

11 May 2005

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

Dear Sir

**The Constitutional Development Task Force: Fourth Report: Opinions on Follow-up
Questions and Related Matters**

I enclose my opinions in respect of the above.

If you would like a soft copy of my Opinions, please ask my secretary , who can be reached at any of the above telephone, fax or email contacts.

Yours faithfully

(Name Provided)

Encl(s).

(Editor's Note : The sender requested anonymity.)

The Fourth Report of the Constitutional
Development Task Force

**Views and Proposals of Members of the Community on
the Methods for Selecting the Chief Executive in 2007
and for Forming the Legislative Council in 2008**

Opinions of _____
on the Follow-up Questions and Related Issues

May 2005

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The Fourth Report of the Constitutional Development Task Force

Opinions on the Preliminary Summary of Views and Follow-up Questions

INTRODUCTION TO OPINIONS

I consider that certain issues need to be addressed on an introductory basis, before considering the Follow-up Questions raised upon the Preliminary Summary of Views in the Fourth Report. Some, but not all, of those issues relate to, or are brought into focus by, the premature resignation of the previous Chief Executive.

In presenting my views in the form of an initial Summary, followed by fuller opinions, I therefore cover first the Introductory Issues which I consider relevant, as Section A. Sections B and C relate respectively to the Method of Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008, under the paragraph headings used in Appendix III to the Fourth Report, together with additional headings and comments on certain other issues which I consider relevant.

However, the summaries are only that, and for full explanation and support, as well as for additional comments, it is necessary to refer to the full Opinions which follow under the same Section letters and headings as above. Moreover, the issues are extensively interrelated, so that it is inappropriate to consider issues and comments and opinions on them in isolation.

Even the summary is quite lengthy. I therefore provide the following overview of some of my most important opinions, many of which are applied recurrently through the Opinions:-

- i) no material changes in the topics dealt with in the Fourth Report can sensibly be considered except in the context of at least clear principles and outlines of how the Nomination Committee for the Chief Executive will be structured and how it will operate and how election of the Legislative Council by universal suffrage will be structured and will operate;
- ii) that context appears not meaningfully to have been considered at all, so that no material changes should be made for the time being;
- iii) the present functioning of the Election Committee is unacceptably opaque, and has to be assumed to be without the substance appropriate to its role; its role should be made more substantive and transparent, as a priority;
- iv) while the competence of our government is often unfairly criticised, government does too often lack transparency, and ways need to be found, as a priority, to improve relationships between government and the Legislative Council and the effectiveness of the Council; that probably involves a need for representation of the Council within policy making bodies of government;
- v) mutually improved understanding between the SAR and the CPG is necessary.

The Opinions end with a Section D, entitled Closing Thoughts. I have not dealt with those in the Summary, since in a different way to the Summary they condense my broader thoughts on the subject matter of the Fourth Report and indeed of the present Constitutional Review as a whole.

SUMMARY

A. INTRODUCTORY COMMENTS

A.1 *Interpretation Issues*

- i) There is widespread misunderstanding and misinterpretation of constitutional issues. The Basic Law is law of the PRC, and apart from the actual terms of the Basic Law it is therefore both inevitable and at least arguably in accordance with tenets of an English legal system such as that of Hong Kong that:-
 - the final right of interpretation lies with the PRC;
 - final interpretation should be according to PRC law.
- ii) The PRC legal system has material differences of concept as well as of content from an English system. Hong Kong must therefore expect and accept that those differences may result in PRC interpretations being incompatible with interpretations according to English law if the Basic Law had been domestic law of the SAR.
- iii) It is a reflection of the “one country, two systems ” concept, and a signal of its normal, proper and effective operation, and not a signal of its collapse or of weakness of the legal system or administration of the SAR, that aspects of the Basic Law which directly concern the PRC as well as the SAR should be referred to the PRC for interpretation. The selection methods of the Chief Executive Officer and of the Legislative Council are patently aspects of the Basic Law which concern the PRC as well as the SAR.

A.2 *The Election Committee*

- i) The term of the present Election Committee ends on 13th July 2005, and the next Election Committee should be elected before that date, to ensure continuity.
- ii) That means that the selection of the Chief Executive for the term next after that of the Chief Executive selected on or with effect on 10th July will be made by the next Election Committee.
- iii) In the absence of amendments or further interpretation in respect of the term of the next Election Committee, made during its term, there is therefore no scope for amendment of the method of selection of the Chief Executive in 2007.
- iv) My following opinions will in any case suggest that there are other priorities and possibilities and that no material changes should be made for the time being.

A.3 *Further Immediate Constitutional Issues*

There appears to be a need:-

- i) to change SAR law to ensure that it applies to a mid-term resignation of the Chief Executive;
- ii) and either to obtain a Standing Committee interpretation of the Basic Law limitation of any one Chief Executive to two terms, or to amend the Basic Law to clarify that issue.

A.4 *Basis of Views*

My Opinions are so far as possible objective and without political bias.

A.5 *Who should lead whom: limitations of public opinion*

- i) The subject of the selection methods and their amendment involves important and complex issues of constitutional law, which must be treated as overriding public and political opinion.
- ii) Even where that is not the case, decision of what amendments are appropriate wholly or even mainly according to the majority vocal expression of public opinion does not represent good government or good leadership.

A.6 *Are the changes under discussion the most appropriate?*

- i) I question whether the issues dealt with in the Fourth Report represent those that it is appropriate or most important to deal with at this stage.
- ii) I indicate that elsewhere in my Opinions I will suggest as more important or appropriate:-
 - clarification of issues relating to the Nomination Committee;
 - the establishment of a route map outlining the operation of the applicable structure under the ultimate aims and the appropriate stages towards that structure;
 - the material expansion of the processes and transparency of the Election Committee.

A.7 *The Relevance of the Nomination Committee*

It is imprudent at the least, and potentially very damaging to progress at a later date, that material changes should be made in the size or composition of the Election Committee until there is at least an established outline of the size, composition and procedures of the Nomination Committee, and consequently

reasonable assurance of transitional consistency from the Election Committee to that Committee.

B Method for Selecting the Chief Executive in 2007

B.1 *The Number of Members of the Election Committee*

- i) Any change of size or composition of the Election Committee must be compatible with the planned size and composition of the Nomination Committee as envisaged under Article 45.
- ii) In the current absence of planning on the size, composition or procedures of the Nomination Committee, no material change should therefore be made.
- iii) As an example, the suggested 50% to 100% range of increase in the number of members of the Election Committee is not presented in any longer term context of projected and adequately considered, further increases nor in any other context shown to be consistent with the ultimate aim.
- iv) As a further example, the impact of an increased number of seats of same sub-sectors on the ratio of seats of different sub-sectors appears to have received very limited consideration. For instance, the present 60:800 ratio, i.e. 7.5 per cent, of Legislative Council Members to the total membership of the Election Committee, seems about right. (see below for further discussion of this point.)

B.2 *The Composition of the Election Committee*

- i) My comments under paragraph B.1 are equally relevant to this paragraph.
- ii) The concept of the Basic Law as to the composition of the Election Committee is expressed in the fact that “broadly representative” is initially constituted by business and professional sectors having significantly weighted representation.
- iii) The same phrase of “broadly representative” will expressly also be applicable to the Nomination Committee under the ultimate aims, and even if that allows for some flexibility the concept of the Nomination Committee only makes sense if there is a meaningful distinction between a broadly representative Nomination Committee and universal suffrage.
- iv) In support of the above being intentional, it must be borne in mind that the Chief Executive is and will remain the chief executive of an administrative region of the PRC, appointed by the CPG. In order to avoid a potential constitutional crisis, candidates selected by the Election Committee, or in due course the Nomination Committee, should at least be likely to be acceptable to the CPG, and the composition of the Committees should reflect that need.
- v) Public views on this issue as represented in the Fourth Report come across as far too divided and mutually inconsistent to suggest that any particular changes in the composition of the Election Committee are supported, or are seen as appropriate or necessary. Still less is there any general consistency of views to support changes in proportions between sectors, or, materially, between subsectors.
- vi) The one qualification to that is the specific suggestion that there should be a material increase in the number of seats for District Council

Members, up to each of them having a seat. Apart from considering that proposition to be generally inappropriate, I regard it as entirely inappropriate that a change from a present ratio of about 3:2 between Legislative Council Members and District Council Members on the Committee to a ratio of 1:5 should even begin to be contemplated.

B.3 *The Number of Members of the Election Committee Required for Nominating Candidates for Chief Executive*

- i) I do not consider that changing the number of Election Committee Members required for nominating candidates is a priority.
- ii) Under paragraph B.5.c below I outline proposals which I consider would be much more pertinent to improving the operation of the Election Committee.

B.4 *The Delineation and Size of the Electorate of the Election Committee*

- i) Broadening the size and scope of the electorate of the Election Committee is not necessarily consistent with a broadly representative Election Committee, nor with ensuring the preservation of the evident purpose of the Election Committee, and later the Nomination Committee, to perform a function other than as a proportionate microcosm of the general electorate.
- ii) In general the existing subsectors appear to be broadly representative within the intention of the Basic Law, but application of the principles and criteria by which the original subsectors were chosen and seats allocated between them might suggest the need for some minor adjustments. However no cogent argument appears to exist to support any more radical change.

- iii) Replacement of corporate voting by individual voting risks conflicting with the evident purpose of the Election Committee and also risks both being open to abuse and accidentally changing subsector balances of influence. Weighted voting for larger entities which currently have a single vote (for instance company members of the commercial constituencies), e.g. by their being granted the right to appoint more than one voting representative, would be more valid in principle but would require complex analysis in respect of each subsector, to ensure that the range of multiple votes was appropriate to each sector.

B.5 *Others*

- a) Abolition of the Requirement that the Chief Executive must Relinquish any Political Affiliation
 - i) Although the provision against this is contained in the Chief Executive Election Ordinance, rather than in the Basic Law, I consider that the independence of the Chief Executive from any political affiliation is an integral part of the constitutional structure and balance.
 - ii) The Chief Executive is accountable to the CPG, (as well as to the SAR through the Legislative Council) and is the CEO of the SAR as an administrative region of China. He or she should be chosen on that basis and not by reference to any political affiliation.
 - iii) Moreover, the Basic Law, taken as a whole, provides a structure of checks and balances between the constitutional status of Hong Kong as an administrative region of the PRC and the protection of the substantive degree of autonomy assured to Hong Kong, which would be materially prejudiced by a political affiliation of the Chief Executive.

