

立法會
Legislative Council

LC Paper No. CB(2) 344/99-00
(These minutes have been seen by
the Administration)

Ref: CB2/SS/8/98

**Subcommittee on
resolution under the Immigration Ordinance**

**Minutes of meeting
held on Tuesday, 6 July 1999, at 4:30 pm
in the Chamber of the Legislative Council Building**

Members present : Hon Ambrose LAU Hon-chuen, JP (Chairman)
Hon David CHU Yu-lin
Hon HO Sai-chu, SBS, JP
Hon Cyd HO Sau-lan
Hon NG Leung-sing
Hon Maragret NG
Hon James TO Kun-sun
Hon Ambrose CHEUNG Wing-sum, JP
Hon HUI Cheung-ching
Hon CHAN Kam-lam
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Hon Mrs Miriam LAU Kin-ye, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk

Members absent : Hon Albert HO Chun-yan
Hon Mrs Selina CHOW LIANG Shuk-ye, JP

**Public Officers
attending** : Mrs Regina IP, JP
Secretary for Security

Mr Timothy TONG
Deputy Secretary for Security

Miss Cathy CHU
Principal Assistant Secretary for Security

Mr Andy CHAN
Assistant Secretary for Security

Mr Ian WINGFIELD, GBS, JP
Law Officer (Civil Law)

Mr Gilbert MO
Deputy Law Draftsman

Mr T K LAI
Assistant Director of Immigration

**Attendance by
Invitation** : Professor Albert H Y CHEN
Faculty of Law
University of Hong Kong

Dr LIN Feng
School of Law
City University of Hong Kong

**Clerk in
attendance** : Mrs Sharon TONG
Chief Assistant Secretary (2)1

**Staff in
attendance** : Mr Jimmy MA, JP
Legal Adviser

Mr Raymond LAM
Senior Assistant Secretary (2)5

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I. Meeting with individuals and the Administration
(LC Paper No. CB(2) 2496/98-99)

Meeting with Professor Albert CHEN and Dr LIN Feng

At the invitation of the Chairman, Professor Albert CHEN presented his submission (tabled at the meeting and issued to absent members vide LC Paper No. CB(2) 2515/98-99) on the resolution under the Immigration Ordinance (Cap. 115) (IO) as follows -

- (a) the speech by Secretary for Security (S for S) for the Legislative Council (LegCo) meeting on 14 July 1999 had not provided explanation on the reason for the proposed amendments to paragraph 2(a) of Schedule 1;
- (b) the provision in proposed paragraph 2(a)(ii) to Schedule 1 was reasonable, and was consistent with the Basic Law (BL) and the Opinions of the Preparatory Committee on Article 24(2) of BL (BL24(2)) given in August 1996) (PC's Opinions) endorsed by the Standing Committee of the National People's Congress (NPCSC). However, the provision in proposed paragraph 2(a)(i) seemed to be different from that in paragraph 1 of PC's Opinions; and
- (c) Annex G of Administration's paper had clearly explained that a Chinese national born in HK before 1 January 1983 was a citizen of the United Kingdom (UK) and Colonies and Hong Kong believer irrespective of his parents' status. A Chinese national born in Hong Kong between 1 January 1983 and 30 June 1987 was a British Dependent Territory Citizen (BDTC) under section 15(1) of the British Nationality Act 1981 (BNA), if his father or mother was a BDTC or settled in Hong Kong at the time of his birth. This requirement was consistent with that under paragraph 1 of PC's opinion. A Chinese national born in Hong Kong between 1 July 1987 and 30 June 1997 was a BDTC under section 15(1) of BNA if his father or mother was a BDTC or settled in Hong Kong at the time of his birth. In addition to being a Hong Kong believer, he was a Hong Kong permanent resident and had the right of abode (ROA) in Hong Kong.

2. Professor Albert CHEN added that the example in paragraph 6 of the Chinese version of the Administration's paper for the Subcommittee meeting on 3 July 1999 illustrated that there was a difference between the proposed provision at paragraph 2(a)(i) and paragraph 1 of PC's Opinions. However, whether the proposed amendments or PC's Opinions should be adopted was a policy decision.

