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25 November 2005

Mr. Stephen Lam
Secretariat, Constitutional Development Task Force
Constitutional Affairs Bureau
3/F, Main Wing, Central Government Offices
Lower Albert Road, Hong Kong

Dear Mr. Lam,

Re: 5th Report by the Constitutional Development Task Force

I attach the Law Society's submissions on the 5th Report which will be published on the Law Society's web site at:

www.hklawsoc.org.hk

Yours sincerely,

(Signed)

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Submissions by the Law Society of Hong Kong on the 5th. Report of the Constitutional Development Task Force

1. Guiding Principles

The Law Society's Council has reviewed the proposals in the 5th Report of the Constitutional Development Task Force ("CDTF") and makes the following submissions on the recommendations with reference to the principles contained in the following:

- **The Basic Law**

Articles 45:

"The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.

The specific method for selecting the Chief Executive is prescribed in Annex I: "Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region".

Article 68:

"The Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.

The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

The specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: "Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures".

Article 39:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

ICCPR: Article 25:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country."

Principles enunciated in Annex I paragraph 3:

"3. The delimitation of the various sectors, the organizations in each sector eligible to return Election Committee members and the number of such members returned by each of these organizations shall be prescribed by an electoral law enacted by the Hong Kong Special Administrative Region in

accordance with the principles of democracy and openness. (emphasis added)

- **Article 21 of the Universal Declaration on Human Rights**

“(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

- **Declaration of Bangkok 1965**

“It considers that, given peace and stability, there are no intrinsic factors in the Region which make the ultimate establishment, maintenance and promotion of the Rule of Law incapable of attainment; that the Rule of Law can only reach its highest expression and fullest realization under a representative government freely chosen by universal adult suffrage; and that the Rule of Law requires effective machinery for the protection of fundamental rights and freedoms;”

- **Decision of the NPCSC dated 26 April 2004**

2. “Package of Proposals of the Task Force on the Methods for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008”

The CDTF has indicated that the proposed package “*must be consistent with the relevant provisions of the Basic Law and the Decision of the NPCSC of 26 April 2004*” but there is a lack of adherence to the guiding principles outlined in paragraph 1 above particularly the principle enunciated in Paragraph 3 of Annex I namely: “*in accordance with the principles of democracy and openness*”.

3. Method for Selecting the Chief Executive (“CE”)

(a) The Election Committee (“EC”)

The proposal is to increase the number of EC members from 800 to 1600 as follows:

5.05 *The Task Force proposes that the existing four sectors of the Election Committee be maintained. The number of members to be allocated to the sectors should be as follows:*

(1)	<i>Industrial, commercial and financial sectors</i>	300
(2)	<i>The professions</i>	300
(3)	<i>Labour, social services, religious and other sectors</i>	300
(4)	<i>Members of the Legislative Council, members of the District Councils, representatives of the Heung Yee Kuk, Hong Kong deputies to the National People's Congress, And representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference</i>	700

Total: 1,600

Sectors (1), (2), and (3)

It is noted that in sectors (1) and (2) the original sectors could elect 20 members but now the same sectors can elect 30 members. The Law Society is of the view that a simple increase in the numbers does not comply with the principles enunciated in paragraph 3 of Annex I.

The CDTF has failed to provide any convincing rationale for increasing the numbers in these sectors.

The Council notes the proposal to increase the numbers may be progressive, but the proposal is not sufficiently progressive to achieve universal suffrage as stipulated in Article 68 of the Basic Law.

Sector (4)

Paragraph 5.08 of the Report provides the following explanation of the rationale for expanding this sector:

"The Task Force proposes including all District Council members in the Election Committee. The rationale behind the proposal is that District Council members have a public mandate, and that they are in a better position to understand and reflect the views of the general public on day-to-day livelihood issues".

The Law Society would point out that the "public mandate" of the District Council is limited, and that if it is to be extended, it should be extended in accordance with the principles of democracy and openness.

(b) Composition of the District Council (“DC”)

Article 68(2) states:

The CDTF notes that 80% of the DC members have been returned by election and ignores the fact that 20% of the DC members have been appointed. The CDTF has not put forward any justification on its proposal to include the Appointed DC members on the EC. It also fails to justify how this proposal advances the principle of “*universal suffrage*” as required by Article 68(2) of the Basic Law.

The CDTF has not considered the following problems:

- “Double membership” of LegCo and DC members;
- “A LegCo member from the DC Constituency who fails to be re-elected in the next DC election during his term as a LegCo member”.
- DC members had a limited mandate from the 2003 election i.e. to elect 1 LegCo member and 42 EC members, but such a mandate is insufficient to support the new role the CDTF proposes for the DC members.
- Issues with the stipulations in Article 97:

“District organizations which are not organs of political power may be established in the Hong Kong Special Administrative Region, to be consulted by the government of the Region on district administration and other affairs, or to be responsible for providing services in such fields as culture, recreation and environmental sanitation.”

The Council has the following observations on the proposal:

The Central People’s Government made it clear in the past that Article 97 covers the DC, as it consistently rejected the British-Hong Kong Government’s stance on the 3-tier governance i.e. LegCo, Urban Council and the District Boards. The Central People’s Government has always stressed that the DC is only a consultative organisation.

The CDTF’s proposal seeks to include the DC members into the EC by virtue of the office of the DC, and hence the CDTF argues that it cannot exclude the “*Appointed DC members*”, as there is no distinction in “*the office*” of appointed and elected members. The CDTF’s proposal would:

- (i) confer *political power* on all DC members by virtue of the “*office*” of DC;
- (ii) allow the 500 plus DC members to form over 30% of the EC, who would be able to nominate up to 2 CE candidates.
- (iii) calls in question the role of future DCs as the CDTF’s proposal significantly changes the role of the DC.

