



Law Society's Submissions on the Consultation Document

Methods for Selecting the Chief Executive and Forming the Legislative Council in 2012

I. General Comments

1. Guiding Principles

The Constitutional and Mainland Affairs Bureau (CMAB) published its latest Consultation Document on constitutional reform *Methods for Selecting the Chief Executive and Forming the Legislative Council in 2012 (Consultation Document)* on 18 November 2009.

The Law Society's submissions dated 27 September 2004, 25 November 2005 and 10 October 2007 were all made on the following basis:

(a) a review of the legal and constitutional questions surrounding the proposals; and (b) an evaluation of the proposals on the basis of a legal and constitutional analysis.

The Council's comments, with input from its Constitutional Affairs Committee, on the *Consultation Document* will be made on the same principles.

2. Timetable for Universal Suffrage

We note the CMAB has stated the NPCSC's Decision dated 31 December 2007 (*Decision*) "*makes clear the universal suffrage timetable for Hong Kong...*":

*"The election of the fifth CE of the HKSAR in the year 2017 may be implemented by the method of universal suffrage; that after the CE is selected by universal suffrage, the election of the LegCo of the HKSAR may be implemented by the method of electing all the members by universal suffrage"*¹

We question CMAB's statement in paragraph 1.23 (ii) of the *Consultation Document* that "*the universal suffrage timetable has been set*" as the NPCSC's *Decision* is not unanimously accepted as providing a definite timetable for the implementation of universal suffrage. The Government should seek clarification from the NPCSC on the interpretation of the words "may be" (可以) to remove any doubts concerning the timetable.

¹ Consultation Document para 1.12

We note the proposed package is, in many respects, similar to the proposals made in earlier consultations with only minor variations. We have previously pointed out those proposals were not adequately progressive. Hence, if universal suffrage for the election of the CE and LegCo are to take place in 2017 and 2020 respectively, more progressive changes should be made in 2012 so as to avoid drastic changes to the political system which will be required during the run-up from 2012 to 2017 for the CE elections, and from 2017 to 2020 for the LegCo elections.

We note a key paragraph in the *Consultation Document* is 1:26 where the Government sidesteps making any proposals on a roadmap to implement universal suffrage and leaves such decisions to the fourth term CE and the fifth term LegCo. The failure to provide a roadmap will place a very heavy burden on the CE in 2017 as he or she will have to introduce major changes in only 3 years, namely 2017 to 2020. This failure to do so breaches the requirement of the principle of "gradual and orderly progress" enshrined in Articles 45 and 68 of the Basic Law.

3. Universal Suffrage

The *Consultation Document* fails to provide any definition of "universal suffrage". In our submissions dated November 2007 we noted the following points on "universal suffrage":

"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.² 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."³

The Law Society acknowledges that more than 1 system satisfies the notion of universal suffrage and that the right to universal suffrage in Hong Kong is derived from the Basic Law and not only from the ICCPR. However, it does not follow that any electoral system which purports to allow universal suffrage will meet the requirement of the Basic Law and recognised international norms. The Law Society believes that universal suffrage can only be genuine if basic elements of a representative democracy are satisfied and the retention of Functional Constituencies (FCs) is inconsistent with the ultimate goal of universal suffrage.⁴

4. Equality of Voting Power

The Government must state clearly its views on what "universal suffrage" entails as this is an integral part of the debate surrounding the future of FCs.

We note in the *Appendix to the Basic Law*, Ji Peng Fei provided an explanation on the introduction of universal suffrage – this process was gradual and orderly with the First and Second Legislative Councils being elected by a mixture of FCs, the Election Committee (EC)

² Green Paper para 2.24

³ Green Paper para.2.22

⁴ Law Society's submissions para. 9 October 2007

and geographical seats, followed by a gradual increase in geographical seats and corresponding reduction of EC seats during the 2nd election. The 3rd Legislative Council was elected by FCs and geographicals in 50:50 ratio.⁵

BL68 (2) requires “*gradual and orderly progress*”. If FCs are to be retained, it could be argued that the “ultimate” aim to elect all members of the Legislative Council by “universal suffrage” has in fact been achieved and there is no need to continue the debate. What then of the roadmap laid out by Ji Pengfei and the failure to continue along that path to increase the geographicals and reduce the FCs?

We consider universal suffrage encompasses the following elements:

- Equal voting rights, flowing from which each constituency must be generally equivalent in size;
- The right and opportunity for every citizen without distinction and unreasonable restrictions to stand for election at genuine periodic elections guaranteeing the free expression of the will of the electors.

