

PENANG
2030



Top-up Women-Only Additional Seats (TWOAS)

Introducing
'Non-Constituency
Supplementary Members'
for the Penang State Legislative Assembly

White Paper



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List of Abbreviations

AV	Alternative Vote
AWS	All-Women Shortlists
BN	Barisan Nasional (National Front)
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CLPR	Closed List Proportional Representation
CNO	Committee of Nomination and Oversight
CSPA 2021	Constitution of the State of Penang (Amendment) Enactment 2021
DUN	Dewan Undangan Negeri (State Legislative Assembly, SLA)
EC	Election Commission
EXCO	Executive Council
FPTP	First-Past-The-Post
GRC	Group Representation Constituency
GRPB	Gender Responsive and Participatory Budgeting
GS	Gagasan Sejahtera (Ideas of Prosperity)
IWB	Institut Wanita Berdaya (Institute of Women's Empowerment)
LAPSME 2021	Legislative Assembly of Penang (Supplementary Members) Enactment 2021
MMM	Mixed Member Majoritarian
MMP	Mixed Member Proportional
MP	Member of Parliament
NCMP	Non-Constituency Member of Parliament

NCSM	Non-Constituency Supplementary Member
NMP	Nominated Member of Parliament
OLPR	Open List Proportional Representation
PH	Pakatan Harapan (Alliance of Hope)
PI	Penang Institute
PR	Pakatan Rakyat (People's Alliance)
PSLA	Penang State Legislative Assembly
PWDC	Penang Women's Development Corporation
SLA	State Legislative Assembly
TRS	Two-Round System
TSM	Temporary Special Measure
TWOAS / WOAS	Top-up Women-Only Additional Seats / Women-Only Additional Seats

Chief Minister's Foreword



Ensuring a minimum 30 per cent women's representation in the Penang State Legislative Assembly (PSLA) has long been one of my political goals. I believe in gender-balanced management at both the decision-making and implementation levels – ultimately a composition ratio of 40 per cent men, 40 per cent women, and 20 per cent open to both – as outlined in Penang's Gender Inclusiveness Policy (GIP). As it stands though, men State legislators in Penang outnumber women by a ratio of almost six to one.

We have a structural challenge: the single-member constituency nature of our First-Past-The-Post (FPTP) electoral system. Gender quotas are much easier to implement if we have multimember constituencies. Take the case of Singapore where every Group Representation Constituency (GRC) has at least one woman Member of Parliament (MP). Even though GRCs only have ethnic quotas, the practice of several seats being contested in every constituency has generated an unwritten gender quota and gradually improved women's representation in Parliament. Today, 29.5 per cent of MPs in Singapore are women, compared to only 3.8 per cent in 1984, the last General Election before GRCs were introduced.

An even better alternative for gender inclusion is a Mixed Member Majoritarian (MMM) system where some lawmakers are elected in multimember constituencies and gender quotas can be legally imposed, while other lawmakers continue to be elected under the FPTP system in single-member constituencies.

Our centralised federalism, however, has ruled out the possibility of Penang or any State changing its electoral system from FPTP to one with multimember constituencies, which is more women-friendly.

As Penang is a family-focused, green and smart State that inspires the nation, we will not be stopped by such challenges. We will find breakthroughs. Even from the State's early days as a trading port, it has been a site of exchange of ideas and innovation, always dynamic, yet never losing its true character.

This White Paper presents our bold attempt to appoint 'Non-Constituency Supplementary Members' (NCSMs) to our August House, as we believe that having more women at this level will lead to higher quality lawmaking and policymaking.

NCSMs is the brainchild of the Working Committee on 'Top-Up Women Only Additional Seats' (TWOAS) led by YB Chong Eng and supported by the Penang Women's Development Corporation (PWDC), Malaysia's first State-level women's empowerment agency. I congratulate both on a job well done.

TWOAS, a 3-in-1 initiative that can increase women's representation in the State Legislative Assembly, is fair to all parties and potentially creates a more dynamic Assembly. Unlike appointed lawmakers in other States, the NCSM seats shall be allocated fairly based on the vote share of each political party at the next State General Election, just as how it would be if we have an MMM system.

This also gives us a chance to fix another significant problem of the FPTP system. Currently, elected members provide detailed and specific geographical representation but are usually more focused on their own constituencies. Our proposed NCSMs can and will provide issue-based representation, meaning that they can speak for the whole State, and even go beyond 'women's issues' to look at matters through a gender lens.

In Penang, we believe in a democratic system that reflects the political composition of the State Legislative Assembly. We hope that our commitment to proportionality and inclusion will be met with cross-partisan support from all who support gender equality and women's empowerment.

This White Paper is the outcome of a long journey that has spanned a quarter of a century. It underlines Penang's commitment to good governance, which recognises the importance of having women actively participating in political and public life. While TWOAS has been discussed in 21 forums and 72 media stories since my announcement at the last World Human Rights Day, we would like our lawmakers and citizens to study, understand and support this innovative reform for it to be a success. In this light, we invite feedback from all quarters.

YAB Chow Kon Yeow
Chief Minister of Penang

1 November 2021

EXCO Member's Foreword



This White Paper marks another milestone in Penang's ongoing efforts to advance gender inclusiveness in all arenas — a goal that gathered momentum under former Chief Minister YB Lim Guan Eng's leadership in 2008, and is now reaching new heights under the Penang2030 vision of Chief Minister YAB Chow Kon Yeow.

In November 2011, the Penang Women's Development Corporation (PWDC) was set up as the State's implementation agency for women's empowerment, the first in the country. PWDC and I are most grateful to Dr Cecilia Ng Choon Sim and her colleagues in civil society who made PWDC and other related initiatives possible.

In 2017, the minimum 30 per cent women's representation laid down in the 1995 Beijing Platform for Action was introduced at the grassroots level in Penang when all the Village Community Management Councils (Majlis Pengurusan Komuniti Kampung, MPKK) were instructed to have women as one-third of their respective members.

In 2019, Chief Minister YAB Chow launched the Gender Inclusiveness Policy (GIP), which outlines a goal of having gender-balanced management — 40 per cent men, 40 per cent women and 20 per cent open to both — for the State and local governments in Penang. The Executive Council (EXCO) then instructed Government-Linked Companies and local councils to ensure a minimum 30 per cent women's representation in their leadership positions.

The Penang State Government also actively cultivated and nurtured women's talents to showcase their leadership. Beginning 2019, every constituency in the State has had an all-women Women and Family Development Committee (Jawatankuasa Pembangunan Wanita dan Keluarga, JPWK) to enhance the visibility of women's leadership in the community. Since 2020, 40 women — talented and potential leaders, including those without political experience — have been selected annually to mirror the 40 State Assemblypersons in the mock legislative session called the Women's Assembly (Sidang Wanita).

To be sure, the introduction of 'Non-Constituency Supplementary Members' (NCSMs) — originally known as 'Top-up Women-Only Additional Seats' (TWOAS) — is the natural next step in Penang's endeavour to meet the minimum 30 per cent goal set in Beijing 26 years ago.

We fully recognise the practical challenges to increase women lawmakers in First-Past-The-Post (FPTP) elections with single-member constituencies. Our 15 per cent women's representation in the Penang State Legislative Assembly (PSLA) was achieved eight years ago, and this situation may not change if no openings are given for new women politicians to pick up the baton from retiring male incumbents. In contrast, even without any legislated gender quota, Singapore has an average of 1.3 women out of 4-5 parliamentarians who represent each Group Representation Constituency (GRC). Of the world's fully elected national parliaments with the best representation of women, 18 out of the top 20 use fully or partly multimember constituencies.

Since the Federal Constitution prohibits States from changing their electoral system, Penang will use its constitutional competence to create reserved seats for women, to be filled by NCSMs if less than 30 per cent of elected State Assemblypersons are women.

I thank Chief Minister YAB Chow for his visionary and bold leadership to put gender inclusiveness at the core of his Penang2030 vision, and to embark on the TWOAS approach. To quote him in his briefing for the Members of Parliament, State Assemblypersons and local councilors on 23 January 2021, "a 3-in-1 initiative that can increase women's representation in the state legislative assembly, is fair to all parties and can create a more dynamic state legislative assembly."

We must remember that when decision-making is gender-inclusive, the beneficiaries are not just women but all members of society. All stand to gain from better policymaking with a wider talent pool. Gender inclusiveness is win-win, not a zero-sum game.

I thank PWDC for its relentless hard work in pushing the frontiers of gender inclusiveness, and the TWOAS Working Committee for bringing the advocacy for gender and electoral reform to the stage of legislation. I thank my legislative colleague YB Lim Siew Khim, as well as Dato Rohana Abdul Ghani and Ms Ong Bee Leng who led the dedicated PWDC team, Dr Cecilia Ng, Ms Karen Lai, Ms Yeong Pey Jung, and last but not least, Prof Dr Wong Chin Huat, and his colleague Mr Wo Chang Xi, who have contributed immensely in the preparation of this White Paper and its related bills.

I call upon all leaders, especially women in political parties, to support the NCSM initiative. Both sides of the political divide stand to gain when NCSMs are appointed to ensure the minimum 30 per cent goal is met. Even if some of us might personally be free from gender-based marginalisation, we must not generalise our fortunate experience to all women and dismiss gender quotas, which are seen globally as a much needed temporary special measure. Instead, we must join forces to make gender quotas work justly and productively for all, women and men.

Hopefully the NCSM mechanism, when materialised, will be emulated by other States and even by the Federal Government. Then we can gradually change our electoral system to one with a Mixed Member Majoritarian (MMM), where some lawmakers are elected under the Closed List Proportional Representation (CLPR) in multimember constituencies, in which gender quotas can be easily applied; while other lawmakers will continue to be elected in existing single-member constituencies under the FPTP system.

YB Chong Eng

EXCO Member for Social Development & Non-Islamic Religious Affairs, Penang

1 November 2021

Executive Summary

This White Paper provides a detailed explanation of the Penang State Government's plan and consideration for introducing the 'Top-up Women-Only Additional Seats' (TWOAS) through the appointment of 'Non-Constituency Supplementary Members' (NCSMs).

The Vision

The Penang Government envisions a gender-inclusive society for the State. One strategy towards this is to empower the participation and leadership of women in community life, including in all aspects of civic and political life. By ensuring that every person enjoys equality of opportunities – and equality of access to opportunities – the ultimate goal is to reach a composition ratio of 40 per cent men, 40 per cent women, and 20 per cent open to either, at both decision-making and implementation levels within the State and local governments.

With this in mind, the Penang Government aims to make the Penang State Legislative Assembly (PSLA) the first amongst all Federal and State legislatures, to achieve the target of having at least 30 per cent women representatives, which was set 26 years ago in the 1995 Beijing Declaration and Platform of Action. This figure is deemed necessary for women to reach a critical mass of influence, one that results in positive steps towards gender equality.

As a temporary special measure (TSM), an effective gender quota mechanism with well-defined targets and monitoring and evaluation mechanisms is necessary to expedite the increase in women's legislative representation. While the PSLA currently has 15 per cent women's representation – which is above the unweighted average of 11.5 per cent across all State Legislative Assemblies (SLAs) in the country – it is not acceptable to wait another 25 years before reaching the minimum 30 per cent goal.

The Challenges

Gender quotas are introduced to ensure gender balance or inclusion by mandating a certain percentage of representation for either gender or the one that is underrepresented. It may be introduced on the composition of candidates or representatives, and can be commonly categorised into three types: legislated candidate quotas, legislated reserved seats, and voluntary party quotas (Dahlerup et al., 2014).

Observations and analyses have shown that gender inclusion and the implementation of gender quotas are easier in electoral systems with multimember constituencies, especially List-Proportional Representation (List-PR) or those with a List-PR component. Malaysia has neither multimember constituencies nor List-PR at either the Federal or State level. The 2018 Federal and State Elections once again showed the limitations of the single-member constituency-based First-Past-The-Post (FPTP) system in expanding the pool of women candidates, elected lawmakers and government frontbenchers.

The failure to attain the minimum 30 per cent women's representation in Malaysia's legislatures cannot be simply dismissed as a lack of capable or talented female politicians, but must be recognised as a consequence of existing patriarchal structures and other power dynamics, including a lack of openings when insufficient male incumbents retire, and when interventions by party leadership are obstructed by the operational contradiction between gender quotas and the FPTP system.

The best solution is to shift to the Mixed Member Majoritarian (MMM) system, with additional party-list lawmakers elected under multimember constituencies through Closed List Proportional Representation (CLPR). This will complement the existing single-member constituency representatives elected under the FPTP system. The CLPR component will have a legislated gender quota.

However, the Federal Constitution has ruled out the possibility of State-initiated electoral system reforms as the "Elections of the State Legislative Assemblies and all matters connected therewith" fall under the purview of Federal legislative powers in the Ninth Schedule, while Article 117 rigidly dictates that the State electoral system must be based on single-member constituencies. Such a position will not change unless an initiative is moved at the Federal level.

Constitutional Competence and Compliance

Due to the constraints in the Federal Constitution, the creation of 'Non-Constituency Supplementary Members' (NCSMs) is an innovative way of introducing gender quotas to close shortfalls in the number of elected Assemblywomen and the target of a minimum 30 per cent women's representation.

To do so, however, requires answering two questions: (1) whether the State has the constitutional competency to introduce this measure, and (2) even if it does, whether this would be consistent with Article 8(2) of the Federal Constitution that prohibits discrimination on various grounds, including gender.

Although Article 71(5) of the Federal Constitution now rules out State competence to have Ruler-appointed members in an SLA, a State can still introduce NCSMs on the following grounds:

- a. The creation of NCSMs, with the effect of altering the composition of the SLA, is a matter that clearly falls under the 'Machinery of State Government' or alternatively, is a matter that is not enumerated in any of the Lists set out in the Ninth Schedule to the Federal Constitution. It is thus a subject matter within State legislative powers;
- b. The creation of NCSMs should not be regarded as a matter of 'Elections to the State Legislative Assemblies and all matters related therewith' despite making reference to the results of and taking into consideration State General Elections during the appointment process; and
- c. The creation of NCSMs does not go against the essential provisions guaranteed under the Eighth Schedule to the Federal Constitution because:
 - it does not cause the removal of elected members from the SLA;
 - the Eighth Schedule does not confine a State Government to having only full elected members in the SLA;
 - a State Government is only prohibited from having ruler-appointed members; and
 - a State Government can decide on matters not exclusively granted to it by the Federal Constitution, and it is not uncommon for States to do so.

Regarding consistency with Article 8(2) of the Federal Constitution – the non-discrimination provision – the 2001 constitutional amendment is deemed to have incorporated the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) into the Federal Constitution, thus localising CEDAW as part of Malaysia's domestic law that can be judicially enforced.

Under this contextual interpretation of Article 8(2) of the Federal Constitution, the women-only NCSMs as a TSM should not be regarded as being discriminatory against men. In fact, the maximum application of NCSMs will bring no adverse or 'unfavourable bias' against men but only lower down the disproportionate ratio between men and women in the SLA, which is a critical step towards attaining gender equality.

Based on the explanation above, it is clear that a State is competent to legislate the creation of NCSMs, and such a creation is consistent with Article 8(2) of the Federal Constitution.

The Mechanism

To create NCSMs, two bills need to be tabled at the SLA:

- a. Constitution of the State of Penang (Amendment) Enactment 2021 (Appendix B); and
- b. Legislative Assembly of Penang (Supplementary Members) Enactment 2021 (Appendix C).

The selection and appointment process of NCSMs, unlike in other States that have unelected members in their SLA, excludes discretion by the Executive and Legislative branches and is guided by principles and formulas expressly prescribed in the two proposed bills.

The NCMS mechanism is designed to achieve two other purposes besides a minimum of 30 per cent women's representation in the SLA: (1) to provide statewide issue-based representation; and (2) to ensure a diversity of views amongst NCSMs by proportional allocation across the political spectrum, based on the results in the State General Election and the allocation of quotas for underrepresented groups of women.

NCSMs are appointed only when the number of women elected members is less than 30 per cent of the total elected members and to achieve the minimum 30 per cent target of Assemblywomen in the SLA. Based on the current composition of the PSLA (40 elected members), the maximum number of NCSMs that can be appointed is 18. No NCSM will be appointed if 12 or more women are elected. The maximum number of NCSMs may vary if the number of elected members is changed by the SLA.

NCSMs are conferred with full rights and powers similar to those of elected members, except for: (1) the appointment of Chief Minister or member of the Executive Council (EXCO); and (2) holding the NCSM position for consecutive terms.

A Committee of Nomination and Oversight (CNO) will be established to: (1) administer the selection and appointment process of NCSMs; and (2) to evaluate and submit annual reviews of their SLA performance. The CNO will consist of seven members appointed by the Chief Minister after consulting and considering recommendations from relevant bodies and civil society. Such appointments will also be guided by several restrictions to ensure impartiality and transparency, as well as to avoid partisanship and gender exclusion. To ensure impartiality and exclude any Executive preference, the CNO will only play an administrative role in the selection and appointment process of NCSMs.

Nominees to the office of NCSMs will be subjected to the same qualifying criteria as elected Assemblypersons, with three additional requirements to achieve its intended purposes in the SLA: (1) increasing women's representation; (2) advancing the agenda of gender equality and women's empowerment; and (3) providing an arena to train new Assemblywomen. Some restrictions on the submission of a list of qualified nominees will be imposed on political parties to: (1) avoid repeat nominations; (2) uphold the purpose of providing a training ground for new women politicians, and in some circumstances, professional women but with little political experience; and, (3) increase the representation of women who are youth, differently-abled, and/or single parents.

The list of nominees will take effect in relation to the appointment of NCSMs immediately after the State General Election, and in any vacancy involving NCSMs between then and before the next State election. Changes in the status of a political party in circumstances such as dissolution, deregistration, split, merger, joining or leaving a coalition, may affect the status of its NCSMs and other nominees on its list, and will be addressed accordingly.

All the processes of selection and appointment are conducted by the CNO. After polling day of the State General Election, the CNO will ascertain three major aspects:

- a. The number of NCSMs to be appointed;
- b. The allocation of seats among the parties that have submitted a qualified list of nominees; and
- c. The name of the nominees entitled to be appointed.

After the election results have been announced, the CNO will determine the number of NCSMs to be appointed based on the number of Assemblywomen elected. The allocation is determined through the Hare Quota, using the largest remainder method, with principles and formulas (Appendix D) prescribed in the proposed Legislative Assembly of Penang (Supplementary Members) Enactment 2021 (Appendix C). After completing the allocation to parties, the seats will be allocated to the parties' nominees in descending order. The appointment process is completed when the CNO publishes the names of the NCSMs in the Gazette.

Besides existing grounds provided by the Penang Constitution, an NCSM's seat may be vacated on three additional grounds:

- a. Withdrawal of mandate by her party;
- b. Candidacy as a member of the Dewan Rakyat (Lower House) or SLA in another State; or

- c. Successful election as a Member of Parliament or Assemblyperson in another State or appointment as Senator of the Dewan Negara (Upper House) or Speaker of the Dewan Rakyat.

The NCSM system has a built-in exit mechanism, where it ceases to operate when the percentage of elected Assemblywomen reaches or exceeds 30 per cent of members of the SLA. However, another mechanism is inserted into both proposed bills to mandate a review of the NCSM system. In anticipation of an early dissolution of the SLA before completion of its five-year term, this review will start in the second year of the second SLA elected after its implementation, to be completed in the third year.

The Journey

The struggle to ensure a minimum 30 per cent of women's participation in decision-making in Malaysia started with the United Nations Beijing Declaration and Platform for Action in 1995. However, progress was limited until the debate linking gender quotas to the electoral system began at the inaugural National Conference on Gender and Electoral Reform, co-organised by the Penang Women's Development Corporation (PWDC) and Penang Institute (PI) on 26-27 August 2016. The idea of 'Women-only Additional Seats' (WOAS) was born then.

The push for gender quotas received a boost in Penang after 2018 under the leadership of Chief Minister YAB Chow Kon Yeow, whose vision for Penang2030 includes women's empowerment. He has strongly supported initiatives such as the Gender Inclusiveness Policy (GIP) undertaken by YB Chong Eng, the EXCO member in charge of gender inclusiveness, and PWDC. On World Human Rights Day in 2020, Chief Minister Chow and YB Chong Eng announced the State Government's plan to introduce TWOAS, where the shortfall from the minimum 30 per cent women's representation would be topped up.

Since then, there has been no less than 21 forums and discussions on TWOAS involving elected representatives, women and youth activists, electoral reform activists, businesswomen as well as journalists. In the same period, a total of 72 news stories, commentaries and panel discussions, appeared in newspapers, television, and internet media.

The idea of TWOAS was received with a mix of curiosity, enthusiasm and caution. Feedback obtained helped with design improvements. For example, the NCSM system's exit mechanism was introduced in response to concerns of potential abuse raised by MP for Bukit Bendera, YB Wong Hon Wai.

The legal instruments are now ready, revised under the counsel of Messrs Edmund Bon Tai Soon and Amer Hamzah Arshad of AmerBON Advocates. These have considered concerns raised by various parties (Appendix A).

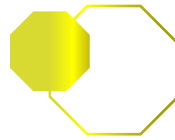
Following global best practices, the Penang State Government has published this White Paper before tabling the bills at the PSLA so that State Assemblypersons and members of the public are able to study the NCSM initiative in detail and provide feedback.

The Penang State Government hopes the bills that it has drafted will be passed with cross-partisan support given its aim to ensure a minimum 30 per cent of women's representation in the PSLA, with the NCSM seats proportionally allocated to each party based on its vote share at the next State General Election.

Chapter 1

The Vision:

A Minimum 30 per cent
Women's Representation
in Legislature



Introduction

1. This chapter explains why a minimum 30 per cent women's representation in the Penang State Legislative Assembly (PSLA) is an integral part of the Penang2030 Vision, and the Gender Inclusiveness Policy (GIP) it inspires, in line with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the 1995 Beijing Declaration and Platform of Action, and the Sustainable Development Goals 2030, specifically SDG 5 on gender equality and SDG 10 on reducing inequalities.
2. Penang is cosmopolitan and family-focused. As the basic unit of our society, it is of utmost importance that the family remains harmonious on the basis of trust and respect. In achieving a gender inclusive family, every member of the family is treated equally and yet the different needs of each member are taken into account and catered for. This enables the family members to achieve their fullest potential and the family becomes resilient.
3. Penang recognises that women leaders have had a long history in this region, including as rulers in the 16th to 17th centuries. The kijang emas (barking deer) symbol of Bank Negara Malaysia, also found at the back of every ringgit note, is believed to be linked to Cik Siti Wan Kembang II, a warrior queen in Kelantan (reigning 1610-1667) (Wain, 2019). Thus, far from being a 'foreign' idea, providing women with leadership opportunities will help return the State to this important Nusantara heritage.
4. Further, unlike some who mistakenly view gender equality as a matter of homogenising genders or denying any differences between them, this White Paper understands gender equality as a concept

where women and men, and girls and boys, enjoy the same rights, resources, opportunities and protections. It does not require that girls and boys, or women and men, be the same, or that they are treated exactly alike. Investments in gender equality contribute to lifelong positive outcomes for children and their communities and yield considerable inter-generational payoffs, as children's rights and well-being often depend on the rights and well-being of women.

