

Consultation Document on Methods for Selecting the Chief Executive in
2017 and for Forming the Legislative Council in 2016

**Executive Summary of
the Submission of the Hong Kong Bar Association**

The Method of Selection of Chief Executive

General

1. Article 45(2) of the Basic Law provides for the ultimate aim in the development of the method for the selection of the Chief Executive. It uses broad and general language to prescribe the composition of the nominating committee, which is to be “broadly representative”, and to prescribe the process of nomination by the nominating committee, which is by “democratic procedures”. There are numerous approaches, models, options or proposals that will comply with Article 45(2).
2. At the same time, the method, scheme or arrangement to be established pursuant to the aim stated in Article 45(2) impinges on the enjoyment and exercise by HKSAR permanent residents of their right to vote and right to stand for election, and more generally, their rights and opportunities to take part or participate in the conduct of public affairs. Therefore the standards for the enjoyment and exercise of these rights and opportunities prescribed by Articles 2, 25 and 26 of the ICCPR and by Articles 25 and 26 of the Basic Law must at the same time be fully respected and implemented in the relevant electoral rules that are to be formulated.

The Nominating Committee

3. The explicit language of Article 45(2) of the Basic Law does not envisage nomination otherwise than by the nominating committee. Likewise the explicit language of Article 45(2) that the nominating committee should be “broadly representative” rules out a nominating committee consisting of the whole of the electorate or each and every registered voter.

4. The nominating committee cannot be *required by legislation* to nominate a person who has fulfilled certain characteristics (whether, say, by reason of his political affiliation or by reason of his being able to demonstrate the support of a certain number of electors or a certain portion of the electorate). Such an arrangement cannot reasonably be described as the nominating committee acting on its own. Nor can such an arrangement be rationalized or justified on the basis that it was “in accordance with democratic procedures”.
5. The HKBA at the same time disagrees with the suggestion that forms of nomination otherwise than nomination by a broadly representative nominating committee in accordance with democratic procedures are permissible on the basis that the Basic Law does not expressly prohibit those other forms of nomination. Such a suggestion involves (among other things) a misapplication of the common law principle that “everything is permitted except what is expressly forbidden” outside of its proper context.

The Composition of the Nominating Committee

6. The NPCSC Decision of 29 December 2007 is not, and does not purport to be, an interpretation of any provision of the Basic Law. In so far as the NPCSC Decision of 29 December 2007 says that the nominating committee “may be formed with reference/可參照...組成” to the current provisions regarding the Chief Executive election committee, the HKBA considers this provision to be permissive only but not obligatory. The HKBA disagrees with the view that “may” means “must” in this context. The HKBA is of the view that interpreting this paragraph of the NPCSC Decision of 29 December 2007 as non-decisional (or non-mandatory) would not deprive this paragraph of meaning. As a matter of law, it is possible to constitute a “broadly representative” nominating committee in a way otherwise than by reference to the sectorial makeup of the current election committee. Even if, as it has been suggested, the expression “參照” carries with it a sense of “following”, this does not mean “copy”. This is because the election committee

and the nominating committee are not comparable bodies in terms of purpose and function. How one should “follow” the current provisions regarding the election committee in formulating the composition of the nominating committee (for example, the precise delineation of various sectors, and the weightings given to each sector) remains an open question of adaptation.

7. A sectorial composition of the nominating committee is not a constitutional difficulty in itself. Rather the divisions, distribution and weighing of membership among different sectors may raise constitutionally contentious issues. For example, if disproportionate or undue weight is proposed to be given on the basis of property holding or functions or any other established ground of discrimination to a certain part of the Hong Kong community in the sectorial composition, constitutionally contentious issues could be raised from the perspective of equality or parity, and also on the ground of whether it is “broadly representative” and whether there can be effective representation and meaningful participation. The nominating committee should be formed with the majority of its members elected or selected under rules that ensure the maximum extent of participation of the electorate and parity in such participation by individual members of the electorate. Corporate voting should be abolished.

Continuity of Constitutional Development

8. The HKBA expresses concern as to whether, in the event of the NPCSC approving an amendment to Annex I to the Basic Law to provide for the method of selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures in 2017, it is still possible to *further* amend Annex I subsequently to *improve upon* the method of selection of the Chief Executive. The HKBA suggests that the Central Authorities and the HKSAR Government should clarify their position as to the continued possibility to amend Annex I to improve upon an already “broadly representative” nominating committee and its “democratic procedures”.

