

Consultation Paper on Arrangements for Filling Vacancies in the
Legislative Council

Response of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“HKBA”) makes these carefully considered comments in response to the Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council dated July 2011 (“the Consultation Paper”). The Consultation Paper was issued by the HKSAR Government on 22nd July 2011. This was after it announced on 4th July 2011 that it would defer voting on the Legislative Council (Amendment) Bill 2011 (“the Bill”) and consult the public on the proposed legislative change to the existing by-election arrangement when a vacancy arises mid-term in the Legislative Council.¹

The manner of the consultation

2. The HKBA reads the Consultation Paper against the background of the unusual and unjustified haste in which the HKSAR Government has previously sought to introduce and complete this fundamental change to the existing Legislative Council electoral system.
3. The HKBA would like to re-emphasise what has been stated in its press release dated 4th July 2011, that “the public consultation is only meaningful if the Administration publishes a consultation document setting out and discussing the rationale(s) for the legislative proposal, the various options considered and their pros and cons, as well as detailed arguments in support of the Administration’s claim that the legislative proposal and its variant(s) are lawful and consistent with the Basic Law of the HKSAR”. In the opinion of the HKBA, the HKSAR

¹ The background for this development in relation to the HKBA’s involvement may be briefly stated as follows: On 3rd June 2011, the Bill was gazetted; on 17th June 2011, the HKBA put forward a submission; on 24th June 2011, the Government responded to the HKBA’s submission; on 25th June 2011, the HKBA issued a statement in response to the Government’s response; on 28th June 2011, the Government put forward a revised proposal; on 29th June 2011, a statement in response to the revised proposal was made by the HKBA.

Government has not satisfied these basic requirements in the Consultation Paper or, at the most, has only met them in a very limited way.

4. The HKBA notes with considerable regret and concern that the HKSAR Government has seen fit to put forward options for consultation in the Consultation Paper when the Government itself has not fully and properly considered their implications and (most importantly) their compatibility with the Basic Law before one of the options (Option 2) is cherry-picked in isolation and justified as "fair", "reasonable, proportionate and workable".
5. By way of examples, regarding Option 1, the Administration says in the Consultation Paper "*We have to consider carefully whether such an option is a proportionate response ...*" (para. 4.08(c)); regarding Option 3, the Administration says that "*Whether such a non-uniform approach is appropriate needs to be considered*" (para. 4.17(b)) and that a number of other matters also need to be "considered" (para. 4.18); and regarding Option 4, the Administration says that "*the desirability of leaving a LegCo seat vacant needs to be considered ... where the number of seats is relatively small...*" (para. 4.20(c)). However, nowhere in the Consultation Paper has the Administration sought to set out whether it has in fact given consideration to those issues and if so, its conclusions and reasoning thereon.
6. In contrast to the superficial treatment of the other options in the Consultation Paper, a detailed paper from the Department of Justice (previously supplied to the Bills Committee on 4th July 2011) is included in the Consultation Paper as Annex V. In paragraph 1(a) of Annex V it is boldly stated that "*A replacement mechanism would not amount to an unconstitutional deprivation of the right to vote or the right to stand for election merely because no by-election would be held to fill a casual vacancy.*" Regrettably, no explanation is given for this assertion. The HKBA notes that the Paper does not address the HKBA's previously stated concern that the unconstitutional feature of the Government's original proposal has remained an integral part in Option 2.²

² See the HKBA's press statement dated 29th June 2011.

7. Further, the various statements of the Secretary for Constitutional and Mainland Affairs have conveyed a strong impression that the HKSAR Government is only interested in advocating mainly, if not only, Option 2 (which is the previous revised proposal put forward by the Government), as the only “lawful” option to address the so-called “perceived mischief arising from the resignation of Members in 2010 to trigger a by-election”.³
8. The HKBA is not convinced that a consultation conducted in this skewed and incomplete manner is a genuine, proper or an adequate consultation of the views of the people of Hong Kong. The public are being steered towards a particular pre-conceived and pre-determined conclusion that the HKSAR Government seeks and desires in an imbalanced, and arguably, improper, manner.

