

## The Law Society of Hong Kong

### Submissions on the Green Paper on Constitutional Development

#### *Introductory remarks*

1. This paper constitutes the Law Society Council's submissions on the Government's Green Paper on Constitutional Development, released in July 2007 ("Green Paper").
2. This submission sets out the following:
  - 2.1. legal and constitutional questions surrounding the proposals provided by the Green Paper; and
  - 2.2. an evaluation of the Green Paper proposals on the basis of our legal and constitutional analysis.
3. It should be made clear the views expressed in these submissions are those of the Law Society's Council with input from its Constitutional Affairs Committee. They should not be read as representing the opinions of the legal profession as a whole. Further, our evaluation of the proposals set out in the Green Paper should be read purely as legal and constitutional analysis.

#### *Legal and constitutional issues*

4. Although the Green Paper is said to deal with "constitutional development", in fact it covers only the specific question of how Hong Kong should progress towards and implement systems of universal suffrage for the elections of the Chief Executive ("CE") and the Legislative Council ("LegCo").
5. On this basis, we note that the principles contained in the following are of relevance to the current consultations:
  - 5.1. **Basic Law, Article 45:** CE is ultimately to be elected by universal suffrage through gradual and orderly progress and in light of the actual situation in Hong Kong. Candidates for the position are to be nominated through democratic procedures by a broadly representative nomination committee.
  - 5.2. **Basic Law, Article 68:** LegCo is ultimately to be elected by universal suffrage through gradual and orderly progress and in light of the actual situation in Hong Kong.
  - 5.3. **2004 Interpretation and 2004 Decision of the Standing Committee of the National People's Congress ("NPCSC"):** On 2 April 2004, the NPCSC issued an interpretation of Article 7 of Annex I (dealing with the progression

to universal suffrage in CE elections) and Article III or Annex II of the Basic Law (dealing with the progression to universal suffrage in LegCo elections). The interpretation clarified that the relevant articles in these annexes could be amended as from and including 2007. However, on 26 April 2005, the NPCSC issued a decision to the effect that CE and LegCo elections will not be by universal suffrage in 2007 and 2008 respectively.

5.4. **Article 25, International Covenant on Civil and Political Rights (“ICCPR”)**: the ICCPR is adopted as part of Hong Kong laws through the Hong Kong Bill of Rights Ordinance and is entrenched by Article 39 of the Basic Law. Article 25 of the ICCPR states that citizens are entitled to universal and equal suffrage in elections. The Green Paper appeared to cast doubt on the applicability of this Article to Hong Kong, and we will be considering this in more detail below.

5.5. **Declaration of Bangkok 1967**: *“It considers that, given peace and stability, there are no intrinsic factors in the Region which make the ultimate establishment, maintenance and promotion of the Rule of Law incapable of attainment; that the Rule of Law can only reach its highest expression and fullest realization under a representative government freely chosen by universal adult suffrage; and that the Rule of Law requires effective machinery for the protection of fundamental rights and freedoms.”*<sup>1</sup>

6. We believe that there are a number of concepts which require clarification, and we will examine them in turn.

### *Universal suffrage*

7. Taken literally, the term “universal suffrage” merely means every citizen having the right to vote in elections. In the Green Paper, the Government appears to accept that this concept also encompasses the notion of “equal” suffrage.<sup>2</sup> The Green Paper further cites the United Nations Human Rights Committee’s general comments on the ICCPR (“General Comments”), which states that as regards the right to vote:

*“no distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*<sup>3</sup>

8. The Law Society agrees with this formulation as regards the fundamental requirement in relation to universal suffrage.

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<sup>1</sup> International Commission of Jurists, *The Dynamic Aspects of the Rule of Law in the Modern Age* (Report on the Proceedings of the South-East Asian Pacific Conference of Jurists, Bangkok, Thailand, 15-19 February 1965), p. 175

<sup>2</sup> Green Paper, para 2.24

<sup>3</sup> General Comments, para 3, as cited in Green Paper, para 2.22.

