

**Bills Committee on
Legislative Council (Amendment) Bill 2012**

Constitutionality of the Proposal

This paper sets out the Administration's legal views on the constitutionality of the legislative proposal (the "Proposal") in the Legislative Council (Amendment) Bill 2012 (the "Bill").

Background

2. At the Special Meeting of the Panel on Constitutional Affairs held on 31 January 2012, some Members requested the Administration to provide further information regarding the constitutionality of the Proposal to be introduced into the Legislative Council ("LegCo"), and to disclose the contents of the independent legal advice obtained from external Counsel, Lord David Pannick QC.

3. The Bill was introduced into the LegCo for First and Second Reading on 8 February 2012. In summary, the Bill seeks to amend the Legislative Council Ordinance (Cap. 542) (the "LCO") to implement the following arrangement for filling mid-term vacancies in the LegCo with effect from the 5th term of LegCo:

- (a) a vacancy arising mid-term in a geographical constituency ("GC"), the District Council (second) functional constituency ("DC (second) FC") or any other functional constituency ("FC") under section 15 or section 72 of the LCO or Article 79 of the Basic Law would continue to be filled by a by-election;
- (b) a Member returned by a GC, the DC (second) FC or any other FC who has voluntarily resigned from office under section 13 or section 14 of the LCO would be prohibited from standing in any by-elections in all GCs, the DC (second) FC and other FCs in the same LegCo term within six months of his resignation; and

- (c) the restriction would not apply to general elections. If the six-month prohibition spans over a current LegCo term and the following LegCo term, the prohibition will not be applicable to the by-elections in the following LegCo term.

4. This paper sets out the Administration’s legal considerations in forming the view that the Proposal in the Bill is constitutional.

The Administration’s legal assessment

5. We have carefully considered the Proposal in consultation with the Department of Justice (“DoJ”). The Proposal prima facie restricts a resigning Member’s right to stand for election under Article 26 of the Basic Law (“BL”) and Article 21(b) of the Hong Kong Bill of Rights (“HKBOR”)¹. The rights under BL Article 26 and HKBOR Article 21(b) are fundamental rights. The right to vote has moreover been described as “the most important political right”². It is well established in local jurisprudence that fundamental rights and freedoms protected under the Basic Law or the HKBOR must be given a generous interpretation in order to give individuals the full measure of the rights and freedoms so guaranteed³.

6. At the same time, we note that the rights under BL Article 26 and HKBOR Article 21 are not absolute but may be subject to reasonable restrictions prescribed by law, so long as, applying the “proportionality test”, they are rationally connected to legitimate aim(s), and are no more than is necessary to achieve those aim(s).⁴

7. The starting point for the purposes of considering the constitutionality of the Proposal in question must be the Basic Law and the

¹ This right is based on Article 25(b) of the International Covenant on Civil and Political Rights (“ICCPR”)

² Per Andrew Cheung J (as he then was) in Chan Kin Sum v Secretary for Justice [2009] 2 HKLRD 166, at para. 164.

³ See for example the judgments of the Court of Final Appeal in Ng Ka Ling v Director of Immigration (1999) 2 HKCFAR 4 and Leung Kwok Hung & Ors v HKSAR (2005) 8 HKCFAR 229 and of the Court of First Instance in Chan Kin Sum, supra.

⁴ The proportionality test has been applied by our Court in analyzing the rights under BL Art. 26 and/or HKBOR Art. 21 – see for example Chan Kin Sum v Secretary for Justice [2009] 2 HKLRD 166.

HKBOR.⁵ As regards the principles to be applied when interpreting the provisions of the Basic Law, the Court of Appeal has said that “purpose and context are the cornerstones of constitutional interpretation”.⁶ BL Article 26, which provides for electoral rights, forms “part of a mosaic which includes articles 45, 68 and Annexes I and II of the Basic Law”⁷. Specifically, with respect to the formation of the LegCo, BL Article 68(3) provides that “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’.” Paragraph 2 of Part I of Annex II of the BL further provides that “[t]he division of geographical constituencies and the voting method for direct elections therein; the delimitation of functional sectors and corporate bodies, their seat allocation and election methods; and the method for electing members of the Legislative Council by the Election Committee shall be specified by an electoral law introduced by the Government of the Hong Kong Special Administrative Region and passed by the Legislative Council.” BL Article 68 and Annex II thus give the LegCo broad discretion in determining the contents of the legislation which governs the “specific method” for forming the LegCo.

