

**President's decision for deferring
the administration of oath or affirmation
for Hon Sixtus LEUNG Chung-hang and Hon YAU Wai-ching**

Background

At the first meeting of the Sixth Legislative Council (“LegCo”) on 12 October 2016, the Clerk to LegCo as the oath administrator declined jurisdiction to administer the oath/affirmations taken by Dr Hon YIU Chung-yim, Hon Sixtus LEUNG Chung-hang and Hon YAU Wai-ching. On 13 October, Dr YIU wrote to me requesting to subscribe his affirmation afresh at the Council meeting of 19 October. On 14 and 17 October, many Members wrote to me seeking my ruling on the validity of the oath/affirmations taken by these three Members, Hon LAU Siu-lai and Hon Nathan LAW Kwun-chung. Hon WONG Ting-kwong also wrote to me on 13 October seeking my permission for him to subscribe his affirmation afresh as he had omitted two material words while subscribing his affirmation at the first Council meeting.

2. After considering the relevant constitutional and statutory requirements and all the relevant evidence/information available to me, I ruled on 18 October that the oath/affirmations taken by Dr Hon YIU Chung-yim, Hon Sixtus LEUNG Chung-hang, Hon YAU Wai-ching, Hon LAU Siu-lai and Hon WONG Ting-kwong were invalid, and the affirmation subscribed by Hon Nathan LAW Kwun-chung was not inconsistent with the Oaths and Declarations Ordinance (Cap. 11) (“the Ordinance”)¹. I acceded to the requests of Mr WONG and Dr YIU to subscribe the affirmations afresh at the Council meeting of 19 October. I also stated in my ruling that I was prepared to allow Mr LEUNG, Ms YAU and Ms LAU to take their oath/affirmations afresh at a Council meeting if they put forward their requests to me in writing (“my Decision”).

3. After the making of my ruling, Hon Sixtus LEUNG Chung-hang, Hon YAU Wai-ching and Hon LAU Siu-lai separately wrote to me requesting to take oath/affirmations afresh at the Council meeting of 19 October.

4. At around 6:00 pm on 18 October, I was informed through an email by the Department of Justice acting for the Chief Executive and the Secretary for Justice (collectively referred to as “the Applicants”) that “*there will be an urgent inter partes hearing before the Court later today (at a time to be confirmed by*

¹ President's ruling on the validity of the Legislative Council Oath taken by six Members at the Council meeting of 12 October 2016 issued on 18 October 2016

the Court) relating to an application for leave to apply for judicial review² and an application by way of an originating summons³ seeking reliefs arising from your decision today to allow Mr Sixtus LEUNG Chung-hang and Ms YAU Wai-ching to take their oaths afresh if they put forward their requests in writing.”

5. In the application for leave for judicial review, the Applicants seek, among others, (i) a declaration that the President has no power to re-administer or allow the re-administration of any further oaths to be taken by Mr LEUNG and Ms YAU under section 19 of the Ordinance on the basis that they are disqualified from entering on the office of a member of LegCo and are not entitled to act as a member of LegCo; and (ii) an injunction or interim relief that the President be restrained from administering or allowing to be administered the making of oaths of Mr LEUNG and Ms YAU under section 19 of the Ordinance. In the proceedings on the originating summons, the reliefs sought by the Applicants include (i) a declaration that Mr LEUNG and Ms YAU are disqualified from assuming the office of a member of LegCo and are not entitled to act as a member of LegCo; and (ii) an injunction restraining Mr LEUNG and Ms YAU from claiming to be entitled and/or acting as a member of LegCo⁴.

6. The urgent inter partes hearing was held before the Court of First Instance (“the Court”) in the late evening of 18 October. After hearing parties’ submission, while the Court refused to grant the interim injunction, the Court found a strong arguable case on the part of the Applicants and granted leave to the judicial review application. An expedited hearing date of the substantive hearing on the judicial review application was granted and the hearing date was fixed two weeks later on 3 November with the following day reserved.

