

Responses from the Professional Commons on the
“Consultation Paper on Arrangements for Filling Vacancies
in the Legislative Council”

I. Introduction

1. In the “Consultation Paper on Arrangements for Filling Vacancies in the Legislative Council” (hereafter “Consultation Paper”) in July 2011, the HKSAR Government (hereafter “the Government”) claimed that the changing the arrangements for filling vacancies in the Legislative Council (hereafter the “LegCo”) is to “plug” the so-called “loophole” caused by the by-election after the resignation of the five LegCo members in 2010. The Consultation Paper concluded, through quoting some opinion surveys that indicated the low level of support of the “referendum” held in 2010, that there is a need for the current arrangements on the filling of vacancies in the LegCo to be changed.

2. The Professional Commons is in the view that the Government is simply deceiving and factually incorrect when coming to such conclusion. The Government is attempting to suggest that any by-elections for the filling of vacancies in LegCo would be used as equivalent to a “referendum” which Government claimed was not supported by the public. We have to point out by-elections, as a means to fill vacancies in the LegCo has been an effective practice since the introduction of the proportional representation electoral system. The two by-elections of the LegCo held in 2000 and 2007 respectively had received significant public responses¹, for example, the by-election held in 2007 received a voting turnout of 52.06%, which was even higher than the turnout in the 2008 LegCo election for the same constituency (50.17%)². Hence, we believe that the consultation is fundamentally flawed and ungrounded; we believe that it would be totally unnecessary for the Government to propose any changes of the current arrangements for filling vacancies in the LegCo, through the means of hosting by-elections in the first place.

3. The Government is not open and neutral in proposing different options in the

¹ The two by-elections are: The 2000 Hong Kong Island by-election following the resignation of an elected member, and the 2007 by-election, also in the Hong Kong Island constituency following the death of an LegCo member during his term of office)

² See http://www.elections.gov.hk/legco2008/eng/turnout/tt_gc_LC1.html;
<http://www.elections.gov.hk/legco2007by/eng/turnout.html>

consultation paper. It has excluded the option of maintaining the by-election as it is. Furthermore, the paper is full of subjective and biased wordings and most importantly, “leading questions” were used to mislead citizens to elect options in favour of the Government’s intended position. The problematic approach has rendered the results generated from this consultation doubtful to be reliable for decision-making. We would further elaborate our arguments in this response.

4. Although we believed that the making of any changes in the current arrangements regarding the filling of vacancies in LegCo will be duly unnecessary, and hence we do not consider the Government’s proposal merits any further discussions, we would still address and pinpoint the flaws of the options that the Government has proposed in this response.

II. Reason for the Review is Ungrounded

A. Manipulating Results of Opinion Polls and Distorting the Public

5. The Government is claiming one of the reasons for the proposals to change the by-election arrangements is that the “referendum” resulted from the resignation of the five LegCo members in 2010 did not receive public support³. The Professional Commons is in the view that the Government attempts to distort and deceive the public in perceiving that any “by-elections arisen as a result when any LegCo seats become vacant”, is equivalent to that of a “referendum”, and that the Government claims that the general public is against such “referendum”. The Government shall not use simply one case of by-elections in 2010 to discredit the by-elections mechanism itself, which has been running well for a substantial period of time. It is a blatant distortion and attempt to steer public opinion towards its preferred direction that the by-elections shall be abolished, and to be replaced with “replacement mechanism”.
6. The Government quoted the results of the opinion polls to support its claims, but it merely selectively publicized the results of the opinion polls which are favourable to its position of the false claims which was that the “referendum” failed to obtain the support from the general public. The Government failed to reveal and

³ It is stated in the Consultation Paper that “according to opinion polls conducted by various organizations between November 2009 and May 2010, around 50% to 58% of the respondents were against the so-called “referendum” ” (para. 1.01 of the Consultation Paper).

highlight many other opinion polls that pointed out the issue of universal suffrage and on the people who stated their rejection of Government's proposal on political reform (see the footnote on the details of these opinion polls)⁴.