The rationale for changing the Legislative Council electoral system

9. The Government’s case for changing the Legislative Council electoral system by abolishing by-elections for vacancies arising mid-term in the Legislative Council is its asserted consideration that the resignations in 2010 of five Members of the Legislative Council to trigger by-elections in which they intended to stand and seek re-election was “an abuse of process” (para 1.04 of the Consultation Paper). The Government then asserts that this is a “mischief” that needs to be addressed by legislative amendment to the Legislative Council electoral system and relies upon the claims that the Basic Law “does not require that any casual vacancy of the Legislature must be filled by means of a by-election” (para 3.02 of the Consultation Paper); and that Article 68 and Annex II of the Basic Law of the HKSAR give the HKSAR Government and the Legislature “a broad discretion in determining the contents of the legislation which governs the ‘specific method’ for forming the LegCo” (para 3.04 of the Consultation Paper).
10. The HKBA regards the legal rights of Hong Kong permanent residents to vote and to stand for election in by-elections arising out of a vacancy in the

³ Paragraph 1(d) of Annex V to the Consultation Paper.

Legislative Council to be much cherished and basic political rights of Hong Kong permanent residents. These legal rights were guaranteed by statute before 1st July 1997 and exercised by Hong Kong permanent residents before 1st July 1997. The legislature of the HKSAR, in enacting the Legislative Council Ordinance (Cap 542) in 1997, enacted a list system of proportional representation with by-elections to be held to fill vacancies arising in the Legislative Council. The statute adopted and preserves these basic political rights of HKSAR permanent residents. Such rights have been practised in the 2000 and 2007 Legislative Council Hong Kong Island by-elections, as well as the 2010 Legislative Council Geographical Constituencies by-elections. In the circumstances, the HKBA is of the view that strong, convincing and compelling reasons must be advanced by the HKSAR Government before stripping permanent residents of the HKSAR of the benefits and fruits of such fundamental entitlements. On the basis of the materials and arguments presented to date by the Government, the HKBA remains unconvinced that a sufficient case has been made out to justify this drastic deprivation of rights enjoyed by HKSAR permanent residents.

11. The HKBA does not accept that the resignations of Members of the Legislative Council in 2010 (and the by-elections that their actions brought about) justify the HKSAR Government introducing legislative amendments that fundamentally affect the basic political rights of HKSAR permanent residents which they have long enjoyed and which are and have been for long guaranteed by legislation.
12. No doubt, there may be mixed views as to the political merits and wisdom of the events in 2010. In a political system constituted by elections, such views can be (and are expected to be) expressed and reflected in the votes of the electorate. Members of the Legislative Council whose performance during their term does not command support of the electorate may fail to be re-elected in the next general election. In the context of the resignations of 2010, if (as the HKSAR Government has been keen to demonstrate by the citation of opinion polls at para 1.01 of the Consultation Paper) the conduct of the resigning members was genuinely unpopular among the electorate, this can be taken care of by the

process of competitive party-based electoral politics, whether in the next general election or, indeed, in the by-election triggered by their acts of resignation.

13. The act of resigning carries with it serious political risks with far reaching impact both on the resigning members themselves and their political parties or groups. The intrinsic merit of the present system of by-elections is that HKSAR permanent residents can judge by themselves and react to a scenario of resignation by exercising their legal rights to vote and to stand for election in such a situation.
14. In the view of the HKBA, any attempt by the HKSAR Government to change the law to cure an alleged “mischief” simply creates more problems than those it purports to solve. The Government’s self-confessed difficulty (para 4.18 of the Consultation Paper) in drawing the appropriate line under Option 3 demonstrates this point. While the Government regards the “triggering event” for the proposed legislative reform to be the resignations of Members of the Legislative Council which took place in 2010, the Government was and has still been unable to devise a form of linguistic formulation which could encapsulate and describe precisely *that* “mischief”.

