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From : Clerk to the Legislative Council

To : All Members of the Legislative Council

**Information note prepared by Legal Service Division
on the interpretation and application of Article 77 of the Basic Law**

With the President's consent, I attach for Members' information the captioned information note prepared by the Legal Service Division of the Legislative Council Secretariat.

(Dora WAI)
for Clerk to the Legislative Council

Encl.

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Legislative Council

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Information note prepared by Legal Service Division on the interpretation and application of Article 77 of the Basic Law

Purpose

This paper provides information on matters relating to the interpretation and application of Article 77 of the Basic Law ("BL") to address the recent enquiries made by some Members at meetings of the Legislative Council ("LegCo") and committees.

Article 77 of the Basic Law

2. BL 77 provides as follows:

"Article 77

Members of the Legislative Council of the Hong Kong Special Administrative Region shall be immune from legal action in respect of their statements at meetings of the Council."

3. According to the records of the Consultative Committee for the Basic Law, BL 77 is derived from the existing Cap. 382.¹

4. Sections 3 and 4 of Cap. 382 provide as follows:

"3. Freedom of speech and debate

There shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Council."

¹ The Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (for Solicitation of Opinions) – Consultation Report Vol. 5 issued by the Consultative Committee for the Basic Law in October 1988: 香港基本法起草過程概覽 [中冊], p. 799.

"4. Immunity from legal proceedings

No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or a committee, or by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise."

Matters relevant to the interpretation and application of BL 77

5. Members of Parliaments in Westminster-modelled parliamentary jurisdictions enjoy privilege or immunity similar to that of BL 77 and sections 3 and 4 of Cap. 382. The privilege or immunity concerned has been recognized in those jurisdictions as a matter falling within parliamentary privilege. Erskine May defines parliamentary privilege in the following terms:

"Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

Certain rights and immunities such as freedom from arrest or freedom of speech are exercised primarily by individual Members of each House. They exist in order to allow Members of each House to contribute effectively to the discharge of the functions of their House. Other rights and immunities, such as the power to punish for contempt and the power to regulate its own constitution, belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members."²

6. The above indicates that Members of the United Kingdom ("UK") Parliament derive their privilege, including freedom of speech, only as a means to the effective discharge of the collective functions of the House of Commons. This principle has also been adopted in Westminster-modelled parliamentary jurisdictions. It is also settled law in those jurisdictions that the courts are competent or have jurisdiction to inquire whether a privilege exists and to determine its scope or extent.

² *Erskine May Parliamentary Practice*, 25th edition, p. 239.

If it is so determined, the courts will not inquire into how Parliament chooses to exercise or apply the privilege. In cases of uncertainty, there is broad acceptance that the courts have jurisdiction to determine the precise extent, or scope, of a claimed privilege.³ In determining the scope or parameters of parliamentary privilege, the courts will apply the test of necessity, i.e. whether the claimed privilege is necessary for a legislative body to perform its functions.⁴

7. In Hong Kong, issues relevant to the interpretation and application of sections 3 and 4 of Cap. 382 were recently considered by the Court of Appeal ("CA") in the Magistracy Appeal case *Secretary for Justice v Leung Kwok Hung* (HCMA 520/2018). In that case, CA made the following observations relating to section 3 of Cap. 382 after reviewing the legislative history of Cap. 382 and the law of parliamentary privilege (including the privilege of speech and debate) in the English jurisprudence:

- (a) Since section 3 of Cap. 382 is a statutory provision, its scope must be determined by the courts as a matter of statutory interpretation. Under the constitutional framework of BL, the courts will determine whether LegCo has a particular power, privilege or immunity. It is also for the courts to determine the scope of parliamentary privilege. This approach accords with that adopted by the English courts.⁵
- (b) The privileges and immunities of a colonial legislature are not identical to the privileges and immunities that the English Parliament has in every aspect. It is because the parliamentary privilege of the English Parliament sprang from its authority as a court, which is not applicable to colonial legislatures. The privileges and immunities attached to the pre-1997 LegCo were derived from the common law doctrine of inherent necessity. Under that doctrine, colonial legislatures are deemed to possess such privileges and immunities that are necessarily incidental to their capacity to function as legislative bodies.⁶

³ This is a long-standing principle derived from the case *Stockdale v Hansard* [1839] 9 Ad and El at 208-210. See also *Canada (House of Commons) v Vaid* [2005] 1 SCR 667.

⁴ *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319; *Vaid, supra*.

⁵ *Secretary for Justice v Leung Kwok Hung* (HCMA 520/2018), paragraphs 14, 15 and 17.

⁶ HCMA 520/2018, paragraphs 20 to 22.

- (c) Section 3 of Cap. 382 is modelled on Article 9 of the English Bill of Rights (1689), which is recognized by the English courts as providing absolute protection. The freedom of speech denotes the freedom that LegCo Members have to discuss what they will. However, it does not follow that there is no restriction whatsoever on the manner in which one wishes to express his views.⁷
- (d) The purpose of conferring the privileges and immunities on LegCo Members is not to put them above the law. The protection conferred by sections 3 and 4 of Cap. 382, together with other privileges and immunities, aim at enabling LegCo to carry out its functions independently and without outside interference. Members are not immune from civil or criminal proceedings merely by reason of their status. Thus, they would enjoy no immunity if charged with ordinary offences which are not connected with their legislative functions.⁸
- (e) The main purpose of Cap. 382 is to provide a secure and dignified environment for LegCo to perform its functions and conduct its business orderly and effectively. The privilege provided in section 3 of Cap. 382 must not be exercised in a way which is contrary to or inconsistent with or even defeats the main purpose of Cap. 382.⁹

8. The observations of the Court of Final Appeal in ("CFA") in *HKSAR v Leung Hiu Yeung* (FACC 5/2017) on the privileges and immunities provided in BL 78¹⁰ and sections 3 to 5 of Cap. 382 may also throw light on how the courts would construe BL 77. In that case, CFA observed that the object of BL 78 and sections 3 to 5 of Cap. 382 is to ensure freedom of speech and debate essential to the legislative process. In line with the common law position as explained by the UK Supreme Court in *R v Chaytor*¹¹ in connection with parliamentary privilege, CFA considered that the above provisions do not restrict the criminal liability even of members of the legislature in respect of ordinary criminal

⁷ HCMA 520/2018, paragraphs 55 and 56.