9. However, the Green Paper also makes a number of other observations about the notion of universal suffrage:
- 9.1. the notion does not seek to impose any specific electoral system provided that the system satisfies internationally recognised standards;<sup>4</sup>
  - 9.2. strict equality of voting power is not required;<sup>5</sup>
  - 9.3. any implementation of universal suffrage in Hong Kong must be consistent with the following precepts based on explanations given by the Chairman of the Basic Law Drafting Committee when submitting the Basic Law to the National People's Congress on 28 March 1990:
    - (a) meeting the interests of different sectors of society;
    - (b) facilitating the development of the capitalist economy;
    - (c) gradual and orderly progress; and
    - (d) appropriate to the actual situation in the HKSAR; and<sup>6</sup>
  - 9.4. the right to universal suffrage in Hong Kong is derived from the Basic Law only and not from the ICCPR, as Article 25 of the ICCPR is said not to apply to Hong Kong, as a result of a reservation allegedly against the application of this Article entered into by the United Kingdom in 1976.<sup>7</sup>
10. Taking these points in turn:
- 10.1. **Electoral systems:** we agree with the observation in the Green Paper that the ICCPR does not seek to impose any specific electoral system, and that each jurisdiction should shape its system by the particular needs, aspirations and historical realities of the people involved. However, it does not follow that any electoral system which purports to allow universal suffrage will meet the requirements of the ICCPR and satisfy the international norms. In this context, we find it helpful to note a leading ruling on the question of voting rights from the Australian High Court, *Attorney General; ex rel McKinlay v Commonwealth of Australia*.<sup>8</sup> In the course of discussing the requirement that the Australian legislature must be “chosen by the people” (thus being similar to a requirement for universal suffrage), Stephen J. notes that this is equated with “representative democracy” (we will return to what this entails

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4 Green Paper, paras 2.23 to 2.24.

5 Ibid para 2.25.

6 Ibid para 2.10.

7 Ibid para 2.20.

8 (1975) 135 CLR 1.

later in these submissions).<sup>9</sup> However, in connection with the point made by the Green Paper as regards the variety of systems capable of fulfilling universal suffrage requirements, Justice Stephen said:

*“[R]epresentative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description. The spectrum has finite limits and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether; but at no one point within the range of the spectrum does there exist any single requirement so essential as to be determinative of the existence of representative democracy.” [emphasis added]*<sup>10</sup>

- 10.2. **Equality of voting power:** to the extent that it does not impinge upon the principle of universal suffrage set out in paragraph 7, we basically agree with the Green Paper’s position on this issue. However, we would note the following warning from Mason J. in *McKinlay* in relation to the impact of electoral boundaries for the Australian legislature on voting power, and its effect on the notion of universal suffrage, which we believe applies equally to any electoral system to be implemented in Hong Kong:

*“It is perhaps conceivable that variations in the numbers of electors or people in single member electorates could become so grossly disproportionate as to raise a question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people ...”*<sup>11</sup>

- 10.3. **Effect of the explanations by the Chairman of the Basic Law Drafting Committee:** we do not comment specifically on the desirability or otherwise of the electoral system criteria as allegedly set out in these explanations. However, we would note that, in themselves, these comments may at most be useful in considering the context surrounding the Basic Law, have no specific legal effect, as they are not part of the Basic Law. Having said that, we acknowledge that the third and fourth points (namely, gradual and orderly progress and in view of the actual situation of Hong Kong) deduced from these explanations are found in Articles 45 and 68 of the Basic Law. We will deal with these concepts separately.

- 10.4. **The applicability of Article 25 of the ICCPR:** the Law Society believes that the legal position on this is not as straight-forward and clear cut as is stated in the Green Paper (namely, that Article 25 of the ICCPR does not apply to Hong Kong). There are at least respectable, if not forceful, arguments to the contrary:

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<sup>9</sup> Ibid at page 56.

<sup>10</sup> Ibid at page 57.

<sup>11</sup> Ibid at page 61.

- (a) The 1976 reservation entered into by the United Kingdom against the applicability of Article 25 of the ICCPR to Hong Kong was stated as its non-application “*in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong.*” The Central People’s Government informed the United Nations that this reservation continued to apply after reunification.
- (b) Similar excluding wording relating to the applicability of Article 25 of the ICCPR can be found in section 13 of the Hong Kong Bill of Rights Ordinance (Cap 383).
- (c) On its face, this appears to support the Green Paper’s assertion on the applicability Article 25 of the ICCPR on Hong Kong.
- (d) However, we would note that the reservation in question only applies in circumstances where Hong Kong does not have any elections at all, but not where there is an electoral system in place. This very idea found support in the *obiter dicta* (the applicant in that case lost on other grounds) of Keith J.’s judgment in *Lee Miu Ling v Attorney General*.<sup>12</sup> The same view is also held by the United Nation’s Human Rights Committee (see e.g. paragraph 19<sup>13</sup> of its Concluding Observations at CCPR/C/79/Add.57 of 3 November 1995). This way of interpreting the reservation is also consistent with the principles laid down in cases such as *Ng Ka Ling v Director of Immigration*<sup>14</sup> and *R (Morgan Grenfell & Co. Ltd) v. Special Commissioner of Income Tax*,<sup>15</sup> which require a generous interpretation of constitutional and statutory provisions in favour of fundamental rights and against restrictions on the same.

