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29 April 2004

Mrs Rita Fan, GBS, JP
President of the Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear President,

In connection with Hon Martin Lee's notice of amendment to Hon. Frederick Fung's motion set down in Council for 5 May 2004 the Administration wishes to make the following submission for your consideration.

The proper limits of debate

Whilst the Administration fully respects the power and function of the Council under BL73(6) "To debate any issue concerning public interest", and Members' freedom of speech and debate in the Council Chamber under section 3 of the Legislative Council (Powers and Privileges) Ordinance Cap. 382, these provisions are nevertheless subject to certain limitations, depending on context.

One particularly relevant context in this case is the special constitutional status of the NPC and its permanent body, the NPCSC, as recognized by the Basic Law. BL 2 provides that "[t]he NPC authorizes the HKSAR to exercise a high degree of autonomy and enjoy executive,

legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.” So far as the Legislature is concerned, it is by virtue of the NPC’s authorization, as set out in BL 17, that the HKSAR “shall be vested with legislative power”. Moreover, the HKSAR is under a duty to report laws enacted by the SAR legislature to the NPCSC for the record, and the NPCSC may return and invalidate any such laws that it considers to be in breach of the Basic Law in accordance with BL 17(3).

Hong Kong’s Judiciary has accepted that the NPC and NPCSC have a special status. In *Ng Ka Ling v Director of Immigration* (No. 2) [1999] 1 HKLRD 577 at 578C (at 578E), the CFA accepted that there are constitutional limits to the judicial power of SAR courts vis-a-vis the NPC and the NPCSC¹.

There are therefore constitutional limits to the powers and functions of the SAR legislature under the authorization of the NPC through the Basic Law, vis-a-vis the NPC and its Standing Committee. In the context of amendments to Annexes I and II of the Basic Law, a close relationship between the SAR legislature and the Standing Committee is provided for in the Annexes. Specifically, the SAR legislature is entrusted with the constitutional function to report relevant amendments to the NPCSC for approval or record, as the case may be.

In view of the constitutional relationship between the Hong Kong legislature on the one hand, and the NPC and NPCSC on the other hand, the Administration submits that it is out of order for the Legislative Council to debate a motion or amendment whose language and/or substance accuses the NPC or NPCSC of breach of law or other improper

¹ “The Court’s judgment of 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under art 158 which would have to be followed by the courts of the Region. The court accepts that it cannot question that authority. Nor did the Court’s judgement question, and the Court accepts that it cannot question, the authority of the NPC or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein.”

conduct. Mr. Lee's amendment clearly falls into this category, in the Administration's view.

In making this submission regarding LegCo's proper parliamentary conduct the Administration is requesting no more than that LegCo apply to the NPC and NPCSC the same standards that it applies to itself, namely that it is out of order for LegCo to pass a motion involving offensive expressions against the character and conduct of LegCo itself which would be likely to degrade the legislature in the public estimation (although criticism of the role and functions of LegCo would be in order).

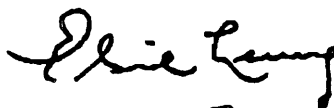
Scope of the amendment

The Administration further submits that the amendment is beyond the scope of the original motion and is therefore out of order under the Council's Rules of Procedure. The original motion is expressly directed at the Report of the Chief Executive submitted to the NPCSC. The amendment is directed at the NPCSC's consideration of the Report and requires members to decide (among other issues) –

- i) whether the NPCSC abused its powers;
- ii) whether it violated the Basic Law; and
- iii) whether the Council should condemn the NPCSC's decision.

Even if these issues were considered to be in order for debate they are clearly matters which are both grave and wholly outside the scope of the original motion.

Yours sincerely,



(Ms. Elsie Leung)
Secretary for Justice