(UNICEF, September 2021: <https://data.unicef.org/topic/gender/overview/>)

5. In strengthening Penang as a "family-focused, green and smart state that inspires the nation", the Penang2030 Vision introduced in 2019 stresses the importance of democratising policymaking and "[boosting] participation of youth, women and seniors in community life" (Strategic Initiative C2, p8).

6. The disempowerment of women in participation and leadership in public and political life does not only deny them equal rights and opportunities, but also means a collective loss for society since only half its potential is fulfilled.

7. Empowering women is key to enhancing competitiveness and meritocracy while the maintenance of obstacles towards their full participation and leadership is, consciously or not, male protectionism, if not dominance.

8. Inspired by the Penang2030 vision and formulated with key inputs from the Penang Women's Development Corporation (PWDC), the GIP defines gender inclusiveness as

an environment which [can] accept, respect and understand men and women's different needs and rights equally and that promotes gender equality and social justice for all persons to enjoy basic human rights. (p3)

9. Penang's gender inclusiveness approach started as early as 2012 with the introduction of the Gender Responsive and Participatory Budget (GRPB) flagship project. This connects local communities to the State Government and empowers them to claim ownership of their environment and public facilities through participation in state-society projects. GRPB has been emulated in other parts of Malaysia, clearly a testament to Penang's inspirational leadership.

10. The GIP lists five comprehensive and systematic steps:

- a. Achieving Gender Equity/Equality;
- b. Stimulating economic development and wellbeing by achieving gender equality;
- c. Advancement towards the realisation of Human Rights;
- d. Achieving good governance; and
- e. Increasing the effectiveness of public expenditure and policies.

11. Ensuring a minimum 30 per cent women's representation in the PSLA is in line with the GIP's first goal, which is to:

Provide a clear and consistent framework for the Penang State Government to ensure all women and men, girls and boys have equal opportunity to engage, contribute and benefit from planning, projects, and programmes undertaken by or with the Penang State and Local Governments. (p5)

12. Such representation is a natural step in the alignment of the GIP's third implementing strategy, "Ensure a Gender-Balanced Management within the Penang State Departments and Agencies, Local Governments", which is to:

[M]ake sure that equal opportunities are open to all men and women in decision making and implementation level within Penang State and Local Governments. The composition to be at 40% men, 40% women and 20% to both men and women. Hence, this will avoid a single-gender compositing more than 60% and avert a single-gender dominated decision-making and implementation system within the state and local governments in Penang. (p8)

13. The minimum target of 30 per cent women in decision-making positions was set in the 1995 Beijing Declaration and Platform of Action. This percentage is deemed necessary to constitute a critical mass for women to make a substantial difference in public and political life.
14. Twenty-six years after Beijing, women in Malaysia constitute one in seven parliamentarians and less than one in eight State Assemblypersons, underlining in no uncertain terms, the necessity of gender quotas. Lacking quotas, the minimum 30 per cent goal in Penang may still not be attainable for another quarter-century.
15. Gender quotas are particularly controversial amongst Malaysians whose understanding of such measures has been tainted by past practice in the country. Hence they tend to see all quotas as a form of discrimination against excluded categories and a stumbling block to meritocracy and free competition.
16. It is important to note that the elimination of discrimination entails not just the elimination of explicit or direct discrimination, but also the introduction of pro-active temporary special measures (TSMs) to eliminate indirect discrimination and promote substantive equality. Article 4 of CEDAW explicitly provides for TSMs whereby the:
- (1) Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*
- (2) Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.*

17. A society cannot reject all forms of quotas without perpetuating inequalities and preventing individuals from reaching their full potential. The absence of TSMs is not only a denial of opportunities to those who need them to enjoy the equality of results, but also a denial of benefits to all other members who may gain from contributions through the former.

18. TSMs (including quotas) can be productive and pro-meritocracy in the long run provided they are conceptualised to be temporary, have well-defined targets and evaluation and monitoring mechanisms, and are effective in incentivising effort and performance. Well-designed TSMs can and are necessary to build solidarity among individuals and groups, with spillover benefits.

19. For Penang to continue to inspire the nation as a family-focused, green and smart state, the absence of a minimum 30 per cent women's representation in the PSLA is a challenge that needs immediate redressal. Committed efforts must be undertaken to implement a gender quota as a TSM, bearing in mind the requirements spelt above for this to be effective.

Conclusion

20. As guided by the Penang2030 Vision and the GIP, and in line with the 1995 Beijing Declaration and Platform of Action, CEDAW, SDGs and other related global instruments and goals, the failure to attain a minimum 30 per cent women's representation is acknowledged as a challenge that calls for a smart and pragmatic solution.

21. This chapter has explained why gender inclusiveness, by providing women with real opportunities in political leadership and participation, is at the core of values that the People of Penang hold, and is not only necessary for solidarity among individuals and groups, but also conducive to meritocracy in the long run.



Chapter 2

The Challenges:

Gender Quotas in the
First-Past-The-Post
(FPTP) Electoral System



Introduction

1. The underrepresentation of women in elections and legislatures is not due to the lack of capable and talented women. Structures, institutions and mechanisms, often laced by patriarchal ideology and other power dynamics have been barriers to women's access to decision-making positions and public life for the longest time. However, at the practical and immediate level, it is noted that there is limited access to existing seats due also to insufficient numbers of male incumbents retiring.
2. To overcome these challenges, both the problem and the complexity of the solution needs to be recognised. Imposing gender quotas on the First-Past-The Post (FPTP) system is politically challenging because fielding women candidates in electorally difficult constituencies can be meaningless. On the other hand, replacing popular incumbents with new and capable women in party strongholds may invite electoral revolt.
3. This chapter introduces the concept of gender quotas and common types of electoral systems, explains why gender quotas are easier to implement in electoral systems with multimember constituencies, analyses the operational contradiction between gender quotas and the FPTP electoral system raised by some politicians and their supporters, and underlines the necessity to go beyond the practice of FPTP.

Gender Quotas

4. Women's participation in politics has long been inhibited by cultural, social, organisational and institutional obstacles. As cultural and social obstacles take time to be overcome, organisational and institutional rules can be changed much faster with political will, for instance, through the introduction of temporary special measures (TSMs) like gender quotas.
5. Gender quotas are specific measures to ensure gender balance or inclusion by mandating a certain percentage of representation for either genders or the one that is underrepresented. It becomes redundant once society has internalised gender inclusion as a norm, and no one is systematically underrepresented merely on the basis of their gender.

6. In the electoral and legislative arena, gender quotas may be introduced in relation to the composition of candidates or representatives. These may take one of three common forms (Dahlerup et al., 2014):

- a. Legislated candidate quotas. These are imposed by law affecting all parties such that a representative body like the Parliament or State Legislative Assembly (SLA) must have a certain percentage of representation for either genders or the one that is underrepresented. For example, parties may be required to nominate a minimum percentage of women candidates in winnable constituencies or placements before they can contest in an election. Alternatively, in Closed List Proportional Representation (CLPR) elections, seats won by parties may be filled on a gender basis. In such a case, a party cannot take up a seat earmarked for a woman if it does not have a woman candidate to fill this post;
- b. Legislated reserved seats. These are representative seats specifically allocated to women by law. Often voters may be given an additional ballot in a separate tier of constituencies in which only women candidates can contest. In rare examples like local elections in India, one-third of constituencies are earmarked in a certain election where only women candidates contest, and all constituencies rotate to become the women-only ones. In other cases, women are simply appointed by the Executive or by parties represented in Parliament to take up these reserved seats, without any voter involvement; and
- c. Voluntary party quotas. These are voluntarily enforced by individual parties on their candidate list, in the absence of legislated quotas.

7. The effectiveness and suitability of gender quotas is strongly affected by electoral systems, i.e., the mechanisms that translate votes into seats in elections.
8. Electoral systems are a combination of three elements: electoral formula, magnitude and ballot structure (see Table 2.1).

Table 2.1 Basic Elements of Electoral Systems

Element		Options			
Electoral Formula		Plurality	Majority	Proportionality	
Magnitude		Single-member Constituencies		Multimember Constituencies	
Ballot Structure	Object of the Vote	Individuals		Team/List	
	Number of Votes*	1	$1 < v < s$	S	$\leq c$
	Type of votes	nominal	ordinal	numerical	

Note: options for each element are not linked to options for another element in the table.

* v = number of votes; s = number of seats; c = number of candidates

Source: Rae (1967); Blais (1988)

9. There are three broad types of electoral formulas:
 - a. Plurality. The winner only needs to win the highest number of votes, i.e., more than any other contestant, which may fall below 50 per cent in a multi-cornered contest. It is possible and likely that the majority of voters are not represented if their votes are split amongst losing contestants;

- b. Majority: The winner must win at least 50 per cent plus one vote, i.e., more than all other contestants combined. The winner can claim legitimacy on the basis that they have more supporters than their opponents; and
- c. Proportionality: All contestants who win votes to pass the minimum requirement, termed 'threshold', can win seats. The lower the threshold, the more voters are represented.

10. Magnitude is the number of seats open for contestation in a constituency. It dictates the available options of the electoral formula. For multimember constituencies, all three formulas – plurality, majority and proportionality – are available. For single-member constituencies, proportionality is not possible because a single seat cannot be shared by several contestants.

11. Heads of governments like presidents and mayors have single-member constituencies by default. Depending on the number of legislative seats and constituencies, legislatures can have single-member constituencies, like in Malaysia and the United Kingdom, or multimember constituencies like in Indonesia and Singapore.

12. Ballot structure details the options available to voters after the electoral formula and magnitude are determined. It contains:

- a. Object of the votes. Whether the voter gets to vote for an individual, a team/list (party) or both;
- b. Number of votes. Whether the voter has just one vote, as many as the number of seats, as many as the number of candidates or somewhere in between; and
- c. Type of votes. Whether the voter has to choose between names of different contestants (nominal), gets to rank the contestants (ordinal) or can split the votes across contestants (numerical).

13. Different combinations of electoral formulas, magnitude and ballot structure produce different electoral systems. Table 2.2 illustrates a few electoral systems used globally or by Malaysia's neighbours. These are briefly introduced to facilitate subsequent discussion on gender quotas.

Table 2.2 Selected Electoral Systems by Combination of Elements

Electoral System	First-Past-The-Post (FPTP)	Alternative Vote (AV)	Party Block Vote (PBV)	Closed List Proportional Representation (CLPR)	Open List Proportional Representation (OLPR)
Formula	Plurality	Majority	Plurality	Proportionality	Proportionality
Magnitude	Single-Member	Single-Member	Multimember	Multimember	Multimember
Number of Votes	1	As many as the number of candidates	1	1	1+1
Object of the Votes	Individuals	Individuals	Team/List	List	List + Individual
Type of Votes	Nominal	Ordinal	Nominal	Nominal	Nominal + Nominal
Countries	UK, Malaysia	Australia	Singapore	Timor Leste, Indonesia (till 1999)	Indonesia (since 2004), Netherland

14. Like the United Kingdom, India, Canada and many Commonwealth countries, Malaysia uses the FPTP system. Every constituency has only one seat, voters have one vote to choose between candidates, and the candidate with the highest votes wins. The system encourages personal ties between the elected representative and their constituents but does not favour issue-based parties without local strongholds. Alternatively known as Single-Member Plurality (SMP), the elements of the FPTP system can be summarised as:

- a. Plurality formula
- b. Single-member constituencies
- c. One vote per voter
- d. Contestants are individuals
- e. Nominal voting

15. Presidential elections in Indonesia, France, Iran, Russia and Brazil use the Two-Round System (TRS), also known as Run-Off, to ensure a majority outcome. Elections are conducted the same way as in FPTP but if no candidate wins a majority vote in a multi-cornered first round contest, then the two strongest candidates will enter the second round of a FPTP election.

16. Australia uses the Alternative Vote (AV) system, also known as Instant Run-off, to produce majority outcomes. Voters are asked to rank all candidates, as their first preference, second preference, right up to the last. If a candidate wins a majority of first preferences, then the system works just like FPTP. However, if no candidate does so, the last candidate will be excluded, and their votes will be transferred to all other candidates by the voters' second preference. The process will continue until one candidate wins a majority vote. The elements of AV can be summarised as:

- a. Majority formula
- b. Single-member constituencies
- c. As many preference votes as the number of candidates per voter
- d. Contestants are individuals
- e. Ordinal voting

17. Since 1988, Singapore has had Group Representation Constituencies (GRC) by simply combining several conventional FPTP constituencies into one. Every GRC has 4-5 seats, and every contesting party must present a team of 4-5 candidates with at least one from a designated minority group – defined as Malay, Indian or another ethnic minority – in Singapore. Voters choose between parties and the party that wins the plurality vote will take all seats. Comparatively known as Party Block Vote, the elements of the GRC can be summarised as:

- a. Plurality formula
- b. Multimember constituencies
- c. One vote per voter
- d. Contestants are parties
- e. Nominal voting

18. Timor Leste, Hong Kong, Indonesia (up to 1999), Spain and Portugal use CLPR for their legislative elections. Every constituency has multiple seats, every party can nominate as many candidates in a list, and every voter gets to choose only one party, as in Singapore's GRC. The sequence of candidates on a list is fixed by the party and cannot be altered by voters, hence termed 'closed'. Unlike Singapore's GRC where the winner takes all, the seats in CLPR will be allocated to parties based on their vote shares and will be taken up by candidates in descending order. Any mid-term vacancy will be filled by the next available candidate without a by-election. The elements of CLPR can be summarised as:

- a. Proportionality formula
- b. Multimember constituencies
- c. One vote per voter
- d. Contestants are parties
- e. Nominal voting

19. If voters can alter the sequence of candidates on party lists, such systems are called Open List Proportional Representation (OLPR). These vary in design. Since 2004, Indonesia uses OLPR where voters, after choosing their favoured parties, can further choose their favoured candidates from such parties. Seats allocated to parties will first go to candidates with the highest candidate votes, as the original sequence determined by the party will only be followed for candidates without candidate votes. Collectively, OLPR and CLPR are known as List-PR. The elements of OLPR can be summarised as:

- a. Proportionality formula
- b. Multimember constituencies
- c. One vote for party and one vote for candidate per voter
- d. Contestants are parties and candidates
- e. Nominal voting

20. Mixed member or hybrid systems combine different electoral systems. The most common combination is one of FPTP and CLPR – taking the best of both worlds. FPTP is candidate-based, good for representation of local interests but winner-takes-all; while CLPR is party-based, effective for issue-representation and proportional.

21. Depending on how the CLPR seats are allocated, Mixed Member Systems have two variants:
- a. Mixed Member Majoritarian (MMM), also termed Parallel Voting or the Supplementary Member System, which is dominated more by the FPTP component and produces a more majoritarian outcome, is used in Japan, Taiwan, the Philippines and Russia; and
 - b. Mixed Member Proportional (MMP), also termed the Additional Member System in the United Kingdom, which produces a proportional outcome based on the CLPR votes, is used in Germany, New Zealand, Scotland and Wales.

Women's Parliamentary Representation and Multimember Constituencies

22. The presence of multimember constituencies appears to be one of the most conducive factors for women's parliamentary representation. Of the top 20 countries with the highest percentage of women lawmakers in fully elected national parliaments in the world (as at September 2020), 13 used List-PR with all multimember constituencies, five used MMP or MMP with some multimember constituencies, and only two used FPTP or TRS with single-member constituencies. This list covers a diverse group of countries in Europe, Latin America and Africa, at different levels of socio-economic development, and with Catholic, Protestant and Muslim heritages. Having multimember constituencies appears to be the most common factor amongst them (Table 2.3). To put things in perspective, Malaysia with its FPTP system ranked 143 out of the 192 nations surveyed.

23. It is not surprising that gender inclusion is easier with multimember constituencies (Thames, 2016). In Singapore, although GRCs were introduced in 1988 for inclusion of ethnic minorities, an implicit women's quota gradually emerged over time through this system. In the last pre-GRC election in 1984, only three out of 79 parliamentarians were women. By 2011, almost all GRCs saw a woman MP elected. In the current Parliament, 27 (29.5 per cent) out of 93 directly elected MPs are women, with 22 of them representing a GRC.

24. When a constituency has multiple representatives, it is hard for any of them to treat the constituency as their own 'territory' and resist inter-generational renewal. Also, as most electoral systems with multimember constituencies allow voters to cast their votes for parties, this allows parties to increase their number of women candidates if they choose to do so. Both factors open up opportunities for women politicians, especially those who are new.

Table 2.3 Top 20 Countries with the Highest Percentage of Women in Fully Elected National Parliaments (as at 1 September 2021)

No	Country	% Women ¹	Electoral System ²	Presence of Multimember Constituencies
1	Rwanda	61.3	List PR	All
2	Cuba	53.2	TRS	None
3	Nicaragua	50.6	List PR	All
4	Mexico	50.0	MMP	Some
5	New Zealand	49.2	MMP	Some
6	Sweden	47.0	List PR	All
7	Grenada	46.7	FPTP	None
8	South Africa	46.5	List PR	All
9	Andorra	46.4	MMM	Some
10	Bolivia	46.2	MMP	Some
11	Finland	46.0	List PR	All
12	Costa Rica	45.6	List PR	All
13	Norway	44.4	List PR	All
14	Namibia	44.2	List PR	All
15	Spain	44.0	List PR	All
16	Senegal	43.0	MMM	Some
17	Belgium	42.7	List PR	All
18	Ethiopia	42.6	FPTP	None
19	Mozambique	42.4	List PR	All
20	Argentina	42.4	List PR	All

Source: ¹IPU Parline (2021); ²International IDEA (n.d.)

25. For List-PR systems, gender quotas can be applied easily and effectively with rank order and in various forms as identified by the ACE Electoral Knowledge Network (Ace Project, 2021):

- a. A zebra/zipper system where female and male candidates are alternated throughout the lists as found in Bolivia, Costa Rica, Ecuador, France, Kenya, Republic of Korea, Lesotho, Libya, Nicaragua, Senegal, Tunisia and Zimbabwe;
- b. A prohibition of having the top two candidates of the same sex, as found in Belgium;
- c. A 40:60 ratio for every five posts on the list, as found in Spain; and
- d. A requirement that one out of every three candidates must be a woman, as found in Albania, Argentina, Indonesia, Serbia and Timor-Leste.

26. By having larger constituencies, the function of lawmakers will be less on constituency services and more on championing issues. This may also enlarge the talent pool by attracting women who are less inclined towards constituency-level service provision and socialising, to join politics.

27. Remarkable initiatives have been undertaken to reduce gender imbalances within the FPTP system but these have not been without challenges. If women candidates are fielded mostly in marginal constituencies facing stronger male candidates from rival parties, even if all parties nominate the minimum 30 per cent women candidates, their percentage in legislatures would still lag behind.

28. In the 1997 British General Election, the Labour Party employed a party-based gender quota called All-Women Shortlists (AWS) whereby 50 per cent of its winnable constituencies (defined as within a six per cent swing) had to be contested only by women. This was challenged in court and ruled illegal before the law was changed to allow for such positive discrimination. The Labour Party now has even more female MPs than male MPs, in contrast to its main rival, the Conservative Party. However, some also allege that AWS has been a tool of the party leadership to sideline dissident male candidates supported by the grassroots.

29. In India, some States have provided for legislated reserved seats ranging from one-third to one-half of the total seats in local government councils, both in the village (panchayat) and municipal levels. The reserved seats are allotted on a rotational basis. While this opens up the opportunity for women candidates, it may also be problematic for two reasons, especially if applied beyond local communities. First, some popular male incumbents may be forced to step aside when their constituencies are designated to have only women councillors. Second, when new reserved seats are allotted in a new electoral cycle, and the former reserved seats become open to all candidates again, some women politicians elected for reserved seats may move to contest in new constituencies, thus negating long term links between the representatives and their voters.

30. In Malaysia, there is currently no political party that opposes the attainment of the minimum 30 per cent women's representation. However, even among those that support this in principle, none has managed to reach this target. In 2018, no major parties nominated more than 20 per cent women candidates in both Parliamentary and State contests (Table 2.4).

31. The situation of having a small pool of women candidates is worsened if they are placed in marginal constituencies, resulting in fewer women lawmakers. After the polls on 9 May 2018, only one in seven parliamentarians and one in eight State Assemblypersons elected were women (Table 2.5). This in turn limits the pool of women for selection as government frontbenchers. While DAP, PKR, Warisan and Bersatu appointed disproportionately more female MPs to the frontbench, the percentage of women ministers and deputy ministers was pathetically low at only 18 per cent (Table 2.6). At the State level, with the exception of Selangor (27.3 per cent), Perlis (22.2 per cent), Kedah (18.2 per cent) and Sabah (14.8 per cent), the proportion of female members of SLAs was as low as 9.1 per cent for most States and zero for Terengganu (Table 2.7).

Table 2.4 Total Number and Percentage of Female Candidates in Parliamentary and State Contests in Malaysia, 2018, by Party

Main Party/ Grouping	Parliamentary Candidates			State Assembly Candidates		
	Total	Female	Female %	Total	Female	Female %
PKR	70	14	20.0	144	24	16.7
DAP	47	8	17.0	103	18	17.5
Bersatu	53	3	5.7	104	7	6.7
Amanah	34	1	2.9	105	10	9.5
Warisan	17	2	11.8	45	7	15.6
UMNO	121	9	7.4	343	43	12.5
Other Peninsula-based BN parties	59	9	15.3	138	15	10.9
Sabah-based BN parties	11	2	18.2	24	2	8.3
Sarawak-based BN parties	31	6	19.4	-	-	-
PAS	158	10	6.3	390	28	7.2
Others	86	11	12.8	250	23	9.2
Total	687	75	10.9	1,646	177	10.8

Source: Adapted from Tables 1 and 3, Yeong (2018)

Note: Sarawak's State election was held earlier in 2016, hence excluded here for State-level comparison.

Table 2.5 Total Number and Percentage of Female Parliamentarians and State Assemblypersons in Malaysia, Elected on 9 May 2018, by Party

Main Party/ Grouping	Parliamentarians			State Assemblypersons		
	Total	Female	Female %	Total	Female	Female %
PKR	47	11	23.4	69	12	17.4
DAP	42	8	19.0	100	18	18.0
Bersatu	13	1	7.7	24	1	4.2
Amanah	11	0	0.0	33	3	9.1
Warisan	8	1	12.5	21	3	14.3
UMNO	54	6	11.1	149	20	13.4
Other Peninsular-based BN parties	3	0	0.0	5	0	0.0
Sabah-based BN parties	3	0	0.0	12	2	16.7
Sarawak-based BN Parties	19	4	21.1	-	-	-
PAS	18	1	5.6	90	3	3.3
Others	4	0	0.0	2	0	0.0
Total	222	32	14.4	442	62	12.3

Source: Adapted from Tables 5 and 6, Yeong (2018)

Note: Sarawak's State election was held earlier in 2016, hence excluded here for State-level comparison.

