

Legal Issues Arising out of the Resignation of the Hon. Tung Chee Hwa from
the Office of Chief Executive of the HKSAR

Statement of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“the Bar”) notes that the Hon. Tung Chee Hwa submitted his resignation of the office of Chief Executive today. This statement summarizes its views on certain legal issues arising out of the resignation of Mr. Tung of the office of the Chief Executive.

The Selection and Appointment of the new Chief Executive

2. Upon the resignation of Mr. Tung, the office of Chief Executive has become vacant. A selection process that conforms to the provisions of Article 45 of the Basic Law will have to take place to return the candidate for appointment as the new Chief Executive. Under present arrangements, the Election Committee under the Chief Executive Election Ordinance (Cap 569) will elect the candidate for appointment as the new Chief Executive.
3. The Bar notes that there are different views as to the length of office of the new Chief Executive. The Bar considers that the answer to this question

requires a proper interpretation of the relevant provisions of the Basic Law of the HKSAR, namely Articles 45, 46, 52, 53 and Annex I.

4. The Bar recalls that in interpreting the Basic Law of the HKSAR, the orthodox approach seeks to construe “the language used in the text of the instrument in order to ascertain the legislative intent as expressed in the language. It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and it should be ascertainable by the citizen.” The language of the article in question is not looked in isolation but “considered in the light of its context and purpose. The exercise of interpretation requires [the identification of] the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise.” See Director of Immigration v Chong Fung Yuen (2001) 4 HKCFAR 211, per Li C.J. at pp. 223-224.
5. The Bar is of the view that where the language of the Basic Law of the HKSAR is free from ambiguity it means that the meaning is clear and full effect must be given to it. The clear language of the Basic Law of the HKSAR cannot be given a meaning which it cannot bear.
6. Article 46 of the Basic Law specifies clearly and without qualification that the

term of office of the Chief Executive is five years. Article 53 of the Basic Law provides that in the event of the office of the Chief Executive becoming vacant, a new Chief Executive shall be selected within six months in accordance with Article 45 of the Basic Law. The candidate for appointment who is returned in accordance with Article 45 (and by virtue of Article 45, Annex I) of the Basic Law is a new Chief Executive. There has to be a *fresh* process of election.

7. The specification of the term of office of the Chief Executive in Article 46 of the Basic Law of the HKSAR to be five years does not mean that where the office of the Chief Executive becomes vacant, without the incumbent completing his term of office, the new Chief Executive needs to serve the remainder of the term of his predecessor-in-office. Nor is it an implication that can be drawn from the text of Article 53 of the Basic Law of the HKSAR. It simply provides that “a new Chief Executive” is to be selected within six months of the office becoming vacant in accordance with the provisions of Article 45 of the Basic Law of the HKSAR.
8. Annex I of the Basic Law of the HKSAR does not contemplate the office of the Chief Executive to be a periodic office with fixed commencement dates. The Election Committee prescribed in Annex I is to be the method for

selecting “the Chief Executives for the terms subsequent to the year 2007” if no amendment to Annex I pursuant to paragraph 7 of Annex I. In any event, the supplementary provisions of Annex I of the Basic Law of the HKSAR cannot be applied to qualify the main body provision of Article 46 of the same.

9. The Bar has also examined the drafting history of the Basic Law of the HKSAR. While it is true that the Draft Basic Law for Solicitation of Opinions referred at Article 53 to a “xindeyijie” (or new term) Chief Executive being selected within six months of the office becoming vacant and the final and adopted text of Article 53 refers to a “xinde” (or new) Chief Executive being selected within six months of the office becoming vacant, one must not lose sight of the fact that a similar change in drafting occurred in Article 46, with the reference to the expression “jie” (or term) in Article 46 of the Draft Basic Law for Solicitation of Opinions removed in the adopted text of Article 46. The Bar considers therefore that the drafting history of the Basic Law of the HKSAR is neither determinative nor conducive to the resolution of the present question of interpretation.
10. The Bar considers that neither the language nor the context and purpose of Articles 46 and 53 of the Basic Law of the HKSAR supports the contention

that the new Chief Executive selected in accordance with Article 45 of the Basic Law of the HKSAR as a result of the office becoming vacant serves not a term of office of five years as specified in Article 46, but the remainder of the term of his predecessor-in-office.

Dated 10 of March 2005

Hong Kong Bar Association