Nominating Candidates of Chief Executive Election by Universal Suffrage

9. Neither the rules in respect of the nominating committee and of its work, nor the nominating committee itself, may sanction the use of or apply political or other opinion as a ground for depriving any person of the right to stand for election. These rules must in practice and substance ensure that the persons entitled to vote shall have a “free choice of candidates”.
10. The nominating committee’s function is limited to nomination; it is neither its function nor its purpose to determine the result of the Chief Executive election.
11. Individual HKSAR permanent residents must have access to the process of nomination by the nominating committee to enable their proposed candidature to be considered. The conditions of access must be transparent, opinion-neutral, non-discriminatory, and conducive to meaningful participation. The conditions must not become eligibility criteria additional to those already exhaustively spelt out in Article 44 of the Basic Law.
12. Having considered (i) the solemn declaration that every Chief Executive candidate had to make in the 2012 Chief Executive election, (ii) the oath of office of the Chief Executive already prescribed in Article 104 of the Basic Law, (iii) the eligibility criteria for the Chief Executive stipulated in Article 44 of the Basic Law, as well as (iv) the applicable constitutional principles of legal certainty and non-discrimination, the HKBA is of the view that any proposal to introduce into electoral law an additional requirement that a person proposing his candidature to the nominating committee must “love our country, love Hong Kong/愛國愛港” is highly questionable as a matter of law.
13. The expression “democratic procedure” connotes, in the context of candidate selection, procedures that must be “participatory”. The HKBA disagrees with the suggestion that “democratic procedures” in Article 45(2) of the Basic Law simply

or necessarily connotes collective decision-making by a simple majority of the nominating committee in a meeting to select and nominate a certain number of candidates (such as between two to four). Such a proposal runs a serious risk of limiting the free choice of voters among the variety of alternatives, and undermines the requirement that Chief Executive elections shall be genuine periodic elections that guarantee the free expression of the will of the electors without unreasonable restrictions.

14. Placing a self-standing numerical limit to the number of candidates that the nominating committee can nominate arguably infringes the authority and liberty of the nominating committee.
15. However, there is nothing inherently objectionable in having collective decision-making by a lower threshold (though what the percentage threshold should be, and rules governing the number of votes each member is entitled to cast, is a matter of careful consideration and debate).
16. In any event, the nominating committee's democratic procedures should ensure the production of a spectrum or plurality of candidates for the voters. "Plurality" refers here to not simply numerical plurality but more importantly political plurality.
17. To achieve this legitimate aim of "plurality", it may be constitutionally permissible to prescribe a lower threshold of nomination by the nominating committee in respect of applicants who can put forward verified recommendations from a substantial number of registered voters (provided that the threshold is not so low as to be reasonably regarded as *de facto* automatic nomination). Such an arrangement could counterbalance some of the consequences that may arise out of a "broadly representative" nominating committee that contains certain sectorial interests and the risk that certain candidates commanding popular support might not be able to obtain the support of such sectorial interests. But an arrangement

that requires a specified majority of the nominating committee to veto such applicants from becoming candidates runs the risk of constituting an impermissible fetter on the nominating committee's function and power since it could be regarded as *de facto* automatic nomination.

18. The HKBA disagrees with the suggestion that the nominating committee should endorse or "rubberstamp" as a matter of law or course applicants who can put forward verified recommendations from a substantial number of registered voters or demonstrate the support of a well recognized or represented political party in Hong Kong. There cannot possibly be implied into Article 45(2) of the Basic Law a *duty* on the part of the nominating committee to endorse or "rubberstamp" certain applicants who have been purportedly "nominated" by other entities or groups.
19. Each member of the nominating committee participates in the nominating committee in the capacity of a "representative" only. He or she owes a duty to account to those whom he or she represents. Thus the nominating committee's deliberation and decision-making should be public and open in order to promote and ensure transparency and accountability. The decision-making of each member of the nominating committee must be open and accurately recorded. There should not be any secret balloting in the nominating committee's decision-making.

Chief Executive Election by Universal Suffrage

20. If the nominating committee nominates only one candidate, there must still be voting on such candidate by the electorate. If it were otherwise, the nominating committee would have effectively determined the election. In such a vote, the single candidate must obtain more than 50 per cent of the valid votes of all voters who voted, provided that the number of voters who voted passes a minimum threshold in terms of the proportion of the electorate, say 40 per cent.

21. In a contested Chief Executive election with two or more candidates, the method of voting should ensure that the preference of each voter be expressed and properly taken into account. The method of voting should also ensure that the winning candidate would have a majority mandate.

22. Voting in a Chief Executive election must be by secret ballot.

The Method of Forming the Legislative Council

23. Functional constituency elections to return members of the Legislative Council in the present format do not comply with Article 25(a) and Article 25(b) of the ICCPR, particularly the principle of equality of voting power. Corporate voting should be abolished in all functional constituencies.

24. There is no valid reason to maintain the present procedures for voting on Bills and Motions in the Legislative Council in Annex II of the Basic Law.

Dated 28 April 2014.

HONG KONG BAR ASSOCIATION