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3. At the invitation of the Chairman, Mr LIN Feng presented his submission (tabled at the meeting and issued to absent members vide LC Paper No. CB(2) 2515/98-99) and made the following points -

- (a) the legitimacy of the amendments proposed in the resolution under IO depended on the legitimacy of the interpretation of NPCSC. If the interpretation of NPCSC was lawful and appropriate, the proposed amendments were necessary;
- (b) the proposed amendments to paragraph 2(a) of Schedule 1 were not consistent with the PC's Opinions, which had been confirmed by NPCSC's interpretation to reflect the legislative intent of BL24(2). While it was inappropriate to use the term "ROA" in paragraph 2(a) of Schedule 1, the term could be replaced by some other terms rather than the formulation proposed by the Government;
- (c) the issue of how the original legislative intent of BL should be identified should be further examined, as the legal system in the Hong Kong Special Administrative Region (HKSAR) was facing great uncertainty in this respect; and
- (d) HKSAR should continue to adopt the broad and purposive approach in statutory interpretation. As regards the interpretation of NPCSC, only the substance of the interpretation was binding on HKSAR, not its interpretation approach.

Legal status of PC's Opinions in Hong Kong

4. Miss Emily LAU enquired about the legal status of the PC's Opinions under the common law system of Hong Kong. She said that paragraph 1 of PC's Opinions seemed to impose additional requirements on the eligibility for ROA conferred by BL24(2)(1).

5. Professor Albert CHEN said that the legal status of PC's Opinions had been unclear and the NPCSC had not made any comment on such status in the past. Before NPCSC's interpretation, the PC's Opinions could be presented to the court for consideration, but was not legally binding. BL24(2) only set out the brief requirements in respect of ROA. Its detailed implementation had to be made through legislation enacted by the legislature of HKSAR. NPCSC had confirmed that the PC's Opinions reflected the legislative intent of BL24(2). Thus, reference had to be made to the PC's Opinions in drafting the legislative amendments. However, PC's Opinions, which was not a legal document, did not have the same legal status as that of BL or NPCSC's interpretation. The wording in the PC's Opinions might not meet the preciseness required of legislation. It could be noted that the wording and drafting of the NPCSC's

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interpretation was not the same as that of the relevant paragraphs of the PC's Opinions. Dr LIN Feng said that the issue concerned whether one considered the interpretation of NPCSC to be lawful and appropriate. If so, the PC's Opinions was equivalent to the interpretation of BL, as NPCSC had stated that the PC's Opinions reflected the legislative intent of BL24.

6. Miss Emily LAU asked whether it was necessary to refer to PC's Opinions whenever interpreting a BL provision. Professor Albert CHEN said that there were rules on statutory interpretation in Hong Kong and on the documents admissible in the interpretation of legislation. There were also case laws in UK providing guidance on the rules of interpretation of statutes. He did not think that NPCSC's interpretation would affect these established rules which had been followed by the courts of Hong Kong. The PC's Opinions had no authoritative status. Any such status it had would have been derived from the NPCSC's interpretation. Since NPCSC's interpretation, which was made under BL158, had confirmed the PC's Opinions to reflect the legislative intent of BL, it was necessary for the courts to make reference to the Opinions. He said that in the interpretation of other provisions of BL, there was no need for the court to make reference to other opinions of PC to which NPCSC had not confirmed or made any reference.

7. As regards the legal status of PC's Opinions, Dr LIN Feng said that according to Chinese constitutional law, the PC's Opinions that had been confirmed by NPCSC was equivalent to an interpretation made by NPCSC. Under the Chinese legal system, it had the same legal status as BL. However, documents having a legal status in China might not have the same status in Hong Kong, as the power of NPCSC was restricted to a certain extent by BL. The interpretation authority of NPCSC had been restricted by BL158.

Issue of whether the rights under BL24(2) were conferment of new rights or continuation of existing rights

8. Miss Margaret NG asked whether the rights under BL24(2) were conferment of new rights or continuation of existing rights. She said that if it was a continuation of existing rights, there should have been a provision in BL setting out that persons who enjoyed ROA before the establishment of HKSAR would continue to enjoy such a right after 1 July 1999. Professor Albert CHEN said that paragraph 7 of PC's Opinions had provided transitional arrangements, which was also reflected in IO. On the question of whether the rights under BL24 were conferment of new rights or continuation of existing rights, he said that the provisions under BL24(2) were not the views of the BL Drafting Committee. They were basically copied from the Sino-British Joint Declaration (JD), which was based on the legislation in force in Hong Kong in the early eighties and the BNA in respect of the right to land in Hong Kong. An examination of the relevant legislation and situation at that time would facilitate

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the understanding of the meaning and purpose of the provisions of BL. Dr LIN Feng said that from a constitutional perspective, one had to start everything from BL. On the other hand, BL had the intention of maintaining the existing common law system in HK. When interpreting BL 24, the objective of BL would also need to be studied. In his view, it was a conferment of new rights.

