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Paper for the House Committee meeting on 9 July 1999

**Report of the Subcommittee on
resolution under the Immigration Ordinance**

Purpose

This paper reports on the deliberations of the Subcommittee on resolution under the Immigration Ordinance.

Proposed resolution under section 59A of the Immigration Ordinance

2. The Secretary for Security has given notice to move a motion at the Council meeting on 14 July 1999 under section 59A of the Immigration Ordinance (Cap. 115) to amend certain provisions in Schedule 1 of the Ordinance. According to the Administration, the proposed resolution seeks to achieve the following effect -

- (a) to implement the decision of the Court of Final Appeal (CFA) in respect of persons born out of wedlock;
- (b) to remove any doubt as to the text of the Immigration Ordinance in respect of the categories of persons who have the right of abode, following the CFA's judgment and the interpretation by the Standing Committee of the National People's Congress (NPCSC) of the true legislative intent of Article 24(2)(3) of the Basic Law (BL); and
- (c) to correct an inadvertent error relating to the use of the term "right of abode" in Schedule 1.

The Subcommittee

3. At the special House Committee meeting on 28 June 1999, Members decided to form a subcommittee to study the proposed resolution. A membership list of the Subcommittee is in **Appendix I**.

4. Chaired by Hon Ambrose LAU Hon-chuen, the Subcommittee held four meetings with the Administration between 30 June and 8 July 1999. The Subcommittee has invited the two legal professional bodies and eight legal academics to give views on the resolution. The Subcommittee has subsequently met with the Hong Kong Bar Association, the Law Society of Hong Kong and two legal academics.

The deliberations of the Subcommittee

5. The main deliberations of the Subcommittee are summarized below.

Need for urgent amendments to Schedule 1

6. As advised by the Administration, the NPCSC's interpretation has the same legal force and validity as the BL. The BL is both a national law and a law of the Hong Kong Special Administrative Region (HKSAR). The NPCSC's interpretation has already become part of the domestic law. Against that underlying legal position as advised, some members query the urgent need for the amendments to Schedule 1. They consider that the proposed amendments to Schedule 1 should be studied together with a package of proposed amendments to the Immigration Ordinance and Form 12 in the Immigration Regulation as well as a draft gazette notice, to be issued by the Director of Immigration, on application procedures for the Certificate of Entitlement (C of E).

7. The Administration has responded that since the CFA has declared unconstitutional certain parts of the Immigration Ordinance, it is necessary to bring amendments to local legislation for the purpose of certainty and clarity pursuant to the NPCSC's interpretation. It would be desirable to introduce all the necessary legislative amendments to the Immigration Ordinance, Schedule 1 of the Ordinance and the Immigration Regulation at the same time. In view of the time required to work out the amendments and for Members to study the amendment bill, the Administration considers that the approval of the proposed amendments to Schedule 1 is an important first step towards resolving the right of abode issue. The approval of the proposed resolution will enable the Director of Immigration to promulgate the application procedure for C of Es as soon as possible. The Administration stresses that there has not been a procedure for applying for C of Es since the CFA's judgment on 29 January 1999. It is of paramount importance that amendments to Schedule 1, which deals with how the permanent residents of the HKSAR are determined, be

approved as early as possible.

8. The Administration has provided the Subcommittee with information on the application and verification procedures for a C of E. The Administration has advised that the detailed procedures for applying C of Es are being discussed with the relevant Mainland authorities. The procedures are similar to the former ones for applying for C of Es. The Administration intends to issue a new gazette notice on 16 July 1999 to promulgate the procedures. At the request of members, the Administration has agreed to provide members with a copy the draft gazette notice when available.

9. Some members express concern that the administrative procedures for application and verification for C of Es might restrict a core right of persons for acquiring the right of abode in Hong Kong. The NPCSC's interpretation is not clear about the linkage between One-way permit and C of E. The Administration has pointed out that as stated in the NPCSC's interpretation, people from all provinces, autonomous regions, or municipalities directly under the Central Government, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents must apply to the relevant authorities of their residential districts for approval in accordance with the national laws and administrative regulations, and must hold valid documents issued by the relevant authorities before they can enter the HKSAR.

10. Some members propose that the gazette notice to be issued by the Director of Immigration on the procedures for applying C of Es be examined by the Subcommittee. The proposal was not endorsed by the Subcommittee. The Subcommittee therefore will not deliberate on the gazette notice. Some members suggest that the discussion on the gazette notice be followed up by the relevant panel as it will not be considered by the Subcommittee.

Proposed paragraph 2(a)

11. The existing paragraph 2(a) in Schedule 1 provides that a Chinese citizen born in Hong Kong before or after the establishment of HKSAR is a permanent resident of HKSAR if his father or mother was settled or had the right of abode in Hong Kong at the time of birth of the person or at any later time. The Administration proposes to amend paragraph 2(a) to the effect that a Chinese citizen born in Hong Kong -

- (i) before 1 July 1987; or

- (ii) on or after 1 July 1987 if his father or mother was settled or had the right of abode in Hong Kong at the time of his birth or at any later time

is a permanent resident of HKSAR.

12. Regarding the rationale for the proposed amendment to paragraph 2(a), the Administration has explained that it is a technical amendment to correct an inadvertent error. The CFA has pointed out in its judgment, there is an error in paragraph 2(c) of Schedule 1 in referring to the term “right of abode”, given that the term “right of abode” was only introduced into the Immigration Ordinance on 1 July 1987. Reference to the term therefore produced the inadvertent effect that persons born before 1 July 1987 would not be able to satisfy the condition of having acquired the right of abode. The same error was made in paragraph 2(a) of the Schedule. The proposed amendment to paragraph 2(a) is to rectify this drafting error and to put beyond doubt that persons born before 1 July 1987 do not have to satisfy the requirement of right of abode.

