

**Administration's Responses to Points raised
on 29, 31 May and 5 June 2001
by Members of the Bills Committee
on the Chief Executive Election Bill**

(for submission to the Bills Committee meeting to be held on 12 June 2001)

Clause 4

Q1: The Administration is requested to consider Hon Audrey EU's proposed amendment to clause 4 of the CE election Bill.

A1: Source of power of removal

As previously explained the CPG's power to remove the CE flows from the Basic Law. Under BL12, the HKSAR is a local administrative region of the PRC, which apart from enjoying a high degree of autonomy comes directly under the CPG. 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.

This is, in fact, a view shared by the LegCo Legal Adviser. In his written opinion on this matter, he holds that –

“According to the basic principles of “one country, two systems” and “high degree of autonomy” of the HKSAR, and on the premise that the CPG should only exercise its power

not to appoint sparingly and rationally, it appears that the CPG will have the implied power to revoke the appointment of the CE in limited circumstances which include circumstances specified in BL 52 and BL 73(9), and circumstances which do not fall within the ambit of BL 52 and BL 73(9) but revocation is necessary for purposes which do not contravene the BL, including the purpose of maintaining “Hong Kong’s stability and administrative efficiency”.”

Purpose of clause 4

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.

Proposed amendments to clause 4

(i) Hon Audrey EU’s suggestion

The Hon Audrey EU suggested that clause 4 of the CE Election Bill be recast as follows –

4. Vacancy in office

There shall be an election when the office of the Chief Executive becomes vacant upon –

- (a) the expiry of the term of office of the Chief Executive;
- (b) the death of the Chief Executive;
- (c) the removal of the Chief Executive by the Central People’s Government from office –
 - (i) upon his resignation under Article 52 of the Basic Law or otherwise;
 - (ii) upon the reporting to it for decision of a motion of impeachment passed against him under Article 73(9) of the Basic

Law; or

- (d) the office being vacant under any other circumstances.

While appreciating the effort of the Hon Audrey EU, we are afraid we have difficulties in accepting her suggestion. The clause suffers from technical drafting problem in that it does not relate to clauses 5 and 6 immediately following. The purpose of clause 4 is to explain when a vacancy arises. Clauses 5 and 6 deal with declaring the vacancy and holding an election respectively. However, as the Hon Audrey EU's draft goes straight into "There shall be an election", it will be incompatible with clauses 5 and 6. Moreover, the most critical point is the circular effect of the proposed clause 4(d) ("... the office of the CE becomes vacant upon – (d) the office being vacant under any other circumstances"). This will create uncertainties.

(ii) Democratic Party's suggestion

At the Bills Committee meeting held on 5 June 2001, the Democratic Party (DP) suggested another version for clause 4. It reads as follows –

4. Vacancy in office

The office of the CE becomes vacant –

- (a) on the expiry of the term of the office of the CE;
- (b) if the CE dies;
- (c) if the CE resigns in accordance with BL 52 or otherwise; or
- (d) if the CPG removes the CE from office upon the reporting to it by LegCo of a motion of impeachment passed against the CE under BL 73(9) because the CE refuses or is unable to resign despite being charged of serious

breach of law or dereliction of duty (including the CE's failure to fulfill his duties for whatever reasons).

We have carefully considered the DP's suggestion. While the proposal does allow for resignation other than under BL 52, thus recognizing that there are circumstances beyond BL 52 and 73(9), we cannot accept this version for the following reasons –

- (a) clause 4, if so drafted, cannot fully reflect all the circumstances under which removal office of the CE may arise. Members will recall that both the LegCo Legal Adviser and the Administration's legal advice are of the view that there may be circumstances other than those prescribed under Articles 52 and 73(9) of the Basic Law where removal of the CE from office is necessary for purposes not contravening the Basic Law; and
- (b) we do not accept that the resignation of the CE under BL 52 or otherwise does not require the acceptance of the CPG. The resignation must be made to the CPG as the appointing authority. Account must be taken of the legal position, which the Administration takes, that upon resignation under BL 52 or otherwise, the office of the CE will only become vacant when the CPG removes the CE from office.

(iii) the Administration's proposal

Having regard to the discussion at the Bills Committee in respect of the above, we propose that clause 4 be revised, inter alia, as follows –

4. Vacancy in office

The office of the Chief Executive becomes vacant –

- (a) on the expiry of the term of office of the Chief Executive;

- (b) if the Chief Executive dies; or
- (c) if the Central People's Government removes the Chief Executive from office –
 - (i) upon his resignation under Article 52 of the Basic Law or otherwise;
 - (ii) upon the reporting to it for decision of a motion of impeachment passed against him under Article 73(9) of the Basic Law; or
 - (iii) under any other circumstances consistent with the Basic Law.

In our view, this draft reflects Members' view that clause 4 should be drafted in such a way to make it clear that the removal of the CE from office by the CPG should be consistent with the Basic Law. At the last meeting, Members raised questions in respect of clause 11(2) of the Bill which has a bearing on this in terms of a solution. We are working on further amendments to clause 4 in this regard. Please also see answer to the next question.

Q2: Should there be a procedure to cater for situations where the CE-elect “cannot assume” the CE office under clause 11(2), e.g. the instrument of appointment specified under clause 3 has not been issued? Why is the polling date under clause 11(1) determined by the EAC, whereas that under clause 11(2) by the CE? What is the legal basis for the Administration’s advice that the nomination of candidates will be re-opened under clause 11(2)?

A2: We propose to amend clause 11 to provide that –

- (a) *in respect of clause 11(1)*: in the event that the CE election fails (e.g. due to death of all candidates), a new poll will be held 42 days later. A 42-day is proposed because clause 15 of the Bill requires a minimum of 14 days for nomination and 21 days for canvassing. We need an extra seven days to arrange for the new election (e.g. gazetting of notice concerning nomination and polling date);
- (b) *in respect of clause 11(2)*: We propose to delete this sub-clause and to provide under clause 4 that, if the CE elect cannot assume office upon the expiry of term of the serving CE or upon the expiry of the six-month period when the office of the CE first became vacant, as the case may be, the office of the CE will become vacant, and hence a new election will be held on the first Sunday 120 days after the office of the CE becomes vacant.

These proposals will require changes to clause 4 in order to trigger the declaration of vacancy and the election of a new CE.

Subject to the Bills Committee’s agreement, we will draft CSAs to provide for that and present them, together with other Administration CSAs, for Members’ discussion at the meeting to be held on 19 June 2001.

Q3: The Administration is requested to provide extracts of law for the purpose of specifying the circumstances under which the office of the head of state becomes vacant in some overseas countries.

A3: While we are still awaiting information on France, we have the U.S. arrangement in hand. Article II of the U.S. Constitution provides that *“in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, ... until the disability be removed, or a President shall be elected.”*

Constitutional Affairs Bureau
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