- b) Pros and Cons of setting out, at this stage, a timetable for electing the Chief Executive by universal suffrage
- i) As a preliminary, it is necessary to make quite clear that to refer to election of the Chief Executive by universal suffrage is a materially incomplete reference to the relevant provision of Article 45.
 - ii) Putting the issue in its proper textual context, extensive amplification of how the Nomination Committee under the ultimate aim will be constituted and how it will operate, and of adequately considered stages of progress towards the achievement of the structure under the ultimate aim, is necessary before any timetable could be considered.
 - iii) Fixing a timetable must be secondary to settlement of its content, and in any case I consider it inappropriate to try to decide in advance what constitutes gradual and orderly progress all the way to the ultimate aim.
- c) The Functioning of the Election Committee
- i) I consider that this is an issue which in any case should be addressed, and also one that it would be appropriate to deal with in the context of my overall opinions and the political situation in Hong Kong.
 - ii) I propose that the Election Committee should have a more substantive involvement in the performance of its role, with far more transparency than at present, and that the status of the Committee as a broadly representative body should be better reflected by its processes than is currently the case.
 - iii) Such changes are more appropriate, at least at this time, than material changes in the size or composition of the Election Committee, and would be more directly relevant to the evident public dissatisfaction over the election process in 2002.
 - iv) I make some specific procedural suggestions aimed at materially increased substance and transparency of the procedures of the Committee, including arrangements for public presentations by, and interview of, candidates and

potential candidates, and plenary session discussion by the Committee of the merits of different candidates.

d) Constitutional Issues and Principles of Democracy

- i) The Basic Law establishes a system for Hong Kong which contains substantial and substantive elements of democracy, but it is not ultimately a democratic constitution. The Chief Executive and senior government executives are and will continue to be ultimately appointed by the CPG and accountable to it.
- ii) Consequently normal western principles of democracy are not applicable and deciding on what relevant constitutional amendments are appropriate based on consensus or even majority views of the electorate is not appropriate.

e) Political Realities and Pragmatism

- i) Hong Kong should accept the political realities of its status and constitution, and that the government of Hong Kong has a responsibility to lead the people towards that acceptance.
- ii) Therefore, even if the guidelines established by the CPG for the maximum scope of amendments allow for the possibilities discussed in the Fourth Report, the government should very carefully consider the possible impact of any potential amendments on the ongoing operation of the Basic Law and future development of the election methods.
- iii) However, the development of democratic principles necessarily involves the development of transparency and accountability, and the limitations on the extent of democratic rule available to Hong Kong do not void that necessity. Indeed the political realities in themselves make the issues of transparency and accountability within the SAR even more important, and the SAR government must be constantly cognisant of that.

- iv) The development of transparency and accountability on the areas dealt with in the Fourth Report is more important and relevant than amendments of details, at least when such details could only be at present considered in the absence of a long-term context. Under its dual accountability to the Legislative Council, the government must owe the Council transparency, as otherwise it is hard for the Council to act responsibly and in the interests of Hong Kong in considering relevant legislative proposals.

C Method for Forming the Legislative Council in 2008

C.1 The Number of Seats in the Legislative Council

- i) Although there are some arguments in favour of modest increase, there are also some arguments against any increase, in particular that any increase in the number of seats in geographical constituencies must be matched by the same increase of seats in functional constituencies.
- ii) The appropriate ration between the number of seats in the Legislative Council, as represented by seats on the Election Committee, to the total number of seats on the Election Committee and the number of seats on the Election Committee allocated to certain other subsectors is relevant to both this topic and that of the number of seat in the Election Committee (as is also the principle of creating more functional constituencies).
- iii) Perhaps making changes in the size of Legco, or other changes in its constitution, is less important than finding ways to give Legislative Councillors a better understanding of government and of relevant issues, probably involving Legislative Councillors in decision making processes of government.

C.2 *The Number of Seats Returned by Geographic Constituencies*

- i) This topic can only be considered together with the next, as the total number of seats in Geographic Constituencies and in Functional Constituencies must remain equal for the 2007 Election.
- ii) If an increase is made it does not have to be 5 or a multiple of 5, as the number of seats in each geographic constituency should be such as to reflect as nearly as is practicable a proportionate allocation of seats according to the number of election in each constituency.
- iii) That might more strongly justify the creation of one or two new seats if that is necessary to correct material current proportionate imbalances. The same need may suggest adjusting for 2008 the number of seats allocated to each constituency for 2004, without an overall increase, if that is considered better than creating one or two more functional constituencies at this time.

C.3 *The Number of Seats Returned by Functional Constituencies*

- i) In addition to relevant points raised under paragraph C.2, broadening the representation and enlarging the overall electoral base of functional constituencies should not be seen as an end in itself.
- ii) Increasing the number of seats returned by functional constituencies now seems inconsistent with the progressive reduction in the number which is in due course likely to be found appropriate.
- iii) It is difficult to form rational views in the absence of an adequate context (an outline of the ultimate aims and of feasible steps towards them) and that context does not exist.
- iv) In particular the involvement, breadth and clarifications of functional constituencies in the Nomination Committee needs to be established at least

in principle before it is appropriate to make any material amendments to the structure of functional constituencies.

- v) It is or may be inappropriate to apply normal standards of democracy to issues concerning the dismantling or watering down of the functional constituencies; for the time being any change in relation to functional constituencies as relevant to the Legislative Council must be considered in parallel with functional constituencies relevant to the Nomination Committee, though eventually they will probably only be relevant to the latter.

C.4 *The Delineation and Size of the Electorate of Functional Constituencies*

My opinions in Sections B.2, B.4, C.1 and C.3 above cover my views on this subject.

C.5 *Provisions Regarding Nationality of Legislative Council Members*

The involvement of foreign nationals should be encouraged and the number of Legislative Council Members who may be foreign nationals should be preserved.

C.6 *Others*

- i) The long-term future of functional constituencies should be examined, but this is only one of many issues which should be examined in the context of the ultimate aims before any material changes are made.
- ii) The same applies to the exploration of different forms of universal suffrage. Interpretation of that term is not necessarily limited to election by geographical constituencies, nor to the present format of elections through them.

- iii) In that context retention of the principle of functional constituencies might be considered, but adopted to provide a means for minority groups whose representation on the Council is considered valuable or appropriate. Foreign nationals might be one such group.
- iv) However, probably no elector should have more than one vote, so that those qualifying for a special category constituency would have to elect whether to vote in that or in their geographic constituency.
- v) A timetable to achievement of the ultimate aims cannot be considered without first settling more detail on the relevant structure and formation of the Legislative Council under the ultimate aims and then establishing a feasible and orderly performance of progress to reach the ultimate aims as amplified. Even then the CPG might reasonably rule that it would only approve a timetable for part of the programme at any one time.

The Fourth Report of the Constitutional Development Task Force
Opinions on the Preliminary Summary of Views and Follow-up Questions

OPINIONS

A. INTRODUCTORY COMMENTS

A.1 *Interpretation Issues*

A.1.1 The constitutional position now applicable inevitably has an impact on the subject matter of the Fourth Report. The first issue has become that of interpretation.

A.1.2 On interpretation of the relevant terms of the Basic Law as a domestic matter purely under English law, I consider that there is little or no ambiguity about the term of a Chief Executive elected to take office if the previous incumbent has resigned or otherwise left office in mid-term: the term should be five years. Any argument that selection of a replacement Chief Executive under the now applicable Article 53 means, by its reference back to Article 45, selection only for the remainder of the term established by Article 46 for the previous Chief Executive would, I am fairly confident, be regarded in English law as far-fetched.

A.1.3 However, the Basic Law is primarily law of the PRC, which is why under Article 158 the final right of interpretation rests with the Standing Committee. Further, under Article 159 the first named parties with the right to propose amendments of the Basic Law are the Standing Committee and the State Council.

A.1.4 Moreover, in certain areas of law English law itself establishes situations which it treats as governed by the law of another jurisdiction. The Basic Law is, so far as I

am aware, a unique legal document, as it is law enacted under one legal system, i.e. that of the PRC, and only capable of being amended under that legal system, but establishes the constitutional basis for another legal system, i.e. that of Hong Kong. (On reflection I think that some or all of the dominions of the British Empire, such as Australia, may for a period have had a more or less similar situation, but I have not had time to check what is in any case not a critically relevant point.) I think that an interesting point of English law arises as to whether, in the circumstances, at least those aspects of the Basic Law which have a direct relevance to the PRC system, which must include the term of office of the Chief Executive, would be treated even in an English system court as governed by the law of the PRC. Consequently I consider that on the relevant subject matter a Court, such as that of Hong Kong, applying the English legal system might rule that PRC constitutional law was applicable. In any case I consider that an English legal system court would accept the constitutional rights of PRC bodies referred to in paragraph A.1.3, and would therefore overrule any claim that interpretation is a matter primarily for the Hong Kong courts. Thus I regard it as inappropriate to challenge the right of the PRC to take the position that the replacement Chief Executive will serve a term only until 30th June 2007, subject to the qualification which I make in paragraph A.1.6.

A.1.5 I add to my above comment the observation that while, under English law, the doctrine of strict interpretation is applicable to legal documents, so that a court will not consider extraneous arguments as to intention if a meaning is clear from the words of the document (even if the effect of the words is undesirable), I understand that the PRC approach to interpretation is different, and allows for a more pragmatic approach. (Indeed, statute law of the PRC, for instance on commercial contracts, reflects that approach by the express inclusion of what English Common Law would regard more as principles of equity, not of contract.) Therefore I believe that comments by politicians and others in Hong Kong to the

effect that a ruling of the PRC in favour of a two year term of the next Chief Executive is untenable are also inappropriate.

- A.1.6 There is however a qualification to my views in paragraphs A.1.4 and A.1.5: several individuals holding senior positions in the Chinese government made statements on the position under PRC law, but it is not clear to me whether the Hong Kong government received a formal PRC legal opinion on the interpretation of the relevant provision of the Basic Law under PRC law. I consider that the government of the SAR should have had, and have given appropriate publicity to, such an opinion before it could properly proceed on the basis of it. In the absence of that I believe that the Basic Law, as well as domestic law of the SAR, would have to be amended. Needless to say I therefore consider that it is best and most appropriate to have had an interpretation by the Standing Committee, but I do not think that it would have been constitutionally improper for the SAR government to proceed on the basis of a PRC legal opinion.
- A.1.7 Subject to that qualification, I therefore consider that as the Chief Executive is an administrative officer of the PRC, responsible for a region of the PRC, interpretation of matters relating to his selection and term are constitutional issues for the PRC at least as much as for the SAR. I believe that this is one of many areas in which more understanding is needed in Hong Kong, as well as perhaps in the PRC. There are material differences in the systems of the SAR and those of the rest of the PRC, which are inevitably sometimes relevant to interpretation of the Basic Law and to the status of the SAR. I suggest that the need to resolve relevant differences, whenever they are identified, without either resort to confrontation or claims of subservience to the PRC, should be better appreciated, particularly by politicians, the media and the public in Hong Kong, and by international commentators than it appears to be.

A.1.8 In relevant circumstances the government and Legislative Council of Hong Kong should accommodate such resolution by amendment of the Hong Kong legislation which implements the Basic Law. I consider that it is not constructive, and may be indicative of a lack of sufficient understanding, that the recent constitutional events and relevant interpretations in the PRC have been reported by at least one Legislative Councillor as demonstrating the breakdown of the one country two systems constitution. However, if those remarks of mine are regarded as justified, I submit that the governments, both of the CPG and of the SAR, should accept some responsibility for the need pro-actively to address the issue of improving mutual understanding.

A.1.9 In the context I welcome the recent reported initiatives of the CPG to obtain legal opinions both in the PRC and in the SAR as to all areas of the Basic Law which might usefully be interpreted or, if necessary, amended, for the purpose of clarification after eight years of operational experience.