Table 2.6 Total Number and Percentage of Female Federal Government Frontbenchers (Excluding Senators) after the 2018 Election, by Party

Main Party/ Grouping	Federal Ministers and Deputy Ministers		
	Total	Female	Female %
PKR	14	3	21.4
DAP	12	4	33.3
Bersatu	10	1	10.0
Amanah	9	0	0.0
Warisan	5	1	20.0
Total	50	9	18.0

Source: Adapted from Table 15, Yeong (2018)

Note: Senators are excluded from the analysis to avoid distortion as Government frontbenchers should be elected.

Table 2.7 Total Number and Percentage of Female State Government Frontbenchers after the 2018 Election, by State and by Party

State	Ruling Coalition/Party	Chief Ministers, State Ministers, Assistant Ministers and Members of the Executive Council (EXCO)		
		Total	Female	Female %
Johor	PH	11	1	9.1
Kedah	PH	11	2	18.2
Kelantan	PAS	11	1	9.1
Malacca	PH	11	1	9.1
Negeri Sembilan	PH	11	1	9.1
Pahang	BN	11	1	9.1
Perak	PH	11	1	9.1
Perlis	BN	9	3	33.3
Penang	PH	11	1	9.1
Sabah	Warisan-PH-UPKO	27	4	14.8
Selangor	PH	11	3	27.3
Terengganu	PAS	11	0	0.0
Total		146	18	12.3

Source: Adapted from Table 17, Yeong (2018)

Note: Sarawak's State election was held earlier in 2016, hence excluded here for State-level comparison.

32. Acknowledging the cultural and social inertia towards women's empowerment, attaining the minimum 30 per cent women's representation more than 25 years after the Beijing Platform requires commitment, innovation and pragmatism.

33. It is not true that Malaysian women lack political capabilities. However, it should be acknowledged that more efforts are needed to encourage their greater participation in political and public life. It is misleading to cite a few exemplary women political leaders to assert that all women would be nominated if they were talented; and that gender quotas stand in the way of meritocracy.

34. In the current practice, raising the number of women (or youth or any other underrepresented constituencies) in legislatures, without an increase in legislative seats, requires the retirement of male incumbents, namely those who are older. Without vacancies, no matter how 'talented' a woman politician is, she may not obtain the opportunity to contest if no incumbent retires, voluntarily or involuntarily.

35. Political retirement of elected representatives happens in only two ways: first, electoral defeat at the hands of a rival party; and, second, declining or being denied nomination as their own party's candidate for the next election.

36. Many outstanding women political leaders have been elected during electoral upheavals such as the 2008 General Election and the 2006 Sarawak State Election when many seats changed hands, or due to the generosity or support of male mentors. As more marginal constituencies become strongholds, an electoral victory of women challengers (sometime called 'dragon slayers' or 'assassins') against incumbents becomes highly unlikely.

37. If women politicians today are denied the opportunity to shine and perform like their predecessors, simply because more constituencies are becoming party strongholds while male incumbents are not retiring fast enough, society misses out on the opportunity and choice to be served by them. If gender quotas can help society to cultivate women's capabilities and talents otherwise suppressed, how can such TSMs be dismissed as a foe of meritocracy?

38. As a TSM to cultivate and nurture more talented women from the overlooked half of the population, gender quotas can advance meritocracy and must be recognised as so. At the same time, they must be carried out without causing political turmoil to parties and governments.

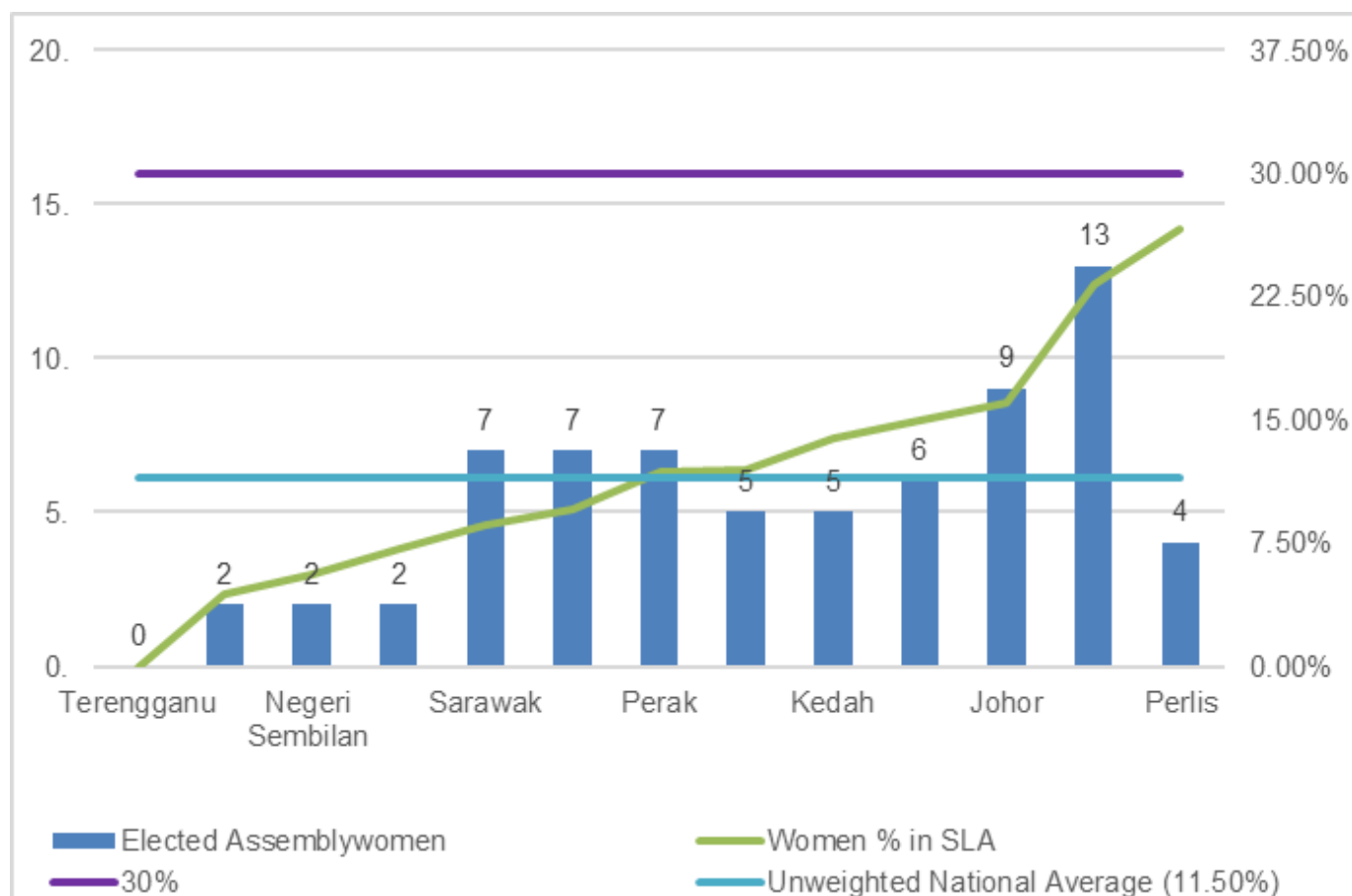
39. No rational leader and grassroots in any party today would oppose fielding the strongest new female candidate to replace the weakest male incumbent. Such a perfect match would enhance both the party's strength and women's representation.
40. However, many fear the opposite situation, where strong male incumbents will be replaced by weak female successors, a situation that can be deemed unfair or damaging to the incumbent, the party and the constituents. There may be grounds for this fear but this can and must be intelligently addressed with an improved electoral and candidacy selection system.
41. The feared 'mismatch' lies in the operational conflict between the FPTP system and gender quotas. To maximise the electability of women candidates, gender quotas require openings in stronghold constituencies. However, FPTP constituencies are single-member seats, and strongholds are normally held by incumbents who have built a personal following amongst voters through years of hard work. An abrupt replacement of such incumbents may invite backlash from voters.
42. This situation can be avoided if there is an electoral system with multimember constituencies, like CLPR or GRCs. When parties are represented by a team instead of an individual, renewal can be smooth and painless when only the weakest members of the team are replaced by new candidates who also get to be mentored by stronger incumbents.
43. The best solution for Malaysia is to have a MMM system where CLPR lawmakers can be elected from multimember constituencies to complement existing FPTP lawmakers elected from single-member constituencies. There will also be a legislative gender quota introduced in the CLPR component.
44. Unfortunately, the Federal Constitution rigidly confines the electoral system with conventionally defined elected members of the SLA to single-member constituencies, as per Article 117:

For the election of members to the Legislative Assembly of a State the State shall be divided into as many constituencies as there are elected members, so that one member shall be elected for each constituency; and the division shall be made in accordance with the provisions contained in the Thirteenth Schedule.

45. This means the State-level electoral system may be changed from FPTP to the French-style TRS or the Australian-style AV without any amendment to the Federal Constitution, but not to the CLPR or any MMM system with CLPR. As elections are a Federal matter under the Ninth Schedule to the Federal Constitution, any change to the electoral system or process – even if not constitutionally restricted – will have to be enabled by a Federal law, the Elections Act. In brief, States have no power without Federal consent to change the electoral system for the conventionally elected members of their SLAs.

46. While the Penang State Legislative Assembly (PSLA) has a 15 per cent women's representation, higher than the unweighted national average of 11.50 per cent (Figure 2.1), this is only half of the 30 per cent global minimum benchmark. This percentage has remained at 15 per cent for eight years since it rose from 7.5 per cent in 2013.

Figure 2.1 Women's Underrepresentation in State Legislative Assemblies (SLAs) in Malaysia, October 2020 (elected members only)



Source: Election Commission; Ministry of Women, Family and Community Development (2021)

Note: For the Sabah State Legislative Assembly, this figure does not include the vacant Bugaya State seat.

47. With all these concerns, the Penang State Government has decided to pursue its constitutional competency detailed in Chapter 3 of this White Paper, to create a new type of State legislators – ‘Non-Constituency Supplementary Members’ (NCSMs) – as a means to ensure the attainment of the minimum 30 per cent women’s representation in the PSLA.

Conclusion

48. The failure to attain the minimum 30 per cent women’s representation in legislature cannot be simply be attributed to their lack of political capability. Besides existing patriarchal structures and processes and other power dynamics, at the practical and immediate level, the problem also lies in the lack of openings due to an insufficient number of male incumbents retiring. This is linked to personal popularity enabled by the single-member constituencies of the FPTP system. Electoral upheavals in the past – as in 2008 and in Sarawak in 2006 – gave many outstanding women political leaders an opportunity to capture the seats of male incumbents from rival parties. However, such openings disappear when marginal constituencies become strongholds.

49. Some politicians and party leaders fear that gender quotas may lead to strong male incumbents being replaced by weak female successors. This fear lies in the operational contradiction between gender quotas and the FPTP system. Under this, effective attainment of gender quotas requires that new women candidates be given party strongholds, which are normally helmed by influential male incumbents who have built up a personal following. Party leaders too fear that abrupt replacement of such incumbents will cause electoral revolts, making them hesitant to field more female candidates. Having multimember constituencies would easily resolve this problem since new female candidates would replace the weakest male incumbents.

50. This chapter has explained why the implementation of gender quotas in the FPTP system is challenging. Since the PSLA members cannot be elected in multimember constituencies, it is important and essential to create NCSMs to overcome the restriction posed by Article 117 of the Federal Constitution.

Chapter 3

Constitutional Competence and Compliance:

Creation of 'Non-Constituency
Supplementary Members'
for the State Legislative
Assembly



Introduction

1. The Federal Constitution, through Article 117 and the Ninth Schedule, prohibits the adoption of an electoral system with multimember constituencies. One way to facilitate the introduction and implementation of a gender quota for the constitutionally defined elected members of State Legislative Assemblies (SLAs) is by creating 'Non-Constituency Supplementary Members' (NCSMs). This would help close any shortfall from not meeting the minimum 30 per cent women's representation target.
2. Some question or even dismiss the idea that State governments have such constitutional competency; while others question even if a State has such competence, if this would be inconsistent with Article 8(2) of the Federal Constitution – which prohibits discrimination – given that only women qualify as NCSM candidates to fill the 30 per cent target.
3. Based on a commissioned legal opinion by Messrs Edmund Bon Tai Soon and Amer Hamzah Arshad of AmerBON Advocates (Appendix A), this chapter explains both why the Penang State Government has the constitutional competence to introduce NCSMs and why the proposed women-only candidacy is not inconsistent with Article 8(2).

Constitutional Compliance

4. Constitutional compliance is of utmost importance when considering the introduction of any institutional reforms.
5. Both the Federation of Malaysia and the State of Penang have written constitutions, which are the sources of law for and superior than ordinary State legislation. As such, any State legislation that is inconsistent with the Federal or State Constitution will be declared as void even if it has been passed by the legislature through due process. This is provided in Articles 4 and 75 of the Federal Constitution, and Article 27 of the Constitution of the State of Penang (Penang Constitution).

6. The Penang Constitution prescribes the composition of the State Legislature, the qualification of members of the State Legislative Assembly (SLA), the tenure of the SLA, the operation and procedure of the SLA, and the exercise of lawmaking power. However, the material provisions involving State Legislatures and their powers are also guaranteed in the Eighth Schedule to the Federal Constitution under Article 71(4). The Eighth Schedule has a list of essential provisions that every State Constitution shall contain.

7. The Federal Constitution demarcates the legislative powers between the Federation and the State. A State Legislature only can make laws:

- a. Of which application is confined to the whole or any part of the State (Article 73(b), Federal Constitution);
- b. On subject matters enumerated in the State List and Concurrent List set out in the Ninth Schedule (Article 74(2), Federal Constitution); and
- c. On subject matters not enumerated in any of the lists set out in the Ninth Schedule (Article 77, Federal Constitution).

8. The Federal Constitution also provides a list of fundamental rights and liberties in Part II to protect the rights of citizens against infringements by governments.

9. In the past decade, the Penang Government has attempted to move several institutional reforms to advance and strengthen democracy including local government elections, an anti-defection law, and a term limit for the Chief Minister. Some of these are facing or have been defeated by legal challenges. These precedents show the necessity of being ready for any resistance, including through the legal arena, against State-initiated pro-democracy reforms.

10. To ensure the constitutional compliance of the proposal here and to shield the creation of NCSMs from legal challenges, the Top-up Women-Only Additional Seats (TWOAS) Working Committee engaged Messrs Edmund Bon Tai Soon and Amer Hamzah Arshad of AmerBON Advocates for a legal opinion to address the issue of the constitutionality of NCSMs (Appendix A). This chapter is based on their learned opinion.

11. The Penang State Government is confident that it is both constitutionally competent to introduce NCSMs and that the women-only candidacy is consistent with Article 8(2) of the Federal Constitution.

Competency to Legislate

12. To accelerate the increase of women's representation in the SLA through institutional change, three options are available:

- a. Imposing a gender quota in the First-Past-The-Post (FPTP) system;
- b. Switching the electoral system from FPTP to Closed List Proportionate Representation (CLPR) or a Mixed Member Majoritarian (MMM) system that combines FPTP and CLPR to have multimember constituencies; or
- c. Creating reserved seats for women through the appointed member system.

13. As explained in Chapter 2, the single-member constituency nature of FPTP makes the implementation of gender quotas ineffective, difficult or both.

14. While theoretically desirable and supported by comparative evidence, changing the electoral system to have multimember constituencies is constitutionally out of reach for any State government without amendments to the Federal Constitution. Item 6(a) of the Federal List of the Ninth Schedule to the Federal Constitution stipulates that, "elections to the Legislative Assemblies of the States and all matters connected therewith" is a subject matter placed under the Federal legislative powers. Article 117 of the Federal Constitution and section 13 of the Elections Act 1958 have fixed the State-level electoral system. Hence, any changes to this requires constitutional and legal amendments passed by Federal Parliament, not the SLA.

15. This leaves the third option of creating reserved seats for women via the appointed member system. The SLAs of Terengganu and Pahang, and the Parliament of Singapore have non-elected members appointed into their chambers.

16. It is not uncommon for a State to invent new features out of the Westminster tradition to remedy the underrepresentation of certain groups. In 2003, Terengganu introduced a new Article XXVII to its Constitution to allow for a maximum of four members who have to be non-Muslim or women, to be appointed by its SLA if no non-Muslim or woman is elected to the Assembly. To ensure a minimum representation of the Opposition in the House, Singapore introduced the Non-Constituency Member of Parliament (NCMP) scheme to appoint defeated Opposition candidates who attain the highest votes ('best losers').

17. Section 21 of the Eighth Schedule to the Federal Constitution provides for ruler-appointed members in the SLA. However, this provision shall be read together with Article 71(5) of the Federal Constitution wherein the period allowing for such ruler-appointments has already expired.

18. Despite this, the Penang Government believes, and it is supported by the opinion of the private legal counsel, that:

- a. The composition of the SLA, and the qualification and disqualification of an Assemblyperson (i.e., the legislature's membership) are matters that clearly fall under the 'Machinery of State Government', as provided under Item 7 of the State List in the Ninth Schedule to the Federal Constitution;
 - b. The words "all matters connected therewith" in Item 6(a) of the Federal List in the Ninth Schedule is intended to mean operational issues such as the procedure and process of the elections involving the Election Commission, which shall not extend its application to cover a system that appoints additional members to the Assembly just because the appointment process makes references to the results of the General Election;
- and
- c. Even if there is ambiguity over the application of Item 7 of the State List to provide for the creation of NCSMs, the SLA can rely on its residual powers under Article 77 of the Federal Constitution as an alternative.

19. Hence, the creation of NCSMs with the effect of altering the composition of an SLA and providing different legislatures' membership is clearly within State legislative powers and shall not be regarded as a subject matter of "the Election to the Legislative Assemblies of the States and all matters connected therewith".

20. Despite having the competency to provide such, the SLA shall also comply with the essential provisions set out in the Eighth Schedule as required under Article 71(4) of the Federal Constitution. The creation of NCSMs does not go against the Eighth Schedule based on the following grounds:

- a. The creation of NCSMs does not cause the removal of elected members in the SLA, whose presence is required under section 4 of the Eighth Schedule;
- b. The Eighth Schedule does not confine the State Government to the option of having only full elected members in the SLA;
- c. The State Government is only prohibited from having ruler-appointed members as defined by section 21 of the Eighth Schedule;
- d. The State Government can decide on matters not exclusively granted to it by the Federal Constitution. This is not uncommon. For example, a vacancy of Assemblyperson membership on absenteeism is a matter not provided for in the Eighth Schedule but commonly provided in each State Constitution; and
- e. There has been neither legal action initiated or Federal Parliament action taken against the introduction of non-elected members in Terengganu (2003) and Pahang (2020) under Article 71(4) of the Federal Constitution.

21. Based on the justifications provided above, the PSLA clearly has the competency and powers to legislate on the introduction of State NCSMs under the current Federal structure.

22. To achieve the purpose of having a minimum 30 per cent Assemblywomen in the House, the NCSMs can only be women. Since men are excluded due to their gender, discussion on the initiative's consistency with Article 8(2) of the Federal Constitution, the provision that prohibits discrimination, is necessary.

23. The word 'gender' was added to Article 8(2) in 2001 by the Constitution (Amendment) (No. 2) Act 2001. As stated in the Minister's speech during the second reading of the amendment Bill, such an addition was made to comply with Malaysia's obligations under CEDAW.

24. Importantly, Article 4(1) of CEDAW and General Recommendation No. 25 of the CEDAW Committee, stipulates that temporary special measures (TSMs) adopted by States Parties to accelerate de facto equality between men and women shall not be considered as discrimination. As one form of TSM, the women-only NCSM mechanism is thus not to be regarded as discriminatory against men or in violation of Article 8(2) of the Federal Constitution.

25. The Penang Government believes, and it is supported by the opinion of the private legal counsel, that not only did the constitutional amendment that came into force in 2001 prohibit gender discrimination, but it also incorporated CEDAW into the Federal Constitution. With this, CEDAW became part of Malaysia's domestic laws that can be judicially enforced.

26. In interpreting Article 8(2), the State's duty in eliminating gender discrimination shall include both:

- a. Preventive measures to outlaw gender discrimination; and
- b. Affirmative measures to remedy discrimination against suffered gender groups and to accelerate their equal status.

Further, the concept of ‘discrimination’ in Article 8(2) must also involve an element of ‘unfavourable bias’ as explained below.

27. In the event that all elected members of the PSLA are male, a maximum 18 seats of NCSMs would need to be filled, constituting slightly more than 30 per cent in the expanded House of 58 members. Even so, the 40 male elected members will outnumber the 18 female supplementary members at a ratio of 2.22 to 1.00. Considering that the male-female population ratio in Penang in September 2021 is only 101 to 100 (Department of Statistics Malaysia, 2021), the 2.22:1 ratio, even with the NCSM seats for women, it means that men’s representation in the PSLA is still twice more than women’s. Without the NCSMs, the current ratio of 34 male elected members to six female elected members is excessively lopsided at 5.67:1 (Table 3.1 and Figure 3.1).

Figure 3.1 Gender Ratios in the Population and Penang State Legislative Assembly (PSLA)

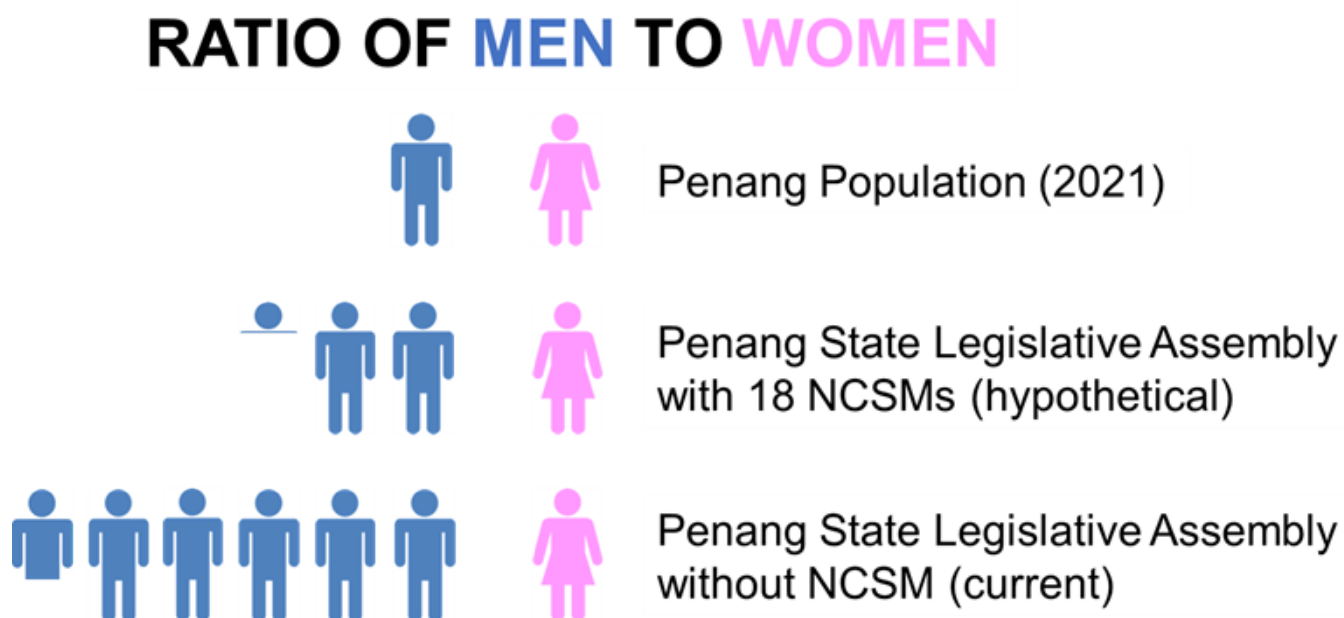


Table 3.1 Comparison of Gender Ratios in Penang’s Population and the Penang State Legislative Assembly (PSLA)

Group	Male/ Elected Assemblymen	Female/ Elected/Supplementary Assemblywomen	Men:Women Ratio
Penang’s Population (‘000) ¹	890.9	883.6	1.01 : 1
PSLA with 18 NCSMs (hypothetical)	40	18	2.22 : 1
PSLA without any NCSMs (September, 2021)	34	6	5.67 : 1

Source: ¹ Department of Statistics Malaysia (2021)

28. It is clear that the women-only NCSM seats will bring no adverse or ‘unfavourable bias’ against men. The NCSM mechanism will only increase the proportion of women lawmak-ers to 30 per cent, lower than the target of having minimum 40 per cent women in deci-sion-making positions laid out in Penang’s Gender Inclusiveness Policy (GIP), and even further from women’s 50 per cent share of the population.

