



## HONG KONG BAR ASSOCIATION

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Your Ref: CB2/BC/1/07

20 February 2008

Mrs. Percy Ma  
Clerk to Bills Committee  
Bills Committee on Legislative Council  
(Amendment) Bill 2007  
Legislative Council Secretariat  
3/F Citibank Tower, 3 Garden Road  
Hong Kong.

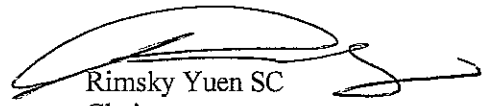
Dear *Percy*,

### Re: Bills Committee on Legislative Council (Amendment) Bill 2007

I refer to our letter dated 15 February 2008 enclosing the Hong Kong Bar Association's comments on the question raised by some members of the Bill Committee on expansion of the electorate of functional constituencies. As you appreciate from the letter, the comments were to be ratified by the meeting of the Bar Council on 19 February 2008.

Please be informed that the Bar Council in the meeting on 19 February 2008 considered that paragraph 16 of the comments should be clarified. While the Bar Council considers that any expansion of the electorate of functional constituencies by a locally enacted electoral law should not attempt to deal with an issue coming within the provisions of paragraph 1 of Article 1 of Annex II of the Basic Law of the HKSAR, the Bar Council wishes to clarify that the point put in that paragraph, namely that the electorate of a functional constituency should not be expanded so that the delimitation of the sector(s) concerned ceases to be functional, whether as understood historically or otherwise, is only put by way of a possible argument that may be raised.

Yours Sincerely,

  
Rimsky Yuen SC  
Chairman

### 香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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Mr. Dennis Kwok 郭榮樂

## **Legislative Council (Amendment) Bill 2007**

### **Comments of the Hong Kong Bar Association**

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1. The Hong Kong Bar Association (“HKBA”) is asked by the Bills Committee on the Legislative Council (Amendment) Bill 2007 to comment on a question raised by some members of the Bills Committee.
2. As the HKBA understands it, the question raised is whether the Interpretation by the Standing Committee of the National People’s Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China made on 6 April 2004 (“2004 NPCSC Interpretation”) allows room for expansion of the electorate of functional constituencies in the 2008 Legislative Council election.
3. Article 68 of the Basic Law of the HKSAR provides in the third paragraph that “the specific method for forming the Legislative Council” is prescribed in Annex II of the Basic Law of the HKSAR.
4. Article 1 of Annex II of the Basic Law of the HKSAR is headed “Method for the formation of the Legislative Council”. Paragraph 1 of Article 1 sets out: (1) the number of members in each term of the Legislative Council; (2) the method for the formation of the first term of the Legislative Council; and (3) the composition of the Legislative Council in the second and third terms. Paragraph 2 of Article 1 provides as follows:

“Except in the case of the first Legislative Council, the above-mentioned Election Committee refers to the one provided for in Annex I of this Law. The division of geographical constituencies and the voting method for direct elections therein; the delimitation of functional sectors and corporate bodies, their seat allocation and election methods; and the method for electing members of the Legislative Council by the Election Committee shall be specified by an electoral law introduced by the Government of the Hong Kong Special Administrative Region and passed by the Legislative Council.”

It should be noted that the “corporate bodies” is the English translation of the Chinese expression *fading tuanti*, which arguably admits a larger group of bodies than corporate bodies.

5. Article 3 of Annex II of the Basic Law of the HKSAR provides as follows:

“With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record.”

6. The 2004 NPCSC Interpretation adopted an interpretation of the above provision. Paragraph 3 of the 2004 NPCSC Interpretation states, in the context of, *inter alia*, amending Annex II of the Basic Law, that:

“The Chief Executive of the Hong Kong Special Administrative Region shall make a report to the Standing Committee of the National People's Congress as regards whether there is a need to make an amendment; and the Standing Committee of the National People's Congress shall, in accordance with the provisions of Articles 45 and 68 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, make a determination 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 bills on the amendments to the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region into the Legislative Council”.

