

立法會

Legislative Council

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Outside Counsel's advice on issues relating to House Committee arising from delay in election of the House Committee Chairman for the 2019-2020 session and related background information

Background

Since the issue of LC Paper No. LS 11/19-20 in October 2019 on the implications on the operation of the House Committee pending the election of its chairman and deputy chairman, there has been new development in the election of the chairman of the House Committee ("HC") for the 2019-2020 session. While in the ordinary course of events, the election of HC chairman for a new session is the first proceeding of HC for the new session and should be disposed of before HC transacts business in the new session under the chairmanship of the new chairman, what has happened in HC relating to the election of the chairman has raised new problems.

2. Set out at **Annex I** are relevant considerations from the perspective of the Legislative Council Secretariat ("Secretariat") on certain issues relating to the delay in the election of HC Chairman for the 2019-2020 session.

3. Against the above background, the President of the Legislative Council has directed the Secretariat to seek outside Counsel's advice.

Main points of outside Counsel's advice on certain issues relating to HC arising from delay in the election of HC Chairman

4. **Annex II** sets out the main points of the advice of Mr Benjamin YU SC and Mr Jenkin SUEN SC on certain issues relating to HC arising from the delay in the election of HC Chairman for the 2019-2020 session.

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**Relevant considerations from the perspective of the
Legislative Council Secretariat on issues relating to delay in election
of chairman of the House Committee for the 2019-2020 session**

Election of committee chairmen and tenure of office

The chairmen and deputy chairmen of some committees of the Legislative Council ("LegCo") (including the Public Accounts Committee, Committee on Rules of Procedure ("CRoP"), Committee on Members' Interests and Investigation Committee) are appointed by the President of LegCo ("President"). The tenure of these offices is for the entire term or until the work of the committees is completed.

2. For other committees of LegCo whose chairmen and deputy chairmen are elected to office, the arrangements for the calling and convening of the first meetings of committees for the purpose of electing the chairmen and deputy chairmen of these committees had been considered by Members-elect of the First LegCo during the drafting of the Rules of Procedure in June 1998. In the absence of a most "senior" Member in the first term of the new legislature, it was decided that the only practical arrangement was for the clerks of committees to call the first meeting of a term and preside over the election of the Member to preside over the elections of the chairmen and deputy chairmen. Hence, when RoP were adopted by the First LegCo in July 1998, the relevant rules applicable to the House Committee ("HC") and Finance Committee ("FC") provided that the clerk to the committee concerned shall be responsible for calling the first meeting of a term of the committee, and shall preside at the beginning of that meeting for the purpose of electing the presiding Member for the election of the chairman of the committee.¹ The calling of meetings for the purpose of electing committee chairmen and deputy chairmen was subsequently reviewed by CRoP of the First LegCo. While CRoP considered that there was a need to simplify the procedure for the election of committee chairmen at the beginning of a new term², it had come to the view that no question should arise for calling and convening meetings for the purpose of electing the chairmen

¹ The rules applicable to HC and FC were RoP 75(3) and RoP 71(3) respectively. These rules were repealed in 1999 pursuant to a review conducted by CRoP of the First LegCo.

² The election procedure was simplified in 1999 such that instead of the committee clerks calling and convening the first committee meetings in a new term, the Member with the longest continuous service in the Council present at the meeting will set the date for the first meeting and preside over the election of the chairmen.

in the second or subsequent sessions as RoP already provided for chairmen of FC, HC and Panels to hold office until the election of chairmen of the respective committees in the session next following that for which they were elected. In such case, the first meetings in the second and subsequent sessions for electing the chairmen were called by the respective chairmen. CRoP also considered that no question should arise in the case of committees the chairmen of which were appointed by the President.³

3. While the election of chairman is normally held at the first meeting of committees of the Council in a new session, RoP were amended in 2002 to allow the election to be held before a new session commences. The purpose of this arrangement, as set out in LC Paper No. CROP 23/01-02, is to enable the newly elected chairman to decide on the agenda for the first HC meeting which is usually held shortly after a new session commences. It should therefore be the spirit and legislative intent of these provisions to require the committee concerned to elect its chairman for the new session before transacting business. It has also been the practice of LegCo that committees would conclude the election of chairmen for a new session so that business of the committees in the new session will be transacted under the chairmanship of the newly elected chairmen.

