



By Email: afv_consultation@cmab.gov.hk and by Courier

6 September 2011

The Secretary for Constitutional and Mainland Affairs
Room 308, 3/F., Main Wing,
Central Government Offices
Lower Albert Road, Hong Kong

Dear Sir,

**Consultation Paper on Arrangements for Filling Vacancies
of the Legislative Council (LegCo)**

Through the past years, the Chamber has on the invitation of the Administration, duly put forward our views on Hong Kong's constitutional development, such as the way for electing the Chief Executive, and the structure and operation of LegCo. In late May this year, the Administration proposed to introduce changes to replace by-election for mid-term vacancies in LegCo with alternative measures which would yet be another setback to Hong Kong's constitutional development with adverse implications socially and economically. In the light of public criticism, the Administration has subsequently produced the Consultation Paper for public comment. We take the liberty to present our views.



2. We are depressed that the wording and the tone of the Paper, the options proposed and the way the Paper is written convey the impression that the Administration has already taken a biased position in negating the institution of by-election. There is a risk of misrepresentation such that the Paper misleads an undiscerning reader to draw the wrong conclusion.

3. The Administration “considers it is an abuse of process for a Member to resign in order to trigger a by-election in which the Member intends to stand and seek re-election” (paragraph 1.04 of the Paper). This suggests that the Administration fails to appreciate the spirit of democracy, and the very purpose of by-election. We strongly oppose the Administration’s standpoint, and therefore the deduction drawn in the Paper to replace by-election in whole or in part. It is legitimate that a LegCo member should have the right to resign when the matter before him is such that he finds himself in an impossible position given the mandate of his constituency. If his electorate considers he is right to have resigned, and as he seeks re-election, he will receive support and be re-elected. If his electorate does not agree to his action, he will fail to gain support, and will not be re-elected. This is a normal process by which voters’ views can be manifested. If this action were regarded an abuse, would it be considered also an abuse of process for those refraining from standing for by-election?

4. Because of this misconception, the Administration argues that there is a “loophole” in the current election system which has to be plugged (paragraph 5.01 and paragraph 5.06 of the Paper). In other words, the Administration sees that the application of by-election as a responsible behaviour to express dissent is a “loophole” in the current election system. We do not agree to the Administration’s conclusion that a loophole exists.



5. In support of its contention to remove by-election, the Administration cites opinion polls conducted by various organizations, which reported that 50% to 58% of the respondents were against the so-called “referendum”. It has to be pointed out that a difference must be drawn between by-election and the so-called “referendum”. Whereas those percentages of respondents were against the so-called “referendum” move, it does not necessarily mean they were in favour of doing away with by-election. Can the Administration provide information on the percentage which is against by-election? On the other hand, the polls also say 42% to 50% is in support of the so-called “referendum”, which is not a small percentage either. The Administration must read the statistics in this light too.

6. The Paper refers to the low turn up rate (17.19%) in the 2010 by-election and it is taken as a reason to remove by-election. There are however many reasons for people going to or not going to vote, and we find it difficult to establish a causal relationship between the percentage voting and the acceptability of the by-election system. We think the Administration’s argument is implausible. Moreover, removing by-election is depriving the electorate’s right to vote and the right to exercise its choice. This is not fair.

7. The Report cites the 2010 by-election costs around HK\$126M, which is a waste of public funding. Again because the Administration mistakenly sees by-election as an abuse, it concludes that it is a waste of public funds. We are of the view that by-election is a constitutional right and should not be tinkered with lightly. Any election system will incur expenses; does the Administration suggest that human rights can be pared to fit the Administration’s view of public spending? Does the Administration see preserving public funds more important than maintaining a political



institution (the by-election) when the government has a huge reserve?

Moreover the LegCo member who resigns and seeks re-election will have to bear his own cost of election too. It is clear therefore the Administration fails to see the LegCo member who resigns is seeking to fulfil his constitutional responsibility to tell his constituency the grave problem he faces in his public duty, and to seek the constituency's mandate through standing in the by-election.

8. The election system under the Basic Law has been in place for 14 years. There have been useful and successful by-elections providing the most up-to-date public opinion on public issues and on the choice of legislators. The Administration now alleges there is abuse or a loophole in the by-election process because of the 2010 by-election. This is neither a balanced nor reasonable attitude to an important constitutional issue.

9. As regards the options in the Paper, these rest on certain assumptions and contain inconsistencies which have yet to be solved. Moreover we do not see any reason why the first-past-the-post method used for by-election need be changed to list proportional representation. The first-past-the-post method is preferred in the present stage of development of Hong Kong's political parties.

10. With reference to the questions raised in the Paper (paragraph 5.06) seeking views, on the basis of the reasons set out in the previous paragraphs, we should like to respond seriatim:

regarding a), as we said in this letter, there is neither abuse nor a loophole;

regarding b), none of the options is acceptable and current by-election is preferred to let the electorate exercise its constitutional right fully; regarding c), there is no loophole, and the status quo should be maintained; regarding d), the first-past-the-post method should be applied in by-election; and regarding e), as there is no loophole to plug, time should not be wasted to further creative searching.

11. By-election is an inherent right to be protected. Even if there were a matter of such gravity that would require its modification, the solution would have to be proportional to the problem. In the present case, we do not see a need for tampering with by-election, and the options are defective. We should like to ask the Administration to have regard to the following in introducing measures on constitutional affairs:

- a) they are constructed in line with international instruments on human rights viz the International Covenant in Civil and Political Rights, and the Universal Declaration of Human Rights;
- b) they provide the electorate the maximum and equal opportunity to participate; and
- c) the freedom of choice of the electorate should not be unreasonably or unduly prescribed.

12. The government last year decided on certain changes in Hong Kong's political institutions which have minimal impact, if any, on advancement in democracy. If by-election were removed or watered down, the government is in fact further eroding the democratic process provided in the Basic Law, and choosing to do a serious disservice to Hong Kong people. Hong Kong's success has been built on its people. The government now has a great



opportunity to show it is genuine and willing to share the future with Hong Kong people, if the government decides to preserve the institution of by-election.

Yours faithfully,

K. P. Tay

Secretary

cc : Members of the Legislative Council