

**Ruling by the President on
Hon Andrew WONG's proposed amendments
(relating to election of District Council chairmen)
to the District Council's Bill**

Hon Andrew WONG has given notice to move a total of 44 Committee Stage amendments (CSAs) to the District Councils Bill, relating to the election of District Council chairmen in the respective districts.

2. Clause 60 of the Bill provides that a District Council is to elect a Chairman and a Vice Chairman from amongst its members at the first meeting of the Council held after each ordinary election. Clause 62 provides that if the office of Chairman or Vice Chairman becomes vacant, members of the Council must elect such person from amongst themselves.

3. Mr WONG's amendments seek to delete the office of Vice Chairman and, more significantly, to provide that the chairmen of all 18 District Councils be directly elected by all electors in the District concerned. They would require the elections of Chairman of District Councils to take place on the same date when elections of members of the District Councils are conducted pursuant to clause 27 of the Bill. For the election of the Chairman of a District, the entire area of a District will be "a constituency (in contradistinction to the many constituencies within the District)", as explained by Mr WONG in his Aide Memoire issued to Members on 3 March 1999.

4. I am required to rule under Rule 57(6) of the Rules of Procedure whether the proposed amendments, if passed, will have a charging effect. If this is so, then the proposed amendments require the written consent of the Chief Executive.

The Administration's views

5. The Secretary for Constitutional Affairs considers that the proposal, in effect, will mean election of an additional member to each District Council. A person who is running for election to become an elected member will not be qualified as a candidate for the election of Chairman. This mutually exclusive

arrangement is not considered suitable and will require incumbent District Council members to resign first from being members in order to run for chairmanship in case there is a by-election of the Chairman. This will create a number of vacancies in elected membership and by-elections will be required. The proposal introduces major changes to the structure of the District Councils which have not been discussed by the District Boards. The Secretary therefore does not support the proposed amendments.

6. The Secretary for Constitutional Affairs also considers that Mr WONG's amendments have a "charging effect" since election of the Chairmen in the way proposed will lead to an increase in election expenditure, in particular staffing (more staff will be required to count two votes instead of one) and postage (since letters posted to candidates at election under the Bill will not be subject to postage) and the cost incurred will have to be absorbed by the Government. Additional expenditure will also be incurred in the by-election of the Chairman and the consequential by-elections to fill the vacancies created by the resignation of incumbent members who are obliged to resign before running for election to become Chairman. At present day value, the estimated cost of running a by-election to fill the vacancy of a Chairman and a member is roughly \$3 million and \$250,000 respectively.

7. The Secretary also asserts that the amendments have another "charging effect" as the creation of 18 additional members (Chairmen) will increase "public expenditure" on allowances payable to members. At the prevailing rate of \$286,000 per member per annum, the addition of 18 District Council members will mean an additional expenditure of \$5.15 million per annum. The amendments therefore relate to public expenditure and cannot be introduced under Article 74 of the Basic Law.

Hon Andrew WONG's response

8. Mr WONG points out that it is out of place for the Secretary to argue against the desirability of his proposal in the context of seeking the President's ruling on whether or not his proposal has a charging effect under the Rules of Procedure and therefore it is also out of place for him to counter the arguments. He also considers that it is a matter which should be left to the Courts regarding whether or not Article 74 of the Basic Law applies to amendments to bills, as it

relates to the constitutionality of the Rules of Procedure.

9. Mr WONG also argues that the proposed amendments only seek to vary the composition of the District Councils and the way the Chairman of a District Council is elected. They are all within the scope of the District Councils Bill the charging effect of which has already been agreed to by the Government. In other words, increased public expenditure, if any, is only incidental to a charge which the Government has accepted.

10. Pointing to the fact that his CSAs moved in 1994 to the Legislative Council (Electoral Provisions) (Amendment) Bill 1994, which sought to vary the composition of functional constituencies and enlarge the franchise to universal adult franchise for all the five proposed 6-Member functional constituencies, had not been ruled out of order, Mr WONG argues that his proposed amendments on direct election of the Chairman of a District Council do not have any charging effect. Mr WONG also states that his proposed amendments to the Legislative Council Bill in 1997 were ruled out of order by me for being outside the scope of the bill, which indicated that I did not regard such amendments as having a charging effect.