Issues relating to exercise of powers of the incumbent HC Chairman pending the election of the chairman for a new session

4. Against the above background, it is apparent that in the case of committees whose chairmen are elected to office (viz. HC, FC and Panels), a new chairman is required to be elected for each legislative session. To reflect and implement this requirement, it is important that the election of the chairman should be the first item of business of the committee concerned for a new session.

5. Similar to the Finance Committee and Panels, the HC Chairman elected for the previous session ("the incumbent HC Chairman") continues to hold office until the chairman for the new session is elected. However, as the first item of business of a committee in a new session is the election of the new chairman, HC needs to proceed with the election before transacting business. Although the incumbent HC Chairman continues to hold office before the new chairman is elected, any

³ Progress Report of the Committee on Rules of Procedure (July 1998 to April 1999), paras. 3.17 to 3.26.

contention that he/she could exercise the powers of the chairman from the outset as a matter of right would have the effect of frustrating the purpose of requiring the election of a chairman for each new session because this would mean that after a Member has been elected as the HC Chairman in the first session of a term, he/she could theoretically act as the HC Chairman for all subsequent sessions without the need of being re-elected so long as no new chairman is elected. This would also upset the LegCo's practice in relation to the mode of operation of committees of the Council.

6. In view of the foregoing, although the incumbent HC Chairman continues to hold office pending the election of the chairman for the new session, he/she should not exercise the powers of the chairman in his/her capacity as the chairman in office from the outset as HC should elect the chairman first. It should however be pointed out that the incumbent HC Chairman has a role or function over the election of the new chairman. If the incumbent HC Chairman is not being nominated for the chairmanship, the election of the new chairman will be presided by him/her. Even when the incumbent HC Chairman is being nominated for the chairmanship and the role of Presiding Member passes to the incumbent HC Deputy Chairman, this does not mean that the incumbent HC Chairman ceases to have any role or function over the election of the chairman. Indeed, it should be open to the incumbent HC Chairman to deal with matters and problems relating to the election. In the present case, for example, when no chairman is elected at the meeting of 11 October 2019, the incumbent HC Chairman has called meeting(s) to tackle this problem. The incumbent HC Chairman has also directed the Clerk to HC to issue papers and reports on bills and subsidiary legislation to HC members for their consideration during the time when the election of the new chairman is going on. Hence, in case the election-related problems continue or if new problems arise from the election, the incumbent HC Chairman, being the chairman in office pending the election, should be able to exercise powers as appropriate to deal with these problems. However, if the incumbent HC Chairman is being nominated for the chairmanship, he/she cannot preside at the actual election process/procedure.

Role and powers of the Member presiding at the election of the House Committee chairman

7. Save for paragraphs 4 to 12 of Appendix IV to the House Rules, which set out what the presiding Member has to do at the election of HC chairman, there are no express provisions in the RoP or the House Rules

providing for the duties and powers of a Member presiding at the election of the chairman/deputy chairman of a committee. It is however clear that the incumbent HC Deputy Chairman, as Presiding Member, does not have the power to call meetings for the purpose of electing the HC Chairman, nor can he decide not to hold the meeting after one is called by the incumbent HC Chairman. When the incumbent HC Deputy Chairman is not able to attend the meeting called by the incumbent HC Chairman, the meeting will proceed all the same, but it will be presided by another Member who is the Member present at the meeting having the highest precedence among Members not nominated for the chairmanship.

8. The role and powers of a presiding Member should be confined to the conduct of the election and the election procedure. Apart from the duties prescribed in paragraphs 4 to 12 of Appendix IV to the House Rules, the Member presiding at the election of HC chairman should be under a duty to do what is reasonable and necessary to facilitate the election of the HC chairman and to ensure that the HC chairman can be elected within a reasonable time. In that regard, he should have such powers as may be reasonably necessary for him to perform his role and function of presiding at the election. Such powers may include maintaining the order of the election proceedings and taking necessary action to ensure that the election will be conducted in an orderly manner. However, such reasonably necessary or incidental powers should not include the power to adjourn the election or not to proceed with the election altogether since the whole purpose of the election is to elect the chairman.

Main points of outside Counsel's advice on certain issues relating to the House Committee arising from the delay in the election of the House Committee Chairman for the 2019-2020 session

This paper sets out the main points of the advice of Mr Benjamin YU SC and Mr Jenkin SUEN SC on certain issues relating to the House Committee ("HC") arising from the delay in the election of HC Chairman for the 2019-2020 session.

