



METHODS FOR SELECTING THE CHIEF EXECUTIVE IN 2017 AND FOR FORMING THE LEGISLATIVE COUNCIL IN 2016

SUBMISSIONS

1. Hong Kong SAR Government published the “*Consultation Document On Methods For Selecting The Chief Executive In 2017 And For Forming The Legislative Council In 2016*” (the Consultation Document) in December 2013. It seeks views from the community on issues relating to the methods for selecting the Chief Executive (CE) in 2017 and for forming the LegCo in 2016. The Law Society of Hong Kong (the Law Society) understands the consultation represents the Government’s effort to gauge views in order to commence the “Five Steps” Process set out in the National People’s Congress’s Standing Committee (NPCSC) Interpretation in 2004.
2. The Law Society has reviewed the Consultation Document. It notes that the Consultation Document embraces initiatives on *political* reform and design of the *political* framework for Hong Kong, chiefly on the universal suffrage for the CE and the Legislative Council.
3. In connection thereto, the Law Society has conducted a members’ survey in April 2014. Over 690 responses were received from a pool of about 9,000 members. The results of the survey are appended.
4. The Law Society wishes to emphasize that we respect members’ views on political development of Hong Kong, but at the same time, it should unmistakably be pointed out that the Law Society is not a political party and as such, it does not wish to render political comments.

5. Mindful of the above, the Law Society shall address *the legal aspects* of those more important issues arising from the Consultation Document. In this submission the Law Society would not therefore respond to the questions posed on the Consultation Paper in a question-and-answer format; we would also not set out any proposals for political reform.

Constitutionality of those issues for consultation

6. The Law Society notes that in the Consultation Paper, among other things, there are proposals on or relating to
 - (a) Nominating Committee (para 3.11 – 3.22);
 - (b) Voting arrangements for electing CE by universal suffrage (para 3.23-3.29);
 - (c) Method of forming Legislative Council, including Functional Constituencies (para 4.14 – 4.18).

Overriding Principles

7. The Law Society considers the following should be the guiding or overriding principles in the discussion of the above issues.
8. The underlying goal or the spirit of the Basic Law, set out in the Preamble of the Basic Law, are instrumental in the consideration of the above:

“In accordance with the Constitution of the People’s Republic of China, the National People’s Congress hereby enacts the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, prescribing the systems to be practised in the Hong Kong Special Administrative Region, in order to ensure the implementation of the basic policies of the People’s Republic of China regarding Hong Kong.”

(in Chinese) “根據中華人民共和國憲法，全國人民代表大會特制定中華人民共和國香港特別行政區基本法，規定香港特別行政區實行的制度，以保障國家對香港的基本方針政策的實施。”

9. Furthermore, Article 11 of the Basic Law provides inter alia that:

“No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this [Basic] Law.”

(in Chinese) “香港特別行政區立法機關制定的任何法律，均不得同本法相抵觸。”

10. It is therefore important that the discussion of the legality of the proposals *must be held* within the boundaries of the Basic Law.

(a) Issues on Nominating Committee

11. Articles 45 of the Basic Law provides that (with emphasis supplied):

“The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

*The method for selecting the Chief Executive 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**. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a **broadly representative nominating committee in accordance with democratic procedures**.*

The specific method for selecting the Chief Executive is prescribed in Annex I: "Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region".

12. The Law Society has identified the more important elements in Article 45 of Basic Law in the above. As a matter of fact, these elements were largely echoed in a speech given by Mr Ji Pengfei (Chairman of the Drafting Committee for the Basic Law) when the Basic Law (Draft) and related documents were submitted at the Third Session of the Seventh NPC on 28 March 1990. Mr Ji was one of the draftsmen of the Basic Law and was the chairman of the drafting committee. The drafting intentions as deliberated by the committee at that time would be relevant when interpretation is being sought.

“In the light of the actual situation”

13. The Law Society considers that, in respect of the “actual situation”, the following views of the NPCSC on the constitutional development of the HKSAR, which are excerpted from the NPCSC Decision on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008 (26 April 2004), are relevant.