8. Moreover, different jurisdictions are entitled to develop their own electoral systems in different ways to reflect the differences in their own historical background, culture and political development. As pointed out by the European Court of Human Rights, “[t]here are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought which it is for each ... State to mould into their own democratic vision.”⁸ In reviewing the electoral system, the HKSAR Government and the LegCo may seek changes in the electoral process to deal with perceived problems that are specific to Hong Kong.

⁵ Per Andrew Cheung J in Chan Kin Sum, supra, at para 49.

⁶ Per Stock VP in Chan Yu Nam v Secretary for Justice (CACV 2/2010), at para 28.

⁷ Court of Appeal in Chan Yu Nam, supra, at para 105 of the judgment (concerning the participation in the public affairs of the HKSAR through elections in the early years of Hong Kong’s new constitutional dispensation).

⁸ See the judgment of the Grand Chamber of the European Court of Human Rights in Hirst v United Kingdom (No. 2) (App. No. 74025/01), at para 61. The European Court reaffirmed that the margin of appreciation in such matter is wide.

9. Although restrictions on fundamental rights should be considered carefully and construed narrowly, and the restrictions imposed should be no more than necessary to pursue legitimate objective(s), in light of the above principles and in particular, the broad discretion given by the Basic Law to the LegCo in determining the contents of the legislation governing the specific method for its formation, the Administration and the LegCo enjoy considerable margin of appreciation in managing electoral affairs.

10. As pointed out by the Court of Final Appeal in Mok Charles Peter v Tam Wai Ho⁹, a case concerning electoral matters, the concept of margin of appreciation is well established in our courts and has been applied by the courts in relation to the views of the Legislature.

11. Although the Court “has the ultimate responsibility to determine whether legislation is constitutional”¹⁰, and the Court “must not and does not defer to anybody on the question of what is or is not constitutional”¹¹, “what the Court will do is to recognise that, save where absolute and non-derogable rights and freedoms are concerned, there will generally and naturally be a range of legislative choices as to which any preference that the Court may have is irrelevant”¹².

12. In Chan Kin Sum v Secretary for Justice, Andrew Cheung J (as he then was) also considered the concept of “margin of appreciation” at para. 154 of the judgment:

“I have no difficulty with the concept of margin of appreciation or deferring to the judgment of the legislature. The point I wish to make here is that by whatever name the courts’ deference is called, one should be very slow, in a domestic context, to evaluate *the quality* of the legislative debate, particularly with a view to *lowering* the deference or respect that the courts should have, in a given case, for the choice made by the legislature. That is, generally speaking, no business of the courts. Once the legislature has spoken, the courts should generally take it from there. Furthermore, the courts should, where appropriate, defer to the wisdom and choices made by the LegCo or the executive, in particular where questions of social or economic policy are involved. The respect and deference is much less required where the rights are of high

⁹ FACV 8/2010, per Ma CJ, at para 55 of the judgment.

¹⁰ Per Ma CJ in Mok Charles Peter, supra, at para 56 of the judgment.

¹¹ Per Bokhary PJ in Mok Charles Peter, supra, at para 79 of the judgment.

¹² Ibid.

constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection. See also the observations by Ma CJHC in *Leung v Secretary for Justice* [2006] 4 HKLRD 211, 239-240 (paras 52-53).”

13. Of course, as pointed out by Cheung J (at para 156), the margin of appreciation or deference to legislature does not relieve the Court of its constitutional role and responsibility to examine the choices, as made, closely and see whether the restrictions of fundamental rights (the right to vote in that case) can be justified.

