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**Report of the Bills Committee on  
The English Schools Foundation (Amendment) Bill 2007**

**Purpose**

This paper reports on the deliberations of the Bills Committee on The English Schools Foundation (Amendment) Bill 2007 (the Bill).

**Background**

2. The English Schools Foundation (ESF) was established in September 1967 under The English Schools Foundation Ordinance (Cap. 1117) (the Ordinance), and is vested with the power, subject to the provisions of the Education Ordinance (Cap. 279), to own, manage, administer and operate within the territory schools offering, without regard to race or religion, a modern liberal education through the medium of English to boys and girls who are able to benefit from such an education. As at the end of the 2005-2006 school year, ESF operated 10 primary schools, five secondary schools and one special school, while its associate company, ESF Educational Services Limited (ESL), operated three kindergartens. The schools directly operated by ESF receive a subvention from the Government, which has been frozen since 2000, whereas those operated by ESL do not receive any Government subsidy.

Concerns of the Public Accounts Committee

3. In Report No. 43 of the Public Accounts Committee (PAC) issued in February 2005, PAC expressed the following areas of concern about the corporate governance of ESF and its schools -

*Corporate governance of ESF*

- (a) ESF and its schools had not adopted a high standard of corporate governance and had not exercised proper financial and administrative controls to achieve value for money;

- (b) the large size of the Foundation's membership, standing at 132, was not conducive to making decisions effectively;
- (c) the external members of ESF did not constitute a majority at any of ESF's four annual general meetings held in the 2000-2001 to 2003-2004 financial years;
- (d) large percentages of internal and external members failed to attend ESF's meetings;
- (e) ESF's existing arrangement for an internal auditor reporting directly to the Financial Controller was not sufficient to help ESF discharge its monitoring functions effectively;

*Corporate governance of ESF schools*

- (f) with the exception of one school, the composition of school councils did not include alumni;
- (g) most school councils did not specifically set out their delegated decision-making powers;
- (h) some school councils did not participate in major school activities recommended by ESF; and
- (i) most schools did not require council members to declare their personal interests which might conflict with their roles.

4. To address the concerns raised by PAC, ESF established a Governance Task Force to examine how the governing structure of ESF should be reformed. In June 2005, ESF approved a framework for the reform. In June 2006, ESF approved the proposed amendments to the Ordinance and the Regulations of The English Schools Foundation (the Regulations).

**The Bill**

5. The Bill was presented by Hon Abraham SHEK to the Legislative Council (LegCo) on 30 May 2007. It seeks to make changes to the governing structure of ESF and the administration of its schools. The main proposals are as follows -

- (a) the supreme governing body will be a Board of Governors (the Board) consisting of 26 voting members and one non-voting member who is the Chief Executive Officer (CEO) of ESF. Twenty-two voting members will be external members,

i.e. non-employees of ESF, and among whom 10 will be independent community representatives to be nominated by a Nominating Committee;

- (b) there will be five advisory committees advising the CEO;
- (c) three standing committees under the Board shall be established to advise on auditing, remuneration and financial management matters respectively;
- (d) the School Councils of ESF schools will have more defined functions and will be encouraged to include alumni among their membership; and
- (e) each school of ESF shall establish a parent teacher association comprising the parents of students of the school, its teaching staff and principal.

### **Bills Committee**

6. The House Committee agreed at its meeting on 1 June 2007 to form a Bills Committee to study the Bill. Dr Hon YEUNG Sum was elected Chairman of the Bills Committee. The Bills Committee held six meetings with ESF, and one of the meetings was attended by the Administration. The Bills Committee also received views from nine organizations and two individuals. A membership list of the Bills Committee and a list of the organizations/individuals which/who have given oral/written views to the Bills Committee are in **Appendices I and II** respectively.

### **Deliberations of the Bills Committee**

7. Members support the object of the Bill to streamline the governing structure of ESF and to improve the administration of its schools. All organizations and individuals which/who have given views to the Bills Committee also express support for the spirit of the Bill. The Bills Committee has focused its deliberations on the following aspects:

- (a) objects of ESF;
- (b) composition of the Board;
- (c) composition of the Nominating Committee; and
- (d) composition of School Councils.

The deliberations of the Bills Committee on these and related issues are set out below.

