



Submissions on Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council

1. Introduction

The Administration published its Consultation Paper on 22 July 2011 to seek the public's views on the "*Arrangements for Filling Vacancies in the Legislative Council*" in order to gauge the public's views on the policy to abolish by-elections because it wishes to address a "loophole" in the current system. The Consultation Paper discusses whether the status quo should be retained and invites comments on four Options which are discussed below.

In responding to this Consultation, the Law Society focuses on the constitutional acceptability and legal basis therefor, and does not express a preference for or against any particular options *per se*. The Law Society has encouraged its members to make submissions on their own preferences of the four Options and indeed to submit any other suggestions.

The Law Society reiterates its view on the basic rights of Hong Kong people to be elected and notes the current by-election mechanism has served the community well so far. The Law Society therefore firmly believes there must be compelling reasons before any changes are introduced.

2. Constitutional provisions

The Law Society has reviewed the four Options and considered various constitutional provisions, including Articles 26 and 68 of the Basic Law¹, and Article 25 of the International Covenant on Civil and Political Rights².

3. Fundamental right to vote

In *Chan Kin Sum v. Secretary for Justice* [2009] 2 HKLRD 166, a case which concerns prisoners' right to vote, the Court affirmed that the right to vote is a fundamental right in Hong Kong and without doubt the most important political right.³

4. Some guiding considerations

The following points should therefore be taken into account when considering the arrangements for filling vacancies in the Legislative Council:

- (a) The “*gradual and orderly progress*” requirement in Article 68(2) towards universal suffrage should point towards more rather than less voting rights.
- (b) The key issue is which replacement mechanism can most fairly and reasonably reflect the will of the electors.⁴
- (c) Using by-election as the replacement mechanism whenever a vacancy arises has always been the practice in Hong Kong before and after the 1997 handover. The will of the electors is best reflected by allowing them to vote at a by-election if and when a vacancy arises rather than merely the selection of a candidate based on any presumed general will of the electorate as reflected in an earlier vote.⁵
- (d) Any replacement mechanism should not undermine our permanent residents’ right to vote and right to stand for elections.
- (e) We refer to the Law Society’s submissions on constitutional development⁶ where we have provided our views based on constitutional/statutory interpretation principles, and note that Article 68 of the Basic Law does require that LegCo members be returned only through elections, although the method of election may vary from one type of constituency to another.

The Law Society’s’ response to views sought by the Administration as outlined in paragraph 5.06 of the Consultation Paper

“(a) Is there any loophole to be plugged?”

5. The Law Society does not express a view on whether the phenomenon of LegCo members resigning at will should be considered a loophole and, if so, whether, as a matter of policy (we will return to the legal considerations further below) that needs to be plugged. This is ultimately a political question that will no doubt be considered by others who make submissions in response to the Consultation Paper and, in the end, by the Legislative Council. The Law Society considers that its role in relation to the Consultation Paper is to set out its legal analysis on the various options set out in the Consultation Paper.

6. In this regard, the Law Society notes that any legislative measure which, on its face, potentially abrogates constitutional or otherwise fundamental human rights (as is the case in relation to matters outlined in the Consultation Paper), must, in order to be upheld as constitutional, be reasonably proportionate to the objective that such a measure is intended to

achieve. Thus, the following factors are noted for the purpose of considering whether the options presented in the Consultation Paper can be said to be constitutionally proportionate:

(a) Fundamentally, the purported loophole boils down to concerns about alleged lack of political integrity and wasting of taxpayers' money on the part of LegCo members who resign to trigger a by-election, only to stand again for re-election. The Law Society reiterates that it expresses no view on whether it is a concern from a policy / political question perspective. Nonetheless, from a constitutional proportionality perspective, certain logical consequences would ensue should such concerns be accepted as ones that need to be dealt with through an abrogation of the right to vote and/or the right to stand for elections.

(b) It is noted that the Administration has not extended sufficient justification to categorise the action of a LegCo member who chooses to resign in order to trigger a by-election in which he or she will stand in order to convey a political message as an abuse of process. Voluntary resignation to trigger a by-election in order to provide an opportunity for voters to use their votes to show their support for or disagreement with the resigning member's political stance is not uncommon among democratic countries⁷. If the majority of voters do not support such a course, the resigning member will risk losing his or her seat at the by-election.

(c) The Administration relies on the significant drain on public resources and refers to the cost of around \$126 million expended in the 2010 by-elections. However, it should be noted that around 580,000 electors voted at the by-election, and so the average cost for each vote was approximately \$200 (or less than \$40 per each registered voter). Given the importance of one's constitutional right to vote, the cost involved may be said to be insignificant. In any event, costs incurred for running any elections or by-elections are necessary concomitants of the democratic process.

“(b) The 4 options”

7. If the result of this Consultation is such that there is a “loophole” to be plugged, then the Law Society's position is that any change should be focused at correcting that so-called “loophole”, and not create more issues than was needed.

Option 1: Restricting resigning Member from participating in any by-election in the same term

8. The Law Society notes paragraph 164 of Cheung J's judgment in *Chan Kin Sum v. Secretary for Justice*.⁸ The court has clearly set out the rather stringent requirement for restricting a person's constitutional right to vote. However, against the right to vote, there are classes of voters who are, for various reasons, not entitled to stand for election.