Developments following my Decision and the Court hearing on 18 October

7. At the Council meeting of 19 October, as soon as I called upon Hon Sixtus LEUNG Chung-hang to take the oath, 39 Members belonging to

² HCAL 185/2016

³ HCMP 2819/2016

⁴ The grounds for both actions are essentially the same. In gist, the Chief Executive and the Secretary for Justice contend that the conduct of Mr LEUNG and Ms YAU during the oath taking proceedings at the Council meeting of 12 October 2016 constituted refusing or deliberately failing to swear to uphold the Basic Law and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China. According to Article 104 of the Basic Law, Mr LEUNG and Ms YAU are unfit or disqualified from assuming the office of a member of LegCo and are not entitled to act as a member of LegCo. On this basis, the Chief Executive and the Secretary for Justice contend that the President has no power to re-administer or allow for re-administration of any further oaths to be taken by Mr LEUNG and Ms YAU under section 19 of the Ordinance.

the pro-establishment camp left the Chamber. As a quorum was not present after the expiry of the quorum call, I adjourned the Council under Rule 17(2) of the Rules of Procedure (“RoP”).

8. On 20 October afternoon, 17 Members belonging to the pro-establishment camp requested a meeting with me in private. They indicated categorically that unless and until the Court had made a decision on the judicial review application, I should not administer the oath/affirmation by Hon Sixtus LEUNG Chung-hang and Hon YAU Wai-ching (“the two Members”).

9. Following the private meeting with me, all 39 Members in the pro-establishment camp, after making a joint public announcement, wrote to me on 21 October requesting me not to arrange administration of oath/affirmation for the two Members on the grounds that the Court would soon hear the judicial review application and it would be in the overall interest of Hong Kong and the smooth and normal operation of LegCo. They also stated in public that should I not accede to their request, they would resort to all practicable means to prevent the taking of oath/affirmation by the two Members, including not attending Council meetings which would inevitably lead to a lack of a quorum.

10. On the same day, four Members belonging to the Liberal Party also wrote to me requesting me to defer or even consider refusing administration of oath/affirmation for the two Members.

11. On 24 October, I met with 17 Members in the pan-democratic camp in private upon their request. They urged me to stick to my Decision to allow the two Members to take oath, given that there has been no significant change since the Court’s refusal to grant the application for an interim injunction.

Considerations for review of my Decision

12. The Council was adjourned after I had called upon Hon Sixtus LEUNG Chung-hang to take his oath at the meeting of 19 October. Under Rule 17(5) of RoP, the question on which the Council is adjourned shall stand over until the next meeting. The two Members and Hon LAU Siu-lai separately wrote to me after the Council meeting of 19 October requesting me to administer oath for them at the Council meeting of 26 October. In light of the latest developments, I need to review critically whether I have the power not to include an item of business for the Council meeting of 26 October which is otherwise a stand over item and whether there are circumstantial changes that warrant my making of a fresh decision.

Powers and functions of President

13. The powers and functions of the President of LegCo are stipulated in the Basic Law (“BL”) and RoP. BL 72(1) provides that the President shall preside over meetings. Under BL 72(2), the President shall decide on the agenda for Council meetings which is reflected in Rule 19(1) of RoP. BL 75 confers on LegCo the power to make the rules of procedure on its own, provided that they do not contravene BL. Accordingly, it is incumbent upon me as President to ensure that my exercise of the power in deciding on the agenda for Council meetings is not in contravention of any provision of BL.

14. Both Counsel to the Legislature and the external Counsel acting for me in the Court hearing advise me that given the President’s constitutional power to decide on the agenda under BL 72(2), I have the power to decide whether or not to include an item in or withdraw it from the agenda for a Council meeting. As to how and when to exercise such power, Counsel to the Legislature advises me that these are matters within my discretion and I should exercise my discretion reasonably having regard to relevant considerations.

Operation of LegCo

15. I note with grave concern the avowed intention of the 39 Members in the pro-establishment camp to forestall the taking of oath/affirmation by the two Members at all costs including not attending Council meetings in order to make the meeting inquorate. Their walk-out from the Chamber immediately after Mr LEUNG was called upon to take the oath at the start of the Council meeting of 19 October resulted in the adjournment of the Council without the transaction of any business on the Agenda. As of today, one Government Bill, one petition, 22 questions to the Government and three Members’ motions have to stand over until the next Council meeting.