The FCs fail to meet these fundamental requirements. The Law Society has not yet seen any suggestion whereby FCs can be re-organised to meet the requirements stated above. (See our General Comments on FCs in Part II of our submissions).

II. Law Society’s Response to the Questions in Chapter 6 of the Consultation Document

Method for Selecting the Chief Executive in 2012

1. The number of members of the Election Committee

(a) Do you agree that the number of members of the Election Committee should be increased to not more than 1200?

Law Society’s response: In the absence of a roadmap it is impossible to give constructive comments.

2. The composition of the Election Committee

(a) Should the proportion of members of the four sectors remain even or not?

Law Society’s response: We note that the current proposal represents a retrograde step as compared to the Government’s earlier proposal in 2005. In the 2005 proposal, the Government Task Force recommended to increase the number of EC members from 800 to 1600 on the basis that the majority of the increase went to the 4th Sector (an addition of 500 members as compared to an increase of 100 members for each of the first three sectors). At that time, the Government’s justification for substantially increasing the proportion of the 4th Sector by including all District Council members in the EC was that more EC members would be directly elected by over three million voters in Hong Kong, thereby further enhancing the representativeness of the EC. The

⁵ See Part IV(3)

Government has failed to provide any explanation for its current proposal to maintain the proportion of members of all four sectors and its apparent withdrawal of the earlier stated goal of further enhancing the representativeness of the EC. The Law Society reiterates our earlier submissions that there is no need to increase the number of the EC members in the first three sectors, but to add 400 directly elected EC members under the 4th Sector (see below).

(b) Do you agree the new seats in the fourth sector should be allocated to District Council members?

Law Society's response: We do not agree with this proposal.

We re-iterate the proposal in our submissions dated 27 September 2004, with emphasis now added:

"The Law Society repeats its submission that there should be "greater direct participation by Hong Kong people in the mechanism to select the CE."

We refer to our submissions to the Constitutional Development Task Force (CDTF) dated 27 September 2004 when we indicated the Election Committee (EC) could be expanded as required by Article 45 "in accordance with democratic procedures".

The Law Society recommended the size of the EC should be increased by 400 additional members thus increasing the total number of "Electors" to 1,200.

Hong Kong is currently divided into 400 District Council constituencies under 18 Districts, with each constituency returning one directly elected Member to the District Council. Each District Council constituency has a population of approximately 17,000 people.

The additional members to the EC could be directly elected via the existing District Council constituencies' thus widening public participation in the selection of the CE. (emphasis added)

This proposal should be easy for the public to understand as voters are already familiar with the District Council elections. The existing boundaries of the District Council constituencies should be adopted as this will enhance the ties between the voters and the candidates.

Under this proposal, directly elected members will account for one third of the EC's membership. It will be a gradual but significant step towards the ultimate aim of universal suffrage as stated in the Basic Law. The direct election of one third of the members of the EC will assist with the development of democracy at the grassroots level by enabling greater participation by members of the public. (emphasis added)

We submit that our proposal removes concerns raised in the preceding paragraph on the role of the DC members in relation to the provisions of Article 97 of the Basic Law.

The composition of the existing 4 Sectors should remain; the CDTF should adopt the Law Society's proposal which increases direct participation of the public compared to

their proposal which simply increases indirect elections, therefore failing to make any progress towards universal suffrage.”⁶

Therefore, our proposal, as stated, is a “gradual and significant step towards the ultimate aim of universal suffrage as stated in BL68. We do not consider the Government’s proposal to be sufficiently progressive in widening the representativeness of the Election Committee.

(c) What should be the extent of the increase in numbers of seats to be allocated to District Council members? Do you agree that only elected District Council members should take part in the election?

Law Society’s response: We do not agree with this proposal.

The Government accepts that appointed District Councillors lack any mandate to represent the electorate of their district and has decided to drop its untenable proposal that appointed members were eligible to stand for these new seats. We again refer to our submissions dated 25 November 2005 on the CDTF’s proposal to “widen the franchise by increasing the number of seats allocated to the District Councils”:

“The Central People’s Government made it clear in the past that Article 97 covers the DC, as it consistently rejected the British-Hong Kong Government’s stance on the 3-tier governance i.e. LegCo, Urban Council and the District Boards. The Central People’s Government has always stressed that the DC is only a consultative organisation.

The CDTF’s proposal seeks to include the DC members into the EC by virtue of the office of the DC, and hence the CDTF argues that it cannot exclude the “Appointed DC members”, as there is no distinction in “the office” of appointed and elected members. The CDTF’s proposal would:

(i) confer political power on all DC members by virtue of the “office” of DC;

(ii) allow the 500 plus DC members to form over 30% of the EC, who would be able to nominate up to 2 CE candidates.