*“Any change 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 shall conform to principles such as being compatible with the social, economic, political development of Hong Kong, being conducive to the **balanced participation** of all sectors and groups of the society, being conducive to the effective operation of the executive-led system, being conducive to the **maintenance of the long-term prosperity and stability of Hong Kong.**”* (Emphasis supplied):

Nevertheless, the Law Society wishes to point out that the interpretation of this phrase should be reasonable. In this regard, we reiterate that the question of “actual situation” is not, strictly speaking, a legal issue but a factual one (although this potentially leaves room for argument between people with different interpretation of the facts as regards the “actual situation”).

“In accordance with the principle of gradual and orderly progress”

14. The Law Society notes the following position of the Government previously set out in the 2007 Consultation Paper on constitutional reform:

“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, and should proceed in a gradual and orderly manner and in the light of the actual situation in the SAR, in order to preserve its prosperity and stability.”

15. In this regard, the Law Society considers that the following comments which were previously set out in the Law Society’s response dated 10 October 2007 should

apply *mutatis mutandis* to the consideration of Art.45 in the set up of the nominating committee:

“17. *Whilst [the above position of the Administration] may appear literally consistent with the phrase “gradual and orderly progress”, we submit ... 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...

17.3 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.”

“Nomination by a broadly representative nominating committee in accordance with democratic procedures”

16. Under Article 45 of the Basic Law, the candidates for the office of the CE to be elected through universal suffrage have to be nominated “*by a broadly representative nominating committee in accordance with democratic procedures*”. According to the Decision of the NPCSC dated 29 December 2007, “*the*

nominating committee may be formed with reference to the current provisions regarding the Election Committee in Annex I to the Hong Kong Basic Law.”

17. In respect of the “*broadly representative*” element in Article 45, the Law Society is in support of any proposal(s) which could make the nominating committee more representative, but we prefer not to descend into the debates as to, for example, how many more members should the nominating committee take in. We do take note that in our members’ survey held in April 2014, there is an overwhelming majority of the respondents who opined that the size of the nominating committee should be increased (Question 3 therein).
18. With regard to “*may be formed with reference to/可參照…組成*” in the NPCSC Decision of 29 December 2007, the Law Society agrees that the nominating committee can be formed with reference to the existing Election Committee, but there shall not be any mandatory obligation for the nominating committee to strictly follow those current provisions regarding the Election Committee.
19. As for the element “*in accordance with democratic procedures*”, the Law Society takes the view that the nomination procedures should be designed to *encourage a wide degree of participation* by members of the public, and *a fortiori*, subject to what has been set out in relevant articles in the Basic Law (see paragraph 28 below), no one should unreasonably be included, excluded or “pre-screened” out in the process.
20. In previous submissions of the Law Society, the Law Society has emphasized the importance of increasing public participation in the process of selecting the CE (e.g. through adding directly elected members in the EC). In the light of the provision of Art 45, which embraces the following three considerations:
 - (a) the “actual situation of the HKSAR” where political participation is keenly valued and anticipated,
 - (b) the “democratic procedures” in the nomination process, and
 - (c) the principle of gradual and orderly progress,

the Law Society submits that more direct election elements should be introduced into the nominating committee.

Role and Function of nominating committee

21. The Law Society acknowledges that the nominating committee, as a constitutional body, has been vested with substantive (and not nominal) authority to nominate candidates for the CE election in 2017. Proposal such as civil nomination or nomination by political parties would not be consistent with the Basic Law. Indeed, any proposal that usurps or waters down the constitutional role of the nominating committee is also inconsistent with the Basic Law.
22. The Law Society also acknowledges that the “broadly representative” element in the composition of the nominating committee has to be enhanced so as to comply with Art 45, and enable members of the electorate to exercise their right to vote meaningfully.

(b) Voting Arrangement for electing CE

23. It is instructive to repeat a few principles in the consideration of the proposals in this aspect.
24. Article 26 of the Basic Law provides that

“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.”

