

Hong Kong Bar Association's Submission
on the proposed replacement arrangement in
the Legislative Council (Amendment) Bill 2011

1. The Hong Kong Bar Association (“HKBA”) makes this submission in response to the legislative proposal for introducing a replacement arrangement for filling a casual vacancy arising from resignation of members of the Legislative Council (“LegCo”) and other situations in the Legislative Council (Amendment) Bill 2011 (“the Proposal”).
2. The HKBA disagrees with the Administrations’s claim that the Proposal is “in conformity with the Basic Law, including the provisions concerning human rights.”¹
3. The HKBA is of the view that the Proposal is incompatible with Articles 26 and 68 of the Basic Law, Articles 5 and 25(b) of the International Covenant on Civil and Political Rights (“ICCPR”) as applied to Hong Kong within the meaning of Article 39 of the Basic Law, and Article 21(b) of the Hong Kong Bill of Rights (when read with section 2(4) and (5) of the Hong Kong Bill of Rights Ordinance (Cap 383)).
4. Article 68 of the Basic Law mandates that the LegCo “shall be constituted by election” and the fundamental requirement for an election is that the free expression of the will of electors must be guaranteed and given effect.²
5. The HKBA considers that a member returned through the replacement mechanism provided in the Proposal is not “elected” within the meaning of “election” in Article 68 of the Basic Law for the mechanism cannot guarantee and give effect to

¹ See paragraph 6 of the Legislative Council Brief dated 31st May 2011.

² See United Nations Human Rights Committee’s General Comment No. 25/57 (12th July 1996) on Article 25 of the ICCPR, in particular, at paragraphs 9, 15, 19 & 21. As regards the reservation entered into by the United Kingdom for Hong Kong in 1976 in respect of Article 25 of the ICCPR, the HKBA has repeatedly stressed and explained that it provides no justification for excluding Article 25(b) of the ICCPR as applied to Hong Kong within the meaning of the Article 39 of the Basic Law. See the HKBA’s Submissions of the Consultation Document as regards Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012 (5th January 2011) (paragraph 14 et seq).

the will of the electors and also deprives of the right to stand for election of those who wish to be elected when a vacancy arises mid-term:

- (1) The Proposal mandates that in a LegCo ordinary election, the electors elect not only the elected ones but also a candidate to fill a vacancy arising mid-term (“the Back-up Candidate”).
- (2) The Proposal states that *“[t]he first candidate who has not yet been elected in the list with the largest number of remainder votes in the preceding general election will fill a vacancy of the LegCo arising mid-term. If the candidate concerned has died, or is now disqualified or does not wish to serve, the first unelected candidate on the list with the second largest number of remainder votes will fill the vacancy. Where necessary, other candidates on the gazetted list can be approached in sequence to fill the vacancy.”*³
- (3) There is simply no way for the electors to know how to vote for the Back-up Candidate. At the time of voting, it is impossible for the electors to know in advance when a vacancy will arise and who will be the outgoing member, let alone whether the first candidate to fill the vacancy will by then have died, or be disqualified or not wish to serve; and the same applies to the next one on the list and so on.
- (4) In other words, with these uncertain factors, the votes cast at the ordinary election cannot reflect the electors’ will insofar as the Back-up Candidate is concerned, let alone that the electors may wish to change their votes when a vacancy arises mid-term depending on, for example, who the outgoing member is and the then political and social circumstances.
- (5) As such, the mechanism does not serve to express the free will of the electors. Rather it forces the choice of the Back-up Candidate upon them by operation of law. Consequently, the electors are deprived, in substance, of their right to vote for the candidate to fill the vacancy.

³ See paragraph 3(a) of the Legislative Council Brief dated 31st May 2011.

(6) It follows that the Back-up Candidate is not “elected” within the meaning of “election” under Article 68 of the Basic Law.

(7) A new election for the electors to express their will is necessary when a vacancy arises mid-term. The proposed mechanism, by its compulsory and artificial choice of the Back-up Candidate, also deprives of the right to stand for election of those who wish to be elected when a vacancy arises mid-term.

6. In addition, both the Basic Law and the Hong Kong Bill of Rights should not be interpreted as implying on the part of the Government any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Basic Law or the Bill of Rights or at their limitation to a greater extent than is provided for in the Basic Law or the Bill of Rights.⁴ Further, there shall be no restriction upon or derogation from any of the fundamental rights recognized or existing pursuant to law on the pretext that the ICCPR as applied to Hong Kong or the Bill of Rights does not recognize such rights or that it recognizes them to a lesser extent.⁵ The right of voters to vote and of candidates to stand for election in by-elections arising out of a casual vacancy in the LegCo are such existing legal rights.

7. The HKBA notes that the Administration has not provided any justification for such a fundamental deprivation of the right to vote and right to stand for election. The HKBA does not see any arguable justification exists.

Dated 17th June 2011

Hong Kong Bar Association

⁴ See the ICCPR Article 5(1), and the Hong Kong Bill of Rights Ordinance (Cap 383) section 2(4).

⁵ See the ICCPR Article 5(2), and the Hong Kong Bill of Rights Ordinance (Cap 383) section 2(5).