B. Use of Subjective and Biased Wordings for A Predetermined Outcome

7. In the Consultation Paper, the Government used subjective and biased wordings in favour of its positions to make its claims that the holding of by-elections is not the appropriate means for the filling of vacancies in the LegCo⁵.

i. Asking "Leading Questions" to Ensure a Predetermined Outcome

8. The Government is attempting to "lead" the public of the opinions which would support the Government's predetermined and biased position to abolish the by-election mechanism should a seat in the LegCo becomes vacant, and replacing it with the "replacement mechanism". Although the Government has elaborated different pros and cons regarding the different options in the Consultation Paper, it has used many subjective and biased wordings on the questions it asked the general public for comments at the end of the Consultation Paper, such as:

- Emphasizing that the current mechanism allows LegCo Members to "resign at will",
- Referring to the by-elections is a "loophole that needs to be plugged",

⁴ The HKSAR Government claimed that "according to the opinion poll conducted in December 2009 by the Hong Kong Institute of Asia-Pacific Studies, the Chinese University of Hong Kong, 56.7% of the respondents were against or very against the so-called "referendum"", but the same survey also indicates that about 55% of the respondents "still find the pace of democratic progress in the proposal as too slow". Nearly 60% also "do not agree it is the best that the HKSAR Government could propose under current circumstances". It also claimed that the opinion polls jointly conducted by "the Public Opinion Programme ("POP") of The University of Hong Kong and NOW TV around 50% to 58% of the respondents were opposed to the so-called "referendum"". However, during the same poll, for the question on the Government's proposal on changing the election methods in LegCo, the percentage who opposes to this proposal is actually the same as those who agree on the proposal (37%).

⁵ It referred to the resignation of the five LegCo members in 2010 as "to force territory-wide by-elections for the purpose of instigating a so-called "referendum"" (para. 1.01 of the Consultation Paper), it refers to the by-elections as "an unnecessary and significant drain on public resources, which could have been deployed for other more productive purposes". (para. 1.02 of the Consultation Paper), it refers to the hosting of by-elections for filling vacancies in the LegCo as a result of the resignation of LegCo members as "loophole that should be plugged to prevent occurrence of similar incidents in future" (para. 1.02 of the Consultation Paper), and it also emphasized that "various proposals for plugging this loophole have been put forward and discussed in the community" (para. 1.06 of the Consultation Paper).

- Suggesting that the hosting of by-elections would “involving a considerable amount of public funds” (para. 5.04 of the Consultation Paper).

The subjective and biased remarks and “leading question” are pulling citizens to a biased position towards the predetermined agenda of the Government. Hence, the results could not be a fair and true account of the views of the general public for genuine consideration, and to be based on in decision making.

ii. Referring to the By-election Mechanism as a “Mischief”

9. Another major example of the Government’s usage of biased language and wordings for supporting its predetermined position is that the Consultation Paper suggested the 2010 by-elections as a result of the resignation of the five LegCo members was :

- An “unnecessary and significant drain on public resources” (para. 1.02 of the Consultation Paper),
- An “abuse of process” (para. 1.04 of the Consultation Paper), and
- A “mischief” (also in para. 1.04 of the Consultation Paper) which the replacement mechanism is designed to address.

10. The imposition of a predetermined moral value on claiming that the by-election arrangements is a “mischief” in the Consultation Paper is both deceiving and deceptive, as well as imposing a political judgment of its own to the general public. The by-elections as a result of the resignation of the five LegCo members is itself is by no means a “mischief”, as Article 26 of the Basic Law clearly stipulated the scope of voting rights and the right to stand as the candidates⁶. The five LegCo members and voters were simply exercising their rights of standing in elections and the rights to vote in accordance with the Basic Law. Therefore, we remain unconvinced that the reasons for changing the current practice of hosting a by-election when the seat becomes vacant are compelling enough.

11. We believe that it would be a more optimal option should the Government trust the general public and voters in making a sound judgment on whether the resignation of LegCo members (should it happens again) would indeed be a

⁶ Article 26 of the Basic Law stipulates that “as it suggested that the “permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.”

“mischief” or “abuse of process”, through the exercising of the voting rights by the voting in or out of the candidates concerned in the by-elections.

C. Leaving No Genuine Choice for the General Public

12. The Consultation Paper suggested many legal implications and potential legal challenges would need to be considered from the other options, and entrusted the Option 2 as the sole option that is “fair” and “reasonable, proportionate and workable” (para. 4.14 of the Consultation Paper)⁷. We believe that the Government merely “crowned” Option 2 as the sole option for the public for consideration. Such act of the pre-determination of option could not be considered as a form of genuine consultation.