14. While ruling that the blanket prohibition of voting by prisoners in that case was an unconstitutional restriction on the prisoners’ right to vote, Cheung J said, at para 165 of the judgment,

“Having said that, I must strongly emphasise that the Court is not suggesting that some form of restrictions on voting (or even registration) cannot be imposed by the legislature against those in jail (and others). Far from it – I have yet to come across a single case that suggests so. **The single and all important question that the Court has to decide in the instant case is whether the restrictions in question are compatible with the constitutional right of prisoners to vote. The Court is not otherwise concerned with where the cut-off line should be drawn and how it should be drawn.** That is a matter for the legislature: *Hirst* in para 83. Although in the concurring judgment of Judge Caflisch, the learned judge did set out his view on what would constitute reasonable restrictions (para 0-I7), **for my part, I do not think it is the function of the courts to say what would constitute reasonable restrictions in Hong Kong. That is the function of the legislature, not the courts.**” (emphasis added)

15. Applying these principles to the Proposal, DoJ is of the view that the Proposal is constitutional as the restriction on the right to stand for election is a reasonable, necessary and proportionate measure in serving a legitimate purpose, namely to deter the practice of a Member resigning in order to trigger a by-election in which he intends to stand and seek to be re-elected:

- (a) the Administration has already explained why it considers such conduct to be an abuse of the Member’s power to resign and an abuse of the electoral process, with negative consequences arising, and why this is a mischief which needs to be addressed. See the Consultation Paper on Arrangements for Filling

Vacancies in the Legislative Council (“Consultation Paper”) issued by the Constitutional and Mainland Affairs Bureau in July 2011. The submissions received by the Administration in response to the public consultation indicate that there is strong public support for the Government to address the mischief and that, amongst the four Options set out in the Consultation Paper, Option 1 receives more support than the other three Options;

- (b) under the Proposal, by-elections will continue to be held to fill mid-term vacancies arising in LegCo. The public’s right to vote under BL Article 26 and HKBOR Article 21(b) is not affected. This addresses concerns previously raised by some members of the public that their right to vote should not be restricted because of the mischief;
- (c) the restriction on the right to stand for election in a by-election only applies to a Member who has resigned or is taken to have resigned from office under sections 13 and 14 of the LCO. This is a more targeted response to the mischief, namely the phenomenon of a Member voluntarily resigning in order to trigger a by-election in which he intends to stand and seek to be re-elected;
- (d) the restriction only applies to by-elections held in the same LegCo term within 6 months of the effective date of the resignation. In this regard, it may be noted that past experience indicates that a by-election would normally be conducted around 4 months after a mid-term vacancy arises;
- (e) insofar as the Proposal may result in some “hard cases” where a Member chooses to resign for health or other personal reasons or concerns, it is well-established that the legislature may adopt a general rule which is justifiable, even though it may result in a detrimental effect on individuals in hard cases. Moreover:
 - (i) the restriction only applies to a Member who has resigned or is taken to have resigned from office under

sections 13 and 14 of the LCO. It does not apply to a Member who vacates the office in other circumstances, including BL Article 79(1);

- (ii) a Member with a valid reason may apply to the President of the LegCo for consent to be absent from meetings for the purposes of BL Article 79(2). As representatives of the constituents in a democratic society, LegCo Members have important public functions to discharge. The assumption of the office of a Member is a solemn public commitment, and it is expected that a Member would give serious consideration before deciding to resign from office;
- (f) the Proposal does not restrict the resigning Member's right to stand in any subsequent general election, even if it is held within 6 months of his resignation. Nor would the resigning Member be prevented from standing in any subsequent by-election held in the next LegCo term.

16. In view of the above, the Administration is of the view that the Proposal represents a targeted and proportionate solution in addressing the mischief, whether in terms of the persons affected by the Proposal (resigning Members), the circumstances in which the vacancy arises (voluntary resignation), the scope of the restriction (right to stand for election in a by-election) and the restriction period (no more than 6 months in the same term). The Proposal strikes a fair balance between the need to address the mischief and to protect the integrity of the electoral system on the one hand, and avoiding imposing unnecessary restrictions which may be an "overkill" on the other. The Proposal provides a simple, practical and reasonable solution to the mischief while keeping the changes to the existing system to a minimal. The Proposal is compatible with the provisions of the Basic Law and the HKBOR, and is constitutional.