A.2 *The Election Committee*

A.2.1 In one major respect I believe that recent developments only highlight a time related issue in respect of the subject matter of the Fourth Report which was in truth already there. That is that the term of the present Election Committee expires in mid-July 2005, and that the period before then is too short to settle and amend constitutional provisions relating to the Election Committee. It is unthinkable that such amendments should be dealt with as emergency legislation, because it cannot be said that there is an essential need.

A.2.2 If relevant steps had been started some months ago, when the problem was, to my knowledge, identified, it might well have been possible to pass legislation extending the term of the present Election Committee by 12 or 18 months, with

the necessary approval of the Standing Committee, to allow adequate time for the settlement of appropriate amendments. I do not know whether that could still be done in time, even with the full co-operation of all parties, and acting in haste on issues such as these in any case suggests itself as best avoided. Further, I refer to the view I express in paragraph A.2.5 that a more or less contemporaneous ending of the terms of a Chief Executive and an Election Committee is undesirable.

A.2.3 Anyway, the polling date for selection of the next Chief Executive is now statutorily established as Sunday 10th July 2005, just three days before the term of the present Election Committee expires. The next Chief Executive will therefore be selected by the present Election Committee. Sub-sector bye-elections are being held before that to fill current vacancies. In the absence of statutory amendment to extend the term of the present Election Committee, elections will also have to be held before 10th July to constitute the new Election Committee to take office from 14th July.

A.2.4 To clarify my view as to the time for the election of the next Election Committee, I consider that, although not stated in so many words, it is constitutionally necessary that there should be an Election Committee in office and in readiness at all times. Conceptually it is clearly a standing institution, with a five year term, and not one which is to be created ad hoc when needed or when it suits government. There are statutory provisions for bye-elections to fill vacancies, and I regard it as a lapse, fortunately of a not too critical nature, that the vacancies disclosed a few weeks ago were not filled promptly after they arose. In the absence of an extension of the term of the present Election Committee, the next one should be elected on or before 13th July this year.

A.2.5 Further, I consider that the provisions and normal operation of the Basic Law such that the 5 year terms of the Election Committee end two years or so before

the end of the 5 year terms of the Chief Executive create an appropriate separation of the two elections. I think that that separation is likely to produce a more objective choice in the selection of the Chief Executive than if the selection is made very soon after the beginning of the term of the Election Committee or very soon before its end. It is undesirable but in the circumstances inevitable that on this occasion the selection of the Chief Executive takes place literally on the last possible day in the term of the Election Committee. There may be broadly similar future situations.

A.2.6 It follows that, putting other considerations on one side, I support the ruling from the Standing Committee in favour of the two year term for the next Chief Executive so long as it is accepted that the next Election Committee should be elected on or before 13th July this year.

A.2.7 I appreciate that acceptance of my views on the subject of the Election Committee, reached by separate focus on that subject, are incompatible with discussion of review of the election method of the Chief Executive in 2007. On that, first I observe that that situation is not caused by the premature retirement of the last Chief Executive: as stated in paragraph A.2.1 the situation was already there. Secondly, as will become clear from my following opinions I do not in any case believe that any material changes should be made for the time being. Having said that, I would like to think that prior issues would have been sufficiently resolved by 2010 for material changes to be responsibly considered in respect of the composition of the Election Committee then due to take office.

A.3 *Further Immediate Constitutional Issues*

A.3.1 There appears to be an omission in the Chief Executive Election Ordinance (“CEEEO”) in that it does not accommodate the resignation of a Chief Executive

under Article 52 of the Basic Law. It might be possible to conclude that the provisions of the Basic Law itself adequately fill in this omission, and that Sections 5 and 6 of the CEEO should be treated as equally applicable in the event of a resignation. Otherwise, and this might in any case be preferable to avoid argument, an early and simple amendment of the CEEO seems to be necessary.

- A.3.2 For completeness I note one other difficulty about limiting the initial term of the new Chief Executive to about two years. That is that under the Basic Law a Chief Executive may serve only two terms. However, on the basis of a Standing Committee interpretation that in the given circumstances the new Chief Executive serves only the remainder of his/her predecessor's term, the Standing Committee may also make an interpretation that the two terms limit means two full terms, to which therefore the initial part term may be added. The same observations as those which I have made above about the determination of whether the Chief Executive elected on 10th July should serve a two year term or a five year term would then apply. I understand that this difficulty has been acknowledged but treated as one to be considered at a future date.

Note: The remainder of these opinions assumes and refers to the next election of the Chief Executive, after that on 10th July 2005, being in 2007. In general the opinions would be the same if the next election had been in 2010, but of course that would have allowed more time for what I see as the priority issues to be addressed, so that more progressive changes might then have been supportable.

A.4 *Basis of Views*

- A.4.1 This document is not a legal opinion as such, though the basis of my views is inevitably my legal training, to which I have tried to add objectivity. I have thus attempted to avoid political bias. I venture to hope that if and in so far as my

views are therefore at odds with the majority of submissions in response to the Fourth Report, they are also worth considering precisely because of that attempt to be non political.

A.4.2 The remainder of my introductory comments are points which I believe have general application to the subject matter of the Fourth Report. After that I will move on to specific points in the Fourth Report.

A.5 *Who should lead whom: limitations of public opinion*

A.5.1 I find it necessary to make a point which has relevance to most, if not all, of the follow-up questions contained in the Fourth Report, by its very nature and approach of being a Summary of Views and Proposals of Members of the Community.

A.5.2 That is that while it is appropriate that there be public consultation on relevant issues, and that the views and proposals of members of the public should be considered, it is not necessarily appropriate that the consequent direction in which government moves forward towards the formulation of specific proposals should be based upon, or even influenced by, the numerical weight of public opinions.

A.5.3 First, there are important and complex issues of constitutional law, which, where applicable, must be accepted as overriding public and even political opinion, however strong it is. I suggest that the subject matter of paragraphs A.1 and A.2 of these introductory comments amply illustrate and support that view. Some of those issues involve PRC aspects, including in my opinion the need for gradual and orderly progress in Hong Kong to have some recognition of the direction and pace of political change in the PRC. The public cannot be expected to relate its views to considerations of constitutional law, nor, at least extensively, to PRC

aspects. (The first sentence of this paragraph is qualified to the extent that political opinions, originated or accepted by the Standing Committee result in substantive amendment of provisions of the Basic Law other than Annexes I and II, but such a situation is outside the parameters of the April 2004 “Decision” of the Standing Committee. Thus the recent reference to the Standing Committee in respect of the term of the next Chief Executive was correctly dealt with as an issue of constitutional law.)

- A.5.4 Secondly, even where considerations of constitutional law are not applicable or are of less importance, each submission of views and proposals should surely be considered and assessed by government on its merits. Making the large number of submissions, or a summary of them, available to the public and leaving the public to make that assessment is inappropriate, especially when done with an impression that government is mainly concerned to establish the most popular view. If a single submission is considered by government to have more merit on a given issue than the most popular view, or than all other views received, then surely government should support that single view, and should explain its reasons for that.
- A.5.5 Further, I suggest that public consultation is far from assured of producing a result which fairly reflects the consensus view of the people as a whole, even if constitutionally unacceptable views are set aside. There is usually a “silent majority”, who are either in general satisfied with the existing position or who, while not so satisfied, either do not relate the subject matter of the consultation to the reasons for their dissatisfaction or for other active or passive reasons do not take the opportunity to submit their views.
- A.5.6 In summary I believe it to be essential that, in the consultation process as well as overall, government is seen to be leading the public, at the same time as listening

to the public, rather than the public being seen to be leading a government which does not present its own views or any guidance, at least in the Fourth Report.

A.6 *Are the changes under discussion the most appropriate?*

A.6.1 This point at least partly follows on from the previous one, but also moves to a more specific level. I believe that the Fourth Report's summaries and follow up questions on issues on the Selection of the Chief Executive reflect public concerns and views that changes are necessary, but fail to consider fully the reasons and justification for those concerns and whether, if justified, the weight of public opinion as to the appropriate direction of changes represents the best way of addressing the concerns.

A.6.2 I observe in connection with that that the Fourth Report only asks follow up questions on a number of specific potential amendments of the selection methods, and neither mentions any broader considerations that have been raised in relation to the general subject matter nor suggests that there may be areas or topics which might be considered to warrant attention instead of or in priority to those put forward in the Report.

A.6.3 Therefore, while I give my opinions below on the follow-up questions on the issues as raised I note that:-

- i) in paragraph A.7 below I discuss the relevance of the Nomination Committee, and suggest that it would be imprudent to make material changes in either of the selection methods until issues relating to the Nomination Committee have been adequately considered and decided;
- ii) in paragraph B.5 b below I discuss the priority need for an overall route map of the relevant structure under the ultimate aims and how that

structure will operate, and also of the gradual and orderly progressive steps to be taken towards that structure, again before any material changes are made;

- iii) in paragraph B.5c below I put forward some views and proposals on amendments to the functioning of the Election Committee which I suggest might sensibly and appropriately receive attention in priority to any material amendments within the issues dealt with in the Fourth Report, and while matters referred to in (i) and (ii) above are being dealt with.

A.6.4 It is partly coincidence that even taking at their face value the issues as presented in the Fourth Report, and their follow-up questions, in most cases I find reasons to challenge whether any material change at this time is appropriate. However, given the level of public sentiment I do believe that it is appropriate to make some changes within the overall context of the Method for Selecting the Chief Executive before the next election after that on 10th July this year. It is a question of identifying the most appropriate changes in the circumstances.

A.7 *The Relevance of the Nomination Committee*

A.7.1 I refer in my opinions on the Follow-up Questions on the Method of Selecting the Chief Executive in 2007 to the relationship between the Election Committee and the Nomination Committee and to the need for thought and planning in respect of the Nomination Committee within the ultimate aim of Section 45. By thought and planning I do not mean just the composition of the Nomination Committee, but also the way in which it is to operate. In order to make clear why I see that as a currently and directly relevant issue, I expand upon the point here.

- A.7.2 The function of the Nomination Committee will be markedly different from that of the Election Committee. The Election Committee nominates candidates and then elects one of them, by majority vote. The Nomination Committee will nominate candidates, and then (at least assuming the achievement of the ultimate aim) the registered individual electorate will elect one of them, by its majority vote. A key point to be decided in respect of the Nomination Committee is whether the candidates put forward to the electorate will simply be as nominated by a minimum number of members of the Nomination Committee, or will be selected from those (probably in such case on a lower nomination threshold) by election by the Nomination Committee.
- A.7.3 Either way – and there may be others, as well as variations of detail, but I think that the end result must remain the same – the preferred choice of the electorate is by no means certain to be the preferred choice of the Nomination Committee. A minority group on the Nomination Committee might well be able to procure that its favoured candidate is put forward to the electorate and the electorate may then choose that candidate. Conceptually it might be possible to introduce provision for negative as well as positive support, so that a majority could block an undesirable candidate, but that could be objected to on the grounds that such an arrangement could be abused; anyway such an arrangement would be likely to negate the purpose of the Nomination Committee in being broadly representative.
- A.7.4 However, that is assuming that an intention of the Nomination Committee in being broadly representative is that there would be at least a theoretical chance that a candidate with less than the majority support of the Committee could qualify to be put forward to the electorate at large. Whether the selection rules and processes of the Nomination Committee should be drawn so as positively to avoid total domination by Committee members who, however they were themselves elected, belong to a single party or interest group, is taking the point

of broadly representative one step further, but I observe that opinions on that might vary according to the political alignment of the majority group and of the person expressing the opinion.