Option 2

15. Faced with such difficulties, the HKBA is of the view that the HKSAR Government ought to have paused and reflected on whether the issue was one that ought and can be addressed by legislative means. Instead, what the Government then did was to put forward a proposal (Option 2) which amounts to an “overkill” in the view of the HKBA. This proposal would abolish by-elections arising from causes which plainly did not fall within the alleged “mischief” (such as death, serious illness, bankruptcy, censure, disqualification or imprisonment). Further and in order then to justify the “overkill”, it is argued by the Government that irrespective of the events of 2010, the existing by-election system requires change anyway because of three points which are set out in para 3.06 of the Consultation Paper, namely:

- (1) *De facto* adoption of the first-past-the-post system;
- (2) Deprivation of service of a Member of the Legislative Council during the period before the by-election; and
- (3) Costs.

16. The HKBA is not persuaded that these three points, whether singly or cumulatively, are genuine or sound reasons for reforming the law in any event at this point in time. Historically, ever since the list system of proportional representation was adopted by the Provisional Legislative Council in 1997 for elections to return members of the Legislative Council in the geographical constituencies, a by-election has been adopted as part of the electoral system of Hong Kong to fill vacancies arising mid-term in the legislature. Before the Consultation Paper, the Government has not expressed any concern or complaint that the existing system of by-elections in Hong Kong required reform because of any of these three points. The reasons appear to be in the nature of “makeweights” and “afterthoughts”, put forward by the Government to justify the indiscriminate treatment of all causes of vacancy under Option 2.

17. Specifically, the HKBA would like to draw the attention of the public to, and remind the HKSAR Government of, the fact that as a matter of law, the same system of voting and counting of votes for geographical constituencies applies with any necessary modifications to by-elections for a geographical constituency.⁴ Where two or more vacancies arise in the same geographical constituency on the same occasion or in chronologically close occasions, the by-election held to fill those vacancies in that geographical constituency would be contested in the list system of proportional representation both in law and in effect. The appearance of first-past-the-post in single vacancy by-elections is a result of the fact that only one seat is contested. It is therefore not entirely correct in law to say (cf. para 1.09 of the Consultation Paper) that the current system of by-elections introduces a first-past-the-post element into what is otherwise a proportional representation system.

⁴ Legislative Council Ordinance (Cap 542) s 49(4).

18. As to costs and deprivation of service of a Member of the Legislative Council before the holding of a by-election (the other two points relied upon by the HKSAR Government), these are necessary concomitants of the democratic process and the HKBA wholly fails to see how they can be relied upon to justify abolition of by-elections.
19. Given the above, and in the light of the fact that the Consultation Paper has not attempted to set out the Government's own views on the constitutionality of Options 1, 3 and 4 and the fact that the Government does not appear to be recommending those Options to the public, the HKBA does not think it is necessary to offer any further comments on those Options. As to Option 2 (which the Consultation Paper is steering towards), the HKBA repeats its earlier arguments and submissions on the legality of the Government's original proposal insofar as that proposal is still inherent in and remains an integral element of Option 2. The HKBA makes the following further comments.
20. The HKSAR Government has failed to provide convincing arguments to deal with the situation of a single-candidate list. Under Option 2, when a candidate in a single candidate list vacates office (for whatever reason), the precedence list mechanism would be immediately triggered, with the risk (for the single candidate) that his seat would potentially go to a candidate whose political views or ideologies he does not agree with, and over the identity of which neither he nor the electorate had any control or ability to predict. To prevent this from happening, an independent candidate may be *forced* to stand for election with other candidates in the same list for fear that if he has to vacate his seat for any reason (such as serious illness), the effect of the votes in his favour will be treated as "exhausted"⁵ if there is no one else on the list. The HKBA does not agree or accept that this undesirable effect caused by compulsion inherent in the proposed mechanism can simply be answered by the convenient phrase of "personal decision".⁶

⁵ Paragraph 3(c) of Annex V to the Consultation Paper.

⁶ Paragraph 3(a) of Annex V to the Consultation Paper.