Counsel to the Legislature's Opinion

11. One of the purposes of the Bill is to provide for the procedure for election of persons to be members of District Councils. It also provides for related matters which include the election of a Chairman and Vice Chairman of a District Council. Under clause 60 of the Bill, a District Council is to elect a Chairman and a Vice Chairman from amongst its members at the first meeting of the Council held after each ordinary election. This provision is put under Division 2 of Part VI of the Bill which provides for "Functions, Chairman and Vice Chairman and Procedure of a District Council". It is clear from the structure of the Bill that Part VI is for the purpose of providing for the mode of operation of a District Council after it has come into being and its members elected into or accepted office.

12. The legal effect of Hon Andrew WONG's proposed amendments, if passed, would be to remove the key provision (clause 60) in the Bill which provides for the election of Chairman and Vice Chairman of a District Council

from amongst members of that District Council, and to remove other provisions which may be inconsistent with the Member's proposal of having a Chairman elected by electors in a District. There would be an additional seat for Chairman allocated to each of the 18 District Councils provided in Schedule 3 of the Bill. His proposed amendments would also remove the reference to Vice Chairman so that if the Chairman is not able to chair a meeting members present would have to elect a member to preside at the meeting on an ad hoc basis. Under the Member's proposals, a person cannot run for the seat of a member and the Chairman at the same ordinary election. Should a by-election need to be held for the vacancy of the Chairman, an incumbent member who wishes to be nominated as a candidate for the by-election has to resign first before he is qualified to be nominated.

13. Under Hon Andrew WONG's proposed amendment to clause 6 of the Bill, there would be a new subclause (1A) which requires the Chief Executive in Council to declare by order published in the Gazette the entire area of a District declared under section 3 to be a District Constituency for the purposes of an election to elect the Chairman of the District Council established for that District. A District Constituency so declared would come under the definition of "constituency" as proposed to be amended by the Member. This would have the effect of preventing a person from running in the two elections at the same time because under clause 20(4) of the Bill, "a person is not eligible to be nominated as a candidate for a constituency if the person is currently nominated as a candidate for another constituency". The definition of "ordinary election" in clause 2 of the Bill is also proposed to be amended with the effect that the two elections have to be held on the same date because under clause 27(3) of the Bill, the Chief Executive can only specify one date for holding an ordinary election. For implementing his proposal of having the Chairman of a District Council elected by electors of the District and because he is not providing separate provisions necessary for such implementation, the Member proposes to amend all those provisions in the Bill which relate to elected members by adding to them the reference of Chairman or District Constituency so that they would apply to the election of the Chairman.

14. If Hon Andrew WONG's proposals were passed into law, an election to elect the Chairman would have to be conducted. The Chief Executive in Council would be required to declare a District Constituency (new clause 6(1A)), the Electoral Registration Officer would be required to

allocate a District Constituency to an elector (clause 30), the Postmaster General would be required to provide free postage in respect of one letter addressed to each elector in the District Constituency by the candidate for chairmanship (clause 35) and a poll would have to be taken in each of the District Constituencies (clause 39). Except for the requirement for declaring a District Constituency under the proposed new clause 6(1A), the allocation of District Constituency, the taking of poll and the provision of free postage would have to be done or provided by force of law; expenses for all of which would have to come from the General Revenue. If it is accepted that the election to elect the Chairman of a District Council is fundamentally different from the one proposed by the Bill to such an extent that it would, by law, require an entirely new election to be conducted, Counsel advises that the proposed amendments would have “charging effect” within the meaning of Rule 57(6) of the Rules of Procedure.

15. In relation to the “charging effect” points raised by the Administration, if it is accepted that the proposal to conduct an election to elect the Chairman would have charging effect, it should follow that because an election is defined to include a by-election and the proposed amendments would include Chairman in the definitions of “by-election”, “candidate”, “elected member” and “member”, it would reinforce the view that the proposed amendments, when taken as a whole, would have “charging effect”.

16. As regards the Administration’s view that the increased “public expenditure” on allowances payable to members which would result from the proposed amendments if passed would be another “charging effect”, Counsel submits that that would be irrelevant for present purposes because neither the Bill nor the proposed CSAs are providing for payment of allowances from the General Revenue to members.

