

**立法會**  
**Legislative Council**

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LC Paper No. CB(2)1821/11-12  
(These minutes have been seen  
by the Administration)

**Panel on Constitutional Affairs**

**Minutes of special meeting**  
**held on Tuesday, 31 January 2012, at 8:30 am**  
**in Conference Room 1 of the Legislative Council Complex**

**Members present** : Hon TAM Yiu-chung, GBS, JP (Chairman)  
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP (Deputy Chairman)  
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP  
Dr Hon Margaret NG  
Hon CHEUNG Man-kwong  
Dr Hon Philip WONG Yu-hong, GBS  
Hon LAU Kong-wah, JP  
Hon Miriam LAU Kin-ye, GBS, JP  
Hon Emily LAU Wai-hing, JP  
Hon Abraham SHEK Lai-him, SBS, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon WONG Kwok-hing, MH  
Hon LEE Wing-tat  
Hon Jeffrey LAM Kin-fung, GBS, JP  
Hon CHEUNG Hok-ming, GBS, JP  
Hon WONG Ting-kwong, BBS, JP  
Hon Ronny TONG Ka-wah, SC  
Hon CHIM Pui-chung  
Hon Cyd HO Sau-lan  
Dr Hon LAM Tai-fai, BBS, JP  
Hon CHAN Kin-por, JP  
Dr Hon Priscilla LEUNG Mei-fun, JP  
Hon IP Kwok-him, GBS, JP  
Hon Mrs Regina IP LAU Suk-ye, GBS, JP  
Hon Paul TSE Wai-chun, JP  
Dr Hon Samson TAM Wai-ho, JP  
Hon Alan LEONG Kah-kit, SC

- Members absent** : Hon Albert HO Chun-yan  
Hon WONG Yung-kan, SBS, JP  
Hon LAU Wong-fat, GBM, GBS, JP  
Hon Timothy FOK Tsun-ting, GBS, JP  
Hon WONG Kwok-kin, BBS  
Hon LEUNG Kwok-hung  
Hon WONG Yuk-man
- Public Officers attending** : Mr Raymond TAM Chi-yuen  
Secretary for Constitutional and Mainland Affairs
- Mr Arthur HO Kin-wah  
Permanent Secretary for Constitutional and Mainland Affairs  
(Acting)
- Ms Roxana CHENG  
Deputy Solicitor General (Constitutional)
- Ms Anne TENG  
Principal Assistant Secretary for Constitutional and Mainland  
Affairs
- Clerk in attendance** : Miss Flora TAI  
Chief Council Secretary (2)3
- Staff in attendance** : Mr Arthur CHEUNG  
Senior Assistant Legal Adviser 2
- Mr Raymond LAM  
Senior Council Secretary (2)2
- Mrs Fanny TSANG  
Legislative Assistant (2)3

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- I. Consultation Report on Arrangements for Filling Vacancies in the Legislative Council**  
[LC Paper Nos. CB(2)2285/10-11, CB(2)2432/10-11 and CB(2)896/11-12(01)]

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At the invitation of the Chairman, Secretary for Constitutional and Mainland Affairs ("SCMA") briefed members on the Consultation Report on Arrangements for Filling Vacancies in the Legislative Council ("LegCo") ("the Consultation Report") and the Administration's latest proposal.

2. Mr WONG Kwok-hing welcomed the Administration's latest proposal for filling mid-term vacancies in LegCo. He called on the Administration to introduce legislative amendments as soon as possible to plug the loophole whereby Members could resign at will in order to trigger a by-election in which they intended to stand and sought to be re-elected, resulting in significant waste of public funds. However, he was concerned whether the Administration's latest proposal was constitutional and supported by the legal profession.