Conclusion

29. While the possibility of legal suits initiated by private citizens or the Federal Government against the creation of NCSMs cannot be ruled out, a robust defense is presented above on both the State’s constitutional competency and the consistency of creating NCSMs with Article 8(2) of the Federal Constitution.

30. It has also demonstrated how the creation of NCSMs has been rigorously designed on firm grounds of constitutionality to inspire the nation to explore innovative ways to enhance women’s representation in politics.



Chapter 4

The Mechanism:

Nomination, Appointment,
Removal, Rights and
Functions of
'Non-Constituency
Supplementary Members'



Introduction

1. The success or failure of a policy depends on the design of its mechanism. This chapter will explain in detail the mechanism of 'Non-Constituency Supplementary Members' (NCSMs), including its sources of law, nature and purpose, composition, rights and powers, managing body, design and review.

Legislative Instrument

2. The introduction of Top-up Women-Only Additional Seats (TWOAS) through NCSMs requires:

- a. Altering the composition of the Penang State Legislative Assembly (PSLA), which is provided in the Penang Constitution; and
- b. Making provision for the method and criteria of selection and appointment of NCSMs, and for matters incidental to it.

3. This will involve two bills:

- a. Constitution of the State of Penang (Amendment) Enactment 2021 (hereinafter 'CSPA 2021') (Appendix B); and
- b. Legislative Assembly of Penang (Supplementary Members) Enactment 2021 (hereinafter 'LAPSM 2021') (Appendix C).

4. CSPA 2021 amends only and minimally, Articles 11 and 19 of the Penang Constitution. These constitutional amendments are proposed to:

- a. Change the composition of the PSLA by including NCSMs in the Assembly;
- b. Impose certain limitations on the terms and rights of a NCSM; and
- c. Provide for grounds to vacate the seat of an NCSM other than those specified in the Penang Constitution, and for the filling of NCSM seat vacancies.

5. This legislative instrument is necessary as the Penang Constitution is the basic source of law to provide for the composition of its State Legislative Assembly (SLA), the rights and tenure of members of the SLA, the grounds to vacate the members' office, and the procedures to fill such casual vacancies.

6. LAPSME 2021 is to create a source of law for the operation of the selection, appointment, removal and vacancy filling of NCSMs, and for matters incidental to it. The pro-posed Articles 11 and 19 of the Penang Constitution empower the PSLA to make provisions on these matters. LAPSME 2021 provides for the:

- a. Establishment of the Committee of Nomination and Oversight (CNO) to administer the selection and appointment of NCSMs;
- b. Processes and formulas to determine the appointment of the NCSMs;
- c. Grounds for vacancies and processes to fill such casual vacancies; and
- d. Reports and reviews related to the introduction of NCSMs.

Non-Constituency Supplementary Members (NCSMs)

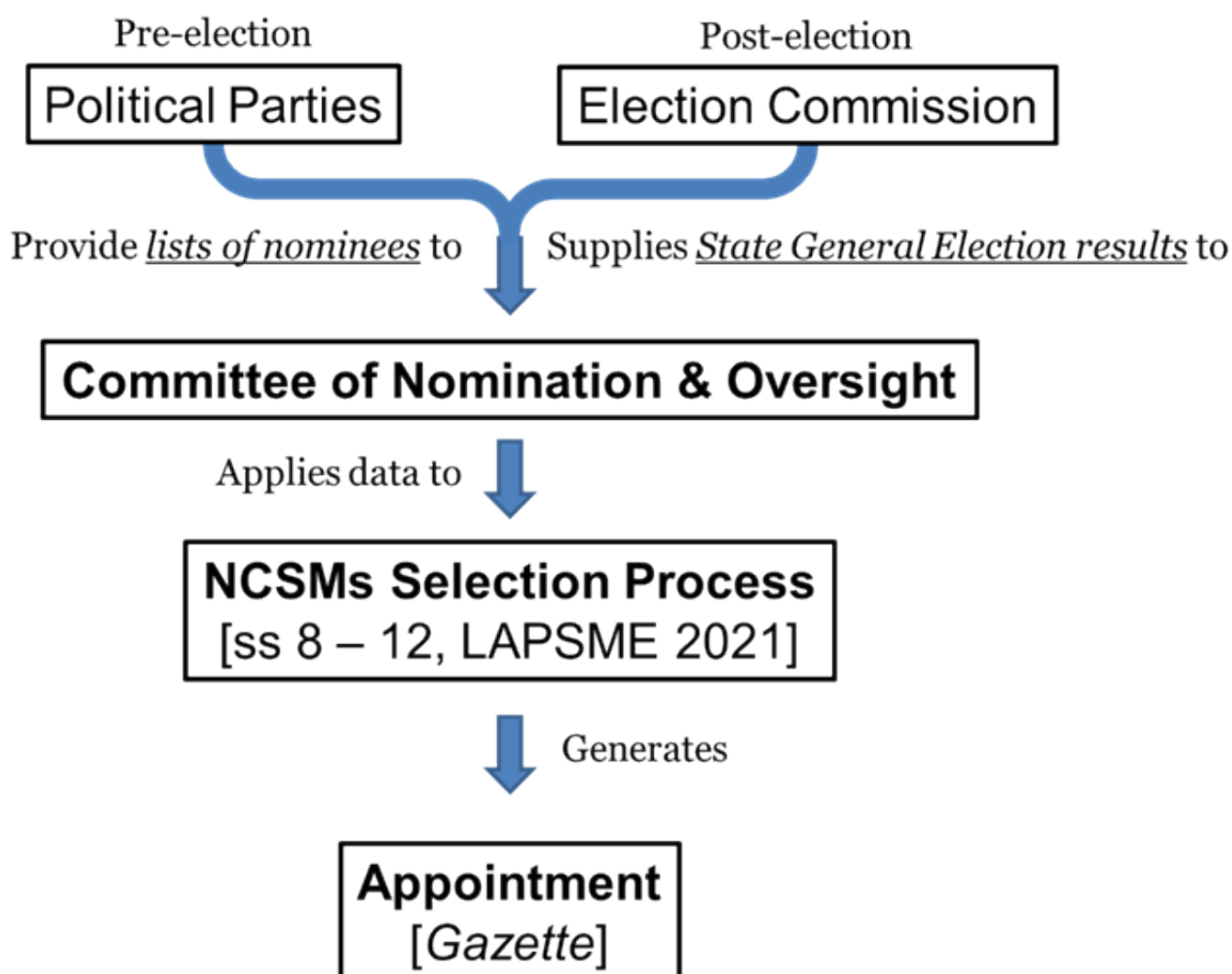
7. A minimum 30 per cent representation of women in the PSLA is achieved through topping up seats of those elected as Assemblywomen. The members of the SLA being topped-up or appointed are known as NCSMs.

8. The choice of the term 'non-constituency' draws from the 'Non-Constituency Member of Parliament' (NCMP) used in Singapore, indicating that NCSMs do not represent any particular constituency in the SLA but rather, the whole State of Penang.

9. The use of 'supplementary members' draws from differences between NCSMs and nominated/appointed members in Sabah, Terengganu, Pahang, and other Commonwealth jurisdictions. The appointment of NCSMs does not involve discretion or preference from the Executive (Sabah) nor the majority in the SLA (Terengganu and Pahang). It also brings the meaning of supplementing women members in the Assembly when such supply through a State General Election falls short.

10. To exclude discretion from the Executive and the SLA, the guiding principles and formulas are clearly stated in LAPSME 2021, mainly sections 8 to 13. The selection and appointment management body – the CNO – merely administers the process by collecting the lists of nominees submitted by the political parties and the State General Election results from the Election Commission (EC), and applies the lists and results into the selection formulas prescribed in LAPSME 2021 (Selection Process). The diagram below illustrates the appointment process of NCSMs (Figure 4.1).

Figure 4.1 The Appointment Process of NCSMs



11. The purposes and intentions of the creation of NCSMs are succinctly declared in the proposed Article 11(1)(b) of the Penang Constitution, and more elaborately spelt out in the Preamble and section 6 of LAPSME 2021.
12. The primary purpose of introducing NCSMs is to ensure “a minimum of thirty (30) per cent women’s representation in the State Legislative Assembly”, in line with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Beijing Declaration and Platform for Action of 1995, and the Sustainable Development Goals, as well as towards the realisation of Penang2030 and the Penang Gender Inclusiveness Policy (GIP).
13. Besides this primary purpose, the two other purposes as explained in section 6 of LAPSME 2021 are to:
 - a. Provide statewide issue-based representation on gender equality, family and all other matters concerning the wellbeing of the People and the State of Penang, hence supplementing constituency-based representation by elected members; and
 - b. Ensure diversity of views amongst NCSMs by proportional allocation of such seats to contesting political parties based on votes received in the State General Election, and the allocation of quotas for women who are youth, differently-abled and/or single parents in
14. The purpose of providing statewide issue-based representation matches the use of ‘non-constituency’ in the legislative title of NCSMs. It aims to supplement the work of elected members who may focus more on issues and interests from a constituency perspective rather than taking a statewide perspective. Having diverse perspectives in the House would help to enhance the quality and sustainability of State policies.

15. The diversity among NCSMs is reflected through two aspects:
- a. Proportional representation. The allocation of seats across the spectrum of political parties based on their results in the State General Election; and
 - b. Quotas for underrepresented groups of women. Prescribing quotas at the nomination stages to certain classes and groups of women such as youth, differently-abled persons and/or single parents.

This will be explained further in the section on the operations design.

Composition

Maximum NCSMs to be Appointed

16. As mentioned in its purpose, NCSMs are appointed when the number of women elected members is less than 30 per cent of the total elected members. Such numbers of NCSMs will be appointed only to achieve 30 per cent Assemblywomen in the House.

Thus, the maximum number of NCSMs required to be appointed may be determined through the following mathematical formula:

$$Y \geq \frac{3N}{7}$$

where

- Y represents the maximum number of NCSMs required to be appointed, or the number of NCSMs to be appointed when the number of women elected members is equal to 0; and
- N represents the total number of elected members in the SLA.

17. As the current total number of elected members in the PSLA is 40, the maximum number of NCSMs to be appointed is 18. This is stated in the proposed Article 11(1)(b) of the Penang Constitution and section 10 of LAPSME 2021, which prescribes that NCSMs shall not exceed 18, and subsection 8(3) of LAPSME 2021, which limits the political parties' list of nominees to not exceeding 18 persons.

18. The maximum number of NCSMs may vary if the number of elected members is changed by the SLA through a constitutional amendment.

Nominees and Lists of Nominees

19. The nominees to the office of NCSMs are subject to the same qualifying criteria as elected Assemblypersons, with three additional requirements to achieve the intended purposes of increasing women's representation in the SLA, advancing the agenda of gender equality and women's empowerment in the House, and providing an arena to train new Assemblywomen. The three additional requirements are:

- a. Being a woman;
- b. Not holding the office of NCSMs in the immediate past SLA; and
- c. Having completed a gender sensitisation training by PWDC.

These are enumerated in section 7 of LAPSME 2021.

20. The proposed section 8 of LAPSME 2021 further prescribes restrictions on the nominees submitted by the political parties to:

- a. Exclude nominees emerging on more than one list;
- b. Exclude women who are or have been members of the Dewan Rakyat (Lower House), Dewan Negara (Upper House) or any SLA regardless of being elected or appointed;
- c. Exclude Federal or State candidates if the Federal or State General Elections are held together; and
- d. Include sufficient 'diversity nominees' in the list.

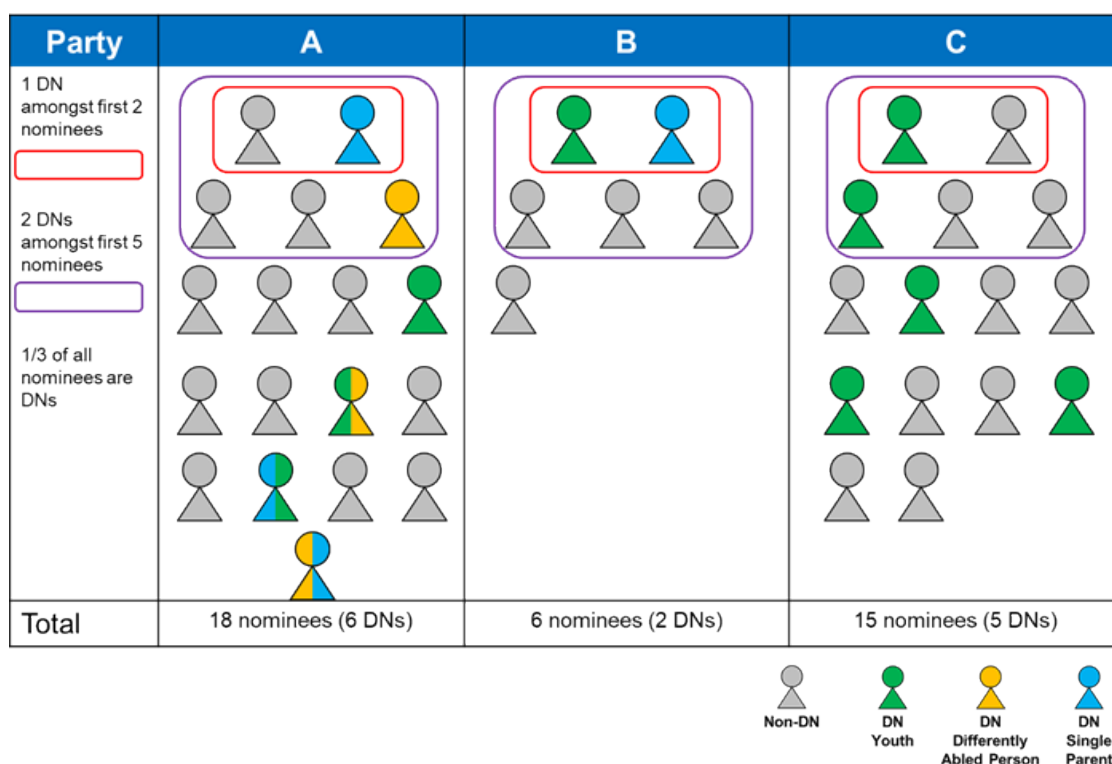
21. The first restriction in the paragraph above is to avoid repetition of nominations. The second and third restrictions are for the purposes of providing an arena to train new and/or inexperienced women politicians, and avoid NCSMs being a chamber to park those who are experienced or have lost at the polls.

22. The fourth restriction is imposed with the intention to create and attach importance to certain target groups to be nominated into the House. This would also increase the diversity and inclusiveness of views in the SLA. It is proposed that women who are youths aged thirty years and below, differently-abled and/or single parents be included as 'diversity nominees' as provided in the proposed subsection 8(8) of LAPSME 2021. A person qualified to be a 'diversity nominee' may meet any or all of the three criteria. When submitting its list of nominees, a political party shall include sufficient diversity candidates by fulfilling the following requirements:

- a. Having at least one (1) amongst the first two nominees;
- b. Having at least two (2) amongst the first five nominees; and
- c. Having one-third (1/3) amongst all nominees submitted.

Figure 4.2 provides examples of lists of nominees that fulfil the requirements above.

Figure 4.2 Examples of Qualified Lists with Sufficient Diversity Nominees (DNs)



23. Only registered political parties that contest in the State General Election by nominating at least one candidate are eligible to submit a list of nominees to be NCSMs. The parties may choose to cooperate and submit a common list of nominees. However, the parties that contest in the State General Election under a common coalition or party symbol are limited to submitting one common list of nominees, and prohibited from submitting separate lists based on each individual component party.

24. The submission of lists by political parties shall be held within one day after the conclusion of nominations for the State General Election. The CNO may prescribe several hours only to conduct the submission. The parties shall submit their lists at the time, in a form or format, and according to the manner prescribed by the CNO. The list of nominees shall not exceed the maximum number of NCSMs to be appointed as permitted by the Penang Constitution with the current maximum number being 18 persons.

25. Once the submitted lists are reviewed, confirmed and published by the CNO as the qualified list, each party's list of nominees shall have effect in relation to the appointment of NCSMs immediately after the State General Election, and for any vacancy occurring among NCSMs between this election and the next one. After confirmation, the lists cannot be altered by the said parties either by changing the name of nominees, rearranging the sequence of the list or adding new nominees.

26. The nominees of a political party whose list qualifies shall be appointed according to the sequence named in the list, beginning with the first nominee on the list and ending with the lowest ranking nominee, which is equal to the number of seats allocated according to what the party is entitled to have. If an NCSM seat vacancy arises, the next available nominee from the same list of nominees as the member whose seat has been vacated, will be appointed to fill this. If a vacancy of an NCSM seat arises and the political party whose seat has been vacated has no next available nominee to fill this vacancy, the seat shall remain vacant, i.e., not be filled by this or any other political party.

Actual NCSMs to be Appointed

27. The number of NCSMs to be appointed depends on the number of women elected members in each State General Election. It may be determined by the following mathematical formula:

$$y \geq \frac{3N - 10x}{7}$$

where

x represents the number of women members elected in the State General Election;

y represents the number of NCSMs to be appointed; and

N represents the total number of elected members in the SLA.

28. Following the formula provided above, the corresponding number of NCSMs to be appointed for each number of women elected members will be as follows (Table 4.1):

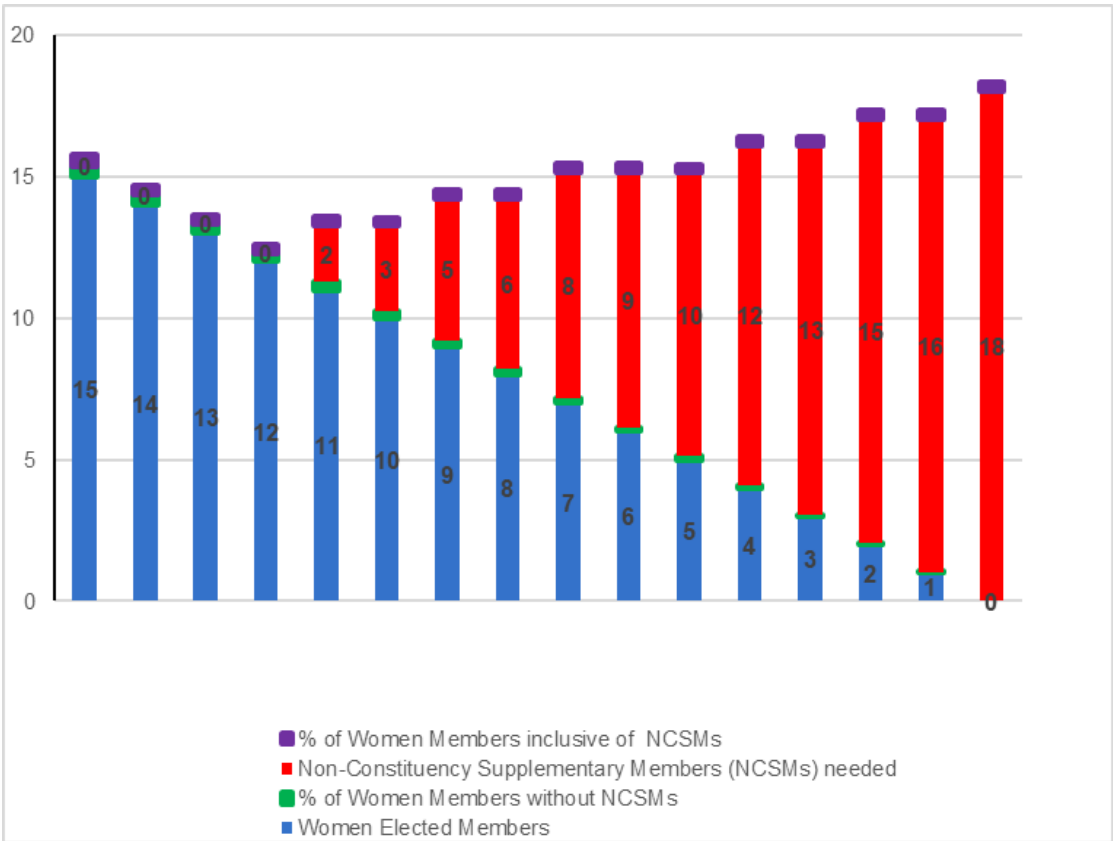
Table 4.1 The Number of NCSMs Needed/Permitted

Total Number of Women Elected Members	Total Number of NCSMs
0	18
1	16
2	15
3	13
4	12
5	10
6	9
7	8
8	6
9	5
10	3
11	2
12 and more	0

Table 4.1 is also provided in section 10 of LAPSME 2021.

29. So, if there are 12 or more Assemblywomen elected in the State General Election, the SLA will comprise 30 per cent or more of women’s representation, and no NCSM will be appointed. If this proposed bill is applied to the current composition of the SLA with only six Assemblywomen elected, then nine NCSMs need to be appointed. To reduce the number of NCSMs, parties need to field more women candidates in winnable constituencies (Figure 4.3).

Figure 4.3 The Number of Non-Constituency Supplementary Members (NCSMs) Needed to Attain a Minimum 30 per cent Women's Representation in the Penang State Legislative Assembly (PSLA)



The derivation of the above-mentioned formulas is explained in Appendix D.

