



Legislative Council (Amendment) Bill 2011 Submissions on Proposed Committee Stage Amendments

The Administration's Proposed Amendment

1. The Administration announced in a press conference on 28 June 2011 its intention to introduce Committee Stage Amendments ("CSAs") to the Legislative Council (Amendment) Bill 2011. It is our understanding the CSAs will put into effect the following revised proposal:
 - (a) If any Legco vacancy arises (including those due to death, serious illness, resignation, or disqualification), the replacement candidate will come from the original candidate list of the vacating Member.
 - (b) Where the candidates remaining on the candidate list of the Member vacating his seat do not wish or are ineligible to fill the vacancy, or if there is no other candidate remaining on the candidate list, then the precedence list of candidates with the largest remaining votes will be used to fill the vacancy.
 - (c) If the vacancy cannot be filled by sub-paragraph (a) and (b) above, a by-election will be held.
2. Despite the Government's latest proposed amendments, the Law Society reiterates its position that the Bill should be withdrawn and a full consultation be conducted.

Constitutional Provisions

3. The Basic Law

Article 26

Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.

Article 68

The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress.

4. The International Covenant on Civil and Political Rights

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by a secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) To have access, on general terms of equality, to public service in his country.*

5. When interpreting the above constitutional provisions, we should note the following:

- (a) A fundamental principle of construction is that an instrument should be read in a way that is intended to preserve and maximise the scope of fundamental human rights.**
- (b) The right to elect a political representative is a fundamental human right.**
- (c) It is accepted by the Administration that the methods for forming Legco should evolve in accordance with the principle of gradual and orderly progress.**

6. In *Chan Kin Sum v. Secretary for Justice* [2009] 2 HKLRD 166, a case which concerns prisoners' right to vote, the Court affirmed that the right to vote is a fundamental right in Hong Kong and without doubt the most important political right.

7. The following points could therefore be considered when reviewing the "right to vote":

- (a) Interpretative principles as outlined in paragraph 5 above means that "elections" must be read in a way as to preserve the right to vote rather than merely the selection of a candidate based on an earlier vote.**

- (b) The key issue is whether the replacement mechanism can fairly and reasonably reflect the will of the electors, or in the words of Article 25(b) of the ICCPR, whether it can guarantee the free expression of the will of the electors.
- (c) To the extent that by-elections are partially abolished in the latest proposal, this may still undermine citizens' right to vote and right to stand for elections.

Unresolved issues and the need for consultation

- 8. The Government had earlier stated unequivocally that allowing the candidate appearing next in the same list to replace the outgoing Member does not reflect the will of the electors. It is important to note that in the Government's paper before the Legislative Council, dated May 2011 (LC Paper No. CB(2)1787/10-11(01)) at paragraph 13, stated its rationale for rejecting the very proposals it now intends to introduce:

“The following considerations are pertinent:

- (a) electors in Hong Kong vote according to the political parties or groups which they wish to support. At the same time, they also cast their votes on the basis of the lists which have candidates who are more well known. Hence, the number of votes obtained by a list of candidates to a significant extent hinges on the presence of individual well-known candidates. Thus, once a candidate has resigned, it is reasonable to assume that in the absence of that candidate, his list may not receive the same level of support. One cannot assume that the votes used by the resigned Member could again be accorded to the list he belonged to;
- (b) furthermore, from the perspective of the electoral system, once an incumbent Legco Member resigns, his votes should go with him as he has already used the quota of the votes to take up his seat; and
- (c) the political party system in Hong Kong is still evolving. In fact, political party politics in Hong Kong have not yet evolved to an extent whereby in the general election, voters can choose between two or three major political parties.” (emphasis added)

- 9. The Government has not addressed why the will of the electors can receive such dramatically different interpretations overnight. It also has not explained why contrary to what the Government has earlier said, it can now be reasonably assumed that in the absence of the outgoing candidate, his list would have received the same level of support or that the votes used by him could again be accorded to the list he belonged to. The fact that an important amendment to the replacement mechanism -

which the Government has previously argued against - is now being proposed reinforces the need for a fuller public consultation.

10. We are of the view the revised proposal still suffers from the same problems in the original proposal, in that the replacement mechanism cannot guarantee the free expression of the will of the electors. In particular, if there is no replacement from the same list of the outgoing Member, the replacement will come from another list. The Government has not explained how a voter can freely express his view through his ballot to select the replacement candidate in case a vacancy arises. As stated above, we consider that the right to vote is more than merely the selection of a candidate based on an earlier vote. The Government's reference to the replacement being made according to the "collective will" of the electors is no substitute for the constitutional requirement that the election must guarantee the free expression of the will of the voters.
11. Under the Government's revised proposal, an incumbent LegCo Member can legitimately and safely pass his seat to his party member in the same list by resigning voluntarily during his 4-year term. This is a significant and fundamental change to our current election system, which again merits wide public consultation.
12. There are many important issues on which the public need to be consulted even with the latest amendment. For example, questions to be considered include whether the public agree to abolishing their existing rights to have a by-election in case of a vacancy arising. If yes, then should it differentiate between the situation of the death of a LegCo Member, and a Member who resigns. Also relevant are the questions whether there should be a by-election if the outgoing Member was the only candidate in the list when he was elected, and how should the replacement mechanism be designed (e.g. whether voters should in future be allowed to vote specifically for the reserve and perhaps casting two votes in the election).

The Law Society re-iterates its recommendation that the Government should withdraw the Bill. A full consultation should then take place so that the views of the public can be ascertained on whether it is necessary to introduce such changes to a citizen's fundamental rights.

**The Law Society of Hong Kong
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