Issues relating to the proceedings at HC meetings presided by the incumbent HC Deputy Chairman for the election of HC Chairman for the 2019-2020 session

2. Senior Counsel note that the Presiding Member allowed HC members: (a) to discuss security arrangements for Council meetings and the Legislative Council ("LegCo") Complex, and the Secretary General's follow up actions with the Administration; and (b) to move non-binding motions to request The Legislative Council Commission to provide confidential documents, information and records about the various security incidents in the vicinity of the LegCo Complex from June to October 2019. In Senior Counsel's view, it is difficult to see how such discussions could be relevant to the election of HC Chairman.

Issues relating to exercise of powers of the incumbent HC Chairman pending election of the chairman for a new session

3. In Senior Counsel's view, these are ultimately questions of construction of the relevant provisions in the Rules of Procedure ("RoP") and the House Rules ("HR"), although in exercising his/her powers the incumbent HC Chairman may assume or be subject to relevant duties or responsibilities and be guided by the practice of LegCo. Senior Counsel observe that the purpose of RoP and HR is for the proper functioning of LegCo as the legislative body of the HKSAR, and it is clear that RoP 75 envisages that once a chairman has been elected for the first session of a term, there will, during the term, always be a chairman of HC.

4. Adopting a purposive approach, Senior Counsel are of the firm view that RoP and HR clearly show that pending the election of a new chairman, the incumbent HC chairman (being the HC chairman in office) should have all the usual powers which may be exercised by an HC chairman to conduct the usual business of HC until a new chairman is elected for the 2019-2020 session or until the end of the current term, whichever is earlier, but the exercise of such powers is subject to the caveats below:

- (a) in the present case, the incumbent HC Chairman has no power to preside over HC meetings held for the purpose of electing the new chairman since she is being nominated for the office of the new chairman: HR 20(c) and para. 2(b) of Appendix IV of HR;
- (b) as envisaged in RoP 75(2) and HR 20(c), the incumbent HC Chairman should ensure that the election of the chairman for the new session should take place either before the commencement of the next session or at any rate as the first item of business in the new session. This means that if a new chairman has not been elected before the commencement of a new session, the election of chairman should be made the first item on the agenda for the first meeting of a new session;
- (c) the incumbent HC Chairman should not deliberately defer the process of election of the new chairman in order that he/she would remain as chairman for the next session; otherwise, he/she would be frustrating the plain intent of RoP 75(2);
- (d) the incumbent HC Chairman should be cognizant that where a new session has commenced but she still holds the office of HC chairman, she only exercises power as chairman pending the election of the new HC Chairman; accordingly, she should exercise caution or prudence as to whether to exercise her powers as HC chairman and, if so, the extent of such exercise of powers;
- (e) where the new HC chairman, as in the present situation, still has not been elected over six months after the commencement of the new session, the incumbent HC Chairman in office must be under a continuing duty and responsibility (and has the concomitant power) to act as HC chairman to make sure that there is no undue disruption to the work and normal functioning of HC caused by the inordinate delay in the election of the HC Chairman, by calling meetings to transact or deal with HC's business, especially urgent or essential business pending the election of a new chairman to enable LegCo as a whole to discharge its constitutional duty and function under Article 73 of the Basic Law ("BL");
- (f) it is possible that the exercise of powers of both the incumbent HC Chairman and of the Presiding Member pending the election of the new HC Chairman are susceptible to abuse. For example, an incumbent HC Chairman who is not being nominated for the chairmanship may seek to abuse his/her powers by prolonging or delaying the process of election in his/her capacity as the Member

presiding at the election such that he/she can remain in office as the HC Chairman. Alternatively, an incumbent HC Chairman who is being nominated may act in concert with the Presiding Member to filibuster the election process to enable such incumbent HC chairman to remain in office. Despite the potential abuse of powers by the incumbent HC Chairman, he/she should have the usual powers as HC Chairman pending the election of the new chairman subject to the caveats or safeguards mentioned above so that HC can transact its business, especially urgent or essential business; and

- (g) the incumbent HC Chairman will have to ensure the normal or proper functioning of HC (particularly to transact its essential or urgent business) without impeding the election of the new chairman. In the ordinary course of events where the election of the new chairman concludes within a short time before or shortly after the commencement of a new session, the election of the new chairman should be put as the first item of the agenda ahead of any business to be transacted at a new session. The present situation is, however, unprecedented, and does require the incumbent HC Chairman to continue to discharge her duties as chairman of HC.

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