III. Critique on the Options Suggested in the Consultation Paper

A. Violation of Political Rights

13. The Professional Commons is in the view that the rights to vote and stand in any election, including by-election, is a fundamental and basic human rights of the citizens of the Hong Kong. We noted with serious regret that the options proposed in the Consultation Paper have basically stripped from the general public of these rights, and we therefore consider this as a clear and blatant violation of human rights⁸.

i. Failure of Reflecting the Latest Preference of the Electorate

14. As suggested in our previous submission to LegCo, we still hold the view that the options of “replacement mechanism” suggested by the Government that the

⁷ For example, it stated that Option 1 “could give rise to court challenges” (para. 4.08(c) of the Consultation Paper), on Option 3, it commented that “whether such a non-uniform approach is appropriate needs to be considered” (para. 4.17(b) of the Consultation Paper), and for Option 4, it stated that “the legal implications of leaving a LegCo seat vacant also have to be explored further” (para. 4.20 (d) of the Consultation Paper)

⁸ The four options are: namely “restricting resigning Legislative Council (hereafter the LegCo) Members from participating in any by-election in the same term” (Option 1), and the three options of “replacement mechanism”, that is, “using the same candidate list followed by a precedence list system as proposed by the Administration” (Option 2), “not covering causal vacancies arising from death, serious illness or other involuntary circumstances” (Option 3), “using the same candidate list, followed by leaving the seat vacant when the list is exhausted” (Option 4).

automatic replacement of seats according to past election results is “incapable of reflecting the latest preference of the electorate”. Public opinions and preferences on the candidates and the political parties may vary tremendously between the period of the previous elections, and the time when the seat in the LegCo becomes vacant. Should the “replacement mechanism” be introduced, the candidacy of the replacement would not be able to reflect the latest preference of the voters.

ii. Voters Being Deprived of the Expression of Free Will

15. Under the three proposed options of the “replacement mechanism”, voters have no power to decide the replacement candidate. The voters would be deprived of the rights under the “free expression of will” principle by the electors under the “International Covenant on Civil and Political Rights” (“ICCPR”) and Article 21(b) of the “Hong Kong Bill of Rights”, a fundamental principle for the free expression of ideas and views.
16. We are also in the view that the Government has failed to guarantee the free expression of the will of the voters under the proposed “replacement mechanism”, as voters are denied the right to make a choice on who should fill the vacancies. Under the proposed replacement mechanisms, the rights for choosing the replacement of the candidate in the same list would not be at the decision of the voters, but of the political parties, which ranked the candidates in accordance with their own decisions. The Government did not propose any mechanisms in which the voters can choose in advance of the replacement candidates in the same party list.
17. In Option 2 in the Consultation Paper, when a seat originally held by the candidate in a single candidate list becomes vacant, his/her seat would go to the first person on the precedence list (i.e. the list of the first candidates who have not been elected on each of the lists with remaining votes at the previous election). The seat may go to a person in which the political views and standings could be entirely different from the candidate holding the seat originally. The expression of free will of the voters would certainly be unable to be reflected then.

B. Questioning the Constitutionality of the Proposed “Replacement Mechanism”

18. We also question the constitutionality of the proposed “replacement mechanism”. We are in the view that the proposed replacement mechanism might be in violation with the Basic Law Article 68, which stipulated that “The Legislative Council of the HKSAR shall be constituted by election”. The replacement candidate from the “replacement mechanism” would be automatically chosen based on the previous voting results of an earlier election, may violates the principle of “constituted by election”. Hence, all the option related to the “replacement mechanisms” might violate Article 68 of the Basic Law indeed.

C. Effects on the Electoral Systems and “Election Ecology”

i. Disincentives for Single Candidate Lists in Option 2 on Candidates from Single Candidate Lists

19. If Option 2 was adopted, it would also creates a situation that the candidates wishing to be on a single candidate list wishing to stand in the election as an independent list of a single member would not be willing to do so, as they would fear that his/her seat may be lost to a candidate of an entirely different political views with him/her, and would be forced to be on a list with other candidates. This is clearly a major disincentive for the candidates who wish to form an independent voice by only having himself/herself in the list, and it certainly undermines the fulfillment of diversity among candidates in elections.
20. Voters who favour candidates in the single candidates list would also fear that the seat would goes to the candidate of the exact opposition of their political views, and thus causing them to stay away from voting the candidates in the single candidate list. This would strongly undermine the chances of winning of the candidates running as a single candidate list. It would simply be wrong that the Government is blaming those who stands as single candidate as making a “personal decision” and “own choice” in running as a single candidate (Para. 4.14 (d) of the Consultation Paper).

ii. **Encouraging the “Inheritance” of the Seats from the Same Political Party**

21. The realization of “replacement mechanism” represents a significant and fundamental change to our current electoral system in which an incumbent member of LegCo can automatically “pass” his seat safely to other candidates in the same list through voluntary resignation, without the need to go through an electoral process. The “replacement mechanism” might create a situation in which higher popularity candidates could pass the seats to other members of the same political party who are otherwise unable to win should the seat concerned is contested in an election. This could create a modern day equivalent of “inheritance of seats” in the legislature which also undermines voters’ right of the expression of free will.