A.7.5 Discussing that and other important issues on the Nomination Committee to a conclusion is not relevant to the point I am making. The point I am making is that:-

- i) there are important issues relating to the Nomination Committee, but there is as yet not even a basic outline or proposal as to the composition and operation of that Committee;
- ii) the terms and wording of the Basic Law, and rational thinking, suggest strongly that gradual and orderly progress from the Election Committee to the Nomination Committee is likely to mean that it would be conceptually and politically difficult for the composition of the first Nomination Committee to be reduced or narrowed from that of the last Election Committee, even though they will have different functions; and
- iii) it is therefore imprudent at the least, and potentially very damaging to progress at a later date, that any material changes should be made in the size or composition of the Election Committee until there is at least an established outline of the size, composition and procedures of the Nomination Committee, and consequently reasonable assurance of transitional consistency from the Election Committee to that Committee.

B Method for Selecting the Chief Executive in 2007

B.1 The Number of Members of the Election Committee

B.1.1 In principle it would be acceptable to increase the number of Election Committee Members. Annex 1 of the Basic Law provides for the election of the Chief Executive by a broadly representative Election Committee, and it would be consistent with the principle of gradual and orderly progress towards the ultimate aims that, 15 years after the adoption of the Basic Law, some increase should be considered.

B.1.2 There are however several significant qualifications to the principle of an increase. In relation to the level of increase:-

- i) The term “broadly representative” is applicable to the Nomination Committee, which will nominate candidates for election by universal suffrage under the ultimate aim of Article 45, as well as to the Election Committee constituted under Annex 1. Further, as discussed in Section A.7 above, it is conceptually difficult to identify an appropriate or practicable transition from the Election Committee to the Nomination Committee other than for the role of the Election Committee to change at some time to the role of the Nomination Committee without any major difference in the size and composition of the two Committees. Certainly it is extremely difficult to contemplate the change from one Committee to the other being accompanied by a reduction in the number of members or in a narrowing of the composition of the Nomination Committee from what is, immediately prior to the change, applicable to the Election Committee.
- ii) Consequently it is critically important that changes proposed to be made in the size or composition of the Election Committee for the 2007 Election

or subsequently are not subsequently found to be incompatible with the planned size and composition of the Nomination Committee.

- iii) In the absence of evidence that there has been material thought, let alone planning, in relation to the Nomination Committee, my opinion is necessarily that any change in the Election Committee should be limited to that which can be assessed with complete confidence as not creating difficulties for the future, which must mean that any change should be non material. I make clear that I am not criticizing any lack of planning at this time in relation to the Nomination Committee: it might fairly be regarded as premature that that subject should be or have been planned in 2005. I am simply saying that the connection cannot be ignored.
- iv) The phraseology of the Basic Law references to “gradual and orderly change” appears to endorse my above view that changes must be considered in relation to wider and more long-term factors than just meeting immediate popular pressures.
- v) I believe that points that I make below in respect of the composition of the Election Committee further endorse everything that I have said on the issue of the number of members of the Committee.
- vi) To illustrate graphically in respect of numbers the possible consequences of a decision taken now without full consideration of its context in relation to the future, I take the lower end of the range of suggested increase in the number of Members of the Election Committee for the 2007 Election, i.e. to 1200. If that 50% increase is taken as a standard for further numerical increases at 10 year intervals, then by 2037 the Committee membership would be in excess of 4000. That suggests that a 50% increase for the 2007 Election should only be considered in the event that either:-
 - it is decided and accepted that similar increases should not be expected in the future; or

- it is established and agreed that an Election Committee, and subsequently a Nomination Committee, expanded on a progressive basis to a very much larger number than 1200 is within the ultimate aim and is desirable and appropriate.
- vii) I submit that the appropriate ratio between the number of members of the Legislative Council (and the consequent number of seats on the Election Committee allocated to Legislative Council Members) and the number of members of the Election Committee should at least be considered. The ratio at present is 60:800, i.e. 7.5 per cent. That ratio may or may not have been accidental, but it seems to me to be a broadly suitable one, in relation to the influence of other blocks of votes as well as overall. I suggest therefore that it would be inappropriate that the ratio is materially changed. On that point see further paragraph B.2.4 (iv) below.
- viii) I believe that there are other existing ratios between subsectors which are broadly appropriate, but I use that between the Legislative Council and others as being one which could only be maintained, in the event of a material increase in the size of the Election Committee, at the expense of an undesirable increase in the size of the Legislative Council.

B.2 *The Composition of the Election Committee*

- B.2.1 Again, in principle, adjusting the composition of the Election Committee to enhance its representativeness is acceptable. The requirement for the Election Committee and the aim for the Nomination Committee are that they should be broadly representative, so that steps to make them more so should be considered in principle.

B.2.2 However, as is applicable to a possible increase in the number of members of the Election Committee, so also are there significant qualifications in respect of its composition. Some of those qualifications overlap. In addition to those points made under B.1 above which are also relevant to this issue:-

- i) Interpretation of the phrase "broadly representative" is as difficult as of any words and phrases in the Basic Law, but is the key to this issue. There is a substantial ambiguity in the meaning of the word "broadly" within the phrase. In the OED it has the alternate meanings of "widely, generally or fully". I am informed that there is similar ambiguity in the Chinese language. I believe however that some leads are available.
- ii) Most tangibly, paragraph 2 of Annex 1 of the Basic Law sets out parameters for the initial Election Committee, and can therefore safely be taken as definitive so far as it goes. That far is at least strongly suggestive of an intention that business i.e. the first two named sectors, industrial, commercial and financial and the professions, should have significantly weighted representation, by the allocation of 50% of the total number of members of the Committee, while also being represented in the fourth sector, both directly in the relevant functional constituencies of the Legislative Council and indirectly through one or more other constituent parts of that sector.
- iii) I suggest that the fairly clear view to be drawn from that is that the word "broadly" in the particular context means "generally", or "in general", rather than that representation on the Committee should be as wide as possible, or that it should reflect the same franchise as the electorate. I note that at this point I am considering the meaning of the word; consideration of whether a different weighting from that currently applicable is desirable is a separate and subsidiary issue to the establishment of principles.

- iv) I think however that support for that interpretation as intentional, and ongoing in principle, is readily available from consideration of the ultimate aim, in the definition of which the same phrase is used. Conceptually there must be intended to be a substantive distinction between the selection of the Nomination Committee and the election of the Chief Executive by universal suffrage: otherwise there is no point in having a Nomination Committee. The nearer the selection of the Nomination Committee, or for the time being the Election Committee, gets to being directly or effectively selection by general franchise of the electorate, the more the concept and evident intention are challenged.
- v) Therefore my first qualification on this issue arises on the summary, before reaching the follow up questions. It is that the word “enhancing”, while almost as ambiguous as the word “broadly”, is dangerously capable of a wider and different interpretation. That is not to say that no consideration should be given to more District Councillors being included in the Election Committee: however, the inclusion of more District Councillors should be considered in the context of the best available interpretation of a “broadly representative” Committee, not in the different context of a Committee of “enhanced representativeness”. (I refer further below to the specific issue of increased representation of District Councils on the Election Committee.)
- vi) That criterion should also be used in relation to any other proposed change in the composition of the Election Committee. “Broadly representative” is in my view quite clearly not intended to equate to or result in the effective passing of control of the Committee to universal suffrage. Further, under paragraph 7 of Annex I, amendments in paragraph 2 of that Annex should be a matter of need, not simply a matter of public expression of a wish. Moreover, I believe that the principle of gradual and orderly progress should be borne in mind on all issues and at all stages.

- vii) It should also at all times be kept in mind that the SAR is an administrative region of the PRC, that the Chief Executive reports to the CPG (as well as to the Legislative Council of the SAR) and that he is appointed by the CPG. Selection by the Election Committee at present, or election by universal suffrage at a later date from candidates selected by the Nomination Committee, does not and will not oblige the CPG to appoint as Chief Executive a person they consider to be unsuitable. Therefore, in order to avoid a potential constitutional crisis, it is important that candidates selected by the Election Committee, or hopefully in due course nominated to the general electorate by the Nomination Committee, are at least likely to be acceptable to the CPG. The composition of the Election Committee and the Nomination Committee, and the procedures of both, should be expected to reflect that.

B.2.3 Within the background of the above comments, and those on issue B.1 above, I have opinions on the specific follow-up questions on issue B.2 as follows:-

- i) There would need to be good reason, within the constitutional intention, as well as need, to adjust the delineation of the four sectors or the proportion of seats allocated to each of them.
- ii) It may be appropriate to consider some changes in the organisations in each sector eligible to return Election Committee Members, and the number of such members returned by each of those organisations. However, while that (but not the delimitation of sectors or the number of members in each sector) could be changed by local legislation, without amendment of Annex 1, the same criteria should be applied as to any proposed change of the delimitation of sectors or the number of members in each sector.
- iii) From the content of Chapter III of the Fourth Report, there appear to be some views on relevant changes in numbers on the Election Committee or

on representation that are inconsistent with my above views on the meaning and intention of the phrase “broadly representative”.

- iv) Further from that content there appear to be wide ranging views as to who should have a bigger say, some of which are directly aimed at changing the balance (in opposite directions) between the broad grouping of the first two sectors as business interests and the third and fourth sectors as popular interests.
- v) There are some views that substantial particular interest groups of the general electorate, e.g. women and the elderly, should have their own allocations of seats. However, while I have some support for these in principle, I think they raise the question of whether if some parts of the general electorate have a “special focus” allocation of seats it is not reasonable that the whole of the general electorate should be allocated to special focus selection constituencies.
- vi) Overall, with the possible exception of subdividing some of the organisations in different sectors, and their attributable seats, my personal view is that I do not identify from the Fourth Report a sufficiently clear and established need to justify any material change in the delimitation of sectors, the proportion of seats allocated to each or the organisations in each sector eligible to return Election Committee members at this time. I believe that there are more important issues.
- vii) As a footnote, but supporting my views, I think that there is an available interpretation at least of the spirit of the Standing Committee “Decision” of April 2004 that the proportions between the first two sectors and the third and fourth sectors of the Election Committee should not be changed in respect of the 2007 selections method of the Chief Executive.

B.2.4 Therefore:-

- i) If the number of Election Committee members is increased, that is not a reason to change the delimitation of the sectors or the proportion of seats allocated to each.
- ii) A small increase in the number of members, allocated proportionately, would allow some recognition of public views where those are assessed (on full consideration) to be consistent with a “broadly representative” Election Committee, but, in accordance with my comments in paragraph B.1.2 above, any such increase should almost certainly be very much smaller than the 50% to 100% indicated in the Fourth Report as having the most public support.
- iii) I personally question whether the inclusion of more District Council Members in the Election Committee represents the most justifiable allocation of any new seats or existing seats which it is considered should be re-allocated, but if more District Councillors are to be included it follows from my above views that that should only be out of the proportionate total of seats in the fourth sector. There should be no change in proportions between the sectors.
- iv) Further with reference to any potential increase in District Council Members on the Election Committee, I refer back to paragraph B.1.2 (vii) above. At present the ratio of District Council seats to Legislative Council seats on the Election Committee is just over 2:3. In view of the comparable seniority and responsibility of the bodies, I do not consider that it is appropriate that that ratio should be materially changed in favour of District Council seats. The proposition that all District Council Members should have seats on the Election Committee, which would result in ratio of 5:1 between District Council seats and (present) Legislative Council seats, or any change as a result of which the District

Council seats are collectively more than the Legislative Council seats, seems entirely inappropriate.

