

Consultation Document on Methods for Selecting the Chief Executive in
2017 and for Forming the Legislative Council in 2016

Statement of the Hong Kong Bar Association

1. It has been widely reported that the HKSAR Government will soon be reporting on the result of the consultation exercise and that the Chief Executive of the HKSAR (the HKSAR Government and the Chief Executive will hereinafter be collectively referred to as “the HKSAR Government”) will soon be officially reporting to the Central Authorities in connection with the Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016. The Hong Kong Bar Association (“the HKBA”) takes this opportunity to emphasize a number of points of crucial importance for the attention of the HKSAR Government consequential upon recent developments.

2. The HKBA’s Submission on the Consultation Document of 28 April 2014 (“the Submission”) was prepared on the basis of treating all the relevant provisions of the Basic Law of the HKSAR as a coherent whole. The Submission itself ought to be read as a whole. It is unfair for any party to rely on any part of it selectively and out of context. Indeed it would be a grave mistake for any party involved in the development of the above two electoral methods to quote part of the HKBA’s views in support or in justification of that party’s position without properly mentioning, referring to or giving due consideration to the HKBA’s other views on related legal issues. To take a simple example, it would be an incomplete and potentially misleading statement to say that the law does not allow the attainment of a certain objective through one means without at the same time mentioning that it is legitimate to achieve the same through another means.

3. Even if the HKSAR Government takes the view that a particular proposal is inconsistent with the Basic Law of the HKSAR (despite the popular support that

any such proposal commands), it would be irresponsible for the HKSAR Government to simply reject the proposal off hand, or to recommend to the Central Authorities to disapprove or exclude that proposal, on the ground of non-compliance with the Basic Law of the HKSAR *and then do no more about the proposal*. It is incumbent on the HKSAR Government to positively consider and explore whether the rationale or underlying objective of any such proposal (commanding popular support) could be accommodated by *alternative* methods which *are* compatible with the relevant provisions of the Basic Law.

4. Specifically, even though it would technically not be compatible with the Basic Law for a person to become a Chief Executive election candidate by gathering a certain number of nominations from the general electorate (because the Basic Law requires that nomination be done through a nomination committee), the rationale and underlying objective of such a proposal - namely to ensure maximum participation of the general electorate in the nomination process - is perfectly capable of being accommodated within the concept of the "nomination committee" in the Basic Law. This point has been addressed in the Submission and should not be overlooked by the HKSAR Government. In particular (but without prejudice to the generality of the foregoing), the HKBA refers to the wide and unqualified language in Article 45 of the Basic Law of a "broadly representative" nominating committee which nominates in accordance with "democratic procedures", and the HKBA also repeats paragraphs 37 to 39 as well as 57 of the Submission.
5. If after addressing its mind to the above, there are any reasons (political or otherwise) why the HKSAR Government does not feel able to put forward *any* Basic Law-compliant proposal to give effect to the above rationale and underlying objective, it is incumbent on it to explain the reasons – political or otherwise - to the public.

6. For the HKSAR Government merely to use the Basic Law as a reason to reject, or recommend the putting aside of, such popular proposals on the ground of “doing things according to the Basic Law”, but without attempting to consider whether the rationale and underlying objective of any such proposals can be accommodated within the rubric of the Basic Law is, with respect, a misuse and abuse of the concept of the Rule of Law. Law is simply being used by the ruler as a means of defeating public expectation *and no more*, rather than as a means of respecting, facilitating and giving effect to public expectation.

7. Lastly, the HKBA wishes to reiterate its position as stated in its Submission and emphasizes to the HKSAR Government that:
 - (1) Since the nominating committee’s function is limited to nomination, it is neither its function nor its purpose to determine the result of the Chief Executive election; and

 - (2) Since the method, scheme or arrangement to be established pursuant to the aim stated in Article 45(2) of the Basic Law impinges on the enjoyment and exercise by HKSAR permanent residents of their right to vote and right to stand for election, and more generally, their rights and opportunities to take part or participate in the conduct of public affairs, the electoral rules to be formulated and enacted must ensure that the persons entitled to vote shall have a “free choice of candidates” and that there should be a spectrum or plurality (in both the numerical sense and the political sense) of candidates for the voters.

Dated 11 July 2014.

HONG KONG BAR ASSOCIATION