



Method for Selecting the Chief Executive by Universal Suffrage

Submissions of the Law Society of Hong Kong

1. The Law Society of Hong Kong has reviewed the *Method for Selecting the Chief Executive by Universal Suffrage: Consultation Document* published by the Administration in January 2015.
2. The Law Society agrees that constitutional reform in accordance with and under the Basic Law is of pivotal importance to the development of Hong Kong. Given the significance of this reform, and also the uniqueness of “One Country Two Systems” in the constitutional development, the Law Society considers that necessarily reform should adhere to and follow the constitutional framework.
3. The constitutional framework which underpins the reform must be the Basic Law and also the decisions made by the Standing Committee of the National People’s Congress (NPCSC) in relation thereto. These decisions (“the Decisions”) include:
 - The Interpretation by the Standing Committee of the National People’s Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (6 April 2004) (“2004 Interpretation”)
 - Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special

Administrative Region in the Year 2012 and on issues Relating to Universal Suffrage (29 December 2007) (“2007 Decision”)

- Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (31 August 2014) (“the 31 Aug Decision”).
4. The Law Society acknowledges that the 31 Aug Decision has been controversial and has received cynical comments and, on some occasions, disapproval.

(I) Second Step of the Five Step Process

5. Under the Basic Law and the 2004 Interpretation, a “Five-Step” Process is constituted for the constitutional reform for Hong Kong.
6. According to the 2004 Interpretation, constitutional reform should start with the Chief Executive (CE) making a report to the NPCSC as regards “**whether there is a need**” to make an amendment to the electoral methods in 2012 (“**First-step**”). The NPCSC will then make a determination in accordance with the Basic Law and in the light of the actual situation of Hong Kong and in accordance with the principle of gradual and orderly progress (“**Second-step**”).
7. The 31 Aug Decision completes the Second Step of the Five Step Process in the constitutional reform.
8. We observe that:
 - (a) in its 2007 Decision, the NPCSC stipulated that “**appropriate amendments**” may be made to the electoral methods in 2012; and
 - (b) in the 31 Aug Decision, the NPCSC stated that it “**finds it necessary to make provisions on certain core issues concerning the method for selecting the Chief Executive by universal suffrage**” (emphasis supplied).

9. The above stipulations may give rise to a question as to whether those decisions, and in particular, the 31 Aug Decision, may not be in line with the 2004 Interpretation. On this subject we are of the view that the NPCSC is the supreme body in the hierarchy of the legislative framework in Mainland China. In the context of the Basic Law the highest Court in Hong Kong in *Lau Kong Yung & Others v. Director of Immigration* (1999) 2 HKCFAR 300 has confirmed that the NPCSC has “general and free-standing power” in interpreting provisions of the Basic Law. After all, only the National People’s Congress has the power to make alteration or annulment of inappropriate decisions of the NPCSC (Article 62(11) of the Constitution of the People’s Republic of China refers).

(II) Composition and Formation Method of the Nominating Committee (Chapter 3)

10. On the composition and formation of the Nominating Committee (NC), we have been advocating that¹
- (a) The composition and mode for choosing members of the NC should reflect the views of Hong Kong people as a whole.
 - (b) We support any proposal(s) which could make the NC more representative.
 - (c) The nominating procedures should be designed to encourage a wide degree of participation by members of the public; and no one should unreasonably be included, excluded or “pre-screened” out in the process.
 - (d) More direct election elements should be introduced into the NC.
 - (e) Corporate votes in the subsectors should not be extended and should eventually be abolished.

11. In the 31 Aug Decision it is stated that:

“When the selection of the Chief Executive of the Hong Kong Special Administrative Region is implemented by the method of universal suffrage:

¹ See various previous submissions of the Law Society

(1) A broadly representative nominating committee shall be formed. The provisions for the number of members, composition and formation method of the nominating committee shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth Chief Executive.”

12. It is not entirely clear, by reference to the above stipulation, whether the number of subsectors and/or the number of members in the subsectors of the NC could be varied, notwithstanding what has been set out by the Administration in the Consultation Document per se. On the supposition that such could be varied, in line with what we have been advocating, we consider that a fine balance should be struck between the addition of new subsectors and the readjustment of distribution of seats so that the NC can be broadly representative of our society, whilst being mindful that constitutional reform in Hong Kong should be in accordance with the principle of gradual and orderly progress as set out in Article 45 of the Basic Law.
13. On the same supposition as above, for the electoral base (§ 3.09 (v) – (vi)), we consider that that should be widened generally so as to enable wider participation in the election process.

