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**Statement of the Hong Kong Bar Association
on the Legislative Council (Amendment) Bill 2012**

1. The HKBA makes this statement in response to the Legislative Council (Amendment) Bill 2012 (“**the Bill**”) by which the Government will be seeking to introduce an amendment to disqualify a resigning Member of the Legislative Council for six months from participating in a by-election resulting from such resignation.
2. The HKBA disagrees with the statement made by the Government in the Legislative Council Brief dated 1 February 2012 that by the proposed amendment, “the only persons affected are the resigning members” (paragraph 10).
3. It must be emphasised again that both (i) the right to elect and (ii) the right to stand for election guaranteed under Article 26 of the Basic Law of the HKSAR are correlated. The restriction imposed on a resigning Member not only curtails the resigning Member’s right to stand for election, but also the electors’ choice of their favourite candidates and consequently restricts their right to elect as well.
4. First, under the proposed amendment, the 6-month prohibition applies to any Member who resigns (or is taken to have resigned)¹ even if the resignation is not aiming at triggering a by-election in which he or she seeks to stand and be re-elected (which is identified as the alleged “loophole” by the Government which needs to be plugged²). The HKBA would however like to observe that a Member may resign for health or other personal reasons or concerns. In such circumstances there is and would appear to be no justification to prohibit them from standing in the by-election as such. Their health or personal problems may have disappeared with time, or medical attention, or (say) an acquittal in a criminal trial or a whole host of other reasons. They may then wish to stand again as a candidate. The electors may or may not vote for them. However, their choice should not be curtailed by legislation. The proposal does not discriminate between resignations which fall within the alleged “mischief” asserted by the Government

¹ See section 2 of the Bill.

² Paragraph 7(a) of the Legislative Council Brief dated 1 February 2012.

and those which do not. The Government has given no reasonable explanation, or any sufficient and rational justification why Members who resign for medical, personal or other reasons should be denied the right to stand for re-election; nor why electors should be deprived of the choice and the right to vote for them

5. More importantly, as to whether or not the 2010 resignations should be regarded as a “mischief” to be addressed by legislative intervention in the first place, the HKBA has commented extensively in its previous responses in this respect.³ The result of the Government’s consultation shows that this is indeed an issue strongly disputed by different sections of the public which reveals that there is not even a *clear* majority consensus.⁴
6. The HKBA reiterate that the present by-election system is already capable of addressing the alleged “mischief” (even if it were to be so regarded) identified by the Government. This is done by simply leaving the choice to the good sense and judgment of Hong Kong permanent residents who can exercise their existing right to vote and right to stand for election to react to such a scenario.⁵ Members who choose to resign will bear their own political risks and face the judgment of the electors.
7. In any event, the proposed amendment cannot possibly remove the perceived “loophole” since if a Member wishes to stage a repetition of the events of 2010, he or she could still resign and then candidates endorsed by the resigning Member (or from the same political party) may still stand in the by-election instead. On the other hand, the proposed amendment will undoubtedly curtail the electors’ choice of candidates. Worse still (as the HKBA has pointed out above), the curtailment is not limited to resigning members who aim at triggering a by-election in which they seek to stand and be re-elected, but include those who resign for other reasons.
8. From the legal and constitutional perspective, the HKBA notes that the Government has relied on Lord Pannick QC’s advice in support of its view that the Government and Legco are entitled to regard it as an abuse of power for a Member to resign in order to trigger a by-election in which the Member intends to

³ See, in particular, paragraphs 9-14 of the HKBA’s Response dated 31 August 2011.

⁴ Although the Government states that “over 50% or close to 50%” of the respondents to the opinion polls consider that the Government need to plug the “loophole” by way of legislative amendments (para. 7(a) of the Legislative Council Brief), it is quite clear that there exist very substantial views (represented by roughly 40% to 50% of those polled) that the *status quo* should be maintained; see paragraphs 3.11. 3.13. 3.14 and 3.15 and 3.16 of the Consultation Report (January 2012).

⁵ See paragraphs 12-13 of the HKBA’s Response dated 31 August 2011.

stand and seek re-election. Questions such as costs of by-elections, deprivation of the services of a Member prior to the by-election and possible undermining of the respect for the electoral process and consequential low turnout rates are referred to and relied upon.

9. The HKBA would like to point out that, at the end of the day, whether a matter constitutes a “mischief” for the purpose of constitutional analysis is ultimately a matter for the Courts. The factors relied on by the Government are precisely the sort of factors that the electors are entitled to take into account in casting their vote at the by-election. The HKBA remains unconvinced that these factors, whether taken individually or cumulatively, are sufficient to turn the matter into a “mischief” in the eyes of the law justifying legislative intervention in such a way as to interfere with a fundamental constitutional right.
10. In view of the above, the HKBA does not agree that the proposed amendment has addressed any “mischief”. The curtailment of the electors’ choice of candidates is neither necessary nor justified. Despite the fact that *some* sectors of society may want *some* changes to be made (with no clear consensus as to *what* changes), the HKBA would respectfully urge the Government to not introduce changes just for the sake of appearing to have introduced changes. The HKBA repeats its view that no convincing reason has been shown why the *status quo* should not be maintained.

Dated this 17th day of February 2012.

Hong Kong Bar Association