Consistency between proposed paragraph 2(a)(i) and PC's Opinions

9. Mr James TO asked whether paragraph 2(a)(i) of Schedule 1 was consistent with PC's Opinions. Professor Albert CHEN said that PC's Opinions was not equivalent to legislation. Inconsistency with the PC's Opinions could not be a sufficient reason to overturn a piece of legislation. However, as NPCSC had stated that the PC's Opinions reflected the legislative intent of BL, and the court could strike down a piece of legislation if it was inconsistent with BL, reference could be drawn to the PC's Opinions in seeking to overturn a piece of legislation for inconsistency with BL. In practice, proposed paragraph 2(a)(i) was more generous than the requirements under PC's Opinions and therefore it was unlikely to be challenged by persons who benefited from the provision. The paragraph might only be challenged in the extreme case where a person's ROA status was challenged in an election. He considered that the issue of whether to pass the resolution was a policy decision. Dr LIN Feng considered the argument that the PC's Opinions reflected the legislative intent of BL to be weak. The PC's Opinions were given six years after the enactment of BL. Under the Chinese constitutional system, it was more appropriate to say that the PC's Opinions was similar to an interpretation made by NPCSC rather than saying that it represented the legislative intent of BL. To identify the legislative intent, one should examine the original document. As regards the wording in proposed paragraph 2(a)(i), he was inclined to follow that used in the PC's Opinions, as it had been confirmed by NPCSC to reflect the legislative intent of BL.

10. Mr Howard YOUNG enquired whether the legality of the provision in proposed paragraph 2(a)(i) could be challenged by any person or only by persons whose interests were prejudiced. Dr LIN Feng said that it was unlikely for the court to allow challenges to be made by a person whose interest was not prejudiced.

11. The Chairman thanked Professor Albert CHEN and Dr LIN Feng for attending the meeting.

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Meeting with the Administration

Consistency of paragraph 2(a)(i) with the legislative intent of BL

12. Responding to the views expressed by Professor Albert CHEN and Dr LIN Feng, S for S said that any differences between the wording in proposed paragraph 2(a)(i) and PC's Opinions did not necessarily imply that the provision in paragraph 2(a)(i) was inconsistent with the legislative intent of BL. As indicated in the paper provided by the Administration, the documents on which the proposed amendments set out in the resolution were based included -

- (a) the Opinions given by the PC in August 1996 on BL24(2) of the Basic Law;
- (b) the NPC's Resolution of 14 March 1997 endorsing the Report of the Chairman of the PC on the work of the PC;
- (c) the press statement dated 13 April 1997 issued by the Hong Kong & Macau Affairs Office on the ROA issue;
- (d) the statement of the Director of Immigration made at the LegCo Panel on Security meeting dated 14 April 1997 on the consensus reached in the Sino-British Joint Liaison Group (JLG) on the ROA issue;
- (e) Immigration Department (ImmD)'s booklet on ROA issued in 1997 recording its understanding of the consensus of JLG on the ROA issue; and
- (f) the interpretation of BL22(4) and 24(2)(3) given by NPCSC on 26 June 1999.

S for S stressed that the list of documents was not exhaustive. The wording of BL24(2) was reproduced from paragraph 14 of Annex I to JD. The definition of ROA and permanent resident in Annex I reflected the basic policy of the Central People's Government on Hong Kong. When drafting the document, the two sides of JLG had discussed the issue in depth and fully understood the legislation and practice of that time. Since 1948, there had been many changes in respect of the right to land and ROA. This had made it necessary to set out a date distinguishing the rights of persons before and after the concept of "ROA" was introduced. In deciding whether the date should be 1 January 1983 or 1 July 1987, the more generous choice of 1 July 1987 was adopted. Although it was more generous, it was consistent with the legislative intent of BL. She pointed out that on a number of times when the coverage of BNA was narrowed down in

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the past, some “grandfathering clauses” were introduced to preserve the existing rights of persons. She believed that the drafters of BL were also aware of such an arrangement. Thus, paragraph 2(a)(i) was consistent with the practice in the past. Although the wording of proposed paragraph 2(a)(i) was different from that in the PC's Opinions, the paragraph was consistent with the legislative intent of BL.