### Objects of ESF

8. Proposed section 4 of the Ordinance (clause 7 of the Bill) provides for the objects and powers of ESF. Under proposed section 4(1), the objects of ESF are, among others, "*to own, manage, administer and operate within Hong Kong or elsewhere schools offering, without regard to race or religion, a modern liberal education through the medium of the English language to boys and girls who are able to benefit from such an education*". Members appreciate the efforts made by ESF in providing quality education for students with special educational needs (SEN students) who are English-speaking. At present, the great majority of public or aided schools use Chinese as the medium of instruction, whereas international schools and Direct Subsidy Scheme schools which use English as the medium of instruction seldom admit SEN students. ESF has filled a gap in the existing provision of education for English-speaking SEN students. To further take forward the commitment of ESF to provide quality education for SEN students, Dr Hon Fernando CHEUNG proposed amending the objects of ESF to include a requirement to provide education for students without regard to SEN, as in the case of race and religion.

### *Resource implications*

9. Members have received diverse views on Dr Fernando CHEUNG's proposal. Some parents of SEN students in certain ESF schools support the proposal which, in their view, will underpin the ESF's stated desire to provide inclusive education and encourage other international schools to follow suit. However, the teaching staff and parent teacher associations of ESF mainstream schools, the School Council Chairmen (Management Committee) and Principals (Academic Committee) object to the proposal. They are concerned about the limitations of ESF in terms of finance, physical space, facilities, teaching method and curriculum on the acceptance of students with certain kinds of or severe disability such as blindness.

10. In the view of ESF, it is unfair to impose an obligation upon it which does not apply to any other schools. ESF is gravely concerned about the wide range of needs which the proposal will bring about but cannot be met. ESF has highlighted the significantly higher cost of educating a SEN student than a student in a mainstream class. According to the information provided by ESF, the Government subvention for providing education for SEN students in supporting classes in ESF schools is respectively about 4.6 and 5.4 times of those for students in ordinary primary and secondary classes. ESF has stressed that any increase in the cost of operating ESF schools will have to be shouldered by either the Government in providing higher subvention, or ESF in charging higher tuition fees.

*Legal implications*

11. Apart from resource implications, members have also considered the legal implications of Dr Fernando CHEUNG's proposal as provided respectively by the Legal Adviser to the Bills Committee and the Legal Adviser to ESF. In the opinion of the Legal Adviser to the Bills Committee, based on the relevant case law, it is likely that a decision of ESF which relates to the implementation of its objects would be reviewable by the court. Dr CHEUNG's proposed amendment to the objects of ESF may be interpreted as a target duty. Target duties are aspirational duties whose breach does not ordinarily lead to a remedy. Unlike statutory duties, target duties provide a wide measure of tolerance with which ESF may operate. The court will not intervene in how they are to be implemented or achieved as long as ESF is not acting outside the tolerance. Financial and budgetary considerations, where relevant, are matters that the court will take into account if ESF is acting in any way under such objects as to be challenged on the ground of irrationality. In the view of the Legal Adviser to the Bills Committee, it is not possible to say whether the proposed amendment would by itself attract applications for judicial review that would otherwise not be made. The proposed amendment, if passed, may have some practical implications on ESF in formulating and implementing operational policies, including financial and resource implications.

12. While agreeing that a decision of ESF which relates to the implementation of its objects would be reviewable by the court, the Legal Adviser to ESF does not agree that the proposed amendment to the objects of ESF would amount to a target duty only. In his opinion, the court has, on occasion, determined that certain statutory obligations can be construed as target duties, but this is only in specific circumstances which do not apply to ESF's case. The Legal Adviser to ESF has pointed out that according to the established law, if a public body takes account of a matter beyond those specified in statute in exercising a statutory power, then such an act is ultra vires. Should the proposed amendment be passed and were ESF to have regard to an applicant's SEN in considering whether to accept or reject him or her as a student, ESF would be considering matters beyond those set out in statute, and would therefore be ultra vires. The effect of the proposed amendment would thus be to make ESF vulnerable to judicial review on the question of SEN.