3. SCMA advised that the Administration had sought legal advice on the latest proposal from Lord Pannick, QC, and the Department of Justice ("DoJ"). As explained in paragraph 6.11 of the Consultation Report, legal advice obtained by the Administration confirmed that the latest proposal was constitutional. Deputy Solicitor General (Constitutional) said that in examining the constitutionality of the latest proposal, Article 26 of the Basic Law ("BL26"), which stipulated that permanent residents of the Hong Kong Special Administrative Region had the right to vote and the right to stand for election in accordance with law, had to be read in conjunction with BL68 and Annex II to BL, which provided LegCo with a broad discretion in determining the contents of legislation which governed the specific method for forming LegCo. Restrictions could be imposed on the right so long as they were proportionate to a legitimate aim. Having regard to the above, DoJ had come to the conclusion that the latest proposal was constitutional. In response to Mr WONG Kwok-hing's question about the possibility of judicial review on the latest proposal, SCMA responded that the possibility of legal challenge was one of the major considerations of the Administration in drawing up the latest proposal. The Administration was confident that the latest proposal could stand up to a legal challenge by way of judicial review.

4. Mr Ronny TONG asked whether the Administration had considered the views of a large number of people who participated in a demonstration on 24 September 2011 opposing the arrangements for filling vacancies in LegCo. SCMA responded that the Administration was aware of the views of some members of the public including those who joined a demonstration on 24 September 2011 regarding the proposed replacement mechanism for filling vacancies in the membership of LegCo arising during the term of

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office of LegCo. The Administration observed that one of their major concerns was the lack of public consultation before introduction of the relevant legislative proposal. Another major concern was the protection of the right to vote when a mid-term vacancy in LegCo arose. To address these concerns, the Administration had published in July 2011 a Consultation Paper on Arrangements for Filling Vacancies in LegCo ("Consultation Paper") and invited the views of the public on a number of options for filling these vacancies.

5. Mr Ronny TONG queried why the Administration had only sought the legal advice of Lord Pannick but not other legal experts. He also queried whether the Administration had included in its instructions for legal advice the information that a large number of members of the public had joined a demonstration to express their opposition against the proposed replacement mechanism for filling mid-term vacancies in LegCo.

6. SCMA responded that Lord Pannick had provided legal advice to the Administration in the past and there had been no question about the reliability of his legal advice. The Administration noted that some legal experts, including Professor Albert CHEN, had also taken the view that the Administration's proposal was consistent with BL.

7. Mr Ronny TONG said that although he did not support the endeavour of the five resigned Members, he did not consider that public resources were wasted for holding the by-elections to fill the vacancies if there were other candidates contesting in the by-elections.

8. SCMA responded that the Administration considered the incident of Members resigning in 2010 in order to trigger by-elections was a waste of public funds, as there were many other channels for expression of political views. He pointed out that apart from avoiding the significant drain on public resources, there were other justifications for the Administration's latest proposal, such as the need to uphold the creditability of the electoral system and respect for the electoral process, as set out in Chapter Six of the Consultation Report. He added that constituents would be deprived of a representative in LegCo during the period between the resignation and by-election. The Administration and many members of the public considered it necessary to plug the loophole.

9. Ms Miriam LAU appreciated that the Administration had sought to address the major concerns of the public about its legislative proposal to implement a replacement mechanism for filling mid-term vacancies in

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LegCo by way of launching a public consultation exercise in July 2011 and drawing up the latest proposal. She considered that as the right to vote was involved, any change would require clear public support. Referring to the findings in paragraph 3.11 of the Consultation Report that 43% of the respondents to an opinion poll of the Public Opinion Programme at the University of Hong Kong ("the Public Opinion Programme") supported the introduction of legislative amendments and 55% supported maintaining the status quo, Ms LAU asked how the Administration had come to the conclusion in paragraph 3.10 of the Consultation Report that in general over or close to 50% of the respondents considered that the Government should plug the loophole.

10. SCMA responded that according to an opinion poll conducted on some 1 000 respondents by the Public Opinion Programme in late August and early September 2011, 57% supported legislative amendments and 31% supported maintaining the status quo. After the Hong Kong Deliberative Forum jointly organized by Radio Television Hong Kong and the Public Opinion Programme was conducted, an opinion poll conducted by the Public Opinion Programme on 85 respondents indicated that 43% supported legislative amendments and 55% supported maintaining the status quo. He said that after studying the views expressed by different political parties/groups and organizations, the results of the opinions polls conducted by university, the media, organisations and political parties to gauge the views of the public on the arrangements for filling vacancies in the LegCo during the public consultation period, the Administration had come to the conclusion that in general over or close to 50% of the respondents considered that the Government needed to plug the loophole by way of legislative amendments. He added that persons who supported maintaining the status quo were mainly concerned about the need to protect the right to vote, which would not be affected under the Administration's latest proposal. Mr Ronny TONG, however, considered that a person's right to vote would still be compromised if the Member who resigned could not stand again in the by-election but that Member was his choice.