16. I noted that in refusing to grant the interim injunction restraining me from administering the oaths for the two Members, the Court stated that the two Members were Members returned at the general election of LegCo unless they were disqualified and whether they were so disqualified was a matter for the Court to decide at the substantive hearing on the judicial review application. The Court also stated that the President might, in performing his constitutional role, decide to allow the two Members to take the oath before him pending the Court’s decision on the judicial review application.

17. I also noted that among the issues to be considered by the Court in the substantive hearing are (i) whether the way the two Members took the LegCo Oath at the Council meeting of 12 October constituted a contravention of BL 104; and (ii) the interpretation and application of section 21 of the Ordinance.

18. It has now become apparent to me that given the outcome of the Council meeting of 19 October and the subsequent position as stated by the majority Members of the Council, if I were to continue to place the oath-taking of Mr LEUNG and Ms YAU on the agenda, the most probable outcome would be that the operation of LegCo would come to a complete halt until the Court has made its decision on the judicial review application. The effect is that not only is LegCo unable to perform its constitutional powers and functions under BL 73 in the interim, but also Hon LAU Siu-lai will not be able to fulfill her constitutional duty of taking the LegCo Oath under BL 104 as she is placed after the two Members on the agenda to take her oath in accordance with rule 1 of the House Rules. Before taking the LegCo Oath, Ms LAU cannot attend or vote in meetings of LegCo and its committees.

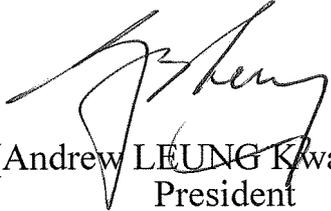
19. As President, I must consider the overall interest of LegCo as a law-making institution as well as the interest of individual Members. It is my constitutional duty to ensure the effective discharge of the powers and functions of LegCo and the orderly, fair and proper conduct of Council meetings. It would certainly be in the interest of LegCo as well as the two Members that the Court would come to a decision on the substantive hearing on the judicial review application as soon as possible. But before that, LegCo must continue to effectively discharge its powers and functions. I emphasize that both Counsel to the Legislature and the external Counsel acting for me in the Court hearing advise me that given the President's constitutional power to decide on the agenda under BL 72(2), I do have the power to decide whether or not to include an item in or withdraw it from the agenda for a Council meeting.

20. In the light of the above latest developments, I consider it appropriate to withdraw from the agenda for the coming Council meetings the item on administration of oath/affirmation for the two Members in the exercise of my power under BL 72(2) as well as Rule 19(1) of RoP pending the Court's decision on the judicial review application. I am mindful that if I exercise my power to make such a decision, the two Members will not be able to sit in the Council to represent their electorate for the time being. But if I insist on keeping the item on the agenda, the reality will be a recurrence of the happenings at the Council meeting of 19 October and LegCo will unlikely have a quorum to meet, thus failing to exercise its constitutional powers and functions altogether.

21. Having carefully assessed the significant developments and after weighing and balancing the possible prejudice between including the taking of oath by the two Members in the agenda for the coming Council meetings and removing it from the agenda, I consider that the proper course of action is to defer the administration of oath/affirmation for Mr LEUNG and Ms YAU for the time being pending the Court's judgment on the judicial review application which will be heard in less than 10 days.

My decision

22. Having considered the constitutional requirements under BL, the relevant rules under RoP, the impact on the operation of LegCo and the interest of individual Members concerned as well as the major developments since the Council meeting of 19 October, I find that there are justifiable grounds for me to defer the administration of oath/affirmation for Hon Sixtus LEUNG Chung-hang and Hon YAU Wai-ching and withdraw the relevant item from the agenda of the Council until the Court has made a decision on the judicial review application. I must stress that while I have considered Members' views in arranging LegCo business, such views were not and have never been the sole basis of my ruling. It is the unprecedented and exceptional circumstances of the situation, which involves fundamental legal and procedural issues, that has warranted this decision.


(Andrew LEUNG Kwan-yuen)
President
Legislative Council

25 October 2016