17. It is stated in Hon Andrew WONG’s letter of 5 March 1999 that “They [His set of amendments] are all within the scope of the District Councils Bill the charging effect of which has already been agreed to by the Government. In other words, increased public expenditure, if any, is only incidental to a charge which the Government has accepted.” It should be noted that the issue of charging effect would only need to be considered if the proposed amendment is within the scope of the Bill. And it is only in the context of considering the possible charging effect of a proposed amendment that the

President may treat expenses required to undertake proposed new functions or expenditures as not having charging effect if the President is satisfied that the proposed new functions or expenditure are already required to be undertaken or incurred by the force of law either expressly or by implication. The fact that a certain proposed amendment is within the scope of the Bill to which it relates does not necessarily mean that it does not have charging effect.

18. The precedents cited by the Member are not applicable. His proposed amendments to the Legislative Council (Electoral Provisions) (Amendment) Bill 1994 were to propose an alternative method of election to elect members of the Legislative Council. It was not to enact a separate election exercise for electing the President of the Legislative Council. If it was the case, it would have raised the issue of whether it should be ruled out of order for contravening the then Royal Instructions which provided that the President was to be elected from amongst Members. His proposed amendments to the Legislative Council Bill in 1997 were ruled out of order by the President for reason that the proposed amendments were not within the scope of the Bill. It does not appear that the precedents cited are relevant for present purposes.

Ruling

19. The President is bound by the Rules of Procedure made by the Legislative Council in pursuance of Article 75 of the Basic Law. Since the Rules of Procedure only require me to form an opinion as to whether the object or effect of an amendment may be to dispose of or charge any part of the revenue or other public moneys of Hong Kong, I shall not deal with other points arising from the Administration's view on the merits or otherwise of the proposed amendment or its understanding of the effect of Article 74 of the Basic Law.

20. The proposed amendments relating to the election of District Council chairmen clearly create, in addition to the District Council Constituencies, 18 distinct District Constituencies from which District Council chairmen are to be elected from a distinct category of candidates in District elections. If the amendments are enacted, a new statutory obligation is imposed on the Government to conduct separate district-wide elections, and by-elections where

necessary, solely for the election of the chairmen, resulting in new expenditure being incurred. Such expenditure include the postage foregone in regard to the letter sent by each candidate to each registered elector in the territory, as provided in clause 35 of the Bill and regulation 6 of the Post Office Regulations (Cap. 98 sub. leg.) as proposed to be amended under the Bill. Clause 35(3) provides that the postage foregone is a charge on, and is payable from, the general revenue.

21. Mr WONG has made reference to his amendments to the Legislative Council (Electoral Provisions) (Amendment) Bill 1994. As I understand it, the 1994 Bill made provisions in its schedule 2 for the creation of a total of 29 functional constituencies for the election of 30 Members to the Legislative Council. Mr WONG sought, at that time, to vary the composition of functional constituencies and group them into five large constituencies, each returning six Members. The Administration did not raise the question of “charging effect”; neither was a ruling made in that regard on that occasion. Since the context in which the amendments to the 1994 Bill were proposed is different from that in the present Bill before Council, it has not helped in my ruling on Mr WONG’s amendments which, if enacted, will require the Government to conduct a separate district-wide election of District Council chairmen, involving all the electors, whereas the Bill proposes that members of a District Council elect a Chairman from amongst themselves.

22. Mr WONG has stated that his proposed amendments to the Legislative Council Bill in 1997 were not ruled out of order on charging effect grounds. I must point out as a matter of fact that his proposed amendments to that Bill were out of order for being inconsistent with the Decision of the Preparatory Committee and the Basic Law; hence, there was no need for me to form an opinion on “charging effect”. Therefore the implied suggestion that I did not regard that the proposed amendments as having a charging effect is not correct.

23. As regards the Secretary’s point about “the other charging effect” arising from the need to pay allowances to 18 additional members in District Councils, although it is not unreasonable to expect that District Council members may be paid allowances, I do not consider it relevant for this ruling because nowhere in the Bill are the allowances proposed.

24. For the reasons given in paragraphs 20 to 23, I rule under Rule 57(6) of the Rules of Procedure that Mr WONG's proposed amendments in respect of the election of District Council chairmen have a charging effect and may not be moved without the written consent of the Chief Executive.

(Mrs Rita FAN)
President
Legislative Council

9 March 1999