11. Referring to paragraph 3.11 of the Consultation Report, Dr Margaret NG and Ms Audrey EU pointed out that after the Hong Kong Deliberative Forum was conducted, the percentage of people who supported legislative amendments had decreased while the percentage of those who supported maintaining the status quo had increased, which indicated that more people opposed the Administration's proposal when they had a better understanding of the issue.

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12. Ms Audrey EU expressed dissatisfaction that there was no mention in the Consultation Report of the joint declaration by a number of academics expressing opposition against the proposed replacement arrangement for filling a vacancy arising from resignation of Members. There was also no mention in the Consultation Report of the number of people, which was reported to exceed 200 000, who participated in a demonstration on 24 September 2011 opposing the proposed replacement mechanism for filling vacancies in LegCo. In this connection, Mr IP Kwok-him said that there were reports that only about 80 000 people participated in the demonstration.

13. Ms Audrey EU and Ms Cyd HO pointed out that according to the Consultation Report, there were many people who supported maintaining the status quo but only a low percentage who supported Option 1, which proposed restricting resigning Members from participation in any by-election in the same term. Many professional bodies also supported maintaining the status quo. They queried how the Administration could conclude that in general over or close to 50% of the respondents to opinion polls considered that the Government should plug the loophole. Ms EU was strongly of the view that there should not be any restriction on the right to vote, unless all functional constituency seats were abolished in the membership of LegCo and universal suffrage was implemented for its formation.

14. SCMA responded that all the submissions received had been set out in the Appendix to the Consultation Report. The views received during the public consultation period indicated that there was a strong support for the Administration to address the mischief arising from Members resigning at will in order to trigger by-elections. Although there was no overwhelming support for any of the options in the Consultation Report, it would be noted that Option 1 received more support than the other three options. He stressed that the Administration's latest proposal, which prohibited a resigned Member from standing in any by-election in the same LegCo term within six months of his resignation as compared to any by-election in the same LegCo term under Option 1, had substantially addressed the major concerns of those who participated in the demonstration on 24 September 2011.

15. Ms Emily LAU considered that members of the public did not support any restriction on a person's right to stand for election. She asked whether

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the Administration had consulted the two legal professional bodies on its latest proposal. Dr Margaret NG expressed concern that although Lord Pannick considered the Administration's proposal constitutional, the Hong Kong Bar Association ("the Bar Association") might hold a different view.

16. SCMA responded that the Administration had sought legal advice on its latest proposal from Lord Pannick and DoJ. The Administration had also briefed representatives of the Bar Association and the Law Society of Hong Kong on the contents of its latest proposal. After the relevant bill was introduced, the Administration would approach the two legal professional bodies again for their views.

17. Ms Emily LAU asked whether a similar restriction was imposed in overseas jurisdictions on resigned Members to stand in by-elections. SCMA responded that a similar restriction could be found with the House of Representatives of Japan. Permanent Secretary for Constitutional and Mainland Affairs (Acting) ("PSCMA(Atg)") added that a replacement mechanism was adopted in many countries without conducting any by-election to fill mid-term vacancies. In the United Kingdom ("UK"), Mr David Davis, a Member of Parliament of the House of Commons, had resigned in order to trigger a by-election in which the Member sought re-election. The resignation had aroused much controversy and was not supported by political parties, including the political party to which the Member belonged and the Speaker of the House of Commons had not permitted the Member to deliver a speech on his resignation.