Independent legal advice from external Counsel

17. We have sought independent legal advice from Lord David Pannick QC who confirmed that the Proposal is legally defensible as compatible with the Basic Law and the HKBOR. His substantive legal advice is extracted and set out below.

General legal principles

18. As a matter of general constitutional/human rights legal principles, Lord Pannick QC advised as follows:

- “(1) The rights under Article 26 of the Basic Law and Article 21 of the Bill of Rights are not absolute. Restrictions may be, and are, imposed on the right to stand for election: for example, section 37 of the LCO prohibits a person under the age of 21 from standing for election, and section 39 disqualifies categories of people such as bankrupts, prisoners and those found to be incapable under the Mental Health Ordinance.
- (2) Article 26 of the Basic Law states that permanent residents “shall have the right to vote and the right to stand for election in accordance with law”. As Article 18 of the Basic Law makes clear, “law” includes the Basic Law itself. See Chan Yu Nam v Secretary for Justice (HCAL 32/2009, 10 December 2009, Andrew Cheung J), paragraph 92.
- (3) Article 68 and Annex II of the Basic Law give LegCo a broad discretion in determining the contents of the legislation which governs the “specific method” for forming LegCo. In applying the proportionality test, the courts would accord considerable weight to the views of LegCo on what steps are needed to maintain the integrity of the democratic process and would recognise a broad discretionary area of judgment in relation to these matters of policy. Article 68 of the Basic Law states that LegCo “shall be constituted by election”. Article 68 adds that “the specific method for forming the Legislative Council” is prescribed in Annex II, which states that “the method for electing members” of

LegCo “shall be specified by an electoral law” introduced by the Government and passed by LegCo. Andrew Cheung J explained in Chan Yu Nam v Secretary for Justice at paragraph 118 that Article 25(b) of the International Covenant on Civil and Political Rights - which guarantees the right to vote - must be understood in the Hong Kong context, through Article 39 of the Basic Law, by reference to the specific Basic Law provisions, that is Article 26, Article 68 and Annex II. The applicant's appeal to the Court of Appeal in Chan Yu Nam was dismissed (CACV 2/2010, 7 December 2010). At paragraph 105, Stock VP stated for the Court of Appeal that

“Article 26 is part of a mosaic which includes Articles 45, 68 and Annexes I and II of the Basic Law...”.

- (4) In Chan Kin Sum v Secretary for Justice [2009] 2 HKLRD 166, a case about prisoners' right to vote, Andrew Cheung J held at paragraphs 61-62 that the right to vote under Article 26 may be restricted if the restriction is prescribed by law and proportionate. He referred to Article 21 of the Bill of Rights (which is closely based on Article 25 of the International Covenant on Civil and Political Rights) and allows for restrictions that are not “unreasonable”. Andrew Cheung J held in Chan Kin Sum at paragraphs 61-62, that a proportionality test applied even though the right to vote is stated in apparently absolute terms in Article 26 of the Basic Law. That must be correct, otherwise the law could not restrict the right to stand for election by reference to age or mental competence, for example, however reasonable the restriction might be. And the law would not be able to require candidates to show that they are nominated by a prescribed number of supporters and to provide a deposit (to be forfeited if the candidate fails to obtain a specified proportion of the total votes cast): see the Legislative Council (Subscribers and Election Deposit for Nomination) Regulations (Cap 542, sub leg C). Such requirements are very common in electoral systems throughout the world. A proportionality test was also applied by Cheung J in Lau San Ching v Apollonia Liu (1995) 5 HKPLR 23, paragraph 67, concerning a challenge under Article 21 of the Bill of Rights to the

legality of a 10-year residential requirement for nomination for election to a District Board. (The case was thereafter heard by the Court of Appeal which did not address the proportionality test). So restrictions may be imposed, so long as they are proportionate.

- (5) The application of the principle of proportionality was addressed by the CFA in Leung Kwok Hung v HKSAR (2005) 8 HKCFAR 229, paragraphs 33-38:

“(1) the restriction must be rationally connected with one or more of the legitimate purposes; and

(2) the means used to impair the right of peaceful assembly must be no more than is necessary to accomplish the legitimate purpose in question”.