Right to vote subject to restrictions, only if reasonable

25. Article 21 of the Hong Kong Bill of Rights Ordinance Cap 383 (HKBOR) (Article 25 of the International Covenant on Civil and Political Rights (ICCPR)) provides that

“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 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.”

26. The right and the freedom to vote are fundamental, but restrictions could lawfully be imposed. If any such restriction is to be imposed, a generous approach needs to be adopted. This clearly has been affirmed by the Court of Final Appeal upon the interpretation of the fundamental rights enjoyed by all residents.¹ In *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, Chief Justice Li said (at para.26)

“Thus, in the context of rights recognized by the ICCPR as applied to Hong Kong (whether or not such rights are also enshrined in the Basic Law), art.39(2) spells out the two requirements which any purported restriction must satisfy.

The two requirements are: (1) prescribed by law; and (2) the restrictions shall not contravene the provisions of art.39(1), viz it must be consistent with the ICCPR as applied to Hong Kong prior to 1 July 1997.”

27. In *Chan Kin Sum v. Secretary for Justice* [2009] 2 HKLRD 166, Andrew Cheung J held that the right to vote in Article 26 is not an absolute right. It may be restricted or otherwise interfered with but only if the restriction or interference is prescribed by law and such restriction or interference does not contravene Article 21 of the Hong Kong Bill of Rights as being an unreasonable restriction.

At para 73, His Lordship said

“... Furthermore, for a right as fundamental as the right to vote, a restriction that is not proportionate to the achievement of the (legitimate) aim that it seeks to achieve and that goes beyond what is necessary to achieve that aim can hardly be said to be a ‘reasonable’ one.”

Candidacy for and right to stand for election

28. In respect of the candidacy for CE election, the Law Society observes that the following in the Basic Law are relevant :

¹ *Ng Ka Ling & Others v. Director of Immigration* (1999) 2 HKCFAR 4, *HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442

Art 43:

“ The Chief Executive of the Hong Kong Special Administrative Region shall be accountable to the Central People’s Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law.”

(in Chinese) “香港特別行政區行政長官依照本法的規定對中央人民政府和香港特別行政區負責。”

Art 47:

“The Chief Executive of the Hong Kong Special Administrative Region must be a person of integrity, dedicated to his or her duties.”

(in Chinese) “香港特別行政區行政長官必須廉潔奉公、盡忠職守。”

Art 52:

The Chief Executive of the Hong Kong Special Administrative Region must resign under any of the following circumstances:

(1) When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons;

(in Chinese) “香港特別行政區行政長官如有下列情況之一者必須辭職：(一) 因嚴重疾病或其他原因無力履行職務;”

29. As for the right to stand for election, the Law Society notes, with agreement, the following comments by the United Nations Human Rights Committee.

“17. The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.

21. *Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.*"²

30. In this regard, it is relevant to note that any interference with the right to take part in the conduct of public affairs could not easily be acceptable. Such right is guaranteed under art.25 of the ICCPR as applied to Hong Kong by art.21 of the HKBOR (*ibid*), and enshrined in Article 39 of Basic Law. Thus in *Tse Hung Hing v. Medical Council of Hong Kong* [2010] 1 HKLRD 111 Chu J held that a blanket ban on the right to stand for election and to hold office of the Medical Council of Hong Kong upon conviction for an offence punishable with imprisonment, giving no regard to the nature, gravity and culpability of the offence involved was an unreasonable or disproportionate restriction.

(c) Method of forming Legislative Council, including Functional Constituencies

Existence of functional constituencies

31. Article 68 of the Basic Law provides the following.

“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. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

² United Nations Human Rights Committee, ‘General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) (CCPR/C/21/Rev.1/Add7), 7 December 1996

The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: "Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures".