18. Mr LAU Kong-wah expressed support for the Administration's latest proposal which, he considered, was simple and reasonable, as the scope of the proposed restriction was very narrow and the restriction period would only last for six months. Mr LAU considered that the resignation of five Members in January 2010 to trigger a by-election in which the five Members sought re-election had a serious negative impact on the political landscape of Hong Kong. He said that members of the public were generally of the view that the Administration should introduce legislative amendments to plug the loophole. In drawing up the legislative amendments, it would be more appropriate to focus on the specific circumstances of Hong Kong rather than to consider whether a similar restriction was found in other jurisdictions. He added that as it was not unusual for different lawyers to hold different views on a subject, it would be inappropriate to oppose a proposal merely because of the opposing views of some lawyers.

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19. Dr Margaret NG was of the view that if a Member sought to resign for the purpose of triggering off the need to hold a by-election, electors could express their support or otherwise for such an action by exercising the right to vote in the by-election. The existing arrangement for filling a vacancy in LegCo through a by-election should therefore be retained. She added that the Administration's latest proposal could not address the alleged mischief because other members of the same political party of the resigning Members could still stand in a by-election.

20. SCMA responded that although the Administration's latest proposal would not entirely prevent any Member from resigning at will to trigger by-election, a more restrictive proposal would compromise the right to vote. The latest proposal was a compromise among the different views expressed during the public consultation exercise and concerns about the need to preserve the right to vote. Although the latest proposal would not entirely prevent a Member from resignation to trigger by-election, it could have considerable effect in preventing a Member from doing so as he would consider the consequences of the act.

21. Mr Jeffrey LAM said that a majority of members of the public disapproved the act of resignation at will to trigger by-election, which incurred considerable expenditure of public funds. There were strong calls from the community to plug the loophole. He opined that in studying whether a proposal should be adopted, it was more important to consider the circumstances of Hong Kong rather than whether a similar mechanism was adopted by other countries. Mr LAM asked whether a Member who resigned for serious illness but recovered shortly thereafter could stand in a by-election within six months after his resignation.

22. PSCMA(Atg) explained that the scope of the Administration's latest proposal was very narrow and confined to voluntary resignation from office under section 13 or section 14 of the Legislative Council Ordinance ("Cap. 542"). The proposed arrangement would not apply to mid-term vacancies arising from death, serious illness and other involuntary circumstances. A Member who had resigned for serious illness and recovered shortly afterwards could stand in a by-election any time after his resignation.

23. Dr Priscilla LEUNG expressed support for the Administration's latest proposal. She said that when five Members resigned in January 2010 to trigger a by-election in which the five Members sought re-election, the



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public at large disapproved their act and there were strong calls from the community for the Administration to plug the loophole. Dr LEUNG stressed that BL26 should be read in conjunction with BL79. She opined that the Administration's latest proposal was a compromise among the diverse views obtained during the public consultation period.

24. Ir Dr Raymond HO said that he had sent out more than 10 000 electronic mails to consult the engineering sector on the options in the Consultation Paper and noted that the number of respondents who supported Option 1 were slightly more than those who supported maintaining the status quo. With the Administration's latest proposal being less restrictive than Option 1, he envisaged that there should be more support in the engineering sector for the proposal.

25. Mr CHEUNG Man-kwong said that the Democratic Party had not joined in the resignation of Members in January 2010 to trigger a by-election, as it considered that it could not resolve the disputes over the political issues at that time. He took the view that the Administration's latest proposal could not address the alleged mischief because people who shared the political views of the resigning Members could still stand in a by-election. There was nothing inappropriate for Members to be able to resign in order to trigger a by-election in which they sought to stand. Members of the public should not be deprived of the right to vote in a by-election. The existing arrangement for filling a mid-term vacancy in LegCo through a by-election should therefore be retained.

26. SCMA reiterated that the Administration's latest proposal had struck a right balance among the diverse views expressed during the consultation exercise and concerns about the need to protect the right to vote. He stressed that the final decision as to whether the relevant legislative amendments should be enacted rested with LegCo.

27. Mrs Sophie LEUNG considered that the Administration's latest proposal had struck an appropriate balance between the need to prevent possible abuse of the existing by-election system and the need to protect the right to vote of the Hong Kong people. Mr IP Kwok-him shared her view. He said that while filling a vacancy by a candidate from the same list as that of the resigning Member was more in line with the spirit of proportional representation, the latest proposal should be able to answer the strong call from the community to plug the loophole although it might not be entirely satisfactory.