- (6) However, the application of the principle of proportionality involves a margin of discretion for the State. Because Article 26 arises in the context of social and political choices by the State, for which there are no right answers, the courts will recognise a discretionary area of judgment for the legislature and for the executive. See, for example, Lau Cheong v HKSAR (2002) 5 HKCFAR 415 (on mandatory life sentences for murder) at pp. 448-449, paragraphs 102-105. A margin of discretion may be appropriate even in relation to rights of fundamental constitutional importance. In R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312, paragraph 33, Lord Bingham (for the Appellate Committee of the House of Lords) said, in upholding restrictions on freedom of expression (to prevent the broadcasting of advertisements on political subjects):

“The weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter. In the present context it should in my opinion be given great weight ... [I]t is reasonable to expect that our democratically-elected politicians will be particularly sensitive to the measures necessary to safeguard the

integrity of our democracy. It cannot be supposed that others, including judges, will be more so”.

I would expect the Hong Kong courts to accord a similarly broad margin of discretion to LegCo in relation to the detailed arrangements for implementing the democratic process, especially when Article 68 and Annex II of the Basic Law expressly leave such matters to LegCo. Indeed, Article 26 of the Basic Law, unlike most of the rights conferred by Chapter III of the Basic Law requires positive action by the Administration to establish a scheme. Most of the rights are focused on prohibiting State interference, for example with free speech or freedom of assembly (although all rights may require positive action in some contexts). Because Article 26 requires positive action, Article 68 and Annex II of the Basic Law recognise that it must be for LegCo to decide what positive action is required. Andrew Cheung J was therefore correct, in my opinion, to state in Chan Kin Sum at paragraph 165 in relation to Article 21 of the Bill of Rights:

“I do not think it is the function of the courts to say what would constitute reasonable restrictions in Hong Kong. That is the function of the legislature, not the court”.

- (7) This margin of discretion does not remove the power and the duty of the court to consider and decide whether the approach adopted by LegCo satisfies constitutional standards of proportionality. See Andrew Cheung J in Chan Kin Sum at paragraphs 154-157 and see Mok Charles Peter v Tam Wai Ho (CFA, 13 December 2010) at paragraphs 55-56 (Ma CJ) and at paragraph 79 (Bokhary PJ). Nevertheless, the approach adopted by LegCo is not subject to an appeal to the court on the merits. The court will recognise a broad discretionary area of judgment for LegCo in relation to LegCo's decisions on the detailed implementation of the electoral system, including how to address vacancies in LegCo between general elections.”

19. Lord Pannick QC advised that:

“The international materials recognise the width of the discretion enjoyed by States in relation to the details of the electoral system:

- (1) The Human Rights Committee has published General Comment No. 25 on Article 25 of the ICCPR. It states at paragraph 21 that Article 25 “does not impose any particular electoral system” so long as it is compatible with the general right by guaranteeing and giving effect to the free expression of the will of the electors. Paragraph 15 says:

“The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. ...”.

The General Comment imposes no duty to hold by-elections.

- (2) Article 3 of the First Protocol to the European Convention on Human Rights states:

“The High Contracting parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.

The Grand Chamber of the European Court of Human Rights has recognised a broad discretion for the State in deciding on the details of the electoral system. In Yumak and Sadak v Turkey (2008) 48 EHRR 61, the Court held that there was no breach of Article 3 of the First Protocol when the State provided for a

threshold of 10% of the votes nationally before a party gained any Parliamentary seats. The effect was that only 2 of the 18 parties which took part in the 2002 elections passed the 10% threshold and secured seats. A party which won 45% of votes in a particular province obtained no representation in the Parliament. The Court concluded that the threshold law served the legitimate aim of avoiding excessive and destabilising Parliamentary fragmentation and thus strengthened government stability and that it was not in breach of Article 3 of the First Protocol. The Court held at paragraphs 109-112:

- (a) The rights to vote and to stand for election are “not absolute”, there is room for “implied limitations” and States “must be given a wide margin of appreciation in this sphere”.
- (b) The legality of the limitation depends on two criteria: “whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people”.
- (c) The Court must determine whether these principles have been satisfied. The Court

"has to satisfy itself that limitations do not curtail the rights in question to such an extent as to impair their very essence, and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim and that the means employed are not disproportionate. In particular, any such conditions 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. ...”.