(iii) calls in question the role of future DCs as the CDTF’s proposal significantly changes the role of the DC.”⁷

We note the Government has failed to address our observations on its proposals to change the role of the District Councillors and re-iterate our views that the current proposal could well result in a breach of BL97.

We do not endorse the proposal to increase the political power of the District Council members by the introduction of yet another small circle election of candidates who are only eligible to stand for election to the Election Committee and to vote by virtue of the office they hold. People elect District Council members primarily for representing them in District affairs, but not to confer District Council members with political

⁶ Law Society submissions 25 November 2005 para.3(c)

⁷ See para.3(b)

powers to return the Chief Executive. We wish to make it clear that our proposal to use the District Council constituencies is in relation to the existing electoral structure which can be used to widen the franchise. Our comments in 2(b) above are also relevant.

3. The electorate base of the Election Committee

(a) Do you agree that the method of replacing “corporate votes” with “director’s votes/executive/association/individual votes” should not be adopted?

Law Society’s response: We have stated in earlier submissions that corporate votes should not be extended and should eventually be abolished.⁸ We restate our recommendation.

(b) Do you agree that the proportion of District Council members in the Election Committee should be increased to broaden the electorate base?

Law Society’s response: We do not agree. See our comments in paragraphs 2(b) and (c) above.

4. The arrangements for nominating candidates for office of the CE

(a) Do you agree that the nomination threshold should be maintained at the existing level, i.e. at the ratio of one-eighth of the total membership of the Election Committee?

Law Society’s response: The Government’s proposal is to increase the number of electors to 1200 and to retain the 1:8 ratio in respect of nomination. We consider the retention of the 1:8 ratio of an expanded electorate means it will be more difficult in practice for a person to obtain sufficient nominations to stand for the CE election. The system can be manipulated to promote a single candidate and this is undesirable.

There should not be unreasonable barriers in relation to standing or voting in the election of the CE. There should not be any increase from the current nomination threshold of 100. Indeed there may be a case to lower further the nomination threshold in order to comply with the requirement in BL45 for “gradual and orderly progress” towards genuine universal suffrage.

(b) Do you agree that the arrangement of not setting an upper limit on the number of subscribers should be maintained?

Law Society’s response: We agree.

5. Political Affiliation of Chief Executive

(a) Do you agree that the requirement that the CE should not have any political affiliations should be maintained?

Law Society’s response: If Hong Kong is to make progress along its democratic path, political parties should continue their development and the Government should adopt

⁸ Law Society submissions dated 27 November 2007 para 4(c)

a long term view. We consider this proposal to be contrary to the right of freedom of association, as stated in the Basic Law, and the development of a democratic society.

We note the following:

- (a) the Basic Law does not preclude political affiliation by CE candidates;
- (b) a successful candidate forced to resign from his political party because of his political affiliations undermines the right to freedom of association; and
- (c) BL 52 of the Basic Law mandates the circumstances when a Chief Executive must resign; we note “Political Association” is not one of the grounds.

Method for forming the LegCo in 2012

Law Society’s General Comments on Functional Constituencies

The Law Society notes there is pressure to retain FCs and various proposals such as the “two-vote proposal” have been floated. We consider this particular proposal would be incompatible with the recognised elements of universal suffrage as the weight of the second vote for the FC would not be “equal”. Indeed, we note it would require voters to have 31 votes namely 1 vote for each existing FC + 1 vote for the geographical constituency if “equal suffrage” is to be achieved. Proposals to “dilute” the FC model have also been floated with the aim of “widening the franchise” and even if such proposals are implemented, the elections will still fail to satisfy the ultimate goal of universal suffrage.

FCs, as constituted, breaches the principles of Article 25 of the ICCPR because of the restrictions on eligibility of candidates to stand for such seats. In addition, another important question is how the electoral base of the FCs can be broadened? What proposals can the Government or those advocating retention of FCs make for those sectors of society such as housewives, or the unemployed? The status of such potential electors is fluid e.g. a person may be unemployed and thus assumes the role of a housewife pending a change to her employment status – what FC would she be eligible to register for? What FC would the unemployed be able to register for?

