

**The Chief Executive's Term of Office :  
Response of the Department of Justice to  
The Law Society's Statement of 18 March 2005**

The Law Society has stated that -

“Under the common law rules of statutory interpretation provisions are to be interpreted according to their literal meaning. It is only when the provisions are unclear or ambiguous that the rules relating to legislative intention need to be considered.”

“The provisions of Article 46 are unambiguous and their meaning clear. Accordingly it is incorrect to apply any meaning to its provisions other than that which is readily apparent, namely that the term of office of the Chief Executive shall be five years.”

2. The Department of Justice respects the views of the Law Society but takes issue with these statements.

**Literal meaning and legislative intent**

3. The leading work on common law statutory interpretation is Francis Bennion's *Statutory Interpretation : A Code* (4<sup>th</sup> ed, 2002). According to Bennion, “The sole object in statutory interpretation is to arrive at the legislative intention”. Amongst the authorities cited for this proposition is the case of *Attorney General for Canada v Hallett & Carey Ltd* [1952] AC 427, in which Lord Radcliffe stated (at p. 449) that –

“There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention.”

4. In the case of *Director of Immigration v Chong Fong-yuen*, Hong Kong's Court of Final Appeal ruled that, in ascertaining the legislative intention of the Basic Law, the courts should act as follows -

“Their duty is to ascertain what was meant by the language used and to give effect to the legislative intent as expressed in the language.”

“Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear.”

“To assist in the task of interpretation of the provision in question, the courts consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question.”

### **Ambiguous?**

5. In the case of *Attorney General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 463, Viscount Simonds stated that –

“the elementary rule must be observed that no one should profess to understand any part of a statute ..... before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.”

6. One should not, therefore, conclude that Article 46 is or is not ambiguous until one has studied other relevant provisions in the Basic Law.

### **Article 46**

7. Article 46 of the Basic Law states that “The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years.” If one were to adopt a narrow, literal, construction of this provision in isolation, it could be argued that each Chief Executive must serve a full 5-year term. However, having regard to provisions concerning the resignation of the Chief Executive (Article 52) and the possibility of a vacancy in the office of Chief Executive (Article 53), it is clear that this is not the case.

8. The question that is posed by the current situation is this : what happens to the 5-year term of office of the Chief Executive if a particular incumbent leaves that office prematurely? There are two possible answers –

- (1) the 5-year term of office is cut short and the new Chief Executive is to serve a new 5-year term; or
- (2) the 5-year term of office remains in existence and the new Chief Executive serves the remainder of that term.

There is therefore an ambiguity that must be resolved by reference to other parts of the Basic Law. Of particular relevance are Articles 53 and 45, and Annex I of the Basic Law.

### **Articles 53 and 45**

9. Article 53 provides that –

“In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law.”

10. Article 45 provides that the ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. This is to be achieved in accordance with the principle of gradual and orderly progress. The specific method for selecting the Chief Executive is prescribed in Annex I to the Basic Law.

### **Annex I**

11. Annex I provides that the Chief Executive shall be elected by a broadly representative Election Committee, which is to have a term of office of 5 years. Although the 5-year term of the Election Committee has not, in practice, run in parallel with the 5-year term of office of the Chief Executive,

there was intended to be a link between the two terms of office. The Election Committee formed in the year 2000 elected the second-term Chief Executive in 2002. It was intended that another Election Committee should be formed to elect the third-term Chief Executive in 2007.

12. The intended election in 2007 is important, since Annex I provides for the possibility of an amendment of the method for selecting the Chief Executive for the terms subsequent to that year. The HKSARG Constitutional Development Task Force is seeking to achieve a consensus on amendments that would be in line with principle of gradual and orderly progress towards universal suffrage. If this can be achieved, and Annex I is amended, an Election Committee formed to elect the third-term Chief Executive in 2007 would be more representative than the current one.

### **Resolving the ambiguity**

13. If the Basic Law is interpreted as requiring Chief Executive who is elected this July to serve a 5-year term, this would have the following consequences –

- (1) the current Election Committee, which was formed in the year 2000, would be electing a Chief Executive who serves until 2010;
- (2) no progress towards greater democracy in the election of the Chief Executive could be made in the year 2007;
- (3) the community would have to wait until 2010 until a more representative Election Committee could select another Chief Executive.

14. These consequences would be anomalous. It is an established common law principle of statutory interpretation that the courts seek to avoid a construction that creates an anomaly or otherwise produces an irrational or illogical result (Bennion, *Statutory Interpretation* p. 845).

15. An interpretation that results in the original 5-year term of office being partly filled by a new Chief Executive would avoid such a result. It would also be beneficial to the development of democracy and the human rights values enshrined in the Basic Law. For these reasons, the court should lean in favour of the latter interpretation.

Department of Justice  
1 April 2005