11. In any event, the Green Paper acknowledges that the electoral system must satisfy internationally recognised standards. The requirements stipulated in Article 25 could

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<sup>12</sup> HCMP 1696A of 1994 at para 31.

<sup>13</sup> Paragraph 19 reads: “19. The Committee is aware of the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. It however takes the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant. It underscores in particular that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25 (b) and 26. ...”

<sup>14</sup> (1999) 2 HKCFAR 82

<sup>15</sup> [2003] 1 AC 563.

be considered one of the benchmarks. As such the electoral system for universal suffrage should satisfy the following requirements under Article 25:

- (1) There shall be no distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
  - (2) There shall be no unreasonable restrictions on one's right to vote and to be elected.
  - (3) The election shall be by universal as well as equal suffrage.
  - (4) The election shall be genuine in that it shall guarantee the free expression of the will of the electors.
12. In this connection, we would also like to elaborate on Stephen J.'s point in *McKinlay* that universal suffrage entails a representative democracy.
13. Stephen J. held that requirements of a representative democracy include “*the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions* [Law Society's note: this reflects Australia's parliamentary system – the concept can be applied to any elected arms of government] *upon the representatives thus selected.*”<sup>16</sup>
14. In essence, this means universal suffrage as an embodiment of representative democracy requires a fair system which ensures that citizens are not only given the right to vote. The system should also try to ensure that citizens' wishes are genuinely reflected in the election results, and that their representatives get to exercise real power on their behalf.
15. The Law Society believes that universal suffrage can only be genuine if basic elements of a representative democracy as outlined above are satisfied. Failure to abide by these requirements will necessarily circumvent the intention of a system of electing representatives through “one person, one vote” (ie to allow citizens to choose their presented political representatives). In this regard, we note further that the notion that Hong Kong should recognise rights afforded under the concept of “representative government” (being used in Australia as an alternative term for “representative democracy”) is arguably supported by Saunders J.'s ruling in *Mandy Tam Heung Man v The Hong Kong Institute of Certified Practising Accountants*.<sup>17</sup>

### ***Gradual and orderly progress***

16. As noted earlier, both Articles 45 and 68 refer to the process towards universal suffrage in CE and LegCo elections as requiring “gradual and orderly progress”. The Green Paper states the Government's understanding of the phrase in the following terms:

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<sup>16</sup> (1975) 135 CLR 1 at 57.

<sup>17</sup> HCAL 9 of 2007 at para 101, citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.



*“It is generally understood that ‘gradual and orderly progress’ means proceeding step by step in an orderly fashion to move forward. It involves a step by step transition, and different stages of evolution over time. With regard to arriving at the ultimate aim of selecting the CE and electing all members of LegCo by universal suffrage, the evolutionary process could not be taken forward too rapidly ...”<sup>18</sup>*

17. Whilst this may appear literally consistent with the phrase “gradual and orderly progress”, we submit that the Green Paper fails to consider the overall factual and legal context in relation to this concept:
  - 17.1. **Annexes I and II of the Basic Law:** it is clear that Annex I (in the case of CE elections) and Annex II (in the case of LegCo elections), when read together with the SCNPC’s interpretation of 2004, allows for changes to the electoral system on or after 2007 or 2008 respectively. This is contrasted with the precisely prescribed systems provided for in these Annexes for elections prior to 2007/2008. The fact that these systems could move from their previous forms to entirely flexible arrangements suggest that “gradual and orderly progress” does not necessarily involve a linear transition as appears to be implied by the Green Paper definition.
  - 17.2. **Problems with a literal, linear approach:** if “gradual and orderly progress” is taken to have a literal meaning such that any progress should take place through a linear step by step process, then absurd results will arise. A golden rule at law for the interpretation of legal instruments is that it cannot be read in a way as to create an absurd result.
  - 17.3. **The Government’s actual position:** indeed, the Government tacitly acknowledges the non-linear nature of the progression when it presents universal suffrage for CE and LegCo elections in 2012 as a possible option in the Green Paper, rather than dismissing it as being inconsistent with “gradual and orderly progress”.
18. Thus, taking these points together, the Law Society submits that the phrase “gradual and orderly progress” in Articles 45 and 68 of the Basic Law does not necessarily mandate a slow movement towards universal suffrage. There is nothing in the Basic Law which appears to suggest any restrictions against “premature” achievement of universal suffrage from 2007/2008 onwards (subject only to the NPCSC’s 2004 decision against universal suffrage in 2007/2008). Indeed, as noted above, it would appear that the current rate of “progress” towards universal suffrage is so slow as to create legally untenable results.