(III) Procedures for the Nominating Committee to Nominate Chief Executive Candidates (Chapter 4)

Stages of nomination and threshold

14. The Consultation Document raises the possibility of the nominating procedures being divided into two stages, namely the stage of “members recommendation” and the stage of “committee nomination” (§ 4.07 and 4.09).
15. We consider that the design of the nominating procedures largely belongs to a political agenda, as different procedures could command different election strategies and deployment of resources for election. As a matter of usual policy we do not comment on political issues. From the point of views of constitutional law, nevertheless, we consider that an acceptable nomination process should be one which gives Hong Kong people a

genuine choice of candidates representing a diverse range of views, irrespective of the nomination having one or two stages.

16. Subject to the principle set out in the preceding paragraph, from a constitutional law prospective, we have no strong preference on the design on the nominating procedures. However, if the procedures are divided into two stages then in order to achieve the aim of enabling more people to participate, the threshold for “members recommendation” should appropriately be lowered so as to enable more people to participate in the process.
17. As to whether there should be a limit for recommendations (§ 4.09 (iii)),
 - (a) we prefer not to express views on the numbers for any recommendation threshold (being 100, 150 or other numbers), but
 - (b) there should be a cap on the number of NC votes each candidate can obtain so as to allow more hopeful candidates to participate.

That should encourage participation of hopeful CE candidates, but at the same time avoid the risk of a situation where the NC generally all favors a single highly popular candidate resulting in less than 2 to 3 CE candidates at the end of the nomination process.

Transparency of the nominating procedures

18. The Consultation Document explores the need to convene any “plenary meeting” of the NC so as to conduct nomination of candidates, and to provide an appropriate platform for persons seeking nomination to have the opportunities to explain their manifestoes and mission to all NC members or even the public to seek their support (§ 4.09 (iv)).
19. As it is the duty of the NC as a collective body (not each NC member acting singly) to come up with the CE candidates, the Law Society is supportive of the proposal to increase transparency of the nominating procedure and agrees that a plenary meeting should be convened of the NC. A platform should be arranged for persons seeking nomination to have the opportunity to explain their manifesto submissions to all members of the NC as well as to the public.

Specific nominating procedures

20. The Consultation asks whether the number of CE candidates could be either two or three, i.e., the three persons seeking nomination and obtain the highest number of endorsement of more than half of all the NC members could formally become candidates; if only two of the persons seeking nomination could obtain endorsement of more than half of all the NC members, such two persons will formally become candidates, and there will be no nomination of a third candidate (§ 4.09(v)).
21. We are of the view that as long as the composition of NC is sufficiently representative of the people of Hong Kong, and the threshold for members recommendation is sufficiently lowered so as to enable more people to be “recommended to seek nomination”, members of the NC should have the right to nominate up to three candidates in the nomination process. We note that the 31 Aug Decision has proposed for the CE candidates to be 2 to 3. Legally speaking, the rules of the nomination process could be written so that the NC would give birth to **2 to 3** CE candidates, and it is not legally necessary to now decide whether to restrict to **2 or 3** CE candidates at this stage of the constitutional reform.
22. Another question posed in the Consultation Document is whether open or secret ballot should be adopted (§ 4.09 (vi)).
23. In response, we consider that if the nominating procedures takes two stages, then we suggest for the “members recommending” stage to take the form of an open nomination (e.g. NC members should sign on the official recommendation form assigned to a hopeful CE candidate, and the public should know which NC member recommended which CE candidate with that one recommendation quota), whilst secret ballot should be adopted during the nominating voting stage, as it has been embraced in the past in the voting arrangements of the Election Committee (EC).
24. As to whether the NC should adopt the “one person, three votes”, “one person, two to three votes”, “one person, maximum three votes”, “voting on each person seeking nomination”, or other procedures to select two to three candidates (§ 4.09 (vii)), we opine that in order to enable more candidates

to be considered by the general public, the NC should adopt “one person up to three votes in a given NC nomination voting round”. In this regard, we repeat our comments in paragraph 21 above.