13. The Legal Adviser to ESF has also highlighted section 24 of the Disability Discrimination Ordinance (DDO) (Cap. 487) which prohibits discrimination against a person with disability and provides exceptions in case where the fulfilment of the obligations would impose unjustifiable hardship on the providers. Given that all educational establishments are subject to DDO, the Legal Adviser to ESF considers the amendment proposed by Dr Fernando CHEUNG unnecessary.

*Revised proposal*

14. Members had requested ESF to consider how Dr Fernando CHEUNG's proposal could be reflected in law to address its concern about the imposition of a statutory duty. However, ESF did not consider this approach to be the appropriate way forward. To allay the concern of ESF, Dr CHEUNG has revised his proposal to set out clearly in section 4 that it is the aim of ESF not to discriminate against SEN students. Notwithstanding the revised wording of the proposed amendment, the Legal Adviser to ESF maintains the view that any requirements set out in the objects of ESF in section 4 will carry statutory obligations that will put ESF at risk of being challenged in court. In his view, the effect of introducing into the Ordinance the concept of "non-discrimination against students with SEN" when discrimination against SEN students is already unlawful under the DDO may well be to override in part the "undue hardship" exception contained in the DDO. He further points out that, unlike the inclusion of "without regard to race or religion" in the existing objects of ESF, the reference to "SEN" in section 4 will carry on-going implications for ESF as special adaptation to its facilities and teaching methods, etc, will be required.

15. ESF has stressed that the spirit of Dr Fernando CHEUNG's proposed CSA has already been reflected in ESF's Mission Statement. The Mission Statement expressly stipulates that "*ESF provides schools and other educational services in the medium of English to children and young people who can benefit from them, including those with special educational needs, in Hong Kong.*" Moreover, ESF Executive Committee has agreed on and published a SEN policy. The SEN policy reiterates the commitment of ESF to continue to discharge its responsibilities in the area of SEN under the subvention within the financial resources available to it. ESF has stated clearly to the Bills Committee its objection to Dr Fernando CHEUNG's proposed CSA to section 4, irrespective of how the amendment is drafted.

16. While respecting the spirit of Dr Fernando CHEUNG's proposed CSA, Hon Tommy CHEUNG accepts ESF's explanations. Given his proposal to include a parent representative of SEN students in the Board (as detailed in paragraphs 28 to 30 below), Mr CHEUNG has indicated that Members of the Liberal Party do not support Dr Fernando CHEUNG's proposed CSA.

17. Mr Abraham SHEK also accepts ESF's explanations, and has indicated that Members of The Alliance do not support Dr Fernando CHEUNG's proposed CSA. He considers that Dr CHEUNG's proposed CSA will put a burden on ESF which is tantamount to punishing ESF for its good work in providing education for SEN students. Mr SHEK is of the view that the provision of education for SEN students without discrimination should not be tackled in the context of the Bill which aims to streamline ESF's governing structure. He suggests that the matter should be followed up by the Panel on Education.

18. The Chairman and Ms Audrey EU have expressed support for Dr Fernando CHEUNG's proposed CSA. They consider the proposed CSA a recognition of the good work done by ESF. Given that ESF has made a commitment to provide education for SEN students in its Mission Statement and SEN policy, reflecting such a mission in law will send a clear message to members of the public and set a good example to other international schools to accept SEN students.

19. Dr Fernando CHEUNG notes the diverse views of members on his proposal, and has indicated that he will move the proposed CSA to section 4.

#### Composition of the Board

20. The main purpose of the Bill is to streamline the governing structure of ESF. Under the existing Regulation 3.2 of the Regulations, the Foundation consists of 132 members falling under four categories, namely, Government and community, parents, teachers and school management. Proposed section 6(1) of the Ordinance (clause 8 of the Bill) will reduce substantially the membership of the Foundation's governing body, i.e. the Board, to 27, with members coming largely from the same four categories.

#### *Legislative Council representation*

21. Under proposed section 6(1)(a) of the Ordinance, two of the members of the Board shall be elected from among Members of LegCo. Mr Tommy CHEUNG considers it inappropriate and unnecessary to have LegCo representation on the Board, and proposes to remove the two LegCo seats. He has pointed out that LegCo is not represented on the governing boards of other school sponsoring bodies which are also subvented by public fund. In his view, with or without LegCo Members sitting on the Board, the use of public funds by ESF will be monitored, as shown in the audit conducted by the Director of Audit and the study by the PAC concerning ESF in 2004 and 2005 respectively. The removal of LegCo representation on the Board will not discourage ESF staff and parents of students of ESF schools to seek assistance from LegCo Members on matters relating to ESF, if necessary.