30. The following understanding should be upheld in considering the rights and powers to be conferred upon NCSMs:

- a. NCSMs shall not be regarded as second-class lawmakers;
- b. The effect of having Assemblywomen over the critical mass can be achieved and appreciated only if NCSMs perform full functions like elected members; and
- c. The office of NCSMs shall be an arena to train new Assemblywomen, not used as a tool for political rewards.

31. Based on the considerations above, this White Paper proposes that NCSMs shall enjoy the full rights and powers similar to elected members except for the appointment of Chief Minister or member of the Executive Council. Further, no one can hold an NCSMs' office for consecutive terms. These restrictions are set out in the proposed Article 11(2) of the Penang Constitution (Table 4.2).

Table 4.2 NCSMs: Rights, Powers and Restrictions

Rights and Powers	Restrictions
<ul style="list-style-type: none"> ✓ Speaking and participating in the SLA ✓ Voting on any motion including motions related to confidence and supply of the Government ✓ Remuneration and pension ✓ Any other rights and privileges that an elected Assemblyperson has 	<ul style="list-style-type: none"> X Becoming Chief Minister and member of the Executive Council X Holding an NCSM position for consecutive terms

32. The restrictions on NCSMs, barring them from appointment as Chief Minister or member of the Executive Council, and holding office for consecutive terms, are to ensure that the office of NCSMs will be an arena to train new Assemblywomen, not a tool for political rewards.

33. Beside the restrictions set out in the proposed Article 11(2) of the Penang Constitution, NCSMs shall enjoy the same rights, powers, privileges and remunerations as elected members. This includes but is not limited to the rights, powers, privileges and remunerations conferred to a conventional State Assemblyperson under the Legislative Assembly (Privileges and Powers) Enactment 1959 and the Members of the Administration and the Legislative Assembly (Remuneration) Enactment 1980. The general principle mentioned above is stated in the proposed section 17 of LAPSME 2021.

34. However, due to the differences in the nature and responsibility between NCSMs and elected members, NCSMs will be denied constituency development funds and other constituency-specific allocations available to elected members.

35. One possible point of dispute is the conferment of full voting rights to NCSMs on all occasions, including the confidence and supply motions, and constitutional amendment bills. With such full voting rights, NCSMs may have the power to decide which parties get to form government and shift the balance of power in the SLA.

36. In Terengganu, an appointed member has the right to speak and participate but is denied the power to vote. In Singapore, the Nominated Members of Parliament (NMPs) have no right to vote on important motions involving a bill to amend the Constitution, Supply Bill, Money Bill, confidence in the Government, and removing the President from office. A common reason cited for this is the lack of electoral mandate.

37. However, NCSMs are more comparable to Singapore's Non-Constituency Members of Parliament (NCMPs) who are appointed through the 'best loser mechanism' and where up to 12 top-up appointments are possible to ensure the Opposition's representation in the House. These MPs are not subject to the same prohibitions as appointed members in Terengganu.

38. In fact, the appointment of NCSMs is dependent on the results of the State General Election. Specifically, it is based on the percentage of votes gained by the various parties, thus carries a certain degree of mandate from the voters. This provides NCSMs with democratic legitimacy as compared to appointed members in Sabah, Terengganu and Pahang, who are dependent on the pleasure of the Executive or Legislature, to voice and vote in the House.

39. Further, if the rights and powers of NCSMs in the SLA are restricted, they may not be able to effectively offer statewide issue-based representation to complement elected members who provide geographical representation. The Penang State government believes that the full involvement of non-constituency statewide representation in the legislative and policymaking processes will improve the quality of laws and policies.

40. If NCSMs are only accorded the status of second-class lawmakers, and allowed to voice their opinions but not to vote, they will likely fail to bring about an impactful change in enhancing women's political leadership, and showcasing the benefits of having both issue-based and geographical representation under a Mixed Member Majoritarian (MMM) system, which is how Penang's new electoral system would resemble when NCSMs are added to elected members.

41. In conferring NCSMs equal voting powers, including the right to vote on matters of confidence and supply, the balance of power in the House will more closely reflect the distribution of votes. Also potentially advantageous is if the introduction of proportionally allocated seats of NCSMs can reduce the electoral advantage brought to any party by the undemocratic practices of constituency malapportionment and gerrymandering.

42. Based on the justifications above, conferring full voting powers to NCSMs is advancing democracy on all three counts of gender equality, seat-vote proportionality, and more effective issue-based representation in the House.

43. An NCSM is paid the same allowance as an elected Assemblyperson, a monthly RM 11,250 in allowance and RM 5,500 for other needs, totalling RM 16,750 a month and RM 201,000 a year. The number of NCSMs depends on the number of Assemblywomen elected. The more Assemblywomen are elected, the fewer the NCSMs appointed. For instance, if only six Assemblywomen are elected for the next PSLA as in the current one, nine NCSMs need to be appointed.

44. An NCSM is entitled to the same pension as an elected Assemblyperson, ranging from a minimum of RM 2,812.50 (if they have served at least 36 months) to a maximum of RM 6,750. This will translate into RM 33,750 to RM 81,000 a year. If an NCSM is subsequently elected as an Assemblywoman, there will be no additional pension costs because the pension will start only after her legislative career stops. As most NCSMs nominated by parties are expected to continue as elected Assemblywomen in future, then the actual pension payouts for a few NCSMs will be insignificant.

45. An NCSM is not entitled to allowances or allocation for constituency services and development. She will be given an allowance of RM 5,000 a month for office maintenance and staffing.

Committee of Nomination and Oversight – Composition and Duties

46. A committee termed 'Committee of Nomination and Oversight' (CNO) shall be established under the proposed section 4 to serve two major functions:

- a. Administering the selection and appointment process of NCSMs; and
- b. Evaluating and submitting annual reviews of the SLA's performance after the introduction of NCSMs.

47. It is proposed that the CNO consists of seven (7) members with a person who has a qualification as a retired High Court Judge or retired SLA Speaker as the Chair, a senior member of the Penang Women's Development Corporation (PWDC) as the Secretary, an officer from the State Secretary's Office, and four members of civil society or academia who have conducted research or advocacy on gender equality and women's empowerment. The members are appointed by the Chief Minister. The Chief Minister shall consult and consider the recommendations from the relevant bodies and civil society before appointing members of the CNO even though this requirement is not prescribed in the LAPSME 2021.

48. To ensure impartiality and transparency, and to avoid partisanship and gender bias, there are several restrictions and requirements for CNO members:

- a. No member shall hold an active membership in any political party;
- b. No one gender shall occupy more than five membership positions in the CNO;
- c. No members shall be appointed for more than two three-year terms; and
- d. All appointments of the membership and its duration shall be published in the Gazette.

49. To ensure the impartiality and to exclude any Executive's preference, the CNO has only an administrative role in the selection and appointment process of NCSMs, with the following tasks guided by clear procedures and criteria provided in the proposed provisions of LAPSME 2021:

- a. After the nomination of the State General Election, receiving the list of nominees for the seats of NCSMs from the qualified parties and confirming the qualified lists of nominees [s 8];
- b. Before the polling day of the State General Election, organising public presentation sessions and other events to introduce the qualified nominees to the public [s 9];
- c. After the announcement of the State General Election outcome, identifying the number of NCSMs to be appointed, the allocation of seats for each qualified party and the nominees entitled to be appointed, and ensuring that the names of the nominees entitled to be appointed as NCSMs are gazetted [ss 10-13];
- d. In situations of vacancies, identifying the next available nominees as replacements and causing such appointments to be gazetted [s 15]; and

Within three months of the State General Election polling day, submitting a report on the selection of NCSMs to the SLA [s 18(1)].

These tasks are listed in the proposed subsection 5(1) of LAPSME 2021.

50. Between State General Elections, the CNO is tasked to produce and submit to the SLA, an annual evaluative report of the SLA and its Select Committees' performance after the introduction of NCSMs in the previous year, and any necessary improvements in the institutional setting for their optimum performance. The report is required to be submitted within the first three months of every year of an SLA, starting from its second year. The CNO may commission suitable independent researchers to prepare annual reports to facilitate public participation and involvement. This task is stated in the proposed subsections 5(1)(f) and 18(2) of the LAPSME 2021.

51. To execute its functions and duties, the CNO is empowered to set up a secretariat and appoint any State Government officer into the secretariat to assist the CNO.

Systemic Design of NCSMs

Effect on the NCSMs and Lists Caused by Changes in Political Parties' Status and Coalitional Affiliation

52. Since the mandate of nominees on an NCSM list comes from their respective parties, and the sequence of nominees is also decided by the parties, any change in a political party's status might affect the status of its NCSMs and its qualified list. The proposed section 16 of LAPSME envisages four situations and states their effect on the lists (Table 4.3).

Table 4.3 Effect on the NCSMs and Lists Caused by Changes in Political Parties' Status and Coalitional Affiliation

Event	Status of Existing NCSMs	Status of Existing Lists	Creation of New List
Merger of parties/formation of coalition	Not affected	Not affected — the original lists will continue to operate separately	No
Party ceasing to exist	Not affected	Ceases to have any effect	No
Party ceasing to be a coalition member	Coalition may retain or exclude NCSMs from that party	Coalition may retain or exclude nominees from that party	No
Coalition ceasing to exist	Not affected	Coalition's list ceases to have any effect	Yes — Coalition's list will be separated into individual party lists; each party's list operates separately

53. The merger of parties or the formation of a political coalition shall not affect the status of NCSMs of those parties; their lists shall operate and have effect as if separated. For example, Party A merges with Party B to form Party Z. If both parties have submitted a separate list to the CNO and have nominees to be appointed as NCSMs, their NCSMs will remain in office and the lists of Party A and Party B will be retained as separate lists despite the merger. If Party A NCSM's seat is vacated, the CNO will identify the next available nominee from Party A's list. If Party A's list has no next available nominee, the seat will not be filled even if there is a next available nominee from Party B's list.

54. For a political party that ceases to exist due to whatever reasons, including deregistration or declaration as unlawful or otherwise, the existing NCSMs who have been appointed under that party's list shall remain in office, but the lists submitted by that party shall cease to have any effect. For example, Party U is declared unlawful by the court of law and thus ceases to exist. The NCSMs who have been appointed under Party U's list shall remain as NCSMs. However, if those NCSM seats are vacated, there shall be no next available nominee as Party U's list has ceased to have any effect.

55. In a situation where a component party ceases to be a member of the coalition that the party belonged to when submitting a list, for whatever reason including withdrawing, being expelled or otherwise, the coalition shall have the choice to decide whether to retain the existing NCSMs and the nominees from that component party or to exclude them. For example, Party P splits from Coalition R after the State General Election. If there are NCSMs and nominees from Party P, Coalition R may retain the NCSMs and the nominees from Party P in their list. Coalition R may also choose to exclude those NCSMs and nominees from representing Coalition R. If Coalition R decides to exclude the existing NCSMs from Party P, their seats shall be vacated as the NCSMs from Party P no longer represent the coalition that nominated them. If Coalition R decides to exclude the nominees from the list, the relevant nominees will be removed from the list and the next nominees will fill the sequence accordingly. When Coalition R has made such a decision, it must inform the Speaker of the House regarding the NCSMs, and the CNO regarding the nominees, so that its decision has the effect of law.

56. For a coalition that ceases to exist due to whatever reason, the effect is different from the cessation of a party. The existing NCSMs who have been appointed under that coalition's list shall remain to hold office, which is the same as the cessation of a party, but the lists submitted by that coalition will be separated into different lists based on its component parties, which is different from the cessation of a party. Each component party's list shall operate and have effect as if separated. For example, Coalition B, which consists of Party S, T and U, is dissolved. The list of Coalition B will be separated into three — one list each for Party S, Party T and Party U. The nominees from Party S will be included in the newly created Party S's list, the nominees from Party T go to Party T's list, and the nominees from Party U go to Party U's list. If Party S's NCSM seat is vacated, the CNO will identify the next available nominee from Party S's list even if in Coalition B's original list the next available nominee may come from either Party T or Party U. If Party S's list has no next available nominees, the seat will not be filled even if there is a next available nominee from the lists of Party T or Party U.

57. The effect of an NCSM changing their party affiliation will be discussed in the subsection on 'Vacancies and Replacement'.

Processes of Selection and Appointment

58. All the processes of selection and appointment are conducted by the CNO. The political parties contesting in the State General Election are involved only to the extent of providing the nominees for future appointments and deciding the sequence of nominees in their respective lists.

59. Within one day after the conclusion of nominations for the State General Election, the CNO will receive NCSM lists submitted by parties. Political parties need to submit their list of nominees to the CNO at a time and according to the manner prescribed by the CNO. After the submission is closed, the CNO will review the nominees and lists, exclude the nominees or lists that do not fulfill the requirements set out in the Penang Constitution and the proposed LAPSME 2021, and then confirm and publish the qualified nominees and qualified lists.

60. After publication of the qualified nominees and qualified lists, the CNO shall organise at least one public presentation session to introduce the qualified nominees. The form of the public presentation session is not fixed in the proposed LAPSME 2021. It may be a debate, conference, question and answer session or other modalities. The public presentation session will be held at least three days before the polling day of the State General Election. The CNO is allowed and encouraged to organise any other events to publicise the qualified nominees.

61. After the polling day of the State General Election, the CNO shall ascertain three major aspects:

- a. The number of NCSMs to be appointed;
- b. The allocation of seats among the parties that have submitted a qualified list of nominees; and
- c. The names of the nominees entitled to be appointed.

To complete this process, the CNO will obtain the official results of the State General Election announced by the Election Commission. This will be done as soon as reasonably practicable.

62. As detailed in the section 'Composition', the number of NCSMs to be appointed depends on the number of women members elected to the SLA in the State General Election. The proposed section 10 of LAPSME provides two simple matching lists to guide the CNO in identifying the number of NCSMs needed (column B) based on the number of women elected members (column A).

63. Once the number of NCSMs needed has been ascertained, the CNO will proceed to determine the allocation of seats among the various parties. This is done through the Hare Quota largest remainder method. The proposed subsections 11(3) to 11(7) will guide the CNO to apply the calculation of the Hare Quota and determine the number of seats that will be allocated to the said parties. The proposed subsection 11(8) covers circumstances where parties nominate fewer candidates than the number of seats warranted. The unfilled seats will be passed to other parties that have the largest remainder. The proposed subsection 11(9) deals with the situation when parties have the same remainder but there are limited seats remaining to be allocated. To resolve this rare deadlock, the final determination shall be drawn by lots. The next subsection illustrates the application of the Hare Quota largest remainder method.

64. Once the allocation of seats among parties is settled, the CNO shall proceed to determine the nominees who are entitled to be appointed. The proposed section 12 of LAPSME explains that the seats allocated to a party shall go to its nominees by the ascending order on the qualified list.

65. Subsequently, as required in the proposed section 13 of LAPSME, the CNO shall cause the name of the nominees entitled to be appointed as NCSMs to be published in the Gazette. Together with the name of the nominees, a statement explaining the calculation completed under sections 10 and 11 will be included in such Gazette publication. Mirroring the setup for the elected members, an NCSM is deemed to be appointed when their name is published in the Gazette subject to further taking and subscribing to an oath in the SLA.

Illustration – Hare Quota Largest Remainder Method

66. This subsection uses the past two State General Elections to explain the operation of the Hare Quota largest remainder method.

67. In the 2018 State General Election, three major coalitions contested: Pakatan Harapan (PH), Barisan National (BN) and Gagasan Sejahtera (GS). Assume each coalition submitted a list containing 18 nominees while other parties did not submit any list. Based on the results, six Assemblywomen were elected and nine NCSMs are required to be appointed. Table 4.4 shows the calculation through the Hare Quota largest remainder method and the allocation of seats among the coalitions.

Table 4.4 Simulated Operation of the Hare Quota Largest Remainder Method based on the 2018 State General Election Results

Coalition	Votes (A)		Hare Quota (B)	Party Quota			Remainder seats allocation	Total NCSMs	
	No	%		(A/B)	full quota	remainder		No	%
PH	530,008	67.64	87062.22	6.0877	6	0.0877		6	66.67
BN	176,723	22.55	87062.22	2.0298	2	0.0298		2	22.22
GS/PAS	76,829	9.81	87062.22	0.8825	0	0.8825	1	1	11.11
Total	783,560	100.00	-	9.0000	8	1	-	9	100.00

68. The total number of votes gained by the three coalitions that submitted NCSM lists was 783,560. The Hare Quota is calculated by dividing the total votes gained by three coalitions (783,560) to the seats to be appointed (9). Then, the following calculation is dividing each party's vote to the Hare Quota to obtain the party quota. From this calculation, PH gets six full quotas and BN two full quotas. Thus, PH and BN are entitled to six and two NCSMs respectively. There is one more seat required to be allocated. Assessing the remainders of each coalition, GS obtained the largest remainder (0.8825) and thus, GS gets the last remainder seat.

69. In the 2013 State General Election, two major coalitions contested in the elections: Pakatan Rakyat (PR) and Barisan National (BN). Assume both coalitions submitted a list containing 18 nominees each while GS/PAS and the other parties did not submit any list. Based on the result of the polls, six Assemblywomen were elected and nine NCSMs are required to be appointed. Table 4.5 shows the calculation through the Hare Quota largest remainder method and the allocation of seats among the coalitions.

Table 4.5 Simulated Operation of the Hare Quota Largest Remainder Method based on the 2013 State General Election Results

Coalition	Votes (A)		Hare Quota (B)	Party Quota			Remainder seats allocation	Total NCSMs	
	No	%	(724,044/9)	(A/B)	full quota	remainder		No	%
PR	490,798	67.79	80449.3333	6.1007	6	0.1007		6	66.67
BN	233,246	32.21	80449.3333	2.8993	2	0.8993	1	3	33.33
Total	724,044	100.00	-	9.0000	8	1	-	9	100.00

70. The two coalitions gained a total of 724,044 votes. The Hare Quota is calculated by dividing the total votes gained by the two coalitions (724,044) to the seats to be appointed (9). Then, to get the party quota, each party's votes is divided by the Hare Quota. From this calculation, PR gets six full quotas and BN gets two full quotas. Thus, PR and BN are entitled to six and two NCSMs respectively. There is one more seat required to be allocated. Assessing the remainders of each coalition, BN had the largest remainder (0.8993) and thus BN would get the last remainder seat, increasing its total to three.

71. As the method to enter the SLA is entirely different between the elected members and the NCSMs, a constitutional amendment is required, as stated in the proposed section 4 of CSPAE 2021, serving the following two purposes:

- a. Confining the application of Article 19(5) of the Penang Constitution regarding casual vacancies to elected members only; and
- b. Creating a source of law to provide for the grounds to vacate an NCSM seat in circumstances other than those specified in the Penang Constitution, and the method to fill the vacancies caused otherwise than by a dissolution of the SLA.

72. Besides existing grounds provided by the Penang Constitution such as absence, death, disqualification and resignation, the proposed section 14 of LAPSME lists three other grounds that may cause a vacancy of an NCSM seat:

- a. Withdrawal of mandate by her party;
- b. Her candidacy as a member of the Dewan Rakyat (Lower House) or SLA in other States; and
- c. Her successful election or appointment as a Member of Parliament or Senator (Dewan Negara, Upper House) or Speaker of Dewan Rakyat (Lower House), or an Assemblyperson in another State.

73. Ground (a) is a de facto anti-defection clause applicable to NCSMs; Grounds (b) and (c) echo the restrictions on the nominees submitted by the political parties.

74. The seat will be declared vacant by the Speaker of the SLA if the Speaker has been informed of the existence of the grounds of vacancy prescribed in the Penang Constitution or the proposed section 14 of LAPSME. Then the Speaker will issue a notification to the CNO on filling that vacancy.

75. On receipt of any notification issued by the Speaker, the CNO shall immediately identify the name of the next available nominee from the same list of nominees from which the member whose seat has been vacated arose. Upon completion of such identification, the CNO shall cause the name of the next available nominee to be published in the Gazette, and the nominee is appointed into the SLA subject to the taking and subscribing to an oath.

76. If a political party has no next available nominee to fill a vacancy, the vacancy shall not be filled by any other political party and the seat remains vacant until the next State General Election is held. If this situation arises, the CNO shall notify the Speaker that the vacancy cannot be filled.

Review

77. Since the NCSM mechanism in its nature is a temporary special measure (TSM) rather than a permanent set up, it requires a sunset clause or exit mechanism.

78. The NCSM mechanism in its systemic design has a built-in exit mechanism. When 12 or more women members are elected, meeting the minimum goal of 30 percent women's representation in the SLA, the preliminary target for empowering women's representation is achieved. Hence no NCSMs will be appointed as clearly provided in the proposed section 10 of LAPSME.

79. Besides the internal exit mechanism, a periodic review is necessary to examine the effect of introducing the NCSMs, formulate necessary policies and consider the adjustment, improvement or abolishment of the NCSM mechanism.

80. Thus, there is a 'review clause' in both proposed bills to assess the NCSM mechanism in the third year of the second SLA elected after its implementation. This review is made mandatory through the provisions enacted in the proposed section 2 of CSPAE 2021, and sections 2 and 19 of LAPSME 2021.

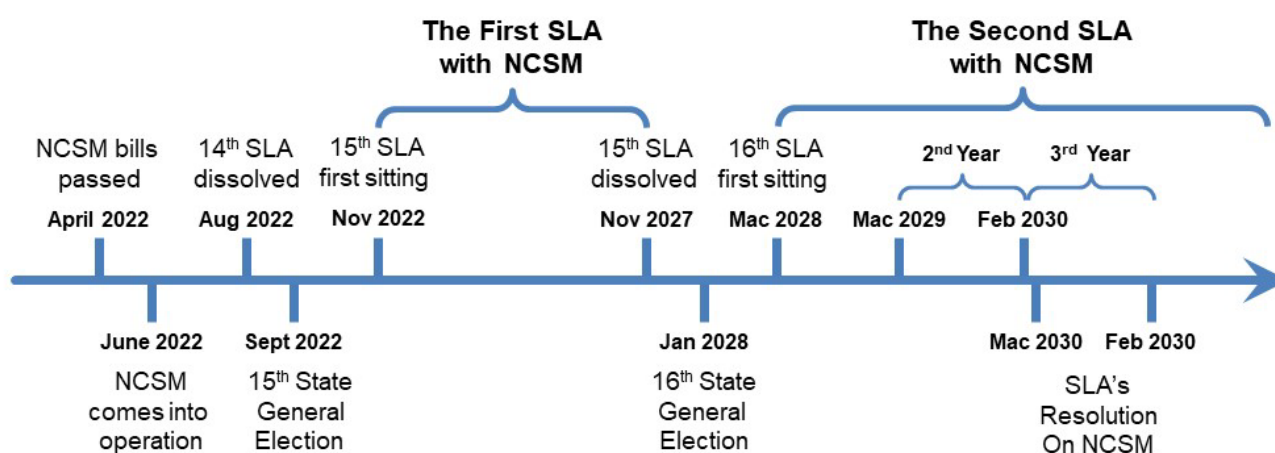
81. The review process will begin in the second year of the second SLA elected after the implementation of the NCSM mechanism by commencing and conducting an independent study. The SLA may decide on the manner of conducting the independent study. The content of the independent study is on the impact and effectiveness of the NCSM mechanism in improving women's representation. The annual evaluative reports made by the CNO and submitted to the SLA may become references for the independent study. Eventually, the independent study will be laid before the SLA to assist the Assemblypersons to resolve in the third year, if the NCSM mechanism shall be retained, revised or repealed. A simulated time frame is illustrated in Table 4.6 and Figure 4.4.