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28. Ms Audrey EU said that although the political parties in UK did not support the resignation of Mr David Davis, more than 70% of the voters voted for him in the by-election. Mr Paul TSE said that he adopted an open attitude towards the Administration's latest proposal. To his knowledge, all the major political parties in UK did not participate in that by-election and thus it was not surprising for the Member to be re-elected. SCMA advised that the voter turnout rate for that by-election in UK was only 34%, as compared to 70% in previous general elections. Ms Cyd HO said that although Mr David Davis had resigned to trigger a by-election, the UK government had not imposed any restriction on the right to vote similar to that proposed by the Administration.

29. Mr Paul TSE said that different lawyers might have different opinions on the constitutionality of the latest proposal. While the opinions of Lord Pannick might be considered wrong by some people, the same applied to the views of the Bar Association. In his view, the election of LegCo Members at a four-year interval had also imposed a restriction on the right to vote of electors. He considered that the proposed restriction on the right to vote was proportionate and the Administration's latest proposal was acceptable. However, he requested the Administration to provide more details of the legal advice about the constitutionality of its latest proposal. His request was supported by Mrs Regina IP. SCMA undertook to consult DoJ on whether the legal advice of Lord Pannick and DoJ could be disclosed. He added that the Administration would explain in greater detail about its legal views on the latest proposal to the Bills Committee to be formed to study the new bill.

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30. Mrs Regina IP said that she was pleased to note that the Administration had consulted the public on the arrangements for filling vacancies in LegCo. She pointed out that two surveys conducted by the New People's Party among its party members revealed that a majority of the respondents were opposed to holding any de facto referendum. She considered that the holding of de facto referendum was inconsistent with the spirit of a representative political system. In the history of UK, only two referenda had so far been conducted, with the support of the parliament, in 1975 and 2011. Mrs IP advised that many articles published in the Economists had revealed that the abuse of the referendum system in California of the United States had made it very difficult for a democratic political system to function. She had exchanged views in person with Professor James S. Fishkin, the founder of deliberative democracy during his

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visit to Hong Kong in 2011 who also encouraged deliberative democracy but not referendum. Ms Audrey EU considered that it was inappropriate to compare Hong Kong with California, as the two places had different legislation. Ms Cyd HO remarked that there was no conflict between deliberative democracy and referendum.

31. Mrs Regina IP agreed that the Administration's latest proposal would make it more difficult for a Member to abuse the by-election system. She, however, queried why the Administration had not adopted Option 2 or 4, which were more desirable for the purpose of facilitating the nurturing of political talents and succession in political parties.

32. SCMA explained that Options 2 and 4 had received less support during the public consultation exercise. Option 2 was less viable in view of the concern of some members of the public about the need to protect the right to vote. Leaving one or more LegCo seats vacant for a prolonged period of time under Option 4 would also affect adversely the operation of LegCo.

33. Mr Alan LEONG was of the view that the Administration's latest proposal was in essence not much different from Option 1. It would still compromise the right to vote and the right to stand for election as protected under BL26. He pointed out that under the latest proposal, public expenditure would still need to be incurred for the holding of the by-election and electors would be deprived of the right to express their support or otherwise for the resigning Member by exercising the right to vote in the by-election. Mr LEONG added that the example in the House of Commons of UK cited by the Administration was not very rare while Professor Ming SING had pointed out in an article that more than a hundred referenda had been held in democratic countries in the past.

34. SCMA responded that there were generally more restrictions in many countries on the right to stand for election than the right to vote. This was necessary for public interests, as the acts of the elected Members would affect the community at large. He added that while the expenditure of public funds incurred in a by-election could not be avoided under the Administration's latest proposal, it would deter a Member from resigning at will to trigger by-election.

35. Ms Audrey EU sought information from the Administration on the timing for introduction of the new bill into LegCo. SCMA responded that

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the Administration would introduce a new bill into LegCo, if possible, at the Council meeting of 8 February 2012. The Administration would withdraw the Legislative Council (Amendment) Bill 2011 in the short future.

36. There being no other business, the meeting ended at 10:30 am.

Council Business Division 2  
Legislative Council Secretariat  
25 April 2012