(d) The State enjoys

"a wide margin of appreciation when it comes to determination of the type of ballot through which the free expression of the opinion of the people in the choice of the legislature is mediated".

The Protocol

"does not create any obligation to introduce a specific system, such as proportional representation or majority voting with one or two ballots".

(e) The rules adopted

"vary in accordance with the historical and political factors specific to each State".

The large number of diverse systems shows "the diversity of the possible options". The Court emphasised that

"any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

(f) The Court also emphasised that the breadth of the discretion is necessary because

"it should not be forgotten that electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other: on the one hand to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of

thought so as to promote the emergence of a sufficiently clear and coherent political will”.

- (3) Applying these principles, the Supreme Court of the United Kingdom held in R (Barclay) v United Kingdom [2010] 1 AC 464, 541, paragraphs 70-71, that it was not in breach of Article 3 of the First Protocol for Sark (in the Channel Islands) to have a legislature with 28 elected representatives of the people, and 2 unelected Members - the Seigneur (who can speak but not vote) and the Seneschal (who presides but may not otherwise speak and who may not vote)”

Approach to be adopted by LegCo in considering the Proposal

20. Lord Pannick advised that:

“It is important that LegCo, when it considers the Administration's proposal, should direct itself as follows:

- (1) It must proceed from the starting point that the right to stand for election is of fundamental constitutional importance and any restrictions or alterations need very careful consideration of whether they are truly necessary to address a legitimate aim and are proportionate.
- (2) It must ask itself whether the mischiefs posed by a Member resigning in order to stand in the consequent by-election are so great as to require a remedy.
- (3) It must ask itself whether the reform proposed is proportionate in that the means used to impair the right are no more than is necessary to address the mischief.

If LegCo adopts this approach, and approves the Administration's proposal, then, applying the principles which I have set out [in paragraphs 18 and 19 of this Bills Committee paper] above, I would expect the courts to decide that LegCo is acting within its discretion because its views are entitled to

great weight on what steps are needed to maintain the integrity of the democratic process.”

21. Applying the general legal principles to the Proposal, Lord Pannick QC advised on the following in particular.

Whether the Proposal pursues a legitimate aim

22. With regard to whether the phenomenon of a Member resigning in order to trigger a by-election in which he/she intends to stand and seek to be elected is a mischief, Lord Pannick QC advised that:

- “(1) The Administration and LegCo are entitled to regard it as an abuse of the power of a Member to resign for him to do so in order to provoke a by-election in which the Member intends to stand and seek re-election. The Administration is entitled to regard this as an abuse because it will inevitably mean that the constituents are deprived of a representative during the period between resignation and the by-election; LegCo will be deprived of a Member during that period; the by-election will involve costs to public funds; and if such resignations to trigger by-elections become a common occurrence, respect for the electoral process will be undermined, particular when (as occurred in 2010) such a device will lead to a low turnout in the by-election.
- (2) The fact that it is not unknown for a Member of the legislature in other countries to resign in order to trigger a by-election (for example David Davis MP in the Westminster Parliament in 2008) does not prevent the Administration from regarding such a practice as a mischief to be addressed in Hong Kong.”

Proportionality of the proposed restriction

23. As regards the proportionality of the Proposal, Lord Pannick QC advised that:

- “(1) There is no question of a Member who has been elected being required to stand down before the end of his term. Any Member

who is considering resigning and forcing a by-election would know of the consequences.

