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From : Legal Adviser (Acting)

To : Members of the House Committee

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**A Note on the Status of the Draft Motions attached to the Fifth Report of  
the Constitutional Development Task Force**

At the meeting of the House Committee on 21 October 2005, members enquired about the status of the two draft motions attached as Annex B and Annex C to the Fifth Report of the Constitutional Development Task Force in terms of the Rules of Procedure (RoP). Since the motions are only in draft form, it would appear that the assumption is that if and when the motions are in fact introduced to LegCo, they would be in the same or substantially the same form as their present draft versions.

2. The RoP are made by LegCo in pursuance of Article 75 of the Basic Law, which provides that the “rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law”. An obvious example of Basic Law provisions which affect LegCo’s power to make its own rules of procedure is Article II of Annex II “Method for the Formation of the Legislative Council of the Hong Kong Administrative Region and its Voting Procedures”. The Article provides for the different operation of a simple majority rule in respect of the passage of government bills and bills introduced by individual members of LegCo. Those provisions are reflected in Rule 46 of RoP.

3. In the RoP, motions provide the procedural mechanism by means of which decisions (whether on procedural, legislative or other matters) are made by the Council. Rules are therefore made to provide for, among other things, the giving of notice, making of amendment and passage of motions generally. However, the RoP have also made special provisions for some motions dealing with specific matters, for example -

- (a) no amendment to be moved to the standard form motions under Article 79(6) and (7) of the Basic Law and their passage to require a two-thirds majority vote of Members present (Rule 49B);
- (b) notice of motion for second reading of a bill not required (Rule 53(3)); and
- (c) special arrangements for motions in relation to the reconsideration of a returned bill (Rule 66).

4. It is clear that the two draft motions are not bills to which Part K of the RoP applies, nor are they motions for which special provisions have been made. As Government motions, they would (if and when they are formally introduced to LegCo) be subject therefore to the same rules in the RoP which now apply generally to Government motions (other than those which seek to amend local subsidiary legislation for which the notice period is different). However, two exceptions have to be considered in view 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 (the Interpretation) adopted by the Standing Committee of the Tenth National People's Congress at its Eighth Session on 6 April 2004.

5. Paragraph 3 of the Interpretation states that the "provisions in the two above-mentioned Annexes that any amendment must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council ..... mean the requisite legislative process through which the method for selecting the Chief Executive and the method for forming the Legislative Council ..... are amended. Such an amendment may take effect only if it has gone through the said process .....". In view of this interpretation, it would appear that the two Government draft motions, if allowed to be passed by LegCo with the usual majority vote of the Members present under Rule 46(1) of the RoP, might not be regarded as fulfilling the 'said process' if the actual majority is less than two-thirds of all the Members of LegCo. Members may wish to consider whether the apparent incompatibility should be resolved by applying directly the majority rule in the Interpretation specifically to the two draft motions or by other appropriate means.

6. Paragraph 3 of the Interpretation states further that the "bills on the amendments to the method for selecting the Chief Executive and the method for forming the Legislative Council ..... and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region into the Legislative Council". This restriction would appear to be specifically applicable to any amendment to the two draft motions and as such would rule out any amendment by individual Members to the motions. At present, there is no such restriction on an ordinary Government motion, such as the two draft motions, in the RoP (e.g. Rule 31). In order to facilitate the compliance of the two draft motions during its passage in LegCo with Article 7 of Annex I and Article III of Annex II to the Basic Law as interpreted by the Interpretation, Members may also wish to consider whether the incompatibility should be resolved by applying directly the restriction in the Interpretation specifically to the two draft motions or by other appropriate means.

7. A query has also been raised about the use by the Administration of motions instead of "bills" as referred to in paragraph 3 of the Interpretation. The Administration has made a preliminary response at the Special Constitutional Affairs Panel meeting on 21 October 2005, which will be followed up by a written response with details. Members may wish to discuss the issue further at a later stage.

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