The provisions of Section 39 of the Legislative Council Ordinance (Cap. 542) which disqualify persons from being nominated as a candidate at an election and from being elected as a member are rationally based – namely the disqualifications are on the basis of conflict of interest (or the need for separation of power), or on those recognised grounds such as criminality, bankruptcy or capacity.

If as a result of this Consultation there is clearly established and wide public support that there was indeed a “loophole” that needed to be plugged, then the addition of one further ground for disqualification, namely those LegCo members who resign from their seat and for the remainder of their remaining term, may be worth further looking at. In the view of the Law Society, Option 1 would deal specifically with the so-called “loophole” but this option may well be subject to legal challenge, as acknowledged by the Administration itself. The Law Society considers that if indeed this option is pursued, then the Administration should expend more research and study in this area.

Option 2: a replacement mechanism using the same candidate list followed by a precedence list system (the Administration's revised proposal)

9. While it is true that examples of the same candidate list being used to fill casual vacancies can be found in other jurisdictions which adopt the list proportional representation system, such an arrangement must be predicated upon the development of a mature political party system. However, as stated in the earlier paper of the Administration before the Legislative Council dated May 2011 (LC Paper No. CB(2)1787/10-11(01)) at paragraph 13, “...*the political party system in Hong Kong is still evolving. In fact, political party politics in Hong Kong have not yet evolved to an extent whereby in the general election, voters can choose between two or three major political parties.*” As further explained by the Administration at that time, “*electors in Hong Kong vote according to the political parties or groups which they wish to support. At the same time, they also cast their votes on the basis of the lists which have candidates who are more well known. Hence, the number of votes obtained by a list of candidates to a significant extent hinges on the presence of individual well-known candidates. Thus, once a candidate has resigned, it is reasonable to assume that in the absence of that candidate, his list may not receive the same level of support. One cannot assume that the votes used by the resigned Member could again be accorded to the list he belonged to.*”

10. Under Option 2, an incumbent LegCo Member can legitimately and safely pass his seat to his party member in the same list. This is a fundamental change to our current election system, but the Administration has not analysed the implications and desirability for such a fundamental change in the Consultation Paper.

11. In addition, it is also noted that in paragraph 1(a) of Annex V of the Consultation Paper, the Administration asserts that neither the Basic Law nor the Bill of Rights Ordinance requires that casual vacancies be filled through by-elections. That may arguably be the case in relation to the Bill of Rights Ordinance (to the extent that Option 2 arguably gives voters in the previous election a member from the same party list and thus could possibly be a reflection of their will), but it is doubtful whether this is the case under the Basic Law. Article 68 of the Basic Law makes clear that LegCo shall be constituted through elections. In the absence of express constitutional provisions allowing for an alternative to elections, and taking into account constitutional / statutory interpretive principles which require instruments to be interpreted in ways which give fundamental human rights a generous scope (of which the right to vote is one)⁹, Option 2's constitutionality is arguably doubtful.

12. We also adopt the comments of the Bar Association's submissions dated 31 August 2011 on Option 2.

Option 3: a replacement mechanism which does not cover casual vacancies arising from death, serious illness or other involuntary circumstances

13. The Administration has laid out the objections in its Consultation Paper (see paras. 4.18 and 4.18)

Option 4: a replacement mechanism using the same candidate list followed by leaving the seat vacant when the list is exhausted

14. The Administration has laid out the objections in its Consultation Paper and even acknowledges the legal implications of this proposal have to be "explored further" (see para. 4.20).

Paragraphs (c) to (e) Status Quo or Need for change?

15. On the basis of the materials and justifications provided by the Administration, the Law Society takes the view that a convincing case has not been made out for any of the four Options. In the absence of other justifications and options put forward by the Administration and more particularly set out in our submission above, the Law Society does not consider that

the current established right of our permanent residents to vote and to stand for election at by-elections should be abolished or varied.

The Law Society of Hong Kong
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¹ **The Basic Law**

Article 26

Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.

Article 68

(1) "The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

(2) The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

(3) The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: "Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and its Voting Procedures".

² **The International Covenant on Civil and Political Rights**

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by a secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

³ Cheung J. further noted: "*in so far as universal suffrage is already allowed in the election of LegCo members for geographical constituencies, the presumption must be in favour of inclusion and the aim must be directed at identifying the will of people through universal suffrage. One could indeed argue that, where only 50% of the LegCo members are elected by universal suffrage, that makes the right to vote doubly important and precious.*" (paras. 106, 164) (emphasis added)

⁴ ICCPR, Article 25(b).

⁵ ICCPR, Article 25(b).

⁶ Submissions of the Law Society dated 25 November 2005, 10 October 2007, 2 October 2010 and 9 December 2010

⁷ For example, the English MP David Davis' resignation in 2008 from the UK Parliament.

⁸ "164. *The right to vote is without doubt the most important political right: Nowak, op cit, at p 574 (para 18). Having considered the matter carefully, I have come to the view that the general, automatic and indiscriminate restrictions on the right to vote and the right to register as an elector cannot be justified under the proportionality test. They are unreasonable restrictions....*"

⁹ See, e.g. *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 at para 77; *R (Morgan Grenfell Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563 at para 8

