

Submission

To: Constitutional and Mainland Affairs Bureau, HKSAR Government

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Re: Arrangements for Filling Vacancies in the Legislative Council

Our position in brief

1. We submit that there is no need to change the *status quo*.
2. Furthermore, we submit that assuming for the sake of argument a change is needed, all four options suggested in the consultation paper are inferior to another option which we will call the “fifth option”. This is the option of using the same candidate list followed by a by-election if no more candidates on the same list are eligible and willing to fill the vacancy. The merits and demerits of this fifth option are discussed below.

There is no need to change the *status quo*

3. The government has stated six main reasons for changing the *status quo*. First, cost is involved in holding by-elections. Second, the Legislative Council (LegCo) will be deprived of the service of one member before the by-election. Third, the respect for the electoral process will be lowered if by-elections are frequently triggered by voluntary resignations. Fourth, intentional triggering of by-elections, which is allowed by the *status quo*, amounts to an abuse of process. Fifth, the effect of by-elections is to introduce a first-past-the-post element into what is otherwise a proportional representation system. Sixth, there is strong public dissatisfaction with the so-called referendum.
4. We do not regard the six reasons adduced by the government sufficiently strong to justify abolishing by-elections. Insofar as cost is concerned, one

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should not lose sight of the fact that the cost involved in holding by-elections forms a very small part of the government expenditure. Moreover, adherence to democratic values should generally be regarded as more important than cost-saving in designing electoral systems, and as such, cost should not be the focus of the debate.

5. As to the concern about deprivation of a member's service, two replies could be given. First, the primary purpose of a legislature is to represent. As such, an electoral system should be assessed primarily on whether it reflects the views of the public, a function which is not necessarily made better with the number of legislators in office. Second, a proportionate response to this alleged problem only calls for an improvement of the efficiency of by-elections rather than the elimination of them. Furthermore there is no evidence to suggest that the workings of the legislature has ever been impaired or compromised as a result of a vacancy (or concurrent vacancies) and the relatively short period needed to hold a by-election.

6. It is purely a matter of speculation that the public respect for the electoral process will be lowered if by-elections are frequently triggered by voluntary resignations. Furthermore, we doubt if by-elections will be frequently triggered by voluntary resignations. Such resignations may be unpopular, and there is always a risk of losing the by-election. Moreover, since we believe that the four options provided by the government contravene democratic principles, it may prove to be the case that the adoption of any of them would compromise public respect for the electoral system to a greater extent.

7. As to the charge that the *status quo* allows for intentional triggering of by-elections which is an abuse of process, it is worth emphasizing that a legislator resigning and triggering a by-election could be seen advancing the highest ideals of democratic government. It could be argued that a legislator facing a highly controversial public issue might elect through resignation and participating in a by-election to consult the voters directly. Thus, rather than being an abuse of process this would be the occasion where a by-election is seen as serving the ideals of elected representative and responsible government.

8. As to the worry that the effect of by-elections is to change the electoral system from proportional representation to first-past-the-post, we wonder whether proportional representation should always be adopted. After all, the Basic Law is silent as to whether proportional representation or first-past-the-post should be adopted in electing legislators, and it is unclear to us that the former is a better expression of democratic values. It must not be forgotten that the policy of proportional representation for LegCo elections was one endorsed

by the undemocratic Provisional Legislative Council of 1997-8 and has never been tested in the crucible of public opinion.

9. The mere fact that there is strong dissatisfaction with the so-called referendum is not a good reason for altering the *status quo*. For it is consistent for a person to be both dissatisfied with the so-called referendum and to believe that a change is undesirable. What the government needs to show, in order for this argument which appeals to public opinion to make some sense, is that our public opinion is strongly in favor of a change. We do not think such evidence has been adduced.

Assuming that a change is necessary, a fifth option is preferable to all four options suggested by the government

10. The government suggested four options if the *status quo* is not to be maintained. The first option is to restrict resigning members from participating in any by-election in the same term. The second option is to adopt a replacement mechanism using the same candidate list, followed by a precedence list system. The third option is to use the replacement mechanism as stated in the second option, but adding that the replacement mechanism should only be triggered if the vacancy resulted from voluntary circumstances. The fourth option is to adopt a replacement mechanism using the same candidate list, followed by leaving the seat vacant when the list is exhausted.

11. The first option is unsatisfactory for two reasons as the government itself recognizes. First, it restricts the right to stand for elections, and thus may give rise to court challenges. Second, the first option does not really help to solve the six problems suggested by the government (mentioned in paragraph 3 of this Submission). Since the third option also uses the replacement mechanism as stated in the second option, the attractiveness of it is closely tied to the attractiveness of the second option. So in what follows we will only address the second and the fourth options.

12. We submit that the second and the fourth options are both inferior to the following option (the fifth option): *a replacement mechanism using the same candidate list, followed by a by-election if no more candidate on the same list is eligible and willing to fill the vacancy*. It should be observed that this option is quite similar to the British method of filling in casual vacancies in the European Parliament (see Part III of The European Parliamentary Elections Regulations 2004).

13. The difference between the second option and the fifth option is that the second option adopts the precedence list system after exhausting the same candidate list, while the fifth option adopts by-elections after exhausting the same candidate list. As observed by many others, the use of a precedence list system to fill vacancies could lead to very unattractive and undemocratic outcomes.

14. The difference between the fourth option and the fifth option is that the fourth option leaves the seat vacant after exhausting the same candidate list, while the fifth option adopts by-elections after exhausting the same candidate list. The reason why the fifth option is preferred to the fourth is that leaving the seat vacant may lead to undemocratic outcomes. For example, suppose that party A and party B competed for three seats in a constituency, and there are two members in each of their lists. The result of the election is that party A won two seats and party B won one seat. However, both members in party A have to leave the office. If their seats are left vacant, then party B, which did not win a majority of votes in the election, would become the majority party. On the other hand, if by-elections are held, then party A could maintain its position as the majority party.

15. We should observe that the fifth option is on a par with the second and the fourth options insofar as the aim of maintaining proportional representation is concerned. Given that the second option and the fourth option can lead to very undemocratic outcomes (as noted in paragraphs 13 and 14 of this submission), we believe that the fifth option would be a more proportionate response to the problem of proportional representation, *if* that is a real problem at all.