13. LO(CL) added that paragraph 7 of the PC's Opinions set out that “for Chinese citizens who were born in Hong Kong or have ordinarily resided in Hong Kong for a continuous period of seven years, the permanent identity cards they hold shall continue to be valid after 1 July 1997 and they shall have ROA in HKSAR”. Thus, it was the PC's intention that Chinese citizens who had ROA before 1 July 1997 should not lose such a right merely because they did not meet the precise wording of BL. The transitional provision in paragraph 6(2) of Schedule 1 had reflected the relevant part in paragraph 7 of PC's opinion. It was evident that the overall arrangement sought to ensure that no one lost out as a consequence of the absence of a provision for ROA before 1987. It was very clear that this reflected the intent of PC when the Opinions was drafted. The reason that 1 July 1987 was taken as the cutoff date was to ensure that any person who was born outside Hong Kong to such a person before that date would not suffer the consequence of that parent not having ROA in Hong Kong.

Issue of whether the legislature of HKSAR had the power to pass a resolution which was different from the PC's Opinions

14. Mr James TO asked whether the legislature of HKSAR had the power to and whether it should pass a resolution in which the requirements were different from the those under the PC's Opinions which had been confirmed by NPCSC. In response, LO(CL) said that LegCo had the legal power to enact the resolution. In establishing whether a proposed legislation was consistent with BL, it was permissible to look at PC's Opinions to discern the intent of BL. LegCo could not enact legislation that was inconsistent with BL. If PC's Opinions reflected the legislative intent of BL, LegCo could not legislate inconsistently with it. However, the PC's Opinions was not drafted in a legislative way. There was some flexibility in how the PC's Opinions were to be interpreted. While the court was unlikely to overturn any legislation on the basis of inconsistency with the PC's Opinions, a piece of legislation could be overturned for inconsistency with BL. Miss Margaret NG said that the issue was not a question of whether the provision could be successfully challenged in the court, but whether LegCo had captured the true legislative intent of BL. LO(CL) responded that in ascertaining the true legislative intent of BL, one was entitled to look at the PC's Opinions.

15. Mr James TO asked whether the wording “the following opinions are hereby provided for the HKSAR to formulate the details of the implementation

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rules” in the first paragraph of PC's Opinions referred only to the time when HKSAR was formed or also to the time after the HKSAR was formed. In response, LO(CL) said that whether the PC's Opinions would be used for future reference was unpredictable. The PC's opinions were not legislation. They were expressed as opinions as to what the legislature should do in order to be consistent with BL.

16. In response to Mr James TO, Assistant Director of Immigration (AD of Imm) referred members to Annex G to the paper provided by the Administration. He said that if the parents of a person born in Hong Kong between 1 January 1981 and 30 June 1987 had no BDTC status at the time of his birth but his parents subsequently acquired BDTC status or was settled in Hong Kong, the person had the right to register as a BDTC under section 15(3) of BNA 1981 before he attained 18 years of age. The deadline for such a registration was 31 March 1996. The granting of BDTC status was not automatic. An eligible person had to register for the status as a BDTC. If he fulfilled the requirements under section 15(3) of BNA1981, he would become a BDTC. Whereas one had to apply to become a BDTC before 1 July 1997, an application needed not be made for acquiring ROA in Hong Kong after 1 July 1997. As regards a person who was born in 1993 but whose parent did not acquire ROA until 1999, AD of Imm said that under paragraph 2(a), the person would acquire ROA once his parent acquired ROA in 1999.

