



HONG KONG BAR ASSOCIATION

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1. The Hong Kong Bar Association (“HKBA”) makes this statement in reply to the Government’s written response dated 24th June 2011 submitted to the LegCo Bills Committee on the Legislative Council (Amendment) Bill 2011 and the Department of Justice’s statement of the same date (collectively “the Government’s Response”).
2. The Government’s Response has sought to justify its proposal by reference to the existing list proportional representation voting system practised in Hong Kong. It is argued that the intention of the list proportional representation system is “to secure a close match between the percentage of votes a group of candidates obtains in an election and the number of seats they fill”. The HKBA is of the view that the Government’s proposal in fact runs directly contrary to the Government’s understanding of the spirit and intention of a list proportional representation system.
3. The position can be illustrated by an example of a 3-member constituency with three competing lists and 150 registered voters. Assuming that all 150 voters voted in the election, with 97 voters voting in favour of list A, 52 voters voting in favour of list B and 1 voter voting in favour of list C, under the current system the distribution of the three seats would be 2 seats to list A and 1 seat to list B. This represents a close match with the percentage of votes the two lists obtained in the election.
4. On the other hand, under the Government’s proposal, if a member from List A dies, his place will be taken by a candidate in List B. The balance of representation would become 1 member from List A and 2 members from List B. This cannot be said in anyway to reflect the percentage of votes earned by the respective lists at the time when voters exercised their right to vote during the election.
5. The absurdity of the situation is further underlined by the fact that if the remaining member from List A dies or resigns, then a candidate from List C would be the “back up candidate” under the Government’s proposal. The resulting balance of representation would then be 2 seats to list B and 1 seat to List C. List A, which commanded almost 65% support from the electors in the election would end up with ***no*** representation in LegCo. This cannot by any stretch of imagination be said to fairly and truly reflect the wishes of the electorate at the election.
6. The Government’s Response argues that the votes originally cast in the previous general election in favour of the out-going LegCo Member had been “used” or “spent”. Such an argument is unprincipled and flawed. The flaw in this argument is that under the present system, voters vote for a list as a whole. They do not cast their votes in favour of any particular candidate on a list and so there is no question of any votes being “spent” just because certain candidates have been returned. The Government’s proposal and

arguments in support appear to distort the effect of the electors' original vote. In effect most, if not all, of those who voted in favour of any Lists which returned LegCo members in the previous election are disenfranchised by the Government's proposal. The Government has provided no rational reason or justification for such a drastic disenfranchisement of the electorate.

7. The HKBA repeats its earlier submissions that under the Government's proposal, there is no way for the electors to *express their views in advance* who the "back up candidate" should be (and from which List he/she will come from) in the event that the seat taken by the candidate in the List whom they favour most should become vacant. The electors are simply denied the right to make a choice as to who should fill a vacancy. Instead, the Government's proposal effectively deems an *unidentified* candidate (unidentified as at the time when the electors cast their votes) as the replacement choice of the electors. The "back up candidate" is pronounced only *after* counting the votes in the original election.
8. Under the Government's proposal, if an elector is asked at the time of voting which "back up candidate" he voted for, he can only say "I do not know". In fact such a voter can argue that he did not and cannot vote for any candidate or list by way of back up at all, because he has only one vote (which he casts in favour of a list) and there is no way in which he can "split" his vote into two halves to indicate (i) his choice of a list of candidates for returning members of LegCo in the election and (ii) his preferred choice of a back up. Thus, no voter has ever voted or expressed any views as to who should be the "back up candidate". The HKBA questions 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 ICCPR and Article 21(b) of the Hong Kong Bill of Rights.
9. The HKBA maintains that a system under which a "back up candidate" determined by an artificial reliance on the voting results of an earlier election is allowed to stand by and be offered the office of a member of LegCo if and when a vacancy in LegCo arises does not give effect to the free expression of the will of the electors. Further, the HKBA maintains that a LegCo consisting of such a member is not a LegCo "constituted by election" within the meaning of Article 68 of the Basic Law.
10. The HKBA further does not agree that the present proposal is a "proportionate response" to or justified by the said "perceived mischief" as claimed in the Government's Response. In particular, the HKBA questions the validity of the Government's assertion that a one-time record low voter rate during the 2010 by-elections provides sufficient justification for such a fundamental and permanent deprivation of the right to elect and the right to stand for election by the permanent residents of the HKSAR.
11. The significance of the relatively low turnout rate is a matter for political interpretation. The HKBA however questions whether it evidences a "mischief" that needs to be addressed in the manner proposed by the Government, nor does it justify any proposal to redress whatever is the perceived "mischief" when the proposal is a breach of the Basic Law.
12. Further, the Government's proposal would apply to cases where the vacancy arises due to (for example) the death of a LegCo member. Under the Government's proposal, in the event of the death of a LegCo member (which has nothing to do with the situation such as the resignation *en bloc* in 2010) the "back up candidate" would not be determined by a by-election. In this connection we draw attention to the fact that in the 2007 by-election necessitated by the death of a serving LegCo member, the turnout rate was as high as 52.06%¹.
13. On the Government's own logic of identifying a "mischief" by reference to (among others) turnout rates, the holding of a by-election due to death is plainly not a "mischief" which needs to be redressed. Yet the Government's proposal, if applied to the events of

¹Source: <http://www.elections.gov.hk/legco2007by/eng/turnout.html>.

2007, would mean that the 52.06% of electors on Hong Kong Island who wished to vote would not be entitled or allowed to vote. The HKBA fails to see how this can be a proportionate response to the so-called “mischief” identified by the Government (if mischief it be). The Government has not provided any justification why their proposal should apply in the case of the death or disability of an elected member of LegCo by a draconian deprivation of the right to vote and stand for elections by the permanent residents of the HKSAR.

14. The HKBA notes with the deepest regret that the Administration has not seen fit and appropriate to conduct a general consultation of the public in respect of the present proposal which has such fundamental and far reaching consequences to the rights of the public in respect of future elections in the HKSAR to LegCo. The Bar has been compelled to engage the Government and the general public by means of public statements in the present way because of the lack of proper, adequate and transparent consultation. The HKBA further notes that the Government does not explain how what may be practised or prevalent in “the other electoral systems” elsewhere bear any similarity to the present situation having regard to, *inter alia*, the particular constitutional setting in the HKSAR.
15. Article 68 and Annex II of the Basic Law *do not* provide the LegCo any discretion to impose unreasonable restrictions on, or unjustifiably deprive permanent residents of the HKSAR of, the right to elect and/or the right to stand for election as their representatives in LegCo.
16. The HKBA stresses that its comments are directed at the Government’s proposal, and not at any other possible methods for filling a casual vacancy (which does not form part of the Government’s proposal).

Dated 25th June 2011.

Hong Kong Bar Association