- (2) A six month period is long enough to deter abusive conduct and not so long that it unreasonably prevents a Member from standing again if circumstances alter. Past experience shows that a by-election in a GC is normally held within 4 months of the vacancy arising. Following the resignation of the five LegCo Members in January 2010, the relevant by-elections were held in May 2010. Furthermore, in accordance with section 36(2)(a) of the LCO, where a casual vacancy arises within the 4 months preceding the end of the current LegCo term, no by-election needs to be held to fill the vacancy.
- (3) A resignation would lead to a by-election. Another candidate from the same party as the resigning Member would be able to stand.
- (4) The six months prohibition would only apply to by-elections in the same LegCo term. So a GC Member who resigns in May 2012 would be prohibited from standing in the ensuing by-election and any other by-elections before the next general election in September 2012, but he would be able to stand in the general election to be held in September 2012, as well as in any by-elections held in the new LegCo term.
- (5) It will be said that one can envisage circumstances in which it may be appropriate for a Member to resign for the purpose of submitting himself to the electorate in a by-election so they can decide whether they wish to continue to be represented by him. For example, if a Member decides to change his party allegiance or he has been involved in some scandalous conduct. But it is well-established that the legislature may adopt a general rule (provided that it is justifiable) even though this will have a detrimental effect on individuals in hard cases. Otherwise legal certainty would need always to give way to discretion. See, for example, R (Pretty) v DPP [2002] 1 AC 800, 823, paragraph 29 (Lord Bingham of Cornhill for the House of Lords); R (Carson)

v Secretary of State for Work and Pensions [2006] 1 AC 173, paragraph 41 (Lord Hoffmann for the House of Lords); Evans v United Kingdom (2007) 46 EHRR 728, 755, paragraph 89 (Grand Chamber of the European Court of Human Rights); Kong Yunming v The Director of Social Welfare (No. 127 of 2008, A. Cheung J, 23 June 2009), paragraphs 125-126; and Mathews v Diaz 426 US 67, 83 (1976) (United States Supreme Court). In R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312, paragraph 33, Lord Bingham (for the Appellate Committee) said in relation to a right – freedom of expression – which receives very substantial protection from the courts:

“A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.”

Consistency with the list proportional representation system

24. As to whether continuing to hold by-elections to fill mid-term vacancies may be inconsistent with the list proportional representation system adopted for general elections in GCs and the DC (second) FC, Lord Pannick QC advised that:

“I recognise that the proposal of the Administration would involve retaining by-elections where a Member resigns, even though this may have undesirable consequences in shifting the political balance in a multi-member proportional representation system. But the current system involves by-elections. And LegCo is entitled to conclude that by-elections are desirable to give the electorate the opportunity to replace a resigning Member, and that it would be disproportionate to the mischief to react by abolishing or limiting by-elections when a vacancy occurs.”

Section 2(5) of the HKBOR Ordinance (Cap. 383)

25. It has been argued that the right of electors to vote and of candidates to stand for election in by-elections arising out of a casual vacancy in LegCo are existing legal rights and the proposed restriction of the right to stand for by-election would be inconsistent with section 2(5) of the HKBOR Ordinance (Cap. 383). Section 2(5) of the Ordinance provides:

“There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in Hong Kong pursuant to law, conventions, regulations or custom on the pretext that the Bill of Rights does not recognize such rights or that it recognizes them to a lesser extent”.

26. Lord Pannick QC advised as follows:

“Section 2(5) simply means that the mere fact that a right is not protected in the Bill of Rights (or the ICCPR) is not of itself a reason for a restriction or derogation. But that does not prevent a State from restricting a right previously enjoyed for other reasons. See the remarks of Manfred Nowak in UN Covenant on Civil and Political Rights: CCPR Commentary (2nd revised edition, 2005), at p. 118:

“For instance, a State party that domestically or by ratification of the First Additional Protocol to the [European Convention on Human Rights] guarantees the right of property may not limit or derogate from this right simply because it has ratified the [ICCPR], which does not contain such a provision. This is the true significance of the term 'on the pretext', (*sous pretexte*). Article 5(2) does not, of course, preclude a State party, once it has ratified the Covenant, from eliminating the right of property from its national bill of rights or from denouncing the relevant international treaty obligations”. ”

Advice on Constitutionality of the Proposal

27. Lord Pannick QC advised that, for the reasons set out above, the Proposal is legally defensible as compatible with the provisions of the Basic Law and the HKBOR.

Conclusion

28. In light of the legal assessment of DoJ and having regard to independent legal advice from external Counsel, the Administration confirms that the Proposal is compatible with the provisions of the Basic Law and the HKBOR, and is constitutional.

Constitutional and Mainland Affairs Bureau
Department of Justice

February 2012