(c) The Law Society's Proposals

The Law Society repeats its submission that there should be *“greater direct participation by Hong Kong people in the mechanism to select the CE.”*

We refer to our submissions to the CDTF dated 27 September 2004 when we indicated the EC could be expanded as required by Article 45 *“in accordance with democratic procedures”*. (See Appendix 1)

The Law Society recommended the size of the EC should be increased by 400 additional members thus increasing the total number of *“Electors”* to 1,200.

Hong Kong is currently divided into 400 District Council constituencies under 18 Districts, with each constituency returning one directly elected Member to the District Council. Each District Council constituency has a population of approximately 17,000 people.

The additional members to the EC could be directly elected via the existing District Council constituencies thus widening public participation in the selection of the CE.

This proposal should be easy for the public to understand as voters are already familiar with the District Council elections. The existing boundaries of the District Council constituencies should be adopted as this will enhance the ties between the voters and the candidates.

Under this proposal, directly elected members will account for one third of the EC's membership. It will be a gradual but significant step towards the ultimate aim of universal suffrage as stated in the Basic Law. The direct election of one third of the members of the EC will assist with the development of democracy at the grassroots level by enabling greater participation by members of the public.

We submit that our proposal removes concerns raised in the preceding paragraph on the role of the DC members in relation to the provisions of Article 97 of the Basic Law.

The composition of the existing 4 Sectors should remain; the CDTF should adopt the Law Society's proposal which increases direct participation of the public compared to their proposal which simply increases indirect elections, therefore failing to make any progress towards universal suffrage.

(d) Nomination Mechanism

Annex I paragraph (4) states:

“Candidates for the office of Chief Executive may be nominated jointly by not less than 100 members of the Election Committee.”

The Council does not agree with the proposal to increase the threshold nomination to 200. If the number of EC members is increased, the Law Society endorses the view that it is preferable to have a lower threshold for nomination which will encourage more candidates to stand and thus prevent a "1-horse race".

(e) Requirement that the CE should not have any Political Affiliations

The Council notes the proposal. However, it is also noted that the Basic Law does not prohibit political affiliations by the CE.

(f) The question of a candidate returning uncontested

The Council endorses the recommendation that an election should take place if there is only 1 candidate as the process should be transparent. An election will ascertain the candidate's level of support. The Administration should provide details of the mechanism for the election proceedings.

4. Method for Forming the Legislative Council

(a) Number of Seats

The Council notes the NPCSC's Interpretation dated 26 April 2004 which requires the proportionality between the geographical and functional constituencies to be maintained. The proposal to increase the number of seats from 60 to 70 with 35 seats returned by functional constituencies and 35 by direct elections complies with the NPCSC's Interpretation.

(b) Number of Seats Returned by Functional Constituencies

The Law Society notes the CDTF proposal that DC members "elect" 5 DC members to fill the 5 new LegCo seats. The CDTF must review the role of the District Council under the District Councils Ordinance given the matters raised in paragraph 3(c) above.

(c) Corporate Voters

The Administration has not put forward any justification to expand the corporate vote as the proposal is contrary to the principle of establishing universal suffrage.

The Council recommends that corporate votes should not be extended and should eventually be abolished.

5. Timetable for Universal Suffrage

The Council notes the Draft Motions in Annexes B and C of the Report do not contain any proposals on future milestone events on the introduction of universal

suffrage. The Council notes there is no legal obligation on the Administration to make such proposals but this does not prevent the Administration from making its views known in a policy statement.

6. Issues arising from the Term of Office of the Chief Executive

Annex A of the Report

The Law Society notes the CDTF has indicated that its proposal on the method for selecting the CE can be implemented *“through local legislation and does not require amendments to Annex I to the Basic Law”* and agrees there is authority to permit *clarification* of the Basic Law in local legislation.

The Interpretation by the NPCSC dated 27 April 2005 states that:

“... prior to the year 2007, when the Chief Executive is selected by the Election Committee with the 5-year term of office, in the event that the office of Chief Executive becomes vacant as (he/she) fails to serve the full term of office of 5-years as prescribed by Article 46 of the Basic Law, the term of office of the new Chief Executive shall be the remainder of the previous Chief Executive; ...”

The CDTF now proposes to apply this interpretation of Article 46 to the 2007 elections.

It appears the CDTF is proposing an interpretation and not a clarification of Article 46 in local legislation namely: *“the remainder term of a retiring Chief Executive equals 1 term, and the CE will be entitled to serve 1 additional term”*.

This is an attempt to introduce an amendment to the Basic Law by amending Annex 1 and by-passing the prescribed procedure as stipulated in Article 159 of the Basic Law.

7. Draft Motion to be put by the HKSAR Government to the Legislative Council Concerning the Amendment to the Method for the Selection of the Chief Executive (Annex B)

The draft Amendment contained in the Appendix to the Draft Motion only covers the election of the CE in 2007 and there is no provision for future elections. If for whatever reason no further amendment is effected for selecting the CE *for the years subsequent to 2007* the original provisions in Annex I would prevail. This would be a retrogressive step. The situation after 2007 should be suitably addressed to avoid such a situation.

8. Draft Motion to be put by the HKSAR Government to the Legislative Council Concerning the Amendment to the Method for the Formation of the Legislative Council (Annex C)

The Council considers the Government should set out proposals to increase direct participation by individuals in the 2008 Legco elections.

**The Council
The Law Society of Hong Kong
25 November 2005**

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