised in accordance with the law, which is strongly indicative of the underlying constitutional spirit.

**(b) legal consideration**

The Basic Law is a national law adopted by the National People's Congress. As such it has legal effect in the whole of the PRC. As observed by Professor Wang Shuwen, Introduction to the Basic Law of HKSAR (English edition 2000) p. 158 :

“the Basic Law of the HKSAR, as a basic law enacted by the NPC, should have legal force throughout the country, too, and should be observed by all state organs.....”

The legal requirements of the Basic Law thus have force not only in HKSAR but throughout the country and apply to state organs including the CPG.

(c) **conventional consideration**

With regard to constitutional conventions the Basic Law has not been in operation long enough for relevant conventions to develop in this area. That position may alter with time and practice.

**Q2: Whether the Chief Executive Election Bill could be considered as a piece of constitutional legislation?**

A2: Whilst the CE Election Bill is necessary to give effect to the provisions of Annex I to the Basic Law and related to constitutional issues, it is an ordinary piece of legislation with no special status.

**Q3: Could the Administration explain whether redress could be sought in Hong Kong courts in respect of a decision of CPG to remove an incumbent CE?**

A3: Any aggrieved party could seek redress from the HKSAR courts if he considers that an ordinance was operated in a manner inconsistent with the Basic Law. It is not strictly a matter covered by the Bill but, in respect of a decision by the CPG, an aggrieved party could apply to the courts seeking redress or a declaration as to his rights or status.

Constitutional Affairs Bureau  
26 May 2001