22. Members support Mr Tommy CHEUNG's proposal to remove LegCo representation on the Board. ESF, its teachers and parents of students of ESF schools all prefer some kind of public representation on the Board, be it through LegCo or the Education Bureau. Nevertheless, they respect the view of members of the Bills Committee.

23. Members note that should Mr Tommy CHEUNG's proposed amendment to remove LegCo representation on the Board be voted down in LegCo and two LegCo Members continue to sit on ESF's governing body, section 3(5) of the draft English Schools Foundation (General) Regulation (the draft Regulation) to

be made by ESF upon the enactment of the Bill will address LegCo Members' long-standing concern that their nominees should cease to be a member of the Foundation's governing body should they cease to be LegCo Members.

*Government representation on the Board*

24. Mr Tommy CHEUNG had originally proposed that one of the two seats vacated by LegCo Members should be taken up by the Permanent Secretary for Education or his appointed representative. Under the existing Regulation 3.2 of the Regulations, two Government officials are members of ESF, whereas no Government representatives will be sitting on the Board as proposed in the Bill.

25. Members note the objection of the Police Force Council Staff Associations and the Overseas Inspectors' Association of the Hong Kong Police Force (Overseas Inspectors' Association) to the non-provision of Government representation on the Board. These two Associations are concerned about possible adverse impact on the interest of civil servants with children attending ESF schools should the Administration relinquish its role in ESF's governing body.

26. The Administration does not support Mr Tommy CHEUNG's proposal. The Administration has drawn members' attention to an established and widely accepted policy that it should refrain from micro-managing individual schools. The Administration considers it inappropriate to seek representation on the boards of school sponsoring bodies or on the managing committees of schools except for Government schools. The Administration has stressed that the existing Regulations which provide for Government representation on the governing body of ESF were made by ESF and were not subject to the Administration's approval. Government representation on ESF's governing body is not a prerequisite for maintaining partnership with ESF, and the Administration will continue to foster such partnership through other established channels.

27. Members consider the Administration's explanations acceptable. Mr Tommy CHEUNG has therefore withdrawn his proposal to include Government representation on the Board.

*Representation of parents of SEN students*

28. Mr Tommy CHEUNG had also proposed the addition of a parent of SEN students in ESF schools to the Board to be elected from among parents of SEN students. Diverse views on the proposal have been expressed by the stakeholders. Initially, ESF, principals, teachers and parent teacher associations of ESF mainstream schools and School Council Chairmen objected to the proposal. In their view, it was inappropriate to give one particular interest group dedicated representation on the Board. The Bill had already provided for



seven parent members of the Board, and six of them would be elected from among parents and one by the Committee of Parents to be established under proposed section 12(1)(c) of the Ordinance (clause 8 of the Bill). They considered that parent representatives should speak for the needs of all students in ESF schools, and they could be parents of SEN students. Should parents of SEN students have membership of the Board, other interest groups in ESF might request membership also. They also considered that the composition of the Board proposed in the Bill was well balanced, had allowed the widest practical representation of all stakeholders, and had suitable checks and balances.

29. On the other hand, the parent teacher association of Jockey Club Sarah Roe School, a special school of ESF and the parents of SEN students in King George V School, one of the eight ESF, schools which has a Learning Support Class for SEN students, have expressed support for the proposal to add one parent representative of SEN students to the Board. In their view, the proposal will ensure that their voice will be heard by ESF and the needs of SEN students be better met. The proposal will also promote an inclusive culture in ESF schools.

30. Noting the diverse views on the proposal, the Bills Committee has considered ways to address the concerns of both sides. Members have discussed the viability of an alternative suggested by ESF, namely, designating one of the six seats for parent representatives on the Board for the parents of SEN students. Members do not accept this alternative as it may provoke even more objection from parents of students in mainstream classes and divide parents. After further discussion with the stakeholders, ESF proposes that the parent representative of SEN students be elected by all parents of students in ESF schools to address the concern about preferential treatment of a particular group of parents. This proposal will ensure that all parents will have the same number of votes in selecting their representatives to sit on the Board. Mr Tommy CHEUNG has revised his original proposal to take on board ESF's suggestion. Members of the Bills Committee agree to Mr CHEUNG's revised proposal. They also agree on the need to include a definition of SEN students in the Bill. A comparison of the composition of the Board under the Bill and Mr Tommy CHEUNG's proposed CSAs is in **Appendix III**.