D. **Wrong Accusation of the Undermining of the “List Proportional Representation” Election System**

22. In the Consultation Paper, the Government has accused that the by-elections arrangements would introduce a “first-past-the-post” element, and therefore would not follow the “proportional representation” nature of the current electoral system (para. 1.08 of the Consultation Paper). We are in the view that there will be no difference of the results of the by-election running under either in the so-called “first-past-the-post” principle, or the “list proportional system” when only one seat is contested. But when two or more seats have become vacant at the same time, the same “list proportional representation” in the electoral system will apply. Hence, it is not appropriate to say that the hosting of by-elections when a seat becomes vacant would be in violation of the “list proportional representation” system.

23. With regard to the two by-elections of the LegCo hosted in 2000 and 2007, while the Government has not expressed any concerns or complaints during that period that the hosting of by-elections in which only a single seat has become vacant and contested has violated the “list proportion representation” system.

Conclusions

24. The Professional Commons is in the view that the Government is attempting to mislead the general public and manipulate public opinion through biased and guided wordings in the Consultation Paper.
25. The Government's proposal of disenfranchising the voting rights of the general public under the "replacement mechanism" clearly violates the fundamental rights of voters in expression of free will in the election.
26. As stated in our previous submission to LegCo, "the proposed replacement arrangement is beyond any doubt a major step-back in democratization of our election system". We also reiterate our position that "Any act leading to the withdrawal of the existing by-election mechanism would result in enticing the public to ignore their democratic rights as well as their opportunities to speak out".
27. Hence, The Professional Commons strongly *urges the Government to withdraw any proposals on changing the current arrangements on filling vacancies in the LegCo, including the introduction of any form of "replacement mechanism", and we call for simply maintaining the current arrangements status quo, that is, having by-elections when a seat in the LegCo becomes vacant under any circumstances.*
28. We consider the arrangement for filling the vacancy of future District Council (Second) Functional Constituency should be the same as the election of LegCo and District Council Geographical Constituencies, that is, via by-election.

Reply from The Professional Commons the Question Raised by the HKSAR Government in its “Consultation Paper on Arrangements for Filling Vacancies in the LegCo”, (para. 5.06 of the Consultation Paper):

Question

- (a) whether the phenomenon of Members resigning at will, triggering by-elections in which they seek to stand and involving a considerable amount of public funds, is a loophole that needs to be plugged?

Reply from The Professional Commons:

We believe that the hosting of by-elections is still the best and only means to fill up a mid-term vacancy in the LegCo. Hence, we **do not** consider the phenomenon of LegCo Members resigning at will, triggering by-elections to be a loophole that needs to be plugged.

Question

- (b) if it is considered that the loophole should be plugged, of the following options identified in Chapter Four, which one(s) would be preferred:

- (i) Option 1: restricting resigning Members from participating in any by-election in the same term (see paragraphs 4.07 and 4.08);
- (ii) Option 2: a replacement mechanism using the same candidate list followed by a precedence list system as proposed by the Administration;
- (iii) Option 3: a replacement mechanism which does not cover causal vacancies arising from death, serious illness or other involuntary circumstances;
- (iv) Option 4: a replacement mechanism using the same candidate list, followed by leaving the seat vacant when the list is exhausted;

Reply from The Professional Commons:

As we do not consider the so-called “loophole” should be plugged, we object to all the options suggested by the Government. **We had also pointed out all four options are violating the rights of voters and could not be accepted in any means.**

Question

- (c) if it is considered that the loophole need not be plugged, whether the status quo should be maintained i.e. no legislative amendment will be made, a by-election will be held if a Member resigns, the resigning Member can stand in the resulting by-election, and a considerable amount of public funds will be spent;

Reply from The Professional Commons:

We are in the position in which **the current arrangements for filling mid-term vacancies in the LegCo, i.e., the hosting of by-elections, shall be maintained.**

Question

- (d) whether it is necessary to address the issue that holding a by-election (which adopts the first-past-the-post system) to fill a mid-term vacancy in GCs and the future DC (second) FC (which adopt the list proportional representation system in general elections) may result in an unfair change in the proportion of seats allocated among political parties and groups in the previous general election (see paragraphs 1.09 and 1.10); and if so, whether a replacement mechanism that is a fair and reasonable alternative to by-election can be considered;

Reply from The Professional Commons:

We **do not** consider holding a by-election to fill a mid-term vacancy in GCs and the future DC (second) FC is an adoption of the “first-past-the-post system”, nor it would result in an unfair change in the proportion of seats allocated among political parties and groups in the previous general election. (See paras. 22-23 in our submission for our detailed responses on this question)

The Professional Commons
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