

**Hong Kong Bar Association**

**Submission on the 2nd Round Consultation Document on the Method for Selecting  
the Chief Executive by Universal Suffrage**

**Press Summary**

1. The Hong Kong Bar Association has prepared a Submission published on its website in response to the Consultation Document of the HKSAR Government regarding the method for selecting the Chief Executive by universal suffrage. This is a summary of the contents of the Submission.
2. We refer to our previous Submission of 28 April 2014 on the HKSAR Government's 2014 Consultation Document.
3. Both submissions can be accessed at <http://www.hkba.org/whatsnew/index.html>.
4. We are a professional and apolitical body. We strive to limit our public comments to legal issues affecting public interest, particularly on the rule of law and civil liberties. The same approach is adopted in this Submission. In particular, we do not intend to propose any particular method of selecting the Chief Executive in 2017 but would comment on the related procedures by reference to principles.
5. This round of consultation proceeds on the basis that the relevant amendments to local legislation must comply with the NPCSC's Decision of 31 August 2014 ("**the Decision**"). There has been much debate on the validity of the Decision. This is the subject matter of an application for leave to apply for judicial review, recently made on 3 March 2015. At this time, we do not believe it is appropriate for us to express our view or position on this issue. This is not a question posed in the Government's consultation anyway.

6. The Submission focuses therefore on the matters the HKSAR Government has asked for the public's view in Chapters 3 to 6 of the Consultation Document.
7. We believe, as has been made clear in our previous Submission of 28 April 2015, that the method of selecting the Chief Executive should not contain discriminatory distinctions or unreasonable restrictions. The permanent residents of Hong Kong should enjoy the right and opportunity to vote, and be elected, in genuine periodic elections. Such elections should ensure that the will of electors are freely expressed.
8. We have examined whether the conditions imposed under the Decision would be discriminatory measure(s) or would result in any restrictions of the above fundamental rights, and if so whether any such restriction is proportionate for achieving any legitimate purpose.
9. Any conclusion that there is a disproportionate restriction of fundamental rights would be significant, because:
  - 9.1 It would call into question whether there is a violation of the ICCPR;
  - 9.2 Any local legislation should strive to mitigate such unreasonable restriction; and
  - 9.3 There should be improvements and changes in respect of future Chief Executive elections.

### *Chapter 3*

10. Article II(1) of the Decision provides that the nomination committee should (i) follow the current composition of the Election Committee for the Fourth Chief Executive; (ii) have 1,200 members; (iii) have members selected from four major

sectors in equal proportions; (iv) be selected by the existing method provided for in Annex I to the Basic Law.

11. We have stated in our Submission of 28 April 2014 that the formation of the nominating committee should ensure (i) the maximum extent of participation of the electorate; and (ii) parity in such participation by individual members of the electorate. It is questionable whether the conditions laid down under Article II(1) of the Decision are consistent with these principles.
12. We believe it is important to make the nomination committee as “broadly representative” as possible. To achieve that, there could be more sub-sectors in the nominating committee. The existing number of sub-sectors is 38, and that is not sufficiently representative. Also, a sub-sector which covers a large number of people should proportionately have more members on the nominating committee. Corporate voting should be abolished across the board.

#### *Chapter 4*

13. Article II(2) of the Decision limits the maximum number of candidates the nominating committee can nominate. It also requires each nominated candidate to have the endorsement of more than half of the members of the nominating committee.
14. The restrictions on nominations now formulated under Article II(2) of the Decision are open to criticisms precisely for failing to meet the following requirements set out in our Submission of 28 April 2014:
  - 14.1 The process of nomination must ensure plurality. Not only should there be plurality by number, there should be candidates of different political inclinations. The electorate should have a genuine “free choice”.