Table 4.6 Simulated Time Frame for the Review of the State Legislative Assembly (SLA) NCSM Mechanism

Event	Date
NCSM Bills passed	March 2022
NCSM comes into operation	April 2022
14 th SLA dissolved	August 2022
15 th State General Election	September 2022
15 th SLA first summoned (the first SLA sitting after introduction of NCSM)	November 2022
15 th SLA dissolved	November 2027
16 th State General Election	January 2028
16 th SLA first summoned	March 2028
2 nd year of the 2 nd SLA with NCSMs (commencement of the independent study)	March 2029 ~ February 2030
3 rd year of the 2 nd SLA with NCSMs (SLA's resolution on NCSM)	March 2030 ~ February 2031

Assumptions: The current SLA is dissolved on August 2022 and the next SLA will serve its full five-year term.

Figure 4.4 Simulated Time Frame for the Review of the State Legislative Assembly (SLA)'s NCSM Mechanism



82. Based on the simulation above, if the first SLA after the introduction of NCSMs serves its full term, the independent study would have six years of NCSMs in operation to assess and six annual evaluative reports produced by the CNO highlighting the achievements of, and identifying the weaknesses and improvements required for the implementation of the NCSM mechanism. The number of years to assess and conduct the annual evaluative reports is subject to the length of the first SLA after the introduction of NCSMs.

83. The statutory requirements of having the CNO's annual reports and the independent study before the resolution in the SLA is to provide sufficient detail, information and third party opinions to the Assemblypersons for the debate on the resolution on NCSM, and to minimise the likelihood of abrupt abolition before the NCSM mechanism is given a fair chance to work.

84. There is a possibility of an early dissolution of the second SLA elected after the implementation of the NCSM mechanism but before the NCSM review process is completed, in other words before:

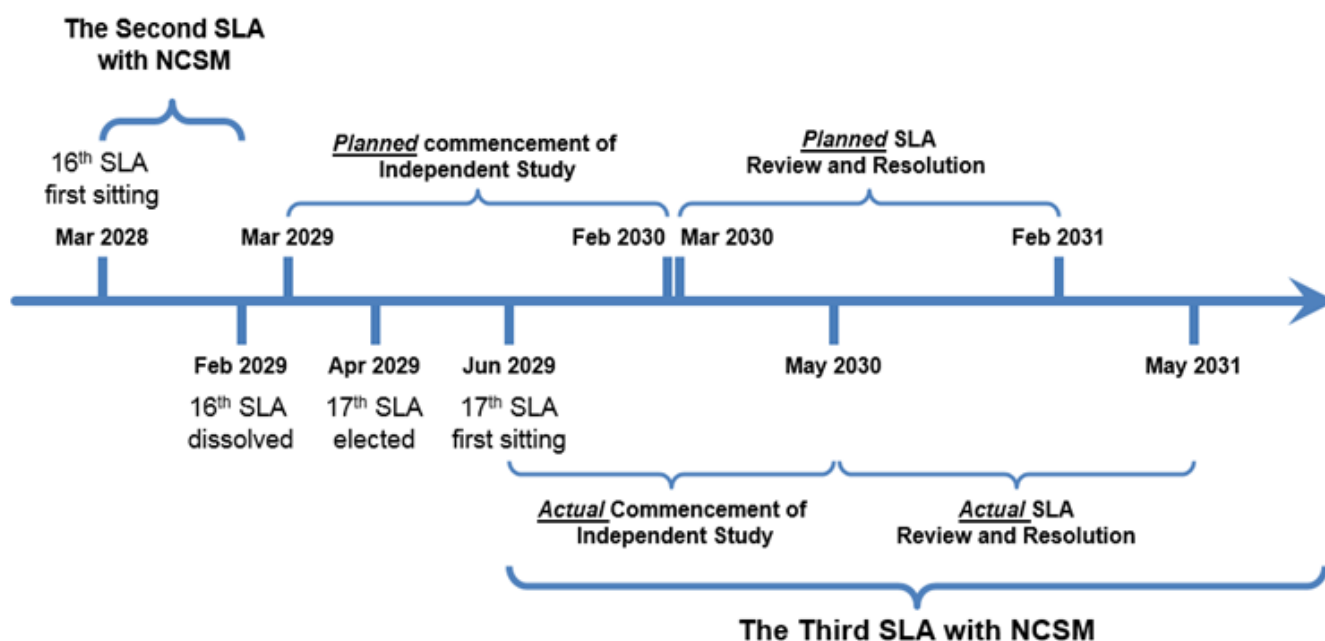
- a. The SLA commences the independent study;
- b. The independent study is laid before the SLA; or
- c. The SLA resolves on the retention, revision or repeal of the NCSM mechanism.

85. Both the proposed bills oblige the subsequent SLA to initiate or complete the related pending matters within 12 months from its first meeting after the State General Election. If the second SLA is dissolved before it commences the independent study, then the subsequent SLA must commence the study during its first meeting and resolve on the NCSM mechanism within a year. This is illustrated by Table 4.7 and Figure 4.5.

Table 4.7 Simulated Time Frame for the Review of the NSCM Mechanism with the Dissolution of the Second State Legislative Assembly (SLA) (Before Commencement of the Independent Study)

Event	Date
16 th SLA dissolved	February 2029
Planned commencement of the independent study	March 2029 ~ February 2030
17 th SLA elected	April 2029
17 th SLA first summoned	June 2029
Actual commencement of the independent study	June 2029 ~ May 2030
Actual SLA's resolution on NSCM	June 2030 ~ May 2031

Figure 4.5 Simulated Time Frame for the Review of the NSCM Mechanism with the Dissolution of the Second State Legislative Assembly (SLA) (Before Commencement of the Independent Study)

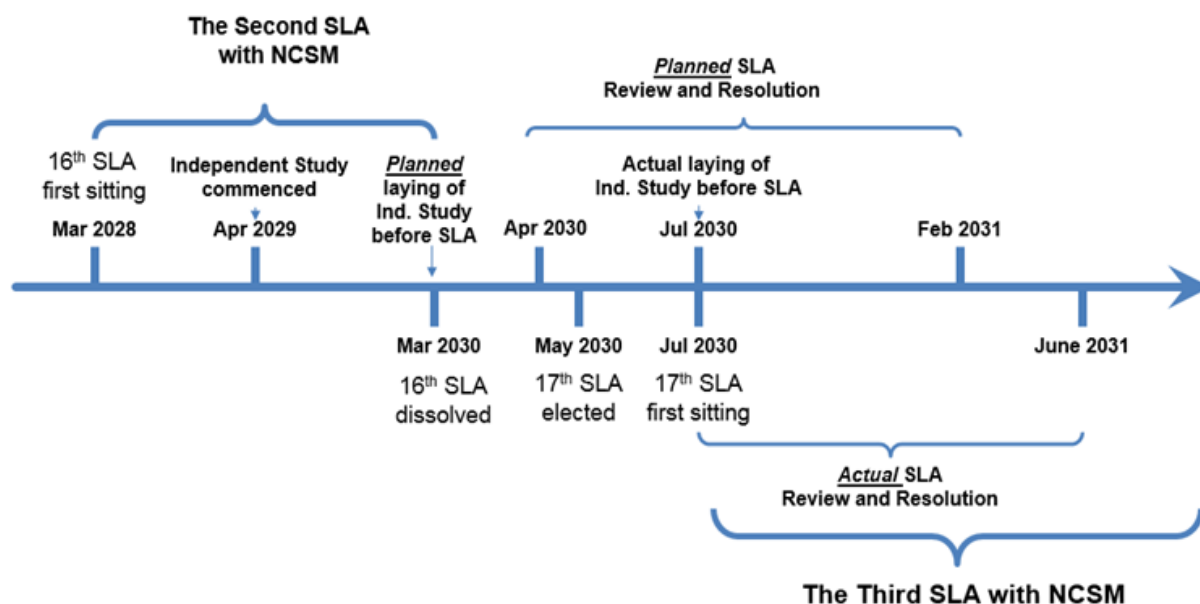


86. If the second SLA is dissolved before the independent study is laid before it, then the subsequent SLA must lay the study as soon as possible after its completion and resolve on the NSCM mechanism within a year. One possible scenario is illustrated by Table 4.8 and Figure 4.6.

Table 4.8 Simulated Time Frame for the Review of the NSCM Mechanism with the Dissolution of the Second State Legislative Assembly (SLA) (Before Laying of the Independent Study)

Event	Date
Independent study commenced	April 2029
16 th SLA dissolved	March 2030
Planned laying of independent study before SLA	April 2030
17 th SLA elected	May 2030
17 th SLA first summoned	July 2030
Actual independent study laid before SLA	July 2030
Actual SLA's resolution on NSCM	July 2030 ~ June 2031

Figure 4.6 Simulated Time Frame for the Review of the NSCM Mechanism with the Dissolution of the Second State Legislative Assembly (SLA) (Before Laying of the Independent Study)



87. If the second SLA is dissolved after the laying of the independent study but before resolving on the NSCM mechanism, then the subsequent SLA must resolve on the NSCM mechanism within a year from the day it is first summoned.

88. This chapter explains the mechanism of NCSMs and demonstrates how it is democratic and inclusive even though the NCSMs will be appointed by operation of law and not elected. The requirements for NCSM lists submitted by parties contesting in the State General Election ensure that this mechanism will both train new women politicians, and provide quotas for women who are youth, differently-abled persons and single parents. The number of actual NCSMs appointed would be inversely determined by the number of State Assemblywomen elected. Administered by the non-partisan CNO, the formula-based allocation of NCSM seats amongst parties, using the largest remainder method with the Hare Quota, further ensures that the inclusion of NCSMs will benefit both the government and opposition parties. Because of their democratic legitimacy, NCSMs will enjoy the same rights as their elected colleagues, except for their ineligibility to be Chief Minister or member of the EXCO, and the prohibition to hold office of NCSM for consecutive terms.

89. Adding NCSMs to conventional State Assemblypersons elected under FPTP is to emulate the MMM electoral system employed in many countries, so that Malaysians can experience the benefits of having both geographical representation by FPTP lawmakers and issue-based representation by CLPR lawmakers. For NCSMs to effectively champion statewide issues, the SLA would need to set up Select Committees, which would also be open to elected Assemblypersons to take part. To this end, the CNO is tasked to produce an annual evaluative report of the performance of the SLA and its Select Committees, and any necessary improvements in the institutional setting for their optimum functioning.

90. Beyond the built-in exit mechanism, which stops the appointment of NCSMs when 12 or more Assemblywomen have been elected, the SLA is required to resolve on whether the NCSM mechanism should be retained, revised or repealed, on the third year of the second SLA after the introduction of NCSMs. The resolution follows a study by independent researchers in the preceding year on the impact and effectiveness of the NCSM mechanism in improving women's representation.



Chapter 5

The Journey:

From Advocacy to
Legislation



Introduction

1. This chapter details the evolution of the idea for 'Non-Constituency Supplementary Members' (NCSMs) from the early advocacies in the 1990s, the linking of gender quotas and electoral system reform at the National Conference on Gender and Electoral Reform organised by the Penang Women's Development Corporation (PWDC) and the Penang Institute (PI) in 2016, the announcement for the 'Top-up Women-Only Additional Seats' (TWOAS) by Chief Minister YAB Chow Kon Yeow on World Human Rights Day in 2020, to the preparation of this White Paper as a step before the tabling of the proposed bills, expected in early 2022.

Early Advocacy

2. Women's groups in Malaysia started campaigning for the minimum 30 per cent women's representation in public and political life following the Beijing Declaration and Platform of Action in 1995. They relentlessly lobbied political parties to increase women's representation but progress was limited.

3. In the 1999 General Election, women's and civil society groups launched the Women's Agenda for Change, which covered a list of demands and policy reforms addressed at candidates and their respective political parties. In the same year, supported by the Women's Candidacy Initiative, activist Zaitun 'Toni' Kassim stood unsuccessfully as a candidate for the parliamentary constituency of Selayang.

Linking Gender Equality and the Electoral System

4. In November 2011, PWDC was established by the Penang State Government, then led by former Chief Minister YAB Lim Guan Eng. As Malaysia's first State-level agency for women's empowerment, PWDC was set up under the leadership and initiative of parliamentarian and long-term activist YB Chong Eng, academic-activist Dr Cecilia Ng Choon Sim and other women's rights advocates.

5. In 2016, Dr Cecilia Ng Choon Sim, Ms Karen Lai and others from PWDC, upon the suggestion of YB Chong Eng, mooted a new direction for gender advocacy, linking gender quotas to electoral system reform. Prof Dr Wong Chin Huat and Ms Yeong Pey Jung of PI, the State Government's think tank, were subsequently engaged for this task.

6. On 26-27 August 2016, PWDC and PI co-organised the inaugural National Conference on Gender and Electoral Reform, supported by the Friedrich Ebert Stiftung (FES), bringing activists and politicians to explore innovative solutions for this purpose. The idea of 'Women-only Additional Seats' (WOAS) was born out of this conference.

7. The Conference also led to the formation of the Coalition for Gender and Electoral Reform chaired by YB Chong Eng, with elected representatives, activists and academics from various States to enhance advocacy.

8. On 24 November 2017, the agency for women's empowerment in Selangor, Institut Wanita Berdaya (IWB) organised the second National Conference on Gender and Electoral Reform (Persidangan Nasional Gender dan Reformasi Pilihanraya) on the theme 'More Women, Better Nation'. The WOAS was repackaged as 'Non-Constituency Seats' where the gender quota was 50:50 (Institute Wanita Berdaya Selangor, 2017).

Penang2030 and the Gender Inclusiveness Policy (GIP)

9. The push for gender quotas received a boost in Penang after 2018 under the leadership of Chief Minister YAB Chow Kon Yeow who strongly supported initiatives undertaken by YB Chong Eng, EXCO member in charge of gender inclusiveness and PWDC.

10. On 29 August 2018, Chief Minister YAB Chow launched the Penang2030 Vision to enhance Penang's strength as a "family-focused, green and smart state that inspires the nation". Strategic Initiative C2 under the theme "Empower people to strengthen civic participation" is to "boost participation of youth, women and seniors in community life".

11. On International Women's Day 2019, Chief Minister YAB Chow and YB Chong Eng launched the Penang Gender Inclusiveness Policy (GIP), which outlines a 40-40-20 gender-balanced management within departments, agencies and local governments in Penang. This policy underlines an unmistakable commitment to enhance women's participation in decision-making.

‘Top-Up Women-Only Additional Seats’ (TWOAS)

12. In October 2020, the State Executive Council approved the TWOAS concept paper to fill the shortfall of the minimum 30 per cent women’s representation target in the Penang State Legislative Assembly (PSLA) through the appointment of women non-constituency representatives from various parties in a proportional representation manner.
13. In November 2020, a Working Committee on TWOAS was formed, chaired by YB Chong Eng, comprising Dato Rohana Abdul Ghani and Ms Ong Bee Leng of PWDC, Dr Cecilia Ng, Ms Karen Lai, Ms Yeong Pey Jung, YB Lim Siew Khim and Prof Dr Wong Chin Huat, the latter assisted by Mr Wo Chang Xi.
14. On World Human Rights Day 2020, Chief Minister YAB Chow and YB Chong Eng announced the State Government’s plan to introduce TWOAS.
15. On 23 January 2021, State Assemblypersons, Members of Parliament and local councillors in Penang were given a briefing on the systemic design and operational details of TWOAS by Chief Minister YAB Chow, Dato YB Chong Eng and Prof Dr Wong Chin Huat.
16. Chief Minister YAB Chow declared in the briefing that, “the Top-Up Women-Only Additional Seats (TWOAS) is a 3-in-1 initiative that can increase women’s representation in the state legislative assembly, is fair to all parties and can create a more dynamic state legislative assembly. TWOAS is a democratic system that would reflect the latest political composition in the assembly based on the percentage of votes obtained by their respective political parties during the election.”
17. From December 2020 to October 2021, 21 forums and discussions in multiple languages on TWOAS were held by various parties and civil society groups involving elected representatives, women and youth activists, electoral reform activists, businesswomen and journalists.
18. TWOAS was also hotly debated in the media, appearing in a total of 72 news stories, commentaries and panel discussions, spanning print, broadcast and internet media, and appearing in English (49), Malay (12) and Chinese (11).

19. In all forums and public discussions, questions were raised and answered on the principles, operation, viability, implications and unintended consequences of TWOAS.

20. Some of the feedback helped to improve the design of TWOAS. For example, the concern raised by the MP of Bukit Bendera, YB Wong Hon Wai, led to the incorporation of a sunset mechanism, where after its introduction, a review of TWOAS – now the NCSM mechanism – would be conducted before the end of the second State Legislative Assembly (SLA).

White Paper and Legislation

21. By September 2021, the Constitutional Amendment Bill (see Appendix B) and the Legislative Assembly Of Penang (Supplementary Members) Bill 2021 (see Appendix C) were prepared and revised by Prof Dr Wong Chin Huat and Mr Wo Chang Xi, enlightened by the legal opinion of Messrs Edmund Bon Tai Soon and Amer Hamzah Arshad of AmerBON Advocates who considered concerns raised by various parties.

22. The TWOAS representatives will now be known as ‘Non-Constituency Supplementary Members’ (NCSMs) to be distinguished from the conventional elected members and nominated/appointed members in the States of Sabah, Terengganu and Pahang.

Conclusion

23. Following best practices worldwide, the Penang State Government has published this White Paper before tabling the proposed bills in the PSLA so that the State Assemblypersons and members of the public will be able to study the NCSM mechanism in detail.

24. The Penang State Government hopes the bills will be passed with cross-partisan support as it aims to ensure a minimum 30 per cent women’s representation in the House, with the NCSM seats proportionally allocated to all parties based on their vote shares at the next State General Election.



Appendices

Appendix A: Legal Opinion by AmerBON Advocates

LEGAL OPINION ON THE CONSTITUTIONALITY OF THE PROPOSED TOP-UP WOMEN-ONLY ADDITIONAL SEATS (TWOAS) MECHANISM IN THE PENANG STATE LEGISLATIVE ASSEMBLY

We have been instructed to advise whether the Penang State Government's TWOAS initiative to be introduced in the Penang State Legislative Assembly (Penang SLA) is constitutional.

Despite Malaysia's accession to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995 and 26 years after the Beijing Declaration and Platform for Action, none of the country's state legislative assemblies has achieved 30% women representation. In February 2018, the Concluding Observations (69th session, 19 February–9 March 2018, CEDAW/C/MYS/CO/3-5) of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) recommended that the Malaysian Government expand the use of temporary special measures, including quota systems to accelerate gender equality in areas where women continue to be under-represented. The TWOAS mechanism is one such measure that aims to have women hold at least 30% of seats in the Penang SLA. It only applies when the total number of elected women representatives falls below 30%.

Design of the TWOAS mechanism

1. We note two draft Bills that are being considered for tabling at the Penang SLA: "Legislative Assembly of Penang (Supplementary Members) Bill 2021" (LAPSME 2021) and the "Constitution of the State of Penang (Amendment) Bill 2021" (CSPA 2021). The documents set out elements of the TWOAS mechanism and the attendant legal amendments required to implement it.
2. *How does the TWOAS mechanism work?* In summary, political parties contesting in Penang's state elections may submit a list of women nominees to be Non-Constituency Supplementary Members (NCSMs). The list identifies the nominees in order of the party's preference commencing with the first preference and ending with the last. After the elections, the Committee of Nomination and Oversight (CNO) will identify the number of NCSMs to be appointed and apply the quota formula in section 11 of the LAPSME 2021 to allocate the seats among the political parties. The allocation is proportional to the percentage of popular votes received by the respective parties. After that, the CNO will cause the list of NCSMs to be appointed be gazetted.
3. The Legislative Assemblies of Terengganu, Pahang and Sabah also have appointed or nominated members.

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Terengganu

- 3.1 Section 5(2) of the Laws of the Constitution of Terengganu (First Part) (Amendment) Enactment 2003 introduced article XXVII(2) into the state's Constitution to allow for a non-Muslim and/or woman to be appointed to the Assembly by a motion supported by at least seven members of the Assembly and passed with a simple majority. The number of appointed members shall be no more than four. The appointments can only be made if there are no non-Muslims or women elected to the Assembly.

Pahang

- 3.2 Sections 2 and 3 of the Laws of the Constitution of Pahang (Second Part) (Amendment) Enactment 2020 amended article 18 and introduced article 18A of the Laws of the Constitution of Pahang to allow a maximum of five appointed members to the state's Assembly on a motion supported by at least seven members and passed with a simple majority.

Sabah

- 3.3 Under article 14(1)(c) of the Constitution of the State of Sabah, the Assembly shall consist of "such number of other members (hereinafter referred to as "nominated members"), not being more than six, as the Yang di-Pertua Negara may appoint".

Constitutionality of the TWOAS mechanism

4. We address the issue in two ways: (a) competency and (b) consistency. The questions are framed as follows:

Question 1 (competency):

Whether the Penang SLA is competent to enact the TWOAS mechanism?

Question 2 (consistency):

If the Penang SLA has the power and is competent, is the TWOAS mechanism discriminatory based on gender violating article 8(2) of the Federal Constitution?

Question 1: Whether the Penang SLA is competent to enact the TWOAS mechanism?

5. To legislate on the mechanism, the Penang State Government needs:

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- 5.1 to amend the state's Constitution to provide that the Legislative Assembly shall also comprise NCSMs to ensure that women representation in the Assembly is not less than 30%; and,
- 5.2 to enact a new law providing for NCSMs' qualifications and the procedural and operational matters to appoint them to the Assembly.
6. Two legal routes are available. First, under item 7 (Machinery of the State Government) in List II – State List of the Federal Constitution; and second, under article 77 of the Federal Constitution.

Item 7 (Machinery of the State Government) in List II – State List of the Federal Constitution

7. Heads or fields of legislative entries appearing in the legislative lists must be given their widest significance and cannot be curtailed save to the extent necessary to affect other legislative entries. None of the items in the lists should be read in a narrow and restricted sense but broadly to cover or extend to all cognate, subsidiary, ancillary or incidental matters which can fairly and reasonably be said to be comprehended in them (see **Fathul Bari bin Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors [2012] 4 MLJ 281**).
8. Only the states are authorised to determine the composition and size of their legislatures. Parliament and the Federal Government cannot make such decisions. Under the State List, states are entitled to make laws to regulate their state machinery, including their legislatures' membership. As long as the provisions are not inconsistent with federal law or the mandatory provisions in the 8th Schedule to the Federal Constitution, states can change the composition of their assemblies (see also section 19 of the 8th Schedule).
9. In **Abdul Karim bin Abdul Ghani v. Legislative Assembly of Sabah [1988] 1 MLJ 171**, the Supreme Court decided that the subject of disqualification of a state assemblyperson was within the competency of the state legislature. Provisions of the 8th Schedule of the Constitution were relied on. The judge held that the issue regarding the tenure of seats of members of the Legislative Assembly was a state matter “clearly falling under Item 7 (machinery of State Government) of the State List in the Ninth Schedule to the Federal Constitution”.¹
10. The term “(t)he Machinery of Government” is also used as headings in the Constitutions of Johore (2nd Part), Negeri Sembilan (2nd Part) and Selangor (2nd Part), under which they

¹ At page 173 of the report.

set out the qualification and disqualification of their assemblypersons, and the composition of their legislatures.