13. Some members point out that Article 24(2)(1) of the BL provides that Chinese citizens born in Hong Kong before or after the establishment of HKSAR shall be the permanent residents of HKSAR. There is no requirement that either one of the person’s parents was settled or had the right of abode in Hong Kong at the time of his birth. They question whether the proposed formulation of paragraph 2(a) is consistent with the legislative intent of BL 24(2)(1), particularly in respect of the condition required of the parents. With the absence of the “was settled” element in new paragraph 2(a)(i), they also question whether the proposed provision would in effect widen the scope of the existing provision, and hence a change in the policy.

14. The Administration has explained that under the proposed new paragraph 2(a)(ii), a Chinese citizen born in Hong Kong on or after 1 July 1987 is a permanent resident if his father or mother was settled or had the right of abode in Hong Kong at the time of his birth or at any later time. This is the current provision. As at present, a Chinese citizen born in Hong Kong to parents both of whom are illegal immigrants or Two-way Permit holders could not acquire the right of abode by birth in Hong Kong. Under the proposed new paragraph 2(a)(i), Chinese citizens born in Hong Kong before 1 July 1987 to parents both of whom were illegal immigrants or Two-way Permit holders would also be eligible for the right of abode. The Administration envisages that a small number of such persons would benefit from the proposed new paragraph 2(a)(i). The proposed provision in paragraph 2(a)(i) is more generous than the existing one.

15. On the parentage requirement in paragraph 2(a)(ii), the Administration has explained that the British Nationality Act 1981 (Act) came into force on 1 January 1983. Under the Act, a Chinese national born in Hong Kong was a

British Dependent Territories citizen (BDTC) if at the time of birth, his father or mother was a BDTC or settled in Hong Kong. A Chinese national born in Hong Kong after 1 January 1983 had to satisfy the condition of having a parent being a BDTC or settled in Hong Kong before he had the Hong Kong belonger status under the First Schedule to the Immigration Ordinance and had the right to land in Hong Kong. On 1 July 1987, the term “right of abode” and “Hong Kong permanent resident” were introduced in the Immigration Ordinance. The BL is a piece of constitutional legal instrument. In discussing the implementation of the relevant provisions of the BL, the Joint Liaison Group had considered the then immigration policy of the United Kingdom (UK) and the People’s Republic of China (PRC), the usual practice and the then local legislation in respect of immigration control. The Administration is of the view that the present formulation reflects the true legislative intent of BL 24(2)(1). The provision in paragraph 2(a)(ii) will enable a Chinese national born in Hong Kong of a parent who had lawfully resided in Hong Kong but had not yet ordinarily resided in Hong Kong for a continuous period of seven years at the time of his birth to be eligible for the right of abode after his parent has satisfied the seven years residency requirement.

16. Some members point out that the proposed paragraph 2(a) is more generous than the existing provision. However, when compared with the provision in BL 24(2)(1), it is more restrictive as there is no parentage requirement in the BL. They express concern that the proposed paragraph 2(a) may give rise to litigations. They also point out that according to the Opinions of the Preparatory Committee for the HKSAR on the Implementation of Article 24(2) of the BL, Chinese citizens born in Hong Kong as provided in BL 24(2)(1) refer to people who are born during which either one or both of their parents were lawfully residing in Hong Kong, but excluding those who are born to illegal immigrants, overstayers or people residing temporarily in Hong Kong. They question whether the provision in proposed paragraph 2(a)(i) is consistent with the true legislative intent since there will be no prescribed condition of the parents of those persons born in Hong Kong before 1 July 1987.

17. The Administration has responded that the difference in the wording of the proposed paragraph 2(a)(i) from that in the Opinions of the Preparatory Committee does not imply that the proposed provision violates the original legislative intent. The wording of BL 24 was reproduced from Annex I to the Joint Declaration. Annex I is an elaboration of the basic policies of the PRC regarding Hong Kong. The Governments of the PRC and the UK when drawing up the Joint Declaration fully understood the immigration policy and legislation of Hong Kong at that time. The proposed date of 1 July 1987 as a dividing line is to reflect the introduction of the right of abode concept on that date. In the past, when legislative amendments were made to the British nationality legislation, a “grandfathering clause” was provided so that any rights previously enjoyed would remain unaffected. In the Administration’s view, the proposed provision reflects the legislative intent of the provision of

the BL.

錯誤! 尙未定義書籤。 . Noting that litigations in relation to the existing paragraph 2(a) are before the court, some members query whether it is appropriate to amend the provision in question. They are concerned that the passing of these amendments may pre-empt the decision of the court. The Administration has confirmed that the litigations in question relate to persons born after 1 July 1987 and would be unaffected by the proposed amendments. The Administration has no intention to propose legislative amendments for the purpose of affecting the present litigations.

Proposed paragraph 2(c)

18. The Administration has agreed to improve the drafting of the proposed paragraph 2(c). A copy of the motion to be moved by the Administration is in **Appendix II**.

Conclusion of the Subcommittee

19. There is no consensus view of the Subcommittee as to whether the proposed resolution should be supported. Some members have indicated support for the resolution. Some members, however, consider that the resolution should be studied in conjunction with proposed amendments to the Immigration Ordinance, Form 12 in the Immigration Regulation and the gazette notice to be issued by the Director of Immigration. They express reservation about the urgent need to amend Schedule 1. They have indicated that they would not support the resolution.

Advice sought

20. Members are invited to note the deliberations of the Subcommittee.

Legislative Council Secretariat
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