⁸ HCMA 520/2018, paragraphs 42, 50 and 51.

⁹ HCMA 520/2018, paragraphs 59 and 75.

¹⁰ BL 78 reads: "Members of the Legislative Council of the Hong Kong Special Administrative Region shall not be subjected to arrest when attending or on their way to a meeting of the Council."

¹¹ [2011] 1 AC 684.

offences whose enforcement has no adverse impact on the core business of LegCo.¹²

9. As regards the scope of BL 77 and sections 3 and 4 of Cap. 382, the Court of First Instance ("CFI"), in considering whether the taking of oath by LegCo Members is protected by the immunity provided under sections 3 and 4 of Cap. 382 and BL 77 in *Chief Executive of the Hong Kong Special Administrative Region v The President of the Legislative Council* (HCAL 185/2016), took the view that the immunity provided to LegCo Members pursuant to sections 3 and 4 of Cap. 382 attaches only to words and speeches (spoken or written) in relation to debates in LegCo meetings.¹³ CFI also held that the word "statements" in BL 77 refers to statements made by a LegCo Member in the course of official debates on the floor of LegCo when exercising his/her powers and discharging his/her functions as a LegCo Member.¹⁴

10. Based on the above decided cases, the protection provided by BL 77 and sections 3 and 4 of Cap. 382 is not without restrictions. Where a Member claims the above protection on the basis that he is performing an act in the exercise, or purported exercise, of their freedom of speech and debate in the Council or proceedings in a committee, the courts will look at whether the act or conduct in question is inherently necessary for the performance of the constitutional functions of LegCo.¹⁵ Members would not enjoy immunity if charged with ordinary offences the enforcement of which has no adverse effect on the core business of LegCo. Furthermore, the privilege must not be exercised in a way which is contrary to or inconsistent with the main purpose of Cap. 382 in creating a secure and dignified environment that LegCo needs to conduct its business orderly and effectively.

11. In interpreting BL 77 which is one of the provisions under BL, it is important to also keep in mind the approach to the interpretation of BL that has been established by CFA. In *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4, Li CJ stated (at p. 28C-I) the following:

¹² FACC 5/2017, paragraphs 21 and 22.

¹³ HCAL 185/2016, paragraph 88.

¹⁴ HCAL 185/2016, paragraph 86.

¹⁵ In *Secretary for Justice v Leung Kwok Hung* (HCMA 520/2018), the Court of Appeal held that it is not inherently necessary for the proper functions of LegCo to give LegCo Members, as part of the privilege of section 3 of Cap. 382, the freedom to disorderly conduct themselves within the meaning of section 17(c) of Cap. 382, thereby disrupting LegCo's business or infringing other Members' freedom of speech and debate (see paragraph 60).

"It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.

As to purpose, the purpose of the Basic Law is to establish the Hong Kong Special Administrative Region being an inalienable part of the People's Republic of China under the principle of "one country, two systems" with a high degree of autonomy in accordance with China's basic policies regarding Hong Kong as set out and elaborated in the Joint Declaration. The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.

As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used." ¹⁶

12. In the light of the above interpretation approach, if questions concerning the application or scope of the privilege or immunity provided under BL 77 arise in future, the courts, when interpreting BL 77, would not look at the provision in isolation, but would construe BL 77 having regard to the purpose of BL and other provisions of BL or relevant extrinsic materials. Given the courts' observations on the privileges and immunities conferred on Members set out in paragraphs 7 to 10 above, it is likely for the courts, when interpreting and determining the scope of

¹⁶ See also CFA's judgment in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

BL 77, to consider whether a Member's act done in the exercise or purported exercise of the privilege provided under BL 77 is inherently necessary for the performance of LegCo's constitutional functions under BL 73; whether the act in question relates to an ordinary criminal offence which has no connection with LegCo's constitutional functions; and whether or not the exercise of the privilege under BL 77 is consistent with the purpose of BL.

13. The purpose of BL, as stated by CFA in *Ng Ka Ling*, is to establish the Hong Kong Special Administrative Region ("HKSAR") being an inalienable part of the People's Republic of China under the principle of "one country, two systems" with a high degree of autonomy in accordance with China's basic principles regarding Hong Kong as set out and elaborated in the Joint Declaration. This purpose is enshrined in BL 1¹⁷ and BL 12.¹⁸ The provisions in BL 1 and BL 12 are described in Article 2 of The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law") as provisions on the legal status of HKSAR and are the fundamental provisions in BL. It also provides that no institution, organization or individual in HKSAR shall contravene the provisions in BL 1 and BL 12 in exercising their rights and freedoms. Based on the above judicial decisions, should there be cases involving BL 77 vis-à-vis the provisions in the National Security Law in future, it would be for the courts to determine how BL 77 is to be interpreted having regard to the relevant principles and the actual circumstances of each individual case.

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¹⁷ BL 1 reads: "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China."

¹⁸ BL 12 reads: "The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government."