- v) Issue B.4 below clearly interrelates with this issue, and so do my views on the two issues.

B.3 *The Number of Members of the Election Committee Required for Nominating Candidates for Chief Executive*

B.3.1 My overall view is that changing the number of Election Committee members required for nominating candidates is not a priority. I will comment further in relation to specific follow-up questions below.

B.3.2 On those:-

- i) I do not think that the one-eighth current proportion is a magic figure, but as a matter of convenience I think that if (which I do not support) the number of Election Committee members is increased substantially, then the number of members required for a nomination might have to be reviewed upwards.
- ii) The suggestion which I outline under issue B.5.c includes an idea by which the names of potential candidates could more easily be put before the Election Committee for consideration, while still ensuring a material degree of support for candidates for the election.
- iii) I do not think that support in all four sectors should be obligatory. That could enable one sector to block a candidate who might otherwise have substantial overall majority support. Annex 1 to the Basic Law provides that the election shall be by secret ballot on a one for one basis, i.e. an individual basis. I believe it to be important that that spirit is maintained, i.e. that once elected to the Election Committee its members should, at

least in the ballot, act on an individual basis rather than a party or factional basis.

- iv) I sympathise with the principle that it is best that there be more than one candidate to contest an election, but I do not think it appropriate, nor likely to be effective, to try to achieve that by limiting the number of members of the Committee required to nominate a candidate. Again, the suggestion which I outline under issue B.5.c includes ideas which I think would be more conducive to that objective.

B.4 *The Delineation and Size of the Electorate of the Election Committee*

- B.4.1 In line with my views on issues B.1 and B.2 I believe that the first point to make is that broadening the size and scope of the electorate is not necessarily consistent with a broadly representative Election Committee, nor with ensuring the preservation of the evident purpose of the Election Committee, and later the Nomination Committee, to perform a function distinct from that which would be likely to result from the body effectively being a microcosm of the general electorate. The principle and distinction of the broadly representative Election Committee as discussed under the above issues should be maintained.
- B.4.2 However I think that concerns are fairly raised in relation to whether in those sub-sectors in which voting is currently on a corporate (or associate) basis the “broadly representative” objective is fulfilled as well as could be wished for. Having said that, I fear that steps to achieve the objective better could easily be open to abuse, and the qualifications that would consequently have to be built in might result in the improvement aimed at being instead impractical.
- B.4.3 Further to the comment and qualification in the previous paragraph:-

- i) In principle the sub-sectors appear to me to be broadly representative within the intention of the Basic Law.
- ii) I see no reason in principle to change the original principles and criteria that were presumably established by which the sub-sectors were chosen (and incidentally the same goes for the allocation of seats between them).
- iii) Under paragraph B.2 I have commented on some of the specific proposals reported in the Fourth Report which would or could involve the creation of additional sub-sectors.
- iv) I can conceptualise that in some sub-sectors there may in reality be sufficiently distinct groups of constituents that the members of the Election Committee elected by that sub-sector would be expected always to be those favoured by, and probably representing, a numerically dominant group of constituents. That is the simplest example of a subdivision being potentially justified, but there may well be other, more complicated situations with the similar result that constituents who were evidently intended to be given a voice in the selection of the Chief Executive do not get one. However, each case claimed by constituents would have to be examined on its merits, as a wholesale breaking down of sub-sectors into even smaller electorates seems undesirable generally, and open to possible abuse.
- v) Replacement of corporate voting by individual voting is fine in principle, but dangerous in practice, and would need very careful controls, to avoid it representing an arbitrary means of increasing the relevant electorate, and one which would be more open to abuse than the present approach. The number of members on the board or other governing body of a corporate constituent does not necessarily reflect the size of the constituent. There may well be some trade associations in which there is no governing body in the normal sense. A “\$2” shell company could join say one of the commercial constituencies and then create a board of say 20 members.

- vi) I suggest that a more valid basis in principle for the replacement of corporate voting by individual voting (or actually the replacement of one nominated individual voter by a corporate member to several nominated individual voters) would be to introduce a measure of weighted voting entitlement according to size. If a corporate voter has say 10,000 bona fide employees, or gross assets of say \$10 billion (and there may be other fair and practicable measures of size, such as the number of members of the associations which comprise some of the sub-sectors), it is reasonable and indeed appropriate that that corporate voter should have a bigger say in the election of members of the Election Committee than a corporate voter with say 10 employees or gross assets of say \$100,000. A range of say one to ten voting entitlements, according to size measured by an appropriate range of criteria, could be on the basis that the constituent can nominate that number of individual voters; it would be up to the constituent to determine how to choose its nominees. (I note that in some of the sub-sectors, the range of sizes of constituents is probably much smaller than in others, and the range of voting entitlements should then also be smaller in order that the spread does not distort rather than reflect the difference in size. That is an illustration of the practical difficulty in relation to the topic under discussion in making changes which produce a clearly better result.)

B.5 *Others*

B.5a Abolition of the Requirement that the Chief Executive must Relinquish any Political Affiliation

- B.5a.1 It is interesting to note that this requirement is contained not in the Basic Law, but in the Chief Executive Election Ordinance. However, I consider that the political independence of the Chief Executive is, at least for the time being, an integral part

of the constitutional structure and constitutional balance of the SAR, and that in any case it would be inappropriate to change the present position without the approval of the CPG or the Standing Committee.

- B.5a.2 In support of that opinion I refer first to the fact that Hong Kong is a Special Administrative Region of China, and that the Chief Executive is and will continue to be ultimately appointed by, as well as accountable to, the CPG. He is the CEO of the SAR as an administrative region of China, not as a politically independent or autonomous region. The electoral choice of a CEO for the SAR as an administrative region of China should not be confused by political affiliations.
- B.5a.3 Secondly, the Basic Law provides what I believe to be a deliberate and carefully calculated structure of checks and balances between the constitutional status of Hong Kong as an administrative region of the PRC and the protection of the substantial degree of autonomy assured to Hong Kong. I believe that for the Chief Executive to have a political affiliation would materially prejudice that structure of checks and balances.
- B.5a.4 In particular, there are in the Basic Law provisions under which the Legislative Council has the ultimate ability to bring about the resignation of the Chief Executive. That is separately a reason for caution in making material changes in the method for electing the Legislative Council, but for the purposes of the present topic it is a reason for great caution in allowing the Chief Executive to have a political affiliation. On the other hand, the Legislative Council is unable to enact new law without the approval of the Chief Executive.
- B.5a.5 Thus political linkage would challenge the present, and I believe both intentional and appropriate, structural balance. I believe that balance to be appropriate not just because the SAR is part of the PRC but also because the Chief Executive, not

the Legislative Council, is responsible for the government and administration of Hong Kong, and further because, as exemplified in most democracies of the world, the ability of a legislative chamber to legislate should not be absolute. A Chief Executive with a political affiliation could not be expected to exercise his role in relation to the passage of legislation, and equally importantly seen to exercise it, with the necessary objectivity and political independence.

- B.5a.6 I believe that for similar reasons the key members of the executive branch of government should also remain non-political. I believe that additional reasoning is available to support the same view, by reference to easily projected possible situations if the executive branch of government was politicised.
- B.5b Pros and Cons of setting out, at this stage, a timetable for selecting the Chief Executive by universal suffrage
- B.5b.1 As a preliminary comment I am always uneasy when reference is made to this subject without the inclusion of the relevant qualifications contained in Article 45. I sense that there are still sections of the community, which may include some individuals who express opinions on the subject, who believe that the ultimate and available aim is that anyone who wishes, and certainly anyone put up by a political party (thus ignoring the relevance of the previous point) may stand and will then be a candidate for election by the people.
- B.5b.2 Once the point is put in its full textual context, I fully support a route map, and indeed I believe that no material changes in the method of selection should be made without one. There is a number of reasons, but I think that they can be divided into two main categories:-

- i) the need to fill in technical details of gradual and orderly progress towards the ultimate aim, since progress on the basis of purely political or popular pressure within Hong Kong, without a fully considered route map, must risk running into major roadblocks later;
- ii) the need for consideration of the relationship between progress towards, and detail of, the ultimate aims in Hong Kong under the Basic Law and progress towards ultimate aims of the PRC under its constitution.

- B.5b.3 In respect of the first category, a good example is the relationship between the Election Committee and the Nomination Committee. The need to establish an outline of how the Nomination Committee will operate, as well as how it will be constituted, is discussed in paragraph A.5 of the Introductory Section of these Opinions.
- B.5b.4 The second category is more abstract, and could be seen as requiring a particular angle to be put on issues within the first category. 2047 is realistically not that far away – little more than half the life expectancy of a one year old today, and a time at which today's school children will form the power house of Hong Kong. The overriding objective of us all should surely be to ensure that Hong Kong retains after 2047 the status and systems protected for it until then within the Basic Law. It is hard to think that the PRC would wish to impose retrogressive changes, but if the PRC government of the time were concerned that the systems of the SAR had moved too far away from those of the PRC, it should at least be expected that negotiation of further development of the SAR systems after 2047 would be more difficult.
- B.5b.5 I think that the government and people of Hong Kong should act in respect of changes which it proposes in the election methods on the basis that the gradual and orderly progress of the systems of the SAR should at all times have regard to

the progress of change in the PRC (as to which change in the operation of its constitution may be more relevant than change in the constitution itself) in relation to democratic representation of the people in government. We should not press our wishes for the SAR without seeking mutual understanding with relevant bodies in the PRC on the comparable issues under each system, and with that mutual understanding we should aim for compatible solutions in which hopefully the systems may gradually become closer together rather than further apart. Properly approached, I believe that the SAR has a very positive role to play in relevant development in the PRC, but I submit that a proper approach involves setting and offering an example, with adequate understanding of the systems and objectives of the PRC, rather than confrontation.

- B.5b.6 In answering the specific question, therefore, I consider that setting a timetable for selecting the Chief Executive by universal suffrage upon nomination by a broadly representative Nomination Committee is premature to a material extent. First it is necessary to clarify all the issues that need to be resolved in relation to the ultimate aim. Then it is necessary to reach resolution, with the CPG, on all those issues. It is possible, and may be likely, that the CPG will be unwilling to commit at this time to resolution of all of the issues: given its own political situation, and a view of that in Hong Kong which it may take, such unwillingness should at least be understood and may be sensible.
- B.5b.7 In summary on this issue, extensive amplification of how the structure under the ultimate aim will or at least might operate, and of the stages of progress towards the achievement of that structure, is necessary before any timetable can even be considered. A fixed timetable for the entire progress may be inappropriate in the context of what is acceptable to the CPG, and it is in the interests of Hong Kong and its people to seek harmony with the PRC on these relevant issues, even if that

results in slower progress than the people of Hong Kong may consider appropriate if it views its capacity for orderly development in isolation.