32. Article 68, as above-quoted, is instructive in the discussion of the role and the existence of functional constituencies, because it refers to the actual situation of Hong Kong. The phrases "actual situation of the HKSAR" (and also the "principle of gradual and orderly progress") appear in both art.45 and art.68 of Basic Law. The comments made in the previous paragraphs are therefore equally applicable here.
33. In the light of the above, and also given the NPCSC Decision dated 29 December 2007 (i.e. after the CE was to be selected by universal suffrage, the election of the Legco may be implemented by the method of electing all the members by universal suffrage), the Law Society considers it is relevant to reiterate our submissions on constitutional reform dated 10 October 2007 in the following:

"33. Given the notion of universal and equal suffrage as enshrined by the Basic Law and the ICCPR, we submit that the retention of [functional constituencies or 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.”*

34. The Law Society adds that:

- i. any reform of the functional constituencies should be consistent with the goal of their eventual abolition.
- ii. In the transitional period, there should be an increase in the number of geographical seats by removing the 50:50 ratio for the 2016 elections, in order to prepare for the eventual abolition of the functional constituencies in the future in an orderly fashion in accordance with the stated aim of universal suffrage in art. 68.

Principles underlining the Design of the Political Structure

35. Finally, we invite the attention of the Government to the following passages cited in the case of *Wong Hin Wai v Secretary for Justice* HCAL 51 and 54/2012, with our emphasis supplied.

“26. In R (Barclay) v Lord Chancellor, Lord Collins summarized the relevant European jurisprudence in several propositions set out at paras.52-64 of the judgment. The relevant test can be found at paras.58 and 59:

*[58] Sixth, limitations on the exercise of the right to vote or stand for election must be imposed in pursuit of a legitimate aim, must **not be arbitrary or disproportionate, and must not interfere with the free expression of the opinion of the people in the choice of the legislature...***

*[59] Seventh, such limitations must not curtail the rights under art.3 to such an extent as to impair their very essence, and deprive them of their effectiveness. **They must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. ...***

27. ...

In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature - in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of art.3 of Protocol No 1 (see Hirst (No 2) [GC], cited above, para.62).”

36. The above citation, the Law Society submits, are relevant to both the rights to vote and the rights to stand for election, which in turn would be related to the issue of, for example, the number of CE candidates and nomination threshold.
37. In this regard, in the April members’ survey of the Law Society, a large number of respondents preferred to have no cap on the number of CE candidates (Question 5 therein).

Conclusion

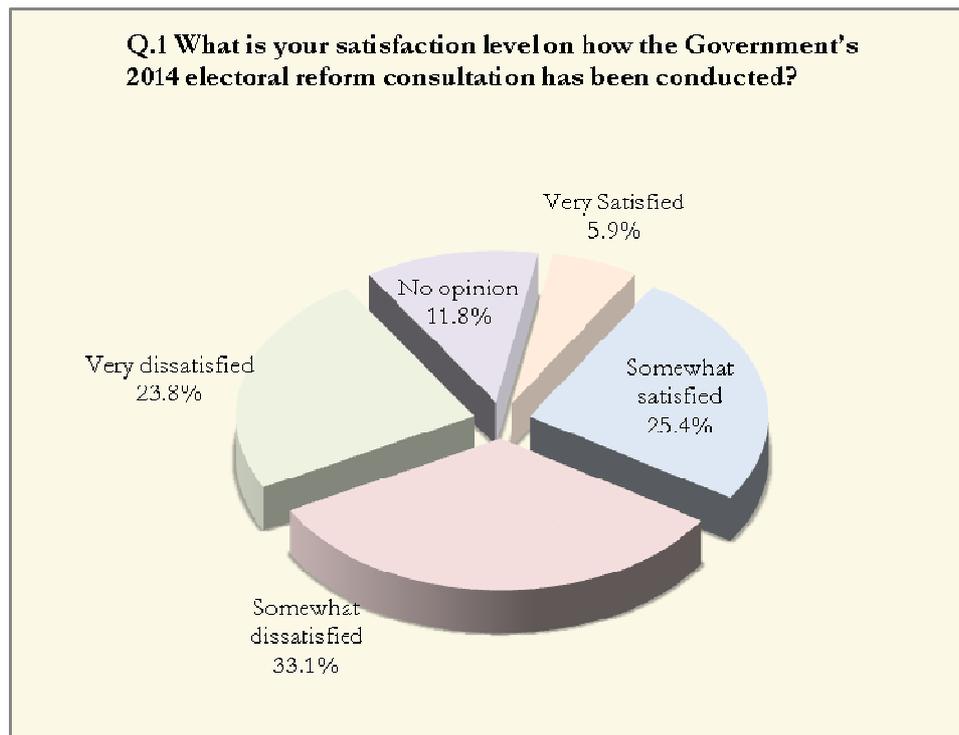
38. It is clear from the above members’ survey that the majority of the responding members intend to move forward and towards universal suffrage in the election of CE and LegCo. A majority would be dissatisfied if the electoral reform were to “fail” and the next election had to continue to adopt the current system (Question 9 therein).