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<sup>18</sup> Green Paper at para 2.16.

***In light of the actual situation in Hong Kong***

19. As noted earlier, Articles 45 and 68 also provides that the development of electoral arrangements for CE and LegCo elections should be seen in light of Hong Kong's actual situation. The Green Paper sees the examination of the "actual situation" as involving a review of Hong Kong's "*political, economic and social conditions*" at a given point in time.
20. The Law Society agrees with this formulation. It appears to us that the question of "actual situation" is not, strictly speaking, a legal issue but a factual one. This potentially leaves room for argument between people with different interpretation of the facts as regards the "actual situation". Nonetheless, we suggest that this Basic Law requirement would prohibit the implementation of any electoral system that is inconsistent with any reasonable interpretation of Hong Kong's "actual situation" at a given time.

***Broadly representative Nominating Committee***

21. This term appears in Article 45 of the Basic Law, which requires an Nominating Committee formed for nominating CE candidates to be broadly representative. In the Green Paper, the Government saw this from two aspects:
  - 21.1. the number of members on the Nominating Committee (ranging from less than 800 members, exactly 800 members as per the current Election Committee, or more than 800 members) and its composition;<sup>19</sup> and
  - 21.2. the electoral base for the Nominating Committee (the Green Paper suggests using the current system of electing Election Committee members as a starting point, with perhaps some scope for expansion).
22. The Law Society agrees that these issues are relevant to whether the Nominating Committee would be broadly representative, but note the following:
  - 22.1 The term "broadly representative" can potentially be read in two contexts. First, it may be read narrowly as meaning a reflection of a wide number of specific sectors in Hong Kong. Second, it can be read more widely as being a reflection of the wishes of Hong Kong people as a whole. Applying the principles of constitutional interpretation discussed earlier in these submissions, we are of the opinion that the second interpretation, being a more generous one, should be preferred over the first.
  - 22.2 The precise number of members on any Nominating Committee is not of paramount importance (though of course there will be a need to settle on this). The number only needs to be sufficiently large to ensure that it is capable of being broadly representative.

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<sup>19</sup> Ibid at paras 3.06 to 3.18.



- 22.3 Of much greater importance is the composition of the Nominating Committee, and how it is chosen. Applying the wider interpretation of “broadly representative”, the Law Society submits that the current Election Committee composition and the mode for choosing its members should be further improved as much as possible to ensure that it reflects the views of Hong Kong people as a whole.

### ***Democratic Procedures***

23. Once a Nominating Committee is formed, Article 45 suggests that CE candidates be nominated through “democratic procedures”. The Green Paper considers the issue mainly as one of the nomination thresholds within the Nominating Committee for aspiring CE candidates, and the potential number of candidates to which the thresholds can lead.<sup>20</sup>
24. The Law Society submits that in order for the nomination process to be democratic, it should be one which (based on our discussions of the notion of “representative democracy” earlier in these submissions) gives Hong Kong people a genuine choice of candidates representing a diverse range of views. In this regard, we note that the present nomination system theoretically allows for up to eight CE candidates. However, in practice, the highest number of candidates up for selection by the Election Committee was four (in 1997). Meanwhile, in the 2002 and 2005 CE selection process, only one candidate was nominated. This historical trend should be a relevant factor as to how best to ensure a diverse range of candidates can be made available for Hong Kong people to elect by universal suffrage.