Article 77 of the Federal Constitution

11. Should ambiguity be over item 7 of the State List, the Penang SLA can rely on its residual power under article 77 as an alternative option. The provision reads as follows:

The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

12. Under the Federal List, and subject to the State List, Parliament may make laws regarding elections to both Parliament and state legislative assemblies and “all matters connected therewith”. We interpret the words “all matters connected therewith” to mean the procedure and process of the elections, such as operational issues. These fall under federal law providing the Election Commission with the powers to conduct elections under article 113 of the Federal Constitution. The TWOAS mechanism is not an “election” to the Penang SLA. The Election Commission’s intervention is not required. As such, there is no encroachment into Parliament’s power to make laws relating to elections.

Question 2: If the Penang SLA has the power and is competent, is the TWOAS mechanism discriminatory based on gender violating article 8(2) of the Federal Constitution?

13. Article 8(2) of the Federal Constitution provides that, unless expressly authorised by the Constitution, there shall be no discrimination against citizens on the ground only of gender in any law or the appointment to any office. Only women are qualified to be NCSMs (see section 7(c) of the LAPSME 2021). Men cannot be considered. At first blush, this position appears discriminatory of men and violative of article 8(2).
14. The word “gender” was added to article 8(2) by the Constitution (Amendment) (No. 2) Act 2001, which came into force on 28 September 2001. It was made to comply with Malaysia’s obligations under CEDAW. This was explained by the then Minister in the Prime Minister’s Department, Datuk Seri Utama Dr Rais Bin Yatim, during the second reading of the amendment Bill 1 August 2001 at page 76 of the Hansard:

Saya maklum tentang konvensyen tersebut dan Malaysia sebagai salah satu daripada anggota konvensyen CEDAW pada tahun 1995 memang akur kepada keputusan tersebut dan memasukkan perkataan “jantina” dalam

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Perkara 8(2) ini adalah sedekat-dekat mungkin bagi kita memberi penjelasan dan kesempurnaan kepada tuntutan CEDAW itu.

15. But the amendment did not just prohibit gender discrimination – it went further. It is arguable that the amendment incorporated CEDAW principles into the Federal Constitution and, in turn, localised CEDAW as part of Malaysia’s domestic law that can be judicially enforced. The amendment allows the Malaysian courts to use CEDAW as an aid to interpretation. The landmark decision of **Noorfadilla bt Ahmad Saikin v. Chayed bin Basirun & Ors [2012] 1 MLJ 832** is a case in point. The High Court judge held that CEDAW could be used to interpret and expound on article 8(2), at page 843 of the report:

[28] ... in interpreting art 8(2) of the Federal Constitution, it is the court’s duty to take into account the government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The court has no choice but to refer to CEDAW in clarifying the term ‘equality’ and gender discrimination under art 8(2) of the Federal Constitution.

16. Article 4(1) of CEDAW states that adopting “temporary special measures” aimed at accelerating *de facto* equality between men and women shall not be considered discrimination. Such measures must be discontinued when their objectives of equality of opportunity and treatment have been achieved. The TWOAS mechanism is an example of a temporary special measure operationalised only to meet the 30% threshold of women representation. It is to be revised, retained or repealed depending on whether the equality of opportunity and treatment objectives have been achieved (see sections 2(2) and 19 of the LAPSME 2021).
17. The CEDAW Committee encourages the use of temporary special measures such as preferential treatment, quota systems, setting numerical goals and appointments to public positions – all meant to advance women’s integration into politics [see “General Recommendation No. 5: Temporary special measures” (1988), “General Recommendation No. 23: Political and public life” (1997) and “General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)” (2004)].² Importantly, these measures are not considered to be discrimination against men. They are meant to achieve *de facto* or substantive equality for women with men and are not exceptions to the norm of non-discrimination.

² The CEDAW Committee welcomed measures similar to the TWOAS mechanism that have been implemented in Bangladesh (reserved seats) and Indonesia (party-list quotas).

18. Following CEDAW, Malaysia is obliged to eliminate discrimination against women. One way is to outlaw gender discrimination, and the amendment to article 8(2) has directly addressed that. A second way is to take positive steps such as implementing programmes to accelerate and improve the status of women in society. The state can remedy any unintended inequality through law and policy measures, to compensate for bias or other barriers faced in the pursuit of equality and create a level playing field for women. The intention is to eliminate unintended discrimination against women. Structural, social and cultural obstacles impeding the achievement of substantive equality need to be removed.³ All of such positive steps are protective of women's rights, and the state is sanctioned by item I in List III – Concurrent List of the Federal Constitution to enact them.
19. Being an instance of a positive or affirmative measure, the TWOAS mechanism to “top up” with women-only seats in the Penang SLA must be tested against the prohibition of gender discrimination in article 8(2). Considering the CEDAW Committee's interpretation of the Convention, a contextualised interpretation of article 8(2) consistent with CEDAW should be applied. The purpose of CEDAW must not be lost through a literal interpretation of the provision. A narrow reading of article 8(2) assumes that the prohibition of gender discrimination *simpliciter* satisfies Malaysia's obligations under CEDAW when it is not the case. CEDAW also calls for affirmative action to, among others, speed up the broadening of women participation in political life. To this end, biological, and socially and culturally constructed differences between men and women at times require non-identical treatment of women and men to address such differences [see “General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)” (2004)]. One method is to implement a preferential system for women where seats are reserved for them. A broader reading of equality and non-discrimination will consider this measure integral to equality rights consistent with what the 2001 amendment to article 8(2) intended to achieve.
20. Colleen Sheppard, in her 1993 “Study Paper on Litigating the Relationship Between Equity and Equality” at pages 71–72, argued that affirmative action is integral to equality rights and not an exception to their protection:

Intimately related to viewing affirmative action provisions as expressions of, rather than exceptions to, equality is a willingness to acknowledge actual group-based patterns of inequality and social disadvantage in society. In other words, it is essential to adopt a contextualized understanding of inequality, rather than adhering to a formal notion that all individuals are equal once the

³ For an excellent exposition on the demands of CEDAW to achieve substantive equality for women, see Shanthi Dairiam, “Women's Right to Equality: The Promise of CEDAW” (2014).

law proclaims that discrimination is illegal. Affirmative action programs are designed to redress pervasive and systemic problems of group inequality.

Accordingly, it may be said that special measures, such as the TWOAS mechanism, are a manifestation of the right to equality, and the failure to implement them may constitute unfair discrimination against women.

21. The Supreme Court of India in **National Legal Services Authority v. Union of India and Others [2014] 3 MLJ 595** affirmed that equality is founded on two complementary principles: non-discrimination and reasonable differentiation. It also said as follows, at page 630 of the report:

88. ... Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation.

22. The nett effect of the preceding discussion is that the term “discrimination” in article 8(2) has a nuanced meaning that bears greater scrutiny. On a “formal equality” approach to compare women and men on a “likes alike” and “unlikes unlike” basis, equality may not be achieved if the conditions are unequal even in the face of gender-neutral laws. Dairiam argues that the concept of formal equality is the reason we “still witness the persistence of discrimination against women and their inequality despite the existence of legal provisions prohibiting discrimination and guaranteeing equality”.⁴ If the TWOAS mechanism is viewed from a “substantive equality” approach that focuses on equality of outcomes or results, its overall impact is to have 18 additional women-only NCSMs whereas 40 others are male elected members. There is no discrimination against men as the 18 members are not equal to even half of the Penang SLA members (i.e., 58). But if one takes the limited perspective of only looking at the gender eligibility of the NCSMs (i.e., up to 18 members), then on this view, it may be asserted that men have been excluded due to their gender. We prefer to adopt a reading of “discrimination” in article 8(2) in a way that is consonant with CEDAW’s concept of substantive equality.
23. Article 8(1) and (2) must be read together. Their combined effect is not that the state cannot discriminate or pass unequal laws, but if it does so, the discrimination must be based on some reasonable grounds. Religion, race, descent, place of birth or gender alone

⁴ At page 21 of “Women’s Right to Equality: The Promise of CEDAW” (2014).

cannot be a reasonable ground for discrimination against citizens. Discrimination in article 8(2) must involve an element of “unfavourable bias” (see **Public Prosecutor v. Datuk Harun Bin Haji Idris & Ors [1976] 2 MLJ 116**). The TWOAS mechanism does not discriminate against men as the representation of men in the Penang SLA will continue to be assured and, in fact, constitute more than 50% of the Penang SLA membership. Men’s status as a group will not be compromised. Taken at its highest (i.e., where there are no women elected to the Penang SLA resulting in 18 NCSMs), the TWOAS mechanism only raises women representation to 30%. Taken at its lowest, and where there are 12 or more women elected to the Penang SLA, there will be no NCSMs. Thus, the measure does not deny men equality but raises the number of women representatives to bring about their equality as a group progressively, on par with men.⁵ In short, there is no unfavourable bias for women and against men.

24. In summary, we are of the view that:

- 24.1 Malaysia is obliged by CEDAW to eliminate gender discrimination and take positive steps to improve the status of women towards achieving gender equality.
- 24.2 CEDAW has been domesticated by article 8(2) of the Federal Constitution.
- 24.3 Article 8(2) must be read consistently with the purposes, principles and jurisprudence of CEDAW. CEDAW aids the interpretation of article 8(2).
- 24.4 Temporary special measures such as preferential treatment, among others, to enhance women’s participation in political life are not considered discrimination against men.
- 24.5 In interpreting discrimination in article 8(2), a broad view of equality is adopted. Affirmative action to increase women participation is an expression of equality and not an exception to it.
- 24.6 Article 8(2) intends to prohibit gender discrimination towards achieving gender equality. Laws and actions that have an unfavourable bias are targeted as prohibited discrimination. Based on substantive equality, positive measures for equality acceleration of one gender are efforts to eradicate, alleviate or mitigate discrimination against them. They are not to be interpreted as an unfavourable bias for women, and more so when women as a group are the “weaker” segment of the population in that, they have yet to reach equal status with men.

⁵ In preparing this opinion, we corresponded with two experts on CEDAW namely, Shanthi Dairiam and Honey Tan, to discuss issues surrounding article 8(2) and CEDAW. We acknowledge their contributions to our opinion here.

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24.7 In any event, even if the TWOAS mechanism is implemented with all 18 women NCSMs in the Penang SLA, men will still have majority coverage in the Assembly.

We trust the above has been of assistance. Do not hesitate to contact us if you have any queries.

Dated this 29 October 2021



Edmund Bon Tai Soon || Amer Hamzah Arshad

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Appendix B:

The Constitution of the State of Penang (Amendment) Bill 2021



A BILL

intituled

An Enactment to amend the Constitution of the State of Penang in order to provide for the new composition of the Legislative Assembly of the State of Penang.

[]

ENACTED by the Legislature of the State of Penang as follows:

Short title

1. This Enactment may be cited as the Constitution of the State of Penang (Amendment) Enactment 2021.

Commencement and review

2. (1) This Enactment shall come into force on such date as the Yang di-Pertua Negeri may, by notification in the Gazette, appoint.

(2) This Enactment, and the amendments made to the Constitution of the State of Penang by this Enactment, shall be reviewed in the third year of the second Legislative Assembly elected after the date on which this Enactment comes into force and the Legislative Assembly shall resolve whether this Enactment, and the amendments made to the Constitution of the State of Penang by this Enactment, shall be retained, revised or repealed.

(3) The Legislative Assembly shall, within twelve (12) months prior to the review and resolution required under subsection (2), commence and conduct an independent study on the impact and effectiveness of this Enactment and such study shall be laid before the Legislative Assembly before the review under subsection (2) begins.

(4) In the event the second Legislative Assembly elected after the date on which this Enactment comes into force is dissolved –

- (a) before the Legislative Assembly commences the independent study;
- (b) after the independent study is commenced but yet to be laid before the Legislative Assembly; or
- (c) before the Legislative Assembly resolves on the retention, revision or repeal of this Enactment, and the amendments made to the Constitution of the State of Penang by this Enactment,

the subsequent Legislative Assembly shall, within twelve (12) months since its first meets after the State General Election, commence such study, cause such study to be laid before the Legislative Assembly or undertake the resolution, whichever applicable.

Amendment of Article 11

3. Article 11 of the Constitution of the State of Penang is repealed and the following Article substituted therefor:

“Composition of the Legislative Assembly

11. (1) The Legislative Assembly shall consist of –

- (a) forty (40) elected members, elected in accordance with the provisions of the Federal Constitution; and
- (b) such other members, not exceeding eighteen (18) in number, who shall be known as Non-Constituency Supplementary Members, appointed by operation of law and the Legislative Assembly may prescribe the method and criteria of such appointment, to ensure the women’s representation in Legislative Assembly is not less than thirty (30) per cent.

(2) A Non-Constituency Supplementary Member shall not –

- (a) be appointed as Chief Minister or member of the Executive Council; and
- (b) be appointed to hold the office of Non-Constituency Supplementary Members for consecutive terms.”

Amendment of Article 19

4. Article 19 of the Constitution of the State of Penang is amended:

- (a) by inserting immediately after the words “A casual vacancy” in clause (5) the words “of any elected member”;
- (b) by inserting immediately after clause (5) the following new clause (6):

- “(6) The Legislative Assembly may by law provide for –
- (a) the vacating of a seat of a Non-Constituency Supplementary Members in circumstances other than those specified in this Constitution; and
 - (b) the filling of vacancies of the seats of Non-Constituency Supplementary Members where such vacancies are caused otherwise than by a dissolution of Legislative Assembly.”

Existing composition of Legislative Assembly before dissolution

5. Article 11 of the Constitution of the State of Penang, as amended by section 3 of this Enactment, shall not affect the composition of the Legislative Assembly or any election to the Legislative Assembly until the dissolution of the Legislative Assembly occurring on or after the date of the coming into force of this Enactment.

EXPLANATORY STATEMENT

The proposed Constitution of the State of Penang (Amendment) Enactment 2021 amends the Constitution of the State of Penang to provide the ‘Top-up Women Only Additional Seats’ (TWOAS) through a supplementary members system. The proposed Enactment is the Penang State Government’s initiative to ensure a minimum of thirty (30) per cent women’s representation in the State Legislative Assembly, as a temporary special measure to accelerate equality for women in political and public life in line with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Beijing Declaration and Platform for Action of 1995, and the Sustainable Development Goals, and towards the realisation of the Penang Gender Inclusiveness Policy. The initiative abovementioned is implemented through a top-up additional seats system without contravening Article 117 of the Federal Constitution. The proposed Enactment appoints by operation of law a maximum of eighteen (18) Non-Constituency Supplementary Members, depending on the total number of women members elected to the Legislative Assembly in the State General Election, to achieve the goals abovementioned. The proposed Enactment also empowers the Legislative Assembly to prescribe the method and criteria of the selection and appointment of Non-Constituency Supplementary Members.

Clause 1 states the short title of the proposed Enactment.

Clause 2 provides the commencement and review of the proposed Enactment. This clause reflects the policy implemented through this proposed Enactment, which is meant to be temporary in nature and will be reviewed by the Legislative Assembly in the third year of the second Legislative Assembly elected after the date on which this Enactment comes into force. Sub-clause (2) also requires the Legislative Assembly, at the end of the review, to resolve whether this proposed Enactment, and the amendments made to the Constitution of the State of Penang by this proposed Enactment, shall be retained, revised or repealed. Sub-clause (3) further requires the Legislative Assembly to commence and conduct an independent study before the review required under sub-clause (2) and cause such study to be laid before the Legislative Assembly. Sub-clause (4) provides the measure(s) to be taken if the second Legislative Assembly elected after the date on which this Enactment comes into force is dissolved before the Legislative Assembly completes the process of review and resolves on the retention, revision or repeal of this proposed Enactment.

Clause 3 repeals Article 11 of the Constitution of the State of Penang and substitutes it with a new Article 11. Sub-clause (1) provides the proposed composition of the Legislative Assembly, which shall consist of forty (40) elected members and not exceeding eighteen (18) Non-Constituency Supplementary Members. The purpose of appointing Non-Constituency Supplementary Members by operation of law is to ensure that women's representation in the Legislative Assembly is not less than thirty (30) per cent. The Legislative Assembly is empowered to prescribe the method and criteria of such appointments. Sub-clause (2) imposes limitations on Non-Constituency Supplementary Members to be appointed as Chief Minister or member of the Executive Council, and to hold the office of Non-Constituency Supplementary Members for consecutive terms.

Clause 4 consequentially amends Article 19 of the Constitution of the State of Penang by inserting the words "of any elected member" immediately after the words "A casual vacancy" in clause 5 of Article 19, and inserting a new clause (6) into the Constitution. The amended clause (5) of Article 19 relates to the casual vacancy of an elected member. The proposed new clause (6) of Article 19 empowers the Legislative Assembly to enact law on vacating a seat of a non-constituency supplementary member in circumstances other than those specified in this Constitution, and filling the casual vacancies of the seats of Non-Constituency Supplementary Members.

Clause 5 provides that the coming into force of this proposed Enactment shall not affect the composition of the existing Legislative Assembly or any election to the existing Legislative Assembly until the dissolution of the Legislative Assembly occurring on or after the date of the coming into force.

FINANCIAL IMPLICATIONS

This Bill will involve the Government in extra financial expenditure the amount of which cannot at present be ascertained.

Appendix C:
The Legislative Assembly of
Penang (Supplementary Members)
Bill 2021



ARRANGEMENT OF CLAUSES

PART I

PRELIMINARY

Clause

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2. Commencement
3. Interpretation

PART II

COMMITTEE OF NOMINATION AND OVERSIGHT

4. Establishment and constitution of the Committee
5. Functions, duties and powers of the Committee

PART III

NON-CONSTITUENCY SUPPLEMENTARY MEMBERS

6. Purposes of appointing Non-Constituency Supplementary Members
7. Qualification of Non-Constituency Supplementary Members
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Clause

- 14. Vacating of seats
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PART IV

RIGHTS AND ASSESSMENTS

- 17. Rights, privileges, powers and remunerations
- 18. Reports
- 19. Review

A BILL

intituled

An Enactment to make provision for the method and criteria of the selection and appointment of Non-Constituency Supplementary Members of the Legislative Assembly of the State of Penang and for matters incidental to it.

[]

WHEREAS Article 11 of the Constitution of the State of Penang has been amended to enable the appointment of Non-Constituency Supplementary Members by operation of law;

AND WHEREAS the purpose of appointing Non-Constituency Supplementary Members is to ensure a minimum of thirty (30) per cent women's representation in the State Legislative Assembly, as a temporary special measure to accelerate equality for women in political and public life to give effect in part to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), in accordance with the Beijing Declaration and Platform for Action of 1995 and the Sustainable Development Goals, and towards the realisation of the Penang Gender Inclusiveness Policy;

AND WHEREAS the Legislative Assembly is, pursuant to the new provision of Clause (1)(b) of Article 11 of the Constitution of the State of Penang, empowered to prescribe the method and criteria of the selection and appointment of Non-Constituency Supplementary Members of the Legislative Assembly of the State of Penang;

AND WHEREAS the Legislative Assembly intends to clarify that the provision for Non-Constituency Supplementary Members is nothing related to matters on elections to the Legislative Assembly of the State which are matters enumerated in the Federal List under Item 6(a) of List I of the Ninth Schedule to the Federal Constitution;

NOW, THEREFORE, IT IS ENACTED by the Legislature of the State of Penang as follows:

PART I

PRELIMINARY

Short title

1. This Enactment may be cited as the Legislative Assembly of Penang (Supplementary Members) Enactment 2021.

Commencement

2. (1) This Enactment shall come into operation in the State of Penang on such date as may be appointed by the State Authority by a notification in the Gazette.
(2) This Enactment, together with Article 11 of the Constitution, shall be reviewed in the third year of the second Legislative Assembly elected after the date on which this Enactment comes into operation in accordance with section 19.

Interpretation

3. In this Enactment, unless the context otherwise requires –

“coalition” means a registered political party in respect of which consists of two (2) or more registered individual component parties;

“Committee” means the Committee of Nomination and Oversight established under section 4 and having the functions, duties and powers provided under section 5;

“constituency” means a State constituency for the State of Penang;

“Constitution” means the Constitution of the State of Penang;

“Legislative Assembly” means the Legislative Assembly of the State of Penang;

“list” or “list of nominees” means a list submitted by a political party to the Committee under section 8;

“nominee” means a person who is named in the list of nominees by a political party;

“party”, “political party” or “political party contesting in State General Election” means a registered political party that has nominated at least one (1) candidate in the State General Election;

“State General Election” means an election of members of the Legislative Assembly conducted under the Election Act 1958 (Act 19) where the writs of election are issued in all state constituencies; and

“Speaker” means the Speaker of the Legislative Assembly.

PART II

COMMITTEE OF NOMINATION AND OVERSIGHT

Establishment and constitution of the Committee

4. (1) A Committee of Nomination and Oversight is established and shall consist of the following members appointed by the Chief Minister:
 - (a) one (1) retired High Court Judge or retired Speaker of the Legislative Assembly, who shall be the Chairperson;
 - (b) one (1) senior member of the Penang Women's Development Corporation, who shall be the Secretary;
 - (c) one (1) officer from the State Secretary's Office; and
 - (d) four (4) other persons from civil society or academia, who have worked on gender equality and women's empowerment.
- (2) The Committee shall not consist of any person who holds an active membership in any political party.
- (3) The composition shall be such that not more than five (5) members are from one (1) gender.
- (4) Members of the Committee appointed under subsections (1)(a) and (d) shall hold office for a period of three (3) years and are eligible for reappointment but no member shall hold office for more than two (2) terms.
- (5) The appointment of members of the Committee and the duration of the appointment shall be published in the Gazette.

Functions, duties and powers of the Committee

5. (1) The functions and duties of the Committee are –
- (a) to receive and confirm lists of nominees for the seats of Non-Constituency Supplementary Members submitted by the political parties contesting in State General Elections;
 - (b) to organise a public presentation session and other events before the polling day of State General Elections to introduce to the public all nominees qualified for the seats of Non-Constituency Supplementary Members;
 - (c) to identify the number of Non-Constituency Supplementary Members to be appointed after State General Elections;
 - (d) to identify the list of Non-Constituency Supplementary Members to be appointed and caused such list of appointments to be gazetted;
 - (e) to identify, when the seat(s) for a Non-Constituency Supplementary Member is vacated, the next available nominee from the same list submitted under subsection (a) and caused such list of appointment(s) to be gazetted;
 - (f) to prepare reports on the selection process of Non-Constituency Supplementary Members after every State General Election and annual reviews on the Legislative Assembly performance after the introduction of Non-Constituency Supplementary Members; and
 - (g) to perform all other functions necessary for the purpose of this Enactment.
- (2) The Committee shall have all such powers as may be necessary for, or in connection with, or reasonably incidental to, the performance of its functions under this Enactment.
- (3) The Committee may set up any secretariat it deems fit to assist in the implementation of its functions and appoint any State Government officer into such secretariat.