#### *Election of parent representatives to the Board*

31. Members have examined the procedure for the election of parent representatives to the Board proposed by ESF. At the request of the Bills Committee, ESF has agreed to include the election procedure in the draft Regulation. Members note the identification process for SEN students under the SEN policy endorsed by ESF. Students will be assessed against a 6-level scale. The levels of the scale indicate the degree of support or adjustment that is needed to enable a SEN student to be educated in school. The higher the level a student is placed, the more support he/she will require in education.

Members agree to ESF's proposal that the parent of a student who has been formally assessed by the school at Level 2 or above will be eligible to stand as a candidate for the seat for parents of SEN students on the Board. Members urge ESF to ensure fairness and transparency in the identification of SEN students and involvement of the parents concerned in the process. The same principle should also apply to the election of parent representatives to the Board. Members also request ESF to set up a mechanism to handle complaints about election matters, and to review the election procedure after the completion of the first election exercise. ESF has agreed to consider members' views and suggestions.

#### Composition of the Nominating Committee

32. Proposed section 8(1) of the Ordinance (clause 8 of the Bill) provides for the establishment of a Nominating Committee whose function is to nominate 10 persons to serve as members of the Board. The Nominating Committee shall comprise six members: two each from the business sector and the Committee of School Council Chairmen, and one each from the higher education field and the Committee of Parents. The two members from the business sector shall be nominated respectively by The Hong Kong General Chamber of Commerce and The British Chamber of Commerce in Hong Kong. The Overseas Inspectors' Association and the Police Force Council Staff Associations have queried the appropriateness of conferring the nomination power on these two business chambers.

33. ESF has explained to the Bills Committee the reasons for the proposed inclusion of two members nominated by the two business chambers in the Nominating Committee. ESF has all along had members from the business community sitting on the Foundation. This is to ensure that ESF is in touch with the community and has governing members with the expertise in running organizations. ESF is confident that the two chambers will consult their member organizations and professional bodies in recommending suitable persons for appointment to the Nominating Committee.

34. Members consider the proposed composition of the Nominating Committee acceptable.

#### Composition of School Councils

35. While the overall governance of ESF rests with the Board, the governance of individual ESF schools falls on their School Councils. Under proposed section 13 of the Ordinance (clause 8 of the Bill), each school shall have a School Council comprising a maximum of 16 persons. The maximum number of parent representatives on a School Council shall be not more than four persons. Dr Fernando CHEUNG had proposed to include a parent representative of SEN students in the School Council of each ESF school.

36. As in the case of the proposal to include a parent representative of SEN students on the Board, diverse views have been expressed by the stakeholders. The reasons put forth by the parties for supporting and objecting to the proposal to add a parent representative of SEN students to the Board in paragraphs 28 and 29 above apply similarly to the proposal concerning the composition of School Councils. Having considered the views of both sides, Dr CHEUNG withdrew his proposal.

#### The draft English Schools Foundation (General) Regulation

37. The existing section 10 of the Ordinance provides that any regulations made under the Ordinance are not required to be published or laid on the table of LegCo. PAC recommended in its Report No 43 that subsidiary legislation in the form of regulations made under the Ordinance should be published in the Gazette and tabled in LegCo. Members welcome the adoption of PAC's recommendation in proposed section 24(1) of the Ordinance (clause 12 of the Bill), and regulations made by resolution of the Board will be subject to the negative vetting procedure of LegCo under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1).

38. Members have examined the draft Regulation to be made by ESF after the enactment of the Bill. The draft Regulation provides for the practice and procedure of the Board, the School Councils and the parent teacher associations, and miscellaneous matters. Members have not expressed any view on the draft Regulation.