### ***Observations on the proposals set out in the Green Paper***

25. The Green Paper has set out many potential options relating to matters as the timetable for achieving universal suffrage, method for choosing CE (including nomination issues), and method for choosing LegCo members (including the future of functional constituencies, “FCs”).
26. The Law Society does not seek to endorse or reject any of the potential options as a matter of their desirability or otherwise for Hong Kong. Those are political and social questions which are beyond the scope of these submissions.
27. Therefore, we make the following observations as regards the options found in the Green Paper, based on the preceding submissions on the legal and constitutional context for the issues at hand.

### ***Timetable for achieving universal suffrage***

28. We believe that Article 25 of the ICCPR (which, as explained earlier, is in fact applicable to Hong Kong) mandates that Hong Kong should have universal and equal suffrage for its political representatives as soon as possible. In itself, this would

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<sup>20</sup> Ibid at paras 3.29 to 3.36.

appear to rule out any further delays to implementing universal suffrage in Hong Kong (subject only to the NPCSC's 2004 decision as noted earlier).

29. Nonetheless, we also note that Articles 45 and 68 of the Basic Law state that universal suffrage should be the “ultimate aim” through a gradual and orderly progress, and in light of Hong Kong’s actual situation. In this regard, we note that:

29.1. “Gradual and orderly progress” does not, as explained earlier in these submissions, prevent an early move to universal suffrage. However, the later that universal suffrage is implemented, the greater the risk of Articles 45 and 68 being contravened as a result.

29.2. In this regard, the requirements of Article 25 of the ICCPR (as applied by Article 39 of the Basic Law) should be instructive when reading the Basic Law as a whole, subject only to whether the introduction of universal suffrage is in light of Hong Kong’s actual situation. The “actual situation” concept is, as suggested previously in these submissions, not a legal concept on the whole.

#### ***Election of CE by universal suffrage***

30. In view of our earlier submissions, we suggest that a sector-specific approach to a “broadly representative” Nominating Committee, with committee members elected in a system similar to that of the Election Committee now, is unlikely to be consistent with the Basic Law. Possibilities of the Nominating Committee composition and selection methods that would most likely satisfy the “broadly representative” requirement would include:

30.1 universal suffrage for Nominating Committee candidates; or

30.2 the Nominating Committee being formed by directly elected LegCo and/or District Council members.

31. As for the CE candidate nomination procedure, we reiterate our earlier submissions regarding the need for the people of Hong Kong ultimately to be given a genuine choice, and the historical experience to date. This may well mean that proposals which allow for a lower maximum number of candidates than the present system may not give voters a genuine choice in practice.

32. For completeness, we further note that proposed systems which only allow for a few candidates with the highest number of nominations (regardless of thresholds) to be put forward may also be inconsistent with the need to provide voters with genuine choice. This is because such systems may be open to manipulation by Nominating Committee members. For example, those members who are like-minded can “split” their votes to ensure that candidates reflecting their views can obtain the highest number of nominations, thus potentially excluding those potential candidates with different political views.

*Election of LegCo by universal suffrage*

33. Given the notion of universal and equal suffrage as enshrined by the Basic Law and the ICCPR, we submit that the retention of FCs is inconsistent with the ultimate goal of universal suffrage:

33.1. The present system of FCs and their mode of election are clearly inconsistent with universal and equal suffrage. This is because it provides that certain people have two votes whilst some only have one, thus violating the principle of equal suffrage.

33.2. This beckons the question of whether the situation can be “cured” by FCs also being subject to popular election, such that all voters can have two or more votes (depending on the number of FCs that are being retained). Leaving aside the practical question of making voters submit up to 31 votes if the present number of FCs are maintained (which, being a purely political/logistical question, the Law Society expresses no views), we submit that the legally better view (based on a generous interpretation as explained earlier) is that FCs by popular election does not make the system consistent with universal and equal suffrage overall:

(a) As noted earlier in these submissions, voters must be given a genuine choice in a representative democracy. If certain LegCo candidates must come from certain fields, then voters are in effect restricted as to the choices available to them.

(b) More importantly, those eligible as FC candidates are also eligible to run as direct election candidates, but the reverse is not true. This means that, in effect, voters are not given genuine equal representation within LegCo itself, which indirectly violates the principle of equal suffrage.

*Conclusion*

34. The Law Society Council’s submissions above represent the Council’s evaluation of the views contained in the Green Paper. They should be seen as legal analysis of the proposals in the Green Paper, rather than any views of their political desirability.

**The Law Society of Hong Kong**  
**The Constitutional Affairs Committee**  
**10 October 2007**