The Law Society of Hong Kong

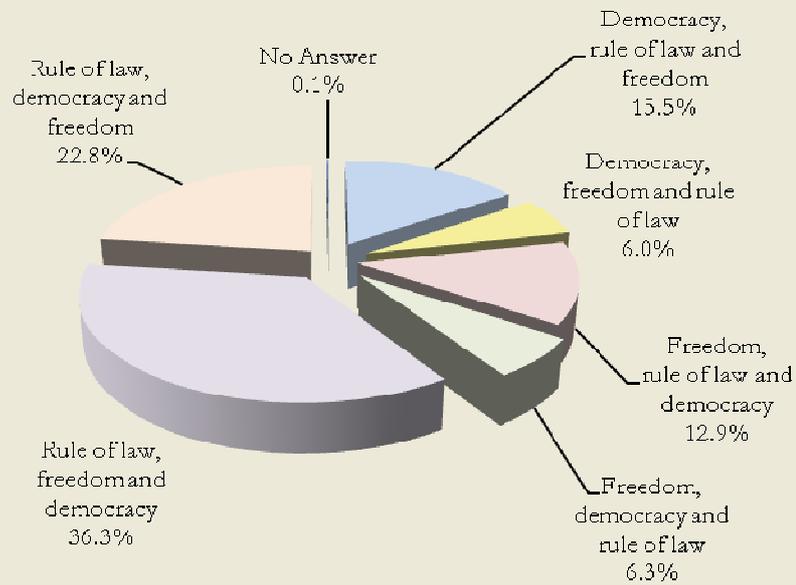
2 May 2014

The Law Society of Hong Kong Public Policy Committee
Electoral Reform Survey

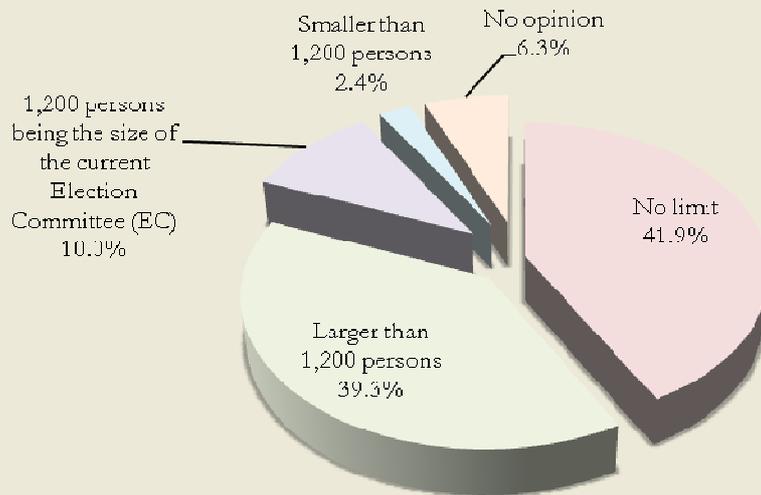
Results of Questions 1-9



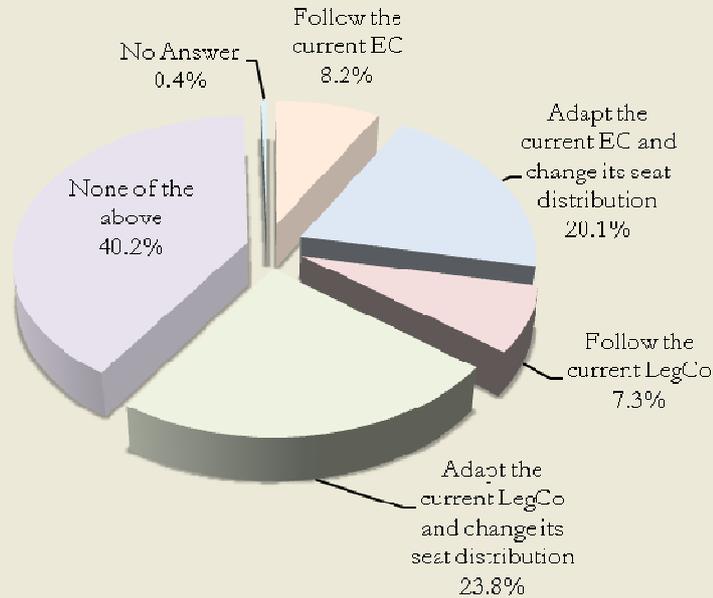