B.5c. The Functioning of the Election Committee

B.5c.1 Before bringing this Section to an end with some more abstract comments, I wish to make some specific proposals on a subject which has not been raised in any report or consultation paper of the Task Force. I put this forward partly because I consider objectively that the subject is one which in any case should be dealt with, but also because I perceive as a more subjective view that it would be appropriate to deal with it in the context of my overall opinions and of the political situation in the SAR as I see it.

B.5c.2 The subject is in my opinion entirely within the function of the SAR Government and Legislative Council under the provisions of Annex I of the Basic Law. The concept is that the Election Committee should have a more substantive involvement in the performance of its role, with far more transparency, than at present, and that the status of the Committee as a broadly representative body should be better reflected by its processes than is currently the case. I develop and comment on that concept as follows:-

- i) The Chief Executive Election Ordinance (the "CEEEO") implements the provisions of Annex I of the Basic Law in relation to the constitution and procedures of the Election Committee. The Electoral Affairs Commission Ordinance ("EECO"), or more directly regulations made under it, deal in full detail with the mechanics of the election of Election Committee Members and of the election by them of the Chief Executive. However, the

substantive processes of the Election Committee are obscure, and I can therefore only assume that there are none.

- ii) I suggest that in the context of gradual and orderly progress towards the ultimate aims under Article 45, and in the light of the actual situation in Hong Kong, it would be appropriate that the processes of the Election Committee become more substantive and more transparent, as a matter of priority over any material changes to the composition or numbers of members on the Committee. Apart from other reasons, there is no certainty that such change would have much value if the processes of the Election Committee remain as undefined and obscure as they are at present. In support of those comments, if any is needed, I believe that, whatever the facts, the public perception of the selection process of the Chief Executive in 2002 was one of dissatisfaction.
- iii) On the face of the CEECO and the EECO, the Election Committee is a Committee in name only; there is no requirement for it to meet, and no process even for the circulation and discussion among members of names of possible candidates. The appearance is that it does not meet and that any exchange of information or views on actual or possible candidates is carried out on a private basis between individuals. In the circumstances it is not unreasonable that a public perception should have been formed that in 2002 the Election Committee did not even consider, as a representative Committee, either the performance of the sitting incumbent or the comparative merits of any other potential candidate than the sitting incumbent identified by Committee members. Whether he would in any case have been collectively decided to be the best choice is secondary: what I believe matters is the apparent lack of clear, proper and considered process in the reaching of the decision.
- iv) I suggest that the present apparent lack of process and certain lack of transparency does not just create public dissatisfaction immediately related

to those deficiencies: it also results in widespread doubt, again whether or not well-founded, as to whether the selected candidate has the considered endorsement of an Election Committee functioning as a broadly representative committee. Such doubt is surely not only undesirable by any standards, but also cannot be helpful to the selected candidate in the performance of his or her duties.

v) I therefore suggest that some procedural rules should be established under the EECO for the Election Committee, to increase the substance of its role and (subject to sub-paragraph (i) below) its transparency. That, in my opinion, is a more pressing and relevant need in the context of democratic accountability within the limitations of the Basic Law and the actual situation in Hong Kong than considering amendments of the size and composition of a Committee whose present functioning is so opaque, especially when any such amendments cannot be considered in the full applicable context. The following might be suitable points for inclusion in such rules:-

- a) the Chief Electoral Officer should act as or should appoint a Convenor and Secretary of the Election Committee;
- b) the Chief Electoral Officer should create and publish a timetable for the following processes (in addition to the existing requirements of the CEEO and EECO);
- c) preliminary nominations of candidates will be invited, requiring a materially smaller number of signatures than the number for formal nomination; a member of the Election Committee may only make a preliminary nomination of one candidate, but is not thereby precluded from making a formal nomination of a different candidate (a further qualification might be to limit the maximum number of signatures for a nomination to say one fifth of the number of members of the Election

Committee, so as to encourage a more open approach to the procedures as a whole);

- d) a meeting of the Election Committee will be convened at which:
 - a chairman is elected by the members;
 - all candidates with preliminary nominations have a right of audience;
 - members may question any candidate;
 - with no candidate present, members may address the Committee in respect of any candidate (review of the performance of an incumbent Chief Executive standing for re-election thus being included);
- e) in addition to the rights at (d) any candidate with a preliminary nomination may provide a (reasonable amount of) written material as to his or her suitability, policy views and other relevant information;
- f) after (d) and (e) the Chief Electoral Officer will invite formal nominations, with a closing date; nominations will not be limited to those who were nominated at (c);
- g) the nominations so made will be published;
- h) if there is more than one nomination the procedures at (d) and (e) will be repeated, before the poll is conducted;
- i) by virtue of the subject matter and to ensure the most open discussion, it might be appropriate that all internal discussions at meetings of the Election Committee are in camera and that such internal discussion is treated as confidential; however I consider that it would be in the public interest, and not unduly sensitive, that any written materials provided by candidates or preliminary candidates be available to the public and that any addresses by those individuals to the Committee, and question and answer sessions, be open to the public. Informed public views

could then be given to, or indeed solicited by, Election Committee members at all stages prior to the poll.

(Note: The above provisions are suggested as legally consistent with the relevant provisions of the Basic Law, such as they are, and with the proposition in subparagraph (iv) above. However, political considerations in both the PRC and the SAR also have to be taken into account in the resolution of the issue. On this particular proposition, for instance, there might be a political point, which could be taken either by the CPG or by the SAR government, that it would be appropriate that all candidates nominated under this more transparent process should be referred to the CPG for “vetting” before the election. Political as well as constitutional reality must prevail, and I believe that dealing with this respect of Article 45 openly would be much preferable to the alternatives of a constitutional crisis if a candidate is elected whom the CPG is not willing to appoint or of exposure of the entire constitutional apparatus for the selection of the Chief Executive to claims that the CPG manipulates what happens. For its part I believe that the CPG should, and needs to, accept that orderly progress, and political stability, in the SAR make the alternative of a widespread public perception of CPG manipulation of the constitution and conduct of the Election Committee the least desirable alternative. A straight forward reflection of the words of Article 45 would be better, and, if properly presented, could suggest that as the SAR grows in political maturity and understanding, the CPG would hope that the need for rejection by it of nominations of the Election Committee or in due course the Nomination Committee, would not arise.)

B.5d Constitutional Issues and Principles of Democracy

B.5d.1 Hong Kong has a unique constitution. It establishes a system for Hong Kong which contains substantial and substantive elements of democracy, but it is not

ultimately a democratic constitution. Whatever degree of involvement by a local electorate there may be, the government of Hong Kong is not an elected government, and there is no scope in the Basic Law for it to become an elected government: the Chief Executive and other senior executives are and will continue to be appointed by the CPG, and if the CPG does not approve of the choice of the Hong Kong electorate (however comprised) of the Chief Executive, it need not appoint him.

B.5d.2 Consequently normal western principles of democracy are not applicable.

B.5d.3 In turn, whether or not otherwise desirable, making decisions on relevant constitutional amendments based on consensus or even majority views of the electorate of Hong Kong is not appropriate: the electorate at large may understand the constitutional position and express views which accept and reflect that position but – and realistically I suggest that this has to be regarded as more likely – it may not.

B.5e Political Realities and Pragmatism

B.5e.1 I believe that Hong Kong should accept the political realities of its status and its constitution, and that, difficult and unpopular as such course of action may be, the government of Hong Kong has a responsibility to lead the people of Hong Kong towards that acceptance.

B.5e.2 At an overall level, I suggest that the fact that the SAR is an administration region of the PRC, and that in recognition and implementation of that the Chief Executive and senior executive officers of the SAR government are substantively appointed by the CPG, and are accountable to the CPG, needs to be better understood. The dual accountability to the people of Hong Kong, through the

Legislative Council, is a meeting point of the two systems, but must be accommodated within the one country which overlays – and overrides – the two systems.

- B.5e.3 Some continuing popular, media and even political views critical of government for talking and listening to the CPG may be appropriate to ensure a balanced maintenance of that dual accountability and of the two systems. However, at present I question whether such views are always given from a fully informed basis of the relevant political reality.
- B.5e.4 Accepting the political reality, I believe that pragmatism is also necessary. I therefore suggest that even if the guidelines established by the CPG for the maximum scope of amendments allow for the possibilities discussed in the Fourth Report, the government should very carefully consider the possible impact of any potential amendments on the ongoing operation of the Basic Law and future developments of the election methods.
- B.5e.5 Any amendments made now will constitute only initial steps in the gradual and orderly progress towards the ultimate aims, and the SAR government should not put forward proposals which, if adopted, would risk the creation of a situation in which the institutions of the Election Committee and the Legislative Council, or either of them, would operate in a manner inconsistent with, or in confrontation of, the political reality. Democratic pressures in Hong Kong might suggest otherwise, but I strongly suggest that it is within the responsibility of the SAR government to Hong Kong and its people, not just within its responsibility to the CPG, to act with pragmatic recognition of the overriding political realities.
- B.5e.6 However, I do not see that as a one-sided issue. The development of democratic principles necessarily involves the development of transparency and

accountability. I do not consider that necessity to be voided by virtue of the applicable limitations on the extent of democratic rule available to Hong Kong even under the ultimate aims of the Basic Law. It may have to be somewhat qualified, as a matter of pragmatism, but it is still present. Indeed, the political realities in themselves make the issues of transparency and accountability within the SAR even more important to the development of democratic principles under the SAR system. The SAR government must be constantly cognisant of that, in order not to risk popular dissatisfaction and instability.

B.5e.7 In connection with my observations in the previous paragraph, I consider that the introduction of more transparency and accountability in the basic areas dealt with in the Fourth Report is important, and should indeed be seen as a priority over amendments of detail, at least when such can only be considered in the absence of a long-term constitutional context. If the political reality is that the CPG perceives the maintenance of functional constituencies, both for the election of the Election Committee and in the Legislative Council, to be important to the continuing operation and decisions of the two bodies being likely to be acceptable to the CPG, and thus minimising the risk of a constitutional crisis and a real break down of the one country two systems concept, is it not better to acknowledge that openly, and to act within relevant limitations? I suggest that transparency in these areas would serve Hong Kong better than the current flow of critical comment which, being related to opaque and uncertain factual situations, rouses emotional rather than rational re-actions. Moreover, under its dual accountability to the Legislative Council, the government owes transparency on these matters to the Council: that duty is owed in any case, but if it is not fulfilled it is hard for the members of the Legislative Council to act responsibly and in the best interests of Hong Kong in considering relevant legislative proposals.

B.5e.8 In the previous Section I made some specific comments and proposals in relation to increased transparency and accountability of the functioning of the Election Committee. I suggest that focus on that topic and on other areas in which transparency and accountability might be improved would represent a more appropriate direction of change for the time being than the proposing or making of amendments which either do not address the underlying problems or would at least risk creating bigger problems. I add to that the observation that apart from issues of political reality, it is not clear on a more technical basis, as I have already commented, that amendments currently under discussions have been adequately considered in the context of progress towards and achievement of the ultimate aims.

C. The Method for Forming the Legislative Council in 2008

C.1 *The Number of Seats in the Legislative Council*

C.1.1 I believe that there is some merit in principle in a modest increase in the total number of seats in the Legislative Council, generally within the summary of supporting views stated in the Annex to the Fourth Report, though I would substitute “[to] enable more individuals to gain experience in the functioning of the Council” for “[to] recruit more political talent”.