7. This paragraph of the 2004 NPCSC Interpretation states that the ultimate decision with regard to whether the provisions of Annex II of the Basic Law needs to be amended is to be made by the NPCSC in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress.

8. Paragraph 4 of the 2004 NPCSC Interpretation provides as follows:

“If no amendment is made to the method for selecting the Chief Executive, the method for forming the Legislative Council and its procedures for voting on bills and motions *as stipulated in the two above-mentioned Annexes*, the provisions relating to the method for selecting the Chief Executive in Annex I will still be applicable to the method for selecting the Chief Executive, and the provisions relating to the method for forming the third term of the Legislative Council in Annex II and the provisions relating to its procedures for voting on bills and motions in Annex II will still be applicable to the method for forming the Legislative Council and its procedures for voting on bills and motions” (emphasis supplied).

9. On 26 April 2004, the NPCSC made the Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008 (“2004 NPCSC Decision”). Article 1 of the 2004 NPCSC Decision decided, *inter alia*, that:

“The election of the Legislative Council in the fourth term in the year 2008 shall not be by means of an election of all the members by universal suffrage and that the ratio between members returned by functional constituencies and members returned by geographical constituencies through direct elections, who shall respectively occupy half of the seats, is to remain unchanged.”

Article 2 of the 2004 NPCSC Decision then provides as follows:

“Subject to Article 1 of this Decision not being contravened, appropriate amendments that conform to the principle of gradual and orderly progress may be made to the specific method for selecting the third Chief Executive of the Hong Kong Special Administrative Region in the year 2007 and the specific method for forming the Legislative Council of the Hong Kong Special Administrative Region in the fourth term in the year 2008 according to the provisions of Articles 45 and 68 of the Hong Kong Basic Law and the provisions of Article 7 of Annex I and Article III of Annex II to the Hong Kong Basic Law.”

Again, the context of the above provisions of the 2004 NPCSC Decision is amendment of the provisions of Annex II of the Basic Law of the HKSAR.

10. The motions put before the Legislative Council on 21 December 2005 were for the amendment of Annex I and Annex II of the Basic

Law of the HKSAR. Since the two motions did not pass with the requisite special majority in the Legislative Council, no amendment was made to the two Annexes and pursuant to paragraph 4 of the 2004 NPCSC Interpretation, “the provisions relating to the method for forming the third term of the Legislative Council in Annex II ... will still be applicable to the method for forming the Legislative Council”.

11. What are “the provisions relating to the method for forming the third term of the Legislative Council in Annex II”?
12. The HKBA is of the view that “the provisions relating to the method for forming the third term of the Legislative Council in Annex II” refer to the provisions in paragraph 1 of Article 1 of Annex II of the Basic Law of the HKSAR.
13. This leaves “the delimitation of functional sectors and corporate bodies, their seat allocation and election methods” in paragraph 2 of Article 1 of Annex II of the Basic Law of the HKSAR a matter, like other issues in the same paragraph, for “an electoral law introduced by the Government of the Hong Kong Special Administrative Region and passed by the Legislative Council”.
14. The HKBA takes the view that the expansion of the electorate of functional constituencies to elect members of Legislative Council comes under the issue of “the delimitation of functional sectors and corporate bodies, their seat allocation and election methods”.
15. However, the HKBA should not be taken as endorsing the view that the expansion of the electorate of functional constituencies by a locally enacted electoral law like the Legislative Council Ordinance (Cap 542) is without prohibitions or restrictions.
16. One such prohibition or restriction is that the electorate of a functional constituency should not be expanded so that the delimitation of the sector(s) concerned ceases to be functional, whether as understood historically or otherwise. Such an attempt to expand the electorate would in substance be an attempt to deal with an issue coming within the provisions of paragraph 1 of Article 1 of Annex II.

17. In principle, the HKBA does not find that the abolition of corporate voting in functional constituencies will infringe the prohibition or restriction described above. However, the critical question lies not in the abolition but the replacement. In this regard, whether the line is crossed is a question of fact and degree and the HKBA cannot possibly comment *in abstracto*.

Hong Kong Bar Association  
15 February 2008