Q.2 In order of importance, from most to least, how would you personally prioritise the following values: democracy, rule of law and freedom:



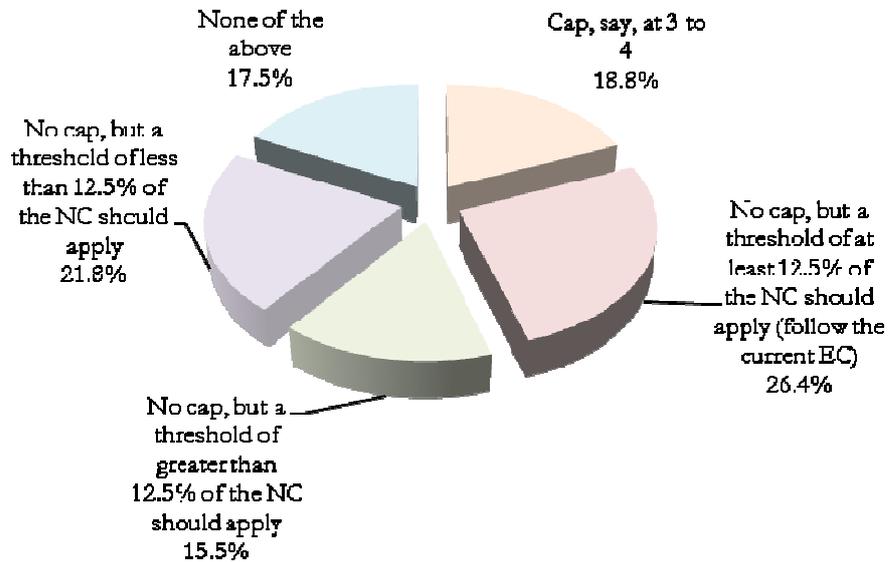
Q.3 In respect of the pool of persons who could nominate the Chief Executive, what should the size be?