Authority for determining the right to land and ROA policy before and after 1 July 1997

17. In response to Miss Margaret NG's question on whether the policy on the right to land and ROA were determined by the Hong Kong Government before 1 July 1997, AD of Imm said that the policy was implemented through legislation enacted by the then LegCo. Before 1 July 1997, ROA and the right to land were subject to provisions in BNA. Besides nationality, there was the definition of "Chinese resident" in the former IO. A person of Chinese race who had continuously resided in Hong Kong for over seven years would acquire the right to land. After the ROA concept was introduced in 1987, such persons became the permanent residents of Hong Kong. All these were implemented through the IO in force at that time. After 1 July 1997, ROA was determined in accordance with BL and was implemented through legislation enacted by LegCo.

18. Miss Margaret NG said that the policy on right to land and ROA, apart from those related to BNA, was determined by the Hong Kong Government in the past. There was a change after 1 July 1997 in that matters of ROA were determined by BL, which was the mini-constitution of Hong Kong. LO(CL) responded that the situation on and after 1 July 1997 was a mirror image of the situation before that date. Before 1 July 1997, BNA applied directly to Hong Kong. The Hong Kong legislature could not legislate inconsistently with the

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provisions of BNA so far as persons who were British nationals were concerned. After 1 July 1997 Chinese nationals had rights in Hong Kong by virtue of their status as Chinese national under the Chinese Nationality Law. The Chinese Nationality Law applied directly to HKSAR. Miss Margaret NG said that nationality and ROA were different matters. Before 1 July 1997, there were persons who were not BDTCs but had the right to land in Hong Kong.

Issue of whether legislative amendments should be introduced at a time when there was still litigation relating to the Schedule before the court

19. Miss Emily LAU sought LA's views on whether the introduction of amendments to the Schedule when litigation relating to BL24(2) was not yet concluded by the court might pre-empt the decision of the court. In response, LA said that as a general principle, the legislature should be very cautious in examining legislative amendments that were the subject of litigation so that the legal principles adopted in the case would not be affected. LO(CL) said that the litigation in question related to a person born in Hong Kong after 1 July 1987. It was not related to the proposed amendments.

20. Mr James TO expressed concern about whether the proposed amendment to paragraph 2(c) was intended to influence the litigation in the court. LO(CL) said that the rights of persons under BL24(2)(3) were determined in accordance with the NPCSC's interpretation. The proposed amendment to paragraph 2(c) only sought to bring the text in line with NPCSC's interpretation and remove any doubt about the text of the provision. S for S added that the resolution was not introduced for purpose of increasing the Administration's chance of winning in the litigation. It only sought to ensure that local legislation reflected the actual legal position. As the Court of Final Appeal (CFA) had made rulings on Schedule 1, it would be incomplete if not amended. The promulgation of application procedure before the amendment of Schedule 1 would be inappropriate and irresponsible, as applications would be invited before announcing who had ROA. A person who had no ROA according to NPCSC's interpretation might submit an application, and after Schedule 1 was later amended, claimed that he had such a right before the amendment of Schedule 1. Mr James TO said that after NPCSC's interpretation was gazetted, persons with legal knowledge should be able to understand which category of persons had ROA. The passing of the resolution would not alter the substantive rights of persons. S for S said that since the CFA had declared unconstitutional certain parts of IO, the provisions in local legislation relating to ROA had become incomplete. There was a need to implement NPCSC's interpretation of BL24(2) in local legislation for the purpose of clarity.

21. Mr James TO requested the Administration to set out in writing that the resolution would not alter the substantive rights of persons and affect the litigation in the court. LA said that the resolution had the advantage of

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providing clarity in legislation. On the ROA status of persons after a certain date, there might be a need to have a transitional or "grandfathering" provision setting out whether their status would be affected by the amendment. Miss Emily LAU supported Mr TO's suggestion. On the question of completeness of legislation, she commented that the Administration was selective in introducing legislative amendments, as no legislative amendment was introduced after the CFA's judgment on 29 January 1999, whereas legislative amendments were introduced shortly after the NPCSC's interpretation. S for S responded that the CFA's judgment would result in a substantial increase in the number of persons who had ROA in Hong Kong. Such a judgment was not implementable as Hong Kong could not cope with a sudden influx of a huge number of people into Hong Kong. The problem was solved with the NPCSC's interpretation on 26 June 1999. Since 29 January 1999, there had not been complete local legislation on ROA and therefore the Administration could not promulgate the application procedure. She hoped that the amendments could be made as soon as possible. Miss Emily LAU considered that once CFA had made its judgment, legislative amendments should be introduced to implement the judgment.