We note some commentators indicate the historical discussion on FCs is no longer relevant as the reforms should be considered in the light of “*the present situation*”. We disagree with this line of thinking. The historical debate as well as legislative intent of the drafters is highly relevant to the discussion on the role of FCs and the concept of universal suffrage as issues such as the composition and role of FCs had been extensively debated before the Basic Law was promulgated; this can be reviewed in the discussion papers and minutes of the 17th meeting of the Basic Law Drafting Committee Political Sub-Group held in December 1989. It is clear the BL Drafting Members understood the “*ultimate goal of universal suffrage as requiring the abolishment of FCs*”.⁹ The Basic Law Drafting Committee had intense discussion on FCs and its members agreed that FCs had their valuable role only as a transitional arrangement but had to be abolished eventually in order to achieve the ultimate goal of

⁹ Minutes of the 17th. Meeting of the Basic Law Drafting Committee Sub-group, December 1989

universal suffrage according to the gradual and orderly progress in the light of the actual situation in Hong Kong.¹⁰

We have considered the matter in depth and have concluded there is no credible argument that FCs meet the internationally recognised norm of universal and equal suffrage and the legislative intent of the Basic Law.

6. *The number of seats in LegCo*

(a) Do you agree that the number of seats should be increased from 60 to 70?

Law Society's response: The latest proposals recommend an increase in the number of LegCo seats because the *Declaration* stated proportionality must be maintained between the geographical and functional constituencies. We did not comment on the proposal to increase the number of seats save to observe it complied with the NPCSC Interpretation dated 26 April 2004.¹¹

In order to introduce any change in the method of forming the Legislative Council Ji Peng Fei stated any such "improvement shall be made with the endorsement of two-thirds majority of all members of the Legislative Council".¹² Currently, with a 60 seat Council, a two-thirds majority requires 40 votes. If the number of seats in LegCo is increased to 70 seats, a two-thirds majority will require 47 votes and thus it will be much harder to achieve 47 votes to abolish the FCs.

The Law Society does not support this proposal and favours retention of the status quo, namely 60 seats. The proposal does not meet the requirements of BL68 on "orderly progress" as it will exacerbate the problem of eliminating the FCs. We believe that any reform of the FCs in 2012 should be with the goal of their future abolition.

The only way forward is to remove the 50:50 ratio for the 2016 elections by increasing the number of geographical seats to say 70%. The remaining FCs could then be abolished in an orderly fashion and thus comply with the stated aim of universal suffrage in BL68.

7. *The electorate base of the FCs*

(a) Do you agree that the method of replacing "corporate votes" with "director's votes/executive/association/individual votes" should not be adopted?

Law Society's response: We repeat our submission that corporate votes should be abolished.

(b) Do you agree that all five new FC seats and the existing District Council seat should be returned through election by elected District Council members from amongst themselves to broaden the electorate base of the FCs?

¹⁰ See *Introduction to the Basic Law* 2006 ed. by Wang Shuwen, and *Consultation Report of the Basic Law (Draft)* published October 1988

¹¹ Law Society's submissions dated 25 November 2005 para.4(a)

¹² Appendix to the Basic Law- Section IV(3)

Law Society's response: We do not agree with the proposal to increase the number of seats in LegCo and therefore do not agree with the proposal to return elected District Council members as outlined in the *Consultation Document*.

We consider this proposal to be a retrograde step which only serves to entrench FCs and will only add to the problem of complying with BL68. The Government should introduce proposals to reduce and eventually abolish all FCs and replace them with geographical seats.

BL97 clearly states District Councils are not “*organs of political power*”. District Councillors were voted into office by the electorate to deal with local affairs, not for political power in LegCo.

In our submissions dated 25 November 2005 we suggested the 400 District Council constituencies under the 18 District Councils could be used as the basis to provide greater direct participation by Hong Kong people in the selection of the Chief Executive. However, the current proposal politicises the District Councils and in our view, breaches BL97. We note the Government has not addressed our concerns in the *Consultation Document*.

The attempt to “broaden the electorate base of the FCs” is an attempt to introduce another small circle election which breaches the principle in Article 25 of the ICCPR of “freely chosen representatives” as only elected District Councillors are eligible to stand as candidates i.e. eligibility is based on their office and not as a member of the general community.

8. *Nationality requirement of LegCo members*

(a) Do you agree that the existing arrangement of allowing Hong Kong permanent residents who are not of Chinese nationality or who have the right of abode in foreign countries to stand in LegCo elections for 12 seats should remain unchanged?

The current provisions of BL67 have not created any problems.

III *Conclusion*

The Law Society therefore urges the Government to put forward a revised *Consultation Document* with more progressive proposals and a clear roadmap on the way forward.

**The Law Society of Hong Kong
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