

**For discussion on
20 June 2000**

LegCo Panel on Administration of Justice and Legal Services

NPCSC Interpretation of the Basic Law

The Chairman of the LegCo Panel on Administration of Justice and Legal Services has informed the Secretary for Justice (in a letter dated 5 May 2000) that some members of the Panel “demand that the Government give an unequivocal assurance that it would not again seek an interpretation from the NPCSC” and that a similar demand has been made by the Bar Association that the Government undertake not to seek an interpretation from the NPCSC except through judicial referral under BL 158(3). The Chairman requests a full explanation of the reasons why the Government “refuses to give such an assurance”.

Legal position

2. It appears from other parts of the letter that these requests may be based on a view of the law that differs from that held by the SARG. The Administration has explained in numerous speeches and articles (copies of which can be supplied if necessary) why it firmly believes that the request for an NPCSC interpretation was lawful and constitutional.

3. The Administration has considered the arguments of those who assert that it is unlawful or unconstitutional for the CE to seek an interpretation from the NPCSC, but does not accept them. It does not consider that those arguments provide a reason why it should undertake not to seek any further interpretation from the NPCSC. The NPCSC in its interpretation given in June 1999 noted the basis (i.e. BL 43 and BL 48(2)) on which CE submitted the report to the State Council; and the

CFA subsequently in its judgment handed down in December 1999 made no adverse comment on CE's request for the NPCSC interpretation (Lau Kong Yung).

4. In the same judgment, the CFA held that "It is clear that the Standing Committee has the power to make the Interpretation. This power originates from Article 67(4) of the Chinese Constitution and is contained in Article 158(1) of the Basic Law itself. The power of interpretation of the Basic Law conferred by Article 158(1) is in general and unqualified terms. That power and its exercise is not restricted or qualified in any way by Articles 158(2) and 158(3)."

5. Numerous suggestions have been made as to how the Administration should behave in future in respect of NPCSC interpretations. The LegCo Panel on Constitutional Affairs (CA Panel) held three special meetings in May and June of last year to discuss the need for a formal mechanism to govern the circumstances in which the CE might seek an NPCSC interpretation. The views expressed by LegCo members, the legal profession, academics and other parties concerned were diverse. This was acknowledged in the CA Panel's report to the Legislative Council tabled on 7 July. The views expressed can be summarised as follows –

- (1) some considered that it was the CE's constitutional duty to report to the State Council the problems he had encountered in the implementation of the Basic Law and, where necessary, to request assistance from the State Council. No restriction should be imposed on the CE in exercising his constitutional duty in accordance with BL 43 and BL 48(2);
- (2) some considered that while it was lawful and constitutional for the CE to make such a request, it would be desirable that some formal mechanism be established setting out the circumstances under which CE could make such a request in

the future;

- (3) some voiced objection to the CE's decision, but took the view that since CE's request had set a precedent, it would be necessary to establish a formal mechanism to regulate the CE's power in submitting requests in future; and
- (4) some were of the view that any discussion on the need to set up a formal mechanism would simply legalise or rationalise the CE's requests. The Panel should not discuss the subject matter at all.

Putting matters into perspective

6. The Administration firmly believes that the CE's request for an NPCSC interpretation was lawful and constitutional. Moreover, there are constitutional limits to what can be done. In particular, the Administration could not lawfully detract from the NPCSC's constitutional power to interpret the Basic Law, or the Chief Executive's constitutional duties under BL43 and BL48(2). The Administration has repeatedly emphasized that it would not seek an NPCSC interpretation save in wholly exceptional circumstances; that the NPCSC has rarely exercised its power to interpret national laws; and that the NPCSC would not lightly decide to interpret the Basic Law.

7. The Department of Justice hopes that the Administration will not again be faced with a problem of the magnitude of the right of abode issue, and that another request by the Chief Executive for an NPCSC interpretation will not be necessary. There is no basis for the fear that such a request would be lightly made or accepted.

**Department of Justice
June 2000**