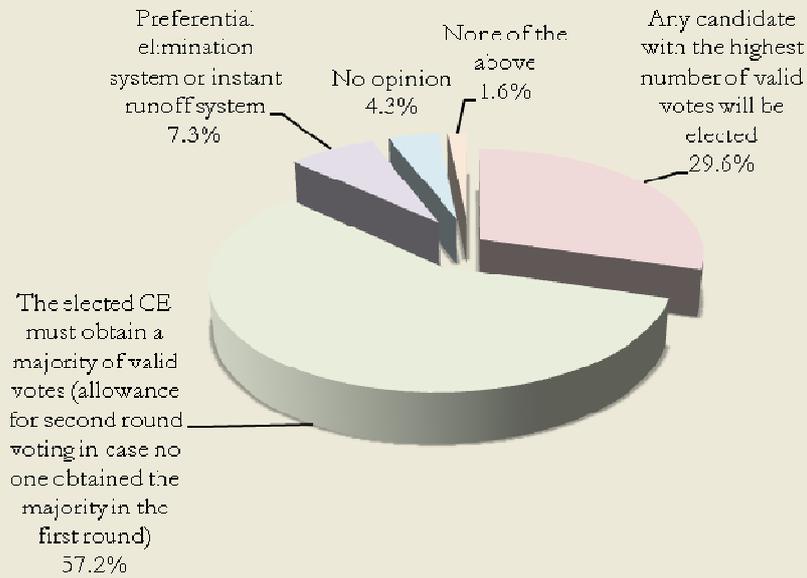
Q.4 If the Nominating Committee (NC) were established, what should its composition be?



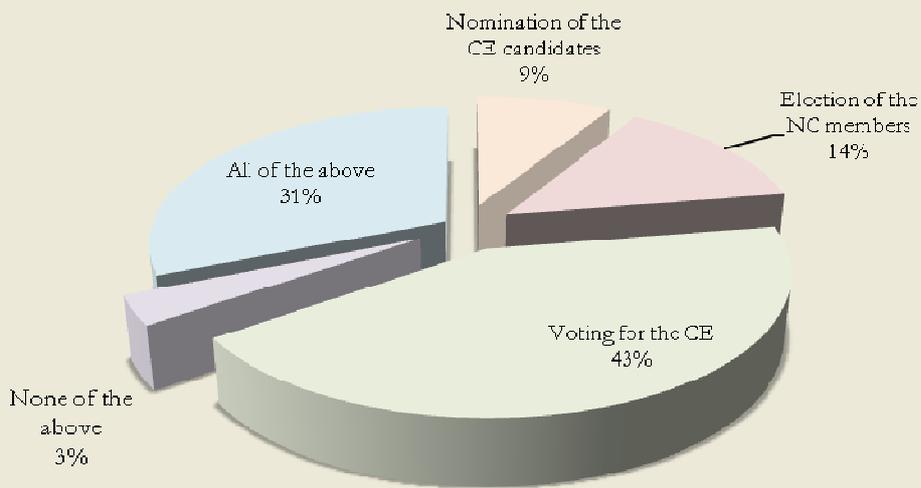
Q.5 In each election, should there be a capped number of CF candidates or a minimum number of nominations before a person can become a candidate (i.e. a nomination threshold)?



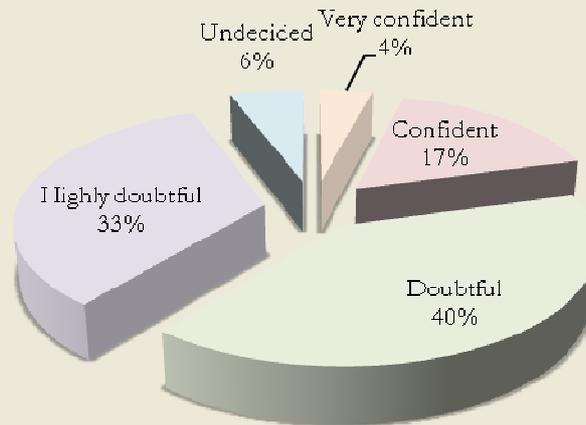
Q.6 What should the voting arrangement be for electing the CE?



Q.7 At which stage of the CE selection process could "one person, one vote" be accounted for most under the Article 45 of the Basic Law?



Q.8 How confident are you that the ultimate aim of universal suffrage will be achieved eventually for both the CE selection and the LegCo election process after 2017 in accordance with the Basic Law?



Q.9 If the electoral reform "fails", how satisfied would you be if the next election continued to adopt the current system?