25. There is a caveat to the above – for “one person up to three votes”, when each NC member casts votes, he can cast at most one vote per candidate, so that his votes could not be lumped onto a single candidate.
26. The Consultation Document asks how to handle the situation if no person seeking nomination can obtain endorsement of more than half of all the NC members, or only one such person is able to obtain endorsement of more than half of all the NC members (§ 4.09 (viii)).
27. In response, we propose two options:
 - (a) multiple rounds that would cumulatively generate 2 to 3 successful CE candidates --- after at least 2 candidates have received the requisite NC members’ recommendations, then after the plenary information session with these candidates the NC members can start with the first round of voting where any one candidate receiving endorsement of more than half of validly cast votes from the NC members will be declared a successful candidate, and the NC members will proceed to the next round(s) (eliminating the candidate with the lowest votes before proceeding to the next round) until the process generates an aggregate reaching at least 2 but not more than 3 successful CE candidates;
 - (b) multiple rounds of voting within the NC until in any one round the voting could yield 2 to 3 candidates who at the same time pass 50% of the validly cast votes --- after at least 2 candidates have received the requisite NC members’ recommendation, then after the plenary information session with these candidates the NC members can start with the first round of voting and proceed to subsequent rounds (eliminating the candidate with the lowest votes before proceeding to the next round) until at the relevant round the process at the same time generates at least 2 but not more than 3 successful CE candidates who each received endorsement of more than half of validly cast votes from the NC members in that given round.

Further, the nominating procedures would have to make provisions concerning (i) ties and (ii) any exceptional situations where the entire

nominating procedure will have to restart if a number of valid candidates are incapacitated or withdraw (for whatever reasons) prior to completion of the nominating process.

(IV) Voting Arrangements (Chapter 5)

28. The Consultation Document explores the pros and cons of different voting systems: “first-past-the-post”, two-round voting, instant runoff system, or supplementary vote system (§ 5.06).
29. Given that the primary aim is to afford members of the public a genuine choice to select the CE, it appears to us that both the two-round voting system (for its ease of public understanding and confirmed legitimacy of the CE-elect) and the supplementary vote system (for its cost effectiveness although it is unfamiliar to Hong Kong voters) are feasible choices.

(V) Other Related Issues (Chapter 6)

Term of Office of the NC

30. The Consultation Document considers the term of office of the NC and seeks views as to whether that shall follow the existing arrangement of the EC, i.e., a five-year tenure; or the term of office of the NC shall terminate upon the swearing in of the CE it has nominated (§ 6.06).
31. We agree that the term of office of the NC shall follow the existing arrangement of the EC, i.e., a five-year tenure. In some “extraordinary circumstances”, e.g., when the Central People’s Government (CPG) has decided not to appoint the CE, or the office of the CE becomes vacant for any reason, this would allow the future NC to nominate candidates, and the public to vote on the candidates, as soon as possible, minimizing uncertainty as a result.

Re-election Arrangements if the CE-elect were not appointed

32. The Consultation Document suggests that the existing Chief Executive Election Ordinance (CEEO) should include provisions to deal with the

situation where a CE-elect returned by universal suffrage is not appointed by the CPG (§ 6.14).

33. We concur that the CEEO should include provisions for a re-election in the event that the CE-elect were not appointed by the CPG.

Political Affiliation of the CE

34. The Consultation Document asks if the requirement under the CEEO that the CE should not have any political affiliation should be maintained (§ 6.16).
35. The issue of the CE having or not having political affiliation involves political consideration, which the Law Society would not comment upon.
36. At the same time, we note that Hong Kong presently does not have political party law. There are different opinions on whether Hong Kong needs a separate legislation on political parties, or whether amendments to existing legislation would suffice. In the above regard, we are happy to review any consultation on the relevant proposals on the above or any draft legislation, if and when promulgated by the Administration.
37. We also consider that if the Administration is going to review the political affiliation of the CE, it should take a holistic approach to also examine the current system of the appointment of principal officials and the accountability system. Before a comprehensive review is to take place and be concluded, we take the view that the status quo of requiring the winning candidate to declare he is not a member of political party (section 13 of the CEEO) should be maintained.

**The Law Society of Hong Kong
6 March 2015**