#### **Committee Stage amendments**

39. Members of the Bills Committee support the CSAs to be moved by Mr Tommy CHEUNG. They also support the CSAs to be moved by Mr Abraham SHEK to improve the text of the Bill. Members have expressed diverse views on the CSA to be moved by Dr Fernando CHEUNG as indicated above.

#### **Recommendation**

40. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 5 March 2008.

### **Consultation with the House Committee**

41. The Bills Committee consulted the House Committee on 15 February 2008 and obtained its support for the resumption of the Second Reading debate on the Bill.

42. Mr Abraham SHEK informed the House Committee at its meeting on 22 February 2008 of his decision to defer the resumption of the Second Reading debate on the Bill to the Council meeting on 12 March 2008.

Council Business Division 2  
Legislative Council Secretariat  
29 February 2008

**Bills Committee on  
The English Schools Foundation (Amendment) Bill 2007**

**Membership list**

**Chairman** Dr Hon YEUNG Sum, JP

**Members** Hon Jasper TSANG Yok-sing, GBS, JP  
Hon Emily LAU Wai-hing, JP  
Hon Abraham SHEK Lai-him, SBS, JP  
Hon Tommy CHEUNG Yu-yan, SBS, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Dr Hon Fernando CHEUNG Chiu-hung  
Hon Albert Jinghan CHENG, JP  
Hon TAM Heung-man

(Total : 9 Members)

**Clerk** Miss Odelia LEUNG

**Legal Adviser** Mr Arthur CHEUNG

**Bills Committee on  
The English Schools Foundation (Amendment) Bill 2007**

**List of organizations and individuals  
which/who have given oral/written views to the Bills Committee**

The organizations and individuals which/who have given oral views

1. A Group of SEN Parents of King George V School
2. Academic Committee, The English Schools Foundation
3. Association of Professional Teachers in The English Schools Foundation
4. Jockey Club Sarah Roe School Parent Teacher Association
5. Joint Council of Parent Teacher Associations
6. Management Committee, The English Schools Foundation
7. Police Force Council Staff Associations
8. Staff Council, The English Schools Foundation
9. The Support Staff Association in The English Schools Foundation
10. Mr Albert LEUNG
11. Mrs Virginia Wilson

The organization which has given written views

12. Overseas Inspectors' Association of the Hong Kong Police Force

**Bills Committee on  
The English Schools Foundation (Amendment) Bill 2007**

**Composition of the Board of Governors**

<b>Clause 8 of the Bill - proposed section 6(1)</b>	<b>Committee Stage amendments proposed by Hon Tommy CHEUNG Yu-yan</b>
(a) two persons nominated by the members of the Legislative Council from among their own number	--
(b) three persons elected by the Chairmen of the School Councils from among their own number	(a) three persons elected by the Chairmen of the School Councils from among their own number
(c) six persons elected by the parents of students of schools of the Foundation that provide primary or secondary education from among their own number	(b) six persons elected by the parents of students of schools of the Foundation that provide primary or secondary education from among their own number
--	(c) one person elected by the parents of students of schools of the Foundation that provide primary or secondary education from parents of students with special educational needs of schools of the Foundation
(d) one person elected by the Committee of Parents from among the members of that Committee	(d) one person elected by the Committee of Parents from among the members of that Committee
(e) one person elected by the Principals of the schools of the Foundation from among their own number	(e) one person elected by the Principals of the schools of the Foundation from among their own number
(f) two persons, one of whom is a teacher of primary level students and the other of secondary level students, elected by the Committee of Teaching Staff from among the members of that Committee	(f) two persons, one of whom is a teacher of primary level students and the other of secondary level students, elected by the Committee of Teaching Staff from among the members of that Committee

<b>Clause 8 of the Bill - proposed section 6(1)</b>	<b>Committee Stage amendments proposed by Hon Tommy CHEUNG Yu-yan</b>
(g) one person elected by the Committee of Support Staff from among the members of that Committee	(g) one person elected by the Committee of Support Staff from among the members of that Committee
(h) 10 persons who are not eligible for nomination or election under any other categories, nominated by the Nominating Committee	(h) 10 persons who are not eligible for nomination or election under any other categories, nominated by the Nominating Committee
(i) the Chief Executive Officer, ex officio	(i) the Chief Executive Officer, ex officio
Total : 27 members	Total : 26 members

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Legislative Council Secretariat  
29 February 2008