21. Further, and in any event, the HKBA does not agree that if an independent candidate insists on standing alone, the effect of the votes cast in his favour should be treated as “exhausted” if he subsequently vacates his seat. The electors who cast their votes in his favour cannot know, nor could they anticipate in advance, whether there would be any future event causing him to vacate his seat. To eliminate the effect of the votes cast by the electors in favour of the single candidate, and then (in effect) put the blame on the electors’ own choice and also deprive them of their opportunity to participate in voting for another candidate is unfair, disrespectful and amounted to disenfranchisement of them.⁷ At the same time, it will also deprive citizens of the right to stand for election in respect of those who may wish to stand for the seat in the new circumstances then prevailing.
22. Apart from the independent candidate situation, the HKBA considers that Option 2 is flawed for other reasons.⁸ The HKSAR Government advocates that Option 2 is an improvement in that a casual vacancy is “to be filled initially by the first candidate on the same list as the vacating Member’s” and that “[such] arrangement will give effect to the free expression of the will of those electors in the general election who voted in favour of the list to which the outgoing Member belongs”.⁹ Given that under the list system of proportional representation used in Hong Kong, electors vote for a list as a whole and do not cast their votes in favour of any particular candidate on a list, there remains no way for the electors to express *their views in advance* as to who the “back up candidate” should be. That choice is determined not by the electors themselves but by the political parties of the candidates forming the list or among the candidates forming the list. In some instances, such as where the candidates remaining on the same list as the vacating Member of the Legislative Council do not wish (which can be the result of horse trading with political colleagues in favour of someone else on the same list) or have become ineligible (which can be the consequence of appointment to a public office) to fill the vacancy or

⁷ This also appears to be the effect of Option 1.

⁸ These reasons apply to oppose Option 4 as well, since they are not concerned with the “fallback arrangement”.

⁹ Paragraph 2(a) of Annex V to the Consultation Paper.

having switched their political views or allegiances, this will be at a time well after the general election.

23. Accordingly, under Option 2, electors remain denied the right to make a choice as to *who* should fill a vacancy and the Government effectively deems a pool of *identified candidates* as the replacement choice of the electors. The elector still cannot indicate by his or her vote as to who should be the “back up candidate”. The HKBA continues to question how this can be regarded as respecting and reflecting the “free expression of will” by the electors within the meaning of Article 25(b) of the International Covenant on Civil and Political Rights (“ICCPR”) and Article 21(b) of the Hong Kong Bill of Rights.
24. In short, Option 2 is a system under which a “back up candidate” determined by an artificial reliance on the voting results of an earlier election is allowed to standby and be offered the office of a Member of the Legislative Council if and when a vacancy in the Legislative Council arises. Such a system does not give effect to the free expression of the will of the electors. A Legislative Council consisting of such a member is not a Legislative Council “constituted by election” within the meaning of Article 68 of the Basic Law.
25. In addition, the HKBA reminds the HKSAR Government that both the Basic Law and the Hong Kong Bill of Rights should not be interpreted as implying on the part of the Government any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Basic Law or the Bill of Rights or at their limitation to a greater extent than is provided for in the Basic Law or the Bill of Rights.¹⁰
26. Further, there should be no restriction upon or derogation from any of the fundamental rights recognized or existing pursuant to *law* on the pretext that the ICCPR as applied to Hong Kong or the Bill of Rights does not recognize such rights or that it recognizes them to a lesser extent.¹¹ The right of electors to vote

¹⁰ See the ICCPR Article 5(1), and the Hong Kong Bill of Rights Ordinance (Cap 383) section 2(4).

¹¹ See the ICCPR Article 5(2), and the Hong Kong Bill of Rights Ordinance (Cap 383) section 2(5).

and of candidates to stand for election in by-elections arising out of a casual vacancy in the Legislative Council are such existing legal rights.

27. Accordingly, the HKBA is of the view that Article 68 and Annex II of the Basic Law *do not* provide the HKSAR Government and the Legislative Council the discretion to impose unreasonable restrictions on, or unjustifiably deprive HKSAR permanent residents of the right to elect and/or the right to stand for election as their representatives in the Legislative Council.

Conclusion

28. The HKBA considers that the HKSAR Government has not sufficiently addressed its concerns. If the Government does not see any better solution than its present preferred proposal, the HKBA urges the Government simply to consider maintaining the *status quo*. This is particularly so in light of the highly undesirable effects that may be produced by the proposed legislative changes. The HKBA strongly proposes that the Government should leave the choice to the good sense and judgment of the HKSAR permanent residents as to how to react to any future political manoeuvring similar to the 2010 by-elections by exercising their existing right to vote and right to stand for election.

Dated 31st August 2011

Hong Kong Bar Association