- 14.2 The nomination committee is to nominate candidates to be voted upon by the entirety of the electorate in Hong Kong. It is not to pre-determine the result of that election. Collective decision by “majority rule” in the nomination committee runs a serious risk of that.
- 14.3 The concern about the “overcrowding” of candidates can be dealt with by other means. The rules of nomination in the nomination committee would, in any event, in practice return a finite number of candidates without an explicit numerical limitation by law.
15. We believe that the nominating committee should adopt a “two stage” procedure: (i) members recommendation; and (ii) committee nomination.
- 15.1 At the first stage, the aspiring candidate would be required to secure the endorsement by the requisite number of members of the nomination committee.
- 15.2 At the second stage, the nominating committee votes on the candidates who have secured the requisite number of endorsements.

We also believe that there should be measures in the procedure of nomination to increase the possibility of plurality and free choice of candidates.

16. As regards the first stage (“members recommendation”):
- 16.1 The number of endorsements required should be 100 or lower to ensure plurality and genuine free choice by the electorate of Hong Kong.
- 16.2 To ensure plurality and free choice, we do not agree with the Government’s proposal that each member of the nomination committee should be limited to giving one endorsement.

- 16.3 Likewise, we suggest that there be a cap on the number of recommendations each candidate can obtain.
17. As regard the second stage (“committee nomination”), we believe that the method which would have the greatest chance of ensuring plurality and free choice should be preferred.
18. Regarding the proceedings of the nominating committee:
- 18.1 The proceedings of the nominating committee should be open. It is a body which represents the people of Hong Kong generally. Each of its members participates as a “representative” only. Its members should accordingly be accountable to the people they represent. Transparency, therefore, is key.
- 18.2 There should be at least three plenary meetings of the nominating committee.
- 18.2(a) First, there should be a plenary meeting at the members recommendation stage. The aspiring candidates should be given equal and adequate opportunities to present themselves.
- 18.2(b) Second, there should be another plenary meeting after the members recommendation stage, for the candidates recommended to have a further opportunity to present themselves and answer questions.
- 18.2(c) Third, there should be a plenary meeting where the nomination committee votes on the recommended candidates. The voting should be open. There should not be secret balloting in the nomination committee. It is a body accountable to the Hong Kong people as a whole.

## *Chapter 5*

19. Turning to the procedures for the electorate to vote on the candidates nominated by the nomination committee:

19.1 As we have said in our Submission of 28 April 2014, the method of voting should ensure that the winning candidate should have a majority mandate. The voting by the electorate at large must be by secret ballot.

19.2 We do not believe that the “first past the post” voting system achieves the objective of a majority mandate. Of the three other systems the Government asks the public to consider, both the two-round voting system and the instant runoff system merit further consideration.

19.3 We suggest that further consideration be given to the possibility that if more than 50% of the votes cast were “NOTA” (none of the above), then the election be deemed to have failed. This rule gives the electorate the option of rejecting all the candidates nominated by the nomination committee. It may also increase the degree of participation in the election, and ensure that the voting results would more accurately reflect the precise sentiment of the electorate.

## *Chapter 6*

20. We believe the nomination committee should cease to have any function upon the swearing in of the Chief Executive returned by the electorate. If another election is required mid-term, another nomination committee should be constituted *then* for that purpose. The nomination committee should be reflective of public opinion as at the time of the relevant election.

21. We agree that the Chief Executive Election Ordinance (Cap 569) should provide for the situation where the Chief Executive-elect returned by the electorate is not

appointed by the Central People's Government. In such an event, the election process should re-commence within a reasonable time or a specified time frame.

22. We believe there are respectable arguments for removing the restriction that the Chief Executive should not have any political affiliation. This restriction is a restriction of an individual's right to stand for election, freedom of association and right to political expression.

*Other matters*

23. In the event that a bill of amendments to Annex I to the Basic Law is not endorsed by a two-third majority of the Legislative Council, we do not believe that the Government is under a constitutional or legal duty to restart the five-step process under the NPCSC Interpretation of 6 April 2004. In such a scenario, the existing method of selection of the Chief Executive will continue to be used.
24. Lastly, if local legislation is passed to implement an election process in compliance with the Decision for 2017, further amendment or improvement is permissible under the Basic Law.

**Hong Kong Bar Association**

**6 March 2015**