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**The Hong Kong Bar Association's Statement on**  
**the HKSAR Government's new proposal on**  
**the Legislative Council Vacancy Replacement Mechanism**

1. The HKBA notes that the Government has put forward a latest proposal on a new mechanism to fill a casual vacancy in a geographical constituency and the District Council (Second) functional constituency in LegCo.
2. The HKBA finds it inappropriate to comment on the legality of any proposal except viewed as a whole. It notes that the objectionable features of the original proposal are still inherent and retained in the new proposal. Specifically, in the event that the list of the outgoing member of LegCo failing to provide a back up candidate, the Government's original proposal would still be triggered. Our fundamental objections to the legality of this part of the proposal are still not addressed by the Administration.
3. Different views and opinions can be held as to the mass resignation which took place in 2010; that is a matter of political judgment and interpretation. It is however highly questionable whether the Government's avowed intention to prevent a repetition of such mass resignations can provide a justification for its proposed drastic measures which are inconsistent with article 68 of the Basic Law, article 25 of the ICCPR and article 21 of the Hong Kong Bill of Rights and interferes with guaranteed and entrenched rights. Further, the list of the outgoing member of LegCo may fail to provide a back up candidate for a host of different reasons. The original list may only consist of one candidate (which is not unknown). Even on the Government's own rationale that the measure is to address the situation of voluntary

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resignation, the proposal is however not confined to such situations. The only reason provided by the Government for not distinguishing between the case of voluntary resignation and other cases such as death or disability is simply for the sake of consistency. The HKBA does not accept this to be a sufficient justification.

4. Closely associated with the above points is the haste with which the measure was proposed and the lack of public consultation on the subject. The new proposal came amidst strong Government opposition to criticisms of the original proposal. It was introduced in a sudden manner. However, the proposed time for LegCo to enact it into legislation has remained unchanged. In the HKBA's view the proposal will have far reaching consequences and impact upon the existing rights of voters and potential candidates. Yet there is a continuous refusal to engage in any form of public consultation on the part of the Administration. The reason provided by the Secretary for Constitutional and Mainland Affairs, namely the legislation should be in place before the nomination period for the District Councils elections begins in September 2011, is unsound and unconvincing, as the District Council (second) functional constituency election will only take place in September 2012 and the commencement dates of the proposed amendments are either the commencement of the term of the office of the fifth term of office of LegCo in 2012 or 1 September 2012. In any event, if there is a genuine need to introduce legislation by September 2011, then the proper approach should have been to commence the consultation and legislative process much earlier, instead of presenting a *fait accompli* to LegCo and to the public. The alleged lack of time or urgency is, with respect, entirely self-induced. The election rights that the citizens of the HKSAR have enjoyed for all these years should not be sacrificed at the altar of expediency.

5. In the view of the HKBA, the need for public consultation is both important and fundamental. A responsible Government should not simply aim at passing legislation which satisfies the minimum threshold stipulated by constitutional instruments and/or to stave off or survive a judicial review challenge. Normal procedure preceding the introduction of fundamental and far reaching legislation involves a period of proper and widespread consultation. The background to the legislation should be set out in a readily understandable manner; options should be explained and explored; the pros and cons of the options should be analysed; reasons should be provided as to why a particular option is preferred over others. The public and/or relevant organisations should then be consulted.

6. This introduces transparency and legitimacy. The public and/or relevant organisations can then express an informed view. Legislators are made accountable to the public in the way they vote. This is particularly acute in the present case, since even if one is to assume that there is a need to reform the law to prevent the recurrence of the events last year (which, the HKBA repeats, is a matter of political interpretation and not necessarily a legal justification for what is otherwise a deprivation of a fundamental right), the Bar has noticed a number of possible alternatives that have been suggested from various quarters. These proposals ought to be properly and seriously explored; the public should be allowed to comment on them; and if the Administration decides not to adopt them in preference to the one proposed by it, the public ought to be told why.

7. For all the above reasons, the HKBA still questions the constitutionality of the proposed measure. In any event, irrespective of whether it will survive a judicial review, the HKBA does not believe that the circumstances are such that the Bill should be pushed through with such haste and without public consultation. We therefore call upon the Administration to withdraw its latest proposal and to commence proper public consultation on the subject.

29th June 2011

Hong Kong Bar Association