C.1.2 I do not believe that an increase would conflict directly with the ultimate aim of universal suffrage. However, given the limitation that the proportions of seats between functional constituencies and geographical constituencies are to remain unchanged, and that therefore any increase would involve the creation of new functional constituencies (or division of existing ones) to elect half the additional

number of members, I can see that an increase might be seen as indirectly contrary to the ultimate aim. I will refer further to this point below.

C.1.3 So long as extra cost is small in the context of the overall SAR budget, and I would have thought that it should be, I do not see cost as a material factor. In any case, on the subject of cost, I suggest that materially more logistical support is appropriate for the Legislative Council. That suggestion reflects, among other things, my views that:-

- i) government needs to find ways to give Legislative Councillors a better understanding of the processes of government, and of issues to be handled, and probably to involve at least a representative cross selection of Legislative Councillors in decision making processes of government; and
- ii) too few Legislative Councillors appear (and quite understandably so) to have any deep grasp of much of the more technically complex draft legislation that constitutes a material part of the workload of the Council;
- iii) a better supported and more involved Council would hopefully result in it operating more efficiently and effectively, and perhaps in more people being interested in standing as candidates.

C.1.4 In support of those views I refer back to paragraph 1.06 (iv) of the Third Report of the Task Force, from which it appeared that the Task Force was itself adequately aware of a “co-ordination problem of the current relationship between the executive authorities and the legislature.”

C.1.5 I suggest that one point, not mentioned in the Fourth Report, which should at least be considered in relation to the number of seats in the Legislative Council is that which I have raised in discussion of potential increases and changes in the number of members and composition of the Election Committee. The proportion of Legislative

Council seats to the total number of seats in the Election Committee is a factor which should not be overlooked. The maintenance of that ratio within reach of the present ratio seems generally desirable. If that is accepted then it follows that the scope for increase in the number of seats in either body or in both bodies is interrelated. That would appear to make at least the upper end of what is reported as the popular range of opinion on increase of membership of the Election Committee hard to accommodate, apart from other reasons which I have put forward which lead to the same view.

C.2 *The Number of Seats Returned by Geographical Constituencies*

- C.2.1 First, except in the footnote to paragraph 1.03 of the Fourth Report, in which footnote the text of “the Decision” as defined in that paragraph is set out, I can find no reference in the Fourth Report to the important fact that the Decision prescribes that the ratio between Functional Constituencies and Geographical Constituencies must remain unchanged, i.e. 50:50.
- C.2.2 Consequently this subject cannot be considered in isolation from the next. Any increase in the membership of the Legislative Council must be an even number, equally divided between geographical and functional constituencies. If on either side of the ratio it is decided that no increase is appropriate, then there can be no increase on the other side of the ratio.
- C.2.3 If, subject to that, there is an increase in the number of seats returned by geographical constituencies, then I consider that the allocation of the additional seats must be such that the increased number of seats of each constituency reflects as nearly as possible the proportions which its registered electorate bears to the electorate of the other constituencies.

C.2.4 I suggest, incidentally, that it follows from that opinion that even if there is no increase in the relevant total number of seats for geographical constituencies, the allocation of seats between them should be periodically reviewed, e.g. prior to every second election if not prior to every election, and adjusted as necessary to reflect the nearest possible proportionate allocation.

C.2.5 A simple arithmetical allocation between constituencies must be inappropriate.

C.2.6 Therefore there may be an arguable justification for an increase by a number not divisible by 5, on the basis that closer proportions would be achieved by allocating an extra seat to certain constituencies, but not to others. That would of course be subject to the need to allocate the same number of additional seats to new functional constituencies.

C.3 *The Number of Seats Returned by Functional Constituencies*

C.3.1 Parts of what I have said on point C.2 above are equally relevant to this point.

C.3.2 On issues specifically referable to functional constituencies, broadening the representation and enlarging the overall electoral base should not, in my opinion, be seen as ends in themselves. I have discussed some of my views on those issues in Section B of these opinions, and apart from such views in response to specific follow up questions on Section B, I draw attention to my broader comments on political reality and pragmatism in Section B.5.e. Hong Kong will do better to work within the realities, and not to aim for short-term achievement of unattainable ideals.

- C.3.3 I tend to agree with the views that creating additional functional constituencies might make it more difficult to reduce the number in future or to abolish them altogether. (I note that a progressive reduction in due course is not only objectively more consistent with gradual and orderly progress towards the ultimate aim, but also, more subjectively, what is likely to be acceptable in practice to the CPG.)
- C.3.4 However, it is also in my opinion possible that creating more functional constituencies now would make it easier progressively to reduce the number in due course, as there would be more to choose from, in the first stage or stages of the reduction process, as capable of merger – which I assume would be found preferable to elimination.
- C.3.5 The point there, and perhaps one of the reasons for the divergence of public views, is, I suggest, that it is difficult to form rational views on the subject in the absence of an adequate context. The required context is, I suggest, that which I have already suggested in respect of the selection method for the Chief Executive. A route map is necessary which at least outlines likely steps towards the ultimate aims, the operation of which also needs to be mapped out, with studied compatibility and feasibility of the various steps and the ultimate aims.
- C.3.6 Further to that, the interrelationship between the Election Committee or Nomination Committee for the Chief Executive, and the functional constituencies of the Legislative Council, must be considered conceptually at all stages. In particular the involvement or lack of involvement of functional constituencies, or sectors, and if applicable their breadth and classification, in the composition of the Nomination Committee under the ultimate aims for the method of selecting the Chief Executive surely has to be considered, and established at least in principle, before it is appropriate to make any material amendments to the existing structure.

C.3.7 An Election Committee with two of its four equal sectors representing functional constituencies of the industrial, business and professional sectors was considered to constitute a broadly representative body when the Basic Law was enacted, and without necessarily saying that that proportionate representation should be maintained in the Nomination Committee, I believe that it would be wrong to change it without much fuller examination of the issues than is evident so far.

C.3.8 That observation clearly raises the political issue that the existing constitutional structure under the Basic Law clearly favours what could be variously termed, in each case as a generalization, the establishment, business interests, white collar workers, the comparatively wealthy or the better educated. I think that I have said enough in earlier sections of these opinions to indicate my view that arguments that that structure should be dismantled or materially watered down, based on normal concepts of democracy that majority vote of the people is the best form of rule, are not necessarily appropriate given the particular constitutional status of Hong Kong, at least with reference to the Election Committee and Nomination Committee. As I have observed earlier, political reality and pragmatism must prevail. Assuming gradual and orderly progress towards the ultimate aims, functional constituencies, at least in the present form, will eventually cease to form part of the composition of the Legislative Council. That does not and should not necessarily apply to the Nomination Committee. For the time being, any change in relation to functional constituencies in the Legislative Council has to be considered in parallel with the relevant sectors and sub-sectors of the Election Committee. In theory constitutional divergence could be introduced now, but I oppose that on the basis that at present any such divergence would be decided in the absence of a long-range framework in which it can be seen as appropriate.

C.4 *The Delineation and Size of the Electorate of Functional Constituencies*

I refer back to my comments in Sections B.2, B.4, C.1 and C.3 above. They cover my views on the follow up questions on this subject.

C.5 *Provisions Regarding Nationality of Legislative Council Members*

C.5.1 I am concerned that some sections of the people of Hong Kong appear to be less broad minded on this issue than was the CPG fifteen years ago.

C.5.2 I believe that rather than discouraging foreign nationals who have obtained status as electors, and putting them at disadvantage, they should be positively encouraged. Hong Kong owes its achievements and its present global standing to its having a mixed race population, particularly in business and service sectors, and I believe that attracting expertise on a non-racial, international, basis will continue to be critical to the fortunes of the territory.

C.5.3 I strongly believe, therefore, that the number of Legislative Council Members who may be (not, as stated in the question in the Fourth Report, are) foreign nationals should be preserved.

C.5.4 I will make a related comment under the next heading.

C.6 *Others*

C.6.1 On the first follow-up question, examination of the long-term future of functional constituencies, I believe that my opinion is evident from my previous comments.

The answer, simply, is yes, but with the added observation that this is only one of many issues which should be examined in the context of the ultimate aims under both of Articles 45 and 68, before it is sensible to decide and make any material changes applicable to either.

- C.6.2 The same applies to the exploration of different forms of universal suffrage. My added observation on that is that in relation to the formation of the Legislative Council I consider that such exploration is of paramount importance. I do not accept that the meaning of universal suffrage is limited to election by geographical constituencies, nor to the present format of elections through those constituencies. On the contrary I believe that Hong Kong might be best served by a format in which groups of electors who would be unable to obtain representation through geographical constituencies would be enabled to obtain representation in some other way.
- C.6.3 It is in that context that foreign nationals might be one group to whom it would be fair, and hopefully constructive, to provide an assured representation in the Legislative Council. I would not rule out some retention of functional constituencies related to sectors where the criterion is the value to the Council of input from a particular sector, such as manufacturing or law. In giving those as examples one can perceive that the members for most, if not all, the functional constituencies ought to be able to make an informed contribution to the deliberations of the Council on issues relevant to their constituencies, in a manner which could not be assured as available from the members for geographical constituencies. I believe that in many present cases they do so, even if political considerations somewhat obscure the fact.
- C.6.4 From limited thinking on such possibilities, my present view is that to meet the concept of universal suffrage no elector should have more than one vote. If I choose

to vote in a “protected” constituency for say foreign nationals or lawyers (assuming that I am so qualified), I would not be entitled to vote in a geographical constituency.

- C.6.5 I would only see such “protected” constituencies as constituting a minority of the seats in the Legislative Council, so as to provide representation of the relevant interests, though collectively such constituencies might have a material influence on the proceedings of the Council.
- C.6.6 Before moving to some broader closing thoughts, I mention a topic not dealt with in the Fourth Report but which I consider to be relevant to its underlying subject matter, particularly in view of my reservations about material amendment for the time being on the topics dealt with in it. That is that the domestic HK legislation on the mechanics of geographic constituency elections could usefully re-examined: I believe that the present rules may have been intended to give some help towards proportionate representation, rather than allowing party politics to dominate, but, while I support that objective, I am not confident that the present mechanics achieve it in the best possible way.
- C.6.7 Finally, on timetable, my views are the same those expressed in respect of a timetable to the ultimate aim under Article 45. Setting a timetable cannot be done without first filling in sufficient detail in relation to the ultimate aims and a feasible and orderly programme or progress to reach the ultimate aims as amplified. Even then, it is probably not feasible to set a firm timetable, as the approval of detail on implementation of each stage will not be within the control of Hong Kong; nor is it likely to be acceptable to the CPG to agree a firm timetable for all stages, other than in the unlikely event that it considers that the ultimate aims can be implemented in relation to the 2012 elections.