22. Miss Margaret NG said that shortly after CFA's judgment, she had requested the Administration to introduce the relevant legislative amendments. At that time, the Administration had said that apart from the need to set out requirements relating to DNA tests, the relevant legislation was complete and no amendment was necessary. S for S said that the Administration had provided a written response stating that the CFA's judgment on BL 24(2)(3) had legal effect and there was a need to introduce amendments to the relevant local legislation. However, as the CFA's comments in respect of BL 24(2)(1) was not a formal ruling, the Administration had no plan to introduce any amendments. As it had been a long time since CFA's judgment, the need for amendment of local legislation had become more pressing. Mr James TO said that if the same rationale was applied, the NPCSC's interpretation had just been announced for a short period of time and therefore there should not be an urgent need to pass the resolution.

23. Mr James TO asked the Administration to consider promulgating the application procedure as scheduled without moving the resolution while relying on NPCSC's interpretation to deal with the litigation in the court. While agreeing that such an arrangement would not alter the substantive rights of persons concerned, LO(CL) said that it would create confusion because the provisions in Schedule 1 would then be different from the interpretation of NPCSC. It was highly desirable that the text of the legislation reflected the true legal position so that it would not be necessary to refer to a large number of documents. This would avoid any confusion of potential applicants who had a right to know what the text should be. Mr James TO said that even if the resolution were not passed, the substantive rights of the persons concerned would not be affected. In the extreme case that NPCSC's interpretation was ruled by

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CFA as inconsistent with BL and therefore had no legal effect, the resolution would still have legal effect, as it was enacted by the Hong Kong legislature. He opined that it would be fairer to the litigants if the resolution was not passed before the litigation was over. He added that without the passing of the resolution, the application procedure could still be promulgated as scheduled.

Drafting of proposed paragraph 2(c)

24. On the proposed amendment to paragraph 2(c), Mr James TO said that according to NPCSC's interpretation, BL24(2)(3) referred to "both parents of persons born outside Hong Kong, whether born before or after the establishment of HKSAR", while the wording "a person of Chinese nationality born outside Hong Kong of a parent who was a Chinese citizen" was used in proposed paragraph 2(c). He asked whether the Administration would consider adding the words "before or after the establishment of HKSAR" to proposed paragraph 2(c) to bring it in line with NPCSC's interpretation, and whether the lack of such wording would create any unforeseeable effect. Deputy Law Draftsman (DLD) said that such wording was not found in BL24(2)(3), although it was found in NPCSC's interpretation. After consideration, the Administration had chosen to follow the wording in BL. The lack of "before or after the establishment of HKSAR" would not result in different interpretations. In this connection, Miss Emily LAU asked whether NPCSC's interpretation was in contravention of BL. DLD said that in making an interpretation of BL, it was inevitable for NPCSC to use wording that was different from those used in BL 24(2)(3). Mr James TO asked whether it would have a different effect on persons who acquired ROA by descent. S for S responded that the arrangements under BL24(2)(3) was a mirror image of the "by descent" provision under BNA.

25. Mr James TO expressed concern that if the same logic was applied, the provisions in Schedule 1 should all follow the wording of BL. He commented that the Administration was inconsistent in that some of the provisions in Schedule 1 followed NPCSC's interpretation, while some provisions followed the wording of BL. This might result in confusion. LA said that from a technical point of view, Hong Kong was defined under the Interpretation and General Clauses Ordinance (Cap. 1) as HKSAR, which was not formed until 1 July 1997. Thus, the provision might need to be examined. DLD undertook to look into the issue. He added that PC's Opinions also lacked the element of "before or after the establishment of HKSAR". S for S added that as the deadline for giving notice of amendments to the resolution was the next day, there would not be time for any amendment proposed to be presented to the Subcommittee for discussion. The Administration would consider Mr TO's views in deciding whether to introduce technical amendments relating to the issue.

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II Date of next meeting

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26. Members noted that the next meeting had been scheduled for 8 July 1999 at 8:30 am. They also noted that representatives of the Law Society of Hong Kong and Hong Kong Bar Association would attend the next meeting.

27. The meeting ended at 6:40 pm.

Legislative Council Secretariat

27 October 1999