PART III

NON-CONSTITUENCY SUPPLEMENTARY MEMBERS

Purposes of appointing Non-Constituency Supplementary Members

6. The purposes of appointing Non-Constituency Supplementary Members in the manner provided by this Enactment are –
- (a) to ensure women's representation in the Legislative Assembly that is not less than thirty (30) per cent;
 - (b) to provide statewide issue-based representation, supplementing constituency-based representation by elected members, on gender equality, families and all other matters concerning the wellbeing of the People and the State of Penang; and
 - (c) to ensure diversity and inclusiveness amongst Non-Constituency Supplementary Members by proportional allocation of such seats to contesting political parties based on their votes received in the State General Election and allocation of quotas for youths, differently-abled persons, and single parents in the lists.

Qualification of Non-Constituency Supplementary Members

7. Every citizen who –
- (a) is qualified to be a member of the Legislative Assembly under Article 12 of the Constitution;
 - (b) is not disqualified for being a member of the Legislative Assembly under Article 13 of the Constitution;
 - (c) is a woman;
 - (d) has not been appointed to hold the office of Non-Constituency Supplementary Members in the immediate past Legislative Assembly; and

- (e) has completed a gender sensitisation training by the Penang Women's Development Corporation; is qualified to be a Non-Constituency Supplementary Member.

List of nominees

8. (1) Subjected to subsection (2), any political party contesting in State General Election may submit to the Committee a list of nominees to be Non-Constituency Supplementary Members within one (1) day after the conclusion of nomination for the State General Election, in accordance with the time and manner as the Committee may prescribe.

(2) Two (2) or more parties that contest in State General Election may opt to submit to the Committee a common list of nominees to be Non-Constituency Supplementary Members. Provided that the parties, which contest in State General Election under a common coalition or party symbol, shall submit only one (1) common list of nominees and are prohibited to submit separate lists based on each individual component parties.

(3) The list of nominees submitted by a political party shall not exceed eighteen (18) persons.

(4) The list shall—

- (a) list nominees in order of the party's preference, commencing with the first in order of preference and ending with the last;
- (b) identify the 'diversity nominees' required under subsection (7), with supporting documents, which the Committee may prescribe;
- (c) identify the nominees' component parties, if two (2) or more parties submit a common list;
- (d) set out the contact details of each nominee;

(e) contain a declaration made by the leader of the political party together with relevant supporting documents, if any, that states –

- (i) each nominee is qualified to be appointed; and
- (ii) if the parties or coalition submit a common list, the name of each component party;

and

(f) be in a form that the Committee prescribes.

(5) A political party's list of nominees shall have effect in relation to the appointment of Non-Constituency Supplementary Members immediately after the State General Election and in any vacancy occurring among the Non-Constituency Supplementary Members after that State General Election and before the next State General Election.

(6) A political party's list of nominees shall not include a person –

- (a) who is included in any other list of nominees submitted under subsection (1);
- (b) who is or has been a Member of Parliament;
- (c) who is or has been an elected member of the Legislative Assembly of the State of Penang or of other States in Malaysia;
- (d) who is nominated as a candidate to be a member of the Dewan Rakyat, or a member of the Legislative Assembly of the State of Penang or of other States in Malaysia, if the General Election is held together with the General Election of the State of Penang; or
- (e) who is or has been appointed to be a member of the State Legislative Assembly other than the State of Penang.

- (7) A political party's list of nominees shall have at least –
- (a) one (1) 'diversity nominee' amongst the first two (2) nominees;
 - (b) two (2) 'diversity nominees' amongst the first five (5) nominees; and
 - (c) one-third (1/3) of all nominees submitted being 'diversity nominees'.

- (8) In subsection (7), 'diversity nominee' means a nominee who is –
- (a) at the age of thirty (30) years or below on the polling day of the State General Election;
 - (b) a differently-abled person; or
 - (c) a single parent.

(9) A list of nominees which violates the restrictions and conditions prescribed in subsections (6) and (7) shall to extent of such violation be deleted.

(10) The Committee shall review the qualification of the nominees and of the lists, and, as soon as practicable after the closing of submission in accordance with subsection (1), confirm the qualified nominees on all qualified lists.

(11) The Committee shall publish all qualified nominees on all qualified lists as soon as practicable after the confirmation made under subsection (10) in not less than one (1) place in each constituency and on its website.

Public presentation session

9. The Committee shall organise a public presentation session to introduce the qualified nominees to the public at least three (3) days before the polling day of the State General Election, and may organise any other events to publicise all qualified nominees on all qualified lists.

Number of Non-Constituency Supplementary Members

10. (1) The number of Non-Constituency Supplementary Members to be appointed shall be ascertained in accordance with the formula –

If A equals to	then B shall be
0	18
1	16
2	15
3	13
4	12
5	10
6	9
7	8
8	6
9	5
10	3
11	2
12 and more	0

where A is the total number of woman members being elected to the Legislative Assembly, and B is the total number of Non-Constituency Supplementary Members to be appointed to the Legislative Assembly.

(2) The Committee shall ascertain the number of Non-Constituency Supplementary Members to be appointed immediately after the Election Commission has officially announced the result of the State General Election.

Allocation of seats

11. (1) In this section –

“list” means a qualified list of nominees submitted by a political party to the Committee in accordance with section 8;

“member” means a Non-Constituency Supplementary Member; and

“party” means a political party that has submitted a qualified list of nominees to the Committee in accordance with section 8.

(2) The allocation of seats among the parties is determined through the Hare Quota largest remainder method as provided by this section.

(3) Subject to this section, for every full quota received by the party, a nominee from that party’s list is to be appointed as a member.

(4) For the purpose of subsection (3),

(a) a “quota” is to be calculated as follows –

$$Q = \frac{V_t}{N_t}$$

Q represents the Hare Quota (with any part of the number resulting from the calculation that is a fraction to be disregarded);

V_t represents the total number of votes received by all the parties in the State General Election; and

N_t represents the total number of members to be appointed ascertained in accordance with section 10;

and

(b) a “full quota” of each party is to be calculated as follows –

$$Np = \frac{Vp}{Q}$$

Np represents the quota received by a party, where the number before the decimal point is the “full quota” while the number after the decimal point is called “remainder”;

Vp represents the total number of votes received by the party in the State General Election; and

Q represents the Hare Quota;

The decimal fraction of the quota received by the party shall be rounded to the fourth decimal place.

(5) The Committee shall first ascertain, from the results of the State General Election officially announced by the Election Commission, the total number of votes received by each party and by all the parties in State General Election, and then complete the calculation of quota in accordance with subsection (4).

(6) If, after the calculation under subsection (5) is completed –

- (a) the number of members to be appointed by virtue of subsection (3) is less than the total number of members to be appointed ascertained under section 10; or
- (b) none of the members can be appointed by applying the full quota, the number of members remaining to be appointed among the parties is to be determined by applying the largest remainder formula as provided by subsection (7).

(7) Subject to subsections (8) and (9), the largest remainder formula is to be applied as follows –

- (a) the list with the largest remaining number is determined from among the lists that have any remainder;
- (b) for the list that has the largest remainder as determined under subsection (a), a nominee from that list is to be appointed as a member;
- (c) the process is to be continued with the remainder as provided by subsections (a) and (b) until all remaining seats are allocated.

(8) If the seats allocated to a party in accordance with subsections (3) and (6) exceed the number of nominees on its seats, the party shall receive only the same number of seats as the number of its nominees. The unfilled seats shall be passed to other parties in accordance with subsection (7).

(9) If it is found that—

- (a) two (2) or more lists have the largest number of remainder; and
- (b) the number of those lists exceeds the number of members remaining to be allocated,

the Committee shall determine the outcome by drawing lots.

Selection of nominees

12. (1) Upon completing the determination set out in section 11, the Committee shall determine which of the nominees whose names appear on the lists are entitled to be appointed.

(2) The Committee shall select those nominees on the list of each political party, beginning with the first nominee on the list and ending with the lowest ranking nominee, which is equal to the number of seats to which that party is entitled to have allocated.

Publication in the Gazette and appointment of members

13. (1) The Committee shall forthwith after the completion of selection under section 12 cause the name of the nominees entitled to be appointed as Non-Constituency Supplementary Members, together with a statement explaining the calculation completed under sections 10 and 11, to be published in the Gazette.

(2) Subject to taking and subscribing to an oath as required under Article 21 of the Constitution, a Non-Constituency Supplementary Member is deemed to be appointed when her name is published in the Gazette under subsection (1).

Vacating of seats

14. (1) Other than the circumstances specified in the Constitution, a seat for a Non-Constituency Supplementary Member shall be declared vacant by the Speaker if the Speaker has been informed –

- (a) by the party which nominates the member that she no longer represents the party to be a Non-Constituency Supplementary Member;
- (b) that the Non-Constituency Supplementary Member is nominated as a candidate to be a member of the Dewan Rakyat or to be a member of the Legislative Assembly of the State of Penang or of other States in Malaysia; or
- (c) that the Non-Constituency Supplementary Member is elected or appointed to be a member of Parliament or of a State Legislative Assembly other than the State of Penang.

(2) If the Speaker is satisfied that the seat of a Non-Constituency Supplementary Member has become vacant as the consequence of the circumstances specified in the Constitution and under subsection (1), the Speaker shall, without delay, notify the Committee of the vacancy.

Filling of vacancies

15. (1) On receipt of any notification issued by the Speaker under subsection 14(2), the Committee shall, without delay, identify the name of the next available nominee from the same list of nominees from which the member whose seat has been vacated arose in accordance with the procedures set out in section 12 and cause such to be published in the Gazette.

(2) If a political party has no next available nominee to fill a vacancy, the vacancy shall not be filled by the political party or any other political party.

(3) Whenever subsection (2) applies, the Committee shall notify the Speaker that the vacancy cannot be filled.

Merger, dissolution and split of party or coalition

16. (1) If two (2) or more parties, which have submitted a list separately, merge into one political party or coalition, such a merger shall not affect the office of Non-Constituency Supplementary Members who have been appointed under that parties' list, if any, and the parties' list shall operate and have effect as if separated.

(2) If a party, which has submitted a list, ceases to exist, the list of nominees submitted by that party shall cease to have any effect and any Non-Constituency Supplementary Member who has been appointed under that list, if any, shall remain to hold the office of Non-Constituency Supplementary Members.

(3) If one of the component parties of a coalition that submitted a list ceases to be a member of that coalition, the coalition may opt to –

- (a) inform the Speaker that the Non-Constituency Supplementary Members who are members of that component party, if any, no longer represents the coalition to be a Non-Constituency Supplementary Member, same as if a case under subsection 14(1)(a) arises; or
- (b) inform the Committee to remove from the coalition's list, the name of the nominees who are the members of that component party, if any.

(4) If a coalition that has submitted a list ceases to exist, the list submitted by that coalition shall be separated into different lists based on the component parties of that coalition, and each list shall operate and have effect as if separated, and any Non-Constituency Supplementary Member that had been appointed under that list, if any, shall remain to hold the office of Non-Constituency Supplementary Members.

(5) Parties that contest in the State General Election under a common party symbol but not a coalition shall be treated as a coalition in this section.

PART IV

RIGHTS AND ASSESSMENTS

Rights, powers, privileges and remunerations

17. Except for restrictions set out in Article 11(2) of the Constitution, Non-Constituency Supplementary Members shall enjoy the same rights, powers, privileges, and remunerations as elected members.

Reports

18. (1) Within three (3) months after polling day of the State General Election, the Committee shall prepare a report on the selection of Non-Constituency Supplementary Members to be laid before and debated in the Legislative Assembly.

(2) Within the first three (3) months of every year of a Legislative Assembly, beginning with the second year of a Legislative Assembly, the Committee shall prepare an evaluative report on the Legislative Assembly and its Select Committees' performance after the introduction of Non-Constituency Supplementary Members in the previous year, and any necessary improvements in the institutional setting for their optimum performance, to be laid before and debated in the Legislative Assembly.

(3) The Committee may commission suitable independent researchers to prepare the reports required under subsection (2).

Review

19. (1) The Legislative Assembly shall, in the second year of the second Legislative Assembly elected after the date on which this Enactment comes into force, commence and conduct an independent study on the impact and effectiveness of this Enactment in improving women's representation, for the Legislative Assembly to resolve in the third year whether Article 11 of the Constitution and this Enactment shall be retained, revised or repealed, and such study shall be laid before the Legislative Assembly once completed.

(2) In the event the second Legislative Assembly elected after the date on which this Enactment comes into force is dissolved before the independent study required under subsection (1) is commenced or completed, the subsequent Legislative Assembly should, as soon as practicable, commence and complete such study.

(3) In the event the second Legislative Assembly elected after the date on which this Enactment comes into force is dissolved before the independent study required under subsection (1) is laid before the Legislative Assembly, or before the Legislative Assembly resolves on the retention, revision or repeal of the Article 11 of the Constitution and the Enactment as required under subsection 2(2), the subsequent Legislative Assembly shall within twelve (12) months after the Legislative Assembly first meets after the State General Election cause such study to be laid before the Legislative Assembly and undertake the resolution.

(4) The Legislative Assembly may decide on the manner of conducting the independent study.

EXPLANATORY STATEMENT

The proposed Legislative Assembly of Penang (Supplementary Members) Enactment 2021 (“the proposed Enactment”) is enacted to make provision about the method and criteria of the selection and appointment of Non-Constituency Supplementary Members of the Legislative Assembly of the State of Penang and for matters incidental to it. The proposed Enactment is the Penang State Government’s initiative to ensure a minimum of thirty (30) per cent women’s representation in the State Legislative Assembly, as a temporary special measure to accelerate equality for women in political and public life in line with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Beijing Declaration and Platform for Action of 1995, and the Sustainable Development Goals, and towards the realisation of the Penang Gender Inclusiveness Policy. The initiative abovementioned is implemented through a top-up additional seats system without contravening Article 117 of the Federal Constitution. This proposed Enactment also provides that the allocation of the additional seats through the appointment of Non-Constituency Supplementary Members shall result in proportional representation among the political parties that contested in the State General Election and secure the representation from target groups, which are youths, differently-abled persons, and single parents, to ensure diversity and inclusiveness amongst Non-Constituency Supplementary Members.

PART I

2. Part I of the proposed Enactment contains preliminary matters.

Clause 1 states the short title of the proposed Enactment.

Clause 2 provides the commencement of the proposed Enactment. This clause reflects that the policy implemented through this Enactment is meant to be temporary in nature and will be reviewed by the Legislative Assembly in the third year of the second Legislative Assembly elected **after the** date on which this Enactment comes into force.

Clause 3 provides the definitions of certain words and expressions used in the proposed Enactment.

PART II

3. Part II of the proposed Enactment deals with the establishment of a committee and its functions, duties and powers to administer the selection of Non-Constituency Supplementary Members.

Clause 4 relates to the establishment and constitution of the Committee of Nomination and Oversight [henceforth the Committee]. The proposed Enactment provides that the Committee shall consist of seven (7) members, including one (1) retired High Court Judge or retired Speaker of the Legislative Assembly appointed by the Chief Minister, who shall be the Chairperson, one (1) senior member of the Penang Women's Development Corporation who shall be the Secretary, one (1) officer from the State Secretary's Office, and four (4) other persons from civil society or academia, who have worked on gender equality and women's empowerment, appointed by the Chief Minister. Sub-clauses (2) to (4) further limit the qualification of members. Member of the Committee shall not hold an active membership in any political party. There shall not be more than five (5) members from one (1) gender. Appointed members from civil society or academia shall hold the office for a limited tenure. Sub-clause (5) requires the appointment of members of the Committee and the duration of the appointment to be published in the Gazette.

Clause 5 set out the functions, duties and powers of the Committee. This clause seeks to provide the administrative functions of the Committee before and after the polling day of a State General Election. This clause also empowers the Committee to set up a secretariat to assist the Committee in exercising its administrative functions.

PART III

4. Part III of the proposed Enactment deals with the selection of Non-Constituency Supplementary Members.

Clause 6 states the purposes of the implementation of Non-Constituency Supplementary Members. This clause clarifies that the overall purpose of this proposed Enactment is to ensure the women's representation in the Legislative Assembly is not less than thirty (30) per cent, which

means only women are eligible to be appointed under this proposed Enactment, and this proposed Enactment will operate only if the women representatives being elected to the Legislative Assembly is less than thirty (30) per cent. This clause also states that this Enactment seeks to provide statewide issue-based representation on gender equality, families and all other matters concerning the wellbeing of the People and the State of Penang, supplementing constituency-based representation by elected members. This clause further states that the appointment of Non-Constituency Supplementary Members shall be allocated proportionally according to the results of the political party that submitted the list of nominees in the State General Election, and that quotas are allocated for youths, differently-abled persons, and single parents.

Clause 7 sets out the qualification of Non-Constituency Supplementary Members. Besides of the individuals must be qualified and not disqualified to be a member of the Legislative Assembly, the individuals must also be a woman, have not been appointed to hold the office of Non-Constituency Supplementary Members in the immediate past Legislative Assembly and complete a gender sensitisation training by the Penang Women's Development Corporation.

Clause 8 relates to the submission of the list of nominees to be Non-Constituency Supplementary Members. Sub-clause (1) provides that only the political parties contesting in the State General Election may submit a list of nominees to the Committee in time and manner the Committee may prescribe. However, the Committee is required to conduct the submission of lists within one (1) day after the conclusion of nomination for the State General Election. Sub-clause (2) seeks to provide the parties that contest the State General Election an option to submit their nominees on a common list and limit the coalition or parties which contest in the State General Election under a common coalition or party symbol to submit only one common list of nominees. Sub-clause (3) limits the number of nominees to eighteen (18). Sub-clause (4) states the requirement of a list of nominees. Sub-clause (5) provides the effect of the list's order of preference in the appointment of Non-Constituency Supplementary Members. Sub-clause (6) provides further restrictions on potential nominees, excluding those who are or have been Members of Parliament or State Assemblypersons in Penang or other States, and those who are nominated to be Members of Parliament or State Assemblypersons in Penang or other states. Sub-clauses (7) and (8) provide for quotas in the lists for youth, differently-abled persons, and single parents. Sub-clause (9) seeks to provide legal sanction against lists of nominees which violate any restrictions imposed under sub-clauses (6) and (7). Sub-clauses (10) and (11) state the Committee's duty to review, confirm and publish the list of nominees.

Clause 9 relates to a public presentation session for all qualified nominees in all qualified lists submitted by the political parties. This clause requires the Committee to organise a public presentation session three (3) days before the polling day of the State General Election, and encourages the Committee to organise any other events to publicise all qualified nominees in all qualified lists.

Clause 10 provides the formula to ascertain the number of Non-Constituency Supplementary Members to be appointed. This clause also prescribes the Committee's duty to ascertain the number of Non-Constituency Supplementary Members to be appointed immediately after the Election Commission has officially announced the results of the State General Election.

Clause 11 provides the formula to determine the allocation of seats through the Hare Quota largest remainder method among the political parties, which have submitted a list to the Committee. This clause also prescribes the Committee's duties to ascertain from the official result announced by the Election Commission, the total number of votes received in the State General Election by each and all of the political parties that have submitted a list of nominees to the Committee, and to determine the number of seats to which each of the parties is entitled under the Hare Quota largest remainder method.

Clause 12 provides the formula to select the nominees to be appointed as Non-Constituency Supplementary Members and prescribes the Committee's duty to determine the name of the nominees entitled to be appointed as Non-Constituency Supplementary Members.

Clause 13 prescribes the Committee's duty to cause the list of appointments and relevant statements to be published in the Gazette. Sub-clause (2) further provides that such appointments are effective once the list of appointments is gazetted but subject to taking and subscribing to an oath as required under Article 21 of the Penang State Constitution.

Clause 14 prescribes the conditions for a Non-Constituency Supplementary Member's seat to be vacated other than the circumstances specified in the Penang State Constitution.

Clause 15 provides for the procedures, and the Committee's duty with regards to the vacancy of seats of Non-Constituency Supplementary Members. This clause also prescribes that if a political party has no next available nominee to fill a vacancy, the vacancy shall not be filled by any party.

Clause 16 relates to the status of the Non-Constituency Supplementary Members and the parties' list of nominees under certain circumstances, including the merger of parties, dissolution or deregistration of a party, split of a component party from the coalition and dissolution or deregistration of a coalition.

PART IV

5. Part IV of the proposed Enactment deals with rights and assessments.

Clause 17 seeks to provide that Non-Constituency Supplementary Members shall enjoy the same rights, powers, privileges, and remunerations as elected members, except for the restrictions set out in Article 11(2) of the Penang State Constitution.

Clause 18 requires the Committee to submit to the Legislative Assembly, reports of the selection of Non-Constituency Supplementary Members after every State General Election, annual evaluative reports on the Legislative Assembly and its Select Committees performance after the introduction of Non-Constituency Supplementary Members in the previous year, and any necessary improvements in the institutional setting for their optimum performance. This clause also empowers the Committee to commission suitable independent researchers to prepare the annual evaluative reports.

Clause 19 provides for the review of the Non-Constituency Supplementary Members system such that the second Legislative Assembly elected after its implementation shall resolve if Article 11 of the Penang State Constitution and this Enactment shall be retained, revised or repealed. Sub-clause (1) provides for the mechanism and the timeline while sub-clauses (2) and (3) provide

for necessary measures in the event of early dissolution of the second Legislative Assembly. Sub-clause (4) relates to the manner of conducting the independent study.

FINANCIAL IMPLICATIONS

This Bill will involve the Government in extra financial expenditure the amount of which cannot at present be ascertained.

Appendix D: Formulas



Let

x = no of assemblywomen elected

y = no of supplementary member to be appointed

N = no of total elected members in the House

$x, y, N \geq 0$

x, y, N is a whole number

Formula to calculate 'the NCSMs to be appointed for each number of women elected members' :

$$\frac{x+y}{N+y} \geq 0.3$$

$$x+y \geq 0.3(N+y)$$

$$[x \ 10] \quad 10x + 10y \geq 3N + 3y$$

$$10y - 3y \geq 3N - 10x$$

$$7y \geq 3N - 10x$$

$$y \geq \frac{3N - 10x}{7}$$

Formula to calculate 'the maximum number of NCSMs required to be appointed' :

$$y \geq \frac{3N - 10x}{7}, \text{ when } x = 0$$

$$y \geq \frac{3N - 10(0)}{7}$$

$$Y \geq \frac{3N}{7}$$

Y = maximum number of NCSMs required to be appointed

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