D. Closing Thoughts

- D.1 The views I have expressed will no doubt be in large part unpopular to those who see full scale democracy as the only way forward for Hong Kong, and believe that the people of Hong Kong should act to bring about the changes in the constitutional system necessary to achieve that end.
- D.2 I have endeavoured objectively to explain in these opinions why I see the drive for full scale democracy as constituting a denial of, and therefore confrontation with, the political realities.
- D.3 I have further endeavoured to explain why I also see any material changes to the present numbers, composition or electorate of either the Election Committee or the Legislative Council as being imprudent and inappropriate, at least for the time being. I believe that there are greater priorities and other steps which could be taken and would be more appropriate. However, I am concerned that much present public opinion is based on either a mis-guided pro democracy stand as referred to in the previous paragraph or on a more general dissatisfaction with the present situation.
- D.4 On the subject matter of both of the previous paragraphs I wish to make clear that I believe that there is a constructive and positive way ahead, but one which requires pragmatism and a long-term view. The previous sections provide some pointers on my views on that in relation to the Basic Law and gradual and orderly progress under it towards the ultimate aims. In this short final section I summarise in broader terms my support for my proposition.

D.5 I submit that prosperity, a good legal system, freedom of speech and movement, and fair, open and competent government are ultimately as important to most people as full-scale democracy, if not in practice more so. I suggest, in support of that, that at least a significant underlying cause of most public demonstrations of any size over the last few years has been more directly related to actual or perceived absence of one or more of those qualities (the “four qualities”) than to a considered commitment to the objective or wish for a full-scale democracy, even if the organisation and promotion of the demonstrations has been in the name of democracy.

It might validly be argued that the evidence suggests that western style democracy represents the best way to secure at least the last three of the four qualities. However, western style democracy is simply not an available option for Hong Kong, at least in any foreseeable scenario. I suggest that if Hong Kong accepts the realities in its usual pragmatic way, and focuses on other ways of maintaining and improving the four qualities, a stable and harmonious society will result.

D.6 *The “four qualities”*

There is always room for improvement in any given direction, but I think that brief consideration of the current situation in Hong Kong in respect of each of the four qualities is worthwhile, and that it shows that we should consider ourselves fortunate. My summary analysis is as follows:-

- Prosperity: we have had some tough years, in common with the rest of South East Asia, but enjoy one of the highest standards of living in the region, a world level infrastructure, a level of efficiency of public services and utilities (with the possible exception of education) which we happily take for granted,

and the immense economic promise resulting from the above and from our geographical position. Imbalance between rich and poor needs to be addressed, but I think that there are few if any countries in the world of which that is not true, with political status not being conclusively evident as a factor in the degree to which that problem has been successfully addressed.

- A Good Legal System: the Basic Law protects the pre-existing independence of the judiciary, and as shown by my earlier comments I do not subscribe to the view that recent events in relation to interpretation have undermined the rule of law: on the contrary I believe that there is and has been frequent evidence since 1997 of the determined exercise of independence by our judiciary – the handling of the government REIT plan is an internationally respected example. We also have a body of statute law which is constantly reviewed, under government leadership, to ensure that it meets the needs of Hong Kong; if occasionally there are vocal public concerns as to whether that objective is satisfactorily fulfilled, first that is a situation which is far from unique to Hong Kong, and secondly the record shows that, even if not democratically elected, our government listens to public opinion, as exemplified by the withdrawal of the inadequately considered (or presented) Article 23 legislation.
- Freedom of Speech and Action: I believe that Hong Kong has as good a record as any country in respect of civil liberty, and that includes countries with western style democracies. There are occasional suggestions that some parts of the media are too willing to bow to government pressure on content; I do not know how far that is true, but I imagine that any government attempts to influence the media to a greater or lesser extent. Indeed, allowing that the media is constantly subjected to influence – or just contributions – by a huge range of groups or individuals who wish to get their message across, I consider that it would be an incompetent government that did not, within reason, join in such activities. What I am confident applies in Hong Kong,

and what I consider to be what matters, is that there are plenty of channels, in the media and otherwise, for free speech.

- Fair, Open and Competent Government: I do have some qualifications on this item, mainly in relation to openness. I have made some points on that in these opinions, and will return to it under my next sub-heading. However, for the purpose of this overview in relation to what I have proposed as the four key qualities of a satisfied community, I suggest that we have a government whose competence is well above the average. I further suggest that the compactness of Hong Kong and its community, which is in so many ways a great advantage to us, does sometimes become a disadvantage in that many people, politicians and media included, are too close to “the action” sometimes for full objectivity of appraisal. A good example of that was the opening of the new airport at Chek Lap Kok, in which politicians and the media seized on teething problems, and continued to criticise and harry everyone involved even when international opinion had already appraised the airport as the most efficient in the world, and the move from one airport to the other as a logistical operation of remarkable success. I sum up my views on all four qualities by saying that the people of Hong Kong, and their political representatives, might do well to stand back rather further than they commonly do and consider just how much is good in Hong Kong, and whether for the SAR’s own benefit that should be promoted at least as much as what could be better.

D.7 *Open Government*

I suggest that Government should, and could, be considerably more open than it is. I think that in most of the free world an ever increasing level of openness of government is expected by the people, as representing one of the important ways for the people – the electorate – to assess the competence of their government. In a

democracy the ballot box provides the ultimate right and means for the people collectively to control and individually to influence the choice of government. In Hong Kong, where that ultimate right is subject to material restrictions, I consider that it is for that very reason more important that Government is fully transparent and is seen to be so.

D.8 *Examples of Openness*

I have put forward in an earlier section suggestions as to increased transparency in the conduct of the Election Committee, I have referred earlier in this section to the inadequate handling of the Article 23 legislation, and in numerous places I have raised the need for a clear outline of how the ultimate aims will operate and by what stages Hong Kong is expected to progress to the ultimate aims. I submit that that topic alone indicates how more open government is better government, and how consulting the people for their views without providing the full scenario to which their views should be related is neither open nor good government.

In a different direction, I suggest that Government has to find ways of achieving more constructive relationships between the executive authorities and the Legislative Council, inclusive of its diverse political party constituents. Notwithstanding the apparent extent of the separation in the Basic Law of the functions of executive government from those of the Legislative Council, I believe that the latter can only perform a satisfactory and satisfying role if it is given a more involved understanding of the major issues of government and allowed to contribute to the decision making processes. I further believe that it is feasible to a material extent to achieve that without interfering with the principles of the Basic Law. In due course, when there is better mutual understanding and confidence between the SAR and the CPG, I could contemplate that the accountability of the executive branch to the Legislative Council

becomes statutorily more real, as a logical development of the present rather extreme mechanics by which the Council could force the resignation of the Chief Executive. (As a footnote to that comment, it is perhaps incongruous that while the Legislative Council has that ultimate ability, it has no current power to remove or require the resignation of other senior executives of the SAR government.)

D.9 *The PRC Constitution*

I suggest that rather than a confrontational approach to the PRC Constitution, better understanding of it than is generally demonstrated in Hong Kong would be constructive, to enable a more informed approach to the formation of views and plans as the feasible developing of the SAR Constitution in the context of the PRC Constitution and of the direction in which it or its operation, or both, might change or be expected to change. There is good reason to believe that the PRC will in due course face, and may indeed already be facing, growing pressure for more involvement by the people in decisions which affect them; assuming that to be the case it would be logical to assume that the issue will arise of how far that involvement can be provided without it including control over the election of the PRC government.

D.10 *The NPC*

The HKSAR already contributes representatives to the NPC, though currently they are appointed; at some stage of the development of the system of Hong Kong it is to be hoped that at least some and preferably all of the SAR's representatives will be elected. That is indeed a matter for consideration within the "route map" which I have proposed – conceptually each of the Election Committee / Nomination

Committee and the Legislative Council might for example elect an agreed number of representatives, or possibly the first of those bodies would select a list of candidates for election by the electorate at large.

D.11 *Projection of Democracy*

It is an interesting diversion to project the consequence for Hong Kong of the adoption of democratic principles by the PRC for the whole country, which is the only logical conclusion of the views held by the proponents of full democracy. I can only see the status of Hong Kong as then being that, at best, it elected members of the National People's Congress in the ratio of say 7.5 m citizens to say 1.25 b citizens, i.e. approximately 1.07 per cent, of the body. It would be a further quantum leap, which I personally find it more difficult to contemplate than that one, that all the separate regions, provinces and municipalities would have more democratic independence from the centre in respect of their local government than Hong Kong has at present. In some respects it would be necessary to anticipate that the SAR would be expected to conform to other parts of the country and to lose certain of its present protected systems and way of life.

D.12 *Developing with the PRC*

Drawing together the points made in the previous three paragraphs, first I think it to be a fair generalisation that any system of government, at any period of history and in any country, has either moved progressively forward to maintain or improve the prosperity and stability of its people, or has had a limited future. Secondly, I believe that the CPG is fully aware of that, for the SAR as shown by the terms of the Basic Law, and, ultimately more importantly, for itself as shown, overall, by changes

within the PRC over the last 30 years or so. Thirdly, I suggest that promoters of democracy should be careful about applying the normal tenets of democracy to the PRC: I do not perceive that the democratic system of India over the last 50 years has, again overall, worked as well for its people as has the non-democratic system of the PRC for its people. The CPG is patently determined to maintain national unity, and perhaps, just perhaps, gradual and orderly development in Hong Kong, thoughtfully effected in harmony rather than in confrontation with the CPG, could be reflected in the manner in which the PRC moves progressively forward to maintain the prosperity and stability of its people. That would be likely to involve the same flexibility in approach to what constitute appropriate tenets of democracy as I believe to be appropriate in the more limited arena of the SAR.

D.13 *Political Parties in Democracy*

I venture to illustrate the notion I have put forward in the previous paragraph by spending a few moments of speculation on political parties in democracy. Is the conduct of government improved by the modern prevalence of political parties, which dominate both democratic and non-democratic governments? Is a governing party supported by little over one third of the voters, as just returned to power in the U.K., a good and fair reflection of democracy? I am reminded of the satirical words of W.S. Gilbert, put into the mouth of Private Willis – one of the lowest ranking characters he ever created – in the operetta *Iolanthe* 100 years or so ago: “The prospect of a boring lot of dull MPs, in close proximity, all thinking for themselves is what no man can face with equanimity”. Do political parties ultimately represent the combined objectives of their leaders trying to maximise their support and therefore their power base and of their other members trying to improve their importance and power by attaching themselves to a chosen leader? How far does that system ensure the best quality of government out of all those interested in serving?

Modern standards of corporate governance, widely endorsed by major democratic governments, endorse what has in fact always been a legal duty of the direction of public companies, that they should speak and vote at board meetings according to their individual views, not according to the wishes of a powerful chairman or chief executive. In line with that principle, shareholders elect directors on their individual merits, not on any factional "slate". Supported by that illustration of apparent inconsistency of attitude on the part of politicians themselves, I simply pose the question of whether modern constitutional thinking should not be willing to question present tenets of how democracy should best operate, and explore new ideas. Of course that illustration also raises issues of comparison between the levels of transparency and accountability which governments expect of others and those which they consider - or ought to consider - appropriate to themselves.

D.14 *Conclusion*

I started to put down those Closing Thoughts as a means of collecting my own views on the overall adequacy of our present position. I end them with the considered opinion that there are many more things about the status of the SAR that we should be satisfied with, and indeed grateful for, than that we should be determined to change, in the context of any constitutional review. Some matters relating to constitutional issues could and should be improved, but the appropriate changes are not, at least for the time being, within the constitution itself. A lot more review and preparation is necessary before material constitutional reform of the election methods can sensibly be considered.

Hong Kong

10 May 2005